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Country report

Gender equality

How are EU rules transposed into
national law?

Denmark

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Reporting period 1 January 2020 – 01 January 2021

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CONTENTS

1	Introduction	5
1.1	Basic structure of the national legal system	5
1.2	List of main legislation transposing and implementing the directives	5
1.3	Sources of law	6
2	General legal framework	7
2.1	Constitution	7
2.2	Equal treatment legislation	7
3	Implementation of central concepts	9
3.1	General (legal) context.....	9
3.2	Sex/gender/transgender	11
3.3	Direct sex discrimination	11
3.4	Indirect sex discrimination	12
3.5	Multiple discrimination and intersectional discrimination	15
3.6	Positive action.....	16
3.7	Harassment and sexual harassment.....	18
3.8	Instruction to discriminate	22
3.9	Other forms of discrimination	22
3.10	Evaluation of implementation	23
3.11	Remaining issues.....	23
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)	24
4.1	General (legal) context.....	24
4.2	Equal pay	25
4.3	Access to work, working conditions and dismissal	29
4.4	Evaluation of implementation	31
4.5	Remaining issues.....	31
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)	33
5.1	General (legal) context.....	33
5.2	Pregnancy and maternity protection	34
5.3	Maternity leave	37
5.4	Adoption leave	40
5.5	Parental leave	41
5.6	Paternity leave	46
5.7	Time off for <i>force majeure</i>	47
5.8	Care leave	48
5.9	Leave in relation to surrogacy	49
5.10	Flexible working time arrangements.....	49
5.11	Evaluation of implementation	50
5.12	Remaining issues.....	50
6	Occupational social security schemes (Chapter 2 of Directive 2006/54) ..	52
6.1	General (legal) context.....	52
6.2	Direct and indirect discrimination	52
6.3	Personal scope	52
6.4	Material scope.....	52
6.5	Exclusions	52
6.6	Laws and case law falling under the examples of sex discrimination mentioned in Article 9 of Directive 2006/54	52
6.7	Actuarial factors	53
6.8	Difficulties	53
6.9	Evaluation of implementation	53
6.10	Remaining issues.....	53
7	Statutory schemes of social security (Directive 79/7)	54

7.1	General (legal) context.....	54
7.2	Implementation of the principle of equal treatment for men and women in matters of social security.....	54
7.3	Personal scope	55
7.4	Material scope.....	55
7.5	Exclusions	55
7.6	Actuarial factors	55
7.7	Difficulties	55
7.8	Evaluation of implementation	55
7.9	Remaining issues.....	55
8	Self-employed workers (Directive 2010/41/EU and some relevant provisions of the Recast Directive).....	56
8.1	General (legal) context.....	56
8.2	Implementation of Directive 2010/41/EU.....	56
8.3	Personal scope	57
8.4	Material scope.....	58
8.5	Positive action.....	58
8.6	Social protection	58
8.7	Maternity benefits.....	58
8.8	Occupational social security	60
8.9	Prohibition of discrimination.....	60
8.10	Evaluation of implementation	60
8.11	Remaining issues.....	60
9	Goods and services (Directive 2004/113)	61
9.1	General (legal) context.....	61
9.2	Prohibition of direct and indirect discrimination	61
9.3	Material scope.....	61
9.4	Exceptions	62
9.5	Justification of differences in treatment	62
9.6	Actuarial factors	63
9.7	Interpretation of exception contained in Article 5(2) of Directive 2004/113.....	63
9.8	Positive action measures (Article 6 of Directive 2004/113).....	63
9.9	Specific problems related to pregnancy, maternity or parenthood	63
9.10	Evaluation of implementation	63
9.11	Remaining issues.....	63
10	Violence against women and domestic violence in relation to the Istanbul Convention	64
10.1	General (legal) context.....	64
10.2	Ratification of the Istanbul Convention	65
11	Compliance and enforcement aspects (horizontal provisions of all directives)	66
11.1	General (legal) context.....	66
11.2	Victimisation	67
11.3	Access to courts	68
11.4	Horizontal effect of the applicable law	68
11.5	Burden of proof	68
11.6	Remedies and sanctions	69
11.7	Equality body	69
11.8	Social partners	70
11.9	Other relevant bodies.....	70
11.10	Evaluation of implementation	70
11.11	Remaining issues.....	70
12	Overall assessment	71
	Bibliography	72

1 Introduction

1.1 Basic structure of the national legal system

Denmark is a constitutional monarchy, consisting of Denmark, Greenland and the Faroe Islands. Greenland and the Faroe Islands are not members of the European Union.

The Danish judicial system is based on the traditions of civil law as in continental Europe. In general, rules and legal principles are organised in a number of statutory acts. Approximately 80 % of the Danish labour market is covered by collective agreements. Collective agreements cover areas such as minimum wages, working hours, occupational pension schemes and parental leave rights. Thus, collective agreements play a significant role in the legal landscape regarding work-related issues. Collective agreements are concluded by the labour market parties themselves, and the state is not party or in any other way involved in the negotiation of such agreements.¹

A Public Conciliator, as well as the Labour Court, has been set up by the state in order to assist in resolving conflicts in the labour market. Only in exceptional cases, has it been necessary to issue statutory legislation and only in instances where the aim was to protect certain groups of workers whose organisation had insufficient power to protect their members or were otherwise in need of special protection, and never on the topic of pay. Statutory legislation concerning the employment relationship between employer and employee has therefore primarily been limited to instances where it was required as part of the process of implementing European Union directives.

The Danish welfare model is to a large extent funded by general taxes. Regulation and interpretation of social security benefits are tied to the Parliament; courts, in their interpretation of regulations, often follow the intent of the legislators through a purposive interpretation. This suggests that judicial interpretations of the legislation are very closely linked to the preparatory works of the legislative act.

In addition to the court system, there are several specialised administrative complaint boards in Denmark. The Board of Equal Treatment (the Equality Board) was established in 2009. The Board handles individual complaints on all grounds of discrimination. Decisions of the Equality Board can be brought before the courts.

1.2 List of main legislation transposing and implementing the directives

All Danish legislation is published electronically in *Lovtidende*,² the official Law Journal of the Danish Government. Simultaneously, it is made available in the electronic database *Retsinformation*.³

The relevant Danish legislation on equality with regard to the subject of this report is listed below:

- Consolidation Act No. 156/2019 on Equal Pay (*Ligelønsloven*);⁴
- Consolidation Act No. 645/2011 on Equal Treatment of Men and Women as regards Access to Employment, etc. with later amendments (*Ligebehandlingsloven*);⁵
- Consolidation Act No. 1147/2020 on Gender Equality (*Ligestillingsloven*);⁶

¹ For more on the Danish labour market system see Kristiansen, J. (ed) (2015) Europe and the Nordic Collective-Bargaining Model: The Complex Interaction between Nordic and European Labour Law, Nordic Council of Ministers.

² www.lovtidende.dk.

³ www.retsinfo.dk.

⁴ <https://www.retsinformation.dk/Forms/R0710.aspx?id=206381>.

⁵ <https://www.retsinformation.dk/Forms/R0710.aspx?id=137042>.

⁶ <https://www.retsinformation.dk/eli/lt/2020/1147>.

- Consolidation Act No. 1001/2017 on the Prohibition of Discrimination in the Labour Market, (*Forskelsbehandlingsloven*);⁷
- Consolidation Act No. 235/2021 on Entitlement to Leave and Benefits in the Event of Childbirth, (*Barselsloven*);⁸
- Consolidation Act No. 950/2015 on Equal Treatment between Men and Women in insurance, pension and similar matters, with later amendments (*Lov om ligebehandling af mænd og kvinder i forbindelse med forsikring, pension og lignende finansielle ydelse*).⁹

1.3 Sources of law

The main sources of gender equality law in Denmark are the statutory acts on gender equality, national as well as EU case law, ratified international treaties and collective agreements. The administrative Equality Board has the competence to decide on discrimination cases brought before it. Decisions by the Equality Board form an important source of law in that the decisions are public, many of the decisions are not brought before an ordinary court and hence in many instances remain the only ruling on a particular matter of equality law. The decisions can in principle be used in courts as an interpretive instrument.

⁷ <https://www.retsinformation.dk/Forms/R0710.aspx?id=179869>.

⁸ <https://www.retsinformation.dk/eli/lt/2021/235>.

⁹ <https://www.retsinformation.dk/Forms/R0710.aspx?id=168655>.

2 General legal framework

2.1 Constitution

2.1.1 Constitutional ban on sex discrimination

The Danish Constitution does not set forth a statutory ban on sex discrimination.

2.1.2 Other constitutional protection of equality between men and women

There is no constitutional protection of equality between men and women in the Danish Constitution.

2.2 Equal treatment legislation

Gender Equality Act, Consolidation Act No. 1147, 3 July 2020.

Act on prohibition against discrimination in the labour market, Consolidation Act No. 1001, 24 August 2017.

Act on Equal Treatment of Men and Women as regards Access to Employment, etc., Consolidation Act No. 645, 8 June 2011, as amended by Act No. 553, 2012, Paragraph 13; Act No. 217, 2013 and Act No. 1709, 2018.

Equal Pay Act, Consolidation Act No. 156, 22 February 2019.

Act on Equal Treatment between Men and Women in insurance, pension and similar matters, Consolidation Act No. 950, 14 August 2015, as amended by Act No. 706 of 8 June 2018.

According to Section 1 of the Gender Equality Act, the purpose of the act is to promote equality between women and men, including equal integration, equal influence and equal opportunities in all functions in society on the basis of women's and men's equal status. The goal is also to prevent direct and indirect discrimination on the ground of gender and to prevent harassment and sexual harassment.

According to Section 1 of the Act on Equal Treatment of Men and Women as regards Access to Employment, etc., the purpose of the act is to ensure that there must be no discrimination on the ground of sex. This applies to both direct discrimination and indirect discrimination, notably with reference to pregnancy or to marital or family status.

Section 1 of the Act on the Prohibition of Discrimination in the Labour Market states that discrimination in the labour market is prohibited with regard to race, colour, religion or belief, political opinion, sexual orientation, age, disability or national, social or ethnic origin.

According to Section 1 of the Equal Pay Act, no discrimination on grounds of gender as regards pay may take place in violation of the Act. This applies to both direct and indirect discrimination, and all employers must pay men and women equally, including providing equal pay conditions for the same work or work given the same value.

The Act on Equal Treatment between Men and Women in insurance, pension and similar matters ensures equal treatment of men and women in the working population, including the self-employed, workers temporarily out of work due to illness, pregnancy and maternity, accident or involuntary unemployment, and jobseekers, as well as retired and disabled workers and those entitled to benefits; relatives, in the occupational insurance

schemes, and in connection with insurance and similar financial benefits, cf. Section 1 of the Act.

3 Implementation of central concepts

3.1 General (legal) context

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

- *Status report on gender 2015/2016*, Danish Institute for Human Rights (2016).¹⁰

This report gives an overview of gender equality in Denmark in general. In particular high level of participation of women in the labour market is mentioned as positive. At the same time the gender-segregated education system as well as gender segregation in the labour market are highlighted as areas of concern.

KVINFO (Danish centre for study of and work with issues relating to gender, equality and diversity) (2018) 'Study on paternity leave in Denmark'.¹¹

This information site provides information on paternity leave in general. In Denmark most women take a leave of absence when caring for smaller children, which has consequences for the equality of men and women with regard to equal pay and equal pension coverage in old age.

Danish Centre for Social Science Research (2018), *Report on the difference in pay for men and women 2012-2016*.¹²

According to the report there has been an improvement in the gross salary gap between men and women since 2007. The report concludes that women's educational attainments is one reason for this improvement. Also, an increase in the number of women in management positions adds positively to the decrease in the gross wage difference between men and women.

- *Report on Discrimination in the Labour Market 2014-2016*, Danish Ministry of Employment (2016).¹³

The survey gives an overview of discrimination cases decided by the Equality Board as well as by courts from 2014-2016. The purpose of the study is to create a comprehensive overview of the legal situation in this type of case and the extent of discrimination in the labour market on the basis of the decisions requested.

- *Discrimination against parents – experiences of discrimination in connection with pregnancy and parental leave*, Danish Institute for Human Rights (2019).¹⁴

The report represents a survey on how and to what extent parents and expecting parents experience discrimination on the labour market when they decide to have children and take parental leave. The report is based on a qualitative and quantitative survey of the experiences of 1 589 people.

The survey concludes upon its findings that women in particular experience less favourable working conditions in connection with becoming parents, but it could not be concluded that the discrimination experienced is discrimination under the law.

¹⁰ https://menneskeret.dk/sites/menneskeret.dk/files/media/dokumenter/udgivelser/status/2015-16/delrapporter_med_issn/status_2015-16_delrapport_om_koen_-_issn.pdf.

¹¹ <https://kvinfo.dk/viden-om-faedres-barsel/>.

¹² <https://www.vive.dk/da/udgivelser/forskelle-mellem-kvindes-og-maends-timeloen-6990/>.

¹³ <https://bm.dk/media/5145/beskaeftigelsesministeriets-undersogelse-af-forskelsbehandling-paa-arbejdsmarkedet-2014-2016.pdf>.

¹⁴ https://menneskeret.dk/sites/menneskeret.dk/files/06_juni_19/discrimination_against_parents.pdf.

The survey is indicative of parental leave being an underlying cause for indirect sex discrimination against women because, by far, women take more parental leave than men.

Report '*Gender – Status 2019*', Danish Institute for Human Rights (2019).¹⁵

The report provides an overview of the human rights and developments between 2017 and 2019 regarding gender and gender equality. The report highlights the following themes:

- Sexual harassment
- Violence
- Democratic participation and representation
- Women in management
- Equal pay
- LGBTI
- Parents and children

The report contains recommendations for improving human rights protection in Denmark.

3.1.2 Other issues

Nothing further.

3.1.3 General overview of national acts

In November 2020, the responsibility for the Government's activities in the field of gender equality on the labour market was transferred from the Ministry for Food, Fisheries and Equal Opportunities and Ministry for Nordic Cooperation to the Ministry of Employment and Equal Treatment, which has the overall responsibility for the Government's activities in the field of gender equality and coordinates the equality work of other ministries.¹⁶

The acts mentioned under Section 2.2 above all contain provisions on central concepts, and they all use similar definitions of such concepts as direct and indirect discrimination as well as victimisation and harassment. The acts are:

The Gender Equality Act, Consolidation Act No. 1147, 3 July 2020, which contains provisions on direct and indirect discrimination as well as mainstreaming, instruction to discriminate, harassment, sexual harassment and victimisation.

The Act on Prohibition against Discrimination in the Labour Market, Consolidation Act No 1001, 24 August 2017, which contains provisions on direct and indirect discrimination as well as instruction to discriminate, harassment, victimisation and reasonable accommodation.

The Act on Equal Treatment of Men and Women as regards Access to Employment, etc., Consolidation Act No. 645, 8 June 2011, as amended by Act No. 553, 2012, Paragraph 13; Act No. 217, 2013 and Act No. 1709, 2018, which contains provisions on direct and indirect discrimination as well as mainstreaming, instruction to discriminate, harassment, sexual harassment and victimisation.

The Act on Equal Treatment between Men and Women in insurance, pension and similar matters, Consolidation Act No. 950, 14 August 2015, as amended by Act No. 706 of 8 June 2018, contains provisions on direct and indirect discrimination as well as mainstreaming,

¹⁵ The report is only available in Danish: <https://www.humanrights.dk/publications/gender-status-2019>.

¹⁶ An overview (in Danish) of national acts on gender equality can be found on the webpage of the ministry: <https://bm.dk/arbejdsmraader/ligestilling/lovgivning-om-ligestilling/>.

instruction to discriminate, harassment, sexual harassment and victimisation.

The Equal Pay Act, Consolidation Act No. 156, 2019, which contains provisions on direct and indirect discrimination as well as mainstreaming, instruction to discriminate, harassment, sexual harassment and victimisation.

3.1.4 Political and societal debate and pending legislative proposals

The approval by the European Parliament of Directive 2019/1158 of 20 June 2019 on work-life balance for parents and carers grants earmarked parental leave of four months to fathers, which has sparked a debate on how to implement the Directive. The Directive must be implemented by 2 August 2022. It could produce a significant increase in men taking parental leave, which would in turn have a positive effect on the gender wage gap, *inter alia* by decreasing the reduction of women's income as an effect of childbirth. A recent report touched upon these positive effects.¹⁷ Yet, in the first statements from the Minister of Equality on the implementation of the Directive, the plan was to apply for an exemption from the requirement of earmarked maternity leave. However, the opinion of the Minister on the topic later changed and the planned application was abandoned. The Danish Institute for Human Rights has provided an analysis on the possible ways to implement the Directive, proposing a reform of the existing legislation rather than just earmarking a number of the weeks in present maternity and parental leave periods.¹⁸

3.2 Sex/gender/transgender

3.2.1 Definition of 'gender' and 'sex'

The concepts of 'gender' and 'sex' are not defined in the legislation. Danish legislation does not distinguish between gender and sex; both concepts are covered by the Danish term 'køn'.

3.2.2 Protection of transgender, intersex and non-binary persons

Protection of transgender, intersex and non-binary persons are not specifically mentioned in national equality law. All acts on gender equality are understood as covering also transgender, intersex and non-binary persons. All complaints on discrimination on grounds of gender identity are heard by the Equality Board on equal terms as other genders.¹⁹ One complaint was referred to the ordinary court system and assessed as a breach of the Act on Equal Treatment of Men and Women in regard to Employment.²⁰

3.2.3 Specific requirements

There are no specific requirements for trans persons in order to benefit from legal non-discrimination protection.

3.3 Direct sex discrimination

3.3.1 Explicit prohibition

The prohibition on discrimination directly on the grounds of gender is explicitly stated in the legislation as mentioned below. The definition reads:

¹⁷ <https://oxfordresearch.dk/en/2019/04/09/report-from-oxford-research-show-that-a-new-eu-directive-on-ear-marked-paternity-leave-can-lead-to-a-series-of-positive-effects/>.

¹⁸ The analysis is available here in Danish: https://menneskeret.dk/sites/menneskeret.dk/files/media/document/Analyse_Barsel_06.pdf.

¹⁹ Ruling no. 10375 of 11/11/2011; Ruling no. 10158 of 21/11/2012; Ruling no. 10237 of 28/8/2013 (assessed by the municipal court in Aarhus in 2015, case no. 72-45/2014); Ruling no. 10043 of 27/11/2013; Ruling no. 9447 of 14/5/2014; Ruling no. 9179 of 27/02/2017.

²⁰ District Court of Aarhus, Ruling of 9/6/2015, case BS 72-45/2014.

'Direct discrimination shall be taken to occur when a person on grounds of gender is treated differently than another person is, has or would be treated in a corresponding situation.'

The prohibition on direct discrimination is provided:

In Section 1(a)(1) of the Consolidation Act No. 156/2019 on Equal Pay.

In Section 1(2) of the Consolidation Act No. 645/2011 on Equal Treatment of Men and Women as regards Access to Employment, etc.

In Section 2a(2) of the Consolidation Act No. 1147/2020 on Gender Equality.

In Section 1(2) of the Consolidation Act No. 1001/2017 on the Prohibition of Discrimination in the Labour Market.

In Section 3(a)(2) of the Consolidation Act No. 950/2015 on Equal Treatment between Men and Women in insurance, pension and similar matters.

3.3.2 Prohibition of pregnancy and maternity discrimination

Discrimination due to pregnancy, maternity, paternity and parental leave is considered direct discrimination. Any less favourable treatment of a woman related to pregnancy and a woman's 14 weeks' absence after birth is considered as direct discrimination according to:

- Section 1(a) of the Consolidation Act No. 156/2019 on Equal Pay.
- Section 1(2) of the Consolidation Act No. 645/2011 on Equal Treatment of Men and Women as regards Access to Employment, etc.
- Section 3(a)(1)(3) of the Consolidation Act No. 950/2015 on Equal Treatment between Men and Women in insurance, pension and similar matters.

The provisions comply with Article 2(2)(c) of Directive 2006/54.

3.3.3 Specific difficulties

There are no specific difficulties.

3.4 Indirect sex discrimination

3.4.1 Explicit prohibition

Indirect discrimination is explicitly prohibited in the Danish legislation, and the definition in the relevant acts reads:

'Indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would place persons of one sex at a (the act on Gender Equality adds the word "particular") disadvantage compared with other persons unless that provision, criterion or practice is objectively justified by a (the act on Gender Equality uses the term "legitimate") just and proper aim and the means of achieving that aim are appropriate and necessary.'

The prohibition on indirect discrimination can be found in:

- Section 1(a)(2) of the Consolidation Act No. 156/2019 on Equal Pay.

- Section 1(3) of the Consolidation Act No. 645/2011 on Equal Treatment of Men and Women as regards Access to Employment, etc.
- Section 2a(3) of the Consolidation Act No. 1147/2020 on Gender Equality.
- Section 1(3) of the Consolidation Act No. 1001/2017 on the Prohibition of Discrimination in the Labour Market, and
- Section 3(a)(3) of the Consolidation Act No. 950/2015 on Equal Treatment between Men and Women in insurance, pension and similar matters.

The definition used in the different acts complies with EU law. However, the Act on Gender Equality uses the term 'particular disadvantage' rather than just 'disadvantage', and also uses the term 'legitimate' rather than 'just and proper'.

The use of the term 'just and proper' instead of 'legitimate' caused the European Commission to send a Letter of Formal Notice No 2006/2435 to Denmark in December 2006, where the Commission raised concerns that Denmark had not implemented the Employment Directive 2000/78/EC, since the term used in the Directive was 'legitimate'. The infringement procedure was subsequently brought to a halt and the Formal Notice did not lead to the definition of 'just and proper' being altered. Professor Ruth Nielsen has argued that the term 'just and proper' could be interpreted differently from the term 'legitimate' in that, according to her, it could also encompass working conditions resulting from collective bargaining because such conditions would per se be an expression of what the labour market organisations on both sides regard as reasonable and hence 'just and proper'.

3.4.2 Statistical evidence

Statistical evidence can be used, but is in principle not required, in order to establish a presumption for indirect discrimination. However, if statistical evidence is available it might provide sound evidence for a presumption for indirect discrimination.

There are no available cases supporting a limit on the use of statistical evidence applied in indirect sex discrimination cases.

3.4.3 Application of the objective justification test

The justification test applies when a presumption for discrimination is established. Justification requires a legitimate aim and that this aim cannot be achieved through less discriminatory means. The test has been applied somewhat irregularly by the Danish courts, which makes it difficult to ascertain the scope of the test. In recent years, it could be said that the courts have taken a more verbatim approach to the justification test.

In a 2019 case before the District Court of Copenhagen, the question arose whether the use of the neutral criterion *flexibility* could place women at a particular disadvantage, and whether this was indirect discrimination in breach of the Act on Equal Treatment of Men and Women in Employment, etc..

The Danish Supreme Court had previously ruled in 2013²¹ that flexibility with regard to working hours is a gender-neutral criterion and not direct discrimination. However, the use of the criterion could have a gender-biased effect, and it could therefore not be ruled out that the application of such criterion could be considered indirect discrimination. In 2013, the Supreme Court did not reiterate the criteria for justification of indirect

²¹ Judgment U.2014.106/2H.

discrimination. Instead, the Supreme Court stated rather matter-of-factly that it had been 'decisive for the choice to dismiss the employee to ensure that the group of employees consisted of the employees best suited for taking care of the functions that were necessary in the future of the company'. This reasoning does not take its starting point from the wording of the criteria for justified indirect discrimination, but rather bypasses the assessment, providing a margin of discretion for the employer to choose with a view to the functioning of the undertaking. The ruling was not clear in stating that the use of the criterion of flexibility was indeed a matter of indirect discrimination, nor was it clear in the use of the criteria for justified indirect discrimination.

In the 2019 case before the District Court of Copenhagen, it was documented that there was an overrepresentation of women among the group of sole providers with children. If an employer thus requires employees to be flexible in terms of working hours, for instance due to travelling activities, it puts women at a particular disadvantage. The court found that the employee had proved that the employer, when deciding who to dismiss, had put decisive emphasis on the employee being less flexible due to her family circumstances as a single provider for children. The employer had not proved that using the criterion was objectively justified by a legitimate aim, nor that the means of achieving such aim was appropriate or necessary. The Court found the dismissal to be in breach of the prohibition against indirect discrimination against women, cf. Section 1(3) of the Act on Equal Treatment.

The judgment by the District Court was brought before the Eastern High Court, which in a judgment of September 2020 upheld the District Court judgment ruling in favour of the female employee.²² The Eastern High Court found that the employee had proved that the decision to dismiss had been decisively influenced by the company's perception of her lack of flexibility in relation to working hours because of her family situation as a single parent. Also, the High Court found that the dismissal took place without prior dialogue with the employee, as to whether she would be able to meet the requirements of increased flexibility. It referred to the above-mentioned Supreme Court ruling of 2013. The Eastern High Court found that the employer's reference to the requirement of flexibility and her family status constituted a reference to factual circumstances, which gave reason to presume that the dismissal could constitute indirect discrimination on grounds of gender. The burden of proof thus shifted to the employer, who then had to prove that the principle of equal treatment had not been violated, as stated in Section 16a of the Equal Treatment Act. As the employer had not investigated whether the employee possessed the necessary qualifications or flexibility required for the future terms of the position, nor proven that her work performance had not been satisfactory up until then, the employer could not prove that the principle of equal treatment had not been violated.

3.4.4 Specific difficulties

The Eastern High Court judgment leaves certain questions unanswered related to the concept of indirect discrimination and how to adjudicate in such cases. Firstly, it is still not clear whether a factual lack of flexibility would in itself justify the indirect discrimination, as the 2020 High Court ruling only emphasised that the employer should have investigated whether the employee was in fact flexible enough to fulfil the requirements of the position. Secondly, the connection between the status of single parent and the indirect discrimination based on gender is not elaborated on in the 2020 High Court ruling, nor in the 2014 Supreme Court ruling. The 2020 High Court ruling simply refers to the 2014 Supreme Court ruling, in which the Court stated that the perception that a female employee is less flexible in relation to working hours in the week, where the children lived with her, was indirect discrimination based on gender. The Supreme Court referred to the preparatory works of the amendments to the Equal Treatment Act in 2000 and 2005 as the basis for assessing that perceived flexibility of single parents could be indirect

²² Judgment U.2020.3690Ø. The Equal Treatment Board has published the ruling of the Eastern High Court here: <https://ast.dk/filer/naevn/ligebehandlingsnaevnet/j-nr-2017-6810-34888-ol.pdf>.

discrimination based on gender. However, neither of the preparatory works mention single parents. The amendment in the year 2000, LF 78 of 2000-2001, introducing the new definition of indirect discrimination, merely explains that a neutral criterion can have a disproportionate effect on a significantly larger number of persons of one gender, as the criterion is more easily fulfilled by the other gender, and mentions seniority as a gender-neutral criterion that is more easily fulfilled by one gender. The amendment in 2005, LF17 2005-2006, likewise does not elaborate on the connection, but underlines that less emphasis should be placed on the number of persons adversely affected by a gender-neutral criterion. In the 2020 High Court ruling, the parties put forth statistical evidence, *inter alia* showing that out of 186 244 single parents with children residing with them, 81 % were women (2017). However, the Court did not refer to these statistics as the basis for its decision and did not link the adverse effects to women in particular, nor to any other basis for limiting the protection to women.

There have not been many cases concerning indirect discrimination and the Eastern Court judgment illustrates the difficulties of using statistics as a basis for the supposed particular disadvantage combined with the factual circumstances of the affected person. Hopefully, later judgments will solve these difficulties by taking a clear stance on these matters.

3.5 Multiple discrimination and intersectional discrimination²³

3.5.1 Definition and explicit prohibition

There is no explicit definition of multiple or intersectional discrimination in Danish equality legislation. There have been no proposals on this topic. The Danish anti-discrimination remedies theoretically allow applicants to simultaneously invoke several grounds of discrimination in the same claim, although this is not explicitly addressed.

The legislative architecture of the protection against discrimination in Denmark might be seen as impeding the judicial recognition of multiple/intersectional discrimination given that the judicial framework does not mention these types of discrimination. On the other hand, the framework is transparent and there is a strong degree of cohesion in the fact that the prohibition applies in a similar way throughout the different suspect grounds, which should ease the application of multiple grounds at once.

3.5.2 Case law and judicial recognition

Case law does not address multiple discrimination. Intersectional effects are neither argued nor part of the reasoning. Discrimination cases are usually assessed separately in relation to each prohibited ground invoked and are decided on the ground (if any) for breach of the protection. This is the approach of the Equality Board, which hears by far the most cases in which the complainant invokes several grounds at once. This has been the case e.g. for age and gender, disability and gender, sexual orientation and gender, and religion and gender.

In a 2005 ruling of the Danish Supreme Court,²⁴ a young Muslim woman working in a grocery store was dismissed because she wore a headscarf, which was against the dress code. The Supreme Court found that the dress code was justified and thus not a violation of the right to non-discrimination on grounds of ethnicity. The intersectional effect of the dress code was not addressed by the court.

²³ See for more information Fredman, S. (2016) Intersectional discrimination in EU gender equality and non-discrimination law European network of legal experts in gender equality and non-discrimination, available at <https://www.equalitylaw.eu/downloads/3850-intersectional-discrimination-in-eu-gender-equality-and-non-discrimination-law-pdf-731-kb>.

²⁴ Supreme Court ruling in case U.2005.1265H.

3.6 Positive action

3.6.1 Definition and explicit prohibition

The Danish Gender Equality Act, Section 3; the Act on Equal Treatment of Men and Women as regards Access to Employment, etc., Section 13(2); and Section 9 of the Act on the Prohibition of Discrimination in the Labour Market permit public authorities and employers to invoke special measures to support the promotion of equality.

According to Section 13(2) of the Equal Treatment Act, the relevant minister may by application allow specific initiatives to derogate from the Act in order to promote equal opportunities for women and men, in particular by remedying actual inequalities affecting access to employment, education, etc.

According to Section 13(3) of the Equal Treatment Act, the Minister of Employment may give general rules allowing for the initiation of specific initiatives with a view to promoting equal opportunities for men and women without prior approval under Section 13(2).

Such ministerial rules are laid down in Executive Order No. 340/2007 on initiatives to promote gender equality.²⁵ The Executive Order provides a legal basis for initiatives, positive actions, with a view to addressing and equalising an existing underrepresentation of one gender. The initiatives must not give preference to applicants of the underrepresented gender for any employment or education.

According to Section 3 of the Gender Equality Act, the Minister may approve measures to promote equality aimed at preventing or counteracting discrimination on the grounds of gender.

According to Section 9 of the Act on the Prohibition of Discrimination in the Labour Market, the Act does not preclude the imposition of measures aimed at improving the employment opportunities of persons of a particular race, skin colour, religion or belief, political view, sexual orientation or national, social or ethnic origin or with a specific age or disability.

Section 9(2) furthermore stipulates that the Act does not preclude measures being taken to promote employment opportunities for older workers and people with disabilities.

In the authors' opinion, the definitions in the Equal Treatment Act and the Gender Equality Act comply with the definition in Article 157(4) TFEU.

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

Danish legislation makes use of the term 'special measures'. The purpose of a special measure must be to ensure equal opportunities for the underrepresented gender. Neither of the acts mentioned refer to the term 'positive action'. There is no case law on the term 'positive action'.

According to the preparatory works of the Act on the Prohibition of Discrimination in the Labour Market, the Danish Parliament was acutely aware of the limitations set up by the European Court of Justice on the use of such special measures as positive actions. The remarks concerning Section 9(2) mention that if Member States choose to introduce specific measures to promote gender equality, the European Court of Justice has set out a number of requirements/principles in the area of gender equality:

- Positive action is an exception to the principle of equal treatment.

²⁵ <https://www.retsinformation.dk/eli/lta/2007/340>.

- The aim should be to eliminate existing inequalities in society.
- Priority in relation to employment and promotion must not be automatic. Its justification must be justified in concrete terms.²⁶

According to the remarks, these principles must probably be assumed to be applicable to a certain extent to similar measures in relation to older workers and employees with disabilities.

This illustrates the awareness on the boundaries of measures used to promote equality.

3.6.3 Specific difficulties

There are no specific difficulties.

3.6.4 Measures to improve the gender balance on company boards.

Legislation in respect of gender balance in boards in state owned companies has been in place since 1990. Legislation that requires the largest companies to set a quantitative target and establish a policy for the gender composition of management came into force on 1 January 2013.²⁷ The legislation does not provide a specific target or threshold, rather the companies themselves set their own target figure in respect of the business area.

According to Section 11 of the Gender Equality Act, management boards and other collective management bodies in institutions and companies within the state administration should have an equal composition of women and men.

According to *inter alia* Section 99b of the Financial Statement Act, which regulates the duty for companies to prepare an annual financial report, large companies, which according to *inter alia* the Danish Companies Act are obliged to set target figures for the proportion of the underrepresented gender in the top management body, must disclose the target number in the annual report and explain the status of the fulfilment of the stated target, including the reason why the company has not achieved the stated objective.

According to Section 139c of the Companies Act,²⁸ in companies with 50 or more employees, the top management body must establish a policy for increasing the proportion of the underrepresented gender at the company's other management levels. It is essential that the policies are supported by concrete initiatives including specific actions and associated results.

As stated above, the companies must report annually on compliance with the goals set in a gender statement containing information on the target number set as well as on the general policies on women in management. The Business Agency makes a yearly evaluation of the company's gender statement. If a company does not comply with the legal requirements when reporting, the company can be served with an administrative order. The Business Agency has the power to enforce the legal requirements. As a last resort, the Business Agency can report companies that are not in compliance with the regulation to the police.

In 2017, the Business Agency conducted an evaluation of the impact of the legislation on the number of women in management in the largest companies in Denmark. According to the evaluation, the overall picture was that since the legislation came into force, there is a slight tendency for increased annual growth in the proportion of women on the boards

²⁶ Proposal No. 92 of 11 November 2004 to amend the Act on the Prohibition of Discrimination in the Labour Market, remarks to amendment-proposal No. 17.

²⁷ Act No. 1383/2012 amending the Danish Companies Act and the Financial Statements Act <https://www.retsinformation.dk/Forms/R0710.aspx?id=144739>.

²⁸ Consolidation Act No. 763 of 23 July 2019 on Public and Private Limited Companies.

of the largest Danish companies. However, the evaluation also shows that the effect of the statutory requirement so far is somewhat limited, as the annual increase in growth has not exceeded 1.1 percentage points.²⁹

According to a study performed by the Danish Institute for Human Rights in 2017, more than half of the 1595 largest companies in Denmark had no female board members, and of the boards with female board members, only 7 % had women chairing the board.³⁰ The Institute also commented that no fines had been issued to companies for not setting target figures or establishing a policy as stated above. According to an evaluation assessment from 2018, 56 administrative orders had been issued to companies up to the end of 2017.³¹

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

One action, which could be seen as positive action aimed at improving the gender ratio in a certain area, is the Inge Lehmann programme. The Inge Lehmann programme is part of the political agreement of 6 November 2019 on allocation of the Research Reserve for 2020 for the Independent Research Fund Denmark. The objective of the programme is to strengthen talent development within Danish research by promoting a more even gender ratio in the research milieus in Denmark. The programme covers all scientific areas, and it is open to men as well as women. However, through an exemption pursuant to the above-mentioned Section 3 of the Gender Equality Act, the Fund will, as a general rule, choose female applicants over male applicants in cases of equal qualifications between two applicants. An objective assessment will be made, taking into consideration all specific criteria regarding applicants, regardless of gender. DKK 19.7 million (EUR 2 650 00) (including overheads) has been allocated for this programme in the year 2020.³²

3.7 Harassment and sexual harassment

3.7.1 Definition and explicit prohibition of harassment

Harassment is explicitly mentioned in the equality legislation as a prohibited form of discrimination.

The prohibition on harassment can be found in:

- Section 1(a)(6) of the Consolidation Act No. 156/2019 on Equal Pay providing the prohibition of harassment and Section 1a(4) of the same act defining harassment.
- Section 1(4) providing the prohibition of harassment of the Consolidation Act No. 645/2011 on Equal Treatment of Men and Women as regards Access to Employment, etc. and Section 1(5) of the same act defining harassment.
- Section 2a(1) of the Consolidation Act No. 1147/2020 on Gender Equality providing the prohibition of harassment and Section 2a(2) of the same act defining harassment.
- Section 1(4) of the Consolidation Act No. 1001/2017 on the Prohibition of Discrimination in the Labour Market prohibiting and defining harassment, and

²⁹ The Business Agency (2017) 'Evaluation on the legislation concerning the legislation on target figures and policies for the underrepresented gender effect' https://erhvervsstyrelsen.dk/sites/default/files/2019-02/180921_evaluering_af_maaltal_og_politikker_2018.pdf.

³⁰ The study is available here in Danish: <https://menneskeret.dk/projekter/lige-ledelse-danmark>.

³¹ According to p. 32 of the 2017 Evaluation Report on target figures and policies for the underrepresented gender, which is available here in Danish: https://erhvervsstyrelsen.dk/sites/default/files/2019-02/180921_evaluering_af_maaltal_og_politikker_2018.pdf.

³² https://dff.dk/en/application/funding-instruments/dff-call-inge-lehmann-2020_eng-1.pdf.

- Section 3a(1)(1) of the Consolidation Act No. 950/2015 on Equal Treatment between Men and Women in insurance, pension and similar matters providing the prohibition of harassment and Section 3a(4) of the same act defining harassment.

According to the Act on Equal Pay Section 1a(6), harassment and sexual harassment and any less favourable treatment based on a person's rejection or acceptance of such behaviour is deemed discrimination on grounds of sex. According to Section 1a(4), harassment shall be understood as taking place when unwanted conduct is exhibited in relation to a person's sex for the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment.

According to Section 1(4) of the Act on Equal Treatment of Men and Women, harassment on grounds of gender, as defined in Subsection (5), and sexual harassment, as defined in Subsection (6), shall be deemed to be discrimination on the grounds of sex and is consequently prohibited. According to Section 1(5) of the Act on Equal Treatment of Men and Women, harassment shall be understood as taking place when any form of unwanted verbal, nonverbal or physical conduct is exhibited in relation to a person's sex for the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment.

According to Section 2a(1) of the Act on Gender Equality, harassment as defined in Subsection (2) and sexual harassment as defined in Subsection (3) shall be deemed to be discrimination on the grounds of sex and is consequently prohibited. A person's rejection of or acceptance of such behaviour must not be used as grounds for a decision that involves that person. According to Section 2a(2), harassment shall be understood as taking place when any form of unwanted verbal, nonverbal or physical conduct is exhibited in relation to a person's sex for the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment.

According to Section 1(4) of the Act on the Prohibition of Discrimination in the Labour Market, harassment is deemed as less favourable treatment, when unwanted conduct in relation to a person's race, skin colour, religion or faith, political views, sexual orientation, age, disability, or national, social or ethnic origin takes place with the purpose of or with the effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment.

Section 3a(1)(1) of the Act on Equal Treatment between Men and Women in insurance, pension and similar matters states that unfavourable treatment includes harassment and sexual harassment and unfavourable treatment based on a person's rejection or acceptance of such behaviour. According to Section 3a(4) of the same act, harassment takes place when unwanted conduct is exhibited in relation to a person's sex for the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment.

The definitions comply with the EU definitions in Article 2(1)(c) of Directive 2006/54.

3.7.2 Scope of the prohibition of harassment

Section 2a of the Gender Equality Act, prohibiting harassment and sexual harassment, covers discrimination outside the labour market.

Section 1(5) of the Act on Equal Treatment of Men and Women as regards Access to Employment, etc. covers harassment and sexual harassment in the labour market, etc.

Section 3a(1) of the Act on Equal Treatment between Men and Women in insurance, pension and similar matters covers occupational security schemes and insurance.

3.7.3 Definition and explicit prohibition of sexual harassment

The prohibition on harassment can be found in:

- Section 1(a)(6) of the Consolidation Act No. 156/2019 on Equal Pay providing the prohibition of harassment and sexual harassment, and Section 1(a)(5) of the same act defining sexual harassment.
- Section 1(4) of the Consolidation Act No. 645/2011 on Equal Treatment of Men and Women as regards Access to Employment, etc. providing the prohibition of harassment and sexual harassment, and Sections 1(6) and 4(2) of the same act defining sexual harassment.
- Section 3a(1)(1) of the Consolidation Act No. 950/2015 on Equal Treatment between Men and Women in insurance, pension and similar matters providing the prohibition of harassment and sexual harassment and Section 3a(5) of the same act defining sexual harassment.

According to Section 1a(6) of the Act on Equal Pay, harassment and sexual harassment and any less favourable treatment based on a person's rejection or acceptance of such behaviour is deemed discrimination on grounds of sex. According to Section 1a(5), sexual harassment shall be understood as taking place when any form of unwanted verbal, nonverbal or physical conduct with sexual undertones is exhibited for the purpose or effect of violating the dignity of a person, in particular by creating an intimidating, hostile, degrading, humiliating or offensive environment.

According to Section 1(4) of the Act on Equal Treatment of Men and Women as regards Access to Employment, harassment on grounds of gender, as defined in Subsection (5), and sexual harassment, as defined in Subsection (6), shall be deemed to be discrimination on the grounds of sex and is consequently prohibited. According to Section 1(6), sexual harassment shall be understood as taking place when any form of unwanted verbal, nonverbal or physical conduct with sexual undertones is exhibited for the purpose or effect of violating the dignity of a person, in particular by creating an intimidating, hostile, degrading, humiliating or offensive environment. Furthermore, in a 2018 amendment of the Act on Equal Treatment of Men and Women as regards Access to Employment, amendment Act No. 27/12/2018, a new provision was inserted under Section 4(2), clarifying that the right to equal working terms contained in Section 4(1) includes a prohibition of sexual harassment.

According to Section 2a(1) of the Act on Gender Equality, harassment as defined in Subsection (2) and sexual harassment as defined in Subsection (3) shall be deemed to be discrimination on the grounds of sex and is consequently prohibited. A person's rejection of or acceptance of such behaviour must not be used as grounds for a decision that involves that person. According to Section 2a(3), sexual harassment shall be understood as taking place when any form of unwanted verbal, nonverbal or physical conduct with sexual undertones is exhibited for the purpose or effect of violating the dignity of a person, in particular by creating an intimidating, hostile, degrading, humiliating or offensive environment.

Section 3a(1)(1) of the Act on Equal Treatment between Men and Women in insurance, pension and similar matters states that unfavourable treatment includes harassment and sexual harassment and unfavourable treatment based on a person's rejection or acceptance of such behaviour. According to Section 3a(5), sexual harassment takes place when unwanted verbal, non-verbal or physical conduct with sexual undertones is exhibited for the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment.

3.7.4 Scope of the prohibition of sexual harassment

Section 2a of the Gender Equality Act, prohibiting harassment and sexual harassment, covers discrimination outside the labour market.

Section 1(4) of the Act on Equal Treatment of Men and Women as regards Access to Employment, etc. covers harassment and sexual harassment in the labour market.

Section 3a(1) of the Act on Equal Treatment between Men and Women in insurance, pension and similar matters covers occupational security schemes and insurance.

3.7.5 Understanding of (sexual) harassment as discrimination

National legislation specifies that harassment and sexual harassment as well as any less favourable treatment based on the person's rejection of or submission to such conduct amounts to discrimination. This is clearly included in the legal definitions. It is also clearly included in the prohibitions that rejections of or acceptance of the behaviour must not be used as grounds for decisions affecting that person.

The legal content of harassment and sexual harassment has been specifically discussed in the wake of the #MeToo scandals. The content of the legal provisions was clear, and it underlined that harassment does not depend on e.g. the intentions of the person harassing. The understanding in the general public was less clear, perhaps due to irregular case law on e.g. the role played by a general 'free' tone or atmosphere at the workplace.

In 2018, an amendment was made to the Act on Equal Treatment of Men and Women with regards to Access to Employment, clarifying that the tone or the atmosphere at the workplace could not be used as an element elevating the threshold for sexual harassment.

The discourse during the #MeToo period, and during the negotiations in Parliament, has illuminated the legal definitions of what constitutes harassment and sexual harassment.

3.7.6 Specific difficulties

In workplaces, the tone or the atmosphere at the workplace was sometimes included in the assessment of whether certain conduct constituted sexual harassment in breach of the prohibition contained in the Act on Equal Treatment of Men and Women with regard to Access to Employment. In a 2018 amendment to the Act on Equal Treatment of Men and Women with regard to Access to Employment, this was specifically addressed. A new provision was added in Section 4(2), clarifying that the right to equal working terms under Section 4(1) includes a prohibition of sexual harassment.

The preparatory works explain, in relation to Section 1.2 (Strengthened focus on prohibition of sexual harassment), that the purpose of the new provision is to create a connection between the prohibition of sexual harassment and the employer's duty to provide equal terms of work to men and women. Case law had illustrated that on several occasions some employees experienced situations at the workplace as violating and/or sexually charged, whereas others at the same workplace described the situations as 'ordinary fun and games' or a 'good familiar tone' or 'a free language'. The language or tone at the workplace was sometimes taken into consideration by the courts, when assessing whether a particular incident was a breach of the prohibition of sexual harassment – in that a person could be expected to have accepted a certain level of sexually charged tone or atmosphere at the workplace. The purpose of inserting the new provision was to ensure that the tone or atmosphere of a workplace is not an element that can be included in assessing whether sexual harassment has taken place, as the tone or atmosphere is not the choice of the individual employee. In a professional work

relationship, it will not be relevant or suitable to express oneself or behave in a manner that is sexually charged.

- Link to amendment act: <https://www.retsinformation.dk/eli/lta/2018/1709>;
- Link to preparatory works to amendment act: <https://www.retsinformation.dk/eli/ft/201812L00093>.

3.8 Instruction to discriminate

3.8.1 Explicit prohibition

Instruction to discriminate is explicitly prohibited in the equality legislation according to:

- Section 1(a)(7) of the Consolidation Act No. 156/2019 on Equal Pay.
- Section 1(7) of the Consolidation Act No. 645/2011 on Equal Treatment of Men and Women as regards Access to Employment, etc.
- Section 2 of the Consolidation Act No. 1147/2020 on Gender Equality.
- Section 1(5) of the Consolidation Act No. 1001/2017 on the Prohibition of Discrimination in the Labour Market, and
- Section 3(a)(1)(2) of the Consolidation Act No. 950/2015 on Equal Treatment between Men and Women in insurance, pension and similar matters.

They all stipulate that an instruction to discriminate against one person on grounds of sex shall be deemed to be discrimination prohibited by the act.

3.8.2 Specific difficulties

There are no specific difficulties with instructions.

3.9 Other forms of discrimination

The Danish Equality Board in a decision of 24 June 2011 (case 101/2011) specifically mentioned the CJEU case C-303/06 *Coleman* and the right not to be discriminated against on the grounds of association to a person protected by non-discrimination law.

With regard to discrimination by association there is no case law addressing the question explicitly. However, the Danish Supreme Court has been hesitant regarding the ruling in the CJEU case C-83/14 *CHEZ*. In a 2016 ruling³³ concerning the dismissal of a person providing public day care, the Supreme Court issued an *obiter dictum* concerning its thoughts on the aspect of indirect discrimination by association.

A person employed by the local municipality to provide day care services in her private home was terminated, as decreasing numbers of children in the municipality necessitated a reduction of day-carers. The employee's son suffered from Asperger's syndrome, a recognised disability under the Act on Prohibition against Discrimination on the Labour Market, which implements the Employment Directive 2000/78/EC. The Court assessed whether the dismissal was discrimination of the employee due to her care obligations towards her disabled son. The Supreme Court found that the reason for the dismissal was a reduction in staff, and the reason for selecting her was the length of periods of leave and absences due to illness. In the view of the Court, the reason for the dismissal was not

³³ Supreme Court ruling in case U.2005.1265H.

the disability of her son, but her prolonged absences from her work as a day-carer. The Supreme Court furthermore dismissed that this constituted indirect discrimination. In the view of the Court, the dismissal had taken place for a just cause, *inter alia* so that young children could avoid being moved to substitute day-carers they did not know. The reason provided for the dismissal of the day-carer was found appropriate and necessary to achieve the legitimate aim.

Given the mere fact that the dismissal was appropriate and necessary, the Supreme Court saw no reason to decide on the question whether the prohibition could in actual fact comprise a situation of indirect discrimination by association. The Supreme Court nonetheless commented on this issue. According to the Supreme Court, the difference in the wording of the definition of direct and indirect discrimination in Article 2(2)(a) and Article 2(b) of the Employment Directive indicates that the prohibition of indirect discrimination only applies to persons who are themselves disabled. In indirect discrimination, the wording shows that the provision only applies to 'persons with disabilities', whereas direct discrimination includes discrimination on grounds of disability, irrespective of who is disabled. In light of the judgment of the CJEU in the *Coleman* case and *CHEZ*-case, the Supreme Court found the understanding of the Employment Directive neither clear nor resolved.

The *obiter dictum* by the Supreme Court could indicate a reluctance towards indirect discrimination by association, indicating that for protection also against indirect sex discrimination, the victim has to belong to the disadvantaged group. There is so far no ruling on the issue of indirect sex discrimination by association.

Algorithmic discrimination is not as such a new form of discrimination, since it falls within the category of direct or indirect discrimination. However, the expression of it – for instance, in the form of automated gender-biased decisions – can be difficult to dispute as discriminatory in Denmark as well as in general, as they can lack transparency in so far as the discriminatory effect and reasoning behind such decisions is concerned. However, if a victim of algorithmic discrimination can establish facts, *inter alia* a biased outcome of the algorithm, from which it may be presumed that there has been direct or indirect discrimination, the burden of proof rests with the entity responsible for the automated decision to map out the algorithm as non-discriminatory, cf. Section 2(4) Gender Equality Act.

3.10 Evaluation of implementation

In the opinion of the author, Danish legislation complies with the directives with regard to the various forms of discrimination (direct, indirect, harassment, sexual harassment and instruction to discriminate). Most discrimination cases are decided by the Equality Board. The Board has the power to decide on cases only on the merit of written evidence and the Board cannot evaluate evidence. This means that no oral evidence can be submitted before the Board and all cases are decided on a written basis. This means that in some cases the Board will reject the case on the basis of lack of evidence. The complainant then has the opportunity to bring the case before a district court. Cases decided by the district courts in Denmark are usually not published, whereas District Court rulings on the basis of complaints about Equality Board rulings have been published since 2016.

3.11 Remaining issues

There are no remaining issues.

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

4.1 General (legal) context

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

The Danish Centre for Social Science Research (2018) *Report on the difference in pay for men and women 2012-2016*.³⁴

According to the report there has been an improvement in the gross salary gap between men and women since 2007. The report concludes that women's educational attainment is one reason for this improvement. Moreover, an increase in the number of women in management positions adds positively to the decrease in the gross wage difference between men and women.

With regard to the gender pay gap, Denmark was the subject of the first empirical study on the impact of mandatory wage transparency. The study suggests that wage transparency with a view to disclose gender disparities in pay can have some effect in narrowing the gender wage gap at company level.³⁵

4.1.2 Surveys on the difficulties of realising equal treatment at work

Danish Institute for Human Rights (2016), *Status report on gender 2015/2016*.³⁶

This report gives an overview of gender equality in Denmark in general. In particular, the high level of participation of women in the labour market is mentioned as positive. At the same time the gender-segregated education system as well as gender segregation in the labour market are highlighted as areas of concern.

KVINFO (Danish centre for study of and work with issues relating to gender, equality and diversity) (2018) 'Study on paternity leave in Denmark'.³⁷

This information site provides information on paternity leave in general. In Denmark, most women take a leave of absence when caring for smaller children, which has consequences for the equality of men and women.

Danish Institute for Human Rights (2019), *Gender – Status 2019*.³⁸

This report provides an overview of the human rights and developments between 2017 and 2019 regarding gender and gender equality. The report touches upon equal pay and concludes that the right to equal pay for equal work is well-established in human rights law, EU law and Danish law. However, there are still unexplainable pay differences between men and women, which lead to a considerable economic inequality between men and women across a life span. The report offers a possible explanation being the historic Civil Servant Reform of 1969, which caused women civil servants to be ranked at a lower grade level than their male counterparts. Later developments, such as introducing

³⁴ <https://www.vive.dk/da/udgivelser/forskelle-mellem-kvindes-og-maends-timeloen-6990/>.

³⁵ Bennedsen, M. and Simintzi, E. and Tsoutsoura, M. and Wolfenzon, D., Do Firms Respond to Gender Pay Gap Transparency? (January 2019). NBER Working Paper no w25435. Available at SSRN: <https://ssrn.com/abstract=3315240>. The report is mentioned on page 34 of the recent evaluation by the European Commission of the relevant provisions in the Directive 2006/54/EC implementing the Treaty principle on 'equal pay for equal work or work of equal value' (SWD(2020) 50 final).

³⁶ https://menneskeret.dk/sites/menneskeret.dk/files/media/dokumenter/udgivelser/status/2015-16/delrapporter_med_issn/status_2015-16_delrapport_om_koen_-_issn.pdf.

³⁷ <https://kvinfo.dk/viden-om-faedres-barsel/>.

³⁸ The report is only available in Danish: <https://www.humanrights.dk/publications/gender-status-2019>.

bargaining agreements in many of the sectors affected by the reform, have not been able to close the pay gap.³⁹

4.1.3 Other issues

There are no further issues.

4.1.4 Political and societal debate and pending legislative proposals

There are no political and/or societal debates and no pending legislative proposals.

4.2 Equal pay

4.2.1 Implementation in national law

In Denmark, equal pay between men and women is governed by the Equal Pay Act, which dates back to 1976 when it was adopted to implement the Equal Pay Directive. It has been amended on several occasions. The latest amendment was in 2016. The prohibition on discrimination on grounds of gender with regard to pay is stipulated in Section 1 of the Act.

Collective bargaining is of paramount importance in all wage issues in Denmark. Collective agreements must comply with the principle of equal pay for men and women. This interpretation is supported by a mediation agreement from 28 March 1973, which abolished different pay rates for men and women in collective agreements between members of the FH – Danish Trade Union Confederation (then LO), and the DA, the Confederation of Danish Employers, which have been the two main organisations since 1 April 1976 (i.e. three months after Article 141 EC then Article 119 EEC became directly applicable in Denmark due to the *Defrenne-II* judgment). Many collective agreements have implemented the regulation of the Equal Pay Act, which thereby transfers disputes concerning equal pay to the Labour Court and the Industrial Tribunals instead of to the ordinary courts. Collective agreements in Denmark are private contracts, hence, in principle, a matter for the contracting parties.

4.2.2 Definition in national law

According to Section 1(1) of the Equal Pay Act, it is a violation of the principle of equal pay if gender is the reason for a difference in salary. This applies to direct as well as indirect discrimination.

According to Subsection 2, all employers must pay men and women equally, including providing equal pay conditions, for the same work or work of the same value. Especially when a job classification system is used to determine pay, this system must be based on the same criteria for male and female employees and be structured so that discrimination on grounds of gender is ruled out. According to Subsection 3, the assessment of the value of the work shall take place on the basis of an overall assessment based on relevant qualifications and other relevant factors.

There is no definition of pay in the legislation. However, as mentioned, Section 1(2) of the Equal Pay Act states that the principle of equal pay applies to all elements of the pay, including equal pay conditions ensuring that women and men are paid equally for the same work or work given the same value. The wording of the Equal Pay Act Section 1(2) corresponds to the wording of Article 4 of the Recast Directive 2006/54.

³⁹ See Chapter 8.3 of the report: Danish Institute for Human Rights (2019), *Gender – Status 2019*: <https://www.humanrights.dk/publications/gender-status-2019>.

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

The Danish Equal Pay Act was amended in 2008 in order to implement the Recast Directive 2006/54 in matters of equal pay. Section 1 of the Equal Pay Act was reworded so as to follow closely the wording of the directive.

4.2.4 Related case law

Danish Equality Board, case 2020-9213-17158: A woman complained that she received a lower monthly salary than her male colleague. The woman was employed as a Sales Assistant by the defendant company on 1 July 2015. At the time of employment, her work experience was working in a clothing store for four months. She had no managerial experience. In 2017, the woman was promoted to Store Manager. On 1 July 2018, the woman's monthly salary was raised to DKK 34 000 (EUR 4 600). On 1 April 2018, the defendant company employed a male Store Manager, whose monthly salary was DKK 42 500 (EUR 5 800). The male Store Manager had 20 years of store experience. On that basis, the Equality Board ruled that the complainant had not established factual circumstances that gave reason to believe that there had been discrimination on the grounds of gender.

Danish Equality Board, case 2017-6810-22191: A male employee found that the parental leave policy of his employer was an infringement of the right to non-discrimination on grounds of gender as well as an infringement of the Equal Pay Act. According to the policy, the entitlement to compensation related to parental leave for mothers was calculated on the basis of seniority whereas the compensation for fathers was a fixed amount. Accordingly, there was the potential for mothers to receive a higher level of compensation than fathers. The Equality Board found this to be an infringement of the right to equal pay.

Danish Equality Board, case 2015-6810-03775: A female store manager was placed in another store after returning from parental leave. The store was situated in an area with fewer customers. Accordingly, it became more difficult to comply with the goals set in the employment contract that would result in an economic bonus. According to the employment contract, a bonus would be awarded when the turnover in the store reached a certain amount. Because of the difficulties in obtaining a bonus, the female store manager found the placement in the new store after the return from parental leave to be an infringement of her right to equal pay. The Equality Board found that the placement in a different store was in accordance with her employment contract and therefore was not an infringement of the right to equal pay, even though it became more difficult for her to be awarded a bonus.

Danish Equality Board, case 2014-6810-07992: A female health consultant was employed in a local health centre on a temporary contract. In total 13 health consultants were employed at the centre, the vast majority of whom were female. The complainant was working in a smaller unit with only two consultants, one man and one woman. The complainant was assigned salary level 4, while the other consultants in her unit were both assigned a higher salary level. The complainant claimed that her assignment of a lower salary level was an infringement of the right to equal pay. The Equality Board pointed to the fact that the health centre mainly employed female consultants and accordingly found that the assignment of salary levels was not related to gender and thus not an infringement of the right to equal pay.⁴⁰

4.2.5 Permissibility of pay differences

There is no permissibility of pay differences.

⁴⁰ These cases were published on the Danish Equality Board database.

4.2.6 Requirement for comparators

A specific comparator is not required but is often used to set out or prove a difference in treatment. Comparators can be from within the same employer or be taken more broadly across different sectors. It is not a requirement that the employer in question employs both men and women.

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

No parameters are laid down in the Equal Pay Act for what constitutes 'equal value'. Section 1(3) states that the assessment of the value of the work must be carried out as an overall assessment of relevant qualifications and other relevant factors.

4.2.8 Other relevant rules or policies

There are no other relevant rules or policies.

4.2.9 Job evaluation and classification systems

There are no examples of good practice or guidance on job evaluation and classification systems.

4.2.10 Wage transparency

As mentioned above, many collective agreements have implemented the regulation of the Equal Pay Act, which thereby transfers disputes concerning equal pay to the Labour Court and the Industrial Tribunals instead of to the ordinary courts. Furthermore, the signatory parties to the largest sectoral collective agreement in Denmark, the employer organisation the Confederation of Danish Industry (Dansk Industri) and association of trade unions, the Central Organisation of Industrial Employees in Denmark (CO-Industri) have established their own Equal Pay Council, which can mete out a fine where there is a violation of the rule concerning the preparation of gender-segregated equal wage statistics/equal pay report, or in the event of special circumstances.⁴¹ However, according to early reports the council has only ruled in very few, if any, cases.⁴²

According to Section 5a(6) of the Equal Pay Act an undertaking can choose to enter into an agreement with the employees or their union representatives with the purpose of preparing a report on equal pay. A report on equal pay must contain a description of conditions that are important for the remuneration of women and men in the undertaking, and an action plan with a view to preventing or reducing the pay gap between women and men as well as a follow-up on the action plan. The report must cover all the company's employees and be prepared in accordance with the principles in the Act on Information and Consultation of Employees or in a collective agreement, cf. section 3 of the Act on Information and Consultation of Employees. The statement must cover a period of 1-3 years and must be prepared no later than the end of the calendar year in which the obligation to compile gender-disaggregated wage statistics existed. The existence of this options illustrates the role of the social partners albeit it is not mandatory for employers to utilise this option.

In 2016, the Equal Pay Act was amended by Act No. 116/2016. Following the amendment, Section 5a of the Equal Pay Act stipulates that only companies with a minimum of 35 full-time workers have to prepare gender-segregated wage statistics every year. The management has to inform employees about the wage differences and engage in a hearing

⁴¹ See Clause 2 of Appendix 21 to the Industrial Agreement available here in English: <https://www.danskindustri.dk/DownloadDocument?id=165072&docid=161722>.

⁴² See page 33 of the report: Danish Institute for Human Rights (2014), *Erfaringer fra Ligelønssager*: <https://menneskeret.dk/udgivelser/erfaringer-ligelønssager>.

on gendered wage differences. Until the introduction of the recent amendment, such an obligation applied to companies with a minimum of 10 full-time workers. The duty only applies to companies that employ a minimum of 10 men and 10 women with comparable job functions. According to the administrative guide on gender segregated wage statistics employees have comparable job functions if they are subject to the same classification of job title, i.e. DISCO code, which is the official Danish version of the international classification of job titles, International Standard Classification of Occupations (ISCO).⁴³

The preparatory works to this amendment stated that it was not expected that there would be any negative gender consequences. The intent of reducing the number of companies subject to the obligation to prepare gender-segregated wage statistics was to ease the administrative burden of smaller companies.

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

The Commission's recommendation provides guidance to Member States on a better and more effective implementation of the equal pay principle. Some of the instruments mentioned in the recommendation are in effect in Denmark, however, the recommendation was not specified as the basis for putting the instruments into effect in practice.

Denmark has implemented a pay reporting duty concerning wage statistics for companies with 35 or more employees as described below. According to Section 6b of the Equal Pay Act, violations of Section 5a will be sanctioned by fine unless higher sanctions are imposed under other legislation, and legal persons can be held criminally liable under the provisions of Part 5 of the Criminal Code. However, there is no public mention of such violations being sanctioned.

4.2.12 Other measures, tools or procedures

According to the Equal Pay Act, the Government is obliged to present a national statement on the status and development of the gender pay gap every three years. This monitoring report is based on an extensive review as well as a large dataset and is made public. Furthermore, all companies with more than 35 employees have to make available a yearly statistical overview on pay distribution segregated by sex. This allows for full transparency on wages within companies, and the national statement ensures that the gender pay gap is analysed and kept on the political agenda.

Section 5a of the Danish Equal Pay Act, on gender-segregated pay statistics, was introduced in 2015.⁴⁴ The amendment to the Equal Pay Act aimed to strengthen cooperation on equal pay in the workplace by increasing the number of companies covered by the duty to provide gender specific wage statistics. According to the 2015 amendment, the duty to provide gender-segregated wage statistics yearly applied to companies with more than 10 employees. In 2016, the act was amended again, such that only companies with 35 or more employees are under the obligation to provide gender-segregated wage statistics yearly.⁴⁵

A research group at the University of Copenhagen has conducted a study that found that wage transparency helps to reduce the wage gap between men and women.⁴⁶

⁴³ Administrative Guide No. 10563 of the 12 December 2006 on gender segregated wage statistics.

⁴⁴ Act 513/2014 amending the Act of Equal Pay.

⁴⁵ Act 116/2016 amending the Equal Pay Act.

⁴⁶ https://news.ku.dk/all_news/2018/12/wage-transparency-works/.

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 Act on Equal Treatment of Men and Women as regards Access to Employment, etc. applies to workers as well as job applicants.

The Act on Equal Treatment between men and women in insurance, pensions and similar matters implements the Recast Directive with regard to insurance and occupational social security schemes. The act applies to workers, including self-employed persons, persons whose activity is interrupted by illness, maternity, accident or involuntary unemployment and persons seeking employment and to retired and disabled workers, and to their close relatives their beneficiaries, according to Section 1.

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

The Act on Equal Treatment of Men and Women as regards Access to Employment, etc. applies to access to work including recruitment, working conditions and transfers of job as well as to dismissals according to Section 2. The Act also applies to access to vocational training and guidance as well as to retraining, as provided in Section 3 of the Act. According to Section 5 of the Act, it also applies to any person who lays down provisions and makes decisions concerning the access to exercise activities on the basis of self-employment. This shall also apply to the establishment, organisation or extension of an enterprise and the taking-up or extension of any other form of self-employment, including the financing thereof. According to Section 5a, the obligation to observe equal treatment also applies to any person who decides to become a member of and participate in employees' or employers' organisations, or in organisations whose members carry on a certain trade, including the benefits that such organisations offer their members.

The Act on Equal Treatment of Men and Women in insurance, pensions and similar matters applies to occupational social security schemes, insurance and other financial services, as per Section 4 of the Act.

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

Section 13 of the Act on Equal Treatment of Men and Women as regards Access to Employment, etc. allows for deviation from the prohibition by the minister under whose competence the enterprise in question falls, in the event that certain types of occupational activities and education significantly require a person to be of a specific sex, and this requirement is reasonable in the context of the occupational activity in question.

There has not been any assessment of this provision.

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

Under Chapter 3 of the Act on Equal Treatment of Men and Women as regards Access to Employment, etc., an employer may not dismiss an employee, demote an employee to a less favourable position or subject the employee to less favourable treatment due to the fact that the employee has insisted on exercising her/his right of absence on the grounds of pregnancy or maternity/paternity/parental leave.

Non-hiring, non-renewal or non-continuation of (fixed-term) contracts are viewed as non-hiring in the case law, not as dismissals.

In the Western High Court Judgment U.2020.331V, a female employee, who had been employed since May 2011 with a weekly working time of 37 hours, had her working time reduced to 30 hours per week from 1 January 2016. At the beginning of 2016, she became pregnant with her second child and went on pregnancy-related sick leave in June 2016. During her subsequent maternity leave, she met twice with the construction market manager. At the last meeting in September 2017, she found out that she had been sent an email in the summer of 2017 with a work plan covering the period of her return to the workplace. She was informed at the meeting that the work plan contained changes in relation to her previous working hours and that she had also been transferred to a different department. She disputed the changes and her trade union made a claim for compensation under Section 16(1) of the Equal Treatment Act, since the changes in her working conditions had to be regarded as a dismissal in violation of Section 9 of the Act. The change in working hours meant, among other things, that from then on, she had closing shifts, which she had not previously had, so that she could pick up her child from an institution. In her opinion, the allocation of closing shifts was skewed, and she was given more closing shifts than her colleagues. Both the District Court and the High Court found that the changes in her working conditions with regard to working hours and job content introduced in the summer of 2017 and at the meeting in September 2017 were significant, i.e. constituting a dismissal, and she was therefore not under an obligation to accept such changes. The dismissal had taken place during the maternity leave, and the employer had not proved that the dismissal was not linked to her absence, in violation of Section 9 of the Equal Treatment Act. She was therefore awarded compensation corresponding to 12 months' salary, DKK 277 000 (EUR 37 250).

In the Eastern High Court ruling U.2019.909 Ø, a temporary agency worker employed in a fixed-term position with a user entity, had her contract extended twice and then went on maternity leave. The expiry of the last extension without an express agreement to continue was not equal to a termination. The temporary agency worker had pointed to facts creating a presumption that the decision not to extend the position could in part be based on the pregnancy. The decision not to extend the employment was found to be indirect discrimination, and the employee was awarded DKK 25 000 in compensation (approximately EUR 3 000).

In Supreme Court ruling U.2012.3029 H, a pregnant office assistant trainee had applied for a permanent position after the expiry of her trainee position. Even though the employer knew about her pregnancy, the office trainee had not pointed to facts creating a presumption that the employer had based the decision not to hire her in part on her being pregnant. The rule of reversed burden of proof was not applied.

In Supreme Court ruling U.2012.2602 H, a temporary agency worker was in fertility treatment at the time her position expired. She had not by this fact pointed towards facts that created an assumption of the employer taking into consideration her fertility treatment in the decision not to offer her one of the available permanent positions in the company.

In Supreme Court ruling U.2012.511 H, a pregnant fixed-term hairdresser was not offered continued employment. It was documented that the employer had taken the pregnancy into consideration in the decision not to offer the hairdresser an available position. Compensation of DKK 25 000 (approximately EUR 3 000) was granted for the decision not to hire, in breach of the Equal Treatment Act.

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)

Special measures on the protection for women in relation to pregnancy and maternity are explicitly excluded from the notion of discrimination, (Section 1(8) of the Act on Equal Treatment of Men and Women as regards Access to Employment, etc.).

4.3.6 Particular difficulties

There are no particular difficulties

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

According to Section 13(2) of the Act, the relevant minister under whose responsibility a business comes may allow measures derogating from Sections 2 to 6 in order to promote equal opportunities for women and men, in particular by remedying actual inequalities affecting access to employment, education, etc.

4.4 Evaluation of implementation

The implementation of the Recast Directive in Danish legislation is satisfactory, in the opinion of the author. The Danish labour market is to a large degree covered by collective agreements. The collective agreements must comply with the directive. To a large degree, the effect of the legislation depends upon its interpretation by courts and administrative tribunals.

4.5 Remaining issues

In terms of issues related to the COVID-19 pandemic, the question of equal pay arose. Danish society was locked down on 10 March 2020. The lock-down included the closing of schools, public childcare services, universities, cultural institutions, restaurants and cafes. Public gatherings of more than 10 people were prohibited. Despite the lock-down, all schools and education establishments continued teaching through online classes and no classes were cancelled. The level of digitalisation is very high in Denmark, thus enabling remote work and remote schooling to take place without either schools or employers having to take additional measures, when the lock-down forced employees and school children to stay at home.

As a result of the lock-down, all non-essential public employees were required to work from home. A large number of healthcare workers, in particular nurses and doctors, were naturally deemed essential in the fight against the pandemic, which led to a surge of public empathy and acclaim directed towards these workers. In the public eye, these workers, the majority of them being women, risked their lives in the combat against the pandemic and were thus regarded as heroes. There were many forms of appreciation shown towards them: people applauding from their balconies; planes drawing hearts in the sky; gifts being donated to hospital wards; free cakes and food from restaurants, among other things, all in honour of the healthcare personnel at the Danish hospitals.

At the same time, the Danish Minister of Health, Magnus Heunicke, and the Danish Prime Minister, Mette Frederiksen, paid tribute to the 'frontline staff' and highlighted how much they 'slaved' for Denmark. This led Grete Christensen, Chairwoman of the Danish Nurses' Organisation, to reopen the topic of nurses receiving lower pay when compared to male-dominated jobs, such as construction engineers, bearing in mind they have the same educational requirements, which makes it a question of equal pay.

The Nurses' Organisation referred to statistics from 2017 showing that a full-time nurse earns an average of DKK 29 300 (EUR 3 900) a month, while a construction engineer earns an average of DKK 37 600 (EUR 5 000) a month. According to the Nurses' Organisation, they both require a medium-term education but the difference is that 96 % of all nurses are women, while 85 % of construction engineers are men.

There is very little case law on the question of equal pay between cross-sector work, i.e. the question of 'work of the same value'. The Nurses' Organisation has on numerous occasions raised awareness about the topic in the public discourse and tried to appeal to

politicians to solve the matter. They have also tried using it as leverage when bargaining for renewal of their collective agreements with the signatory on the employer side, the Danish Regions, but their attempts have not yet been successful.

Private employers were strongly encouraged to send their employees home to work, or to let them take time off in lieu or take outstanding holidays. This affected the employees' work-life balance, but as of yet there have been no studies on it having a gender-adverse effect. However, when keeping in mind the documented gender-orientated role distribution in terms of housekeeping and the majority of single providers being women, the stress of having to work from home, whilst home-schooling children, could result in women being treated less favourably than men under those circumstances. Even in families with two parents, studies show that it is usually the mother who does the majority of cleaning, helping with homework and so on, which harms their ability to perform their work-related duties on an equal footing with men, which can affect whether they keep their jobs, either because they themselves resign or because their employers do not want to keep them.

However, no cases have yet been tried before the courts in which an employer has dismissed an employee for poor performance due to working from home.

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)⁴⁷

5.1 General (legal) context

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

The Danish Association of Masters and PhDs (*Dansk Magisterforening*) in 2019 conducted an analysis⁴⁸ of the work-life balance of 4 870 of their members, and the analysis came to the following conclusion:

- Those who are dissatisfied with their jobs have a significantly worse opportunity for work-life balance than those who are satisfied with their jobs. For example, several of those dissatisfied cannot choose their own working hours and are expected to be available outside working hours.
- There is also poor work-life balance among stressed versus non-stressed members.

The significant differences indicate that work-life balance should be prioritised to ensure job satisfaction and reduce stress.

5.1.2 Other issues

There are no other issues.

5.1.3 Overview of national acts on work-life balance issues

Consolidation Act 67/2019 on Entitlement to Leave and Benefits in the Event of Childbirth (*Barselsloven*).

Consolidation Act No. 674/2020 on the Working Environment (*Arbejdsmiljøloven*).

5.1.4 Political and societal debate and pending legislative proposals

On 26 June 2017, the Minister for Employment wrote to the European Commissioner for Employment, Social Affairs, Skills and Labour Mobility on behalf of the Danish Parliament to state that Denmark did not support the Commission's proposal on work-life balance (COM (2017) 253 final).⁴⁹

The Directive must be implemented by 2 August 2022. It could produce a significant increase in men taking parental leave, which would in turn have a positive effect on the gender wage gap *inter alia* by decreasing the reduction of women's income as an effect of childbirth. A recent report touched upon these positive effects. However, in the first statements from the Minister of Equality on the implementation of the Directive, the plan was to apply for an exemption from the requirement of earmarked maternity leave. However, the opinion of the Minister on the topic later changed and the planned application was abandoned.

⁴⁷ 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>.

⁴⁸ The report is available here: <https://dm.dk/media/35344/derfor-er-work-life-balance-saa-vigtigt.pdf>.

⁴⁹ <https://www.ft.dk/samling/20161/almindel/LIU/bilag/103/1773465.pdf>.

Think Tank Europe has produced a report on the Danish position on the work-life balance proposal from the Commission.⁵⁰

The Danish Government has indicated that it would like to encourage fathers to take more parental leave, but currently the Government has no policy initiatives ensuring a more gender-balanced distribution between parents' caring responsibilities.

5.2 Pregnancy and maternity protection

5.2.1 Definition in national law

There is no definition of a pregnant worker in Danish legislation.

5.2.2 Obligation to inform employer

The pregnant employee is obliged to inform the employer of the stipulated date of birth with three months' notice according to Section 15 of the Consolidation Act No. 67 of 25 January 2019 on Entitlement to Leave and Benefits in the Event of Childbirth (*Barselsloven*). In addition, a mother who has exercised her right to a leave of absence according to Section 7 of the Act on Entitlement to Leave and Benefits in the Event of Childbirth, must give the employer notice of the date of their return to the job no later than eight weeks after confinement.

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

There is no case law on the definition of a pregnant worker.

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

The employer must ensure safe and healthy working conditions and all recognised health and safety norms and standards must be followed.

According to the Executive Order on the Performance of Work 1234/2018, Section 8(1), the employer must take into consideration the employee's age, experience, the specific tasks of the employee's position and other qualifications. According to Subsection 2, particularly sensitive groups of workers, including pregnant and breastfeeding employees must be protected against dangers that might affect them. The employer is required to assess the risks for pregnant and breastfeeding women (Subsection 3), and if there is a risk, Subsection 4 obligates the employer to take necessary steps to avoid it, which according to Subsection 6 can consist of assigning the pregnant or breastfeeding employee other tasks or functions.

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

The Maritime and Commercial High Court issued a ruling in three combined cases,⁵¹ which all concerned pregnant employees working at dental clinics, where concerns were raised with regard to the health and safety of these employees due to *inter alia* the possible exposure to nitrous oxide. The employees were either sent home by the employer or on sick leave and the primary issue of the dispute was whether or not they were entitled to their full salary as sick pay. In the ruling F-44-98, the Maritime Court expanded on the Employers' duties towards pregnant workers. The court stated:

⁵⁰ Think Tank Europe (2017), 'EU Foreslår Øremærket Barsel, Men Danmark Stritter Imod', <http://thinkeuropa.dk/sites/default/files/>.

⁵¹ Maritime Court rulings F-44-98, F-45-98 and F-46-98 of 3 March 2003.

'Therefore, it must be assessed whether according to the rules in the area or otherwise FF (the employee) is allowed a claim for full salary during the absence. Neither in the Executive Order on the Execution of Work Section 12(2) nor the processors therefor, is it decided whether full pay is required during this absence. As a starting point, there are only claims for unemployment benefits, cf. 2, No. 2.'

Paragraph 59 of C-66/96 states that a national law under which an employer may send home a non-incapacitated pregnant employee without paying her full wages when he considers that he is unable to utilise her labour is in breach of Directive 92/85 and Directive 76/207 of 9 February 1976 implementing the principle of equal treatment for men and women.

FF's absence was due to the layout of the workplace, and a leave of absence must, in these circumstances, be equated with a return home. Since a male employee would be entitled to full pay in the event of termination of employment due to a health hazard, it would be contrary to Sections 1 and 4 of the Equal Treatment Act if the pregnant woman is entitled to unemployment benefit only in a situation where her absence is solely due to the place of work not being designed in such a way that pregnant women can perform their work in a healthy manner. The plaintiff must therefore be upheld in the application.

In the ruling F-45-98, the Maritime Court stated the following concerning the duty to assess the possible risk of exposure:

'In connection with FF's (the employee) leave of absence, Dagny Dalsgaard (the employer) chose not to have measurements of the nitrous oxide level at the clinic, and she has not documented how much measures to secure the working environment for pregnant women would have cost at this time. In these circumstances, the court finds that FF's absence is equivalent to a return home decided by the employer. It is clear from paragraph 59 of C 66/96 (Høj Pedersen) that full wages must be paid to returned non-incapacitated pregnant employees when the return depends on the workplace's layout and the employer's assessment, and the claim must be upheld.'

In the third ruling, F-46-98, the Maritime Court stated the following concerning the obligation of the employee to pass on correct information to the physician and hospital assessing the employee and the possible risk of exposure:

'FF (the employee) was reported absent, among other things, for the purpose of examining whether exposure to nitrous oxide posed a risk to the foetus. With a single call, toxicologist Anders Bjerre Mikkelsen found that the ventilation conditions were such that the use of nitrous oxide did not pose a risk for FF. The other conditions which were referred to by Skive Hospital were of such a nature that they could be rectified immediately by the employer. If FF's information about the ventilation conditions to her own doctor and Skive Hospital had been adequate, the necessary measures could be taken immediately at the clinic. The court finds that a worker has a duty to seek information on the relevant working conditions before disclosure of such information. Thus, in the present situation, it must be attributed to the circumstances of FF that the absence was reported on an incorrect basis, which is why the defendant is successful.'

The third case might seem to put severe obligations onto the employee with regard to passing on correct information to the physician and hospital, but the reality of the case was that the employee had been dismissed prior to her sick leave due to other reasons. The court therefore seemingly perceived her sick notice and absence as a likely reaction to the dismissal, which explains the view the court took on her interaction with the physician and the hospital.

5.2.6 Prohibition of night work

According to the Working Environment Act, the employer must ensure a healthy and safe working environment. According to Executive Order No. 1234/2018, employers are obliged to evaluate the working environment with regard to the risks when they are made aware that an employee is pregnant or is breastfeeding. In Denmark there is not, as such, a general prohibition on night work for pregnant and or breastfeeding women. However, according to Section 8 of the Executive Order No. 1234 of 29 October 2018 on the Performance of Work issued by the Danish Working Environment Authority, the employer, when being notified of the worker being pregnant or breastfeeding, is required to evaluate whether the worker is exposed to effects which may involve danger to the pregnancy or breastfeeding. If such a risk is found the employer shall take measures, possibly consisting of technical measures or design and fitting out of the workplace. Where it is not reasonably practicable to achieve adequate protection of the employee in this way, the risk shall be prevented through measures in connection with the planning and organisation of the work, including, if necessary, any change of working hours and limitation of night work.

5.2.7 Case law on the prohibition of night work

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

5.2.8 Prohibition of dismissal.

Section 9 of the Act on Equal Treatment of Men and Women as regards Access to Employment, etc. prohibits an employer from dismissing an employee for having put forward a claim to use the right to absence or for having been absent under Sections 6 to 14 of the Act on Maternity Leave (those sections stipulate the right to absence during pregnancy, the first 14 weeks after childbirth, parental leave and absence in special cases) or for any other reason related to pregnancy, maternity or adoption. Furthermore, Section 4 of the Equal Treatment of Men and Women as regards Access to Employment, etc. requires employers, who employ men and women, to treat them equally as regards working conditions. This shall also apply in connection with dismissal.

5.2.9 Redundancy and payment during maternity leave

The Act on Equal Treatment between Men and Women as regards Employment, etc. protects against dismissal due to pregnancy, maternity or adoption. If the employment contract is terminated at any time from the beginning of the pregnancy until the maternity leave expires, then a reversal of the burden of proof applies, cf. Section 16(4) of the Act, and it is the responsibility of the employer to prove that the termination is not due to pregnancy/maternity leave. The entitlement to payment of salary from the employer is not affected by a dismissal to the detriment of the employee. Furthermore, salaried employees (white collar workers) are entitled to their regular salary during the notice period according to Section 7(4) of the Consolidation Act No. 1002 of 24 August 2017 on The Employers' and Salaried Employees' Legal Relationship if they are dismissed before the start of the maternity leave or during the period mentioned in Subsection 2 (the period encompassing absence from work due to pregnancy and maternity from the beginning of the maternity leave until 14 weeks after the childbirth).

5.2.10 Employer's obligation to substantiate a dismissal

The Act on Equal Treatment between Men and Women as regards Employment, etc. not only applies to dismissals, but also includes less favourable treatment, cf. Section 4 of the act, such as not being summoned to salary negotiations due to maternity leave. The rules on the burden of proof also apply to this situation. If an employee is made redundant during her maternity leave, the employer bears the burden of proof.

5.2.11 Case law on the protection against dismissal

There is a vast amount of case law in relation to the protection against dismissal of pregnant workers, etc. In 2020 alone, the Equality Board reviewed 44 cases in which pregnancy was part of the circumstances. One example was the case 19-27218, where a female reserve doctor was instantly dismissed from her position where she worked for one of the Danish 'Regions'. At the time of the instant dismissal, she was pregnant and absent due to pregnancy-related sickness. Prior to the dismissal, she was in India and according to a medical certificate she could return home at the earliest in the 12th week of pregnancy. Her instant dismissal was due to the fact that she was absent from status meetings and that she had not made it possible to hold a status meeting in person. According to the available information, her lack of participation in such a status meeting was related to the fact that she was on sick leave and that her doctor recommended that she not return from India until the end of November 2018, due to pregnancy complications. The reserve doctor had suggested that status meetings could be held by telephone or Skype, or that her husband could attend on her behalf. Against this background, the Equality Board assessed that the 'Region' had not lifted the burden of proof that her pregnancy was of no significance for the instant dismissal. Therefore, she was awarded compensation corresponding to about nine months' salary.

5.3 Maternity leave

5.3.1 Length

According to Section 7(1) of the Act on Entitlement to Leave and Benefits in the Event of Childbirth, a mother shall have a right and a duty to absence for the first two weeks after childbirth. Subsequently, she shall be entitled to absence for another 12 weeks.

5.3.2 Obligatory maternity leave

A woman is entitled to a leave of absence from work due to pregnancy from the beginning of the four-week period preceding the expected due date, cf. Section 6 of the Act on Entitlement to Leave and Benefits in the Event of Childbirth. As mentioned, she is under a duty to take absence from work the first two weeks after childbirth according to Section 7(1) of the Act on Entitlement to Leave and Benefits in the Event of Childbirth.

A woman in continued employment is entitled to a leave of absence prior to the four-week period if it appears from a medical assessment that the pregnancy is taking an abnormal course involving a risk to the woman's health or the health of the foetus, cf. Section 6(2)(1). According to Section 6(2)(2), this also applies if the special nature of the work involves a risk to the foetus or if the pregnancy prevents the mother from carrying out her work due to public authority requirements and the employer is unable to offer the mother any suitable alternative employment.

Collective agreements also contain leave rights for parents including maternity leave.

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

The protection found in Articles 5, 6 and 7 of Directive 92/85 is implemented in the Executive Order No. 1234 of 29 October 2018 on the Performance of Work issued by the Danish Working Environment Authority. Section 8(1) of the Order reads:

'In connection with the performance of work account shall be taken of the employee's age, insight, fitness for work and other qualifications.'

According to Subsection (2), particularly sensitive risk groups, including pregnant employees and employees who are breastfeeding, shall be protected against the dangers which specifically affect them.

Subsection (3) stipulates that when the employer is notified or otherwise becomes aware that an employee is pregnant or breastfeeding, the employer shall see to it that the assessment of health and safety at work includes an evaluation of whether the employee is exposed to effects which may involve danger to the pregnancy or breastfeeding, in particular concerning the agents, working processes and working conditions mentioned in Annex 2 issued under the Order.

If thereafter a risk is found to exist that a pregnant employee or an employee who is breastfeeding is exposed to the effects referred to in Subsection (3) above, it shall be determined on the basis of an assessment of the nature, scale and duration of the individual exposure whether such risk will have an adverse effect on the pregnancy or breastfeeding of the employee, and, where necessary, preventive measures shall be taken in pursuance of Subsections (5) and (6) below according to Subsection (4).

Subsection (5) requires that, if possible, such measures shall consist of technical measures or design and fitting out of the workplace. Where it is not reasonably practicable to achieve adequate protection of the employee in this way, the risk shall be prevented through measures in connection with the planning and organisation of the work, including, if necessary, any change of working hours and limitation of night work.

Subsection (6) stipulates that if it is not possible to comply with Subsection (5), the measures may consist of transfer to other jobs which do not involve any danger to the health and safety of the pregnant employee or the employee who is breastfeeding.

Where the measures referred to in Section 8(4) are not found to be adequate to prevent the risk to the health and safety of the pregnant employee or the employee who is breastfeeding, such employee shall not be engaged in the work concerned, as provided under Section 12(2).

Annex 2 of the Order, concerning pregnant workers and workers who are breastfeeding, as covered under Section 8(3) and (4), sets forth detailed conditions on agents, work processes and working conditions in Chapter 1; agents, work processes and working conditions presenting a particular risk for pregnant workers in Chapter 2 and agents and working conditions presenting a specific risk for breastfeeding workers in Chapter 3. The Annex concerns specific substances, such as chemical agents, possibly harmful to pregnant workers.

Furthermore, Section 43 of the Executive Order No. 96 of 13 February 2001 on the Conditions at Permanent Places of Work requires the employer to facilitate rest rooms at the workplace, if special resting breaks are necessary or required, and at times when pregnant women or nursing mothers shall have the possibility of taking a rest.

5.3.4 Legal protection of rights ensuing from the employment contract

If the question concerns employment rights exceeding those rights found in legislative acts, such as a right to a payment under maternity leave exceeding the payment stipulated in the Consolidation Act on Entitlement to Leave and Benefits in the Event of Childbirth and a possible collective agreement, such rights are contractual rights which the employee can claim a right to as part of a binding contract (see Section 1 of Consolidation Act No 193 of 2 March 2016 on contracts). The Act stipulates that an offer and a reply to an offer shall be binding on the persons making them, and the employment contract is a binding contract between the parties, which can be enforced through the courts of the arbitration tribunals.

5.3.5 Level of pay or allowance

The level of pay or allowance is the same level as sick-leave benefits, and the rate in 2020 is DKK 4 405 (EUR 592) per week according to Section 36 of the Consolidation Act on Entitlement to Leave and Benefits in the Event of Childbirth, which is regulated annually, cf. Section 38. Section 2(2) of the Consolidation Act on Entitlement to Leave and Benefits in the Event of Childbirth stipulates the right to maternity benefits/allowance. Some collective agreements provide for the full salary to be paid during all or part of the leave. Other agreements have a cap on the salary.

5.3.6 Additional statutory maternity benefits

Some collective agreements provide for the full salary to be paid during all or part of the leave. Other collective agreements have a cap on the salary. Several collective agreements provide a portion of the parental leave to the father together with the salary. Due to the collective agreement between the State and the Unions, the mother has the right to claim her full salary during the maternity leave of six weeks before the expected date of confinement and 14 weeks after birth. Fathers are entitled to two weeks of paid paternity leave.

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

According to the Act on Entitlement to Leave and Benefits in the Event of Childbirth, Section 3, the right to maternity benefit, is conditional upon the person, at the beginning of the period of absence, residing legally in Denmark or, under Regulation (EEC) No 1408/71 of the Council of 14 June 1971, on the application of social security schemes to employees, to self-employed persons, and to members of their families moving within the Community, is subject to Danish legislation on social security. Furthermore, Section 4 of the Act stipulates that the right to maternity benefits is conditional upon the income, included in the basis of calculation under Chapter 8 of the Act, is subject to taxation in Denmark.

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

According to Section 8a of the Act on Equal Treatment as regards access to Employment mothers who have exercised the right to a leave of absence according to the Act on entitlement to leave and benefit in the event of childbirth have the right to return to the same or an equivalent job. In addition, the mother has a right to benefit from any improvements in working conditions to which they would have been entitled had they not been absent.

5.3.9 Legal right to share maternity leave.

There are no legal rights to share maternity leave. However, according to Section 7(2) of the Act on Entitlement to Leave and Benefits in the Event of Childbirth, the father shall assume the mother's right to absence, the 14 weeks after childbirth, if the mother dies or due to illness proves unable to care for the child.

5.3.10 Case law

There is an abundance of case law concerning maternity leave, related employment rights and/or the return after maternity leave. A mere brief description of the cases would take several pages, which is outside of the scope of this questionnaire.

One example of a relevant case is the ruling J.nr. 18-49227 by the Equality Board, where a pregnant veterinarian prior to taking maternity leave was not offered an extension of her fixed-term agreement, which entailed extra weekly working hours. Before the expiry

of the agreement on the extra weekly working hours, the owner of the veterinary clinic advertised a position for a temporary worker, partly as a substitute for the pregnant worker, to cover the clinic's need for veterinary work aimed at covering the extra number of weekly working hours not offered to the pregnant employee. The veterinary clinic had in this case not lifted the burden of proof that the less favourable treatment of the veterinarian was not based on the employee's pregnancy.

The veterinarian therefore received a compensation of DKK 25 000 (EUR 3 350).⁵²

In another instance, the Equality Board considered a case in which a female florist was dismissed shortly after returning to her job after having taken maternity and parental leave.⁵³ During the complainant's leave, the business had recruited another florist who had essentially taken over the duties the woman had undertaken prior to her leave. The Equality Board considered that the woman had proven facts suggesting that there had been discrimination on the grounds of sex. The business had not proved that the principle of equal treatment had not been violated.

The woman received compensation of EUR 26 800 (DKK 200 000).

5.4 Adoption leave

5.4.1 Existence of adoption leave in national law

The Act on Entitlement to Leave and Benefits in the Event of Childbirth also contains a provision regarding leave in the event of adoption. Section 8 of the Act regulates the right to leave of absence for adoptive parents.

Prospective adoptive parents who reside abroad in order to adopt a child each have a right to be absent from work for up to four weeks before receiving the child. The child is received by the parents when the formal conditions to return home with the child are met. Prospective adoptive parents, who are adopting a child in Denmark, are entitled to leave for up to one week prior to receiving the child, if the child is not already residing in the adopter's home. In the first 14 weeks after receiving the child, one of the adopting parents at a time is entitled to leave. There is a right to a simultaneous absence for the parents for two consecutive weeks. The right to be absent under parental leave, according to Section 8(7), can start in the first 14 weeks after receiving the child. Section 8(7) provides that, after the 14th week after receiving the child, adopters have the right to a leave of absence from work during parental leave according to Sections 9 and 10 (i.e. the normal rules on parental leave). Thus, adopting gives the same rights as in the maternity situations described above, except regarding the adoption of children from Denmark, in which case the pre-leave is only one week, according to Section 8(3).

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

Parents who adopt are under the same protection with regard to dismissal as biological parents, according to Section 9 of the Act on Equal Treatment of Men and Women as regards Access to Employment, which stipulated that an employer may not dismiss an employee for having put forward a claim to use the right to absence or for having been absent under Sections 6 to 14 of the Act on Entitlement to Leave and Benefits in the Event of Childbirth or for any other reason related to pregnancy, maternity or adoption.

5.4.3 Case law

There is no relevant case law.

⁵² Danish Equality Board, case J 18-49227 <https://www.retsinformation.dk/eli/accn/W20190918925>.

⁵³ Danish Equality Board, case J 18-3188 <https://www.retsinformation.dk/Forms/R0710.aspx?id=202970>.

5.5 Parental leave

5.5.1 Implementation of Directive 2010/18

The implementation of Directive 2010/18 only gave rise to minor adjustments in Danish legislation.⁵⁴ This was partly due to the fact that Denmark already had rules in place that went beyond the European minimum regulations and partly because a number of provisions did not relate to an actual duty but were less binding considerations which should be taken into consideration when designing the rules. The minor adjustments took place by amendment Act No. 217 of 5 March 2013 to the Act on Equal Treatment of Men and Women as regards Access to Employment. The amendment act introduced a new Section 8a(2), according to which parents, when returning from parental leave or absence pursuant to Sections 6-14 of the Maternity Act, may request in writing that the employer change working hours and patterns for a specified period. The employer must consider and respond to such a request in writing, taking into account both the needs of the employer and the employee. The Act also specified that the protection of parents with regard to pregnancy and parental leave not only applies to dismissals, but also to any less favourable treatment. The duration of parental leave was not revised when implementing Directive 2010/18.

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

The Act on Equal Treatment between Men and Women regarding employment etc. applies to both the public and private sectors.

5.5.3 Scope of the transposing legislation

Minor adjustments to the Act on Equal Treatment between Men and Women regarding Employment, etc. were chosen to implement the parts of the Directive that were not already transposed. The Act on Equal Treatment between Men and Women regarding Employment, etc. applies to *all* employers according to Section 2 and the applicability is not limited to certain types of employment contracts.

5.5.4 Length of parental leave

Each of the parents has a right to parental leave of 32 weeks. However, the parents will only be compensated with a benefit for 32 weeks in total. The duration of parental leave was not revised following Directive 2010/18. There is no difference in the duration of parental leave in the public sector and the private sector.

5.5.5 Age limits

Parental leave is granted to take care of a child up to nine years old.

5.5.6 Individual nature of the right to parental leave

The right to leave of absence for parents is individual in the sense that each of the parents has a right to parental leave of 32 weeks. However, the right to parental leave benefit is not individual, but can be split between the parents.

5.5.7 Transferability of the right to parental leave.

Under the current Danish Act on Entitlement to Leave and Benefits in the Event of Childbirth, the parents can agree to share the parental leave benefits between them, as

⁵⁴ According to the preparatory works of the amendment Act No. 217 of 5 March 2013 to the Act on Equal Treatment of Men and Women as regards Access to Employment. See the amendment proposal No. 105 of 12 December 2012 in the remarks to the amendment proposal.

they please. The parents cannot transfer their right to 32 weeks of parental leave to the other parent.

5.5.8 Form of parental leave

Parental leave can take the form of either full-time or part-time leave. Under Section 11 of the Act on Entitlement to Leave and Benefits in the Event of Childbirth, employed workers have the right to resume work and defer at least 8 weeks and a maximum of 13 weeks of leave of absence. The right to postpone a leave of absence can only be used by one of the parents. The deferred absence must, when exercised, be used in a continuous period.

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

Under Section 2 of the Parental Leave Act, the right to leave of absence applies to all parents with no qualifying period. The right to benefits requires a qualifying period. The parent claiming the benefit must have fulfilled a qualifying period in accordance with Section 27 (employees) or Section 28 (self-employed people) of the act.

Section 27 of the Parental Leave Act stipulates the employment requirements for employees and states that an employee is entitled to maternity benefits from Payment Denmark (*Udbetaling Danmark*; the Danish authority which pays the benefit), where the employee:

- 1) has participated in the labour market continuously for the last 13 weeks before the period of absence begins and during this period has been employed for at least 120 hours;
- 2) would have been entitled to unemployment benefit or another benefit instead under the Unemployment Insurance Act, if he or she had not been entitled to benefits under this act;
- 3) within the past month has completed vocational training for at least 18 months;
- 4) is in work training in a programme that is regulated by or under the act; or
- 5) is employed in a flexible job according to Section 70(c) of the Active Employment Act.

The calculation of the above 13-week period includes periods that the employee:

- has worked as an employee;
- has worked as a self-employed person immediately prior to working as an employee and the company has met the employment requirement according to Section 28;
- is receiving benefits under the Sickness Benefits Act or benefits under this Act;
- has received unemployment benefit or an allowance in lieu thereof;
- is on annual leave with pay or holiday pay;
- has received compensation during a period of notice from the Employees Guarantee Fund; or
- is the subject of a labour dispute.

For self-employed persons, Section 28 of the Parental Leave Act grants the right to maternity benefits, subject to the condition that, within the last 12 months, the person has been self-employed for at least half the normal contractual working week for at least six months, which includes the last month immediately prior to the absence. The condition for the payment of maternity benefits is that the employment requirements in Section 27 or Section 28 have been met at the start of a period of absence.

5.5.10 Notice period

Under Section 15(4) of the Parental Leave Act, an employee who wishes to exercise his/her right to parental leave, under Sections 9 and 10, must within eight weeks after childbirth or the arrival of the child inform the employer of the date of the beginning of the absence and of the duration of the absence. If the right to absence is exercised so that the employee's absence falls in several periods, the information must include the beginning and the duration of later absence.

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

In accordance with the Parental Leave Act, it is possible to extend the parental leave with some degree of public benefits.

Parents who are employees and who are entitled to parental leave under the act may postpone 8 to 13 weeks of the 32-week parental leave.

Only one parent may postpone parental leave and the postponed leave must be kept together and be taken before the child is nine years of age.

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

There are no special arrangements for small firms.

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

According to Section 26 of the Act on Leave and Benefits in the Event of Childbirth, parents with severely ill children under the age of 18 are entitled to unemployment benefits if, in connection with the child's illness, they completely or partly abandon paid work or personal work in a self-employed business.

Section 42 of the Social Services Act provides parents with a right to leave and a right to compensation for loss of income if they look after their mentally impaired child at home. This provision also applies to parents who care for a child who suffers from long-term illness.

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

Prospective adoptive parents who reside abroad in order to adopt a child each have a right to be absent from work for up to four weeks before receiving the child. The child is received by the parents when the formal conditions to return home with the child are met. Prospective adoptive parents, who are adopting a child in Denmark, are entitled to leave for up to one week prior to receiving the child, if the child is not already residing in the adopter's home. In the first 14 weeks after receiving the child, one of the adopting parents at a time is entitled to leave. There is a right for the parents to take simultaneous leave for two consecutive weeks. The right to be absent under parental leave, according to Section 8(7), can start in the first 14 weeks after receiving the child. Section 8(7) provides that, after the 14th week after receiving the child, adopters have the right to a leave of absence from work during parental leave according to Sections 9 and 10 (i.e. the normal rules on parental leave). Thus, adopting gives the same rights as in the maternity situations described above, except regarding the adoption of children from Denmark, in which case the pre-leave is only one week, according to Section 8(4).

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

As previously mentioned, the statutory provisions on discrimination related to pregnancy and maternity, maternity leave, paternity leave, parental leave and adoption leave are to be found in the Act on Equal Treatment of Men and Women as regards Access to Employment, etc., Section 9, according to which an employer may not dismiss an employee for having put forward a claim to use the right to absence or for having been absent under Sections 6 to 14 of the Act on Entitlement to Leave and Benefits in the Event of Childbirth or for any other reason related to pregnancy, maternity or adoption.

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

According to Section 8a of the Act of Equal Treatment of Men and Women as regards Access to Employment, etc., parents who have exercised the right to a leave of absence (under the Act of Entitlement to Leave and Benefits in the Event of Childbirth, Sections 6-14) have the right to return to the same or equivalent job, which is no less favourable to them, and to benefit from any improvements in working conditions.

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

All rights acquired or in the process of being acquired by the worker on the date on which parental leave starts are maintained as they stand until the end of the parental leave, cf. Section 8, Act of Equal Treatment of Men and Women as regards Access to Employment, etc.

5.5.18 Status of the employment contract or relationship during parental leave

The status of the employment contract/relations during parental leave is not defined in the legislation. However, the contract is not affected by parental leave but is suspended and valid during the time of absence. The employee thus accumulates employment seniority during parental leave.

5.5.19 Continuity of entitlement to social security benefits

Parents on parental leave continue to be entitled to social security benefits.

5.5.20 Remuneration

The weekly allowance is approximately DKK 4 405 (EUR 592) per week for 32 weeks in total. However, some collective agreements provide a right to the full salary during part of the parental leave.

5.5.21 Social security allowance

Parents are entitled to parental leave benefit for 32 weeks in total. The allowance is maximum DKK 4 405 (EUR 592) per week, according to Section 36 of the Parental Leave Act.

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

The implementation of the Directive 2010/18 did not introduce any more favourable provisions.

5.5.23 Case law

There is a large number of cases pertaining to dismissals occurring during parental leave or afterwards, where the decision to dismiss in reality was taken by the employer during the parental leave. In such cases the burden of proof lies with the employer, according to Section 16 of the Act of Equal Treatment of Men and Women as regards Access to Employment, etc..

One example is the Western High Court Judgment U.2020.331V, mentioned above in Section 3.4.3, where a female employee had her previous working hours changed during leave as well as being transferred to a different department. She disputed the changes and her trade union made a claim for compensation under Section 16(1) of the Equal Treatment Act, since the changes in her working conditions had to be regarded as a dismissal in violation of Section 9 of the Act. The changes in her working conditions with regard to working hours and job content were significant, i.e. constituting a dismissal, which had taken place during her maternity leave. The employer could not prove that the dismissal was not linked to her absence, thereby violating Section 9 of the Equal Treatment Act. She was therefore awarded compensation corresponding to 12 months' salary, DKK 277 000 (EUR 37 250).

Furthermore, two cases from 2019 are illustrative of the case law:

The ruling 18-58122 from the Equality Board,⁵⁵ where an employee took a holiday period in continuation of maternity and parental leave. The employee was dismissed during the holiday period. The letter of dismissal stated that, at the time of return after maternity and parental leave, the employee did not possess what was required for the job. The Equality Board assumed that the decision to dismiss the employee had already been made during maternity and parental leave. The employer had not lifted the burden of proof that the maternity and parental leave had not been fully or partially part of the decision to dismiss the employee. In assessing this, it was emphasised that the employer had stated that before leaving on maternity and parental leave, the employee had fulfilled her duties and that the position of the employee as business controller when leaving was still in existence at the time of her return. The Equality Board therefore awarded her compensation due to the breach of the Act of Equal Treatment of Men and Women as regards Access to Employment, etc. equal to nine months' salary.

Another illustrative case is the ruling by the Eastern High Court of 31 October 2019,⁵⁶ which concerned whether the dismissal of an employee occurred as a result of his notice of an upcoming unpaid parental leave, or whether the dismissal occurred for other legitimate reasons. The parties in the case agreed that the employer's termination of an amendment to the employee's employment contract constituted a significant change to his terms of employment, which the employee was entitled to consider a dismissal of the employment relationship unless the employee accepted the changes. It was also agreed that, under the Act of Equal Treatment of Men and Women as regards Access to Employment, etc., the employer bore the burden of proof that the principle of equal treatment was not violated. The employment contract amendment of 22 November 2017 stated that it was the employer's goal that the employee should, in time, switch to full-time sales and that in connection with this – during ongoing and monthly meetings between the employee and his manager for the sales and service department – he had to evaluate how the sales process and order intake evolved towards the stated goal. According to the evidence, it was assumed that by the end of June 2018, the sales department had experienced growth for the year of almost DKK 6 million (EUR 805 000) and that at no time was the employee criticised for his efforts, for which, in accordance with the employment contract supplement, he received a bonus. The High Court assumed that the head of the service department did not, during the status meeting of 11 June

⁵⁵ See the ruling in Danish here: <https://www.retsinformation.dk/eli/retsinfo/2020/9053>.

⁵⁶ Case BS-6563-2019.

2018 with the employee, when the latter announced the upcoming paternity leave in the spring of 2019, express a need for strengthening the service department's staff. Under those circumstances, after an overall assessment, which included the close temporal connection between the employee's announcement of his paternity leave request and the employer's termination of his employment contract amendment, the Eastern High Court found that the employer had not lifted the burden of proof of the paternity leave not wholly or partially influencing the employer's decision to terminate the said amendment. The employee was therefore entitled to compensation under Section 16(2) of the Act of Equal Treatment of Men and Women as regards Access to Employment, etc. corresponding to six months' salary plus bonus, totalling DKK 240 126 (EUR 32 200). The case illustrates that not only dismissals but also any less favourable treatment pertaining to parental leave can constitute a breach of the Act of Equal Treatment of Men and Women as regards Access to Employment, etc. – also relating to male employees.

5.6 Paternity leave

5.6.1 Existence of paternity leave in national law

Paternity leave is covered by Section 7(3) of the Act on Entitlement to Leave and Benefits in the Event of Childbirth, according to which a father or co-mother has the right to be absent for 2 consecutive weeks after birth or upon receipt of the child at home or by agreement with the employer within the first 14 weeks after birth. Employees and self-employed persons can hold the 2-week absence as non-consecutive periods within the first 14 weeks after birth. For employees, non-consecutive absences require an agreement with the employer.

The father or co-mother is entitled to benefits under Section 35 of the Consolidation Act on Entitlement to Leave and Benefits in the Event of Childbirth and is subject to the conditions set forth in Sections 27 to 29 of the Act, which are described above under Section 5.5.9.

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

The same rights for protection against unfavourable treatment apply to paternity leave as to maternity leave (see above) as the act applies to all parents.

5.6.3 Case law

The ruling 19-2487 by the Equality Board, in which a male carpenter was dismissed after informing his employer that his girlfriend was pregnant and that he wanted to take paternity leave immediately following the birth of the child. As the carpenter was dismissed during his girlfriend's pregnancy, the rules on reverse burden of proof applied. The carpenter was dismissed due to a lack of work. On the basis that the employer had, among other things, lost a large work project, the Board assumed that it was objective to dismiss an employee. The Board further assumed that the carpenter was chosen for dismissal as he was the employee who had been employed for the shortest time. The other employees were the owner's son, two apprentices and two journeymen. The latter had special duties that could not be performed by the carpenter. Hence, the Board assessed that the employer had lifted the burden of proof that the dismissal was not wholly or partly motivated by the carpenter's wish to take paternity leave. The complaint by the carpenter was dismissed.

The ruling 18-42450 by the Equality Board⁵⁷ concerned a male employee who was dismissed from his position as department head two days after the birth of his child. On

⁵⁷ See the ruling in Danish here: <https://www.retsinformation.dk/eli/retsinfo/2019/9185>.

the basis of the company's accounts and board minutes, the Equality Board assumed that at the time of dismissal the company was in financial difficulties and that it was necessary to dismiss several employees. In addition to the head of department, another employee was also dismissed, while a third employee agreed to change the terms of employment. The head of department was selected for dismissal due to his short time of employment after a significant deficit was found in the company. The Equality Board considered that the company had lifted the burden of proof that his partner's pregnancy and childbirth, or his desire for paternity leave, had no bearing on the dismissal and acquitted the employer of the claim for compensation.

5.7 Time off for *force majeure*

5.7.1 Time off for *force majeure*

National legislation entitles workers to time off work on grounds of *force majeure*, if it is family related. Employees are entitled to absence from work where urgent family reasons in cases of sickness or accident make the immediate presence of the employee indispensable (*force majeure*) according to Section 1(1) of the Act No. 223 of 22 March 2006 on Employees' Entitlement to Absence from Work for Special Family Reasons.

The protection applies, as long as the situation is of an acute character. The conditions pertaining to the period and eligibility have not been further specified in the legislation.

An unlawfully dismissed employee is entitled to compensation, cf. Section 4(2).

5.7.2 Case law

In Eastern High Court ruling U.2011.70, an office assistant's son was acutely hospitalised, and the presence of the office assistant was necessary for six days in the hospital due to testing and a disabling diagnosis. The assistant was dismissed during the six days of absence with reference to her 'significant absence'. The Court referred to the preparatory works of Act No. 223 of 22 March 2006 on Employees' Entitlement to Absence from Work for Special Family Reasons which stipulate that absence due to such circumstances must normally be presumed to be of short duration until the employee can organise other measures. On the basis of an overall assessment of all the circumstances, including the character of the disease, the duration of the absence, the hospital reports and ensuing assessments of continuing care and compensation schemes, the Court found that the assistant had a right to absence as her son's disease was a compelling family reason that made her immediate presence urgently necessary in the six-day period. The compensation for breach of the protection in the Act on Employees' Entitlement to Absence from Work for Special Family Reasons was set at three months' salary. The assistant had been employed for less than three months at the time of termination.

The Supreme Court, in ruling U.2011.1355/2 H, specified that the protection against dismissal for not coming in to work at the request of the employer on a specific day does not apply, when the situation is no longer of an acute character.

In the Maritime and Commercial Court ruling of 29 June 2011, case F-6-10, acute hospitalisation of a spouse due to risk of dying, was also considered *force majeure*, and termination was in breach of the protection.

In the Dismissal Board ruling of 10 December 2012, case 2012.0395, the hospitalisation and necessary, but not life-threatening, surgery of twins, was considered a *force majeure* situation and termination was in breach of the protection.

5.8 Care leave

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

National law also entitles workers to care leave. According to Section 1(2) of the Act No 223 of 22 March 2006 on Employees' Entitlement to Absence from Work for Special Family Reasons, employees are entitled to absence from work in the form of care leave, if the employee is engaged by the local authority according to the provisions thereof in the Act on Social Services in order to care for a closely connected person with substantial and permanent impairment of physical or mental function or serious, chronic or long-term illness. According to Subsection 3, the employee is entitled to absence, if the employee receives constant care allowance according to the provisions thereof in the Act on Social Services in order to care for a closely connected person who wishes to die in his/her own home.

5.8.2 Case law

The District Court ruling BS-25143/2018-HIL of 4 March 2019 concerned the dismissal of an employee, who was absent on care leave caring for her dying father, see Section 1(3) of the Act. The employer tried to withdraw the dismissal afterwards, but it was deemed final. The District Court ruled that the employee was dismissed at a time when she was on leave to care for her father who wanted to die in his own home, in accordance with Section 1(3) of the Sickness Leave Act. Hence, the court found the employee to be entitled to compensation in accordance with Section 4(1) of the Sickness Leave Act. The court stated in the ruling that the Sick Leave Act – Act No. 223 of 22 March 2006 on workers' right to absence from work for special family reasons – is an implementation of the *force majeure* provision of Council Directive 96/34/EC on the framework agreement on parental leave concluded by the general interdisciplinary organisations (UNICE, CEEP and EFS). According to the court, an infringement of the Sickness Leave Act should therefore be equated with a violation of the rights to parental leave, as per Section 9 of the Equal Treatment Act. Accordingly, the court found that the principles for determining compensation for dismissal in violation of the Equal Treatment Act should be applied in cases such as the one at hand. The employee had been employed for approximately one year and eight months. The compensation was fixed according to her seniority for pay corresponding to nine months' salary.

The case was appealed, and the Eastern High Court found that the employee had rightly considered herself dismissed, and she was also found not to have lost her claim for compensation. In determining the amount of the compensation, the High Court noted that:

'Section 1(3) of the Sickness Leave Act, which was amended by Act No. 223 of 22 March 2006 on the right of employees to be absent from work for special family reasons (the Sickness Leave Act) is not related to the *force majeure* provision of the Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC. The preparatory works to Section 1(3) cf. legislative proposal No. L91, which was submitted by the Minister for Family and Consumer Affairs on 30 November 2005, state that this is a continuation of the current provision in Section 1a(1) of Act No. 359 of 6 June 2002 on leave for employees who care for close relatives with a disability or serious illness. The preparatory works of the compensation provision in Act No. 359 of 6 June 2002 on leave for employees who care for close relatives with a disability or serious illness state that the compensation must be determined taking into account the employee's employment period and the circumstances of the case in general, and that the provision in question complements the general protection against unfair dismissal, under which many employees are already covered. This is repeated in the preparatory works for the compensation provision in Act No. 223 of 22 March 2006

on employees' "right to absence from work for special family reasons, cf. the comments on Section 4 of legislative proposal No. L91".'

On that basis, the High Court found that the compensation, taking into account the employee's period of employment and the circumstances of the case in general, should be set at DKK 110 400 (EUR 14 850), corresponding to four months' salary.

5.9 Leave in relation to surrogacy

There is no leave in relation to surrogacy in Denmark. According to the Children Act, any agreement on surrogacy is rendered invalid. Parental leave is not available in relation to surrogacy, which might result in a very insecure legal position, in particular for a woman who tries to become the legal mother of a child carried by another woman. Under Section 31 of the Children Act, any agreement that a woman who gives birth to a child will surrender the baby to someone else after the birth is invalid. Under Section 33 of the Adoption Act, help must not be given or received in order to make a connection between a woman and another person who wants the woman to give birth to a child for the adoptive mother.

5.10 Flexible working time arrangements

5.10.1 Right to reduce or extend working time

According to Section 8a(2) of the Act on Equal Treatment of men and women as regards access to Employment Act, the employee has the right to ask the employer for changes in working hours and working patterns within a specified period after return from a leave of absence. The employee has no legal right to modified working time arrangements. However, the employer is obliged to consider a written application from the employee and to provide a written response within a reasonable length of time, which according to the preparatory works normally equals 14 days.⁵⁸

According to Section 9 of the Act on Equal Treatment of Men and Women as regards Access to Employment, the employer cannot subject the employee to 'less favourable treatment' if the employee has applied for a modified work schedule.

According to the Act on Parental Leave, it is possible to extend parental leave. In total, 13 weeks of the 32 weeks of parental leave can be postponed.

Some collective agreements contain provisions on flexible working arrangements after the return from a leave of absence. As one such example is the agreement covering the financial sector, which allows parents with children under the age of 12 an agreement on reduced working hours. According to clause 80 of this collective agreement, employees are entitled to a reduction in working hours up to 30 hours per week. The specific conditions must be agreed on with the employer and the agreement applies for a period of 3 to 12 months. The employer can refuse to enter an agreement if the agreement is inconsistent with the operational conditions of the company. In such situations, the employer is obliged to discuss the refusal with trade union representatives and explore alternative options.

5.10.2 Right to adjust working time patterns

Beyond the right to request an adjustment as mentioned under Section 5.10.1, there is no individual right to adjusted working time. However, the employer and the employee can agree on adjusted working time. Working hours and patterns must be stipulated in

⁵⁸ Proposal for amendment Act No. 105 of 12 December 2012 in the remarks to the amendment proposal.

the employment contract and are thus a matter of agreement between the parties. The contractual freedom is, however, limited by regulation and collective agreements.

5.10.3 Right to work from home or remotely

There is no right for the employee to work from home or remotely in Denmark. However, a right to work from home or remotely can be agreed between employer and employee and in some sectors, in particular the public sector, there are collective agreements supporting such individual agreements, albeit not granting the employee an absolute right to be granted a right to work from home.

5.10.4 Other legal rights to flexible working arrangements

There is no legislation granting the employee a legal right to flexitime, but many collective agreements stipulate a right for employees to organise their daily working hours to a certain extent.

An example from the private sector is the collective agreement between the Danish Employers' Association for the Financial Sector (FA) and the Financial Services Union on salary and working conditions in the banking and mortgage credit sector, where Paragraph 12 reads:

'12 Flexitime

(1) Flexitime provides the employee with the possibility of organising his or her own daily working hours—responsibly, and taking into account the running of the company.

(2) Employees are entitled to flex up to two hours either side of core time. Core time is the period of the day when the individual employee/all employees have to be present. If core time is not usable as a starting point for flexitime, the company can choose instead to give employees the right to flex up to two hours either side of starting or leaving time respectively.

Where appropriate, a local agreement can be concluded on extended scope for flexitime. The company can oppose flexitime for individuals or groups of employees if the work is incompatible with flexitime. The local shop steward must be given objective reasons why this is not feasible. In the event of disagreement, the case can be pursued with the union representative. If agreement cannot be reached, the talks will be carried on between the organisations.'

Similar provision, albeit more detailed, is commonplace in the public sector.

5.10.5 Case law

There is no case law concerning disputes in relation to a request for flexible working arrangements within the scope of gender equality.

5.11 Evaluation of implementation

National law implements EU law to a satisfactory standard.

5.12 Remaining issues

The COVID-19 pandemic brought about the question of whose financial burden – employee or employer – it was, if an employee had to stay at home to take care of a child, if the child had been sent home from school due to a case of COVID-19 at the school, despite

the child not being infected by COVID-19. By principle, it was the burden of the employee, which caused some debate. A tripartite agreement provided an extra period of 10 days of parental leave in situations where children were sent home from school due to closure of classes or schools to reduce the risk of spread of infection. The scheme was implemented as an amendment to the Act on Entitlement to Leave and Benefits in the Event of Childbirth, by Act No. 1427 of 29 of September 2020. The amendment allows parents of a child under 14 years of age to apply for parental leave benefits, if their child has been sent home due to a case of COVID-19 at their daycare centre, preschool or school. They can apply for parental leave benefits for up to 10 days, cf. Section 26c. Obtaining the right to benefits is conditional upon e.g. the employee taking time off without pay because of not being able to work from home. The right to benefits provides a degree of financial security for the employees.

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

6.1 General (legal) context

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

There are no specific reports addressing difficulties linked to occupational and or statutory social security issues.

6.1.2 Other issues related to gender equality and social security

There are no other issues.

6.1.3 Political and societal debate and pending legislative proposals

There are no pending debates or proposals related to occupational and or social security issues.

6.2 Direct and indirect discrimination

The principle of equal treatment of men and women covers occupational pension schemes according to Consolidation Act No. 950/2015 on Equal Treatment between Men and Women regarding insurance, pensions and similar matters. According to Section 3a of the act, direct as well as indirect discrimination is prohibited. In respect of occupational pensions, the act prohibits both the payment of different contributions as well as different benefits even in situations where the reason for different treatment is due to actuarial factors. However, this provision applies only to workers who joined the scheme after July 1999.

6.3 Personal scope

According to its Section 1(1)(1), the Act on Equal Treatment between Men and Women regarding insurance, pensions and similar matters, covers workers, including self-employed persons, workers who are temporarily out of work due to illness, pregnancy and maternity, accident or involuntary unemployment, and persons seeking work, as well as retired and disabled workers and the beneficiaries of those workers. Thus, the coverage complies with Directive 2006/54.

6.4 Material scope

The Act on Equal Treatment between Men and Women regarding insurance, pensions and similar matters covers all occupational security schemes including occupational injuries, sickness, invalidity, unemployment and age (see Section 4). The act also covers benefits in kind.

6.5 Exclusions

There are no exclusions.

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

There is no specific case law.

6.7 Actuarial factors

In 1998, the Act on Equal Treatment between Men and Women in insurance, pension and similar matters was adopted. The act stipulates the use of unisex occupational pension schemes. The main provision in the act prohibits provisions in occupational pensions schemes according to which men and women are treated differently on grounds of gender as regards the determination and calculation of contributions and benefits. Of special importance is that the act prohibits different contributions as well as different benefits, even in situations where the reason for difference in treatment is due to actuarial factors. However, the prohibition on treating contributors differently on grounds of gender-specific actuarial factors applies only to workers who joined the scheme after 1 July 1999.

In Denmark, most occupational pension schemes are defined-contribution schemes. During the past 25 years, a number of pension schemes have been established in connection with the renewal of collective agreements in 1989 and 1993. Most of the schemes use actuarial calculations that result in women receiving the same monthly benefit as men for whom identical contributions have been paid.

6.8 Difficulties

There are no specific difficulties

6.9 Evaluation of implementation

Implementation is satisfactory.

6.10 Remaining issues

There are no remaining issues.

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

7.1 General (legal) context

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

There are no recent national surveys or reports linked to statutory schemes of social security.

7.1.2 Other relevant issues

No other relevant issues.

7.1.3 Overview of national acts

- Consolidation Act No. 903 of 26 August 2019 on Health (healthcare and hospital treatment)
- Consolidation Act No. 107 of 2 February 2020 on Sickness Benefits (sickness benefits)
- Consolidation Act No. 106 of 2 February 2020 on Entitlement to Leave and Benefits in the Event of Childbirth (maternity benefits)
- Consolidation Act No. 199 of 11 March 2020 on Unemployment Insurance (unemployment insurance)
- Consolidation Act No. 983 of 23 September 2019 on Social Pension (old age pension)
- Consolidation Act No. 548 of 7 May 2019 on Active Employment Policy (wage subsidies)
- Consolidation Act No. 1110 of 10 October 2014 on Labour Market Supplementary Pension (supplementary pension to wage earners)
- Consolidation Act No. 609 of 3 June 2016 on Child and Youth Benefits (child and youth benefits)
- Consolidation Act No. 63 of 21 January 2019 on Child Allowance (child allowance)
- Consolidation Act No. 376 of 31 March 2020 on Occupational Injury (occupational injury)

7.1.4 Political and societal debate and pending legislative proposals

There are no pending political or social debates or proposals regarding Directive 79/7.

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

Denmark implemented Directive 79/7/EC by removing all direct discriminatory elements in the legislation. Most benefits were made gender neutral, however in specific situations the implementation resulted in a levelling down, for instance, widows' pension was

abolished and was not replaced by a gender-neutral survivors' pension with the exception of the gender-neutral right to spouses' pension granted to spouses of civil servants according to the Act on Civil Servants' Pensions, which was gender neutral even prior to the Directive. The principle of gender equality in matters of social security was first made visible in the Danish legislation by the adoption of the Equality Act in 2000. Before 2000, the principle of equal treatment of men and women with regard to social security was not evident in Danish legislation.

7.3 Personal scope

The scope of the statutory acts mentioned under Section 7.1.3 is gender neutral and the personal scope differs in accordance with the purpose of the act in question. It is therefore not possible to define whether it is more restrictive or broader, since the individual acts cover separate aspects of the risks mentioned in Article 3 of the Directive.

7.4 Material scope

The material scope of the statutory acts mentioned under Section 7.1.3 differs in accordance with the purpose of the act in question. It is therefore not possible to define whether it is more restrictive or broader, since the individual acts cover separate aspects of the risks mentioned in Article 3 of the Directive.

7.5 Exclusions

There are no exclusions.

7.6 Actuarial factors

Sex is not used as an actuarial factor; the percentage of contributions and the level of benefits is the same for men and women.

7.7 Difficulties

There are no specific difficulties.

7.8 Evaluation of implementation

The implementation in national law is satisfactory.

7.9 Remaining issues

There are no remaining issues.

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

8.1 General (legal) context

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

The report *Atypical employment in Denmark* by Professor Steen Scheuer⁵⁹ analyses the working conditions of self-employed independent contractors and identifies the risk factors in comparison to regular employment. The report *inter alia* documents that whereas 95 % of employees in typical employment are entitled to their normal salary during sick leave, only 30 % of self-employed have taken out insurance giving them the same right. According to the report, only just under 60 % of self-employed have independent pension savings (compared to 92 % and 72 % respectively for normal and atypical employees).

8.1.2 Other issues

There are no further issues.

8.1.2 Overview of national acts

Section 5 of the Consolidation Act No. 645/2011 on Equal Treatment of Men and Women as regards Access to Employment, etc.

Section 3 of the Consolidation Act No. 1001/2017 on the Prohibition of Discrimination in the Labour Market, and

Section 1 of the Consolidation Act No. 950/2015 on Equal Treatment between Men and Women in insurance, pension and similar matters.

Section 2 of the Consolidation Act No. 106 of 2 February 2020 on Entitlement to Leave and Benefits in the Event of Childbirth.

Section 57a of the Consolidation Act No. 199 of 11 March 2020 on Unemployment Insurance.

8.1.3 Political and societal debate and pending legislative proposals

There are no current political debates or pending legislative proposals.

8.2 Implementation of Directive 2010/41/EU

There is no specific act on self-employed persons in Denmark nor is there a general definition of the concept of self-employment in the legislation.

Directive 2010/41/EU on self-employed people and helping spouses did not require transposition into Danish law, since it was not interpreted as requiring any substantial changes compared to what was already current Danish law.

⁵⁹ Report 'Atypisk beskæftigelse i Danmark Om deltidsansattes, midlertidigt ansattes og soloselvstændiges vilkår', LO-Dokumentation Nr. 1/2017 available here in Danish: <https://fho.dk/wp-content/uploads/lo/2017/09/atypisk-beskaeftigelse-i-danmark-steen-scheuers-rapport-enderlig.-rettet-version.pdf>.

8.3 Personal scope

8.3.1 Scope

In Denmark, gender equality in self-employment is governed by the Act on Equal Treatment of Men and Women as regards Access to Employment, etc. (*Liegebehandlingsloven*) and the Gender Equality Act (*Ligestillingsloven*). These two acts complement each other. Most provisions on the principle of equal treatment between men and women engaged in an activity in a self-employed capacity, or contributing to the pursuit of such a capacity, are found in the Act on Equal Treatment of Men and Women in Access to Employment, etc.

8.3.2 Definitions

There is no general definition of self-employment in Danish law. However, self-employment is defined in the Act on Unemployment Insurance, under Section 57a, which aligns the definition with the tax definition. Any activity with the purpose of generating income and where the person has or has had personal work with the activity can be viewed as self-employment, if one of five additional conditions are met. One of these conditions is that the activity is registered with the Central Business Registry, unless the tax authorities tax the income as personal salaries, see Section 57a(1)(1). The tax authorities assess the reality of the status of self-employed versus employees, which very much resembles the assessment in labour and employment law, according to the guidelines from the tax authorities.⁶⁰

This means that having registered a business with the Central Business Registry is not in itself decisive for status as genuinely self-employed in relation to unemployment benefits, but an individual assessment must be carried out.

8.3.3 Categorisation and coverage

There are no differences in coverage between groups of self-employed people. All self-employed persons fall under the same category.

8.3.4 Recognition of life partners

There is no specific regulation defining life partners. In general, cohabitating persons are not treated the same as married persons.

The life partner of a self-employed person does not have the same right as a married person in respect of tax, due to the Act No. 1403/2010 on Taxation at Source (*Kildeskatteloven*) and Act No. 1163/2015 on Taxation on Personal Income (*Personskatteloven*).

A spouse can be jointly taxed with the self-employed person. This is not the case for the life partner of a self-employed person.

Thus, in general, life partners are not recognised as equal to spouses. On the other hand, the directive is not clear with regard to the obligations that must be implemented in national law.

Following a Supreme Court judgment,⁶¹ there is a difference between the legal position of unmarried life partners and spouses, not only with regard to self-employed workers but also in general. This judgment did not concern self-employed workers but compensation

⁶⁰ Legal guidelines 2020-21, C.C.1.2.1 Self-employed work, delimitation of employees, <https://skat.dk/skat.aspx?oID=2048530&chk=216701>.

⁶¹ Supreme Court, U.2012.1629H, case No. 94/2010 of 01-02-2012.

with regard to taxation due to the cessation of cohabitation between life partners and stated that it is a legal right for the state to treat spouses and life partners differently.

8.4 Material scope

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

As mentioned under Section 8.2, Directive 2010/41/EU on self-employed people and helping spouses did not require transposition into Danish law, since it was not interpreted as requiring any substantial changes compared to what was already current Danish law.

8.4.2 Material scope

As mentioned under Section 8.1.2, a range of statutory acts regulate particular risks and benefits concerning social security, but they all ensure gender equality. Whether it is broader or the same is difficult to ascertain.

8.5 Positive action

Denmark has not adopted positive action measures in this field.

8.6 Social protection

Denmark has a system for the social protection of self-employed workers. Self-employed men and women and collaborating spouses are covered by Danish social security schemes, e.g. in case of sickness, pregnancy, or unemployment.

The unemployment benefit schemes are voluntary both for workers/employees and self-employed/collaborating spouses. Membership in an unemployment benefit scheme and payment of membership fees is required in order to obtain benefits. Occupational injuries insurance is mandatory for workers/employees but voluntary for self-employed and collaborating spouses. Other social security schemes such as sickness benefits and pregnancy and maternity/paternity benefits are mandatory both for workers/employees and for self-employed/collaborating spouses.

Section 41 of the Sickness Benefits Act entitles self-employed and collaborating spouses to benefits after two weeks of illness. For workers/employees, the employer carries the risk of the first 30 days of a sickness period. On a voluntary basis and by paying contributions, self-employed/collaborating spouses can insure themselves from the first or third day of illness according to Section 45 of the Sickness Benefits Act.

There is no special system for social protection for self-employed workers or collaborating spouses in Denmark. They are covered by the general social protection system including social pensions and healthcare, etc. on the same conditions as others. There are no schemes in Denmark which are mandatory for the self-employed worker but voluntary for his/her spouse or life partner, or vice versa.

8.7 Maternity benefits

Under the Act on Entitlement to Leave and Benefits in the Event of Childbirth, self-employed persons and collaborating spouses have the same rights to maternity leave, paternity leave and parental leave and maternity, paternity or parental leave benefits during such leave, vis-à-vis the municipality, as workers/employees if they meet the occupation requirement provided for in Section 28 of the Act. Since they have no employer, they have no rights against employers. Under Section 28 of the Act, it is a condition for the right to maternity, paternity or parental leave benefits for self-employed persons that within the last 12 months they have been self-employed for at least half the normal

contractual working week for at least 6 months, including the last month prior to the absence. If the self-employed person has been self-employed for less than six months prior to the absence, prior periods as worker/employee can be taken into account.

In 2020, the Danish Government adopted a legislative proposal to improve the maternity/parental leave situation for self-employed persons, aiming to solve certain economic challenges experienced when self-employed take maternity/parental leave from their self-employment activity. The proposal was part of an overall political intention to improve the incentive for women to become self-employed in the private sector, as well as to improve the salary compensation during maternity and parental leave for men and women. The proposal entailed an amendment to the existing Act on Equalisation of Maternity Leave, applicable to the private sector. The amendments were adopted on 17 December 2020 and came into force on 1 January 2021. The situation before the amendments was that self-employed were entitled to receive only maternity and parental leave benefits during maternity and parental leave on the same terms as employees. The Parental Leave Benefits Act applies to employees as well as to self-employed. The level of benefits is capped, and the same cap applies to self-employed and employees. In addition, many collective agreements entitle employees to receive their normal salaries during a considerable part of their maternity and parental leave. When an employer pays out the normal salary to employees on maternity/parental leave, the employer is entitled to receive the parental leave benefits from the local municipality as a reduction of their expenses in relation to employees on maternity/parental leave. In addition, private employers could apply for further salary compensations from the Maternity Equalisation Fund, to reduce the costs for paying the difference between employees' maternity/parental leave benefits and their full salaries. The purpose of the Maternity Equalisation Fund is to equalise the expenses relating to maternity/parental leave between private employers with many female employees and private employers with many male employees.

However, the self-employed were not entitled to apply for additional funding from the Maternity Equalisation Fund. The self-employed were thus in a situation where they experienced financial challenges during maternity/parental leave. The maternity/parental leave benefits often did not match the level of income of the self-employed. The self-employed could not apply for additional funding with a view to reducing the gap between the usual income level and the level of maternity/parental leave benefits. Nor could the self-employed apply for compensation to reduce the financial burden of the ongoing costs of running the company whilst on maternity/parental leave, such as rent for commercial property, commercial insurance and temporary staff.

The amendment awards the self-employed access to the Maternity Equalisation Scheme applicable to private employers. The self-employed can receive compensation from the Maternity Equalisation Scheme similar to the salary compensation reimbursed to private employers. The compensation to the self-employed is calculated based on the difference between the income of the self-employed in the preceding financial year(s) and the level of maternity/parental leave benefits. The compensation is capped at the same level as private employees' salary compensations from the Maternity Equalisation Scheme. This compensation scheme reduces the general costs of being on maternity/parental leave for the self-employed and can, for example, be used to pay for ongoing costs such as rent, insurance and a temporary worker during the leave period. In turn, all self-employed (where self-employment is their main occupation) must contribute to the Maternity Equalisation Fund on an equal footing with private companies. The annual contribution for self-employed is set at DKK 1 225 (EUR 163).

The maternity benefit meets the requirement of sufficiency in Article 8(3) of Directive 2010/41. The criterion used is Subparagraph (a). The allowance is granted on a mandatory basis. There is no choice between public maternity benefit systems. There is no provision for services supplying temporary replacements.

8.8 Occupational social security

8.8.1 Implementation of provisions regarding occupational social security

Directive 2002/73/EC was implemented by Act No. 1385 of 21 December 2005 amending the Equal Treatment in Employment and Occupation Act. The Equal Treatment in Employment and Occupation Act deals with gender equality with regard to access to employment including self-employment, working conditions (including pay), promotion and dismissal. The Equal Treatment in Employment and Occupation Act was not amended again in connection with transposition of the Recast Directive and the Self-Employment Directive since those Directives were not interpreted as requiring any substantial changes compared to what was already current Danish law.

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

National law introduces no exceptions for self-employed persons regarding occupational social security matters.

8.9 Prohibition of discrimination

Section 5a of the Act on Equal Treatment of Men and Women as regards employment etc. prohibits discrimination (direct as well as indirect) on grounds on gender by anyone who makes decisions on access to or conditions of work as a self-employed person or a helping spouse.

8.10 Evaluation of implementation

The implementation is satisfactory.

8.11 Remaining issues

There are no particular issues relating to self-employed and their position during the COVID-19 pandemic in relation to gender equality, as the relief packages have been gender neutral and have not generated any documented disparate effect between female and male self-employed.

9 Goods and services (Directive 2004/113)⁶²

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

Danish Institute for Human Rights (2013), *Report on Women's Equal Access to Goods and Services*.⁶³ The report analyses legislation and case law in relation to the prohibition of discrimination in relation to goods and services. The report concludes that the application of the principle of non-discrimination in cases relating to services and goods differs from the application of the principle of non-discrimination in cases relating to the labour market. Cases from the Equality Board on services and goods are primarily men complaining of a direct discriminatory practice, whereas cases relating to discrimination in the labour market primarily concerns women who are complaining of an indirect discriminatory practice.

The Institute for Human Rights in 2016 issued a report on gender equality in prices and services.⁶⁴ The report focuses on the Gender Equality Act's rules on equal access to the public and private services used in everyday life. The report touches upon the recent lawsuits of principle, including the lawfulness of a separate women's floor at a hotel and different hairdressing prices for women and men.

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

Issues of discrimination concerning access to and supply of goods in the digital economy have not attracted any attention.

9.1.3 Political and societal debate

There are no specific political or societal debates pending.

9.2 Prohibition of direct and indirect discrimination

Section 3a of the Act on Equal Treatment of Men and Women in insurance, pensions and similar matters prohibits direct as well as indirect discrimination, as does Section 2 of the Consolidation Act No. 1147/2020 on Gender Equality.

9.3 Material scope

According to Section 1, the Act on Equal Treatment of Men and Women in insurance, pensions and similar matters covers insurance and similar financial matters.

According to Section 1a(1)(2), the prohibition on discrimination in the Act on Gender Equality applies to authorities and organisations and all persons providing goods and services available to the public in both the public and private sectors, including public bodies, offered outside private and family life, as well as transactions therein.

In that respect, the scope of the two acts is similar to that of the Directive, given the similar wording of Section 1a(1)(2) and Article 3(1) of the Directive.

⁶² See e.g. Caracciolo di Torella, E. and McLellan, B. (2018), Gender equality and the collaborative economy, European network of legal experts in gender equality and non-discrimination, available at <https://www.equalitylaw.eu/downloads/4573-gender-equality-and-the-collaborative-economy-pdf-721-kb>.

⁶³ https://menneskeret.dk/files/media/dokumenter/udgivelser/undersoegelse_om_lige_adgang.pdf.

⁶⁴ <https://menneskeret.dk/udgivelser/ligestilling-priser-service>.

9.4 Exceptions

National law has not applied the exceptions from the material scope as specified in Article 3(3) of Directive 2004/113, regarding the content of media, advertising and education. The Danish Act on Gender Equality applies to all areas of society, encompassing media content, advertising and education.

9.5 Justification of differences in treatment

Article 4(5) of Directive 2004/113 is transposed into Danish law through Section 3a of the Gender Equality Act, which reads:

'Notwithstanding Section 2 [of the act], this Act does not prohibit discrimination of one sex if the measure pursues a legitimate goal and the means to pursue this goal are appropriate and necessary.'

One example from case law is ruling J.nr. 18-31768 of 26 September 2018⁶⁵ from the Equality Board, which concerned a complaint from a male customer concerning the rejection he received from a beauty clinic, which only treated female clients. He complained to the Equal Treatment Board because he was unable to get a facial at the clinic.

According to the Equality Board, the principle of equal treatment in access to goods and services does not always require the provision of facilities for men and women on a common basis, as long as the facilities are not provided on more favourable terms to members of one sex. The clinic specialises in serving women and offers treatments to women alone. Thus, it was not contrary to the Equality Act that the clinic refused to treat the man.

He was therefore unsuccessful in the complaint.

The Equality Board did not refer to Section 3a of the Gender Equality Act but could have done so as part of its judicial reasoning.

Another example is the ruling by the Equality Board from 2020, J.nr. 19-43462, where a menswear store announced at a Facebook event that they were holding an event for men only. The said event consisted of a lecture on, among other things, how men learn to be well within themselves and how they accommodate women. A woman had approached the store as to whether she could attend the event. The woman had not received an answer from the store, and she lodged a complaint with the Equality Board. The Board assessed that the woman had a legal interest in the case, as she had stated that she had previously dealt with gender and the understanding of male and female roles, and that she was considering participating in the event. The committee emphasised the content of the lecture, and that participation in the event triggered a voucher of DKK 1 000 for a tailored suit at the store, which both men and women could be interested in receiving. The Board could therefore process the complaint. It appeared directly from the public Facebook event that the event was for men only. The store – despite several requests from the Equality Board – had not made any comments on the case. The respondent had thus not informed the Board about the background to the fact that only men had access to the event. On that basis, it had not been proven that the event was covered by either the promulgation of initiatives to promote gender equality or Section 3a of the Gender Equality Act. The Board ruled in favour of the woman. After an overall assessment of the circumstances of the case, no fully sufficient basis was found for awarding compensation to the complainant.

⁶⁵ Available here in Danish: <https://www.retsinformation.dk/eli/retsinfo/2018/9830>.

9.6 Actuarial factors

According to Section 8 of the Act on Equal Treatment of Men and Women in insurance, pensions and similar matters, business-related insurance schemes must not contain provisions according to which discrimination based on sex is established in respect of the determination and calculation of contributions and benefits.

However, the act further states that for members admitted before 1 July 1999, in business-related insurance schemes, where benefits are calculated on a pre-determined basis, benefits may differ for men and women to the extent that the calculation is based on actuarial factors that are different for the two sexes. In these schemes, employers' contributions can be set differently for men and women, in so far as the levels of benefit for men and women are approximated. For members admitted before 1 July 1999 in business-linked insurance schemes, where contributions are calculated based on pre-determined benefits, employers' contributions may differ for men and women to the extent that the calculation is based on actuarial factors that are different for the two sexes.

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

The Act on Equal Treatment of Men and Women in insurance, pensions and similar matters was amended in 2012 and 2014 to adopt the CJEU decision in the *Test-Achats* case.

Sections 5 and 18 of the Act on Equal Treatment between Men and Women in insurance, pensions and similar matters were adjusted after the C-236/09, *Test-Achats* case in 2012 (Act No. 1287, 19 December 2012) and in 2014 (Act No. 403, 28 April).

2012 amendment:

Section 18b of the act relates to the use of gender as a factor in calculating premiums and benefits for insurance and related financial services. In the previous version of the Danish act it was possible, under Section 18b(2-4), to use gender as a parameter in calculations. Following the CJEU's decision in *Test-Achats*, these provisions were deleted, and the possibility was removed from Danish law in 2012.

2014 amendment:

In 2014, Section 5(2) of the act was repealed following the *Test-Achats* ruling. Before the amendment to the act, there was an opportunity to emphasise gender with regard to pension arrangements. Following legislative amendment, the entire area of insurance and pensions is now subject to a unisex principle.

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

There are no positive action measures as understood by Article 6 of Directive 2004/113.

9.9 Specific problems related to pregnancy, maternity or parenthood

There are no specific problems to report.

9.10 Evaluation of implementation

The implementation of Directive 2004/113 in Danish legislation is satisfactory.

9.11 Remaining issues

There is nothing further to report.

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

10.1 General (legal) context

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

The Ministry of Gender Equality, published an *Action Plan against Violence Against Women* in March 2019. The action plan focuses on violence against women in close relationships, paying particular attention to mental or psychological violence. Mental or psychological violence has since been criminalised as a separate offence (Act No. 329/2019 amending the Criminal Code). The action plan in addition contains a number of initiatives with the purpose of combating mental or psychological violence.⁶⁶

According to reports from women's shelters, the recent COVID-19 pandemic resulted in a drastic increase in violence against women.⁶⁷ Some report a doubling in the number of requests for refuge in a women's shelter.⁶⁸ In March 2020, this development led the Danish Government to redirect funds from the National Finance Act to fund the immediate establishment of capacity to temporarily accommodate 55 more fleeing women.⁶⁹ In August 2020, the Government established the funds to extend the capacity to accommodate a further 100 fleeing women.⁷⁰

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

In 2014, the Danish Criminal Code was amended so as to comply with the ratification of the Istanbul Convention. The preparatory works to the amendment act state that Danish legislation was already almost compliant with the Istanbul Convention. Section 94 of the Criminal Code was adjusted as to comply with the Convention. Under Section 94(4) the period in which a complaint can be presented has been prolonged with regard to notification. Thus, the limitation period will begin from the date the victim is 21, if the victim was under 18 when the crime was committed. Furthermore, forced marriage, forced abortion and forced sterilisation were added to the list of crimes covered by the Criminal Code.

10.1.3 National provisions on online violence and online harassment

The Government has taken initiatives to prevent sexual harassment in the digital realm, including through a package of initiatives against digital sexual harassment.

For example, the maximum penalty for sharing intimate photographs or videos of others without consent has been increased from six months to a term not exceeding three years under aggravating circumstances. The maximum fine for indecent exposure, such as unsolicited sharing of intimate photos of oneself, has been doubled.

⁶⁶ <https://www.ft.dk/samling/20181/almdel/LIU/bilag/58/2025429/index.htm>.

⁶⁷ See *inter alia* a news article referring to the increase in the number of reported incidents of domestic disputes and the experience of the shelters, available in Danish here: <https://www.information.dk/moti/2020/06/centre-voldsramte-kvinder-forudsaa-stormloeb-coronanedlukningen-fik-ret>.

⁶⁸ According to this news article in Danish: <https://www.alt.dk/artikler/nyt-noedkrisecenter-skal-hjaelpe-voldsramte-kvinder-under-coronakrisen>.

⁶⁹ According to Document 118 of 25 March 2020, available here in Danish: https://www.ft.dk/RIPdf/samling/20191/aktstykke/aktstk118/20191_aktstk_anmeldt118.pdf.

⁷⁰ According to the press release from the Ministry of Social Affairs and Senior Citizens available here in Danish: <https://sm.dk/nyheder/nyhedsarkiv/2020/aug/omkring-100-ekstra-pladser-paa-kvindekrisecentrene-paa-vej>.

10.1.4 Political and societal debate

In 2017, the Danish Government took action to launch a set of initiatives to combat digital sexual harassment. The initiatives include an increase in the maximum penalty for sharing intimate photographs or videos without consent, and better education of the police to increase the quality of investigations.⁷¹

10.2 Ratification of the Istanbul Convention

Act No. 168, 26 February 2014, amended the Criminal Code (*Lov om ændring af straffeloven (Gennemførelse af Europarådets konvention til forebyggelse og bekæmpelse af vold mod kvinder og vold i hjemmet)*). The act came into force on 1 July 2014.

Denmark has ratified the Istanbul Convention. It is stated in the preparatory works to the ratification act that almost the whole content of the convention was already covered by Danish law, so it was nearly in compliance with the obligations in the convention, and only a few new rules were needed (See the amended act to the Criminal Code, No. 168, 24 February 2014).⁷²

Denmark has not introduced stalking as a specific crime in the Criminal Code. However, in March 2012, Act No. 112 of 3 February 2012 on Detention, Exclusion and Expulsion came into force. The act has introduced a coherent set of rules that brings together the rules of detention, exclusion and expulsion, in which stalking is defined.

Section 94 of the Criminal Code was changed following Denmark's accession to the Istanbul Convention. In Section 94(4), the limitation period to present a complaint has been prolonged with regard to notification. Thus, the limitation period will start from the date the victim is 21, if the victim was under 18 or for children under 15 when the crime was committed. Furthermore, forced marriage, forced abortion, forced sterilisation were added to the list of crimes in the act.

⁷¹

http://www.justitsministeriet.dk/sites/default/files/media/Pressemeddelelser/pdf/digitale_sexkraenkelser_u_dspil.pdf.

⁷² Latest version of the Danish Criminal Code: Consolidation Act No. 873, 9 July 2015 as amended by Act No. 152, 18 February 2015.

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

11.1 General (legal) context

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

There are no specific reports on particular difficulties related to obtaining legal redress.

11.1.2 Other issues related to the pursuit of a discrimination claim

Victims of discrimination can bring a case before the Equality Board and to the civil courts, as well as to the industrial tribunal boards if they are a member of a trade union. As such, there is satisfactory access to addressing discrimination claims. There are no further issues related to the pursuit of a discrimination claim.

11.1.3 Political and societal debate and pending legislative proposals

There are no pending proposals or pending debates.

11.1.4 Gender mainstreaming

Since the year 2000, gender mainstreaming obligations have been implemented at all levels of public administration and in decision-making in Denmark. Section 5 of the Gender Equality Act stipulates that all public institutes should conduct gender impact assessments every three years. Despite the implementation of gender mainstreaming obligations being regulated by law, there are no provisions for their enforcement nor sanctions for failing to do so.

At national level, the Strategy for Gender Mainstreaming describes the Danish strategy for gender mainstreaming in the public sector and focuses on improved guidance and strengthening of gender mainstreaming in legislation and monitoring.

Gender equality action plans (published yearly since 2002, in compliance with the Act on Gender Equality) include several priorities and specific initiatives within the area of gender equality. The main vision of the 2018 action plan was that 'no one should experience discrimination based on gender, sexual orientation, or gender identity'. The action plan for 2019 focuses on four major areas:

- 'Rights and freedom', including the promotion of equality among ethnic minorities and the combating of online harassment, intimate partner violence, and human trafficking.
- 'Better utilisation of talents and resources', including the promotion of equality in the labour market and in the education field.
- 'Global equality', including the promotion of women's societal participation globally.
- 'Equal opportunities for LGBTQI+ persons', including the promotion of freedom and rights for LGBTQI+ persons nationally and internationally.

The gender equality action plan presents initiatives/interventions to be undertaken within these four focus areas and follow-up initiatives/interventions from the previous action plan but does not present specific targets to be met. The presented initiatives/interventions encompass 8 out of 18 ministries.

The Danish legislature utilises a Gender Mainstreaming Assessment scheme when adopting new legislation.⁷³ According to the guidelines, the respective ministers are responsible for equality / gender mainstreaming within their own areas, including gender mainstreaming assessment of policies, legislation and activities to determine if and how it impacts gender equality. According to the guidelines of the scheme, all legislative proposals must be screened by the respective ministry / government agency as part of a relevance test in which the following questions are meant to be put in order to decide whether to conduct a more in-depth equality assessment of the proposal:

- Can the proposal have different consequences for women and men, girls and boys?
- Are women's and men's existing rights affected differently by the proposal?
- Will women and men have different rights as a result of the proposal?
- Are women and men equally respected by the proposal?

Any legislative proposal conflicting with, for instance, a directive, would naturally 'pass' the relevance test and become subject to a more in-depth assessment trying to ascertain if and how it impacts gender equality. The in-depth assessment consists of a two-step process, which *inter alia* elaborates on the available data on gender differences, where relevant, and illuminates and assesses whether any differences between men and women have gender equality consequences. It must also be assessed what significance any gender equality consequences have for the proposal, and whether there is a need to adjust the proposal. Finally, the possible significant positive or negative gender equality consequences must be described in the comments on the proposal.

If the proposal is expected to have gender equality implications, it should also be examined whether the implications of the proposal violate the prohibition of indirect and direct discrimination on grounds of sex.

11.2 Victimisation

The provision on victimisation in the directives is implemented in the different statutory acts as follows.

According to Section 3 of the Equal Pay Act, an employer shall not be allowed to dismiss or treat an employee, including an employee representative, in an unfavourable manner as the reaction to a complaint or because the employee or the employee representative has put forward a claim for equal pay, or because he or she has passed on information regarding pay. An employer may not dismiss an employee or an employee representative because he or she has put forward a claim.

According to Section 2b of the Gender Equality Act, no one shall be subjected to unfavourable treatment or adverse consequences in response to a complaint or any legal proceedings instituted for the purpose of ensuring compliance with the principle of equal treatment.

According to Section 7(2) of the Act on Prohibition against Discrimination in the Labour Market, any person exposed to adverse treatment or adverse consequences because such person has made a demand for equal treatment under Sections 2-4 of the Act may be awarded compensation.

According to Section 9 of the Act on Equal Treatment of Men and Women as regards Access to Employment, etc., an employer may not dismiss an employee for having put forward a claim to use the right to absence or for having been absent under Sections 6 to 14 of the Act on Maternity Leave or for any other reason related to pregnancy, maternity or adoption.

⁷³ <https://english.ligestillingsvurdering.dk/gender-mainstreaming-assessment>.

11.3 Access to courts

11.3.1 Difficulties and barriers related to access to courts

Claims regarding gender discrimination are settled within the system set up for the settlement of industrial disputes, the ordinary civil courts of law and the Equality Board. However, most cases are decided by the lower courts. These cases are not published.

Access to court in a civil lawsuit is as a general rule conditioned upon the claimant being directly affected by the administrative action or regulation that forms the basis of the legal action. Cases regarding allegations of discrimination in the labour market must be brought either before the civil court, the industrial arbitration tribunals or the Labour Court, depending on the circumstances of the allegations. On certain conditions, it is possible to apply for legal aid, either via an insurance policy or via the public legal aid. The public legal aid is subject to a financial means test.

11.3.2 Availability of legal aid

Public legal aid in Denmark can also be granted to cover civil cases. Application for aid in civil actions is decided by the civil directorate of the Ministry of Justice (*Civilstyrelsen*) and is granted in view of the expected outcome of the lawsuit.

In addition, insurance companies offer legal insurance coverage as part of the basic family insurance packages and although the insurance does not cover employment disputes as such, legal assistance is typically offered through the membership of a trade union.

11.4 Horizontal effect of the applicable law

11.4.1 Horizontal effect of relevant gender equality law

The gender equality legislation applies to all authorities, organisations, private persons as well as public and private employers. Thus, the gender legislation also applies between private parties.

11.4.2 Impact of horizontal direct effects of the charter after Bauer

It is not expected that the *Bauer* judgment will have any added impact.

11.5 Burden of proof

The provisions on shared burden of proof in the underlying directive are repeated in the Danish equality legislation.

According to Section 6(2) of the Equal Pay Act, if a person who considers himself/herself offended, in accordance with Section 1, and presents facts which give rise to the suspicion that direct or indirect discrimination has been committed, it is for the counterparty to prove that the principle of equal treatment has not been violated.

According to Section 2(4) of the Gender Equality Act, if a person who considers himself or herself discriminated against presents facts which give rise to suspicion of direct or indirect discrimination, it is for the other party to prove that the principle of equal treatment has not been infringed.

According to Section 7a of the Act on Prohibition against Discrimination in the Labour Market, if a person who considers himself wronged – see Sections 2-4 – establishes facts from which it may be presumed that direct or indirect discrimination is occurring, it shall be for the respondent to prove that the principle of equal treatment has not been violated.

According to Section 16(4) of the Act on Equal Treatment of Men and Women as regards Access to Employment, etc., if the dismissal takes place in connection with pregnancy, or absence laid down in Sections 6 to 11, 13 and 14 of the Act on Maternity Leave, and in periods of notice under Section 16(2), it shall be incumbent on the employer to prove that dismissal was not based on these grounds. According to Section 16a of the Act, where a person who finds that he or she has been discriminated against, under Sections 2 to 5, 9 and Section 15(1), establishes facts which give cause for presuming that direct or indirect discrimination may have occurred, it shall be incumbent upon the other party to prove that the principle of equality has not been violated.

11.6 Remedies and sanctions

11.6.1 Types of remedies and sanctions

Under the Act on Equal Treatment of Men and Women in access to employment etc. the typical sanction for a breach of the duty not to discriminate on grounds of sex is compensation, which may cover both financial and non-financial loss.

In equal pay cases, the typical remedy is the payment of the difference in payment between the woman and the male comparator. Interest to compensate for the loss sustained can be awarded. The substantive right to equal pay or compensation for a breach of the ban on sex discrimination will usually be time-barred after five years. In principle, a fine can also be used as a sanction for companies violating the duty to perform yearly gender-segregated wage statistics.

The consequences (remedies and sanctions, civil and/or criminal) in a case of discriminatory harassment are the same as for other discrimination cases.

In case law, in employment cases, the typical remedy against the employer who is the defendant is monetary compensation. There is no remedy under discrimination law for a harasser/fellow worker who is not an addressee. However, the harasser can be sentenced to pay the harassed fellow worker tort compensation according to Section 26 of the Compensation for Damages Act.

It is a breach of the duties under the employment contract to commit unlawful harassment. Depending on the specific circumstances, under employment law, the employer may have the right to take disciplinary measures, transfer the worker to other work or – in serious cases – to dismiss or instantly dismiss him/her.

11.6.2 Effectiveness, proportionality and dissuasiveness

The typical remedy for unjustified discrimination is compensation. In unjustified discrimination cases under the Act on Equality Between Men and Women regarding Access to Employment, etc. (for instance, an unjustified dismissal), compensation corresponds to the loss of salary for a certain number of months, typically 9 to 12 months.

The level of compensation for unjustified discrimination under the Gender Equality Act is very low, typically EUR 3 347 (DKK 25 000). It is debatable whether the level of compensation serves as an effective remedy to prevent discrimination.

11.7 Equality body

The Equality Board (*Ligebehandlingsnævnet*) has the competence to decide on individual complaints. The Board has horizontal competence: it has powers in relation to all discrimination grounds according to the specific equality acts governing the prohibition of discrimination. The competence of the Equality Board is defined in Consolidation

Act No. 1230/2016. It is competent to decide on complaints about discrimination on the grounds of gender according to the Consolidation Act No. 1230/2016, Section 2(2-5).⁷⁴

The Equality Board is also competent to decide on complaints of discrimination in collective agreements. A full text of all decisions of the Equality Board are published in Danish on the Board's website, although the board members are anonymised.⁷⁵ The Equality Board is not under a duty to produce reports and recommendations on sex equality issues.

The Equality Board has processed a large number of complaints regarding discrimination on the grounds of gender. In 2020, the Board processed 73 cases on gender.⁷⁶

The Danish Institute for Human Rights is the Danish national human rights institution. The institute monitors the general human rights situation in Denmark, including in relation to gender discrimination. In 2016, the Institute for Human Rights was given the mandate to bring cases before the Equality Board.

11.8 Social partners

The collective agreements covering large parts of the Danish labour market bind the parties subject to the agreements. Collective agreements are a very important source of law in Denmark. Gender equality legislation is subsidiary to the collective agreements, which provide for similar protection as prescribed by law. The social partners are thus very influential in respect of gender equality provisions in Denmark. Some collective agreements offer better protection in respect of flexible working conditions for parents than do the general provisions in the Act on entitlement to leave and benefit in the event of childbirth.

11.9 Other relevant bodies

The Danish Institute for Human Rights (menneskeret.dk) is the national human rights centre in Denmark. The Institute for Human Rights advises the Parliament, ministries and authorities on human rights issues in general, including equality issues. The institute produces surveys and reports on specific discriminatory issues as well as on more generalised and broader areas of discrimination. The institute also carries out specific projects to promote equal treatment. It also provides advice to those who may have been a victim of discrimination.

11.10 Evaluation of implementation

Denmark has implemented the EU anti-discrimination directives satisfactorily in the areas covered by this report.

11.11 Remaining issues

In 2017, Statistics Denmark launched a gender site (www.dst.dk/equality) with a gender indicator system to improve data collection and analysis of gender equality data in Denmark. The gender site was launched in response to a recommendation made by the CEDAW Committee following a country review.

⁷⁴ <https://www.retsinformation.dk/Forms/R0710.aspx?id=179851>.

⁷⁵ www.ligebehandlingsnaevnet.dk.

⁷⁶ Yearly report of the Equality Board 2017.

12 Overall assessment

The following transposition problems were mentioned in this report:

1. There could be a potential issue with the recognition of the discrimination form of indirect discrimination by association. There is no case law addressing the question explicitly, but as discussed in Section 3.9, it could be argued that there is a reluctance of the Supreme Court towards indirect discrimination by association, indicating that also for protection against indirect sex discrimination, the victim has to belong to the disadvantaged group.
2. Both the Act on Gender Equality and the Act on the Prohibition of Discrimination in the Labour Market use the term 'just and proper' rather than 'legitimate' in the definition of indirect discrimination.

Beyond those two examples, the author can point to no other transposition problems.

As stated in this report, Denmark has implemented the EU gender equality directives in national law. In the opinion of the author of this report, the current status of the implementation is satisfactory and there are no gaps due to a lack or poor implementation of EU legislation.

The major issue regarding gender equality in Denmark is the gender segregation of the labour market, both vertically and horizontally. Women tend to work in the public sector and women are still significantly underrepresented on management boards, in top management posts and at professor level in universities. Albeit not based on the transposition of a directive, the sanctioning of the duty for larger companies to set up target figures and to establish a policy for increasing the proportion of the underrepresented gender at the company's management levels appears cautious and could be seen as ineffective in terms of compelling the companies to comply with the rules meant to promote gender equality at management level. A significant pay gap between men and women is one consequence of the segregated labour market. In addition, due to lower pensions, women are at higher risk of poverty in their old age than men.

Women also take on the largest role in caring for children and progress on this issue has been very slow. In Denmark, more women than men work part time. However, the unequal sharing of care-related activities offers only part of the explanation for this phenomenon.

The general situation for gender equality in Denmark is not specifically tied to non-compliance with EU legislation.

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