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Gender equality



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Country report

Gender equality

How are EU rules transposed into
national law?

Finland

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Reporting period 1 January 2019 – 31 December 2019

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CONTENTS

1	Introduction	5
1.1	Basic structure of the national legal system	5
1.2	List of main legislation transposing and implementing the directives	5
1.3	Sources of law	5
2	General legal framework	7
2.1	Constitution	7
2.2	Equal treatment legislation	7
3	Implementation of central concepts	9
3.1	General (legal) context.....	9
3.2	Sex/gender/transgender	11
3.3	Direct sex discrimination	11
3.4	Indirect sex discrimination	12
3.5	Multiple discrimination and intersectional discrimination	13
3.6	Positive action.....	15
3.7	Harassment and sexual harassment.....	18
3.8	Instruction to discriminate	20
3.9	Other forms of discrimination	20
3.10	Evaluation of implementation	20
3.11	Remaining issues.....	20
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)	21
4.1	General (legal) context.....	21
4.2	Equal pay	22
4.3	Access to work, working conditions and dismissal	27
4.4	Evaluation of implementation	30
4.5	Remaining issues.....	30
5	Pregnancy, maternity, and leave related to work-life balance for workers (Directive 92/85, relevant provisions of Directives 2006/54, 2010/18 and 2019/1158)	31
5.1	General (legal) context.....	31
5.2	Pregnancy and maternity protection	33
5.3	Maternity leave	36
5.4	Adoption leave	38
5.5	Parental leave	39
5.6	Paternity leave	43
5.7	Time off for <i>force majeure</i>	44
5.8	Care leave	44
5.9	Leave in relation to surrogacy	45
5.10	Flexible working time arrangements.....	45
5.11	Evaluation of implementation	46
5.12	Remaining issues.....	47
6	Occupational social security schemes (Chapter 2 of Directive 2006/54) ..	48
6.1	General (legal) context.....	48
6.2	Direct and indirect discrimination	48
6.3	Personal scope	48
6.4	Material scope.....	48
6.5	Exclusions	48
6.6	Laws and case law falling under the examples of sex discrimination mentioned in Article 9 of Directive 2006/54	49
6.7	Actuarial factors	49
6.8	Difficulties	49
6.9	Evaluation of implementation	49
6.10	Remaining issues.....	50
7	Statutory schemes of social security (Directive 79/7)	51

7.1	General (legal) context.....	51
7.2	Implementation of the principle of equal treatment for men and women in matters of social security.....	51
7.3	Personal scope	52
7.4	Material scope.....	52
7.5	Exclusions	52
7.6	Actuarial factors	52
7.7	Difficulties	52
7.8	Evaluation of implementation	52
7.9	Remaining issues.....	53
8	Self-employed workers (Directive 2010/41/EU and some relevant provisions of the Recast Directive).....	54
8.1	General (legal) context.....	54
8.2	Implementation of Directive 2010/41/EU.....	55
8.3	Personal scope	55
8.4	Material scope.....	56
8.5	Positive action.....	57
8.6	Social protection	57
8.7	Maternity benefits.....	57
8.8	Occupational social security	57
8.9	Prohibition of discrimination.....	58
8.10	Evaluation of implementation	58
8.11	Remaining issues.....	58
9	Goods and services (Directive 2004/113)	59
9.1	General (legal) context.....	59
9.2	Prohibition of direct and indirect discrimination	59
9.3	Material scope.....	59
9.4	Exceptions	59
9.5	Justification of differences in treatment	59
9.6	Actuarial factors	60
9.7	Interpretation of exception contained in Article 5(2) of Directive 2004/113.....	60
9.8	Positive action measures (Article 6 of Directive 2004/113).....	60
9.9	Specific problems related to pregnancy, maternity or parenthood.....	60
9.10	Evaluation of implementation	60
9.11	Remaining issues.....	60
10	Violence against women and domestic violence in relation to the Istanbul Convention	61
10.1	General (legal) context.....	61
10.2	Ratification of the Istanbul Convention	62
11	Compliance and enforcement aspects (horizontal provisions of all directives)	63
11.1	General (legal) context.....	63
11.2	Victimisation	63
11.3	Access to courts	63
11.4	Horizontal effect of the applicable law	64
11.5	Burden of proof.....	64
11.6	Remedies and sanctions	64
11.7	Equality body	65
11.8	Social partners	65
11.9	Other relevant bodies.....	65
11.10	Evaluation of implementation	66
11.11	Remaining issues.....	66
12	Overall assessment	67
	Bibliography	68

1 Introduction

1.1 Basic structure of the national legal system

The Finnish legal system is based on statute law. Finland follows a dualist approach to international law. The Government has the right of legislative initiative, although legislative proposals submitted by MPs may be adopted. In addition, a citizens' initiative, allowing citizens to make legislative initiatives to Parliament, has been in use since 2012.¹ Although legislation is generally introduced by a Government bill, even the new citizens' initiative has been used for gender-related issues.² Gender equality legislation consists of constitutional and ordinary legislative provisions. The relevant case law consists of judgments by the Supreme Court (which has competence concerning civil, commercial, and criminal law, including employment contracts and criminal law provisions on discrimination), the Administrative Supreme Court (which has competence concerning administrative law, including the position of public servants), and the Labour Court (which has an exclusive mandate to decide matters concerning collective agreements).

1.2 List of main legislation transposing and implementing the directives

- *Laki naisten ja miesten välisestä tasa-arvosta* (Act on Equality between Women and Men), 1986/609;
- *Laki yhdenvertaisuus- ja tasa-arvolautakunnasta* (Act on the Non-Discrimination and Equality Board) 2014/1327;
- *Laki tasa-arvovaltuutetusta* (Act on the Equality Ombudsman) 2014/1328;
- *Työsopimuslaki* (Employment Contracts Act) 2001/55;
- *Sairausvakuutuslaki* (Sickness Insurance Act) 2004/1224;
- *Työntekijän eläkelaki* (Pensions Act of the private sector) 395/2006;
- *Julkisten alojen eläkelaki* (Pensions Act of the public sector) 395/2016;
- *Yrittäjän eläkelaki* (Entrepreneurs' Pensions Act) 1272/2006;
- *Maatalousyrittäjän eläkelaki* (Agricultural Entrepreneurs' Pensions Act) 1280/2006 ; and
- *Rikoslaki* (Criminal Code) 1889/39, which contains provisions on work-related discrimination and harassment.

1.3 Sources of law

The most important source of Finnish law is legislation. The Constitution, ordinary legislation, and administrative regulations constitute a hierarchy of sources, all of which are important for gender equality. The Constitution and parliamentary acts are considered strong primary sources that must be taken into account in legal interpretation. Section 6 (on equality) of the Constitution and the Act on Equality are thus both obligatory sources. Constitutional review by courts is limited to cases where an 'application of an Act would be in evident conflict with the Constitution', in which case the court shall give primacy to the provision in the Constitution. The Parliament's Constitutional Committee previews the constitutionality of legislation to be passed, and if the Committee has considered that there is no conflict between the Constitution and an ordinary act, there is held to be no 'evident' conflict. European Union law on gender equality, treaties, and legislation are also considered obligatory sources. The Convention on the Elimination of All Forms of

¹ The Finnish Constitution 1999/731 was amended in 2011 by adding Section 53(3) on the citizens' initiative, which allows an agenda initiative to be presented to Parliament by 50 000 citizens, in a manner further regulated by the Act on the Citizens' Initiative 12/2012. Where the proposal concerns EU legislation, Regulation (EU) No. 211/2011 of the European Parliament and of the Council on the citizens' initiative, OJ L 65/1 is to be followed.

² A citizens' initiative on the gender-neutral marriage act was presented to the previous Parliament, and was adopted although the Government then in power had agreed on not bringing a Bill on the matter to Parliament. A new citizens' initiative was started for overturning the amendment and re-introducing marriage as an institution between persons of different sexes. So far, the new initiative has collected over 97 000 signatures, which means that the initiative will be presented to Parliament.

Discrimination Against Women (CEDAW) is an important source for the Act on Equality, which was passed in 1986 for the purpose of ratifying the Convention. EU law is often used as a source of law in gender equality issues.

Where two or more laws contradict, the most recent legislation and most specific regulation are to be followed. Section 23 of the Constitution dictates that court and administrative decisions must be based in law. Where the meaning of legislation requires interpretation, preparatory works (committee reports, working group reports, Government bills, and Parliament standing committee reports) are to be consulted for guidance. Case law and the decisions of the Supreme Courts (Supreme Court and Supreme Administrative Court in particular), are also sources of law that must be consulted. Although the opinions of the Equality Ombudsman are not binding, they may be used by courts to support reasoning. Legislation in force as well as decisions by the Supreme Court, Supreme Administrative Court, and Labour Court can be accessed in the electronic data base Finlex.³

Other sources of law, such as legal literature and established custom, as well as comparative law and moral and ethical arguments, may be used in legal interpretation. The lack of up-to-date literature on equality law limits the use of scholarship in the area. The relevant legislation is relatively old and has undergone many amendments, which makes using preparatory works cumbersome.

International agreements are in force in Finland if they have been transposed into national legislation.

³ <https://www.finlex.fi/fi/>.

2 General legal framework

2.1 Constitution

2.1.1 Constitutional ban on sex discrimination

Section 6 of the Finnish Constitution prohibits discrimination on the ground of sex, age, language, religion, conviction, opinion, health, disability or 'other reason that concerns his or her person'. The list of prohibited grounds is therefore non-exhaustive, and even grounds not mentioned are protected against discrimination (Section 6(2)).

2.1.2 Constitutional protection of equality between men and women

Section 6(1) of the Constitution contains the principle of equality before the law; however, this provision does not refer specifically to equality between men and women. The preparatory works for the Constitution state that Section 6 should be interpreted so that even the general principle of equality (expressed in Section 6(1)) contains a duty to promote equality in society. This means that each subsection in Section 6 may be considered relevant from the point of view of gender equality law, as the general principle of equality (Section 6(1)) should not be interpreted narrowly so as to preclude positive measures.

Section 6(4) of the Constitution contains a provision on promoting equality of the sexes 'in societal activity and working life, especially in the determination of pay and the other terms of employment', as provided by legislation (Section 6(4)). The legislation referred to is, according to the preparatory works, the Act on Equality between Women and Men and other legislation. In addition, the prohibition of discrimination expressly includes sex as a protected ground, but since other grounds are also protected the prohibition against discrimination should at least in principle cover intersectional discrimination. Finally, as the equality of children necessarily requires equality between girls and boys, the expressly stated duty to promote gender equality is certainly a far-reaching provision.

2.2 Equal treatment legislation

The Act on Equality between Women and Men contains provisions on equal treatment on the ground of sex and is complemented by legislation on equality bodies, whereas other grounds of discrimination fall under the Non-Discrimination Act. The Non-Discrimination Act covers all discrimination grounds under the Constitution, except for sex. The provisions of the Non-Discrimination Act are justiciable only in relation to the grounds recognised under European Union law.

Section 7 of the Act on Equality contains a general prohibition of discrimination on the ground of sex, directed at all parties and persons. The material scope of the Act on Equality is quite broad, and Section 7 contains a definition of direct and indirect discrimination on the basis of sex and prohibits discrimination on the ground of sex. A violation of Section 7 may have an impact in administrative law, as the prohibition of discrimination also applies to public authorities. However, Section 7 does not provide a victim of discrimination with a justiciable right to demand compensation for discrimination. There is no justiciable right for an individual, but authorities have a duty to act.⁴ The Act on Equality contains further prohibitions on discrimination in working life (Section 8), victimisation (Section 8a), discrimination in educational institutions (Section 8b) and labour-market organisations (Section 8c), workplace harassment (Section 8d), and discrimination in the access to and

⁴ This is a general prohibition with no specific addressee, such as employers. In this sense, the prohibition is very broad. On the other hand, there is no remedy for the violated person under Section 7, although authorities such as the Chancellor of Justice may consider that an authority has misused its powers by violating Section 7.

supply of goods and services (Section 8e). Authorities and actors that violate these provisions are required to compensate the victim(s) of discrimination.

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

No surveys have been completed on how the central concepts of gender equality law are defined, implemented, or limited.

3.1.2 Other issues

Courts often differ in their views on certain issues, such as how to identify a comparator in discrimination cases. The Supreme Court and the Labour Court have each presented different interpretations of the comparator requirement, which, as the highest courts in their respective competences, is problematic. Aside from the courts, the concept of discrimination is in general not sufficiently understood. Social partners, who play an important role in gender equality in the labour market and other areas such as social insurance, tend to narrowly interpret the notion of discrimination, and indirect discrimination and the concept of equal pay for work of equal value are not always understood by the social partners. Employers tend to consider equal pay within the bounds of collective agreements, and pay differentials under different agreements are not necessarily considered discriminatory. There is a tendency to dismiss discrimination as a cause of pay differentials, and rather, stress the impact of gender segregation of the labour market as an explanation.

3.1.3 General overview of national acts

The Act on Equality between Women and Men (1986/609) is the main legislative instrument that implements EU directives in Finnish law. The Act has been amended several times (in 1988, 1992, 1995, 1997, 2001, 2005, 2009, 2011, 2014, and 2016). Initially, the Act was introduced in order to implement the requirements of the CEDAW, and the amendments of 1995 intended predominantly to facilitate the implementation of EU gender equality law.

As explained under 2.2, above, Section 7 of the Act on Equality contains a general prohibition of discrimination on the ground of sex, as well as defining what constitutes discrimination under the Act. The material scope of the Act on Equality is quite broad, as only religious activities of religious communities, family and other private relations, and acts of MPs and the President are excluded (Section 2). A violation of Section 7 may have an impact in administrative law, as the prohibition of discrimination also applies to public authorities. However, Section 7 does not provide a victim of discrimination with a justiciable right to demand compensation for discrimination, the general provision only has legal effect through monitoring of legality by the Equality Ombudsman and other authorities monitoring legality. The Act on Equality contains further prohibitions on discrimination in working life (Section 8), victimisation (Section 8a), discrimination in educational institutions (Section 8b) and labour-market organisations (Section 8c), workplace harassment (Section 8d), and discrimination in the access to and supply of goods and services (Section 8e). Authorities and actors that violate these provisions are required to compensate the victim(s) of discrimination.

The provisions that concern the two equality bodies – the Equality Ombudsman and the Gender Equality Board – were originally incorporated into the same legal act, but in 2014 the Gender Equality Board was merged with the former Board for Ethnic Discrimination into the National Non-Discrimination and Equality Tribunal of Finland, which has a broad mandate to protect persons who consider that they have been discriminated against on

any ground of discrimination, under the Act on Non-Discrimination and the Equality Board.⁵ The Act on the Equality Ombudsman⁶ was also amended in 2014, although the function was not merged into that of the new Non-Discrimination Ombudsman. The office of the Equality Ombudsman was transferred from the Ministry of Social Affairs and Health to the Ministry of Justice, where the other equality bodies are also located.

Other acts that are important as instruments to implement EU law are the Employment Contracts Act,⁷ which contains the provisions on family-related leave, and the Sickness Insurance Act,⁸ which defines the benefits during those periods of leave. The gender equality requirements concerning pensions have been implemented through the legislation on mandatory pension schemes. Prior to the 2016 reform, mandatory pension legislation was separated in the public and private employment sectors until the beginning of 2017. The provisions on public sector mandatory pensions were combined into one Act,⁹ which now stipulates the minimum age of 63 for retirement in the private and the public sectors, which is to rise gradually to the age of 65. Mandatory pension schemes cover entrepreneurs¹⁰ and agricultural entrepreneurs,¹¹ and all schemes follow similar principles both in general and in the issues relevant for EU gender equality law.

The Criminal Code¹² also contains provisions that enforce EU gender equality law by way of criminal law sanctions. Chapter 47 of the Criminal Code on work-related crimes contains provisions on discrimination at work, including aggravated discrimination.¹³ Gross sexual harassment carries a criminal law sanction.¹⁴

3.1.4 Political and societal debate and pending legislative proposals

The reform of the parental leave system has been the topic of debate for a very long time, both socially and in politics. The current Government aims to implement a reform that should lead to more equal sharing of family-related leave and responsibility for childcare in families, as well as more equal participation in paid work. The Government programme promises to introduce an equal quota of non-transferable family leave to mothers and fathers, by increasing the time allocated to fathers but without reducing the time allotted to mothers. Part of the leave will remain non-transferable. The reform is being prepared in a tripartite working group under the Ministry of Social Affairs and Health.¹⁵ The minister responsible for the reform has said that the family leave system should be gender neutral, as the benefits during the leave would no longer be different for mothers and fathers, and suited to all forms of family. The issue of equal pay, including pay transparency, has also been under debate and is mentioned in the current Government's programme. A working group is to start preparing a law to this effect in August.

⁵ *Laki yhdenvertaisuus- ja tasa-arvolautakunnasta* (Act on the Non-Discrimination and Equality Board) 2014/1327.

⁶ *Laki tasa-arvovaltuutetusta* (Act on the Equality Ombudsman) 2014/1328.

⁷ *Työsopimuslaki* (Employment Contracts Act) 2001/55.

⁸ *Sairausvakuutuslaki* (Sickness Insurance Act) 2004/1224.

⁹ *Julkisten alojen eläkelaki* (Pensions Act of the public sector) 395/2016).

¹⁰ *Yrittäjän eläkelaki* (Entrepreneurs' Pensions Act) 1272/2006.

¹¹ *Maatalousyrittäjän eläkelaki* (Agricultural Entrepreneurs' Pensions Act) 1280/2006.

¹² *Rikoslaki* (Criminal Code) 1889/39.

¹³ *Työsyryjintä* (work discrimination) under Chapter 47, Section 3 prescribes fines or imprisonment of up to six months for an employer or employer representative who, without an important and justifiable reason, puts an employee into an inferior position in employment or access to employment on the grounds of sex, among other grounds. In the crime of *Kiskonnantapainen työsyryjintä* (extortionate work discrimination), the employer places an employee into a considerably inferior position by using the employee's economic or other distress, dependent position, lack of understanding, thoughtlessness or ignorance, and carries a penalty of maximum two years of imprisonment.

¹⁴ Chapter 20, Section 5a on sexual harassment (*seksuaalinen ahdistelu*) was added to the Criminal Code in 2014.

¹⁵ Ministry of Social Affairs and Health (2020) 'Reform aims to encourage both parents to take family leave', <https://stm.fi/en/reform-aims-to-encourage-both-parents-to-take-family-leave>.

3.2 Sex/gender/transgender

3.2.1 Definition of 'gender' and 'sex'

The distinction between gender and sex is not commonly used in the Finnish language, as it does not have a linguistic term for gender. Although 'gender' was introduced into the Finnish language as *sosiaalinen sukupuoli* (social sex), it is not even used in the context of gender studies, which are referred to as *sukupuolentutkimus* (study of sex). Legislation uses the terms sex, woman, and man. Gender-neutral formulations are preferred in legislation. For example, the reform of the family-related leave system referred to in Section 3.1.4 above uses a gender-neutral definition of family-related leave, and preference is given to the neutral term 'parent', rather than 'mother' and 'father'.

3.2.2 Protection of transgender, intersex and non-binary persons

In the amendment to the Act on Equality in 2014, Section 1 of the Act changed so that the aim of the Act is now to prevent discrimination on the basis of sex and to promote equality between women and men, especially in working life. The aim is also to prevent discrimination on the basis of gender identity or expression of gender (the word '*sukupuoli*' (sex) is used here to refer to what is here translated as gender). Subsections 5 and 6 were added to Section 3, which contains the definitions of terms used in the Act. Gender identity is defined as 'the person's own experience of (his or her) gender', and expression of gender as 'articulating one's gender by clothing, behaviour or in some other similar manner'. To Section 7, which contains definitions and a general prohibition of discrimination on the basis of sex, a new provision was added on discrimination on the basis of gender identity and expression of gender: Section 3 defines differential treatment on the grounds of gender identity or expression of gender as direct discrimination. The provisions do not expressly refer to gender reassignment; but, since gender reassignment concerns gender identity and the expression of gender, the provisions protect persons who have undergone gender reassignment. There is no further definition of '*sukupuoli*' (gender) beyond the recognition that it may be expressed by choice of clothes and other similar means. Although there is no legal definition of transgender, intersex or non-binary characteristics, gender identity and a person's own experience of gender seem to cover these characteristics.

The Act on Equality also contains provisions on positive duties for authorities, employers, and educational institutions. A new positive duty was added to the Act in 2014; the new Section 6(c) contains obliges the aforementioned actors to prevent discrimination on the ground of gender identity and expression of gender. This positive duty is to be considered when employers and educational institutions prepare equality plans. These provisions exceed the requirements under EU law.

3.2.3 Specific requirements

The Act on Equality does not require that the affected individual should have undergone gender confirmation or surgery procedures. Protection under non-discrimination law is not clearly demarcated concerning the Act on Confirmation of Transsexual Sex (252/2016). Due to the lengthy confirmation procedure, persons undergoing the procedure may have difficulties after changing his/her name while the procedure is still underway. In 2013, the Ministry of Education and Culture together with the Equality Ombudsman published a recommendation that a person's diplomas should be provided in their new name even before the gender reassignment procedure is finished.

3.3 Direct sex discrimination

3.3.1 Explicit prohibition

In Section 7(2) of the Act on Equality, direct discrimination is defined as 'placing women and men in a different position on the basis of sex'. The definition complies with the definition under EU law. It does not refer directly to a comparator, nor does it require that differential treatment is less favourable. However, avoiding an open reference to a 'comparable situation' may be beneficial, as there is less emphasis on the need to present a comparator. Some type of comparison is still required to establish that a person has received differential treatment, and the more specific provisions on various forms of prohibited discrimination may require that a comparator is presented.

3.3.2 Prohibition of pregnancy and maternity discrimination

In Section 7(2) of the Act on Equality, differential treatment on grounds of pregnancy or maternity status is defined as direct discrimination.

3.3.3 Specific difficulties

The fact that the definition of direct discrimination was introduced into the Act on Equality long after the provisions on specific forms of discrimination, such as pay discrimination, had been formulated, may make interpretation of the latter provisions somewhat difficult. The definition of direct and indirect discrimination were inserted under Section 7 of the Act, while specific prohibitions of discrimination which give a justiciable claim to the victim are placed under other provisions. If the latter ones are read separately, the personal scope of prohibited discrimination may remain unnoticed or incompletely understood.

3.4 Indirect sex discrimination

3.4.1 Explicit prohibition

In Section 7(3) of the Act on Equality, indirect discrimination on the basis of sex is defined as '1) placing a person in a different position by means of an apparently neutral provision, criterion or practice, if the person may de facto be disadvantaged by this means, and 2) placing a person in a different position due to parenthood and childcare responsibilities'. Section 7(4) further defines that the means mentioned under Section 7(3) are not considered discriminatory if they are used to achieve an acceptable aim, and if the means taken are appropriate and necessary to achieve that aim.

This definition differs from EU law, as it does not require that the person would suffer a 'particular disadvantage'; it is sufficient that any disadvantage is or would be suffered. Furthermore, differential treatment on the basis of parenthood and childcare duties is specifically defined as indirect sex discrimination. Unlike discrimination on the basis of pregnancy, indirect discrimination on the basis of parenthood and childcare may also be suffered by men. Finnish law in these respects is more generous than EU law.¹⁶ Indirect discrimination may be found even in cases where there is some disadvantage, which does not need to be 'particular'. The definition covers parenting duties as a separate discrimination ground. The definition protects parents who are using their right to take care of their children, and is helpful for fathers in particular.¹⁷

¹⁶ It should be noted that prohibition of differential treatment on the basis of parenthood and childcare does not give a justiciable right for parents. Section 8 of the Equality Act on discrimination in working life gives a right to compensation to a person who has been discriminated against, but the section covers only issues that the employer has control over. The system of family-related leave is not among them. Thus, the separate prohibition of differential treatment on the basis of parenthood and childcare does not cover a father's right to leave, which was the issue in Case C-104/09 Alvarez. Fathers have a right to paternity and parental leave, but the right to parental leave is used less by fathers than mothers. One of the reasons behind the disparity is prohibitive attitudes of the employers to fathers using their social parenting rights. Section 7(3) of the Equality Act is useful in these situations.

¹⁷ The definition of differential treatment due to parenthood and childcare does not give a justiciable right except in the context of the specific prohibitions of discrimination, such as Section 8 on discrimination in working life, which covers issues that the employer has control over. The system of family-related leave is

3.4.2 Statistical evidence

Statistical evidence was used to establish indirect sex discrimination for example in case TT:1998-34,¹⁸ a judgment of the Labour Court on indirect discrimination. A collective agreement condition calculated pay bonuses on the basis of experience, and all 'lawful absences from work' not exceeding 30 days were to be counted as time to be taken into account in the calculation. Although the condition was apparently gender neutral, it disproportionately disadvantaged women, as women were often on maternity leave for more than 30 days and statistically took parental leave significantly more often than men. The Labour Court found that both maternity leave and parental leave were to be counted as time to be taken into account for the calculation of pay benefits. The statistical fact that women use their right to parental leave was therefore used to establish indirect discrimination.

3.4.3 Application of the objective justification test

The Supreme Court applied the objective justification test in the much-discussed case KKO 2004:59, which concerned a municipality that had made redundant only part of its employees, justified by the municipality on the basis of economic difficulties. The personnel made redundant worked in departments (social and health) in which the majority of employees were female (more than 90 %), and not in departments where more than 90 % of the employees were male. The Supreme Court found that the disproportionate redundancies of women could not be justified by mere budget restrictions alone. However, according to the Supreme Court, since the budget objectives were set for all departments without discrimination, and the expenditure of the female-dominated departments had been higher than that of the male-dominated departments, the measure had not been discriminatory because there were objective grounds to save expenses.

The Supreme Court, unlike the lower courts before it, did not consider EU law in its judgment, and has been criticized in legal literature for failing to apply the EU objective justification test. The Supreme Court should have considered whether budgetary grounds were sufficient to justify the measure by comparing them against several EU cases. The Supreme Court did not proceed to consider whether it was necessary to dismiss only female employees, or whether the economic objective could have been achieved by non-discriminatory measures.¹⁹

3.4.4 Specific difficulties

There are no specific difficulties to report.

3.5 Multiple discrimination and intersectional discrimination²⁰

3.5.1 Definition and explicit prohibition

There is no explicit prohibition of multiple and intersectional discrimination under Finnish non-discrimination law. The reform of non-discrimination law that came into force on 1

not among them. A father's right to family-related leave is sometimes not taken due to the prohibitive attitudes of the employer, and this is where the provision under Section 7(3) is useful.

¹⁸ The case is available at <http://www.finlex.fi/fi/oikeus/tt/1998/19980034>.

¹⁹ Anttila, O. (2013) *Kohti tosiasiallista tasa-arvoa? Sukupuolisyrjinnän kiellot oikeudellisen pluralismin aikana* Suomalainen lakimiesyhdistys, pp. 306-308, and Schiek, D. 'Indirect Discrimination' (2007) in Schiek, D., Waddington, L., Bell, M. (eds) *Materials, Cases and Texts on national, supranational and international non discrimination law* Ius Commune Casebooks for international non/discrimination law. pp. 323- 475, at pp. 456-460.

²⁰ 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>.

January 2015 was originally motivated, amongst other reasons, by the need to include provisions to help address multiple and intersectional discrimination. Sex discrimination was prohibited by the Act on Equality between Women and Men in 1986, and discrimination on any other ground was prohibited by the Non-Discrimination Act in 2004. This latter Act was adopted hastily for the purpose of implementing Directives 2000/43/EC and 2000/78/EC, and at the time of passing it Parliament required that the Act soon be amended, as the Act was considered to implement the 2000 Directives incorrectly. In the first phase of the reform, unification of the two non-discrimination acts was discussed, although the idea was abandoned and finally only two equality bodies (the Equality Board and Discrimination Tribunal) were merged together to form a new National Non-Discrimination and Equality Tribunal of Finland.²¹ The preparatory works for the amended Non-Discrimination Act (135/2014)²² note that the Non-Discrimination Act may be applied to cases of multiple discrimination. The solution does not benefit all victims of multiple or intersectional discrimination, as the rules concerning access to the new National Non-Discrimination and Equality Tribunal remain different for victims of sex discrimination and victims of discrimination on other grounds. The Equality Ombudsman's 2018 report to the Parliament²³ noted Commission Recommendation (EU) 2018/951 on standards for equality bodies. The Non-Discrimination Ombudsman's opinion on the Equality Ombudsman's report noted that the recommendations are not being fully followed; no reform is planned.

No reform of the amended legislation is expected in the near future.

3.5.2 Case law and judicial recognition

The new Tribunal has the competence to handle cases under both the Non-Discrimination Act and the Act on Equality. However, a victim of sex discrimination (unlike a victim of discrimination based on other prohibited grounds) cannot submit a case to the new Tribunal; the Act on Equality requires that complaints of sex discrimination are submitted only by the Equality Ombudsman and the main Social Partners. In this context, the new Equality Board only has the mandate to prohibit the continuation of a discriminatory act, and the mandate of the new Non-Discrimination and Equality Tribunal therefore remains similar to the mandate of the previous Gender Equality Board. The new Tribunal has a broader competence over issues covered by the Non-Discrimination Act (concerning all other discrimination grounds) to confirm conciliation between the parties (Section 20 of the Non-Discrimination Act). The mandate of the Equality Ombudsman was extended to cover conciliation between parties, and the mandate of the Tribunal was extended to confirming agreements between them.

The amendment gave victims of gender discrimination access to – and introduced access to – conciliation by the Tribunal. Rights provided by the Act on equality were thus brought on a par with the rights of victims of discrimination on the grounds protected under the Non-Discrimination Act. Before the amendment, victims of gender discrimination had no access to the Tribunal. However, victims of gender discrimination have no individual right of access, as cases under the Act on Equality can only be admitted on bequest by a social partner or the Equality Ombudsman. The Tribunal has a mandate on employment-related gender discrimination, but it has no mandate in employment-related discrimination that is based on other discrimination grounds, as these are monitored by the Occupational Health Authorities. The disparity between victims of gender discrimination and victims of (other grounds of) discrimination concerning access to the Board, and the difference in the

²¹ Kantola, J., Nousiainen, K. (2008) 'Pussauskoppiin? Tasa-arvo- ja yhdenvertaisuuslakien yhdistämisestä' (On the unification of the Act on Equality and the Non-Discrimination Act) (*Naistutkimus* 2008(2), pp. 6-20. The Parliament's Constitutional Committee noted in its statement of the Government Bill for the Non-Discrimination Act that the reform left victims of multiple discrimination with a weak protection.

²² Government Bill HE 19/2014 *Hallituksen esitys yhdenvertaisuuslaiksi ja siihen liittyviksi laeiksi* (Government proposal for Non-Discrimination Act and related acts).

²³ Equality Ombudsman (2018) *Tasa-arvoaltuutetun kertomus eduskunnalle* (K22/2018) (Report to the Parliament).

mandate to conciliate, may complicate the process of handling cases of intersectional discrimination under the new equality legislation.

No cases explicitly dealing with intersectional discrimination have been brought to Finnish courts. While occupational safety directorates have the mandate to monitor legislation on discrimination grounds other than gender, some of the cases dealt with may de facto involve intersectional or multiple discrimination, without the term being explicit in the documents of the case. Few studies have focused on the recognition and elimination of multiple discrimination in general, despite the issue having been discussed for a long time. The term remains uncommon and ambiguous.²⁴

3.6 Positive action

3.6.1 Definition and explicit prohibition

Finnish legislation allows for – and even specifically requires – positive action. Section 6(4) of the Constitution explicitly requires the promotion of equality of the sexes in societal activities and working life, especially in the determination of pay and other terms of employment, ‘as provided in more detail by an Act’. The reference to secondary legislation is explained in the preparatory works to refer to the Act on Equality, but can also include other legislation. For example, amendments of the Criminal Code may be needed for promoting gender equality, with the aim of reducing violence against women. Preparatory works further note that even the principle of (formal) equality under Section 6(1) involves the duty to promote equality.

The Act on Equality between Women and Men (609/1986) uses the terms ‘promotion of (gender) equality’ and ‘duty to promote (gender) equality’. For instance, Section 4 refers to ‘[a]uthorities’ duty to promote (gender) equality’; Section 5(a) refers to ‘[m]easures for promoting (gender) equality in educational institutions’; Section 6 refers to ‘Employers’ duty to promote (gender) equality’; and Section 6(a) refers to ‘[m]easures for promoting (gender) equality in working life’. Other additional positive action provisions are worded differently. For instance, Section 4(a) addresses the composition of administrative bodies and bodies that yield public power, and although no reference is made to promoting equality or positive action, the provision is one of the strongest examples of positive action under Finnish law. In addition, Section 6(c) addresses the prevention of discrimination on the basis of gender identity or expression of gender, and introduces a positive action duty in terms of preventing discrimination rather than promoting equality. The word ‘equality’ in the Act and in other contexts is ‘*tasa-arvo*’, which denotes ‘equal value’, and is considered to refer specifically to gender equality. In other contexts, such as discrimination on the grounds of ethnicity, the term in use is ‘*yhdenvertaisuus*’, which contains an element of comparison (*vertailu*). Positive action is more commonly referred to in the context of gender equality rather than in other discrimination contexts.

3.6.2 Conceptual distinctions between ‘equal opportunities’ and ‘positive action’ in national law

Neither ‘equal opportunities’ nor ‘positive action’ is frequently used in Finnish law or everyday discourse; it is thus not possible to identify any conceptual differences between the two.

3.6.3 Specific difficulties

Although several provisions impose positive action duties upon authorities, employers, and educational institutions – which is in line with the Constitution – problems arise with their

²⁴ Lepola, O. (2018) *Koko ajan jännittyneenä: Moniperusteinen syrjintä seksuaali- ja sukupuolivähemmistöjen kokema* (Tense all the time: Multiple discrimination experienced by sexual and sex minorities), Ministry of Justice reports 51/2018, 26.

relatively weak implementation and monitoring. For example, Sections 6, 6(a) and 6(b) of the Act on Equality require employers to implement positive action; all employers have a duty to promote equality within the scope of their resources. This requires employers to take action to ensure that both women and men apply for jobs; to employ women and men at various levels and to provide them with equal career paths; to promote equality in working conditions, pay in particular; to develop working conditions suitable for both women and men; to facilitate combining working and family life for both women and men, paying attention to working time arrangements in particular; and to prevent gender-based discrimination. Section 6(a) dictates that employers with 30 employees or more must make an equality plan every second year. The plan is not submitted to an authority, but must be made public in the workplace. The Equality Ombudsman monitors equality plans. This plan must list positive action measures concerning pay and other conditions of work, either as an independent plan or as incorporated into the personnel, educational, or safety at work plans. The plan is to be drafted in cooperation with an employee representative, who is to be given appropriate resources to influence and participate in the planning. The plan should provide an analysis of gender equality in the work place and a pay audit that addresses the classification, pay, and pay differentials of women and men. The plan must also list the actions required to ensure equality and equal pay, and an assessment of earlier action and their effects. Personnel must be informed about the pay audit.

Section 6(b) details more specific rules on the pay audit process. The audit is to ensure there are no groundless pay differentials between women and men in the work place, although Section 6(b) does not stipulate exactly how the pay audit should be conducted or which jobs to compare. Rather, the provision states that if a comparison of groups based on demands of the job or job categories demonstrates 'clear differences' between the pay of women and men, the employer is obliged to analyse the reason for these differences. If an employer implements a remuneration system consisting of pay components, the most important of these components must be analysed. This means that if the employer has a bonus system, or offers specific benefits for some employee groups, these pay components are to be taken into consideration. If there are no legitimate grounds for salary differentials, the employer must take action to remedy the situation.

While the Act on Equality contains a number of positive duties for public and private actors, their implementation is not guaranteed by remedies or sanctions. The most powerful positive duty is probably the 'quota provision' under Section 4(a). This has been amended several times and is by now well-known in state and municipal decision-making. The provision seems to have some spill-over effects in areas that traditionally fall outside its material scope, for example in organisations. Section 6(c), which was amended in 2014, replaces a less stringent employer duty for 'pay mapping' (see section 3.5.1 of this report). If an educational institution or employer does not fulfil the equality planning duty required by Sections 5(a) or 6(a), the Equality Ombudsman may set a date by which the duty must be fulfilled (Section 19 of the Act) or submit a complaint for violation of these provisions to the Non-Discrimination and Equality Tribunal (Section 20 of the Act).

The limits of positive action were tested in August 2017, when a Finnish textile company planned a marketing campaign to draw attention to the gender pay gap. The company announced that it would sell products to women for 83 % of the normal price, reflecting the fact that on average women only earn 83 % of men's pay. The company planned to donate the earnings from the campaign to a women's rights association. All customers would have been given the reduced price only by asking for it, without proving their sex. Several complaints were made to the Equality Ombudsman, who decided that the campaign would not violate the Act on Equality provided that all customers were clearly informed that they were de facto entitled to the reduced price. The Ombudsman referred to what may be considered justified differential treatment under Directive 2004/113/EC, and stated that the aim of prohibiting differential treatment in provision of goods and services was not to prevent all differential treatment, but clearly unjust differential treatment. When the Act on Equality was amended in 2008 to implement the Directive,

the Parliament's Employment and Equality Committee stated that when a measure has an acceptable aim and context, giving special offers whose monetary value is small to women or men is not prohibited.²⁵

Positive action policies agreed upon in tripartite programmes between social partners and the Government have overshadowed legal measures of promoting equality. A tripartite equal pay programme, for example, has run for more than a decade and gives recommendations for both Government and social partner policies. The emphasis in the programme has generally focussed on reducing pay differentials rather than addressing pay discrimination, and issues such as combining family and working life and gender segregation in the labour market have therefore dominated. In practice, these programmes have not been very effective. The latest (2016-2019) was evaluated in 2018,²⁶ and was found to have had little direct impact on pay differentials. The positive action duties stipulated under the Act on Equality also rely heavily on the monitoring conducted by social partners.

3.6.4 Measures to improve the gender balance on company boards

Section 4(a)(2) of the Act on Equality requires a gender balance on company boards of directors 'unless there are specific reasons against this'. However, this legal obligation covers only companies (of all sizes) that are majority owned by public bodies. The provision does not set out a timeline or deadline by which to achieve this.

In 2019, the percentage of women in large cap companies reached 33 %, in mid cap companies 29 %, and in small cap companies 25 %.²⁷ Since 2003, the national Code of Conduct for listed companies has required that both sexes must be represented on the boards, but no quota is set in the self-regulatory code.²⁸ The percentage of women on the boards of listed companies increased yearly until coming to a standstill or even reducing in 2019. The Finnish Chambers of Commerce, which has promoted self-regulatory measures to improve gender balance, explained that the small decline may be caused by changes in the market values of companies, and stresses that the percentage of women on all listed companies' boards remained at 29 %. The Government has exerted pressure on listed companies to increase the number of women on their boards, and the Chambers of Commerce has responded by introducing a duty to achieving gender-balanced representation through self-regulation. Listed companies are to have both women and men on their boards of directors, and must follow the 'comply or explain' rule when reporting on the national Code of Conduct requirements.

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

Section 4(a)(1) of the Act of Equality requires that state committees and other similar bodies (as well as municipal bodies that are not elected but nominated) must ensure a minimum of 40 % of the under-represented sex. This provision is not required by EU law, and has been considered effective in its efforts to create more gender balanced public bodies. The provision has had a certain spill-over effect in other areas of life, for example in civil society. Non-governmental organisations that have no legal duty to follow the provision often still do so.

²⁵ Equality Ombudsman's opinion 29.8.2017, Dnro TAS/225/2017.

²⁶ Suomaa, Leo *Samapalkkaisuusohjelman kokonaisarviointi 2016-2019* (Overall evaluation of the equal pay programme 2016-2019), Ministry of Social Affairs and Health 2018.

²⁷ According to the Finnish Foundation for Share Promotion, large cap companies have a share value over EUR 1 billion and small cap companies share value up to EUR 150 million, while the share value of mid cap companies lies between these figures.

²⁸ *Naiset pörssiyhtiöiden hallituksissa -19* (Women on the boards of directors of the listed companies -19), *Keskuskauppakamari* (Finnish Chambers of Commerce), <https://kauppakamari.fi/wp-content/uploads/2019/05/naiset-porssiyhtioiden-hallituksissa-2019>.

3.7 Harassment and sexual harassment

3.7.1 Definition and explicit prohibition of harassment

Section 7 of the Act on Equality defines discrimination and harassment. Sexual harassment is defined as:

'verbal, non-verbal or physical unwanted sexual conduct which intentionally or de facto violates the mental or physical integrity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment' (Subsection 7(7)).

Harassment on the basis of sex is defined as:

'unwanted conduct related to sex, sexual identity or expression of sex which is not sexual by nature and which with its purpose or effect violates the mental or physical integrity of a person and which creates an intimidating, hostile, degrading, humiliating or offensive environment' (Subsection 7(8)).

Subsection 7(6) stipulates that harassment based on sex and sexual harassment amounts to discrimination.

3.7.2 Scope of the prohibition of harassment

The prohibition under Section 7 of the Act on Equality prohibits harassment in general, except in private relations, religious communities, and the acts of Parliament and the President, which areas Section 2 of the Act on Equality explicitly excludes from the material scope of the Act. The general prohibition does not also include a right to compensation for the victim of harassment. However, authorities are bound by the general prohibition, and violation of Section 7 may have administrative legal impact. The specific prohibitions of harassment under Sections 8(b) to 8(e) extend the prohibition of harassment, supported by the right of the victim to compensation, to education, labour-market organisations, workplaces and the provision of goods and services.

3.7.3 Definition and explicit prohibition of sexual harassment

Under Section 7 of the Act on Equality, subsections 6-8 prohibit sexual harassment and harassment on the basis of sex, and define sexual harassment as:

'verbal, non-verbal or physical conduct of a sexual nature with the purpose or effect of violating the mental or physical integrity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment'.

3.7.4 Scope of the prohibition of sexual harassment

The prohibition of sexual harassment covers a broader scope than EU law, while remedies for the victim are available only in cases covered by EU law, i.e. those concerning discrimination in working life and in the access to and supply of goods and services, prohibited under Sections 8 and 8(e). Section 8(d) stipulates that the conduct of an employer is considered discriminatory if they do not take available measures to remove harassment when they have been informed of it.

The Finnish legal definition complies with EU law. The broad scope of Section 7 has an impact, mostly because authorities are required to take the prohibition of sexual harassment into account, even when there is no justiciable right for the victim to demand compensation. In addition, Section 8(b) prohibits discrimination, including sexual harassment, in educational institutions, and an amendment adopted in 2016 extended this

to institutions that provide basic education, which until then fell outside the material scope of the provision. The prohibition covers harassment and entitles the victim with a right to compensation. This provision exceeds the requirements of EU law.²⁹

3.7.5 Understanding of (sexual) harassment as discrimination

The Act on Equality is clear in defining both sexual harassment and harassment on the grounds of sex as amounting to discrimination. However, the situation is complicated by a parallel provision under Section 28 of the Occupational Safety Act (738/2002). This provision requires the employer to take action when 'harassment or other improper treatment' takes place at work. Harassment is in this context defined by its impact on the health of the employee, and is not described as a form of discrimination that is prohibited even irrespective of health risks involved. The Occupational Safety Act is well known and more vigorously monitored than the Act on Equality.

3.7.6 Specific difficulties

A victim of harassment is often in a difficult situation, as the employer is held responsible for harassment at work only after they have been informed and then neglects to take action to address it. The victim often feels it is difficult to make an accusation of harassment, particularly against a person in a superior position. The rule on the burden of proof (Section 9a of the Equality Act) requires that the victim of discrimination presents facts on which it may be assumed that discrimination has taken place. If the complainant manages to do so, the burden of proof falls on the respondent. It is considered difficult to obtain proof that harassment has taken place. Harassment often takes place between two individuals, and if the alleged harasser denies the violation, there often is no further proof of it. Harassment claims tend to become public when several persons present complaints, rather than when reported by one individual. Widespread problems of sexual harassment have been found to exist in several public bodies, such as the Ministry of Foreign Affairs³⁰ and the Parliament.³¹ The way to solve such situations has been to nominate a rapporteur, rather than encouraging the victims to go to court.³² The Supreme Court and Supreme Administrative Court have not ruled on cases of harassment under the Act on Equality. The Labour Court has ruled on several cases of contested dismissals of persons on the ground of harassment under the Occupational Safety Act (738/2002), Section 28. The provision requires the employer to take adequate measures against 'harassment and other inappropriate treatment of an employee'. Most cases based on the Occupational Safety Act involve bullying rather than sexual harassment or harassment on the basis of sex, but it is often difficult to discern whether there are elements of gender-based harassment involved. Case TT:2014-79 of the Labour Court concerned a contested dismissal on the grounds of sexual harassment of a co-employee. In the case, the Labour Court assessed the proof on harassment, finding the victim's narrative credible. The core issue of the case, however, was whether the harassment was a sufficient ground for dismissal. The Court found it was not a 'serious breach of the employee's contractual duties', and thus the dismissed employee was entitled to compensation under the collective agreement.

²⁹ Section 8b of the Act on Equality, which contains the prohibition of discrimination in educational institutions, was amended by Act 915/2016. The earlier wording of the section made an exception concerning basic education, i.e. the mandatory schooling for persons between 7 and 16.

³⁰ In March 2019, the ministry of Foreign Affairs announced that a study of the prevention, handling and follow-up of cases of harassment in the Foreign Service had been completed. The report noted shortcomings in reporting of harassment and handling of harassment cases. Ministry of Foreign Affairs Press release 'Consultants recommend improved communications and changes in HR and management to address harassment', 26.3.2019.

³¹ The activities of MPs are exempted from the scope of the Act on Equality. At several points, studies have shown that assistants to MPs are vulnerable to harassment. The latest study on the issue was published by the national public broadcasting company YLE 12.12.2017, in <https://yle.fi/uutiset/3-9972340>.

³² For example, when the CEO of the Veikkaus Oy, the government-owned betting agency, was accused of harassing several employees, Pirkko K. Koskinen, a professor of labour law, was nominated as rapporteur. Ms Koskinen found there was proof of harassment, and the CEO was dismissed.

3.8 Instruction to discriminate

3.8.1 Explicit prohibition

Section 7(6) of the Act on Equality explicitly prohibits the instruction to discriminate as discrimination: 'an incitement or instruction to discriminate is to be considered as discrimination under this Act.'

3.8.2 Specific difficulties

There are no specific difficulties.

3.9 Other forms of discrimination

Under Section 7(7) of the Act on Equality, 'discrimination is prohibited irrespective of whether it is based on a fact or assumption concerning the person him/herself or someone else', which covers both discrimination by association and assumed discrimination.

3.10 Evaluation of implementation

Equality and discrimination are defined in two ways: Section 7 of the Act on Equality follows the definitions in EU law, while the older provisions on specific forms of discrimination use a different vocabulary, which may be difficult to relate to the definitions under Section 7. The implementation may be correct, but the provisions are rather difficult to understand for persons who are not experts on equality law.

3.11 Remaining issues

The fact that most pay discrimination cases that come before courts involve an employment contract that has been terminated or has never commenced (recruitment situations) seems to indicate that victims may feel too vulnerable or insecure to allege discrimination while their employment continues.

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

Surveys on the gender pay gap and attempts to reduce it have been made for decades. Both Statistics Finland and social partners conduct surveys on gender equality in the labour market.

Women in Finland participate in the labour market almost equally as men, and their level of education is generally higher than that of men's. Nevertheless, Statistics Finland reports a high average gender pay gap, at present 16 %. This gap is broader than the EU average, and it has only reduced slowly. The Finnish labour market is highly gender segregated; the private sector is predominantly dominated by men, while the public sector employs mainly women. Only one tenth of employees work in occupations that employ an equal number of men and women,³³ and men tend to dominate in higher positions.

Part-time work has slightly increased in Finland, and is more common for women than for men. In 2018, 10 % of men and 21 % of women worked part time. Part-time working is more common for young and older employees, which indicates that it is not primarily a solution for combining work and family life. The latest statistics show that the number of part-time working men increased from 2019 to 2020, while the number of part-time working women declined.³⁴ Fixed-term work increased during the economic depression in the 1990s and has since remained common, especially for women; in 2018, 13 % of men and 19 % of women were employed on fixed-term contracts. Such jobs are more common in the public than the private sector, where new employment contracts tend to be fixed-term – new contracts were fixed-term in 59 % of cases for women and in 49 % for men.³⁵ The latest statistics show an increase (1.3 %) in the percentage of fixed-term employment, but the statistics are not gender-specific.³⁶

4.1.2 Surveys on the difficulties of realising equal treatment at work

Tripartite (Government and social partners) equal pay programmes have been running since 2006. The most recent programme (2016-2019), as well as those that preceded it, have involved cooperation with the social partners; mainly central organisations of employers and employees. The programme aims to reduce the gender pay gap by various means, and operates on the assumption that the gendered segregation of the labour market is the main reason for the gap. The latest programme named the need to educate experts on labour and economic affairs administration and to include a gender dimension in immigrant and refugee services as a means to reduce the gap.³⁷ The tripartite Equal Pay Programme included actions for social partners, such as to promote gender impact assessments of collective agreements, and to increase the use of pay systems based on demands of the work and assessment of personal input. Significant emphasis is placed on reducing gender segregation in the labour market through educational measures. The Programme also refers to the need to increase fathers' use of family-related leave. However, an evaluation of the Programme indicated that the results have been meagre, and that any new tripartite programme in the future should find new approaches to the

³³ Statistics Finland 2015.

³⁴ http://tilastokeskus.fi/til/tyti/2020/01/tyti_2020_01_2020-02-25_tau_010_fi.html.

³⁵ Kauhanen, Merja *Sukupuolten väliset erot työpaikkojen laadussa – onko työsuhteen tyypillä väliä?* (Gender differences in the quality of working places – does the type of the working contract matter? in Pietikäinen, Marjut (ed.) *Työ, talous ja tasa-arvo* (Work, Economy and Equality) Statistics Finland, 2013, 49-63.

³⁶ http://tilastokeskus.fi/til/tyti/2020/01/tyti_2020_01_2020-02-25_tau_013_fi.html.

³⁷ *Hallituksen tasa-arvo-ohjelma* (Government's Equality Programme) 2016-2019, p. 9-10, http://julkaisut.valtioneuvosto.fi/bitstream/handle/10024/75238/04_2016_STM_Tasa-arvo-ohjelma_2016-2019_fi_sv_B5_netti.pdf?sequence=1&isAllowed=y.

pay gap problem.³⁸ In general, different studies and surveys indicate that there is disagreement over the reasons behind the gender pay gap and the means required to overcome it.

The Equality Ombudsman's Office collects information on queries made to the Ombudsman, as well as on a number of discrimination cases that have reached the courts. The latest collection of such unpublished reports was conducted in 2015,³⁹ and contains information on cases concerning gender-based discrimination that reached the courts in 2012-2014. Over 50 gender-based discrimination cases were brought to district courts. Seven of these were pay discrimination cases.

4.1.3 Other issues

There are no further issues to be discussed.

4.1.4 Political and societal debate and pending legislative proposals

Political and societal discussions on family-related leave, pay discrimination and pay transparency took place during the previous Government of 2016-2019. The Government was unable to come to an agreement on the reform of family-related leave, and the preparations for an amendment to the pay transparency legislation were cut short by the Government's premature resignation in March 2019. The current Government programme promises to reduce pay discrimination by increasing pay transparency legislation, as well as by means of a more effective tripartite equal pay programme that would commit parties to job evaluations and pay transparency.⁴⁰

4.2 Equal pay

4.2.1 Implementation in national law

The principle of equal pay is referred to under Section 6(4) of the Constitution, as described above under 2.1.1, and also under Section 8 of the Act on Equality. Section 8(3)(4) of the Act on Equality prohibits implementing conditions of pay or employment in a manner that places an employee or employees in a less advantageous position than one or several employees who do equal work or work of equal value.

4.2.2 Definition in national law

The term 'pay', including 'equal pay', is not defined in national law.

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

Section 7 of the Act on Equality defines direct and indirect discrimination, and Section 8 prohibits pay discrimination, in principle using the definitions under Section 7. However, it may still be difficult to distinguish direct and indirect pay discrimination in practice, as pointed out above. The preparatory works to the Act on Equality refer to the possibility that the general prohibition of discrimination under Section 7 may be applied to pay discrimination in some cases that fall outside the scope of Section 8, for instance when

³⁸ Suomaa, Leo Samapalkkaisuusohjelman kokonaisarviointi 2016-2019 (Overall assessment of the Equal Pay Programme 2016-2019), Sosiaali- ja terveysministeriön raportteja ja muistioita 56/2018, http://julkaisut.valtioneuvosto.fi/bitstream/handle/10024/161221/R_56_18_STM_Samapalkkaisuus_kokonaisarviointi-WEB.pdf?sequence=1&isAllowed=y.

³⁹ Jokinen, Jasmiina *Tasa-arvolain ja rikoslain syrjintäsäännösten soveltaminen oikeuskäytännössä vuosina 2012-2014* (Implementation of the Non-Discrimination Provisions under the Act of Equality and Criminal Code in 2012-2014, unpublished report for the Equality Ombudsman's Office, 2015).

⁴⁰ Programme of Prime Minister Sanna Marin's Government 2019, Section 3.5, <https://valtioneuvosto.fi/en/marin/government-programme/finland-built-on-trust-and-labour-market-equality>.

employees do not do equal work or work of equal value, if an employee is placed at a disadvantage on the basis of sex. Section 7 does not provide a victim of discrimination with the right to obtain compensation under the Act on Equality, but compensation under tort law is possible.⁴¹

4.2.4 Related case law

Indirect discrimination in the application of the equal pay principle was the focus in case TT:1998-34. In this case, the Labour Court assessed a collective agreement that did not accept maternity leave fully as a period to be considered when calculating experience-based pay additions, even though all permissible periods of absence were defined as time to be taken into account. The Labour Court held that the condition of the collective agreement was indirectly discriminatory.

The choice of comparator and the burden of proof have also been central in several cases. There is legal uncertainty as to when the employee has been able to provide facts from which it may be presumed that there has been direct or indirect discrimination. Finnish courts have come to different conclusions in the so-called 'judge cases' brought to courts when the pay system of judges was changed and judges were redistributed to different pay categories. The definition of pay discrimination under Section 8 of the Act on Equality requires that the employer implements conditions on pay so that one or several employees are disadvantaged on the ground of sex. The Labour Court in case TT:2002-7-10 accepted that the burden of proof turned to the employer, when an employee had shown that his/her pay was lower than the comparators, who was of the opposite sex. The employee was not required to show that the disadvantage was caused by his/her sex in order to turn the burden of proof. The Labour Court required that the employer must justify pay differentials in each case. Later, Supreme Court case KKO 2009:79 and Supreme Administrative Court case 2005:51 were based on a different interpretation. These courts held that the employees had not been able to establish a presumption of discrimination to shift the burden of proof onto the respondent, as the courts assumed that sex was not the ground of the disadvantage, as both women and men were placed in lower pay categories.

Pay during compulsory temporary transfer of a pregnant worker because of risk to her and her child's safety and health has caused difficulties. Case C-471/08 *Parviainen v. Finnair Oyj*, referred to the Court of Justice of the EU by the Helsinki District Court (*Helsingin käräjäoikeus*), concerned the calculation of pay, in particular supplementary allowances. The applicant was transferred from working as an air hostess to ground duties, in accordance with EU and national law, during her pregnancy. Supplementary allowances represented approximately 40 % of the pay of the air hostess, which she was not paid when performing office work. Finnair contended that the pay the applicant received was higher than what a person in similar ground duties received. The question referred to the preliminary ruling was whether a pregnant worker, temporarily transferred due to pregnancy, is entitled to the pay she received on average before the transfer. The Court ruled that the transferred employee is not entitled to the pay she received on average prior to the transfer, but to her basic salary and the pay components or supplementary allowances relating to her professional status.

In Finland pay is not mandatory during maternity leave, but many collective agreements provide an entitlement to pay at least during some part of the leave. Maternity, paternity and parental leave periods are covered by income-related benefits. These family-related leave periods may be complemented by childcare leave, which entitles the parent to a flat-rate benefit. Childcare leave is available until the child is three years old. The childcare leave is often called home care leave, as the flat-rate benefit is only available when the child is cared for at home. Problems have arisen when employers have limited the entitlement in cases when new maternity leave begins while the employee is still on unpaid

⁴¹ Government Bill 57/1985 vp, p. 16.

parental leave or childcare leave. The District Court of Tampere referred a case to the ECJ in which a teacher on unpaid childcare leave wished to have the leave interrupted so that she could start new maternity leave. The collective agreement to which she was subject required an unforeseeable and justified ground to permit alteration of the date of childcare leave, but did not mention pregnancy. The employer rejected the request, contending that in Finnish case law, a new pregnancy did not constitute a justified ground for altering the duration of the childcare leave. The ECJ ruled in Case C-116/06 that Community law precludes decisions that prevent a pregnant worker from obtaining an alteration of the home care leave and thus deprives her of the rights inherent in maternity leave.⁴² Some later collective agreements explicitly limited the right to pay during maternity leave for those who start maternity leave after having been on home care leave. The Labour Court referred two cases concerning the limitation of pay that is paid according to a collective agreement to an employee on maternity leave. In both cases the employee had started new maternity leave straight from having been on childcare leave. The Court of Justice held in joined cases C-512/11 and C-513/11 that Directive 96/34 precludes a provision in collective agreements that prevents a pregnant worker who interrupts a period of unpaid parental leave from receiving the pay to which she would have been entitled had the maternity leave been preceded by a minimum period of work.⁴³ Similarly, in case KKO:2017:25, the Finnish Supreme Court adjudicated on a situation where an employee had returned to work after childcare leave and started a new maternity leave before working less than six months between leave periods, which was the requirement for paid maternity leave in the applicable collective agreement. The employer did not pay the employee during the second maternity leave. The Supreme Court found indirect discrimination on the grounds of parenthood and family care duties, and violation of the prohibition of discrimination at work, for which the employee was to receive compensation. The Court ruled that there was no direct discrimination on the ground of pregnancy, as childcare leave is available for both sexes, but found indirect discrimination on the ground of parenthood and family responsibilities, which is prohibited under Section 7(3) of the Act on Equality.

4.2.5 Permissibility of pay differences

Pay differentials have been considered permissible by preparatory works of the Act on Equality, if there is a labour shortage caused by demand in the labour market. The preparatory works of the Act on Equality also mention education, professional skill, proactivity and suitability for demanding tasks as permissible grounds for pay differences. The Equality Ombudsman stresses that the reason for pay differences must be proportionate. Pay differences are to have a legitimate aim and be appropriate and necessary for the aim in question.⁴⁴ The Equality Ombudsman has pointed out that two jobs being under different collective agreement classifications or different collective agreements altogether does not constitute a justification for pay differences.⁴⁵ An employer cannot justify pay difference by citing lack of resources. Pay difference has to be corrected within a reasonable time, and the Act on Equality requires that the pay of the person discriminated against must be levelled up, rather than the pay of the comparator being levelled down.⁴⁶

4.2.6 Requirement for comparators

The provision on pay discrimination in Section 8 of the Act on Equality refers explicitly to comparison (to apply pay or other conditions of work so that an employee or employees are placed at a disadvantage on the ground of sex compared to one or several employees),

⁴² Paragraph 57.

⁴³ Paragraph 49.

⁴⁴ Equality Ombudsman's website, *Hyväksyttävät syyt palkkaeroille* (Permissible grounds for pay differentials, <https://www.tasa-arvo.fi/hyvaksyttavat-syyt-palkkaeroille>).

⁴⁵ Equality Ombudsman's opinion (TAS 93/2013, of 10.6.2014).

⁴⁶ Equality Ombudsman's opinion (TAYS 293/2018, of 26.8. 2019).

and the preparatory works⁴⁷ for the provision state that the equal pay principle contains the idea of comparison. When considering whether pay discrimination has occurred, it must be judged whether the tasks are so similar as to be the same or if they may be considered equally demanding. A hypothetical comparator is not allowed, but in pay discrimination concerning pregnancy the comparison may be made with the person herself (if she had not become pregnant). In practice, the comparator requirement may be more flexible. For example, if a neutral norm has a differential impact on a group of persons defined by their belonging to the same protected characteristic, this establishes the assumption that the norm itself is discriminatory. Such collective considerations are not necessary in cases that address whether or not a norm that is per se neutral has been applied in a discriminatory manner. If the application of certain criteria cannot be objectively justified, then it can be assumed that pay differentials are caused by gender. Anja Nummijärvi refers both to *Danfoss* and to Finnish case law on pay discrimination when she claims that drawing the line between collective and individual assessments, and direct and indirect discrimination, is not always easy. As to what evidence is to be presented for indirect discrimination, Nummijärvi notes that statistics may be used to establish an assumption of indirect discrimination and to reverse the burden of proof. However, she also indicates that statistical evidence in cases like *Danfoss* can be too difficult to provide; therefore, any suitable evidence may be used to establish the assumption of discrimination.⁴⁸ The preparatory works for an amendment to the Act on Equality also draw attention to the difficulty in distinguishing between direct and indirect discrimination in certain cases,⁴⁹ and the Equality Ombudsman has not always made the distinction between direct and indirect pay discrimination, but has merely stated that pay differentials must be justified.⁵⁰

There are also cases where the main issue has been whether a comparison may be made if there are both women and men among those with lower pay. The Labour Court has held that the burden of proof may be shifted onto the respondent employer if the claimant can present at least one comparator of the opposite sex who has better pay for equal work, irrespective of the fact that there are both women and men in lower and higher pay brackets doing equal work.⁵¹ However, the Supreme Court and the Supreme Administrative Court have previously decided that in cases concerning the new pay system for judges, since both men and women were placed in lower bracket offices pay discrimination could not exist. In these cases the claimants had not even managed to establish an assumption of discrimination, which, according to the Act on Equality, would reverse the burden of proof onto the respondent employer.⁵² It seems that both the Supreme Court and the Supreme Administrative Court dismissed the argumentation in the preparatory works referred to above,⁵³ and did not proceed to consider whether indirect discrimination could have been in question. Evidence of indirect discrimination would have required a comparison of how female and male judges were positioned in different pay brackets.

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

The preparatory works for the Act on Equality explain that in establishing whether equal work or work of equal value is in question, attention should be paid to the quality and contents of the job and the conditions under which the job is performed. In deciding whether equal work is in question, attention shall be paid to the differences used in job classifications. However, the preparatory works also state that if the system of

⁴⁷ Government Bill HE 57/1985 vp.

⁴⁸ Nummijärvi, A. (2004) *Palkkasyrjintä: Oikeudellinen tutkimus samapalkkaisuuslainsäädännön sisällöstä ja toimivuudesta*, Edita, p. 302.

⁴⁹ Government Bill HE 90/1994, 17.

⁵⁰ For example, Opinion of the Equality Ombudsman, Dnro 5/53/02.

⁵¹ Labour Court TT:2002-7-10.

⁵² Cases of the Supreme Court KKO 2009:78 and the Supreme Administrative Court KHO 2005:51.

⁵³ Nummijärvi, A. (2004) *Palkkasyrjintä: Oikeudellinen tutkimus samapalkkaisuuslainsäädännön sisällöstä ja toimivuudesta*, Edita, p. 302.

classification used in a collective agreement de facto discriminates on the basis of gender, the social partners shall develop the agreement in question.⁵⁴ The Equality Board has adopted a similar approach in a case on pay discrimination.⁵⁵

The starting point for job classifications is that attention should be paid to the classifications used in collective agreements when deciding whether two jobs include equal work or whether the work is of equal value, although the preparatory works also acknowledge the possibility that such classifications are based on discriminatory grounds. No legislative clarification concerning how classifications should be assessed has been undertaken. The issue of job assessment has been very much in the hands of the labour market's central organisations, and in 1990 the issue was taken up by a Working Group on Job Assessment, established by the social partners. The issue soon proved to be complicated and one that could give rise to conflicting claims. Several working groups have been established and numerous studies conducted on job assessment in various branches, but so far there has been little real development.

4.2.8 Other relevant rules or policies

There are no further relevant rules or policies to report.

4.2.9 Job evaluation and classification systems

First, private pay systems and somewhat later the public pay systems in Finland have gradually developed into systems that are expected to motivate employees towards better performance. Typically, pay systems involve components that reflect the requirements of the job as well as the personal performance of the employee, with parameters set by collective agreements. The 'new' pay systems involve regular job and performance evaluations. The move to these 'new' pay systems was also justified by their assumed gender equality impacts. A study on job, competence and performance evaluations' impact on gender equality in private and public organisations⁵⁶ reported in 2012 that it cannot be taken for granted that job evaluation promotes gender equality. Structural solutions of the 'new' pay systems allow the promotion of equal pay, but that requires critical analysis and monitoring. Gender equality was seldom defined as a practical goal of the pay system, and therefore the equality of the outcome was not monitored. Existing social norms and prejudices restricted development work in the workplace.

4.2.10 Wage transparency

The employer is to provide the victim of alleged pay discrimination 'information on the grounds of his/her pay and other information that is necessary for assessing whether there has been discrimination', under Section 10.3 of the Act on Equality. It is clear on the basis of other provisions of the Act, however, whether the employer is obliged to provide information on a comparator who refuses the disclosure of his/her pay details. An employee representative may receive information on an individual employee's pay only with his/her consent, but at the request of the alleged victim of pay discrimination the representative may request such information from the Equality Ombudsman. The Ombudsman requests the employer to supply the information if there are reasonable grounds to suspect discrimination (Section 17.3 of the Act on Equality).

Under Section 6(b) of the Act on Equality, the employer is under a positive obligation to conduct regular pay audits (pay mapping). If pay differentials are found, the employer is to enquire into the causes and reasons for these differentials.

⁵⁴ Government Bill HE 57/1985, 19.

⁵⁵ Equality Board opinion No. L 2/2005.

⁵⁶ Ikävalko, H, Karppinen, V, Kohvakka, R., Koskinen, P. Nylander, M, Wallin, T. (2012) *Tasa-arvoa palkkaukseen; Havaintoja palkkausjärjestelmien kehittämisestä TAPAS -hankkeessa* (Gender equality into pay: Findings on development of pay systems in the TAPAS-project), Ministry of Social Affairs and Health, <http://julkaisut.valtioneuvosto.fi/bitstream/handle/10024/73274/URN%3ANBN%3Afi-fe201504222858.pdf?sequence=1&isAllowed=y>.

4.2.11 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

Pay audits required by Section 6(b) of the Act on Equality precede the Commission's Recommendation; the provision was adopted in 2005 and amended in 2014. Pay audits are required for employers of a minimum of 30 employees as part of equality planning (Section 6(a) of the Act). The aim of the pay audit is to clarify that there are no groundless pay differentials between women and men. The equality plan must involve an analysis of job classifications, pay, and pay differentials by gender, and if there are clear pay differentials the employer is to analyse their reasons and grounds. The main pay components are to be taken into consideration, and employers must conduct the audit in cooperation with the employees' representative.

The Commission's Recommendation was one of motivations for nominating Equality Ombudsman Jukka Maarianvaara to report on pay transparency in 2018. The report was published in October 2018,⁵⁷ and it contains an analysis of the legal prerequisites of pay transparency and balancing requirements of the equal pay principle, particularly the right to privacy and data protection.⁵⁸ The Ministry of Social Affairs and Health nominated a tripartite working group (the Pay Transparency Working Group) to consider the proposals made by the Equality Ombudsman for amending Section 6(b). The report of the Pay Transparency Working Group was published in April 2019,⁵⁹ which indicated that the employees' representatives supported an amendment of the provision on pay transparency along the lines proposed by the Equality Ombudsman, whereas the employers' representatives rejected it. As the Government resigned before the final report was published, no political conclusions were drawn. The current Government's programme notes that pay differentials and pay discrimination are to be combated by increasing pay transparency by means of legislation. Provisions will be introduced on the right of staff, staff representatives and individual employees to access pay information and to address pay discrimination more effectively.⁶⁰

4.2.12 Other measures, tools or procedures

There are no further measures, tools or procedures to report.

4.3 Access to work, working conditions and dismissal

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

Gender discrimination in the access to employment, in employment, working conditions, and dismissals are prohibited under Section 8 of the Act on Equality, which specifically uses the terms 'employer' and 'employee'. The personal scope of the provision depends on how an employee is defined under the Act.

Section 3(1) of the Act on Equality defines an employee as a person under a contract who binds her/himself to work under an employer's direction and monitoring against pay or

⁵⁷ Ministry of Social Affairs and Health and Maarianvaara, Jukka *Selvitys palkka-avoimudesta* (Report on Pay Transparency), Ministry of Social Affairs and Health 2018, http://julkaisut.valtioneuvosto.fi/bitstream/handle/10024/161103/R_41_18_Selvitys_palkka-avoimudesta.pdf?sequence=1&isAllowed=y (Legal Prerequisites of Pay Transparency), in Ministry of Social Affairs and Health and Maarianvaara, Jukka, 2018, pp. 17-38.

⁵⁸ Nousiainen, Kevät Palkka-avoimuuden oikeudelliset edellytykset (Legal Prerequisites of Pay Transparency) in Ministry of Social Affairs and Health and Maarianvaara, Jukka, *Selvitys palkka-avoimudesta*, pp. 17-39.

⁵⁹ *Palkka-avoimuustyöryhmän loppuraportti* (The Final Report of the Pay Transparency Working Group), Reports of the Ministry of Social Affairs and Health 2019:32, http://julkaisut.valtioneuvosto.fi/bitstream/handle/10024/161495/STM_rap_2019_32_Palkka-avoimuustyoryhman_loppuraportti.pdf.

⁶⁰ Government Programme 2019, <https://valtioneuvosto.fi/en/marin/government-programme/finland-built-on-trust-and-labour-market-equality>, Section 3.5.

other remuneration; or is in an office or similar service to the State, a municipality, or another public community (authority). When Directive 2002/73/EC was transposed,⁶¹ the definition of 'employee' was broadened from one based on labour law criteria by adding that the Act's provisions on employees apply 'as appropriate, to persons working in other legal relationships that are comparable to an employment relationship'. The preparatory works explain that the definition refers to forms of work that take place under circumstances similar to those under employment contracts. This includes independent workers or entrepreneurs, freelancers, persons with their own professional practice, or persons who perform care work in families under an assignment agreement paid by public funds under social welfare legislation. Independent workers and entrepreneurs are only covered if they sell their own skills, even though they may act as entrepreneurs in the sense understood by unemployment or pension legislation. A person similar to 'employee' cannot be one who engages in activities that involve a proper enterprise risk or employs others. The decisive factor is the actual nature of the activity, not its legal form.⁶²

Protection against gender discrimination in access to vocational training may be provided for under Section 8, when the training in question takes place in an employment relationship. Access to vocational training is also covered by Section 8(b) of the Act on Equality, which prohibits discrimination in educational institutions. The provision covers discrimination in the election of students, in teaching arrangements, student assessment, and other activities of an educational institution.

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

The material scope of the prohibition of discrimination in access to employment relies on the definition of 'employee'. Section 8(1) covers both public and private employment.

Section 3 subsection 1 of the Act defines an employee 'as appropriate, to persons working in other legal relationships which are comparable to an employment relationship.' The preparatory works explain that this definition refers to forms of work that take place under circumstances similar to those under employment contracts, such as independent workers or entrepreneurs, freelancers, persons with their own professional practice, or persons who are engaged in care work in families under an assignment agreement' paid by public funds under social welfare legislation. Independent workers and entrepreneurs are only covered if they sell their own skills, even though they may act as entrepreneurs in the sense understood by unemployment or pension legislation. A person similar to an employee cannot be one who engages in activities that involve a proper enterprise risk or who employs others. The definition of an employee thus covers self-employed persons in work-like situations, and in these cases offers remedies and sanctions. This definition, however, does not provide protection against discrimination when establishing a business and in other business-related situations. In this respect, the scope of the prohibition of discrimination under Finnish law is narrower than that of EU law.

Gender discrimination with regard to membership of and in a labour market organisation is prohibited under Section 8(c) of the Act on Equality.

⁶¹ Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (Text with EEA relevance) OJ L 269, 5 October 2002 pp. 15-20.

⁶² *Hallituksen esitys Eduskunnalle laiksi naisten ja miesten välisestä tasa-arvosta annetun lain muuttamisesta* (Government Bill on amendment of the Act on Equality between Women and Men), HE 195/2004 vp.

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

The prohibition of gender discrimination in the access to employment under Section 8(1) contains an exception – Section 8(2) allows nominating a less qualified person of the opposite sex to a job for a 'weighty and acceptable reason'.

There has been no assessment of the implementation of Article 14(2) of Directive 2006/54.

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

Protection against the non-hiring, non-renewal of a fixed-term contract, and dismissal of pregnant women is implemented in national law. Under Section 8(2) of the Act on Equality, the conduct of an employer amounts to discrimination if the employer 'upon employing a person, selecting someone for a particular task or training, or deciding on the duration or continuation of an employment relationship or the pay or other terms of employment, acts in such a way that the person finds herself/himself in a less favourable position on the basis of pregnancy or childbirth or by some other gender-related reason'. Under the Employment Contracts Act, the employer is not entitled to terminate the employment contract of an employee who is pregnant or on family leave on normal grounds of termination (Chapter 7, Section 9(1) of the Employment Contracts Act). There are no exceptions to this rule.

In the event of dismissal due to economic or production reasons, the employer is to explain the grounds of dismissal (Chapter 9, Section 3 of the Employment Contracts Act), but there is no explicit requirement of this being done in writing. If an employer dismisses a pregnant employee or an employee on family-related leave, the dismissal is assumed to be caused by pregnancy or use of family-related leave unless the employer can show another cause (Chapter 7, Section 9(2)). An employer may dismiss a pregnant employee or an employee on family-related leave using normal grounds of dismissal only if the employer ceases all operations. Under Chapter 12 Section 1, the employer is liable for the loss suffered by the employee by the employer's intentional or negligent breach of obligations arising from the employment relationship or the Act on Employment Contracts. Section 2 of the Chapter stipulates the rules on compensation for an unfounded termination of an employment contract (3-24 months' pay).

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)

Under Section 9(1) of the Act on Equality, special protection of women due to pregnancy and childbirth is not to be considered gender discrimination. The preparatory works for amendments to the Act on Equality carried out in 2004 note that the provision needs no amendment, as it implements EU law correctly. The preparatory works stress, however, that differential treatment due to pregnancy and childbirth is only allowed for the purpose of necessary protection.⁶³

4.3.6 Particular difficulties

Despite the provisions in place, pregnancy-related discrimination is relatively common according to reports by the Equality Ombudsman – more than half of all persons who contact the Ombudsman allege pregnancy-related discrimination. Even occupational safety authorities, the police, and trade unions are often contacted in pregnancy discrimination issues. According to the Equality Ombudsman, discrimination is common

⁶³ HE 195/2004 vp, pp. 35-36.

when women work under insecure conditions, such as fixed-term work, part-time work, lease work or on so-called zero-hour contracts. Alleged pregnancy discrimination takes place at recruitment, continuation of fixed-term contracts, return from family-related leave, as well as pay during maternity and parental leave.⁶⁴

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

Maternity-related policies are not understood as positive action measures under non-discrimination law; they are considered social policy measures. These measures (such as health checks and other services for pregnant women) are common in Finland.

4.4 Evaluation of implementation

Legislation to protect women against pregnancy-related discrimination is in principle sufficient, and the protection afforded through the legal assumptions in the Employment Contracts Act concerning the cause of dismissal exceed what EU law requires. Nevertheless, de facto discrimination is widespread. The problem appears to lie in implementation, namely lack of information and lack of support. In a gender-segregated labour market, a victim of discrimination often fears not only retaliation by the present employer, but difficulties in finding employment in the same occupation in the future.

4.5 Remaining issues

There are no remaining issues left to address.

⁶⁴ Equality Ombudsman's website: *Mitä on raskausyrjintä?* (What is pregnancy discrimination?), <https://www.raskausyrjinta.fi/mita-on-raskausyrjinta->.

5 Pregnancy, maternity, and leave related to work-life balance for workers (Directive 92/85, relevant provisions of Directives 2006/54, 2010/18 and 2019/1158)⁶⁵

5.1 General (legal) context

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

The National Institute for Health and Welfare has carried out surveys and published reports on work-life balance issues. Studies show that combining work and family life has both negative and positive aspects. Parents in families with children, who find their demands of work stressful, and mothers of children under school age often feel they neglect home due to their employment. In addition, mothers, more often than fathers, feel that family limits their options in work. Many mothers of children under three are on home care leave and do not feel time pressure caused by employment – rather, stress because their income is very limited. Despite this, combining work with family life has also been received positively. For instance, four of five mothers and two of three fathers of children under school age feel it is good for childcare that the parent has respite from care work in work outside the home.⁶⁶ While flexible work is common in Finland, only approximately 50 % of families can make use of flexible working hours, and only a small percentage of them could do telework. Flexible working time was more common among fathers than mothers.⁶⁷ A study by Statistics Finland showed that two out of three employed parents of children under 15 think they have influence over when their work starts and ends, but men thought so somewhat more than women (71 % men and 63 % women). The majority (58 %) of such parents worked less than 40 hours per week, but more than half of fathers said they worked over 40 hours (57 %), 44 % of all such parents worked 35-39 hours, and 14 % worked less than 35 hours.⁶⁸ Fathers seem to be able to influence their working hours more than mothers, but in practice work longer hours than mothers. However, even mothers tend to work relatively long hours.

5.1.2 Other issues

Women in Finland tend to work full-time, and part-time work is not necessarily available for parents who wish to shorten their working hours. Fixed-term work is common, and more common among women than men. In 2017, 19 % of women and 13 % of men worked in fixed-term jobs. Of women between 25 to 34 years of age, that is women in child-bearing age, 27 % worked in fixed-term jobs. Young women are more commonly employed on fixed-term contracts than other groups of employees, and the main reason for this is lack of permanent work.⁶⁹ The availability of home care leave – a parental right to remain at home and take care of a child until the child is three – on a flat rate benefit

⁶⁵ 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>.

⁶⁶ Lammi-Taskula, Johanna & Salmi, Minna: *Työ, perhe ja hyvinvointi* (Work, Family and Welfare) in Lammi-Taskula, Johanna & Karvonen, Sakari & Ahlström, Salme (ed.): *Lapsiperheiden hyvinvointi* (Welfare of Child Families) The National Institute for Health and Welfare TEE004, Helsinki 2009, available at <http://www.julkari.fi/bitstream/handle/10024/80047/0e6f5676-9ccf-4490-8496-45c7b3acce5f.pdf?sequence=1&isAllowed=y>.

⁶⁷ Salmi Minna & Lammi-Taskula Johanna, *Joustoa työn vai perheen hyväksi?* In Pietikäinen Petteri (ed.) *Työstä, joustaa, jaksa: Työn ja hyvinvoinnin tulevaisuus* (Grind, Be Flexible, Endure: The Future of work and welfare) Gaudeamus, Helsinki, 2011, 155–183

⁶⁸ Nieminen, T. (2019) 'Kumpi joustaa: työ vai perhe?' (Which is flexible: work or family) Expert articles by Statistics Finland 2019, <http://www.tilastokeskus.fi/tietotrendit/artikkelit/2019/kumpi-joustaa-tyo-vai-perhe/>.

⁶⁹ National Institute for Health and Welfare, Information on gender equality at work, <https://thl.fi/en/web/sukupuolten-tasa-arvo/tyo/epatyyppilliset-tyosuhteet>.

is often seen as a factor that has a negative impact on working life participation of mothers of small children. Home care leave is a politically contested form of childcare leave. A person on home care leave is entitled to return to his/her job, which is seen as an incentive for discrimination, as such long leave periods may cause the employer problems. The use of home care leave by parents has declined during the last decade from nearly 90 % to 83 %, and only 10 % of families use the right to home care leave for the whole period. A shorter home care leave is often used in lieu of a longer parental leave, as many parents consider the present paid family-related leave too short. The clear majority of parents on home care leave are mothers.⁷⁰

Provision of childcare services is facilitated by a municipality's legal duty to provide childcare. The aim of providing day care for all children as a general social service was introduced in an act on day care for children in the 1970s, and a subjective right to day care for all children under school age was adopted in 1996. Children under school age are entitled to day care even when parents, or one of them, do not work. In 2016, the right to day care for children whose parents do not work or study a full day was cut to 20 hours a week, but the present Government programme promises to return to equal rights for all children. Under the Act on Early Childhood Education and Care (540/2018), early childhood education and care may be provided in early education centres, as family-based day care or as open early childhood education and care. Municipalities have the obligation to provide such care for children residing in the municipality, in municipal centres or by procuring services from private bodies. Parents who do not opt to use the early childhood education and care place provided by the municipality are entitled to an allowance, enabling them to provide care at home or in private day care. Parents may require compensation for lost income if they cannot work due to the lack of childcare they have applied for.

5.1.3 Overview of national acts on work-life balance issues

Chapter 4 of the Employment Contracts Act (55/2001) defines family-based leave, including maternity, parental, paternity and home care leave, and Chapter 9 of the Sickness Insurance Act (1224/2004) contains provisions on benefits to be paid under those periods of leave, including leave for adoptive parents. Any amendments to the family-based leave benefits automatically change the leave periods under the Employment Contracts Act. The other pieces of legislation on employment, such as the State, Municipal and Church Employment legislation⁷¹ follow the provisions of the Employment Contracts Act. Employers are not legally obliged to pay employees on family-related leave, but many collective agreements have clauses on pay for some leave periods. Breastfeeding and safety at work of pregnant employees is regulated under the Occupational Health and Safety Act 738/2002.

The Act on Pre-School Education (540/2018) requires municipalities to arrange day care as a municipal service, or to buy day care services from other providers. That Act and the Act on Day Care for Children, which preceded it, gave a child (or their parents) a subjective right to day care services. In 2016, the child's right to full-time day care was limited to 20 hours per week if both parents did not work or study, and to full day care when both parents worked. Full-day day care has to be arranged if it is in the best interest of the child (Section 12). Not all municipalities limited the right to pre-school education, however, and access to full day pre-school education in day care thus depends on the occupational situation of the child's parents; the child's particular needs, and the child's place of residence. The 20-hour limit of the right to pre-school education for children whose parents

⁷⁰ Finnish Institute for Health and Welfare (2019) *Kotihoidon tuen käyttö vähenee edelleen – pienten lasten äidit entistä useammin töissä* (The use of home care leave continues to decline – mothers of small children work more than previously), THL-blogi 16.1.2020, <https://blogi.thl.fi/kotihoidon-tuen-kaytto-vahenee-edelleen-pienten-lasten-aidit-entista-useammin-toissa/>.

⁷¹ The Act on state officials (759/1994), the Act on municipal office holders (304/2003) and the Church Act (1054/1993), Part II, contain provisions on employees of the state, municipal employees and employees of the Lutheran Church, who hold a public office. The state, municipalities and the Lutheran Church also have employees working under (private law) employment contracts.

both do not work, and the uneven implementation of the amendment were criticised for being against the best interest of the children whose right was limited. The current Government introduced an amendment to the Act on Pre-School Education that reintroduced the subjective right to pre-school education, irrespective of whether the parents work or not (Act 1395/2019).

Children begin school relatively late, at seven years. Basic education is free, while municipal day care carries an income-determined fee. The Act on Basic Education (628/1998) has since 2014 required that children participate in pre-school education for one year, which is free, prior to commencing free basic education. The Act on Pre-School Education (540/2018) obliges municipalities to provide pre-school education, to which a child is entitled, but the child's right to day care or pre-school education is limited to shorter hours when a parent does not work or study full-time.

5.1.4 Political and societal debate and pending legislative proposals

More equal sharing of the family-related leave among mothers and fathers has been under debate for a long time. Two prominent contested issues are the home care leave, which is seen to keep mothers at home for long periods and thus make their access to the working life difficult, and a mandatory sharing of parental leave. The care periods that are presently covered by income-related benefits is also regarded as too short. The current Government has promised a reform of family-related leave in its programme for Government, but does not intend to make changes with respect to home care leave. The Government programme promises an ambitious reform of family leave, aiming for an equal distribution of family leave between parents, implemented so that earnings-related leave allocated to fathers is prolonged without reducing the share currently available to mothers. A part of the leave is set to remain transferable.⁷² The Ministry of Social Affairs and Health has presented a draft model for further preparation in a tripartite working group. The draft model is based on gender-neutral terminology, and aims to take different types of families into account. Entitlement to family-related leave would be equal irrespective of the sex of the parent, or whether a biological or adoptive parent is concerned.⁷³

5.2 Pregnancy and maternity protection

5.2.1 Definition in national law

There are no definitions provided in national law of a pregnant worker, a worker who has recently given birth, and/or a worker who is breastfeeding.

5.2.2 Obligation to inform employer

The employee must inform the employer on the use of maternity, paternity, and parental leave two months prior to the planned use of the leave, but when the leave period is 12 days or less, the notice period is one month. If the two-month notice period is impossible because the employee's spouse returns to work, the notice period may be reduced to one month, provided that the leave does not cause serious damage to the employer's production or service. The employee may, for an acceptable reason, change the time of the leave by informing the employer one month in advance. In addition, the parent of an adoptive child may inform the employer about a change to the time of the leave for an acceptable reason and as soon as it is possible to do so (Chapter 9, Section 3a, Employment Contracts Act).

⁷² Programme of Prime Minister Sanna Marin's Government 10 December 2019, section 3.5.2 <https://valtioneuvosto.fi/en/marin/government-programme/finland-built-on-trust-and-labour-market-equality>.

⁷³ Ministry of Social Affairs and Health (2020) *Perhevapaaudistus tähtää perheiden hyvinvointiin ja tasa-arvon lisäämiseen* (The family leave reform aims at family welfare and enhanced equality), press release, 5.2.2020 https://valtioneuvosto.fi/artikkeli/-/asset_publisher/1271139/perhevapaaudistus-tahtaa-perheiden-hyvinvointiin-ja-tasa-arvon-lisaamiseen.

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

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

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

If the tasks or working conditions of a pregnant employee endanger her or her child's health, and the risks involved cannot be removed, the employee is to be assigned other tasks that are suited for her work capacity and qualifications, under the Employment Contracts Act (55/2001) Chapter 2, Section 3(2). Chapter 9 Section 4 of the Sickness Insurance Act (1224/2004) contains provisions on special maternity benefits for employees in cases where it is impossible to complete their normal work tasks due to potential risks incurred during pregnancy and no other work can be found by the employer.

Provisions on the employer's duty to assess risk of exposure to agents, processes and working conditions that pregnant workers may be exposed to are found under the Occupational Safety Act (738/2002) and under the Regulation on risks to reproductive health at work and prevention of risk (603/2015). Under the Act on Occupational Safety, the employer is responsible for assessing the risks in employment, considering, amongst others, the sex of the employee (Section 10) and to plan the working environment so that the risks are eliminated, considering the employees whose safety at work requires specific measures (Section 12). Possible risks to reproductive health must be assessed (Section 19(1)5). The employee is not to be exposed to chemical, physical or biological factors that pose risks to his or her reproductive health (Sections 28-40). Government Regulation on risks to actors that endanger reproductive health lists substances that create a risk, and requires that they are replaced with less dangerous substances if possible. Section 3 of the Regulation contains further provisions to protect a pregnant employee, by removing risks or assigning the employee other tasks. There are no specific provisions on night work during pregnancy or after childbirth, although the assessment of the risks to the employee or her child cover the possible risks caused by night work. The Ministry of Social Welfare and Health has published guidelines to assess risks in the context of an employee receiving special maternity leave and benefits.⁷⁴

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

An employer's failure to protect the reproductive health of the employee by infringement of the provisions in the Occupational Safety Act may be reported by the Occupational safety authorities to the police, as a work safety offence (Chapter 47, Section 1 of the Criminal Code (18)), but may also be punished as negligent homicide, negligent bodily injury or imperilment. Criminal law cases are seldom brought to the Supreme Court, as the contested issue often concerns evidence, and the Supreme Court usually does not admit leave to appeal in such cases. No case law was found in the electronic collection of the Supreme Court's rulings on the failure to protect reproductive health.

If the tasks or working conditions of a pregnant employee endanger her or her child's health and the risks involved cannot be removed, under the Chapter 2 Section 3(2) of the Employment Contracts Act (55/2001) the employer must assign the employee other tasks suitable for her work capacity and qualifications. Chapter 9 Section 2 of the Sickness Insurance Act (1224/2004) contains provisions on special maternity benefits for employees in cases where their normal work is impossible due to risks during pregnancy, and when no other work can be found by the employer.

⁷⁴ *Ohjeet vaaran arvioimisesta erityisäitiysrahan tarvetta harkittaessa* (Guidelines on risk assessment at decisions on the need of special maternity benefits), at <http://urn.fi/URN:NBN:fi-fe201504225419>.

Under the Act on Occupational Safety, the employer is responsible for assessing the risks in employment, considering, amongst other factors, the sex of the employee (Section 10), and to plan the working environment so that the risks are eliminated, taking into account the employees whose safety at work requires specific measures (Section 12). The employee is not to be exposed to chemical, physical, or biological factors that pose risks to his or her reproductive health (Sections 28-40). Government Regulation 603/2015 on risks to actors that endanger reproductive health lists dangerous substances, and requires that they are replaced with less dangerous substances if possible. Section 3 of the Regulation contains further provisions to protect a pregnant employee, for instance by removing risks or assigning the employee other tasks. There are no specific provisions on night work during pregnancy or after childbirth, although the assessment of the risks to the employee or her child cover the possible risks caused by night work. The Ministry of Social Welfare and Health has published guidelines on assessing risks in the context of an employee receiving special maternity leave and benefits.⁷⁵

Breastfeeding is regulated under the Occupational Health and Safety Act 738/2002. Under Section 48(2), pregnant women and breastfeeding mothers are entitled, when necessary, to rest in a break room or other suitable place. Problems connected to breastfeeding are seldom discussed, as the great majority of mothers only return to work when they have finished breastfeeding.

5.2.6 Prohibition of night work

Night work is not prohibited for pregnant workers and is common in many sectors.

5.2.7 Case law on the prohibition of night work

There is no case law on the prohibition of night work, since it is not prohibited in national law.

5.2.8 Prohibition of dismissal

Under Section 8(2) of the Act on Equality, the action of an employer amounts to prohibited discrimination if the employer 'upon employing a person, selecting someone for a particular task or training, or deciding on the duration or continuation of an employment relationship or the pay or other terms of employment, acts in such a way that the person finds herself/himself in a less favourable position on the basis of pregnancy or childbirth or by some other gender-related reason'. Under the Employment Contracts Act, the employer is not entitled to terminate the employment contract of an employee who is pregnant or on family leave on normal grounds of termination (Chapter 7, Section 9(1)). There are no exceptions to this rule.

5.2.9 Redundancy and payment during maternity leave

Redundancy is regulated under Chapter 5 of the Employment Contracts Act. Redundancy rules may not be applied in a discriminatory manner, but it may be more difficult to prove discrimination because there is no similar legal presumption concerning the employer's obligation to substantiate redundancy as there is concerning obligation to substantiate a dismissal of an employee who is pregnant or on family leave. In case a pregnant employee is entitled to pay during maternity leave, her right to pay when she is made redundant depends on the collective agreement. There is no legal regulation of the issue.

5.2.10 Employer's obligation to substantiate a dismissal

⁷⁵ *Ohjeet vaaran arvioimisesta erityisäitiysrahan tarvetta harkittaessa* (Guidelines on risk assessment at decisions on the need of special maternity benefits), at <http://urn.fi/URN:NBN:fi-fe201504225419>.

In the event of dismissal due to economic or production reasons, the employer is to explain the grounds for dismissal (Chapter 9, Section 3 of the Employment Contracts Act), but there is no explicit requirement to provide this explanation in writing. If an employer dismisses a pregnant employee or an employee on family-related leave, the dismissal is assumed to be caused by pregnancy or use of family-related leave unless the employer can provide a different credible reason (Chapter 7, Section 9(2)). An employer may dismiss a pregnant employee or an employee on family-related leave using normal grounds of dismissal only if the employer ceases all operations. Under Chapter 12 Section 1 of the Employment Contracts Act, the employer is liable for the loss suffered by the employee by the employer's intentional or negligent breach of obligations arising from the employment relationship or the Act on Employment Contracts. Chapter 12 Section 2 provides rules on compensation for unfounded termination of employment contract (3-24 months' pay).

5.2.11 Case law on the protection against dismissal

The Equality Ombudsman's opinion (TAS/2019, 8.11.2019) concerns a case of an employee who returned to work after family leave. The employee's replacement was nominated permanently to the the job s/he had held during the employee's leave, and the employee was given another similar job. Three months afterwards, the employee was dismissed due to financial and production-related grounds for termination of the employment contract. An employer may terminate an employment contract for these reasons (Employment Contracts Act, Chapter 7, Section 3). The Ombudsman used the Equality Act test of whether the employee would have been treated similarly if s/he had not been on family leave. If the employer uses different criteria for dismissals than usual when selecting persons to be dismissed due to financial and production-related grounds, this raises a presumption of discrimination, and the employer has to justify the use of different criteria. Chapter 7, Section 6 of the Employment Contracts Act requires that if an employer needs new employees within four months of termination to do the same or a similar job that the dismissed employee had been doing, the employer must offer work to the former employee. The Equality Ombudsman found that employing the former replacement permanently could be compared to hiring a new employee to a similar job. This creates a presumption of discrimination. The Ombudsman also held that there were hints of an attempt to circumvent the prohibition of dismissal of an employee returning from family leave, because the employee had been dismissed after s/he had been appointed to another position after returning to work. As usual, the Ombudsman pointed out that the opinion is based on documents submitted to him alone, as the Ombudsman does not have the mandate to take judicial evidence. Final decisions in discrimination cases are given by courts.

5.3 Maternity leave

5.3.1 Length

Normal maternity leave lasts 105 weekdays, which amounts to the maternity benefits period. Maternity leave may start 30 to 50 days before the expected date of birth. The days from Monday up to and including Saturday (six days per week) are defined as week days, meaning the leave lasts approximately four months. Relevant provisions are detailed in Chapter 4, Section 1 of the Employment Contracts Act, and the maternity benefits period referred to is defined in the Sickness Insurance Act.

5.3.2 Obligatory maternity leave

Women are not allowed to work in the two weeks immediately prior to and following delivery of the child. However, the employee may work with the employer's consent during the maternity benefits period, if the work in question does not endanger her or the child's safety. Both the employee and the employer may at any point interrupt the work (Employment Contracts Act Chapter 4, Section 2(1)).

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

Under Chapter 2, Section 3(2) of the Employment Contracts Act, if the working duties or conditions of a pregnant employee endanger the health of the employee or the foetus and if the hazard cannot be eliminated from the work and working conditions, the employee shall, if possible, be transferred to other duties suitable in terms of her working capacity and skills for the period of pregnancy. The employee's right to special maternity leave is stipulated under Chapter 4, Section 1 of the Employment Contract Act, which refers to the conditions for benefit under the Sickness Insurance Act (1224/2004) for the material content of the right. Chapter 9, Section 4 of the Sickness Insurance Act entitles a pregnant insured person, who is in employment, the right to special maternity benefit, if her own or her foetus' health is endangered by a chemical substance, radiation or other similar cause. A Regulation further defines the danger. A condition for the special maternity benefit is that the employer cannot transfer the employee to other duties. The right to special maternity benefit extends until the right to ordinary maternity benefit begins (Chapter 9, Section 5 of the Sickness Insurance Act).

5.3.4 Legal protection of rights ensuing from the employment contract

Chapter 4 of the Employment Contracts Act provides for the right to take up family-based leave, including maternity leave. Chapter 9 of the Sickness Insurance Act (1224/2004) defines the length and conditions of leave and contains provisions on benefits to be paid under those periods of leave, including maternity benefits (Sections 1-5 of Chapter 9 of the Sickness Insurance Act). There is no definition of the different types of family-related leave under the Employment Contracts Act.

5.3.5 Level of pay or allowance

The allowance during maternity leave (the entitlement begins when a woman has been pregnant for 154 days) is calculated on the basis of an employee's former employment income. For the first 56 weekdays, the maternity benefit is 90 % of the former income up to EUR 50 606, and then 32.5 % for income exceeding that sum. For the first period of maternity leave, the benefit is higher than sick leave benefit. After that, benefits are similar to the sick leave benefits, which amounts to 70 % of the income up to EUR 32 892; to 40 % of the income that exceeds that sum but does not exceed EUR 50 606; and 32.5 % of the income exceeding that sum (Chapter 11, Section 1 of the Sickness Insurance Act). There is no absolute ceiling, but in higher income brackets the benefit covers a lower percentage of income.

5.3.6 Additional statutory maternity benefits

There are no statutory benefits to supplement the benefits based on social insurance, but collective agreements often have clauses that stipulate for the employee to be paid her normal pay for a time, while the employer is entitled to receive the employee's maternity benefit. It is very common that the employer pays the normal pay during the first months of maternity leave, but usually not more than three months.⁷⁶ The higher benefits during the first period of maternity leave are in fact intended to compensate the employers for the expenses incurred by the collective agreements – when the employee receives full pay during maternity leave, her employer is entitled to the maternity benefits under Chapter 7, Section 4 of the Sickness Insurance Act.

⁷⁶ It is common that employees covered by the collective agreement receive pay during the 72 first weekdays of maternity leave, see for example the site of the Union of Health and Social Care Professionals in Finland, <https://www.tehy.fi/fi/apua/vapaat/aitiysvapaa-ja-aitiysajan-palkka>. The collective agreement of employees in the tourist, restaurant and leisure services allows three months of pay in the beginning of the maternity leave for employees who have worked for a minimum of one year before the leave, as well as for adoptive leave. Six days of paternity leave are also paid by the employer. <https://www.pam.fi/media/pdf-tessit/marava-tes-1.5.2014-31.1.2017.pdf>.

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

The right to any family-related benefits including maternity benefits requires that the person in question has been insured in Finland for 180 days immediately prior to the expected date of delivery. However, according to Chapter 9 Section 1 of the Sickness Insurance Act, being insured in another EU Member State is considered equivalent to being insured in Finland. Even women who do not earn an income receive a minimum benefit.

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

Under Chapter 4, Section 9 of the Employment Contracts Act, an employee has the right to return from family-related leave (maternity, paternity, parental, childcare and partial childcare leave) to their former job. If that is not possible, s/he is to be offered equivalent work under his or her employment contract, and if that is not possible, alternative work under his or her employment contract. The preparatory works list some criteria for defining what is equivalent work; namely, the nature of the employee's previous work and his or her education and work experience.⁷⁷ Collective agreements often contain more detailed guidelines on the matter.

5.3.9 Legal right to share maternity leave

Maternity leave as such cannot be shared, but paternity leave may be taken simultaneously with maternity leave.

5.3.10 Case law

In three cases brought before the Labour Court, an employee had become pregnant during childcare leave and commenced a new period of maternity leave without returning to work. The employer had refused to pay the employee during maternity leave based on the provisions of a collective agreement. The Labour Court requested a preliminary ruling from the CJEU on the issue. The CJEU decided that the Parental Leave Directive 96/391/EEC was to be interpreted in such a way as to prohibit national rules that prevent an employee who discontinues unpaid parental leave and commencing a new maternity leave from obtaining benefits, based on Directive 92/85/EEC. In joined cases TT:2014-2016, the Labour Court decided that collective agreements to that effect are discriminatory.

5.4 Adoption leave

5.4.1 Existence of adoption leave in national law

Chapter 9, Section 11 of the Sickness Insurance Act entitles adoptive parents to benefit during parental leave and partial parental leave. The right to parental leave only applies in external adoptions, not when a spouse adopts the other spouse's child. An adoptive father entitled to parental benefit is also entitled to paternity benefit. Amendments introduced in 2017 give same-sex couples rights and benefits equal to those of adoptive parents.⁷⁸ When a same-sex couple adopts a child together, they may decide which of them is entitled to paternal benefit. Chapter 9, Section 12 of the Sickness Insurance Act contains provisions on the parental benefit period for adoptive parents. The benefit is paid for 234 weekdays (Monday up to and including Saturday) after the birth of the child, or minimum 200 weekdays if the child comes into the custody of the adoptive parents later than 54 weekdays after the birth. Under the Employment Contracts Act, an employee is entitled to the leave periods defined under the Sickness Insurance Act. The employee also

⁷⁷ HE 157/2000 vp *Hallituksen esitys Eduskunnalle työ sopimuslaiksi ja siihen liittyviksi laeiksi* (Government Bill for Act on Employment Contracts Act and related acts). p. 22-23.

⁷⁸ The amendment of the Sickness Insurance Act, by Act 6/2017, was mainly motivated by the need to take into account the amendment of the Marriage Act in 2014, which introduced gender-neutral marriage in Finland. It was previously impossible to apply all social security provisions to same-sex marriage partners.

has the right to care leave to take care of his or her child, or a child who resides permanently in his or her household, until the child is three years old. The adoptive parents' right to care leave continues until two years after adoption (Chapter 4, Section 3 of the Employment Contracts Act). However, this care leave does not carry the right to pay or income-related benefits, but only to a flat-rate benefit.

The reform of family-related leave planned by the current Government would treat all parents, including adoptive parents, equally. All families would thus receive similar benefits irrespective of the form of the family.⁷⁹

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

An employee who uses his or her right to any of the family-related leave under the Employment Contracts Act is protected by Chapter 7, Section 9 of the Employment Contracts Act. This stipulates that the employer may not dismiss an employee who uses the right to family-related leave, and if this occurs the legal presumption is that the employer has dismissed the employee because he or she exercised their right to take leave. An employer may dismiss an employee on family-related leave only if the employer ceases all business activities.

5.4.3 Case law

There is not yet any case law on rights related to adoption leave.

5.5 Parental leave

5.5.1 Implementation of Directive 2010/18

The provisions under Chapter 4 of the Employment Contracts Act and Chapter 9 of the Sickness Insurance Act contain the rights that are ensured in the Directive. These provisions were already in place prior to the adoption of the Directive.

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

The provisions on parental leave apply to both public and private sectors.

5.5.3 Scope of the transposing legislation

The rights ensured in the Directive cover employment relationships related to part-time workers, fixed-term contract workers, and persons with a contract of employment or employment relationship with a temporary agency.

5.5.4 Length of parental leave

The duration is 158 weekdays (Monday up to and including Saturday), or approximately six months.

5.5.5 Age limits

The right to parental leave generally stops when a child is three years old (Chapter 4, Section 3 of the Employment Contracts Act). However, partial parental leave may be taken by employees who have worked for the same employer for the last 12 months until the child has completed two years of basic education, or in certain cases after completing

⁷⁹ Ministry of Social Affairs and Health (2020) *Perhevapaaudistus tähtää perheen hyvinvointiin ja tasa-arvon lisäämiseen* (The family leave reform aims at family welfare and increased equality), press release, 5.2.2020; https://valtioneuvosto.fi/artikkeli/-/asset_publisher/1271139/perhevapaaudistus-tahtaa-perheiden-hyvinvointiin-ja-tasa-arvon-lisaamiseen.

three years of basic education. A child commences basic education at seven years of age. An employer may refuse partial parental leave if such leave would cause serious harm to production or service (Chapter 4, Section 4(3) of the Employment Contracts Act).

5.5.6 Individual nature of the right to parental leave

Eligibility for parental leave requires that the recipient has social insurance. Each parent has an individual right to parental benefit; meaning that, for instance, a father's right to parental benefit does not depend on whether the mother fulfils the criteria for benefit. The insured person's right to parental leave depends on his or her being married to and living with the mother of the child, or living together with the mother continuously in circumstances that resemble marriage. If a child has a biological mother and an adoptive mother, the term 'mother' refers to the biological mother. The rules thus exclude non-resident fathers but cover same-sex marital partners and cohabitees (Sickness Insurance Act, Chapter 9, Sections 1(2) and 1(3)). If the mother does not participate in the care of the child, or if the father is solely responsible for the care of the child, the requirement that a father is married or cohabits with the mother is waived (Sickness Insurance Act, Chapter 9, Section 8). An amendment of these provisions was made in 2017 in the context of an amendment of the Marriage Act in 2015, which introduced gender neutral marriage.

An insured person living together with an adoptive parent in circumstances resembling marriage (Sickness Insurance Act, Chapter 9, Section 1) is not entitled to parental benefit nor parental leave. As stated above, a father who lives separately from the mother has an exceptional right to parental leave if he is responsible for the care of the child (Chapter 9, Section 8(2) of the Sickness Insurance Act).

5.5.7 Transferability of the right to parental leave

The entire parental leave is transferrable between the parents, as the parents have the right to parental benefit 'according to parental agreement' (Chapter 9, Section 8 of the Sickness Insurance Act); the leave may thus be shared between the parents or taken by only one. Each parent may take his or her care period in two separate parts. The parents may not be on parental leave at the same time, except when they both work part time and receive part-time pay.

The planned family leave reform would introduce a leave period of about 14 months for both parents (or, the only parent in case of single parent families), of which about 6.6 months would be non-transferable for each parent, and 69 weekdays would be transferable.⁸⁰

5.5.8 Form of parental leave

The parents may divide the parental leave into two parts, which have to be at least 12 days long (Employment Contracts Act, Chapter 4, Section 1(2)). Parental benefits may be paid as partial benefits if the mother and father agree to share the benefits; they are both paid partial benefits simultaneously, provided they have both agreed on part-time work with their employer so that they both work at least 40 % and at most 60 % of full-time work. The employer has no obligation to agree to part-time work, however, and may refuse the request by the employee, but only if part-time work would cause serious harm to production and service by the workplace, which cannot be avoided by reasonable reassignment of work. In these cases, the employer must present the grounds for refusing the request for part-time work (Employment Contracts Act, Chapter 4, Section 4). Even

⁸⁰ Ministry of Social Affairs and Health (2020) *Perhevapaaudistus tähtää perheiden hyvinvointiin ja tasa-arvon lisäämiseen* (Reform of family leave aims at family welfare and increased equality), press release, 2.2.2020; https://valtioneuvosto.fi/artikkeli/-/asset_publisher/1271139/perhevapaaudistus-tahtaa-perheiden-hyvinvointiin-ja-tasa-arvon-lisaamiseen.

an entrepreneur has the right to partial parental benefits, if the work in his or her enterprise is reduced to 40-60 % (Chapter 9, Section 9 of the Sickness Insurance Act).

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

Eligibility for parental benefit requires that the recipient has had social insurance in Finland or in another EU member state for 180 days before the calculated day of birth or, in the case of adoption, before the child is taken into the care of the adoptive parent. Parental benefit is also paid to parents who are not employed and who therefore have no parental leave. Employed persons have a right to parental leave irrespective of their work history.

5.5.10 Notice period

The employee must inform the employer on the use of maternity, paternity and parental leave two months ahead of the planned use of the leave, but when the leave period is 12 days or less, the notice period is one month. If the employee is unable to provide a two-month notice period because their spouse has returned to work, the notice period may be reduced to one month provided that the leave does not cause serious damage to the employer's production or service. The employee may, for an acceptable reason, change the time of the leave by informing the employer one month in advance. The parent of an adoptive child must inform the employer about a change to the time of the leave for an acceptable reason as soon as possible (Chapter 9, Section 3(a), Employment Contracts Act).

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

Parental leave may not be postponed by the employers when full-time parental leave is requested; however, the employer and the employee may agree that the employee works part-time during the parental leave (Chapter 4, Section 3(2) Employment Contract Act). As part-time work requires an agreement, and the conditions of such an agreement are not defined under the Employment Contracts Act, the employer's agreement may depend on the operation of the organisation.

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

There are no special arrangements for parental leave taken by employees of small firms.

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

A parent of a disabled child or a child with a long-term illness may take partial parental leave until the child becomes 18 years of age. (Chapter 4, Section 4(1) of the Employment Contracts Act).

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

No measures were adopted to implement the Directive, although in 2018, the rules on the right of adoptive parents were amended. Chapter 9, Section 11 of the Sickness Insurance Act stipulates that an adoptive parent has right to parental and paternity benefit (and corresponding leave). Both an adoptive parent and a person married to the adoptive parent have the right to parental leave, according to their mutual agreement. There is no right to parental leave in cases of adoptions within families. The provision also stipulates that when there are two adoptive mothers or fathers in a family, only one has the right to paternity benefit (Section 11(3)).

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

Chapter 7, Section 9 of the Employment Contracts Act prohibits dismissal of an employee on the ground of pregnancy or because the employee uses his or her right to family-related leave. Section 9(2) contains the presumption that if a pregnant employee or employee on family-related leave is dismissed, the dismissal is caused by the pregnancy or use of family leave, unless the employer can prove otherwise. Furthermore, under Section 9(3) of the same Act, an employer may dismiss a person on maternity, paternity or parental or care leave only if the employer's activities cease completely. Adoption leave is one of the forms of family-related leave. Finally, Section 7(3) of the Act on Equality defines placing a person in a different position due to parenthood and childcare responsibility as indirect discrimination on the ground of sex.

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

Section 9, Chapter 4 of the Employment Contracts Act entitles the employee to return from any family-related leave under the Employment Contracts Act (maternity leave, paternity leave, parental leave, partial parental leave, childcare leave) primarily to his/her former job, but if that is not possible, to corresponding work which is covered by his/her employment contract, or if even that is not possible, to other work covered by his/her employment contract.

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

In principle, the rights of the worker are maintained. Chapter 4, Section 9 of the Employment Contracts Act stipulates that employees are in the first place entitled to return to their former duties after family-related leave. If that is not possible, employees shall be offered equivalent work in accordance with their employment contract, and if this is not possible either, other work in accordance with their employment contract. Return to former duties or work that accords with the conditions of the employment contract involves accompanying rights. Problems may arise with relatively long absences from work, as the working conditions and requirements tend to change during the absence. In practice, the replacement doing the work of the employee on family-related leave may then have acquired new skills needed in the work. The person returning from family-related leave has the right to return to their former job, and the employer has a duty to provide training that is needed. Problems arise when the employer claims that the former job no longer exists. In the Labour Court case TT:2013-150, the employer had divided the sales assistant tasks of the person on family-related leave among other employees, and had no intention of changing that arrangement. The returning person was offered work at the switchboard. The Labour Court ruled that the employer should have offered a similar job as a sales assistant in another department.

5.5.18 Status of the employment contract or relationship during parental leave

The employment contract remains valid during parental leave. This is not explicitly stated in the Employment Contracts Act, but it is clear from several provisions. For example, the employer is prohibited from terminating an employment contract due to the pregnancy of an employee or because an employee uses their right to family-related leave. If the employer terminates the employment contract of a pregnant employee or a person on family-related leave, the termination shall be deemed to have taken place on the basis of pregnancy or family leave (Chapter 7, Section 9 of the Employment Contracts Act).

5.5.19 Continuity of entitlement to social security benefits

The right to social security benefits continues under family-related leave.

5.5.20 Remuneration

The employer has no legal obligation to provide remuneration during parental leave. To the author's knowledge, parental leave and paternity leave (unlike maternity leave) are seldom (if ever) remunerated through collective agreements. Individual employment contracts do not contain provisions on pay during family-related leave.

5.5.21 Social security allowance

Parental leave benefits are defined in the Sickness Insurance Act, and are similar to the sickness insurance benefits. Persons with income from the labour market and entrepreneurs receive a benefit that is related to their income. Persons who do not have such income – for instance, those unemployed – receive a minimum benefit. All sectors are covered, including self-employment, agricultural entrepreneurship, and other entrepreneurship.

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

The personal scope of family-related benefits is clearly broader than what Directive 2010/18 requires, as it even covers the self-employed and entrepreneurs, and parental leave is also longer than the minimum required under the Directive. In 2017, the right to parental leave was extended to persons who are married to the mother or live with the mother in circumstances that resemble marriage, and adoptive mothers married to the biological mother. This also exceeds what is required under EU law.

5.5.23 Case law

There is no case law on parental leave to report.

5.6 Paternity leave

5.6.1 Existence of paternity leave in national law

Paternity leave covers a maximum of 54 weekdays, of which only 18 days of leave may coincide with maternity or parental leave taken by the mother. The provision aims to promote fathers' use of their right to family-related leave and to alleviate the imbalance in the use of parental leave, which is fully transferrable between the parents. The right to paternity leave previously depended on the parents living together, but an amendment in 2017 gave a father who does not live with the mother an individual right to paternity and parental leave, provided he is responsible for the care of the baby.⁸¹

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

Protection against unfavourable treatment and dismissal covers all family-related leave, including paternity leave. For legislation, see the explanation provided for above at 5.5.14.

5.6.3 Case law

In case TT:2007-12, the Labour Court ruled in a case where the Sailors' Collective Agreement contained a condition on how absence from work related to working shifts. Absences caused by illness or injury, or for any other reason, during which the employee was entitled to pay, did not shorten the employee's right to free days between shifts. The parties to the collective agreement had not discussed paternity leave in this context. The Labour Court found that unpaid days of absence were not comparable to paid ones, and

⁸¹ The provision was amended by Act 6/2017.

as the employee was not entitled to pay during paternity leave, thus paternity leave shortened the free days between shifts.

5.7 Time off for *force majeure*

5.7.1 Time off for *force majeure*

The Employment Contracts Act, Section 7, allows an employee time off for *force majeure* reasons; the employee has a right to leave if his or her presence is required due to an unforeseeable and compelling reason caused by illness or accident in his or her family. 'Family' in this context refers to persons living in the same household under family-like circumstances. The preparatory works indicate that this includes parents and children.⁸² The number of times *force majeure* leave may be taken is not limited. The employee is not entitled to pay during absence, but under some collective agreements, the employee may be entitled to pay in relation to certain absences covered by the provision. The death and funeral of a relative, fire or water damage at home, or an accident requiring the presence of an employee in hospital are examples of unforeseen and compelling reasons. The right to time off under Section 7 covers short absences only.

The prohibition against the dismissal of an employee who uses his/her right to family-related leave (Chapter 4, Section 9 of the Employment Contracts Act) covers all forms of leave under Chapter 4 of the Employment Contracts Act, including Section 7.

5.7.2 Case law

There is no case law concerning the use of *force majeure* family-related leave.

5.8 Care leave

5.8.1 Existence of care (or carers') leave in national law

Chapter 4, Section 7a of the Employment Contracts Act contains a provision on care leave, which was added to the Act when the *force majeure* based family leave provisions were already in place. The preparatory works for the amendment that led to the adoption of Section 7a (absence for care of a family member of someone close to the employee) note that the right to absence for compelling family reasons (Section 7) is applied under tight conditions only. The number of days the employee may be absent is not limited, but only a short, temporary absence can be taken. The possibility for employees to care for family members that require constant assistance in their every day life under Section 7 was therefore too limited. Section 7a was adopted to give the employer an obligation to investigate possible arrangements for an employee's temporary absence. Time off under Section 7a may cover longer periods, but is only provided if agreed with the employee.⁸³ The provision puts an obligation on the employer to act so as to make such absence possible, and the obligation to explain to the employee if absence is considered impossible. The personal scope of family members refers to persons living in the same household, children and grandchildren, parents and grandparents of the employee and his/her spouse or partner, including same-sex partners. The personal scope of the provision is the same as for Section 7 (absence due to compelling family reasons).

5.8.2 Case law

There is currently no case law to report.

⁸² HE 157/2000 vp *Hallituksen esitys Eduskunnalle työ sopimuslaiksi ja eräiksi siihen liittyviksi laeiksi* (Government Bill for Act on the Employment Contracts Act and related acts), p. 22.

⁸³ HE 263/2010 vp *Hallituksen esitys Eduskunnalle laiksi työ sopimuslain muuttamisesta* (Government Bill for an Amendment of the Employment Contracts Act), pp. 2-3.

5.9 Leave in relation to surrogacy

Surrogacy is not legal in Finland.

5.10 Flexible working time arrangements

The Working Hours Act (872/2019), which came into force at the beginning of 2020, covers both private and public work and all employees. Directors and persons with independent tasks comparable to directors; employees of religious communities performing religious acts; work by an employer's family members; or other work where the working time cannot be monitored by the employer; or certain work in courts, the diplomatic service, or certain work in the Bank of Finland is excluded. The new Act allows exceptions to the general legal provision on working time, as well as exceptions to the valid collective agreement. Sections 12-14 of the Act allow the employer and employee to agree on flexible working hours, departing from the regular hours defined under the Act, or from the working time terms of the valid collective agreement. The employee may then, within the limits agreed upon, decide when and where he or she will work, or save hours to be used as free time later. Such an agreement must include certain standard conditions concerning issues such as days of weekly rest, and the agreement must be made in writing. The agreement contains mandatory conditions, however. It is assumed that the new legal provisions on flexible working time are useful especially for persons whose work is based on their expertise. Even before the implementation of mandatory legislation on flexible working hours, flexible working times were common in Finnish work places. Local collective agreements often contain clauses on flexible work, usually in the form of flexible times for starting and stopping daily work. The right to agree on flexible working time only concerns the individual employee. An amendment of the Employment Contracts Act in 2018 allows variable working times based on a working contract which defines either the maximum hours, minimum and maximum hours or no regular hours at all (a so-called zero-hour agreement), on the employee's initiative, or on the initiative of the employer, provided that the employer does not have a continuous need of a regular labour force (Employment Contracts Act Chapter 1, Section 11).

An employee is entitled to partial care leave⁸⁴ to take care of his or her child or other child living permanently in the household until the second school year in basic education ends (when the child is about 9 years old), provided the employee has been employed in his or her present workplace for at least six months and upon negotiation with the employer. For the care of a disabled child, the partial leave may continue until the child is 18 (Chapter 4, Section 4 of the Employment Contracts Act). The employer may refuse the leave only if it causes serious damage to the production and service at the workplace, which cannot be avoided by reasonable rearrangement of work (Subsection 2 of the provision). If an employee has the right to partial leave, but the conditions cannot be negotiated, the employee has the right to one period of partial care leave each year of a length and at a time that the employee proposes. The length of the partial care leave must be negotiated and therefore also depends on the employer. If partial leave is agreed upon, then it consists of working days of six hours, or 30 hours per week. Section 15 of the new Working Hours Act broadens the possibility to work shorter hours due to social and health reasons other than childcare. If the employer refuses to agree to shorter working hours, they have to justify their refusal.

5.10.1 Right to adjust working time patterns

The regular working time patterns provided by the Working Hours Act may be adjusted by national collective agreements so that the average weekly working time in a period of 52 weeks is 40 hours, under Section 34. It is moreover possible to introduce many more exceptions from the mandatory working time provisions by means of a national collective

⁸⁴ This partial care leave is paid relative to the number of hours worked.

agreement. It is also possible to agree through a national collective agreement on flexible working times as stipulated under Sections 13 and 14 of the Act. An employer that is not party to a collective agreement but is bound by an *erga omnes* collective agreement may also make use of the exceptions to the legal provisions (Section 35). It is possible to allow local parties to make a local collective agreement via a clause inserted in an *erga omnes* collective agreement making exceptions to the working time provisions in the Act, Section 36. Such a local collective agreement is adopted between the employer and the representatives of the employees.

It is also possible to make exceptions to the regular working times through agreements between an employer and an employee, or an employer and a group of employees. Section 13 of the new Working Hours Act defines the parameters within which it is possible to form an agreement between the employer and the employee on regular working times that differ from up to half of the clauses of the valid collective agreement. Such an agreement must contain certain mandatory clauses, and the number of working hours must be balanced to a maximum of 40 hours per week during a period of four months. The agreement must be made in writing, and it may be cancelled without specific reasons at the end of the balancing period that follows the ongoing balancing period. Section 14 of the new Working Hours Act contains provisions on a 'working time bank', which is an agreement made between an employee representative or a group of employees together with the employer on saving working time (a minimum of two weeks per year) to be used later. The arrangement makes it possible to 'save' and combine working time, leave and compensation that is provided instead of leave. The agreement has to include clauses on the items that may be saved to bank, limits to saving, how the bank can be dissolved and the earned items compensated, and the principles on how leave is to be spent. The right is an individual right, but the agreement that established the right is made on a group basis.

5.10.2 Right to work from home or remotely

Section 13 of the new Working Hours Act covers provisions on flexible working hours, and also the right to work remotely. The employer and employee may make an agreement on flexible hours and place of work that cover half of the working hours defined under the valid collective agreement, but the agreement must include certain mandatory clauses on weekly rest and similar issues. The agreement must be made in writing. The provision covers all employees.

5.10.3 Other legal rights to flexible working arrangements

Section 15 of the Working Hours Act contains a provision for shorter working hours for social and health reasons other than those connected to family that may be agreed upon by request of the employee and the employer must try to arrange work so that the employee may work part time. An agreement for such shorter hours may cover a maximum of 26 weeks at a time. A denial of an employee's request for part-time work by the employer must be justified.

5.10.4 Case law

There is no case law to report.

5.11 Evaluation of implementation

At present, the right to flexible work to combine work and family life depends on the employer, and often on the field or tasks of the employer's work. The provisions introduced by the new Working Hours Act did not change the situation radically. Flexible working time under collective agreements may reflect interests other than those of parents wishing to balance working hours with care duties. It was assumed that employees undertaking

independent expert work may benefit from the reform. A recent study on work and family balance⁸⁵ shows that more than 90 % of both mothers and fathers were more or less satisfied with the possibility of combining work and family, but the majority of fathers were very positive, while the majority of mothers only rather satisfied. Suitable working hours were considered important by 80 % of parents. Half of all parents found that some feature of their work made combining work and family difficult. The problems for mothers were demanding or exhausting work, while for fathers, long or unpredictable working hours are problematic. Increased flexibility of working hours and remote work has helped mothers and fathers of small children, but it seems that employees with higher education have benefited more from the increased flexibility than those with a lower education.

5.12 Remaining issues

There is nothing further to report.

⁸⁵ Sorsa, T, Rotkirch, A. (2020) *Työ ja perhe ne yhteen soppii?* (Are work and family compatible?), Väestöliitto.

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

6.1 General (legal) context

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

The social insurance that covers old age, sickness and disability as well as maternity, paternity and parental benefits is both occupational and mandatory. Mandatory, statutory social insurance covers not only employees but also entrepreneurs, including agricultural entrepreneurs. The social insurance that covers old age, sickness and disability, as well as maternity, paternity and parental benefits, is both occupational and mandatory. For those who do not earn a minimum pension through work, pensions are complemented through a statutory scheme. Sex disaggregated statistics are conducted by several bodies, which indicate that pensions related to previously earned income are higher for men, and women more often than men receive a complement to their pensions from the state pension scheme. Women's lower income from work and entrepreneurship leads to lower benefits and pensions.

6.1.2 Other issues related to gender equality and social security

There are no further issues related to gender equality and social security to report.

6.1.3 Political and societal debate and pending legislative proposals

There are currently no pending legislative proposals on this topic. The Government's Programme, published in June 2019, promises to reform the family-related leave system which would divide responsibility for family more evenly between mothers and fathers. Mothers and fathers are to have the same number of non-transferrable months of leave. Fathers are to have the right to the same length of income-related leave as mothers have at present, without making the mothers' right to leave shorter. The parents' combined time to which they are entitled for income-related family leave will thus become longer.

6.2 Direct and indirect discrimination

Section 7 of the Act on Equality contains a general prohibition of discrimination on the grounds of sex, and social security schemes fall within the material scope of the Act. However, there is no remedy or compensation for a victim of discrimination in the Act on Equality. The general principles of administrative law under Chapter 2 Section 6 the Act on Administration (434/2003) include the principle of equal treatment.

6.3 Personal scope

The Finnish sickness, disability, maternity and parental benefits as well as pension schemes are statutory and mandatory, and cover all fields in which people earn as employees or entrepreneurs. They cover also self-employed persons and agricultural entrepreneurs. The scope of the national law is broader than what EU law requires, as it even covers entrepreneurs.

6.4 Material scope

The material scope covers the scope of Article 7, and as noted in 5.1, even entrepreneurs.

6.5 Exclusions

There are no exclusions.

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

Article 9(h) of the Act on Equality addresses setting different levels of benefit 'except insofar as may be necessary to take account of actuarial calculation factors which differ according to sex' in certain cases.

In the Finnish Employment Accidents Act (608/1948), Section 14(1) (192/1987), Section 18b(1), and Section 18b(3) (1642/12992) allowed a lump-sum compensation for an accident in certain cases, and the lump sum was calculated using sex as an actuarial factor. The Supreme Administrative Court referred a case (KHO 2013:105) concerning this type of lump-sum compensation to the CJEU. In Case C-318/13, the CJEU interpreted Directive 79/7/EEC Article 4(1) to preclude national regulation of employment accident insurance that uses sex-segregated life expectancy calculations as an actuarial factor, if this results in a lower lump-sum compensation for a man than for a similarly situated woman. It was for the Finnish Supreme Administrative Court to decide whether Finnish legislation violated EU law, in which case the applicant, X, would be entitled to compensation by the State. The Finnish Supreme Administrative Court in case KHO:2015:8 found that the use of sex-segregated life expectancy in calculating lump sum compensation under the Employment Accidents Act breached EU law, and that X had suffered a loss due to the provisions of the Act. The breach was not sufficiently evident to warrant reparation by the State, as the CJEU's ruling in Case C-236/09 occurred after relevant decisions concerning X's right to benefit by Finnish courts, and no infringement procedure had taken place.

The Act on Employment Accidents and Occupational Diseases (459/2015) does not contain a provision which would use sex as an actuarial factor, unlike the former legislation that the Act replaced.

6.7 Actuarial factors

Sex is not used as actuarial factor under Finnish social security legislation now in force. The Finnish occupational pension schemes are mandatory, as mentioned above. Some employers may complement the mandatory schemes of some of their key employees with private schemes previously offered to directors. The author has not been able to find out whether sex is used as an actuarial factor in such private schemes.

6.8 Difficulties

The Finnish occupational security schemes are not easily comparable to either statutory or occupational social security schemes. They are mandatory and based on statute, but the benefits paid under the schemes are related to occupational income (including income from acting as an entrepreneur, as well as persons on stipends). The classification problem does not involve special problems of equality, although the broad coverage is a bonus.

Section 7 of the Act on Equality contains a general prohibition of discrimination on the grounds of sex, and social security schemes fall under the material scope of the Act. However, there is no remedy or compensation for a victim of discrimination in the Act on Equality. The general principles of administrative law under Chapter 2 Section 6 of the Act on Administration (434/2003) include the principle of equal treatment.

6.9 Evaluation of implementation

Implementation of the requirement of non-discriminatory occupational social security schemes is broader than what is required under EU law, as such schemes cover even entrepreneurs. It may be considered problematic, however, that while Section 7 of the Act on Equality prohibits both direct and indirect discrimination on the grounds of sex, and occupational social security is within the scope of the Act on Equality, there is no remedy

under the Act for a victim of discrimination. Administrative law remedies and legality supervision are available.

6.10 Remaining issues

There are no remaining issues to report.

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

7.1 General (legal) context

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

As explained above, the occupational (mandatory) social security covers 'the working population, including self-employed persons, workers and self-employed persons whose activity is interrupted by illness, accident or involuntary unemployment and persons seeking employment, and retired or invalidated workers and self-employed persons'. The Finnish mandatory social insurance covers old age, sickness and disability, as well as family-related benefits, and both occupational and residence-based social security. When a person who resides in Finland is not working on an employment contract, s/he does not have a right to leave, but a right to benefit for a similar period of time as an employed person has. Pension rights are twofold: either earnings-related (based on employment or entrepreneurial activities), or national and guarantee pensions, which are meant for pensioners who have no earnings-related pension or whose pension is very small.

Statutory schemes further cover persons who have no income from these sources or under the national pension scheme, as well as persons receiving unemployment benefits. The overall model for social security consists of rights to benefits, based either on one's earnings, or based on residence in Finland.

7.1.2 Other relevant issues

There are no further issues to report.

7.1.3 Overview of national acts

There are no further remarks.

7.1.4 Political and societal debate and pending legislative proposals

There is currently no political or societal debate or pending legislation on this issue.

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

The Sickness Insurance Act covers sickness and family-related benefits. Employees' Pensions Act (945/2006) covers pension schemes for the private sector, and Pensions Act for Public Occupations (81/2016) covers state and municipal officials' pensions, as well as pensions of the Lutheran Church. Sailors' Pensions Act (1290/2006) contains pension schemes for sailors. These pension acts cover old age pensions, pensions for the disabled, as well as rehabilitation pensions. Under the Unemployment Security Act (1290/2002), unemployed persons receive either basic or earnings-related unemployment allowance. Both basic and earnings-related allowance requires that the applicant lives permanently in Finland, has registered as an unemployed jobseeker, is seeking full-time work, is able to work, and has either been in paid employment or self-employed for a required time. The right to earnings-related allowance further requires that the jobseeker has been insured for a minimum of 26 weeks in an unemployment insurance fund. The duration of the unemployment allowance depends on the person's employment history.

Section 7 of the Act on Equality contains a general prohibition of discrimination on the grounds of sex, and social security schemes fall under the material scope of the Act. There is no remedy or compensation for a victim of discrimination in the Act on Equality,

however. The general principles of administrative law under the Act on Administration (434/2003); Chapter 2, Section 6 includes the principle of equal treatment.

7.3 Personal scope

As explained above, the occupational (mandatory) social security covers 'the working population – including self-employed persons, workers and self-employed persons whose activity is interrupted by illness, accident or involuntary unemployment and persons seeking employment – and retired or invalidated workers and self-employed persons'. Statutory schemes further cover persons who have no income from these sources or under the national pension scheme, and persons receiving unemployment benefits, but with benefits that are not income related.

7.4 Material scope

The material scope of the Finnish mandatory social security, both basic and income-based, covers the risks which Directive 79/7 mentions (sickness, invalidity, old age, accidents at work and occupational diseases and unemployment).

7.5 Exclusions

There are no exclusions concerning equal treatment for men and women in mandatory social security. The family pensions scheme under the Employees Pensions Act is gender neutral, and involves both widows' and widowers' rights to a pension. There are no gender-based differences concerning pension age.

7.6 Actuarial factors

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

7.7 Difficulties

There are no specific difficulties.

7.8 Evaluation of implementation

It is difficult to compare the Finnish social security system to what is legislated at the EU level, as the Finnish occupational and statutory social security are both based on mandatory provisions, and the occupational security extends to groups not protected under EU law, such as entrepreneurs, agricultural entrepreneurs and persons receiving a grant. The occupational social security is complemented by mandatory social security not related to income from employment or entrepreneurial activities, providing basic benefits based on residence. The provisions are not discriminatory on the ground of sex, but a person allegedly discriminated against is not entitled to a remedy through gender equality law. The Act on Equality provides the victim of discrimination the right to demand compensation for discrimination in working life (Section 8), in an educational institution (8b), in a labour market organisation (8c), or in the provision of goods or services. Section 8 does not cover mandatory social security. Direct and indirect discrimination is prohibited under Section 7 of the Act, and the Equality Ombudsman who monitors the Act should intervene in gender discrimination. Complaints may be filed with the Chancellor of Justice and the Parliamentary Ombudsman, who make decisions on the legality of acts of authorities. These are not remedies, in the sense that they do not involve a justiciable right and compensation for the victim. Administrative law remedies also must consider prohibitions of discrimination in the Constitution and in the Act on Equality. For example, a municipal decision may be overturned if it violates legislation by being discriminatory.

The Finnish mandatory social security that covers the scope of Directive 79/7 are gender neutral, and do not discriminate directly on the ground of sex, concerning the scope of the schemes and conditions, the obligation to contribute and the calculation of the contributions. Finnish mandatory social security is based on individual benefits and does not include increasing benefits due to a spouse and dependants, the only exception being the right to family pensions under the pensions acts. The pensions acts reform started with the reform of the Employees' Pensions Act, and a gender impact analysis was then carried out. With the reform, time spent on maternity, special maternity, paternity and parental leave was added to the calculation of the right to benefit. The pension benefit for this unpaid time is calculated as a percentage of the income that was the basis for the family-related benefit under the Sickness Insurance Act.

7.9 Remaining issues

There are no remaining issues.

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 European Commission's ad hoc query into entrepreneurship in 2017 prompted Statistics Finland to draft a special report on entrepreneurship.⁸⁶ The study divided entrepreneurs into three categories: agricultural entrepreneurs, employer entrepreneurs, and the self-employed. The last group consists of persons who are neither employed by another nor employ others. The category covers persons who identify themselves as entrepreneurs and those who are self-employed in a narrow sense, such as professionals, freelancers not employed by others, and persons working on a grant. The number of self-employed has risen and was circa 171 000 in 2017, and while other entrepreneur categories were predominantly male, the self-employed were more evenly divided between men and women.

Entrepreneurs in general have a lower level of education than employees, but the level of education of self-employed resembles that of employees. The self-employed presented a varied profile, the biggest of them being experts in law and social and cultural issues. The income distribution of the self-employed differed from employer entrepreneurs, as more self-employed were in low income groups, but many worked relatively short hours (circa 35 hours per week). The self-employed are not always well informed of their right to social security. Entrepreneurs can define the level of their social security payments, and they often end up with low benefits – 49 % of men and 43 % of women entrepreneurs thought they had paid enough, often because they felt they could not afford a higher level. Some self-employed even had private pension insurances. 58 % of the self-employed who had children considered they had not been able to have long enough family-related leave. The self-employed, as well as other entrepreneurs, are entitled to family-related leave, but the right to leave is not used to full extent.

8.1.2 Other issues

There are no further issues to report.

8.1.3 Overview of national acts

Maternity, paternity and parental benefits are paid for all entrepreneurs and their spouses under Chapter 9 of the Sickness Insurance Act (1224/2004). Provisions on how to calculate the income – divided between spouses for tax and social welfare purposes – are addressed in various Acts. The Act on Entrepreneurs' Pensions (1272/2006) covers entitlement to an old-age pension, part-time pension, rehabilitation pension, disability pension, and family pension for an entrepreneur's widow or widower. The pension accrues in a manner similar to employment-based pension schemes on the basis of occupational income, and it also accrues during maternity, paternity, parental, and sickness leave periods. There is no regulation as to how spouses or life partners run an enterprise (other than an agricultural enterprise) together are to divide the income from the enterprise between themselves for purposes of the entrepreneurs' pension scheme.

Benefits are calculated on the basis of occupational income during a preceding period, and persons without an income are entitled to minimum benefits on the grounds of residence. The Act on Entrepreneurs' Pensions (1272/2006) covers entitlement to old-age pension,

⁸⁶ The report consists of two parts: *Yrittäjät Suomessa* (Entrepreneurs in Finland), which is based on questions defined by Eurostat, and of *Yrittäjyys* (Entrepreneurship), based on nationally defined questions. Sutela, Hanna and Pärnänen, Anna *Yrittäjät Suomessa* (Entrepreneurs in Finland), Statistics Finland 2018, http://www.stat.fi/tup/julkaisut/tiedostot/julkaisuluettelo/ytym_201700_2018_21465_net.pdf.

part-time pension, rehabilitation pension, disability pension, and family pension for an entrepreneur's widow or widower. The pension accrues in a manner similar to employment-based pension schemes on the basis of occupational income, and it also accrues during maternity, paternity, parental, and sickness leave periods.

8.1.4 Political and societal debate and pending legislative proposals

There is currently no political or societal debate or pending legislative proposals on this issue.

8.2 Implementation of Directive 2010/41/EU

The Act on Equality is the main legal instrument to implement Directive 2010/41/EU. The prohibition of discrimination under Section 7 of the Act is general and can be applied to self-employed persons, but the Section 8 guarantees of justiciable rights and access to remedies against discrimination in working life are not fully applicable to the self-employed. Section 3, subsection 1 of the Act's definition of an 'employee' applies 'as appropriate, to persons working in other legal relationships that are comparable to an employment relationship.' The preparatory works explain that the definition refers to forms of work that take place under circumstances similar to those under employment contracts, such as independent workers or entrepreneurs, freelancers, persons with their own professional practice, or persons who are engaged in care work in families under an assignment agreement that is paid by public funds under social welfare legislation. Independent workers and entrepreneurs are only covered if they sell their own skills, even though they may act as entrepreneurs in the sense meant by unemployment or pension legislation. A person similar to an 'employee' cannot engage in activities that involve a proper enterprise risk or employ others. The definition of an employee thus covers self-employed persons in work-like situations, and in these cases offers remedies and sanctions. The definition, however, does not provide protection against discrimination when establishing a business and in other business-related situations.

8.3 Personal scope

8.3.1 Scope

The personal scope of the Act on Equality is broad, as the general prohibition of discrimination on the grounds of sex (Section 7 of the Act) does not have any personal limitation. However, the general prohibition of discrimination does not provide a victim of alleged discrimination with a remedy; it merely involves a monitoring duty for authorities. The Equality Ombudsman monitors implementation of the Act on Equality, but other authorities such as the Chancellor of Justice and the Parliamentary Ombudsman monitor legality in general.

8.3.2 Definitions

It is not entirely clear what the term 'self-employed' refers to under Finnish legislation, and especially what the term 'spouse of a self-employed person' refers to. A person may establish an enterprise, but the obligation to register only exists if the enterprise has a business location or employs persons other than the spouse or under-age child of the entrepreneur. No documents are needed to establish an enterprise, unless the entrepreneur wishes to run it in a company form, although the entrepreneur is still obligated to submit a tax declaration and follow any special regulations on his or her line of activity. There is no specific legislation on self-employed persons, who are considered entrepreneurs. The scope of the Employment Contracts Act is defined by a rather strict definition of employment contract. Agricultural entrepreneurs are not considered entrepreneurs, as there is specific legislation concerning the occupation. In general, the self-employed are not a specific category. Statistics Finland considers the self-employed

to be persons who are not in employment and who have no employees, while they may have partners.⁸⁷ For example, persons working on a scholarship are considered to be self-employed entrepreneurs.

8.3.3 Categorisation and coverage

Entrepreneurs, including agricultural entrepreneurs, are covered by social security legislation, as well as the Act on Equality. Certain provisions, such as how the income is to be divided between spouses and a right to a replacement during family-related leave, only cover agricultural entrepreneurs. As the information based on surveys shows (see 8.1.1), there is no de jure categorisation between entrepreneurs and the self-employed, although there exist considerable de facto differences in the circumstances of different types of entrepreneurs.

8.3.4 Recognition of life partners

Life partners⁸⁸ are considered family members, and if they participate in their partner's enterprise they are covered independently. There is no regulation as to how spouses or life partners who run an enterprise together are to divide the income from the enterprise between themselves for purposes of the entrepreneurs' pension scheme. The Act on Agricultural Entrepreneurs' Pensions (1280/2006) provides pensions similar to those in the Entrepreneurs' Pension Act. An agricultural entrepreneur is defined under Section 3 as a person who alone or together with others runs an agricultural business on a minimum of five hectares of agricultural land, is a professional fisherman/fisherwoman without being in employment, runs reindeer husbandry, performs these activities as a family member of the entrepreneur, or is in a life partnership with the entrepreneur. The provisions on agricultural enterprises in company form are similar to those for other enterprises, and the annual income from agriculture is calculated per hectare of land or forest (or the number of reindeer herders). Unlike in other entrepreneurs' pension schemes, the income cannot be divided freely between the spouses or life partners for pension purposes. Under Section 18 of the Act, the agricultural income is to be shared so that one third is calculated for each spouse, and only one third may be divided between them as they agree.

8.4 Material scope

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

There is no explicit implementation of the principle of equal treatment concerning the self-employed in Finland. Becoming a private entrepreneur happens by filing an online notification to the Trade Register, and filing notifications with the Finnish Tax Administration. The provisions on establishing or launching an extension to activities as an entrepreneur are gender neutral. A new full-time entrepreneur may apply for a startup support grant from public employment and business services. The conditions for a grant are gender neutral, but there are no studies available on whether indirect discrimination occurs when the conditions are applied. A person who wishes to finish acting as self-employed and become a jobseeker may find difficulties in showing that self-employment has come to an end. For example, persons working on a scholarship need to show a clear termination of the activity. While these difficulties have been discussed in public debate, there is no information on indirect sex discrimination being involved. The social insurance of entrepreneurs is arranged under the Entrepreneurs' Pensions Act (1272/2006). The provisions of the Act are gender neutral.

⁸⁷ Sutela, H. Pärnänen A. (2018) Yrittäjät Suomessa 2017 (Entrepreneurs in Finland 2017). Statistics Finland 2018. http://www.stat.fi/tup/julkaisut/tiedostot/julkaisuluettelo/ytym_201700_2018_21465_net.pdf.

⁸⁸ Life partner in these provisions is a very open term referring to persons living together under circumstances that resemble marriage.

8.4.2 Material scope

The material scope of the Act on Equality is broad, as the Act is applied to all fields of life, excluding the religious activities of religious communities and personal relations within families. Members of Parliament and the President are not liable to give an explanation on their acts or pay compensation, as stipulated by the Act. The material scope of the Act is limited similarly to its personal scope by the lack of remedy for a person who has been discriminated against. Administrative remedies and compensation may be available in these cases.

8.5 Positive action

The Act on Equality requires many positive action measures for the employed, but no positive action measures are stipulated concerning the self-employed.

8.6 Social protection

Entrepreneurs and agricultural entrepreneurs are covered by statutory social insurance, as explained below, under 8.8. The self-employed person has access to statutory unemployment services and benefits, but s/he needs to show that activities as self-employed have come to an end.

8.7 Maternity benefits

The self-employed are covered under health and social welfare legislation, including maternity benefits under the Sickness Insurance Act, Chapter 9, Sections 2 - 5. Maternity benefits, as well as other family-related benefits, are defined under Chapter 9, and the level of benefits under Chapter 11 of the Sickness Insurance Act. The level of the benefit is related to an entrepreneur's income during the previous year (Chapter 11, Section 2). The income brackets used as the basis of the benefit for the self-employed are the same as for the employed, as explained under section 5.3.5 of this report.

8.8 Occupational social security

8.8.1 Implementation of provisions regarding occupational social security

The self-employed are covered by occupational security. Statutory social insurance through the Entrepreneurs' Pensions Act includes old age, disability, rehabilitation and family pensions. Persons working on a scholarship are insured under Agricultural Entrepreneurs' Pensions Act (1280/2006), Section 8a. An entrepreneur under the Entrepreneurs' Pensions Act is a person who is in gainful activity without being under an employment relation or in public office (Section 3). Income under EUR 5504 is excluded, as well as entrepreneurship of persons under 18 and over 68 years (Section 4). Because the income of self-employed persons is on average lower than that of persons in employment, their social security benefits are lower. Directive 2010/41 applies to self-employed workers. Irrespective of the interpretation given to the term (employed or entrepreneur), Finnish social insurance covers the self-employed, either as employed persons, entrepreneurs or agricultural entrepreneurs.

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

There are no further remarks.

8.9 Prohibition of discrimination

Section 7 of the Act on Equality, which defines and prohibits direct and indirect gender-based discrimination, applies to gender-based discrimination of self-employed persons. The prohibition under Section 7 is not a justiciable provision, and a victim of discrimination has no right to compensation for violation of the Section. The prohibitions of discrimination in working life extends to the self-employed only in cases explained under 8.2.

8.10 Evaluation of implementation

Finnish law in some ways exceeds what is required under EU law. For example, family-related leave with benefits are extended to the self-employed. On the other hand, Finnish legislation distinguishes problematically between an employee and a self-employed, which has an impact on the right to remedy.

8.11 Remaining issues

There are no further issues to discuss.

9 Goods and services (Directive 2004/113)⁸⁹

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

There are no general surveys on these issues. The main source of information are the reports by the Equality Ombudsman, which cover specific forms of alleged discrimination in the context of the supply of goods and services. Special offers and pricing to women and time slots reserved for women and men in swimming halls and saunas often induce questions to the Ombudsman. The Ombudsman has explained several times that different prices for men and women at hairdressers' are prohibited, but the practice of separate prices lists is quite common.

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

The expansion of the collaborative economy has been noted in Finland, but so far, there are no legal responses to problems arising in that context. Problems of discrimination in the online environment are not yet reported, except for online gender-based violence against women. There are currently no public reports of problems in the collaborative economy.

9.1.3 Political and societal debate

There are no further remarks.

9.2 Prohibition of direct and indirect discrimination

Section 8(e) of the Act on Equality defines the offering of goods and services as discriminatory if it falls under the definition of discrimination (including direct and indirect discrimination) under Section 7 of the Act.

9.3 Material scope

The material scope of the provision mirrors the material scope of the Directive.

9.4 Exceptions

Section 8(e)(3) contains the exceptions provided for by Article 3(3) of the Directive.

9.5 Justification of differences in treatment

Section 8(e)(2) allows the provision of goods or services exclusively or primarily to members of one sex if it is justified by a legitimate aim, and if the means of achieving that aim are appropriate and necessary. The Equality Ombudsman has considered that offers to one sex only are justified if their value in money is small; e.g., when special offers are made due to the yearly mothers', fathers', or women's day celebrations. Some public baths and swimming halls offer some time slots for men and women separately, and public saunas are offered for men and women separately. A recent opinion of the Equality Ombudsman concerns an island on which an enterprise established a resort for women only (SuperShe Island), with the aim of providing business women a possibility of networking together. The Ombudsman found that the size of the island was small and the

⁸⁹ See e.g. Caracciolo di Torella, E. and McLellan, B. *Gender equality and the collaborative economy* (2018) 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>.

premises such that it would be difficult to divide them for men and women. Provision of services for women served a legitimate aim, and offering them for women only was appropriate and necessary for reasons of privacy and decency, and the limited space available. Provision of services to women only on the island did not breach the Act on Equality.⁹⁰

9.6 Actuarial factors

Section 10, Chapter 31 of the Act on Insurance Companies (521/2008) prohibits the use of sex as an actuarial factor in the calculation of premiums and benefits in consumer insurances. Sex may be used as an actuarial factor in other types of insurance policies than those marketed to consumers, and in that case, on the condition that sex is a factor that affects risk calculation, assessed on the basis of actuarial facts and statistics. Insurances not marketed to consumers involve, for example, tailored insurance offered to entrepreneurs against risks to property.

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

The provisions that allowed the use of sex as actuarial factor were repealed and the new provision described above adopted in 2012. This means that the exception is no longer relevant concerning consumer insurances. Employers have started to provide pension schemes for some of their employees (typically for directors or high executives) that are not considered as consumer insurances, and as they are not statutory schemes, sex may then be used as actuarial factor.

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

There are no positive action measures for provision of goods and services.

9.9 Specific problems related to pregnancy, maternity or parenthood

There are no specific problems related to pregnancy, maternity or parenthood.

9.10 Evaluation of implementation

EU gender equality law is applied correctly at the level of legislation. Differently priced services at hairdressers remain common, but no effective measures have been taken to prevent the usage. It is the opinion of the writer that marketing goods and services in a gender-differentiated manner irritates many, but that there is little in-depth analysis of whether indirect discrimination may occur, as there are few studies or gender-impact assessments on the issue.

9.11 Remaining issues

There are no remaining issues.

⁹⁰ TAS 75/2018, 4.6.2018.

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

Surveys and statistics on violence against women have been available for decades. An important official attempt to gather information on the issue was made by the Council for Gender Equality in 1990, which established a committee to undertake a fact-finding mission on violence against women in Finland. Today, information is collected from crime statistics, national victim surveys and special studies on violence against women and men. These sources provide information on different aspects of violence against women. According to the latest survey on violence against women, one in five women had experienced violence or the threat of violence by her present partner at some point of the relationship.⁹¹ The results of an EU-wide survey conducted by the Fundamental Rights Agency revealed that in Finland, the percentage of women that had experienced physical and/or sexual violence was among the highest in the EU.⁹²

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

Finnish legislation on violence, including both criminal law and victim services, is strictly gender neutral. In the Criminal Code (39/1889), for example, several provisions in Chapter 20 on sexual crimes, Chapter 21 on crimes against life and health, and Chapter 25 on crimes against freedom have been amended. Earlier amendments of Chapter 20 involved a gender-neutral definition of rape. In the past ten years, most sexual crimes have been brought under public prosecution, physical harassment has been criminalised, and the definitions of several sexual crimes have been changed. So far, the definition of rape is based on force and not lack of consent. There is a citizens' initiative pending for an amendment of the provision on rape to be based on lack of consent. Physical sexual harassment was criminalised in 2014. As to crimes against life and death (Chapter 21), the crime of petty assault against the offender's spouse, former spouse or partner was brought under public prosecution in 2011. Until then, the prosecutor could not act unless the victim required the perpetrator to be punished. Stalking was criminalised under Chapter 25 of the Criminal Code in 2013. Amendments were made over several years. The Act on Protection Orders (898/1998) was adopted in 1998, and the State provides funding for shelters for victims of violence in intimate relations under the Act on State Subsidies for Providers of Shelters (1354/2014). In April 2019, the Ministry of Justice announced a reform of Chapter 20 of the Criminal Code on sexual crimes. The preparatory works should be ready by the end of May 2020.

The first GREVIO report on Finland⁹³ noted a number of issues for improvement. The report found that key professionals are not systematically trained to tackle cases of violence against women. The report also criticised the implementation of the Act on restraining orders, the failure to secure the position of children who have experienced or witnessed violence in custody issues, the lack of resources for victim services, as well as making several other observations. It was noted that the gender-neutral approach followed in

⁹¹ *Sukupuolistuneen väkivallan yleisyys Suomessa* (Prevalence of gender based violence in Finland), Centre for Gender Equality Information, National Institute for Health and Welfare, <https://thl.fi/fi/web/sukupuolten-tasa-arvo/hyvinvointi/sukupuolistunut-vakivalta/sukupuolistuneen-vakivallan-yleisyys-suomessa>.

⁹² Violence against women: an EU-wide survey, European Union Agency for Fundamental Rights, https://fra.europa.eu/sites/default/files/fra-2014-vaw-survey-factsheet_en.pdf.

⁹³ Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO) (2019) *Baseline Evaluation Report Finland*, Grevio/Inf(2019)9, <https://rm.coe.int/grevio-report-on-finland/168097129d>.

Finland does not always do justice to the particular experiences of women as victims of domestic violence.

10.1.3 National provisions on online violence and online harassment

Violation of peace of communication was criminalized in 2013 by Chapter 24, Section 1(a) of the Criminal Code. The crime consists of harassing another person by repeatedly sending messages that cause disturbance or harm. However, the provision does not explicitly cover all forms of violence and harassment online, but may be applied to online sexual harassment. Stalking (Chapter 25, Section 7(a)) covers repeatedly threatening, observing, contacting and otherwise stalking a person, and thus some forms of online harassment.

10.1.4 Political and societal debate

Societal debate on the legal sanctions for sexual crimes has been active for a long time, and the sanctions on sexual crimes have been considered unduly lenient in the public debate. The Ministry of Justice announced in January 2019 that it aims to establish a working group to amend the provisions on rape. The aim of the amendment is to make lack of consent more central in the definition of the crime, but also to amend provisions on sexual intercourse with a minor.⁹⁴ That consent should be the decisive factor in the definition of rape under the Istanbul Convention was one of the factors behind the decision to start the reform, but media attention on crimes committed by persons with a refugee status strengthened the political motivation. A citizens initiative on adopting consent as the decisive criterion of rape was presented to the Parliament in 2018, and delegated to the Legal Affairs Committee in 2019.

10.2 Ratification of the Istanbul Convention

Finland has ratified the Istanbul Convention, which came into force 1 August 2015. The Penal Code was amended before the ratification (introducing stalking and physical sexual harassment as crimes), and an Act on compensation for shelter providers from state funds was introduced at ratification. This latter Act was introduced to provide compensation for the municipalities and (a few) private providers of shelters. When Parliament accepted the Government Bill on ratification (HE 155/2014) in 2014, it requested that the shelter provision be improved, that special services to victims are provided, and that the NGOs that are active in the area receive appropriate funding (Response of Parliament EV 307/2014 vp – HE 155/2014 vp). There was notable expert criticism on the failure of Finnish law to fulfil the substantive law requirements of the Convention; Parliament's Employment and Equality Committee noted this criticism and called for follow-up measures (Report of the Committee TyVM 15/2014 vp). The Ministry of Social Affairs and Health coordinates the implementation across all ministries involved, and has nominated a committee to draft an action plan on the implementation of the Convention for years 2018-2020. The plan stresses coordination, victim protection, and services.⁹⁵

⁹⁴ Oikeusministeriö käynnistää raiskauslainsäädännön uudistuksen (Ministry of Justice starts amendment of legislation on crime), Ministry of Justice 15 January 2019, https://oikeusministerio.fi/artikkeli/-/asset_publisher/ministeri-hakkanen-oikeusministerio-kaynnistaa-raiskauslainsaadannon-kokonaisuudistuksen.

⁹⁵ *Istanbulin sopimuksen toimeenpanosuunnitelma 2018-2020* (Action Plan for Implementation of the Istanbul Convention 2018-2020), Ministry of Social Affairs and Health, publications 2017:16, http://julkaisut.valtioneuvosto.fi/bitstream/handle/10024/160401/16_2017_Istanbulin%20sopimuksen%20tps%202018-21_suomi.pdf?sequence=1&isAllowed=y.

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

There are no surveys or reports concerning legal redress.

11.1.2 Other issues related to the pursuit of a discrimination claim

Finnish procedural law does not allow amicus curiae briefs or give an independent position to social actors. There is very limited access to low threshold bodies as an alternative to court procedures. This is true of the remedies available under the Act on Equality, which only allows access to the Equality and Non-Discrimination Tribunal for a person alleging discrimination if the Equality Ombudsman or a Social Partner brings the case before the Tribunal. Finnish procedural law does not give specific standing to interest groups in legal cases. Such groups may, of course, subsidise or assist a complainant, but they have no formal role.

11.1.3 Political and societal debate and pending legislative proposals

There is currently no political and societal debate or pending legislative proposals on this issue.

11.2 Victimisation

The provisions on victimisation are implemented by the Act on Equality. Under Section 8(a)(1), it is discriminatory if an employer dismisses an employee or disadvantages an employee in some other manner when the employee has referred to the rights and obligations under the Act on Equality, or has been party to handling a case of discrimination. Under Section 8(a)(2), it is discriminatory if a provider of goods or services disadvantages a person after that person has referred to the rights and obligations under the Act on Equality, or participated in handling a case of discrimination.

11.3 Access to courts

11.3.1 Difficulties and barriers related to access to courts

Although victims of discrimination have access to court, the high costs prevent this from being realised, and there is a risk that the losing party has to pay the costs of the other party. The evidence required to prove discrimination is often difficult to obtain.

11.3.2 Availability of legal aid

The Equality Ombudsman provides opinions and advice to alleged victims of discrimination under Section 19 of the Act on Equality. The Ombudsman has a mandate to assist a victim in court, but the mandate has not yet been used. Legal aid is provided by public legal aid offices for persons with low income, and the right to free trials is income-related and not available for persons with a higher income.

11.4 Horizontal effect of the applicable law

11.4.1 Horizontal effect of relevant gender equality law

The horizontal effect of EU gender equality law is recognised by courts which frequently refer to EU law in cases involving private parties. For example, in KKO:2017:25, a case on an employee's right to start a new period of paid maternity leave directly, without returning to work from childcare leave, was decided in all instances with arguments that referred to EU gender equality law. The Court of Appeals referred to national law and extensively to EU case law. A condition of the collective agreement required that pay during maternity leave required six months' work between two periods of leave. Also, the Labour Court has referred to EU law, for example, in several cases concerning pay during maternity leave.

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

There have been no cases where the direct effect of Articles 20 and 23 of the Charter of Fundamental Rights would have been considered. The courts may not deem it necessary to look at the direct effects of equality provisions in the Charter, as the national constitutional provisions, equality before the law and the duty to promote gender equality, guaranteed under Section 6 of the Finnish Constitution, have an important horizontal effect in Finnish case law.

11.5 Burden of proof

Section 9(a) of the Act on Equality stipulates that if the alleged victim of sex discrimination shows in a court (or before an authority) facts on the basis of which it may be assumed that discrimination has taken place, the respondent has to show that no wrongdoing has occurred and that the treatment was caused by an acceptable ground, other than sex. This provision on the burden of proof is not applied in criminal-law matters.

Under Section 10, the employer has a duty to explain his/her acts to a person who alleges to have been discriminated against in employment or access to employment. Regarding access to employment, the employer is to provide information on the grounds of selection to the post, the education, work and other experience of the selected person and other grounds that have had an impact on that person being selected. Access to proof is more difficult in cases of pay discrimination, where the necessary information on comparator's pay needs to be received with the help of an employee representative or the Equality Ombudsman. The alleged victim has no independent right to receive the information. In practice, the right to receive comparator's pay information has not been used at all.⁹⁶ The lack of information makes it difficult to present sufficient evidence of discrimination to reverse the burden of proof.

11.6 Remedies and sanctions

11.6.1 Types of remedies and sanctions

The remedies under the Act on Equality include the right to compensation through a court within two years after the violation has taken place (Section 12 of the Act). Compensation is available for violations of Section 8 and 8(a)-(d), which cover discrimination in working life, in educational institutions, in labour-market organisations, and in the provision of and access to goods and services. The compensation under the Act on Equality does not exclude compensation under the Act on Torts or labour legislation, nor does it preclude the victim's right to use administrative-law remedies. A municipal decision to employ an official may be reversed, if the decision is found to violate the Act on Equality, and the

⁹⁶ This concerns the right to receive information by asking for it via the Ombudsman. There are other routes to receiving pay information, especially in the public sector where pay information is largely public.

person discriminated against may thus be reinstated. Discrimination is criminalised under Chapter 11 Section 11 of the Criminal Code. The scope of the provision covers market and occupational activities, services to the public, activities of the authorities and other public activities and in arrangements of a public occasion or general meeting. The prohibited grounds cover sex and family relations. Under Chapter 47 on work-related crimes, Section 3 criminalises work discrimination, and Section 3(a) criminalises extortionate work discrimination. Under the Criminal Code, the act must be intentional and the burden of proof lies with the prosecutor or claimant.

11.6.2 Effectiveness, proportionality and dissuasiveness

The compensation under the Act on Equality is appropriate in the sense that there is no upper limit, except for cases where several applicants to a post have suffered discrimination. It is problematic, however, that under Section 11 the compensation may be reduced or removed altogether, if considered reasonable when considering the economic circumstances of the violator, his or her attempts to prevent harmful effects caused by the act, or other circumstances. These grounds are not in line with the requirements of effectiveness, proportionality, and dissuasiveness of compensation. It is possible to be compensated through criminal law or on a tort-law basis, although the corresponding rules on the burden of proof and the intention requirements are different from those under the Act on Equality.

11.7 Equality body

The equality bodies include the Equality Ombudsman,⁹⁷ who monitors the Act on Equality and sex discrimination, and the Non-Discrimination and Equality Tribunal.⁹⁸ The Tribunal, merges the functions of the former Gender Equality Board and the Discrimination Tribunal and monitors the Act on Equality between Women and Men and the Non-Discrimination Act, the latter of which covers all grounds of discrimination except sex/gender.

The tasks of the Equality Ombudsman are to advise, monitor, and decide on cases to be brought to the Non-Discrimination and Equality Board. An amendment to the Act on Equality in 2016 provided the Ombudsman with the mandate to conciliate parties to a discrimination case (in practice, the Ombudsman had often attempted to help parties to reach an agreement even before the amendment was made). The Ombudsman has the right to visit workplaces, educational institutions, labour-market organisations and service providers in order to monitor the Act on Equality. The Non-Discrimination and Equality Board may decide discrimination cases brought to the Board by the Ombudsman or by the social partners. Victims of gender discrimination may not bring a case to the Board themselves. An amendment of the Act on Equality in 2016 gives parties in a case of discrimination that have reached an agreement the right to have that agreement confirmed by the Non-Discrimination and Equality Board.

11.8 Social partners

The social partners have the right to bring cases of sex discrimination (but not other cases of discrimination) to the Non-Discrimination and Equality Board. The social partners are influential in proposing and drafting legislation in all issues of working life, including gender equality law. The collective agreements have a strong impact on work conditions and pay, and traditionally the social partners jointly discuss gender equality issues.

11.9 Other relevant bodies

There are no other relevant bodies to discuss.

⁹⁷ <https://www.tasa-arvo.fi/fi/etusivu>.

⁹⁸ <http://yvtltk.fi/en/index.html>.

11.10 Evaluation of implementation

The implementation is formally sufficient, although access to justice is not facilitated by quasi-legal bodies or simplified procedures. The number of court cases on gender discrimination is low, which partly reflects lack of access.

11.11 Remaining issues

There are no remaining issues to report.

12 Overall assessment

EU law has generally been implemented correctly. However, access to remedies and legislation on compensation are not de facto satisfactory, even where there is no infringement of the formal aspects of EU law. The strongest national gender equality provisions are those involving positive measures and an access to social security, both of which exceed the requirements of EU law.

The following specific transposition problems are mentioned in this report:

1. The complicated structure of the prohibitions of discrimination under the Act on Equality (separate sections: general prohibition and definition of discrimination under Section 7, and specific prohibitions for different areas of life under other sections) may make interpretation difficult.
2. Access to justice is not sufficiently facilitated, as victims of discrimination have no independent right to bring cases to the Non-Discrimination and Equality Board. The only option is the ordinary court, which in most cases involves a considerable economic risk.
3. The gender pay gap is relatively big and prohibition of pay discrimination has not been an effective tool for reducing the gap.

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