



European  
Commission

European network of legal experts in  
gender equality and non-discrimination

# Country report

## Gender equality



Spain  
2020

**EUROPEAN COMMISSION**

Directorate-General for Justice and Consumers  
Directorate D — Equality and Union citizenship  
Unit D.2 Gender Equality

*European Commission  
B-1049 Brussels*

# **Country report**

## **Gender equality**

How are EU rules transposed into  
national law?

## **Spain**

Dolores Morondo Taramundi

Reporting period 1 January 2019 – 31 December 2019

***Europe Direct is a service to help you find answers  
to your questions about the European Union.***

**Freephone number (\*):**

**00 800 6 7 8 9 10 11**

(\*) The information given is free, as are most calls (though some operators, phone boxes or hotels may charge you).

## **LEGAL NOTICE**

This document has been prepared for the European Commission however it reflects the views only of the authors, and the Commission cannot be held responsible for any use which may be made of the information contained therein.

More information on the European Union is available on the Internet (<http://www.europa.eu>).

Luxembourg: Publications Office of the European Union, 2020

© European Union, 2020

PDF ISBN 978-92-76-18971-8

ISSN 2600-0164

doi:10.2838/089630

DS-BD-20-012-EN-N

**CONTENTS**

<b>1</b>	<b>Introduction .....</b>	<b>5</b>
1.1	Basic structure of the national legal system .....	5
1.2	List of main legislation transposing and implementing the directives .....	6
1.3	Sources of law .....	6
<b>2</b>	<b>General legal framework .....</b>	<b>8</b>
2.1	Constitution .....	8
2.2	Equal treatment legislation .....	8
<b>3</b>	<b>Implementation of central concepts .....</b>	<b>9</b>
3.1	General (legal) context.....	9
3.2	Sex/gender/transgender .....	9
3.3	Direct sex discrimination .....	12
3.4	Indirect sex discrimination .....	12
3.5	Multiple discrimination and intersectional discrimination .....	14
3.6	Positive action.....	14
3.7	Harassment and sexual harassment.....	16
3.8	Instruction to discriminate .....	18
3.9	Other forms of discrimination .....	18
3.10	Evaluation of implementation .....	18
3.11	Remaining issues.....	18
<b>4</b>	<b>Equal pay and equal treatment at work (Article 157 on the Treaty of the Functioning of the European Union (TFEU) and Recast Directive 2006/54) .....</b>	<b>19</b>
4.1	General (legal) context.....	19
4.2	Equal pay .....	20
4.3	Access to work, working conditions and dismissal .....	24
4.4	Evaluation of implementation .....	28
4.5	Remaining issues.....	28
<b>5</b>	<b>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) .....</b>	<b>29</b>
5.1	General (legal) context.....	29
5.2	Pregnancy and maternity protection .....	32
5.3	Maternity leave .....	35
5.4	Adoption leave .....	39
5.5	Parental leave .....	40
5.6	Paternity leave .....	46
5.7	Time off for <i>force majeure</i> .....	47
5.8	Care leave .....	47
5.9	Leave in relation to surrogacy .....	48
5.10	Flexible working time arrangements.....	49
5.11	Evaluation of implementation .....	50
5.12	Remaining issues.....	50
<b>6</b>	<b>Occupational social security schemes (Chapter 2 of Directive 2006/54) ..</b>	<b>53</b>
6.1	General (legal) context.....	53
6.2	Direct and indirect discrimination .....	53
6.3	Personal scope .....	53
6.4	Material scope.....	53
6.5	Exclusions .....	54
6.6	Laws and case law falling under the examples of sex discrimination mentioned in Article 9 of Directive 2006/54 .....	54
6.7	Actuarial factors .....	54
6.8	Difficulties .....	54
6.9	Evaluation of implementation .....	54
6.10	Remaining issues.....	54
<b>7</b>	<b>Statutory schemes of social security (Directive 79/7) .....</b>	<b>55</b>

7.1	General (legal) context.....	55
7.2	Implementation of the principle of equal treatment for men and women in matters of social security.....	56
7.3	Personal scope .....	57
7.4	Material scope.....	57
7.5	Exclusions .....	57
7.6	Actuarial factors .....	57
7.7	Difficulties .....	57
7.8	Evaluation of implementation .....	58
7.9	Remaining issues.....	58
<b>8</b>	<b>Self-employed workers (Directive 2010/41/EU and some relevant provisions of the Recast Directive).....</b>	<b>59</b>
8.1	General (legal) context.....	59
8.2	Implementation of Directive 2010/41/EU.....	60
8.3	Personal scope .....	60
8.4	Material scope.....	61
8.5	Positive action.....	61
8.6	Social protection .....	62
8.7	Maternity benefits.....	62
8.8	Occupational social security .....	63
8.9	Prohibition of discrimination.....	63
8.10	Evaluation of implementation .....	63
8.11	Remaining issues.....	64
<b>9</b>	<b>Goods and services (Directive 2004/113) .....</b>	<b>65</b>
9.1	General (legal) context.....	65
9.2	Prohibition of direct and indirect discrimination .....	65
9.3	Material scope.....	65
9.4	Exceptions .....	65
9.5	Justification of differences in treatment .....	66
9.6	Actuarial factors .....	66
9.7	Interpretation of exception contained in Article 5(2) of Directive 2004/113.....	66
9.8	Positive action measures (Article 6 of Directive 2004/113).....	66
9.9	Specific problems related to pregnancy, maternity or parenthood .....	66
9.10	Evaluation of implementation .....	67
9.11	Remaining issues.....	67
<b>10</b>	<b>Violence against women and domestic violence in relation to the Istanbul Convention .....</b>	<b>68</b>
10.1	General (legal) context.....	68
10.2	Ratification of the Istanbul Convention .....	70
<b>11</b>	<b>Compliance and enforcement aspects (horizontal provisions of all directives) .....</b>	<b>71</b>
11.1	General (legal) context.....	71
11.2	Victimisation .....	71
11.3	Access to courts .....	72
11.4	Horizontal effect of the applicable law .....	72
11.5	Burden of proof.....	74
11.6	Remedies and sanctions .....	74
11.7	Equality body .....	74
11.8	Social partners .....	75
11.9	Other relevant bodies.....	76
11.10	Evaluation of implementation .....	76
11.11	Remaining issues.....	76
<b>12</b>	<b>Overall assessment .....</b>	<b>77</b>
	<b>Bibliography .....</b>	<b>82</b>

# 1 Introduction<sup>1</sup>

## 1.1 Basic structure of the national legal system

Spain has two law-making levels: the State and the Autonomous Communities. Spain recognises certain legislative autonomy in its Autonomous Communities for the execution of legislation but anti-discrimination legislation is an exclusive task of the State. According to Article 81 of the Spanish Constitution, anti-discrimination legislation must be approved by the Spanish Parliament and requires organic law, which means that it has to be approved by a qualified majority of the Parliament (absolute majority of the Parliament).<sup>2</sup> However, some Autonomous Communities have equality strategies or plans that serve the objective of promoting the equality of women and men at the local level (Andalusia, Galicia, Castile and León, Asturias, Canary Islands, Castilla-La Mancha, Murcia, Chartered Community of Navarre, Basque Country and Catalonia).<sup>3</sup> Most of the Autonomous Communities have specific regulations for the prevention of gender violence and for the care of victims of gender violence (Aragón, Canary Islands, Cantabria, Castilla-La Mancha, Castile and León, Valencian Community, Madrid, Extremadura, Galicia, La Rioja and the Chartered Community of Navarre).<sup>4</sup> Moreover, some Autonomous Communities establish benefits such as subsidies for the employment of women, for childcare etc.<sup>5</sup> Residences for the elderly and young children are also supported, in whole or in part, by the Autonomous Communities. The scope of these subsidies is different in each Autonomous Community. Some municipalities also invest in measures for equality between men and women, for example by means of childcare services, training workshops for women, etc.

The court which decides in a sex discrimination claim depends on the issue. If discrimination based on sex occurs in access to goods and services, the competent jurisdiction is civil jurisdiction.<sup>6</sup> If the discrimination occurs in relation to employment, the jurisdiction is labour jurisdiction.<sup>7</sup> If the discrimination is the consequence of an action by a public administration, it is the administrative jurisdiction which is competent.<sup>8</sup> All of them are courts of justice.

Besides the victim, other entities who may address the courts on matters relating to discrimination are the following:

- 1) According to Article 11 of the Civil Procedure Act, when the victims are a group of unspecified persons or if they are difficult to identify, the following entities will have standing before the courts: public entities that have as an objective equality between women and men (for example, the Institute of Women and for Equal Opportunities), and most representative unions<sup>9</sup> and national associations that have amongst their objectives equality between women and men. This special legitimacy to intervene in judicial processes related to discrimination on the ground of sex was established so

---

<sup>1</sup> The report was originally written by María Amparo Ballester. Updates from January 2019 onwards were added by the present author.

<sup>2</sup> Spanish Constitution, approved 28 December 1978, [www.boe.es/buscar/act.php?id=BOE-A-1978-31229](http://www.boe.es/buscar/act.php?id=BOE-A-1978-31229).

<sup>3</sup> For instance, Law 17/2015, of 21 July 2015 sets out a strategy for the equality of women and men in Catalonia, [www.boe.es/diario\\_boe/txt.php?id=BOE-A-2015-9676](http://www.boe.es/diario_boe/txt.php?id=BOE-A-2015-9676).

<sup>4</sup> For instance, Law 11/2007, of 27 July 2007, of Galicia, for the prevention and integrated treatment of gender violence (modified by Law 12/2016, of 22 July 2016), [www.boe.es/diario\\_boe/txt.php?id=BOE-A-2007-1661](http://www.boe.es/diario_boe/txt.php?id=BOE-A-2007-1661).

<sup>5</sup> For instance, Resolution 15 May 2018, of the General Secretariat of Equality of Galicia, which establishes an allowance for working parents who go on part-time leave, <http://igualdade.xunta.gal/es/ayudas/ayudas-la-conciliacion-de-la-vida-familiar-y-laboral-por-reduccion-de-la-jornada-de-trabajo>.

<sup>6</sup> Civil Procedure Act (*Ley de Enjuiciamiento Civil*), Law 1/2000, of 7 January 2000, [www.boe.es/buscar/act.php?id=BOE-A-2000-323](http://www.boe.es/buscar/act.php?id=BOE-A-2000-323), Article 1.

<sup>7</sup> Act Regulating Social Jurisdiction (*Ley reguladora de la Jurisdicción Social*), Law 36/2011, of 10 October 2011, [www.boe.es/buscar/act.php?id=BOE-A-2011-15936](http://www.boe.es/buscar/act.php?id=BOE-A-2011-15936), Article 1.

<sup>8</sup> Law on Administrative Jurisdiction (*Ley Reguladora de la Jurisdicción Contencioso Administrativa*), Law 29/1998, of 13 July 1998, [www.boe.es/buscar/act.php?id=BOE-A-1998-16718](http://www.boe.es/buscar/act.php?id=BOE-A-1998-16718), Article 1.

<sup>9</sup> The most representative unions in Spain are the General Union of Workers (*Union general de trabajadores*) and the Workers' Commissions (*Comisiones Obreras*).

that entities with a certain level of representativeness could initiate judicial proceedings in cases in which the specific victims were indeterminate or diffuse. However, these entities have never used this special standing.

- 2) According to Article 17.2 of the Act Regulating Social Jurisdiction, workers' unions which are sufficiently established in the area of the dispute are entitled to act in any process in which the collective interests of workers are involved. In particular, they may act, through the process of collective dispute (group action), in defence of the rights and interests of multiple workers who are undetermined or difficult to determine; and, in particular, through this channel they may act in defence of the right to equal treatment between women and men in all matters attributed to labour jurisdiction.
- 3) According to Article 148.c of the Act Regulating Social Jurisdiction the Labour Authority with powers to impose sanctions for breach of labour regulations can initiate judicial proceedings for discrimination based on sex within an organisation.

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

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

- Royal Decree 6/2019, of 1 March 2019, on urgent measures for ensuring equal treatment and opportunities for women and men in employment and occupation;<sup>10</sup>
- Law 3/2007 of 22 March 2007, on Effective Equality between Women and Men (Law on Effective Equality);<sup>11</sup>
- Article 28 of the Workers' Statute (Royal Legislative Decree 2/2015, of 23 October 2015);<sup>12</sup>
- Article 26 of the Prevention of Labour-Related Accidents Law (Law 31/1995 of 8 November 1995);<sup>13</sup>
- Article 37 of the Workers' Statute (Royal Legislative Decree 2/2015 of 23 October 2015);
- Article 177 of the General Law on Social Security (Royal Legislative Decree 8/2015 of 30 October 2015).<sup>14</sup>

## **1.3 Sources of law**

The main sources of gender equality law in Spain are the following. The norms of the European Union, as interpreted by the CJEU, are the highest hierarchical norms within the framework of sources of Spanish law (Article 93 of the Spanish Constitution). Below them is the Constitution and the interpretations thereof by the Constitutional Court. Below the Constitution are the International Treaties ratified by Spain (Article 96 of the Spanish Constitution). Below the International Treaties are the laws of the State and of the Autonomous Communities, approved by their Parliaments, in accordance with the interpretation thereof by the Supreme Court. In case of extraordinary and urgent need, the Government can approve provisional norms (Royal Decrees) that must be ratified by Parliament afterwards (Article 86 of the Spanish Constitution). Below these standards are collective agreements (Article 37 of the Spanish Constitution). If collective agreements are negotiated by trade unions and business associations with sufficient representation (in

<sup>10</sup> Royal Decree 6/2019 on urgent measures for ensuring equal treatment and opportunities for women and men in employment and occupation (*Real Decreto-ley 6/2019 de medidas urgentes para garantía de la igualdad de trato y de oportunidades entre mujeres y hombres en el empleo y la ocupación*), 1 March 2019, <https://www.boe.es/buscar/doc.php?id=BOE-A-2019-3244>.

<sup>11</sup> Law 3/2007 on Effective Equality between Women and Men (*Ley Orgánica 3/2007 para la igualdad efectiva de mujeres y hombres*), 22 March 2007, [www.boe.es/buscar/doc.php?id=BOE-A-2007-6115](https://www.boe.es/buscar/doc.php?id=BOE-A-2007-6115).

<sup>12</sup> Royal Legislative Decree 2/2015 which approved the Workers' Statute (*Estatuto de los Trabajadores*), 23 October 2015, [www.boe.es/buscar/act.php?id=BOE-A-2015-11430](https://www.boe.es/buscar/act.php?id=BOE-A-2015-11430).

<sup>13</sup> Law 31/1995 of 8 November 1995, which approved the Prevention of Labour-Related Accidents Law (*Ley de Prevención de Riesgos Laborales*) [www.boe.es/buscar/act.php?id=BOE-A-1995-24292&tn=2](https://www.boe.es/buscar/act.php?id=BOE-A-1995-24292&tn=2).

<sup>14</sup> Royal Legislative Decree 8/2015 that approved the General Law on Social Security (*Ley general de Seguridad Social*), 30 October 2015, [www.boe.es/buscar/doc.php?id=BOE-A-2015-11724](https://www.boe.es/buscar/doc.php?id=BOE-A-2015-11724).



accordance with the provisions of the Workers' Statute), they have general effectiveness and apply to the whole company or sector of activity, including employers and workers not affiliated with the unions and signatory associations.

## **2 General legal framework**

### **2.1 Constitution**

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

A general prohibition of discrimination on grounds of sex is established in Article 14 of the Spanish Constitution.<sup>15</sup> This article establishes, first, the principle of equality before the law and, second, a general principle of non-discrimination on the grounds of birth, race, sex, religion, opinion and any other personal or social condition or circumstance.

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

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

Although it does not refer specifically to discrimination based on sex, another constitutional provision of particular importance is Article 9.2 of the Spanish Constitution. This precept establishes the obligation of the public authorities to eliminate the obstacles that impede real equality of individuals and the groups to which they belong. Article 9.2 of the Spanish Constitution recognises positive action in this way.

Articles 9.2, 14 and 35 of the Spanish Constitution can be invoked in horizontal relations.

### **2.2 Equal treatment legislation**

The Law on Effective Equality<sup>16</sup> is the specific law on gender equality. This Law is applicable in all areas, especially in political, civil, labour, socio-economic and cultural contexts. Before the Law on Effective Equality entered into force, legislation on gender equality was scattered among different texts. In addition, some of the basic principles of gender equality such as indirect discrimination or affirmative action did not exist explicitly in written legislation. The Law on Effective Equality of 2007 has had significant impact in Spain, as it expressly established and clarified the content of the right to non-discrimination on the ground of sex and established concrete strategies to achieve effective equality.

Other discrimination grounds covered by Spanish equal treatment legislation are racial or ethnic origin, religion or belief, disability, age or sexual orientation as prescribed in Law 62/2003.<sup>17</sup> The grounds of discrimination prohibited by Law 62/2003 are exactly the same as those in Directives 2000/43/EC and 2000/78/EC. Gender discrimination is addressed in the Law on Effective Equality. The scope of protection is the same as that established in those directives.

---

<sup>15</sup> Article 14 of the Spanish Constitution states as follows: 'Spaniards are equal before the law, and may not in any way be discriminated against on account of birth, race, sex, religion, opinion or any other personal or social condition or circumstance'. The Constitution of Spain was adopted on 28 December 1978, [www.boe.es/buscar/act.php?id=BOE-A-1978-31229](http://www.boe.es/buscar/act.php?id=BOE-A-1978-31229).

<sup>16</sup> Law 3/2007 of 22 March 2007, on Effective Equality between women and men.

<sup>17</sup> Law 62/2003 on fiscal, administrative and social measures (*Ley 62/2003 de medidas fiscales, administrativas y del orden social*), 30 December 2003, [www.boe.es/buscar/act.php?id=BOE-A-2003-23936](http://www.boe.es/buscar/act.php?id=BOE-A-2003-23936).

### **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**

There are no official reports in Spain about the definition, implementation and limits of central concepts of gender equality law.

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

The concepts of anti-discrimination in relation to discrimination based on sex are regulated in the Law on Effective Equality. There is also specific legislation that refers to discrimination based on disability which also includes the main concepts (Royal Legislative Decree 1/2013 and General Law on the rights of persons with disabilities and their social inclusion).<sup>18</sup> However, the legislation corresponding to the other grounds of prohibited discrimination, part 2 of Law 62/2003, is much more limited, although it contains the basic concepts established in Directives 2000/43/EC and 2000/78/EC.<sup>19</sup>

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

The main concepts of gender equality are contained in the Law on Effective Equality and its scope is very similar to the concepts in the anti-discrimination directives.

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

The main concepts of gender equality regulated by Spanish legislation are generally accepted and there are no proposals to reform them.

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

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

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

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

There is no State law (applicable to the whole of Spain) that specifically states the principle of non-discrimination against transgender, intersex and non-binary people. The judgement of the Constitutional Court 176/2008, of 22 December 2008,<sup>20</sup> stated that transgender discrimination is forbidden in Spain because it is included in Article 14 of the Spanish Constitution. This article first mentions the most common causes of prohibited discrimination (sex, origin and age) and then sets out a general non-discrimination clause against 'any other personal or social condition or circumstance'. According to the Constitutional Court, discrimination against transgender people would be included in this general clause. Nothing has been expressly stated in relation to intersex and non-binary people by the Constitutional Court.

The Spanish Criminal Code includes gender identity in the reasons that could lead a person to be condemned for a so-called 'hate crime' (*delito de odio*). The concept of this crime is

<sup>18</sup> Royal Legislative Decree 1/2013, General Law on the rights of persons with disabilities and their social inclusion (*Ley General de derechos de las personas con discapacidad y de su inclusión social*), 29 November 2013, <https://www.boe.es/buscar/act.php?id=BOE-A-2013-12632>.

<sup>19</sup> Part 2 of Law 62/2003 of 30 December, [www.boe.es/buscar/act.php?id=BOE-A-2003-23936](http://www.boe.es/buscar/act.php?id=BOE-A-2003-23936).

<sup>20</sup> Constitutional Court, ECLI:ES:TC:2008:176: <http://hj.tribunalconstitucional.es/es-ES/Resolucion/Show/6408>.

in Article 510 of the Criminal Code which sets out the penalties for, 'Anyone who publicly encourages, promotes or directly or indirectly incites hatred, hostility, discrimination or violence against a group, a part of a group or against a particular person by reason of their belonging to a group, on the grounds of racist, anti-Semitic or other related to ideology, religion or beliefs, family situation, membership of a particular ethnic group, race or nation, national origin, sex, sexual orientation or gender identity, gender, illness, or disability.'<sup>21</sup> Anyone found guilty of this crime can be sentenced to between one and four years in prison.

Several Autonomous Communities have approved legislation expressly prohibiting discrimination against transgender, intersex and/or non-binary people. These laws are only applicable in the territory of each Autonomous Community and only in relation to the matters that have been attributed to them. The Autonomous Communities that have approved laws against discrimination of transgender, intersex and/or non-binary people are the following:

- 1) Chartered Community of Navarre: Law 12/2009, of 19 November 2009, against discrimination on the grounds of gender identity and for the recognition of the rights of transsexual people. This was the first law on gender identity in Spain. It refers only to the subject of gender identity, so it does not include any reference to sexual orientation. It states the principle of non-discrimination because of gender identity and it establishes a broad recognition of rights in the area of healthcare, education, labour contracts and social matters
- 2) Basque Country: Law 14/2012, of 28 June 2012, against discrimination on the grounds of gender identity and for the recognition of the rights of transsexual people. The scope of the law is quite close to the Chartered Community of Navarre law. Law 9/2019, of 27 June, has modified the definition of transsexual people in Article 3 of Law 14/2012, so that the identification of transsexual people to the effect of the provisions of the law will be based on the self-identification of sexual identity. The modified Article 3 establishes that no diagnosis, psychiatric or psychological review or medical treatment can be required in order to have the law applied.
- 3) Galicia: Law 2/2014, of 14 April 2014, for equal treatment and non-discrimination of lesbian, gay, transsexual, bisexual and intersex people. This law states the principle of non-discrimination based on gender identity and sexual orientation together. The law provides for a fairly general description of rights without specific measures. Its scope is the following: police and justice; labour contracts; family relations; healthcare; education; culture and leisure; sport; young people; and communications.
- 4) Canary Islands: Law 8/2014, of 28 October 2014, on non-discrimination on the grounds of gender identity and for the recognition of transsexual persons. This law is quite similar to the Basque Country and Navarre laws.
- 5) Catalonia: Law 11/2014 of 10 October 2014, to guarantee the rights of lesbian, gay, transgender, bisexual, and intersex people and to fight against homophobia, biphobia and transphobia. This law states the principle of non-discrimination based on gender identity and sexual orientation together. Besides the general recognition of rights in the areas of healthcare, education, police and justice, labour contracts, social services, sport, culture and leisure, communications and family relations, the Law has two important elements. Firstly, it creates the National Council of Lesbian, Gay, Bisexual, Transgender and Intersex People, which is a consultative body within the Government of Catalonia. Secondly, the Law sets out a relatively complete list

---

<sup>21</sup> Criminal Code, Organic Law 10/1995 of 23 of November 1995, [www.boe.es/buscar/act.php?id=BOE-A-1995-25444](http://www.boe.es/buscar/act.php?id=BOE-A-1995-25444).

of offences and penalties to punish behaviour and acts which contravene people's rights because of their gender identity or sexual orientation.

- 6) Extremadura: Law 12/2015 of 8 April 2015, on the social equality of lesbian, gay, transsexual, transgender and intersex people and on public policies against discrimination because of sexual orientation and gender identity. The law has a similar scope to the Catalan law: it creates a specific consultative body (the Observatory against discrimination on grounds of sexual orientation and gender identity), and it states a detailed list of offences and penalties to punish behaviour and acts which contravene the rights of people because of their gender identity or sexual orientation.
- 7) Murcia: Law 8/2016 of 27 May 2016, on social equality of lesbian, gay, transsexual, transgender and intersex people and on public policies against discrimination on the grounds of sexual orientation and gender identity. This law is also quite similar to the Catalan law as well.
- 8) Balearic Islands: Law 8/2016 of 30 May 2016, to guarantee the rights of lesbian, gay, transsexual, bisexual and intersex people and to fight against homophobia, biphobia and transphobia. This law is also quite similar to the Catalan law. The consultative body is the Council of Lesbian, Gay, Transsexual, Bisexual and Intersex People of the Balearic Islands.
- 9) Madrid: Law 2/2016 of 29 March 2016 on gender identity and gender expression and on social equality and non-discrimination. This law is quite advanced in terms of respect for gender identity, since it recognises any expression of gender identity. It foresees specific units specializing in gender identity in the healthcare system.
- 10) Andalusia: Law 8/2017 of 28 December 2017, to guarantee rights, equal treatment and non-discrimination for lesbian, gay, transsexual, bisexual and intersex people and their families. It is similar to the Madrid law and it creates a consultative Council.
- 11) Valencian Community: Law 8/2017, of 7 April 2017, comprehensive law of recognition of the right to identity and gender expression. This is similar to the law of Andalusia.
- 12) Aragon: Law 18/2018, of 20 December 2018, on equality and integral protection against discrimination on grounds of sexual orientation, gender expression and identity in the Autonomous Community of Aragon.

The various pieces of legislation of the Autonomous Communities provide different solutions to discrimination based on gender identity. Some autonomous communities establish joint anti-discrimination protection on the basis of gender identity and sexual orientation (Galicia, Catalonia, Extremadura, Murcia and Andalusia). Others establish specific and differentiated protection based on sexual identity (the Chartered Community of Navarre, the Basque Country, the Canary Islands, Madrid, the Valencian Community and Aragon).

### 3.2.3 Specific requirements

The legislative acts of the Autonomous Communities do not establish specific requirements, such as gender confirmation surgery, to benefit from legal non-discrimination protection (and nothing is specifically stated in the national legislation).

### 3.3 Direct sex discrimination

#### 3.3.1 Explicit prohibition

The concept of direct sex discrimination is expressly prohibited in Spanish legislation. The Spanish concept of direct sex discrimination is set out in Article 6 of the Law on Effective Equality and is exactly the same as the definition found in Article 2(1)(a) of the Recast Directive 2006/54/EC.

#### 3.3.2 Prohibition of pregnancy and maternity discrimination

Article 8 of the Law on Effective Equality establishes that any 'less favourable treatment of a woman related to pregnancy or maternity leave will be direct discrimination on the grounds of sex'. This legislation complies with Article 2(2)(c) of the Recast Directive 2006/54/EC.

#### 3.3.3 Specific difficulties

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

### 3.4 Indirect sex discrimination

#### 3.4.1 Explicit prohibition

Article 6.2 of the Law on Effective Equality contains exactly the same definition of indirect discrimination as found in Article 2(1)(b) of the Recast Directive.

#### 3.4.2 Statistical evidence

Statistical evidence is used in Spain in order to establish a presumption of indirect sex discrimination. In fact, the Spanish Constitutional Court used statistical evidence to argue sex discrimination as early as 1987,<sup>22</sup> when indirect discrimination was not yet recognised in Spain. In 1991, the Constitutional Court considered that the general prohibition of discrimination on grounds of sex in Article 14 referred to both direct and indirect discrimination.<sup>23</sup> Since then, statistical evidence has been consistently accepted to establish prima facie indirect discrimination. Most of the case law refers to unequal pay, but statistical evidence has also been used to establish that a system of promotion, with minimal transparency, which results in stagnation of women in lower positions (according to statistical analysis) constitutes indirect discrimination.<sup>24</sup> More recently, the concept of indirect discrimination has been applied by the Constitutional Court in relation to the pejorative treatment of part-time workers by the social security system.<sup>25</sup> In all these cases, the courts applied the presumption of indirect sex discrimination after it was shown that the majority of the people affected were women.

---

<sup>22</sup> Judgement of the Constitutional Court 128/1987, of 16 July 1987, ECLI ES:TC:1987:128; <http://hj.tribunalconstitucional.es/es-ES/Resolucion/Show/860>.

<sup>23</sup> Judgement of the Constitutional Court 145/1991, of 1 July 1991, ECLI: ES:TC:1991:145.

<sup>24</sup> Judgement of the Supreme Court of 18 July 2011, appeal number 133/2010, ECLI: ES:TS:2011:5798: [www.poderjudicial.es/search/contenidos.action?action=contentpdf&databasematch=TS&reference=6134165&links=&optimize=20111003&publicinterface=true](http://www.poderjudicial.es/search/contenidos.action?action=contentpdf&databasematch=TS&reference=6134165&links=&optimize=20111003&publicinterface=true).

<sup>25</sup> Judgement of the Constitutional Court 61/2013 of 14 March 2013, ECLI: ES:TC: 2013:61 <http://hj.tribunalconstitucional.es/docs/BOE/BOE-A-2013-3797.pdf>, and Judgement of the Constitutional Court 91/2019, of 3 July 2019, ECLI ES:TC:2019:91, <https://hj.tribunalconstitucional.es/docs/BOE/BOE-A-2019-11903.pdf>.

### 3.4.3 Application of the objective justification test

The reasoning of the Spanish courts does not generally follow a detailed structure for the justification test, in line with the CJEU doctrine (legitimate aim, necessity and suitability). Nevertheless, in the author's view, the objective justification test is correctly applied by national courts.

It must be borne in mind that to establish a violation of Article 14 of the Spanish Constitution, the lack of an 'objective and reasonable' justification must be established in any case. Back in 1981,<sup>26</sup> the Constitutional Court received the doctrine established by the European Court of Human Rights and ruled that:

'The principle of equality does not imply equal legal treatment in all cases making an abstraction of any legally relevant differentiating element; thus, not all inequalities in normative treatment in the regulation of any given issue are a violation of the obligation in Article 14 of the Spanish Constitution, but only those which introduce a difference in situations that might be considered equal without offering or having an objective and reasonable justification to do so (...). In addition, it is necessary, for the differentiation of treatment to be constitutionally licit, that the legal consequences resulting from the distinction are proportionate to the pursued aim, so that excessively onerous or undue results are avoided.'

Courts in Spain have generally followed this structure of the 'objective and reasonable' justification requested by Article 14 of the Constitution, rather than the structure of 'legitimate aim – necessity – suitability of the measure' used by the CJEU.

In cases concerning discrimination, the Constitutional Court further established that, 'the judicial body cannot limit itself to assessing if the difference in treatment has, in the abstract, an objective and reasonable justification, but must enter a concrete analysis of whether what appears as a formally reasonable differentiation does not conceal or allow to be concealed an instance of discrimination contrary to Article 14 of the Constitution'.<sup>27</sup>

### 3.4.4 Specific difficulties

One of the most significant problems with implementing the prohibition of indirect sex discrimination relates to the deficiencies that exist in Spanish law when challenging collective agreements. There are few cases of indirect discrimination in relation to incorrect job evaluations in collective agreements, probably because Spanish legislation renders the challenging of illegal collective agreements difficult. There are only two ways to challenge an illegal collective agreement. Firstly, the labour authority can start a judicial procedure against the illegal collective agreement. Secondly, the social partners with an interest in the issue can start a judicial procedure. However, the labour authority rarely initiates judicial procedures against collective agreements. This has been highly criticised.

In addition, the social partners with an interest in the issue are basically the same social partners which have agreed the collective agreement or which could have agreed with the collective agreement. In practice, it is usually trade unions which have not signed the collective agreement which challenge illegal agreements. If such trade unions do not exist or do not have an interest in challenging the collective agreement, it remains unchallenged. In theory, an individual could request the judge to reject a clause of a collective agreement on the ground that it is discriminatory (indirect discrimination). However, because that individual cannot access sex-disaggregated data, they would encounter problems when trying to make a *prima facie* case of indirect sex discrimination.

---

<sup>26</sup> Judgement of the Constitutional Court 22/81, of 2 July 1981, ECLI:ES:TC:1981:22.

<sup>27</sup> Judgement of the Constitutional Court 145/1991, of 1 July 1991, ECLI: ES:TC:1991:145.

### **3.5 Multiple discrimination and intersectional discrimination<sup>28</sup>**

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

Multiple discrimination and/or intersectional discrimination are not explicitly addressed in Spanish national legislation and there are no proposals pending which aim to incorporate them.

Anti-discrimination remedies in Spain allow applicants to invoke several grounds of discrimination simultaneously.

The legislative architecture of protection against discrimination in Spain does not favour or impede the judicial recognition of multiple/intersectional discrimination given that the legislation does not recognise its existence.

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

There have not been any multiple discrimination cases. Cases involving several grounds of discrimination are not treated as multiple discrimination: each ground is examined separately.

### **3.6 Positive action**

#### **3.6.1 Definition and explicit prohibition**

Positive action measures are recognised as legitimate in Article 9.2 of the Spanish Constitution, which expressly refers to the obligation of public authorities to remove the obstacles to achieving real equality. Article 11 of the Law on Effective Equality and Article 17 of the Workers' Statute recognise the legal possibility of measures to achieve real equality between women and men. In this way Spain complies with the EU definition found in Article 157 TFEU. Positive action measures can be implemented in the public as well as the private sector and can consist of the preferential hiring of women in professions in which they are under-represented (quota). However, according to Article 17.4 of the Workers' Statute, a preference for female candidates will only be applied if they are equally suitable as the male candidate ('equal conditions of suitability'). Preference can be given by the collective agreement to the 'less represented sex in the concrete group or category'. In this way, Spanish Law respects CJEU doctrine on quotas.

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

Spanish Law considers 'equal opportunities' and 'positive action' as separate but related concepts. On one hand, it is expressly stated in several articles of the Law on Effective Equality that its objective is the achievement of 'equal treatment and opportunities' for women and men (for example, Articles 1, 4 and 5 of the Law on Effective Equality). Thus 'equal opportunities' is the objective. On the other hand, Article 11 of the Law on Effective Equality establishes that positive action is legitimate for the attainment of equality. It follows that the Law on Effective Equality considers that positive action is an instrument for the achievement of equal opportunities.

---

<sup>28</sup> For more information, see 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>.



### 3.6.3 Specific difficulties

The main difficulties in the application of positive action measures in Spain are, as described below, related to a certain tendency of Spanish legislation to establish exclusive or preferential benefits for women to compensate for their greater dedication to the care of their children, which is against the doctrine of the CJEU established in the *Roca Alvarez*, *Griesmar* and *Leone* cases. Two examples of it are given below.

Firstly, there is a pension supplement established in the Spanish social security system exclusively for mothers that may go against what was established by the CJEU in the *Leone* case.<sup>29</sup> In fact, it may go against the provisions of the *Griesmar* case as well.<sup>30</sup> Article 60 of the General Law on Social Security<sup>31</sup> establishes the so-called 'maternity supplement', which consists of an increase directly applicable to the final pension, which is 5 % if the pensioner had two children, 10 % if she had three, and 15 % if she had four or more children. The measure is limited to mothers, of both birth and adopted children, who met the minimum requirements for access to the corresponding pension. Nothing in this regard has been established for fathers, not even for those who would have taken care of their children alone. This supplement is called the maternity supplement but is not intended to compensate the woman for the physical fact of motherhood. In fact, the supplement also applies to mothers in the case of adoption. This is the reason why it could contravene what was established by the CJEU in the *Griesmar* and *Leone* cases. So far there are two preliminary rulings submitted by Spanish Courts which have asked the CJEU whether the Spanish maternity supplement fits into European Union regulations or not.

Secondly, there is the sentence handed down in the *Roca Alvarez* case (resulting from a preliminary ruling from the Superior Court of Justice of Galicia (Spain)).<sup>32</sup> In this judgement the CJEU established that parental leave must be recognised without distinction to fathers and mothers, because if this is not the case, there is discrimination based on sex against women, since it perpetuates care roles. After this ruling, Spain changed the regulation on parental leave for breastfeeding, which was the parental leave that was the subject of the preliminary ruling. Presently, there is no parental leave in Spain that is foreseen to be exclusively or preferably taken by women.

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

Article 75 of the Law on Effective Equality states that the companies which are obliged to submit non-abbreviated profit and loss accounts will have to include on their company boards a number of women to enable them to reach a balanced composition of women and men within a period of eight years from the date of entry into force of the Law. The obligation refers to very large companies, since the only companies that must submit non-abbreviated profit and loss accounts are those with more than 250 workers which have a turnover exceeding EUR 22 million a year.

The concept of a balanced membership of women and men is contained in Additional Provision 1 of the Law on Effective Equality. According to this provision, the composition of women and men is well-balanced when the number of people of one sex does not exceed 60 % of the overall membership of the company board. The deadline established in Article 75 of the Law on Effective Equality was March 2015, but the objective was not reached by far, since recent studies show that in 2018 only 20.3 % of the members of company boards in Spain were women.<sup>33</sup>

<sup>29</sup> Judgement of 17 July 2014, C-173/13, *Maurice Leone and Blandine Leone v Garde des Sceaux*.

<sup>30</sup> Judgement of 29 November 2001, C-366/99, *Joseph Griesmar v Ministre de l'Economie*.

<sup>31</sup> General Law on Social Security, [www.boe.es/buscar/act.php?id=BOE-A-2015-11724](http://www.boe.es/buscar/act.php?id=BOE-A-2015-11724).

<sup>32</sup> Judgement of 30 September 2010, C-104/09, *Pedro Manuel Roca Álvarez v Sesa Start España ETT SA*.

<sup>33</sup> ATREVIA and IESE (2019) *Las mujeres en los Consejos de las empresas cotizadas*, <https://media.iese.edu/research/pdfs/ST-0466.pdf>.

The National Securities Market Commission is the body responsible for overseeing and inspecting the Spanish Securities Market and the activities of the companies involved in it. The chairperson of the National Securities Market Commission is appointed by the Government. The Unified Code of Good Governance of the National Securities Market Commission (*Comisión Nacional del Mercado de Valores*) recommends that listed companies have a selection procedure for non-executive board members which is concrete and verifiable and which ensures that proposals for appointments or re-election are based on an analysis of the needs of the board (Recommendation 14). The Unified Code establishes that the selection system should promote diversity of knowledge, experience and gender on the board and that it should promote the objective that in 2020 the number of female members represents at least 30 % of the total number of members of the non-executive boards of all the listed companies.<sup>34</sup> However, these are only recommendations and there are no established sanctions in the event that the objective is not met.

Article 540.4.c of Royal Legislative Decree 1/2010<sup>35</sup> states that listed companies must mention in their annual reports the procedures they are applying so that their company boards have a balanced composition of women and men. According to this article, if a policy of this type is not applied, a clear and motivated explanation should be given. It is only an obligation to provide information and does not require any results or establish any sanction mechanism.

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

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

## 3.7 Harassment and sexual harassment

### 3.7.1 Definition and explicit prohibition of harassment

Spanish legislation does not use the general term 'harassment' from the Recast Directive, but the more specific 'harassment on the ground of sex'. The prohibition is therefore of sexual harassment and harassment on grounds of sex. This is because Spanish legislation regulates and defines other kinds of discriminatory harassment, such as harassment on the ground of racial or ethnic origin, religion or belief, disability, age or sexual orientation.<sup>36</sup>

Article 7.2 of the Law on Effective Equality defines harassment on the ground of sex as 'any conduct based on the sex of a person, with the purpose or effect of threatening their dignity and creating an intimidating, degrading or offensive environment'.

Harassment on the ground of sex differs from sexual harassment in that it does not concern conduct with a sexual intention, and it includes a wider spectrum of discriminatory labour relations (for example, if company vehicles are not made available to female employees 'because women can't drive').

<sup>34</sup> Comisión Nacional del Mercado de Valores (2015) *Código de buen gobierno de las sociedades cotizadas*, [www.cnmv.es/docportal/publicaciones/codigogov/codigo\\_buen\\_gobierno.pdf](http://www.cnmv.es/docportal/publicaciones/codigogov/codigo_buen_gobierno.pdf).

<sup>35</sup> 2 July 2010, Law of Corporations (as modified by Law 11/2018, of 28 December 2018).

<sup>36</sup> Article 28 of Law 62/2003 of 30 December, [www.boe.es/buscar/act.php?id=BOE-A-2003-23936](http://www.boe.es/buscar/act.php?id=BOE-A-2003-23936).

### 3.7.2 Scope of the prohibition of harassment

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

### 3.7.3 Definition and explicit prohibition of sexual harassment

According to Article 7.1 of the Law on Effective Equality, sexual harassment is, 'Any verbal or physical conduct of a sexual nature, with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, offensive or degrading environment'.

Similar to the regulation of harassment on the ground of sex, and in contrast to the concept contained in the Recast Directive 2006/54/EC, Spanish legislation does not expressly require that sexual harassment should be undesired behaviour. The absence of the term 'undesired' improves the situation of victims of sexual harassment because it makes it easier to prove that sexual harassment has occurred. In fact, the Spanish Constitutional Court has interpreted that certain conduct may be considered as sexual harassment, even though there is no expressed and categorical opposition on the part of the victim and always if the behaviour concerned is serious enough to be considered offensive.<sup>37</sup>

### 3.7.4 Scope of the prohibition of sexual harassment

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

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

Article 7 of the Law on Effective Equality expressly qualifies both sexual harassment and harassment on the ground of sex as discrimination (Article 7.3) as well as the conditioning of any right to the acceptance of sexual harassment or harassment on the ground of sex (Article 7.4).

### 3.7.6 Specific difficulties

The main difficulty with the concept of harassment based on sex is ignorance of it on the part of the population, partly motivated by the fact that the concept is too generic and difficult to differentiate from discrimination based on sex. Nowhere does Spanish legislation establish any threshold for an attack on dignity to be considered harassment. In fact, as far as the author knows, there are no judgements in which a claim is made about harassment based on sex. There are also no sanctions imposed on companies for engaging in harassment based on sex, although Article 8.13 bis of the Law on Offences and Penalties in the Social Order<sup>38</sup> establishes that, when harassment occurs on the grounds of sex, the employer is responsible for a very serious offence liable to a fine of between EUR 6 000 and EUR 187 000.

The main problem in terms of sexual harassment is fear on the part of victims of reporting incidents and not being believed. This fear of reporting is exacerbated by the fact that there is great precariousness in the labour market in Spain and high unemployment, so the fear of losing employment is a major impediment. However, the concept of sexual harassment itself is not the cause of this situation.

<sup>37</sup> Judgement of the Constitutional Court 224/1999 of 13 December 1999, ECLI:ES:TC:1999:224: <http://hj.tribunalconstitucional.es/HJ/es/Resolucion/Show/3966>.

<sup>38</sup> Approved by Royal Legislative Decree 5/2000, of 4 August 2000, [www.boe.es/buscar/act.php?id=BOE-A-2000-15060](http://www.boe.es/buscar/act.php?id=BOE-A-2000-15060).

### **3.8 Instruction to discriminate**

#### **3.8.1 Explicit prohibition**

Article 6.3 of the Law on Effective Equality explicitly states that any order to discriminate, directly or indirectly, on the ground of sex, will be considered discriminatory.

#### **3.8.2 Specific difficulties**

There are no specific difficulties in Spain in relation to the concept of instruction to discriminate, because there are no lawsuits or judgements on the matter as far as the author knows.

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

Discrimination by association or assumed discrimination is not expressly prohibited in Spanish legislation. There have been no cases on this issue but there is no reason to believe that the legislation would not be applied by the Spanish Courts as established by the CJEU in *Coleman*.<sup>39</sup>

### **3.10 Evaluation of implementation**

From the theoretical point of view, Spanish legislation scrupulously complies with the European Union regulations in relation to the prohibition of discrimination based on sex. In fact, most of the concepts in Spanish legislation are the same as the concepts established in the Recast Directive 2006/54/EC. However, the number of lawsuits and judgements in judicial proceedings regarding discrimination based on sex is scarce, which indicates that in practice the concepts have not been adequately implemented or, at least, are not adequately known and applied.

#### **3.11 Remaining issues**

Judicial doctrine regarding discrimination is not consolidated, which leads to ambiguous criteria and general ignorance and this in turn discourages legal claims in this area. For example, cases in which the existence of indirect discrimination has been judicially recognised were cases where the disadvantage affecting women was clear and indisputable.<sup>40</sup> Thus, it remains to be seen how courts will react to cases where the disadvantage experienced by women is less immediately visible or less clear-cut and first needs to be established. In Spain there are no percentage references for a prima facie case of discrimination. There is also no consolidated judicial doctrine that specifically establishes when there is indirect discrimination due to unequal pay for work of equal value. In short, there are fundamental problems with the effectiveness and application of anti-discriminatory concepts, rather than with their mere existence in normative texts.

---

<sup>39</sup> Judgement of 17 July 2008, C-303/06, *S. Coleman v Attridge Law and Steve Law*.

<sup>40</sup> For example, Judgement of the Supreme Court of 18 July 2011, appeal number 133/2010, ECLI: ES:TS:2011:5798:

[www.poderjudicial.es/search/contenidos.action?action=contentpdf&database=TS&reference=6134165&statsQueryId=105339384&calledfrom=searchresults&links=%22133%2F2010%22&optimize=2011003&publicinterface=true](http://www.poderjudicial.es/search/contenidos.action?action=contentpdf&database=TS&reference=6134165&statsQueryId=105339384&calledfrom=searchresults&links=%22133%2F2010%22&optimize=2011003&publicinterface=true).

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

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

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

The statistical series and summary reports 'Women and men in Spain', produced jointly by the Institute of Women and for Equal Opportunities and the National Institute of Statistics, is the only official survey regarding sex equality in the labour market in Spain.<sup>41</sup> The latest data it contains regarding the wage gap are from 2017. This survey does not include any analysis of causes of inequality, or forms or scope of discrimination.

According to the 2019 report, the most frequent annual salary for women (EUR 13 518) represented 77.2 % of the most frequent salary for men (EUR 17 501). When applied to the average salary this percentage was 78.35 % and in relation to the gross average salary, it was 78 %. These percentages show slight increases since the last report with data from 2016. According to the latest EUROSTAT data, which is based on data from 2018, the gender pay gap in Spain stands at 14.0 %, 0.8 points below the EU-27 average.<sup>42</sup>

In 2018 the Foundation for Studies in Applied Economics (*Fundación de Estudios de Economía Aplicada* FEDEA), a cultural organisation mostly financed by large companies, financed a report on gender wage gaps in Spain.<sup>43</sup> The conclusions of the report established that: 'In this sense, our results underscore once again the need for policies and actions both from the public sector and at the company level which should be carried out to achieve gender equality or at least to guarantee equality of opportunities. In particular, there is a need for policies aimed at improving the balance between family life and work life and to foster co-responsibility in couples (universalise education from zero to three years, paternity leave and measures aimed at employment flexibility), policies that avoid discriminatory behaviour in promotion processes (blind CVs reinforcing the laws of equal pay and increasing salary transparency) and policies with the objective of correcting the problem of female under-representation in leadership positions (introducing progressive and temporary gender quota policies).'<sup>44</sup>

Trade unions have conducted studies into the wage gap in Spain. For instance, in 2018, the women's section of the General Union of Workers (UGT) published a report called 'The wage gap persists because women's work is undervalued'.<sup>45</sup> UGT is one of the two most representative unions in Spain. The UGT report includes the following recommendations: (i) An Equal Pay Act should be passed which includes the concept of 'work of equal value' and also includes effective penalties; (ii) Statistics on salaries should include more information, such as the number of variables analysed for all the autonomous communities of Spain, which allows for a comprehensive analysis of real wages received by women and men and the differences between them.

---

<sup>41</sup> 'Mujeres y Hombres en España', statistical series and summary reports, updated in July 2019, [https://www.ine.es/ss/Satellite?L=es\\_ES&c=INEPublicacion\\_C&cid=1259924822888&p=1254735110672&p\\_agename=ProductosYServicios%2FPYSLayout&param1=PYSDetalleGratis](https://www.ine.es/ss/Satellite?L=es_ES&c=INEPublicacion_C&cid=1259924822888&p=1254735110672&p_agename=ProductosYServicios%2FPYSLayout&param1=PYSDetalleGratis).

<sup>42</sup> Eurostat (2018) Gender Pay Gap Statistics, [https://ec.europa.eu/eurostat/statistics-explained/index.php/Gender\\_pay\\_gap\\_statistics](https://ec.europa.eu/eurostat/statistics-explained/index.php/Gender_pay_gap_statistics).

<sup>43</sup> Brindusa Anghel, J. Ignacio Conde-Ruiz and Ignacio Marra de Artiñano (2018) *Brechas salariales de género en España* (Gender wage gaps in Spain), <http://documentos.fedea.net/pubs/eee/eee2018-06.pdf>.

<sup>44</sup> Brindusa Anghel, J. Ignacio Conde-Ruiz and Ignacio Marra de Artiñano (2018) *Brechas salariales de género en España* (Gender wage gaps in Spain), <http://documentos.fedea.net/pubs/eee/eee2018-06.pdf>.

<sup>45</sup> General Unión de Workers (UGT) (2018) *La brecha salarial persiste porque se infravalora el trabajo de las mujeres*, (The wage gap persists because women's work is undervalued), [www.ugt.es/sites/default/files/migration/18-02%20INFORME%20BRECHA%20SALARIAL.pdf](http://www.ugt.es/sites/default/files/migration/18-02%20INFORME%20BRECHA%20SALARIAL.pdf).

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

The report 'Women and men at work', carried out jointly by the Institute of Women and for Equal Opportunities and the National Institute of Statistics is the only official survey on the general situation of equal treatment in the workplace. This report contains statistical data related to eight topics: employment; wages, income and social cohesion; education; health; work and family balance; science, technology and the information society; crime and violence; power and decision-making. The survey does not contain an analysis of the causes of inequality and obstacles.<sup>46</sup>

Studies on the causes of inequality at work and the possible strategies to combat it are mainly academic in nature. The content of each piece of research is incomplete, because it refers to specific topics and uses different approaches and methodologies (depending on the focus of the thesis, research project or paper).

#### 4.1.3 Other issues

There are no further issues to be discussed.

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

There are no pending legislative proposals on equal pay and equal treatment at work.

### 4.2 Equal pay

#### 4.2.1 Implementation in national law

Article 28.1 of the Workers' Statute states that: 'The employer is obliged to pay for work of equal value the same remuneration, paid directly or indirectly, and whatever its nature, whether salary or non-salary items, without discrimination on the basis of sex in any of its items or conditions.'

Royal Decree 6/2019 added a second paragraph to this provision in order to implement the European Commission's Recommendation of 7 March 2014, so that the concept of 'work of equal value' is now clarified in the legislation. This new paragraph reads: 'Work has equal value in relation to other work when the work or tasks involved, the educational, professional or educational conditions, the training required for its exercise, the factors strictly related to its performance and the working conditions in which those activities are carried out are in fact equivalent.'

The Spanish Constitutional Court has issued several rulings,<sup>47</sup> pointing out that systems of professional classification and promotion must rely on criteria which should be neutral and not result in indirect discrimination, e.g. using 'physical effort' or 'arduous work' as a reason to give higher value to men's activities.<sup>48</sup> The Supreme Court also established that workers at the same company doing different work deserve the same payment if the difference is based on the fact that the kind of jobs done mostly by women are undervalued in relation to the jobs occupied mostly by men.<sup>49</sup>

---

<sup>46</sup> Institute of Women and for Equal Opportunities, the National Institute of Statistics (2018) *Women and men at work*, [www.ine.es/ss/Satellite?L=es\\_ES&c=INEPublicacion\\_C&cid=1259924822888&p=1254735110672&pagename=ProductosYServicios%2FPYSLayout&param1=PYSDetalleGratuitas](http://www.ine.es/ss/Satellite?L=es_ES&c=INEPublicacion_C&cid=1259924822888&p=1254735110672&pagename=ProductosYServicios%2FPYSLayout&param1=PYSDetalleGratuitas).

<sup>47</sup> For instance, Judgement of the Constitutional Court 58/1994 of 28 February 1994, ECLI:ES:TC:1994:58: <http://hj.tribunalconstitucional.es/es/Resolucion/Show/2575>.

<sup>48</sup> For instance, Judgement of the Constitutional Court 145/1991, of 1 July 1991, ECLI:ES:TC:1991:145: <http://hj.tribunalconstitucional.es/es/Resolucion/Show/1784>.

<sup>49</sup> Judgement of the Supreme Court of 14 May 2014, appeal number 2328/2013, ECLI: ES:TS:2014:1908 [www.poderjudicial.es/search/contenidos.action?action=contentpdf&datasematch=TS&reference=7084867&links=&optimize=20140602&publicinterface=true](http://www.poderjudicial.es/search/contenidos.action?action=contentpdf&datasematch=TS&reference=7084867&links=&optimize=20140602&publicinterface=true).



#### 4.2.2 Definition in national law

The concept of pay defined in Spanish legislation complies with the definition of Article 157(2) TFEU, since Article 28 of the Workers' Statute considers as pay anything received from the employer, whatever its nature, as described in Section 4.2.1.

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

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

#### 4.2.4 Related case law

There is no leading national case law in Spain with regard to Article 4 of the Recast Directive 2006/54/EC.

#### 4.2.5 Permissibility of pay differences

There is no national legislation or case law in Spain that allows for pay differences.

#### 4.2.6 Requirement for comparators

Article 28.1 of the Workers' Statute does not make any reference to the 'would be' expression, as referred to in the Recast Directive 2006/54/EC, although Article 6 of the Law on Effective Equality contains this expression when defining direct discrimination, in the same way as referred to in the Recast Directive 2006/54/EC. However, the issue of a hypothetical comparator has never arisen in Spain.

The first thing that should be highlighted is the low number of judicial judgements on equal pay that have been issued to date in Spain, particularly in the Supreme Court, and none of them have raised the topic of a hypothetical comparator. The courts often resolve these cases by analysing the identity of functions or their equal value, without considering the possibility of introducing the concept of a hypothetical comparator. In the years of the Spanish transition to democracy, the Central Labour Court (*Tribunal Central de Trabajo*) allowed the possibility of applying hypothetical comparators in equal pay cases.<sup>50</sup> This interpretation had a strictly historical explanation: since it was then lawful that some jobs were occupied exclusively by men or exclusively by women, equal pay cases based on sex could only be resolved if hypothetical comparators were applied. However, the situation in Spain has fortunately changed, so it is difficult to know whether the hypothetical comparator would now be applied by the Spanish Courts. The best way to ensure its application would be a regulatory reform that expressly includes the hypothetical comparator in Article 28 of the Workers' Statute.

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

Article 28 of the Workers' Statute was modified in March 2019 to introduce a definition of work of equal value: 'Work has equal value in relation to other work when the work or tasks involved, the educational, professional or educational conditions, the training required for its exercise, the factors strictly related to its performance and the working conditions in which those activities are carried out are in fact equivalent.'

Before this, Spanish legislation did not lay down parameters for establishing the equal value of the work performed, and the concept of work of equal value had been addressed

---

<sup>50</sup> For instance, Central Labour Court Judgement of 6 June 1984.

through decisions of the Constitutional Court and the Supreme Court. The following paragraphs provide some examples.

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

Judgement of the Supreme Court of 14 May 2014, appeal no. 2328/2013: the Supreme Court considered, in relation to a hotel, that the maids (predominantly women) were performing work of equal value to that of the bartenders (mostly men), on the basis of which they deserved equal pay. The jobs were considered to be of equal value because both were on Level IV of the wage structure set out in the applicable collective agreement.<sup>51</sup>

#### 4.2.8 Other relevant rules or policies

There are no other relevant rules or policies that provide parameters for establishing the equal value of work performed.

#### 4.2.9 Job evaluation and classification systems

Following the adoption of Royal Decree 6/2019, Article 22.3 of the Workers' Statute now provides that:

'The definition of professional groups will follow criteria and systems that, based on a correlation analysis of gender bias, job positions, allocation criteria and remuneration, can guarantee the absence of discrimination, both direct and indirect, between women and men.'

Besides this, Royal Decree 6/2019 modified Article 46 of the Law on Effective Equality so that professional classification and professional promotion are now included as compulsory items in the gender diagnosis that must precede the design of measures for the equality plans. Royal Decree 6/2019 has extended the obligation to develop equality plans to all firms with more than 50 employees, although implementation deadlines are extended to March 2022 for firms with 50-100 employees; March 2021 for firms with 100-150 employees and March 2020 for firms with more than 150 employees.

Previously, job evaluation and promotion mechanisms as well as professional classification systems and job classification clauses in collective agreements had also been the subject of court decisions on indirect sex discrimination cases. Besides the decisions already mentioned in Section 4.2.7 on professional classification, the Judgement of the Supreme Court of 18 July 2011, appeal no. 133/2010 may be recalled. The Supreme Court established that a system of promotion that lacked even minimal transparency constituted indirect discrimination. This was because the lack of transparency led to women stagnating in lower ranked positions, according to statistical analysis.

#### 4.2.10 Wage transparency

Royal Decree 6/2019 of 1 March 2019 established for the first time a mechanism for wage transparency in Spain.

---

<sup>51</sup> Judgement of the Supreme Court of 14 May 2014, appeal no. 2328/2013, ECLI: ES:TS:2014:1908: [www.poderjudicial.es/search/contenidos.action?action=contentpdf&databasematch=TS&reference=7084867&links=&optimize=20140602&publicinterface=true](http://www.poderjudicial.es/search/contenidos.action?action=contentpdf&databasematch=TS&reference=7084867&links=&optimize=20140602&publicinterface=true).



Following the adoption of Royal Decree 6/2019, Article 28.2 of the Workers' Statute now establishes that:

'Employers are obliged to keep a record with the average remuneration of the staff, wage complements and non-salary payments, broken down by sex and distributed by professional groups, professional categories or job positions that are equal or of equal value.'

According to this article, employees have a right to access, through workers' representatives, the wage records of their firm.

In addition, according to Article 28.3 of the Workers' Statute, for all firms with 50 employees or more, if the average remuneration of workers of one sex is 25 % or more higher than the other's average remuneration, the employer is obliged to include a justification in the wage records showing that the difference is unrelated to the sex of the employees.

#### 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

The Recommendation of the European Commission of 7 March 2014, on strengthening the principle of equal pay for men and women through transparency, has been implemented by Royal Decree 6/2019 of 1 March 2019.

Royal Decree 6/2019 introduced, for the first time in the Spanish legal system, the concept of work of equal value in the following way:

'Work has equal value in relation to other work when the work or tasks involved, the educational, professional or educational conditions, the training required for its exercise, the factors strictly related to its performance and the working conditions in which those activities are carried out are in fact equivalent'.

It also introduced a mechanism of wage transparency into Article 28.2 of the Workers' Statute (discussed above in Section 4.2.10) and established the right of employees to have access to the wage records of their firm through workers' representatives.

Following the adoption of Royal Decree 6/2019, Article 22.3 of the Workers' Statute now contains parameters that guide gender-neutral job evaluation and classification systems.

Furthermore, Royal Decree 6/2019 has modified the Law on Effective Equality to introduce, among other things, pay audits. Article 46.2 enumerates pay audits among the required items of the evaluation that must be carried out before an equality plan is drawn up. It also establishes that firms must consult and/or negotiate the process for the evaluation and the equality plan with workers' representatives. Some of the items in the equality plans, including pay audits, will be further regulated by by-laws.

Royal Decree 6/2019 also establishes the creation of a Registry of Enterprise Equality Plans, under the General Direction of the Ministry of Labour and the labour authorities of the Autonomous Communities.

In Spain, Article 12.2 of the Law on Effective Equality gives legal standing in civil, social and administrative proceedings concerning the defence of the right to equality between women and men to physical and legal persons with a legitimate interest, as determined in the laws on procedure. In particular, among its functions, the Institute of Women and for Equal Opportunities receives complaints made in concrete cases of sex discrimination and channels them to the administrative order, supporting discrimination victims so that they

can file their complaints. According to its 2018 Activities Report, the Institute received three formal complaints (*denuncia*) and 10 claims that were referred to another department, namely the Labour Inspectorate or the Autonomous Communities.

#### 4.2.12 Other measures, tools or procedures

Royal Decree 6/2019 of 1 March 2019 establishes a presumption that there is a *prima facie* case of discrimination if, in companies with more than 50 workers, the average remuneration of workers of one sex is at least 25 % higher than the salaries of workers of the other sex. If this happens, the employer must justify the difference in the wage records of the company. This justification must explain that the difference is due to reasons not related to the sex of the workers.

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

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

Article 5 of the Law on Effective Equality expressly states that equal opportunities must be guaranteed for women and men in the public and private sectors in relation to conditions for access to employment or to self-employment, access to all types of vocational training, employment and working conditions (including payment and dismissals), membership of an organisation of workers or employers or any organisation whose members carry on a particular profession. Article 5 of the Law on Effective Equality adequately transposes Article 14 of the Recast Directive 2006/54/EC.

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

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

Article 5 of the Law on Effective Equality basically reproduces Article 14 of the Recast Directive 2006/54/EC, meaning that the material scope is the same. However, there are other articles in Spanish legislation that broaden the scope of the general principle of equal treatment in employment, particularly in relation to access to employment. For instance, Article 22 (*bis*) of the Employment Law<sup>52</sup> stipulates that the Public Employment Agency has an obligation to monitor all job offers so that they do not contain discriminatory criteria for access to employment. In addition, Article 51 of the Law on Effective Equality requires that the composition of women and men in staff recruitment and evaluation bodies for access to public sector employment is well-balanced. The concept of well-balanced is contained in the first Additional Disposition of the Law on Effective Equality: 'For the purposes of the Organic Law 3/2007, balanced composition shall be understood as the presence of women and men so that persons of each sex do not exceed 60 % nor fall below 40 %'.

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

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

---

<sup>52</sup> Law 56/2003 of 16 December 2003, [www.boe.es/buscar/act.php?id=BOE-A-2003-23102](http://www.boe.es/buscar/act.php?id=BOE-A-2003-23102).

#### 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

Dismissal during the new birth-related leave, which has replaced the previous maternity and paternity leaves, or during leave because of risks during pregnancy or breastfeeding, as well as dismissal of pregnant women, from the start of the pregnancy to the start of maternity leave, will be considered null and void except when the reason for the dismissal is a serious fault on the part of the worker or when the dismissal is objectively necessary for reasons not linked to pregnancy and maternity, such as economic or technical reasons.<sup>53</sup> The nullity of the dismissal in these situations is consistent with the consequence of nullity that Article 17 of the Workers' Statute establishes for any discriminatory act or conduct on the part of the employer. In theory, the nullity of the dismissal without cause of a worker who is pregnant or on birth-related leave seemed adequate for the protection against dismissal without cause established by Article 10 of Directive 92/85/EEC. However, in the *Porrás Guisado* case the CJEU established that Spain, with this system, did not guarantee adequate protection as required by Directive 92/85/EEC.<sup>54</sup> In this judgement, the CJEU established that effective protection requires preventive and not only restorative action and that Spain did not adequately comply with the former. To date there has been no regulatory change to introduce such preventive protection, as required by the CJEU, into Spanish law. There has not been a formal recognition that the employer has a general obligation to do everything possible to avoid the dismissal of a pregnant worker.

Protection against non-hiring, non-renewal of a fixed-term contract or non-continuation of a contract does not exist in Spanish law. However, the Spanish Constitutional Court has long established that the non-renewal of a pregnant woman's temporary contract, if the employer does not prove that there is a justified reason for it, means that they must proceed with the renewal.<sup>55</sup>

In this way, a consequence similar to the nullity of dismissal without cause for pregnant women is applied to non-renewal. However, there is no rule which expressly prohibits non-renewal of contract without cause or which establishes preventive protection as required by the CJEU for dismissal without cause in the *Porrás Guisado* case.

#### 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)

In Spain it is impossible to prohibit women from performing certain professional activities. In fact the Constitutional Court has declared some cases to be non-constitutional where women had been denied access to certain jobs, based on possible risks to their health, if those working conditions could be equally hazardous to men.<sup>56</sup> However, certain general maternity protection measures exist in Spanish legislation (e.g. birth-related leave, right to be transferred to a safe job in the case of pregnancy, etc.). In addition, the courts have established that employment conditions must be adjusted to take account of the state of pregnancy. For instance, the Supreme Court has ruled that, if possible, the time and/or

<sup>53</sup> Article 55(5) of the Workers' Statute.

<sup>54</sup> Judgement of 22 February 2018, C-103/16, *Jessica Porrás Guisado v Bankia SA and Others*; the CJEU ruled in this case as follows: 'Article 10(1) of Directive 92/85 must be interpreted as precluding national legislation which does not prohibit, in principle, the dismissal of a worker who is pregnant, has recently given birth or is breastfeeding as a preventative measure, but which provides, by way of reparation, only for that dismissal to be declared void when it is unlawful.'

<sup>55</sup> Judgement of the Constitutional Court 173/1994, of 7 June 1994.

<sup>56</sup> For example, Judgement of the Constitutional Court 229/1992 of 14 December 1992, in relation to the access of women to work activities in mines, [www.boe.es/boe/dias/1993/01/19/pdfs/T00058-00063.pdf](http://www.boe.es/boe/dias/1993/01/19/pdfs/T00058-00063.pdf).

place of a written test for access to a position in the public sector must be adapted to the particular circumstances of a female candidate who has just given birth.<sup>57</sup>

#### 4.3.6 Particular difficulties

There are no particular difficulties to be detected in case law related to the application and implementation of national law in relation to equal access to work, vocational training, employment contracts, working conditions, promotion and protection against dismissal on grounds connected to sex. However, in the view of the author, Spanish legislation could be more effective to ensure effective protection against discrimination based on sex at work. For example, positive action measures could be established to increase the participation of women in jobs where they are under-represented. Likewise, programmes could be increased to encourage women to obtain training in work positions occupied mainly by men. In addition, there is also a need for greater involvement of Labour Inspectorate to detect and sanction discriminatory job offers. Likewise, there is a lack of protection of a preventive character against the dismissal of pregnant women, as required by the CJEU.

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

The positive action measures provided for under Spanish legislation are the following.

- 1) Article 55.5 of the Workers' Statute establishes that, in the event that a pregnant worker is dismissed without cause, regardless of whether the employer knows about her pregnancy or not, the dismissal will be considered null and void and the worker will have the right to return to her job. The same happens when an employer terminates the work contract of a pregnant worker during her probation period. Article 55.5 of the Workers' Statute contains other situations in which dismissal without cause is considered null and void and therefore entitles workers to return to the same job. These situations are related to motherhood and childcare and greatly simplify the prima facie case of discrimination. According to Article 55.5 of the Workers' Statute, a dismissal without cause will be null and void and necessitates reinstatement in the following cases: if a pregnant worker is dismissed, if a person on parental leave to care for a breastfeeding child is dismissed, if a person working reduced hours to care for children or relatives is dismissed, if a person on birth-related leave (which includes maternity and paternity leave) is dismissed or if a person on parental leave is dismissed. This measure has been expressly considered to be positive action by the Constitutional Court.<sup>58</sup>
- 2) There are some measures which are aimed at preventing undeclared work and which have a particular impact on women because they are the ones who do most of these jobs. From this point of view, they are indirectly inclusionary measures. They include deductions to social security contributions as follows: (i) 50 % deduction for 18 months of self-employed social security contributions in the case of new registrations of self-employed family members (Law 3/2012, of 6 July 2012); (ii) 20 % deduction of the employer's contribution for domestic employees. This deduction does not apply in the case of domestic employees who work less than 60 hours per month and who directly assume the obligations of social security contributions; (iii) 45 % deduction in the employer's contribution when a caregiver is hired by a large family, that is one with at least three children (Law 40/2003, of November 18, and successive budget laws). This deduction does not apply in the case of caregivers who work less than 60 hours per month and who directly assume the obligations of social security

<sup>57</sup> Judgement of the Supreme Court of 14 March 2014, appeal number 4371/2012, ECLI: ES:TS:2014:1099: [www.poderjudicial.es/search/contenidos.action?action=contentpdf&database=match=TS&reference=7010892&links=&optimize=20140402&publicinterface=true](http://www.poderjudicial.es/search/contenidos.action?action=contentpdf&database=match=TS&reference=7010892&links=&optimize=20140402&publicinterface=true).

<sup>58</sup> Judgement of the Constitutional Court 173/2013, of 13 October 2013.

contributions. It is difficult to know the effectiveness of these measures given that there are no official data.

- 3) Article 60 of the Law on Effective Equality establishes preferences for access to training for people who return to a job in the Public Administration after birth-related or parental leave. Article 60 states as follows: '1. In order to improve the training of public employees, preference will be given, for one year, in the allocation of places to participate in training courses to those who have joined the active service from maternity or paternity leave, or have re-entered from a situation of leave for reasons of legal guardianship and care for dependent elderly people or people with disabilities'. Likewise, in order to facilitate the promotion of women in the Public Administration, the following is established in Article 60.2 of the Law on Effective Equality: '2. In order to facilitate the professional promotion of women and their access to management positions in the General State Administration and in public bodies linked to or dependent on it, in the calls for the corresponding training courses, at least 40 % of the places will be awarded to women, provided they meet the established requirements'. There are no data about the effectiveness of this measure.
- 4) Article 17.4 of the Workers' Statute states that it is valid to establish quotas in collective agreements for the hiring of women whenever the preference occurs 'under equal conditions of suitability'. These quotas, however, are not common in private companies. In the view of the author, quotas are more frequent in Public Administration appointments, although there are no statistics or data to prove this.
- 5) The Law on contracts in the public sector, Law 9/2017, of 8 November 2017, establishes that mechanisms can be established by contracting Public Administrations which favour public contractors which have established positive action mechanisms in favour of hiring women and which favour the reconciliation of different responsibilities.
- 6) Article 75 of the Law on Effective Equality states that companies which are obliged to submit non-abbreviated profit and loss accounts must try to include on their company boards sufficient women to allow them to reach a balanced number of women and men over a period of eight years from the date of entry into force of the Law. The objective set in Article 75 of the Law on Effective Equality is to reach a balanced number of women and men. According to the Law on Effective Equality, the composition of women and men is well-balanced when the number of people of one sex does not exceed 60 % of the membership of the board. This means that the figure to be reached is 40 %. It is a soft target, since the companies only have an obligation to 'try' to reach it. The deadline was eight years from the date of entry into force of the Law. That point arrived in 2015 and the goal was not met.
- 7) According to Law 43/2006, of 29 December 2006, employers who hire women who are disabled receive special discounts in social security contributions which are higher for women than for men. The amount of the discounts varies, depending on the age of the worker and the severity of their disability, but in all cases the discount for hiring women is higher than for hiring men.
- 8) The concept of a balanced number of women and men is contained in Additional Provision 1 of the Law on Effective Equality. According to this provision, the proportion of women and men is well-balanced when the number of people of one sex does not exceed 60 % of the overall number. The objective of a balanced proportion of women is established for company boards (as described above) but the same provision is also made for other areas. The Law on Effective Equality recommends a balanced proportion of women and men (at least 40 % women) in the following fields: political candidate lists and decision-making bodies (Article 14

of the Law on Effective Equality); members of the governing bodies of the General State Administration and of the public entities linked to or dependent on it (Article 52 of the Law on Effective Equality); and tribunals and bodies for the selection of the staff of the General State Administration and public entities linked to or dependent on it (Article 53 of the Law on Effective Equality).

#### **4.4 Evaluation of implementation**

National law and case law implementing EU law with regard to access to work, working conditions and dismissal are theoretically correct.

#### **4.5 Remaining issues**

Although Spanish legislation on the issue of access to work, working conditions and dismissal is theoretically correct, very few claims have been filed for discrimination on the ground of sex, particularly in the area of wage discrimination, promotion discrimination and access to work. This suggests that there are problems with detection and with claims of discrimination practised within companies. The precarious situation in which workers find themselves in Spain, especially in positions of lower levels of responsibility, which are occupied mostly by women, means that judicial claims are rarely made. Similarly, the Labour Inspectorate does not appear to have a decisive role in the detection, monitoring and sanctioning of discriminatory behaviour, although in a few cases the Labour Inspectorate has initiated judicial proceedings of notable interest.<sup>59</sup>

---

<sup>59</sup> For example, Judgement of the Supreme Court of 18 July 2011, appeal number 133/2010, which condemned a well-known department store known in Spain for discrimination in the promotion of women.

## **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)<sup>60</sup>**

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

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

The only official survey on the practical difficulties linked to work-life balance is the 'Women and men in Spain' report, produced by the Institute of Women and for Equal Opportunities and the National Institute of Statistics. The survey was last updated in May 2020. It only provides statistical data and does not analyse possible causes or possible solutions. Below are some of the points it raises in relation to work-life balance.

- 1) In Spain in 2019, the employment rate of men aged 25 to 49 years without children under 12 years was 85.3 %; for those with children in that age range the employment rate was higher (90.1 %). The highest employment rate among men is reached with two children under 12 years old (90.9 %). In the case of women, as the number of children under 12 increases, their employment rate decreases. For women between 25 and 49 years of age without children of that age, the employment rate in 2019 was 75.1 % and this is reduced to 69.1 % for those with children under 12 years of age. With a child under 12, the figure is 71 % and the employment rate is 69.2 % for women with two children under 12. With three children or more, the rate is 48.3 %. This figure is the only one that has dropped (from 50.3 %) as compared to the employment rates in 2017 contained in the last report.<sup>61</sup> From this data, it is possible to conclude that the tasks relating to the care of children fall mostly to women and that for many of care work is not compatible with paid work. In the opinion of the author, this may be due both to the greater difficulties for women in finding employment when they have children and to the tendency to abandon work while raising children, which at the same time shows that there may be problems with reconciling different responsibilities.
- 2) The percentage of men and women between the ages of 25 and 49 who work part-time involuntarily, that is because they cannot find full-time work, is considerably higher in Spain than in the EU-28. In 2019, 52.4 % of women aged 25 to 49 who worked part-time did so because they could not find a full-time job, compared to 21.9 % in the EU-28. In men this percentage is significantly higher: in 2019, 59.6 % of men working in Spain part-time did so because they could not find a full-time job. In the EU-28 in 2019, this percentage was 40 %.<sup>62</sup> In the opinion of the author, the fact that there is such a high percentage of women and men who work part-time involuntarily, together with the figures regarding the decreasing employment rates of women with children, suggests that part-time work is not an employment pattern related to family reconciliation but to the precarisation of the labour market. This is further supported by the comparison of the figures for women who work part-time in the EU-28 because they are caregivers or have family obligations (42.7 %) as compared to the same categories in Spain (21.1 %).

<sup>60</sup> See Masselot, A. (2018), *Family leave: enforcement of the protection against dismissal and unfavourable treatment* European network of legal experts in gender equality and non-discrimination, available at <https://www.equalitylaw.eu/downloads/4808-family-leave-enforcement-of-the-protection-against-dismissal-and-unfavourable-treatment-pdf-962-kb> and McColgan, A. (2015), *Measures to address the challenges of work-life balance in the EU Member States, Iceland, Liechtenstein and Norway* European network of legal experts in gender equality and non-discrimination, available at <https://www.equalitylaw.eu/downloads/3631-reconciliation>.

<sup>61</sup> Survey 'Women and men in Spain', section on 'Incidence in employment due to the existence of children', [www.ine.es/ss/Satellite?L=es\\_ES&c=INESeccion\\_C&cid=1259925463094&p=1254735110672&pagename=ProductosYServicios%2FPYSLayout&param1=PYSDetalle&param3=1259924822888](http://www.ine.es/ss/Satellite?L=es_ES&c=INESeccion_C&cid=1259925463094&p=1254735110672&pagename=ProductosYServicios%2FPYSLayout&param1=PYSDetalle&param3=1259924822888).

<sup>62</sup> Survey 'Women and men in Spain', section on 'Reasons for part-time work according to age groups', [www.ine.es/ss/Satellite?L=es\\_ES&c=INESeccion\\_C&cid=1259925461773&p=1254735110672&pagename=ProductosYServicios%2FPYSLayout&param1=PYSDetalle&param3=1259924822888](http://www.ine.es/ss/Satellite?L=es_ES&c=INESeccion_C&cid=1259925461773&p=1254735110672&pagename=ProductosYServicios%2FPYSLayout&param1=PYSDetalle&param3=1259924822888).



- 3) In 2019, the main reason alleged by women for working part-time due to caring for dependants is the lack of, or not being able to afford, adequate childcare (46.7 %). 3.3 % claim not to have or not to be able to afford adequate services for the care of sick, disabled or elderly adults and 2.1 % allege both reasons. A total of 47.9 % of men claim the fact of not being able to afford adequate childcare services as the main reason for working part-time. 4.7 % of men claim not to have or not to be able to afford adequate services for the care of sick, disabled or elderly adults and 5.8 % allege both reasons.<sup>63</sup> In the opinion of the author, these data may indicate that there is no adequate public or business investment in services for the care of children or dependants.

#### 5.1.2 Other issues

The latest official data from the Labour Force Survey<sup>64</sup> on leave of absence are from 2010. They show that women took most of the parental leave (*excedencia*) that year. The results were the following: 8 100 male workers and 11 500 female workers took parental leave (*excedencia*) of less than one month; 4 100 male workers and 43 700 female workers took parental leave (*excedencia*) of between one and three months; 900 male workers and 42 700 female workers took parental leave (*excedencia*) of between three and six months; 1 000 male workers and 70 800 female workers took parental leave (*excedencia*) of between six and twelve months; 700 male workers and 38 000 female workers took parental leave (*excedencia*) of more than 12 months. In the opinion of the author, the imbalance between parental leave (*excedencia*) requested by women and men could indicate that there are no effective policies promoting co-responsibility.

Another important factor is the birth rate in Spain, which is one of the lowest in the world. According to the latest available data from the National Institute of Statistics, the birth rate in Spain in 2019 was 7.6 births per 1 000 inhabitants, a figure that has dropped by 3.68 points since 2008.<sup>65</sup> In the opinion of the author, these data could also serve to reflect the difficulties that families have in making paid work compatible with family life in Spain.

Women with higher levels of education are strongly represented in the labour market, with an upward trend. In 2018, 52.1% of individuals with higher education were women, practically the same level as in 2017 and three points more than in 2007 (3.2 pp.). Economically active women of that educational level have increased by 34.4% since 2007, compared to a smaller increase in men with this level of education (18.3%). For women with lower levels of education, their presence in the workplace is lower: they represent 39.5 % of the total low studies jobs, with a downward trend. The figure has reduced by 10.1 % compared to 2007.<sup>66</sup>

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

Spanish legislation on work-life balance issues has recently been modified by Royal Decree 6/2019, of 1 March 2019, with the explicit intention of ensuring (more) effective equality between women and men in employment.

Spanish legislation on work-life balance has two fundamental elements: on the one hand, the regulation establishes several types of parental leave, including the right to reduce

<sup>63</sup> Survey 'Women and men in Spain', section on 'Working people caring for dependants', [www.ine.es/ss/Satellite?L=es\\_ES&c=INESeccion\\_C&cid=1259925472720&p=1254735110672&pagename=ProductosYServicios%2FPYSLayout&param1=PYSDetalle&param3=1259924822888](http://www.ine.es/ss/Satellite?L=es_ES&c=INESeccion_C&cid=1259925472720&p=1254735110672&pagename=ProductosYServicios%2FPYSLayout&param1=PYSDetalle&param3=1259924822888).

<sup>64</sup> [http://www.ine.es/jaxi/Tabla.htm?path=/t22/e308/meto\\_05/modulo/base\\_2011/2010/10/&file=01019.px&L=0](http://www.ine.es/jaxi/Tabla.htm?path=/t22/e308/meto_05/modulo/base_2011/2010/10/&file=01019.px&L=0).

<sup>65</sup> National Institute of Statistics, Birth Indicators 2017 [www.ine.es/jaxiT3/Datos.htm?t=1433](http://www.ine.es/jaxiT3/Datos.htm?t=1433).

<sup>66</sup> Ministry of Labour, Migration and Social Security, the situation of women in the labour market in 2018, [www.mitramiss.gob.es/es/sec\\_trabajo/analisis-mercado-trabajo/situacion-mujeres/situacion\\_mujer\\_trabajo\\_2018.pdf](http://www.mitramiss.gob.es/es/sec_trabajo/analisis-mercado-trabajo/situacion-mujeres/situacion_mujer_trabajo_2018.pdf).



working hours. On the other hand, the legislation establishes a right for workers with caring responsibilities to adapt their working day and conditions of work to facilitate care-giving (both will be described below).

Until its reform in 2019, the latter right was limited and conditional and had very little impact. Parental leave is of greater significance; however, there is a strong division of care work in Spain, and this is reflected in the use of leave and in the interruption of working careers too. According to the latest data (2018) from the National Institute of Statistics,<sup>67</sup> 28.13 % of workers with children have interrupted their career at some point to care for them. In the case of men, 86.93 % of the interruptions were of less than six months, whereas only 49.87 % of women have interrupted their work for less than six months. Among women, 20.87 % interrupted their careers for between six months and one year, and 9.36 % between one and two years. While 17.7 % of women had interruptions of more than two years, only 2.76 % of men did. The Institute of Women and for Equal Opportunities has published data on the use of parental leave and leave to care for other dependent relatives (*excedencia*) which show, from 2007 to 2017, that a parental leave was used consistently at a rate of over 92 % by women.<sup>68</sup> In the case of leave for taking care of other relatives, the rate of use by women was over 83 % for the same period.<sup>69</sup>

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

There are no pending legislative proposals.

The reform of 2019 is still being implemented and the debate is still mainly academic. Within the academic literature, the reactions are mixed and, necessarily, cautious.<sup>70</sup> On the one hand, it is appreciated that the Royal Decree sees the need to introduce changes that make the Law on Effective Equality more effective. The reform touches on some important issues, closely related to women's discrimination in the labour market. It introduces the 'birth-related' leave as an individual, non-transferrable right, which necessarily affects perceptions of gendered division of family responsibilities. It also gives an answer to the discussion of whether the differentiated treatment of fathers in relation to the care of an infant is sex discrimination in relation to them and/or indirectly sex discrimination against women.<sup>71</sup> It also introduces the possibility of rendering work time flexible to meet the needs of work-life reconciliation. Finally, it takes into account the importance of tools like equality plans or collective bargaining as ways to clear discriminatory practices without putting the burden on the shoulders of individual claimants.

On the other hand, a Decree-Law<sup>72</sup> is not the most appropriate form to ensure the detailed and careful attention that reconciliation issues require to be effectively mainstreamed through all the relevant laws and statutes, as the Royal Decree intended. There has been a lack of attention to important issues, such as guarantees and procedural issues. Moreover, in some aspects, the reform of parental leave could have gone further, with easy changes that have not been introduced, giving the impression that the text was rather rushed.

<sup>67</sup> [https://www.ine.es/prensa/epa\\_2018\\_m.pdf](https://www.ine.es/prensa/epa_2018_m.pdf).

<sup>68</sup> Excedencia por cuidado de hijas/os (parental leave), [http://www.inmujer.es/estadisticasweb/6\\_Conciliacion/6\\_2\\_ExcedenciasPermisosyReduccionesdeJornada/w121.xls](http://www.inmujer.es/estadisticasweb/6_Conciliacion/6_2_ExcedenciasPermisosyReduccionesdeJornada/w121.xls); Excedencia por cuidado

<sup>69</sup> Excedencia por cuidado de familiares (leave for taking care of relatives), [http://www.inmujer.es/estadisticasweb/6\\_Conciliacion/6\\_2\\_ExcedenciasPermisosyReduccionesdeJornada/w120.xls](http://www.inmujer.es/estadisticasweb/6_Conciliacion/6_2_ExcedenciasPermisosyReduccionesdeJornada/w120.xls).

<sup>70</sup> Ballester Pastor, M. A. (2019), 'El RDL 6/2019 para la garantía de la igualdad de trato y de oportunidades entre mujeres y hombres en el empleo y la ocupación: Dios y el diablo en la tierra del sol (Royal Decree 6/2019 for the guarantee of equal treatment and opportunities between women and men in employment and occupation: God and the devil in the land of the sun)', *Femeris*, vol. 4, no. 2, pp. 14-38.

<sup>71</sup> Judgement of the Constitutional Court 138/2018, of 17 December, ECLI:ES:TC:2018:138.

<sup>72</sup> Royal Decree Laws are meant to introduce urgent measures.

## 5.2 Pregnancy and maternity protection

### 5.2.1 Definition in national law

There is no definition of pregnant worker in Spanish legislation.

### 5.2.2 Obligation to inform employer

It is not compulsory for a pregnant woman to inform her employer about her pregnancy.

### 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

The Supreme Court ruled in the same sense as the CJEU in a case similar to the one that gave rise to the judgement issued in the *Mayr* case.<sup>73</sup> Indeed, the Supreme Court established the nullity of the dismissal without reason of a worker who was at an advanced stage of *in vitro* fertilisation treatment, although the egg had not yet been transferred to the uterus.<sup>74</sup> The Supreme Court considered that the same protection should be applied as that established for cases of pregnancy.

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

Protection during pregnancy, after a recent birth and during breastfeeding periods is regulated in Article 26 of the Prevention of Labour-Related Accidents Law. This Article states as follows:

'1. The assessment of the risks [for the safety and health of workers] ... must include determination of the nature, degree and duration of exposure of pregnant workers or workers who have recently given birth to agents, processes or working conditions liable to have an adverse effect on the health of the workers or the foetus in any activity likely to present a specific risk. If the results of the assessment reveal a risk to the health or safety or a possible effect on the pregnancy or breastfeeding of such workers, the employer shall adopt the measures necessary to avoid exposure to that risk by adjusting the working conditions and the working hours of the worker concerned. Such measures shall include, where necessary, the non-performance of night work or shift work. 2. Where the adjustment of working conditions or working hours is not feasible or where, despite such adjustment, working conditions are liable to have an adverse effect on the health of the pregnant worker or the foetus and a certificate to that effect is issued by the medical department of the [INSS] or the mutual insurer, depending on the entity with which the company has agreed cover for occupational risks, together with a report from the Spanish National Health Service (*Servicio Nacional de Salud*) medical practitioner who treats the worker, the latter will have to perform a different job or role which is compatible with her condition. After consultation with the workers' representatives, the employer must determine the list of jobs that are risk-free for these purposes. A move to another job or role shall be effected in accordance with the rules and criteria applied in cases of functional mobility and shall take effect until such time as the worker's state of health allows her to return to her previous job. (...) 3. If such a move to another job is not technically or objectively feasible or cannot reasonably be required on substantiated grounds, the worker concerned may have her contract suspended on the grounds of risk during pregnancy, pursuant to Article 45.1.d. of the Workers' Statute, for the period necessary for the protection of her health and safety and for as long as it remains impossible for her to return to her previous job or move to

<sup>73</sup> Judgement of 26 February 2008, C-506/06, *Sabine Mayr v Bäckerei und Konditorei Gerhard Flöckner OHG*.

<sup>74</sup> Judgement of the Supreme Court of 4 April 2017, appeal number 1584/2017, ECLI: ES:TS:2017:1584: [www.poderjudicial.es/search/contenidos.action?action=contentpdf&database=TS&reference=8003649&statsQueryId=106305208&calledfrom=searchresults&links=&optimize=20170502&publicinterface=true](http://www.poderjudicial.es/search/contenidos.action?action=contentpdf&database=TS&reference=8003649&statsQueryId=106305208&calledfrom=searchresults&links=&optimize=20170502&publicinterface=true).

another job compatible with her condition. 4. The provisions of paragraphs 1 and 2 of this article shall also be applicable during the period of breastfeeding if the working conditions are liable to have an adverse effect on the health of the woman concerned or her child and a certificate to that effect is issued by the Social Security medical department or the mutual insurer, depending on the entity with which the company has agreed cover for occupational risks, together with a report from the National Health Service medical practitioner who treats the worker or her child. In addition, the worker concerned may have her contract suspended on the grounds of risk while breastfeeding children under nine months old, pursuant to Article 45.1.d. of the Workers' Statute, if the conditions set out in paragraph 3 of this article are satisfied.'

In this way, protection during pregnancy, after a recent birth and during breastfeeding periods includes adapting working conditions or changing the job or function when there is a health or safety risk. Previously, the employer had the obligation to assess the nature, degree and duration of exposure to any risk that could have any possible effects on pregnancy or breastfeeding. If these measures are not possible or adequate, according to the Workers' Statute, the employee affected can be put in a situation where the contract is suspended (which will last as long as is necessary for the protection of health or safety or until maternity leave starts) on account of risk during pregnancy or breastfeeding (for children younger than nine months), with the right to a social security payment equivalent to 100 % of the previous contribution base, which basically equals her previous salary (Article 186 of the General Law on Social Security). Given that, in the case of breastfeeding, the paid leave will last only until the child is nine months old, if the mother decides to continue breastfeeding and the risk has not disappeared, she will have to ask for unpaid parental leave. These articles appear to adequately implement Articles 4 to 7 of Directive 92/85/EC.

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

In both the *Otero Ramos* and *Gonzalez Castro* cases the CJEU stated that, in the case of a risk to pregnancy in the workplace, Spain must adequately guarantee the reversal of the burden of the proof if a worker has provided evidence suggesting that the risk assessment of her work was not conducted in accordance with the requirements of Article 4(1) of Directive 92/85.<sup>75</sup> After these judgements of the CJEU the Supreme Court changed its previous doctrine and transferred to the employer the burden of proving that the work undertaken by the worker was compatible with breastfeeding.<sup>76</sup>

#### 5.2.6 Prohibition of night work

Spanish legislation does not prohibit night work by workers during their pregnancy or for a period following childbirth but it establishes certain protections for both situations. Article 26 of the Prevention of Labour-Related Accidents Law states that, if the results of the evaluation reveal a risk to health and safety or a possible impact on the pregnancy or breastfeeding of the worker, the employer will take the necessary measures to avoid exposure to that risk, through an adaptation of the working conditions or time of the affected worker. These measures shall include, when necessary, the non-performance of night work or shift work. With this formulation, Article 26 meets the provisions of Article 7 of Directive 92/85/EC in relation to night work.

<sup>75</sup> Judgement of 19 October 2017, C-531/15 *Elda Otero Ramos v Servicio Galego de Saúde and Instituto Nacional de la Seguridad Social*; Judgement of 19 September 2018, C-41/17, *Isabel Gonzalez Castro v Mutua Umivale*.

<sup>76</sup> Judgement of the Supreme Court of 26 June 2018, appeal number 1398/16, ECLI: ES:TS:2018:2651: [www.poderjudicial.es/search/contenidos.action?action=contentpdf&datasematch=TS&reference=8454467&statsQueryId=106305728&calledfrom=searchresults&links=&optimize=20180719&publicinterface=true](http://www.poderjudicial.es/search/contenidos.action?action=contentpdf&datasematch=TS&reference=8454467&statsQueryId=106305728&calledfrom=searchresults&links=&optimize=20180719&publicinterface=true).

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

There is no case law on the prohibition of night work apart from the judgement of the CJEU in the *Gonzalez Castro* case which was the consequence of a preliminary ruling from the High Court of Justice of Galicia, Spain. The CJEU established in this case that a worker who does shift work in the context of which only part of their duties are performed at night must be regarded as performing work during 'night time' and must therefore be classified as a 'night worker' within the meaning of Directive 2003/88/EC, which defines a night worker as 'any worker, who, during night time, works at least three hours of his daily working time as a normal course' and 'any worker who is likely during night time to work a certain proportion of his annual working time'.

### 5.2.8 Prohibition of dismissal

Dismissal during maternity leave or during leave because of risks during pregnancy or breastfeeding, as well as dismissal of pregnant women, from the start of the pregnancy to the start of maternity leave, will be considered null and void except when the reason for the dismissal is a serious fault on the part of the worker or when the dismissal is objectively necessary for reasons not linked to pregnancy and maternity, such as economic or technical reasons.<sup>77</sup> The Constitutional Court has established that dismissal in these situations is automatically nullified if there is no just cause for dismissal, even if the employer has no knowledge of the pregnancy.<sup>78</sup>

However, the doctrine of the Constitutional Court exempted the dismissal of a pregnant woman during the probationary period, which was not automatically considered null and void, if the employer argued that they were not aware of the pregnancy.<sup>79</sup> This could result in ineffective protection against the termination of contracts of pregnant women during their probationary period, which could potentially counteract the principles laid down in Directives 92/85/EC and 2006/54/EC. This situation was addressed by Royal Decree 6/2019 of 1 March 2019, so that the dismissal of a pregnant worker during the probationary period shall be null and void, unless it is due to reasons unrelated to pregnancy and maternity (Article 14.2, Workers' Statute).

### 5.2.9 Redundancy and payment during maternity leave<sup>80</sup>

When an employee is dismissed during her maternity leave, for redundancy or for any other reason, the social security payment for maternity leave will continue until the end of the maternity leave period.<sup>81</sup> This also applies if it is possible to start receiving the maternity leave social security payment when receiving the unemployment insurance payment, in which case the unemployment coverage will be suspended until the maternity leave social security payment finishes.<sup>82</sup> This is a benefit for the worker since the social security payment during maternity leave is higher than the unemployment insurance payment, especially considering the fact that the duration of the unemployment insurance coverage will not be affected.

---

<sup>77</sup> Article 55(5) of the Workers' Statute.

<sup>78</sup> Judgement of the Constitutional Court 92/2008 of 21 July 2008, ECLI:ES:TC:2008:92: <http://hj.tribunalconstitucional.es/HJ/es/Resolucion/Show/6324>.

<sup>79</sup> Judgement of the Constitutional Court 173/2013 of 10 October 2013, ECLI:ES:TC:2013:173: <http://hj.tribunalconstitucional.es/HJ/es/Resolucion/Show/23619>.

<sup>80</sup> Royal Decree 6/2019 of 1 March 2019 substituted maternity leave for a birth-related leave. However, there are still several pieces of applicable legislation where the name has not yet been modified.

<sup>81</sup> Article 8(1) of the Royal Decree 295/2009, of 6 March 2009, [www.seg-social.es/Internet\\_1/Normativa/116462?ssSourceNodeId=1139#A10](http://www.seg-social.es/Internet_1/Normativa/116462?ssSourceNodeId=1139#A10).

<sup>82</sup> Article 10(1) of the Royal Decree 295/2009.

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

In the case of dismissals for redundancy, the Supreme Court has ruled that the employer must justify the specific reason for including a pregnant woman in the group of people dismissed. If the employer fails to do so, the dismissal of the claimant must be declared null and void.<sup>83</sup>

### 5.2.11 Case law on the protection against dismissal

The judgement of the CJEU issued in the *Porras Guisado* case was fundamental.<sup>84</sup> This ruling was the result of a preliminary ruling by the Superior Court of Catalonia, Spain. The preliminary question was raised because, according to the doctrine of the Spanish Supreme Court then applied, the employer should not specify at the time of individual dismissal after a collective dismissal, the specific causes for which a particular worker had been selected to be made redundant. When this doctrine was applied in the case of pregnant workers, the result was that the worker was not sufficiently protected and, therefore, it could be understood that the provisions of Directive 92/82/EC were not complied with. The CJEU stated in its judgement that national legislation which allows an employer to dismiss a pregnant worker in the context of a collective redundancy without giving any grounds other than those justifying the collective dismissal is not against Directive 92/85/EC only if 'the objective criteria chosen to identify the workers to be made redundant are cited'.<sup>85</sup> Subsequently, the Supreme Court expressly established the need to specify the specific reason for the selection of the pregnant worker in case of objective dismissal for redundancy.<sup>86</sup> Royal Decree 6/2019 of 1 March 2019 introduced this requirement to Article 53.4 of the Workers' Statute.

## 5.3 Maternity leave

Royal Decree 6/2019 of 1 March 2019 modified the regulation of maternity leave. From April 2019, maternity and paternity leave no longer exist, instead these forms of leave have been replaced by a single 'birth-related leave' (*permiso por nacimiento*) with similar features for each parent. There is a transition period until 2021, when both parents' leave entitlements will be fully equalised.

However, the modified regulation for civil servants and recruited staff in the Public Administration distinguishes between the birth-related leave for the biological mother (*permiso por nacimiento para la madre biológica*) and the leave for the other parent (*permiso para progenitor diferente de la madre biológica*). The resulting protection scheme is nevertheless similar, with the differences explained below.

### 5.3.1 Length

Article 48.4 of the Workers' Statute states that:

'birth, which includes delivery and care of an infant under 12 months, will suspend the work contract of the biological mother for 16 weeks, of which the first 6 weeks

<sup>83</sup> Judgement of the Supreme Court of 14 January 2015, appeal number 104/2014, ECLI: ES:TS:2015:711: [www.poderjudicial.es/search/doAction?action=contentpdf&databasematch=TS&reference=7324092&links=&optimize=20150313&publicinterface=true](http://www.poderjudicial.es/search/doAction?action=contentpdf&databasematch=TS&reference=7324092&links=&optimize=20150313&publicinterface=true); Judgement of the Supreme Court of 20 July 2018, appeal number 2708/16, ECLI: ES:TS:2018:3248: [www.poderjudicial.es/search/contenidos.action?action=contentpdf&databasematch=TS&reference=8515525&statsQueryId=106519600&calledfrom=searchresults&links=&optimize=20181001&publicinterface=true](http://www.poderjudicial.es/search/contenidos.action?action=contentpdf&databasematch=TS&reference=8515525&statsQueryId=106519600&calledfrom=searchresults&links=&optimize=20181001&publicinterface=true).

<sup>84</sup> Judgement of 22 February 2018, C-103/16, *Jessica Porras Guisado v Bankia SA and Others*.

<sup>85</sup> Judgement of 22 February 2018, C-103/16, *Jessica Porras Guisado v Bankia SA and Others*.

<sup>86</sup> Judgement of the Supreme Court of 20 July 2018, appeal number 2708/16, ECLI: ES:TS:2018:3248: <http://www.poderjudicial.es/search/contenidos.action?action=contentpdf&databasematch=TS&reference=8515525&statsQueryId=106519600&calledfrom=searchresults&links=&optimize=20181001&publicinterface=true>.

immediately after delivery will be compulsory and have to be taken full-time, to ensure the protection of the health of the mother’.

The other 10 weeks can be taken full-time or part-time, as a single period or interrupted from the end of the compulsory six-week period until the child is 12 months old. The biological mother can take up to four weeks of the leave before the estimated date of delivery.

The duration of the birth-related leave is increased by two weeks (one for each parent) if the child has a disability. It is also increased by two weeks (one for each parent) for every further child in a multiple birth. Finally, it may be increased by as many days as the child requires to remain in hospital, if due to any health condition the child has to be in hospital for more than seven days after birth, with a limit of 13 weeks.

Civil servants and recruited staff in the Public Administration have a similar leave of 16 weeks, which can be extended in the same cases of disability, multiple birth and hospitalisation. The first six weeks of the leave are also compulsory and must be taken full-time and without interruption immediately after delivery. Differently from the regulation in the Workers’ Statute, the non-accumulated use of the remaining 10 weeks is possible only if both parents are working.<sup>87</sup>

### 5.3.2 Obligatory maternity leave

Article 48.4 of the Workers’ Statute and Article 49 of the Basic Statute of Civil Servants stipulate that it is compulsory to take the first six weeks immediately after delivery as leave.

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

Article 26 of the Prevention of Labour-Related Accidents Law expressly states that, if a pregnant or breastfeeding woman is transferred to another position because the original one was hazardous for her pregnancy or breastfeeding, the employer must respect the provisions established in Spanish legislation on transfers, which is basically what is regulated in Article 39 of the Workers’ Statute. This establishes that the transfer must be to an equivalent position. In this case, the woman will have the right to have, at least, the same salary as she was receiving before the transfer took place. If the paid leave for risk during pregnancy or breastfeeding applies, the mother will have the right to return to her previously held post, according to Article 48.1 of the Workers’ Statute. In addition, Article 48.4 of the Workers’ Statute expressly ensures that any employment rights relating to the employment contract will be guaranteed to the worker during her leave for risk during pregnancy or breastfeeding.

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

Article 48.9 of the Workers’ Statute expressly ensures that any employment rights relating to the employment contract will be guaranteed to the worker during maternity leave. The Supreme Court has pointed out that women on maternity leave cannot suffer any reduction in their annual salary as a consequence of their absence, not even if a concrete amount of their salary was variable in relation to the effective working days during the year.<sup>88</sup> The Constitutional Court has established as well that motherhood and pregnancy must not pose any prejudice to a woman’s career, including the woman’s seniority, which means

<sup>87</sup> Article 49 of the Basic Statute of Civil Servants (*Real Decreto Legislativo 5/2015, por el que se aprueba el texto refundido de la Ley del Estatuto Básico del Empleado Público*), 30 October 2015, <https://www.boe.es/buscar/act.php?id=BOE-A-2015-11719&tn=1&p=20190307#a49>.

<sup>88</sup> Judgement of the Supreme Court of 27 May 2015, appeal number 103/2014, ECLI: ES:TS:2015:2628: [www.poderjudicial.es/search/doAction?action=contentpdf&database=match=TS&reference=7418210&links=%22103/2014%22&optimize=20150626&publicinterface=true](http://www.poderjudicial.es/search/doAction?action=contentpdf&database=match=TS&reference=7418210&links=%22103/2014%22&optimize=20150626&publicinterface=true).



that the initial date of the contract must be the one that she would have had if she had not been pregnant.<sup>89</sup> In another judgement, the Constitutional Court has also established that delaying the promotion of a female worker to a full-time position due to her maternity leave is unconstitutional.<sup>90</sup> The Supreme Court has also guaranteed that when a pregnant woman has to be transferred to a safer workplace because of a risk to her pregnancy, the entirety of her previous pay must be maintained, including the payment of the overtime that she could not do in the new position.<sup>91</sup>

### 5.3.5 Level of pay or allowance

There are two kinds of maternity allowance: contributory and non-contributory. Contributory maternity allowance is a social security benefit, so it is paid by the State. Contributory maternity allowance is higher than pay during sick leave, since employees are entitled to remuneration equivalent to 100 % of the previous month's social security contribution base (*base de cotización*).<sup>92</sup> The contribution base of the previous month is usually the same amount as the salary for the previous month, so workers on contributory maternity allowance basically receive the same amount as they received when they were actively working. Theoretically, no ceiling is applied, although given that contributory maternity allowance depends on the previous social security contribution base and given that this base has a maximum, the maximum monthly amount that a beneficiary of maternity allowance could receive in 2019 was EUR 4 070.10.

A non-contributory maternity allowance is established by the social security system if a working mother does not comply with the required periods of social security contribution. In this case, she would receive a one-off payment for the amount equivalent to 42 days of her previous social security contribution base, with a ceiling of 42 times a daily indicator called the Public Indicator of Multiple Effects Income.<sup>93</sup> For 2019 this ceiling amounted to EUR 753.06. This payment guarantees that the mother receives a certain amount during the compulsory six weeks after the birth if she has not worked long enough to qualify for the contributory maternity allowance. This is why the one-off payment guarantees only 42 days (six weeks) of the previous social security contribution, with the maximum of 42 times the daily indicator. In the following situations, 14 days can be added to the 42-day period: a) a child born to a large family; b) a child born to a single-parent family; c) a multiple birth; and d) when the mother or the child have at least a 65 % degree of disability.

In any case, this one-off payment will always be higher than the payment that the mother would receive if she was on sick leave, since she would not have access to sick leave payment due to not having worked long enough. The beneficiary of non-contributory maternity allowance would be permitted to continue on maternity leave until completing the 16 weeks established in Article 48 of the Workers' Statute, although she would not receive the social security payment established for the contributory maternity allowance. This system formally complies with Directive 92/85/EC since this allows a period of previous working time to be required in order to receive the maternity allowance, but it creates a difficult situation for the mother since she might be forced to go back to work right after the six compulsory weeks after birth if she has not contributed sufficiently for contributory maternity allowance.

---

<sup>89</sup> Judgement of the Constitutional Court 66/2014 of 5 May 2014, [www.boe.es/diario\\_boe/txt.php?id=BOE-A-2014-5868](http://www.boe.es/diario_boe/txt.php?id=BOE-A-2014-5868).

<sup>90</sup> Judgement of the Constitutional Court 2/2017 of 16 January 2017, ECLI:ES:TC:2017:2: <http://hj.tribunalconstitucional.es/HJ/es/Resolucion/Show/25231>.

<sup>91</sup> Judgement of the Supreme Court of 24 January 2017, appeal no. 1902/2015, ECLI: ES:TS:2017:633: [www.poderjudicial.es/search/contenidos.action?action=contentpdf&datasematch=TS&reference=7950828&links=&optimize=20170306&publicinterface=true](http://www.poderjudicial.es/search/contenidos.action?action=contentpdf&datasematch=TS&reference=7950828&links=&optimize=20170306&publicinterface=true).

<sup>92</sup> Article 179 of the General Law on Social Security.

<sup>93</sup> Article 182.2 of the General Law on Social Security.

### 5.3.6 Additional statutory maternity benefits

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

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

Article 178 of the General Law on Social Security establishes different minimum periods of contribution as conditions of eligibility in the case of contributory maternity allowance. These periods depend on the age of the beneficiary at the date of the birth. If the worker is younger than 21, no previous working time will be required to have access to contributory maternity allowance. If the worker is between 21 and 26 years old, the contribution period required will be 90 days in the previous seven years or 180 days at any time. If the worker is older than 26, the contribution period required for access to contributory maternity allowance will be 180 days in the previous seven years or 360 days at any time.

There are no conditions for eligibility in the case of the non-contributory maternity allowance.

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

Article 48.1 of the Workers' Statute expressly stipulates that the worker on birth-related leave has the right to return to the same job as the one she had before birth-related leave. Article 48.9 of the Workers' Statute expressly ensures that any employment rights relating to the employment contract will be guaranteed to the worker on birth-related leave, which means that she will also benefit from any improvement in working conditions to which she would have been entitled during her absence.

### 5.3.9 Legal right to share maternity leave

Under the new regulation introduced by Royal Decree 6/2019, of 1 March 2019, 'birth-related leave', which replaces maternity and paternity leaves, is an individual right of the worker, and it is not possible to transfer its exercise to the other parent. However, there is a transition period until 2021, when the birth-related leave will be the same and non-transferable for both parents. Until then, there is some possibility for sharing the leave: in 2019, the other parent had their own leave of eight weeks but the mother could transfer up to four weeks of her leave; in 2020, the other parent will have leave of 12 weeks, but the mother can transfer up to two weeks of her leave. Until the transition period is completed in 2021, in the event of the mother's death, regardless of whether or not she was working, the other parent will have a right to the 16 weeks leave. Civil servants and recruited staff working for the Public Administration have the same right.<sup>94</sup> During the transition period, in case of transfer to the other parent of the mother's leave, they can access it on a part-time basis if there is an agreement with the employer or if it is provided for in a collective agreement.

### 5.3.10 Case law

On 14 May 2018, the Constitutional Court admitted the application filed by a father who alleged that he had been discriminated against on the basis of sex, since his paternity leave (four weeks) was significantly shorter than the maternity leave (16 weeks). In its ruling, the Constitutional Court established that it did not constitute discrimination that paternity leave was shorter than maternity leave because the purposes pursued were

---

<sup>94</sup> Article 49 of the Basic Statute of Civil Servants.



different.<sup>95</sup> The new birth-related leave does not oppose this doctrine completely. Article 48 of the Workers' Statute, while equalising the leave for both parents, states that the purpose of the mother's compulsory 6 weeks is to ensure the protection of her health; whereas the purpose of the other parent's compulsory 6 weeks is to enable the fulfilment of equal parental duties under Article 68 of the Civil Code.

## **5.4 Adoption leave**

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

Article 48.5 of the Workers' Statute establishes leave for adoption, legal guardianship for adoption and fostering for periods of over 1 year of children under six years or between 6 and 18 if they are disabled or have particular difficulties with social and family integration due to personal circumstances and experiences or because they come from abroad. Adoption leave was reformed by Royal Decree 6/2019 of 1 March 2019, which establishes that – after the transition period finishing in 2021 – each adopting or fostering parent will have 16 weeks of leave; of these, the first six after the judicial resolution of the adoption or the administrative decision on fostering must be taken full-time and without interruption. Similarly to birth-related leave, the remaining 10 weeks may be taken as a single period or interrupted over the following 12 months.

In cases of international adoption, where it is necessary for adopting parents to travel the child's country of origin, the leave may start up to four weeks before the formal act of adoption. The non-compulsory 10 weeks may be taken full-time or part-time, based on previous agreement with the employer. As in the case of birth-related leave, when both parents work for the same firm, the employer may limit the simultaneous exercise of the non-compulsory part of the leave on justified and objective grounds, duly provided in writing. The duration of adoption leave is also increased when the child is disabled or in case of multiple adoption.

According to the transition provision established by the Royal Decree, after March 2019, each parent had the right to the compulsory six weeks of uninterrupted, full-time leave. Furthermore, they had another voluntary 12 weeks, which must be taken without interruption within the 12 months following the formal act of adoption or the foster decision. Each parent could have a maximum of 10 weeks of those 12. From 1 January 2020, besides the compulsory six weeks, the non-compulsory part of the leave is 16 weeks, with a maximum for each parent of 10 weeks. From 2021, the right to 16 weeks of leave will be granted to each of the two parents.

The regulation of adoption leave for civil servants and recruited staff in the Public Administration has also been modified by Royal Decree 6/2019.<sup>96</sup> It establishes an adoption/fostering leave similar to the birth-related leave for the biological mother, with a period of six compulsory weeks to be used immediately after the adoption or fostering decision, full-time and without interruption. When both parents work, the remaining ten weeks may be used as a single period or interrupted over the following 12 months. Civil servants may also take leave of up to two months with basic remuneration, when it is necessary to visit the country of origin of the child in cases of international adoption or fostering. In these same cases, and independently of this right, they can also start their adoption leave up to four weeks prior to the adoption decision.

Adoption leave is only eligible for contributory allowances, with the same requirements of previous contribution periods as birth-related leave and the same rates of payment.<sup>97</sup>

---

<sup>95</sup> Judgement of the Constitutional Court 111/18 of 17 October 2018, ECLI:ES:TC:2017:111: <http://hj.tribunalconstitucional.es/es/Resolucion/Show/25467>.

<sup>96</sup> Article 49 of the Basic Statute of Civil Servants.

<sup>97</sup> Articles 178 and 179 of the General Law on Social Security.

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

Parents on adoption leave have the same protection against dismissal as parents on ordinary birth-related leave.<sup>98</sup> As a consequence, the dismissal of a parent on adoption leave will be considered null and void except when the reason for the dismissal is a serious fault on the part of the worker or when the dismissal is objectively necessary for reasons not linked to pregnancy and maternity, such as economic or technical reasons.

#### 5.4.3 Case law

There is no national case law in relation to adoption leave, related employment rights and/or return after adoption leave.

### 5.5 Parental leave

#### 5.5.1 Implementation of Directive 2010/18

Directive 2010/18/EC has not been specifically implemented in Spain, but the previous Directive 96/34/EC was implemented by Law 39/1999 of 5 November 1999 to promote the reconciliation of family and work responsibilities<sup>99</sup> and by the Law on Effective Equality. There are no problematic consequences linked to this. Parental leave has been further modified by Royal Decree 6/2019 of 1 March 2019.

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

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

#### 5.5.3 Scope of the transposing legislation

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

#### 5.5.4 Length of parental leave

Birth-related leave as introduced by Royal Decree 6/2019 combines features of paternity leave and parental leave as defined and regulated in Articles 3 to 5 of Directive 2019/1158. In the case of the other parent, birth-related leave is intended for the provision of care to the child,<sup>100</sup> as defined in Article 3.1.b. of Directive 2019/1158. When fully implemented in 2021, it will be for a period of 16 weeks, the first six of which are compulsory and must be used immediately after the birth of the child, full-time and without interruption.

Spanish legislation contains other types of parental leave and arrangements to reconcile family and working life, with different features and durations. There are also some differences between the arrangements for parental leave granted to workers and civil servants.

- a) Royal Decree 6/2019 introduced leave 'for the care of the breastfeeding infant' which replaces the previous 'breastfeeding leave'.<sup>101</sup> In this way the character of parental leave, as established by the CJEU in the *Roca Alvarez* case, is reinforced. This leave is recognised both in case of birth and adoption/fostering. The leave consists of one hour of paid daily leave until the child is nine months old. If both parents request it,

<sup>98</sup> Article 55.5 of the Workers' Statute.

<sup>99</sup> Law 39/1999, of 5 November 1999, [www.boe.es/diario\\_boe/txt.php?id=BOE-A-1999-21568](http://www.boe.es/diario_boe/txt.php?id=BOE-A-1999-21568).

<sup>100</sup> In the case of birth-related leave for biological mothers, the aim of the legislator is also to guarantee time to recover after giving birth, to ensure the health of women and to prevent undue pressure to return to work too soon.

<sup>101</sup> Article 37.4 of the Workers' Statute and Article 48.f. of the Basic Statute of Civil Servants.

the leave is extended to when the child is 12 months old. This is a mechanism to encourage both parents to participate in childcare. In this case, the remuneration corresponding to the leave of one of the parents from when the child is nine to twelve months old will be paid in the form of a social security benefit.

- b) Workers and civil servants have the right to unpaid leave (*excedencia*) for up to three years after the child's birth or after the adoption or fostering decision.<sup>102</sup>
- c) Parents, including adoptive and foster parents, of children younger than 12 can ask for a reduction in working time, in which case their salary is reduced proportionally.<sup>103</sup>

#### 5.5.5 Age limits

The age of the child to whom the parental leave applies depends on each type of leave:

- a) Leave to care for a breastfeeding infant: until the child is 9 months old, extendable to 12 months if both parents exercise the right simultaneously,
- b) Unpaid leave: until the child is 3 years old,
- c) Unpaid reduction of working time: until the child is 12 years old.<sup>104</sup> This leave can be extended until the child is 18, when it is intended to take care of a child who is seriously ill.<sup>105</sup>

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

All parental leave options in Spain are granted individually, for each of the parents.

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

None of the parental leave arrangements established in Spanish legislation can be transferred to the other parent.

#### 5.5.8 Form of parental leave

Parental leave can take the following forms:

- a) According to Article 37.4 of the Workers' Statute, leave to take care of a breastfeeding infant can be used in three possible ways: firstly, the worker may be absent from work during each working day for an hour, divisible into two periods; secondly, the worker may reduce the working day by half an hour; thirdly, the hours of the breastfeeding leave corresponding to the worker until the child is nine months old can be added up and taken in complete days if the worker so requests and as long it is established by collective agreement or accepted by the employer. In the case of civil servants, the Basic Statute of Civil Servants, in Article 48.f, establishes that the reduction may be of one hour at the beginning or at the end of the working day or of half an hour at the beginning and at the end of the working day.
- b) According to Article 46.3 of the Workers' Statute, the unpaid leave (*excedencia*) must be taken full-time, but the period of leave may be interrupted. Civil servants' right to unpaid leave, however, is established as a 'single leave period'.<sup>106</sup>
- c) According to Article 37.6 of the Workers' Statute, the reduction of working time must be taken daily. It can be determined by the worker, from a minimum of one eighth and a maximum of one half of their working day. No minimum or maximum applies to civil servants.

<sup>102</sup> Article 46.3 of the Workers' Statute and Article 89.4 of the Basic Statute of Civil Servants

<sup>103</sup> Article 37.5 of the Workers' Statute and Article 48.h of the Basic Statute of Civil Servants.

<sup>104</sup> Article 37.6 of the Workers' Statute and Article 48.h of the Basic Statute of Civil Servants.

<sup>105</sup> Article 37.6 of the Workers' Statute and Article 49.e of the Basic Statute of Civil Servants. In this case, the leave may also be remunerated, under certain conditions (as explained in Section 5.5.20).

<sup>106</sup> Article 89.4 of the Basic Statute of Civil Servants.

- d) According to Article 37.6 of the Workers' Statute, the reduction in working time for the purpose of taking care of a child who is seriously ill can be determined by the worker. In this case the reduction must be at least half of the ordinary working day. The same applies to civil servants.

The unpaid leave (*excedencia*) can be freely taken when the worker decides. Since the right exists until the child reaches the age of three, the worker can apply for it on several occasions, returning to work in between. The concrete form of the leave to care for a breastfeeding infant or of the corresponding reduction of working time is also up to the worker, whose preferences take priority over the organisational needs of the employer. Only in extreme cases, of disproportionate harm to the company, could the employer alter this right. However, the 2012 law reform<sup>107</sup> has reduced the scope of this employees' right, since the unremunerated reduction of working time that can be requested, based on parental reasons, must be on a daily basis, which means that it is no longer allowed to apply for longer periods of a reduction of working time. In addition, the reform has introduced, for the first time, the possibility that collective agreements can establish concrete criteria for working time reductions. Before the 2012 reform there was a wide and almost absolute right of employees to establish the specific time when they wanted to take the leave. The current legislation means that the negotiators can decide the time within which the reduction of work time must be taken.

#### 5.5.9 Work and/or length of service requirements (Clause 3(b) of Directive 2010/10)

No length of work and/or length of service are required in order to benefit from parental leave. However, the social security payment established to guarantee 100 % of the worker's salary in the case of working time reduction for the purpose of taking care of a child who is seriously ill requires the same previous working time as that established to have access to maternity leave.<sup>108</sup>

#### 5.5.10 Notice period

According to Article 46.3 of the Workers' Statute, there is no legally established notice period when applying for unpaid leave (*excedencia*), but it can be established by collective agreement. According to Article 37.7 of the Workers' Statute, there is a notice period of 15 days if the worker applies for leave to take care of a breastfeeding infant, ordinary reduction in working time or reduction in working time for the purpose of taking care of a child who is seriously ill. The legal notice period seems reasonable but it does not consider the possibility of force majeure. There is also a problem in relation to the possibility that the collective agreement establishes a different notice period, since it fails to take into account the situation of force majeure. Spanish legislation does not consider the interests of workers in relation to notice periods so it could be in violation of Clause 3(2) of Directive 2010/18/EC.

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

There is no indication in the law on postponement of parental leave. When both parents work for the same firm, the employer may limit a request for simultaneous unpaid parental leave or reduction of working time.<sup>109</sup> Civil servants may also have simultaneous requests for unpaid leave limited.<sup>110</sup> The limitation must be justified by objective reasons related to the operation of the organisation or the service.

<sup>107</sup> Law 3/2012 on Urgent Measures for the Reform of the Labour Market (*Ley 3/2012 de medidas urgentes para la reforma del mercado laboral*), 6 July 2012, [www.boe.es/boe/dias/2012/07/07/pdfs/BOE-A-2012-9110.pdf](http://www.boe.es/boe/dias/2012/07/07/pdfs/BOE-A-2012-9110.pdf).

<sup>108</sup> Article 190 of the General Law on Social Security; Article 49 of the Basic Statute of Civil Servants.

<sup>109</sup> Articles 37.6 and 46.3 of the Workers' Statute.

<sup>110</sup> Article 89.4 of the Basic Statute of Civil Servants.

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

There are no special arrangements for small firms.

#### 5.5.13 Special rules and exceptional conditions for parents of children with a disability or long-term illness (Clause 3(3) of Directive 2018/10)

In Spanish legislation, there are no special rules or exceptional conditions for parents of children with a disability. There is an exceptional rule regarding children affected by cancer or any other serious illness which implies a long-term hospital admission and requires the need for their direct, continuous and permanent care, to be confirmed in writing by the public health service. In addition, under certain circumstances, the reduction of working time in order to take care of children who are seriously ill may be either remunerated, in the case of civil servants, or compensated by the Social Security system.<sup>111</sup>

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

According to Article 48.4 of the Workers' Statute, in cases of international adoption, when the parents must travel in advance to the adopted child's country of origin, the period of leave may be started up to four weeks before the resolution establishing the adoption. The same right applies to civil servants. In addition, civil servants may have an extra period of leave, up to two months, in cases of international adoption or fostering that require travel to the child's country of origin.<sup>112</sup>

Article 37.3f of the Workers' Statute also establishes a paid leave of absence, for the time required to attend the mandatory information and preparation sessions and to carry out the required psychological and social reports prior to the declaration of suitability as adoptive parents, provided, in all cases, that they take place within the working day. The same right applies to civil servants.<sup>113</sup>

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

There are at least four provisions in Spanish legislation which aim to protect workers who make use of parental leave. Firstly, if a dismissal takes place during any parental leave, under Article 108 of the Act Regulating Social Jurisdiction the dismissal will be considered null and void unless there is a justified reason, in the same terms as those governing pregnancy or maternity leave. A period of nine months after a child's birth is also protected by the nullity of the dismissal.<sup>114</sup> Secondly, under the same Act there is a shorter judicial procedure that aims to guarantee that any dispute between employee and employer about parental leave is resolved as soon as possible, so the worker can have access to their rights immediately (Article 139.1.b). Thirdly, the worker can ask for compensation of damages under the same Act (Article 139.1.a). Fourthly, under Articles 7.5 and 40.1.b of the Law on Offences and Penalties in the Social Order, the employer could be considered guilty of serious misconduct, in which case they could be ordered to pay an administrative sanction of EUR 626 to EUR 6 250.<sup>115</sup>

Theoretically, this protection framework is adequate but, in some specific cases, effective reparation of damages may not be guaranteed. This was true for a case that gave rise to

<sup>111</sup> Article 37.7 of the Workers' Statute and Article 49 of the Basic Statute of Civil Servants.

<sup>112</sup> Article 49.b of the Basic Statute of Civil Servants.

<sup>113</sup> Article 48.e of the Basic Statute of Civil Servants.

<sup>114</sup> Article 108 of the Act Regulating Social Jurisdiction, Law 36/2011 of 10 October 2011, [www.boe.es/buscar/act.php?id=BOE-A-2011-15936&tn=2&p=20120714](http://www.boe.es/buscar/act.php?id=BOE-A-2011-15936&tn=2&p=20120714); Royal Decree 6/2019 states that the period of protection will be of 12 months after the child's birth.

<sup>115</sup> Law on Offences and Penalties in the Social Order approved by Royal Legislative Decree 5/2000 of 4 August 2000, [www.boe.es/buscar/doc.php?id=BOE-A-2000-15060](http://www.boe.es/buscar/doc.php?id=BOE-A-2000-15060).

the judgement of the European Court of Human Rights in *García Mateos v. Spain*, in which the Court established that Spain had to pay compensation of damages of EUR 16 000 to the worker who was unable to benefit from the parental leave which had been recognised by a Spanish Court since the child was too old to allow the working time reduction.<sup>116</sup>

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

Workers benefiting from any parental leave in Spain have the right to return to the same job or, if this is not possible, to an equivalent or similar job consistent with their employment contract or relationship. The situation of workers returning from unpaid leave is ambiguous in legislation: if a worker returns within one year of unpaid leave they have the right to return to the same job. If a worker returns after one year of unpaid leave they only have the right to 'similar' work. However, an employer has the right to move an employee to similar work, so long as the employee does not have to change residence and may, for example, move an employee to similar work the day after they return from unpaid leave. In practice, there is no difference between returning within or after one year of unpaid work. In addition, the Supreme Court has also expressly recognised that workers have the right to the same or a similar job upon their return.<sup>117</sup>

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

Rights acquired or in the process of being acquired by the worker on the date on which parental leave starts are maintained as they stand until the end of the parental leave. In particular, during the unpaid leave the worker will maintain and increase their seniority.<sup>118</sup>

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

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

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

There is general continuity of entitlements to social security cover during a period of unpaid leave. Workers in this situation have the right to apply for pensions if they fulfil the requirements. Workers also have the right to healthcare. However, they cannot apply for maternity leave, paternity leave, unemployment or sickness leave.<sup>119</sup> For example, if a child is born during parental leave, this leave does not automatically turn into maternity leave for the mother; she would have to return to work for at least one day and then take maternity leave. Beneficiaries of breastfeeding leave and reductions in working time are active workers, so their social security rights are maintained.

#### 5.5.20 Remuneration

The only form of parental leave remunerated by the employer (in the public as well as the private sector) is the leave to take care of a breastfeeding infant.

---

<sup>116</sup> European Court of Human Rights (ECtHR), *García Mateos v Spain*, No. 38285/09, 19 February 2013, <http://hudoc.echr.coe.int/sites/fra/pages/search.aspx?i=001-116739>.

<sup>117</sup> Judgement of the Supreme Court of 21 February 2013, appeal number 740/2012, ECLI: ES:TS:2013:1099: [www.poderjudicial.es/search/contenidos.action?action=contentpdf&datasematch=TS&reference=6667409&links=&optimize=20130402&publicinterface=true](http://www.poderjudicial.es/search/contenidos.action?action=contentpdf&datasematch=TS&reference=6667409&links=&optimize=20130402&publicinterface=true).

<sup>118</sup> Article 46(3) of the Workers' Statute.

<sup>119</sup> Additional Provision 4 of Royal Decree 295/2009 of 6 March 2009.



In the case of civil servants, the Public Administration will continue to pay the complete remuneration of a civil servant in the event of a reduction of working time to take care of a child who is seriously ill, if both parents work and the other parent does not avail himself or herself of this same right or of the social benefit payable in these cases to workers.<sup>120</sup>

#### 5.5.21 Social security allowance

The only parental leave that is covered by a social security allowance is the reduction in working time for the purpose of taking care of a seriously ill child (in the public and private sectors): social security guarantees that workers receive 100 % of their previous contribution base, which basically amounts to the previous salary. This benefit lasts until the end of the illness or until the child turns 18.<sup>121</sup>

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

In the view of the author, Spanish legislation exceeds the minimum requirements of Directive 2010/18/EC in the following respects:

- a) The possibility for one parent to transfer part of their parental leave to the other parent does not exist in Spain.
- b) Spanish legislation establishes the presumption that during unpaid leave there has been effective contribution to the social security system.<sup>122</sup>
- c) During the first two years of the working time reduction, the contribution to the social security system will be considered as if the worker had been working full-time. If the working time reduction is requested for the care of a seriously ill child, the whole period concerned will also be considered as full-time contributions.<sup>123</sup>
- d) Article 235 and Article 236 of the General Law on Social Security state a benefit of at least 112 additional days of contribution to social security when parents claim pensions. In order to have access to this special benefit the workers must have not worked for childcare reasons during a certain period. Only one parent is entitled to this. The benefit established in Article 235 of the General Law on Social Security applies only to mothers. Article 236 applies to both mothers and fathers.
- e) Additional Provision 18 of the Workers' Statute stipulates that, in the case of the dismissal of a worker who was working part-time for family care-giving reasons, a dismissal indemnity will be calculated as if the worker was working full-time. Article 278 of the General Law on Social Security also states that the worker's unemployment insurance payment will be paid as if the last job was full-time. These two benefits give the worker the right to a higher dismissal indemnity and to a higher unemployment insurance payment.

#### 5.5.23 Case law

There are several relevant judgements of the Supreme Court in relation to unfavourable treatment and/or dismissal related to parental leave. Some of these are provided below.

- 1) The judgement of the Supreme Court of 25 April 2018 established that, in the case of the dismissal of a worker who was working reduced hours for childcare reasons, if the employer has to pay the salary that the worker would have received during the time elapsed from the dismissal until the sentence, the amount of these should correspond to the salary for full-time work.<sup>124</sup>

<sup>120</sup> Article 48.e of the Basic Statute of Civil Servants.

<sup>121</sup> Royal Decree 6/2019 of 1 March 2019 has established a social security allowance for part of the new leave for care of a breastfeeding child.

<sup>122</sup> Article 237(1) of the General Law on Social Security.

<sup>123</sup> Article 237(3) of the General Law on Social Security.

<sup>124</sup> Judgement of the Supreme Court of 25 April 2018, appeal number 2152/2016, ECLI: ES:TS:2018:2329: [www.poderjudicial.es/search/contenidos.action?action=contentpdf&datasematch=TS&reference=8436528&statsQueryId=106645227&calledfrom=searchresults&links=&optimize=20180629&publicinterface=true](http://www.poderjudicial.es/search/contenidos.action?action=contentpdf&datasematch=TS&reference=8436528&statsQueryId=106645227&calledfrom=searchresults&links=&optimize=20180629&publicinterface=true).

- 2) The judgement of the Supreme Court of 11 January 2018 stated that the dismissal without reason of a worker who was working reduced working hours for childcare reasons was null and therefore the employer was required to reinstate him to his job.<sup>125</sup>
- 3) The judgement of the Supreme Court of 14 June 2016 ruled that the benefit of 112 additional days of social security contributions granted to the mother when she claims a pension still applies, even if the birth took place outside Spain and even if the birth had happened before the mother worked for the first time.<sup>126</sup>

## 5.6 Paternity leave

### 5.6.1 Existence of paternity leave in national law

Royal Decree 6/2019 of 1 March 2019 modified the regulation of paternity leave. As of April 2019, maternity and paternity leave no longer exists, but has been replaced by a single birth-related leave (*permiso por nacimiento*) with similar features for each parent. There is a transition period until 2021, when both parents' leave periods will be fully equalised.

However, the modified regulation for civil servants and recruited staff in the Public Administration distinguishes between the birth-related leave for the biological mother (*permiso por nacimiento para la madre biológica*) and the leave for the other parent (*permiso para progenitor diferente de la madre biológica*). The resulting protection scheme is nevertheless similar, with the differences explained below.

The new birth-related leave is granted to the biological mother and to the 'other parent', in order to include same-sex couples. It is thus a 16-week period of leave, extendable in case of a child with disabilities, multiple births or hospitalisation of the child.

However, the duration of leave for fathers or other parents and mothers will only be equalised in 2021, because the Royal Decree establishes a transition period during which the father's leave period will gradually be increased. Immediately after the Royal Decree in 2019, the leave for the father (or the other parent) was increased from five weeks to eight weeks. The first two weeks immediately after delivery were compulsory and had to be taken full-time and without interruption. In addition, during 2019, the mother could transfer 4 of her non-compulsory 10 weeks to the other parent. From January 2020, the duration of the other parents' leave is 12 weeks, 4 of which are compulsory, and the mother can still transfer 2 of the non-compulsory weeks of her leave. From January 2021, the birth-related leave periods will be equalised for mothers and the other parents and no part will be transferrable.

Civil servants and recruited staff in the Public Administration have the same transition calendar, the only difference being that no provision is made for transfers from the biological mother's leave.<sup>127</sup>

The voluntary weeks of the other parent's birth-related leave can be used right after the compulsory part or broken down into weekly periods until the child is 12 months old. These weeks may be used full-time or part-time with the previous agreement of the employer. The employer may limit the simultaneous use of the voluntary weeks by the mother and the other parent, if both work in the same firm, with objective and reasonable justification.<sup>128</sup> In the other parent is a civil servant or recruited staff in the Public

<sup>125</sup> Judgement of 11 January 2018, appeal number 726/2016, ECLI: ES:TS:2018:89: [www.poderjudicial.es/search/contenidos.action?action=contentpdf&database=TS&reference=8269664&statsQueryId=106645746&calledfrom=searchresults&links=&optimize=20180126&publicinterface=true](http://www.poderjudicial.es/search/contenidos.action?action=contentpdf&database=TS&reference=8269664&statsQueryId=106645746&calledfrom=searchresults&links=&optimize=20180126&publicinterface=true).

<sup>126</sup> Judgement of the Supreme Court of 14 June 2016, appeal number 215/16.

<sup>127</sup> Ninth Transitory Provision of the Basic Statute of Civil Servants.

<sup>128</sup> Article 48.4 of the Workers' Statute.



Administration, the voluntary part of the birth-related leave can be used in interrupted periods until the child is 12 months old if both parents work.<sup>129</sup>

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

Article 48.9 of the Workers' Statute expressly ensures that any employment rights relating to the employment contract will be guaranteed to the worker during birth-related leave. Dismissal during birth-related leave will be considered null and void except when the reason for the dismissal is a serious fault on the part of the worker or when the dismissal is objectively necessary, such as for economic or technical reasons.

#### 5.6.3 Case law

There is no relevant case law on paternity leave from the higher courts in Spain.

### 5.7 Time off for *force majeure*

#### 5.7.1 Time off for *force majeure*

Time off from work on the grounds of *force majeure* cannot be considered fully guaranteed, at least as required by Clause 7 of Directive 2010/18/EC, because there is no general leave applicable in cases of sickness or accident 'that makes the immediate presence of the worker indispensable'.

Article 37.3.b of the Workers' Statute allows for time off (up to two days, and four if the worker has to travel outside the province) in case of the death, serious accident or illness, hospitalisation or surgery, of close relatives. However, the worker is required to give notice and justification for the absence.

Article 37.7 contains the only reference to *force majeure* in relation to workers' rights; it states that workers, 'except for *force majeure*' must give 15 days' notice to the employer (unless a collective agreement establishes another notice period) to use the leave to take care of a breastfeeding child or the reduction of working time.

#### 5.7.2 Case law

There is no relevant case law on time off on the grounds of *force majeure* from the higher courts in Spain.

### 5.8 Care leave

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

Following the reform introduced by Royal Decree 6/2019 of 1 March 2019, Spanish legislation contemplates the following leave arrangements for carers:

- a) Adaptation of working time. According to Article 34.8 of the Workers' Statute, 'workers have the right to request adjustments of the duration and the distribution of the working time, of the organisation of working time and in the form of the provision of services, including remote working, to make effective their right to reconciliation of work and family life. These adjustments must be reasonable and proportionate in relation to the needs of the working person and with the organisational or productive needs of the company'.

---

<sup>129</sup> Article 49 c) of the Basic Statute of Civil Servants.

- b) Article 37.3.b of the Workers' Statute establishes a two-day paid leave when a relative up to the second-degree dies, has an accident, becomes seriously ill, needs to be hospitalised or undergoes a surgical intervention that does not require hospitalisation. This paid leave is extended to four days if the worker needs to travel to another town. In the case of civil servants, this paid leave is increased to three and six days for first-degree relatives.<sup>130</sup>
- c) Civil servants have a right to paid reduction of up to half of their working time to take care of a first-degree relative who is seriously ill for up to one month.
- d) Unpaid reduction of working time: workers have the right to request a reduction of their working time, with proportional reduction of salary, to take care of a person with disabilities under their legal guardianship or a relative up to the second degree who cannot live independently because of age, accident or illness, when they have no remunerated activity. The reduction of working time must be taken daily. It can be determined by the worker, from a minimum of one eighth and a maximum of one half of their working day.<sup>131</sup> Civil servants have the same right but without minimum or maximum limits to the reduction rate.
- e) Unpaid leave (*excedencia*): workers and civil servants can take unpaid leave to take care of relatives up to the second degree who cannot take care of themselves because of age, accident, illness or disability, and they do not have a remunerated activity. The Workers' Statute establishes a maximum period of two years of unpaid leave, unless the collective agreements provide for a longer duration, and determines that this maximum period can be interrupted.<sup>132</sup> The regulation of unpaid leave for civil servants allows for a maximum duration of three years, but establishes it as a 'single leave period'.<sup>133</sup>

## 5.8.2 Case law

There have been few cases regarding care leave in the higher courts in Spain.

The Supreme Court has maintained, most recently in a judgement from 18 April 2017, that the dismissal of a worker with a reduction of working time to take care of a relative should be considered null and void, and not merely unfair (*improcedente*), and that this is so, even if no discrimination or discriminatory intent can be identified.<sup>134</sup> This must be considered an interpretation favourable to the protection of workers and reconciliation because in the relevant provisions only the dismissal of workers with leave, and not reduction of working time, has the qualification of being null and void.

## 5.9 Leave in relation to surrogacy

All the existing types of parental leave are allowed in case of surrogacy as long as the workers or civil servants have adopted or fostered the child.

With regard to maternity leave, the Supreme Court has allowed that the intended father or mother in the case of a surrogate pregnancy can access maternity leave under the terms established for adoptive parents, even if the adoption has not formally taken place. This question raised some public debate at the time because surrogacy is not legal in Spain. However, the Supreme Court considered that, despite the illegality of the situation,

<sup>130</sup> Article 48.a of the Basic Statute of Civil Servants.

<sup>131</sup> Article 37.6 of the Workers' Statute.

<sup>132</sup> Article 37.6 of the Workers' Statute.

<sup>133</sup> Article 89.4 of the Basic Statute of Civil Servants.

<sup>134</sup> Judgement of the Supreme Court of 18 April 2017, appeal number 2771/2015, ECLI:ES:TS:2017:1756, <http://www.poderjudicial.es/search/contenidos.action?action=contentpdf&databasematch=TS&reference=8015965&links=&optimize=20170512&publicinterface=true>.

and by analogy with regard to maternity leave by adoption, the intended father or mother in the case of a surrogate pregnancy has the right to maternity leave.<sup>135</sup>

## **5.10 Flexible working time arrangements**

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

Parents (both workers and civil servants), including adopting and fostering parents, of children younger than 12 can ask for a reduction in working time, in which case their salary is reduced proportionally. No eligibility criteria applies. A person who takes direct care of a child can use the reduction in working time as well, even if they are not the father, mother or foster parent.<sup>136</sup> The reduction in working time also applies to the care of first and second degree relatives who are dependent on the worker. In this case the working time reduction can last a maximum of two years, unless otherwise stipulated in the collective agreement. The reduction of working time for the care of children or dependants is not tied to any specific trigger. The employer cannot refuse to comply with the working time reduction requested by the employee. However, if two or more workers at the same company exercise this right for the same individual, the employer may limit their simultaneous exercise for justified company operational reasons. Once the working time reduction expires, the worker has the right to return to the same working conditions they had before. Spanish law does not foresee anything in particular to encourage men to make use of reductions in working time.

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

Royal Decree 6/2019 has introduced the right of workers with responsibilities for the care of children under 12 years of age to have their working day adapted to suit their needs.<sup>137</sup> Under Article 34.8 of the Workers' Statute, this right includes 'adjustments of the duration and the distribution of working time, of the organisation of working time and in the form of the provision of services, including remote working. These adjustments must be reasonable and proportionate in relation to the needs of the working person and the organisational or productivity needs of the company'. It is left to collective agreements to establish the terms for the exercise of this right, with criteria and systems that ensure the absence of discrimination, both direct and indirect, between women and men. If there are no agreed criteria in the collective agreement, the employer must negotiate the request with the employee and reply within a maximum of 30 days. The refusal of the right to adjust the working time without an alternative proposal will require the statement, in writing, of objective reasons. The exercise of this right is protected by giving access to the worker whose request has been refused to the ad hoc procedure of Article 139 of Law 36/2011, which is an urgent and priority procedure that must be completed within a maximum of eight days.

### **5.10.3 Right to work from home or remotely**

The right to work from home or remotely is specifically included in Article 34.8 of the Workers' Statute as a form of adaptation of the working day.

### **5.10.4 Other legal rights to flexible working arrangements**

In addition to adjustments in the distribution and organisation of working time, the right under Article 34.8 also includes adaptations in the form of the provision of services, including remote working.

---

<sup>135</sup> Judgement of the Supreme Court of 25 October 2016, appeal number 3818/15, ECLI: ES:TS:2016:5375 [www.poderjudicial.es/search/contenidos.action?action=contentpdf&datasematch=TS&reference=7895650&statsQueryId=106653929&calledfrom=searchresults&links=&optimize=20161222&publicinterface=true](http://www.poderjudicial.es/search/contenidos.action?action=contentpdf&datasematch=TS&reference=7895650&statsQueryId=106653929&calledfrom=searchresults&links=&optimize=20161222&publicinterface=true).

<sup>136</sup> The reduction of working time for workers is established in Article 37.6 of the Workers' Statute.

<sup>137</sup> Article 34.8 of the Workers' Statute.

### 5.10.5 Case law

The Spanish Constitutional Court has declared that an effective balance between work and family life is an aim of constitutional importance that must be taken into account when interpreting and applying the law.<sup>138</sup> Since the entry into force of Royal Decree 6/2019 of 1 March 2019 there has been no case-law on the reconciliation of family life and work in the higher courts. The reform introduced by Royal Decree 6/2019 of 1 March 2019 resolves some restrictive doctrine of the Supreme Court as to the possibilities of making working time more flexible to meet the needs of the workers. It also aligns Spanish legislation with Clause 6 of Directive 2010/18/EC.

### 5.11 Evaluation of implementation

The reform introduced by Royal Decree 6/2019 of 1 March 2019 has resolved a key aspect of compliance with Directive 2010/18/EU. Under the current regulation, employers must now consider and respond to requests from workers to have their working day adapted to their needs, and not only when they come back to work after parental leave, but more widely. This right is also guaranteed by giving access to an urgent and priority procedure before the Labour Courts. The right to have their working day adapted to their needs is recognised for workers, but not for civil servants.

On the other hand, the reform has not addressed issues regarding compliance with other clauses of Directive 2010/18/EU, for example:

- a) Time off from work on the grounds of *force majeure* cannot be considered as completely guaranteed by Spanish law, at least as required by Clause 7 of Directive 2010/18/EU, because there is no general permission applicable in cases of sickness or accident 'that makes the immediate presence of the worker indispensable'. Article 37.3.b of the Workers' Statute establishes a two-day paid leave when a second-degree relative dies, has an accident, becomes seriously ill, needs to be hospitalised or undergoes a surgical intervention that does not require hospitalisation, but no leave is recognised, not even unpaid, in cases of sickness or accident 'that makes the immediate presence of the worker indispensable'. Article 52 of the Workers' Statute states that employers may dismiss workers due to lack of attendance at work, if they exceed a certain number of absences from work. Given that in Spanish legislation there is no general leave applicable in cases of sickness or accident of a child 'that makes the immediate presence of the worker indispensable', this could end in dismissal for lack of attendance
- b) Spanish legislation does not consider the interests of workers in specifying the length of notice periods for parental leave as required by Clause 3.2 of Directive 2010/18/EU, since nothing is established in this respect and collective agreements can freely establish them.

### 5.12 Remaining issues

There are some issues that must be highlighted in relation to maternity and work-life balance in Spanish legislation:

- 1) Although it seems that maternity leave has a correct scope of application, some women could have problems with claiming maternity leave when they are on unpaid leave. Workers in this situation have the right to apply for pensions and other social security benefits. However, from unpaid leave they cannot apply for maternity leave,

---

<sup>138</sup> Judgement 26/2011 of the Constitutional Court of 14 March 2011, ECLI:ES:TC:2011:26: <http://hj.tribunalconstitucional.es/es-ES/Resolucion/Show/6808>.

paternity leave, unemployment or sickness leave.<sup>139</sup> As a consequence, if a child is born during parental leave, this leave does not automatically turn into maternity leave for the mother; she would have to return to work for at least one day and then take maternity leave (the same happens in the case of paternity leave).

- 2) Maternity leave is a social security benefit which consists of a payment equivalent to 100 % of the previous month's social security contribution base (*base de cotización*).<sup>140</sup> The contribution base for the previous month is usually the same amount as the salary for the previous month, so most workers on maternity leave basically receive the same amount as they received when they were actively working. However, this base has a maximum, so women with high salaries will not receive 100 % of their previous salaries. Considering that women in high-level positions are the ones who receive more pressure to come back to work before the end of their maternity leave, the fact of not receiving their whole salary during maternity leave could have an extra deterrent effect on taking maternity leave.
- 3) The most important threat to the enforcement of the prohibition of discrimination and/or unfavourable treatment (in particular indirect sex discrimination) in relation to the take-up of parental and/or adoption leave in Spain has been the Spanish law reform of 2012,<sup>141</sup> which has reduced the rights of workers in relation to their working time and has increased the powers of employers. This situation could have a severe impact on the vulnerability of people on parental and adoption leave. Firstly, the 2012 law reform has reduced the scope of employees' accessing part-time work for family reasons since the unremunerated general reduction of working time which can be requested must be applied on a 'daily' basis, which means that it is no longer allowed to use this option for longer periods of time (for instance, half of the week; or one third of the month). Secondly, the 2012 law reform introduced, for the first time, the possibility that collective agreements can establish criteria for the concrete determination of working time reduction. Before the 2012 reform there was a wide and almost absolute right for employees to establish their own specific time arrangements. The 2012 changes to the legislation mean that the negotiators can decide when the reduction of working time could take effect. Thirdly, the 2012 legal reform has also increased the percentage of working time that can be freely rearranged by the employer if the collective agreement doesn't establish any limit (Article 34.8 of the Workers' Statute). Finally, other powers of the employer have been increased as well with the 2012 legal reform, with the possibility of unilaterally changing substantial conditions of the employment contract (Article 41 of the Workers' Statute), including work centre transfers involving changes of residence (Article 40 of the Workers' Statute). All this could have the effect of expelling people from the labour market who cannot make their various work and family responsibilities compatible with each other (although there are no data available in this respect). The legislation does not establish any guarantee or preference or benefit in favour of people with dependants which counteracts the new powers of the employer.
- 4) Another problem has arisen in relation to the increased powers of employers to change individual working conditions, including when they need to be agreed with the employees' representatives at company level. In this way, taking as a reference Article 41 of the Workers' Statute, the Supreme Court has denied the possibility of individuals challenging, even for reasons of discrimination, the agreement that was reached at company level between the employer and employees' representatives to change substantial conditions of labour contracts due to economical, technical,

---

<sup>139</sup> Additional Provision 4 of Royal Decree 295/2009 of 6 March 2009  
<https://www.boe.es/boe/dias/2009/03/21/pdfs/BOE-A-2009-4724.pdf>.

<sup>140</sup> Article 179 of the General Law on Social Security.

<sup>141</sup> Law 3/2012 of 6 July 2012 on Urgent Measures for the Reform of the Labour Market,  
<https://www.boe.es/buscar/act.php?id=BOE-A-2012-9110>.

productivity or organisational reasons. This was because Article 41 of the Workers' Statute (after the 2012 law reform) stipulates that the agreement reached in this way may not be challenged other than for fraud or abuse of rights. As a consequence, when an attempt was made to challenge one of these agreements because it was affecting mostly workers with family responsibilities, so it could be discriminatory, the Supreme Court responded that Article 41 of the Workers' Statute did not allow the agreement to be nullified except due to fraud or abuse of rights.<sup>142</sup>

- 5) In some particular cases, effective reparation of damages may not have been properly guaranteed. This was true for a case that gave rise to the judgement of the European Court of Human Rights in *García Mateos v. Spain*, in which the Court established that Spain had to pay compensation for damages of EUR 16 000 to a worker who was unable to benefit from the parental leave which had been recognised by a Spanish Court since the child was too old to allow the working time reduction.<sup>143</sup>
- 6) The new birth-related leave for fathers (or for the other parent) has improved the flexibility of the voluntary part of the leave, and this might encourage its use. However, the first six weeks – in addition to having some rigid features (full-time and uninterrupted use simultaneously with the mother's compulsory six weeks) – are compulsory but covered only by contributory allowances.<sup>144</sup> In fact, Article 181 of the General Law on Social Security establishes non-contributory birth-related allowances only for 'female workers' in the case of giving birth, which excludes the other parent. They can receive Social Security allowances only if they have the required contribution periods covered.

The relationship between the reduction in the birth rate and the increase in women's education reveals a phenomenon of great interest: women do not believe that motherhood is compatible with work. Given their greater investment in training, they now risk much more with motherhood, so policies promoting work-life balance and co-responsibility are necessary. However, public policy in this regard to date has done nothing more than to reproduce old mechanisms, without addressing the need for more intense social and business involvement, taking into account the high career expectations of highly qualified women.

---

<sup>142</sup> Supreme Court Judgement of 25 May 2015, appeal number 307/2013, ECLI: ES:TS:2015:3658: [www.poderjudicial.es/search/contenidos.action?action=contentpdf&datasematch=TS&reference=7459543&links=%22307%2F2013%22&optimize=20150904&publicinterface=true](http://www.poderjudicial.es/search/contenidos.action?action=contentpdf&datasematch=TS&reference=7459543&links=%22307%2F2013%22&optimize=20150904&publicinterface=true).

<sup>143</sup> European Court of Human Rights (ECtHR), *García Mateos v. Spain*, No. 38285/09, 19 February 2013, <http://hudoc.echr.coe.int/sites/fra/pages/search.aspx?i=001-116739>.

<sup>144</sup> Article 179 of the General Law on Social Security.

## **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**

There are no official surveys and reports on the practical difficulties linked to occupational social security issues.

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

There are no other issues related to gender equality and occupational social security schemes

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

The only political and societal debate related to occupational social security schemes is focused on the possible crisis in the public security system and the potential need for people to contract private pension plans. The issue of pension reform is a common theme in the political and social arena, although opinions are divided.

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

Occupational pension schemes are private, free and voluntary and are totally excluded from the social security system (which is public and compulsory).

The Spanish regulation on pension plans is the Royal Legislative Decree 1/2002, of 29 November 2002.<sup>145</sup> Article 4 of this Royal Legislative Decree establishes the possibility for an employer or group of employers to promote a pension plan for their employees. It is also possible that they join existing pension plans. In most cases these commitments acquired by the employer in the matter of pension plans are contained in a collective labour agreement, although they may arise independently of any collective labour agreement. They are considered improvements to the basic statutory schemes and therefore they are not used in all sectors of the economy or in all companies. Royal Legislative Decree 1/2002 does not expressly establish the prohibition of direct or indirect discrimination on the ground of sex, although this prohibition follows implicitly from Article 14 of the Spanish Constitution. Collective agreements must also respect the constitutional principle of equality and the prohibition of discrimination on the ground of gender. The promise (pension obligations) established in the collective agreement should be guaranteed through collective insurance or occupational pension schemes. All employees, including those with a special labour contract, can participate in occupational pension schemes, as one of the principles on which the occupational pension schemes are based is a general prohibition of discrimination in access to them.

### **6.3 Personal scope**

There is no specific regulation in Spanish legislation on the personal scope of occupational social security schemes in relation to Article 6 of the Recast Directive.

### **6.4 Material scope**

There is no Spanish legislation on the material scope of occupational social security schemes in relation to Article 7 of the Recast Directive.

---

<sup>145</sup> Royal Legislative Decree 1/2002 of 29 November 2002, <https://www.boe.es/buscar/act.php?id=BOE-A-2002-24252>.

## **6.5 Exclusions**

Spanish legislation has not invoked the exclusions from the material scope as specified in Article 8 of the Recast Directive.

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

There are no laws or case law which fall under the examples of sex discrimination mentioned in Article 9 of the Recast Directive, given that Spanish legislation does not deal expressly with occupational social security schemes.

## **6.7 Actuarial factors**

As far as the author is aware, sex is not used as an actuarial factor in occupational social security plans, although this is not expressly forbidden in Royal Legislative Decree 1/2002. In the opinion of the author, if sex was used as an actuarial factor it would be against Article 14 of the Spanish Constitution.

## **6.8 Difficulties**

There is no Spanish legislation on occupational social security schemes. Examples of occupational social security in Spain are rare and there are therefore no cases to discuss. Approximately 20 years ago, the existence of pension plans was relatively frequent because the potential crisis in the pension system was beginning to be anticipated. However, over time, the interest of companies and workers in pension plans has declined, in part due to their poor performance.

## **6.9 Evaluation of implementation**

Spanish law is not contrary to EU law in the matter of occupational social security schemes.

## **6.10 Remaining issues**

There are no remaining issues in this respect.



## 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)

There are no official surveys on social security and its relation to gender. There are only general data about employment rates, activity rates, average amount of pensions, etc. prepared by the National Statistics Institute and by the Ministry of Labour, Migrations and Social Security (Labour Statistics Bulletin).<sup>146</sup> These official data are presented without analysis and without reference to gender, although many of them are differentiated between men and women. The pension gap between women and men, taking average pensions as reference, was 34.6 % in 2019.

#### 7.1.2 Other relevant issues

Analysis of the official data in relation to gender has been carried out by researchers and trade unions.<sup>147</sup> According to these studies some of the most common problems in female careers which have a negative impact on access and the amount they receive in retirement pension include their greater presence in part-time jobs compared to men, to the reduced amount of time they spend in paid work due to performing tasks of domestic organisation and raising children, the perception of lower wages and the gaps in their careers due to caring for children and relatives (discussed in detail in the corresponding sections of this report).

#### 7.1.3 Overview of national acts

The Spanish social security system is based on Article 41 of the Constitution, which establishes the following: 'The public authorities will maintain a public Social Security system for all citizens, which guarantees assistance and sufficient social benefits in situations of need, especially in case of unemployment. Assistance and complementary benefits will be free'. The basic legislation that regulates the Spanish social security system is the General Law on Social Security, approved by Royal Legislative Decree 8/2015, of 30 October 2015.

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

In recent years, the Spanish social security system has been subject to great social and political debate. The Spanish Constitution establishes that social security must guarantee sufficient benefits for all citizens, which is understood as a mandate to the public authorities to guarantee the maintenance of the public pension system. However, the reduction in the birth rate, the high unemployment rate and the large number of pensioners threatens the system. In 2011 there was a legislative change which tightened the requirements for access to pensions, requiring more years of contribution and establishing a later retirement age.<sup>148</sup> This law also provided for the amount of pensions to be adjusted according to general life expectancy and the means available to the social security system at any given time. This adjustment was made through law 23/2013, of 23 December 2013, which established the so-called 'sustainability factor' which was intended

---

<sup>146</sup> Labour Statistics Bulletin of the Ministry of Labour, Migration and Social Security, [www.mitramiss.gob.es/estadisticas/bel/welcome.htm](http://www.mitramiss.gob.es/estadisticas/bel/welcome.htm).

<sup>147</sup> For example, Alaminos, E. (2018) 'La brecha de género en las pensiones contributivas de la población mayor española' ('The gender gap in contributory pensions of the Spanish elderly population'), *Panorama Social*, 27, pp. 119-135; UGT (2019) *La discriminación salarial más allá de la jubilación. Brecha Salarial en las pensiones* (Pay discrimination beyond retirement. Pay gap in retirement pensions), [https://www.ugt.es/sites/default/files/informe\\_pensiones\\_mujer-ok.pdf](https://www.ugt.es/sites/default/files/informe_pensiones_mujer-ok.pdf).

<sup>148</sup> Spain Law 27/2011 of 1 August 2011, [www.boe.es/boe/dias/2011/08/02/pdfs/BOE-A-2011-13242.pdf](http://www.boe.es/boe/dias/2011/08/02/pdfs/BOE-A-2011-13242.pdf).

to be applied to all pensions as of 1 January 2019. However, given the public debate, the entry into force of the sustainability factor was postponed to 2023.

The debate about the future of pensions has a long history. In 1995, the so-called Toledo Pact was signed by the political parties which were then part of the Congress of Deputies. It was a commitment that sought to establish guidelines for the reform of the pension system in Spain. In that pact, a brief reference was made to the situation of women in the social security system. Specifically, it was established that equal wage compensation should be ensured for women and men and that measures should be established to ensure the reconciliation of responsibilities.

Although there have been several attempts to update the Toledo Pact, this has never been achieved. The last attempt took place in 2019, although the agreement of all the parties in the Parliament was not obtained, partly because of the anticipated elections. It should be noted, however, that the pieces of legislation which have been approved in terms of social security have not taken into account any gender repercussions. In fact, as explained below, there have been regulatory changes which have been forced by judgements of the CJEU on discrimination against women in Spanish social security regulations. The pressure created by the judgement of the Constitutional Court 91/2019, of 3 July 2019 which, following the CJEU in *Villar Laiz*, declared the partiality coefficient of part-time workers' retirement pensions to be unconstitutional on grounds of sex discrimination, has opened the debate up again.

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

Spain has no specific legislation that expressly transposes Directive 79/7/EEC, not even an article that expressly stipulates the prohibition of gender discrimination in statutory social security schemes. However, Article 14 of the Constitution, which prohibits gender discrimination in general, also applies to social security. Apparently, Spanish legislation complies with Directive 79/7/EEC. However, the existence of indirect discrimination in Spain was detected by the CJEU in the *Elbal* case in relation to the requirements regarding contributory pensions which apply to part-time workers.<sup>149</sup> Spanish legislation has been changed in accordance with the CJEU's ruling, so currently the minimum period of work required for access to pensions must be reduced proportionally depending on the duration of the working day of each part-time worker.<sup>150</sup> In the *Espadas Recio* case the CJEU also stated that the way in which unemployment insurance was determined for part-time workers in Spain constituted indirect discrimination on grounds of sex.<sup>151</sup> After the *Espadas Recio* case the Spanish legislation was corrected again, so as not to penalise part-time workers when they intend to access unemployment benefit.<sup>152</sup>

In the *Villar Laiz* case, the CJEU ruled that the 'partiality coefficient' that corrected the calculation of the retirement pensions of part-time workers, introduced to meet the requirements in *Elbal*, constituted an unjustified difference between full-time and part-time workers.<sup>153</sup> Following this ruling, the Spanish Constitutional Court declared the partiality coefficient null because it constituted indirect discrimination on the ground of sex. Although the system for calculating the contributions of full-time and part-time workers is now the same, the Constitutional Court decided that the judgement would not apply to administrative decisions which had already been made (a limitation which would go against the CJEU doctrine). It also limited the applicability of its decision to retirement

<sup>149</sup> Judgement of 22 November 2012, C-385/11, *Isabel Elbal Moreno v. Instituto Nacional de la Seguridad Social (INSS) and Tesorería General de la Seguridad Social (TGSS)*.

<sup>150</sup> Article 247 of the General Law on Social Security.

<sup>151</sup> Judgement of 9 November 2017, C-98/15, *Espadas Recio v. Servicio Público de Empleo Estatal (SPEE)*.

<sup>152</sup> Royal Decree 950/2018 of 27 July 2018, [www.boe.es/diario\\_boe/txt.php?id=BOE-A-2018-10652](http://www.boe.es/diario_boe/txt.php?id=BOE-A-2018-10652).

<sup>153</sup> Judgement of 8 May 2019, C-161/18, *Violeta Villar Láiz v. Instituto Nacional de la Seguridad Social (INSS) and Tesorería General de la Seguridad Social (TGSS)*.

pensions, although the partiality coefficient is used in the calculation of permanent disability pensions, widowhood pensions and orphan pensions.

### **7.3 Personal scope**

There are no specific references to gender discrimination in social security legislation, so there are no references to the personal scope of national law relating to statutory social security schemes in the terms established in Article 2 of Directive 79/7/EEC.

### **7.4 Material scope**

There are no specific references to gender discrimination in social security legislation, so there are no references to the material scope of national law relating to statutory social security schemes in the terms established in Article 3 of Directive 79/7/EEC.

### **7.5 Exclusions**

There are some legal mechanisms in favour of people who have taken care of children which could be within the scope of Article 7(1)(b) of Directive 79/7/EEC, in the sense that they are advantages in respect of old-age pension schemes granted to people who have brought up children. They are the following: (i) Article 237 of the General Law on Social Security establishes that during unpaid leave there is effective contribution to the social security system; (ii) It is also established in Article 237 of the General Law on Social Security that during the first two years of working time reduction for family care the contribution to the system is considered as if the individual was working full-time; (iii) Article 236 of the General Law on Social Security lays down a benefit of at least 112 additional days of social security contributions when parents claim pensions. This benefit can apply to mothers or fathers; (iv) Article 235 of the General Law on Social Security also lays down a benefit of at least 112 additional days of contributions when claiming a pension, which applies only to women who have given birth; (v) Article 60 of the General Law on Social Security lays down a pension supplement exclusively applicable to mothers (including adoptive mothers) of at least two children. The supplement is an increase of between 5 % and 15 % of the pension and may exceed the maximum pension established in the social security system. No equivalent measure is available to fathers who were responsible for taking care of their children. This exclusion was ruled to constitute direct discrimination on grounds of sex by the CJEU in December 2019.<sup>154</sup>

### **7.6 Actuarial factors**

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

### **7.7 Difficulties**

The main difficulty in the Spanish social security system in relation to the equality of men and women is that the legislation has been limited to establishing one-off corrections (for example by allocating social security contributions for the time corresponding to the care of children), but a correction of the entire social security system in order to produce real equality between men and women has never been undertaken. The main problems are related to the differences between full-time and part-time workers and the establishment of exclusive benefits for mothers. Besides that, there is an additional problem related to the lack of consideration of the effects on women of the different reforms in social security which have, in general, increased the requirements for access to pensions and have had a greater impact on women (because they have lower incomes and less job stability) than on men.

---

<sup>154</sup> Judgement of 12 December 2019, C-450/18, *WA v. Instituto Nacional de la Seguridad Social (INSS)*.

## 7.8 Evaluation of implementation

Social security legislation has historically established, and continues to establish, a clear differentiation in access to pensions and benefits for full-time workers and part-time workers. There have been some attempts to harmonise the two systems but differences still exist. In fact, some of the corrections which have occurred recently, motivated by the need to implement judgements of the CJEU, have not produced full equality between full-time and part-time work in social security, but have been limited to modifying aspects which in each case had been submitted to the CJEU and which had been declared contrary to EU regulations. In this way, after the ruling in the *Elbal Moreno* case, the social security regulations were specifically amended in relation to the system of access to pensions, replacing the old system of access to pensions for part-time workers with another system specific to them (proportionality factor), without carrying out a full comparison. This led to a new ruling by the CJEU in *Villar Laiz*, declaring once again the new system to be contrary to EU law. The same can be said regarding the one-off correction made to the Spanish regulations after the sentence handed down in the *Espadas Recio* case.

Following *Villar Laiz*, the Spanish Constitutional Court ruled that the partiality coefficients applied in the calculation of contributions of part-time workers was contrary to the Constitution because it was indirectly discriminatory on the ground of sex. However, the Court has limited the application of its decision, excluding its retroactivity. This is, in the opinion of this author, against the doctrine of the CJEU. The Constitutional Court has also limited its decision to retirement pensions, although partiality coefficients are used for calculating the contributions of permanent disability pensions and some family pensions.

There is also a concrete problem in relation to the supplementing of pensions which is established in Article 60 of the General Law on Social Security. This supplement is not really intended to compensate for the negative effects in social security for women as a result of the birth of children. The supplement is, instead, a benefit established to compensate for the impairment of their professional careers that women suffer as a result of caring for their children. Spanish legislation has not considered that these impairments can also occur for men who care for their children. Certainly Article 7 of Directive 79/7/EEC allows Member States, 'to exclude from its scope ... (b) advantages in respect of old-age pension schemes granted to persons who have raised children'. However, Article 7.2 of Directive 79/7/EEC establishes that, 'Member States shall periodically examine matters excluded under paragraph 1 in order to ascertain, in the light of social developments in the matter concerned, whether there is a justification for maintaining the exclusions concerned'. In *WA v INSS*, the CJEU ruled that the pension supplement implies a difference between mothers and fathers who take care of children which is in violation of Article 7.2 of Directive 79/7/EEC, since these differences should tend to disappear, not be newly established as has happened in Spain.

## 7.9 Remaining issues

The main challenge for achieving equality of men and women in terms of social security is the inclusion of the issue of gender in the debate about the reform of the pension system that is currently taking place in Spain.

## **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**

In December 2019, the number of self-employed people was 3 269 089, a figure that represents an increase of 14 425 people (0.44 %) with respect to the same month in 2018. Of these, 64.3 % (2 087 810) were male and 35.7 % (1 158 352) female. The total number of people involved in family businesses was 198 552. Compared to 2007, there has been a significant increase in the number of self-employed women over the age of 35 years, with a greater number among those aged 50 and over, whereas among men the number has only increased among those over 50. These data indicate that the number of self-employed workers has increased significantly for those groups in which the unemployment rate is higher (women and older workers). This could suggest that the option for self-employment may not be a voluntary option in many cases, although there are no data in this regard.<sup>155</sup>

#### **8.1.2 Other issues**

According to the legislation (Article 310 of General Law on Social Security), self-employed workers can choose the basis on which they contribute to social security and 86 % have decided to contribute the minimum rate, in order to reduce their costs.<sup>156</sup> This has an impact on the amount of their pension, which is determined by the level of the contribution base.

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

The legislation that currently regulates the situation of self-employed workers in Spain is the Self-Employed Workers' Statute (*Estatuto del Trabajador Autónomo*).<sup>157</sup> This law was approved due to the increase in the number of self-employed workers and the need to have a standard that guarantees their rights. The Self-Employed Workers' Statute guarantees the right of the self-employed to the prevention of occupational hazards, the association in defence of their interests, social protection, economic guarantees, etc. In the field of social security, the self-employed are included in the system through a special regime currently regulated in Title IV of the General Law on Social Security. Historically, the trend has been to increase social security protection for self-employed workers to a level similar to that of employed workers. Self-employed people are entitled to sick leave, birth-related leave and coverage for work accidents and occupational diseases and cessation of activity (similar to unemployment benefit), as well as pensions and other social security pensions on almost the same terms as employed workers. Political and societal debate and pending legislative proposals

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

Currently, the great debate about self-employment gravitates around their contribution to social security. Given that the amount of the base for which social security is paid is freely chosen by each self-employed person, the vast majority choose the minimum amount.

<sup>155</sup> Ministry of Labour, Migration and Social Security, (*Datos estadísticos de afiliación del trabajo autónomo a 31 de diciembre de 2019*), [http://www.mitramiss.gob.es/ficheros/ministerio/sec\\_trabajo/autonomos/economia-soc/NoticiasDoc/NoticiasPortada/Nota\\_Autonomos\\_Afiliacion\\_mes\\_de\\_diciembre\\_2019.pdf](http://www.mitramiss.gob.es/ficheros/ministerio/sec_trabajo/autonomos/economia-soc/NoticiasDoc/NoticiasPortada/Nota_Autonomos_Afiliacion_mes_de_diciembre_2019.pdf).

<sup>156</sup> Ministry of Labour, Migration and Social Security, (*Datos estadísticos de afiliación del trabajo autónomo a 31 de diciembre de 2019*), [http://www.mitramiss.gob.es/ficheros/ministerio/sec\\_trabajo/autonomos/economia-soc/NoticiasDoc/NoticiasPortada/Nota\\_Autonomos\\_Afiliacion\\_mes\\_de\\_diciembre\\_2019.pdf](http://www.mitramiss.gob.es/ficheros/ministerio/sec_trabajo/autonomos/economia-soc/NoticiasDoc/NoticiasPortada/Nota_Autonomos_Afiliacion_mes_de_diciembre_2019.pdf).

<sup>157</sup> Law 20/2007 of 11 July 2007, [www.boe.es/diario\\_boe/txt.php?id=BOE-A-2007-13409](http://www.boe.es/diario_boe/txt.php?id=BOE-A-2007-13409).

This is a very low amount for the self-employed with a high level of income but quite high for those self-employed people who work part-time. In the area of benefits and pensions received, a serious problem also arises because pensions are very small. It has been tried on several occasions to accommodate the contribution to the real earnings of the self-employed but this has never been achieved. There have been no legal proposals in this regard.

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

There is no legislation in Spain which is expressly mentioned as transposing Directive 2010/41/EC or the previous Directive 86/613/EEC. The preamble to the Self-Employed Workers' Statute makes express reference to Directive 86/613/EEC, which means it may be presumed that this Directive was taken into account in its drafting. In fact, the non-discrimination obligation on the ground of sex is expressly contained in Articles 4 and 6 of the Self-Employed Workers' Statute. Article 6 of the Self-Employed Workers' Statute establishes that the provisions of the Law on Effective Equality shall apply to the right to equality and non-discrimination on the grounds of sex in relation to self-employed workers.

## **8.3 Personal scope**

### **8.3.1 Scope**

The personal scope related to self-employment in Spanish legislation is contained in Article 1 of the Self-Employed Workers' Statute.

### **8.3.2 Definitions**

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

### **8.3.3 Categorisation and coverage**

The following autonomous workers have established a special regulation: (i) Economically dependent self-employed workers (so-called *TRADE* due to its initials in Spanish) constitute a special category of self-employed workers. Their main characteristic is that at least 75 % of their income depends on a single employer, which makes their situation (particularly their vulnerability) quite close to that of ordinary employees. For this reason, the Statute of Autonomous Workers gives them labour protection in certain aspects similar to that of workers. (ii) Self-employed workers in the agricultural sector are also a special category of self-employed workers because they have a special system of social security, which basically allows them a lower contribution to social security. Unemployment benefit for them also has special characteristics. (iii) Members of cooperatives also have, in some aspects, a specific regulation on social security (for example, in terms of cessation of activity or unemployment benefit).

### **8.3.4 Recognition of life partners**

Life partners of self-employed workers are recognised as self-employed workers as well. The Self-Employed Workers' Statute applies to family members of the self-employed worker who habitually, personally and directly work with the self-employed person, but are not registered as employees. Such family members include the spouse and relatives in the descending or ascending line, provided they live with the self-employed person and work habitually at the company (Article 305 of the General Law on Social Security). In the

case of sporadic work by the spouse or family members, they will not be included in the social security system.

## **8.4 Material scope**

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

Article 4.3.a of the Self-Employed Workers' Statute establishes the self-employed worker's general right to equality before the law and to non-discrimination on the grounds of sex. More specifically, Article 6 of the Statute establishes the following: 'The public authorities and those who hire the professional activity of self-employed workers are subject to the prohibition of discrimination, both direct and indirect, of those workers, for the reasons outlined in Article 4.3.a of this Law. The prohibition of discrimination will affect both free economic initiative and recruitment, as well as the conditions for the exercise of professional activities'.

### **8.4.2 Material scope**

It could be considered that EU legislation has been correctly transposed, given that the material scope of Spanish Law relating to equal treatment in self-employment is quite broad. However, in the Self-Employed Workers' Statute there is no express reference to sexual harassment, harassment on grounds of sex or the prohibition of instructions to discriminate, which are expressly referred to in Article 6 of the Directive.

## **8.5 Positive action**

There are several benefits that could be considered positive action since they intend to promote women's self-employment. One of them is the programme of corporate support for women, funded by the European Social Fund and the Ministry of Equality. It is a programme aimed at women who want to run a business or who, having already started a business, are looking for support for its implementation and/or consolidation. Most of the services offered by the programme are primarily dedicated to giving free advice to self-employed women.<sup>158</sup> Some regions have also established benefits for the promotion of female self-employment, including subsidies and access to credits.<sup>159</sup>

Another positive action measure for self-employed women in Spain is the establishment of discounts on their social security contributions:<sup>160</sup>

- a) There is a discount for self-employed mothers returning to work after maternity leave or parental leave based on which they could qualify for a reduced contribution (EUR 60 per month) to social security for 12 months after their return to work.
- b) Self-employed workers who, during the period of maternity leave, adoption, foster care, parenting, risk during pregnancy or risk during breastfeeding, have been replaced in their activity by an unemployed worker are entitled to a discount of 100 % of their monthly contribution to social security. The self-employed worker has the right to a 100 % discount of the social security contribution for the replacement as well. Both discounts are applied only if the self-employed person is replaced, since one of the objectives of this measure is to generate employment.
- c) There is a discount of 100 % of the social security contribution for a maximum period of 12 months to care for a child under 12 years of age or a family member up to the second degree (by affinity or consanguinity) with dependency or disability, provided that the self-employed person hires a worker to substitute him/her.

<sup>158</sup> Cámara de comercio de España, <https://empresarias.camara.es/>.

<sup>159</sup> For instance in Andalusia, see: <http://www.juntadeandalucia.es/institutodelamujer/index.php/empleo-y-empresas/actuaciones-dirigidas-a-emprendedoras-y-empresarias>.

<sup>160</sup> Law 6/2017 of 24 October 2017, [https://www.boe.es/diario\\_boe/txt.php?id=BOE-A-2017-12207](https://www.boe.es/diario_boe/txt.php?id=BOE-A-2017-12207).



- d) A 50 % discount on the self-employed person's contribution applies to the family members of the self-employed worker who habitually, personally and directly work with the self-employed person if they live with them. The discount applies during the first 18 months after the family member begins their activity. The purpose of this measure is to encourage the contribution of those family members of the self-employed person, primarily spouses and children, who are currently not registered, despite working in the family business, due to the economic difficulties that the crisis has caused in many small businesses. However, this benefit has not served to significantly increase the number of relatives who are registered. This is probably because the benefit has a very limited duration (18 months).

A series of positive action measures are recognised for the benefit of self-employed women who have been victims of gender violence. Article 21.5 of the Gender-Based Violence Law<sup>161</sup> states that if women have to cease their activity as a result of violence against them, they will be entitled to the period of suspension of their activity being considered as contributed for the purposes of future social security benefits, with a limit of six months. In addition, economically dependent self-employed workers (*TRADE*) who were victims of gender-based violence also have the right to changes in working hours or working conditions in order to increase their safety (Article 14.5 of the Self-Employed Workers' Statute).

## 8.6 Social protection

Self-employed workers are included in the Spanish system of social security. The way in which the contributions are made is rather unusual, since self-employed workers are free to declare the income which will be relevant in determining their monthly contribution.<sup>162</sup> This declared income will determine the amount of future benefits (including pensions). The self-employed are entitled to the following social security benefits: healthcare (including medical and pharmaceutical coverage), sick leave (which guarantees between 60 and 75 % of previously declared income), birth-related leave and leave due to risk during pregnancy and/or breastfeeding (which guarantees 100 % of previously declared income), pension due to permanent disability (which guarantees a percentage of the previously declared average income depending on the degree of disability), retirement pension (which guarantees a percentage of the previously declared average income depending on the amount of years of contribution to the system of social security), widow's or widower's pension (which guarantees to the widow or widower –including life partners – of a deceased self-employed person a percentage of their previously declared average income) and cessation of activity benefit (or unemployment insurance) only if the self-employed chose to include this voluntary benefit and made the relevant contributions. There is only one system of social protection for self-employed people, although some slight peculiarities have been established for agricultural workers and for maritime workers. These peculiarities are basically related to organisational and bureaucratic matters. Social security is mandatory for spouses who work in the family business. Only occasional work by spouses is excluded from the system of social security

## 8.7 Maternity benefits

Maternity benefit for self-employed women is recognised in Spain in the same way as it is recognised for employees (100 % of the previously declared income for 16 weeks). Royal Decree 6/2019 of 1 March 2019 established important changes in the maternity leave regulations that also affected self-employed women. From April 2019, maternity leave and paternity leave were replaced by a unique birth-related leave with similar features for each parent. However, full harmonisation of leave for both parents will not be effective until

<sup>161</sup> Article 21.5 of Organic Law 1/2014 of 28 December 2014, for Integral Protection Against Gender Violence, [www.boe.es/buscar/pdf/2004/BOE-A-2004-21760-consolidado.pdf](http://www.boe.es/buscar/pdf/2004/BOE-A-2004-21760-consolidado.pdf).

<sup>162</sup> According to Decree 2530/1970 of 20 August 1970, [www.boe.es/buscar/pdf/1970/BOE-A-1970-1000-consolidado.pdf](http://www.boe.es/buscar/pdf/1970/BOE-A-1970-1000-consolidado.pdf).



2021. Another important feature of the birth-related leave established by Royal Decree 6/2019 is that, after the first mandatory six weeks after childbirth, the rest of the leave can be broken up and taken as full weeks until the child is 12 months old. The coverage and contributions are compulsory for self-employed women.

The allowance can be considered sufficient, since it would be at least the same amount as she would receive in the event of a break in her activities on grounds connected with her state of health. However, given that self-employed people are allowed to declare an income lower than their real income,<sup>163</sup> the maternity allowance hardly serves to replace the loss of the previous income. In fact, self-employed women tend to go back to work immediately after the compulsory six weeks of leave after birth, dispensing with the rest of their maternity leave. There are no services supplying temporary replacements or other kinds of social services, other than the discounts to the social security contribution if the self-employed woman hires someone to replace her during her maternity leave. Spain has not used the option, as provided for in the last sentence of Article 8(4) of Directive 2010/41/EU, to provide for access to those services to be an alternative or part of the allowance.

## **8.8 Occupational social security**

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

Spanish Law has not implemented expressly the provisions regarding occupational social security. This does not mean that Spain does not comply with the Directive in this respect, given that the occupational social security system in Spain is not the usual form of coverage for workers and has a rather small impact. The general prohibition of discrimination based on sex at work is also applicable in this case.

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

Spanish Law has not made use of the exceptions for self-employed people regarding matters of occupational social security.

## **8.9 Prohibition of discrimination**

Article of 69 of the Law on Effective Equality is the implementation in Spain of Article 14(1)(a) of the Recast Directive with regard to self-employment. This Article states: '1. All persons who, in the public or private sector, supply goods or services available to the public, offered outside the scope of private and family life, shall be bound, in their activities and in the consequent transactions, to compliance with the principle of equal treatment between women and men, avoiding discrimination, direct or indirect, based on sex. 2. The provisions of the previous section do not affect freedom of contract, including the freedom of the person to choose the other contracting party, provided that such choice is not determined by their sex. 3. Notwithstanding the provisions of the preceding paragraphs, differences of treatment in access to goods and services when they are justified by a legitimate purpose and the means to achieve it are adequate and necessary.'

## **8.10 Evaluation of implementation**

In the opinion of the author, Spanish Law correctly implements Directive 2010/41/EU and the Recast Directive in the matter of equality gender applied to self-employed workers. It

---

<sup>163</sup> According to Decree 2530/1970 of 20 August 1970, the way in which self-employed people contribute to social security is a percentage of the income they declare (not of the income they actually receive). They are free to declare the income they want and are not required to declare the actual income they receive. Therefore, it is legal for them not to declare their real income but rather a lower income to pay a lower contribution to social security.

cannot be said, however, that Spanish legislation goes beyond European Union law, nor that it has dealt with specific aspects of the Spanish reality related to the activity of self-employed workers in matters of gender equality.

### **8.11 Remaining issues**

It is quite usual for self-employed people to declare the minimum wage, so their monthly contribution will be lower, although this means that their future benefits, including maternity leave, will be lower as well. The allowance can be considered sufficient, since theoretically it would be at least the same amount as that which the individual would receive in the event of a break in her activities on grounds connected with her state of health. However, given that self-employed women usually declare a lower income than their real income, the maternity allowance hardly serves to replace the loss of their previous income. In fact, self-employed women tend to go back to work immediately after the compulsory six weeks leave after giving birth, dispensing with the rest of their maternity leave (no official data are available in this respect).

## **9 Goods and services (Directive 2004/113)<sup>164</sup>**

### **9.1 General (legal) context**

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

There are no official surveys and/or reports in Spain which provide insights into the difficulties men and women may face in terms of equal access to and supply of goods and services.

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

Online and digital market environments are rapidly expanding in Spain. In the opinion of the author, the collaborative economy creates spaces of indirect discrimination in the workplace on the ground of sex and on intersectional grounds, since it increases the level of availability that the worker must have to maintain their employment. Although interest in the ethical issues involved in the use of artificial intelligence (AI) is growing, the attention dedicated to the impact of algorithms on gender equality and the question of algorithmic discrimination is still limited. The news media and specialised discussion forums alike have sporadic contributions, mainly reporting on the results of research or cases investigated abroad. The *White book of women in the technology sector*, published by the State Secretary for Digital Advancement,<sup>165</sup> contains a specific section on algorithmic discrimination. However, Spain has not yet established a regulation on automated decision-making. Specific legislation should be established for this type of environment to eliminate these risks and guarantee effective equality for women and men in companies.

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

There is no important social or political debate about discrimination between men and women in access to goods and services. One issue that sometimes appears in the media is the higher price of women's products (the so-called pink rate) or the need to reduce consumer taxes on women's hygiene products.

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

Article 69.1 of the Law on Effective Equality expressly prohibits direct and indirect discrimination on grounds of sex in access to goods and services. Articles 69, 70, 71 and 72 of the Law on Effective Equality transpose Directive 2004/113/EC.

### **9.3 Material scope**

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

### **9.4 Exceptions**

The exceptions regarding the material scope as specified in Article 3.3 of Directive 2004/113/EC, with respect to the content of media, advertising and education, have not

---

<sup>164</sup> See, for example, Caracciolo di Torella, E. and McLellan, B. (2018), *Gender equality and the collaborative economy*, European network of legal experts in gender equality and non-discrimination, available at <https://www.equalitylaw.eu/downloads/4573-gender-equality-and-the-collaborative-economy-pdf-721-kb>.

<sup>165</sup> State Secretary for Digital Advancement (2020) *Libro Blanco de las mujeres en el ámbito tecnológico* (White Book of women in the technology sector), <https://www.mineco.gob.es/stfls/mineco/ministerio/ficheros/libreria/LibroBlancoFINAL.pdf>.

been implemented in Spanish legislation. Spanish legislation includes no provisions to exclude media, advertising and education from the material scope of the principle of non-discrimination in the access to goods and services, so the principle of gender equality fully applies in these areas as well.

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

Article 69.3 of the Law on Effective Equality reproduces Article 4(5) of Directive 2004/113/EC almost literally. It states that differences in access to goods and services will be allowed if they are justified by a legitimate aim and the means of achieving that aim are appropriate and necessary. However, there is no other reference to this possibility in Spanish legislation and there have not been any cases regarding the issue.

## **9.6 Actuarial factors**

Article 71.1 of the Law on Effective Equality expressly prohibits the conclusion of contracts of insurance and financial or other services that, when considering sex as a factor for calculating premiums and benefits, generate differences in premiums and benefits for the people insured.

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

Spanish legislation was modified in order to be adapted to the *Test-Achats* ruling. Final Provision 14 of Law 11/2013,<sup>166</sup> modified the consolidated text of the Law on the Management and Supervision of Private Insurance, approved by Royal Legislative Decree 6/2004, of 29 October 2004, adding a new 12th additional provision with the following wording: 'Equality of treatment between women and men. Within the scope of Directive 2004/113/EC, of the Council of 13 December 2004, concerning the application of the principle of equality of treatment between women and men in access to and supply of goods and services, in the calculation of the rates of insurance contracts, differences in treatment between women and men may not be established in the premiums and benefits for insured persons, when those consider sex as a factor of calculation.'

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

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

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

There are two specific provisions in Spanish legislation that refer to maternity and pregnancy in relation to access to goods and services. Firstly, Article 71.2 of the Law on Effective Equality states that the costs related to pregnancy and childbirth do not justify differences in the premiums and benefits of individuals. Secondly, Article 70 of the Law on Effective Equality stipulates that, in the access to goods and services, it is not allowed to enquire whether a woman is pregnant, except for health protection. There are no other provisions about discrimination on the grounds of pregnancy, maternity or parenthood in the access to goods and services and there have not been any relevant cases on the issue either.

---

<sup>166</sup> Final Provision 14 of Law 11/2013 of 26 July (*Disposición Final 14 de la Ley 11/2013*; Additional Provision 12 of Law 11/2013 of 26 July, [www.boe.es/boe/dias/2013/07/27/pdfs/BOE-A-2013-8187.pdf](http://www.boe.es/boe/dias/2013/07/27/pdfs/BOE-A-2013-8187.pdf)).

## 9.10 Evaluation of implementation

Directive 2004/113/EC can be said to have been correctly implemented, at least from a formal point of view, as the most relevant provisions of the Directive have been transposed almost literally. However, the Directive's impact has been rather limited despite its proper implementation. This is probably due to a lack of initiative on behalf of the authorities, the lack of specific regulations outlining the rights and obligations in the various areas and in contractual agreements, as well as a lack of court claims concerning specific discrimination issues.

## 9.11 Remaining issues

The applicable sanctions in the case of the violation of rights under Directive 2004/113/EC are as follows.

- (i) Article 512 of the Criminal Code<sup>167</sup> states that those who, in the exercise of their professional or business activities, deny a person access to a good or service to which they have a right, by reason of ideology, religion or beliefs, ethnic origin, race or nationality, sex, sexual orientation, family situation, gender, sickness or disability, will receive a penalty of one year of disqualification from the exercise of their profession, office, industry or commerce. In the case of a profession related to education, sport or leisure, the penalty of disqualification will increase from one to two years. As far as the author is aware, this article has only been applied on one occasion in the case of a violation of the rights under Directive 2004/113/EC. Criminal Court of Barcelona number 6<sup>168</sup> convicted the doorman of a discotheque to one year of professional disqualification for not having allowed a transsexual access to the discotheque.
- (ii) Article 49.1. m. of the General Law for the Defence of Consumers and Persons who make use of Services<sup>169</sup> states that discrimination in access to goods and services will be considered an administrative offence (*infracción administrativa*) against the Law so the offenders will be obliged to pay a fine. The amount is, however, uncertain, since it has never been applied. The sanctions appear dissuasive, since they are theoretically included in the Criminal Code. However, their application is almost non-existent, so it could hardly be said that the sanctions are effective.

The remedies established for the victims of gender discrimination in the access to goods and services are as follows:

- (i) According to Article 72 of the Law on Effective Equality a victim of gender discrimination in the access to goods and services will have the right to compensation for loss and damages;
- (ii) According to Article 10 of the Law on Effective Equality, any discriminatory act or clause will be considered null and void.

---

<sup>167</sup> Criminal Code, Organic Law 10/1995 of 23 November 1995, [www.boe.es/buscar/act.php?id=BOE-A-1995-25444](http://www.boe.es/buscar/act.php?id=BOE-A-1995-25444).

<sup>168</sup> Judgement of the Criminal Court of Barcelona, number 6, 13 March 2014 (procedure 518/2013).

<sup>169</sup> General Law for the Defence of Consumers and Persons who make use of Services, Royal Legislative Decree 1/2007 of 16 November 2007, [www.boe.es/buscar/act.php?id=BOE-A-2007-20555](http://www.boe.es/buscar/act.php?id=BOE-A-2007-20555).

## 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

There is a detailed and permanently updated official survey on gender-based violence prepared by the Government Delegation for Gender Violence of the Ministry of the Presidency, Relations with the Courts and Equality.<sup>170</sup> As of 2007, annual reports are also prepared by the State Observatory on Violence against Women, a state agency specifically created to combat gender-based violence. However, its most recent report is from 2017.<sup>171</sup> A report on violence against women in judicial statistics is also prepared annually by the Observatory against Domestic and Gender Violence of the General Council of the Judiciary.<sup>172</sup> These reports are effectively produced every year. They illustrate that intensive research is being undertaken by public institutions to analyse the causes of gender violence and the best way to combat it, which is confirmed by numerous academic studies. The surveys and studies identify several types of violence against women (physical, sexual, psychological control, psychological, emotional, economic, etc.). The consequences of this violence on the physical and mental health of affected women are also studied, looking at the extent to which these women have reported their situation or have gone to an aid service or have told others about their situation. They also analyse the impact that gender violence has on the sons and daughters of the victim and try to find a solution to gender-based violence. Unfortunately, this interest has not eliminated gender-based violence in Spain: from 2003 to 2018 the number of women murdered in Spain by their partners or ex-partners was 975. In the same period of time, the number of children murdered as a form of gender-based violence against their mothers was 27.

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

The legal framework in Spain on violence against women is Law 1/2004, of 23 December 2004, on Comprehensive Protection against Gender-Based Violence.<sup>173</sup> Law 1/2004 received an honourable mention in 2014 in the Future Policy Award (given by the World Future Council) as one of the best pieces of legislation on violence against women.<sup>174</sup>

Spain ratified the Istanbul Convention in 2014. That same year, Spain was found to have violated the rights under the CEDAW of a woman and her daughter, after the daughter was killed by her father in revenge against the mother and notwithstanding the repeated and unattended complaints by the mother to the police and social services.<sup>175</sup> By means of Law 26/2015, of 28 July 2015, the protection system on gender-based violence was extended to children.<sup>176</sup>

On 28 September 2017 the Spanish Parliament adopted a document, the State Pact against Gender Violence (*Pacto de Estado contra la violencia de género*), which reflected

<sup>170</sup> Government Delegation for Gender Violence of the Ministry of the Presidency, Relations with the Courts and Equality, <http://estadisticasviolenciagenero.igualdad.mpr.gob.es/>.

<sup>171</sup> *Informes Anuales del Observatorio Estatal de Violencia sobre la Mujer* (Annual Reports of the State Observatory of Violence against Women), [www.violenciagenero.igualdad.mpr.gob.es/violenciaEnCifras/observatorio/informesAnuales/home.htm](http://www.violenciagenero.igualdad.mpr.gob.es/violenciaEnCifras/observatorio/informesAnuales/home.htm).

<sup>172</sup> *La violencia sobre la mujer en la estadística judicial* (Violence against women in judicial statistics), [www.poderjudicial.es/cqpi/es/Temas/Violencia-domestica-y-de-genero/Actividad-del-Observatorio/Datos-estadisticos/](http://www.poderjudicial.es/cqpi/es/Temas/Violencia-domestica-y-de-genero/Actividad-del-Observatorio/Datos-estadisticos/).

<sup>173</sup> Law 1/2004 of 23 December 2004: [www.boe.es/buscar/doc.php?id=BOE-A-2004-21760](http://www.boe.es/buscar/doc.php?id=BOE-A-2004-21760).

<sup>174</sup> World Future Council, Future Policy Award 2014: Ending Violence Against Women & Girls, [www.worldfuturecouncil.org/p/2014-ending-violence-against-women/](http://www.worldfuturecouncil.org/p/2014-ending-violence-against-women/).

<sup>175</sup> CEDAW Committee, Decision of 16 July 2014, Communication No. 47/2012 *González Carreño v. Spain*.

<sup>176</sup> Law 26/2015 of 28 July 2015, that modifies the protection system for children and adolescents, [www.boe.es/buscar/pdf/2015/BOE-A-2015-8470-consolidado.pdf](http://www.boe.es/buscar/pdf/2015/BOE-A-2015-8470-consolidado.pdf).

the agreement of the majority of the political parties with parliamentary representation to work together in the fight against gender-based violence. The document contained 200 concrete measures, to be implemented mostly by the Government, the Autonomous Communities and local authorities over the next five years.<sup>177</sup> The Government approved a Royal Decree Law, in 2018, the main points of which were the following: the mechanisms for the accreditation of victims were expanded; the law was modified so that the assistance women receive is compatible with other assistance; measures were included so that the children of victims do not need the permission of the abuser or murderer to receive psychological treatment; the victim was allowed to appear as a private petitioner at any stage of the procedure. The evaluation of the measures adopted to apply the pact against gender-based violence shows they are diverse and have a strong political component.<sup>178</sup>

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

There are no specific national provisions on online violence and online harassment.

### 10.1.4 Political and societal debate

One of the weakest points of Spanish legislation regarding gender-based violence is the limitation of its definition to violence perpetrated by the present or former spouse or partner, which leaves many women victims of gender-based violence – including sexual violence – outside the scope of protection of gender-based violence legislation and policy.

Over the last two years, the main topic of debate in terms of legislation against gender-based violence in Spain has been related to the concept of rape, the lack of express consent by the victim, and its regulation by the law. The issue arose when a judgement of the Provincial Court of Navarre of 20 April 2018 interpreted that, according to the Spanish Criminal Code, sexual relations without mutual consent cannot be considered rape but qualifies as sexual abuse in cases where express and clear violence and intimidation is absent.<sup>179</sup> This judgement triggered a massive public reaction opposing the judgement because it implicitly considered a woman responsible for being assaulted, unless she showed clear and express opposition, forcing her to put her life at risk. Although the Provincial Court's decision was reversed by the Supreme Court in July 2019, which qualified the acts as sexual aggression, the uproar created prompted the introduction of a Draft Law to guarantee sexual freedom in March 2020.<sup>180</sup>

Another important public debate has arisen in Spain in relation to the legislation against gender-based violence with the appearance of extreme right-wing political parties, particularly the Vox party. This party advocates for a repeal of the legislation against gender-based violence because it considers that gender-based violence does not exist but only domestic violence. The party claims that the protection provided to victims of gender-based violence has been fraudulently used by alleged victims to obtain better conditions in the event of divorce and to obtain custody of children. It has also denounced that the money spent in support and shelter policies is funding 'shady feminist organisations' (*chiringuitos feministas*) that propagate gender ideology. In the Autonomous Communities where Vox is key to governance (with the People's Party or Ciudadanos), many grassroots organisations with projects on gender equality, LGBTI rights and protection against gender-based violence saw their funding applications refused in 2019.

---

<sup>177</sup> *El Derecho* (2017), 'El Congreso aprueba el Pacto de Estado Contra la Violencia de Género' (Congress approves the State Pact Against Gender Violence), [www.elderecho.com/actualidad/Congreso-aprueba-Pacto-Estado-Violencia-Genero\\_0\\_1140375145.html](http://www.elderecho.com/actualidad/Congreso-aprueba-Pacto-Estado-Violencia-Genero_0_1140375145.html).

<sup>178</sup> Royal Decree Law 9/2018 of 3 August 2018 on Urgent Measures for the Development of the State Agreement against Gender-Based Violence, [www.boe.es/diario\\_boe/txt.php?id=BOE-A-2018-11135](http://www.boe.es/diario_boe/txt.php?id=BOE-A-2018-11135).

<sup>179</sup> Judgement of the provincial Court of Navarre of 20 April 2018 number 38/2018, <https://cdn.20m.es/adj/2018/04/26/3934.pdf>.

<sup>180</sup> <https://www.lamoncloa.gob.es/consejodeministros/Paginas/enlaces/030320-enlace-mujeres.aspx>.

## 10.2 Ratification of the Istanbul Convention

Spain ratified the Istanbul Convention on 27 May 2014. Spain presented its first (baseline) evaluation report to GREVIO in February 2019. No evaluation report by GREVIO has been published yet.

The Shadow Report, presented by the Spanish Istanbul Shadow Platform,<sup>181</sup> considers the main shortcomings of the Spanish implementation to be the following: the limitation of the definition of gender-based violence to intimate-partner violence; insufficient funding of existing policies (including the measures in the State Pact of 2018); lack of data; lack of programmes against discrimination and gender violence in the education system; lack of early warning protocols about gender violence for health staff; the subordination of support measures to the fact that victims make criminal complaints; and finally but most importantly, the lack of gender training for judges and other law-enforcement actors which leads, for example, to high rates of refusal to grant protection orders and other preventive mechanisms to protect victims.<sup>182</sup>

---

<sup>181</sup> The Spanish Istanbul Shadow Platform (*Plataforma Estambul Sombra España*) brings together feminist, international cooperation and human rights organisations. It was set up in April 2018 to draw up and present the Shadow Report.

<sup>182</sup> Spanish Istanbul Shadow Platform (2018), *Informe Sombra al GREVIO 2018* (Shadow Report to GREVIO 2018), <https://rm.coe.int/spanish-istanbul-shadow-platform/1680931a77>.



## **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**

As far as the author is aware, there are no official surveys and/or reports that provide insights into the particular difficulties that victims of gender discrimination face in practice in obtaining legal redress.

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

As far as the author is aware, there are no statistics about judicial cases related to gender discrimination. Data only exist in relation to lawsuits related to gender violence. At first glance it seems that the amount of cases which have been decided in front of the higher Spanish courts is very low, since only a few of them have been published in the Spanish case-law records.

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

One of the main challenges facing regulation against discrimination based on sex in Spain is its lack of effectiveness. For this reason, in 2019 a Royal Decree was passed with the explicit aim of increasing the effectiveness of the Equality Law.<sup>183</sup> It is too soon to ascertain the impact of the reform through statistics or in case law.

Within the academic literature, the reactions are mixed and, necessarily, cautious.<sup>184</sup> On the one hand, it is appreciated that the Royal Decree sees the need to introduce changes to make the law on gender equality more effective. On the other hand, a Decree-Law<sup>185</sup> might not be the most appropriate form to ensure the detailed and careful attention that discrimination issues require to be effectively mainstreamed through all the relevant laws and statutes, as the Royal Decree intended. There has been a lack of attention to important issues, such as guarantees and procedural issues. Moreover, in some aspects the reform of parental leave could have gone further, with easy changes that have not been introduced, giving the impression that the text was rather rushed.

### **11.2 Victimisation**

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

---

<sup>183</sup> Royal Decree 6/2019 of 1 March 2019.

<sup>184</sup> Ballester Pastor M.A. (2019), 'El RDL 6/2019 para la garantía de la igualdad de trato y de oportunidades entre mujeres y hombres en el empleo y la ocupación: Dios y el diablo en la tierra del sol (The Royal Decree 6/2019 for the guarantee of equal treatment and opportunities between women and men in employment and occupation: God and the devil in the land of the sun)', *Femeris*, vol. 4, no. 2, pp. 14-38.

<sup>185</sup> Royal Decree Laws are meant to introduce urgent measures.

### 11.3 Access to courts

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

In equal treatment cases, the persons affected have standing before the courts and, if the victim consents, so do trade unions and associations for the promotion of equality. If the victims are a group of unspecified persons or if they are difficult to identify, the following entities will have standing before the courts: public entities which have as an objective equality between women and men, and most representative unions and national associations which have amongst their objectives equality between women and men.<sup>186</sup> Theoretically there are many mechanisms for interventions by interest groups and legal entities for the defence of victims of discrimination. However, these actions are quite rare and most cases of gender discrimination submitted to the courts are pursued by individual victims. In the author's opinion the system is apparently correct but in reality there are serious difficulties. Firstly, the Institute of Women and for Equal Opportunities theoretically has the possibility to initiate proceedings against offenders in cases of discrimination but it rarely does so. The same happens with most representative trade unions. Secondly, the Labour Inspectorate theoretically has the possibility to investigate employers who discriminate against women but its intervention depends on the instructions and preferences given by the Labour Authorities, which do not always take a sufficient interest in the issue. Thirdly, the Labour Authority could theoretically check collective agreements for illegal provisions in relation to gender discrimination, but it rarely does so.

#### 11.3.2 Availability of legal aid

Alleged victims of gender discrimination have access to legal aid provided by public entities (the Institute of Women and for Equal Opportunities and entities responsible for equality in the Autonomous Communities and municipalities). If the victim does not have sufficient economic resources to initiate judicial proceedings against the offender she can benefit from the programme of free legal assistance which, in addition to legal assistance, provides exemption from payment of lawyer's fees, the costs of expert testimony, judicial fees, etc.<sup>187</sup>

### 11.4 Horizontal effect of the applicable law

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

One of the issues raised in Spain regarding the horizontal effect of EU legislation on gender-based discrimination is related to the fact that, in some cases, the judgements of the CJEU do not allow its immediate application to individuals because they require specification by internal regulations. One of these complex situations arose in Spain following the *Elbal Moreno* case.<sup>188</sup> The CJEU established that the system for accessing pensions in Spain constituted indirect gender-based discrimination because it had adverse effects on part-time workers. Seven months later the Royal Decree 11/2013 of 2 August 2013 established a new system for calculating the contribution period in terms of part-time workers' pensions (the partiality coefficient). However, until the new legislation was approved and started to be applied, the Spanish Courts of justice had to resolve the issue and were thus faced with the dilemma that any decision meant replacing the action of the legislator. In the specific case that gave rise to the reference for a preliminary ruling that culminated in the *Elbal Moreno* case, the judgement settled the case by counting one full working day of contribution for every day of work by the part-time worker, as requested

<sup>186</sup> Article 11 of the Civil Procedure Act, Law 1/2000 of 7 January 2000, [www.boe.es/buscar/act.php?id=BOE-A-2000-323](http://www.boe.es/buscar/act.php?id=BOE-A-2000-323).

<sup>187</sup> Spain Law 1/1996 of 10 January 1986, on Free Legal Assistance, [www.boe.es/buscar/act.php?id=BOE-A-1996-750](http://www.boe.es/buscar/act.php?id=BOE-A-1996-750).

<sup>188</sup> Judgement of 12 November 2012, C-385/11, *Isabel Elbal Moreno v. Instituto Nacional de la Seguridad Social (INSS) and Tesorería General de la Seguridad Social (TGSS)*.

by the claimant.<sup>189</sup> However, the courts of justice did not generally apply this solution to all the cases brought before them in the interim period between the judgement passed in the *Elbal Moreno* case and Royal Decree 11/2013. There was a certain level of resistance by most of the courts which continued to apply the discriminatory legislation until it was expressly corrected by the legislator, arguing that there was no overlap in the subsequent cases since they were not totally 'equal' to the one resolved by the judgement handed down in the *Elbal Moreno* case.<sup>190</sup>

Another problematic situation related to the horizontal effect of the anti-discrimination Directives arose after the ruling issued by the CJEU in the *Porrás Guisado* case.<sup>191</sup> In this Judgement the CJEU stated that Article 10(2) of Directive 92/85/EEC must be interpreted as not precluding national legislation which allows an employer to dismiss a pregnant worker in the context of a collective redundancy without giving any grounds other than those justifying the collective dismissal, 'provided that the objective criteria chosen to identify the workers to be made redundant are cited'.<sup>192</sup> The sentence seemed to be establishing the validity of the Spanish norm but in fact it was doing the opposite. This was because the CJEU established that the objective criteria chosen to identify the workers to be made redundant had to be expressly stated by the employer.

The Court which prepared the preliminary ruling which gave rise to the ruling issued by the CJEU in *Porrás Guisado* was the Superior Court of Justice of Catalonia. After the ruling of the CJEU the Superior Court of Justice of Catalonia had to apply this doctrine of the CJEU to the concrete case, but considered that it could not do so because Directive 92/85/EEC lacked direct horizontal effects. Therefore, it reached the conclusion, contrary to what was established in the ruling issued by the CJEU in the *Porrás Guisado* case, that the dismissal of the pregnant worker due to redundancy was valid, even though the employer had not mentioned in the letter of dismissal the reasons for which the precise position occupied by the pregnant worker should be made redundant.

However, the Judgement of the Superior Court of Justice of Castile and León (Valladolid) of 28 May 2018, produced a contrary interpretation, stating that the *Porrás Guisado* doctrine could be applied directly among individuals. It reached this conclusion primarily because the national courts must act in a way that facilitates compliance with the purpose intended by the Directives and, secondly, by application of the provisions of Article 33.2 of the Charter of Fundamental Rights of the European Union. As a consequence, in this judgement it was stated that the dismissal of a pregnant worker, without express cause, must be declared null and void, so the woman had the right to be reinstated in her workplace.

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

The Superior Court of Justice of Castile and León (Valladolid) interpreted that the *Porrás Guisado* doctrine could be applied directly among individuals because Directive 92/85/EEC had horizontal effect. One of the arguments for this interpretation was Article 33.2 of the Charter which states that, 'in order to be able to reconcile family life and professional life, every person has the right to be protected against any dismissal for a reason related to maternity, as well as the right to paid maternity leave and parental leave on the occasion of the birth or adoption of a child'.<sup>193</sup>

<sup>189</sup> Judgement of the Social Court 33 of Barcelona of 30 November 2012, confirmed by Judgement of the Catalonia High Court of Justice of 27 November 2013, Appeal number 1339/2013.

<sup>190</sup> Catalonia High Court of Justice of 4 March 2013, Appeal number 7851/2013; this judgement had a dissenting vote signed by a large number of magistrates.

<sup>191</sup> Judgement of 22 February 2018, C-103/16, *Jessica Porrás Guisado v Bankia SA and Others*.

<sup>192</sup> Judgement of 22 February 2018, C-103/16, *Jessica Porrás Guisado v Bankia SA and Others*.

<sup>193</sup> Judgement of the Superior Court of Justice of Castile and León (Valladolid) of 28 May 2018.

## 11.5 Burden of proof

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

## 11.6 Remedies and sanctions

### 11.6.1 Types of remedies and sanctions

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

There are several possible sanctions against the employer who fails to respect employees' rights not to be discriminated against. They are all compatible. Firstly, if a dismissal takes place on grounds of sexual discrimination, the employer's decision is declared null and void, with the immediate effect of reinstatement in the post and on the same conditions as previously applied.<sup>194</sup> Secondly, the worker can ask for compensation of damages which includes moral damages.<sup>195</sup> Thirdly, according to Articles 7(5) and 40(1)(b) of the Law of Offences and Penalties in the Social Order, the employer could be considered guilty of serious misconduct, in which case they could be ordered to pay an administrative sanction of EUR 626 to EUR 6 250.

### 11.6.2 Effectiveness, proportionality and dissuasiveness

In the author's opinion, the remedies and sanctions are theoretically proportionate, but they are not always effective and dissuasive for the following reasons. Firstly, moral damages are difficult to prove and even when they are recognised by the courts, they result in quite low amounts. Secondly, the sanctions established in the Law of Offences and Penalties can only be imposed by the Labour Inspectorate, which does not always have gender discrimination as a priority.

## 11.7 Equality body

The Spanish body which seeks to implement the requirement of European Union gender equality law is the Institute of Women and for Equal Opportunities.<sup>196</sup> Some autonomous communities also have their own equality bodies.<sup>197</sup> Law 15/2014 of 16 September 2014 transformed the former Institute of Women into the Institute of Women and for Equal Opportunities. The current Institute has as its objective to combat discrimination on the grounds of birth, sex, racial or ethnic origin, religion or ideology, sexual identity, sexual orientation, age, disability or any other personal or social condition or circumstance.

The Institute of Women and for the Equal Opportunities is formally an 'autonomous body' attached to the Ministry of Health, Social Services and Equality. However, the fact that it is defined as an 'autonomous body' does not indicate its independence, since its staffing and by-laws are those of a Spanish government body. Its Director General is appointed

<sup>194</sup> Article 55(5) of the Workers' Statute.

<sup>195</sup> Article 183 of the Act Regulating Social Jurisdiction.

<sup>196</sup> Institute of Women and for Equal Opportunities (*Instituto de la Mujer para la igualdad de oportunidades*), [www.inmujer.gob.es/](http://www.inmujer.gob.es/).

<sup>197</sup> For example, the Andalusian Institute of Women' ([www.juntadeandalucia.es/organismos/igualdadpoliticasocialesyconciliacion/consejeria/adscritos/iam.html](http://www.juntadeandalucia.es/organismos/igualdadpoliticasocialesyconciliacion/consejeria/adscritos/iam.html)) or the Basque Institute of the Woman ([www.emakunde.euskadi.eus/inicio/](http://www.emakunde.euskadi.eus/inicio/)).

by the Council of Ministers and hierarchically reports to the Minister. The Institute is not independent of the Government because it is part of the Government. In relation to gender discrimination, the general function of the Institute of Women and for Equal Opportunities is theoretically the promotion and encouragement of conditions that produce social equality of the sexes and allow women's participation in political, cultural, economic and social life. Additional Provision 27 of the Law on Effective Equality establishes that the Institute has the following competences: a) providing independent assistance to victims of discrimination in pursuing their complaints; b) conducting studies into discrimination; c) publishing reports and making recommendations regarding any issue relating to discrimination.

In the opinion of the author, the Institute of Women and for Equal Opportunities has had a very limited influence on progress in combating discrimination based on sex, particularly in recent years. In part, this has been due to cuts in public spending. It could also be as a result of the fact that the Institute is not an independent body but is part of the Government. It should be noted that Spanish legislation establishes a wide range of competences for the Institute in combating discrimination. However, the Institute does not have a proactive role in exercising them. For example, according to its 2018 Activities Report, the Institute only received 3 formal complaints (*denuncia*) and 10 claims that were channelled to another department, the Labour Inspectorate or the Autonomous Communities.

### **11.8 Social partners**

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

The role of collective agreements in the development of equality issues was not really relevant before the Law on Effective Equality entered into force. Since then, there is a general obligation for the social partners to negotiate, in collective agreements, measures promoting equal treatment and opportunities for women and men.<sup>198</sup> Royal Decree 6/2019 has introduced important changes to the regulation of equality plans. It has established that companies with more than 50 workers are obliged to carry out equality plans. Until the reform, only companies with more than 250 workers had this obligation. This has increased the number of companies that must now produce equality plans. It has also created a registry of these plans, which will make it easier to identify the different equality plans in place as well as to monitor their effectiveness. Finally, a series of points are set out in the Royal Decree which must be addressed in the equality plans. This ensures that the relevant topics are not avoided in these plans. These matters are the following:

- selection and recruitment processes;
- professional classification;
- training;
- professional promotion;
- working conditions, including the gender pay audit;
- co-responsible exercise of personal, family and work-life rights;
- female under-representation;
- remuneration;
- prevention of sexual harassment.

---

<sup>198</sup> Article 45.1 of the Law on Effective Equality.

### **11.9 Other relevant bodies**

In equal treatment cases, the individuals affected have standing before the courts and, if the victim consents, so do trade unions and associations for the promotion of equality. When the victims are a group of unspecified persons or if they are difficult to identify, the following entities will have standing before the courts: public entities which have as an objective equality between women and men (including equality bodies) and most representative trade unions and national associations which have amongst their objectives the equality of women and men.<sup>199</sup> Theoretically, therefore, there are many mechanisms for interventions by interest groups and legal entities for the defence of victims of discrimination. However, these actions are quite rare and most cases of gender discrimination submitted to the courts are pursued by individual victims.

The ombudsman does not have competence to bring a claim on behalf of the employee in front of an ordinary judicial body, although it is competent to bring a case of discrimination to the Constitutional Court. However, this is a theoretical possibility which has never been used by the Spanish ombudsman in relation to gender discrimination issues.

Article 146 of the Act Regulating Social Jurisdiction states that the Labour Inspectorate has the competence to bring a judicial claim against an employer who, according to the evidence of the Labour Inspectorate, could be discriminatory against women.

### **11.10 Evaluation of implementation**

In theory, Spanish legislation implements EU Law adequately in the area of the compliance and enforcement aspects of the anti-discriminatory legislation on the ground of sex. Theoretically, there are many mechanisms for intervention by interest groups and legal entities for the defence of victims of discrimination. However, these actions are quite rare and most cases of gender discrimination submitted to the Courts are pursued by individual victims.

### **11.11 Remaining issues**

One of the most significant problems with combating discrimination in Spain relates to the deficiencies which exist in Spanish law when challenging collective agreements. On the one hand, in practice only trade unions which have not signed the collective agreement challenge illegal collective agreements, because the mechanism of public monitoring of collective agreements does not work effectively. If those trade unions do not exist or do not have any interest in challenging the collective agreement, it remains unchallenged. On the other hand, in theory, an individual could request the judge to reject a clause of the collective agreement on the ground that it is discriminatory. However, it is rare that an individual has the necessary information to do this in the case of indirect discrimination (high impact on women). In addition, the worker may have an understandable fear of filing a legal claim against an employer who applies an illegal collective agreement, especially if she has a temporary contract.

---

<sup>199</sup> Article 11 of the Civil Procedure Act, Law 1/2000 of 7 January 2000.

## 12 Overall assessment

The following transposition problems are mentioned in this report:

1. Most of the transposition has been done in a formal way, simply reproducing the text of the directives directly, rather than addressing how it fits into existing Spanish law and case-law.
2. In relation to Directive 2010/18/EC, time off from work on grounds of force majeure is not guaranteed.
3. In relation to Directive 2010/18/EC, Spanish legislation does not consider the interests of workers in determining notice periods (Clause 3.2)
4. In relation to the Recast Directive, the Institute of Women and for Equal Opportunities is not an independent body
5. In relation to Directive 92/85/EEC, Spain has not taken preventive action regarding dismissal of pregnant workers, as requested in the CJEU's *Porrás Guisado* ruling.
6. Regarding social security benefits only for women, in order to compensate for their greater involvement in the care of children, Spain maintains some provisions which were ruled as contrary to EU law in *WA v INSS* in December 2019.

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

Although the Spanish legislation is theoretically correct, very few claims have been filed for discrimination on the ground of sex, particularly in the area of wage discrimination, promotion discrimination and access to work. This suggests that there are problems with detection and with claims of discrimination practised within companies. The precarious situation in which workers find themselves in Spain, especially in positions of lower levels of responsibility, which are occupied mostly by women, means that judicial claims are rarely made. Similarly, the Labour Inspectorate does not appear to have a decisive role in the detection, monitoring and sanctioning of discriminatory behaviour, although in a few cases the Labour Inspectorate has initiated judicial proceedings of notable interest.

There are certain aspects of the gender discrimination directives which have not been properly transposed into Spanish legislation.

Firstly, time off from work on the grounds of *force majeure* cannot be considered as completely guaranteed by Spanish law, at least as required by Clause 7 of Directive 2010/18/EC, because there is no general permission applicable in cases of sickness or accident, 'that makes the immediate presence of the worker indispensable.' Secondly, Spanish legislation does not consider the interests of workers in specifying the length of notice periods for parental leave as required by Clause 3.2 of Directive 2010/18/EC. Thirdly, in relation to the Recast Directive, the Institute of Women and for Equal Opportunities is not independent of the Government because it is part of the Government, so it does not guarantee the independence that the Directive requires. Fourthly, Spain has not adequately complied with the CJEU's *Porrás Guisado* ruling which established that the nullity of the dismissal without cause of a worker who is pregnant or on maternity leave is not enough protection with reference to that required by Directive 92/85/EEC. In this



judgement, the CJEU established that effective protection requires preventive and not only restorative action, and that Spain did not adequately comply with the former.

Generally, the ordinary Spanish Courts of Justice adequately apply Spanish and European Union legislation on gender discrimination. In fact, it is quite common for the judgements of the Spanish courts to contain references to judgements of the CJEU. It is also interesting to note that the number of preliminary rulings at the CJEU being requested by Spanish judges is particularly high. Sometimes, however, some problems arise, given that the Spanish Courts cannot properly apply the judgements of the CJEU resolving preliminary rulings, unless an express normative change takes place. This is what happened following the *Elbal Moreno* and *Porrás Guisado* cases.

In the field of social security there is no formal recognition in Spain of the principle of non-discrimination based on sex. It seems that the legislator has less interest in real and effective equality between women and men in this area than in the field of labour law. Apparently, Spanish legislation complies with Directive 79/7/EEC. However, the existence of indirect discrimination in Spain was detected by the CJEU in relation to part-time workers. Social security legislation has historically established, and continues to establish, a clear differentiation in access to pensions and benefits for full-time workers and part-time workers. There have been some attempts to harmonise the two systems but differences still exist. In fact, some of the corrections which have occurred recently, motivated by the need to implement judgements of the CJEU, have not produced full equality between full-time and part-time work in social security, but have been limited to modifying aspects which in each case had been submitted to the CJEU and which had been declared contrary to EU regulations. In this way, after the ruling in the *Elbal Moreno* case, the social security regulations were specifically amended in relation to the system of access to pensions, replacing the old system of access to pensions for part-time workers with another system specific to them (partiality coefficient), without carrying out a full comparison. This led to the *Villar Laiz* judgement by the CJEU in May 2019. The same can be said regarding the one-off correction made to the Spanish regulations after the sentence handed down in the *Espadas Recio* case. The issue which arises is that there could be many other provisions in Spanish social security legislation which could constitute indirect discrimination.

The main difficulty of the Spanish social security system in relation to equality between men and women is that the legislation has been limited to establishing one-off corrections (for example by allocating social security contributions for the time corresponding to the care of children), but a correction of the entire social security system in order to produce real equality between men and women has never been undertaken. There is an additional problem related to the lack of consideration of the effects on women of the different reforms in social security which have, in general, increased the requirements for access to pensions and have had a greater impact on women (because they have lower incomes and less job stability) than on men.

An important problem of Spanish legislation on gender discrimination is its lack of efficiency. Theoretically, there are many mechanisms for the intervention by interest groups and legal entities for the defence of victims of discrimination. However, these actions are quite rare and most cases of gender discrimination submitted to the courts are pursued mostly by individual victims and, on occasion, by trade unions.

One of the most significant problems with combating discrimination in Spain relates to the deficiencies which exist in Spanish law when challenging collective agreements. For instance, there are few cases of indirect discrimination in relation to incorrect job evaluations in collective agreements, probably because Spanish legislation does not facilitate the challenging of illegal collective agreements. The labour authority rarely starts any judicial procedures against any collective agreement. In addition, the social partners with an interest in the issue are basically the same social partners which have agreed with

the collective agreement or which could have agreed with the collective agreement. In practice, it is usually trade unions which have not signed a collective agreement which challenge illegal agreements. If those trade unions do not exist or do not have any interest in challenging the collective agreement, it remains unchallenged.

In theory, an individual could request the judge to reject a clause of the collective agreement on the ground that it is discriminatory (indirect discrimination). However, it is rare that an individual has the necessary information to do so (high impact on women). In addition, the worker may have an understandable fear of filing a legal claim against an employer, especially if she has a temporary contract.

The labour law reform that took place in 2012 had important consequences for the situation of women in the workplace.<sup>200</sup> For instance, after 2012, the unremunerated reduction of working time which can be requested for parenting reasons must be requested exclusively on a daily basis, which means that it is no longer allowed to apply for longer periods of working time reduction. In addition, the reform has introduced, for the first time, the possibility that collective agreements can establish concrete criteria for working time reductions. In addition, the 2012 legal reform increased the percentage of working time that can be freely rearranged by the employer if the collective agreement does not establish any limit.

Finally, other powers of the employer have also increased with the 2012 legal reforms, with the possibility of unilaterally changing substantial conditions of the employment contract, including work centre transfers involving changes of residence. All this could have the effect of expelling people from the labour market who cannot make their various work and family responsibilities compatible with each other (although there are no data available in this respect). The legislation does not establish any guarantee or preference or benefit in favour of people with dependants which counteracts the new powers of the employer.

There are, however, some interesting measures which have been implemented in Spanish legislation which could be examples of good practice. One such example is Article 75 of the Law on Effective Equality, which states that companies which are obliged to submit a non-abbreviated profit and loss account will have to include on their company board enough women to allow them to achieve a balanced composition of women and men within a period of eight years from the date of entry into force of the Law (at least 40 % women). The deadline for this was March 2015 and the objective was not reached. However, between 2007 and 2018 women's participation on company boards has increased significantly. The Law on Effective Equality also recommends a balanced presence of women and men (at least 40 % women) in the following fields: political candidate lists and decision-making bodies (Article 14); members of the governing bodies of the General State Administration and of the public entities linked to or dependent on it (Article 16); tribunals and bodies of selection of the staff of the General State Administration and public entities linked to or dependent on it (Article 53). Moreover, Article 60 of the Law on Effective Equality stipulates that at least 40 % of the training places for promotion in public administration will be reserved for women. Some of these recommendations of the Law on Effective Equality have been followed to a satisfactory degree.

Article 55.5 of the Workers' Statute is another example of good practice. It establishes that if a dismissal takes place during any period of parental leave, it is considered null and void unless there is a justified cause, in the same terms as those governing pregnancy or maternity leave. The period of nine months after a child's birth is also protected by the nullity of the dismissal.

---

<sup>200</sup> Law 3/2012 of 6 July 2012 on Urgent Measures for the Reform of the Labour Market, <https://www.boe.es/buscar/act.php?id=BOE-A-2012-9110>.

In relation to the reconciliation of family life and work, Royal Decree 6/2019 of 1 March 2019 introduced important changes. Firstly, it substituted maternity and paternity leave arrangements for a single birth-related leave which will be equal for the mother and other parent (thus including same-sex couples) in 2021. Both parents, biological, adopting or fostering, will have six weeks of compulsory, full-time and simultaneous leave to take care of the infant. During the voluntary part of the leave (10 weeks), there is more flexibility in its use. Secondly, after the transition period is completed in 2021 no parental leave will transferable in Spain. In addition, leave to take care of a breastfeeding infant becomes an individual right of each parent. The reform has also introduced the possibility for workers to have their working time and the way they provide their services, including remote working, adapted to their family and personal needs. Their employer is obliged to negotiate the worker's request, refusals must be justified in writing and access to urgent proceedings before the labour courts are granted.

Another interesting mechanism has been introduced by Royal Decree 6/2019 in relation to wage transparency. Article 28 of the Workers' Statute establishes a presumption that there is a prima facie case of discrimination if, in companies with more than 50 workers, the average remuneration of workers of one sex is at least 25 % higher than the salaries of workers of the other sex. If this happens, the employer will have to justify it in the wage records of the company. This justification must explain that the difference is due to reasons not related to the sex of the workers.

There are other examples of good practice which seek to promote women's self-employment. One of these is the programme of corporate support for women, funded by the European Social Fund and the Ministry of Equality. Another measure for self-employed women in Spain is the establishment of discounts for their social security contribution.

- a) There is a discount for self-employed mothers returning to work after maternity leave or parental leave based on which they could qualify for a reduced contribution (EUR 60 per month) to social security for 12 months after their return to work.
- b) Self-employed workers who, during the period of maternity leave, adoption, foster care, parenting, risk during pregnancy or risk during breastfeeding, have been replaced in their activity by an unemployed worker are entitled to a discount of 100 % of their monthly contribution to social security. The self-employed worker has the right to a 100 % discount of the social security contribution for the replacement as well. Both discounts are applied only if the self-employed person is replaced, since one of the objectives of this measure is to generate employment.
- c) There is a discount of 100 % of the social security contribution for a maximum period of 12 months to care for a child under 12 years of age or a family member up to the second degree (by affinity or consanguinity) with dependency or disability, provided that the self-employed hires a worker to substitute him/her.
- d) A 50 % discount on the self-employed person's contribution applies to the family members of the self-employed worker who habitually, personally and directly work with the self-employed person if they live with them. The discount applies during the first 18 months after the family member begins their activity. The purpose of this measure is to encourage the contribution of those family members of the self-employed person, primarily spouses and children, who are currently not registered, despite working in the family business, due to the economic difficulties that the crisis has caused in many small businesses.

However, all these measures are probably not sufficient to improve the working conditions of self-employed women, whose number has increased significantly in recent years, probably due to the high unemployment rate. For instance, in theory, social security protection for self-employed people is quite similar to that for employees, however, given that self-employed women usually declare an income lower than their real income, the maternity allowance hardly serves to replace the loss of the previous income. In fact, self-employed women tend to go back to work immediately after the compulsory six weeks of

leave after birth, dispensing with the rest of their maternity leave. There are no services supplying temporary replacements or other kinds of social services, other than the discounts to the social security contribution if the self-employed woman hires someone to replace her during her maternity leave.

In the area of protection against gender-based violence, Spanish legislation is among the most advanced. Nevertheless, the definition of victims of gender-based violence should be extended beyond cases of intimate partner violence. It is also considered that a reform of the Criminal Code is necessary to reinforce the idea of the existence of sexual assault where there was no consent from the victim. The Spanish Criminal Code could be considered to be contrary to the Istanbul Convention because it does not provide that every sexual assault without the consent of the victim must be considered rape, but only those acts that have been perpetrated with violence or intimidation.

## Bibliography

Ballester Pastor, M.A., (2017) *Retos y perspectivas de la discriminación laboral por razón de género* (Challenges and perspectives of gender discrimination in labour), Editorial Bomarzo.

Casas Baamonde, Ma.E., (2018), 'Conciliación de la vida familiar y laboral: Constitución, legislador y juez' (Reconciliation of family and work life: Constitution, legislator and judge), *Revista Derecho de las Relaciones Laborales* no. 10.

Galvez L. and Rodriguez Modroño, P., (2015) 'Los retos de la crisis económica desde una perspectiva de género' ('The challenges of the economic crisis from a gender perspective'), *Gaceta Sindical*, 24.

Lousada Arochena, J.F., (2014) *El derecho fundamental a la igualdad efectiva de mujeres y hombres* (The fundamental right to effective equality of women and men), Editorial Tirant lo Blanch.

Romero Burillo, A., Moreno Gené, J. (eds.) (2018), *Trabajo, género e igualdad: un estudio jurídico-laboral tras diez años de la aprobación de la Ley 3/2007 para la igualdad efectiva de mujeres y hombre* (Work, gender and equality: a labour law assessment ten years after the approval of Law 3/2007 on Effective Equality between men and women), Pamplona, Aranzadi.

Various Authors (2019) *Revista del Ministerio de Trabajo, Migraciones y Seguridad Social*, Special Issue: *Mujer en el futuro del trabajo* (Women and the future of work), Madrid.

## **GETTING IN TOUCH WITH THE EU**

### **In person**

All over the European Union there are hundreds of Europe Direct information centres. You can find the address of the centre nearest you at: [https://europa.eu/european-union/contact\\_en](https://europa.eu/european-union/contact_en).

### **On the phone or by email**

Europe Direct is a service that answers your questions about the European Union. You can contact this service: – by freephone: 00 800 6 7 8 9 10 11 (certain operators may charge for these calls), – at the following standard number: +32 22999696, or – by email via: [https://europa.eu/european-union/contact\\_en](https://europa.eu/european-union/contact_en).

## **FINDING INFORMATION ABOUT THE EU**

### **Online**

Information about the European Union in all the official languages of the EU is available on the Europa website at: [https://europa.eu/european-union/index\\_en](https://europa.eu/european-union/index_en).

### **EU publications**

You can download or order free and priced EU publications from: <https://publications.europa.eu/en/publications>. Multiple copies of free publications may be obtained by contacting Europe Direct or your local information centre (see [https://europa.eu/european-union/contact\\_en](https://europa.eu/european-union/contact_en)).

### **EU law and related documents**

For access to legal information from the EU, including all EU law since 1952 in all the official language versions, go to EUR-Lex at: <http://eur-lex.europa.eu>.

### **Open data from the EU**

The EU Open Data Portal (<http://data.europa.eu/euodp/en>) provides access to datasets from the EU. Data can be downloaded and reused for free, for both commercial and non-commercial purposes.

