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# Country report

## Gender equality



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# **Country report**

## **Gender equality**

How are EU rules transposed into  
national law?

## **Poland**

Eleonora Zielinska and Anna Cybulko

Reporting period 1 January 2019 – 31 December 2019

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**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 .....	7
<b>2</b>	<b>General legal framework .....</b>	<b>9</b>
2.1	Constitution .....	9
2.2	Equal treatment legislation .....	9
<b>3</b>	<b>Implementation of central concepts .....</b>	<b>11</b>
3.1	General (legal) context.....	11
3.2	Sex/gender/transgender .....	12
3.3	Direct sex discrimination .....	13
3.4	Indirect sex discrimination .....	14
3.5	Multiple discrimination and intersectional discrimination .....	16
3.6	Positive action.....	17
3.7	Harassment and sexual harassment.....	20
3.8	Instruction to discriminate .....	23
3.9	Other forms of discrimination .....	24
3.10	Evaluation of implementation .....	24
3.11	Remaining issues.....	26
<b>4</b>	<b>Equal pay and equal treatment at work (Article 157 of the Treaty on the Functioning of the European Union (TFEU) and Recast Directive 2006/54) 27</b>	
4.1	General (legal) context.....	27
4.2	Equal pay .....	33
4.3	Access to work, working conditions and dismissal .....	45
4.4	Evaluation of implementation .....	49
4.5	Remaining issues.....	49
<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>51</b>
5.1	General (legal) context.....	51
5.2	Pregnancy and maternity protection .....	56
5.3	Maternity leave .....	64
5.4	Adoption leave .....	71
5.5	Parental leave .....	72
5.6	Paternity leave .....	82
5.7	Time off for <i>force majeure</i> .....	82
5.8	Care leave .....	83
5.9	Leave in relation to surrogacy .....	84
5.10	Flexible working time arrangements.....	84
5.11	Evaluation of implementation .....	87
5.12	Remaining issues.....	88
<b>6</b>	<b>Occupational social security schemes (Chapter 2 of Directive 2006/54) ...</b>	<b>89</b>
6.1	General (legal) context.....	89
6.2	Direct and indirect discrimination .....	91
6.3	Personal scope .....	91
6.4	Material scope.....	92
6.5	Exclusions .....	93
6.6	Laws and case law falling under the examples of sex discrimination mentioned in Article 9 of Directive 2006/54 .....	93
6.7	Actuarial factors .....	93
6.8	Difficulties .....	93
6.9	Evaluation of implementation .....	94
6.10	Remaining issues.....	94
<b>7</b>	<b>Statutory schemes of social security (Directive 79/7/EEC).....</b>	<b>95</b>
7.1	General (legal) context.....	95

7.2	Implementation of the principle of equal treatment for men and women in matters of social security.....	99
7.3	Personal scope .....	100
7.4	Material scope.....	101
7.5	Exclusions .....	101
7.6	Actuarial factors .....	103
7.7	Difficulties .....	103
7.8	Evaluation of implementation .....	103
7.9	Remaining issues.....	103
<b>8</b>	<b>Self-employed workers (Directive 2010/41/EU and some relevant provisions of the Recast Directive).....</b>	<b>104</b>
8.1	General (legal) context.....	104
8.2	Implementation of Directive 2010/41/EU.....	107
8.3	Personal scope .....	107
8.4	Material scope.....	108
8.5	Positive action.....	109
8.6	Social protection .....	109
8.7	Maternity benefits.....	110
8.8	Occupational social security .....	113
8.9	Prohibition of discrimination .....	113
8.10	Evaluation of implementation .....	114
8.11	Remaining issues.....	114
<b>9</b>	<b>Goods and services (Directive 2004/113) .....</b>	<b>115</b>
9.1	General (legal) context.....	115
9.2	Prohibition of direct and indirect discrimination .....	115
9.3	Material scope.....	115
9.4	Exceptions .....	116
9.5	Justification of differences in treatment .....	116
9.6	Actuarial factors .....	117
9.7	Interpretation of exception contained in Article 5(2) of Directive 2004/113.....	117
9.8	Positive action measures (Article 6 of Directive 2004/113).....	117
9.9	Specific problems related to pregnancy, maternity or parenthood .....	117
9.10	Evaluation of implementation .....	119
9.11	Remaining issues.....	120
<b>10</b>	<b>Violence against women and domestic violence in relation to the Istanbul Convention .....</b>	<b>121</b>
10.1	General (legal) context.....	121
10.2	Ratification of the Istanbul Convention .....	128
<b>11</b>	<b>Compliance and enforcement aspects (horizontal provisions of all directives) .....</b>	<b>130</b>
11.1	General (legal) context.....	130
11.2	Victimisation .....	132
11.3	Access to courts .....	133
11.4	Horizontal effect of the applicable law .....	135
11.5	Burden of proof .....	137
11.6	Remedies and sanctions .....	139
11.7	Equality body .....	145
11.8	Social partners .....	146
11.9	Other relevant bodies.....	146
11.10	Evaluation of implementation .....	147
11.11	Remaining issues.....	148
<b>12</b>	<b>Overall assessment .....</b>	<b>149</b>
	<b>Bibliography .....</b>	<b>154</b>

# 1 Introduction

## 1.1 Basic structure of the national legal system

Poland is a unified state with a uniform legal system of continental type. The supreme legal act in Poland is the 1997 Constitution,<sup>1</sup> which, among other things, declares that the Republic of Poland is a democratic state that follows the rule of law, implementing the principles of social justice (Article 2). The Constitution also determines the state model, the powers of individual state organs, the relevant sources of law, as well as declaring the freedoms, rights and obligations of persons and citizens. Other universal sources of law are laws (parliamentary acts), ordinances (executive acts) and ratified international agreements (Article 87 of the Constitution). According to Article 95 of the Constitution, legislative power in the Republic of Poland shall be exercised by the Parliament, consisting of two Chambers (the Sejm and the Senate). Legislative initiative is mostly exercised by the Government. Draft laws may also be presented by groups of 15 Deputies or 15 Senators, as well as the President and at least 100 000 citizens (Article 118 of the Constitution). In order for a draft to become law, it has to be passed by a regular majority of votes by both Chambers of Parliament and receive the approval (signature) of the President, who is also the body ordering its promulgation in the Journal of Laws of the Republic of Poland (*Dziennik Ustaw*, or *Dz.U.*; hereafter JoL). The President may refuse to sign the law and refer the bill with his reasoned objections back to the Sejm for reconsideration; such presidential veto might be overridden by the Sejm with a qualified majority. The Council of Ministers (the Prime Minister and particular ministers) are authorised to enact executive ordinances when there is a specific legal basis (delegation) for it in an act issued by Parliament (Article 92 of the Constitution).

The system of administration of justice in Poland consists of common courts (regional, district and appellate), administrative courts and military courts (Article 175). The Supreme Court (SC) performs supervision over the common and military courts (Article 183(1) of the Constitution). The Supreme Administrative Court and other administrative courts exercise control over the activities of the public executive power (Article 185). Together with the Constitutional Tribunal and the Tribunal of State those courts form a separate power, which in theory should be independent from the other state powers (Article 173(1) of the Constitution).<sup>2</sup> Legislative acts (laws and ordinances) can be subjected to constitutional control exercised by the Constitutional Court. The President of the Republic may, prior to signing a bill, refer it to the Constitutional Tribunal for adjudication upon its conformity to the Constitution. He is obliged to refuse to sign a bill which the Constitutional Tribunal has found not to be in conformity with the Constitution (Article 122 of the Constitution). The President may also refer a piece of legislation to the Constitutional Tribunal after having signed it and after it has become binding, following its publication in the official journal of laws. If the Tribunal finds such a law to be entirely or partially unconstitutional, it will either lose its binding authority entirely, or with respect to the unconstitutional provisions (or parts thereof), however, only after the publication of the Constitutional Tribunal ruling in the official journal (Article 190). Every person is empowered to lodge an individual constitutional complaint challenging the constitutionality of a law, yet only in the situation when this law was the basis for an individual and final decision or verdict in his or her case (Article 79 of the Constitution). They may also refer to the Ombudsperson (appointed by the Parliament, independent from the Government), officially the Commissioner for Human Rights (RPO). As of 2010, the RPO, by virtue of the Law of 3 December 2010 on the Implementation of (some) EU Provisions on Equal Treatment (hereafter Anti-Discrimination Law), also

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<sup>1</sup> The Constitution of the Republic of Poland of 2 April 1997 published in the Journal of Laws of the Republic of Poland (JoL No. 78 Item 483 with further amendments). For an English translation see: <http://www.sejm.gov.pl/prawo/konst/angielski/konse.htm>.

<sup>2</sup> But in the opinion of the authors of this report, since 2015 they are, in practice, dependent on the leader of ruling party 'Prawo i Sprawiedliwość (PiS)'.

exercises the tasks of the equality body,<sup>3</sup> with a motion for assistance in the protection of one's freedoms or rights infringed by organs of public authorities (Article 80 of the Constitution). In such cases, the RPO may initiate proceedings on behalf of the citizen in civil, penal or administrative matters, as well as join proceedings that are already in progress (Article 14 of the Law on the Commissioner for Human Rights). In addition to the RPO's activities as the equality body (responsible for the monitoring of preservation of the equal treatment rule in public policies) there is a special office built into the state administration in the form of the Government Plenipotentiary for Equal Treatment, whose competences (partially in elimination of discrimination overlapping with the competences of RPO) are also currently defined by the Anti-Discrimination Law. In January 2016, the Government Plenipotentiary for Equal Treatment was renamed to the Government Plenipotentiary for Civil Society and Equal Treatment as a result of additional duties being transferred to the plenipotentiary's office.<sup>4</sup>

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

The main relevant legislation on gender equality and the prohibition of sex discrimination includes:

- Constitution of the Republic of Poland (*Konstytucja Rzeczypospolitej Polskiej*) of 2 April 1997, JoL 1997 No. 78 Item 483) (hereafter: Constitution);
- Law on the Commissioner for Human Rights (*Ustawa o Rzeczniku Praw Obywatelskich*) of 15 July 1987, consolidated text JoL 2017 Item 958 with amendments;
- Labour Code Act (*Ustawa: Kodeks Pracy*) of 26 June 1974 (hereafter: LC), consolidated text JoL 2018 Item 108, with amendments;
- Amendments to the LC implementing Equality Directives in employment mostly covered by: Law of 24 August 2001, JoL 2001 No. 128 Item 1405; Law of 21 December, JoL 2001 No. 154 Item 1805; Law of 14 November 2003, JoL No. 213 Item 2081; Law of 18 August 2006, JoL 2006 No. 217 Item 1587; Law of 21 November 2008, JoL 2008 No. 223, Item 1460; Law of 6 December 2008, JoL 2008 No. 234 Item 1654; Law of 28 May 2013, JoL 2013 Item 675; Law of 24 July 2015, JoL 2015 Item 1270; Law of 22 June 2016, JoL of 2016 Item 1053, Law of 16 May 2019, JoL 2019 Item 1043;
- Law on the Promotion of Employment and Institutions of the Labour Market (*Ustawa o promocji zatrudnienia i instytucjach rynku pracy*) of 20 April 2004 hereafter Law on Promotion of Employment, consolidated text 2018 Item 1265;
- Law on the Social Insurance System (*Ustawa o systemie ubezpieczeń społecznych*) of 13 October 1998 consolidated text JoL 2017, Item 1778;
- Law on Pensions from the Social Insurance Fund (*Ustawa o emeryturach i rentach z Funduszu Ubezpieczeń Społecznych*) of 17 December 1998 consolidated text JoL 2018 Item 1270 with amendments (hereafter Law on Pensions);
- Law on Social Insurance for Farmers (*Ustawa o ubezpieczeniach społecznych rolników*) of 20 December 1990 consolidated text JoL 2017, Item 2336;
- Law on Occupational Pension Schemes (*Ustawa o pracowniczych programach emerytalnych*) of 20 April 2004, (hereafter also Law on PPE) consolidated text JoL 2016 Item 1449;
- Law on the Occupational Capital Programmes (*Ustawa o pracowniczych planach kapitałowych*) of 4 October 2018 (hereafter also Law on PPK) JoL 2018 Item 2215;
- Law on Pecuniary Social Insurance Benefits in Respect of Sickness and Maternity (*Ustawa o świadczeniach pieniężnych z ubezpieczenia społecznego w razie choroby i macierzyństwa*) of 25 June 1999 consolidated text JoL 2019 Item 645 (hereafter Law on Maternity Benefits);

<sup>3</sup> See more: Section 11.7 of this report.

<sup>4</sup> See more: Section 11.9.



- Law on Social Insurance in Respect of Accidents at Work and Occupational Diseases (*Ustawa o ubezpieczeniu społecznym z tytułu wypadków przy pracy i chorób zawodowych*) of 30 October 2002 consolidated text JoL 2017 Item 1773;
- Law on Family Benefits (*Ustawa o świadczeniach rodzinnych*) of 28 November 2003, consolidated text JoL 2018 Item 2220 with amendments;
- Law on Employment of Temporary Workers (*Ustawa o zatrudnianiu pracowników tymczasowych*) of 9 July 2003 consolidated text JoL 2018, Item 594;
- Law on Capital Pensions (*Ustawa o emeryturach kapitałowych*) of 21 November 2008 consolidated text JoL 2018 Item 926 with amendments.

Law on the Implementation of some EU Provisions on Equal Treatment (*Ustawa o wdrożeniu niektórych przepisów Unii Europejskiej w zakresie równego traktowania*) of 3 December 2010 consolidated text JoL 2016 Item 1219 (hereafter Anti-Discrimination Law), implementing the following Directives: 86/613/EEC, 2000/43/EC, 2000/78/EC, 2004/113/EC and 2006/54/EC. From 2016 it also refers to Directive 2014/54/EU on measures facilitating the exercise of rights conferred on workers in the context of freedom of movement for workers.

It should be noted that it is not feasible to explain, for each law mentioned above, what EU directive / treaty provisions this piece of legislation transposes, due to the fact that in many acts, the transposition was made by amendments of already existing laws (sometimes, as in the case of the Labour Code, with several consecutive modifications) and in most cases the applicable directive was not mentioned at all (or mentioned only in the reasoning of the draft law). The legislative requirement to refer explicitly to EU directives in the footnote of every transposing act has been introduced only recently. As far as the authors were able to easily decode the reference to the directive, it has been mentioned in the text of the report.

### 1.3 Sources of law

The 1997 Constitution plays an essential role in the legal framework on gender equality in Poland. It contains general equality and anti-discrimination clauses, as well as a guarantee for equality between men and women. Amongst ordinary laws, the most important role in the field of gender equality in employment and social security is played by the Labour Code and the Anti-Discrimination Law, as well as the implementing legislation adopted on the basis of these laws. Also of certain importance is the Law of 20 April 2004 on the promotion of employment and institutions of the labour market,<sup>5</sup> which implemented many EU directives, among others, recast directive 2006/54/EC.

Poland has ratified all of the most important human rights treaties – among others, those fundamental for gender equality such as: the UN Convention on the elimination of all forms of discrimination against women (CEDAW) ratified by Poland in 1982,<sup>6</sup> the Council of Europe Convention on combating violence against women, in particular, domestic violence<sup>7</sup> (Istanbul Convention), the Council of Europe Convention on Action against Trafficking of Human Beings (Warsaw Convention),<sup>8</sup> as well as the equality and anti-discrimination clauses contained in other international and regional treaties ratified by Poland,<sup>9</sup> with the exception of the anti-discrimination Additional Protocol No. 12 to the European Convention on Human Rights (ECHR).<sup>10</sup>

<sup>5</sup> By the institutions of the labour market, this act understands: 1) public employment services; 2) voluntary labour corps; 3) employment agencies; 4) training institutions; 5) social dialogue institutions; 6) local partnership institutions.

<sup>6</sup> Ratified on the basis of the Law of 18 July 1980 (JoL 1982, No. 10, Item 71).

<sup>7</sup> Ratified on the basis of the Law of 6 February 2015 (JoL 2015, Item 398).

<sup>8</sup> Ratified on the basis of the Law of 17 November 2008 (JoL 2009, No. 20, Item 107).

<sup>9</sup> In particular, provided for Article 2(1) of the International Covenant on Civil and Political Rights (ratified by Poland in 1977 (JoL 1977, No. 38, Item 167)) and Article 2(2) of the International Covenant on the Economic, Social and Cultural Rights (ratified in 1977 (JoL 1977, No. 38, Item 169)), in Article 14 of the

Article 91(1) of the Constitution describes the status of international law in the Polish legal system and states that ratified international agreements, after their announcement in the Journal of Laws of the Republic of Poland, form part of the national legal order and are directly applicable (unless for their application the adoption of a national legal act is necessary). Poland has implemented, albeit sometimes with delay, all the EU equality directives.

The Polish legal system is generally based on written law. Formally speaking, case law is not included in the constitutional catalogue of sources of law. This does not mean, however, that in practice there is no binding force of such sources in situations other than the one in which a case was decided. The importance of case law varies according to the nature of the judicial authority from which it originates. As already mentioned, judgments of the Constitutional Tribunal on the incompatibility of a given provision with the Constitution invalidate the law at stake. This means that such a provision will lose its binding force entirely, or with respect to the unconstitutional provisions after the publication of the ruling in the official journal.

The decisions of the Supreme Court – as a rule – do not formally bind lower courts in other cases,<sup>11</sup> however in practice they often do. The common formula used is that they bind only with the ‘power of authority’ of the Supreme Court. It means that the courts of lower instance may adopt a different interpretation of the provision in their cases. They risk, however, that their verdicts will be repealed in the course of further proceedings, which usually prevents them from such actions. Differences in interpretation also appear, albeit not very frequently, in the jurisprudence of the Supreme Court itself. Only resolutions entered into the catalogue of legal principles bind the different Supreme Court’s judges’ panels in other cases. Another way to unify the interpretation of law is to consider the legal issue by a wider composition of the Supreme Court than the usual three-judges panel. This may be a panel of seven judges, the entire chamber, joint chambers or the full bench of the Supreme Court (which occurs very seldom). Such a discrepancy within the boundaries of the Supreme Court itself, although unfavourable – since it introduces doubts about the prevailing line of Supreme Court jurisprudence among lower courts – is, however, at times unavoidable. It would be unthinkable that a ruling of three judges, which is the usual composition of a panel of the Supreme Court, would prevent other judges of the same court from expressing their own views.

Scholarly interpretations of legal provisions do not have the status of a source of law, either. However, they often de facto shape the jurisprudence of courts, on the basis of their scientific authority.

Legal opinions of the RPO do not constitute a source of the law, either; this body does not have any judicial powers.

Some consider the State Labour Inspectorate (PIP) to be a quasi-judicial body. It is an administrative body whose primary task is to control and monitor employers’ compliance with labour law, in particular with the regulations of health and safety at work. However, with regard to infringements of the principle of equal treatment in employment, the PIP may only give recommendations to the employer or refer the case to court (but is not entitled to directly impose administrative penalties, as in some other labour law related cases).

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Convention on the Protection of Human Rights and Fundamental Freedoms (ratified in 1993 (JoL 1993, No. 61, Item 284) hereafter: ECHR), and a number of other conventions of a more specific nature.

<sup>10</sup> The decision on this issue has not yet been taken, as announced by the Minister of Foreign Affairs, as asked in 2016 by the RPO. <https://www.rpo.gov.pl/pl/content/rzad-nie-podjal-decyzji-w-sprawie-ratyfikacji-protokolu-nr-12-do-europejskiej-konwencji-praw>.

<sup>11</sup> The only exception is when the appellate court asks the Supreme Court a legal question on a doubtful issue. Then the legal opinion expressed in the resolution of the Supreme Court is binding for the court in this particular case.

## **2 General legal framework**

### **2.1 Constitution**

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

There is no separate Constitutional provision explicitly prohibiting discrimination on the grounds of sex. However, the general prohibition of discrimination contained in Article 32 of the Constitution applies in such a case. Paragraph 1 of this provision provides that all persons shall be equal before the law and all persons shall have the right to equal treatment by public authorities. Paragraph 2 also contains a broad anti-discrimination clause ('No one shall be discriminated against in political, social or economic life for any reason whatsoever'). This clause does not specify any grounds of discrimination; nevertheless, it goes without saying that it applies, *inter alia*, also to sex discrimination.

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

The Constitution addresses separately the issue of equality between men and women. Namely, its Article 33 guarantees that in the Republic of Poland, men and women shall have equal rights in family, political, social and economic life (Paragraph 1).

It also specifies (in Paragraph 2) that women and men have an equal right to education, employment and promotion, to equal pay for work of equal value, to social security, to hold offices, and to receive public honours and decorations.

### **2.2 Equal treatment legislation**

For three decades, Poland has had specific equal treatment legislation. More general provisions are provided for in the Anti-Discrimination Law, which in the field of employment is complementary to the provisions on equal treatment of the Labour Code (LC) and to some other laws (e.g. the Law on Promotion of Employment; the Law on Employment of Temporary Workers; the Law on the Social Insurance System). The principle of complementarity is expressed explicitly in Article 2(2) of the Anti-Discrimination Law which states that its Chapter 1 (entitled: General provisions) and Chapter 2 (The principle of equal treatment and legal measures aimed at its protection) do not apply to workers, as far as the subject matters are regulated by the LC.

In the case of infringements of the provisions of the Labour Code and the provisions related to social insurance and security, the claimant may refer to specialised courts (separate departments of district and regional courts, called Departments for Labour and Insurance Matters). These Departments specialised in labour-related and social security matters apply partially different material and procedural rules<sup>12</sup> than in regular civil cases, contained in the Code of Civil Procedure.<sup>13</sup>

On the other hand, when the Anti-Discrimination Law is applicable, jurisdiction is exercised by common civil departments of district and regional courts. In such situations, unless specifically regulated in the Anti-Discrimination Law, common provisions of the Civil Code<sup>14</sup> and Code of Civil Procedure have to be applied.

The Anti-Discrimination Law in Article 1 enumerates sex, age, disability, race, religion, nationality, ethnic origin, belief, and sexual orientation as possible grounds of discrimination. However, at the same time, it makes the scope of the protection against

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<sup>12</sup> Ordinance of 18 December 2013 Dz. Urz. Min. Spr. (Official Journal of Ministry of Justice) 2014 Item 334, after the amendments introduced by the ordinance of the Minister of Justice of 27 June 2016 Dz. Urz. Min. Spr. (Official Journal of Ministry of Justice) 2016 Item 119.

<sup>13</sup> Law of 17 November 1964, consolidated text JoL 2018, Item 1360 with amendments.

<sup>14</sup> Law of 23 April 1064, consolidated text JoL 2018, Item 1025 with amendments.

discrimination in the case of any of those grounds dependent on the fields in which discrimination might occur. In consequence, as in EU law, the protection against sex discrimination is narrower than, for instance, the protection in cases of racial discrimination. Article 6 of the Anti-Discrimination Law provides that unequal treatment of private persons with regard to sex is prohibited only with respect to access and conditions of employment, social insurance benefits and services, housing services, goods and acquiring rights and energy, if they are offered publicly. At the same time, Article 5 of this Law explicitly excludes protection against gender discrimination in access to educational services, including higher education (point 4), in relation to the content of media and advertising (Article 6 point 2), as well as in the area of health care (Article 7 *a contrario*, which is incompatible with EU law). On the other hand, in all these areas, this Law guarantees protection against discrimination on the grounds of race, ethnic origin and nationality.

Such differentiation as to the grounds of discrimination does not apply in the area of employment. In this field, according to Article 11<sup>3</sup> and Article 18<sup>3a</sup> LC (as amended by the Law of 16 May 2019),<sup>15</sup> discrimination is in any case prohibited on the grounds of, in particular, sex, age, disability, race, religion, nationality, political opinion, membership of a trade union, ethnic origin, belief, sexual orientation, employment for a specified or unspecified period of time, and part-time employment.<sup>16</sup>

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<sup>15</sup> The Law amending Labour Code and selected other laws, JoL 2019 Item 1043, in force from 6 September 2019.

<sup>16</sup> In the literature and case law it is noted that these provisions distinguish two types of grounds for discrimination. On the one hand, purely subjective, relating to individual features or characteristics of a person, and on the other hand, objective, relating to the employment relationship. The Act only uses the phrase 'in particular' in relation to the first group, which means that their listing is exemplary (these may also include characteristics such as worldview, HIV status, and even appearance, if under certain circumstances it may be considered as a ground for discrimination). However, the phrase 'in particular' does not refer to the second group of objective causes such as 'a specified or unspecified period of time, and part-time employment', the list of which is enumerative. See: Ruling of Supreme Court of 14 December 2017 (I PK 342/16). The purpose of the mentioned amendment – as one can read in the explanatory memorandum to the Law of 16 May 2019 – was to clarify this controversy by deciding that the list of all grounds of discrimination in the LC catalogue is open. In the opinion of the legislator, there are no rational premises differentiating discrimination and unequal treatment, and even more so, there is no reason for shaping differently the consequences of violation of the above principles by the employer. See: Draft of the law with reasoning. *Druk Sejmowy* (Sejm print) No. 1653)  
<http://orka.sejm.gov.pl/Druki8ka.nsf/0/B7BBC29AF503D623C125814500365055/%24File/1653.pdf>.

### 3 Implementation of central concepts

#### 3.1 General (legal) context

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

No surveys on the definitions, implementation and limits of central concepts of gender equality in Polish law could be identified.<sup>17</sup> The existing, more comprehensive recent publications of Polish authors mostly focused on the examination of central concepts of European equality law and their interpretation by the CJEU, rather than on analyses of these issues as reflected in national legislation or in the case law of Polish courts.<sup>18</sup> As an exception, the research conducted (albeit on a small scale) by NGO, the Polish Association of Anti-Discrimination Law (*Polskie Stowarzyszenie Prawa Antydyskryminacyjnego*) may be pointed out, following legal expertise published by this Association.<sup>19</sup>

##### 3.1.2 Other issues

Worth noting are problems with the use of the concept of 'gender' in Poland. There is no good translation of this term into the Polish language, which would properly reflect the meaning given to it in international law (as a notion different from the term 'sex', which translates into the word 'płeć' in Polish, while the English term 'sex' in the Polish language is used only with reference to sexual intercourse). In the grammar of the Polish language, the noun 'rodzaj' (kind) may be considered an equivalent to 'gender', which for the use of different declinations can be female, male or neutral. However, as a ground of discrimination without a descriptive explanation, it would be misleading. It is probably the reason why in legal terminology and case law this term is not in use.

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<sup>17</sup> This lack of survey was characteristic for older literature. See for example: Boruta, I., *Równość kobiet i mężczyzn w pracy w świetle prawa Wspólnoty Europejskiej. Implikacje dla Polski* (Equality of women and men under European Community Law. Implication for Poland), Łódź 1996.

<sup>18</sup> See for instance: Zawadzka-Łojek A., *Zakaz dyskryminacji ze względu na wiek w prawie Unii Europejskiej* (Prohibition of age discrimination in European Union law), Instytut Wydawniczy EuroPrawo. 2013.

<sup>19</sup> Compare: Orlicki, M., *Zakaz dyskryminacji w umowach ubezpieczenia* (Prohibition of discrimination in insurances contract) (Expertise No. 05/2015), [http://ptpa.org.pl/site/assets/files/publikacje/opinie/Opinia\\_dotyczaca\\_granic\\_swobody\\_kszaltowania\\_tresci\\_umowy\\_ubezpieczenia.pdf](http://ptpa.org.pl/site/assets/files/publikacje/opinie/Opinia_dotyczaca_granic_swobody_kszaltowania_tresci_umowy_ubezpieczenia.pdf).

This opinion discussing mainly the Test-Achats ruling of the CJEU only marginally touches on the issue of indirect sex discrimination in insurances. More comprehensive in this respect is expertise prepared by Maliszewska-Nienartowicz, J., *'Kryteria dyskryminacji pośredniej – standardy europejskie a prawo i praktyka polskich sądów'* (Criteria for indirect discrimination – European standards and the law and practice of Polish courts) (Opinion No. 04/2015), [http://ptpa.org.pl/site/assets/files/publikacje/opinie/Opinia\\_kryteria\\_dyskryminacji\\_posredniej.pdf](http://ptpa.org.pl/site/assets/files/publikacje/opinie/Opinia_kryteria_dyskryminacji_posredniej.pdf). This author takes into account, albeit to a small extent, the jurisprudence of Polish courts on sex discrimination (generally welcoming the use of the concept of indirect discrimination by Polish courts, despite what she believes to be shortcomings in the legal definition of this type of discrimination, both in the Labour Code and in the Anti-Discrimination Act).

It is also worth mentioning older publications of Gonnera, K.: *'Naruszenie przez pracodawcę obowiązków dotyczących przeciwdziałania dyskryminacji i mobbingowi jako samodzielna podstawa roszczeń pracowniczych'* (Infringement by the employer of obligations relating to the prohibition of discrimination and harassment as an independent basis for workers' claims) [http://www.ptpa.org.pl/site/assets/files/1028/opinia\\_roz\\_a\\_naruszenie\\_przez\\_pracodawce\\_obowiazkow\\_dotyczacych\\_przeciwdzialania\\_dyskryminacji\\_i\\_mobbingowi.pdf](http://www.ptpa.org.pl/site/assets/files/1028/opinia_roz_a_naruszenie_przez_pracodawce_obowiazkow_dotyczacych_przeciwdzialania_dyskryminacji_i_mobbingowi.pdf), and *'Rozkład ciężaru dowodu w sprawach o dyskryminację w zatrudnieniu w świetle orzecznictwa Sądu Najwyższego'* (Distribution of the burden of proof in cases of discrimination in employment in light of the Supreme Court's case law) [http://www.ptpa.org.pl/site/assets/files/1028/ciezar\\_dowodu\\_w\\_sprawach\\_o\\_dyskryminacje\\_21\\_wrzesnia\\_2011.pdf](http://www.ptpa.org.pl/site/assets/files/1028/ciezar_dowodu_w_sprawach_o_dyskryminacje_21_wrzesnia_2011.pdf), and in addition, the study of Burek, W., Klaus, W., *'Definiowanie dyskryminacji w prawie polskim w świetle prawa Unii Europejskiej oraz prawa międzynarodowego'* (Defining discrimination in Polish law in light of European Union law and international law), *Problemy Współczesnego Prawa Międzynarodowego, Europejskiego i Porównawczego* 2013, tom XI.

Instead, in the context of discrimination, only the word 'sex' ('*pleć*') is applied in both meanings (gender and sex).<sup>20</sup>

### 3.1.3 General overview of national acts

The definitions of such general concepts as direct discrimination, indirect discrimination, positive action, harassment, sexual harassment and instruction to discriminate are provided for in the Labour Code and the Anti-Discrimination Law.

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

The public debate on the need to amend the anti-discrimination legislation and bring it in full compliance with anti-discriminatory provisions of the Constitution and some general concepts of EU Directives, was ongoing between 2012 and the first half of 2015. However, it was interrupted by the change of government in November 2015. Although minor changes were made to this legislation in the following years, e.g. the above-mentioned 2019 amendments of the formulation of the prohibition of discrimination provided for in the LC, the express pace at which they were adopted by the Parliament<sup>21</sup> excluded not only the possibility to conduct a joint experts' meeting or social discussion on this issue, but even the possibility of including in the works of the parliamentary committees the often quite reasonable proposals of amendments made by the legislative office of the parliament or deputies from the opposition parties. Instead, those proposals were rejected without any consideration, by the ruling party, having the majority in the Parliament, whose deputies seem to follow the party's instructions as to how to vote without questioning it.

## 3.2 Sex/gender/transgender

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

In the Polish legislation there is no legal definition either of gender or of sex.

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

The discrimination of transgender, intersex and non-binary persons, as well as unequal treatment due to gender reassignment, is not explicitly prohibited in the Polish legislation.

However, in the author's opinion, the linguistic interpretation of the anti-discrimination provisions makes it possible to recognise that the existing prohibition of 'sex discrimination' may be applied in different contexts; also, to protect transgender, intersex or non-binary persons.

Additionally, in the years 2012-2013, the Parliament discussed a legislative proposal amending the Anti-Discrimination Law, which, in addition to sex and sexual orientation (which already exist as grounds of discrimination, intended to explicitly introduce sex identity and sex expression as grounds of discrimination.<sup>22</sup> The Draft Law, however, was

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<sup>20</sup> The reluctance in Poland to directly use the English word 'gender' results from a false narrative of 'gender ideology' and intentional misinterpretation of the notion of 'gender' in order to limit the rights of women and LGBTI persons. See, for instance, the campaign '*Zatrzymajgender*' (Stopgender.pl), <https://instytut.pl/tl/www-.-stopgender-.-pl.htm>.

<sup>21</sup> This law was adopted by the lower chamber of the Parliament (Sejm) within one month: the third reading was scheduled after midnight, as has been reflected in the description of the legislative proceedings related to Parliamentary Print No. 1653. See: <https://www.sejm.gov.pl/Sejm8.nsf/PrzebiegProc.xsp?nr=1653>.

<sup>22</sup> Legislative proposal of 10 October 2012, Ref.: *Sejm* (VII Term) Print 1051 <http://orka.sejm.gov.pl/Druki7ka.nsf/0/866BA4538180DB32C1257AFC003C8D94/%24File/1051.pdf>, <http://www.sejm.gov.pl/Sejm7.nsf/PrzebiegProc.xsp?nr=1051>. Hereafter: Draft Law amending the Anti-Discrimination Law.

not passed by the previous Parliament and, according to the rule on the discontinuity of parliamentary works, after the next parliamentary elections (which took place in 2015) this draft was not processed by the current Parliament. No other draft amending the Anti-Discrimination Law has been identified as having been presented to the current Parliament.

### 3.2.3 Specific requirements

In order to benefit from legal sex non-discrimination protection in Poland, transgender and similar groups of persons do not have to fulfil any specific requirements.

## 3.3 Direct sex discrimination

### 3.3.1 Explicit prohibition

Direct discrimination is explicitly prohibited in Poland in Article 3(3) of the Anti-Discrimination Law, as well as in Article 11<sup>3</sup> and Article 18<sup>3a</sup>(2) of the Labour Code.

The definition in the Anti-Discrimination Law is as follows:

‘By direct discrimination is to be understood a situation in which, a natural person because of sex (...) is treated less favourably than another person in a comparable situation is, was or would be treated’.

The LC states that:

‘Direct discrimination occurs when an employee, as a result of one or more of the reasons defined in Paragraph 1, is or could be treated less favourably, in a comparable situation, than other employees’.

### 3.3.2 Prohibition of pregnancy and maternity discrimination

Pregnancy and maternity discrimination are forbidden in the Polish legislation, yet they are not explicitly indicated as forms of direct sex discrimination. Neither the Anti-Discrimination Law nor any provision of the LC states *expressis verbis* that discrimination includes any less favourable treatment of a woman because of her pregnancy or childbirth-related leave. However, Article 12 of the Anti-Discrimination Law, as modified by the Law of 24 July 2015 (JoL 2015 Item 1268), stipulates that, in case of a breach of the equal treatment rule with regard to pregnancy or childbirth-related leave, such person has the right to damages, according to Article 13 (which refers to discrimination-related damages).<sup>23</sup> Also in some case law related to the LC, the violations of the rights of employees deriving from protection of pregnancy or parenthood, are considered to be sex-based discrimination.<sup>24</sup>

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<sup>23</sup> The Draft Law amending the Anti-Discrimination Law proposed adding the following provision: ‘The violation of the equal treatment rule ... in relation to pregnancy or maternity constitutes direct sex discrimination’. This definition is broad enough to also cover the discrimination connected with breastfeeding in the context of equal access to services, which is not reflected in the regulation currently in force (see more in the next footnote).

<sup>24</sup> The Supreme Court (SC) in the judgment of 8 January 2008, II PK 116/07, said that: ‘the exercise of powers conferred by law in connection with the birth and upbringing of the child cannot be regarded as an objective reason for determining a lower remuneration compared to other employees’. The plaintiff (a mother of five children) claimed damages for discrimination based on sex, age and family status. In her opinion, signs of discrimination included, inter alia, significant differences in remuneration between her and the other employees. The employer argued that unfavourable remuneration of the claimant was, inter alia, the result of her frequent use of maternity and parental leave. The courts of first and second instance found that, by differentiating the situation of the claimant in terms of pay, comparing to other employees, the defendant applied legally acceptable criteria. These judgments were set aside by the SC, recognising a cassation claim and ruling that it was discrimination on the grounds of sex and family status.

### 3.3.3 Specific difficulties

The definition of direct discrimination in the Anti-Discrimination Law corresponds with the one contained in the Recast Directive.<sup>25</sup> However, the definition of this concept in the LC, which in this respect states: 'where the employee has been, is or could have been treated less favourably in a comparable situation than other workers'<sup>26</sup> is not entirely correct. It refers to a comparable situation not in the context of another employee (as does the Recast Directive), but instead refers to a 'comparable situation' to the employee being discriminated against. Therefore, one might wonder how the situation of the employee can be compared with others, before alleged discrimination against him/her happens.

In the authors' view, this inconsistency may be removed by a proper interpretation (that is, being in compliance with the Recast Directive) in courts' case law.

In addition, the definition of direct discrimination in the Labour Code has led to some misunderstandings. For instance, in the commentary to the Labour Code, the prohibition of hypothetical discriminatory activities is criticised as providing for a possibility to punish an employer simply for disclosing his/her intent to discriminate, without its realisation. The author compares this situation with the attempt to commit an offence in criminal law, which, in the case of a voluntary resignation to the commitment of the prohibited act, constitutes a justification for not being punished. In the lack of similar regulation in the L.C. the Author sees the systemic incoherence, what is incorrect since in circumstances of the labour relation in order to be blamed for discrimination the establishment of the intent to discriminate is not necessary.<sup>27</sup>

The lack of a clear statement in the Polish legislation that the disadvantageous treatment of pregnant women or parents due to taking maternity, parental or childcare leave constitutes direct sex discrimination, constitutes a shortcoming in the implementation of EU law. However, due to the long-lasting good tradition of good maternity and parental protection in Poland, this deficiency does not have a significant negative impact on judicial practice.

## 3.4 Indirect sex discrimination

### 3.4.1 Explicit prohibition

Indirect sex discrimination is explicitly prohibited in both the Anti-Discrimination Law (Article 3(3)) and the Labour Code (Article 11<sup>3</sup> and in Article 18<sup>3a</sup>(2)).

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The ruling of the SC of 8 July 2008, IPK 294/07, may serve as another example – its major point is as follows: 'Acceptance of the position that absence from work of a female employee caused by an endangered pregnancy, followed by miscarriage and health complications, may constitute justified grounds for terminating her employment contract and justify the refusal to accept her back to work, due to its purposelessness, would violate the rules regarding protection of motherhood and may even be considered as discrimination with regard to sex'. In a first-instance ruling of 3 August 2016, the District Court for Wrocław Śródmieście found that immediate termination of employment of a pregnant woman, for alleged violation of her obligation of loyalty towards the employer, expressed in frequent use of legitimate and justified medical leave, constituted an incompetent attempt of termination of the employment relation, violating Article 2 and Article 33 of the EU Charter of Fundamental Rights, as well as Article 2 Paragraph 1 and Article 8 Paragraph 1 of the 76/207 Council Directive. The court also referred to rulings of the Court of Justice in cases C-460/06 and C-177/88.

<sup>25</sup> Article 3(1) of the Anti-Discrimination Law speaks about the physical person concerned who 'is treated less favourably than another person in a comparable situation is, has been or would be treated'. The Recast Directive speaks about: one person who is treated less favourably on grounds of sex than another is, has been or would be treated in a comparable situation.

<sup>26</sup> Article 18<sup>3a</sup>(3) of the Labour Code.

<sup>27</sup> See: Korus, P. in Sobczyk, A. (ed.) (2015), *Kodeks Pracy. Komentarz* (Labour Code. Commentary) 2nd ed., C.H. Beck, Warszawa 2015, p. 69.



Article 3(2) of the Anti-Discrimination Law states:

‘Indirect discrimination is to be understood as a situation where a natural person with regard to sex ...due to an apparently neutral provision, criterion or practice was or would be put at particular disadvantage or in a particularly unfavourable situation, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary’.

Article 18<sup>3a</sup>(4) LC reads as follows:

‘Indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice puts or would put all or a large number of employees belonging to a particular group in a particularly disadvantageous situation or create an unfavourable disparity on one or more grounds referred to in Paragraph 1 as regards the establishment and termination of their employment relationship, terms and conditions of employment, promotion and access to training for the development of their professional qualifications, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.’

Article 11<sup>3</sup> LC, which sets out one of the general principles of labour law, confines itself to indicating that the prohibition of discrimination also applies to indirect discrimination, without defining it.

### 3.4.2 Statistical evidence

The Polish civil procedure, even if not mentioning directly the admissibility of statistical evidence, still does not exclude such possibility. In one of the cases (mainly related to discrimination on the grounds of employment status, although claimed by a woman) it seems that the Supreme Court encouraged using statistics in order to prove the possibility of indirect discrimination.<sup>28</sup> Namely, the Supreme Court tackled the issue of wage discrimination of a woman employed for a trial period and decided to revert the case for reconsideration to the court of second instance, ordering it to examine if the employer took advantage of his contractual right to reduce the basic salary only (or mostly) with regard to trial-period employees. If this was true, it could constitute wage discrimination against this group of employees.<sup>29</sup> However, this is the only case law identified to openly use statistical evidence in order to establish a presumption of indirect discrimination.

### 3.4.3 Application of the objective justification test

There is no evidence that the objective justification test has been used to prove sex discrimination in court proceedings in Poland. However, in other discrimination cases (for example, related to different pay for equal work), the courts generally accepted the worker’s increased mobility and availability as objective justifications, without reflecting on their possible negative impact on female employees (see for examples Section 4.2.5).

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<sup>28</sup> Supreme Court ruling of 18 April 2012, II PK 197/11.

<sup>29</sup> In this case, the issue of remuneration was regulated by a collective agreement, which entitled the employer to reduce the basic salary (by one or two categories of classification). In the opinion of the court, the provision of the collective agreement as such did not have a discriminatory character in respect to wages, especially given the fact that no premises were identified (hence none could be assessed as discriminatory) which would guide the employer by applying the provision. The court found, however, that discriminatory practice (direct or indirect) in respect to wages might be observed in the phase of application of the collective agreement by the employer.

### 3.4.4 Specific difficulties

No specific difficulties as to the application of the concept of indirect discrimination have been identified. On the contrary, a good practice example is worth mentioning. In the resolution of 19 November 2008 (I PZP 4/08), the Supreme Court, taking into account EU regulations, stated that the:

'Termination of an employment contract for a fixed period by employers solely on the grounds of acquiring the right to a retirement pension [...] constitutes discrimination on the grounds of sex (Article 11<sup>3</sup> of the Labour Code)'.

This is due to the different retirement ages of women (55 years) and men (60 years). If an employer were allowed to terminate an employment contract solely on the grounds of the employee acquiring the right to a retirement pension, this would disadvantage women, as their retirement age is lower than men. In practice, women would be in a particularly unfavourable situation in relation to men, if they could be dismissed five years earlier, because it would negatively affect their further professional career, wages or retirement benefits. This would thus constitute indirect discrimination on the grounds of sex.

To support this view, the reasoning further refers to the then applicable Community law and the case law of the Court of Justice, stressing that 'national courts are required to interpret national law in a Directive-oriented manner when national law provides for legal concepts or formulations derived from a Directive'.<sup>30</sup>

## 3.5 Multiple discrimination and intersectional discrimination<sup>31</sup>

### 3.5.1 Definition and explicit prohibition

Multiple discrimination understood as discrimination based on two or more grounds simultaneously, or intersectional discrimination, which produces a new and different type of discrimination, are not explicitly addressed in Polish legislation, although the LC (e.g. in Article 18<sup>3a</sup>(3)) recognises the possibility of discrimination based on 'one or multiple reasons'. In consequence, the LC does not e.g. require the amount of damages to be raised in such a case. The unimplemented draft law of 2012 amending the Anti-Discrimination Law had proposed to add a provision explaining that 'multiple discrimination' is to be understood as situations of unequal treatment, based on more than one of the grounds mentioned in Article 1. Additionally, in the same draft it was proposed to amend Article 13, which was to receive the following wording:

'By adjudicating on the amount of damages or compensation (...) the court takes into consideration their effectiveness, proportionality and severity. In particular, the court adjudicates higher damages or compensation in the case of multiple discrimination'.

However, the draft does not pay any attention to intersectional cases. As already mentioned, unfortunately, this draft has been abandoned.

<sup>30</sup> This view has been confirmed by SC 'resolution 21 January 2009 (II PZP 13/08). It is worth mentioning that this view has already been expressed by the Constitutional Tribunal, which pointed out, among other things, that the right of a woman to take early retirement at a reduced retirement age is her special privilege, while the imposition of an obligation to terminate the employment relationship earlier than a man should be considered as a restriction of professional opportunities for women (judgment of the Constitutional Tribunal of 24 September 1991, /Kw 5/91/).

<sup>31</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>.

### 3.5.2 Case law and judicial recognition

There is the legal possibility to simultaneously invoke several grounds of discrimination in the same claim (since the law explicitly refers to 'one or more grounds' (among others in Article 18<sup>3b</sup>(1) LC). In practice, this happens more and more often and is treated as a procedural tactic, rather than real manifestation of multiple discrimination, especially since the prevailing opinion in Supreme Court rulings is that the plaintiff should obligatorily indicate the alleged ground (or grounds) in the complaint.

In the authors' view, the fact that the Polish legislator collectively regulates gender discrimination with discrimination for other reasons obliterates the fact that, on the one hand, women, due to their long history of sex discrimination, are also more susceptible than men to discrimination for other reasons. On the other hand, discrimination on other grounds only deepens discrimination on grounds of sex or gender, making it harsher.

## 3.6 Positive action

### 3.6.1 Definition and explicit prohibition

In the Polish legal system, there is no dedicated legal term corresponding with the notion of 'positive action'. Nevertheless, such actions are explicitly allowed.

Both the Labour Code and the Anti-Discrimination Law use a descriptive construct of:

'measures undertaken over a certain period of time aimed at realising equal opportunities for ... employees who experience different treatment on one or more grounds..., by reducing existing inequalities to the advantage of those employees...' (Article 183b(3) LC),

or

'measures aimed at compensating the inconveniences connected with unequal treatment at the source of which lies one or more grounds for discrimination ...' (Article 11 Anti-Discrimination Law).

In each of those cases, such measures are admissible as permissible exceptions to the principle of equal treatment (under certain conditions). In the professional literature and in policy documents for 'positive action', the following terms are used: equalisation of opportunities, compensatory preference, preferential treatment, affirmative action, and positive discrimination. These terms are used interchangeably and the literature does not pay much attention to possible differences between them.

The Polish definitions of 'positive action' correspond to the 'spirit' of Article 157(4) TFEU and follow CJEU case law, although they differ in detail. Some differences are related to the fact that Polish legislation is not limited to cases of sex discrimination: both the definition in Article 11 of the Anti-Discrimination Law and the definition in Article 18<sup>3b</sup>(3) of the Labour Code, as opposed to Article 157(4) TFEU, do not limit the possibility of using positive action to ensure full equality in practice between men and women, but rather refer to differences in situation because of other grounds as well. They also do not mention the under-represented group of persons as the target for applying such measures. The Polish provision of the Labour Code also underlines the temporary nature of such measures, which is not required according to Article 157(4) TFEU.

None of the Polish legislation explicitly mentions that adopted measures consist in providing for 'specific advantages'. The Labour Code refers to 'measures aimed at realising equal opportunities' and the Anti-Discrimination Law to 'measures aimed at compensating for the inconveniences connected with unequal treatment'.

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

It seems that at least the Labour Code does not consider 'equal opportunities' to be a separate concept from positive action.

### 3.6.3 Specific difficulties

No specific difficulties in applying positive action in employment per se could be observed, since this issue was not subject to deeper reflection in the doctrine of labour law, nor in the jurisprudence of common courts. Only the Constitutional Tribunal paid some attention to this issue.<sup>32</sup>

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

There are no legislative measures which aim to improve gender balance on company boards, only soft-law recommendations. These recommendations are of general nature and it should be emphasised that, after successive modifications of the Corporate Governance Code (*Kodeks Spółek Handlowych*), they have eventually become weaker than initially intended. It is worth tracing this evolution. In June 2010, the Warsaw Stock Exchange (GPW) issued a document titled: 'Good Practices of Stock Exchange Companies', which included a provision that public companies and their stakeholders are recommended to contribute to a balanced participation of women and men in their bodies. In 2016, a new document was issued which, instead of a requirement for a balanced representation, merely recommends the preservation of diversity with regard to sex (as well as age, education and professional expertise) (Recommendation II.R.2).<sup>33</sup> They do not, however, have the competence to set forth a target value for representation of the under-represented sex or a diversity policy; they can merely publish recommendations.

However, there is also a positive development to note. With respect to brokerage houses and so-called significant banks,<sup>34</sup> the Minister of Finances issued two ordinances,<sup>35</sup> providing for the requirement to establish in such institutions special nomination committees (*komitety do spraw nominacji*). According to the Law on trading in financial instruments (*Ustawa o obrocie instrumentami finansowymi*), analogue nomination committees, generally equipped with the same competences, are to be established in Polish companies running stock exchanges.<sup>36</sup> Among the tasks of these bodies is the determination of 'a target value for representation of the under-represented sex on the board of directors' and development of 'a diversity policy for the composition of the

<sup>32</sup> See, for example, ruling of 12 July 2012 (P 24/10), in which the Constitutional Tribunal considered the admissibility of preferential treatment, inter alia, by arguing that a derogation from the principle of equal treatment is permitted in such a case if the differentiation satisfies the requirements of relevance, proportionality and links with other constitutional norms, principles and values, including in particular the principle of social justice.

<sup>33</sup> The Good Practices form an annex to the Resolution of the GPW Supervisory Board No. 26/1413/2015 of 13 October 2015. This document, which substituted the previous one, has been in force since 1 January 2016, Published: [https://www.gpw.pl/pub/GPW/STATIC/files/PDF/RG/Uch\\_RG\\_DB2016.pdf](https://www.gpw.pl/pub/GPW/STATIC/files/PDF/RG/Uch_RG_DB2016.pdf).

<sup>34</sup> Significant banks (*banki istotne*) according to Article 4(35) of the Act of 28 August 1997 Banks Law (uniform text JoL 2018, Item 2187) means an important bank in terms of size, internal organisation and type, scope and complexity of its operations, which meets at least one of the following conditions: - the bank's shares were admitted to trading on the regulated market within the meaning of the provisions of the Act of 29 July 2005 on Trading in Financial Instruments (JoL 2017, Item 1768, as amended); - the bank's share in the own funds of the banking sector is not less than 2 %, or has been recognised as such by the Polish Financial Supervision Authority.

<sup>35</sup> The Ordinance of the Minister of Finance of 7 May 2018 on the detailed scope of tasks of the committee for nominations in brokerage houses (JoL of 2018, Item 878) and the Ordinance of the Minister of Finance of 7 May 2018 on the detailed scope of tasks of the committee for nominations in significant banks (JoL of 2018, Item 883).

<sup>36</sup> Article 25a pt. 11.3 of the Law of 29 July 2005 on financial instruments (JoL of 2005 No. 183 Item 1538).

board of directors ... to achieve this target'. However, there is no sanction for non-fulfilment of the diversity policies. Additionally (with the exception of companies running stock exchanges), the committees perform periodical examinations (at least once every year) of the performance of the board of directors in this respect and recommend changes to the supervisory boards.

All the above committees also have the competence to review the policy of the boards of directors with regard to the selection and appointment of bank managers and present recommendations. On 31 May 2019, due to the confirmed continuation of under-representation of women on the management boards and supervisory boards of listed companies and state-owned companies, in order to achieve a real improvement, the Commissioner for Human Rights, acting in the capacity of equality body, drew the Prime Minister's attention<sup>37</sup> to the need to introduce regulations into the Polish legal order, with mandatory quotas (30 %) of representation of both genders in decision-making bodies of listed companies, in particular, companies owned by the Treasury.<sup>38</sup>

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

There are positive action measures to improve the gender balance introduced with respect to lists of political candidates for public elections. The Electoral Code of 5 January 2011 introduced (in Article 211(3) and Article 425(3)) the requirement to include at least 35 % of women and men on electoral lists to the Sejm, the European Parliament and local elections for Community Councils, with a sanction of refusal to register the list in cases of non-compliance.<sup>39</sup> Since 2011, these quotas no longer apply to the elections of the Senate, considering single-member constituencies were introduced. Since 2014, the quotas no longer apply to the community council elections either, for the same reasons. Further efforts to broaden the scope of single-member constituencies, undertaken in 2014, have failed. Also unsuccessful were attempts undertaken in 2015 to introduce an alternate requirement, placing women and men on the electoral lists (the so-called zipper mechanism), despite promises made by the then leaders of the ruling coalition (Civic Platform and Polish People's Party). Such mechanisms would increase the chances for women to be elected, as candidates placed in the first places of the electoral lists usually receive the highest number of votes. In March 2019, the Commissioner for Human Rights appealed for a change in the electoral law in this respect, underlining that after the 2015 Sejm election, women only constitute 27 % of all deputies.<sup>40</sup> However, the electoral law has not been changed.

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<sup>37</sup> The Prime Minister's competence in this respect results from the fact that the Act of 16 December 2016 on the Principles of Management of State Property (JoL 2018 Item 1182) transferred to the Prime Minister, at the beginning of 2017, the competence to coordinate the powers in companies previously vested in the State Treasury, including the determination of good practices, in particular, in the area of corporate governance or corporate social responsibility.

<sup>38</sup> Official register number of the Commissioner's address to the Prime Minister: XI.801.14.2016.KWŻ, <https://www.rpo.gov.pl/sites/default/files/Wyst%C4%85pienie%20do%20Prezesa%20Rady%20Ministr%C3%B3w%20ws.%20niedostatecznego%20udzia%C5%82u%20kobiet%20we%20w%C5%82adzach%20sp%C3%B3%C5%82ek.pdf>.

<sup>39</sup> In the 2014 local council elections, the refusal to register electoral lists occurred in 255 cases, mainly due to the fact that the required number of supporters' signatures had not been attained. In the report of the National Electoral Commission on these elections, there is no information on the number of cases where such refusal was due to the non-fulfilment of the 35 % quota. See: Report of the National Electoral Commission on local elections 2014: [http://pkw.gov.pl/g2/oryginal/2015\\_03/ec7e7f5b93dff615524e7e5940408b5d.pdf](http://pkw.gov.pl/g2/oryginal/2015_03/ec7e7f5b93dff615524e7e5940408b5d.pdf).

During the parliamentary election in 2015, the same reason for most of the 66 refusals was identified. See: Report of this Commission on the 2015 parliamentary election:

<sup>40</sup> [http://pkw.gov.pl/pliki/1450053460\\_informacja\\_2010.pdf](http://pkw.gov.pl/pliki/1450053460_informacja_2010.pdf).  
<https://www.wnp.pl/parlamentarny/spoleczenstwo/rzecznik-praw-obywatelskich-chce-zmian-w-kodeksie-wyborczym-suwak-mialby-zwiekszyc-szanse-kobiet,37895.html>.

### 3.7 Harassment and sexual harassment

#### 3.7.1 Definition and explicit prohibition of harassment

Both the Anti-Discrimination Law<sup>41</sup> as well the Labour Code<sup>42</sup> provide for separate, but very similar definitions of harassment, identical with the definition provided for in Article 2(1) of the Directive 2006/54/EC, however, without indication of any grounds.

These provisions dealing with harassment do not apply to harassment on the grounds of sex, which is in both of these legal acts improperly regarded as sexual harassment and defined in the same provision entitled 'sexual harassment' with the following wording:

'...any form of unwanted conduct ... related to the sex of a person with the purpose or effect of violating her/his dignity, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment (atmosphere); Such behaviour may consist of physical, verbal or non-verbal conduct'.

Treating harassment related to sex as sexual harassment in the Polish law constitutes an incorrect implementation of Article 2(1) of the 2006/54/EC Directive.

#### 3.7.2 Scope of the prohibition of harassment

Concerning the personal scope of the prohibition of harassment based on sex, provided for in the Labour Code, it is limited only to employees in the understanding of this law.

The Anti-Discrimination Law extends the possibility of applying the provisions on the prohibition of harassment to all other members of the working population. It may therefore also be applied to persons who performed work on the basis of contracts other than employment's contracts (e.g. contract of mandate, contract for specific work) and self-employed in individual economic enterprises outside or within agriculture, who perform so-called free professions (legal, medical, artistic), as well as to all persons who access or supply goods and services.

As to the material scope, this prohibition applies in the sphere of employment with regard to access to professional training, in relation to the conditions of undertaking and conducting professional activity. The harassment provisions also apply with regard to access and conditions of use of labour-market instruments and services, as well as social insurances (social security), housing services, in access to goods and services and in acquiring rights (e.g. deriving from transactions carried out outside the area of private and family life), as long as they are offered publicly.

The personal and material scope of application of the prohibition of harassment in access to goods and services strictly correspond with Directive 2004/113/EC.

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

Sexual harassment is also defined both in the Labour Code (Article 18<sup>3a</sup>(6)) and in the Anti-Discrimination Law (in an almost identical manner).

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<sup>41</sup> Article 3(3) of the Anti-Discrimination Law stipulates that harassment is taken to include any form of unwanted conduct, the purpose or effect of which is violation of the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment (atmosphere).

<sup>42</sup> Article 18<sup>3a</sup>(5) Item 2 LC states that occurrences of discrimination are any unwanted conduct with the purpose or effect of violating the dignity of an employee and of creating an intimidating, hostile, degrading, humiliating or offensive environment (atmosphere) (harassment).

The wording of Article 18<sup>3a</sup>(6) LC is as follows:

'Discrimination on the grounds of sex is also taken to include any form of unwanted conduct of a sexual nature, ... with the purpose or effect of violating her/his dignity, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment (atmosphere); this behaviour may consist of physical, verbal or non-verbal conduct (sexual harassment).'

According to Article 3(4) of the Anti-Discrimination Law, sexual harassment is taken to include any form of unwanted conduct of a sexual nature towards a person ... with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment (atmosphere), this behaviour may consist of physical, verbal or non-verbal conduct.

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

Since sexual harassment and harassment related to sex are regulated in the same provision, the scope of their prohibition is also respectively the same. It means that the prohibition provided for in the Labour Code is limited to employees and the prohibition provided for in the Anti-Discrimination Law extends the possibility of applying sexual harassment provisions to persons who perform work on the basis of other legal relationships than an employment contract, as well as to persons self-employed in individual economic enterprises or agriculture (see 3.6.6). The prohibition also applies to the consumption and the supply of goods and services.

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

The Labour Code explicitly recognises harassment related to sex, as well as sexual harassment as discriminatory behaviour on the grounds of sex. On the other hand, the Anti-Discrimination Law considers sexual harassment as an expression of unequal treatment (Article 3(6) in conjunction with Article 3(5)).<sup>43</sup> However, the difference in formulation seems to have no practical meaning, as the Labour Code in Article 18<sup>3a</sup>(7) states that it may not cause negative consequences for the employee to submit to harassment or sexual harassment, as well as taking action to oppose harassment or sexual harassment. Similarly, in light of Article 3(5) of the Anti-Discrimination Law, any less favourable treatment of an individual, stemming from the rejection of harassment or sexual harassment, subordinate harassment or sexual harassment, is considered as unequal treatment.

#### 3.7.6 Specific difficulties

In the case law regarding sexual harassment, many different issues were raised indicating the difficulties which courts face while deciding such cases. Those doubts concerned the following problems: How should the employee demonstrate that sexual conduct was undesirable? How should the burden of proof be allocated in such cases? What is the extent and basis of the employer's responsibility for sexual harassment amongst its employees?

In the judgment of 7 November 2018 (II PK 229/17), the Supreme Court, while dismissing the claimant's appeal, at the same time responded to some of the above issues, however, not in a fully satisfactory way. In her cassation appeal, the claimant accused the Regional Court of, inter alia, breaching substantive law in relation to Article 18<sup>3a</sup> Section 6 of the Labour Code, by its erroneous interpretation that sexual proposals, which do not materialise in sexual activities due to the lack of consent of the

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<sup>43</sup> Less favourable treatment of an individual stemming from rejection of the sexual harassment, or subordinate sexual harassment is considered as unequal treatment.

addressee of the proposals, may be regarded as an element of approved flirtation, whereas the adoption of such a rule is contrary to the legal definition of sexual harassment, eventually leading to legitimisation of all sexual harassment not involving physical abuse. In addition, she claimed infringement of Article 18<sup>3a</sup>(6) in conjunction with Article 18<sup>3b</sup>(1) of the Labour Code and Article 14 of the Anti-Discrimination Act, by reason of their incorrect application, in that the burden of proof was wrongly placed on the applicant in respect of proving her opposition to sexual harassment. In her opinion, the court should have shifted the burden of proof to the defendant in this respect.

Moreover, she claimed infringement of Article 94(2b) LC, which puts the obligation on the employer to act against discrimination in employment, in particular in respect of sex, while in her opinion, the employer did not react properly on her claims and also the court failed to examine whether the defendant had complied with the aforementioned legal standard by taking effective measures to counteract discrimination.

In its response to the first allegation, the Supreme Court confirmed that the analysis of Article 18<sup>3a</sup> Section 6 LC leads to concluding that physical contact with the victim of sexual harassment does not have to occur. At the same time, however, it recalled that the criterion which is essential for assessing whether sexual conduct constitutes sexual harassment is the fact that such conduct is undesirable to the employee. In the opinion of the Supreme Court, the content of SMS messages sent from her superior's mobile to the claimant was of a sexual nature and indicated that she obviously did not meet his sexual expectations, but these SMSs alone were not considered sufficient to accept the thesis that the applicant did not approve of the proposals resulting from these messages and opposed them. Therefore, the Supreme Court shared the opinion of the courts of I and II Instances, that there was no sexual harassment in this case.<sup>44</sup>

The Supreme Court held that the complainant correctly concluded that Article 18<sup>3b</sup> Section 1 LC (imposing an obligation on the employer to prove that, in breaching the principle of equal treatment in employment, he was guided by objective reasons) should not be invoked in a case of sexual harassment because the obvious unlawfulness of sexual harassment cannot be justified by any objective reasons. Although the Supreme Court's remark on the inapplicability of Article 18<sup>3b</sup> Section 1 LC in relation to alleged sexual harassment was correct, the Court nevertheless made no attempt to investigate whether there was a causal link between alleged sexual harassment and the applicant's subsequent transfers by her employer to other departments of the company and the final termination of her employment contract.<sup>45</sup>

In the Supreme Court's (SC) opinion, the cassation allegation of infringement of Article 94(2b) LC by reason of its non-application is also not justified, either. Pursuant to this provision, the employer is obliged to counteract discrimination in employment, in particular on the grounds of sex. The SC confirmed that the employer is also responsible for discriminatory practices of its employees (including harassment) if it failed to prevent them. However, this regulation does not provide for any specific sanctions for violation of the obligation specified therein. Article 18<sup>3</sup> of the Labour Code will not be directly

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<sup>44</sup> The Supreme Court rightly noted that '...in certain circumstances, expressing such an objection directly may be problematic, especially when the perpetrator is the employee's superior or another person representing the employer. The average employee usually is not interested in conflicting with the employer and may therefore fear for possible consequences of expressing an objection to the attitude of the superior (or other person acting on behalf of the employer). The determination of whether the offender's behaviour was unwanted by the employee should therefore be based on all the circumstances. The form of objection may be, for example, the avoidance of contact between the complainant and the offender. In the mentioned case, however, witnesses appointed by the employer did not confirm that this was the case.

<sup>45</sup> The Supreme Court agreed with the claimant that the provision of the LC in question must be supplemented by the regulation of Article 14(3) of the Anti-Discrimination Law, according to which, in the event of probable breach of the principle of equal treatment, the entity accused of breaching that principle is obliged to prove that it has not been committed. This solution seems attractive, but to assess its usefulness it is necessary to consider equally procedural aspects, which the SC abandon.



applicable, as it concerns compensation for breach of the principle of equal treatment by the employer. The above provision constitutes, however, an indicator in the process of establishing the responsibility of the employer with respect to general provisions, such as Article 471 of the Civil Code, in conjunction with Article 300 LC, in the event of failure to perform its duty to prevent discrimination.<sup>46</sup> In the opinion of the SC, the prerequisite, however, for such liability is always a prior determination of the existence of discriminatory behaviour. It is difficult to agree with this assertion, as it means that the employer is exempt from the obligation to prevent sexual harassment, even if such allegation was made, but not eventually proven.

In the author's view, it is also worth noting that it might sometimes be difficult to distinguish between harassment based on sex within the meaning of Article 18<sup>3a</sup>(6) LC and mobbing (bullying) referred to in Article 94<sup>3</sup> LC, especially if the harassment lasted for a long time.

According to Paragraph 2 of the latter provision, bullying means:

'any act or conduct concerning or directed against a worker, consisting of persistent and prolonged harassment or intimidation of the worker, resulting in an underestimation of the worker's occupational ability (usefulness, suitability), causing or intended to humiliate or ridicule the worker, isolate him/her or eliminate him or her from the work team.'

Pursuant to Paragraph 3 of Article 94<sup>3</sup> LC, an employee for whom harassment has caused a health disorder may receive from the employer an appropriate amount of monetary compensation for the harm suffered, and, together with the termination of the employment contract, compensation in the amount not lower than the minimum remuneration for work (Paragraph 3 and 4 of Article 94<sup>3</sup> LC). In the case of mobbing, however, the provision on shifting the burden of proof, applicable in the case of discrimination, does not apply.

### **3.8 Instruction to discriminate**

#### **3.8.1 Explicit prohibition**

In both the Anti-Discrimination Law and the Labour Code there are explicit prohibitions on instructions to discriminate. According to the Anti-Discrimination Law (Article 3(4)), unequal treatment is also understood as the encouraging or ordering of any discrimination. The LC stipulates that the prohibition of discrimination also forbids the instruction to discriminate (Article 18<sup>3a</sup>(5) point 1 LC).

#### **3.8.2 Specific difficulties**

The matter of instruction to discriminate is very rarely discussed by courts.

Only one court judgment was identified, issued by the District Court in Gdansk,<sup>47</sup> indicating that proving such discrimination can be very difficult in practice, unless there is written evidence. In this case the claimant alleged that the waiter at the restaurant, in prohibiting a woman from breastfeeding her child at the table, declared that he was acting upon instruction of the owner (who was absent at the time of the incident). However, when during the proceedings, the owner, and eventually also the waiter, denied that such instruction ever took place, the court decided that there was not

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<sup>46</sup> Iwulski, J., *Kodeks Pracy. Komentarz* (Labour Code. Commentary), Warszawa 2011.

<sup>47</sup> District Court of Gdańsk, ruling of 12 December 2016, case No. IC 206/15.

sufficient evidence to confirm this fact. The issue of instruction to discriminate is also very seldomly examined in legal literature.<sup>48</sup>

### 3.9 Other forms of discrimination

The Polish legislation does not provide for any other forms of discrimination. However, it is worth mentioning that the draft law of 10 October 2012 (mentioned already in Section 3.2.2) intended to amend the Anti-Discrimination Law by including a definition of discrimination by association and assumed discrimination.<sup>49</sup> Since 2015, those issues are no longer subject to discussion.

### 3.10 Evaluation of implementation

The implementation of the general concepts of European gender equality law is basically correct, with several exceptions.

The main difference between the current Polish and EU regulations is related to the fact that, unlike EU law, in Polish law, sex discrimination is regulated together with discrimination on other grounds. As a result, existing legislation is unclear and vague, making it highly difficult to understand and interpret even for lawyers. It occurs especially under the Anti-Discrimination Law, which provides for different scopes of protection against discrimination on different grounds.

Moreover, the definition of direct discrimination in the LC, is not entirely correct with regard to the hypothetical activities of employers. Namely, the Labour Code speaks of a comparable situation not in the context of another employee (as does the Recast Directive and the Anti-Discrimination Law, which speak about one person who is treated less favourably on grounds of sex than another is, has been or would be treated in a comparable situation), but refers to a 'comparable situation' to the employee being discriminated against.<sup>50</sup> In the author's view, this inconsistency may be removed by proper interpretation applied by courts (that is, being in compliance with the Recast Directive, which speaks about: 'one person who is treated less favourably on grounds of sex than another is, has been or would be treated in a comparable situation').

As far as the definition of indirect discrimination is concerned, despite the different wording, the definitions in many respects correspond to the EU definition with two objections.<sup>51</sup> Namely, neither the Labour Code nor the Anti-Discrimination Act make

<sup>48</sup> Only one commentary on the LC includes an example of a Temporary Work Agency that encouraged employers to give a salary to temporary workers that was lower than that received by other employees. Gersdorf, M., Rączka, K., Skoczyński, J., *Kodeks Pracy. Komentarz* (Labour Code. Commentary), ed. 6, Lexis Nexis, Warszawa 2004, p. 67. In more recent commentaries on the LC, this issue is either completely omitted (see: commentary on Article 18<sup>3a</sup>(5)(1) LC: Świątkowski, A.M., *Kodeks Pracy. Komentarz* (Labour Code. Commentary), 4th edition, C.H. Beck, Warszawa 2012, p. 81-90 and Muszalski, W. (in) *Kodeks Pracy. Komentarz* (Labour Code. Commentary) ed. Muszalski, W. 8th edition, C.H. Beck, Warsaw 2011, p. 50), or limited to the general interpretation of this provision, such as that the refusal of the employee to comply with the instruction has no significance for the responsibility of the instructor (Compare: Korus, P. (in) *Kodeks Pracy. Komentarz* (Labour Code. Commentary), ed. Sobczyk, A., 2nd edition, C.H. Beck, Warszawa 2015, p. 69).

<sup>49</sup> Discrimination by association shall be understood as a situation where the person, referred to in Article 2(1), is treated less favourably, than any other person is, was or would be treated in a comparable situation, to association of this person with another person having one or more characteristics, referred to in Article 1; Discrimination by assumption shall be understood as a situation where the person, referred to in Article 2(1), is treated less favourably, than any other person is, was or would be treated in a comparable situation because of assigning to this person one or a few of the characteristics referred to in Article 1 (Article 5b and 5c of the Draft Law).

<sup>50</sup> Article 18<sup>3a</sup>(3) of the Labour Code in this respect states: '...where the employee has been, is or could have been treated'. One might wonder how the situation of the employee can be compared with others, before alleged discrimination against him/her happens.

<sup>51</sup> The same opinion was expressed by, among others, Burek, W., Klaus, W., 'Definiowanie dyskryminacji w prawie polskim w świetle prawa Unii Europejskiej oraz prawa międzynarodowego' (Defining discrimination in Polish law in light of European Union law and international law). *Problemy Współczesnego Prawa*

reference to a comparison with other persons not having a so-called protected characteristic, as is the case in EU law (e.g. Article 2(1)b. of the Recast Directive refers to a 'particular disadvantage compared with persons of the other sex'). In addition, the definition in the Labour Code mentions among the criteria of indirect discrimination the requirement that a given activity, apparently neutral, leads to 'a particular disadvantageous situation of all or a large number of employees belonging to a particular group'. Such a large group effect is not provided for in the Recast Directive 2006/54, which while speaking about other persons refers only to a plural number without requiring 'all or a large number' of employees. This requirement, if rigorously applied by the courts, may be difficult to demonstrate in practice.<sup>52</sup>

Another example of incorrect implementation of EU law constitutes the above-mentioned definition of sexual harassment which according to Polish regulations, also encompasses harassment related to sex. This type of harassment is treated as a separate central concept in EU law. For this reason, it should also be regulated in Polish law in the same place as harassment for other reasons.<sup>53</sup>

The fact that neither the Anti-Discrimination Law nor any provision of the LC states *expressis verbis* that discrimination includes any less favourable treatment of a woman because of her pregnancy or childbirth-related leave, can also be considered an implementation deficit.<sup>54</sup> In some LC-based case law, discrimination with regard to pregnancy is considered to be 'sex-based',<sup>55</sup> while discrimination with regard to childbirth-related leave is seen as 'parenthood based'.<sup>56</sup> Nevertheless, this does not directly result from the wording of the provisions included in Chapter IIa of the LC, referring to unequal treatment and discrimination cases, hence this fact is not well known amongst employees and employers, nor, as can be seen in other case law, even amongst some of the judges.<sup>57</sup> Article 12 of the Anti-Discrimination Law, as modified by the Law of 24 July of 2015,<sup>58</sup> does in fact stipulate that, 'in the case of a breach of the equal treatment rule with regard to pregnancy or childbirth-related leave, such person

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*Międzynarodowego, Europejskiego i Porównawczego* 2013, tom XI. The opposite opinion: Maliszewska-Nienartowicz, J., 'Kryteria dyskryminacji pośredniej – standardy europejskie a prawo i praktyka polskich sądów' (Criteria for indirect discrimination – European standards and the law and practice of Polish courts). *Polskie Towarzystwo Prawa Antydyskryminacyjnego*. No issue date.

<sup>52</sup> Maliszewska-Nienartowicz, J., 'Kryteria dyskryminacji pośredniej – standardy europejskie a prawo i praktyka polskich sądów' ('Criteria for indirect discrimination – European standards and the law and practice of Polish courts') *Polskie Towarzystwo Prawa Antydyskryminacyjnego*. No issue dated.

<sup>53</sup> [http://ptpa.org.pl/site/assets/files/publikacje/opinie/Opinia\\_kryteria\\_dyskryminacji\\_posredniej.pdf](http://ptpa.org.pl/site/assets/files/publikacje/opinie/Opinia_kryteria_dyskryminacji_posredniej.pdf).  
<sup>54</sup> The removal of the notion of 'harassment' related to sex from the definition of sexual harassment, as well as the over-generalisation of the latter definition (e.g. by removing the word 'unwanted' and all assessment criteria related to the atmosphere, such as 'intimidating, hostile, degrading, humiliating or offensive'), has been proposed by G. Jędrejek, *Dochodzenie roszczeń związanych z mobbingiem, dyskryminacją i molestowaniem. Zagadnienia prawne* (Enforcing claims related to bullying, discrimination and harassment. Legal issues). *Warszawa 2017 r.*, p. 387. The proposal aimed at the generalisation of the definition is not in line with EU definitions of sexual harassment.

<sup>54</sup> Provisions of this chapter of the LC only state that application of measures, which differentiate the legal situation of an employee due to protection of parenthood, are irrespective of the rule of equal treatment (Article 18<sup>3b</sup>(2) pt. 3 LC).

<sup>55</sup> The ruling of the SC of 8 July 2008, IPK 294/07, may serve as an example.

<sup>56</sup> For example, in the ruling of 25 February 2016 (II PK 357/14 the Supreme Court noted: 'if taking up childcare leave by the employee, upon his return to work becomes the reason for unequal treatment in employment, it constitutes parenthood-related discrimination'.

<sup>57</sup> In many court rulings, however, labour courts, when accepting claims of employees (e.g. regarding violation by the employer of the statutory prohibition of worsening working conditions while transferring a pregnant woman to easier work, by not including for the women who worked in the conditions harmful to health the period of pregnancy or sickness and maternity leave into the shorter (then regular) length of working time required for acquisition of retirement pension by the employee performing such kind of work) did not consider such infringements of the LC's provisions by the employer as sex discrimination. As a result, the claimants did not receive the special damages for discrimination provided for in Article 18<sup>3d</sup> of the LC. n. See, for example: Court of Appeals in Warsaw, ruling of 5 February 2016, case No. III AUa 124/15, Court of Appeals in Lublin, ruling of 12 August 2015, case No. III AUa 417/15 and of 13 April 2016, case No. III AUa 898/15, Supreme Court, ruling of 7 October 2014, case No. I UK 51/14.

<sup>58</sup> JoL 2015 Item 1268.

has the right to damages, according to Article 13 (which refers to discrimination-related damages). Nevertheless, this provision does not explicitly provide that the discrimination includes any less favourable treatment of a woman related to pregnancy or maternity leave, which could have significant informative and educational impact, amongst employers and employees and the general public, thus better preventing discrimination in this area and facilitating the pursuit of claims before courts.

It is also desirable to introduce into Polish legislation an explicit regulation relating to discrimination on the grounds of gender identity, discrimination by association and discrimination by assumption, as well as multiple and intersectional discrimination, following the understanding of European case law and legal scholarship.

### **3.11 Remaining issues**

It is worth noting that Article 10 of the Anti-Discrimination Law expands the scope of application of the anti-discrimination provisions to legal, as opposed to natural, persons, by stating that unequal treatment of legal persons ...<sup>59</sup> shall be prohibited, if the breach of the principle of equal treatment is violated with respect to the origin, race, ethnicity or nationality of their members. However, this provision does not apply where the principle of equal treatment has been infringed on the grounds of the sex of the members of such organisations.

At this point the authors limit themselves to indicating that the lack of clear distinction by the Polish legislator between the notion of infringement of the principle of equal treatment and the notion of discrimination (which sometimes were treated by the legislator as synonyms) has caused many problems in courts' efforts to establish their mutual relations. In the current jurisprudence of the Supreme Court, the prevailing opinion is that discrimination is a qualified (more severe) form of violation of the principle of equal treatment due to the application of a prohibited criterion of differentiation.<sup>60</sup> However, such gradation does not derive directly from the legislation.<sup>61</sup>

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<sup>59</sup> As well as other organisational units which are not legal persons, to which the law grants legal capacity.

<sup>60</sup> See, for example, the ruling of the SC of 14 December 2017, I PK 342/16.

<sup>61</sup> In practical terms this means that the claimant must indicate and substantiate in the statement of the petition the ground (or grounds) for the unequal treatment. If the claimant fails to do so and confines himself to indicating that he was treated unequally, he will not be entitled to special compensation provided for in Article 18<sup>3d</sup> LC. The problem is that Article 18<sup>3d</sup> LC does not speak about 'discrimination' but about 'violation (infringement) of the principle of equal treatment'.

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

### 4.1 General (legal) context

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

In Poland, for many years the Central Statistical Office (GUS) has conducted regular research on the remuneration of women and men.<sup>62</sup> According to GUS data, the average salary of women is lower than that of men. In October 2014, this difference amounted to PLN 764 (EUR 177). Men earned PLN 374 (EUR 88) more (by about 9.1 %) than the national average, while women earned PLN 390 (EUR 90.60) less (by about 9.5 %) than the national average. As a consequence, the average salary of women was 17 % lower than the average salary of men (similarly as in 2012).<sup>63</sup>

The latest available report on the structure of wages and salaries dates back to 2016. The data refers to full- and part-time employees who worked the whole month of October 2014 in national economic entities with more than nine employees. The Gender Pay Gap (GPG) is calculated on the basis of average hourly rates of gross total remuneration for time paid in accordance with the Eurostat methodology. In 2014, men achieved an average gross hourly wage that was 6.2 % higher than the average hourly wage in total, and women one that was lower by 6.8 %, so that the average hourly gross wage of men was 13.9 % higher than the average hourly gross wage of women. It is worth noting that data from the Central Statistical Office shows that Poland's gender pay gap in the private sector is over four times higher than in the public sector.<sup>64</sup> This is important because in Poland, according to GUS data for 2018, the private sector employs about 75 % of all employees.<sup>65</sup>

On the basis of GUS data, a survey was carried out in 2016 by a think tank called the Institute for Structural Research, followed by the publication of a report entitled 'The Future of the European Union'.<sup>66</sup> The authors of the part of this report dealing with

<sup>62</sup> The last partial study of the GUS '*Kobiety i mężczyźni na rynku pracy*' ('Women and men on the labour market') was carried out in 2016. See also: *Badania Aktywności Ekonomicznej Ludności* (Bael). (The Economic Activity Studies of the Population (Bael). This labour force Survey covers people aged 15 and over. Its results and methodology are presented quarterly in the publication entitled '*Aktywność Ekonomiczna Ludności Polski*' (The Economic Activity of the Polish Population), [https://biznes.interia.pl/news/kobiety-i-mezczyzni-na-ryнку-pracy,1854159?utm\\_source=paste&utm\\_medium=paste&utm\\_campaign=firefox](https://biznes.interia.pl/news/kobiety-i-mezczyzni-na-ryнку-pracy,1854159?utm_source=paste&utm_medium=paste&utm_campaign=firefox); [https://biznes.interia.pl/news/kobiety-i-mezczyzni-na-ryнку-pracy,1854159?utm\\_source=paste&utm\\_medium=paste&utm\\_campaign=firefox](https://biznes.interia.pl/news/kobiety-i-mezczyzni-na-ryнку-pracy,1854159?utm_source=paste&utm_medium=paste&utm_campaign=firefox).

<sup>63</sup> The largest difference in the level of the average between women's and men's gross remunerations, is recorded in the group of industrial workers and craftsmen. The ratio of the average salary of women in this group amounted to 69 % of the average salary of men. The lowest wage differential was observed in the occupational group Office workers, where the average salary of women amounted to 98 % of the average salary of men. The greatest differences in the average gross remuneration of women and men occurred in the 35-44 age group, where women earned 13.1 % less than men on average per hour of work. The analysis of extreme wages shows that among employees with the lowest salaries there are slight differences between women and men. On the other hand, big differences can be observed among the best remunerated performers. The average salary of 10 % of the best-paid women constituted 77 % of the average salary of the best-paid men. In the case of 5 % of the best earners, this relation was even less favourable for women and amounted to 73 %, [https://biznes.interia.pl/news/kobiety-i-mezczyzni-na-ryнку-pracy,1854159?utm\\_source=paste&utm\\_medium=paste&utm\\_campaign=firefox](https://biznes.interia.pl/news/kobiety-i-mezczyzni-na-ryнку-pracy,1854159?utm_source=paste&utm_medium=paste&utm_campaign=firefox).

<sup>64</sup> '*Różnice w wynagrodzeniach kobiet i mężczyzn w Polsce*' (Differences in wages of women and men in Poland). GUS Report from 2016, <https://stat.gov.pl/obszary-tematyczne/rynek-pracy/pracujacy-zatrudnieni-wynagrodzenia-koszty-pracy/roznice-w-wynagrodzeniach-kobiet-i-mezczyzn-w-polsce-w-2016-r-12.2.html>.

<sup>65</sup> GUS, Statistical information, *Pracujący w gospodarce narodowej w 2018 r.* (Employment in the national economy in 2018), Warsaw 2019, p. 11, [https://stat.gov.pl/download/gfx/portalinformacyjny/pl/defaultaktualnosci/5474/7/16/1/pracujacy\\_w\\_gosp\\_odarce\\_narodowej\\_w\\_2018\\_roku.pdf](https://stat.gov.pl/download/gfx/portalinformacyjny/pl/defaultaktualnosci/5474/7/16/1/pracujacy_w_gosp_odarce_narodowej_w_2018_roku.pdf).

<sup>66</sup> Report prepared by Magda, I., Tyrowicz J., Van der Velde, L., from *Instytut Badań Strukturalnych* pt. '*Nierówności płacowe kobiet i mężczyzn. Pomiar, trendy, wyjaśnienia*' (Pay inequalities between women and

differences between women's and men's salaries stressed that the gender pay gap in Poland is generally relatively high in comparison with other European countries: although among public enterprises it is one of the lowest in Europe; private enterprises, whose share of employment is dominating, are located above the EU average. Although women receive bonuses and awards more often than men, they are much lower in terms of amount (in entities employing at least nine persons, the gender pay gap in terms of flexible components of remuneration reaches as much as 30 %).

In 2014, women's and men's salaries were also examined by the Supreme Chamber of Control (NIK). This monitoring of gender pay covered the entire civil servants corps (about 2 300 offices).<sup>67</sup> This study shows that in Poland, depending on the adopted method of data selection and calculations, the wage gap ranges from 7 % to 18.5 % (which translates into an average lower remuneration of women by about PLN 700 (EUR 162.70)).

According to Eurostat data (2014), Poland has one of the lowest wage gaps in the European Union – the difference in wages is 7.7 % to the disadvantage of women, while the EU average is 16.7 % (the difference in the average gross hourly rate in the whole economy). According to the latest GUS forecast, the wage gap indicator according to the Eurostat methodology, for 2016 amounted to 7.2 %, i.e. 0.5 percentage points lower than in 2014. Those studies also confirmed the rule that the higher the position, the greater the differences in salaries between men and women; the difference in managerial positions in Poland is 27.7 %, i.e. 4.3 percentage points more than the EU average. In the most female-dominated sectors, with the dominating role of the public sector (i.e. in education and health), the scale of wage inequalities between women and men is twice as high as the difference in average wages. It can be assumed that the high supply of highly qualified women is conducive to a larger scale of inequality (however, the researchers emphasised that it cannot be shown that this dependence has a cause and effect character). Wage inequality is also visible in the flexible components of wages.<sup>68</sup>

These findings were partially confirmed in the Supreme Audit Office (*Najwyższa Izba Kontroli* – NIK) report published in 2014. The report shows that men earn more than women in most of the public administration units, municipal companies and the State Treasury surveyed by NIK. The audit showed that the statistical difference between the salaries of men and women in the public sector in the case of basic pay is 10.82 % in favour of men. The difference, to the disadvantage of women, is as much as 80 % among 109 types of positions in ministries, central and provincial offices, local government units, state treasury companies and municipal companies. The NIK report also shows that among people with higher education, pay differences are particularly significant in favour of men. In contrast to other studies, it was found that in inspected workplaces, men receive on average more awards than women. It is confirmed, however, that they can also count on higher bonuses from employers, and the rewards received are also higher in value.

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men. Measurement, trends, explanations),

[http://ibs.org.pl/app/uploads/2016/05/IBS\\_Nierownosc\\_PlacowaRaport.pdf](http://ibs.org.pl/app/uploads/2016/05/IBS_Nierownosc_PlacowaRaport.pdf).

<sup>67</sup> Report '*Zapewnienie prawa do jednakowego wynagrodzenia kobiet i mężczyzn w sektorze publicznym*' (Ensuring the right to equal pay for women and men in the public sector). *Informacja o wynikach kontroli* (Information on the results of the inspection), Report signed by Stawska, J., accepted by Uczkiewicz, J. – Vice President of NIK, on 10 December 2013. Document's evidential number: 167/2013/P13151/LKR, <https://www.nik.gov.pl/aktualnosci/nik-o-wynagrodzeniu-kobiet-i-mezczyzn.html>. Monitoring takes place, inter alia, through annual reports of directors-general of offices, examination of selected groups of offices and positions in the civil service corps, and a payroll report.

<sup>68</sup> Report '*Zapewnienie prawa do jednakowego wynagrodzenia kobiet i mężczyzn w sektorze publicznym*' (Ensuring the right to equal pay for women and men in the public sector) (Ensuring the right to equal pay for women and men in the public sector). *Informacja o wynikach kontroli* (Information on the results of the inspection), Report signed by Stawska J., accepted by Uczkiewicz, J. – Vice President of NIK, on 10 December 2013. Document's evidential number: 167/2013/P13151/LKR, <https://www.nik.gov.pl/aktualnosci/nik-o-wynagrodzeniu-kobiet-i-mezczyzn.html>.

According to information provided by the Civil Service Department of Chancellery of the Prime Minister in 2013 to the President of NIK, the total remuneration of women and men in most positions in the civil service was higher in favour of men (in total by about 21 %, in higher positions by about 7 %). These data allow only to present the wage gap between the average monthly salaries of women and men in the job groups. However, they do not allow for the analysis of individual salaries of women and men in the same positions and for drawing conclusions on possible wage discrimination of women in the civil service.<sup>69</sup>

In many studies aiming to determine the size of the gender pay gap, the causes of its existence have been identified as well. It is most often stressed that the pay gap is a complex phenomenon, because it results from the co-existence of many factors influencing the situation of women and men in the labour market. There are objective differences, such as differences in education, professional experience or kind of exercised profession. There are also factors on which employees have less influence – such as sex segregation in the labour market or length of service resulting from unfair division of family duties. Women's lower pay is also influenced by their lower self-esteem – Polish women do not highly assess their chances of finding a job and have lower financial expectations than men. Both in the group of young unemployed (that is, unemployed graduates up to 30 years of age) and among the remaining unemployed, women's financial expectations are lower by PLN 303 (EUR 70) and by PLN 366 (EUR 85), respectively.

In the study conducted by NIK, no differences in the level of remuneration were found to have been caused by employers violating the equal treatment rule. Rather, wage differentiation in groups of comparable positions resulted – according to the opinion of researchers – primarily from the role played for the whole institution by the organisational unit in which the employee was employed, and thus from the scope of duties assigned to him/her. Women worked mainly in organisational units, as well as servicing or controlling units, while men, mainly due to their field of study, were more often employed in specialist units related to the performance of the main tasks of the institution. The differences between men's and women's earnings were, to a large extent, also caused by a greater share of men in the group of employees in managerial positions.

Other studies also stress that an obstacle in combating the wage gap is the fact that few entities monitor average wages for women and men on an ongoing basis. The reference point is usually the average for the whole entity or a specific department. However, the earnings of women and men in equal positions or in jobs of equal value are not benchmarked. A chance to change this situation is offered by the introduction of a tool in 2017 by the Ministry of Family, Labour and Social Policy, in the form of a special computer application, which compares the wages of employees taking into account such features as: gender, age, education, position, working time and seniority.<sup>70</sup>

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

Equal treatment in the workplace has been reflected in research, in different areas and at different levels of detail. The analysis covers the existing inequalities in the labour market understood as manifestations of a horizontal segregation (research in the ICT

<sup>69</sup> See: Address by the Commissioner for Human Rights to the President of the Supreme Audit Office, of 16 April 2014. (No.: 1.816.10.2014.KWŻ).

[https://www.rpo.gov.pl/sites/default/files/Do\\_MPiPS\\_ws\\_niwelowania\\_roznic\\_w\\_wynagrodzeniach\\_kobiet\\_i\\_mezczyzn.pdf](https://www.rpo.gov.pl/sites/default/files/Do_MPiPS_ws_niwelowania_roznic_w_wynagrodzeniach_kobiet_i_mezczyzn.pdf), see also: Response of the Secretary of State in the Chancellery of the Prime Minister to the Government Plenipotentiary for Equal Treatment – to the deputy interpellation No. 24243 on pay discrimination against women employed in the public administration sector,

<http://sejm.gov.pl/sejm7.nsf/InterpelacjaTresc.xsp?key=4C0CE619>.

<sup>70</sup> <https://www.gov.pl/web/rodzina/aplikacja-do-mierzenia-nierownosci-plac>.



and financial sectors) and a vertical segregation (research on managers in enterprises and the authorities of listed companies). The research presented the collected numerical data, analysed the existing barriers to the implementation of the principle of gender equality and the possibilities of overcoming them. Studies were conducted by different, independent entities, and the mosaic of results obtained in them is difficult to translate into a comprehensive, coherent picture of the problem.

Difficulties in implementing the principle of equal treatment based on gender in the financial sector were analysed in the research conducted by the Foundation Institute of Innovative Economy.<sup>71</sup> Surveys show that although women make up nearly 61 % of the total workforce, their share in lower management positions is less than 44 % (30 % in the case of banks), while on supervisory and management boards it is only 16 % and 12 % respectively.

The presence of women in the Polish ICT sector was also analysed.<sup>72</sup> The study shows that the highest management positions in the Polish ICT sector companies are occupied by only 48 women (slightly more than 10 %), out of 452 positions. Only 9 women (5 %), hold the position of President of the Management Board in this sector. Barriers to women's careers in ICT can be divided into general and specific ones. General barriers are the same as other obstacles to women's participation in the labour market and result from the need to reconcile the absorbing professional role with the role of wife and mother, and from stereotypes affecting the perception of women in society, among which the most important is the belief that women differ from men (are less available, courageous and effective, and have different motivations), so they cannot be good managers. A specific reason for the low participation of women in the teams of companies dealing with ICT is the relatively low interest in technical faculties among secondary school graduates and students of other faculties. In Poland, the percentage of female graduates of IT studies was 13 % in 2014. Research also shows that a quarter of female students of technical studies have experienced systematic dissuasion by their environment from choosing such fields of study; 17 % have heard that they will not be able to cope with learning; and 7 % that they will fail already at the initial stage of their professional career. Specific barriers also include the organisational culture of the company: exclusion of women from informal networks of co-workers and lack of support from higher-level staff, these positions occupied mainly by men.

In the context of vertical segregation, difficulties in applying the principle of equal treatment were analysed in a study conducted in 2017 by the Business Leaders Foundation in cooperation with Kantar Millward Brown.<sup>73</sup> The survey shows that half of Polish enterprises are managed exclusively by men and at every level of management. The majority of respondents (regardless of sex) admit that they prefer a man as a superior. In addition, no man from the top management declares that they want a female superior. The causes of vertical gender segregation in the labour market include historically determined structural factors (e.g. the dominant vertical and hierarchical structure of company management, which was the characteristic feature of the socialist economy, and the dominant heavy industry in the Polish economy), factors related to

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<sup>71</sup> 'Kobiety w finansach. Obecność kobiet w polskim sektorze finansowym', Raport Fundacji Instytut Innowacyjna Gospodarka, 2015 (Women in finance. Presence of women in the Polish financial sector) Report of the Foundation Institute of Innovative Economy: [www.ingos.pl](http://www.ingos.pl).

<sup>72</sup> 'Kobiety w technologiach. Obecność kobiet w polskim sektorze teleinformatycznym', Raport Fundacji Instytut Innowacyjna Gospodarka, 2016; (Women in technology. Presence of Women in the Polish Information and Communication Technology Sector), Report of the Foundation Institute of Innovative Economy, 2016, <https://www.ingos.pl>.

<sup>73</sup> 'Gdzie jest szklany sufit. Kobiety w średniej kadrze zarządzającej' (badanie przeprowadzone w 2017 r. przez Fundację Liderki Biznesu we współpracy z Kantar Millward Brown (Where's the glass ceiling? Women in middle management (survey conducted in 2017 by the Business Leader Foundation in cooperation with Kantar Millward Brown)), [https://www.fundacjaliderekbiznesu.pl/pliki/Gdzie\\_jest\\_szklany\\_sufit\\_Kobiety\\_w\\_sredniej\\_kadrze\\_zarzadzajacej.pdf](https://www.fundacjaliderekbiznesu.pl/pliki/Gdzie_jest_szklany_sufit_Kobiety_w_sredniej_kadrze_zarzadzajacej.pdf).



the organisational culture of enterprises (e.g. a rare model of a 'self-learning' enterprise which means that the enterprise (usually through the use of AI) learns from their own data, actions and results on how to improve its activities) and factors of a social and educational nature (including the strength of stereotypes' impact, women's reluctance to take on responsibility and certain activities as a result of the syndrome of learned helplessness).<sup>74</sup> The Report also indicates the tools available for introducing changes and strengthening equal treatment: change of company culture, e.g. by introducing a position responsible for implementing, supporting and developing diversity (diversity officer), training, mentoring, using employee satisfaction surveys, applying gender mainstreaming in all policies, introducing objectives related to diversity to employee appraisals. The importance of disclosing the diversity policy in accordance with the new provisions of the Directive of the European Parliament and of the Council of Europe is also stressed. From 2018, some large companies will have to publish a report on the non-financial aspects of their activities, including information on how diversity policy was implemented and its effects, possibly explaining the reasons for not implementing this policy.

In the area of vertical segregation, the share of women in the governing bodies of stock exchange listed companies in Poland was also examined.<sup>75</sup> According to data from the survey, in 2015, over 900 companies were listed on the Warsaw Stock Exchange, including over 470 on the Main Market, with 2 164 members of the Management Boards and 4 690 members of the Supervisory Boards. The power in listed companies was held by 6 854 people. The number of women on the boards of listed companies was 870. In 2015, the share of women on the boards of listed companies was approximately 12 %, the share of women on the supervisory boards of New Connect<sup>76</sup> companies was 21.5 %, and for the Main Market it was 14.5 %. The percentage of women in the position of CEO (in relation to the total number of CEOs of listed companies) was 6 %, and the percentage of women in the position of Chairman of the Supervisory Board was about 12 %.

The survey covered equal opportunity measures for women and men in medium-sized enterprises employing no less than 50 and no more than 250 people.<sup>77</sup> The collected data shows that companies of this size very rarely undertake equality activities going beyond the mandatory legal provisions. Knowledge on the subject of equality actions is very low, and there is also a lack of awareness and motivation for actions aimed at creating equal opportunities for women and men. Respondents generally claimed that undertaking equal opportunities activities in their enterprises is not necessary, because in these companies the chances are allegedly equal for all, and when evaluating the employees, no attention is paid to sex, only competences and involvement at work are important. Among the surveyed companies, only very few companies had implemented

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<sup>74</sup> It is the psychological term usually used for the situation of battered women, which in employment may be understood as describing the situation when the female employees who have repeatedly faced uncontrollable wage discrimination, lose the motivation for change and as a result, even if an opportunity arises that allows them to alter their circumstances, they do not take action.

<sup>75</sup> 'Kobiety we władzach spółek giełdowych w Polsce. Czas na zmiany, Raport z badań Fundacji Liderów Biznesu, 2016' (Women in the authorities of listed companies in Poland. Time for change, Report on the survey by the Foundation for Business Leaders, 2016), available at: <https://www.fundacjaliderekbiznesu.pl/>.

<sup>76</sup> New Connect has the status of an organised market but is operated by the Stock exchange (GPW) outside a regulated market in the formula of an alternative trading system. It is an offer for small and medium-sized developing companies from various industries. [https://www.gpw.pl/pub/files/PDF/2015-05-25\\_NEWCONNECTraport2015.PDF](https://www.gpw.pl/pub/files/PDF/2015-05-25_NEWCONNECTraport2015.PDF).

<sup>77</sup> Druciarek, M., Przybysz, I., 'Działania na rzecz równości szans kobiet i mężczyzn w średnich firmach. Raport z badań jakościowych'. (Activities for the benefit of equal opportunities for women and men in medium-sized companies. Report on qualitative research). The report was developed as part of the project 'Equal opportunities in business – practical tools for implementing the principle of equal opportunities for women and men in enterprises' implemented by the Cooperation Fund, Lewiatan Confederation, Good Practice Factory and the Institute of Public Affairs, 2018, co-financed by the European Union within the European Social Fund. <https://www.isp.org.pl/pl/publikacje/dzialania-na-rzecz-rownosci-szans-kobiet-i-mezczyzn-w-srednich-firmach>.

procedures to counteract discrimination. At the same time, in the surveyed companies many discriminatory practices on the grounds of sex were revealed, and there was also a widespread belief that women in these companies have fewer opportunities to develop their professional careers. Issues of actions for equality and diversity were slightly better recognised in companies that are part of a foreign capital group. The key role in the implementation of these types of tasks was played by specialists from the human resources department, in companies where such a position existed. Among the identified barriers hindering the implementation of equality measures by medium-sized companies, barriers of awareness (lack of knowledge, lack of belief in the importance of such measures), of cultural nature (belief in stereotypically defined gender roles) and organisational barriers (e.g. lack of human resources departments or persons strictly delegated to personnel management) were indicated.

The Commissioner for Human Rights also examined the application of the principle of equal treatment in relation to transsexual persons. The results are presented in the report 'Equal treatment in employment regardless of gender identity – analysis and recommendations', prepared on the basis of the results of the study 'Discrimination of transgender people in employment', conducted by market and public opinion polling company IQS in the period from August to October 2015.<sup>78</sup> The Commissioner points out three basic groups of problems in the area of equal treatment of transgender people: lack of knowledge of respondents about transgender issues, difficulties in estimating the scale of discrimination against transgender people and the lack of regulations concerning the possibility of changing an individual's sex registration in the civil-status records. The vast majority of respondents do not know a single transgender person, do not know about transgender issues and associate this phenomenon only with negativity. Transgender people are reluctant to reveal themselves and rarely decide to react when they experience adverse treatment, because they are afraid of a worsening of the situation and do not believe in the effectiveness of actions. They often do not know where to report cases of discrimination, nor do they seek compensation under the provisions of the Labour Code and the Act on Equal Treatment. In addition, the lack of regulations in Poland concerning the possibility of changing an individual's sex registration in the civil-status records restricts the right to perform work freely chosen by transgender people. Discrimination in the area of employment is therefore mainly experienced by transgender people when they have already made some changes in appearance, but their transition process is not yet complete.<sup>79</sup>

#### 4.1.3 Other issues

There are no other issues to report.

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<sup>78</sup> 2016 Report of the Commissioner for Human Rights (*Rzecznika Praw Obywatelskich – RPO*). 'Równe traktowanie w zatrudnieniu bez względu na tożsamość płciową. Analizy i rekomendacje' (Equal treatment in employment irrespective of gender identity – analysis and recommendations), issued in the series *Zasada Równego Traktowania Prawo i Praktyka* (Principle of Equal Treatment Law and Practice), *Biuletyn Rzecznika Praw Obywatelskich* No. 19, Warszawa, 2016.

<sup>79</sup> On the basis of the research, the following conclusions and recommendations were formulated. The most important of these are aimed at changes in existing legislation, including the introduction of sex-adjustment legislation with a fast, transparent and accessible procedure, taking into account the need for a temporary document for use in the transitioning period, introduction of the amendment of the provisions on issuing a certificate of employment taking into account the change of personal data of persons who have obtained a court decision on establishing sex in accordance with their gender identity, introduction of the amendment of the Labour Code and Anti-Discrimination Law which will result in a clear indication that discrimination on grounds of gender identity is prohibited. The raising awareness and disseminating knowledge among employers, on transgender employment, in particular on good practices enabling transgender people to function in the workplace in accordance with the perceived gender. In addition, it was recommended that the National Labour Inspectorate, when collecting data on the number of employees' complaints about unequal treatment, takes gender identity into account as an independent discrimination factor.

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

In the last four years, the gender pay gap issue has rarely appeared in public debate. If at all, it was mainly on the occasion of the European Equal Pay Day. However, as the date of this Day changes every year, it is easy to overlook. As a result, the gender pay gap problem has not regularly appeared in the public space. Generally speaking, there is an atmosphere of denial in Poland that the obvious gender pay gap is the result of sex discrimination. Rather, it is explained by objective factors, such as differences in education between women and men, as well as in the positions held.

The official statements of the Minister of Family, Labour and Social Policy often emphasise that the gender pay gap in Poland is lower than in other member states of the European Union. During the Congress of the ruling 'Law and Justice' party, which took place in September 2019, it was announced that, in order to fight the gender pay gap, this party '...will initiate legislative solutions and raise existing standards in the Labour Code. The biggest employers will carry out a pay survey every two years to prevent unjustified pay differences (...) between women and men'.<sup>80</sup> However, as at 31 December 2019, nothing particular had been done in this regard.

The topic of wage discrimination, and the need to eliminate it, have been constantly raised by the Commissioner for Human Rights in the last four years.<sup>81</sup>

## 4.2 Equal pay

### 4.2.1 Implementation in national law

The principle of equal pay for work of equal value is provided for in the Constitution (Article 33(2)) as well as implemented in the equality provisions of the Labour Code (Article 18<sup>3c</sup>(1) and 18<sup>3b</sup>(1) point 2). Pursuant to Article 18<sup>3c</sup>(1) of the LC 'employees have the right to equal remuneration for equal work or work of equal value'. Article 18<sup>3b</sup>(1) point 2 of the LC stipulates that failure to apply the principle of equal treatment in employment by an employer 'includes different treatment of an employee on one or more grounds (...) particularly with the effect of (...) unfavourable conditions of remuneration for work'. The Anti-Discrimination Act does not directly express the principle of equal pay, however, when it states in Article 4(2) that it applies to the conditions for undertaking and conducting economic or professional activity, in particular within the framework of an employment relationship or employment under a civil law contract, it means, among other things, the equal wage conditions.

### 4.2.2 Definition in national law

The concept of pay is defined in Article 18<sup>3c</sup>(2) LC. According to this provision, 'Remuneration (...) includes all components of payment for work, irrespective of their name or nature, as well as other work-related monetary or non-monetary benefits granted to employees.'<sup>82</sup> This definition, in principle, corresponds with the definition in

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<sup>80</sup> Cited after <https://businessinsider.com.pl/finanse/program-wyborczy-pis-likwidacja-luki-placowej-roznic-w-zarobkach-kobiet-i-mezczyzn/hd08703>.

<sup>81</sup> It is worth mentioning that in 2015, the Commissioner recommended the introduction, into the labour law, of the principle of remunerations' transparency, as well as effective implementation of the European Commission's recommendations of 7 March 2014. None of these recommendations has been implemented so far. See: [https://www.rpo.gov.pl/sites/default/files/Do\\_MRPiPS\\_ws\\_roznic\\_w\\_wynagrodzeniach\\_kobiet\\_i\\_mezczyzn.pdf](https://www.rpo.gov.pl/sites/default/files/Do_MRPiPS_ws_roznic_w_wynagrodzeniach_kobiet_i_mezczyzn.pdf).

<sup>82</sup> The literature mentions in this regard various allowances and so-called bonuses, such as company car, company flat, access to company medical services and paid voluntary medical (or other) insurance, as well as premiums, and severance pay. Gersdorf, M., Rączka, K., Skoczyński, J., *Kodeks pracy. Komentarz* (Labour Code. Commentary) ed. 6, Lexis Nexis, Warszawa 2004, p. 71. Similarly: Wrątny, J., *Kodeks pracy. Komentarz* (Labour Law. Commentary) C.H. Beck, Warszawa 2003, p. 42.

Article 157(2) TFEU, with two exceptions. Firstly, it does not clearly indicate that the notion of pay covers the income which the worker receives directly or indirectly from the employer in respect of the employment. Secondly, it also does not indicate a specific understanding of the principle of equal pay with regard to remuneration for work carried out in a piece-rate system<sup>83</sup> as well as in a time- rate system scheme.<sup>84</sup>

It should be added that pursuant to Article 78(1) LC, as a general rule, the remuneration for work should be determined in such a way that it corresponds in particular to the type of work performed and the qualifications required in the performance of the work, as well as taking into account the quantity and quality of work performed. Conditions of remuneration for work and the granting of other benefits related to work, in light of Article 77<sup>1</sup> LC, are established in collective agreements. Each employer who employs at least 20 persons not covered by such an agreement sets out such conditions in the remuneration regulations (Article 77<sup>2</sup> LC). Special provisions are in force in the budgetary sphere (Article 77<sup>3</sup> LC). If employees employed in state-owned budget units are not covered by a collective agreement, as a rule, the terms and conditions of remuneration are set out in a regulation of the competent minister. Such a regulation in addition to substantive remuneration specifies other components of remuneration beyond it, justified in particular by the characteristics or conditions of work or professional qualifications of employees.<sup>85</sup>

There is some case law on the definition of pay.

For example, it follows from the judgment of the Supreme Court (SC) of 20 November 2012 (I PK 100/12) that the remuneration includes, among other things, the possibility to use a car, a flat or a telephone provided by the company. The SC ruled in this case that, when determining whether there is wage discrimination in a company, it should also be taken into account whether the persons concerned benefit from such bonuses. In a judgment of 22 February 2008 (I PK 208/07) the SC clarified that the reimbursement of travel costs to the place of work or the reimbursement of the costs of apartment rental provided for in a work contract are part of remuneration. In a judgment of 10 May 2006 (III PK 18/06) the Supreme Court stipulated that the definition of remuneration includes additional benefits for employees who are made redundant from the enterprise for reasons not related to them.

Moreover, in the judgment of 10 October 2007 (II PK 39/07) the Supreme Court<sup>86</sup> declared that the regulations of internal remuneration issues concerning the right to a jubilee award should also respect the principle expressed in Article 18<sup>3c</sup> LC. Ordinary bonuses are also a component of remuneration. The consequence of this assumption is that in disputes regarding bonuses, labour courts verify the fulfilment of material and legal conditions for receiving such benefits.<sup>87</sup>

In a judgment of 14 December 2017 (II PK 322/16) the Supreme Court adopted a position regarding the qualification of functional supplements. In the case in question, the plaintiff was granted a mandatory functional supplement (in the symbolic amount of

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<sup>83</sup> In this scheme the amount of employee's remuneration depends on the quantitative results of his work (the degree to which the standard was achieved e.g. the number of shoes produced).

<sup>84</sup> In the case of a time-based system, the amount of remuneration depends on the amount of time worked in a given settlement period. In this system, the remuneration rates are set in relation to the number of time units (an hour, a day, a week or a month) and work efficiency has no influence on the rate.

<sup>85</sup> It is also stipulated that the amount of their additional component of remuneration, the granting of which will be conditioned by the length of employment, cannot exceed 20 % of the basic remuneration. This may in particular apply to the jubilee premium and a one-off severance grant in connection with the transition to a retirement pension (Article 77<sup>3</sup>(3) LC).

<sup>86</sup> This case concerned the exclusion of periods of work in a private company from the periods qualifying for the jubilee award, which, in the opinion of the Supreme Court, justified the allegation of unequal treatment in employment.

<sup>87</sup> Judgment of the Supreme Court of 28 March 2017, case No. II PK 19/16.

PLN 1 (EUR 0.23). The Supreme Court found that such a practice does not necessarily mean that the employee was discriminated against (in this case, on the grounds of her trade unions activity) but confirmed that the functional supplement constitutes additional remuneration for the particular type of work performed.<sup>88</sup> A similar reasoning could be expected with regard to sex discrimination.

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

In the Polish Labour Code, there is no explicit implementation of Article 4 of the Recast Directive 2006/54. However, several provisions of the Labour Code refer to prohibition of pay discrimination. Article 18<sup>3b</sup>(1) and (2) LC stipulates that a differentiation by the employer of the situation of an employee on one or more grounds, set out in Article 18<sup>3a</sup> LC, which has the effect, in particular, of disadvantaging the employee concerning remuneration for work, shall be regarded, with certain reservations, as a breach of the principle of equal treatment in employment.

The right of employees to equal pay for equal work, as well as for work of equal value, is confirmed also in Article 18<sup>3c</sup>(1) LC. These provisions, however, mention neither direct nor indirect discrimination. Nor do they refer to a job classification system.<sup>89</sup> In addition, Article 8 of the Anti-Discrimination Law provides for a general prohibition on any differentiation of the conditions of employment, inter alia, with regard to sex.<sup>90</sup>

It is worth noting the regulation contained in Article 18<sup>3c</sup>(2) of the LC which defines work of equal value as requiring:

‘comparable professional qualifications from workers, evidenced by documents provided for in separate regulation or by practice and by their professional experience, as well as comparable responsibility and effort’.

The comparability of works of equal value is thus based on objective criteria.

#### 4.2.4 Related case law

It should be noted at the outset that the case law described below did not refer to wage discrimination based on the grounds of sex. However, the findings as to what should be taken into account when determining pay for equal work and what should be understood as work of equal value are also relevant in cases of gender discrimination.

The examples given below relate to situations where employees claimed to be unequally paid for equal work.

In the judgment of 9 May 2014 (I PK 276/13), the Supreme Court generally stated that equality is not the same thing as equal treatment, as it may require differential treatment in order to equalise opportunities or ensure equal results, or to reward and motivate the best employees financially. Different treatment of workers in terms of

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<sup>88</sup> This means that there is an especially close link between the amount due and the employer's needs. This relationship was broken when the employee, as in the case of the plaintiff, did not perform such work for objective reasons. In those circumstances, the conduct of the employer who sets a symbolic value for an allowance, cannot be regarded as an act of discrimination on the basis of trade union activity. This does not mean, however, that the determination of the functional allowance at the level of PLN 1 is correct. Here, the SC referred to a similar situation where the employer in the remuneration regulations modified the amount of benefit by setting a maximum amount, without referring to the minimum limit.

<sup>89</sup> However, such a system began to be implemented in the civil service in 2008, [https://dsc.kprm.gov.pl/sites/default/files/trostkowski\\_wynagrodzenia\\_w\\_sc\\_ver\\_2.0.pdf](https://dsc.kprm.gov.pl/sites/default/files/trostkowski_wynagrodzenia_w_sc_ver_2.0.pdf).

<sup>90</sup> Article 8 of the Anti-Discrimination Law stipulates that unequal treatment of natural persons with regard to sex ‘is prohibited (...) with respect to...conditions of undertaking and performing commercial or professional activity, including such performed upon employment contracts or civil-law contracts’.

employment, including pay, is possible. However, it must be based on a legitimate need for which such differentiation is allowed.

In a ruling of 11 October 2013 (III PK 28/13), the Supreme Court clarified what permissible reasons are for wage differentiation, stating that equal (identical) (Polish '*jednakowa*') work is work of the same nature, the same with regard to the qualifications required to perform it, the conditions under which it is performed and the quantity and quality of the work. Work that is equal (identical) in terms of the type (nature) and qualifications required to perform the same work in the same positions with the same employer may differ in quantity and quality, and in this case does not constitute work that is equal (identical) within the meaning of Article 18<sup>3c</sup>(1) of the Labour Code. The quantity and quality of work performed constitute acceptable premises for wage differentiation.<sup>91</sup>

Another example of work in the same position (equal work) was dealt with in the jurisprudence of courts of appeal. The Court of Appeal in Szczecin in its judgment of 6 March 2018 (III Apa 20/17) stated that:

'There is no rational argument in support of the thesis that an employee currently employed in a given position should receive the same remuneration as an employee previously employed in the same or the similar position, or a few years back. The essence of the right guaranteed in Article 18<sup>3c</sup> LC is the equality of employees in the process of providing work, and not the guarantee of obtaining remuneration at a specified level of value'.

In the judgment of 7 February 2018 (II PK 22/17), the Supreme Court responded in particular to the issue of seniority as the reason for the differentiation of basic remuneration rates for employees employed in the same positions. In this case, the Supreme Court held that length of service may constitute a justified reason for such differentiation when the employer does not provide for a length of service allowance, and when professional experience translates into the quality of the employee's length of service. However, it is not permissible to differentiate remuneration twice on the basis of the same criteria: length of service, by taking it into account when determining the basic remuneration rate, and then by also granting the length-of-service allowance. In such a situation, the employee receiving lower remuneration due to the length of service is in a much worse situation than other employees performing the same work with a greater length of service, because his/her basic salary is set at a lower rate, and in addition, he/she does not receive, or receives a lower seniority allowance. This can certainly be a sign of unequal treatment and can also be a sign of discrimination when there is a ground for discrimination.

The length of service was also addressed in a judgment of the Supreme Court of 15 March 2016 (II PK 17/15) in which the SC stated that a longer general length of service usually affects the entitlement to and the amount of the length-of-service allowance, if it is based on the applicable pay regulations. In such situations the length of service does not infringe the principle of equal treatment in employment (Article 18 Section 2 point 4 at the end of the Labour Code).

In a judgment of 8 December 2015 (I PK 339/14), the Supreme Court noted that the criterion of length of service is not, in itself, a sufficient parameter for determining whether the work of compared employees is equal or of equal value, as provided for in

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<sup>91</sup> See: Similar argumentation in the ruling of 14 December 2017 (II PK 322/16), where the Supreme Court added that the quantity and quality of work performed are, in light of Article 78, Paragraph 1 of the LC, the basic criteria for the assessment of work for the purposes of determining the amount of remuneration. They constitute admissible conditions for pay differentials under Article 3(3) of the Convention No. 100 of ILO concerning equal pay for male and female workers for work of equal value, adopted in Geneva on 29 June 1951 (ratification: JoL 1955 No. 38 Item 23).

Article 18<sup>3c</sup>(1) LC, as it does not refer to the objective characteristics of the work performed. At the same time, length of service may justify differentiation of remuneration components other than the length-of-service allowance for employees performing the same or equal work or work of equal value only if the practice and greater professional experience gained during a longer period of service at a comparable workplace objectively justifies a higher remuneration for employees with higher qualifications and higher professional efficiency resulting from a longer period of service at the same workplace.

Subsequent cases concerned the situation of alleged unequal pay for work of equal value.

In a judgment of 14 March 2018 (II PK 125/17), the Supreme Court ruled that the same description of the position held by the claimant at work, as compared to other employees, namely 'chief (main) specialist' does not determine *ipso jure* that such employees provide work of equal value. When dismissing the claimant's cassation appeal (for a formal reason) the Supreme Court indicated 'for the record' that in the employer's organisational structure there was only one human resources position, which was occupied by the claimant. The comparison of her work with the work of other persons occupying the position of 'main specialists' in the company such as an accountant, manager or PR specialist, in terms of the scope of described duties, required professional qualifications and rules of liability, which were 'diametrically' different from the scope of duties performed by the applicant. It was the reason why there was no violation of the principle of equal treatment in this case. This judgment raises doubts as to whether the Supreme Court in the circumstances of this case was entitled to make such a categorical statement without focusing on detailed, separate examination of each of these positions.

The issue of the right to remuneration was also raised in a situation where the position occupied by the applicant is unique in the organisational structure of a given employer. In its decision of 25 April 2018 (I UK 499/17) the Supreme Court held that:

'In the case of performance of employee duties in a position which is not repeated in the organisational structure of the employer, there is no reasonable possibility to indicate and verify objective criteria for comparability of equal work for which there is the right to equal remuneration'.

Admittedly, this ruling was made in the context of dismissing the cassation appeal due to it being manifestly ill-founded. Maybe this is the reason why the Supreme Court did not consider in this case the possibility of comparing the claimant's remuneration with the remuneration of employees performing work of equal value and additionally, excluded from the outset the possibility of comparing the remuneration of employees for equal work but performed in other comparable enterprises.

#### 4.2.5 Permissibility of pay differences

Article 18<sup>3c</sup> LC does not introduce any criteria of differentiation of pay. However, the possibility of using the criterion of length of service (seniority) for such differentiation is envisaged in Article 18<sup>3b</sup>(2) Point 4 LC, but only in the context of age discrimination.

In a judgment of 22 February 2007 (I PK 242/06), the Supreme Court explained that if the employer, while establishing the remuneration of the comparator, took into account such criteria as length of service and qualifications, it must prove that particular skills and professional experience have special significance for the fulfilment of the obligations conferred to the employee. The recourse to the criterion of length of service, while establishing the rules of additional remuneration, is not considered a violation of the principle of equal treatment, under the condition that it is appropriate to attain the

legitimate aim and the requirement of proportionality is observed (Article 18<sup>3b</sup>(2)(4) LC, as modified by Act of 21 November 2008 (JoL 2008, no. 223, item 1460).

The Supreme Court in its decision of 7 April 2011 (I PK 232/10) underlined that the differentiation of working conditions including pay, may also be justified by the objective needs of the employer, such as increased worker's mobility and/or availability, or may be determined by the current situation on the employment market (e.g. a deficit of workers with a particular specialisation). The Supreme Court in this judgment, while in principle accepting 'the worker's increased mobility and/or availability' as the justification for differentiation of pay, did not take into consideration the possible indirect discrimination effect on women, who, due to the existing gender imbalance in the division of family obligations, in general, are much less mobile and available to employers.<sup>92</sup>

In a case of 14 December 2017 (II PK 322/16), the Supreme Court extended this list of additional factors which may influence the level of the claimant's remuneration with 'specific needs of the employer' and the 'type of work performed by employee and its importance for the particular employer'. These aspects constitute objective variables within the meaning of Article 18<sup>3b</sup>(1) LC. The Supreme Court recalled at this point, the view established, inter alia, in the jurisprudence of the European Court of Justice,<sup>93</sup> that there is no breach of the principle of equal treatment (prohibition of discrimination) if the selected measures (provisions) reflect a justified social policy objective and are appropriate and necessary to achieve that objective.

In addition, in the judgment of 29 March 2011 (I PK 231/10) the Supreme Court stated that the difference in remuneration of physicians in relation to the remuneration of resident physicians performing the same work is justified by the method of its financing and the purpose of agreements concluded with residents. This observation is a consequence of taking into account a justified need for which such differentiation is allowed. It may be the implementation of a specific employment policy, and above all, a better division of access to the labour market and instruments of this market aimed at improving professional qualifications, e.g. for young people.

#### 4.2.6 Requirement for comparators

Article 18<sup>3c</sup>(1) LC, regarding the guarantee of equal pay for equal work or work of equal value, does not additionally mention the obligation to use a comparator. Nevertheless, a comparator is mentioned in the general provision regarding direct discrimination provided for in Article 18<sup>3a</sup>(3) LC, which also applies to wage discrimination on all grounds, including sex. This provision requires, inter alia, the possibility to point to real or hypothetical comparators. This means that the necessary condition for determining if a case of direct discrimination in employment has taken place is the comparison of the legal situation of employees placed in different social categories, which are distinguished according to legally forbidden criteria.

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<sup>92</sup> According to this verdict of the Supreme Court, the pay discrimination may occur only when an employee's remuneration noticeably (*dostrzegalnie*) differs from that of other employees performing equal work or work of equal value. It may be *a contrario* understood that unnoticeable (small, not significant) differences in pay do not, by definition, constitute discrimination.

<sup>93</sup> ECJ judgment of 14 December 1995, C-444/93, *Ursula Megner and Hildegard Scheffell v Innungskrankenkasse Vorderpfalz*; C-167/97, *The Queen v Secretary of State for Employment*; C-249/97, *Gabriele Gruber v Silhouette International Schmied GmbH & Co. KG*; of 11 January 2000, C-285/98, *Tanja Kreil v Germany*; of 6 June 2000, C-281/98, *Roman Angonese v Cassa di Risparmio di Bolzano SpA*; of 6 July 2000, C-407/98, in the case of *Katarina Abrahamsson and Leif Anderson v Elisabet Fogelqvist*; of 26 June 2001, in the case C-381/99 of *Susanna Brunnhofer v Bank der Österreichischen Postsparkasse AG*; of 27 May 2004, C-285/02, *Edeltraud Elsner-Lakeberg v Land Nordrhein-Westfalen*; of 12.10.2002, C-19/02, *Viktor Hložek v Roche Austria Gesellschaft mbH*; of 10 March 2005, C-196/02, *Vasiliki Nikoloudi v Organismos Tilepikoinonion Ellados AE*; C-207/04, *Paolo Vergani v Agenzia delle Entrate, Ufficio di Arona*.



Prevalent in case law is the view that a comparator may not be a person employed by another employer.

The legal definition of indirect discrimination does not mention a comparator. Nevertheless, commentaries on Article 18<sup>3a</sup>(4) LC, incorporating the definition of indirect discrimination, point out that:

'any disparity in defining any of the conditions of employment between employees, encompassing one or a significant number of employees in a particular category, must be seen as displays of discrimination in employment'.<sup>94</sup>

The word 'disparity' means that there must be a comparator.

In the reviewed court cases concerning wages discrimination, the scope of comparison was mainly limited to the same employer.<sup>95</sup>

The problem of admissibility of indicating as a comparator a person employed by another employer, occurred in a case decided by the Supreme Court, of 18 April 2012 (II PK 196/11). In this case the SC overruled the argument of the claimant, comparing his work position to similar positions at other employers, with the following reasoning: 'The ground for a claim for damages, according to Article 18<sup>3d</sup> LC cannot constitute the argument that other employers treat their employees more favourably'. This, however, is precisely what the comparison conducted by the claimant, encompassing presidents of management boards employed in other regional broadcasting studios, is all about. However, with reference to employees working for the same employer, it is important to establish if they perform equal work, or work of equal value, because only in this situation do they have the right to equal wages (Article 18<sup>3c</sup>(1) and (2) of the LC).<sup>96</sup>

Theoretically, at least with regard to state employees, for whom the conditions of remuneration are established by regulation of the Ministry of Labour and Social Policy, there exists the possibility to compare salaries within the same sector. However, such a case has not yet been identified.

It follows from the jurisprudence that the Supreme Court accepts the expert's opinion as evidence in proceedings for remuneration discrimination. In particular, in the decision of 29 May 2013 (II PK 21/13), the SC stated, inter alia, that:

'as regards discrimination in the field of pay for work, the Court is competent to assess independently whether employees perform equal work or work of equal value within the meaning of Article 18(3c)(1) of the Labour Code, or whether, in certain cases, it should use an expert's opinion in this respect, depends on the facts of each case.'

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<sup>94</sup> Świątkowski, A.M., *Kodeks pracy. Komentarz* (Labour Code. Commentary), 4th edition, C.H. Beck, Warszawa 2012, p. 85.

<sup>95</sup> Cf. e.g. case I PK 19/16 – in which the Supreme Court in its judgment of 28 March 2017 clearly stated that the employee, who claims to be a victim of breach by the employer of the principle of Article 18<sup>3c</sup>(1) of the LC in conjunction with Article 18<sup>3b</sup>(1)(2) of the LC (for reasons regarded as discriminatory) should set out the direction in which comparative analysis can be carried out by identifying the employees who are more highly paid, even though they carry out comparable work. Then the burden of proving that, when determining the remuneration, the employer was guided by objective reasons (Article 18<sup>3b</sup>(1) *in fine* of the LC) passes to the employer, who may, for example, indicate that other employees do not perform work comparable to that of the plaintiff. The Court, of course, had in mind the employees working for the same employer.

<sup>96</sup> See also SC ruling of 7 March 2012, II PK 161/11.

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

Some parameters exist for establishing the equal value of the work performed. Article 18<sup>3c</sup>(1) LC clarifies what should be understood as 'work of equal value'. This is the kind of work that requires comparable professional qualifications from employees, confirmed by documents, provided for in separate regulations, or by practice and professional experience, as well as comparable responsibility and effort. It is worth noting that in a judgment of 22 February 2007 (I PK 242/06), the Supreme Court generally explained that if the employers take into account such criteria as length of service and qualifications while establishing the remuneration, they must prove that the particular skills and professional experience have special significance for fulfilment of the obligations conferred on the employee.

The problem of comparing work of equal value was tackled by the Supreme Court in the ruling of 9 February 2007 (I PK 222/06), where it noted:

'(...) it would be possible to compare the remuneration for the work of the claimant with another person employed in the position of an accountant, while taking into account many other circumstances (professional qualifications, previous work time, scope of tasks associated with the working position, responsibility, physical workload or amount of work), serving as criteria of evaluation of their work. It was not possible, however, to compare – with respect to the rule of equal treatment (Article 11<sup>2</sup> LC) and the prohibition of discrimination in employment (Article 18<sup>3a</sup> LC) – the remuneration of the claimant as accountant with the remuneration of other employees, employed in the position of painters. A comparison of the wages of an accountant and a painter would be possible if there was a system of evaluating work, which currently does not exist in Poland.<sup>97</sup> In such situation, the fact that only the claimant's remuneration has been raised, not that of persons employed in other positions, cannot be regarded in terms of discrimination, if – as alleged by the claimant and omitted by the court of appeals – the defendant employer did not have another working position, which could be compared with the position of the claimant, according to the criterion of equal work or work of equal value.'

As demonstrated by this ruling, the lack in many enterprises of a system of occupational classifications for the purpose of determining remuneration, as well as the lack of a universal system for evaluating work and establishing criteria, allowing for comparison of various kinds of work, causes difficulties in claiming damages resulting from wage discrimination, in cases of work of similar value.

Such job classifications apply in the public sector, according to Ordinance No. 1 of the Prime Minister, dated 7 January 2011 (*Monitor Polski* (Polish Monitor) 2011 No. 5 Item 61), modified by the ordinance No. 57 of 24 July 2015 (Polish Monitor 2015, Item 724) on the principles of description and job valuation in the civil service.<sup>98</sup> This ordinance,

<sup>97</sup> The SC also stated: 'If the employer has not implemented a system of work valuation it may be regarded as a violation of the principles of community coexistence as defined in Article 5 of the Civil Code, however, only in extreme cases. (According to this provision, one may not use his/her right in a manner that would be contrary to its social and economic purpose or to the principles of community coexistence. Any such act or refraining from acting by the entitled person shall not be treated as the exercise of the right and shall not be protected).'

<sup>98</sup> It should be added that the requirement to specify the principles of making descriptions of positions and job evaluations in the civil service in the above-mentioned Ordinance of the Prime Minister results from Art. 84 S. 1 and 2 of the Act of 21 November 2008 on the civil service (unified text JoL No. 227, item 1505 as amended). This Act also covers the personal scope of the positions covered by the job classification. In accordance with Article 52 of this Act, the list includes: the Director General of the Office and Head of the Equivalent Unit in the Chancellery of the Prime Minister, the Minister's Office, the Office of the Central Authority of Government Administration, the Provincial and local Veterinary Office and the Head of the Organisational Unit in the Forest Seed Office, as well as the Director of the National Fiscal Information Office, the Head of the Revenue and Customs Office and their deputies.

inter alia, regulates the procedures for conducting job valuation (by a specially designated team).<sup>99</sup> In the private sector, however, systems for evaluating work are applied only on a voluntary basis.<sup>100</sup>

#### 4.2.8 Other relevant rules or policies

No other relevant rules and policies which provide parameters for establishing the equal value of work have been identified. The collective bargaining agreements do not usually directly refer to application of the equal treatment principle, although pursuant to Article 77<sup>1</sup> of the LC, the conditions of remuneration should be established by way of a collective agreement.<sup>101</sup> The provisions of collective bargaining agreements (as well as provisions of employment contracts) infringing the principle of equal treatment in employment are deemed non-binding (Article 9(4) and Article 18(2) of the LC).

#### 4.2.9 Job evaluation and classification systems

Many theoretical and more or less general and sophisticated manuals instructing how to make job evaluations by using different methods, written by different experts, are available in Poland. An example of such a manual that could be applied to civil service is the publication from the Chancellery of the Prime Minister in 2010, entitled 'Description and evaluation of senior positions in the civil service: Guide to good practices'.<sup>102</sup> However, no examples of job classification systems being used in concrete situations can be identified as good practices. The same may be said in relation to the private sector.

#### 4.2.10 Wage transparency

The Labour Law does not explicitly address wage transparency. There are, however, legal provisions stipulating directly that the information about remuneration of certain persons is public.<sup>103</sup> There are two important court judgments on this issue: the Constitutional Court judgment of 7 May 2001 (K 18/00) and the Supreme Court judgment of 25 May 2011 (II PK 304/10). The Constitutional Court in its judgment of 7 May 2001 (K 18/00) found the provisions of the Act of 3 March 2000 on remuneration of persons in charge of legal entities owned by the State Treasury in at least 50 % to be compliant with the Constitution with regard to the regulations stipulating the obligation

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<sup>99</sup> Annexes to the ordinance include model job descriptions, stating their place in the organisational infrastructure of the office, a description of the main tasks, authorisations and powers, description of the complexity of the work and creativity, the necessary independence and ability to show initiative, external contacts, factors hindering the performance of particular tasks, different from the ones traditionally occurring in typical administrative positions, as well as the required skills and professional experience.

<sup>100</sup> Different surveys have proved that the extent of work valuation practices is limited (involving only 7 % of small enterprises, 9 % of medium-sized enterprises and 33 % of large enterprises (having more than 250 employees)). In most of those cases simplified methods of evaluating were used. Also worth noting is the very low social awareness of the use of work valuation for the elimination of the gender pay gap.

<sup>101</sup> An entity, employing at least 20 persons, to whom the collective agreement provisions do not apply, should issue (after negotiation with the employees) a special regulation on wages. Pursuant to Article 78 of the LC, remuneration should be determined in a manner corresponding, in particular, to the kind of work and the required qualifications, as well as quantity and quality of work performed. The rate (amount) of wages and rules of their admission in connection with the particular position or kind of performed work (as well as other additional components of the salary, if provided for) should be established through negotiation. In the case of state employees, the conditions of remuneration, if not regulated by collective agreement, will be established by an order of the Minister responsible for labour, taken upon the initiative of an appropriate Minister. The order should, in particular, provide for the conditions of establishment and payment of substantial wages and other additional components of the salary. The criterion of the length of service, as a condition for additional payment related to the kind of work or special conditions of its performance, shall not exceed 20 % of the additional component of the salary (Article 77<sup>3</sup> of the LC). The LC also obliges the employer to apply objective and just criteria in the evaluation of employees and the results of their work.

<sup>102</sup> Warsaw, February 2010. This publication has been produced with the financial support of the European Union (Social Fund).

<sup>103</sup> As examples, certain groups of public servants or persons occupying decision-making positions, as provided for, e.g. in the Law of 3 March 2000 on remuneration of persons in charge of some legal entities (unified text JoL 2018 Item 1252).

to disclose the remuneration of these persons, explaining that this information is not subject to protection in the same way as personal details or trade secrets. The Supreme Court in its judgment of 25 May 2011 (II PK 304/10), found that the fact that an employee disclosed to other employees information covered by the so-called salaries confidentiality clause, in order to prevent unfair treatment and wage-related forms of discrimination, cannot in any way serve as grounds for dissolution of his contract of employment.<sup>104</sup>

The problem of transparency of wages still raises many controversies in the Polish legal literature and case law. On the one hand, part of the doctrine and some courts share the opinion of the employers, that such information constitutes trade secrets,<sup>105</sup> thus being subject to a confidentiality clause. As a result, they approve various contract clauses prohibiting employees from disclosing their wages, even with respect to their co-workers, thus allowing failures to comply with such clauses to be qualified as a severe violation of basic employee obligations, in the interpretation of Article 52(1) LC.<sup>106</sup> The employer is entitled to define the rules for safeguarding secrets regarding the enterprise. Enabling unauthorised persons to access company secrets may constitute a violation of the obligation to preserve secrets, the disclosure of which could expose the employer to damage.<sup>107</sup> The problem of disclosing wage information was also handled by the literature and case law in the context of protection of personal data of the employees. Provided that such information is considered as such data, the argument is raised that illegal<sup>108</sup> disclosure of salaries by employers violates the principles of personal data protection of an employee and is subject to an administrative fine of up to EUR 20 000 000.<sup>109</sup>

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<sup>104</sup> The Court additionally emphasised that 'the exercise by an employee of the rights resulting from violations of the principle of equal treatment in employment, including the attempt to investigate or to provide any form of support to other employees, aimed at preventing the potential application of wage discrimination by the employer, cannot constitute the reason for termination by the employer of the contract of employment, regardless of the way the employee accessed the information, that may indicate a violation of the principle of equal treatment in employment or the application of wage discrimination.' In this case the claimant received information concerning the pay of his co-workers by e-mail by mistake. Surprised by the large differences in the wages he decided to distribute this information among his colleagues, in order to clarify the situation.

<sup>105</sup> In the understanding of the Law of 16 April 1993 on Combating unfair Competition (consolidated text JoL 2018 Item 419, with amendments).

<sup>106</sup> Which allows dissolution of work contract without notice. Compare: Judgment of the SC of 5 March 2007 (I PK 228/06); judgment of Appellate Court in Krakow of 15 May 2002 (I ACa 320/02). However, an employer who has imposed a fine on an employee or terminated the employment contract with him/her without notice period, in the case of a possible court dispute on this account, must take into account the high risk of losing the case. According to the Position of the Ministry of Labour and Social Policy of 28 August 2009 (DPR-II-053-73143/AK/MC/09) the information on wages is, in principle, considered to be information relating to the employment relationship of the employee concerned and not to the functioning of the company as a whole. <https://www.rp.pl/arttykul/384044-Fragment-stanowiska-Departamentu-Prawa-Pracy-Ministerstwa-Pracy-i-Polityki-Spoecznej-z-28-sierpnia-2009-r--dotyczacego-kar-za-ujawnianie-zarobkow-przez-pracownikow--DPR-II-053-73143-Ak-MC-09-----html>.

<sup>107</sup> Ruling of the SC of 6 June 2000, I PKN 697/99, OSNP No. 24/2001, Item 709.

<sup>108</sup> It should be remembered, however, that in certain cases the employer is even obliged to disclose personal data and the amount of remuneration of its employees. It will have to disclose such data at the request of law enforcement agencies, the judiciary, tax authorities, as well as National Labour Inspectorate (PIP) and Social Security Office (ZUS). According to the Supreme Court, the employer may oblige the employee to submit a certificate of earnings from the other employer in order to examine his/her legitimacy for social security benefits from the enterprise fund. See: Judgment of the Supreme Court of 8 May 2002 (I PKN 267/01). The situation is unclear with trade unions, which have the competence to control the employer's compliance with labour law, which also means the right to control the level of employees' salaries. However, without the consent of the employee, trade unions are not entitled to demand information from the employer about the amount of the employee's remuneration. Disclosure of the amount of remuneration for work to trade unions by an employer without the employee's consent may constitute an infringement of personal goods within the meaning of Articles 23 and 24 of the Civil Code. (...) Information on the amount of remuneration of a specific, individually determined employee is not necessary for the conduct of trade union activities, neither in the scope of protection of group interests nor individual interests. Information on the principles of remuneration is sufficient in this respect. See: Resolution of the Supreme Court of 16 July 1993 (I PZP 28/93).

<sup>109</sup> Such maximum penalty (or fine up to 4 % of the total annual worldwide turnover of the company from the previous financial year) is provided for in the Article 83(5) of the Regulation 2016/679 on the protection of

On the other hand, if information about the salary is to be qualified as personal goods of the employee,<sup>110</sup> then he/she cannot be forbidden to disclose this information. It is the employer who is obliged to preserve secrecy, not the employee.<sup>111</sup> In the case of disclosure of information on the amount of remuneration of an employee, the employer is in breach of personal goods, for which he may be held liable for damages under the provisions of the Civil Code.

There is general consent, however, that the prohibition on disclosing wage-related information does not include remuneration tables, which may determine the range of remuneration, depending on the position, rank or qualifications. In such case it is not the actual amount of salary of particular employees which is being disclosed, but rather the range of salaries, within which their wages have to be. To summarise: the employees have the right to inform each other of the amount of their wages. Employees may also ask the employer for remuneration as in similar positions in the company, but may not ask for the salary of a particular person. Contract terms prohibiting employees from disclosing their wages shall be null and void in relation to such employees. However, the employees may not disclose wage information to another company, if this could jeopardise or damage the interests of their employer.

#### 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

In 2012, the Government Plenipotentiary for Equal Treatment announced an amendment to the Labour Code, which would impose an obligation on companies to report on differences with regard to the gender pay gap. Discovering such differences would result in the taking of preventive measures and monitoring of their implementation. Although this project has been supported by the Supreme Audit Office (NIK) when the Office assessed the gender pay gap,<sup>112</sup> it has not yet turned into a concrete legislative proposal. Since 2013, the Government has promised to undertake radical steps in order to eliminate the gender pay gap. The Commissioner for Human Rights has regularly asked the Ministry in charge of labour matters to make progress in this regard.<sup>113</sup> While asking on 18 March 2016, it directly requests the Minister of Family, Labour and Social Policy to

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natural persons with regard to the processing of personal data and on the free movement of such data. Pursuant to Article 101 of the Law of 10 May 2019 on the protection of personal data (unified text JoL 2019 Item 1781), the President of the Office for Data Protection may impose on an entity obliged to comply with the provisions of Regulation 2016/679 by way of a decision, an administrative pecuniary penalty pursuant to and under the conditions specified in Article 83 of the Regulation mentioned above. However, lower penalties up to PLN 100 000 (EUR 25 000) are provided for a public finance unit, a research institute and the National Bank of Poland. Exceptionally, in the case of listed public finance sector entities, the fine may be as low as PLN 10 000 (EUR 2 325.50) (Article 102).

<sup>110</sup> Already in 1993, the Supreme Court decided that 'Employees have the right to remain silent about their employment relationship with regard to remuneration. However, this will not always mean that the ...employer will be prohibited from disclosing such remuneration because of the prohibition to infringe the employee's personal goods. This will only be the case if such information can be included in the "privacy sphere" of the employee.... The latter would be the case if the information about the amount of remuneration of the employee affected his private life, e.g. disclosing the deduction of maintenance (alimony) claims.' (Cf.: Resolution of the Supreme Court of 16 July 1993. I PZP 28/93).

<sup>111</sup> The provision of Article 11<sup>1</sup> of the Code of Criminal Procedure imposes on the employer the obligation to respect the dignity and other personal goods of the employee. Some of those goods (inter alia, health, freedom, honour, freedom of conscience, secrecy of correspondence, inviolability of housing), are listed in Article 23 of the Civil Code in connection with Article 300 of the Civil Code. The above catalogue is of an open nature, so everyday life practice constantly develops new categories of personal rights. One of them is, among others, the information on the employee's remuneration.

<sup>112</sup> Former English name of NIK was Supreme Chamber of Control. In 2014, NIK prepared the report on gender pay gap in the public sector of employment that confirmed the differences in salaries of women and men. In conclusion it recommends proceeding with the project of the Government Plenipotentiary for Equal Treatment <https://www.nik.gov.pl/aktualnosci/nik-o-wynagrodzeniu-kobiet-i-mezczyzn.html>.

<sup>113</sup> For example: the intervention made in 2014 ([https://www.rpo.gov.pl/sites/default/files/Do\\_MPiPS\\_ws\\_niwelowania\\_roznic\\_w\\_wynagrodzeniach\\_kobiet\\_i\\_mezczyzn.pdf](https://www.rpo.gov.pl/sites/default/files/Do_MPiPS_ws_niwelowania_roznic_w_wynagrodzeniach_kobiet_i_mezczyzn.pdf)), and the action taken in 2016 (<https://www.rpo.gov.pl/pl/content/do-mrpi-ps-ws-roznic-w-wynagrodzeniach-kobiet-i-mezczyzn>).

provide it with the copy of the information sent to the European Commission on the progress in implementation of the European Commission's Recommendation 2014/124/EU of 7 March 2014.<sup>114</sup> Finally, in May 2017, a free app to measure the pay gap has been made available on the website of the (now called) Ministry of Family, Labour and Social Policy (MRPiPS).<sup>115</sup> The Ministry encourages employers to use this tool, explaining that providing equal pay for equal jobs or jobs of equal value is not only an obligation for employers, but also brings many advantages, such as: 'a way of creating more attractive workplaces, which will appeal to the most talented persons and motivate current employees'. This, on the other hand, translates into the greater competitiveness of a particular employer, which is very important, given the current situation on the 'employee market'. The MRPiPS also emphasises that many companies monitor the average pay with respect to different groups of employees. The point of reference is usually the average pay for the whole entity or a particular section. Without negating such an approach, the MRPiPS proposes estimation of the so-called corrected pay gap, where employees' wages are compared considering features such as sex, age, education, the position occupied, working time or the length of service. Employees are also encouraged to 'use the option of sending the corrected gender pay gap to the MRPiPS, together with information indicated by the user of the application, which will only be used for statistical purposes.' The Ministry guarantees complete anonymity for users. The fact that the Ministry of Family, Labour and Social Policy has prepared this tool for employers to measure the differences in pay and has decided to make it available free of charge, should be seen as a positive step. It seems, however, that merely encouraging the use of this tool, as stated in the introductory letter to employees, may not be enough to effectively combat the gender pay gap phenomenon, given the legal (constitutional and statutory) obligation to guarantee equal pay for women and men. The MRPiPS should be more categorical in its approach and demand the use of this tool by employers, especially since the statement issued by the Ministry to the effect that 'many companies monitor the average pay with respect to different groups of employees' does not contain any statistical data to confirm this. In addition, mere monitoring activities are not enough to successfully combat discrimination. This is the reason why the gender pay gap monitoring tool should be generally applied by all companies (with the exception of companies which would be able to show that they use different yet similarly detailed monitoring tools). In addition, the periodic uploading of the results of such monitoring should be mandatory, rather than only possible, and information about the existence of such a tool should be dispersed as widely as possible.<sup>116</sup> It is certainly not enough to put the information on the web page of the Ministry.<sup>117</sup> It should be broadly promoted in the mass media and professional publications addressed to employers and employees.

#### 4.2.12 Other measures, tools or procedures

No other measures, tools or practice are identified.

<sup>114</sup> Intervention of 19 March 2016

[https://www.rpo.gov.pl/sites/default/files/Do\\_MRPiPS\\_ws\\_roznic\\_w\\_wynagrodzeniach\\_kobiet\\_i\\_mezczyzn.pdf](https://www.rpo.gov.pl/sites/default/files/Do_MRPiPS_ws_roznic_w_wynagrodzeniach_kobiet_i_mezczyzn.pdf).

<sup>115</sup> <https://www.mpips.gov.pl/narzedzie-do-mierzenia-luki-placowej>, see also:

[https://www.mpips.gov.pl/gfx/mpips/userfiles/public/1\\_NOWA%20STRONA/Aktualnosci/2017/Nierownosc\\_PlacowaRaport.pdf](https://www.mpips.gov.pl/gfx/mpips/userfiles/public/1_NOWA%20STRONA/Aktualnosci/2017/Nierownosc_PlacowaRaport.pdf), <https://www.mpips.gov.pl/aktualnosci-wszystkie/art,5543,9609,luka-placowa-w-polsce.html>, <https://infostrow.pl/biznes/kobiety-w-polsce-zarabiaja-sporo-mniej-niz-mezczyzni/cid,80064,a>.

<sup>116</sup> This was also indicated by the Commissioner for Human Rights: <http://www.rp.pl/Place/308039935-RPO-aplikacja-do-szacowania-wynagrodzen-kobiet-i-mezczyzn-nie-wystarczy-w-walce-z-luka-placowa.html>.

<sup>117</sup> Such information can be found in the news section, dated 9 January 2018

<https://www.mpips.gov.pl/aktualnosci-wszystkie/art,5543,9609,luka-placowa-w-polsce.html>; <https://infostrow.pl/biznes/kobiety-w-polsce-zarabiaja-sporo-mniej-niz-mezczyzni/cid,80064,a>.

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

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

The personal scope of non-discrimination provisions in relation to access to employment, vocational training, working conditions, etc. is regulated in Article 2(1) and Article 2(2) of the Anti-Discrimination Law and in Article 2 of the LC with reference to Article 14 of the Directive 2006/54 EC.

The LC only applies to the employees, who are defined, as individuals employed on the basis of a contract of employment, appointment, election, nomination or co-operative contract of employment (Article 2 LC).<sup>118</sup> After the entering into force of the Anti-Discrimination Law, the personal scope of protection against discrimination has been significantly expanded and covers all categories of workers in the understanding of the Directive (thus e.g. self-employed persons, persons employed on the basis of civil law contracts).

The Anti-Discrimination Law (Article 2(1)) stipulates that this act is applicable to natural and legal persons, as well as organisational units that are not legal persons, but which the law provides with legal capacity. According to its Article 2(2), the Anti-Discrimination Law does not apply with regard to employees, in areas that are regulated in the LC.

National law does not include a definition of a 'worker'. The notion of a worker is broader than that of an 'employee'. 'Employee' is a term limited to persons employed on the basis of a labour law contract or other legal basis (for instance, the appointment of academics or civil servants (public officers) who, in addition to the protection guaranteed by the Labour Code, also benefit from additional protection through special regulations).

'Workers' may be self-employed persons or those employed on civil law contracts. The latter in principle enjoy only the rights guaranteed in individual contracts concluded with the employer, which means that contrary to civil servants, for instance, they are excluded from the general protection provided under the Labour Code. The civil law contracts are very favourable for employers since they do not have the obligation to pay most of the social security contributions for such workers.<sup>119</sup>

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

The Constitution guarantees equal access of women and men to employment, promotion and positions. This principle is laid down in Article 18<sup>3b</sup> of the Labour Code, underlining that it also covers equal access to work, vocational training, upgrading professional qualifications, regardless of whether the employment is full-time or part-time. This principle applies to every employee, regardless of the label of her/his employment contract; essential in this respect are the conditions in which the work has to be performed (under another person's guidance as to the place, time and conditions of work).

The Labour Code in this respect has been supplemented by the Anti-Discrimination Law, which contains provisions specifying that, in relation to employment, the prohibition of unequal treatment of all workers, inter alia, on the grounds of sex, shall apply to: access to and receiving of professional training, including additional education, proficiency courses and requalification training (vocational orientation and reorientation), as well as professional apprenticeships (practical training); conditions of undertaking and performing economic or professional activities, in particular in the form of an

<sup>118</sup> 'An employee is a person employed under a contract of employment, appointment, election, appointment or cooperative employment contract.'

<sup>119</sup> Some of the persons being employed on the civil contracts are conducting individual economic activities pursuant to the Law of 6 March 2019. The Law of Entrepreneurs (JoL 2018 Item 646).

employment relationship or work on the basis of civil law (mandate) contracts (including the so-called managerial contracts); unpaid employment in the form of voluntary work; access to the activities in trade unions, organisations of employers and professional corporations; and access to and conditions for the enjoyment of publicly available instruments and services of the labour market.

The scope of the protection in the above-mentioned provisions is the same as that required by the Recast Directive.

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

Article 5(6) of the Anti-Discrimination Law stipulates that its provisions do not apply to cases of differential treatment,<sup>120</sup> if the ground for unequal treatment constitutes a real and crucial professional requirement for a particular person (due to the kind and conditions of the particular professional activity or vocational training, including such performed in higher studies). The differential treatment also has to be proportional with respect to achievement of the lawful reason for which such differentiation was made.

The Labour Code (in Article 18<sup>3b</sup>(2) Point 1) stipulates that proportionate actions aimed at the achievement of a legitimate aim resulting in the differential treatment of an employee are not contrary to the principle of equal treatment in employment. This includes, inter alia, a decision not to employ a person, taken on one or more grounds, referred to in Article 18<sup>3a</sup>(1) of the LC, if the nature or conditions of work would result in a situation where any of these grounds constitutes a genuine and determining occupational requirement for the employee.

No information has been obtained regarding the assessment of the application of exceptions to the prohibition of unequal treatment.

#### 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

Generally speaking, the scope of protection of the employment of pregnant women and persons on maternity leave is sufficient, with the exception of certain categories of employees (employed for a short probationary (trial) period or as temporary replacement for other employees).

Article 177 of the LC states that, in principle, an employer may not terminate a contract of employment with a female employee who is pregnant or on maternity leave, unless exceptions apply,<sup>121</sup> such as employment for a probationary (trial) period not exceeding one month (Article 177(2) LC). In the case of an employment contract concluded for a definite period of time, or for a trial period exceeding one month, terminated after the third month of pregnancy, protection is extended until the day of childbirth (Article 177(3)),<sup>122</sup> unless such employment contract was concluded in order to replace an employee during an excusable absence from work (Article 177(3<sup>1</sup>) LC).

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<sup>120</sup> The differentiation of the treatment may be related to the possibility and conditions of undertaking and performing professional activity and undertaking, participating or completing vocational training.

<sup>121</sup> In the opinion of the Supreme Court, it is irrelevant for the protection of pregnant women from dismissal whether the employee was aware of her pregnancy, the employer had been informed about this fact, or that the pregnancy was terminated by miscarriage. The only thing that matters is the objective existence of pregnancy at the moment of dismissal.

<sup>122</sup> Since 22 February 2016, when the amendments of the LC, introduced by the Law of 25 June 2015 (JoL 2015 Item 1220) came into force, the provision on extending a labour contract, mentioned in Article 177(2) LC, will not be applied to women employed for the period necessary to perform a specific task (Article 177(3) LC).



It follows from that provision that entitlement to maternity allowance is also granted to a woman employed under an employment contract for a fixed period which ended before the birth of the child. If it occurs after the third month of pregnancy, she acquires the right to maternity allowance for the period corresponding to the basic maternity leave and parental leave, that is, for a maximum of 52 weeks.<sup>123</sup> If the employment contract is terminated after the day of childbirth and if that person was still subject to compulsory sickness insurance on that day, she is entitled to maternity allowance even after the termination of that insurance. In such a situation, the entity granting the benefit and determining its amount is the Social Insurance Institution (ZUS). This is also an important solution for women who gave birth to a child during the period of receiving the unemployment benefit or within one month after its termination. They are entitled to an extension of the period of payment of this benefit. As a result, they are entitled to unemployment benefit for the period corresponding to the period of maternity leave and for the period corresponding to the period of parental leave.

There are no legal obstacles preventing the employer from refusing the extension of an employment contract concluded for a definite period of time with the women entitled to maternity/parental leave.<sup>124</sup> According to the State Labour Inspectorate post-inspection report, there were many such cases, occurring after maternity leave. It should be noted that provisions of the LC do not oblige the employer to provide an explanation for termination of definite period contracts, which facilitates quick and easy dismissals of such employees.<sup>125</sup>

It is worth noting that the Act on the employment of temporary workers<sup>126</sup> in Article 13(3) extends a fixed-term employment contract of at least two months long for the period up to the date of childbirth.

In the context of the employment contracts, the Supreme Court addressed the more general question of whether any violation of labour law against pregnant women constitutes discrimination. In this case, the female worker became pregnant after being employed for replacement and she was dismissed on the same day as she gave birth to her child. The law allows for dismissal of the pregnant woman working 'in replacement', however, the employer should observe a three-day notice period, which he had failed to do. In the judgment of 3 December 2009 (II PK 142/09), the Supreme Court ruled that the mere wrongful termination of an employment contract with a pregnant woman does not yet determine the recognition of the employer's conduct as discriminating against an employee. In order to assess the employer's behaviour in terms of violation of the prohibition of equal treatment in employment, it is important to examine whether the employer's actions leading to termination of the employment relationship were taken due to the fact that the employee possessed features or properties listed as discrimination grounds, for example, in Article 18<sup>3a</sup>(1) of the LC. Only simultaneous breach of the prohibition of discrimination by the employer results in a separate claim for compensation on the part of the employee, as specified in Article 18<sup>3d</sup> of the Labour Code.

In one case, allegations were made against the employer by a mother of five children, who was, among other things, refused vocational training.<sup>127</sup> The court of first instance

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<sup>123</sup> In the jurisprudence it is assumed that the protection is granted only after 3 months, which means 85 days. Cf. judgment of the Supreme Court of 15 January 2019, II PK 252/17.

<sup>124</sup> Although according to Article 177<sup>3</sup> LC, a contract for a definite period of time, or for a trial period exceeding one month, which would expire after the third month of pregnancy, shall be extended to the day of delivery.

<sup>125</sup> See: Results of investigation on the layoffs of persons returning from maternity, paternity, and parental leave and the observance of other employee rights, State Labour Inspectorate, Warsaw 2014 <https://www.pip.gov.pl/pl/f/v/100996/sprawozdanie2013.pdf>.

<sup>126</sup> Law of 9 July on the employing of temporary workers, consolidated text 2018, Item 594 with amendments.

and second instance issued unfavourable judgments for the claimant, finding that, by differentiating the situation of the claimant in terms of access to training, comparing to other employees, the defendant applied legally acceptable criteria. Eventually, the Supreme Court, in the judgment of 8 January 2008 (II PK 116/07), gave a positive decision for claimant, noting, *inter alia*, that:

'the exercise of powers conferred by law in connection with the birth and upbringing of the child cannot constitute a reason to omit a worker from the selection of workers for training to improve professional qualifications'

and ruled that it constituted discrimination on the grounds of sex and family status.

There have been cases where courts have held a similar position, e.g. in respect of a woman who has been dismissed for being of low usefulness for the employer because of her pregnancy-related health problems. The ruling of the SC of 8 July 2008 (I PK 294/07) may serve as an example, the major point being as follows:

'Acceptance for the position that absence from work of a female-employee caused by endangered pregnancy, followed by miscarriage and health complications, may constitute justified grounds for terminating her employment contract and justify the refusal of accepting her back to work, due to its purposelessness, would violate the rules regarding protection of motherhood and may even be considered as discrimination with regard to sex'.

In another first-instance ruling of 3 August 2016, the District Court for Wrocław Śródmieście rightly found that immediate termination of employment of a pregnant woman, for alleged violation of her obligation of loyalty towards the employer, expressed in frequent use of legitimate and justified periods of medical leave, constituted a wrongful termination of the employment relation, violating Article 2 and Article 33 of the EU Charter of Fundamental Rights, as well as Article 2 Paragraph 1 and Article 8 Paragraph 1 of the 76/207 Council Directive. The court also referred to rulings of the Court of Justice in cases C-460/06<sup>127</sup> and C-177/88.<sup>129</sup> This position was shared by the Supreme Court, dismissing the employer's appeal<sup>130</sup>.

A similar decision was made in the same Court (District Court of Wrocław Śródmieście) on 12 January 2016 in case X P 310/15. The Court, justifying the recognition of the claim for compensation for wrongful dismissal due to the use of sick leave during pregnancy and later in connection with illnesses of a child, decided that the circumstances of the case indicated a breach of the provisions of the law related to termination of the employment contract concluded with the claimant, but also a breach of the principles of social coexistence (Article 8 of the Civil Code). The claimant was entitled to sick leave due to the necessity of caring for a child under two years of age, due to the child's medical condition and the lack of an option to take advantage of third parties' assistance in this respect. Difficulties faced by employees exercising parental rights are well-known in Poland. However, it should be remembered that broadly understood, maternity and related rights are covered by the protection and care of the State under the Constitution of the Republic of Poland (Article 18), i.e. a legal act of the highest legal force. It follows from the above that the public authorities are obliged to take measures aimed at the fullest possible protection of motherhood against any threats which could hinder the full

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<sup>127</sup> The employer argued that low remuneration of the claimant and her omission from the selection for trainings was, *inter alia*, the result of her frequent absence from work due to frequent use of maternity and parental leave.

<sup>128</sup> Judgment of the Court (Third Chamber) of 11 October 2007. *Nadine Paquay v Société d'architectes Hoet + Minne SPRL*, ECLI:EU:C:2007:601.

<sup>129</sup> Judgment of the Court of 8 November 1990. *Elisabeth Johanna Pacifica Dekker v Stichting Vormingscentrum voor Jong Volwassenen (VJV-Centrum) Plus*. ECLI:EU:C:1990:383.

<sup>130</sup> Ruling of the District Court for Wrocław Śródmieście of 3 August 2016 XP 20/16.

exercise of this function. The obligation to protect motherhood is fulfilled, inter alia, by enactment of the law which enables a woman to reconcile motherhood with employment. In doing so, the legislator has introduced a number of rights related to motherhood and parenthood in both labour law and social security. They are related to: health care, upbringing of a child up to 14 years of age, family and care benefits, maternity leave, parental leave and protection of the employment relationship. It is characteristic, however, that the court, stating that the absence of the plaintiff from work was closely related to motherhood, did not treat the case of the plaintiff as a manifestation of discrimination on the grounds of gender and did not award compensation under this title.

#### 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)

The prohibition of pregnant and breastfeeding women performing certain jobs, provided for in Article 176 LC, has an absolute character, which means that the law does not provide any exceptions from it.

#### 4.3.6 Particular difficulties

No particular difficulties were identified in the application of the current rules concerning equal access to work, vocational training, employment contracts, working conditions, promotion and protection against dismissal on grounds connected to sex.

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

No legislation has been identified that would explicitly allow preferential treatment of women in access to promotion or give them priority in their selection for vocational training.

### 4.4 Evaluation of implementation

The scope of protection of workers in terms of access to employment, training, etc. appears to be in line with the requirements of, inter alia, Directive 2006/54/EC, with the exception of regulations relating to exemptions. The scope of exemptions provided for in the Anti-Discrimination Law includes a wider range of exceptions to the equal treatment rule than those provided for in Article 14(2) of Directive 2006/54/EC. Firstly, it speaks of exceptions not only in the context of performing professional activity, but also undertaking access to professional activity (including training). Secondly, it provides for wider exceptions to the rule of equal treatment with regard to vocational training. Those may include not only undertaking of the training, as is the case in the Directive, but also participating in such training and finishing it.

### 4.5 Remaining issues

It is worth mentioning that in light of the Polish law, a refusal to employ a candidate on the grounds of, inter alia, sex, is subject to a fine pursuant to Article 123 of the Act of 20 April 2004 on Promotion of Employment and Labour Market Institutions. Such a violation of the law is treated as a contravention. The wording of this provision is as follows:

'Whoever on grounds of sex, age, disability, race, religion, nationality, political opinion, ethnic origin, religion or sexual orientation refuses to employ a candidate in a vacant job or a vocational training place shall be subject to a fine not lower than PLN 3 000 (EUR 697.70).'

For a long time, the problem in Poland was job advertisements, which by indicating the gender of the desired candidate, discriminated against candidates for employment on the

basis of their sex (sometimes in relation to age).<sup>131</sup> To a certain extent, this phenomenon has been limited by the use of the above-mentioned provisions in such cases.<sup>132</sup>

It happened, however, that some courts also pronounced the judgments unfavourable for the candidates for a job, who tried to prove the discriminatory character of such advertisements, not only in theory but also in practice.

In one case of the District Court of Warsaw (which acted as a second instance court), the justification put forward by the court of lower instance to reject a sex discrimination claim was the suspicion that the claimant (a man) called different employers, who had advertised in newspapers a secretary position aimed explicitly at women, not actually wanting to be recruited, but seeking to obtain compensation for discrimination on the grounds of sex, if he was turned down for the job. The fact that the applicant recorded interviews with employers who had issued such advertisements would, in the opinion of the court of first instance, indicate such intentions. Eventually the District Court awarded him damages recognising sex discrimination in access to employment, explaining that it did not share the opinion of the court of first instance, that the claimant had undertaken all the above actions regarding the job application only with the objective of claiming respective damages, because at the time when the claimant conducted the respective telephone conversation with a representative of the defendant, he was not employed anywhere. He was a student and there were no reasons which would prevent him from commencing employment, had he been offered it. In this situation, according to the court of second instance, there was no evidence that the claimant did not have the intention to initiate employment at the defendants' enterprise, although he also called two other firms who produced similar advertisements.<sup>133</sup>

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<sup>131</sup> The research carried out by the Polskie Towarzystwo Prawa Antydyskryminacyjnego (Polish Society of Anti-Discrimination Law) in 2010 showed that out of the 6 000 job advertisements surveyed, over half indicated explicitly (or not explicitly) the criterion which is prohibited, <http://www.ptpa.org.pl/publikacje/publikacje-raporty/> and <http://weblog.infopraca.pl/2011/01/kara-finansowa-za-dyskryminacje-w-ogloszeniach-o-prace-w-polsce/>.

<sup>132</sup> That is, of Article 123 of the Law on Promotion of Employment and Labour Market Institutions.

<sup>133</sup> District Court of Warsaw, judgment of 22 December 2008, VII Pa 35/08.

## **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>134</sup>**

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

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

In Poland over the last five years many surveys related to different issues of work-life balance have been conducted. Some of them follow, on regular basis, the evolution of the use by parents of childbirth and care-related leave. According to the Ministry of Family, Labour and Social Policy,<sup>135</sup> in the period from January to December 2016, 669 000 persons, in total, took advantage of the leave dedicated to parents, amongst which 507 700 (76 %) were women and 161 300 (24 %) were men. In the same period of 2017, the total share of maternity or parental leave increased to 707 800: among them, the percentage of mothers decreased to 74 % (519 100) and fathers increased to 26 % (194 700). It means that more and more fathers take advantage of this opportunity. This increase is constant and quite spectacular. In the period of time from January until December 2015, paternal leave was granted to 115 400 fathers. In the same period of 2017, this number already amounted to 174 200 fathers, which constitutes an increase by 66 %. Although the increase in interest in taking maternity and parental leave is visible throughout the country, still only around a quarter of those taking advantage of it are fathers.

The lower amount of leave taken by men can be explained by economic factors (women earn less than men, hence families are more likely to decide that the leave should be taken by the person whose financial contribution to the family budget is smaller). The cultural factor is also important. Polish society is still a patriarchal one, in the authors' opinion. At home, on the other hand, the matriarchy prevails, where the woman makes all the decisions, including matters regarding childcare. Men are often considered to be less resourceful in this area.<sup>136</sup>

Information on the practice of reconciling work and family responsibilities can be found in the reports of the Central Statistical Office.<sup>137</sup> The most recent data on this subject is contained in the GUS Report 'Work and family duties 2018'.<sup>138</sup> The target group of the GUS survey were 22 969 000 people aged 18-64. In this group, 37.3 % (8 574 000) declared that they take care of their own children under 15, or other family members aged 15 or more in need of care. The provision of care was clearly more frequent among women – 41.6 % (4 783 000) than among men – 33.1 % (3 791 000). Women, to a much greater extent than men, felt the impact of childcare responsibilities related to children under 15 years of age on their current professional situation – 25.8 % compared to only 9.3 %. During the survey, 6.3 % of women worked part-time. In the group of part-time workers, as many as 33.8 % indicated that the reduction in working time was due to childcare responsibilities. These were expected to be mostly women. During the survey period, nearly 6 % of respondents took parental leave. The results of the survey

<sup>134</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>135</sup> <https://www.mpips.gov.pl/aktualnosci-wszystkie/art.5536.9677,wiecej-urlopow-rodzicielskich-.html>, <https://www.mpips.gov.pl/aktualnosci-wszystkie/prawo-pracy/>.

<sup>136</sup> [http://www.mjakmama24.pl/rodzice/kacik-taty/urlop-dla-ojca-dlaczego-tak-niewielu-mezczyzn-korzysta-z-urlopu-tacierzynskiego.170\\_8122.html](http://www.mjakmama24.pl/rodzice/kacik-taty/urlop-dla-ojca-dlaczego-tak-niewielu-mezczyzn-korzysta-z-urlopu-tacierzynskiego.170_8122.html).

<sup>137</sup> Reports of the Central Statistical Office are available at [www.stat.gov.pl](http://www.stat.gov.pl).

<sup>138</sup> *Informacje Statystyczne GUS: 'Praca a obowiązki rodzinne w 2018 r.'* (Statistical Information of GUS. Work and family responsibilities in 2018), 2019, available at: [www.stat.gov.pl](http://www.stat.gov.pl).

showed that career breaks related to the care of children under 15 years of age affect almost exclusively the female population (97.1 %). Among women who currently work or have worked in the past, the most frequently indicated period of childcare breaks was from six months to one year (13.5 %), then from one to two years (12.7 %) and from two to three years (10.1 %). The lowest number of women had a break lasting longer than five years (7.2 %).<sup>139</sup>

The study also examined the use of various forms of support to combine work with family responsibilities: flexible working time (i.e. the possibility of deciding when to start and end a working day) and the possibility of taking one day off without taking leave. Flexible working time was relatively easy for 26.6 % of people to take advantage of, in exceptional cases, 18.9 % of people. Others did not have this option. The option to take a day off without taking holidays was slightly worse: 23.3 % of respondents could take it relatively easily, whereas 17.4 % could take advantage of it only in exceptional cases.<sup>140</sup>

The Institute for Structural Research's study on the structure of employment of mothers and fathers and the use of institutional forms of childcare provides interesting data on this topic.<sup>141</sup> According to data from 2013, the employment rate of childless women and men aged 20-50 was 70 % for men and 66 % for women. However, in the case of parents of one child under 12 years of age, it was 90.1 % for men and 65.4 % for women. The percentage of mothers and fathers of children under 12 years of age who were inactive due to childcare was 18.7 % for women and 0.5 % for men. In addition, 2.6 % of women and 0.1 % of men worked part-time due to the need for childcare. Studies show that the gap in the employment rate between mothers and fathers of children under the age of 12 decreases with the age of the youngest child. At the same time, the gap increases with the arrival of a third child and subsequent children in the family. The researchers emphasise the specific situation of parents with higher education, for whom the gap seems to be less dependent on the number of children. As parents' education increases, the gap decreases. The study also examined the working time of parents of children up to 12 years of age. In 2013, 12 % of mothers and 31 % of fathers worked more than 40 hours a week. The report noted a significant difference between mothers and fathers in this respect: fathers were found to work overtime more often than other men (31 % and 27 % respectively), while mothers were found to work overtime less often than other women. The frequency of overtime work among parents increases with the age of the youngest child. 8 % of mothers and 30 % of fathers of children under 3 years of age and 14 % and 32 % of children between 7 and 12 years of age work overtime.<sup>142</sup> The study additionally presents the level of use of institutional forms of childcare (data from 2012). Nearly 4 % of children up to 3 years of age were cared for by a crèche or a children's club. Among children aged 3 to 5, 70 % were covered by pre-school education. This percentage has increased by 29 percentage points since 2005. This increase concerns mainly rural areas, where in 2005 only 19 % of children used kindergarten services, and in 2012 as many as 51 % (in the city, 58 % in 2005 and 84 % in 2012). Children attending primary schools (from the age of six) during their stay outside compulsory school activities may be covered by day-care centre care. In the school year 2012/2013, 61 % of all primary schools had a such a centre. It is

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<sup>139</sup> *Informacje Statystyczne GUS: 'Praca a obowiązki rodzinne w 2018 r.'* (Statistical Information of GUS. Work and family responsibilities in 2018), 2019, available at: [www.stat.gov.pl](http://www.stat.gov.pl).

<sup>140</sup> *Informacje Statystyczne GUS: 'Praca a obowiązki rodzinne w 2018 r.'* (Statistical Information of GUS. Work and family responsibilities in 2018), 2019, available at: [www.stat.gov.pl](http://www.stat.gov.pl).

<sup>141</sup> Magda, I., Kamińska, A., Potoczna, M.: *'Wskaźniki monitorowania Programu Polityki Rodzinnej Prezydenta RP'* ('Monitoring indicators of the President of the Republic of Poland's Family Policy Programme'), Survey of *Instytut Badań Strukturalnych*, Warszawa 2014 (available at: [http://ibs.org.pl/app/uploads/2015/09/Wskazniki\\_I\\_monit\\_Programu\\_Polityki\\_Rodzinnej\\_Prezydenta\\_RP\\_2014.pdf](http://ibs.org.pl/app/uploads/2015/09/Wskazniki_I_monit_Programu_Polityki_Rodzinnej_Prezydenta_RP_2014.pdf)).

<sup>142</sup> Magda, I., Kamińska, A., Potoczna, M.: *'Wskaźniki monitorowania Programu Polityki Rodzinnej Prezydenta RP'* ('Monitoring indicators of the President of the Republic of Poland's Family Policy Programme'), Survey of *Instytut Badań Strukturalnych*, Warszawa 2014 (available at: <https://ibs.org.pl/publications/wskazniki-monitorowania-programu-polityki-rodzinnej-prezydenta-rp/>).



worth noting the data on which parents provide childcare in case of illness. According to the replies of the respondents, this obligation is incumbent on women (always or usually) in 66 % of cases. In 21 % of cases, respondents shared this responsibility equally. Responses indicating more frequent involvement of a man are rare.<sup>143</sup>

Statistical data provided by GUS demonstrate that the percentage of children covered by institutional forms of childcare has increased in the following years. For example, in 2017 the total number of crèches and children's clubs increased by 15.1 % compared to the previous year. However, the vast majority of childcare facilities for children under 3 are private – 76.0 % of the total number of all facilities. They accounted for 52.8 % of the total number of places and 49.8 % of children stayed there<sup>144</sup>. In the school year 2015/2016, in the age group of children aged 3 to 4 years, 77.3 % were in pre-school care (92 % in cities and 55 % in rural areas). In 2016/2017, both groups fell by around 1 percentage point to 76 % overall (92 % in cities and 54 % in rural areas).<sup>145</sup>

Also worth mentioning is the study conducted in 2016 by the Centre for European Projects (*Centrum Projektów Europejskich*) called 'Solutions for reconciling professional and family life in Poland: Report from an in-depth analysis of collected data'.<sup>146</sup> It includes an analysis from research conducted in this area in 2016, in Poland and selected other countries. Authors of this study identified problems, mentioned in studies of other entities, concentrating on examining legal measures and identifying examples of discrimination in this area, while describing actions undertaken by various employers in order to promote work family- life- balance (good practices).

Similar issues were raised in the study 'Parenthood related rights: Manifestations of sex discrimination', commissioned by the NGO: Women's Congress (*Kongres Kobiet*) in 2016,<sup>147</sup> as well as in the earlier survey carried out by the *Ogólnopolskie Porozumienie Związków Zawodowych* (OPZZ), one of the two main trade unions in Poland, which among others included questions regarding the respecting of parenthood-related rights.<sup>148</sup> Some legal offices also perform fragmentary examinations of jurisprudence and the issue of access to court, among other issues in the subject matter of parental rights.<sup>149</sup>

Diagnoses of the situation related to work/family- life balance are provided by the report prepared by the Commissioner for Human Rights, entitled: 'Diagnosis of the presented statistical data. Reconciliation of family and professional roles. Equal treatment of parents in the labour market. Analysis and recommendations' published in 2015.<sup>150</sup> The

<sup>143</sup> Magda I., Kamińska A., Potoczna M., 'Wskaźniki monitorowania Programu Polityki Rodzinnej Prezydenta RP' ('Monitoring indicators of the President of the Republic of Poland's Family Policy Programme'), Survey of *Instytut Badań Strukturalnych*, Warszawa 2014 (available at: <https://ibs.org.pl/publications/wskazniki-monitorowania-programu-polityki-rodzinnej-prezydenta-rp/>).

<sup>144</sup> See: <https://www.dlaprzedszkolaka.info/s/3180/67604-Przedszkola-w-liczbach.htm>.

<sup>145</sup> 'GUS: Education in 2016/2017 school year' – yearbook providing a wide selection of data and analyses reflecting the condition and dynamics of the Polish education system, [https://stat.gov.pl/files/gfx/portalinformacyjny/pl/defaultaktualnosci/5488/1/12/1/oswiata\\_i\\_wychowanie\\_w\\_roku\\_szkolnym\\_2016-2017.pdf](https://stat.gov.pl/files/gfx/portalinformacyjny/pl/defaultaktualnosci/5488/1/12/1/oswiata_i_wychowanie_w_roku_szkolnym_2016-2017.pdf).

<sup>146</sup> This project was co-financed from EU funds within the European Social Fund. The results are published: [wlb.e-wspolpraca.pl/file/4/Analiza+desk+rezerach.pdf](http://wlb.e-wspolpraca.pl/file/4/Analiza+desk+rezerach.pdf).

<sup>147</sup> The study 'Uprawnienia związane z rodzicielstwem. Przejawy dyskryminacji ze względu na płeć' (Parental rights. Manifestations of discrimination based on sex) was performed by Dziewanowska, M. and Płatek, M.

<sup>148</sup> Cf.: results of the OPZZ survey regarding the problem of discrimination and mobbing in the workplace and respecting employee rights related to parenthood in 2012. This survey showed *inter alia* that 76 % of interrogated persons did not experience abuses regarding paying of pregnancy and maternity -related benefits, while only 6 % confirmed that they had such experiences. 2.6 % of this group noted that this was connected with problems relating to maternity leave, <https://www.opzz.org.pl/assets/opzz/media/files/2c380e8c-7df9-47d0-bab9-39180acfa256/wyniki-ankiety-opzz-nt-rodzicielstwa.pdf>.

<sup>149</sup> See e.g. <http://kancelaria.prawna.warszawa.pl/dyskryminacja-osob-korzystajacych-z-uprawnien-rodzicielskich/>.

<sup>150</sup> Report of the Commissioner for Human Rights 'Godzenie ról rodzinnych i zawodowych. Równe traktowanie rodziców na rynku pracy. Analiza i zalecenia' (Reconciliation of family and professional roles. Equal

main objective of the study was to analyse the limitations of economic activation of young mothers (understood as their willingness to undertake activity in the labour market) and the realisation of the right of young fathers to engage in family life resulting from difficulties in reconciling professional and family roles. These phenomena were identified at the level of organisation practices, individual parental strategies and social policy, taking into account the opinions of trade unions and employers' organisations. Research has confirmed that women are primarily responsible for childcare and unpaid domestic work, while fathers are only occasionally involved in childcare and domestic responsibilities. The lower position of women in the labour market, particularly in relation to the wage gap, is an important factor influencing parents' decision for full custody of their children to be taken exclusively by the mother.<sup>151</sup> Among the key problems of reconciliation of work and private life, research participants pointed to the inefficiency of institutional forms of childcare and insufficient availability of flexible forms of employment. The availability of public nurseries and kindergartens, despite some improvements, continues to be insufficient. Besides, those institutions usually do not operate in the afternoon, when many parents are still working. Another problem is the lack of full availability of institutional care (kindergartens and schools) during holidays and vacations. These factors mean that parents have to use private institutions or arrange informal childcare. A major challenge for young parents is also the requirements set by their employers. They do not always take into account the needs of workers in relation to their family roles. Holidays, longer leave, the need to go out during the day, e.g. to visit a doctor, to a parent-teacher's appointment or to a kindergarten meeting, in the opinion of the parents surveyed, often does not meet with a positive attitude from employers.<sup>152</sup> The analysis presented in this report was the basis for formulating recommendations for further actions to be taken to implement the principle of equal treatment of women and men in the area of employment and family life. The Commissioner stressed that due to the specific nature of the issues at stake, close cooperation between public authorities and social partners is essential. It should be underlined that after this report was published, some of the Commissioner's recommendations have been implemented.<sup>153</sup> Among the most important recommendations of the Commissioner, which still await implementation, especially worth mentioning are:

- Introduction of educational measures aimed at counteracting the stereotypical perception of social roles of women and men, as well as supporting the sense of joint responsibility of men and women for the upbringing and development of their children.

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treatment of parents in the labour market. Analysis and recommendations) issued in the series: Principles of equal treatment. Law and Practice No. 18, Bulletin of the Ombudsman 2015, No. 7. The Report was created on the basis of the results of the study 'Godzenie ról rodzinnych i zawodowych – the situation of young parents in the labour market' (*Godzenie ról rodzinnych i zawodowych – sytuacja młodych rodziców na rynku pracy*), conducted from September to November 2014, commissioned by the Ombudsman.

<sup>151</sup> Report of the Commissioner for Human Rights 'Godzenie ról rodzinnych i zawodowych. Równe traktowanie rodziców na rynku pracy. Analiza i zalecenia' (Reconciling of family and professional roles. Equal treatment of parents in the labour market. Analysis and recommendations) issued in the series: Principles of equal treatment. Law and Practice No. 18, Bulletin of the Ombudsman 2015, No. 7.

<sup>152</sup> Report of the Commissioner for Human Rights 'Godzenie ról rodzinnych i zawodowych. Równe traktowanie rodziców na rynku pracy. Analiza i zalecenia' (Reconciliation of family and professional roles. Equal treatment of parents in the labour market. Analysis and recommendations) issued in the series: Principles of equal treatment. Law and Practice No. 18, Bulletin of the Ombudsman 2015, No. 7.

<sup>153</sup> For example, in the research it has been criticised that the legal system makes the granting of parenting rights to the father dependent on whether the child's mother is entitled to them. Thus, the father is not entitled to paid parental leave if the child's mother does not have an employment relationship or is not covered by social insurance in case of illness and maternity. According to the Commissioner, such a situation constituted an example of discrimination on the grounds of sex, because women – mothers remaining in employment or covered by insurance – acquire full parental rights regardless of the professional situation of the child's father. This legal situation has changed since 2016.



- Dissemination of knowledge on anti-discrimination provisions relating to employment, including the protection of pregnant women and parents using parental rights. Intensification of control of labour law observance in this area.
- Constant monitoring of trends in the labour market from the gender perspective, which will enable the construction of appropriate tools (programmes, legal regulations) aimed at eliminating the discriminatory treatment of women or men.
- Increasing efforts to eliminate the phenomenon of the wage gap, inter alia, by introduction to labour law of the obligation of transparency of remuneration, as well as effective implementation of the European Commission's recommendation of 7 March 2014 on strengthening the principle of equal pay for women and men through transparency, indicating measures to increase the transparency of remuneration, such as: providing employees with information on wages, submission by companies of appropriate reports, audits of remuneration in large companies and inclusion of the issue of equal pay in collective agreements.
- Amending the legal framework for parental benefits so that instruments for reconciling family and professional roles are targeted on equal terms at women and men, in particular to construct parental leave (*urlop rodzicielski*) in such a way that a substantial part of it is reserved for each parent without the possibility of renouncing it to the other parent.
- Increasing the availability of childcare institutions and disseminating knowledge on various forms of childcare and possibilities of obtaining support for their use, including promotion of good practices of parents' self-organisation.
- Introduction of comprehensive legal regulations enabling employers and employees to take advantage of flexible solutions in the scope of professional work organisation, extending the employer's information on those obligations and strengthening the position of the employees who apply for the possibility of using flexible solutions.<sup>154</sup>

### 5.1.2 Other issues

There are no other issues except those raised above.

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

In Poland, there is no special legal act devoted to the problem of work/family-life balance. Special rights that can be applied in this area are provided for in the Labour Code, where there is a whole section (8) concerning the rights of employees related to parenthood.

In this section, the regulations from 175<sup>1</sup> to 189 contain provisions protecting the health of pregnant workers and nursing mothers, special rights of women and both parents related to parenthood (rules for granting maternity, paternity, parental leave, child or family care leave, rules for sharing such leave between the mother and the father of the child, and the possibility of combining some of these periods of leave with part-time work). This chapter also contains provisions guaranteeing specific protection of the employment relationship of pregnant women and parents in the case of taking leave related to the birth, adoption and upbringing of a child, as well as the prohibition of worsening working conditions in such a situation. Breastfeeding breaks are also referred to.

General provisions for the various forms of flexible working time are set out in Section 6 of the Labour Code, but the specific rules for granting some of these forms of flexible working time apply only to parents of children with disabilities.

<sup>154</sup> Report of the Commissioner for Human Rights 'Godzenie ról rodzinnych i zawodowych. Równe traktowanie rodziców na rynku pracy. Analiza i zalecenia' (Reconciliation of family and professional roles. Equal treatment of parents in the labour market. Analysis and recommendations) issued in the series: Principles of equal treatment. Law and Practice No. 18, Bulletin of the Ombudsman 2015, No. 7.

Maternity and parental benefits are regulated by the Maternity Financial Benefits Act.

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

Various aspects of pro-family policy have been the subject of constant public debate in Poland in the last four years. However, it is dominated by the issue of improving the economic situation of families and extending financial incentives to have children. The issue of fair distribution of family responsibilities, if at all reflected in the activities of the government, is rather limited to the sphere of declarations than to taking concrete actions. This situation should not be surprising since the ruling party attaches great importance to the maintaining of the traditional family model based on stereotypical perception of social roles of women and men, and treats the proposals of pro-equality education of society as a harmful invention of the so-called gender ideology. The Commissioner for Human Rights is the only public body that seeks to enforce the previous government's obligations under the National Equal Opportunities Programme. For example, on 14 August 2017, the Commissioner asked the Minister of Labour, Social Policy and Family about the progress of work on amending the Labour Code in relation to issues related to the reconciliation of family life with professional work. In the letter of 9 March 2018, no specific information was received in response, other than assurances that the work was ongoing.<sup>155</sup>

## 5.2 Pregnancy and maternity protection

### 5.2.1 Definition in national law

In Polish Labour law there is no legal definition of the notion of pregnant women, a worker who has recently given birth and a worker who is breastfeeding. The LC only requires the condition of pregnancy to be confirmed by a medical certificate (Article 185 LC).

### 5.2.2 Obligation to inform employer

The law does not put on women the obligation to inform the employer about the pregnancy. However, it is understood that the beginning of the period of protection against dismissal is the existence of pregnancy. It is irrelevant whether the employee was aware of the employee's condition and whether she notified the employer about this fact.<sup>156</sup>

Some commentaries on the Labour Code include the opinion that it is the duty of employees to immediately inform the employer about the state of pregnancy, as the unborn child is also a subject of protection.<sup>157</sup> The author of the same commentary states that the employee should also inform the employer about the end of breastfeeding. It is even stressed that this is a fundamental obligation of the employee, whose failure to observe means the risk of termination of the employment contract. This, however, is only an isolated opinion, as the regulations do not provide any unfavourable consequences for the employee for not disclosing such information.

In relation to Article 185 of the Labour Code, which requires that the condition of pregnancy should be confirmed by a medical certificate, the Supreme Court in the judgment of 9 September 1977 (I PRN 115/77) explained that this certificate does not have to meet any specific formal requirements, as long as it is issued by a doctor and confirms the fact that the employee is pregnant (and, if necessary, the duration of the

<sup>155</sup> <https://www.rpo.gov.pl/pl/content/godzenie-rol-rodzinnych-i-zawodowych-czy-te-kwestie-znalazly-sie-w-przygotowywanych-przepisach>.

<sup>156</sup> See: The Supreme Court in its ruling of 15 January 1988, I PRN 74/78.

<sup>157</sup> Sobczyk, A. (in) *Kodeks pracy. Komentarz* (Labour Code. Commentary). Ed. Sobczyk, A., 2nd edition C.H. Beck, Warszawa 2015 p. 727.

pregnancy). This provision further states that an employer is obliged to grant pregnant workers time off work for prescribed medical examinations in connection with pregnancy if such examinations cannot be carried out outside working hours. The content of this provision corresponds to that of Article 9 of Directive 92/85/EEC. However, it is generally accepted in the literature that in the event of a visible pregnancy, the right of women to protection of their health, whether or not they have submitted a certificate, must nevertheless be respected.<sup>158</sup>

#### 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

No case law on the definition of a pregnant worker, a worker who has recently given birth and/or a worker who is breastfeeding could be found.

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

The protective measures for pregnant and breastfeeding employees are provided, as already mentioned, in special Section 8 of the Labour Code titled: Employee rights related to parenthood. In particular, Articles 176, 178, 178<sup>1</sup>, 179 of the LC refer to them.

According to Article 176 LC, as amended by the Law of 22 June 2016,<sup>159</sup> pregnant and breastfeeding women are not allowed to perform work that is arduous, dangerous or harmful to the health, or which may have harmful influence for the course of pregnancy or breastfeeding. The amended provision of Article 176 LC in Paragraph 2 includes a legal delegation for the Council of Ministers to issue an Ordinance, specifying which jobs are to be encompassed by the prohibition, with specific instructions in this regard.

In light of the appendix to the above-mentioned Regulation,<sup>160</sup> work that is particularly arduous, dangerous or harmful to pregnant and breastfeeding women includes work involving a physical effort, performed in cold, hot or changing microclimates, involving noise and vibrations, involving exposure to electromagnetic waves, ionising and ultraviolet radiation, as well as all work in environments involving higher or lower pressure, for instance, working as a diver. Also forbidden is any work involving contact with harmful biological substances (e.g. involving dangerous substances containing B-type hepatitis and HIV), and work involving exposure to harmful chemical substances. The prohibition also includes work involving a risk of serious physical or mental injuries, for instance, work performed underground and at a height.

Irrespective of this prohibition, the employer must change the working conditions of a pregnant or breastfeeding employee in the event that there are health contraindications, stated in the medical certificate, to perform previously performed work (Article 179(1) LC). Employers are also obliged to respectively modify the working-time patterns of pregnant and breastfeeding women and/or to assign them to another position. If such a transfer is impossible or inadvisable, the woman in question shall be released from her obligation to perform work (Articles 178<sup>1</sup> and 179(1) LC) while retaining full pay (Article 179(5) LC). If her remuneration is reduced following the adaptation of working conditions in her current position, or following the reduction of working time or the transfer to another position, the pregnant woman is entitled to compensatory pay

<sup>158</sup> Sobczyk, A. (in) *Kodeks pracy. Komentarz* (Labour Code. Commentary). Ed. Sobczyk, A., 2nd edition C.H. Beck, Warszawa 2015 p. 779.

<sup>159</sup> This law which entered into force on 3 August 2016 amended the Labour Code and some other laws (JoL of 19 June 2016 Item 1053). Until 3 August 2016 the LC did not generally permit women to be employed for performing work listed (Article 176 LC). A list of such work has been determined in the Ordinance of the Council of Ministers of 10 September 1996, JoL 1996 No. 114, Items 544 and 545. The idea alone of a general exclusion of the possibility to employ women for particular work, irrespective of their health and physical condition, was considered obviously discriminatory.

<sup>160</sup> Regulation of the Council of Ministers of 3 April 2017 on the register of work that is strenuous, dangerous or detrimental to the health of pregnant and breastfeeding women (JoL of 2017 Item 796).

(Article 179(4) LC). When the reasons for the above actions have ceased to exist, the employer shall employ this employee in accordance with the contract of employment as regards the type of work and working time (Articles 178<sup>1</sup> and 179(6) LC).

The ban on employing pregnant women and women who are breastfeeding for prohibited work is absolute, which means that the employer is forbidden to employ them even with their consent. An employer who does not comply with the prohibition on employing pregnant women in prohibited job may be held liable for contravention (*wykroczenie*) under Article 281(5) of the LC. Hence the prohibition of employment of pregnant women and nursing mothers in the jobs specified on the list goes beyond the standard provided for in Article 4 of Directive 92/85/EEC.

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

Case law under these provisions mainly concerned issues such as the obligation to inform the employer when taking up employment of the fact of being pregnant or breastfeeding and the validity of the terms of the contract.

The first issue was addressed, inter alia, by the Supreme Court in its judgment of 17 April 2007 (I UK 324/06), ruling that a worker who takes up employment is not required to disclose the fact that she is pregnant if the work she intends to do is not prohibited because of maternity protection.

The case was pending as a result of an appeal filed by Joanna K. against the Social Insurance Institution (ZUS) branch in Łódź. On 27 February 2003, the claimant concluded an employment contract for an indefinite period of time on a full-time basis with the employer pursuant to which, as of 1 March 2003, she was to work as a sales representative. When concluding the contract, the applicant was pregnant, which she did not inform the employer about. One week after taking up employment, until the day of childbirth, the claimant was on sick leave. By decision of 17 September 2003 the Social Insurance Institution (ZUS) established that claimant was not subject to social insurance, since, in the view of this authority, the contract was concluded solely for the purpose of receiving social insurance benefits. The Court of Second Instance did not agree with this position. The Supreme Court shared the position of the Court of Second Instance, claiming that the conclusion of an employment contract by the petitioners was not intended to circumvent the law causing the invalidity of this act, as it does not constitute circumvention of the law to perform an action in order to achieve the effects of the Law on the system of Social Insurance. The Supreme Court indicated that it should be recognised that in a situation where the will of the parties concluding an employment contract was to enter into an employment relationship and the actual performance of paid work took place, the mere awareness of one of the parties to the contract, or even of both parties to the contract, as to the occurrence of an event giving entitlement to social security benefits in the future (e.g. the birth of a child by an employee) does not give grounds to consider that the contract was intended to circumvent the law.

The Supreme Court additionally expressed in this ruling the opinion that, on an exceptional basis, an employee should, during the recruitment process, inform the employer of her pregnancy when she applies for employment in jobs prohibited for pregnant women. Although this view is usually accepted by scholars it is also rightly criticised<sup>161</sup> as leading to unequal treatment of women who apply for jobs. The common opinion is that the contract of prohibited employment remains valid (since there are no provisions providing for nullity).<sup>162</sup>

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<sup>161</sup> See: Sobczyk, A. (in) *Kodeks pracy. Komentarz* (Labour Code. Commentary). Ed. Sobczyk, A., 2nd edition C.H. Beck, Warszawa 2015, p. 719.

<sup>162</sup> Wrątny, J., *Kodeks pracy. Komentarz* (Labour Code. Commentary). C.H. Beck, Warszawa 2003, p. 405.

There were also interesting rulings on the amount of benefits in the case of the transfer of an employee to another job due to pregnancy. In the judgment of 5 May 1976 (I PRN 32/76), the Supreme Court ruled that when a worker is transferred to another job for health reasons because of pregnancy, the reduced productivity in the new job cannot adversely affect the amount of the compensatory allowance due to her, as provided for in Article 179(2) of the Labour Code. The failure of a pregnant worker to comply with the standard of work laid down for a new post must be assessed in light of the necessary legal protection afforded to pregnant workers by the relevant legislation in force. These, however, are primarily aimed at safeguarding the social interest by guaranteeing the mother's health conditions and the child's development. However, the issue of securing the necessary discipline at work is a separate matter. In this respect, the manager of the workplace is entitled to appropriate measures in order to enforce the obligations incumbent on the employee.

#### 5.2.6 Prohibition of night work

Article 178(1) LC states that a pregnant woman is prohibited from performing any overtime or night work. This provision has an absolute character, which means that a pregnant woman cannot perform night work regardless of whether such work poses any risk to her health or not, or whether there is any objective reason why she should not perform night work. It is also important that the consent of the pregnant employee remains irrelevant.

Pregnant women also cannot be posted to work outside of their permanent workplace or be employed under the shift work system, however, only without their prior consent. The work split-up system provided for in Article 139 LC refers to workdays scheduled with interruption (Article 178(1) in fine LC). This relative prohibition also applies to a worker caring for a child up to the age of four. In addition, such an employee may not be employed overtime without his or her consent (Article 178(2) LC).<sup>163</sup>

According to the provision of Article 178<sup>1</sup> LC,<sup>164</sup> the employer employing an employee during the night time is obliged to change the working time schedule for the period of pregnancy in such a way that it is possible to perform work during daytime, and if it is impossible or unreasonable, transfer the employee to another job, the performance of which does not require night work. Although the LC in Article 178<sup>1</sup> does not provide for any requirement as to the new work, it is assumed that this other work should correspond to the qualifications of the employee, and the temporary position cannot be significantly lower in the hierarchy.<sup>165</sup> In cases of a lack of such opportunities, the employer is obliged to release the employee for the necessary period of time from the obligation to perform the work. Where a change in the terms and conditions of the previous job, a reduction in working hours or the transfer of an employee to another job results in a reduction in remuneration of the pregnant or breastfeeding woman, she shall be entitled to a compensatory allowance (Article 179(4) LC). During the period of release from the obligation to perform work, an employee retains the right to the previous remuneration (Article 179(5) LC). Workers who have changed their working hours or who have been made redundant shall have the right to return to their previous job after the reasons justifying the change have ceased (Article 179(6) LC).

The administrative liability provided for in Article 281(5) of the Labour Code applies, *inter alia*, to an employer who infringes the provisions on working time, e.g. by employing pregnant women at night. Since the prohibition of night work for pregnant women provided for in Article 178 is absolute, the Polish law therefore provides such

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<sup>163</sup> Although the law in this provision does not explicitly mention breastfeeding mothers, the prohibition for an employee caring for a child up to the age of four years applies to such women.

<sup>164</sup> The provision has been added by the Act of 14 November 2003, *JoL* 2003 No. 213 Item 2081.

<sup>165</sup> Sobczyk, A. (in) *Kodeks pracy. Komentarz*. (Labour Code. Commentary) ed. Sobczyk, A., 2nd edition. C.H. Beck, Warszawa 2015, p. 723.

workers with more far-reaching protection than that provided for in the minimum standard provided in Article 7 of Directive 92/85/EEC.

The absolute prohibition of night work provided for in Article 178 shall not apply to a woman who is breastfeeding her child. Paragraph 2 of Article 178, which requires, *inter alia*, the consent of the carer for night work, shall apply to such persons during the childcare period up to the age of four years. The requirement to obtain consent also applies to overtime work and work outside the regular workplace.

Consequently, although the prohibition on night work laid down in Article 178 does not cover nursing mothers, it must be considered that the Polish legislation provides sufficient protection for such women, especially since the refusal to employ such a worker during night time does not necessarily have to be based on medical prescriptions to perform such work (which seems to be suggested by the interpretation of Article 7 of Directive 92/85/EEC in conjunction with Article 19 of Directive 2006/54/EC, carried out in the judgment of the CJEU of 19 September 2018, No. C-41/17).<sup>166</sup>

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

In its judgment of 16 February 2018, the Court of Appeal in Łódź (III AUa 123/17) confirmed the absolute nature of the prohibition on employing pregnant women during night time provided for in Article 178 of the Labour Code, arguing, *inter alia*, that the consent of the employee concerned to perform night work does not repeal that prohibition. Night work is deemed not to comply with the biological rhythm of the human body and may cause adverse effects on the health of pregnant women.

Already in earlier case law (the resolution of the Supreme Court of 15 March 1979 (V PZP 13/78)) – there was a settled view that the transfer of a pregnant employee from a four-team work organisation to a single-shift job due to the statutory ban on overtime and night work (Article 178(1) of the Labour Code), as a transfer to another job within the meaning of Article 179(1) of the Labour Code, justifies, on the basis of Article 179(2) of the Labour Code, the payment of a compensatory allowance in the event of a reduction in the employee's remuneration, even if the type of work performed by the employee remained unchanged.

In its resolution of 28 April 1994 (I PZP 6/94), the Supreme Court ruled that a female doctor is entitled to the compensatory allowance provided for in Article 179(2) of the Labour Code if she was previously on on-call duty at the company for which she received additional remuneration and is unable to do so because of her pregnancy.

#### 5.2.8 Prohibition of dismissal

Dismissal is prohibited from the beginning of the pregnancy until the end of the maternity leave,<sup>167</sup> with two exceptions: 1) fault of the employee 2) liquidation of employer.<sup>168</sup> As for the first case, Article 177(1) of the LC states that an employer may not terminate a contract of employment with a female employee who is pregnant, or on maternity leave, unless there are grounds for contract termination without notice through the fault of the employee, and provided that the trade union representing this

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<sup>166</sup> Judgment of the Court (Fifth Chamber). *Isabel González Castro v Mutua Umivale and Others*, ECLI:EU:C:2018:736.

<sup>167</sup> It is worth noting that this footnote does not refer to a woman breastfeeding her child. The fact is that the dismissal ban on maternity leave will partially protect her from dismissal. Sometimes, however, women breastfeed their children longer than the duration of maternity leave, or women give up part of the leave in favour of the child's father. In such a situation, it is doubtful whether this provision will provide her with sufficient protection.

<sup>168</sup> The first concerns termination of employment contract without notice (i.e. immediate termination), the second concerns termination of employment contract with notice.

employee has consented thereto (Article 177(1)LC).<sup>169</sup> First, such consent repeals the ban on dismissing pregnant workers and workers during maternity leave. Secondly, if there is no trade union in the company or if the employee does not represent any trade union, the employer is exempted from the obligation to obtain any consent. Such a solution seems to be in accordance with Article 10(1) of Directive 92/85/EEC, which, although making the possibility of dismissal conditional on the consent of the competent authority, stipulates that consent is required only 'where applicable'. According to the judgment of the Supreme Court of 3 June 1998 (I PKN 164/98), the consent of a trade union organisation may be given ex post, i.e. after dismissal of an employee, but only in the event when the employer and the management board of the trade union organisation do not know about the pregnancy of the dismissed employee, because the employee did not submit a medical certificate (referred to in Article 185(1) LC). As regards the second exception to the prohibition in question, the Labour Code in Article 177(4) states that dissolution of an employment contract with notice with a pregnant woman or person (mother or father) on maternity leave may take place exclusively in the case of the liquidation of the employer's enterprise or its bankruptcy, upon agreement (*po uzgodnieniu*) with a trade union representing that employee, as to the date of the dissolution of the contract and resulting financial conditions. The period of time during which an employee will receive financial benefits in relation to such dissolution will be counted into the duration of the employment period that entitles an employee to the various employment benefits. In the case of this exception, what has been said above about the situation of a worker who is not represented by any trade union is also valid. In addition, however, it is doubtful whether, if the directive explicitly mentions 'consent', only the requirement of 'agreement' is sufficient. The use of different terms in the legislation ('consent' (*'zgoda'*), 'upon agreement' (*po uzgodnieniu*)) should be interpreted as meaning something else, although a purely linguistic interpretation would allow the terms to be considered as overlapping. In view of this reservation, it is doubtful whether the provision in question is compatible with Article 10(2) of the Directive as regards the part relating to the liquidated establishment.

#### 5.2.9 Redundancy and payment during maternity leave

If the employer goes bankrupt and the pregnant employee's contract with the employer is terminated for this reason, she will receive Social Security benefits until the day of childbirth and after childbirth. The employer should send the documents for this purpose to the relevant ZUS branch office.<sup>170</sup>

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

The employer has in every case of dismissal (with exception of employment contracts for a defined period of time) the obligation to substantiate the decision.

Such a general obligation results from provision of Article 30(4) LC which stipulates that in a decision of the employer to terminate with notice a contract concluded for an indefinite period of time or to terminate an employment contract without notice, the reason justifying the termination of the contract should be stated. These reasons should be precise and formulated in such a way that it is understandable to the employee, so that he/she himself is able to decide whether it is true or not. The decision on the dismissal without notice shall be supplemented by the employer's instructions on the right to appeal such decision to the employment court Article 30(5) LC.

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<sup>169</sup> In the opinion of the Supreme Court, it is irrelevant for the protection of pregnant women from dismissal whether the employee was aware of her pregnancy, the employer had been informed about this fact, or that the pregnancy was terminated by miscarriage. The only thing that matters is the objective existence of pregnancy at the moment of dismissal.

<sup>170</sup> Cf. relevant explanation from the Social Insurance Institution (ZUS), available at: <https://www.rp.pl/ZUS/310239946-Czy-likwidacja-zakladu-pracy-pozbawia-ciezar-na-swiadczen.html>.

### 5.2.11 Case law on the protection against dismissal

The case law on protection against dismissal during pregnancy is very extensive. The following judgments are worth noting.

In the ruling of 2 June 1995 (I PRN 23/95) the Supreme Court noted that the time in which a woman informed her employer about the pregnancy is not relevant for the protection against dismissal with or without notice. Significant only is the objective existence of pregnancy at the time of dismissal or notice (ruling of the SC of 15 January 1988, I PRN 74/87). The employee's failure to inform the employer about the pregnancy before the date of termination of the employment contract is only relevant to the recognition of the employee's claim for remuneration for the period during which the employee remained unemployed.<sup>171</sup>

The employer is obliged to immediately withdraw the notice of termination of employment if it learns that an employee became pregnant, during the course of the notice period, which was confirmed by an appropriate medical certificate (Article 177 Section 1 in conjunction with Article 185 Section 1 of the Labour Code). In the event of a breach of this obligation, the lack of clear statement of the employer on the withdrawal of notice may justify the reinstatement of the deadline for bringing an appeal against the termination of the employment contract (Article 265 Section 1 in conjunction with Article 264 Section 1 of the Labour Code).<sup>172</sup> The ruling of the Supreme Court of 28 March 2017 (II PK 17/16) shows that in the case of a pregnant employee, the court is, as a rule, bound by her demand for reinstatement and should award remuneration for the time of being unemployed.

However, there are other rulings which indicate that in exceptional cases maternity protection should give way to the employer's organisational need manifested in liquidation of the workplace (ref. judgment of the Supreme Court dated 5 May 2016, II PK 65/15). In another judgment of the Supreme Court concerning the immediate dismissal of a pregnant employee due to the fault of the employee, the Supreme Court stated that the Labour Court may decide on compensation instead of a claim for reinstatement of an employee subjected to special protection of the employment relationship, if the claim for reinstatement by such employee may be classified in a specific situation as an abuse of rights (Article 8 of the Labour Code) (ref. judgment of the Supreme Court of 24 June 2015, II PK 180/14). The Supreme Court has also stressed that the ban on termination of employment contracts likewise applies in the event that an employee becomes pregnant during the notice period, even if after the notice period she underwent an abortion procedure (resolution of the SC of 14 April 1972, III PZP 7/72 and resolution of the SC of 13 September 1979 (I PRN 284/79)).<sup>173</sup>

In its judgment of 8 July 2008 (I PK 294/07) the Supreme Court confirmed the protection of the employment relationship also for women who have had a miscarriage by ruling that acceptance of the position that the absence from work of a female employee due to the risk of pregnancy and subsequent miscarriage and the health complications associated with it may constitute an excusable reason for the termination of her employment contract and justify the refusal to reinstate her on the grounds that

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<sup>171</sup> Pursuant to Article 47(2) of the Labour Code, employees who take up employment as a result of being reinstated at work, if the employment contract was terminated during pregnancy – are entitled to remuneration for the entire period of staying without work, starting from the moment when the employer was notified of the pregnancy causing the woman to be covered by special protection of the employment relationship.

<sup>172</sup> See also: ruling of the SC of 30 May 2017, I PK 174/16 and decision of the SC of 22 August 2013, II PK 83/13.

<sup>173</sup> See also ruling of the SC of 16 December 1999, I PRN 468/99.



she is not fit for purpose, constitutes a breach of the principles relating to maternity protection and may even be regarded as discrimination on grounds of sex.<sup>174</sup>

Protection against dismissal also applies to an employee who, not knowing that she is pregnant, has made a declaration of intent to terminate her employment contract. The SC ruled that she has the right to waive such declaration as it was made under the influence of an error (ruling of 11 June 2003, I PK 206/02). The jurisprudence also allows for the possibility of withdrawal of the declaration of will made by an employee who, in the event of termination of the employment contract by mutual agreement of the parties, at the time of conclusion of the agreement, did not know about the state of pregnancy. Such a statement is also considered to be submitted under the influence of an error, even if the employee herself was the initiator of the dissolution upon agreement (SC ruling of 3 February 1993, I PZP 72/92).

There are also several rulings related to a limited scope of protection (in the case of fault of the employee and liquidation or bankruptcy of the employers' enterprise).

With respect to the liquidation of the employer, the Supreme Court ruled that the closure of a branch of a foreign legal entity in Poland, being an employer within the meaning of Article 3 LC does not constitute the liquidation of that employer within the meaning of Article 41(1) of the Labour Code and cannot exclude the protection of the employment relationship of pregnant employees provided for in Article 177(4) of the Labour Code (SC ruling of 3 December 2009, II PK 147/09).

The Supreme Court also confirmed the views expressed earlier in the literature, that the requirement (provided for in Article 177(1) and (4) LC) to obtain the consent (or opinion) of a trade union organisation, does not apply to those situations when women are not covered by trade union protection. To take a different approach would lead to impunity and greater protection for those workers who have not designated the organisations representing them (resolution of SC of 18 March 2008, II PZP 2/08).

Recent national case law<sup>175</sup> proves that there are also other difficulties in understanding the exceptions to the prohibition of the dismissal from work of pregnant women. One of these cases was regarding a religion teacher at a public school who was dismissed despite the fact that she was pregnant, because her permit to teach religion (*missio canonica*) had not been extended.<sup>176</sup> The diocesan bishop, responsible for the issuing of this document, refused to extend it when he learned that the teacher was a divorcee and lived with the father of her unborn child without being married. The court of first instance found that the school was entitled to dissolve the employment contract with the woman after the refusal of the extension of the *missio canonica*, since in light of

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<sup>174</sup> The case concerns a woman, employed by the Regional Healthcare Insurance Fund, who has been on sick leave for 7 months... After returning to work, the respondent terminated the claimant's contract with three months' notice, and as the main reason for termination of the contract indicated disorganisation of work resulting from the frequent absence. The Regional Court stated that the termination of the claimant's employment contract was made in accordance with binding regulations and the reasons for the termination were justified. The District Court changed the judgment under appeal by ordering the respondent to pay the claimant compensation for unlawful termination of the employment contract. The Supreme Court, however, stated that the District Court did not take into account the fact that the state of pregnancy existed at the time of sick leave, whereas at the time of the Court's ruling the claimant was no longer pregnant, and therefore it could be assumed that there would be no further absences from work caused by the claimant's inability to work. The Supreme Court also pointed out that the Regional Court failed to determine when the claimant was pregnant, as well as when the miscarriage occurred and how these circumstances affected her inability to work. The Court stressed that an event such as pregnancy (which may turn out to be dangerous, which justifies the sick leave for its duration until the delivery) should not be treated as a circumstance against the employee.

<sup>175</sup> Case No. VII Pa 326/15, Ruling of 20 October 2016 of the Regional Court in Kraków.

<sup>176</sup> The requirement to hold a valid permit is regulated in Section 12(3) of the International Agreement between the Polish Government and the Vatican concluded in 1993 (so-called Concordat). Published: in Jol 1998 No. 51 Item 318.

Article 23(1) Item 6 of the Teacher's Charter,<sup>177</sup> such refusal constituted a lawful basis for the dissolution of the employment contract. In her appeal the teacher claimed that the court of first instance had violated material law, by assuming that the case of dismissal of a pregnant religion teacher, whose *missio canonica* has not been extended, is not regulated by law. The court of second instance fully rejected the appeal. Although it found that in this case Article 177 LC should be applied, it nevertheless decided that this fact would not influence the direction of the ruling. The court noted that, in the case of the claimant, the exception from the general prohibition provided for in Article 177(1) LC applied, namely the possibility to terminate the contract if the reason for termination resulted from a fault of the employee. The court interpreted her failure to formally obtain the extension of her *missio canonica* as a fault of the employee (by not lodging an official application for an extension). The court failed to consider the circumstance, indicated by the teacher, that such official application was not required before and that she always obtained her extension (in practice, a stamp in the teacher's book) automatically, upon her visit to the Curia. Exceptional in this ruling are the hypothetical considerations of the court, regarding what would have happened, if the teacher had submitted an official application for extension of the *missio canonica*. In the court's opinion, in such a situation the Bishop would still be entitled to refuse an extension of the permit due to her personal situation, without discriminating against her. The court noted that 'such behaviour of the church authorities lies within the exceptions set forth in Article 18<sup>3b</sup>(4) LC.<sup>178</sup> It also noted that the situation of the claimant was:

'(...) contrary to the religion of the Church which she was supposed to teach. Hence there was a collision between the claimant's right to protection of pregnancy and the right to decide upon her private life with the right to practise religion by church authorities'.

In the author's opinion, the reference of the court to Article 18<sup>3b</sup>(4) LC was very superficial, without a deeper analysis of its wording, especially by conducting the obligatory proportionality test.

### 5.3 Maternity leave

#### 5.3.1 Length

The length of maternity leave depends on the number of children born from one pregnancy.<sup>179</sup> Article 180 of the LC stipulates that a female employee is entitled to the following periods of maternity leave: 1) 20 weeks (140 days) when giving birth to one child in one birth; 2) 31 weeks (217 days) when giving birth to two children in one birth; 3) 33 weeks (231 days) when giving birth to three children in one birth; 4) 35 weeks (245 days) when giving birth to four children in one birth; 5) 37 weeks (259 days) when giving birth to five or more children in one birth.

<sup>177</sup> Consolidated text published in: JoL 2016 Item 1379 with amendments.

<sup>178</sup> This provision states that 'The principle of equal treatment is not violated where churches and other religious societies, as well as organisations the ethics of which are based on religion, belief or world view, deter access to employment on the grounds of religion, belief or world view provided the type or characteristics of the activity conducted by the churches and other religious societies, as well as organisations, causes that the religion, belief or world view are a real and decisive occupational requirement for the employee, proportional to reaching a lawful aim of the differentiation of the situation of such a person; it also concerns the requirement for the employed person to act in good faith and loyalty towards the ethics of the church, other religious society and organisation the ethics of which are based on religion, belief or world view.'

<sup>179</sup> Maternity leave shall not be granted in the event of a miscarriage. In the case of stillbirth (or death of a child before the end of the 8th week of life) the mother is entitled to a period of 8 weeks of maternity leave (not less than 7 days from the day of the child's death).

### 5.3.2 Obligatory maternity leave

There is no obligatory period of maternity leave before the birth.

Until 2009, the LC included the recommendation that two weeks of the leave should be taken before the childbirth. However, due to the fact that this provision was generally ignored, it has been abolished.

Currently Article 180(2) of the LC provides that no more than six weeks of maternity leave may be used prior to the expected date of childbirth.

It applies also to an insured woman who gives birth to a child while she is taking the unpaid childcare leave for children born earlier (cf. the judgment of the Court of Appeal of Katowice of 11 January 2012, III AUA 954/11).

The maternity leave must last at least 14 days after the birth (Article 180(4)).<sup>180</sup> After this period, the woman may resign from the remaining part of the leave in favour of the insured father<sup>181</sup> of the child. The compulsory period of maternity leave is only eight weeks if the woman does not care for the child for various reasons (death, abandonment of the child or her inability to care due to health reasons). This difference (14 as opposed to 8 weeks) in the length of the period of maternity leave reserved exclusively for mothers caring for their child, is considered to be an inconsistency of the legislator, as it is not justified in light of medical knowledge about the required recovery time after childbirth.

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

The protection of employment rights derives from Articles 45(3), 56 and 67(2) and Articles 243-265 of the LC. In such cases, general rules for resolving disputes deriving from employment agreements apply, with some modifications. These general provisions stipulate that disputes over claims arising from an employment relationship shall be settled by labour courts, which form separate organisational pillars of district courts (Article 262 LC). According to Articles 44 and 45(3), as well as Articles 56 and 67(2) of the LC, dissolution or termination of the employment agreement during pregnancy and maternity leave, which contradicts the rules defined in Article 177 of the LC, is not absolutely invalid *de jure*, but becomes relatively invalid. This means that only after a judgment from the Labour Court declaring the dissolution of an unlawful labour contract can the employee return to work. If, therefore, a respective claim is not lodged by the employee within the specified period, the dissolution of employment contract will be valid. It should be noted that if the court finds the dissolution to violate the provisions on the protection of women during pregnancy and maternity leave, upon her bringing a claim, it is obliged to declare the dissolution invalid and, if the contract has already been terminated, it has to reinstate her to work on the previous conditions. Awarding damages instead of reinstatement to work is allowed only when the latter is not possible due to reasons listed explicitly in the law, namely in the case of the employer's bankruptcy or liquidation (Article 41<sup>1</sup> LC), i.e. when the provisions about protection of employees during pregnancy and on maternity leave do not apply. With regard to other employees, awarding damages instead of reinstatement to work (if postulated by the employee) is possible in cases when reinstatement is impossible, but in such cases the decision as to whether one of these conditions applies remains within the discretionary power of the court.

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<sup>180</sup> If a woman is unable to care for her child (due to the state of health or abandonment of the child), the obligatory period of maternity leave is 8 weeks (Article 180(6) and (10) and Article 182 LC).

<sup>181</sup> If the father is not an employee but insured as self-employed, he must interrupt the economic activity for personal childcare purposes.

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

There are no single legal provisions that would explicitly ensure employment rights resulting from an employment contract during pregnancy and maternity leave.

However, Article 179(4-6) of the LC guarantees, for example, that if the woman during her pregnancy is transferred to another job or her work hours are limited, or even when she is released from performing the work, she should receive the same pay as stated in her employment contract. She will be reinstalled at the previous workplace as soon as the reasons for a change of employment cease to exist or, if this is not possible, she will be employed in another position corresponding to her professional qualifications for remuneration for her work which she would have received if she had not taken maternity leave (Article 183(2) LC). Article 184 LC provides that for the period of maternity leave, an employee is entitled to a maternity allowance under the rules set forth in the Act of 25 June 1999 on pecuniary benefits from social insurance in cases of sickness and maternity leave.

#### 5.3.5 Level of pay or allowance

The allowances during pregnancy and maternity leave are higher than 'normal' sickness allowances. The maternity allowances and sickness allowances during pregnancy amount to 100 % of the base for calculating the benefit<sup>182</sup> (Articles 31 and 11 of the Law on Maternity Benefits).<sup>183</sup> The 'regular' sickness benefits amount to only 80 % of the above base. There is no upper limit of those benefits in Polish law.

#### 5.3.6 Additional statutory maternity benefits

The so-called Family 500 plus benefit may be considered as an additional statutory maternity (child) benefit. This is granted monthly in the amount of PLN 500 (EUR 116.30) pursuant to the Act of 11 February 2016 on State aid in bringing up children<sup>184</sup> from the moment of birth of the child until his/her 18th birthday. The Family 500 plus benefit is currently paid for the second and subsequent children (and exceptionally in the case of poorer families also for 1 child), regardless of whether the family is insured and what financial situation it is currently in. It should be added that as of 1 June 2019, this supplement will be due also for one child, regardless of the financial situation of the family.

In addition, parents whose net monthly income per capita does not exceed PLN 1 922 (EUR 500) are entitled to the so-called *becikowe* payment, that is, a one-time birth grant of PLN 1 000 (EUR 232.50) per one living child (Article 15b(1) of the Law on Family Benefits).<sup>185</sup>

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

The conditions of eligibility for benefits related to sickness and maternity are provided for in Articles 4 and 29 of the Law on Maternity Benefits. The basic condition to benefit from

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<sup>182</sup> Pursuant to Article 36 of above-mentioned Law, this base constitutes the average salary of the last 12 months.

<sup>183</sup> In addition, if the sickness occurred during pregnancy the allowance is paid for longer ('normally' max. 182 days, during pregnancy max. 270 days).

<sup>184</sup> Act of 11 February 2016 on State aid in bringing up children. JoL of 2016 Item 195.

<sup>185</sup> If more than one child (alive) is born during a single birth, the subsidy is paid for each of these children. Besides confirmation of low income, the child's mother should provide a certificate from a doctor or midwife informing about the fact that she was under the care of a doctor no later than from the 10th week of pregnancy until the day of childbirth.

maternity allowance is to have (compulsory or voluntary) so-called sickness insurance (which also covers maternity).<sup>186</sup>

The conditions for eligibility for maternity benefits differ from those related to sickness benefits. According to Article 29 of the above-mentioned Law, the only condition for receiving maternity benefits, both by a person employed under an employment contract and by a self-employed person, is the existence of valid sickness insurance in the meaning of the Law of 13 October 1998 on the System of Social Security. Since 1 January 2016,<sup>187</sup> new provisions regarding self-employed persons are to be applied, according to which the amount of maternity benefits while conducting commercial activity will depend on the period of paying contribution fees and on their amount. This change of the law, considered to be discriminatory for self-employed women (since employees still receive maternity benefits according to their actual average salary), was introduced by the Law of 15 May 2015 on the amendment of the Law on Maternity Benefits and some other laws.

As regards sickness benefits, if the worker is subject to obligatory insurance (as is the case with employees on an employment contract), then the required insurance period amounts to 30 days of uninterrupted sickness insurance (which does not have to be with the same employer). If the worker is insured on a voluntary basis (as e.g. self-employed persons), the minimum insurance period amounts to 90 days (Article 4 of the Law on Maternity Benefits).

The special provision concerning taking up employment by an uninsured mother is worth noting. A mother who is not an employee on the day of childbirth is not entitled to maternity leave. If she is not covered by social insurance in the event of sickness or maternity, she is not entitled to a maternity allowance, either. However, if the mother takes up not less than half of the full-time employment, the right to maternity leave shall be vested in the father employee raising the child. This right shall only apply during the period when the mother is employed. This is due to the fact that the maternity allowance is not paid for the birth of a child but for care of the child (because the guardian loses the possibility to earn money).<sup>188</sup>

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

The right to return to the same or an equivalent job after maternity leave is guaranteed in Article 183<sup>2</sup> of the LC. According to this provision, after the end of a period of maternity leave, the employer shall accept an employee to resume work in the previous position or, if this is not possible, in a position equivalent to the position held before the leave or in another position that corresponds to the employee's professional qualifications, against remuneration in the amount that would be due if the leave had not been used. All changes in remuneration which occurred during this leave should be included.<sup>189</sup>

#### 5.3.9 Legal right to share maternity leave

Article 180(4) of the LC provides for the possibility of sharing part of the maternity leave with the child's father, although it does not speak about this option in terms of a legal right of the father (because his entitlements are dependent on the insurance

<sup>186</sup> Such insurance does not apply to persons receiving unemployment benefit, as well as persons receiving scholarships.

<sup>187</sup> The entering into force of these amendments has been postponed because of protests of self-employed mothers. Available at: <https://lawsolutions.eu/swiadczenie-rodzicielskie-a-zasilek-macierzynski-dla-przedsiębiorczych-matek/>.

<sup>188</sup> Sobczyk, A., (in) *Kodeks pracy. Komentarz* (Labour Code. Commentary) ed. Sobczyk, A., 2nd edition, C.H. Beck, Warszawa 2015, p. 745.

<sup>189</sup> Patulski, W., (in) *Kodeks pracy. Komentarz* (Labour Code. Commentary), ed. Muszalski, M., 8th edition, C.H. Beck, Warszawa 2011, p. 804.

entitlements of the mother of the child). In result, the father employee – although he is insured on the conditions provided for in the Law of 13 October 1998 on the system of social security – is not entitled to the part of maternity leave if for instance, the mother employee is insured in another EU member state on worse conditions compared to the Polish conditions. The subjective right to maternity leave is vested exclusively with the mother, who may (after taking 14 weeks of this leave) resign from the remaining part of it (and thus from receiving the maternity allowance), for the benefit of the insured father of the child,<sup>190</sup> or, in specific circumstances,<sup>191</sup> also for an immediate family member of the employee.<sup>192</sup> According to the Law of 16 May 2019 amending the LC (JoL 2019 Item 1043), the special protection against dismissal during maternity/parental<sup>193</sup> leave enjoyed by employee mothers or fathers shall also apply to such immediate family member (new wording of Article 177(5) of the LC).

The LC does not provide the possibility to take maternity leave on a part-time basis. It means that only 'full-time' maternity leave is permissible.

### 5.3.10 Case law

There have been cases of discrimination against women in relation to maternity, resulting in differences in wage and refusal of access to professional training offered to employees, because of frequent use of childbirth-related leave.<sup>194</sup>

An issue of constitutionality, for example, arose with regard to the application of Article 2(3) of the Law of 12 December 1997 on Additional Annual Salary<sup>195</sup> (so-called 13th salaries) during maternity leave. Employees of the budgetary sphere (generally speaking those who are paid from public finances)<sup>196</sup> are entitled to this 13th month if they have worked for at least six months in one calendar year, unless one of the situations listed in the law occurs. From amongst the rights associated with childbirth those exceptions only mention childcare leave (*urlop wychowawczy*). Hence no other periods of justified absence from work may be added to this category, such as maternity or parental leave. The Constitutional Tribunal in its judgment of 9 July 2012 (P 59/11) declared this provision incompatible with the constitutional prohibition of discrimination and principle of protection of maternity, to the extent to which it omitted the period of maternity leave.

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<sup>190</sup> A female employee with a certificate of incapacity for independent living is entitled to withdraw from the remaining maternity leave, after having taken at least eight weeks after childbirth, for the benefit of the insured father raising the child or of another insured member of the immediate (closest) family. (Article 180(6-7)) LC. The insured father (or a member of the closest family) has the right to the remaining part of maternity leave (allowance) in the case where the woman is placed in hospital or in the event of her death. In the case of abandonment of the child by the woman, she is entitled only to eight weeks of maternity allowance. In the event of the birth of a child requiring hospital care, an employee who has taken eight weeks of maternity leave after the birth may take the remaining part of the leave at a later date, when the child leaves the hospital (Article 181 LC).

<sup>191</sup> That is when: the mother of the child has been declared incapable of independent existence, is in hospital, has died, or has abandoned the child (Article 180 Sections 6, 10, 12 and 13 LC).

<sup>192</sup> They may also enjoy other analogous rights to those of parents bringing up a child (e.g. with regard to compensation in the event of an illegal termination of the employment contract, the right to take advantage of the leave immediately after the maternity or parental leave).

<sup>193</sup> According to Art. 182<sup>19</sup> LC all these provisions shall apply to parental leave as well as maternity leave.

<sup>194</sup> One such case was brought to the Supreme Court, in which a woman sued her employer before the labour court, accusing him of discrimination based on sex, age and family status (five children). This was manifested in large disparities in income (her wage amounted to 58 % of the average salary of the entire crew) and bypassing her with regard to training. The Supreme Court in its judgment of 8 January 2008 (II CP 116/07) recognised discrimination.

<sup>195</sup> JoL 1997 No. 160, Item 1080. Hereafter Law on additional annual salary.

<sup>196</sup> The full list of employees of the budgetary sphere is provided for in Article 5 of the Law of 23 December 1999 on Remuneration in the State Budget Sector (unified text JoL 2018 Item 2288). This list includes among others: persons occupying managerial state positions; members of the civil service corps; full-time members of self-government; teachers employed in schools and institutions run by government administration bodies; professional soldiers.

In the judgment of 7 October 2014 (I UK 51/14) the Supreme Court ruled (in favour of the claimant) that in the case of the transfer of a pregnant woman (set for in Article 179 LC) from a job classified as being 'performed in special conditions' forbidden for this category of women, to a lighter job, the periods of receiving sick pay and maternity allowance related to pregnancy and maternity, shall be included in the length of service under special conditions.<sup>197</sup>

A large portion of the case law relates to dismissal on the basis of Article 10(2) of the so-called Law on group dismissal.<sup>198</sup> This law, despite the name in use, is also applied to cases of individual dismissal. This provision allows the employer to dissolve employment contracts also with protected employees, not exclusively in the case of liquidation of the enterprise as a whole, but just in case his/her position is made redundant. A common mistake made by employers, with respect to this law, was indicating only general reasons in the justification of dissolutions of employment contracts, such as the need to reduce employment, without referring to reasons applicable to the position of the laid off employee in particular. Courts of 1st and 2nd instance usually did not pay attention to the incorrectness of such practice. Therefore, the Supreme Court, in the ruling of 25 January 2013 (I PK 172/12), explicitly noted that:

'in a situation when the dissolution of employment contract relates to a particular employee, selected by the employer from a larger group of employees, working in the same positions, by assessing the reason for dismissal, one has to indicate not only organisational changes or reduction of employment, but also the criteria of selecting the particular employee'.

Following this way of thinking, the Regional Court for Warsaw Praga-Południe, in a ruling of 29 July 2014 (VI P 167/13), accepted the claim of women being dismissed during childcare leave. In the opinion of this Court, the employer in the justification for dismissal did not indicate why it chose to dissolve the contract with the claimant (or what criteria were in use to select the persons for lay off), while having seven other persons in a similar situation to choose from. The fact that at the same time, six other persons on childcare leave were dismissed, was for the Court the confirmation that the defendant, in selection of employees for dismissal, applied discriminatory criteria (in the form of taking up of parental rights).

The case law of the SC is also connected with improper interpretation by the employer (and some of the courts of lower instances) of the obligation to employ employees in the previous position after their return from maternity leave, with the same pay to which they would have been entitled if they had not taken up the leave (Article 183<sup>2</sup> LC). As regards employment of an employee after her return from maternity leave, in the judgment of 26 January 2017 (II PK 333/15), the Supreme Court clearly specified how the employer should make a decision in this matter in terms of the order of the proposals submitted to the employee. In the first instance, the employee is guaranteed a return to the position occupied before the maternity leave, and only after the return to this position is not possible, the employer shall offer him/her a position equivalent or corresponding to his/her professional qualifications. It means that, in any case, the employer cannot terminate the employment relationship with the employee due to the fact that the employee's position was made redundant. Inability to work in the current position should be objective. It should result from a change in the organisational structure of the enterprise and depends only on the existence of a previous position. Therefore, the alternative employment, with the same pay, is excluded in the situation when the position has not been liquidated, but another person has already been employed in it. In this way, the legislator protects the stability of employment of an

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<sup>197</sup> The required period of service entitling the worker, for instance, to a retirement pension, in the case of work in special conditions, is shorter than normal.

<sup>198</sup> The Law of 13 March 2003 on special rules regarding the termination of employment relationships for reasons not related to employees. Consolidated text JoL 2018 Item 1969.

employee returning from maternity leave. In the mentioned case, there was no objective impossibility to employ the claimant in her previous position, because this position still existed in the organisational structure of the employer's enterprise, moreover, an external recruitment had been organised in order to fill this position, as a result of which another person was employed, who did not take up parental rights. Crucial for the assessment as to whether the working conditions of the claimant have worsened is if, before taking the leave, she was entitled to such pay components as annual premium or responsibility bonus, regardless of the legal basis on which they were awarded. If, upon return from maternity leave, the claimant was transferred to another unit, where such pay components were not available, this transfer resulted not only in a change of working position, but also in a deterioration of pay conditions of the claimant and should thus be considered as discrimination.<sup>199</sup> This ruling was generally correct, however, there are two critical remarks to be made. First of all, the SC only presented its general remarks on shifting the burden of proof in discrimination cases, regulated in Article 18<sup>3b</sup> LC and its interpretation in EU law and previous Supreme Court (SC) jurisprudence. It failed, however, to indicate the effects of this rule for the present case, despite the fact that the claimant raised the problem that the court of 2nd instance should have found that the requirement of making discrimination probable was met by the mere fact that the claimant was not employed in her previous or equivalent position. Secondly, despite having correctly decided that, in order to properly assess the violation of the non-discrimination rule, the situation of the claimant has to be compared with treatment of other employees in similar conditions, the SC failed to make any detailed findings in this regard.

It happened in practice that the courts questioned the amount of maternity allowance agreed by the Social Insurance Institution (ZUS) in its decisions. For example, in the judgment of 6 December 2016 (II UK 439/15) the Supreme Court ruled that an insured person who was temporarily full-time employed, but had been on sick leave for almost nine months due to medical complications connected with the pregnancy, retains the right to maternity allowance in full, despite the fact that she agreed to reduce her working time to half-time, before taking the sick leave. This case was about a woman employed in a bank who initially worked part-time. Then the employer temporarily increased her working time to full-time, and she agreed to work part-time again after three months. Before this happened, however, the employee took sick leave due to a pregnancy. At that time, until the birth of the child, the Bank paid her a full-time sickness benefit. However, when the woman gave birth to the child, the Social Insurance Institution (ZUS) started to pay her maternity allowance calculated on a half-time basis. As a result, the woman received half as much money monthly. The insured person disagreed with this decision and appealed it to the court. The court acknowledged her claim referring to Article 43 of the Act of 25 June 1999 on social insurance benefits in cases of sickness and maternity, according to which the basis for benefit assessment is not re-established if there was no break between the periods of receiving both the same and different types of benefits, or if the break was shorter than three calendar months. The court indicated that from the time when the woman went on medical leave until the birth of her child, she was receiving sick leave allowance. In view of this provision, the court held that ZUS, when granting maternity allowance, should not recalculate its amount.

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<sup>199</sup> In this case the claimant accused the employer of violating Article 183<sup>2</sup> LC and discriminating against her, in the understanding of Article 183<sup>a</sup>(1) LC and Article 11<sup>3</sup> LC, with regard to taking up by the employee of her rights related to parenthood. The court of 1st instance agreed with arguments of the defendant-employer, deciding that he did not violate his obligations resulting from Article 183<sup>2</sup> LC, and that he did not discriminate against her, in the understanding of Article 183<sup>a</sup> LC and Article 11<sup>3</sup> LC. The court of 2nd instance confirmed this ruling. Only the Supreme Court, after the claimant lodged a cassation claim, shared her arguments. In concluding, the SC noted that the rulings of the court of 2nd instance occurred with violation of material law, regarding discrimination in employment.



It has to be noted that protection against dismissal often ceased automatically with the return to work. This means that, in many cases, the decision to dismiss a woman after her return from maternity leave has been planned by the employer in advance, already during that leave. Such employer's behaviour is contradictory to Article 10 of Council Directive 92/85/EEC of 19 October 1992.<sup>200</sup> According to the case law of the CJEU, this provision must be interpreted as prohibiting not only the notification of a decision to dismiss on the grounds of pregnancy and/or of the birth of a child during the period of protection set down in Paragraph 1 of that Article but also the taking of preparatory steps for such a decision before the end of that period.<sup>201</sup>

The jurisprudence of the Supreme Court, which is criticised in literature,<sup>202</sup> shows that the employer has an absolute obligation to allow an employee to work after leave related to the birth or raising of a child. It does not mean, however, that he cannot terminate the employment contract after return from such leave (cf. the reasoning of the Supreme Court resolution of 30.12.1985, III PZP 50/85).

The provisions of the LC prohibit dismissal during maternity leave and guarantee employees the possibility to return to work in the previous position after the end of maternity leave, yet they do not safeguard protection from dismissal or termination of employment agreement thereafter. It is common belief that cases of dismissing women with young children are quite frequent. According to the State Labour post-inspection report, out of 875 women taking up maternity leave in 2012, 50 were dismissed within 6 months after returning to work (constituting 6 % of cases). In 2013, respectively, 34 women out of 785 were dismissed (4.3 %). As regards men returning to work after taking up their part of maternity leave, the percentages were higher, amounting to 12 % in 2012 (11 out of 87 cases) and 10 % in 2013 (4 out of 39 cases).<sup>203</sup> These numbers seem to confirm the common belief; however, one should be careful to generalise it, without knowing the overall percentage of persons who were dismissed, in comparison to the general number of persons employed in a particular enterprise.

## 5.4 Adoption leave

### 5.4.1 Existence of adoption leave in national law

The Labour Code in Article 183 provides for adoption leave in the wording introduced by the Law of 6 December 2008<sup>204</sup> and modified by the Law of 24 July 2015.<sup>205</sup> The length of the leave depends on the number of children adopted at the same time and corresponds with the leave at childbirth. It amounts to 20 weeks (210 days) for one child and up to 37 weeks (258 days) for five or more children.

Such leave may be taken by the employee (adoptive mother or adoptive father) until the child is 7 years old (10 for a child with disability) (Article 183(1) of the LC). If, for example, the child is to turn seven only a few weeks after being adopted, the employee is entitled to a minimum period of leave of nine weeks (Article 183(3) LC). A condition for receiving leave in the case of adoption is assuming the care of a child and applying to

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<sup>200</sup> On the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding.

<sup>201</sup> So stated CJEU in C-460/06 *Nadine Paquay v Société d'architectes Hoet + Minne SPRL* (2007) EU:C:2007:601.

<sup>202</sup> See: Sobczyk, A. (in) *Kodeks pracy. Komentarz* (Labour Code. Commentary) ed. Sobczyk, A., 2nd edition, C.H. Beck, Warszawa 2015, p. 777.

<sup>203</sup> Cf.: Results of investigation on the layoffs of persons returning from maternity, paternity, and parental leave and the observance of other employee rights, State Inspectorate of Labour, 2014 <https://www.pip.gov.pl/pl/f/v/100996/sprawozdanie2013.pdf>.

<sup>204</sup> JoL 2008 No. 237, Item 1654 with amendments, in force since 1 January 2009.

<sup>205</sup> JoL 2015 Item 1268 and JoL 2015 Item 1735, in force since 2 January 2016. Further cited as amendments of the LC of 24 July 2015.

a family court for the adoption procedure or accepting the child for raising as a foster family (with the exception of professional foster families, Article 183(1) LC).

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

The Labour Code provides for protection against dismissal of workers who take adoption leave and specifies their rights after the end of adoption leave. The protection of the employment relationship of foster parents is the same as that for natural parents.

Articles 183(2) and 183<sup>2</sup> of the LC apply here. According to Article 183(2) of the LC, several provisions regarding the protection of natural parents are to be applied accordingly, among others, to the consequences of unlawful dissolution of employment relationships with foster parents (Articles 45(3), 47, 50(5), 57(2) LC); provisions of Article 177 LC prohibiting dismissal of an employee during maternity leave; Article 180(4) allowing the adoptive mother to renounce part of the maternity leave on behalf of the father of the child and Article 181 LC allowing the employee, in the event of the birth of a child requiring hospital care, to take a remaining part of the leave when the child leaves the hospital.

#### 5.4.3 Case law

Until being cleared by the Supreme Court, the issue of qualification of a particular employee as a person entitled to adoption leave caused practical problems. In order to admit an employee to parental leave in such cases, employers required employees to present a formal decision of a family court, on the temporary acquisition of rights of custody over a child. Only then they considered the condition of 'taking a child for raising', provided for in Article 183 Section 1 LC, to be fulfilled.

In one of the examined cases, the Courts of 1st and 2nd instance confirmed such practice, rejecting the claim of a woman for granting her adoptive leave, before such court decision was issued.<sup>206</sup> As a result of a cassation claim filed by the claimant, the ruling of 2nd instance was overruled by the ruling of the Supreme Court of 4 June 2012 (I PK 4/12) and the case was referred back to the court for re-examination. In the reasoning in this ruling the SC noted that employees who filed a formal notion for adoption and who in fact are actually bringing up the child (even if the custody has not been formally established by court for the duration of the proceeding), are also entitled to adoption leave. The SC referred to a systemic interpretation, noting among other things that it is not possible to assume that the term 'taking a child for raising' has any other meaning than the one resulting from social security regulations (namely, actual custody over a child, irrespective of the formal status of the caregiver).<sup>207</sup> In conclusion the SC stated that Article 183(1) LC does not make the right to leave, under the conditions of maternity leave, dependent on the employee obtaining a decision on entrusting custody of a child pursuant to Article 120[1] of the Family Code.

### 5.5 Parental leave

#### 5.5.1 Implementation of Directive 2010/18

The Directive 2010/18 has been implemented in Poland; however, it is not clear which type of leave should be considered as parental leave within the meaning of this Directive.

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<sup>206</sup> The argument was raised that acceptance of the state of facts, as allowing for the application of article 183 (1 LC), could lead to unjustified uptake of maternal leave by the claimant, in a case where her motion for adoption is refused by the court.

<sup>207</sup> This issue is of great importance, since yearly, there are around 3 000 adoptions (for example, in 2016 – 2 800).

The formal amendment of the Labour Code with respect to childcare leave, implementing the provisions of Directive 2010/18, was made in the Law of 26 July 2013,<sup>208</sup> which entered into force on 1 October 2013.<sup>209</sup> The tables to illustrate the correlation between the above Directive and the transposition measures were added as an appendix to Parliamentary Document No. 909 of 21 November 2012, including the draft law.<sup>210</sup> Therefore, unpaid childcare leave (*urlop wychowawczy*) provided for in Article 186 of the LC, should be regarded beyond doubt as such leave.

Doubts arise in relation to paid parental leave (*urlop rodzicielski*)<sup>211</sup> which due to the specific function has been considered by the scholars as also implementing Directive 2010/18, despite the fact that the regulations first introducing this type of leave mentioned neither the above Directive, nor its predecessor.<sup>212</sup> This leave is currently regulated in Articles 182<sup>1a</sup>, 182<sup>1c</sup>, 182<sup>1d</sup>-182<sup>1g</sup> of the LC.

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

The provisions of the LC, including those regarding parental leave (*urlop rodzicielski*) and childcare (*urlop wychowawczy*), apply both to the public sector and to the private sector, and both parents as well as adoptive parents are entitled to them.

### 5.5.3 Scope of the transposing legislation

The right to parental leave (*urlop rodzicielski*) and childcare leave (*urlop wychowawczy*) does not depend on the type of employment contract. This means that the leave is granted both to persons employed on the basis of an open-ended contract and to workers with a contract for a specified period, e.g. for a trial period, for a fixed-term period, or for the performance of a specific job. Temporary workers, both male and female, are entitled to childbirth-related leave and childcare leave according to the general rules stipulated in the LC.<sup>213</sup>

It is worth underlining that the Law of 24 July 2015 on amendment of the Labour Code and some other laws, introduced a new provision (Article 175<sup>1</sup> LC), stipulating that all rights guaranteed in this Code, related to protection of pregnancy and childbirth, including parental leave, will apply to all insured persons (and not exclusively to employees in the meaning of the LC, as it was before). In practice, this means that parents have the option to share childcare-related rights in situations where: either both are employees or both are insured against sickness/maternity from other sources (e.g. self-employment, a civil law contract), or one of them has employee status, while the other is self-employed or is working under a civil law contract and is covered by

<sup>208</sup> Law of 26 July 2013 amending Labour Code, JoL 2013 Item 1028. It should be added that Poland asked for the implementation deadline of this Directive to be postponed.

<sup>209</sup> With regard to these changes, on the basis of the authorisation included in Article 186<sup>6</sup> of the LC, a new ordinance of the Minister of Labour and Social Policy of 18 September was issued, regarding detailed conditions for granting childcare leave, JoL 2013 Item 1139.

<sup>210</sup> They were published together with the draft on the website: <http://www.sejm.gov.pl/sejm7.nsf/PrzebiegProc.xsp?nr=909>. It is worth noting that the *European trade union confederation (ETUC) interpretation guide to Directive 2010/18* has also been translated into Polish and published.

<sup>211</sup> The parental leave (*urlop rodzicielski*) in actual form has been in force since 24 July 2015 (JoL 2015 Item 1268). This leave is a result of the combining (merging) of no longer existing additional maternity leave (*dodatkowy urlop macierzyński*), introduced into the Labour Code by the Law of 25 November 2010 (JoL 2010 No. 294 Item 1655), and parental leave (*urlop rodzicielski*) introduced by the Law of 28 May 2013 on the amendment of the LC and other laws, JoL 2013 Item 675.

<sup>212</sup> It should be noted that the introduction of all childbirth-related leave, including parental leave, was justified by the pro-natalist Government policy. At the same time, the reasoning to the draft law of 2013 emphasised the fact that its contents lie outside the scope of EU law (Cf.: Parliamentary Print No. 939, <http://www.sejm.gov.pl/sejm7.nsf/druk.xsp?nr=939>).

<sup>213</sup> In conjunction with the Law of 9 July 2003 on the employment of temporary workers. Such leave should be agreed before the contract ends unless the employer would like to renew the contract for temporary employment. (See Resolution of Supreme Court of 21 November 1978, I PZP 28/78).

voluntary insurance (in the case of sickness/maternity). Exceptionally, an employed father may take childbirth-related leave when the mother is not entitled to any social security in the case of sickness/maternity and if she is unable or unwilling to take care of the child.<sup>214</sup>

If neither parent is working, they are not entitled to maternity benefits (*zasilek macierzyński*) as such. However, since 2016, one of the parents, if they are a student, or both are actually unemployed (not dependent on whether or not they are registered as being unemployed),<sup>215</sup> are entitled to receive PLN 1 000 (EUR 250) monthly until the child reaches the age of one (this is the so-called parental benefit – *świadczenie rodzicielskie*).<sup>216</sup> In addition, as already mentioned, most of them (and since 2019, all of them)<sup>217</sup> are entitled to the monthly 'Family PLN 500-plus benefit' for every child (until the child reaches the age of 18).

#### 5.5.4 Length of parental leave

Since 2 January 2016, the duration of paid parental leave (*urlop rodzicielski*), which has to be taken directly after the end of the maternity leave, is 32 weeks (when giving birth to one child in one birth) and 34 weeks when giving birth to more children in one birth (Article 182<sup>1a</sup>(1) of the LC).

In addition, each parent is entitled to unpaid childcare leave (*urlop wychowawczy*) of a total aggregated duration which generally amounts to a maximum of 36 months (Article 186(2) of the LC) and in the case of a disabled child, to a maximum of 72 months. Article 186(3<sup>1</sup>) of the LC stipulates that both parents or guardians of the child are entitled to leave in the above limits jointly. There are no differences as to the duration of these types of leave between the public and the private sector.

#### 5.5.5 Age limits

Since 2 January 2016, parental leave (*urlop rodzicielski*) is to be taken in whole or in parts until the end of the calendar year in which the child reaches the age of six (Article 182<sup>1c</sup>(1) of the LC).

The same age limit is established in cases of unpaid childcare leave (*urlop wychowawczy*), which may be taken at any time, under the condition that it will be finished by the end of the calendar year in which the child reaches the age of 6 (Article 186(2) of the LC), or 18 in the case of a disabled child (Article 186(3) of the LC).

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<sup>214</sup> In terms of the Law of 13 October 1998 on the social security system.

<sup>215</sup> If the person in question has an official 'unemployed' status through being registered at an Employment Office (directly after being employed for at least one year), she/he will be additionally entitled to unemployment benefit for 6 months (with the possibility of an extension for up to one year). The amount of this benefit is circa EUR 200-220 (PLN 700-1 000 depending on the length of time that she/he has worked before becoming unemployed and the amount of the minimum wage). During that period the State will pay the unemployed person's social pension/rental insurance as well as his/her health insurance contributions, but not his/her sickness/maternity insurance contributions. Therefore, these unemployed persons are not entitled to maternity benefits similar to those received by employed persons. However, if being registered as unemployed has taken place before the woman became pregnant, such unemployment benefit will be paid to her not only during the whole pregnancy, but also after the birth of the child (as long as she would receive the maternity benefits if she were employed under an employment contract). The unemployment benefit is paid in such a situation regardless of the parental benefit and the Family 500 plus benefit. Therefore, some are of the opinion that such a regulation demotivates young women from seeking employment, <http://praca.gazetaprawna.pl/artykuly/862018,matce-oplaci-sie-brak-zatrudnienia-nawet-1700zl-dla-bezrobotnego-rodzica.html>.

<sup>216</sup> The lower maternity benefit of farmers who are insured against sickness/maternity; self-employed persons working outside the agricultural sector (V.565.75.2017) and persons working on the basis of civil contracts, will also be upgraded to PLN 1 000 (EUR 238) per month.

<sup>217</sup> The Law of 26 April 2019 (JoL 2019 Item 924 amending the Act of 11 February 2016 on State aid for bringing up children) has introduced the 500+ benefit for every first child starting from 1 July 2019 (up until then, only families in a bad financial situation were entitled to such benefit (for the first child)).

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

Article 182<sup>1a</sup> LC stipulates that each employee has the right to paid parental leave (*urlop rodzicielski*) which should be understood as entitlement of each of the parents to an individual right to this leave. The entitlement is the same in the case of unpaid childcare leave (*urlop wychowawczy*) (Article 186 LC).

### 5.5.7 Transferability of the right to parental leave

Both parents who are entitled to parental leave (*urlop rodzicielski* – 182<sup>1a</sup>(2) of the LC), can take it simultaneously (182<sup>1a</sup>(3) of the LC) or consecutively (each takes a part of it). However, in both cases, the total duration of the leave may not exceed 32 weeks (or 34 in the case of multiple children at one birth). There is also an option for one parent to take the parental leave and another parent at the same time takes only the benefit without leave (182<sup>1a</sup>(4) of the LC). In such a case, the total aggregated duration of leave and sole payment of benefits may not exceed 32 (or 34) weeks (Article 182<sup>1a</sup>(4) of the LC). The possibility to transfer the right to childcare leave (*urlop wychowawczy*) is provided for in Article 186 LC. However, only in the case of this leave, the LC requires that each parent has one month of leave (with some exceptions) for exclusively his/her own use, which means that it expires if not taken (Article 186(4) and (5) LC).

### 5.5.8 Forms of parental leave

Paid parental leave (*urlop rodzicielski*) may be divided into a maximum of four parts, which have to follow each other directly (Article 182<sup>1c</sup>(2) of the LC). This rule does not apply in the case of piecemeal parental leave up to 16 weeks (Article 182<sup>1c</sup>(3) of the LC), which may be taken later on, also after the break. Each part of parental leave may not (with some exceptions) be shorter than eight weeks (Article 182<sup>1c</sup>(4) of the LC).

Until 2 January 2016, a worker could combine parental leave (*urlop rodzicielski*) with work for the same employer, not exceeding half of the regular working time. In such cases, the leave was granted for the rest of the working time. In such a situation, however, there was no possibility to extend the length of parental leave. For this reason, commencing employment during parental leave was very rare. Since 2 January 2016, the possibility of extension exists with regard to parental leave. If such leave were to be combined with, for example, half-time employment, its length could thus be extended to 64 months (68 months in the case of multiple children at one birth) (Article 182<sup>1e</sup>(1-2) and 182<sup>1f</sup>(1-5) of the LC).

Unpaid childcare leave (*urlop wychowawczy*) may also be taken by both parents at the same time, without any time restrictions, however, the overall amount of the leave may not exceed the maximum amount of 36 months (72 months for a child with disabilities). At the same time, as already mentioned, each parent has an exclusive right to one month of the childcare leave, which expires if not taken. This does not apply to single parents, when the parent has died or has been deprived of custody over the child (Article 186(4) and (9) of the LC). In such cases, the other parent is entitled to the full 36 months of childcare leave. Childcare leave may be divided in up to five parts (Article 186(8) of the LC). In addition, the worker entitled to childcare leave may file a written request to decrease their working time to a number of hours not less than half of full-time work (Article 186<sup>7</sup>(1) LC). The employer may not refuse such request.

The Polish regulations regarding teleworking and other flexible work arrangements are not explicitly related to better reconciliation of work with family life, but remain available for parents returning from parental leave on a general basis (Articles 67<sup>5</sup>-67<sup>18</sup> LC).<sup>218</sup>

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<sup>218</sup> Law of 24 July 2015 on amendment of the Labour Code and some other laws. JoL 2015 Item 1268.

In order to allow the employer better planning of work and to eliminate possible negative effects resulting from employees taking advantage of their parenthood-related rights, as of 2 January 2016, the notice period, both for the paid parental leave and for unpaid childcare leave, has been extended to 21 days; the minimal length of one part of the leave will amount to 8 weeks. Also, earlier return to work by an employee who stops the parental leave or childcare leave, will only be possible upon consent of the employer. Additionally, as a safeguard of the employer's interests, his consent will be required for any proportional extension of the parental leave, when it is to be combined with work.

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

There are no work or length of service requirements in order to be entitled to parental leave (*urlop rodzicielski*) provided for in Article 179<sup>1</sup> of the LC. However, in the case of childcare leave (*urlop wychowawczy*, regulated in Article 186(1) LC), there is the requirement for at least six months' service.

In order to be entitled to parental leave (*urlop rodzicielski*) it is enough to be insured by social insurance. The entitlement to the leave, as well as the overall amount of parental benefits for employees, does not depend on the length of service or length of insurance. The benefits for employees depend solely on the amount of salary.

This was also the case of insured self-employed persons who were not employees. However, as of 1 January 2016, their situation has changed dramatically. According to the Law of 15 May 2015, the initial amount of the parental benefits in the case of self-employed persons depends on the length of payment and amount of insurance contributions. On the other hand, in the case of farmers, who are under the special system of insurance,<sup>219</sup> the entitlement to parental leave and benefits still do not depend on the length of insurance.

In respect of unpaid childcare leave (*urlop wychowawczy*), in order to obtain the right to childcare leave, a worker must be in service for at least six months. The six-month employment period includes previous employment (Article 186(1) LC), not necessarily with the employer where the request is submitted. This six-month period may include all previous employment periods on the basis of an employment relationship, regardless of the reason why those relationships were terminated and regardless of the length of gaps between subsequent employment (Article 186(1) LC). For citizens of the EU and EEA Member States, the six-month period may also include employment periods on the territory of those countries.<sup>220</sup> The six-month employment period, according to case law, also includes registered unemployment periods for which the person had received unemployment benefits.<sup>221</sup>

#### 5.5.10 Notice period

As of 2 January 2016, the notice period, both for the paid parental leave (*urlop rodzicielski*) and for unpaid childcare leave (*urlop wychowawczy*), has been extended to 21 days in order to provide better protection for the employer. Previously the fixed time limits for filing (or withdrawing) the request (7 or 14 days) had been strongly criticised.<sup>222</sup>

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<sup>219</sup> Provided by the Law of 20 December 1990 on Social Security for Farmers, unified Text JoL 2016 Item 277.

<sup>220</sup> Cf.: Świątkowski, A.M., *Kodeks pracy. Komentarz* (Labour Code. Commentary), 4th edition, C.H. Beck, Warszawa 2012, p. 862.

<sup>221</sup> Cf.: Ruling of the Court of Appeals in Białystok of 18 June 1998, III AUa 296/98, OSA 1999/5/28.

<sup>222</sup> Świątkowski, A.M., *Kodeks pracy. Komentarz* (Labour Code. Commentary), 4th edition, C.H. Beck, Warszawa 2012, p. 860.

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

The only circumstance which would allow the employer to postpone the granting of parental leave (*urlop rodzicielski*) is connected with failing to meet the deadline for the notice.

The employer is obliged to allow the worker to take advantage of the leave during the period indicated in the request if it has been submitted within the prescribed time limits of 21 days. Should any of the requests be submitted without observing this deadline, the employer may delay the beginning of the leave, but by no longer than 21 days from the day on which the request has been filed (Article 179<sup>1</sup> Article 182<sup>1d</sup>(1), 182<sup>4</sup>). Similar rules<sup>223</sup> are provided in the case of childcare leave (*urlop wychowawczy*, regulated in Article 186(7) and (7<sup>1</sup>) of the LC).

There are no other legal regulations regarding the possibility for the employer to postpone childbirth- and childcare-related leave.

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

Currently there are no special regulations regarding the taking of parental or childcare leave by workers of small firms.

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

According to Article 186(3) if, due to a health condition confirmed by a statement about disability based among others on medical certificate, a child requires personal care by a worker, then regardless of the 'regular' time limits of childcare leave (*urlop wychowawczy*), the worker may take 36 additional months of childcare leave, and the additional childcare leave may be granted before the child reaches the age of 18, even if the worker has not previously used the first 36 months of childcare leave to which he is entitled before the child reaches the age of 6. In the case of adoption of a child with disabilities, according to Article 183(1) LC, leave on the conditions of maternity leave may be taken until the child reaches the age of 10 (in other cases, 7). The same time limits apply to paternity leave (*urlop ojcowski*) (Article 182<sup>3</sup>(1) LC).

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

The Article 183(4) of the LC in the wording introduced by the Law of 6 December 2008<sup>224</sup> and modified by the Law of 24 July 2015<sup>225</sup> provides for the parental leave (*urlop rodzicielski*) for adoptive parents, which should be taken directly after the leave on the same conditions as for maternity leave. The length of the leave depends on the number of children adopted at the same time and corresponds with the leave at childbirth. It amounts to 20 weeks (210 days) for adoption of one child and up to 37 weeks (258 days) for five or more children. Such leave may be taken by the employee (adoptive mother or adoptive father) until the child is 7 years old (10 for a child with disability) (Article 183(1) of the LC). If, for example, the child is to turn 7 only a few weeks after being adopted, the employee is entitled to a minimum period of parental leave of 29 weeks (Article 183(3) LC). A condition for receiving leave in the case of adoption is assuming the care of a child and applying to a family court for the adoption procedure, or accepting the child for bringing up as a foster family (with the exception of

<sup>223</sup> That is, notice of 21 days and the obligation of the employer to allow the worker to take advantage of paternity leave.

<sup>224</sup> JoL 2008 No. 237 Item 1654 with amendments, in force since 1 January 2009.

<sup>225</sup> JoL 2015 Item 1268 and JoL 2015 Item 1735, in force since 2 January 2016. Further cited as amendments of the LC of 24 July 2015.

professional foster families, Article 183(1) LC). The legislator addresses the specific needs of adoptive parents by raising the maximum age of the child (7 years instead of 6; in the case of a child with disabilities, up to 10), which entitles adoptive parents to parental leave, and by providing a special term of such leave (29 weeks) in the case of adoption of a child who is to turn 7 shortly after being adopted.

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

The Labour Code provides as a rule, that the provisions protecting workers against dismissal or less favourable treatment during maternity leave apply also to the parental leave (*urlop rodzicielski*) (Article 182<sup>19</sup> in conjunction with Article 177 of the LC).

In reference to childcare leave (*urlop wychowawczy*), Article 186<sup>8</sup> of the LC stipulates that in general,<sup>226</sup> the employer may not terminate the contract, from the day that the worker submits the request for leave (or reduced working time) until the last day of the leave (or the day of return to regular work). This provision corresponds to the content of the Framework Agreement on Parental Leave, constituting Annex 5(4) to the Directive 2010/18/EU.

Also of relevance is Article 12 of the Anti-Discrimination Law,<sup>227</sup> which applies to persons not covered by protection of the LC. In the case of violation of the equal treatment rule stipulated in this law, with regard to a natural person, with respect to, inter alia, pregnancy, maternity leave, additional maternity leave, leave granted under the terms and conditions of maternity leave, paternal leave, parental leave or childcare leave, this person has the right to claim damages, according to Article 13 of this law.

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

The worker after parental leave and childcare leave (or requested shortening of working time) has the right to return to the same or an equivalent job. In such cases, the LC provides for a similar level of protection of employment relationship as in case of maternity leave. According to Articles 183<sup>2</sup> and 186<sup>4</sup> of the LC, the employer has the obligation to re-admit a worker at the end of the childbirth- or childcare-related leave to her/his former position. If employment in the same position is not possible, the employer has the obligation to employ her/him in an equivalent position or on the same conditions at another job position, corresponding to the worker's professional qualifications. These provisions correspond to the content of Clause 5(1) of the Annex to Directive 2010/18/EU.

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

Generally, the Labour Code does not explicitly state that the rights acquired (or in the process of being acquired) by the worker on the date of commencement of childcare leave (*urlop wychowawczy*) shall stand until the end of it. The case law, however, filled this gap.

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<sup>226</sup> The LC allows some exceptions for the termination of the employment contract by the employer: in the case of bankruptcy or liquidation of the employer, and for reasons justifying termination of the employment contract without notice through the fault of the worker (disciplinary dismissal) (in Article 182<sup>19</sup> with reference to Article 177(4) and (5), as well as Article 186<sup>8</sup>(2) of the LC). The difference with a parental leave cancellation is that no consent or agreement with the trade union organisation is required in this case.

<sup>227</sup> Article 12(1) of the Anti-Discrimination Law after amendments introduced by the Law of 28 May 2013 (Jol 2013 Item 675). The amendment entered into force on 17 June 2013.



However, the Labour Code contains a regulation relating to remuneration after return from the leave; namely, in the case of employment after parental leave, when Article 182<sup>2</sup> LC<sup>228</sup> applies. With regard to remuneration, it is provided that it should be the same as the employee would have received if s/he had not taken their leave. The content of this provision as far as parental leave is concerned appears to meet the requirements of Clause 5(2) of the Annex to Directive 2010/18/EU.<sup>229</sup>

In the case of Article 186<sup>4</sup> of the LC, it is said that the remuneration cannot be lower than the remuneration for work payable to employees on the date of taking up employment in the position held before the leave, which corresponds to the content of Clause 5(2) of the Annex to Directive 2010/18/EU.<sup>230</sup>

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

Parental and childcare leave are considered as a justified interruption of work. The employment relationship is maintained during such leave. This results from the wording of Articles 177 and 186<sup>8</sup> of the LC, according to which the termination of the employment contract with an employee during such leave is prohibited.

The Law of 17 December 1998 on Pensions from the Social Insurance Fund (*Ustawa o emeryturach i rentach z Funduszu Ubezpieczeń Społecznych*)<sup>231</sup> divides the periods in which the worker did not perform the work because of taking care of children, family members, etc. into two categories: contributory periods (*okresy składowe*), that is to say periods which may be taken into consideration when the retirement or survivor's entitlements are calculated; and non-contributory periods (*okresy nieskładowe*), that is to say such periods that bring the worker closer to retirement (in terms of the time), but are not raising the amount of the pension / disability entitlements.<sup>232</sup>

Contributory periods are fully included in the calculation of the right to retirement and disability pensions, while non-contributory periods are included only in the amount not exceeding one third of contributory periods. All periods are considered to be contributory periods when so-called maternity allowances (*zasilek macierzyński*) are paid.<sup>233</sup>

Non-contributory periods include: periods of childcare leave (*urlop wychowawczy*) and periods of the employee's collecting care allowance for a child or other family member (see 5.7 of the Report).

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<sup>228</sup> Which also applies to maternity leave.

<sup>229</sup> Although, as already pointed out with regard to maternity leave when taken by a woman, it does not meet the requirements of Article 15 of Directive 2006/54/EC.

<sup>230</sup> In the case of childcare leave, the remuneration should not be lower than the remuneration on the day when the employee started work in the same position as before the leave (Article 186<sup>4</sup> LC).

<sup>231</sup> *Ustawa o emeryturach i rentach z Funduszu Ubezpieczeń Społecznych* (Act on Pensions from the Social Insurance Fund), Consolidated text: JoL 2013 No. 153 Item 1440 as amended, Articles 5-7 (hereafter Law on Pensions).

<sup>232</sup> It should be noted that currently (after amendment of the pensions regulations in 2016, which have been in force since 1 October 2017), both retirement age and length of service required for retirement are different for men and women. In the case of women, they amount to 60 years (with a length of service of 20 years), while in the case of men, it is 65 years (with a length of service of 25 years).

<sup>233</sup> According to the Law of 25 June 1999 on Cash Social Insurance Benefits in Respect of Sickness and Maternity (*Ustawa o świadczeniach pieniężnych z ubezpieczenia społecznego w razie choroby i macierzyństwa*, Consolidated text JoL 2016 Item 372, with amendments (hereafter Law on Maternity Cash Benefits)) it applies to an insured person due to non-performing of work, in connection with acquired: 1) maternity leave (*urlop macierzyński*) 2) parental leave (*urlop rodzicielski*) 3) paternity leave (*urlop ojcowski*).

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

An employee on childcare leave (*urlop wychowawczy*) is covered by obligatory social and healthcare insurance.<sup>234</sup> Contributions to these insurances are paid to the Social Security Institution (ZUS) from the state budget.

#### 5.5.20 Remuneration

Parental leave is not remunerated by the employer. The sickness insurance contribution, from which it is paid (amounting to 2.45 % of the remuneration), is financed entirely by the employee. The employer deducts it automatically from employees' salaries and transfers it to ZUS.

#### 5.5.21 Social security allowance

During maternity and paternity leave (*urlop ojcowski*) and 6 (or 8) weeks of parental leave (*urlop rodzicielski*), the employee receives an allowance equal to 100 % of the average salary from the last 12 months.<sup>235</sup> For the remaining part of parental leave (*urlop rodzicielski*) the allowance is 60 % of the salary. It may be 80 % for the whole period of childbirth/childcare-related leave if the woman declares after the child was born that she is going to take all such leave. The allowances are paid by ZUS, which receives the sickness insurance contributions. Since 1 January 2016, the allowance for self-employed women is calculated on the basis of the average of the premiums (contributions paid by insured workers to the Social Security Fund) for the last 12 months.<sup>236</sup> Childcare leave (*urlop wychowawczy*) is not remunerated. Allowances in the form of a special supplement for taking care of a child are provided within the social security system but only low-income families are entitled to these family benefits.

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

The relatively long period of paid parental leave (*urlop rodzicielski*) is positively assessed by the general public. However, it is overlooked that it usually results in difficulties for women to reintegrate into the labour market. Therefore, it should be accompanied by special measures encouraging male employees to take such leave and to implement special programmes which would facilitate such reintegration.

#### 5.5.23 Case law

The case law covers different aspects of parental leave (e.g. unpaid childcare leave). Doubts were raised, for example, with regard to the length of such leave in the case of multiple pregnancy. Significant in this respect is the ruling of the Supreme Court of 28 November 2003,<sup>237</sup> regarding the amount of childcare leave in the event of giving birth to twins, similar in its conclusion to the judgment of CJEU in *Zoi Chatzi*.<sup>238</sup> The LC fails to regulate this issue *expressis verbis*. The Supreme Court, however, has interpreted the law in such a way, that the duration of the leave is not to be multiplied by two.

It follows from the case law that the Supreme Court attaches great importance to the observance of the deadline for filing a claim for parental leave allowance. In its ruling of 17 January 2017 (I UK 448/15), the Court ruled that failure to submit an application to the disability pension body before the date of commencement of benefits for parental leave justifies a refusal to grant benefits (see also the judgment of 10 August 2016, III

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<sup>234</sup> A person on childcare leave is not covered by sickness and accidents insurance.

<sup>235</sup> Articles 31 and 36 of the Law on maternity cash benefits; for the remaining 26 weeks of parental leave the allowance is 60 % of salary.

<sup>236</sup> The new rule in this respect has been introduced by the Law of 15 May 2015.

<sup>237</sup> No. II UK 94/02, OSNP 2004/6/106.

<sup>238</sup> Case C-149/10 *Zoi Chatzi v Ypourgos Oikonomikon* [2010] ECR I-8489.

UK 209/15). The Supreme Court also ruled, in the judgment of 10 August 2016 (III UK 209/15), that the deadline for submitting an application for granting and paying the benefit must fall at the latest on the eve of the commencement of the period for which the benefit is to be granted.

Many rulings concerned the right to special allowances or the right of employees to purchase shares in a company at preferential prices. According to the case law, workers on childcare leave (*urlop wychowawczy*) have e.g. the right to a premium reward (for a long duration of work with the same employer (e.g. 15 years), if the time required for getting it elapsed during this parental leave.<sup>239</sup> They may also get the disability benefits in the event that disability occurred during childcare leave.<sup>240</sup> Employees on childcare leave are entitled to buy shares of enterprises being privatised, on preferential conditions, just as other employees.<sup>241</sup> Nevertheless during three years of childcare leave they are not entitled to paid annual leave, which they only can take before this leave starts.<sup>242</sup>

Many rulings of courts of lower instances referred to the problem of maternity allowance for the period of extended (additional) maternity leave (possibly parental leave). In one of the rulings from this series, issued on 18 December 2013,<sup>243</sup> the District Court for Warsaw Downtown (Sąd Rejonowy dla Warszawy Śródmieścia) changed the decision of the Social Security Institution (*ZUS*), thus granting a mother the right to an allowance regarding additional maternity leave and parental leave, considering that the applicant had not been informed either by the employer or by employees of the *ZUS* about her rights to the leave and the obligation to file an additional request for the allowance.

There were different interpretations of the provision of Article 186<sup>4</sup> LC dealing with employment after childcare leave (*urlop wychowawczy*)<sup>244</sup> until the Supreme Court, in its ruling from 29 January 2008 (II PK 143/07), decided that the basis for calculating the remuneration after returning from childcare leave is not the remuneration collected by the worker before the leave, but the remuneration for which he/she would be eligible on the day of commencing work after childcare leave in the position occupied before the leave.<sup>245</sup> In its reasoning the Court, inter alia, refers to EU law, especially to Directive 96/34/EU and the Framework Agreement on parental leave.<sup>246</sup> As an argument, the Court also indicated the constant tendency of the Polish legislator to strengthen the legal protection of employees on childcare leave against their professional condition being worsened, due to the gap in employment caused by the leave. This is realised by

<sup>239</sup> Resolution of the Supreme Court of 3 June 1992, I PZP 33/92, OSN 1993, Nos 1-2 Item 10.

<sup>240</sup> Judgment of Supreme Court of 15 January 1987, II URN 289/86, PiZS 1987, No. 7, p. 62.

<sup>241</sup> Resolution of Supreme Court of 6 February, III ZP 14/96, OSNAPIUS 1997 No. 18 Item 334.

<sup>242</sup> Cf.: Patulski, W. (in) *Kodeks Pracy. Komentarz* (Labour Code. Commentary) ed. Muszalski, W., C.H. Beck, Warszawa 2011, p. 895.

<sup>243</sup> No. XU-724/13.

<sup>244</sup> This provision is not clearly formulated and was interpreted differently, in particular, in the context of different wording used in Article 183<sup>2</sup> LC, related to employment after maternity leave.

<sup>245</sup> The SC argued 'The linguistic interpretation of that provision leaves no doubt that, although the guarantees as to the position to be occupied by an employee returning from parental leave has not changed in any way in comparison with the previous legal situation, the question of the remuneration to which he/she is entitled has been regulated differently. The employer's obligation to provide such a person with remuneration not lower than that received before the leave was replaced by the obligation to grant remuneration not lower than that due on the date of taking up employment after childcare leave in the position occupied before the leave. The point of reference for determining the amount of remuneration for work for a person returning from childcare leave was therefore not that person's earnings before exercising the right to leave, but the state existing at the time of taking up employment expressed as the amount of remuneration to be paid on that date in the position occupied by that person before the leave. Thus, if, during a worker's leave, there were wage changes in that post, those changes were relevant to the determination of the amount of that worker's remuneration after his/her return from leave. In other words, regardless of the final position occupied by the worker on the return from leave, the remuneration which he/she received on that leave could not be lower than the remuneration to which every employee is actually entitled in the position which that worker occupied before his/her leave'.

<sup>246</sup> This ruling was in line with the judgment of the CJEU of 22 October 2009 in *Ch. Meerts v Proost NV*, Case C-116/08, J.T.T. 2010, p. 52.

provisions safeguarding remuneration at the same level as that which they would receive if the leave had not taken place.

It should be remembered that there is the difference in formulation of Article 183<sup>2</sup> LC referring to the remuneration of an employee after return to work from maternity and parental leave and the wording of Article 186<sup>4</sup> LC (*urlop wychowawczy*). Since the 183<sup>2</sup> LC presents correct implementation of the Clause 5(2) Directive 2010/18/EU in this respect, the Article 186<sup>4</sup> LC does not, since it refers to the remuneration from the date on which parental leave starts.

## 5.6 Paternity leave

### 5.6.1 Existence of paternity leave in national law

Paternity leave was introduced in Article 182<sup>3</sup> of the LC in 2008<sup>247</sup> and modified in 2015.<sup>248</sup> It states that a male employee who is a father taking care of a child is entitled to paternity leave of 2 weeks, but in no case can it be taken after the child is 24 months old (until 2 January 2016 it was 12 months). In respect of adoption, the relevant period is 24 months, from the day when the adoption order becomes final, and until the child is 7 years old. For a child with disabilities the leave may be taken until the child is 10 years old.

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

The protection against unfavourable treatment and dismissal in the case of paternity leave is the same as in the case of maternity and parental leave (Article 182<sup>3</sup>(3) of the LC). Accordingly, with regard to the father, the provisions safeguarding the durability of the employment agreement during maternity leave (reference to Article 177 LC) as well as the guarantees of coming back to the same position when returning from paternity leave should be applied. If employment in the same position is not possible, the employer has an obligation to employ him in an equivalent position or, under the same conditions, in another position corresponding to the worker's professional qualifications, for remuneration not lower than the remuneration for work that the worker would have received if not having been on leave (Article 183<sup>2</sup> LC explicitly mentions paternity leave *inter alia*).

### 5.6.3 Case law

No case law could be identified regarding discriminatory dismissals resulting from taking up paternity leave.

## 5.7 Time off for *force majeure*

### 5.7.1 Time off for *force majeure*

There is no explicit provision on time off for *force majeure* in the Labour Code. However, Article 188 of the LC as amended by the Law of 24 July 2015 provides for the entitlement of employees to time off from work, including (presumably)<sup>249</sup> on the grounds of *force majeure* or for urgent family reasons. According to this provision, the employee taking care of at least one child under 14 is entitled to a break of 16 hours or

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<sup>247</sup> By the Law of 6 December 2008, JoL 2008 No. 237 Item 1654.

<sup>248</sup> By the Law of 24 July 2015, JoL 2015 Item 1268.

<sup>249</sup> The LC does not *expressis verbis* in this provision relate to *force majeure* or urgent family reasons and in such a case, no evidence of the actual existence of urgent family reasons is required.

2 days off work in every calendar year, while maintaining the right to remuneration.<sup>250</sup> The decision as to which option to choose is left to the employee (Article 188(2) of the LC). For part-time workers, the hours of such break are reduced proportionally to the established work time (Article 188(3) of the LC). This right is granted regardless of the number of children. When both parents work, the right to this two-day release from work is granted only to one person (Article 189<sup>1</sup> LC). Besides the above-mentioned ones, there are no other conditions of access to time off from work.

#### 5.7.2 Case law

No case law could be identified regarding time off for *force majeure*.

### 5.8 Care leave

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

The entitlement of employees to care leave is provided for in Article 35(1) of the Law on Maternity Benefits.

The grounds for care leave are regulated in the Law on Maternity Benefits, as modified by the Law of 15 May 2015<sup>251</sup> (changes in force since 1 January 2016). According to Article 32(1) of this Law, a care benefit is granted to the insured worker who has been released from the obligation to perform work due to the need to provide personal care for: a sick child, until the child reaches the age of fourteen; or a child younger than eight, in the event of unforeseen closing of the nursery, kindergarten or school, as well as sickness of a contracted nanny<sup>252</sup> or family member who normally takes care of such child. The care benefit may be granted also in order to take care of another family member in case of necessity. Article 32(2) of the Law on Maternity Benefits understands as family members: spouse, parents, grandparents, parents in law, siblings and children over 14 living together with the employee. By children, the Law understands natural, adoptive children of both or one of the parents and other children being under their care (Article 32(3) of above Law). Pursuant to its Article 32<sup>1</sup>, if an insured mother remains hospitalised after giving birth to the child or where it is certain that she is not able to assure her independent existence or she decides to abandon the child, the insured father (or other family member) is entitled to an additional care benefit of up to eight weeks, if he decides to interrupt his employment to take personal care of the child. The monthly care benefits amount to 80 % of the base for calculating the benefits (Article 35(1) of the above law).

The care benefit will be granted for the period of release from work for up to 60 days per year when taking care of a child, and up to 14 days per year, when taking care of other family members. However, it cannot be granted for longer than a total of 60 days per year, irrespective of the number of family members (Article 33(3) and (4)). It will be refused if there are persons other than the employee living together, who may take care of the family member, with the exception of taking care of a child under the age of two (Article 34 of the above Law).

The monthly allowance amounts to 80 % of the basis for calculation of the annual leave. It is available for every day of inability to perform work, including holidays. It cannot be taken while on unpaid holiday or childcare leave (*urlop wychowawczy*).

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<sup>250</sup> The male employee taking care of a child under 14 is also entitled to this right. However, if both parents are employed, only one of them may benefit from this form of time off work (Article 189<sup>1</sup> LC).

<sup>251</sup> Jol 2015 Items 1066 and 1735.

<sup>252</sup> Employed on the basis of Article 50 of the Law of 4 February 2011 on care of the child under the age of three, Jol 2013 Item 1457.

### 5.8.2 Case law

No case law could be identified regarding discriminatory dismissals resulting from taking up care leave.

## 5.9 Leave in relation to surrogacy

Surrogacy is not regulated in Poland. For this reason, the issue of leave connected with childbirth or care in such situations has not been regulated separately either.

## 5.10 Flexible working time arrangements

### 5.10.1 Right to reduce or extend working time

The legal right of workers to reduce working time on request has been granted to persons entitled to parental leave (*urlop rodzicielski*) (on the basis of Article 182<sup>1e</sup> LC) and childcare leave (*urlop wychowawczy*) (on the basis of Articles 186<sup>7</sup> of the LC).

For parental leave (*urlop rodzicielski*), the combination of leave and work may only be made with the same employer and may not exceed half of the full working time (Article 182<sup>1e</sup>(1) LC). The commencement of work occurs upon written notification of the employee, filed not less than 21 days before the day of returning to work. The employer is under the obligation to accept this request unless it is not possible due to the organisation of work or the type of work performed. The employer shall inform the employee in writing of the grounds for rejecting the request (Article 182<sup>1e</sup>(2) of the LC).

An employee entitled to childcare leave (*urlop wychowawczy*) may apply to the employer in writing for a reduction of his working time to no less than 50 % of his full working time in the period during which the leave could be taken. The employer is under the obligation to accept this request. There are no exceptions to this rule. If the application is filed less than 21 days before the commencement of work in the reduced working-time system, the employer shall reduce the employee's working time not later than 21 days after the application has been submitted (Article 186<sup>7</sup>(2) of the LC). In respect of childcare leave, the employment relationship enjoys special protection against termination until the date when the employee resumes work in accordance with the regular working time, but in any case, the protection cannot be longer than 12 months (Article 186<sup>8</sup>(1) of the LC). During this period a contract of employment may be terminated only if the employer's bankruptcy or liquidation is declared, or if there are grounds for contract termination without notice through the fault of the employee (Article 186<sup>8</sup>(1.2.) of the LC). This special protection does not apply to parental leave (*urlop rodzicielski*), which is protected on the same basis as maternity leave (Article 182<sup>1f</sup>, which refers, inter alia, to Article 177 of the LC).

The request to reduce working time might be submitted by the insured parents of a child or in cases indicated in the law<sup>253</sup> by insured close relatives (except childcare leave (*urlop wychowawczy*) which may apply only to persons who have the status of employee. This relates to the fact that self-employed persons are not entitled to childcare leave).<sup>254</sup>

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<sup>253</sup> The law of 15 May 2015 amending the Law on financial maternity benefits and some other laws (JoL 2015 Item 1066), in force since 14 August 2015.

<sup>254</sup> The person running a business activity (entrepreneur) and person cooperating with him/her may, however, give up their professional activity in order to provide personal care for a child. The use of this right does not give any protection, nor results in the payment of any benefit, nevertheless allows the social and health insurance contributions to cumulate, which are financed entirely from the state budget, on the account of ZUS.

Every employee entitled to parental or childcare leave may enjoy the right to reduced working time; there are no additional eligibility criteria except those which entitled the worker to the appropriate kind of leave or allowance. This right may be exercised for taking care of the child until the child reaches the maximum age, up to which the employee is entitled to a certain kind of leave (in the case of childcare leave (*urlop wychowawczy*), there is an additional time limit of 12 months after the end of this leave). In this specific case, the trigger is the fact of returning from childcare leave (in other cases, the moment of acquiring the entitlement to parental leave could be considered as a trigger). The Labour Code does not make the possibility of reduced or flexible work time dependent on the size of the employer. The employer is obliged to comply with such working time arrangement requests if notice was filed before the deadline and may not refuse or postpone the granting of such request. There is no *expressis verbis* guarantee of the return to prior working arrangements, however, the obligation of the employer to reinstate the employee in the same position after childcare leave (Article 186<sup>4</sup> LC) should be applied also in the case of reduced worktime, constituting an alternative to part of the childcare leave. There are no legal measures to encourage men to make use of such legal right.

#### 5.10.2 Right to adjust working time patterns

Since 6 June 2018, the Labour Code<sup>255</sup> provides some groups of workers with the legal right to have individual working time patterns (*indywidualny rozkład czasu pracy* – Article 142) which seems to correspond with the possibility of adjusting working time patterns on request.<sup>256</sup> Generally speaking, such special entitlement is related to the employees having children with disabilities.

Pursuant to Article 142<sup>1</sup> LC, the employer is obliged to accept the application to adjust working time patterns in the case of the following groups of employees: 1) an employee-spouse or employee-parent of a child in the prenatal phase, in the case of a complicated pregnancy; 2) an employee-parent of an unborn child, with established prenatal damage or impairment, who has decided not to perform an abortion;<sup>257</sup> 3) an employee-parent of a child with a certificate of disability and in need of special education.<sup>258</sup> Employees who have children with disabilities are entitled to this benefit, even after the child turns 18 (Article 142<sup>1</sup>(3) LC). The LC does not provide for any other eligibility criteria and the size of enterprise is not a qualifying condition. This right is not, in principle, tied to specific conditions. The employer may refuse to accept the application only in those cases if its acceptance is impossible due to the organisation of work or the type of work performed by an employee. The employer shall inform the employee about the reasons for the refusal to accept the application (in paper or electronic form). In relation to other groups of employees with children, the regular rules for all employees continue to be applied<sup>259</sup> which means that the decision to recognise the request of the employees lies within the

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<sup>255</sup> Such possibility has been introduced into the Labour Code by the Law of 6 June 2018 on the change of the Law on professional and social rehabilitation, as well as employment of persons with disabilities and some other laws (JoL 2018 Item 1076).

<sup>256</sup> Those workers also have the right to interrupted work time (*przerwywany czas pracy* – Article 139 of LC); task-based workload (*zadaniowy czas pracy* – Article 140 LC); flexible work time (*ruchomy czas pracy* – Article 141<sup>1</sup> LC) and individual timetable (*indywidualny czas pracy* – Article 142). Until this time, the regular rules for all employees have been applied, namely the employer may specify (which means that they may refuse the request of an employee) flexible working-time patterns (Article 140<sup>1</sup> LC) or, at the employee's written request, define an individual working-time pattern (Article 142 LC); adopt a reduced working-week system (Article 142 LC); and adopt a working-time system that includes work only on Fridays, Saturdays, Sundays and holidays.

<sup>257</sup> As provided in the Act of 4 November 2016 on support for pregnant women and their families, the so-called Pro-life Law (*Za życiem*). (JoL 2016 Item 1860).

<sup>258</sup> In the case of disabilities, such possibility exists also after the child reaches the age of 18 (Article 142<sup>1</sup>(3) LC).

<sup>259</sup> Which means that the employer may refuse the employee's request for a flexible working-time pattern (Article 140<sup>1</sup> LC); for an individual working-time pattern (Article 142 LC); for a reduced working-week system, which includes work only on Fridays, Saturdays, Sundays and holidays. (Article 142 LC).

full discretion of the employer. However, in the case of the employee having a child under the age of four, the work time in any flexible work time arrangements may not, without the employee's consent, exceed eight hours a day. Also, such worker retains the right to remuneration for the time s/he did not work as a result of a reduction in her/his working time for that reason (Article 148(1) LC). The LC does not guarantee the right to return to prior working arrangements. There are also no measures aimed at encouraging fathers to make use of the right or possibility to adjust working time patterns.

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

The Labour Code in Article 67<sup>6</sup> provides a legal right to work from home or other remote locations, however, only with respect to workers with children with certificated disabilities, listed in Article 142<sup>1</sup> LC. In such a case the request should in principle be recognised by the employer; a refusal is possible if the acceptance of the request is impossible due to the organisation of work or the type of work performed by an employee. The employer shall inform the employee about the reasons for the refusal. Here, the law does not provide any additional eligibility criteria except those listed in Article 142<sup>1</sup> LC. The employee with a child with disabilities is entitled to this right even after the child turns 18 (Article 142<sup>1</sup>(3) LC). There are no measures in place specifically to encourage men to make use of this legal right.

In relation to other employees with children, general rules apply. Since 2010, the possibility of work from home is explicitly provided for by the LC (Chapter IIb of LC). Although it is not considered to be a legal right of a worker to work from home or remotely,<sup>260</sup> Article 67<sup>7</sup>(3) LC states that, as far as possible, the employer shall consider the employee's request to perform work in the form of telework. If the proposal of 'telework' comes from the employer, the employee may refuse it. Article 67<sup>9</sup> LC states the lack of consent for performance of telework or cessation of telework cannot constitute a decision justifying the termination of the employment contract by the employer.

Worth noting is the content of Article 67<sup>15</sup> of the LC, which states (in Paragraph 1) that teleworkers may not be treated less favourably – with regard to the establishment and dissolution of the employment relationship, conditions of employment, promotion and access to training in order to improve professional qualifications – than other employees employed at the same or similar work, taking into account the differences related to the conditions of work in the form of telework. According to Paragraph 2 of this provision, an employee may not be discriminated against in any way for taking up teleworking work or for refusing to take up such work.

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

The possibility of using the so-called equivalent working time provided for in Article 135 of the Labour Code does not constitute, according to this provision, an employee's right but an employer's right related to the specificity of a given job.

#### 5.10.5 Case law

No case law regarding flexible working time arrangements in relation to parents wanting to reconcile their work with family life has been identified.

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<sup>260</sup> The terms and conditions of telework applied by an employer shall be defined in an agreement between the employer and a trade union, and if more than one trade union is active in the establishment, in an agreement between the employer and those trade unions (Article 67<sup>6</sup> LC). During the employment, any change of the terms and conditions of work to those referred to in Article 67<sup>5</sup> may be introduced by agreement of the parties at the employer's or employee's initiative.



## 5.11 Evaluation of implementation

Comparison of the legal status in Poland in the scope discussed herein is difficult because not all types of leave related to childbirth and upbringing, provided for in the Labour Code, are equivalent to the EU law. In Poland, the multiplication of the various types of leave related to the birth and care of a child is subject to criticism, each having different consequences and a different form, without any indication of the purpose that such differentiation is supposed to serve.<sup>261</sup> This applies in particular to two types of leave under Polish law relating to the upbringing of a child (parental and childcare), which seem to correspond functionally to one type of parental leave within the meaning of Directive 2010/18/EU.

Comparing the provisions of EU directives 92/85 EEC, 2010/18/EU and 2006/54/EC with the solutions adopted in Poland, it should be emphasised that the scope of health protection and durability of the employment relationship of pregnant women and breastfeeding mothers corresponds to the scope of protection provided for in EU law, and even exceeds it, taking into account, inter alia, the absolute nature of the ban on night-time employment of pregnant women, or mothers who are breastfeeding a child, and employment in other work that is prohibited for these categories of workers under the threat of quasi penal sanctions (provided for contraventions).

As far as the scope of rights related to birth and childcare provided for in the Polish legislation is concerned, it is in many respects broader than the minimum standard specified in the EU directives. This applies in particular to the duration of individual leave (maternity and parental leave) and/or the associated long period of payment of the benefit (generally up to 52 weeks). This generally positive assessment of parental rights in Poland does not mean that all EU legislation has been properly implemented. In particular, objections may be raised to the implementation of Article 15 of the aforementioned Directive 2006/54/EC in Article 183<sup>2</sup> of the LC referring to the remuneration of an employee returning to work after maternity or parental leave. In contrast to the Directive, Article 183<sup>2</sup> of the LC, while speaking about 'remunerations', omits the words 'no less favourable'. Although there is hardly any doubt that the aim of this provision is to take account of any increases in remunerations, it should be borne in mind that wage cuts may also have been made during the leave period. The Polish legislator did not take such a situation into account.<sup>262</sup>

Currently not all requirements resulting from Directive 2010/18 have been implemented into the Polish legal system.<sup>263</sup> Most of the criticism refers to the lack of proper implementation of Clause 2 Section 1 of this Directive. Formally, this provision was implemented in Article 186(4) of the Labour Code, which refers to 1 month's non-transferable leave, which must be taken by one of the parents. However, this reservation does not apply to paid parental leave (*urlop rodzicielski*) referred to in Articles 182<sup>1a</sup> to 182<sup>1c</sup> of the LC. This leave lasts at least 32 weeks and can be divided between the parents. However, there is no mechanism for motivating the father to take advantage of this possibility in practice, under threat of losing a certain part of the leave. The two-

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<sup>261</sup> Admittedly the number of different types of leave has been reduced by the Law of 24 July 2015, which entered into force on 2 January 2016. However, the current regulation remains very unclear in certain points.

Cf.: Godlewska Bujok, B., 'Uprawnienia związane z rodzicielstwem. Nowa odsłona.' (Parenthood-related rights. A new construction) *Praca i Zabezpieczenie Społeczne* 2015 No. 9.

<sup>262</sup> Attention is drawn to this issue by Sobczyk, A. (in) *Kodeks Pracy. Komentarz* (Labour Code. Commentary) ed. Sobczyk, A., 2nd edition, C.H. Beck, Warszawa 2015, p. 777.

<sup>263</sup> The First President of the Supreme Court, in his opinion about the draft law adjusting the Polish Labour Code to Directive 2010/18, considered that this situation is not compliant with the Directive because if a Member State grants rights to leave exceeding the minimum length required by EU law, this means that EU regulations also apply to the part of these rights that exceeds this minimum. Compare: Opinion of 20 December 2012 to the draft law. Parliamentary Document No. 909, p. 3.

week paternity leave provided for in Article 182<sup>3</sup> of the LC, which may be taken only by the child's father, does not seem to be a sufficient solution.

It is worth noting that Clause 5(2) of the Annex to Directive 2010/18/EU has not been properly implemented either. The Polish provision of Article 186(4) LC, concerning the wage rights of parents returning from parental leave, is a true carbon copy of only the first sentence of this clause,<sup>264</sup> and the second sentence is omitted<sup>265</sup> Despite this, the Supreme Court interprets this provision in accordance with the intention of the EU legislator, recognising that any favourable changes in remuneration that occurred before the employee's return to work should also apply to him/her.

Additionally, the Polish law, which implements the EU regulation dealing with flexible working time arrangements, is not fully satisfactory. On the one hand, the introduction in 2015 (in force since 2 January 2016) of the possibility of combining paid parental leave (*urlop rodzicielski*) with up to half-time work for the same employer (Article 182<sup>1e</sup> LC), as well as an extension of the length of parental leave in such a situation (Article 182<sup>1f</sup> LC) and, in addition, the introduction of the options of reduced working patterns for parents entitled to childcare leave (*urlop wychowawczy* – 186<sup>7</sup> LC)<sup>266</sup> should be positively evaluated. On the other hand, the regulation introduced to the Labour Code in 2018, which restricts special opportunities to adjust working time patterns only to the parents of children with disabilities, is not satisfactory.<sup>267</sup> There is information about the ongoing work in the Ministry of Family, Labour and Social Policy on the new Labour Code, which, among other things, provides for a new regulation of the principles of teleworking and distance working.<sup>268</sup>

## 5.12 Remaining issues

No further issues can be mentioned.

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<sup>264</sup> According to this provision, the rights acquired or in the process of being acquired by the worker on the date on which parental leave starts shall be maintained as they stand until the end of parental leave.

<sup>265</sup> According to this sentence: 'At the end of parental leave, these rights, including any changes ... shall apply'.

<sup>266</sup> Godlewska-Bujok, B., 'Implementacja dyrektywy 2010/18/UE dotyczącej urlopu rodzicielskiego' (Implementation of Directive 2010/18/EU on parental leave) *Prawo Europejskie w Praktyce* 2013 December pp. 52-53.

<sup>267</sup> It should be remembered that on 27 March 2015, the former President submitted to the Parliament a draft law amending the Labour Code and some other laws, in which he proposed flexible working time arrangements for all parents as was recommended by the European Commission in 2014 (Parliamentary document no. 3288, available at: <http://www.sejm.gov.pl/sejm7.nsf/PrzebiegProc.xsp?nr=3288>). This draft has been adopted. According to the draft law, the employer would be obliged to accept a respective request of the employee, justified by 'family obligations', unless it would not be possible for the work organisation or the type of work performed by the employee. The employer would also be obliged to inform the worker in writing of the reasons for the rejection of the request, but only in enterprises employing at least 20 workers. Those amendments were dropped during the parliamentary debate.

<sup>268</sup> Strefabiznesu.pl.

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

### 6.1 General (legal) context

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

Comprehensive surveys regarding occupational security schemes in particular were not identified.

In statistical information related to the use of Occupational Pension Schemes (as introduced by the Law of 20 April 2004 on Occupational Pension Schemes – hereafter Law on PPE) the rare use of the possibility to arrange such pension schemes and the low number of participants among employees is underlined, even though the number of participating employers is rising. For instance, in 2012 in such programmes, around 110 employers and 360 000 workers participated, and in the following years, the number of participating employers raised and oscillated between 900 and 1 000, but in these years the number of PPE participants did not exceed 400 000 employees.<sup>269</sup> This results from the fact that only rich firms can afford such programmes, and that Poles are rather reluctant to consent to additional ‘deductions’ from their wages, which may result from the low level of public confidence in state and political institutions, as well as from the lack of particular incentives to additional insurances.<sup>270</sup> It is indicated that tax deductions could be an effective incentive.<sup>271</sup> One of the obstacles is the relatively lengthy administrative process related to the creation of occupational pension schemes.<sup>272</sup> Another concern relates to lack of promotional activities, such as information brochures. In order to take advantage of particular solutions, one has to know that they exist in the first place.<sup>273</sup> The situation in 2017 seems not to have changed since 2012, according to the information from the Financial Supervision Authority (*Komisja Nadzoru Finansowego – KNF*), which is competent for the registration of PPE programmes; up to the end of April 2017, there were only 6 motions pending from companies, regarding the creation of such a scheme, among which 4 had already been lodged in 2016 and in this year, only 48 new schemes were registered in the PPE.<sup>274</sup>

The situation in numbers improved in 2018, after adoption on 4 October 2018 of the Law on Employee Capital Schemes (*Pracownicze Plany Kapitałowe – PPK*) (JoL 2018 Item 2215; hereafter: PPK Act), schemes which are supposed to supplement the current occupational pension scheme (*Pracownicze Plany Emerytalne – PPE*). This new option (in force from 1 January 2019), aimed at increasing the number of options, additional to statutory pensions’ insurances, has the same function as occupational security schemes in the understanding of EU Law.

Since the adoption of the Law on KPP, i.e. in the period from 4 October 2018 to 18 February 2019, the KNF has received a total of 353 applications, including 254 applications for entry into the register of the newly created PPE and 154 applications for

<sup>269</sup> See: <http://www.polskieradio.pl/42/259/Artykul/1005787,Dlaczego-Pracownicze-Programy-Emerytalne-nie-wypalily-w-Polsce>; <http://www.polskieradio.pl/42/4393/Artykul/1440261,Poszukiwane-firmy-zapewniajace-Pracownicze-Programy-Emerytalne>.

<sup>270</sup> <http://www.polskieradio.pl/42/259/Artykul/1005787,Dlaczego-Pracownicze-Programy-Emerytalne-nie-wypalily-w-Polsce>.

<sup>271</sup> They could have the form of progressive reliefs, where people earning less would qualify for higher relief and higher supplement from the State, than those earning more.

<sup>272</sup> In 2014, the average time of processing an application in the register administered by the Financial Supervisory Authority (KNF) amounted to 17 days, if there were no inconsistencies. If corrections were necessary, this period increased to 42 days.

<sup>273</sup> <http://www.polskieradio.pl/42/4393/Artykul/1440261>.

<sup>274</sup> *Niejasna przyszłość PPE (Pracowniczych Programów Emerytalnych)* (The Unclear Future of Occupational Social Security Schemes) <http://www.rp.pl/Moja-Emerytura/304239943-Niejasna-przyszlosc-PPE.html#ap-1>.

registering of changes in existing PPE programmes.<sup>275</sup> The latter applications concern increasing the contributions to 3.5 % so that the PPE meets the requirement for exemption from the obligation to establish a PPK.<sup>276</sup>

The increase of the number of PPE registrations resulted from the fact that the employers have to choose one from the two following options: to create the new form of compulsory employee capital plan (PPK) or to register their company in an existing voluntary employee retirement plan (PPE). Since there was no clarity as to what PPK will mean for employers in practice, in order to avoid the creation of a PPK, employers have chosen rather to apply for the already well-known social security scheme in the form of PPE, which has contributed to this spectacular growth of their total number countrywide.<sup>277</sup>

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

As mentioned, the current occupational pension scheme (*Pracownicze Plany Emerytalne*, PPE) was supplemented by adoption on 4 October 2018 of the Law on Employee Capital Schemes (PPK). By introducing PPK Law, the intention was to provide additional savings for future pensioners after they reach the age of 60. When someone reaches the age of 60, he or she will be able to withdraw the accumulated funds at once, although then 75 % of them will be taxed. If this amount is paid in monthly instalments for 10 years, it will not be taxed.

While there is no reference to EU law in the PPK Law, the reasoning of the draft indicates that the introduction of a uniform age for men and women for entitlement to payments is justified in particular by EU requirements for voluntary retirement provision.<sup>278</sup>

The main objective of this new option is to introduce a system which will be more popular among employers than the existing PPE and will cover as many people as possible (the prognosis is that it should target approximately 11.5 million employees). The universality of the PPK system is guaranteed by the obligation for employers to enter into a programme if they employ one or more persons (Article 7). The PPK programme will be run by Investment Fund Companies, Insurance Companies and Public Pension Companies, which will be chosen by the employer. The basic contribution financed by a PPK member may amount to between 2 % and 4 % of the salary. On the other hand, the employer would pay an additional premium from 1.5 % to 4 % of the salary. As a result, the maximum contribution to the PPK in the case of one employee could amount to 8 %. In addition, there would be an annual budgetary surcharge of PLN 240 (EUR 55.80) and the State would give an additional 'welcome fee' of PLN 200 (EUR 46.50).

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<sup>275</sup> By way of comparison, only 48 new schemes were registered in the PPE register in 2017. <https://www.parkiet.com/Pracownicze-plany-kapitalowe-PPK/302219981-Firmy-uciekaja-przed-PPK.html>.

<sup>276</sup> The Act indicates that the EPP employer's management of certain parameters will constitute a basis for such an entity not to create an employee's capital plan. According to the planned regulations, employers who will conduct (as of the date of entry into force of the obligation to apply the provisions of the PSC Act to them) PPE on the basic contribution paid in the amount of at least 3.5 % and meeting the criterion of participation in the EPP of at least 25 % of the employed, will not be obliged to form PPK.

<sup>277</sup> Kołek, A., Wojewódka, M., *PPE w przeddzień wejścia w życie PPK – praktyka rynkowa* (PPE on the eve of the entry into force of the PSCs – market practice), *Instytut Emerytalny*, September 2018 <http://www.instytutemerytalny.pl/wp-content/uploads/2018/09/PPE-w-przeddzie%C5%84-wej%C5%9Bcia-w-%C5%BCycie-PPK-Wrzesie%C5%84-2018.pdf> and *Nowe programy pracownicze w 2018 r.* (New employees' programmes in 2018), *Instytut Emerytalny*, <http://kadry.infor.pl/wiadomosci/758800,Nowe-pracownicze-programy-emerytalne-od-2018-r.html>.

<sup>278</sup> It has been mentioned in Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) which implements the principle of equal treatment in relation to, inter alia, voluntary social security. Draft law. Sejm Print No. 2811 <http://www.sejm.gov.pl/Sejm8.nsf/druk.xsp?nr=2811>.

The largest companies employing more than 250 people will start to apply the provisions of the Act as of 1 July 2019. Entities employing at least 50 persons – from 1 January 2020 and companies employing at least 20 persons – from 1 July 2020. Other entities will have to apply the Act from 1 January 2021. The latter deadline also applies to entities belonging to the public finance sector.

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

There was no public debate before the introduction of the PPK scheme. However, when the Law was passed, some critical opinions were presented. It was argued that after 20 years of operating the PPE in practice, it can be said that this solution has proved its worth and the first effects of long-term savings within the PPE are encouraging. One may wonder whether, in this situation, the introduction of new forms of employee insurance such PPK was advisable, or whether, after bad experiences with compulsory social insurance in the form of capital insurance, one should aim rather at extending the scope of application of PPE.<sup>279</sup>

## 6.2 Direct and indirect discrimination

The Law of 20 April 2004 on Occupational Pension Schemes (PPE) does not provide for a special prohibition to discriminate (either directly or indirectly, on the grounds of sex). Also, the Anti-Discrimination Law does not refer explicitly to occupational social security schemes, but only to social security in general (Article 4(4b) and Article 6). With regard to occupational social security schemes it seems certain that the general prohibition of discrimination, provided for in Article 32(2) of the Constitution,<sup>280</sup> may be applied.<sup>281</sup> However, there are doubts about the possibility and possible scope of application of other anti-discrimination laws. However, the constitutional protection, in general, is considered not to be sufficient since it is very difficult to design formally correct claim based only on the Constitution.

A clear solution to this problem was included in Article 23.1 of the Law on PPK. Besides providing that the participation in the PPK is fully voluntary for employees (while the employer has an obligation to have one occupational security scheme: either PPP or PPK), this provision explicitly states that Article 18<sup>3a</sup> Sections 1-5 of the Labour Code, which speaks, among other things, about direct and indirect discrimination, applies accordingly. The obligation of equal treatment set out in these provisions applies to an employed person also regardless of whether or not he/she is a participant in the PPK. However, the Law on PPK does not mention the possibility of applying prescriptive provisions of the Anti-Discrimination Law, although its personal scope indicates that it does not only apply to persons related to an employer by an employment contract.

### 6.3 Personal scope

According to Article 2(2) of the Law on Occupational Pension Schemes (PPE), which provides for definitions of the terms that are used, the term 'employees' which the system applies, means:

'persons employed in full-time or part-time work, on the basis of a contract of employment, appointment, election, nomination, cooperative employment contract,

<sup>279</sup> Kołek, A., Wojewódka, M., *PPE w przeddzień wejścia w życie PPK – praktyka rynkowa* (PPE on the eve of the entry into force of the PSCs – market practice), *Instytut Emerytalny*, September 2018. Available at: <http://www.instytutemerytalny.pl/wp-content/uploads/2018/09/PPE-w-przeddzie%C5%84-wej%C5%9Bcia-w-%C5%BCycie-PPK-Wrzesie%C5%84-2018.pdf>.

<sup>280</sup> This provision reads as follows: 'No one shall be discriminated against in political, social or economic life for any reason whatsoever'.

<sup>281</sup> Pursuant to Article 8(2) of the Constitution its provisions shall apply directly, unless the Constitution provides otherwise.

a person employed under a contract as a result of appointment or election to a body representing a legal person and a member of an agricultural production cooperative or other cooperative of farmers'.

The Law of 10 December 2018<sup>282</sup> which amended this Article in addition states that 'if provided for in the company contract' (*umowa zakładowa*) the Law mentioned above shall apply also to: a) a person performing work on the basis of a tolling agreement (*praca nakładcza*) or b) a natural person performing work on the basis of an agency contract (*umowa agencyjna*) or a contract of mandate (*umowa zlecenia*) or any other contract of services (*umowa o świadczenie usług*) or a member of the supervisory board remunerated for performing this function, to whom the provisions of Law related to employees shall, apply *mutatis mutandis* (Article 2(25)).

The employment should be (in both cases: full-time or part-time) for a period not less than three months unless it is otherwise stated in the company (enterprise) contract (Article 5(1) of the above Law).<sup>283</sup> Participants in this scheme also include natural persons conducting an economic activity (self-employed persons), entitled *expressis verbis*, as well as partners of commercial law companies, mentioned in this law, who are subject to mandatory retirement and disability insurance and to whom the rules apply which are applicable to employees (Article 5(4) and (5) of the Law on Occupational Pension Schemes). The aforementioned Law explicitly prohibits a person older than 70 to enter into the system for the first time (Article 5(1a)). However, the continuation of participation in the scheme by people older than 70 is allowed, even if they are receiving a retirement pension from the mandatory social security system. This right is granted to them for as long as they remain employees.<sup>284</sup> The law does not explicitly refer to persons whose activity is interrupted by illness, maternity, accident or involuntary unemployment and persons seeking employment or to retired and disabled workers, but it seems that as long as they remain employees, they are not excluded from the programme. The personal scope of the Polish regulations seems to correspond with the Directive.

The personal scope of the Law on PPK is similarly defined. It speaks generally of employed persons. However, according to Article 2(1) (point 18), this category includes both employees covered by the protection of the Labour Code as well as natural persons performing imposed work, work on the basis of a contract of mandate, for a specific job or another contract for the provision of services, members of supervisory boards remunerated for the performance of these functions and members of all kinds of agricultural production/services cooperatives

#### 6.4 Material scope

The material scope of occupational social security schemes in Poland seems to be more restrictive than what is provided for in Directive 2006/547. The Law on Occupational Pension Schemes does not explicitly specify what particular risks referred to in Article 7 of the Directive it covers. Nevertheless, the name of this Law (including the term 'pensions'), as well as information included in handbooks regarding this security system, underline its supplementary role for the general pension system. With respect to Article

<sup>282</sup> The added content of Article 2 entered into force on 1 January 2019. JoL 2018 Item 2215.

<sup>283</sup> However, the company agreement may not provide for more than 3 years of service with a given employer, entitling participation in the programme (Article 5(1c) of the Law on Occupational Pension Schemes).

<sup>284</sup> Such prohibition (with the above-mentioned exception) – as explained by Krajewski – is a logical consequence of the regulation contained in Article 42(1) point 3 of the Law on Occupational Pensions, according to which the payment of the money accumulated on the account of the programme has to be realised – as a rule – at the moment the employee reaches the age of 70 years. Therefore, this prohibition cannot be considered as age discrimination. Krajewski, M., (2014), *Pracownicze programy emerytalne. Problematyka prawna*. (Occupational pension schemes. Legal aspects.) Doctoral thesis, p. 228 <http://dspace.uni.lodz.pl:8080/xmlui/bitstream/handle/11089/11378/Doktorat%20nr%203.pdf?sequence=1&isAllowed=y>.

6 of this law, one can also state that protection from the risk of death is included. This provision, speaking of forms in which such programmes may be introduced, mentions not only retirement funds, but also contracts of group life insurance of employees with a private insurance institution, in the form of group life insurance in an insurance capital fund (Article 6(9)). Such contract may also include accident and sickness insurance if they supplement the life insurance (Article 6(13)).

The PPK Act explicitly refers only to pensions, but it also states that it may apply to disability situations (where an employee is totally unable to work or has a recognised certain degree of disability).

## **6.5 Exclusions**

The PPE Act of 2004 on occupational pension schemes, as well as the PPK Law, does not include a provision transposing Article 8 of the Directive, and therefore no exclusions are permissible. The limitations related to the form of employment contract and the minimum time limits for employment are the only legal requirements for participation in the system. The law excludes the possibility of access to the programme for an employee older than 70 (Article 5(1a)).<sup>285</sup> According to Article 5(6) of the Law, the company agreement may not provide for any conditions for employee participation in the programme other than those set out in the law.

The PPK Act additionally prohibits conclusion of an agreement on running a PPK on behalf and for the benefit of an employed person who is 70 years of age (or older, on the first day of employment (Article 15(1)). In the case of a person between 55 and 70 years of age, the agreement on running the PPK is concluded only upon his/her application and on condition that he/she meets the 3-month criterion of the period of employment. (Article 15(2) and (3) I.2 and Article 16).

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

No case law falling under the examples of sex discrimination could be identified. It is worth mentioning that by adjusting the provisions of the Law on occupational pension schemes (PPE) to EU standards, the requirements regarding the age of male and female employees who may access the programme have been equalised.

## **6.7 Actuarial factors**

It is explicitly prohibited to use sex as an actuarial factor. Article 34 of the Law of 11 September 2015 on insurance activity and reinsurance<sup>286</sup> currently provides that the application of the criterion of sex in calculating insurance premiums and benefits cannot result in differentiation of premiums and benefits of particular persons. It is also prohibited to differentiate premiums and benefits, as well as financial services connected with them, with regard to pregnancy and maternity. The latter prohibition applies to life insurance, dowry insurance, childcare, accident pension insurance, sickness insurance, as well as other personal and material insurances.

## **6.8 Difficulties**

No difficulties in application of provisions related to occupational social security schemes are identified.

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<sup>285</sup> It might be added that the difference in the retirement age for men and women was removed from occupational security schemes in 2004.

<sup>286</sup> Consolidated text JoL 2019, Item 381. This law replaced the Law of 22 May 2003.

## **6.9 Evaluation of implementation**

The evaluation of the implementation of EU provisions mentioned in chapter 2 of the Directive 2006/54/EC is hindered by the fact that neither the PPE nor the PPK Act make, with one exception, any direct reference to the provisions contained therein. This exception concerns the requirement of an equal retirement age for women and men.<sup>287</sup>

### **6.10 Remaining issues**

There are no remaining issues to discuss.

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<sup>287</sup> This issue is of great importance in Poland, as this age was also differentiated initially in the PPE Act, and it was only after some time that it became equal. Moreover, in 2016, the Act on the social insurance system returned to the differentiated retirement age of women.



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

### 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/EEC)

Current data on the structure of social insurance (including gender categories) can be found in the publications of the Social Insurance Institution (ZUS). Some of the information is published periodically, other publications are occasional. The most up-to-date data was collected in the Review of the pension system 2016, which consists of the ZUS Green Paper<sup>288</sup> and the White Paper.<sup>289</sup> The Green Paper, which gives a comprehensive diagnosis of the Polish pension system, contains an analysis of conditions and an assessment of the functioning of pension insurance (including OFE), pension provision, as well as solutions that make up the voluntary part of the pension system (Individual Retirement Accounts (called IKE)<sup>290</sup> or Individual Retirement Security Accounts pension (called IKZE).<sup>291</sup> The comprehensive diagnosis contained in the Green Paper became the basis for the preparation of the White Paper,<sup>292</sup> in which the recommendation of reforms was presented.

The data contained in the Green Paper shows that in December 2015, 41 % of men and 59 % of women received their pension. It is worth noting that the average age of pensioners has been increasing for years. In December 1995 it was 65 years old (women) and 67 years old (men), in December 2015 – 69.8 years old (women) and 71.5 years old (men). Women's pensions are significantly lower than men's pensions. The average pension payment from the Social Insurance Institution in December 2015 amounted to PLN 2 116.45, which constituted 62.1 % of the average salary (reduced by the obligatory social insurance contribution). The women's average pension is 69 % of the average men's pension. Women on average get PLN 1 784.07 (i.e. 52.3 % of the overall average salary in Poland) and men get on average PLN 2 601.04 (i.e. 76.3 % of the average salary). Most men (106 900) received a pension of PLN 2 043.51. In the female population, most women (232 200) received a pension of PLN 1 472.92.<sup>293</sup>

Practical inequalities between women and men in the field of social security have been the subject of many studies, the most important of which seems to be the survey carried out by Janina Petelczyc and Paulina Roicka, the results of which were published in the Report 'The situation of women in the pension system', which constitutes an attempt to diagnose the causes of inequalities and present recommendations for changes.<sup>294</sup> The

<sup>288</sup> *Zielona Księga ZUS, Przegląd systemu emerytalnego 2016 – Bezpieczeństwo dzięki odpowiedzialności* (ZUS Green Paper, Review of the Pension System 2016 – Safety through Responsibility) 2016, available at: <https://www.zus.pl/documents/10182/167526/Zielona+ksi%C4%99ga+prze%C4%85du+emerytalnego+2016/d9596eda-c57f-4218-bac4-c8c2470b5a12>.

<sup>289</sup> *Biała Księga ZUS, Przegląd systemu emerytalnego 2016 – Bezpieczeństwo dzięki odpowiedzialności* (ZUS White Paper, Review of the Pension System 2016 – Safety through Responsibility) 2016, available at: <https://www.zus.pl/documents/10182/167526/Bia%C5%82a+ksi%C4%99ga+prze%C4%85du+emerytalnego+2016/68de004b-47f9-47f6-b548-466da05e0bcc>.

<sup>290</sup> *Indywidualne Konta Emerytalne (IKE)*.

<sup>291</sup> *Indywidualne Konta Zabezpieczenia Emerytalnego (IKZE)*.

<sup>292</sup> *Biała Księga ZUS, Przegląd systemu emerytalnego 2016 – Bezpieczeństwo dzięki odpowiedzialności* 2016 (ZUS White Paper, Review of the Pension System 2016 – Safety through Responsibility) available at: <https://www.zus.pl/documents/10182/167526/Bia%C5%82a+ksi%C4%99ga+prze%C4%85du+emerytalnego+2016/68de004b-47f9-47f6-b548-466da05e0bcc>.

<sup>293</sup> *Zielona Księga ZUS, Przegląd systemu emerytalnego 2016 – Bezpieczeństwo dzięki odpowiedzialności* (ZUS Green Paper, Review of the Pension System 2016 – Safety through Responsibility) 2016, available at: <https://www.zus.pl/documents/10182/167526/Zielona+ksi%C4%99ga+prze%C4%85du+emerytalnego+2016/d9596eda-c57f-4218-bac4-c8c2470b5a12>.

<sup>294</sup> Petelczyc, J., Roicka, P., *Sytuacja kobiet w systemie emerytalnym* (Situation of women in the pension system), 2015, Publication created within the framework of the project Gender (in) Equality in Law, implemented by the Institute of Public Affairs with the financial support of the Citizens for Democracy Programme. Available at: <https://www.isp.org.pl/pl/publikacje/sytuacja-kobiet-w-systemie-emerytalnym>.

Report stresses that the consequences of ongoing social and economic changes lead to a reduction in the replacement rate, i.e. the relation between the amount of earnings and future pension benefits. Currently it is about 50 %, but in 20-30 years' time the pension will amount to about 20-30 % of the salary, due to the changes in construction of social security schemes, together with increasing longevity. Taking into account the weaker position of women in the pension system, this may lead to a situation in which the risk of poverty and social exclusion of women will additionally increase. The risk of poverty and social exclusion among women over 65 is already 4 percentage points higher on average than for men in the over-65 age group. With each year above 65, the gap increases and at the age of 75 the risk of poverty and social exclusion among men and women differs by more than 6 percentage points. The increasing gap is due, on the one hand, to lower benefits and, on the other, to the fact that older women often live in a single-person household and therefore have no one to share the expenditure with. The report therefore stresses that, regardless of the need to introduce changes aimed at increasing retirement provision for the general population, the legislator should pay particular attention to the position of women in this system.

The following factors of indirect discrimination in the area of social security were distinguished in the research:

- transition to a system based on the defined contribution (DC) method, which makes the amount of future benefit dependent on the amount of paid contributions;
- special situation of women in the labour market, which consists of such elements as: disproportions in earnings, i.e. the wage gap;<sup>295</sup> more frequent part-time work; persistent lower professional activity of women and higher unemployment rate – in the third quarter of 2015, the professional activity rate was 48.6 % for women and 65.0 % for men, while the unemployment rate was 7.5 % and 6.7 %, respectively;
- legal regulations resulting in a worse situation of women in the pension system: not all periods of childcare are treated as insurance periods, i.e. contribution periods. Frequent use of breaks in employment to provide care may translate into the right to a pension or its amount;
- usually lower basis for pension insurance contributions of persons caring for a family member;
- low pension contributions paid by the state budget for persons resigning from work in order to provide care for a family member, which are not related to the earnings of this person, means that this compensation does not have a significant impact on the amount of future pension benefit.<sup>296</sup>

As emphasised by the authors of the research, historical and cultural factors are the source of the observed inequalities between women and men in terms of social security, i.e. the shaping of insurance systems based on the concept of a male breadwinner, working without interruptions in his career on the basis of an employment contract, as well as cultural and mental conditions which translate into the burden of women's care responsibilities towards children and the elderly (with an underdeveloped network of institutional care). The report stresses that most of the provisions discriminating against

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<sup>295</sup> The reason for lower average earnings for women is that they are more likely to work part-time, most often as a result of combining professional and family roles. In Poland, twice as many women as men work part-time, as a result, men work on average 4 hours a week longer than women. This is one of the factors causing women's pension benefits to be, on average, lower than men's pension benefits.

<sup>296</sup> *Zielona Księga ZUS, Przegląd systemu emerytalnego 2016 – Bezpieczeństwo dzięki odpowiedzialności* (ZUS Green Paper, Review of the Pension System 2016 – Safety through Responsibility) 2016, available at: <https://www.zus.pl/documents/10182/167526/Zielona+ksi%C4%99ga+prze%C4%85du+emerytalnego+2016/d9596eda-c57f-4218-bac4-c8c2470b5a12>.

<sup>296</sup> *Zielona Księga ZUS, Przegląd systemu emerytalnego 2016 – Bezpieczeństwo dzięki odpowiedzialności* (ZUS Green Paper, Review of the Pension System 2016 – Safety through Responsibility) 2016, available at: <https://www.zus.pl/documents/10182/167526/Zielona+ksi%C4%99ga+prze%C4%85du+emerytalnego+2016/d9596eda-c57f-4218-bac4-c8c2470b5a12>.

one gender have been removed from the pension system, therefore the emphasis should be increased on the fight against indirect discrimination, i.e. the worse situation of women in the labour market and their much higher burden of family responsibilities. Equality in the pension system requires equality at every stage and in every area of life. The pension system is, to a large extent, just a litmus test, showing the still diverse situation of women and men in the labour market.

An additional factor that may potentially strengthen the unequal position of women and men in the social security system is the impact of the new solution introduced by the government, the so-called 500+. The Green Paper of ZUS stressed the existence of a link between the introduction of the '500+' programme and resignation from work by women who earn little and are entitled to the benefit. It was also pointed out that in the long-term perspective, problems may be expected with the return to work of women who have been out of the labour market for a long period of time. These trends may lead to further inequalities in pension provision.<sup>297</sup>

The Green Paper also mentions the risks stemming from the solution introduced in the new pension system, where seniority is not a condition for receiving a pension. In the case of persons who have acquired the right to a pension without reaching the required seniority (currently 22 years for women, 25 years for men), the benefit received is not increased to the level of the lowest pension. Thus, it may be extremely low. As predicted, in December 2015, the majority of persons receiving such a pension were women – constituting as much as 95 % of the entire group.<sup>298</sup>

#### 7.1.2 Other relevant issues

No other relevant issues were identified.

#### 7.1.3 Overview of national acts

The Polish legislator when reforming the system of social security, gave it a common and unified character, in the sense that one legal act of 1998<sup>299</sup> covered not only employees, but also workers performing activity on other grounds than on the basis of an employment contract, whose pecuniary benefits paid from the social security were previous to the reform set forth in separate legal acts.<sup>300</sup>

Currently only the situation of persons performing agricultural activities is governed by a separate act of 1990.<sup>301</sup> However, despite the fact that all consecutive governments have envisaged the need for harmonisation of old age benefits of farmers with the

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<sup>297</sup> *Zielona Księga ZUS, Przegląd systemu emerytalnego 2016 – Bezpieczeństwo dzięki odpowiedzialności* (ZUS Green Paper, Review of the Pension System 2016 – Safety through Responsibility) 2016, available at: <https://www.zus.pl/documents/10182/167526/Zielona+ksi%C4%99ga+przeql%C4%85du+emerytalnego+2016/d9596eda-c57f-4218-bac4-c8c2470b5a12>.

<sup>298</sup> Petelczyc, J., Roicka, P., *Sytuacja kobiet w systemie emerytalnym* (The situation of women in the pension system) 2015, available at: <https://www.isp.org.pl/pl/publikacje/sytuacja-kobiet-w-systemie-emerytalnym>.

<sup>299</sup> Act on the System of Social Security, dated 13 October 1998, JoL 1998 No. 137 Item 887, with subsequent amendments.

<sup>300</sup> In 2005, the number of the insured persons in ZUS was around 13 130 000, which, with a total population in Poland of circa 38 157 000, makes circa 34.5 %. In 2005, expenditure on pensions accounted for 89.1 % of total ZUS expenditure and amounted to PLN 99 000 million (EUR 23 571 million for about 7.2 million people. Payment of cash benefits from the different funds was as follows: old age pension fund – PLN 61 017 million (EUR 14 527 million), disability and survivors' pension fund – PLN 37 265 million (EUR 8 872 million), sickness fund – PLN 4 949 million (EUR 1 178 million), work accident fund about 416 million (EUR 99 million). 'Social Insurance in Poland. Information, facts'. ZUS Social Insurance Institution. Warsaw 2006, p. 19. Currently circa 12 million people are insured under the Polish second (capital) pillar. In 2008, the first women shall receive the retirement benefits under this scheme, p. 25.

<sup>301</sup> The situation of persons performing agricultural activity is governed by the Act on the Social Security of Farmers dated 20 December 1990. Uniform text – JoL 1998, No. 7 Item 25, with subsequent amendments. The situation of persons performing activity outside of agriculture is governed by the Act on the System of Social Security, dated 13 October 1998, JoL 1998 No. 137 Item 887, with subsequent amendments.

benefits of other working people, this system still remains unchanged, as any attempts to change face fierce opposition from the farmers.

The old-age benefit granted according to the current system of statutory social security is paid out of one, two or three sources, called pillars. Pension schemes of pillar one and pillar two may be considered as being part of the European first pillar target by Directive 79/7/EEC. The specific feature of the Polish social security scheme is that the date of birth constitutes a criterion of whether a person is covered by the old (first pillar) or by the new (second pillar) system.<sup>302</sup>

The first pillar, similarly to the system before the reform of 1998, is based on a so-called intra-generation agreement, i.e. the repartition system, in which money paid by persons presently working is transferred to retired persons through the reformed Social Security Agency (ZUS). However, in contrast to how it was regulated under the previous system, the amount of the old-age pension paid out from this pillar shall depend, to a certain extent,<sup>303</sup> on the sum of paid contributions, saved in an individual account, re-evaluated every year. In this system, the contribution to social security is paid in one sum, without specification of particular risks. It is not invested. Therefore, the situation on the investment market shall not directly influence the amount of future old-age pension. It will be paid lifelong, but the contributions recorded in the 1st pillar cannot be inherited, even when the insured person dies before retirement.

The second part of old-age pensions shall come from the open retirement fund (2nd pillar, called 'capital or funded pension pillar'). In this pillar, part of the contributions paid by the insured person is invested within the open private retirement fund, administered by the Universal Retirement Society or, since 2017, may be entirely administered by the Social Security Agency (ZUS) instead, if the insured person so wishes. Every contribution paid to the open fund will be calculated in settlement units, the value of which will evolve in concordance with the situation on the financial market. The sum of units multiplied by the actual price of the unit shall constitute the insured person's capital, on which the amount of this person's old-age pension shall depend. The capital deposited in the open retirement fund shall increase with the increase of the number of settlement units on the insured person's account in result of the influx of new contributions and increase of the unit's price.<sup>304</sup> As opposed to the 1st pillar, the means deposited on the account of 2nd pillars may be inherited (under the condition that the insured person dies before he or she retires).<sup>305</sup> In both pillars the legislator introduced an enumerative catalogue of persons, who must or may voluntarily be covered by particular insurances.<sup>306</sup> It has to be mentioned that another specific feature of the Polish

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<sup>302</sup> The new system is obligatory for persons born after 31 December 1968, which means that the contribution paid from their income is shared between the 1st and 2nd pillar. Persons born before 1 January 1949, as well as the persons working exclusively in agriculture, remain only in the old system. Persons who were less than 15 years from the retirement age on the date of the implementation of the reform were excluded from the new retirement system, because new rules could cause a significant decrease of their benefits. Persons born between 31 December 1948 and 1 January 1969 could choose by the end of 1999, whether to allocate the whole contribution to the 1st pillar or whether to share it between the 1st and 2nd pillar.

<sup>303</sup> The system provides maximum pension, which may not be higher than 100 % of the basis of assessment (and the basis of assessment may not be higher than 250 % of the base amount, which is equal to average earning reduced by social insurance contributions deducted from the insured persons in the preceding calendar year). In 2007, it amounted to PLN 2 059.92 (EUR 478) (*Monitor Prawny* (Legal Monitor) No. 12, Item 126), which gives a maximum old age pension of about PLN 5 147 (EUR 1 197) monthly. In 2018, the base amount was PLN 3 731 (EUR 867.60). The minimum retirement age was PLN 1 000 (EUR 232.50) gross. The number of people with pensions below the minimum is growing year by year. The state provides for the payment of a minimum benefit to such persons, but on condition that they prove that they have worked for 20 years (for women) and 25 years (for men).

<sup>304</sup> However, potential decrease of the unit's price may cause the decrease of capital, even below the sum of contributions paid on the open fund.

<sup>305</sup> In the case of divorce of spouses, the contributions gathered within the 2nd pillar may be divided between spouses (possibly by the court).

<sup>306</sup> Groups of persons covered by compulsory pension insurance include: employees, members of agricultural production cooperatives, freelancers, persons carrying out activity outside of agriculture, clergy, members

social security system, reformed since 1999, is the separation of sickness insurance<sup>307</sup> from health insurance.<sup>308</sup>

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

The political and societal debate related to social security concentrates mainly on the issue of the different retirement age for women and men. There is currently no public debate on potential legal reform in this area.

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

The principle of equal treatment of men and women in matters of social security is provided for in Article 2a of the Law on the System of Social Insurance; Article 4(4)(b) of the Anti-Discrimination Law and Articles 2a and 2b of the Law of 20 April 2004 on promotion of employment, which applies to benefits from social insurance in case of unemployment.

The Law on the System of Social Insurance establishes the rule of equal treatment of all insured, without regard to sex.<sup>309</sup> This equal treatment rule refers in particular to conditions of the obligation to calculate and transfer social insurance contributions, calculate the amount of benefits, period of payments and the duration of the right to benefits, as elements of the system of social insurances (Article 2a(2)). An insured person who believes that the principle of equal treatment has been violated with regard to him or her, has the right to claim damages before a court (Article 2a(3)).

Additionally, the Anti-Discrimination Law explicitly provides in Article 4(4)(b) that the horizontal protection enshrined in its provisions also applies to any violation of the principle of equal treatment in the access to the social security system. These provisions implement Articles 4 to 6 of Directive 79/7/EEC.

Until 2016, the self-employed persons insured within the optional sickness insurance scheme were not entitled to sick child care allowances. By contrast, all employees (for whom sickness insurance is mandatory) were entitled to such paid leave.<sup>310</sup> This exclusion, although it did not concern only women, was perceived as indirect discrimination based on sex, since in practice, women usually take care of sick children.

As concerns sick child care allowances (mentioned in the first example), it has already been partially amended, following a ruling of The Constitutional Tribunal that found, in the judgment of 6 March 2007 (P 45/06), the respective provision (Article 32 Paragraph 1 points 2 and 3 of the Law of 25 June 1999 on payments from social security

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of Parliament receiving remuneration, recipients of unemployment benefits, persons in the course of childcare leave or recipients of maternity allowances. Compulsory sickness insurance covers persons subject to compulsory pension insurance being employees, members of agricultural production cooperatives and rural circles cooperatives, persons undergoing substitute military services. The sickness insurance may be joined on a voluntary basis by persons covered by compulsory pension insurance who, inter alia: carry out activity outside of agriculture, perform work on a basis of civil law mandatory or agency contracts. Compulsory work accident insurance covers persons subjected to compulsory pension insurance for example: employees, members of cooperatives, persons carrying out activity outside of agriculture and persons collaborating with them. Persons covered by compulsory pension insurance may – after its cessation – continue it on a voluntary basis.

<sup>307</sup> The sickness insurance provides for the payment of cash benefits in respect of sickness and maternity governed by the Law of 25 June 1999 (consolidated text: JoL of 2005 No. 31 Item 267 with further amendments).

<sup>308</sup> The health insurance means the system of benefits of the preventive, diagnostic, therapeutic and rehabilitative character, financed by public resources. The scope of this system has been determined in the Law of 27 August 2004 (JoL 2004 No. 210 Item 2135).

<sup>309</sup> As well as race, ethnic origin, nationality, civil state, and family status.

<sup>310</sup> Those discriminatory provisions applied to circa 1.9 million self-employed persons in Poland, from which more than one third are women, *Gazeta Prawna*, 5 March 2007.

in case of sickness and maternity) partially incompatible with Article 2 (the principle of rule of law) and Article 32 Paragraph 2 (non-discrimination clause) of the Polish Constitution of 1997. In its reasoning the Tribunal pointed out that the differentiation of the situation of persons under sickness insurance, depending on its character (mandatory or optional), is contrary to the Constitution; the insured persons paying the same contributions may expect the same benefits regardless of whether the participation in the system was obligatory or optional. However, another appearance of different treatment of insured persons depending on whether they participate in the system on an obligatory or optional basis, still remained in existence, since the Minister of Work and Social Policy at that time issued the recommendation that this judgment of the Constitutional Tribunal should be understood literally, which means that the persons under the optional sickness insurance system are not entitled to be paid leave for care of a child under the age of eight in so-called emergency cases.<sup>311</sup>

In 2016 this interpretation was changed and the care allowances in emergency cases are now paid to self-employed persons as well.<sup>312</sup> The Government may thus be considered to have complied with the obligation laid down in Article 5 of Directive 79/7/EEC. In addition, it has to be pointed out that even though the period of parental and childcare leave is considered as a contributory period, paid from the State's Budget, this contribution is paid based on a minimum salary only, which will influence the amount of future old-age entitlement. Taking into consideration the fact that the basis of the contributions of self-employed persons (paid to ZUS before a period of leave) constitutes, as in the case of employees, the average monthly income from the last 12 months, such differentiation of the situation of insured self-employed persons and employees has no objective justification and may be qualified as discriminatory practice. Bearing in mind that most of the beneficiaries of those periods of leave are self-employed women, it may also be considered as indirect sex discrimination.

### 7.3 Personal scope

The personal scope of the Law on the system of Social Insurance corresponds with requirements of Article 2 of Directive 79/7/EEC. The reform of 1998 made the system more universal and uniform in the sense that the application of the Social Security Law was no longer limited to employees, but also covered persons performing work not based on an employment relationship (e.g. the self-employed, persons performing work on the basis of an agency contract or a contract of mandate, artists, priests, etc.).<sup>313</sup> This reform also included public servants remaining in service relationships in the

<sup>311</sup> <http://www.zus.pl/default.asp?p=1&id=1&idk=459>.

<sup>312</sup> <https://zus.pox.pl/zus/zasilek-opiekunczy-a-dzialalnosc-gospodarcza.htm>. According to the regulations, the insured person is entitled to a benefit for a period of 60 days a year if during this time he or she took care of another member of the family, e.g. a sick child or a spouse. Such a care allowance is also granted to persons running their own businesses, which allows for a significant reduction in the amount of ZUS contributions due. This benefit may be paid even if the child falls ill in the first month of the entrepreneur's insurance. The care allowance is granted only if there are no other family members at home who can provide care for the child. However, there is an exception to this rule. It applies to the care of a sick child up to the age of two years.

<sup>313</sup> Groups of persons covered by compulsory pension insurance include: employees, members of agricultural production cooperatives, freelancers, persons carrying out activity outside of agriculture, clergy, members of Parliament receiving remuneration, recipients of unemployment benefits, persons in the course of childcare leave or recipients of maternity allowances. Compulsory sickness insurance covers persons subject to compulsory pension insurance being employees, members of agricultural production cooperatives and rural circles cooperatives, persons undergoing substitute military service. The sickness insurance may be joined on a voluntary basis by persons covered by compulsory pension insurance who, inter alia: carry out activity outside of agriculture, perform work on a basis of civil law mandatory or agency contracts. Compulsory work accident insurance covers persons subjected to compulsory pension insurance, for example: employees, members of cooperatives, persons carrying out activity outside of agriculture and persons collaborating with them. Persons covered by compulsory pension insurance may – after its cessation – continue it on a voluntary basis. The Polish system of social security does not provide the general exclusion of people because they work e.g. in minor employment in non-remunerated employment (voluntary jobs).

system.<sup>314</sup> The only group still to fall outside the scope of this Law are farmers, who are covered by a separate Law of 20 December 1990 on Social Insurance of Farmers. However, it should be emphasised that the farmers' insurance system is deemed to be a part of the statutory social security system, hence the Directive 79/7/EEC and the equal treatment clause enshrined in Article 2a of the Law on the System of Social Insurance and Article 4(4)(b) of the Anti-Discrimination Law applies to it.

## 7.4 Material scope

All social risks mentioned in Article 3(1) of Directive 79/7/EEC are covered by the Polish statutory social insurance system, which in this respect seems to conform to the requirements of the Directive. In the current system, contributions covered by the Law on the System of Social Insurance are divided into the following categories: old-age and disability pensions; sickness and maternity insurance; insurance against accidents at work and occupational diseases (Article 1 of the above Law).<sup>315</sup> Protection against unemployment in the form of benefits is paid from a special Labour Fund, where contributions transferred by the employers and workers are aggregated, for every salary exceeding the minimum salary, provided for in Chapter 15 of the Law of 20 April 2004 on promotion of employment. It is also regulated in the Law of 12 March 2004 on Social Aid (consolidated text in JoL 2017, Item 1769, Article 7(4), concerning social assistance granted in the case of unemployment).

## 7.5 Exclusions

An exception provided for in Article 7(1) of the Directive used to apply in Poland with respect to the retirement age, which was traditionally different for women and men (respectively 60 and 65). This much criticised differentiation of the retirement age for women and men was still in the process of equalisation,<sup>316</sup> when the Law of 16 November 2016 reinstalled different retirement ages for women (60) and for men (65).<sup>317</sup> The same law introduced an analogical change of retirement age for farmers. The law also introduces other changes, which are inseparably linked to the implementation of this regulation, inter alia, it reinstalled the compulsory contribution period (amounting to 20 years for women and 25 years for men) and abolished the possibility of early retirement. The new law came into force on 1 October 2017.

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<sup>314</sup> Such professions as judges and prosecutors are still governed by special regulations.

<sup>315</sup> In respect of old age, the benefits include: the retirement pay (old age pension) and nursing compensatory allowance to pensions.

In respect of sickness and maternity the benefits include: sickness allowance, maternity allowance, care allowance, compensatory allowance, and rehabilitation benefit.

In respect of the long-term incapacity for work the benefits include: disability pension, training pension.

In respect of death of a breadwinner the benefits include: survivor's pension and supplementary allowance to survivors; pension for complete orphans.

In respect of accidents at work and occupational diseases the benefits include: lump-sum compensation, benefits in respect of sickness long-term incapacity for work and death of a breadwinner, dentist services and prophylactic vaccinations, cost of orthopaedic appliances.

In addition, ZUS pays: social pension, pre-retirement benefits and death grant.

<sup>316</sup> The Law on pensions and disability allowances of 17 December 1998, after amendments introduced in May 2012 (unified Text JoL 2013 Item 1440 with further amendments) provided that, starting from 2013, the retirement age be extended by one month every quarter of the year. This meant that it was planned that men would retire at the age of 67 in 2020 and women in 2040. The process of extending the retirement age was ceased in 2016. It is worth noting that the change of the retirement age in 2012 raised constitutional concerns. However, Article 67 Paragraph 1 of the Constitution does not provide any requirements regarding the limits of the retirement age, which means it may be specified in a regular law. This was confirmed by the Constitutional Court in its ruling of 7 May 2014, case No. K 43/12. Nevertheless, in the author's opinion, that the Constitutional Tribunal has overlooked the fact that the increase of retirement age for both sexes, which should eventually reach the age of 67, could be seen as possible gender-based discrimination, since for men, the time of obtaining retirement benefits was only delayed by two years, whereas for women this was supposed to be up to seven years.

<sup>317</sup> The Law of 15 November 2016 on amendment of the Law of 17 December 1998 on retirement and disabilities benefits from the Social Security Fund (JoL of 2016, pos. 887) and certain other laws, published in JoL 2017 Item 38.



The equalisation of retirement ages was considered as an opportunity in the pension gap between the women and men (according to estimations, without equalising the retirement age, the old-age pensions of women would be lower by about 50 %). It has to be noted that although the different retirement ages had not previously raised constitutional concerns,<sup>318</sup> the full bench of the Constitutional Tribunal later found that the increase of the retirement age is constitutional.<sup>319</sup> The question remains whether the constitutional standards of the rule of law also allow abortion of such reforms before their completion and before their impact becomes visible. The current parliamentary majority has reverted the reform for purely populist reasons (the majority of Poles were against the increase of the retirement age). The lowering and differentiation of the retirement age for men and women has important practical consequences due to the fact that the new retirement scheme (in contrast to the old system) is based on the ground rule that the amount of the future benefit is the direct derivative of the amount of paid contributions. People demanding the return to the previous differentiated regulations, especially women, do not always understand that lowering the retirement age has a significant influence on the amount of their future monthly benefit, because it will cause the sum of accumulated contributions to be reduced, additionally increased by the extension of duration of life expectation of retired persons. This was among the reasons why the European Commission in 2012 recommended changing the retirement age according to the longer life expectation, and introducing the equalisation of the retirement age for women and men.<sup>320</sup> The amendments introduced in 2016 are contrary to those recommendations.

As a result of criticism from the European Commission, which recommended initiation against Poland the procedure provided for in the Article 7 TEU among other things due to the different retirement age of female and male judges in the Law on the common courts system, which constitute the violation of Article 157 TFEU and of the 2006/54 Directive,<sup>321</sup> a respective amendment of the Law has been introduced.<sup>322</sup> However, the differentiated retirement age for academics, which is linked to general system's retirement regime,<sup>323</sup> although it proved to be discriminatory for women (whose academic careers are usually delayed in comparison with their male colleagues),<sup>324</sup> still remains.

Article 3(2) of the Directive provides that family benefits and survivors' benefits do not fall within the scope of the Directive. However, in Poland, the principle of gender equality in relation to these benefits has been introduced in practice. All widows and widowers have the right to family pension under the condition that they are over 50 years of age or incapable of work. In the case of death of one of the spouses, 50 % of the contributions gathered within the 2nd pillar (funded pension pillar) has to be transferred to the survivor's spouse's account. The remaining 50 % are reimbursed in cash to the indicated person (which might be the spouse).

<sup>318</sup> In the ruling, of 15 July 2010, in case No. K 63/07, the Constitutional Tribunal confirmed that different retirement ages for women and men were considered in constitutional jurisprudence as so-called privileging compensation (affirmative action, preferential treatment), aiming to reduce inequalities with regard to sex.

<sup>319</sup> Ruling of 7 May 2014, case No. K 43/12.

<sup>320</sup> PL || 15.1/ 19.5 || 61.4/ 57.5 ## || 65/60 || 65/60 || (67/67) || 13.5 || CSR 3-(in): WHITE PAPER An Agenda for Adequate, Safe and Sustainable Pensions /\* COM/2012/055 final L <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52012DC0055>.

<sup>321</sup> [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_17\\_5367](https://ec.europa.eu/commission/presscorner/detail/en/IP_17_5367).

<sup>322</sup> Finally, an equal 'retirement age' for female and male judges has been in force since 23 May 2018 on the basis of the Law of 12 April 2018, amending, among others, the Law on the common courts (JoL 2018 Item 848).

<sup>323</sup> The Law of 20 July 2018 on higher education and science, in force from 1 October 2018 (JoL) as to retirements refers to the Labour Code, which provided for such differentiation.

<sup>324</sup> Which will result in lower pensions (compared to men's) due to the statistically longer period of careers with lower salaries, related to lower scientific degrees. Without higher scientific degree the academic is unable to obtain some decision-making positions within the organisational structure of the academic institutions, to which is attributed additional remuneration.



According to the statistics<sup>325</sup> within the population of persons over 50 years of age, more than 74 % of women profit from the family pensions and only 9 % of men. Many women entitled in a personal capacity to the retirement pay apply for the family pension instead, since – as a rule – it is higher than their own expected old-age benefit.

## **7.6 Actuarial factors**

In statutory social security schemes, sex is not used as an actuarial factor which determines contributions in individual cases.

## **7.7 Difficulties**

There are no specific difficulties in relation to implementation of the Directive 79/7/EEC.

## **7.8 Evaluation of implementation**

The provisions of the Law on the system of social security correspond with the provisions of the 79/7/EEC Directive.

## **7.9 Remaining issues**

On 1 March 2019, the Act of 31 January 2019 on Supplementary Parental Benefit (JoL 2019 Item 303), the so-called Mama 4+ Act, came into force, which defines the conditions and rules for the payment and financing of this benefit. The purpose of the benefit is to provide the necessary means of subsistence for women who have given up employment or other gainful activity or have not taken up such activity due to the fact that they have at least four children (their own, that of the other spouse, adopted, taken for bringing up within a foster family, with the exception of professional foster care). This benefit may exceptionally apply to the father (in the case of death of the mother, abandonment of the child and long-term cessation of the mother's raising of the child (Article 3). The amount of benefit cannot be higher than the lowest pension (which in 2019 amounts to PLN 1 100 (EUR 290)). In the case of receiving a pension in an amount lower than the lowest pension, the benefit is supplemented to the amount of the lowest pension (Article 7). This law appears to comply with Article 4(2) of the Directive.

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<sup>325</sup> National Pensions Strategy. Adequate and Stable Pensions System (2005) and its updating in chapter 3 of the 'National report on strategies for social protection and social inclusion' (2006).

## 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 Poland, self-employment is currently widespread. According to Eurostat data, in 2012 there were 2.9 million self-employed persons, of which 986 000 were women. 43 % of all self-employed persons worked in agriculture.<sup>326</sup> According to research commissioned by the European Commission and published in January 2013, 47 % of Poles would prefer to be self-employed. This percentage is higher than the European average (37 %).<sup>327</sup> Data from the Polish part of this research shows that Poles would prefer to be self-employed mostly because of the independence and self-fulfilment associated with this status (65 %). On the other hand, 27 % of Poles do not consider self-employment, because they do not have the necessary means and the current situation does not favour starting such business activity. 39 % fear bankruptcy and 41 % are discouraged by the potential irregularity of income.<sup>328</sup> Other research indicated handicaps such as administrative difficulties and barriers, and the lack of good business ideas.<sup>329</sup>

Self-employment in Poland is associated with a specialised professional activity (e.g. in the IT sector, publishing, advertising, as well as legal and financial services). At the turn of the century, creating your own company was frequently seen as a means to combat unemployment. A significant number of women took advantage of such opportunities, encouraged by special programmes and loans.<sup>330</sup> There is no data as to how many of those companies set up by women have survived.

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<sup>326</sup> Comparison table available at: [http://epp.eurostat.ec.europa.eu/statistics\\_explained/index.php?title=File:Self\\_employed\\_status,\\_2012.png&oldid=133220](http://epp.eurostat.ec.europa.eu/statistics_explained/index.php?title=File:Self_employed_status,_2012.png&oldid=133220). This data relies on data from the National Business Registry Number (REGON). It is uncertain, however, how many of the companies listed in this register actively conduct commercial activities and how many of these entrepreneurs are own-account workers, without employing others. As a result, the actual number of 'self-employed' persons is difficult to determine precisely, as such a group is not recorded separately in the statistics. It is estimated that they constitute between 60 % and 70 % of the general number of registered enterprises. In 2012, 1.3 million single-person companies were registered in the Social Security Institution (ZUS). This is also the officially estimated number of self-employed persons. Cf. further: Piechowiak, Ł., *Czy to koniec samozatrudnienia w Polsce* (Is this the end of self-employment in Poland), available at: <https://www.bankier.pl/wiadomosc/Czy-to-koniec-samozatrudnienia-w-Polsce-2466703.html>.

<sup>327</sup> Flash Eurobarometer FL354 *Entrepreneurship in the EU and beyond* provides data for the first six months of 2012. Cf.: [https://data.europa.eu/euodp/data/dataset/S1024\\_354/resource/1f6c0b18-3222-4b8e-9c2d-16e7c5792b7c](https://data.europa.eu/euodp/data/dataset/S1024_354/resource/1f6c0b18-3222-4b8e-9c2d-16e7c5792b7c). According to other research, this number was even higher (73 %), with a European average of 69 %. See further: Report from research conducted in November 2012 by Amway Europe, with cooperation of the Center of Entrepreneurship of the Ludvik Maximilian University in Munich and the GfK Institute *Raport na temat przedsiębiorczości w Polsce w 2012 roku* (2012 Report on the entrepreneurship in Poland in 2012) available in Polish at: <http://news.amway.pl/files/2012/11/Przedsi%C4%99biorczo%C5%9B%C4%87-i-m%C5%82odzi-przedsi%C4%99biorcy.pdf>.

<sup>328</sup> [https://data.europa.eu/euodp/data/dataset/S1024\\_354/resource/1f6c0b18-3222-4b8e-9c2d-16e7c5792b7c](https://data.europa.eu/euodp/data/dataset/S1024_354/resource/1f6c0b18-3222-4b8e-9c2d-16e7c5792b7c).

<sup>329</sup> Cf.: research conducted in November 2012 by Amway Europe, with cooperation of the Center of Entrepreneurship of the Ludvik Maximilian University in Munich and the GfK Institute. *Raport na temat przedsiębiorczości w Polsce w 2012 roku* (Report on the entrepreneurship in Poland in 2012) available in Polish at: <http://news.amway.pl/files/2012/11/Przedsi%C4%99biorczo%C5%9B%C4%87-i-m%C5%82odzi-przedsi%C4%99biorcy.pdf>.

<sup>330</sup> Lisowska, E., *Przedsiębiorczość kobiet w Polsce na tle krajów Europy Środkowej i Wschodniej* (Entrepreneurship of woman in comparison to East and Central European Countries). *Monografie i Opracowania nr 494, Szkoła Główna Handlowa, Warszawa* 2001. Compare also *Samozatrudnienie* (Self-employment). Report prepared by the Polish Agency for Entrepreneurs Development (PARP), Warszawa 2004.

A current problem in Poland is the large scale of forced self-employment.<sup>331</sup> A significant number of self-employed persons were given the choice by their employers to either change to self-employment or be made redundant.<sup>332</sup> The main goal of such form of self-employment was to free the employers from burdens and complications associated with contract-based employment. In such cases, self-employed persons work just as if they were employed in the company, with the difference, however, that they pay their own insurance contributions. Also, they do not benefit from all protection measures provided for in the Labour Code. However, since 2016, the LC's provisions dealing with special rights related to childbirth and childcare, as well as the standard safety nets apply to them. Such economically dependent self-employment is frequently referred to as superficial, since it is often not based on the genuinely free choice of the employee.<sup>333</sup> In this context it should be noted that, due to tax reasons, self-employment is not in general beneficial for persons previously employed and continuing the work for the same employer. It has some advantages only for persons with high incomes.<sup>334</sup> It is worth noting that the situation may change soon. The draft of the new Labour Code prepared by the Ministry of Family, Labour and Social Policy contains new regulations protecting the rights of a certain category of self-employed persons<sup>335</sup> as regards minimum salary, leave, sick pay, prevention of contract termination during e.g. pregnancy. At the same time, for this category of self-employed persons, there is also a plan to introduce a contribution for obligatory social insurance, on the basis of principles applied to all employees, which, in the case of self-employed persons with high income, will mean a much higher obligatory burden paid for ZUS.

As already mentioned, the category of self-employed persons is not reflected in official statistical data. The Statistical Yearbook of the General Statistical Office (GUS) recognises the general category of employment (employed persons),<sup>336</sup> which includes employers who own farms or enterprises outside agriculture (together with cooperating family members), and 'own-account' workers (e.g. lawyers and artists). These two categories correspond with the notion of self-employment. In the years 2011 and 2012,

<sup>331</sup> In the literature this is referred to as economically dependent self-employment. See Musiała, A., *Prawna problematyka świadczenia pracy przez samozatrudnionego ekonomicznie zależnego* (Legal problems of performing work by economically dependent self-employed persons), *Monitor Prawa Pracy* 2014 No. 2.

<sup>332</sup> See *Samozatrudnienie w odwrocie: Ubyło jednoosobowych firm* (The number of one-person enterprises has decreased). *Gazeta Prawna*.pl of 28 February 2013 available at: [http://serwisy.gazetaprawna.pl/msp/artykuly/685965,samozatrudnienie\\_w\\_odwrocie\\_ubylo\\_jednoosobowy\\_ch\\_firm.html](http://serwisy.gazetaprawna.pl/msp/artykuly/685965,samozatrudnienie_w_odwrocie_ubylo_jednoosobowy_ch_firm.html) and Rączka, K., *Samo-zatrudnienie. Przyczyny zjawiska i jego skutki w sferze zatrudnienia* (Self-employment. Background of the phenomenon and its consequences in the sphere of employment). Conference materials publication. Office of the Commissioner for Human Rights, *Warszawa* 2005. pp. 17-18. This was also mentioned by the Supreme Court in its rulings from 12 February 2013 (II UK 184/12) and from 10 April 2013 (II UZP 2/13). The court noted with approval the existence of provisions aimed at preventing situations in which employers would force workers to dissolve their employment contracts and change to so-called self-employment, i.e. take up a commercial activity that would be identical to their previous task as workers based on the employment contract.

<sup>334</sup> It allows them to pay lower taxes (the flat-rate tax amounts to 19 %, whereas the regular income tax for persons with high incomes may even amount to 35 %).

<sup>335</sup> This category is described as self-employed economically dependent persons (*samozatrudniony zależny ekonomicznie*), those persons who provide, in a direct way, the services for a particular entrepreneur (or an organisational unit which is not an entrepreneur, or for an agricultural holding (contractor)) for at least 21 hours per week (on average) and for at least 182 days. Regardless of the period of service, the members of management or supervisory boards who are not employed on the basis of an employment contract will also be considered economically dependent self-employed, under the condition that the duration of this occasional work is more than 32 hours. It is important that the employment of employees will not prevent them from the automatic classification as economically dependent self-employed.

<sup>336</sup> In Polish: '*pracujący*'. The data regarding employment concerns persons performing work and providing earnings or income, and include e.g.: 1) employees hired on the basis of an employment contract (labour contract, posting, appointment, or election) or service relation; 2) employers or own account workers. This second category, which corresponds with the notion of self-employed persons, covers 1) owners, co-owners, or leaseholders of private farms in agriculture (including contributing family members) working in private farms; b) owners and co-owners of entities conducting economic activity outside agriculture (including contributing family workers); and c) other self-employed persons who practise learned professions. See *Rocznik Statyczny RP* (Statistical Yearbook of the Republic of Poland) 2012, *Główny Urząd Statystyczny* (Central Statistical Office; further referred to as GUS), *Warsaw* LXXII, at p. 218.

the overall number of self-employed persons amounted to 3 735 000, among which 1 611 700 were women. From the whole group, 2 216 200 were employed on private farms in the agricultural sector.<sup>337</sup> According to GUS data, the number of employers and own-account workers in 2005-2012 showed a gradual increase, although there is no data allowing determination of which of the two combined groups this phenomenon actually relates to. In the last two years the number of self-employed persons has decreased.<sup>338</sup> For example, the number of farmers decreased by 33 000 in the previous year.<sup>339</sup> In the sphere of economically dependent self-employment, this is explained by the fact that employers, when facing the need for further reduction of labour costs, often first terminate cooperation with self-employed persons. Another significant reason for the decrease in self-employment is structural changes in agriculture. Economists indicate that decreasing subsidies from the Labour Fund and smaller funds coming from the European Union have also negatively influenced the number of self-employed persons. For many self-employed persons, the necessity to pay higher social insurance contributions after the first two years of self-employment is a barrier that is difficult to overcome.

### 8.1.2 Other issues

The authors do not see other issues, relevant in this context.

### 8.1.3 Overview of national acts

From the legal perspective, until 2018, the status of self-employed persons did not differ from the situation of other commercial entities. On 30 April 2018, the main legal document regulating non-agricultural commercial activity entered into force, that is, the Law of Entrepreneurs (*Prawo przedsiębiorców*), JoL 2018 Item 646, replacing the previous Law on Freedom of Economic Activity.<sup>340</sup>

The legal status of farmers is regulated in various legal Acts. The matter of social insurance of persons conducting agricultural activity is regulated in the Law of 20 December 1990 on the social security system of farmers.

Directive 86/613 was implemented by the Anti-Discrimination Law.<sup>341</sup> Article 175<sup>1</sup> LC introduced by the Act of 24 July 2015 (JoL of 2015, pos. 1268) – and amendments to the provisions of Section 8 of the LC (on the rights of employees related to parenthood) related to its introduction – may be considered as implementation of Article 8 of Directive 2010/41 with regard to childbirth-related leave in the case of a self-employed person carrying out non-agricultural activities. All the rights provided for in this section are now also applicable to persons who are not employees, but who are subject to social insurance in case of sickness and maternity according to the Act of 13 October 1998 on the social insurance system and the Act of 25 June 1999 on pecuniary benefits from social insurance in case of sickness and maternity.

Formally, the aforementioned Act amending the LC does not refer to the Directive 2010/41, although in fact it does lead to changes adapting the provisions of the LC to

<sup>337</sup> See *Rocznik Statystyczny RP* (Statistical Yearbook of the Republic of Poland) 2012. *Główny Urząd Statystyczny* (Central Statistical Office; further referred to as GUS). Warszawa LXXII, p. 227.

<sup>338</sup> This is one of the strongest decreases among EU countries. Cf.: *Badania aktywności ekonomicznej ludności* (research on economic activity of the population) BAEL, <http://www.stat.gov.pl?cpsd/rde/xbcr/gus>.

<sup>339</sup> Polkowski, W., *Coraz mniej pracujących na własny rachunek* (Fewer and fewer people working on their own account) *Rzeczpospolita* 17 April 2013., see also <https://archiwum.rp.pl/arttykul/1186474-Coraz-mniej-pracujacych-na-wlasny-rachunek.html>.

<sup>340</sup> Already repealed Law of 2 July 2004, JoL 2004 No. 173 Item 1807 (*Ustawa o swobodzie działalności gospodarczej*).

<sup>341</sup> This law was criticised, inter alia, because the legislators seem to have neglected the fact (in the law as well as in the reasoning) that, at the time of its adoption, Directive 2010/41 (which repealed Directive 86/613) was already in force.

the requirements provided for in Article 8 thereof. The lack of such a reference should nevertheless be considered as not fulfilling the obligation stipulated in Article 16(1) of the Directive, requiring the implementing provisions to contain a reference to the Directive.

The Farmers' Social Security Scheme Act has been in force since 1990.<sup>342</sup> Pursuant to this Act, maternity allowance is granted to a person subject to pension insurance in KRUS automatically or upon request (with the exception of persons subject only to accident, sickness or maternity insurance upon request). From 1 January 2016, no sickness benefit is due for the period of receiving maternity allowance.

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

The issue of a separate regulation of social insurance for farmers, which contains more favourable regulations than in the case of insurance for self-employed persons working outside agriculture, is the subject of constant discussion. Intense discussions were also held in 2016 in connection with the change in the rules for granting maternity benefits, which consists of making their amount dependent on the length of time of payment of contributions for voluntary (in their case) sickness and maternity insurance.

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

In the Act of 6 March 2018, the Law of Entrepreneurs, there is only the reference to Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market. No reference to Union law is made in the Act on Insurance for Farmers and Their Families.

### 8.3 Personal scope

#### 8.3.1 Scope

The personal scope of Polish regulations generally corresponds with the categories of workers listed in Article 2 of the 2010/41/EU Directive.

#### 8.3.2 Definitions

Polish legislation does not have an evident and common definition of self-employment. This term, however, is used to describe work activities performed individually or for commercial entities, based on grounds other than a labour contract.

The definition nearest to self-employment is that of an entrepreneur. It exists in various legal acts and varies depending on the goal of those regulations. The most general definition is included in the Civil Code (Article 431), also being very similar to the definition included in the 2018 Law of Entrepreneurs. According to Article 4(1) of the latter Law, an entrepreneur is a natural person, legal person and/or organisational entity without legal personality, on which the special law confers legal capacity, pursuing the economic activity. Partners in a civil law partnership (companies) are also considered as entrepreneurs, as far as their economic activity is concerned (Article 4(2) of the Law). An economic activity is an organised profit-making activity carried out in its own name and on a continuous basis (Article 3).<sup>343</sup> This definition covers 'micro, small and average size entrepreneurs'.

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<sup>342</sup> Law on the social security system of farmers of 20 December 1990 (Consolidated text JoL 2019 Item 220 and Item 303). The changes in this Act, in force since 1 January 2016, concerning maternity benefits, were introduced by the Act of 24 July 2015 amending the Act on family benefits and certain other acts (Journal of Laws of 2015 Item 1217).

<sup>343</sup> The economic activity is not a business activity performed by a natural person whose income due from this activity does not exceed in any month 50 % of the minimum wage (Article 5(1)) of the Act of 2018. The

The definition of self-employed workers within the meaning of Article 2 of Directive 2010/41 EC also corresponds to the concept of a farmer within the meaning of the Act on Social Security for Farmers and their Families. It follows from Article 6(1) of the Act that a farmer is understood as an adult natural person who lives and conducts on the territory of the Republic of Poland, personally and on his own account, agricultural activity<sup>344</sup> on the agricultural enterprise held by him, including activity within a group of agricultural producers, as well as a person who has used the land of the agricultural holding he runs for afforestation.

### 8.3.3 Categorisation and coverage

All self-employed workers are considered to be part of the same category, but some issues in the agricultural sector are regulated separately and partially differently (e.g. taxes and social security). Life partners as such are not explicitly recognised in Polish law. However, similar notions are in use, which may partially correspond with the notion of life partner in the meaning of Article (2) of the Directive 2010/41 EC.

The 2018 Law of Entrepreneurs does not even indirectly refer to spouses of self-employed workers. However, the Law on the system of statutory social security provides for the same protection mechanisms for almost all social and professional groups, including self-employed workers and persons collaborating with them (Article 6(2), Point 5 of the Law on statutory social security). The category of persons collaborating with self-employed includes not only the spouse, but also other persons (children (adopted children); parents, including step- and adoptive parents) (Article 6(11) of the Law on statutory social security).

The Law on the social security system of farmers of 1990 applies both to farmers themselves and to members of their household working with them, including their spouses. According to this Act, a household member is a person over 16 years of age who stays with the farmer in a common household or lives in the area of his or her arable farm or in a close neighbourhood, and in addition he or she works on this arable farm on a regular basis and is not connected with the farmer by an employment relationship (Article 6 point 2 of the Law on the social security system of farmers of 1990).

### 8.3.4 Recognition of life partners

The Polish legislation regarding workers does not refer explicitly to 'life partners', although the definitions of 'householder' within the meaning of the legislation regarding farmers and their 'collaborators', applicable in relation to those self-employed outside agriculture, overlap with this concept.

## 8.4 Material scope

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

The 2018 Law of Entrepreneurs does not contain an implementation of Article 4 of Directive 2010/41/EC. This Law only generally stipulates that the taking up, pursuit and termination of a business is free for everyone on equal terms (Article 2). The Law further states that an entrepreneur may take any action except those that are prohibited by law and may be required to behave in a particular way only under the law (Article 8). The entrepreneur conducts a business activity in accordance with the principles of fair

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provisions of the Act do not apply to farmers in the field of, inter alia, cultivation and rearing in agriculture and the provision of services in the field of agritourism (Article 6). The rights of these entrepreneurs are guarded by a special Ombudsman (Article 16).

<sup>344</sup> Agricultural activity is understood as activity in the field of plant or animal production, including horticultural, fruit, bee-keeping and fish production (Article 6(3) of the Act on social insurance for farmers).

competition, respect for good manners and legitimate interests of other entrepreneurs and consumers, as well as respect for and protection of human rights and freedoms (Article 9).

Also, the Law on social insurance for farmers does not transpose Article 4 of Directive 2010/41 EU.

Article 3(5) of the Anti-Discrimination Law may be considered to have transposed Article 4 of the Directive. This Law, however, transposes various equality directives, including 86/613 and 2006/54, and therefore the wording of this provision is more general than that of Article 4, regarding self-employment. The Anti-Discrimination Law specifies in Articles 4(2) and 8(2) that it is applicable to conditions of undertaking and performing commercial and professional activity, especially with regard to Labour Code- or Civil Code- based employment. This provision may apply both to entrepreneurs and to farmers as self-employed persons.

#### 8.4.2 Material scope

The material scope of Polish regulation relating to equal treatment in self-employment in the Anti-Discrimination Law is more restricted than specified in Article 4 of the Directive. Namely, there is no prohibition on discrimination with regard to equipment or extending business activities. Also, it does not explicitly protect from discrimination with regard to terminating commercial activity. The issue of whether self-employed persons, in the event of direct or indirect discrimination, harassment or sexual harassment experienced with regard to the equipment or extension of business activities, will benefit from the horizontal protection provided for by the Anti-Discrimination Law, depends on the interpretation by courts of the terms 'conditions of undertaking and performing (...) activity'.

### 8.5 Positive action

Although the Anti-Discrimination Law provides in Article 11 for the possibility of taking positive action in order to prevent unequal treatment or align disadvantages relating to equal treatment, currently no such actions have been identified. In the years 2008-2012, positive actions were taken in the form of micro loans for unemployed persons opening small businesses, in particular for women conducting commercial activities. As such, the fact that a special Ombudsman has been appointed to protect the interests of small- and medium-sized enterprises can be seen as a sign of such positive action.<sup>345</sup> However, the Special Ombudsman will protect the rights and interests of both female and male entrepreneurs, although in practice, women may benefit more from this protection (because they run a micro-business activity more often than men).

### 8.6 Social protection

The statutory social security system in Poland<sup>346</sup> provides for the same mechanisms for all social and professional groups, including self-employed workers and persons cooperating with them (only farmers are subject to specific regulations). In the context of Law on statutory social security, in order to be covered by the insurance, the spouse and other family members must not only cooperate with the self-employed person, but must also share a common household with them. Both self-employed persons and persons cooperating with them are subject to compulsory old-age and disability insurance and insurance against accidents at work and occupational diseases

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<sup>345</sup> See: Law of 30 March 2018 on the Ombudsman for small and medium size enterprises, JoL 2018 Item 648. The local offices of the Ombudsman have been opened in several cities.

<sup>346</sup> This system covers: old-age insurance, disability insurance, insurance in case of sickness and maternity (sickness insurance) and insurance against accidents at work and occupational diseases (work accidents insurance) (Article 1 of the Law on statutory social security).

(Article 6(1) point 5).<sup>347</sup> The insurance covering sickness and motherhood may be joined by these persons on a voluntary basis (Article 11(2)).

Pursuant to the Law of 1990, the social insurance of farmers covers the farmers themselves as well as members of their household working with them (Article 1(1)).<sup>348</sup> The provisions of the Act concerning the farmers' insurance and benefits to which the farmer is entitled shall also apply to the farmer's spouse, unless the spouse does not work in the farmer's household or in a household directly related to the agricultural holding (Article 5). The social insurance for farmers includes insurance in case of accidents, sickness and motherhood, as well as old-age and disability pensions (Article 1(2)).

For farmers (and members of their households) operating an agricultural farm larger than one hectare, the insurance from all of the above titles is obligatory.<sup>349</sup> For other farmers or members of their households it is optional (Articles 7 and 16). Since 2016, maternity benefits apply only to those farmers and their family members who are covered by retirement and disability insurance (having accident and sickness insurance alone is not sufficient). The benefit is granted both to the insured mother (biological or adoptive) of the child and the father of the child (at the request of the mother, after 14 weeks of receiving it by her, or in the event of the death of the mother or abandonment of the child by the mother). The State provides additional support if the total amount of collected social insurance contributions is not sufficient to cover all benefits.<sup>350</sup>

## 8.7 Maternity benefits

The wording of Article 8 of the 2010/41/EU Directive has been reflected in Poland in different legal acts. The most important is the previously mentioned Article 175<sup>1</sup> LC, introduced in 2015,<sup>351</sup> which refers to the protection of parental rights of all insured workers, also those without the status of employees in the understanding of the LC. In addition, Articles 48 and 48a of the Law on Maternity Benefits; and Article 35a of the Law on Social Insurance of Farmers should be mentioned.

Currently, an insured woman conducting economic activity may collect maternity benefits, not only during maternity leave, but also during the entire parental leave (a total of 52 weeks), just like a person employed on the basis of a labour law contract. In order to qualify for such benefits, until 1 January 2016, no minimum insurance period was taken into account for the calculation of such benefits.<sup>352</sup> Current rules,<sup>353</sup> laying

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<sup>347</sup> Persons who conducted an economic activity for at least six months and suspended it because of taking care of a child are also entitled to old-age and disability insurances (Article 6a of the Law on statutory social security).

<sup>348</sup> In addition, under certain conditions, it is also available to farmers' assistants.

<sup>349</sup> It is also obligatory for a person collecting a structural pension co-financed from funds from the Guarantee Section of the European Agricultural Guidance and Guarantee Fund or from funds from the European Agricultural Fund for Rural Development; and also for the spouse of such a person, Article 16 of the Act on social insurance for farmers and their families.

<sup>350</sup> The contribution to this insurance is financed from a subsidy from the state budget to the pension fund designated for these contributions in KRUS in the case of childcare of up to three years of age, but not longer than five years of age, provided that the farmer or household member is not subject to other social insurance.

<sup>351</sup> By the Law of 24 July 2015 on amendments of the Labour Code and several other laws (JoL 2015 Item 1268), in force from 2 January 2016. This provision was criticised as breaking the logic of the legal system as a whole because it provided in the Labour Code the regulation on the entitlements of parents being workers but not employees.

<sup>352</sup> The jurisprudence of the courts has repeatedly stressed that the right to maternity leave (in the case of workers) is something different from the right to maternity allowance for self-employed workers granted for a period equivalent to the period of maternity leave, which does not have to suspend it during the maternity leave (the allowance compensates them for the loss of income caused by childcare). For more on this subject cf. judgment of the Constitutional Tribunal of 24 March 2015 (P 42/13), available at: <http://prawo.sejm.gov.pl/isap.nsf/download.xsp/WDU20150000486/T/D20150486TK.pdf>.

<sup>353</sup> Article 48a of the Law on Maternity Cash Benefits.



down a limitation of entitlement to maternity benefits with regard to women (who are non-agriculturally self-employed), created such situation that those allowances are much lower than before, however they can never be lower than PLN 1 000 (EUR 238), otherwise they would not meet the requirement of sufficiency.<sup>354</sup>

According to Article 35a of the Law on social insurance of farmers, as amended in 2015, an insured person (farmer or household member) is entitled to maternity benefits in the case of the birth of a child, or adoption of a child (or taking on for bringing up) up to seven years of age. Maternity allowance is granted for 52 weeks in the case of birth (taking one child for bringing up), and progressively increases to 71 weeks if more than one child is born at one birth or taking more than four children to bring up.<sup>355</sup> Under the new rules, these benefits amount up to the full amount of parental benefit referred to in the Act of 28 October 2003 on Family Benefits (Article 35 b), i.e. in 2018 it amounted to PLN 1 000 (EUR 238) per month for the whole period mentioned above.

The difference in the rules of establishment of the maternity-related benefits which are not fully determined by the amount of paid contributions by the individual may, to a certain extent, be explained by relatively much lower insurance contributions paid by farmers in comparison with employees. It may also be connected with the fact that for a farmer or a household member, subject to pension insurance under the Act or upon application, in connection with personal childcare lasting for up to three years, but not longer than until the child reaches the age of five, the contribution to this insurance is financed from a subsidy from the state budget to the pension fund allocated to these contributions. The condition is that this farmer is not subject to another social insurance scheme (Article 16a). This provision also applies to a farmer or a household member who additionally runs a non-agricultural activity, who is insured for at least three years and who suspends or ceases non-agricultural economic activity during the period of personal childcare (Article 16b).

After the changes referred to above, the maternity allowance for farmers already seems to meet the sufficiency criterion laid down in Article 8(3)(c) of Directive 2010/41/EC – particularly since the PLN 500 (EUR 119) monthly allowance per child should also be taken into account for each child, on the basis of the Family 500 plus programme.

A mother conducting economic activity may combine running the company with taking care of a child, which will not result in losing the right to maternity benefits. While collecting maternity benefits, she will be released from the obligation to pay accident and sickness<sup>356</sup> insurance contributions and maternity insurance contributions as well as pension insurance contributions (which are paid by the State), yet she will have to pay

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<sup>354</sup> According to the amendments brought about by the Law of 15 May 2015 (which has been in force from 1 January 2016) self-employed women are entitled to receive maternity benefits amounting to 100 % of the declared amount of income, only if they have paid the obligatory sickness insurance for a minimum of 12 months prior to commencing maternity leave. In other cases, the maternity benefits will be calculated from the lowest amount of money that, according to the law, can be declared as the basis for calculating insurance premiums. The estimations as to the level of the maternity allowances, made just after the amendments, proved that it may be as low as EUR 4 (PLN 17.20). See Lasocki, T., available at: <http://niezalezna.pl/68363-rzad-wykiwal-przedsiębiorcze-matki-dostana-17-zl-i-77-groszy-zasilku-macierzynskiego>. Successive amendments to Article 48a have eliminated similar absurd situations. Currently, the lowest maternity allowance is EUR 238 (PLN 1 000). Although this benefit is very low taking into account the fact that in 2018 the minimum wage in Poland was approximately EUR 500 (PLN 2 000), it is nevertheless difficult to make an insufficiency charge within the meaning of Article 8(3) of Directive 2010/41 /EC because it corresponds to the amount of other family allowance. The minimum wage was raised in 2016 to EUR 460 (PLN 1 990) (net: EUR 364, PLN 1 565). [http://wyborcza.biz/biznes/1,100896,18219094,Minimum\\_1\\_tys\\_zl\\_zasilku\\_macierzynskiego\\_dla\\_matek.html?disableRedirects=true](http://wyborcza.biz/biznes/1,100896,18219094,Minimum_1_tys_zl_zasilku_macierzynskiego_dla_matek.html?disableRedirects=true).

<sup>355</sup> 65 weeks in the case of two children born in one birth; 67 weeks in the case of three children; 69 weeks in the case of four; 71 weeks for more than 4 children (Section 35a(3) of the Act on Social Insurance for Farmers).

<sup>356</sup> Related to the work performed during the activity.

health insurance contributions.<sup>357</sup> If, however, after giving birth, the person decides to suspend her activity for the period of collecting the benefits, she will be released from health insurance contributions as well.

In practice, sometimes it is difficult to determine when a self-employed woman who adopts a child is entitled to maternity allowance. The following case may serve as an illustration of this problem. A self-employed mother has been running her own business since 2009. In June 2014, she applied for adoption to the family court and in July 2014, she suspended her own business. The main reason was the intention to take care of her daughter, who was then still under the care of a professional foster family. The child was sent to the woman's home already in July, while formal custody (in the form of a court decision to secure personal contact with the minor) was entrusted to her a month later, in August 2014. In October, the woman resumed her economic activity and the final court decision on her daughter's adoption was made in April 2015. Pursuant to Article 29(1)(3) of the Law on cash benefits from social insurance in case of illness and maternity, a maternity allowance is granted to an insured person who – during the period of sickness insurance or maternity/parental/childcare leave – takes a child up to 7 years of age for bringing up (or a child with disabilities up to 10 years of age) and applies to the court for adoption. The key issue here was to determine when the woman actually accepted her future daughter for bringing up. In the opinion of ZUS, the decisive factor was the court's decision of August 2014 to secure personal contact between Mrs. M. and her child. At that time, however, she had her business activity suspended, so – from the point of view of the Law mentioned above – she was not insured, and therefore she was not entitled to maternity allowance for the parent of the adopted child. This is how ZUS assumed and in result rejected the application for the maternity allowance. This decision was critically assessed in the mass media as evidence that ZUS interprets the above-mentioned Law in a discriminatory way towards self-employed adoptive parents<sup>358</sup> and it was finally annulled by the Supreme Court in the ruling of 7 December 2017 (II UK 619/16). In the reasoning, the Supreme Court underlines among other things, that adoption is a process that is spread over time and requires the reprogramming of the lives of future parents. It can be assumed that this trial began when the application for adoption was submitted and the plaintiff was insured at that time. Therefore, in the opinion of the Court she fulfilled the conditions for obtaining the benefit. A different interpretation should be considered as too positivist an approach to the binding regulations.

A self-employed person in Poland also has the right to something similar to unpaid childcare leave (*urlop wychowawczy*).<sup>359</sup> In order to obtain this benefit, such a person must officially interrupt his or her professional activity, directly indicating that in this period he or she intends to provide personal care for a child. During the period of time devoted to taking care of the child, the State pays the contributions for pension (retirement) insurance as well as contributions for health and disability insurance. The basis for calculation of the contributions is the amount equal to 60 % of the expected remuneration in a given year. In order to be able to take childcare leave, persons conducting professional activity have to meet the condition of having paid social insurance contributions for at least six months. This period may not be interrupted and must occur immediately before the childcare leave. If an entrepreneur has paid contributions for less than six months, the Social Care Institution (ZUS) only pays retirement contributions, meaning that in this period the entrepreneur loses his entitlement to health insurance.

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<sup>357</sup> This type of obligatory insurance entitles the insured person to health services covered by the fund from public money. In the case of farmers and registered unemployed persons, the contributions to health insurance are paid from the state budget.

<sup>358</sup> <https://praca.gazetaprawna.pl/artykuly/1091317,zus-zasilek-macierzynski-dla-rodzicow-adopcji.html> and <https://www.rp.pl/Rodzina/312079883-Zasilek-a-adopcja---wyrok-Sadu-Najwyzszego.html>.

<sup>359</sup> In the literature, sometimes it is labelled as a 'childcare leave like' benefit.

In practice, there was a problem as to whether persons suspending economic activity due to childcare and being in a very bad financial situation (due to which they are entitled to child benefit)<sup>360</sup> are also entitled, just like employees in a similar situation, to special childcare allowance during the period of taking parental leave, in the amount of PLN 400 (EUR 100) per month.

The courts of appeal ruled on such cases against the self-employed person. For example, the Court of Appeal in Łódź, in its ruling of 21 March 2018 (II Sa/Ld 477/17) ruled that a person who conducted non-agricultural business activity and suspended it due to the birth of a child does not meet the requirements of Article 10(1) of the Act of 28 November 2013 on Family Benefits (JoL of 2016, Item 1518, as amended), because such a person does not have the right to parental leave in light of Article 186 Section 1 of the LC, because he or she is not an employee. Suspension of economic activity cannot be equated with parental leave, as there is no legal provision allowing for such action by an authority. A similar ruling was issued in this respect by the Court of Appeal in Warsaw on 17 August 2017 (I SA/Wa 375/17), emphasising that under the Polish system of law, entrepreneurs and employees fall into different circles of entities. A person who has suspended business activity cannot be considered as entitled to parental leave, nor can he/she take this leave because he/she is not in an employment relationship. The same applies to the ruling of the Court of Appeals in Białystok of 26 January 2017 (II SA/Bk 2/17). These rulings prove the unequal treatment of employees and self-employed persons, who are not employees, who temporarily interrupt their economic activity in connection with raising a child, but are in a difficult material situation.

There are no services supplying temporary replacements or national social services for self-employed persons. With the exception mentioned above, legislation seems to be in compliance with the requirements laid down in EU law.

## **8.8 Occupational social security**

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

The provisions regarding occupational social security may apply to self-employed persons on the grounds of Article 5(4) of the Law on occupational pension schemes (PPE) and the corresponding Article of the Law on occupational capital pensions (PPK). According to this provision, persons conducting an economic activity are entitled to participate in these programmes.

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

There are no specific exceptions in the application of PPE or PPK to self-employed persons. The law explicitly states that with regard to persons conducting economic activity, who participate in the programme, all provisions apply regarding employees (Article 5(5) of the Law on occupational pension schemes). Although there are no such provisions in the Law on occupational capital pensions (PPK) there are no grounds for differentiation of the situation under PPE and PPK in this respect, what results from other general provisions.

## **8.9 Prohibition of discrimination**

The Law on PPE does not contain any specific non-discrimination clause. However, Article 8(2) of the Anti-Discrimination Law applies to such situations. This provision

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<sup>360</sup> The main criterion for the granting of child benefit is the income criterion per capita in a family. Such a benefit is granted if such income per person does not exceed PLN 674 (EUR 156.70) per month (for a child with disabilities – PLN 764 (EUR 177.60)).

stipulates that unequal treatment of private persons with regard to sex is prohibited, inter alia, with respect to: conditions of undertaking and performing commercial or professional activity, including such performed upon employment contracts or civil law contracts.

### **8.10 Evaluation of implementation**

The provisions of the Polish Acts which may be referred to as implementation of Directive 2010/41/EU, although they are not always explicitly indicated as such, correspond in general to the content of the provisions of the Directive. However, they differ in detail. In particular, the scope of protection against discrimination provided for such persons in the Anti-Discrimination Act declares a similar scope of protection against discrimination (except that, unlike Article 4 of the Directive, it applies only to establishment and exercise of business, and does not include its equipment and extension). The Polish legislation regarding workers does not refer to 'life partners', although the definitions of 'householder' within the meaning of the legislation regarding farmers and their 'collaborators', applicable in relation to the self-employed outside agriculture, overlap with this concept. Polish legislation does not meet the requirement of Article 8(4) of the Directive to provide access to services supplying a temporary replacement for self-employed workers, female spouses and life partners, in connection with the use of maternity benefits. Low minimum maternity allowances for these categories of persons, although formally equivalent in amount to other family-related allowances established in the Polish social-aid law (within the meaning of Article 8(3)(c) of the Directive), may give rise to doubts as to their sufficiency, especially as they amount to half of the minimum wage.

### **8.11 Remaining issues**

The authors have not identified any issues worth raising, other than those discussed in the above text.

## **9 Goods and services (Directive 2004/113)<sup>361</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**

In Poland, no comprehensive research on gender discrimination in the area of access to goods and services has been conducted in recent years. The only significant publication on discrimination in the area of access to goods and services is the 2015 handbook of the Polish Society for Anti-Discrimination Law 'Discriminatory tests. Practical handbook for NGOs.'<sup>362</sup> This publication is a collection of scenarios of exemplary discriminatory tests to be used by NGOs operating in the field of counteracting discrimination. Its aim is to facilitate the gathering of effective evidence to prove unlawful unequal treatment. The publication does not include scenarios concerning gender discrimination and therefore the publication does not provide relevant data for this report.

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

No specific problems of gender discrimination with access to and supply of the online environment / digital market / collaborative economy have been identified.

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

Cases on the refusal to provide services in a restaurant for a breastfeeding mother, as well as the prohibition from entering a shop, for women with a baby in a trolley, raised societal discussion (see below). There was also a strongly politicised public discussion in connection with the refusal to provide services by a private company offering public printing services but on grounds other than gender.<sup>363</sup>

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

The Polish law provides for prohibition of direct and indirect discrimination on the grounds of sex in access to, and the supply of, goods and services, in Articles 4 and 6 of the Anti-Discrimination Law (while defining its scope of application).

### **9.3 Material scope**

The material scope of Polish law relating to access to goods and services is exactly the same as specified in Article 3 of Directive 2004/113. It prohibits unequal treatment of natural persons, inter alia, with regard to sex, including access and conditions of social insurance services, housing services, goods and energy if offered publicly, as well as acquiring rights deriving from those goods and services.

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<sup>361</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>362</sup> Wysińska-Di Carlo, K., Śmiszek, K. (eds): *Testy dyskryminacyjne. Praktyczny podręcznik dla organizacji pozarządowych* (Discriminatory tests. Practical handbook for NGOs.), *Polskie Towarzystwo Prawa Antydyskryminacyjnego*, Warszawa 2015. Accessible at: [http://www.ptpa.org.pl/site/assets/files/1029/publikacja\\_testy\\_dyskryminacyjne\\_praktyczny\\_podrecznik.pdf](http://www.ptpa.org.pl/site/assets/files/1029/publikacja_testy_dyskryminacyjne_praktyczny_podrecznik.pdf).

<sup>363</sup> <https://www.polsatnews.pl/wiadomosc/2018-06-14/drukarz-ktory-odmowil-druku-plakatow-lgbt-winnny-wykroczenia-sn-oddalil-kasacje-ziobry/>, <https://oko.press/drukarz-nie-obsluzy-osob-lgbt-za-to-trybunal-konstytucyjny-obsluzy-ziobre/>.

## 9.4 Exceptions

The Anti-Discrimination Law provides similar exceptions from the material scope as specified in Article 3(3) of Directive 2004/113/EC. According to Article 5 of the Anti-Discrimination Law, it does not apply to content included in mass media and advertisements with regard to access and delivery of goods and services (Item 2); and educational services (Item 4), if they relate to different treatment with regard to sex. The content of Article 5(3) of the Anti-Discrimination Law, which states that: 'the law shall not apply to the freedom of choice of the contracting party as long as it is not based on sex' corresponds with Article 3(2) of the Directive.

## 9.5 Justification of differences in treatment

Article 4(5) of Directive 2004/113 is implemented by the provisions in Article 5(5) of the Anti-Discrimination Law, which states:

'This Act shall not apply to differences in treatment on grounds of sex between men and women in the exceptions to and conditions for the use of services, goods and the acquisition of rights or energy, provided that the provision of such services exclusively or primarily for representatives of one sex is objectively and reasonably justified by a legitimate aim and that the means of achieving that aim are appropriate and necessary'.

In previous judicial practice, this problem arose in two situations, both before and after the Anti-Discrimination Act entered into force. Firstly, before this entry in 2005, in the case of the café 'Babie lato' in Częstochowa, which was available only for women (men could visit it only if they wore one of two specially prepared female wigs). This case became the subject of a court decision, in connection with a man's reporting to the Police of the commission of an offence by a waitress under Article 135 of the Civil Code (for refusing to sell goods without a justified reason for denial). The waitress omitted to serve him the goods on the premises when he refused to put on the wig. The city court in Częstochowa acquitted the waitress. In the opinion of the Court, such a decision of the café owner was justified by economic freedom that is protected in Poland. Therefore, the owner of the café could decide that contracts to buy or sell in this café may be signed with selected customers under certain conditions.<sup>364</sup>

Secondly, this problem has arisen in a more recent case in 2018, when a public Aqua-park in Wrocław restricted the sauna for exclusive use by women on one particular day of the week. The complaint was filed by a man who held a monthly pass and found that the same price of the pass for women and men was not justified in this situation. The case was taken up by the RPO, who expressed doubts as to whether this practice did not constitute discrimination against men on the grounds of sex in access to services offered to the public. He eventually addressed the Municipal Office of Consumer and Competition Protection to investigate whether such practice was correct. The Directorate of the Aqua-park pointed out that women felt constrained by the presence of men, given the fact, that according to the house rules, they should enter the saunas naked, only with towels to hide behind. They asked for a day restricted only to women. Therefore, the provision of sauna services once a week exclusively for women is objectively and reasonably justified by a legitimate aim and proportionate. The case is still pending; no information on the reaction of the above-mentioned authorities on the RPO intervention has been identified.<sup>365</sup> In the meantime, the public Aqua-park in Wrocław opened exclusively for women, in addition to three kinds of sauna.

<sup>364</sup> <https://wiadomosci.dziennik.pl/wydarzenia/artykuly/136220,kawiarnia-tylko-dla-pan-to-niewypal.html>.

<sup>365</sup> Cf.: <https://gazetawroclawska.pl/aquapark-na-cenzurowanym-dyskryminuje-mezczyzn-sprawa-zajal-sie-sam-rzecznik-praw-obywatelskich/ar/12895524>. In addition, it is known that all major cinema chains offer film screenings dedicated exclusively to women. There are also women-only fitness centres and gyms, as well as separate women's and men's hairdressing salons. There is no information on whether there have

## 9.6 Actuarial factors

Polish law explicitly ensures that the use of sex as an actuarial factor in the calculation of premiums and benefits for the purposes of insurance (and related financial services) may not result in differences in the premiums and benefits of individuals. This rule applies in the occupational and statutory social insurances schemes (see Sections: 6.7 and 7.6. of this report), as well as to private insurances. Currently this rule is provided for in Article 34 of the Law of 11 September of 2015 on insurance activity and reinsurance,<sup>366</sup> which states that the application of the criterion of sex in calculating insurance premiums and benefits cannot result in differentiation of premiums and benefits of particular persons. It is also prohibited to differentiate premiums and benefits, as well as financial services connected with them, with regard to pregnancy and maternity. The latter prohibition applies to life insurance, dowry insurance, childcare, accident pension insurance, sickness insurance, as well as other personal and material insurances.

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

Any interpretation of exceptions contained in Article 5(2) of Directive 2004/113 was not needed since the prohibition of use of sex as an actuarial factor was introduced into Polish legislation already in 2009, prior to the Test-Achats ruling.<sup>367</sup>

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

No positive action measures have been adopted aimed at equalising de facto access to, and the supply of, goods and services for women and men.

It is worth mentioning the LGBT plus card, prepared in 2018 by the President of Warsaw elected that year, which assumes, among other things, the establishment of an intervention shelter for LGBT people excluded by their families, a socio-cultural centre for LGBT and special activities aimed at counteracting violence against LGBT people and educational activities. This is the first such document in Poland.<sup>368</sup>

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

There have been cases when women who were breastfeeding in public places have been asked to leave the premises (e.g. shopping centres and restaurants). These cases have become the subject of interventions of the RPO and the Governmental Plenipotentiary for Equal Treatment.

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been any complaints about discrimination on the grounds of sex. Therefore, the justification for such differences in treatment has not been examined.

<sup>366</sup> Consolidated text JoL 2019 Item 381. This law replaced the Law of 22 May 2003.

<sup>367</sup> It should be noted that the Law of 13 February 2009 on amendment of the Law on insurance activities and certain other laws (JoL 2009 No. 42, Item 342) added to the Law on insurance activities of 22 Jun 2004 the provisions of Article 18a and Article 18b which prohibits using sex as an actuarial factor (as implementation of Article 5 of Directive 2004/113/EU). Before this amendment, Poland took advantage of the option (regulated in Article 5(2) of the Directive) to temporarily permit differences in individuals' premiums and benefits, hence to exclude insurance services from the obligation of equal treatment with regard to sex. See further: Więcko Tułowicka, M., *Dyskryminacja płciowa w ubezpieczeniach- wytyczne dotyczące stosowania dyrektywy 2004/113/ w zakresie ubezpieczeń majątkowych i osobowych w świetle wyroku Europejskiego Trybunału Sprawiedliwości w sprawie C 235/09 (Test Achats)* (Sex-related discrimination in insurances – Guidelines on the application of Council Directive 2004/113/EC to insurance in light of the judgment of the Court of Justice of the European Union in Case C-236/09 (Test-Achats)), *Monitor Ubezpieczeniowy* 2012 No. 50, September.

<sup>368</sup> In February 2019 the Charter was signed, <http://warszawa.wyborcza.pl/warszawa/7,54420,24468532,prezydent-warszawy-podpisal-karte-lgbt.html>.



One such breastfeeding incident, which referred directly to the Anti-Discrimination Law, became the subject of a court ruling.<sup>369</sup> It was the case of a woman who went to a restaurant with her family. When she wanted to feed her crying baby at the table, she was told by the waiter that the management of the restaurant did not allow clients to breastfeed at the tables, because this disturbed other clients. She was advised to do this in the toilets and when she refused, she was finally offered a chair located next to the toilets. On behalf of the woman an NGO, *Polskie Towarzystwo Prawa Antydyskryminacyjnego* (Polish Anti-discrimination Law Society), submitted a claim against the owner of the restaurant, arguing that such conduct constituted direct discrimination in the access to a service available to the public, with regard to maternity, i.e. sex. The claim was based on the provisions of Articles 23 and 24 of the Civil Code, regarding a violation of personal goods and Article 6 in connection with Article 13 of the Anti-Discrimination Law. The proceeding was also joined by the Commissioner for Human Rights. The court of first instance dismissed the claim, not believing the claimant's statement that the waiter had initially proposed the restrooms as a place for breastfeeding, before offering her a chair next to the restrooms. The court found as 'contrary to life experience' the possibility that a restaurant that had just opened and had to attract new clients would impose a total prohibition of breastfeeding, while having a family-oriented profile, e.g. giving the children colouring sheets while they waited for their meal. On the other hand, the court did not doubt the argument of the defendant, that a newly opened restaurant could have so many cases of breastfeeding mothers that it provided a special chair for this purpose. According to the court of first instance, this was not a case of discrimination, because the waiter had not submitted the woman to any particular action. Instead he merely informed her of a complaint by other restaurant guests, asking her to breastfeed more discreetly or to find a less public place in the restaurant. According to the court of first instance 'forwarding a request does not constitute unequal treatment' and 'the requests of other guests were appropriate as – according to one of the waiters – the claimant was breastfeeding very ostentatiously'. As a result, the court of first instance ruled that the actions of the waiter were justified, because 'breastfeeding in public places cannot violate the personal rights of other people, nor social or moral norms in this regard'. The female plaintiffs and the representative of the Commissioner of Human Rights disagreed with the view of the court. The appeal lodged by the Polish Anti-discrimination Society emphasised that one of the forms of unequal treatment is the embarrassment and humiliation of mothers who are breastfeeding in public places. 'Making women feel that breastfeeding is something shameful may result in them being afraid to breastfeed at a time and place which is the most suitable for their child'. This, on the other hand, may lead to 'restricting women from participation in social life in public spaces', as well as 'restricting the practice of breastfeeding itself', a practice that is recommended by both the WHO and the Polish Ministry of Health. According to the appellants, the presented facts constituted an example of a violation of the Anti-Discrimination Law, thus constituting discrimination with regard to sex, during the maternity period. As a result, they claimed that the mother should be awarded damages according to Article 13 of the Anti-Discrimination Law. The Court of Appeals in Gdańsk agreed with those arguments. In the ruling of 14 December 2017, it overturned the ruling of the court of first instance and ordered the restaurant owner to pay the amount of PLN 2 000 (EUR 500) in damages plus interest. Additionally, the restaurant owner was obliged to issue a public statement apologising to the woman for unlawfully preventing her from breastfeeding her child at the restaurant table, which 'constituted discrimination with regard to sex'. The statement had to be published on a web portal which had published an article on the whole situation, generating very offensive comments which had been addressed to the woman. The ruling is final.<sup>370</sup>

<sup>369</sup> The District Court in Gdańsk ruled in the first instance in this case, on 12 December 2016 (I C 206/15). This judgment was then changed by the ruling of the Court of Appeals in Gdańsk of 14 December 2017, I Aca 187/17.

<sup>370</sup> The reasoning behind this ruling is not yet available. The ruling has been referred to on the basis of the oral reasoning presented by the court during the hearing and in press releases



The for Human Rights also received many complaints about lack of access to shops, railway station platforms, pedestrian crossings and beaches for people with prams. As this is most often the case for women, the lack of action by the public authority responsible for this can be seen as indirect gender discrimination.

One of those complaints ended up in court. The case concerned a mother, who at the end of 2015 went to a local second-hand shop with her one-year-old daughter. The saleswomen forbade her to enter the shop with a pram, asking her to leave it in front of the shop and do the shopping with her daughter in her arms. When she stated that browsing through clothes with the child in one hand would not be very comfortable, she was told that she could leave the pram with the child in front of the shop. The saleswoman also commented that a mother should go for a walk in the park with her child, rather than shopping, and that she was not a decent mother, because she was focusing on shopping instead of the child. The mother brought the case to the Commissioner for Human Rights, who agreed that the seller's behaviour was discriminatory on grounds of sex and motherhood. The Commissioner's office asked the police to intervene. After the victim and the shop owner testified at the police station, the case was brought to court. The notification pointed to the possibility of commitment of a contravention specified in the previously mentioned Article 138 of the Code of Contraventions.<sup>371</sup>

In another decision rendered in absentia, that is, without a hearing and without the presence of the parties, the district court in the ruling of 5 December 2016<sup>372</sup> imposed a fine of PLN 20 (EUR 4.60) on the seller and ordered him to remove a sign prohibiting entry into the shop with trolleys. According to the general rules provided for in this Code, this was the lowest possible amount of the fine (the maximum being PLN 5 000 (EUR 1 162.70)). The follow-up of this case is not surprising: the sign with information about the ban on trolleys remained on the front door to this shop, despite this ruling.<sup>373</sup> The court did not recognise the existence of sex discrimination in this case. Also, the punishment imposed on the owner of the shop was extremely low (in addition, the defendant was exempted from court fees). Such lenient treatment of the owner (offender) almost certainly will not prevent him from similar behaviour in the future. Nor can it serve as an example, to deter other persons from such behaviour – just the opposite – it may enshrine in the public opinion the belief that discriminatory behaviour is not considered to be a serious violation of law.

## 9.10 Evaluation of implementation

The provisions of Anti-Discrimination Law in respect of the personal and material scope of protection against discrimination on the grounds of sex correspond with the respective provisions of Directive 2004/113/EC. However, as already mentioned, reservations may be raised as to the implementation in this Act of central concepts such as indirect discrimination, which in Article 3(2), speaking of a particular disadvantaged situation omits indication as to whom such person should be compared (the Directive says here: about 'particular disadvantage compared with persons of the other sex'.) The Anti-Discrimination Law, while defining indirect discrimination besides the notion of a 'particular disadvantage situation' (*szczególnie niekorzystna sytuacja*), also uses the notion of 'disadvantage disproportions' (*niekorzystne dysproporcje*) without explanation

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<http://www.dziennikbaltycki.pl/wiadomosci/gdansk/a/prawomocny-wyrok-ws-karmienia-piersia-w-sopockiej-restauracji-przeprosiny-i-2-tys-zl-dla-kobiety-zdjecia,12768777/>.

<sup>371</sup> Which states: 'Whoever, while professionally rendering services ... intentionally refuses to render services for which he is obliged, without a justified reason, shall be subject to the penalty of a fine'.

<sup>372</sup> Ruling of 5 December 2016 of the District Court for the Warsaw residential district of Wola, case no.: V W 4937 /16 (not final). The ruling has not been published. It has been submitted as a courtesy of the NGO: Polish Society of Anti-Discrimination Law.

<sup>373</sup> <https://bezprawnik.pl/z-wozkiem-do-sklepu/>.

as to what it means. In the opinion of the author, the first notion is broad enough to cover the second.

There are also concerns about the inclusion of sexual harassment as any unwanted conduct relating to sex, and there is no clear indication that unequal treatment on grounds of maternity constitutes direct discrimination on grounds of sex, as provided in Recital 20 of the Directive. Furthermore, the rule on compensation raised objections since it does not expressly state that it concerns both material and moral damage.

### **9.11 Remaining issues**

There are no remaining issues to discuss.

## 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

Basic data on violence against women, domestic violence and actions taken in this area and interventions of state bodies are collected and made available by the Central Statistical Office (GUS),<sup>374</sup> the Ministry of Family, Labour and Social Policy,<sup>375</sup> the Ministry of Justice<sup>376</sup> and the Police.<sup>377</sup> It should be noted that the data officially covers only cases of violence reported to the competent authorities of the State. There are also many scientific studies, mainly criminological, on selected aspects of particular forms of violence (among others family violence,<sup>378</sup> rape,<sup>379</sup> marital rape,<sup>380</sup> stalking and other forms of emotional violence).<sup>381</sup>

The most up-to-date data as to the dimensions of the phenomena are those available on Police websites, which show that in 2018, the total number of registered victims of family violence amounted to 88 133 persons, including 65 057 women (about 74 %), 10 672 men (12 %) and 12 404 minors (14 %). There were 73 654 persons suspected of using violence, of which 67 306 (91 %) were men, 6 045 (ca. 8 %) were women and 303 (ca. 0.5 %) were minors. There were 43 182 perpetrators under the influence of alcohol (nearly half of them), including 1 903 women (about 31 % of the female perpetrators), 41 257 men (about 61 % of the male perpetrators) and 22 minors (less than 1 %). 16 915 persons were detained (about 23 %) and 16 % of those under the influence of alcohol were taken to sobering stations or other similar facilities (94 % of whom were male and 6 % female). In 427 cases, the child was placed in a foster family or in a care and educational institution.<sup>382</sup>

<sup>374</sup> 'Informacja GUS: Przemoc wobec kobiet' (Information of Central Statistical Office (GUS): Violence against Women), published: <https://stat.gov.pl/obszary-tematyczne/wymiar-sprawiedliwosci/wymiar-sprawiedliwosci/ofiary-gwaltu-i-przemocy-domowej,1,1.html>.

<sup>375</sup> 'Sprawozdanie z realizacji krajowego programu przeciwdziałania przemocy w rodzinie na lata 2014-2020 za okres od 1 stycznia do 31 grudnia 2016 r. przygotowane przez Ministerstwo Rodziny, Pracy i Polityki Społecznej' (The report on the implementation of the national programme of counteracting family violence) prepared by the Ministry of Family, Labour and Social Policy: <https://www.ms.gov.pl/Data/Files/public/sprawozdanie-za-2016-r.pdf>.

<sup>376</sup> 'Sprawozdanie z realizacji działań wynikających z Krajowego Programu Przeciwdziałania Przemocy w Rodzinie mieszczących się w kompetencjach Ministerstwa Sprawiedliwości od 1 stycznia 2015 roku do 31 grudnia 2015 roku' (The report on the implementation of the national programme of counteracting family violence being within the competences of the Ministry of Justice for the period from 1 January 2015 to 31 December 2015), available at: <https://www.ms.gov.pl/Data/Files/public/ppwr/sprawozdanie-ms-z-kppwr-za-2015-rok.pdf>.

<sup>377</sup> 'Statystyka. Przemoc w rodzinie' (Statistics for Family Violence), published: <http://statystyka.policja.pl/st/wybrane-statystyki/przemoc-w-rodzinie/50863,Przemoc-w-rodzinie.html>.

<sup>378</sup> For example: Spurek, S., *Izolacja sprawcy od ofiary. Instrumenty przeciwdziałania przemocy w rodzinie* (Isolating the perpetrator from the victim. Instruments to prevent domestic violence). Wolters Kluwer, Warszawa 2013.

<sup>379</sup> For example: Grzybek, A., (ed) 'Przełamać tabu. Raport o przemocy seksualnej' (Break the taboo. Report on sexual violence). Wydawnictwo Fundacji na rzecz Równości i emancypacji, Warszawa 2016 and Pietryk, R., 'Odmowy wszczęcia i umorzenia postępowań w sprawach o zgwałcenia popełnione po zniesieniu wnioskowego trybu ścigania. Raport sporządzony na zlecenie Pełnomocnika Rządu ds. Spraw Równego Traktowania' (Refusal to initiate and to discontinue proceedings in cases of rape committed after the abolition of the motion-based procedure of prosecution. Report prepared on the request of the Government Plenipotentiary for Equal Treatment), Warszawa 2014, <http://docplayer.pl/4346718-Odmowy-wszczecia-i-umorzenia-postepowan-w-sprawach-o-zgwalcenia-popelnione-po-zniesieniu-wnioskowego-trybu-szigania.html>.

<sup>380</sup> Michalska-Warias, A., 'Zgwałcenie w małżeństwie. Studium prawne i kryminologiczne' (Marital rape. Criminal law and criminological study), Wolters Kluwer, Warsaw 2016.

<sup>381</sup> See: Woźniakowska-Fajst, D., *Stalking i inne formy przemocy emocjonalnej. Studium kryminologiczne* (Stalking and other forms of emotional violence. Criminological study), Wydawnictwo Uniwersytetu Warszawskiego, Warszawa 2019.

<sup>382</sup> Statystyka. Przemoc w rodzinie. (Statistics for Family violence), <http://statystyka.policja.pl/st/wybrane-statystyki/przemoc-w-rodzinie/50863,Przemoc-w-rodzinie.html>.

The police also periodically publish reports on the implementation of the 'Blue Card' procedure, with the data made available only for activities undertaken by the police, and not for activities of other entities authorised to combat domestic violence. The data shows that in 2018, police officers filled in 73 153 Blue Card A forms (slightly fewer than in the previous year). There were 57 580 cases of physical violence and 75 555 cases of psychological violence and 1 244 cases of sexual violence. The vast majority of women affected by violence are under 65 years of age.<sup>383</sup>

In 2019, the Centre for Social Opinion Research (CBOS) conducted a survey of the scale of violence.<sup>384</sup> It should be stressed that it is very difficult to estimate the scale of the phenomenon in the surveys and the percentage of respondents who admit they are perpetrators or victims is much lower. According to the survey data, more than one in five respondents (22 %) know or see women beaten by husbands or partners, 10 % of respondents admitted to having been physically assaulted by their spouse or partner (12 % of women, 8 % of men). Physical violence against a partner (at least once) was reported by 8 % of respondents (12 % women, 5 % men). Every fourth person living in a relationship experienced a form of aggression other than physical aggression on the part of their partner.<sup>385</sup>

The issue of economic violence was investigated in 2015 by the Senate's Office for Analysis and Documentation<sup>386</sup> and the Institute of Public Affairs.<sup>387</sup> The sources of information on economic violence in the family are police data on the interventions carried out; data from the justice system; information from institutions providing assistance to the persons abused by their relatives and large population opinion polls. On behalf of the Ministry of Labour and Social Policy, in 2010, TNS OBOP – a market and public opinion polling company<sup>388</sup> – conducted a social survey which showed that 70 % of women were victims of economic violence. The research indicated that among the perpetrators of economic violence in the family, 68 % are men and 32 % are women. For women, the perpetrator is generally male (79 % of indications). Among the men who declared that they had been subjected to violence from another member of their household, 53 % indicated a man and 47 % a woman.<sup>389</sup> The research conducted by the Institute of Public Affairs (ISP) in 2015 clearly showed that the perpetrators of economic violence are men and the persons experiencing it are women (in the research conducted by the ISP, only such situations were described).<sup>390</sup>

The aim of the research conducted by the ISP was to learn the specificity of economic violence in relationships, its most popular forms and ways of coexistence with other

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<sup>383</sup> Ibidem.

<sup>384</sup> *Przemoc i konflikty w domu* (Violence and domestic conflicts). *Komunikat z badań nr 48/19. CBOS. Badania sondażowe* (Violence and conflicts at home. Communiqué from survey No. 48/19 CBOS), [https://www.cbos.pl/SPISKOM.POL/2019/K\\_048\\_19.PDF](https://www.cbos.pl/SPISKOM.POL/2019/K_048_19.PDF).

<sup>385</sup> Ibidem.

<sup>386</sup> Tracz-Drał, J.: 'Przemoc ekonomiczna' (Economic violence), *Kancelaria Senatu. Biuro Analiz i Dokumentacji. Opracowania tematyczne* OT – 639, 2015.

<sup>387</sup> Chelstowska, A., Druciarek, M., Niżyńska, A.: *Przemoc ekonomiczna w związkach. Diagnoza zjawiska i dyskusja o przeciwdziałaniu* (Economic violence in partnerships. Diagnoses and discussion on counteracting). Publication was prepared in the frame of the Project 'Economic Violence – diagnosis of the problem and a discussion on countermeasures, part 2', realised by *Instytut Spraw Publicznych* (Institute of Public Affairs) financially supported by the Heinrich Böll Foundation, Warszawa 2015: [https://pl.boell.org/sites/default/files/przemoc\\_ekonomiczna.pdf](https://pl.boell.org/sites/default/files/przemoc_ekonomiczna.pdf).

<sup>388</sup> TNS stands for Taylor Nelson Sofres. Currently the name of the Polish brand of the company has changed to: TNS Polska.

<sup>389</sup> Tracz-Drał, J.: 'Przemoc ekonomiczna' (Economic Violence), *Kancelaria Senatu. Biuro Analiz i Dokumentacji. Opracowania tematyczne* (Chancellery of the Senate Analytical Papers) OT – 639, 2015.

<sup>390</sup> Chelstowska, A., Druciarek, M., Niżyńska, A.: *Przemoc ekonomiczna w związkach. Diagnoza zjawiska i dyskusja o przeciwdziałaniu*. (Economic violence in partnerships. Diagnosis and discussion on counteracting). *Instytut Spraw Publicznych*, Warszawa 2015: <https://www.isp.org.pl/pl/publikacje/przemoc-ekonomiczna-w-zwiazkach>, [https://pl.boell.org/sites/default/files/przemoc\\_ekonomiczna.pdf](https://pl.boell.org/sites/default/files/przemoc_ekonomiczna.pdf), [https://pl.boell.org/sites/default/files/przemoc\\_ekonomiczna.pdf](https://pl.boell.org/sites/default/files/przemoc_ekonomiczna.pdf).

types of violence. The research shows that economic violence rarely takes the form of open blackmail. It coexists in violent relations, regardless of the configuration of earnings of spouses or partners. At the same time, it is the most diverse form of all types of violence, and it looks different in poor and rich homes. It is a systemic phenomenon that stems from and reinforces the usual division of labour, gender roles and inequalities. Many forms of economic violence are difficult to prove because they are based on creating a discrepancy between what the legal documents say (for example, the deeds, notary acts, act of division of marital property, etc.) and reality. It happens that violent partners hide their income or property, transfer property to family members, or work illegally. The purpose of such actions is, among other things, to escape from the need to share property with one's wife in the event of divorce.<sup>391</sup>

Research on cyberbullying against women was conducted in 2017 by the Helsinki Foundation for Human Rights.<sup>392</sup> The results show that cyberbullying is a common experience for many women conducting public activities on the Internet. The escalation of the problem is facilitated by the technical ease and low cost of attacks, their public character, anonymity or impunity of perpetrators, as well as the popular belief that verbal aggression is consistent with the nature of the Internet. Attacks are generally not related to the subject of expression, but are purely sexist in nature. Comments often concern the appearance, private and intimate life of the attacked persons, reducing women to stereotypical roles, undermining the competence and intellect of the addressee. The nature of attacks leads to the conclusion that their aim is not polemics, but to silence women who speak in a public space and prevent others from undertaking public activities.

In response to cyberbullying, women most often chose to remove the content or block the attacker, from the options available on the social networking site. Some respondents documented the attacks, but rarely used the collected materials for further actions, not believing in the possibility of effectively asserting their rights and taking action with intermediaries of Internet services. Few interviewees decided to use the available legal mechanisms, but the more frequent choice was to report cyber-violence to the police compared to filing a civil suit. An obstacle significantly limiting the effectiveness of available legal tools was the attitude of law enforcement agencies, which either underestimated cases or were not prepared to react appropriately.<sup>393</sup>

The research formulated recommendations concerning the need to undertake educational and promotional activities aimed at raising awareness both of the negative consequences of cyberbullying for victims and of the possibility to hold perpetrators responsible for actions taken on the Internet. The need to raise awareness of the police and prosecutor's office and their skills in combating cyberbullying was emphasised. It was also pointed out that the element of counteracting strongly sexist cyber-violence against women should be the implementation of the provisions of the Istanbul Convention of the Council of Europe on preventing and combating violence against women, in particular the implementation of the obligations arising from Article 12, i.e. taking the necessary measures to:

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<sup>391</sup> Chelstowska, A., Druciarek, M., Niżyńska, A.: *'Przemoc ekonomiczna w związkach. Diagnoza zjawiska i dyskusja o przeciwdziałaniu.'* (Economic violence in partnerships. Diagnosis and discussion on counteracting). *Instytut Spraw Publicznych*, <https://www.isp.org.pl/pl/publikacje/przemoc-ekonomiczna-w-zwiazkach>, <https://www.isp.org.pl/pl/publikacje/przemoc-ekonomiczna-w-zwiazkach>.

<sup>392</sup> *'Cyberprzemoc wobec kobiet'* (Cyberbullying of women). Report by the Helsinki Foundation for Human Rights. The report was prepared as part of the project 'Violence against women online' in cooperation with the Heinrich Böll Foundation in Warszawa 2017. Available on the website: <http://www.hfhr.pl/wp-content/uploads/2017/12/HFPC-Cyberprzemoc-wobec-kobiet-raport-www.pdf>.

<sup>393</sup> Ibidem.

'promote the change of harmful social and cultural patterns concerning the behaviour of women and men and to conduct activities aimed at the elimination of prejudices'.<sup>394</sup>

In many studies on criminal policy, attention was drawn to the particularly mild punishment imposed by courts on perpetrators of family violence and rape, often non-custodial,<sup>395</sup> and the infrequent use of restraining orders.<sup>396</sup> Relatively lenient sentences were also imposed for sexual offences, with a decrease in 2016 compared to previous years.<sup>397</sup> In cases of sexual violence, the research proved that existing measures, protecting victims from repeated and secondary victimisation, are in practice seldom – and often not properly – used.<sup>398</sup>

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

The Law of 29 July 2005 on counteracting family violence (consolidated text JoL 2015, Item 1390) is the most important piece of legislation aimed at elimination of this form of gender-based violence. The law provided for a broad definition of family violence, special 'blue card procedure' that is, documentation of all police and other agencies' interventions in relation to family violence incidents. Since 2010, there has been an obligation for every community to establish an interdisciplinary team, serving as a base for joint actions of organisations counteracting family violence. Special preventive measures have been introduced, applied to the suspect of such violence (e.g. an order to leave the jointly occupied premises; restraining orders) and different measures aimed at protection of security of victims and preventing their secondary victimisation, providing them with safe premises (including shelters), medical, psychological and social support (support or crisis centres) and free legal aid.

The measures provided for in the Law on counteracting family violence, generally, are in compliance with the obligations under the IC. However, this law does not include a gender perspective, nor a definition of economic violence and still lacks certain legal solutions (e.g. emergency barring orders (Article 52)). In addition, it has to be noted that this Law only refers to family violence. In 2019, two draft laws amending the

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<sup>394</sup> Ibidem.

<sup>395</sup> For example, according to the Ministry of Justice, sentences with conditional suspension of prison sentences accounted for around 86 % of cases of ill-treatment up to 2015. After the introduction in 2015 of restrictions to the Penal Code in this respect, this percentage decreased, but not spectacularly – because in 2016, it amounted to 73 % of all sentences of imprisonment. In numerical terms, it was as follows: in 2014, the total number of sentences under Article 207 PC was 12 772, of which 12 024 were for imprisonment, of which 1 717 were for immediate imprisonment (that is without conditional suspension of execution) (14.25 %). In 2016, these figures amounted to a total number of persons sentenced under Article 207 PC of 10 723, of which 8 442 were sentences for imprisonment, including immediate imprisonment of 2 275 (26.94 %).

<sup>396</sup> According to the data of the Ministry of Justice, in 2014, the courts ruled prohibitions from approaching the victim for 595 (5.76 %) sentenced persons for family violence, while in 2015, 965 (10.38 %) and in 2016, 836 (13.55 %) had such a measure imposed. An order to leave the premises, in 2014 was imposed on perpetrators in 522 (5.05 %) of all sentences; in 2015, respectively, on 574 (6.18 %) and in 2016, on 423 (6.85 % of sentenced persons).

<sup>397</sup> According to the data of the Ministry of Justice, in the years 2007-2016, between 644 and 887 convictions for rape (Article 197 PC) are recorded annually. Penalties of imprisonment up to one year constituted about 10 % of all sentences for rape; penalties from 2 to 3 years, about 20 %; penalties from 3 to 5 years also about 20 %; penalties from 5 to 8 years, about 6-7 %; penalties in the range of 8-10 years constituted about 2 % of sentences; while penalties above 10 years oscillated between 0-1 % of all sentences. Compared to previous years, in 2016, there was an increase of about 8 % in sentences pronounced for up to one-year imprisonment, with a corresponding decrease in sentences of between one and two years. The remaining sentences oscillate at the level of previous years.

<sup>398</sup> Cf.: Pietryk, R., *'Odmowy wszczęcia i umorzenia postępowań w sprawach o zgwałcenia popełnione po zniesieniu wnioskowego trybu ścigania.'* (Refusal to initiate and discontinue proceedings in cases of rape committed after the abolition of the motion-based procedure of prosecution). Report prepared on behalf of the Government Plenipotentiary for Equal Treatment, Warszawa 2014, <http://docplayer.pl/4346718-Odmowy-wszczecia-i-umorzenia-postepowan-w-sprawach-o-zgwalcenia-popelnione-po-zniesieniu-wnioskowego-trybu-scigania.html>.



regulations relating to family violence have been presented. The first, prepared by the Ministry of Family, Labour and Social Policy was going in a completely opposite direction to what was set forth by the Istanbul Convention and was quickly withdrawn.<sup>399</sup> In replacement, a new draft Law<sup>400</sup> has been prepared by the Ministry of Justice, which allows the Police to issue emergency barring orders (without initiating the criminal procedure). After 14 days this order might be prolonged by the civil court. The draft (despite some deficiencies) is in compliance with the Istanbul Convention and, in general, meets the expectations of experts and feminist NGOs engaged in combating gender-based violence.

With regard to other forms of gender-based violence, general provisions of the Penal Code (PC) and Code of Criminal Procedure (CCP) have to be applied. Among the most important provisions are those relating to rape (Article 197 PC), which consists of two main forms (rape, in which the substantial element is penetration in all possible configurations, and other sexual abuse – both requiring proof of the offender's use of violence, threat or deceit); sexual harassment which resulted in sexual intercourse (Article 199 PC); human trafficking for sexual exploitation (among others) (Article 189a PC) and stalking (Article 190a PC introduced by the Law of 25 February 2011, JoL No. 72, Item 381). The PC's definitions of those crimes more or less correspond with elements of crime provided for in the Istanbul Convention: more, e.g. in the case of human trafficking and stalking; less, for instance, as concerns the definition of rape. It should be noted that the rape provisions of the Penal Code (PC) have been partially modified before ratification of the Convention; however, these amendments have clearly been influenced by this legal document. In particular, the prosecution upon the initiative of the rape victim has been altered to prosecution ex officio (by the Law of 13 September 2013, JoL 2013 Item 849, amending Article 205 PC).<sup>401</sup> At the same time, in the Code of Criminal Procedure (CCP), special procedures of examining victims of sexual offences have been introduced, which are supposed to prevent their secondary victimisation (Articles 185c, 185d CCP). Similar protective measures existed before, with regard to victims and witnesses of sexual and domestic violence, under the age of 15 (Articles 185a, 185b CCP).<sup>402</sup> The last development of the victim's protective legislation is the Law of 15 June 2018 (JoL 2018 Item 1467) amending the Law of 5 August 2015 on free legal aid, citizens' counselling and legal education (JoL 2015 Item 1255 ), which, while providing for broad possibilities for free pre-trial mediation, explicitly excludes such mediations in cases of violence in the relationship between the parties, which is in line with Article 48 of the Convention. However, there is still no such prohibition in the Penal Code and studies indicate that mediation is still relatively common in domestic violence cases.<sup>403</sup>

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<sup>399</sup> This draft law proposed, among other things, changes in the definition of domestic violence which would have as a result that only recurring acts of violence would be considered as constituting domestic violence, thus all forms of protection and assistance to the victims provided for in the law, would not apply to one-time cases. Also subject to suggested change was the procedure of issuing the so-called Blue Card, which could be initiated, among others, by the police in the event of discovering cases of domestic violence. In the draft, the possibility of initiating this procedure was made dependent on the victim's consent. In response to heavy criticism on these changes from experts, already on 3 January 2019, the Prime Minister withdrew this proposal, assuring the public that all 'dubious records' will be eliminated. Also announced was the resignation of the deputy minister responsible for the preparation of this draft at the Ministry of Family, Labour and Social Policy. <http://wyborcza.pl/7,75398,24327192,ministerstwo-rodziny-projekt-ustawy-o-przemocy-w-rodzinie-zostal.html>.

<sup>400</sup> Draft of the law with reasoning. *Druk Sejmowy* (Sejm print) No. 1653

<http://orka.sejm.gov.pl/Druki8ka.nsf/0/B7BBC29AF503D623C125814500365055/%24File/1653.pdf>.

<sup>401</sup> In the Polish criminal system, usually prosecution of criminal proceedings is initiated ex officio. However, in some types of offences, criminal proceedings may only be initiated on the initiative of the victim.

<sup>402</sup> <https://pozytywnezmiany.org/wp-content/uploads/2019/02/RAPORT-Art.2017-KK.pdf>.

<sup>403</sup> See: Zielińska, E., *Mediacja w sprawach karnych o przemoc w rodzinie – skala i efektywność w praktyce polskiego wymiaru sprawiedliwości* (Mediation in criminal cases related to family violence. Scale and effectiveness in practice of the Polish criminal justice system), *Instytut Wymiaru Sprawiedliwości*, Warszawa 2017. [https://iws.gov.pl/wp-content/uploads/2018/08/IWS\\_Zieli%C5%84ska-E.\\_Mediacja-w-spr.-karnych-o-przemoc-w-rodzinie.pdf](https://iws.gov.pl/wp-content/uploads/2018/08/IWS_Zieli%C5%84ska-E._Mediacja-w-spr.-karnych-o-przemoc-w-rodzinie.pdf).

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

Polish law does not provide for any specific provisions on online violence and online harassment. For such cases the general provision may apply, depending on the content of the post. For instance: Article 212 PC, concerning defamation, or Article 216, concerning public insults. In both cases, the offender who commits the offence by means of mass communication is subject to a more severe penalty. This may include the qualification of Articles: 190 (threats), 190a PC (criminalising stalking) or, exceptionally, Article 207 PC (on maltreatment), which might not only be physical but also psychological and emotional; however, the latter provision can only apply if there is a relationship of dependence between the offender and the victim. Article 191a of the PC on revenge porn (violation of sexual intimacy by disseminating the image of a naked person) may also apply, as the dissemination usually occurs online. It is worth noting that under Article 257 PC, concerning insulting another person or group of persons because of their national, ethnic, racial, religion or lack of religious affiliation, or Article 256 sanctioning the encouragement for religious or ethnic hate, may be punished (more severely than in the case of an ordinary insult or encouragement for any other crime). A legislative proposal tabled some time ago by the Polish Association of Anti-discrimination Law, aimed at extending the list of grounds in these provisions to include gender and sexual orientation, has not been taken into account.

The perpetrator of cyberviolence may be held liable for violation of Article 107 of the Code of Contraventions (malicious disturbance of another person), and regardless of criminal liability may also be held liable for a violation of personal goods under the Civil Code. To a limited extent, it is conceivable to apply the provisions of the Labour Code or the Anti-Discrimination Law on cyber sexual harassment. As for the liability of service providers of the Internet, e.g. owners of the portal, it depends on whether this provider was aware of the illegal nature of the content of the entry (post) and whether, in the event of notification of such content, it will immediately prevent access to this data (Article 14(1) of the Act on the provision of electronic services).<sup>404</sup> The problem of who bears the burden of proof that the provider knew about the illegality of the post (entry) was resolved by the Supreme Court in the judgment of 30 September 2016 (I CSK 598/15), ruling that, in principle, it rests with the owner of the portal. In the opinion of the authors of the report on cyber-violence against women, law enforcement agencies do not make sufficient use of the possibilities provided for by law to combat crimes of this type, while not following the special recommendations contained in the Guidelines concerning the conduct of proceedings for hate crimes, issued by the Prosecutor General in 2014.<sup>405</sup>

### 10.1.4 Political and societal debate

The ratification of the Istanbul Convention has been preceded by a long-lasting debate. Most controversy in Poland was caused by the fundamental concepts of the Convention (stemming from the results of feminists' criminological research) such as: the reference to violence against women, the reference to gender discrimination, to structural character of violence against women (motive 9 of the Preamble) and obligations deriving from Article 12 of the IC (e.g. in particular, the obligation to eliminate harmful sex and gender stereotypes). The last point of critics was particularly surprising, since such obligation already derived from CEDAW convention, ratified by Poland in 1980.

After the *Prawo i Sprawiedliwość* party (Law and Justice party – PiS) took over the government in November 2015, it started to fulfil its electoral promises and initiated preparations for the withdrawal of ratification documents (which was a fact, despite consequent denials of the Government). Such withdrawal had been announced by the

<sup>404</sup> Law of 18 July 2002, unified text JoL 2019 Items 123 and 730.

<sup>405</sup> Cf.: <https://pk.gov.pl/wp-content/uploads/2014/03/4e331e3a170f1719e3f846b06a2c5f7d.pdf>.



President multiple times. A very intense reaction from women's circles, as well as critical comments from abroad, caused the PiS Government to pause those actions, at least for now. However, there is no political will to accept the basic principles of the Istanbul Convention and to properly implement its provisions. Symptomatic of this is the interview given by the Minister for Family, Labour and Social Policy – Ms Rafalska, who is responsible for the policy related to family violence. In this interview, in the context of the need for the modification of the Polish legislation after ratification of the Istanbul Convention, she said:

'changes are needed which, on the one hand, will increase the safety of people suffering violence and, on the other hand, allow to keep the subjectivity and autonomy of the family'.<sup>406</sup>

Such a statement, being a specific kind of contradiction *in adiecto*, proves that she denies giving priority to the protection of the safety of the individual family member who is a victim of domestic violence (which is one of the leading principles of the Convention) over the protection of the autonomy of the family as a social group.

On 31 December 2018, on the website of the Ministry for Family, Employment and Social policy, the governmental draft law appeared, amending the Law of 2005 on counteracting family violence, which should be considered as a huge backwards step in the protection of victims of gender-based violence.<sup>407</sup>

The controversial amendments included: a change of the name of the Act, by replacing the term 'violence in the family' with the term 'domestic violence'; significant alterations of the definition of family (domestic) violence; and change of the procedure of issuing the so-called Blue Card (a special protocol documenting violence and the action undertaken on it by the criminal justice system), which could be initiated, among others, by the police, in the event of discovering cases of domestic violence.<sup>408</sup> It should be emphasised that although the Istanbul Convention also utilises the term 'domestic violence', one has to keep in mind, however, that the aim of this change in Poland was not to extend the scope of application of the law, but rather to avoid negative perceptions of the traditional concept of family: according to the currently prevailing ideology, family is to be maintained on a pedestal and protected, regardless of circumstances. Also, other proposed changes of the law are clearly in opposition to international standards. For example, the wording of the definition of domestic violence, namely 'one-time or repetitive, intentional action or omission, violating the law or personal goods', was changed by deleting the word 'one-time'. As a result, domestic violence would only be considered as recurring acts of violence, thus all forms of protection and assistance to the victims provided for in the law, would not apply to one-time cases. The procedure of issuing the so-called Blue Card was also subject to change. In the draft, the possibility of initiating this procedure was made dependent on the victim's consent. This change did not take into account that in most domestic violence cases, the victims are intimidated by the perpetrators, hence the lack of consent for initiating the 'Blue Card' procedure may arise from fears for the victim's life or health, or that of their children.

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<sup>406</sup> Cited after Ambroziak, A., *Konwencję przyjęto, ale PIS nie realizuje jej postanowień* ('Convention is ratified but PIS-party does not implement its provisions'). <https://oko.press/rafalska-trzeba-odroznic-konflikt-malzenski-przemocy-rodzinie-zapomina-o-konwencji-antyprzemocowej/>.

<sup>407</sup> <http://wyborcza.pl/7,75398,24327192,ministerstwo-rodziny-projekt-ustawy-o-przemocy-w-rodzinie-zostal.html>, <https://www.tvn24.pl/wiadomosci-z-kraju,3/jednorazowa-przemoc-nie-bylaby-przemoca-projekt-nowelizacji-ustawy-o-przemocy-w-rodzinie,896663.html>, <http://wyborcza.pl/7,75398,24344225,morawiecki-zdymisjonowal-wiceminister-odpowiedzialna-za-projekt.html>.

<sup>408</sup> In response to heavy criticism from experts, already on 3 January 2019, the Prime Minister withdrew this proposal, assuring the public that all 'dubious records' will be eliminated. Also announced was the resignation of the Deputy Minister of the Family, Labour and Social Policy, responsible for the preparation of the draft.

The immediate response of the Prime Minister to criticism regarding the project should be assessed positively. However, the fact that this project has been prepared and published in such a way on government websites, shows that the Government does not have any comprehensive policy as to how to effectively deal with gender-based violence. In addition, in the authors' opinion, it proves that within the Ministry of Family, Labour and Social Policy, this problem is being handled either by incompetent persons, who are not aware of the international standards in this field, or – more likely – by the so-called experts actively engaged in the battle against all manifestations of phenomena which they describe as 'gender ideology'. Hence, with this assumption, the project should be considered as an attempt to execute the electoral declarations of the ruling party to prevent the Istanbul Convention from being applied, despite its ratification by the Parliament of the previous term. The work on the modifying of the Law on counteracting domestic violence continues in the Ministry of Family, Labour and Social Policy; however, it seems that nobody interested in having amendments to the law passed any time soon.<sup>409</sup>

The attacks on the Convention are still continuing. Catholic circles (e.g. Ordo Iuris Institute) running the campaign called 'zatrzymajgender' ('stopgender') criticise the current government, in particular the Government Plenipotentiary for Civil Society and Equal Treatment, for not taking sufficient actions aimed at withdrawal from ratification of the Convention.<sup>410</sup>

Many discussions on the real extent of violence against women took place in Poland after the publication of the FRA report,<sup>411</sup> which showed that the level of this type of crime in the country is much lower than in other EU Member States. This discourse started with the fact that the government used the results of this report as an argument to support the thesis that in Poland, violence against women is a marginal phenomenon and therefore there is no need to intensify the activities of the State and its authorities in this area. In the discussion, criticising this position, it was argued that higher rates of women's victimisation in Scandinavian countries or France, in comparison with the very low rates in Poland, are a result of the higher level of women's awareness in those countries and their ability to define what behaviour is and should be considered as violence, and less tolerance for various forms of harassment, especially stalking or sexual harassment.<sup>412</sup>

## 10.2 Ratification of the Istanbul Convention

Poland has ratified the IC with the Law of 6 February 2015 (JoL 2015 Item 398) with several reservations and declarations.

The reservations concern: Article 30, Paragraph 2 (compensation) of the Convention, which in Poland shall be applied solely with regard to victims who are citizens of the Republic of Poland or the European Union and in accordance with a procedure provided for by national law; and Article 44 (jurisdiction) in relation to which the Republic of Poland reserves the right not to apply the Convention when the offence is committed by

<sup>409</sup> This results from the response of the Minister of Family, Labour and Social Policy to the Commissioner for Human Rights' question on this matter – while describing the implementation by the Ministry of the tasks of this Act in the field of victim's assistance, referred the draft to the Minister of Justice. <https://www.rpo.gov.pl/sites/default/files/Odp%20MRPiPS%20ws%20przemocy%20domowej%2C%201%20kwietnia%202018.pdf>.

<sup>410</sup> <http://www.pch24.pl/genderowa-konwencja-juz-dobra--zaskakujace-stanowisko-rzadu,65740,i.html#ixzz5maoZ5NVW><https://www.pch24.pl/genderowa-konwencja-juz-dobra--zaskakujace-stanowisko-rzadu,65740,i.html>.

<sup>411</sup> Violence against women: an EU-wide survey. Main results. European Union Agency for Fundamental Rights. Luxembourg 2015.

<sup>412</sup> See for example: Piotrowska, J., *Polska z najlepszym na świecie wskaźnikiem w obszarze przemocy* (Poland with the world's best indicator in the area of violence). <https://feminoteka.pl/polska-z-najlepszym-w-europie-wskaznikiem-dotyczacym-przemocy/m>.

a person whose habitual residence is the Republic of Poland. In addition, the Republic of Poland has made the reservation that Article 55, Paragraph 1 (ex officio proceedings) of the Convention shall not be applied in respect of Article 35 regarding minor offences and that Article 58 of the Convention (limitations) shall not be applied in respect of Articles 37, 38 and 39 of the Convention.

Additionally, Poland puts forward two declarations: Firstly, that the Republic of Poland recognises the need to interpret Article 18, Paragraph 5 of the Convention in accordance with international agreements to which it is a Party and directly applicable normative acts of international organisations, to which the Republic of Poland submitted the competence of the state authority in some cases. Accordingly, the Republic of Poland shall provide consular protection only to Polish citizens and nationals of the Member States of the European Union, who do not have access to a diplomatic or consular post in the territory of a third country, on such terms as Polish citizens. Furthermore, in accordance with the universally accepted principles of international law, the Republic of Poland does not grant consular protection to nationals of the host state. The consul of the Republic of Poland can take actions of consular protection only by the measures provided for by international law on consular relations. Secondly, Poland maintained the declaration handed over to the Deputy Secretary General at the time of signature of the Instrument on 18 December 2012, in which the Republic of Poland declares that it will apply the Convention in accordance with the principles and the provisions of the Constitution of the Republic of Poland.

The Istanbul Convention has been in force since 7 April 2015, hence it is hard to associate any previous legal changes with this document, even if some of them also meet the Convention's requirements. Such changes in the Polish Code of Criminal Procedure are introduced, among others, by the law of 28 November 2014 on protection and support for victims and witnesses (JoL 2015 Item 21). The Law on free legal aid, citizens' counselling and legal education of 5 August 2015 (unified text JoL 2019 Item 294) also includes provision for legal aid for victims of gender-based violence in situations where they are unable to afford such legal aid. The law implements Directive 2012/29/EC of 25 October 2012, establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA<sup>413</sup> and Directive 2011/99/EC of 13 December 2011 on the European protection order<sup>414</sup> which provides for similar requirements to the IC, with regard to protection of those persons.

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<sup>413</sup> OJ L 315, 14.11.2012, pp.57-73.

<sup>414</sup> OJ L 338, 21.12.2011, p. 2-18.

## 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

No in-depth scientific research has been identified related to the difficulties faced by victims of discrimination in trying to assert or vindicate their rights. The compilation of some of the judicial statistics on all anti-discrimination cases and some of their aggregated thematic studies make it possible to identify some of these difficulties (without, however, taking into account the specificities of gender discrimination cases). The monitoring reports of non-governmental organisations also provide some knowledge on this subject. In particular, it is worth mentioning here the studies of the Polish Society for Anti-Discrimination Law.<sup>415</sup>

The analysis of available statistical data and estimates shows that, in general, court proceedings in cases of discrimination are relatively few, especially considering that surveys of public opinion show, that about 35 % of Poles feels discriminated against in work.<sup>416</sup> According to the statistics gathered by the Ministry of Justice, in the last five years, the overall number of all cases regarding damages for different forms of discrimination conducted in regional and in district courts did not exceed 400 cases per year, and a clear downward trend was observed in comparison with e.g. 2012.<sup>417</sup> In addition, statistics prove that victims can rarely count on winning in courts. In 2013-2018, only in one in five discrimination cases did the courts grant a victim's claim for special compensation. It is characteristic that this ratio has not changed significantly over the last five years. The number of cases in which an allegation of discrimination against a worker has been confirmed by a court was equal to the number of dismissed cases, which means that the winner was only every second claimant. The chances of obtaining financial compensation for discrimination in court are as small as in the case of mobbing, despite the fact that only in the discrimination cases is there a shift of burden of proof.<sup>418</sup> It is worth noting, however, that if financial compensation for discrimination is already awarded, the average amount of it per person is higher than e.g. eight years ago.<sup>419</sup>

In April 2014, the State Labour Inspectorate (PIP) published the results of its investigation into the layoffs of persons returning from maternity, paternity, and parental leave and the observance of other employee rights, including those related to

<sup>415</sup> See for instance Bogatko, K., Drabarz, A., Śmiszek, K., *Przeciwno dyskryminacji poradnik prawny* (Preventing discrimination. Legal handbook), Warszawa 2013. [http://www.ptpa.org.pl/site/assets/files/1029/poradnik\\_procesowy\\_rownosc\\_lw0t\\_info.pdf](http://www.ptpa.org.pl/site/assets/files/1029/poradnik_procesowy_rownosc_lw0t_info.pdf); Bogatko, K., Wieczorek, M., *Sędziowie wobec dyskryminacji* (Judges facing discrimination), [http://www.ptpa.org.pl/site/assets/files/1029/sedziowie\\_wobec\\_dyskryminacji\\_wieczorek\\_bogatko.pdf](http://www.ptpa.org.pl/site/assets/files/1029/sedziowie_wobec_dyskryminacji_wieczorek_bogatko.pdf); Kędziora, K., Śmiszek, K., *Wybrane orzecznictwo sądów krajowych i międzynarodowych w sprawach o dyskryminację* (Selected jurisprudence of national and international courts in discrimination cases), Warsaw 2013, [http://www.ptpa.org.pl/site/assets/files/1029/wybrane\\_orzecznictwo\\_rownosc\\_kqed\\_info.pdf](http://www.ptpa.org.pl/site/assets/files/1029/wybrane_orzecznictwo_rownosc_kqed_info.pdf).

<sup>416</sup> <https://www.gazetaprawna.pl/artykuly/1108547.adp-35-proc-pracownikow-doswiadczylo-dyskryminacji.html>. Study has been conducted in 2017 on the representative group of 9908 respondents by the ADP. The results published in the report: The Workforce View in Europe 2018, <https://www.adp.pl/assets/vfs/Domain-3/Workforce-View-2018/PL/ADP-Workforce-View-2018-PL.pdf>.

<sup>417</sup> For example, in all three groups of cases related to discrimination in which statistics are collected (i.e. with regard to cases and adjudged damages under Article 18<sup>3d</sup> of the LC, cases of sexual harassment and violation of the prohibition of discrimination under Article 11<sup>3</sup> of LC), the number of cases on a given day in regional and in district courts (acting as first instance) in 2015 amounted to a total of 343 cases; in 2016 to 452 cases; in 2017 respectively to 284. Own calculations on the basis of annual reports of the Ministry of Justice. See Ministry of Justice 'statistics, annual reports on labour law and insurance. Records of cases. Section 1.1.2 cf.: Ministry of Justice.

<sup>419</sup> <https://serwis.gazetaprawna.pl/praca-i-kariera/artykuly/1091941.sad-odszkodowanie-z-tytulu-dyskryminacji-dla-pracownika.html>.

childcare.<sup>420</sup> According to the analysis of PIP in the years 2012-2013, employers usually respected provisions protecting the continuity of employment of pregnant women and persons returning from maternity leave. Evidence of this is the fact that, out of 596 inspections performed in various enterprises, employing altogether 75 000 persons (including 38 000 women) only in five cases were infringements identified. It should be noted that according to PIP, this is the result of good knowledge of LC provisions in this respect, both amongst employers and employees. In general conclusion, the study indicated that practice shows that one can often achieve more through direct contact between the Labour Inspectorate and the employer, than by going to court.<sup>421</sup> This information was confirmed by statistical data received from the Ministry of Justice, regarding the number of cases related to parenthood rights of employees presented to the courts. This data shows, that in 2017, altogether there were 65 cases involving dissolution of an employment agreement during pregnancy, maternity, or paternal leave (out of which 57 were lodged by women and 8 by men, which constituted respectively 1.8 % and 0.2 % of all cases regarding dissolution of employment agreements). Such claims are very rarely successful. From the above caseload, only 21 % of the cases lodged by women (that is, 12) and 25 % of the cases lodged by men (that is, 2) have not been rejected or refused. It should be noted, that in 10 cases (83 %) the proceeding ended in a court settlement.

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

It is worth recalling that in Poland, mainly common courts – and not administrative bodies or, for example, independent equality bodies – were entrusted with combating discrimination. Consequently, all disputes arising from employment relationships (including discrimination cases) are decided by civil courts' special labour and social security departments of the regional and district civil courts. They have jurisdiction over all workers' cases (whether they are employees, or civil servants). Also, social insurance cases deriving from the appeals against a decision of the Social Insurance Institution (ZUS or KRUS) are heard by the above courts. Complaints asserting discrimination, according to the Anti-Discrimination Law, are decided by regular civil courts.

The way in which the statistical data on discrimination-related court cases are gathered and presented in Poland should be criticised. Although currently these data are presented in a sex disaggregated form (which was not the case before 2010) they still do not indicate the grounds of discrimination (which is obvious only in cases of sexual harassment). Furthermore, the court' claims for violations of provisions related to the special protection of employees during pregnancy or parenthood are not associated with statistics on discrimination.<sup>422</sup> On the other hand, statistics on mobbing and discrimination are often, in analyses, counted as being in the same category (which automatically at least doubles the number of discrimination cases).<sup>423</sup>

These irregularities are worth emphasising, because on the one hand they may prove the lack of sufficient knowledge on the specificity of gender discrimination among the Ministry's employees responsible for collecting data on the justice system. On the other hand, however, they may indicate a lack of willingness to know the true extent of gender

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<sup>420</sup> Cf.: Results of investigation on the layoffs of persons returning from maternity, paternity, and parental leave and the observance of other employee rights, State Inspectorate of Labour. 2014 <https://www.pip.gov.pl/pl/f/v/100996/sprawozdanie2013.pdf>.

<sup>421</sup> The report indicates, inter alia, that in cases of violation of the law, employees rarely go to court. Even in cases where the inspectors themselves referred matters to the court, the persons concerned often backed out of the proceedings and cases were frequently remitted. Cf.: <https://www.pip.gov.pl/pl/f/v/100996/sprawozdanie2013.pdf>. Hereafter: State Labour Inspectorate investigation into the layoffs.

<sup>422</sup> See Ministry of Justice 'statistics, annual reports on labour law and insurance. Records of cases. Section 1.1.2 cf.: Ministry of Justice.

<sup>423</sup> <https://www.kariera.pl/artykuly/pracownik-kontra-szef-w-sadzie/>, <https://serwisy.gazetaprawna.pl/praca-i-kariera/artykuly/1091941,sad-odszkodowanie-z-tytulu-dyskryminacji-dla-pracownika.html>.

discrimination. The latter assumption is not unreasonable, considering that this method of collecting statistical data has not been changed, despite the fact that the above-mentioned irregularities have been pointed out for a long time.

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

The social discussion on the need to improve the discriminatory provisions in force in Poland, in particular the Anti-Discrimination Law 2010, was interrupted after the parliamentary elections in 2015. The current government, despite general criticism of the courts and judges, has not addressed the possible shortcomings of jurisprudence in such cases, nor does it touch the issue of the low judicial effectiveness of the protection of alleged victims of discrimination.

## 11.2 Victimisation

The Directives' provisions on victimisation have been implemented in Article 17 of the Anti-Discrimination Law and in Article 18<sup>3e</sup> of the LC.

In light of Article 17(1) of the Anti-Discrimination Law, an employee's exercising of the right to compensation for failure to apply the principle of equal treatment may not constitute a basis for any unfavourable treatment, and may not place that employee at any disadvantage. The above provision also applies to persons who in any form supported such employee (Article 17(2)). In such cases, the provisions also apply regarding: damages sought by means of a claim for discrimination (Article 13), the burden of proof, as regulated in the Code of Civil Procedure modified by Article 14 of the Anti-Discrimination Law and periods of limitation – as in the case of discrimination claims (Article 15).

According to the Labour Code (Article 18<sup>3e</sup>) the exercise by an employee of the right to compensation for failure to apply the principle of equal treatment in employment may not constitute a basis for any unfavourable treatment of that employee, and may not place that employee at any disadvantage, and in particular, it may not constitute grounds for the termination of an employment relationship by the employer, either with or without notice. This provision shall apply accordingly to any employee who has provided any support in any form to another employee who exercised his rights in relation to a failure to apply the principle of equal treatment in employment.

Currently, the protection against victimisation in both cases<sup>424</sup> complies with the equality directives. However, this legislation raises doubts in judicial practice, particularly as regards the possibility of awarding compensation for discrimination under Article 18<sup>3d</sup> of the LC, in the event of victimisation. In this context, the Supreme Court in its reasoning to the ruling of 14 December 2017, I PK 342/16, discussed the issue whether the defence of employees' rights in the court litigation initiated against an employer belongs to the category of discriminatory grounds listed in the Labour Code. The Supreme Court finally opposed this possibility, considering that it was not a feature and personal characteristic of the claimant, but on the contrary, the victimisation closely relates to the work (the claimant sought to preserve her place of work). The Supreme Court pointed out that the provision of Article 18<sup>3a</sup> LC distinguishes two groups of prohibited criteria. It requires equal treatment of employees, first of all, without regard to their personal characteristics or properties (gender, age, etc.), and these characteristics are listed in this provision only as an example, as evidenced by the use of the words 'in particular'. Secondly, it also requires equal treatment irrespective of whether the worker is employed for a fixed or indefinite period or on a full-time or part-time basis. The

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<sup>424</sup> In 2008, the LC was subjected to important amendments which brought it in compliance with EU Directives (Law of 21 November 2008 (JoL 2008 No. 223 Item 1460) in force since 18 January 2009).



separation of the two discrimination criteria makes it possible to assume that the open list of grounds for discrimination refers only to the personal characteristics.

Defending workers' rights and therefore being in litigation with the employer does not fall within the categories of discriminatory conduct set out in the Labour Code. Therefore, the claimant is not entitled to compensation for discrimination referred to in Article 18<sup>3d</sup> of the Labour Code.

This ruling raises concerns because it proved that the Supreme Court completely ignores the content of Article 18<sup>3e</sup> of the Labour Code, which correctly implemented the victimisation provisions of EU equality directives. It also seems that this line of interpretation cannot be defended anymore, after the introduction of legislative amendments into Article 18<sup>3a</sup> of the LC (by the Law of 16 May 2019), according to which the open list of grounds for discrimination refers not only to the personal characteristics, but also other characteristics (see more: Section 2.2).

### 11.3 Access to courts

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

The fact that people who feel discriminated against rarely decide to pursue their claims in courts, results from many factors of a different nature. One of them is the lack of easy access to courts, which is reflected in the existence of economic barriers. As already mentioned, all disputes arising from employment relationships are decided by special labour and social security departments of the courts. Complaints asserting discrimination, according to the Anti-Discrimination Law, are decided by regular civil courts. The access to labour courts used to be simple. However, since 2006, this access is no longer free of charge if the amount of the claim is higher than PLN 50 000 (EUR 11 628). In such cases, similar to all regular civil cases, the court fee amounts to 5 % of the claim value, not exceeding PLN 100 000 (EUR 23 255).<sup>425</sup>

The risk of having to reimburse the proceedings costs of the winning party,<sup>426</sup> which occurs in one out of five discrimination cases, may also have a deterrent effect on victims.<sup>427</sup> This has resulted in a decline in the number of individual claims, which may be a sign that the reduction in the level of judicial protection, e.g. against discrimination, is unjustified. The previously discussed ruling in case no. VII Pa 326/15 – regarding the reinstatement to work of a religion teacher, dismissed by the school because her *missio canonica* had not been extended due to her out-of-wedlock pregnancy – disclosed a dangerous tendency to burden the losing claimant with the obligation to reimburse the defendant with the costs of procedural representation, blaming her for the rise of the procedural costs.<sup>428</sup> It is hard to say if this ruling constitutes a single incident, or if it is a

<sup>425</sup> The possibilities of claiming high amounts as compensation for discrimination are significantly limited by the provision of Article 35(1) of the Law of 28 July on court fees in civil cases (consolidated text JoL 2018 Item 300), which introduces a relative fee in employee cases if the value of the object of dispute or object of complaint exceeds PLN 50 000 (EUR 11 628). Regarding cases when the amount indicated is exceeded, the introduction of a fixed fee in mobbing and discriminatory cases should be postulated. It should also be postulated that the catalogue of cases that may be considered in class action proceedings would be extended accordingly.

<sup>426</sup> Law of 28 July 2005 on court fees in civil cases. In other cases, the fee is low and amounts to PLN 30 in the case of complaints, appeals and cassation claims. There is the possibility to release an employee from court fees and costs of proceedings, however, only in exceptional circumstances.

<sup>427</sup> See report 'Skarga na naruszenie prawa strony do rozpoznania sprawy w rozsądnym terminie na tle ewidencji spraw w sadach powszechnych w latach 2012-2016' (Action for infringement of a party's right to have his case heard within a reasonable time in the light of the register of cases in the common courts in the years 2012-2016'.) prepared by Department of Statistics of the Ministry of Justice, Warszawa 2017, available through website: <https://isws.ms.gov.pl/pl/baza-statystyczna/publikacje/download,2779,0.html>, Cf. also: <http://serwisy.gazetaprawna.pl/praca-i-kariera/artykuly/1091941,sad-odszkodowanie-z-tytulu-dyskryminacji-dla-pracownika.html>.

<sup>428</sup> The claimant, being pregnant and unemployed, found herself in a difficult material situation and for such occasions, Article 102 of the Code of Civil Procedure provides for the possibility to relieve the claimant from

sign of a broader tendency. Nevertheless, the court taking this position could effectively discourage persons claiming discrimination from bringing their cases to court.

The common knowledge of the very long duration of proceedings in employment cases and about lack of effective legal remedies against excessive length of such proceedings may also discourage victims in bringing discrimination cases before the court.<sup>429</sup> According to data of the Ministry of Justice for the first half of 2017, the average duration of proceedings in all discrimination cases amounted to approximately 19 months (13 months when the claimant was a woman and 16 months in the case of men).<sup>430</sup> Another obstacle for persons pursuing discrimination-related claims are the relatively small chances of obtaining competent legal aid (see more below). A further barrier to exercising the right to a court in discriminatory cases is the lack of clarity as to the admissibility of class actions in such cases. Such possibility is provided for in the Law of 17 December 2009 on claims in group proceedings (JoL of 2010, No. 7, Item 44), which explicitly states that its scope of application does not encompass claims against employers. This limitation seems also to apply to claims for violation of the equal treatment rule. According to some opinions,<sup>431</sup> employees may pursue their claims together only according to Article 72 of the Code of Civil Procedure. In such a situation, however, each of them would have to appear in court (in person or represented by counsel). The above opinion is not entirely correct, however, because the scope of application of the law on group proceedings, inter alia, includes claims resulting from delicts, with the exception of protection of personal goods. An employer violating the employee's right to equal treatment, which can be qualified as a misdemeanour (contravention) or a crime, thus also commits an offence, in the understanding of the law on group proceedings. This provision, however, seems not to apply, e.g. to health injuries, which occurred as a result of sex-based harassment or sexual harassment, hence those actions constitute violations (infringements) of personal interests (rights). Group proceedings cannot be used by an employee who lodges an individual claim after the group proceedings has been initiated. However, despite the fact that class actions in employment disputes are possible, in practice they are very hard to win. This is because in these cases the burden of proof lies with the employee (according to the general rule of Article 6 CC). It is, however, worth noting that in the judgment of 23 November 2001 (I PKN 678/00), the Supreme Court stated that, e.g. in the case of disputes on working time, the burden of proof also lies with the employer, who is obliged to keep a record of working time. Additionally, in the judgment of 5 May 1999 (I PKN 665/98), the Supreme Court decided that missing documentation, resulting from the fact that the employer failed to collect it, results in a shift of the burden of proof towards the employer.<sup>432</sup> The

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those costs. In this case the costs were substantial, amounting to EUR 270 (PLN 1 161) (in the first instance and EUR 240 (PLN 1 032) in the appeal. The court's justification of this refusal was most bizarre: the court blamed her for using the wrong litigation tactic; she should first have lodged a claim for reinstatement to work, for which the costs of representation are regulated at a fixed low level, and, depending on the result of these proceedings, subsequently decide if lodging a claim for compensation was reasonable. In that case, the costs of representation to be reimbursed would have been significantly lower. The court also took into consideration that the claimant was represented by a professional lawyer provided by an NGO, who should have informed her of this fact.

<sup>429</sup> Since 2005, the Law of 17 June 2004 applies – on claims for violation of the right of a party to recognise the case in in court proceedings, without undue delay (*Ustawa o skardze na naruszenie prawa strony do rozpoznania sprawy w postępowaniu sądowym bez nieuzasadnionej zwłoki*), consolidated text JoL 2018Item 75. Nevertheless, there are very few such cases at all (for instance, in 2017, the total number was 18 000) and damages based on this law are awarded very rarely (about 80 % of claims are refused for formal reasons or rejected), <http://serwisy.gazetaprawna.pl/praca-i-kariera/artykuly/1110278.czas-trwania-spraw-sadowych-pracownikow.html>, <http://www.rp.pl/W-sadzie-i-urzedzie/303229980-Coraz-wiecej-skarg-na-zbyt-dlugie-procesy-sadowe.html>.

<sup>430</sup> For comparison: other labour law cases are handled, on average, in approximately 9.4 months.

<sup>431</sup> See: Głądoch, M., Commentary on Article 242 LC (in:) *Kodeks Pracy. Komentarz* (Labour Code. Commentary) ed. Sobczyk, A., C.H. Beck, Warszawa 2015, p. 937.

<sup>432</sup> <http://www.rp.pl/artykul/335227.html> *W sądzie to szef udowadnia, że podwładny nie miał zbyt wielu zajęć* (In court, the boss proves that the subordinate did not have too many jobs).



employer has the obligation to prove that the employee did not actually work during the working times claimed by him.<sup>433</sup>

### 11.3.2 Availability of legal aid

There are no particular provisions regarding legal aid for alleged victims of gender discrimination. The general rules for providing unpaid legal assistance are defined in the Law of 4 August 2015 on unpaid legal assistance, citizens' counselling and education,<sup>434</sup> which entered into force on 1 January 2016, regarding the majority of its provisions. This law, applying to pre-litigation, inter alia, specifies the categories of persons entitled to such assistance, that is, those who cannot afford paid professional aid (Article 4)<sup>435</sup> and also mentions what such assistance might include (Article 2).<sup>436</sup> In addition to the above, a victim of discrimination who decides to initiate legal proceedings may request a representative to be assigned by the court, according to the general provisions of the Code of Civil Procedure, modified by particular provisions regarding claims resulting from employment relationships,<sup>437</sup> as well as those specified in Article 87 CPC. A qualifying condition for a person applying for a court-appointed representative is the submitting of a declaration of inability to cover the costs of a lawyer or legal counsel, without endangering the ability to provide for himself or his family. The form for this declaration is available free of charge in courts and on the website of the Ministry of Justice. The court will grant the request if it finds that participation of a lawyer or legal counsel in the particular case is necessary.<sup>438</sup> This should happen when the case is complicated and past behaviour of the party during proceedings indicates that s/he might be incapable.<sup>439</sup> This condition is applied by courts very restrictively. According to some case law, even discovering that the claimant has a mental disease of mild intensity or a psychological disorder does not constitute a precondition obliging the court to grant the motion for a court-appointed representative.<sup>440</sup> The court's decision on denying the above request might be subject to a formal complaint.

Another problem is the generally low quality of legal aid available to claimants. This results from insufficient knowledge among lawyers regarding discrimination matters. At the same time, some courts show disregard towards the competent specialised lawyers provided by NGOs specialised in discrimination, participating in proceedings (see example given above).

## 11.4 Horizontal effect of the applicable law

### 11.4.1 Horizontal effect of relevant gender equality law

There is no problem in Poland with the horizontal effect of EU gender equality law. This is related to the fact that as part of implementation of respective directives into Polish law, it was directly foreseen that their provisions refer both to relations between the individual and public entities (when they have a vertical effect), as well as relations between private entities (when they have a horizontal effect). This principle in the Labour Code results from Article 3, which states that the notion of an 'employer'

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<sup>433</sup> Ibidem.

<sup>434</sup> JoL 2015 Item 1255.

<sup>435</sup> Such persons also include persons entitled to social aid, younger than 26 or older than 65, victims of natural disaster, veterans, members of large families.

<sup>436</sup> It consists of granting legal information, indicating how to solve a legal problem and prepare pleadings, including application for the allocation of the legal representative.

<sup>437</sup> For example, pursuant to Article 465 of the Code of Civil Procedure, the plenipotentiary can be not only a lawyer or a legal adviser but also a representative of trade unions, a labour inspector or an employee of the workplace, in which the claimant is or was employed.

<sup>438</sup> See [www.ms.gov.pl](http://www.ms.gov.pl).

<sup>439</sup> In the sense that s/he is unable to properly prepare court documents, submit motions for evidence and observe deadlines, or is not active during the proceedings.

<sup>440</sup> SC ruling of 16 December 1997, II UKN 404/97, OSNP 1998/21/641.

encompasses both an organisational unit (even if it does not have a legal personality), and a natural person, if they employ employees. In the Anti-Discrimination Act, the horizontal effect results from Article 2, which states that the Act applies to natural persons and to legal persons or organisational units that are not legal persons, to whom the law grants legal capacity.

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

The authors of this report think that under Polish conditions, the *Bauer* ruling may have double effects, both positive and negative.

The positive effects include the fact that the Court has reaffirmed the constitutional status of the fundamental social rights enshrined in the Charter and their normative character, with the consequence that they can be pursued as such in individual disputes with both public and private entities. Furthermore, it follows from that judgment that the Member State must offer the individual a remedy in the event of infringement of those rights and the failure to comply with this obligation may give rise to State liability for damages.<sup>441</sup>

This is important in Poland for two following reasons. Firstly, it may bring positive changes in the future as to the possibility of vindicating social rights in Poland by relying directly on the provisions of EU law (the Constitution of the Republic of Poland excludes in Article 81 the possibility to vindicate social rights, by giving them a different legal status from other citizens' and political rights).

Secondly, the *Bauer* ruling may also revitalise the discussion, whether or not EU law has priority, not only over ordinary laws (which is directly admitted in Article 91(2) of the Constitution), but also over the Polish Constitution (which was excluded by the Constitutional Tribunal, among others, in the ruling of 4 May 2005 (K 18/04)).<sup>442</sup>

Thirdly, it may also reinitiate the debate on the binding force of Protocol 30 (previously No. 7) to the Lisbon Treaty (the so-called British Protocol) to which Poland has also acceded. The dispute is whether the Protocol is a reservation within the meaning of the Vienna Convention on international treaties or merely an interpretative declaration.<sup>443</sup> The source of these doubts is, among others, the inconsistency characterising the activities of the Republic of Poland at the time of ratification of the Lisbon Treaty. On the one hand, the Republic of Poland excluded in the protocol the direct effectiveness of social rights contained in the Charter. On the other hand, the Republic of Poland adopted Declaration No 62, providing for Polish support for labour and social rights. The effect of the *Bauer* ruling in this respect is difficult to predict. However, there is a danger that this ruling will be used by the current anti-European government to stiffen the position on the binding force of Protocol No. 30 to the Lisbon Treaty.

The CJEU decision on the merits (regarding the recognition of the heirs' right to inherit the remuneration for leave not taken by the employee due to his or her death),<sup>444</sup> which

<sup>441</sup> It is also a merit of the CJEU to offer in the *Bauer* ruling, an illustration of the substantive unfairness in which the lack of horizontal direct effect of directives could have resulted by bringing together a case against a public employer and a case against a private employer in the same factual scenario.

<sup>442</sup> In this judgment, the Constitutional Tribunal stated, inter alia: 'The priority provided for in Article 91(1) and (3) of the Constitution for the application of a ratified international agreement, as well as the law established by an international organisation on the basis of such an agreement over Polish law, does not in any way imply their primacy over the Constitution'.

<sup>443</sup> It is worth recalling that the purpose of this Protocol was undoubtedly to limit the effects of the Charter in the legal order of the Republic of Poland, inter alia, by excluding its direct effectiveness, i.e. the possibility of directly using the provisions of the Charter as a source of rights in proceedings pending before Polish courts in situations where EU law is applied.

<sup>444</sup> In the judgment of 6 November 2018 (in Joined Cases C-569/16 and C-570/16 *Stadt Wuppertal v Maria Elisabeth Bauer and Volker Willmeroth v Martin Broßonn*), the Court of Justice of the EU confirmed that, in accordance with Union law, the death of a worker does not give rise to the expiry of his right to paid annual

was immediately publicly announced in Poland by the Social Insurance Institution (ZUS),<sup>445</sup> should also be positively assessed. Incidentally, it is worth noting the discriminatory aspect of this case, in the sense that if the CJEU did not recognise such a right, it could be considered as indirect gender discrimination, given that in most cases, the heirs of deceased employees would be wives (since statistically, women live longer than men).<sup>446</sup>

### 11.5 Burden of proof

A shift of the burden of proof in sex discrimination cases is provided in Article 14 of the Anti-Discrimination Law and in Article 18<sup>3b</sup> of the LC. In both of the above acts, the wording of regulations related to this is slightly different.

In the Anti-Discrimination Law, Article 14(1) stipulates that proceedings involving charges of violation of the equal treatment rule are covered by provisions of the Code of Civil Procedure. At the same time, however, it changes the general rule of burden of proof in civil law cases, regulated in Article 6 of the Civil Code.<sup>447</sup> According to this provision, an individual who accuses another person of a violation of the equal treatment rule shall make probable (*uprawdopodobnia*)<sup>448</sup> that this violation took place (Article 14(2)). In such cases, the person accused shall prove that in spite of this probability s/he did not commit the violation (Article 14(3)). The intention of this provision was to shift the burden of proof to the defendant. However, the requirements for the person claiming to have been discriminated against go further than just a presentation of the basic facts. This provision might also be understood as requiring a claimant, in addition, to show probable existence of discrimination, by indicating the grounds of it (although in Article 14, such requirement is not explicitly mentioned). In the literature, the argument has been justly raised that it is too much to expect the plaintiff to know the motivation of the defendant's alleged discriminatory behaviour. It therefore seems justified that the plaintiff should only be required to present basic facts of unequal treatment, creating a

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leave. The CJEU clarified that the heirs of a deceased worker may claim an allowance in lieu of paid annual leave not taken by him. Where national law precludes such a possibility and thus proves incompatible with European Union law, the heirs may invoke European Union law directly against both the public employer and the private employer.

<sup>445</sup> <https://ksiegowosc.infor.pl/zus-kadry/urlupy/2795658,Dziedziczenie-ekwiwalentu-za-niewykorzystany-urlup.html>.

<sup>446</sup> Main Polish Statistical Office (GUS) reports that in 2018 the average life expectancy of men living in cities was 74.2 years, i.e. one year more than that of men in rural areas, while the average life expectancy of women living in both cities and rural areas was 81.6 years. In Poland, on average, women live 82.0 years, while men live 73.9 years, <https://stat.gov.pl/kobiety-i-mezczyzni-w-europie/bloc-1a.html?lang=plIn>.

<sup>447</sup> According to which, the burden of proof of a fact shall lie with the person who asserts legal consequences arising from this fact.

<sup>448</sup> Considerations concerning the procedural importance of the legislator's distinguishing the notion of 'probability' (plausibility) from the notion of 'proof' were given by the Supreme Court in the judgment of 7 November 2018 (II PK 229/17). The Supreme Court emphasised that although the institution of probability does not have its own legal definition, in the literature it is explained that probability is a surrogate of evidence in the strict sense. It is an exception to the rule that facts significant for the case must be proved. This exception works in favour of the party invoking certain facts, whereas for the opponent of the trial, plausibility is highly unfavourable. The other party (employer) must put much more effort into overturning the claim made by the employee, because it is more difficult to cross out its probability than certainty. In the latter case, it would be sufficient just to prove that there is any doubt of actual or even only potential character. In the case of probability, however, the employer must show that the negation of the employee's claim is better justified, which causes a lot more problems. The institution of probabilities is also connected with the facilitations (loosening) in evidential rules by possibility of using other sources of information than the means of evidence specified in the Code of Civil Procedure. The means of substantiation may be statements of third parties made in writing, verbal messages, e.g. hearing informal witness statements which are not sworn testimonies. In the judgment of 13 July 1966, II CZ 74/66, the Supreme Court stipulated, however, that such facilitation measures may not result in uncritical acceptance of the findings made in the aforementioned procedure, as the procedures for making *prima facie* evidence, although devoid of formalism, are covered by the objective truth principle.

legal presumption of discrimination, whereas it should be the obligation of the defendant to provide evidence to the contrary.<sup>449</sup>

The provision of Article 18<sup>3b</sup> LC defines what kind of different treatment of an employee,<sup>450</sup> unless justified by objective reasons demonstrated by the employer, is to be considered as failure to apply the principle of equal treatment in employment, *inter alia*, with regard to sex. In the beginning, the different courts interpreted this provision differently, in particular with respect to mutual relations between violation of the principle of equal treatment and discrimination, and as to the understanding of the employee's obligations deriving from the shift of the burden of proof.

Finally, however, the Supreme Court in the ruling of 14 December 2017 (I PK 342/16) suggested the following, uniform way of interpretation:<sup>451</sup>

'Discrimination is a qualified form of unequal treatment of employees and means, unjustified by objective reasons, worse treatment of an employee on the grounds of personal features or characteristics not related to his or her job (such as sex, age, etc.) or specified circumstances related to the job (part-time job, contract of defined period of time), listed in Article 11<sup>3</sup> and Article 18<sup>3a</sup>(1) of the Labour Code. Despite the close link between the principles expressed in Article 11<sup>2</sup> and Article 11<sup>3</sup> LC, if the inequality is not dictated by the criteria prohibited by Article 11<sup>3</sup> and Article 18<sup>3a</sup>(1) of the Labour Code, then it can only be said that the principle of equal rights (equal treatment) of employees, provided for in Article 11<sup>2</sup> of the LC, has been infringed. This has significant consequences, because the provisions of the Labour Code relating to discrimination do not apply in cases of 'simple' unequal treatment.<sup>452</sup> Therefore, if an employee accuses their employer of violating the provisions concerning the prohibition of discrimination in employment, he/she should indicate not only the facts to unequal treatment but, in addition, specify the alleged ground (or grounds) of such differentiation. Only in the case where the claim meets both of these requirements, Article 18<sup>3b</sup>(1) of the Labour Code (introduced while implementing EU law),<sup>453</sup> which shifts a burden of proof to the employer, may be applied.<sup>454</sup> Only the statement of the employer's discriminatory activity justifies the employee's claim for compensation provided for in Article 18<sup>3d</sup> of the Labour Code. In this case, the employer's liability for damages is limited to a breach of the principle of non-discrimination (cf. the aforementioned judgment of the Supreme Court of 28 May 2008, I PK 259/07, as well as judgments of 7 December 2011, II PK 77/11; of 18 April 2012, II PK 196/11; of 10 May 2012, II PK 227/11 and of 14 January 2013, I PK 164/12).'

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<sup>449</sup> See Czarnecki, P., *Rozkład ciężaru dowodu w sprawach na tle dyskryminacji* (The burden of proof in discrimination cases), *Praca i Zabezpieczenie Społeczne* 2006, No. 3, p.11.

<sup>450</sup> The consequence of which is, in particular, the refusal to conclude or dissolve the employment relation or unfavourable transfer to another position.

<sup>451</sup> Emphasising that this view has already been expressed in the SC case law: See the ruling of Supreme Court of: 12 December 2001, I PKN 182/01; of 23 January 2002, I PKN 816/00; 17 February 2004, I PK 386/03; 5 May 2005, IIIPK14/05; 10 October 2006, I PK 92/06; 9 January 2007, II PK 180/06; 19 January 1998, I PKN 484/97; 28 May 2008, IPK 259/07; 8 (18) August 2009, I PK 28/09; 3 December 2009, IIPK148/09; 12 March 2010, II PK 279/09; 21 January 2011, II PK 169/10; 7 April 2011, I PK 232/10; 3 September 2011, I PK 72/10; 2 October 2012, II PK 82/12.

<sup>452</sup> See e.g. judgments of the Supreme Court of 18 August 2009, I PK 28/09, and 18 April 2012, II PK 196/11, and the rulings referred to in them.

<sup>453</sup> Here the Supreme Court cited the provision related to the shift of burden of proof contained in all equality directives, as well as judgment of the Court of Justice of EU of 31 March 1981, C-96/80 in the case of *J.P.J. v K. K.* and of 13 May 1986, C-170/84 in the case *Susanne B. v Bank der Ö.GA.*

<sup>454</sup> For instance, in the Supreme Court judgment of 24 May 2005, II PK 33/05, unpublished, and of 9 June 2006, III PK 30/06 and of 2 February 2007, I PK 242/06, the Supreme Court ruled that an employee should present to the court facts from which a presumption of direct or indirect discrimination may be derived, and then the burden of proof is transferred to the employer, that in differentiating the situation of employees he was guided by objective premises.

It follows from those judgments that, in the SC's view, the court is not obliged to establish the existence of discrimination ex officio, even when it is evident, if the claimant does not raise such allegation, indicating specific grounds for discrimination. This interpretation is unfavourable to the claimant, who may well be unaware of the aforementioned legal subtleties and in addition, it seems to be contrary to the spirit of European anti-discrimination law.<sup>455</sup>

The rules on the shift of burden of proof in Article 14 of the Anti-Discrimination Law in general are compatible with EU law. However, the lack of reference to discrimination should be considered as a flaw in this provision (which speaks only about 'breach of the principle of equal treatment').

The provision of Article 18<sup>3b</sup> in fine LC does not comply with Article 19 of Directive 2006/54/EC, because first of all, it provides such a shift of proof explicitly only in cases when an allegation of discrimination refers to unfair work conditions (including remuneration) and to access to vocational training. Sexual harassment, for instance, remains out of its scope of application, which is also confirmed by the fact that this provision requires the employer to prove that the differentiation of the employee's employment situation was based on objective reasons. When, however, the factual findings confirm the illegality of sexual behaviour, it is difficult to talk about any 'objective reasons' that would justify them. Moreover, unlike EU law, this provision does not specify the obligations of the employee alleging discrimination, which certainly does not facilitate the practical distribution of the burden of proof. In addition, there is no legal provision referring to the denial of access to information, to the person claiming discrimination. In particular, there is no legal provision or case law that would indicate that refusal to grant access to information to the person claiming discrimination, has been considered as one of the factors in the context of establishing facts from which it may be presumed that there has been direct or indirect discrimination. The incorrect implementation in the Labour Code of EU provisions on the shift of the burden of proof, which gives rise to many interpretative difficulties, is undoubtedly one of the reasons for the difficulties encountered by victims of discrimination in asserting their rights.

## 11.6 Remedies and sanctions

### 11.6.1 Types of remedies and sanctions

Both the Anti-Discrimination Law (in Article 13) and Labour Code (in Article 18<sup>3d</sup> LC) provide for the possibility to receive compensation for violation of the equal treatment rule. Both above-mentioned acts use the Polish word in this context, '*odszkodowanie*', which literally is understood as compensation of damages.

The possibility of compensation in the case of discrimination occurring outside the employment relationship is provided in the Anti-Discrimination Law (Article 13(1)). According to this provision, everyone affected by violation of the equal treatment rule has the right to compensation. This provision does not indicate in what minimum amount this compensation should be, nor does it stipulate that it must be effective, proportionate and dissuasive. At the same time, this provision states that in such cases the provisions of the Civil Code shall apply. It should be noted that the Civil Code distinguishes between compensation for material loss (*odszkodowanie*) and satisfaction for immaterial injury (*zadośćuczynienie*). Hence, in the doctrine it is pointed out that in the current state of law, there are serious doubts as to whether granting satisfaction for moral injury, according to Article 13 of the Anti-Discrimination Law, is allowed in the case of discrimination.<sup>456</sup> In some opinions it is stressed that there are no arguments against

<sup>455</sup> Similar: Łętowska, E., *Rzeźbienie prawa* (Sculpturing law), Wolters Kluwer, Warszawa 2012, p. 255.

<sup>456</sup> Cf.: Letter of the Commissioner for Human Rights to Governmental Plenipotentiary for Equal Treatment of 28 May 2012 indicating the need for change of the Anti-Discrimination Law in this respect, p. 10 <https://www.rpo.gov.pl/sprawy-generalne/pdf/2011/10/687085/1647153.pdf>

similar interpretation of the sanction for discrimination in the Labour Code and in the Anti-Discrimination Law, especially since the latter may also apply to workers who are not employed based on an employment agreement (e.g. on service contracts or contract work). Nevertheless, since the Anti-Discrimination Law explicitly refers to the Civil Code, which clearly distinguishes these two types of harm (unlike the LC), one has to assume that the provision of Article 13 of the Anti-Discrimination Law does not properly implement EU gender equality law.<sup>457</sup>

Also, Article 18<sup>3d</sup> LC – which, as mentioned above, also uses the term ‘damages’ – initially raised similar concerns. This provision, unlike the Anti-Discrimination Law, sets the minimum amount of such compensation, which is not lower than the minimum wage in a given calendar year. Therefore, it is not excluded that higher compensation may be claimed. The phrase ‘compensation of not less than’ without setting an upper limit assumes that the amount of compensation will vary depending on the gravity of the breach of the principle of equal treatment in a specific case. Although Article 18<sup>3d</sup> LC does not specify the nature of damages, it would appear that the view that such damages have the characteristics of a penalty for a mere breach of the principle of equal treatment can be defended. In practical terms, this means that the right to compensation under Article 18<sup>3d</sup> of the LC is not conditional on the employee suffering any damage.<sup>458</sup>

Currently, there seems to be a prevailing opinion that the term ‘compensation’, as used in the LC, should be interpreted as also encompassing satisfaction for moral injuries. For instance, the Supreme Court in justification of the judgment of 7 January 2008 (III PK 43/08), which also contains general deliberations on the legal nature and functions of the compensation provided for in Article 18<sup>3d</sup> of the LC, stated that this compensation has two functions. Firstly, the reparations for material damage and secondly, compensation for non-material suffering of the employee. According to the Supreme Court, the existence of this second function is proved (evidenced) by the fact that the above-mentioned provision of the LC, while stating that an employee in a case of discrimination against her/him is entitled to the compensation at least of the amount of the minimum wage, does not make it dependent on any damage.<sup>459</sup> Moreover, the Supreme Court also draws attention to this aspect of the compensation, which gives a sense of satisfaction to the employee that the employer is punished (sanctioned) for discriminatory behaviour.<sup>460</sup>

There are diverging opinions on the question as to whether or not a claim for compensation based on the Labour Code excludes the possibility of referring also to the provisions of the Civil Code.<sup>461</sup> There are two possible views. The first refers to the fact that compensation for discrimination has been included in the Labour Code, which would imply that the matter of compensation of damages in such case has been completely regulated by provisions of labour law (unitary approach). The second view, however, considers the relevant provision of the Labour Code to be a partial regulation, only providing for a punishment (punitive damage) for the fact of committing discrimination,

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<sup>457</sup> It is, among others, the opinion of the Commissioner for Human Rights who, while requesting the revision of the Anti-Discrimination Law raised this issue, among others. Cf.: Appeal to Government Plenipotentiary for Equal Treatment of 28 May 2012 <https://www.rpo.gov.pl/sprawy-generalne/pdf/2011/10/687085/1647153.pdf>.

<sup>458</sup> In light of the case law, that provision does not, however, constitute a basis for awarding damages for damage which may occur in the future (ruling of the SC of 7 January 2009, III PK 43/08).

<sup>459</sup> Cf. also ruling of the SC of 10 June 2007 (II PK 256/13).

<sup>460</sup> In the same sense, cf.: the judgment of the Supreme Court of 14 February 2013 (III PK 31/12) and Korus, P. (in) *Kodeks pracy. Komentarz* (Labour Code. Commentary) ed. Sobczyk, A., 2nd edition, C.H. Beck, Warszawa 2015, p. 81 and Barzycka-Banaszczyk, M., *Odpowiedzialność odszkodowawcza pracodawcy* (Employer's liability for damages), C.H. Beck, Warszawa 2017, p. 71-72.

<sup>461</sup> The question is whether (and possibly when) compensation for a specific, quantifiable, harm resulting from violation of the principle of equal treatment in terms of e.g. remuneration should be awarded on the basis of 18<sup>3d</sup> LC, or on the basis of general provisions of civil law.



thus requiring supplementary reference to the Civil Code in matters regarding compensation of damages caused by pay discrimination (dual approach).

To some extent these concerns have been explained in different ways by the Supreme Court's case law. For example, in the judgment of 22 February 2007 (I PK 242/06), the Court took a dualistic approach stating that, when the allegation concerns wage discrimination, in addition to punitive compensation for discrimination agreed on the basis of Article 18<sup>3d</sup> LC, the employee may also claim compensation, which ought to equal the difference between the wage received and that which should have been received, if the principle of equal treatment had not been violated, for the period during which the violation of the right occurred.<sup>462</sup>

However, in the judgment of 22 February 2007 (I PK 242/06), the Supreme Court took a monistic view by stating that a worker may claim compensation under Article 18<sup>3d</sup> LC equal to the difference between the remuneration which he should have received without breaching the principle of equal pay and that actually received.<sup>463</sup>

There is also an example of seeking a compromise solution, such as the decision of the Supreme Court of 7 January 2009 (III PK 43/08), where it stated that the compensation resulting from Article 18<sup>3d</sup> of the LC includes compensation of personal damage to non-property assets. If, however, the compensation for discrimination, established according to general civil law provisions (Article 361(2) of the Civil Code) are 'effective, proportionate and dissuasive' with respect to European labour law standards, then there is no entitlement to additional satisfaction according to Article 18<sup>3d</sup> LC.<sup>464</sup>

In jurisprudence the problem also arises of the way in which the amount of the compensation provided for in Article 18<sup>3d</sup> LC should be established. The Regional Court for Warsaw Praga-Południe, in a ruling of 29 July 2014 (VI P 167/13), besides damages for unlawful dissolution of employment contract, also awarded the claimant damages for violation of the equal treatment rule, in the amount of PLN 1 680 (EUR 420), which equalled the minimal remuneration at the time of issuing the ruling, despite the fact that the claimant demanded PLN 12 000 (EUR 3 000). The Court justified the reduction of the compensation by declaring that its function is, in the first place, compensation of personal loss, and that it carries out the role similar to compensation of immaterial loss. At the same time, however, the Court noted that the provision of Article 18<sup>3d</sup> LC does not provide for rules for determining damages, besides defining its minimum amount. In the Court's opinion, it was the role of the claimant to make evident why she demanded damages in the particular amount, as well as to prove the existence of loss. Since the claimant did not provide such evidence, the Court decided that the awarded damages should be limited to the minimal amount. This reasoning of this ruling may be somewhat

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<sup>462</sup> Also in commentaries to the Labour Code it is stressed that by determining the damage according to Article 18<sup>3d</sup>, it is important to examine whether it is the only damage or the subsequent compensation imposed on the employer in a case of discrimination. Proving that by determining the amount of remuneration for equal work or work of equal value performed by women and men, the employer has discriminated against women, justifies – in addition to the compensation payable under Article 18<sup>3d</sup> of the Labour Code – the demand to award a due remuneration, which should be determined on the basis of the quantity and quality of work performed, and not on the basis of the employee's sex. (Świątkowski, A.M., *Kodeks pracy. Komentarz* (Labour Code. Commentary), 4th edition, C.H. Beck, Warszawa 2012, p. 104.

<sup>463</sup> The SC in some rulings also supported the monistic concept. For example, in the judgment of 15 March 2016, case ref. no. II PK 17/15, where it is stated, inter alia, that 'compensation under labour law for breach of the principle of equal treatment in employment exhausts, as a rule, all claims for wage discrimination of the injured employee (Article 18<sup>3c</sup> in conjunction with Article 18<sup>3d</sup> LC). In its justification, the Court stated that wage discrimination is an opposite (denial) of the employee's right to equal pay for equal work or for work of equal value (Article 18<sup>3c</sup> LC), therefore it is subject to a compensation sanction of the Labour Law (Article 18<sup>3d</sup> LC), without the need and admissibility of seeking civil law grounds for liability for breach of the right to equal pay for equal work or for work of equal value. In other words, and specifically speaking, compensation under employment law for breach of the principle of equal treatment in employment exhausts, as a rule, the entire claim for wage discrimination of an injured employee.

<sup>464</sup> This view was approved by some of the doctrine representatives (cf. Muszalski, W., *Komentarz do kodeksu pracy* (Commentary to the Labour Code), ed. Muszalski, W., 8th edition, C.H. Beck, Warszawa 2011, p. 54.

surprising. The expectation of the Court, that the claimant shall, according to general rules of evidence, prove the amount of loss suffered as a result of discrimination, evidenced that this court was not aware of the European law requirements that sanctions should be proportional to the nature and seriousness of the violation of equality rule and dissuasive for the employer and it is for the court to decide on this matter.

It should be added that in the case of discrimination in access to goods and services, the general Civil Code (CC) provisions regarding the protection of personal goods may be applied. Article 23 CC explicitly protects such goods as health, freedom, honour, freedom of conscience, image, confidentiality of correspondence and inviolability of residence and scientific and innovative creativity (output). The list of goods protected in this provision does not have exclusive character, which means that a person discriminated against, e.g. with regard to sex, may invoke this provision claiming that his/her dignity has been violated. According to those provisions, one can claim, among other things: abandonment of actions endangering personal goods, payment of monetary damages for moral injuries, or reparation of damages in cases when, as a result of violation of a personal good, material damage has been caused.

Additionally, in such cases there is also the possibility to notify the authorities about a contravention. According to Article 138 of the Code of Contraventions<sup>465</sup> a person active as a professional service provider, who intentionally and unjustifiably refuses access to such services, may be subject to a fine amounting from PLN 20 to PLN 5 000 (EUR 5 to EUR 1 250). A person selling in a professional retail enterprise or gastronomical enterprise, who intentionally and unjustifiably refuses to sell a product, may be subject to the same fine (Article 135 of Code of Contraventions).

In addition to these labour law remedies, the administrative monitoring body, the State Labour Inspectorate (*Państwowa Inspekcja Pracy*), may also initiate proceedings against a discriminating employer. The scope of action of this institution is defined by the Law of 13 April 2008.<sup>466</sup> This Law also regulates the way Inspectors are allowed to proceed with inspections as well as their obligations and competences. Only in matters not defined by law shall provisions of the Code of Administrative Procedure<sup>467</sup> apply.

Besides the employer violating an employee's rights resulting from an employment agreement, inter alia, referring to working time, or parenthood-related rights, the employer also commits a misdemeanour (Article 281(5) LC). Additionally, the Penal Code of 1997 provides, in very serious and notorious cases of violations of employees' rights, for a maximum penalty of up to two years' imprisonment (or a fine or restrictions to the convicted person's liberty) (Article 218 CC). Criminal punishment of a deprivation of liberty for up to three years may also be imposed in the most serious instances of sexual harassment (Article 199 CC). In 2011, the legal measures were supplemented by the criminalisation of stalking (Article 190a CC).

#### 11.6.2 Effectiveness, proportionality and dissuasiveness

The labour courts properly indicate that the wording 'compensation in the amount of not less than', without setting an upper limit, allows for differentiation of the amount of compensation, depending on the type and severity of the discriminatory behaviour of the employer and its consequences. Unfortunately, there are no reliable data as to the level

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<sup>465</sup> Code of contraventions (*Kodeks wykroczeń*) of 20 May 1971, consolidated text JoL 2018 Item 618.

<sup>466</sup> The tasks have been defined in Article 10. JoL 2007 No. 89 Item 589 (consolidated text JoL 2015 Item 640). They were extended to citizens of other EU and EFTA countries in the field of elimination of employee discrimination by the Law of 29 April 2016 on the amendment of the Law on the promotion of employment and institutions of the labour market, the law on the State Labour Inspectorate and the Anti-Discrimination Law, JoL 2016 Item 691. This change was connected with the implementation by Poland of Directive 2014/54/EU.

<sup>467</sup> *Kodeks postępowania administracyjnego* of 14 June 1960 consolidated text JoL 2018 Item 2096.



of compensation awarded in cases of gender discrimination. On the basis of some press information, one may estimate that the average level of compensation in sex discrimination cases varies on average from one to five times the minimum monthly wage, and only tends to be higher in exceptional cases (the maximum amount awarded was approximately EUR 25 000 (PLN 100 000)). Compensation in the amounts usually awarded is not likely to have a dissuasive effect.

In the past four years, the statistics of the Ministry of Justice show that compensation for discrimination awarded by courts was also within these limits.<sup>468</sup> It is worth noting that during the above period of time, in only one case (in 2015) compensation was awarded for sexual harassment (of a man) in the amount of EUR 625 (PLN 2 687) (exactly double the amount of the minimum wage for this year). The total amount of compensation in all cases of discrimination (regardless of the grounds (reasons)) adjudged by regional and district courts together acting as the first instance, were as follows: in 2015 – in the case of six women – the total compensation amounted to PLN 34 761 (EUR 8 083), which gives an average per capita of PLN 5 793 (EUR 1 347). In the case of men (five), the total amount of compensation was PLN 100 483 (EUR 23 368), which gives PLN 20 097 (EUR 4 879) per person. In a further case, PLN 15 000 (EUR 3 499) of compensation for moral injuries was agreed for a man.

In 2016, data for total compensation amounted to PLN 97 616 (EUR 22 701) for 5 women, which gives an average amount per capita of PLN 19 523 (EUR 4 543), and in the case of 10 men, the total was PLN 96 627 (EUR 22 471) and an average per capita of PLN 9 662 (EUR 2 247). Moreover, one compensation amount of PLN 500 (EUR 116) was awarded to a man for moral injuries.

In 2017, four women received compensation amounting to PLN 14 925 (EUR 3 750), an average per capita of PLN 3 731 per person (EUR 932), whereas in the case of three men, a total of PLN 30 400 (EUR 7 600) was awarded, on average PLN 10 133 (EUR 2 533) per capita. No compensation for moral injury was awarded.

In 2018, the total amount of awarded damages for 19 women amounted to PLN 142 381 (EUR 35 500), which was an average of PLN 7 493 (EUR 1 873) per person, and in the case of 14 men, PLN 99 286 (EUR 24 800), which gave an average of PLN 7 091 (EUR 1 772) per person. In addition, one amount of compensation for moral injuries of PLN 19 000 (EUR 4 750) was ordered for a man.

It is worth noting that the district courts when considering cases as second instance ruled on compensation in much lower amounts than some regional courts. It can be assumed that the cases were the same as those against which an appeal was filed, as a result of which the amount of compensation was reduced (the awarded damages by the court of second instance in the case of women amounted to PLN 34 667 (EUR 8 600). In two cases, compensation of PLN 50 000 (EUR 12 500) was awarded for moral injuries in one case, and PLN 4 032 (EUR 1 000) in the other.

Looking at the amount of damages awarded, the following remarks come to mind. The way statistical data are collected does not make it possible to determine the amount of damages awarded in individual cases (hence the calculation of the average per person), or to distinguish cases of gender discrimination (with the exception of sexual harassment). On the basis of these data it is also impossible to know whether the data corresponded to the amount of material damage actually suffered, or whether they were punitive sanctions for discriminatory practices. It is worth noting that in just five cases, compensation for moral injuries was awarded in addition to damages, which indicates,

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<sup>468</sup> The minimum remuneration in those years increased from PLN 1 750 (EUR 416) in 2015 to PLN 2 100 (EUR 500) in 2018.

among other things, a correct interpretation of the notion of 'damage' used in Article 18<sup>3d</sup> of the LC (as covering both material and moral injuries).

However, taking into account the above-mentioned reservations, it is impossible not to notice that the average amount of awarded damages per person, with small exceptions, still remains relatively low (from two to five times the minimum monthly wage). It is also visible that in the case of men, most of the average damages per person are higher than in the case of women, which requires further examination. The low average amount of awarded damages per person may also be the result of low demands made by claimants. Namely, the possibilities of claiming high amounts of compensation for discrimination are significantly limited by the provision of Article 35(1) of the Law on the courts costs in civil matters, which introduces a relative fee in employee cases if the value of the object of dispute or object of complaint exceeds PLN 50 000 (EUR 11 628). Therefore, it has been postulated in the literature to change this provision by stating that, if the amount indicated in the claim exceeds PLN 50 000 (EUR 11 628), the introduction of a fixed fee in discriminatory cases should be postulated.<sup>469</sup>

In any case, however, it is difficult to suppose that the damages and compensations awarded by courts in the last five years had a sufficiently dissuasive effect on the perpetrators of discrimination, and thus could effectively prevent this phenomenon.

As already mentioned, the administrative proceedings conducted by the State Labour Inspectorate, particularly in cases of violations of pregnant women's health protection or parental rights, are considered to be rather effective. In April 2014, the Inspectorate published the results of its investigation into the layoffs of persons returning from maternity, paternity, and parental leave and the observance of other employee rights related to childcare. This investigation covered 581 companies. Practice shows that one can often achieve more through direct contact between the Labour Inspectorate and the employer, than by going to court.<sup>470</sup>

The practical significance of penal law sanctions in discrimination cases was minor, not least because all sexual crimes were traditionally prosecuted not ex officio, but only at the victim's request. In 2013, the situation changed insofar as that currently, it is only stalking that is prosecuted at the victim's request. There are no data on the role of PC provision in relation to fighting the most serious cases of sexual harassment qualified in Article 198 of the PC. The decision of the Court in Olsztyn of 27 December 2018, recognising the former President of the town of Olsztyn as not being guilty of rape and sexual harassment, is discouraging. The ex-President had been found guilty and condemned for five years of absolute imprisonment by the Regional Court in Ostróda. This ruling was then overturned (after eight years of criminal proceedings) by the District Court in Olsztyn, declaring the accused innocent.<sup>471</sup>

The cases of sex discrimination in access to goods and services, mentioned in Section 9.9 of this report (the stroller case and the breastfeeding mother case) indicate that the sanctions applied on the basis of the Code of Contraventions for unjustified refusal to provide services or sell a product, must be considered as extremely lenient and did not meet the standards of effectiveness, proportionality and dissuasiveness. However, these types of cases found application only exceptionally, so it is difficult to generalise such conclusions. Nothing may be said about the damages which may be

<sup>469</sup> Jędrejek G., *'Dochodzenie roszczeń związanych z mobbingiem, dyskryminacją i molestowaniem. Zagadnienia prawne'*, (Enforcing claims of bullying, discrimination and harassment. Legal issues), Warszawa 2017 r., p. 390.

<sup>470</sup> The report indicates, inter alia, that in cases of violation of the law, employees rarely go to court. Even in cases where the inspectors themselves referred matters to the court, the persons concerned often backed out of the proceedings and cases were frequently remitted. Cf.: <https://www.pip.gov.pl/pl/f/v/100996/sprawozdanie2013.pdf>.

<sup>471</sup> <https://www.fakt.pl/wydarzenia/polityka/byly-prezydent-olsztyna-czeslaw-malkowski-uniewinniony-od-zarzutu-gwaltu/wqpshrb>.

agreed in sex discrimination cases on the basis of the Anti-Discrimination Law, because this law has not yet been applied to cases involving this kind of discrimination.

### **11.7 Equality body**

The Commissioner for Human Rights (RPO) is designated as the equality body, according to Article 19 of the Anti-Discrimination Law. This body covers all grounds, including sex. The purpose of the RPO, in light of the Constitution, is assistance in protection of one's freedoms or rights infringed by bodies of public authority, including the rule of equal treatment (Article 1 of the Law on RPO as amended by the Anti-Discrimination Law). In such situation the RPO may examine the case or choose to address respective bodies with a request to examine the case (Article 12). In addition to the above, it may also, acting on behalf of the citizen, initiate proceedings in civil, penal or administrative courts, as well as join proceedings that are ongoing (Article 14). Since 30 August 2015,<sup>472</sup> the Commissioner for Human Rights may, in addition to the right to initiate a case before the Constitutional Tribunal, join and participate in any proceeding pending before this Tribunal. However, in cases where the infringement of a citizen's rights occurs as a result of actions of individual persons or private entities, the competences of the RPO are limited to indicating the proper way of proceeding and examining whether the authorities responded properly to the citizen's claims (Article 11(2) of the Law on RPO). The RPO in such case may not request e.g. the initiation of proceedings, or admittance as a participant of the proceedings (which is possible when the violation has been caused by a public authority). This is a serious barrier to achieving effective protection from discrimination, which in most cases is committed by private actors. Tasks of the RPO also include analysing, monitoring and supporting equal treatment, as well as conducting independent studies and issuing recommendations regarding equal treatment (Article 17b).

The Commissioner for Human Rights takes proactive actions directed at combating discrimination. For example, he systematically addresses, among others, the Minister for Family, Labour and Social Policy with questions regarding her actions aimed at combating the gender pay gap (the last one was sent on 31 August 2017) (Document No. DAE.III.6103.15.2017.JW/JK).<sup>473</sup> He also asked about the plans and actions regarding the documents relating to withdrawal of ratification of the Istanbul Convention.

An important intervention by the Commissioner was sent to the Minister of the Family, Labour and Social Policy on 14 August 2017, asking about the inclusion of matters relating to achieving a work-life balance, in the draft law amending the Labour Code, as prepared by the Labour Law Codification Committee. He also requested general information on the progress of the Committee's work in the above matter and on its conclusions and recommendations. The Commissioner also requested information on the progress of the work at the Ministry regarding the amendment of the law on care for children under the age of three, which was supposed to facilitate the creation of new care institutions, while at the same time safeguarding the safety of children, thus assisting mothers in achieving a work-family balance.<sup>474</sup>

The Commissioner also joins court proceedings regarding discrimination against transsexual persons, provided they are proceeding against public authorities. For example, he joined the proceedings currently being conducted before the District Court in Wrocław, regarding the determination of the sex of a transsexual man, who after having partial surgery gave birth to a child.<sup>475</sup>

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<sup>472</sup> See Article 16(2 point 3) of the Law on the Commissioner for Human Rights, as amended by Article 130 of the Law of 25 April 2015 changing the Law on the Constitutional Tribunal. JoL 2015 Item 1064.

<sup>473</sup> <https://www.rpo.gov.pl/pl/content/europejski-dzie%C5%84-r%C3%B3wnej-p%C5%82acy>.

<sup>474</sup> <https://www.rpo.gov.pl/pl/wystapienia-generalne?page=2>.

<sup>475</sup> Resolution of 7 March 2016, IAc1830/15.

## 11.8 Social partners

According to the Law of 23 May 1991 (consolidated text JoL 2015, Item 1881, with further amendments) trade unions may play a rather significant role with respect to protection from discrimination, both inside and outside the judicial system,<sup>476</sup> in particular, by monitoring the application by employers of labour provisions with regard to employees.<sup>477</sup>

The provision of Article 61 provides non-governmental organisations, as well as other social organisations, with the right to actively participate e.g. in proceedings regarding violations of the equal treatment and non-discrimination rules. They may, in particular, bring actions on behalf of their members, as well as join pending proceedings. If they do not participate in proceedings, they have the right to present opinions to the court (Article 63). However, this is only possible in cases which lie within the scope of their statutory duties and are subject to the written consent of an employee.

The possibility of participation of social organisations is covered by additional regulations in provisions on cases recognised by labour and social insurance courts. In such cases, an employee or insured person may be represented, e.g. by an agent of a trade union (Article 465 CPC). An NGO might also – subject to the written consent of an employee or insured person – bring actions on his behalf and join pending proceedings (Article 462 CPC). However, in practice, these organisations do not play an important role. The first case where an NGO (*Polskie Towarzystwo Prawa Antydyskryminacyjnego*) lodged a claim in the name and upon the consent of a person who felt discriminated against, was the case of the woman breastfeeding in a public restaurant (mentioned in Section 9.9 of this report). It is characteristic that in this case, the court performed a very exhaustive examination of whether initiating a claim on behalf of citizens was within the statutory scope of the NGO's activities. In the above case, the court accepted the NGO's procedural legitimation with regard to discrimination claims, while refusing it with regard to claims for damages for violation of personal rights regulated in the civil code.

The role of collective agreements in promoting equal treatment of women and men and preventing gender discrimination is insignificant. Such agreements can be concluded at the level of an individual enterprise, a part of, or the whole branch of an employment sector (Articles 238-241 LC). An analysis of the collective labour agreements at enterprise level<sup>478</sup> indicated that they very seldom include regulations which are more favourable for employees than the minimum stipulated in the provisions of labour law. More often they simply repeat the Labour Code provisions on equal treatment. This trend is coupled with an increased frequency of cases where the parties to collective labour agreements suspend the application of the entire agreement or a part thereof.

## 11.9 Other relevant bodies

According to Article 18 of the 2010 Anti-Discrimination Law, 'Performance of tasks related to the implementation of the principle of equal treatment' shall be entrusted to the Government Plenipotentiary for Equal Treatment (besides the Commissioner for Human Rights (RPO)).

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<sup>476</sup> In the scope of the protection of collective rights, the trade unions represent all employees. In matters of individual claims, in principle, trade unions represent the interests of their members, however, on request may also defend the rights of non-members. Kęczkowski, M., *Związki zawodowe ich rola w polskich zakładach pracy* (The Trade Unions and their role in Polish enterprises), Płock, 2005.

<sup>477</sup> The active participation of trade unions is explicitly required in the Labour Code, inter alia, in cases of dissolving a contract without notice, reviewing appeals against imposition of a disciplinary penalty. Every such situation can be viewed in a context of unequal treatment on the grounds of sex.

<sup>478</sup> Information received from Women's Section of the Trade Union 'Solidarność'.

While the RPO is an independent body, the Plenipotentiary is a body in charge of non-discrimination policies and the coordination of governmental efforts. It is the reason why the status of Plenipotentiary does not meet the requirements of an equality body in the meaning of EU law. The Plenipotentiary has, however, several important competences in the field of equal treatment. It prepares and presents to the Council of Ministers the National Programme of Activities for Equal Treatment (*Krajowy Program Działań na rzecz Równego Traktowania*) and then reports on its execution annually. Other competences include preparing draft laws related to equal treatment and preparing opinions about such drafts. It has, in addition, a number of analytical and monitoring competences.<sup>479</sup> The Plenipotentiary is responsible for the promotion of equal treatment; international cooperation; and implementing projects that support equal treatment and counteracting discrimination.

Despite being equipped with broad competence in the field of equal treatment, not every person appointed to the post of Plenipotentiary uses these opportunities in practice, which is particularly the case with Mr Lipiński, currently performing the function of Plenipotentiary.<sup>480</sup> After parliamentary elections that took place on 25 October 2015, the office of the Plenipotentiary for Equal Treatment was annulled and renamed 'Plenipotentiary for Civil Society and Equal Treatment'. Also, consecutively, new persons were appointed to the post of Plenipotentiary, however, nobody with a track record of dealing with equal treatment issues and known among NGOs acting in this field. Currently, most of the activities of the current Plenipotentiary target general issues of civil society and the problems of gender equality have marginal significance on his agenda.<sup>481</sup> The latter corresponds well with the general policy line of the ruling party, 'Law and Justice' (PiS).<sup>482</sup>

### 11.10 Evaluation of implementation

The implementation of the Directive with regard to the equality body is, from a formal point of view, correct. However, in practice, the role which the Commissioner may play is rather limited. It results from the legal formulation of the Commissioner's mission and mandate. In particular, the Commissioner's competences after his mandated had been extended (on duties of equality body) did not change significantly and are still focusing on the protection of citizens' rights in the situation when the violations occur as a result of the actions of state (public) organs. In cases where the infringement of citizens' rights occurs as a result of actions of individual persons or private entities, the Commissioner

<sup>479</sup> The Plenipotentiary may establish special research teams, call for specific research or expert analysis and provide reports based on this research. It may also issue recommendations.

<sup>480</sup> However, Prof. M. Fuszara, for example – the Plenipotentiary in the years 2014-2015, appointed by the former Government – had considerable achievements. The ratification by Poland of the Istanbul Convention and the initiation of actions aimed at elimination of the pay gap may be attributed to her as one of her personal achievements. <https://www.rownetraktowanie.gov.pl/aktualnosci/aktualizacja-wykazu-organizacji-pozytku-publicznego-uprawnionych-do-otrzymania-1-6?page=20>.

<sup>481</sup> In January 2019, the ROP asked the Plenipotentiary for information on his monitoring activities in 2018, with regard to observation of the principle of equal treatment and non-discrimination. In response, Adam Lipiński presented eight of his interventions in such cases, of which only two concerned gender discrimination. The first was concerning an attempt to throw a woman in a burqa out of a public bus. In this case, the Plenipotentiary turned to the director of the bus company asking for information about the circumstances of the incident (the director explained the improper reaction of the bus driver by 'deficiencies of procedure', which the Plenipotentiary found as satisfactory). The second case was to draw the attention of the Mayor of Legionowo to the sexist way he presented the candidates for the city and district councils. It is also significant that from the list submitted to the RPO of 11 NGOs acting in the field of equal treatment, with which the Plenipotentiary met in 2018, there was not one women's NGO. <https://www.rpo.gov.pl/pl/content/czym-w-2018-r-zajmowa%C5%82-sie-pelnomocnik-rzadu-ds-rownego-traktowania>.

<sup>482</sup> In fact, when Law and Justice was last in power (a coalition of three parties – Law and Justice; Self-Defence; and League of Polish Families), the post of the Plenipotentiary was abolished (on 3 November 2005). It was re-established (in March 2008) only after new elections resulted in change of the government. Also, the situation of the Plenipotentiary has changed; before 2011, s/he was appointed based on the Ordinance of the Council of Ministers; since January 2011, based on a parliamentary act (namely the Anti-Discrimination Law Act).

may only monitor the adequacy of the reaction of the appropriate state organs on such infringements.

#### **11.11 Remaining issues**

There are no additional issues to raise.

## 12 Overall assessment

1. The following transposition problems were mentioned in this report: Regulating sex discrimination together with discrimination on other grounds.  
As a result, existing legislation is unclear and vague, making it extremely difficult to understand and interpret, even for lawyers.
2. Incorrectly implemented definition of sexual harassment.  
According to Polish regulations, the definition of sexual harassment also encompasses harassment related to sex, while in EU law it is treated as a separate central concept.
3. Not entirely correct definition of direct discrimination in the Labour Code.  
The definition of direct discrimination in the LC is not entirely correct with regard to the hypothetical activities of employers. The Labour Code speaks of a comparable situation not in the context of another employee, but refers to a 'comparable situation' to the employee being discriminated against.
4. Lack of an explicit regulation relating to discrimination on the grounds of gender identity, discrimination by association and discrimination by assumption, as well as multiple and intersectional discrimination.
5. Too wide a scope of exemptions provided for in the Anti-Discrimination Law.  
The scope of exemptions provided for in the Anti-Discrimination Law includes a wider range of exceptions to the equal treatment rule than those provided for in Article 14(2) of Directive 2006/54/EC. The exceptions cover not only performing professional activity, but also undertaking access to professional activity (including training); not only undertaking access to the vocational training, but also participating in such training and completing it.
6. Multiplication of the various types of leave related to the birth and care of a child, each having different consequences and a different form.  
This applies in particular to two types of leave under Polish law relating to the upbringing of a child (parental and childcare leave), which seem to correspond functionally to one type of parental leave within the meaning of Directive 2010/18/EU. There is no indication of the purpose that such differentiation is supposed to serve.
7. An incomplete implementation of the regulation introducing one month's non-transferable leave for each parent.  
The problem concerns implementation of Clause 2 Section 1 of Directive 2010/18, which refers to one month's non-transferable leave, which must be taken by one of the parents. The two-week paternity leave provided for in Article 182<sup>3</sup> of the LC, which may be taken only by the child's father, does not seem to be a sufficient solution.
8. Not fully satisfactory implementation of EU regulations dealing with flexible working time arrangements.  
Besides other arrangements, the Labour Code introduced regulations, which restrict special opportunities to adjust working time patterns only to parents of children with disabilities.
9. Limiting the Law on counteracting family violence only to family violence. This does not include a gender perspective, nor a definition of economic violence.
10. The limited role of the Commissioner for Human Rights as an equality body.  
The Commissioner's competences focus on the protection of citizens' rights in the situation when the violations occur as a result of the actions of state (public) organs. In cases where the infringement of citizens' rights occurs as a result of actions of individual persons or private entities, the Commissioner may only monitor the adequacy of the reaction of the appropriate state organs on such infringements.

The implementation of the EU gender equality acquis in Poland used to be rather satisfactory, generally speaking, even if some provisions and solutions still required amendments. This assessment had to be changed, however, given the adoption of

legislation reinstating different pension ages, after the short period of movement towards equalisation (see Section 7.5), which means that Poland is moving away from the EU acquis in this respect. It should further be noted that the transposition process of various anti-discrimination directives at national level was long and arduous and is still unfinished. The main source of problems was the common belief that such transposition, in order to be complete, should not literally copy the formulations of the directives. It was believed that the adopted provisions, which were often too general in comparison with the directive and contained many possible legal gaps, could be supported by the application of general rules of interpretation of the law, in particular the rule that national law must be interpreted in conformity with EU law.

The process of the transposition of selected EU equality directives into the Polish Labour Code had already been initiated before Poland's accession and it had a progressive character: in 2001, a new Section called 'equal treatment of women and men in employment' was adopted. In 2003, this Section was renamed and modified so as to allow the application of its provisions also to instances of discrimination based on grounds other than gender. The Law of 2004 on the Promotion of Employment and Institutions of the Labour Market, dealing with discrimination in the access to hiring or job training, accomplished the process of the transposition of equality directives in the field of access to work. In 2006, 2008, 2013, 2014, 2015 and 2018, further amendments to the Labour Code were introduced, revising the central concepts and dealing mainly with the protection of women's health during pregnancy, extension of maternity and paternity leave and also providing for different forms of flexible working-time arrangements. In 1998, the general reform of the mandatory social insurance system took place. The Law on Occupational Pension Schemes of 2004 to a certain extent achieved general compliance with EU directives, but failed to transpose many of its specific provisions. In 2011, the Anti-Discrimination Law entered into force, supplementing labour law provisions regulating access to employment and vocational training, and providing for horizontal protection in cases of violation of the principle of equal treatment in the access to goods and some services. As a result of these legislative changes, the labour law as well as social security law and the regulation of access to goods and some services, correspond, in general, with the requirements of the EU gender equality directives. However, when it comes to the transposition of particular EU concepts and regulations, despite several consecutive amendments, the legislation still shows some inadequacies and deficiencies. Sometimes, binding law provisions are overprotective, e.g. in the prohibition of the performance of certain activities by all pregnant women. At the same time, other provisions, e.g. regarding sex-related harassment in the Labour Code, or damages in cases of discrimination according to the Anti-Discrimination Law, do not implement the respective directives properly. In addition, the actions of the legislator aimed at applying the provisions on equal treatment in employment to instances of discrimination based on reasons other than gender, resulted in some detrimental aspects in the field of protection against discrimination based on sex. For example, exceptions to the equal treatment principle provided in the Labour Code no longer refer to pregnancy, but to parenthood only. In addition, questions may be raised as to whether the equality body's mandate and resources are adequate for its activities.

The Polish system of childcare-related leave has been developed over many years. Legal solutions regarding particular types of leave have been introduced at different times and then frequently modified, which has caused them to become inconsistent and overly complicated. Until 2 January 2016, this complexity resulted both from the multiplicity of different types of leave (there were seven types), as well as from diversified rules for granting them. This system has been significantly simplified by the Law of 24 July 2015, and has become more compatible with EU law. Nevertheless, different terminology leads to numerous confusions and misunderstandings. In addition, not all maternity benefits meet the requirement of sufficiency and the special procedure for granting a worker the possibility to perform work on conditions of flexible working time, for family reasons, has



not yet been fully established. Also, certain solutions, such as services supplying temporary replacements for self-employed women on parental leave, should be introduced.

An important shift in social policy, unfavourable for equal treatment, took place with the change in Government after the 2015 election, in which the conservative party, *Prawo i Sprawiedliwość – PiS* (Law and Justice), gained parliamentary majority. The declared priority of the current Government is the pronatalist traditional family policy, which is reflected in some practical financial moves, such as the introduction of Family 500 plus, in a law introducing a new child-raising benefit.<sup>483</sup> The new benefit was initially intentionally designed to be more preferential for traditional nuclear families with two or more children, which was criticised for being discriminatory against one-child and one-parent families. The extension of the eligibility for this benefit also for every first child, not depending on the financial situation of family, has weakened this criticism.<sup>484</sup> However, on the other hand, it even more effectively discourages mothers of one or several children from undertaking their employment.<sup>485</sup> The decrease in the number of working mothers after the introduction of the 500+ programme has been confirmed by scientific research.<sup>486</sup> In 2019, a special family benefit (in the form of the lowest pension) will also be introduced for mothers of at least four children who have not taken up, or have interrupted, their professional career, due to raising the children.<sup>487</sup> In addition, the anti-discriminatory institutional infrastructure has been limited (by the dissolution of the Council for the Prevention of Racial Discrimination, Xenophobia and Intolerance (*Rada do spraw Przeciwdziałania Dyskryminacji Rasowej, Ksenofobii i związanej z nimi Nietolerancji*)<sup>488</sup> and – most importantly – by further systematic cuts in the budgetary fund for the activities of the Commissioner for Human Rights – the only public institution that is actively defending citizens' rights to equality and non-

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<sup>483</sup> Law of 11 February 2016 on state aid in the raising of children (JoL 2016 Item 195) in force from 1 April 2016. In November 2016, a new benefit for mothers of disabled children was introduced. The law of 4 November 2016 on support for women in pregnancy and delivery 'Pro-life' (JoL 2016 Item 1860) introduces special rights for pregnant women with regard to access to medical care services, as well as several other instruments of family policy. In particular, it guarantees a one-time benefit of approximately EUR 900 (PLN 4 000), regardless of the income status, for every woman who gives birth to a child that has been diagnosed with severe, irreversible disability or incurable disease endangering the child's life, which materialised in the prenatal phase or during delivery. The benefit will be granted to the parents or care-givers of the child, if a specialist doctor (gynaecologist, obstetrician, neonatologist, perinatologist) has diagnosed such disability or disease.

<sup>484</sup> However, this programme does not bring the expected results. The 2018 research conducted by I. Magda and I. Kotowska shows that the slight increase in birth rate (by 12 000 children) should be combined with the ongoing demographic changes and changes of labour code favourable for parents (extension of paid childbirth/care-related leave, rather than with the funds obtained from the Family 500 plus programme). It was found that the decrease in child poverty was not as visible as expected (it was expected to occur by 75-100 %, and in fact, it was 41 % among the children from the poorest families). It is related, inter alia, to the fact that only 37 % of the money from this programme goes to real poor families, while the remaining part goes to families that do not need help, or even to wealthy families. Cf.: 'Gazeta Wyborcza' daily newspaper of 8 May 2019, p. 13.

<sup>485</sup> Cf.: 'Gazeta Prawna' (2014), 'Samotny rodzic ma mniejsze szanse na 500 zł na dziecko' (Single parents with less chance of PLN 500 for their child) of 9 December 2014. <http://praca.gazetaprawna.pl/artykuly/910063,samotny-rodzic-500-zl-na-dziecko-szanse.html>, Gazeta.PL (2016), 'Mieć więcej dzieci Rzecznik klubu PiS radzi samotnym matkom bez 500 plus' ('Have more children Chairman of the PiS parliamentary club advises single mothers without 500 plus'), 03 February 2016. The reaction of the President's Minister was similar, regarding teachers' pay protests (he said that the teachers do not have to live in celibacy, so may take advantage of the 500+ programme for every child).

<sup>486</sup> It has been found by the Main Statistical Office that, after this reform, the number of persons willing to work has decreased by approximately 300 000 and among women of the age group 25-34, the ratio was the lowest since 2003. The Ministry of the Family, Employment and Social Policy claimed that the causal relation of this drop with introduction of the 500 plus programme was not sufficiently proved. <https://businessinsider.com.pl/finanse/makroekonomia/aktywnosc-zawodowa-kobiet-a-500-plus-komentarz-ministerstwa/y8m1jz9>.

<sup>487</sup> Law of 31 January 2019, JoL 2019 Item 3030.

<sup>488</sup> By Ordinance No. 53 of the President of the Council of Ministers of 27 April 2016, published in the Polish Monitor (*Monitor Polski*) of 29 April 2016 Item 413.

discrimination).<sup>489</sup> On the other hand, the capacities and effectiveness of the activities of the Office of Governmental Plenipotentiary for Equal Treatment were diminished by expansion of responsibilities of the Plenipotentiary in areas other than discrimination,<sup>490</sup> by repeated nomination for this post of politicians who are not experts in equality issues<sup>491</sup> and by the reduction in the number of competent staff of the Plenipotentiary's Office. All this has resulted in the total marginalisation – and even the absence – of sex equality and gender discrimination issues on his agenda. Furthermore, since 2016, the Ministry of Justice systematically refused to provide financial support for most active women's NGOs, e.g. *Centrum Praw Kobiet* (the Centre for Women's Rights) which, among other things, protects and helps victims of gender-based violence.<sup>492</sup>

Additionally, draft laws intending to prohibit abortion are occasionally submitted to the Parliament<sup>493</sup> and a claim by the group of deputies alleging that the so-called embryo-pathological indication for an abortion, provided for by the Law of 7 January 1993, violates the Constitution, was lodged before the Constitutional Tribunal on 2 November 2017. The introduction of the selling of emergency contraceptives only upon prescription and the tolerance (and sometimes even encouragement) of public authorities for abusive use by different medical professions of the conscientious objection clause in the field of reproductive medicine, combined with the omission of the Minister of Health to realise the recommendation of the Constitutional Tribunal which derives from the ruling of 7 October 2015 (K 12/14), aimed at facilitating the access of women to such services, as well as the threats to denounce the Istanbul Convention and the proposal of amendments of the Law on family violence, hostile towards the victims, have caused feelings of uncertainty and endangerment for many women, mobilising them to participate in protest marches. The tenacious attitude of the Government towards the teachers' strike is also symptomatic, namely, the categorical refusal to raise their salaries, when at the same time, in order to buy voters before the upcoming European and parliamentary elections, the government offered five new social benefits (including the so-called 13 retirement benefits for all of the nearly 9 million pensioners). Such injustice can be seen as indirect discrimination against women, given that women make up more than 80 % of the overall 700 000 teachers, in particular, while remembering the recent Government's decision to increase the salaries of the military and other uniformed services.

In the authors' opinion, most disturbing, however, is the dismantling of the democratic State performed by the *Prawo i Sprawiedliwość* (PiS) party since its electoral victory in October 2015. For the first time since 1989, one political party holds the majority of votes in Parliament. As a result, given the strict disciplinary rigour of its MPs, it is generally able to pass every law, except for changing the Constitution. The PiS party takes huge advantage of this possibility, disregarding constitutional standards of proper legislation. In particular, a series of changes to the laws on: the Constitutional Tribunal;

<sup>489</sup> <https://www.rpo.gov.pl/pl/content/sejmowa-komisja-finans%C3%B3w-o-bud%C5%BCecie-rpo-decyzje-1-grudnia>.

<sup>490</sup> The new remit of the Plenipotentiary is provided for in the Regulation of the Council of Ministers of 8 January 2016, JoL 2016 Item 3.

<sup>491</sup> In the 2016 Congress of Women, the Plenipotentiary tried to explain to the audience that the 'wage gap and glass-ceiling are only a figment of women's imagination' <http://wyborcza.pl/1,75398,20068732,pełnomocnik-rządu-ds-rownego-traktowania-i-list-prezydenta.html>.

<sup>492</sup> The refusal has been justified by alleged discriminatory activities of this centre and its local branches, which do not fulfil their tasks 'by diverting aid offers only to women'. This explanation constitutes clear evidence that the Ministry is not aware of the nature of the phenomena of gender-based violence. Cf.: *Gazeta.PL* (2016), 'Rząd odmówił finansowania Centrów Praw Kobiet bo 'zawężają pomoc do określonej grupy'' (The Government has refused financial support to Centres of Women's Rights because their aid was 'narrowed down to only a specific group of victims') 13 May 2016, available at: <http://wiadomosci.gazeta.pl/wiadomosci/1,114871,20066209,rzad-odmowil-finansowania-centrow-praw-kobiet-bo-zawezaja.html>.

<sup>493</sup> The last draft 'stop abortion' concerning the abolition of embryo-pathological indication for abortion, for the time being is frozen in the Sejm, but nevertheless, Catholic circles constantly intervene in the matter of its further proceedings. Cf.: *Ordo Iuris'* appeal to Sejm of 26 April 2019, <https://ordoiuris.pl/ochrona-zycia/ludzkie-zycie-wazniejsze-niz-pieniadze-odpowiedz-ordo-iuris-na-zarzuty-biura-analiz>.

the common courts system; the Supreme Court; the National Judicial Council, in connection with personal changes in the composition of the Constitutional Tribunal and in the Supreme Court, which has been achieved by imposing an equal retirement age for judges – as well as multiple personal changes in the positions of common court presidents and in the composition of the National Council of the Judiciary, have resulted in an increased loss of independence for those judicial institutions. In the current state of affairs there is no possibility that the Tribunal would independently uphold any provision passed within the PiS party's programme of so-called good change, unless the party leadership approves it.

The incapacitation of the Constitutional Tribunal, in connection with propaganda actions discrediting the judicial community and threatening them by imposing sanctions by the newly created disciplinary chamber of the Supreme Court,<sup>494</sup> has seriously undermined the rule of law and the division of powers. Because of this situation, on 27 July 2016, the European Commission adopted a Rule of Law Recommendation on the situation in Poland, setting out the Commission's concerns and recommending how these can be addressed. In December 2017, following the lack of a real response to the objections raised by the Commission, the Article 7 TUE procedure was triggered against Poland. In the opinion of the Commission, recent events in Poland concerning, in particular, the Constitutional Tribunal, the Supreme Court, the judiciary and the new disciplinary regime for the judiciary, have led the European Commission to open a dialogue with the Polish Government in order to ensure full compliance with the rule of law. The Commission considers it necessary for Poland's Constitutional Tribunal to be able to fully carry out its responsibilities under the Constitution, and in particular, to ensure an effective constitutional review of legislative acts; it also hopes that the newly increased dependency of the courts on the executive authority will be reversed.<sup>495</sup> It is, however, difficult to expect the outcome desired by the Commission to be achieved without further decisive action by the EU institutions. The governmental amendments to the adopted legislation on judicial reform<sup>496</sup> provide evidence of this fact. They are merely 'cosmetic',<sup>497</sup> as they do not change the core of the adopted unconstitutional legal changes and do not provide for any legal possibility to reverse the unconstitutional changes undertaken by the governing political authority.

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<sup>494</sup> Polish law allows to subject ordinary court judges to disciplinary investigations, procedures and ultimately sanctions, on account of the content of their judicial decisions. Also, the new disciplinary regime does not guarantee the independence and impartiality of the Disciplinary Chamber of the Supreme Court which reviews decisions taken in disciplinary proceedings against judges. This Disciplinary Chamber is composed solely of new judges selected by the National Council for the Judiciary whose judges-members are now appointed by the Polish parliament (Sejm), [http://europa.eu/rapid/press-release\\_IP-19-1957\\_en.htm](http://europa.eu/rapid/press-release_IP-19-1957_en.htm).

<sup>495</sup> [http://europa.eu/rapid/press-release\\_IP-16-2643\\_en.htm](http://europa.eu/rapid/press-release_IP-16-2643_en.htm).

<sup>496</sup> Namely to the Law of 8 December 2017 on the Supreme Court (JoL 2018 Item 5) as amended by the Law of 12 April 2018 modifying the Law on the Organisation of the Common Courts, the Law on the National Judicial Council and the Law on the Supreme Court, JoL 2018 Item 848.

<sup>497</sup> The Bill of 17 December 2018 has such character – it reinstates the Supreme Court judges who have been removed from office when the Law on the Supreme Court entered into force. The reinstatement, as every interim measure, will be in force until the case of the European Commission against Poland, brought on 2 October 2018 to the Court of Justice of the EU, is decided by this Court. The provisions on lowering the retirement age of Supreme Court judges, has also been the subject of the question of the Polish Supreme Court of 2 August 2019 (III UZP 4/18) for preliminary ruling to the CJEU. The order on reinstatement has been taken by the CJEU on 19 October 2018.

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