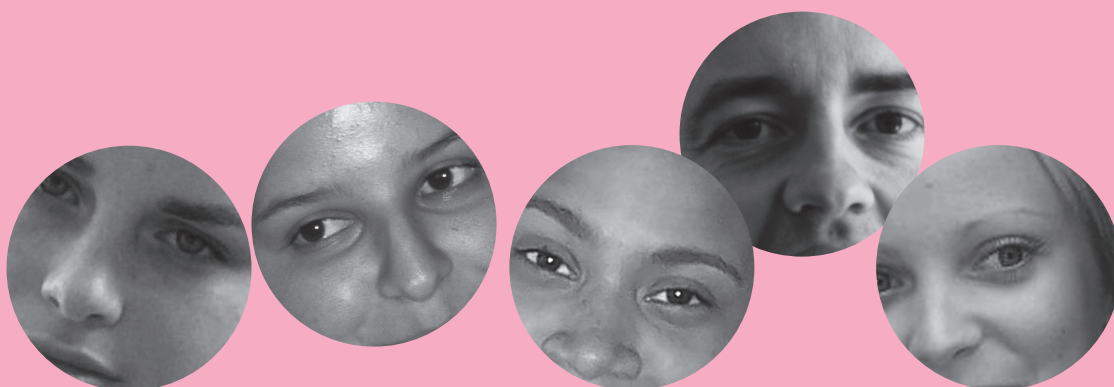


Fighting Discrimination on the Grounds of Pregnancy, Maternity and Parenthood

The application of EU and national law in practice in 33 European countries

EUROPEAN NETWORK OF LEGAL EXPERTS IN THE FIELD OF GENDER EQUALITY



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The application of EU and national law in practice
in 33 European countries

Annick Masselot, Eugenia Caracciolo Di Torella and Susanne Burri

European Commission
Directorate-General for Justice
Unit JUST/D1
Equal Treatment Legislation

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Part I

Executive Summary

Annick Masselot and Eugenia Caracciolo di Torella

1. Introduction: background and aim of the report

The protection of motherhood, fatherhood and family life is a priority for many national governments.¹ Yet, pregnancy and maternity related discrimination still occurs across Europe in many areas of employment.² For example, although it is unlawful discrimination not to hire a pregnant woman when she is the best qualified candidate or not to extend her fixed-term contract when the reason relates to pregnancy, in reality this still happens. Also, women are often not entitled to bonuses or work-related rewards during absences due to pregnancy-related illness and/or maternity leave. Moreover, some insurance companies offer insurances to remedy the loss of income of self-employed workers in relation to maternity leave only after a waiting period of several years. Often airline companies refuse to allow pregnant women on their flights.

In other words, it emerges from this report that, despite the existence of extensive pregnancy and maternity related rights, women are still discriminated against because of their pregnancy. It has been suggested that pregnancy and maternity related discrimination is ‘endemic’ (**United Kingdom**) and that women experience a lot of ‘trouble’ related to the enjoyment of their pregnancy and maternity rights (**the Netherlands**). In its 2012 annual report, the **French** Protection of Rights Body highlights that following the period of maternity or parental leave the professional situation of women very often deteriorates, and sometimes leads to harassment or to dismissal.³

The purpose of this thematic report is to provide information on discriminatory practices suffered by individuals in and outside the area of employment and self-employment as a result of pregnancy and maternity (in particular in relation to maternity leave). The report further includes a discussion on the rights expressly designed for fathers, because it maintains that to expressly make fathers part of the maternity equation is a step towards a more balanced share of family responsibility, supporting the fight against stereotypes and ultimately the achievement of the principle of equality. Finally, this report provides a record of best practices in this area in order to identify a way forward for the legislator, policy makers and NGOs

This report covers the 27 EU Member States, three associated countries (Iceland, Liechtenstein and Norway) and three candidate countries (Croatia, Former Yugoslav Republic of Macedonia – hereafter FYR of Macedonia – and Turkey)

2. The legislative context in European Union law

Over the last two decades the protection of pregnancy, maternity and parenthood has been one of the aims of EU law.⁴ For this purpose a complex array of primary (Treaty provisions) and secondary (mostly directives) legislation has been gradually developed. In addition, there are

¹ See later in the national reports, but this includes e.g. **Greece, Spain and Hungary**.

² As acknowledged, inter alia, in the Report from the Commission on the application of Directive 2002/73/EC COM(2009) 409 final. There is also a wealth of academic material which, over the years, has reiterated that discrimination on grounds of pregnancy still occurs.

³ Rapport annuel 2011 du défenseur des droits, <http://www.defenseurdesdroits.fr/documentation>, accessed 16 July 2012.

⁴ See in particular Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding, OJ [1992] L348/1.

several soft law and political initiatives. The case law of the Court of Justice has also greatly contributed to the development of this field of law. It has done so by further clarifying and applying the principles expressed in legislation such as direct and indirect discrimination and generally it has provided a broad definition of the equality principle. Member States are not only obliged to comply with EU standards, they also have their own framework in place, which is often more sophisticated than the minimum framework provided by the EU legislator.

2.1. Primary legislation

Provisions in the Treaties and the Charter of Fundamental Rights

Article 157 of the Treaty on the Functioning of the European Union (TFEU) establishes the obligation of equal pay between men and women and provides a general legal basis for the adoption of measures in the field of gender equality, which includes equality and anti-discrimination on the ground of pregnancy or maternity within the workplace. Article 19 TFEU expresses the general principle of non-discrimination beyond the strict confines of the workplace as acknowledged by the Court of Justice in *Mangold*.⁵

Furthermore, following the adoption of the Treaty of Lisbon, the EU Charter of Fundamental Rights⁶ has achieved the status of primary legislation. The Charter firmly reiterates the importance of the concept of equality (Article 20). Of specific interest for this report is Article 33(2), which states that ‘to reconcile family and professional life, everyone shall have the right to protection from dismissal for a reason connected with maternity, and the right to paid maternity leave and to parental leave following the birth or adoption of a child.’⁷ This provision guarantees that issues related to pregnancy, maternity and parental leave are to be protected, not only as employment and social issues but also as fundamental human rights. Situations that are not *prima facie* covered by this Article, such as the rights of fathers, are dealt with in the more general provisions of Article 20 (equality) and Article 23 (gender equality). Finally, Article 53 of the Charter provides for minimum protection and only allows the adoption of measures that are further reaching.

2.2. Secondary legislation

The Pregnant Workers Directive

The Pregnant Workers Directive⁸ is primarily aimed at improving health and safety at work for pregnant workers, workers who have recently given birth and workers who are breastfeeding. It provides for two sorts of measures, namely health and safety and protection against unfavourable treatment. In terms of leave, Directive 92/85/EEC provides for a number of specific forms of leave for pregnant workers and women who have recently given birth. Article 5(3) of Directive 92/85/EEC obliges employers to grant a pregnant worker a leave of absence to protect her health and safety and that of the foetus if moving the worker to another job is not technically and/or objectively feasible or cannot reasonably be required on duly substantiated grounds.

Leave must also be granted if a pregnant or breastfeeding worker is exposed to prohibited substances or is required to do night work, if moving her to another job or changing to daytime work is not possible (Article 5(4)). Pregnant and breastfeeding workers are not obliged to perform night work during their pregnancy and for a period following childbirth, if performing night work would be detrimental to the safety or health of the worker concerned (Article 7). A transfer to daytime work or, if this is not technically and/or objectively feasible,

⁵ Case C-144/04 *Werner Mangold v Rüdiger Helm* [2005] ECR I-9981.

⁶ OJ [2010] C82/02.

⁷ See S. Koukoulis-Spiliotopoulos ‘The Lisbon Treaty and the Charter of Fundamental Rights: maintaining and developing the *acquis* in gender equality’ in: *European Gender Equality Law Review* 1/2008 pp. 15-24.

⁸ Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding, OJ [1992] L348/1.

leave from work or the extension of maternity leave should be possible. Article 9 further provides that pregnant workers must be entitled, where necessary, to time off work without loss of pay to attend ante-natal examinations. Article 8 provides for a minimum of 14 continuous weeks of maternity leave before and/or after birth, including at least two weeks of compulsory maternity leave, and Article 11 addresses the issue of rights related to the employment contract and specifically the right to the maintenance of payment and/or the entitlement to an adequate allowance during the period of maternity leave, which should not be set at a lower rate than the level of sickness benefits. Finally, Article 10 provides that Member States shall take the necessary measures to prohibit the dismissal of pregnant workers, workers who have recently given birth and workers who are breastfeeding, during the period from the beginning of their pregnancy to the end of the period of maternity leave.

Amendments to the Pregnant Workers Directive⁹ were proposed by the European Commission as part of the 2008 Work-Life Balance Package,¹⁰ which includes a number of proposed measures concerning the reconciliation of work and family life designed to modernise and rationalise reconciliation policies and ultimately to bring them in line with existing equality legislation and case law. The amendments include, inter alia, a longer period of paid maternity leave and a new period of paternity leave. However, due to ‘the broad diversity of maternity protection and social security amongst the Member States (...) [and] the financial implications, especially during the crisis’, the Council has not yet adopted its first reading position. Future discussions aiming at achieving further progress in this area are welcomed.¹¹

The Parental Leave Directive

The measures contained in the Pregnant Workers Directive are supplemented by the Parental Leave Directive,¹² which sets minimum standards designed to facilitate the reconciliation of work with family life. This Directive implements the Framework Agreement of the European social partners on parental leave and time off on grounds of *force majeure* and repeals Directive 96/34¹³. It provides that Member States shall grant all employees a right, in principle non-transferable and unpaid, to four months’ parental leave which can be used until the child has reached the age of 8, although the precise age is to be determined by the Member States (Clause 2). The two most important changes introduced by the 2010 amendments to the Directive, are the extension of the period that parents can take off (from three to four months) and most of all the fact that, in order to encourage a more equal take-up of leave by both parents, at least one month shall be provided on a non-transferable basis. However, the modalities of application of the non-transferable period are left to the Member States. A fundamental problem is that the right to take parental leave remains unpaid and this has proven to be a considerable deterrent, in particular amongst fathers.

The Parental Leave Directive further provides protection from discrimination for workers on the grounds of applying for or taking parental leave and stipulates that, at the end of the leave, workers have the right to return to the same job or, if that is not possible, to an equivalent or similar job consistent with their employment contract or employment relationship (Clause 5). Workers also have the right to request changes to their working hours for a limited period; in considering such requests, employers must balance the needs of the workers and the company (Clause 6). The Directive also provides a right to leave on grounds of *force majeure* for urgent family reasons (Clause 7). Finally the Directive also grants these rights in the case of adoption.

⁹ Proposal for a Directive of the European Parliament and of the Council amending Council Directive 92/85/EEC on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding, COM(2008) 637.

¹⁰ EU Commission, COM(2008) 635, available on <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/08/603&format=HTML&aged=0&language=EN&guiLanguage=en>, accessed 1 June 2012.

¹¹ Council of the European Union 21 November 2011, Progress Report, SOC 1002/ SAN 246/CODEC 2061.

¹² Council Directive 2010/18/EU of 8 March 2010 implementing the revised Framework Agreement on parental leave concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC.

¹³ Directive 96/34/EC, OJ [2010] L68/13.

The Recast Directive

One of the foundation stones of EU law and policy in the area of gender equality in employment was Directive 76/207 on Equal Treatment.¹⁴ This Directive has now been amended and is part of the Recast Directive¹⁵ which incorporates and updates several existing Directives: Equal Pay Directive 75/117/EEC,¹⁶ Equal Treatment Directive 76/207/EEC as amended by Directive 2002/73/EC,¹⁷ Occupational Social Security Directive 86/378/EEC as amended by Directive 96/97/EC¹⁸ and Burden of Proof Directive 97/80/EC.¹⁹

The Recast Directive provides for the principle of equal treatment between women and men which means that there should be no discrimination whatsoever – direct or indirect – on grounds of sex.

Article 2(2)(c) of the Recast Directive provides that the definition of discrimination includes ‘any less favourable treatment of a woman related to pregnancy or maternity leave’. Over the years, the Court of Justice has interpreted the prohibition of pregnancy discrimination generously and proactively. Article 28(1) also provides that the Directive shall be without prejudice to provisions concerning the protection of women, particularly as regards pregnancy and maternity. Recitals 23 to 25 of the Recast Directive acknowledge the Court of Justice’s case law in this area. Article 15 grants a woman on maternity leave or a man on paternity leave in the Member States that recognise such a right (Article 16), the right to return to her or his job or to an equivalent post on terms that are no less favourable to her/him and to benefit from any improvement in working conditions to which s/he would be entitled during her/his absence. Article 16 moreover includes protection against dismissal for fathers who exercise those rights. The same rights are granted to either parent on adoption leave (in the Member States that recognise this right). In these cases, the rights are tied to the event of the adoption itself.

The Statutory Social Security Directive

Statutory Social Security Directive 79/7/EEC²⁰ applies to statutory social security schemes and statutory pensions as set out in Article 1. Article 4 prohibits both direct and indirect sex discrimination, in particular with reference to family or marital status with respect to the scope of the schemes and the conditions for accessing them; the obligation to contribute and the calculation of contributions; and the calculation of benefits and the conditions governing the duration and retention of an entitlement to benefit. It specifies that measures for the protection of women on the ground of maternity shall not be affected by the principle of equal treatment. However, Member States may exclude the following from the scope of the Directive: the determination of the pensionable age; advantages granted to retired persons who have brought up children, specifically concerning periods of interruption of employment; old-age or invalidity benefit entitlement connected with the derived entitlements of a spouse; and long-term benefits accorded to a spouse connected with the invalidity, old age, accidents at work or occupational disease of their spouse.

¹⁴ Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, OJ [1976] L39/40.

¹⁵ Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), OJ [2006] L204/23.

¹⁶ Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women, OJ [1975] L45/19.

¹⁷ Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, OJ [2002] L269/15.

¹⁸ Council Directive 96/97/EC of 20 December 1996 amending Directive 86/378/EEC on the implementation of the principle of equal treatment for men and women in occupational social security schemes, OJ [1997] L46/20.

¹⁹ Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex, OJ [1998] L14/6.

²⁰ Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security, OJ (1979) L 6/24.

The Self-Employment Directive

On 5 August 2012, Self-Employment Directive 2010/41/EU²¹ replaced Directive 86/613/EEC.²² The Self-Employment Directive provides that all provisions contrary to the principle of equal treatment must be eliminated by the Member States, in particular in respect of the establishment or extension of a business or of any other form of self-employed activity. Member States have an obligation to examine all initiatives concerning the recognition of the work of spouses and, in particular, concerning the interruption of activities owing to pregnancy or motherhood. In particular, Article 8(1) requires Member States to take the necessary measures to grant female self-employed workers and female assisting spouses or life partners the right to a maternity allowance for at least 14 weeks. This principle is, however, diluted by Article 8(2) which states that it is left to the Member States to decide whether the maternity allowance referred to is granted on a mandatory or voluntary basis.

When the allowance is granted it has to be equivalent to the allowance provided at the national level in the event of an interruption in activities on health grounds; and/or the average loss of income or profit;²³ and/or any other family-related allowance provided for and determined by national law.

During the interruption of their activities due to maternity, self-employed women must have access to replacement services and national social services, which may replace all or a part of the maternity allowance.

The Goods and Services Directive

Article 4(1)(a) of the Goods and Services Directive²⁴ provides for the protection of pregnancy and maternity rights outside the workplace. Article 4(2) provides that ‘this Directive shall be without prejudice to more favourable provisions concerning the protection of women as regards pregnancy and maternity’. Of particular relevance is Article 5(1) which requires Member States to ensure that the use of sex as a factor in the calculation of premiums and benefits for the purposes of insurance and related financial services shall not result in differences in individuals’ premiums and benefits. This principle is further reinforced by Article 5(3), which expressly prohibits the use of pregnancy or maternity as a way to discriminate in the calculation of premiums and benefits for the purposes of insurance and related financial services. Increased costs related to pregnancy and maternity shall not result in differences in individuals’ premiums and benefits. Article 5(2) contains an exception to Article 5(1) – but not to Article 5(3) – stating that under certain circumstances it remained possible to differentiate on the basis of gender. This provision, however, has been declared invalid as from 21 December 2012 by the ECJ in its decision in *Test-Achats*.²⁵

Soft-law provisions

Finally, there are a number of important developments in terms of soft law which shows the Member States’ commitment to curb discrimination in this area. These measures have been used as a platform to trigger further intervention. Amongst these, the 1992 Council Recommendation on childcare was the first measure to encourage the equal sharing of family responsibilities between men and women. It also addresses the issue of childcare services (Article 3) and recommends that Member States should take and/or encourage initiatives, for example for special leave (Article 4).

²¹ Council Directive 2010/41/EU of the European Parliament and of the Council of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC.

²² Council Directive 86/613/EEC of 11 December 1986 on the application of the principle of equal treatment between men and women engaged in an activity, including agriculture, in a self-employed capacity, and on the protection of self-employed women during pregnancy and motherhood, OJ (1986) L 359/56.

²³ This amount may be subject to a ceiling limit.

²⁴ Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, OJ [2004] L373/37.

²⁵ Case C-236/09, *Association Belge des Consommateurs Test-Achats ASBL and others v Conseil des Ministres* [2011] 2 CMLR 38.

Other more recent examples of soft law include the Council Resolution of 29 June 2000 on the balanced participation of women and men in family and working life, which provides that the balanced participation of women and men both in the labour market and in family life is an essential aspect of the development of society, and that maternity and paternity rights as well as the rights of children are current social values to be protected by society, the Member States and the European Union. This commitment has been reiterated on several other occasions, most notably in the Presidency Conclusions of 23/24 March 2006 which acknowledged the need to promote a better work-life balance and to combat gender stereotypes in the employment market.²⁶ This commitment was also more recently emphasised by the 2008 Work-Life Balance Package, which includes elements of both binding law and soft law. In terms of soft law, the package includes a Communication from the European Commission²⁷ explaining the background and context, as well as a report monitoring the national progress towards the Barcelona childcare targets.²⁸ One of the most innovative elements of the Communication on the Work-Life Balance Package is the express mention of paternity leave defined as ‘a short period of leave for fathers around the time of the birth of a child.’²⁹ The suggestion was incorporated by the European Parliament in the proposal to amend the Pregnant Workers Directive. The latter has not been adopted yet because of the opposition of some Member States, most notably the United Kingdom, in the Council. Furthermore, the Progress Report highlighted that had the Directive been amended, there was consensus that paternity leave would have not been included.³⁰ This has been justified by the difficult economic situation across Europe.³¹

2.3. The case law of the European Court of Justice

The Court of Justice has been proactive in developing the framework of legislative rights relating to pregnancy, maternity, parental and paternity leaves by providing broad and liberal interpretations of these fundamental rights. In the early cases of *Dekker*³² and *Hertz*,³³ the Court established that as only women can become pregnant, a refusal to employ or the dismissal of a pregnant woman based on her pregnancy or her maternity amounts to direct discrimination on the grounds of sex, contrary to Articles 2(3) and 5(1) of Directive 76/207/EEC (now Article 2(2) of the Recast Directive).³⁴ On the basis of this principle, the Court has further held that any unfavourable treatment directly³⁵ or indirectly³⁶ connected to pregnancy or maternity constitutes direct sex discrimination. In addition, the Court has held that the protection of pregnancy and maternity rights is aimed at promoting substantive

²⁶ Presidency Conclusions of 23/24 March 2006, 777751/1/06 REV 1.

²⁷ Communication from the Commission ‘A Better Work-Life Balance: Stronger Support for Reconciling Professional, Private and Family Life’, COM(2008) 635.

²⁸ European Commission report ‘Implementation of the Barcelona Objectives concerning Facilities for Pre-School-Age Children’ COM (2008) 638.

²⁹ Consultation Document SEC (2006) 1245 and SEC (2008) 571 as discussed in the Communication from the Commission ‘A Better Work-Life Balance: Stronger Support for Reconciling Professional, Private and Family Life’ COM (2008) 635. See also European Commission, Employment, Social Affairs and Equal Opportunities ‘Opinion on New Forms of Leave (Paternity Leave, Adoption Leave and Filial Leave’ 2008.

³⁰ The EU Council, Proposal, Progress Report, 2008/0193 (COD) SOC 423/SAN 107/CODEC 875.

³¹ *Commission Improves Work-Life Balance for Millions with Longer and Better Maternity Leave* Brussels, 3 October 2008, IP/08/1450, available on <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/08/1450&format=HTML&aged=> (as of 10 June 2012).

³² Cases C-177/88 *Dekker v Stichting Vormingscentrum voor Jonge Volwassenen Plus* [1990] ECR I-3941.

³³ C-179/88 *Handels- og Kontorfunktionærernes Forbund I Danmark (Hertz) v Dansk Arbejdsgiverforening* [1990] ECR I-3979.

³⁴ This principle was reiterated in cases C-320/01 *Busch* [2003] ECR I-2041 in Paragraph 39 and C-394/96 *Brown v Rentokil* [1998] ECR I-4185 in Paragraph 16. However, the specific protection against dismissal of pregnant and new mothers starts at the moment that the employer is informed of the pregnancy until the worker’s return to work after her period of maternity leave. If the worker is absent after her period of maternity leave for reasons of illness, even if the illness is pregnancy related, the special protection no longer applies but she can claim treatment that is equal to that of a sick male worker.

³⁵ Case C-32/93 *Webb v EMO Air Cargo* [1994] ECR I-3567 in Paragraph 19.

³⁶ Case C-421/92 *Habermann-Beltermann v Arbeiterwohlfahrt* [1994] ECR I-1657 in Paragraphs 15-16.

gender equality,³⁷ the health of the mother directly following the birth of a child and the relationship between the new mother and her new-born child³⁸ as well as between a father and his child.³⁹ Furthermore the Court has also made it clear on several instances, most notably in the decision in Hill⁴⁰ that the principle of reconciliation between work and family life is a corollary of the principle of equality.

The Court of Justice has held that no other interest, not even economic interest, can prevail over the protection of pregnancy and maternity leave. Thus, refusing to employ a woman because she is pregnant cannot be justified on grounds of the financial loss the employer would suffer for the duration of the maternity leave.⁴¹ Similarly, if the woman appointed cannot be employed in the post concerned for the duration of her pregnancy, the employer cannot raise the excuse of financial loss.⁴²

Moreover, pregnancy and maternity rights cannot be dependent on whether the woman's presence at work during the period corresponding to maternity leave is essential to the proper functioning of the business in which she is employed,⁴³ even if the contract of employment was concluded for a fixed term.⁴⁴ The Court has also made it clear that health and safety obligations cannot be taken into consideration in such a way as to be detrimental to pregnant workers.⁴⁵

Finally, a worker does not have an obligation to disclose her pregnancy either during recruitment⁴⁶ or at any other stage of her employment.⁴⁷

The definition of worker and pregnant worker

In the area of free movement of persons, the Court of Justice considers that 'the concept of worker has a Community meaning and must not be interpreted in a restrictive manner.'⁴⁸ The Court has interpreted broadly the concept of worker for the purpose of applying EU gender equality, pregnancy and maternity rights. It considers that a director of a publicly-owned company is a worker if she has provided services to the company and is an integral part of it.⁴⁹ The Court went further and held that even if the worker cannot be classified as a 'pregnant worker' for the purposes of Council Directive 92/85/EEC, if the removal of a board

³⁷ Cases C-207/98 *Mahlburg v Land Mecklenburg-Vorpommern* [2000] ECR I-549 in Paragraph 26 and C-136/95 *Caisse nationale d'assurance vieillesse des travailleurs salariés v Thibault* [1998] ECR I-2011 in Paragraph 26.

³⁸ Cases 184/83 *Ulrich Hofman v Barmer Ersatzkasse* [1984] ECR 3047, C-207/98 *Mahlburg v Land Mecklenburg-Vorpommern* [2000] ECR I-549 in Paragraph 21; C-136/95 *Caisse nationale d'assurance vieillesse des travailleurs salariés v Thibault* [1998] ECR I-2011 in Paragraph 25; C-421/92 *Habermann-Beltermann v Arbeiterwohlfahrt* [1994] ECR I-1657 in Paragraph 21; C-32/93 *Webb v EMO Air Cargo* [1994] ECR I-3567 in Paragraph 20 and C-394/96 *Brown v Rentokil* [1998] ECR I-4185 in Paragraph 18.

³⁹ Case C-104/09 *Roca Álvarez v Sesa Start España ETT SA* [2010] ECR I-8661.

⁴⁰ Case C-243/95 *Kathleen Hill and Ann Stapleton v the Revenue Commission and the Department of Finance* [1998] ECR I-3739 in Paragraph 42: the Court held that 'Community policy in this area is to encourage and, if possible, adapt working conditions to family responsibilities. Protection of women within family life and in the course of their professional activities is, in the same way as for men, a principle which is widely regarded in the legal systems of the Member States as being the natural corollary of the equality between men and women, and which is recognised by Community law.' See also C-1/95 *Hellen Gerster v Freistaat Bayern* [1997] ECR I-5253.

⁴¹ Cases C-177/88 *Dekker v Stichting Vormingscentrum voor Jonge Volwassenen Plus* [1990] ECR I-3941 and C-207/98 *Mahlburg v Land Mecklenburg-Vorpommern* [2000] ECR I-549 in Paragraph 29.

⁴² Case C-207/98 *Mahlburg v Land Mecklenburg-Vorpommern* [2000] ECR I-549.

⁴³ Case C-32/93 *Webb v EMO Air Cargo* [1994] ECR I-3567 in Paragraph 26.

⁴⁴ Cases C-109/00 *Tele Danmark A/S v Handels- og Kontorfunktionærernes Forbund i Danmark (HK), acting on behalf of Marianne Brandt-Nielsen* [2001] ECR I-2785 in Paragraph 34 and C-438/99 *Maria Luisa Jiménez Melgar v Ayuntamiento de Los Barrios* [2001] ECR I-6915 in Paragraphs 43-47.

⁴⁵ Cases C-66/96 *Høj Pedersen and others* [1998] ECR I-7327 and C-207/98 *Mahlburg v Land Mecklenburg-Vorpommern* [2000] ECR I-549.

⁴⁶ Case C-32/93 *Webb v EMO Air Cargo* [1994] ECR I-3567.

⁴⁷ Case C-320/01 *Wiebke Busch v Klinikum Neustadt GmbH & Co. Betriebs-KG* [2003] ECR I-2041.

⁴⁸ Case C- 357/89 *V. J. M. Raulin v Minister van Onderwijs en Wetenschappen* [1992] ECR I-1027 in Paragraph 10.

⁴⁹ Case C-232/09 *Dita Danosa v LKB Līzings SIA* [2010] ECR I-11405.

member is due, or essentially due, to pregnancy, it can only affect women and it is therefore direct discrimination on grounds of sex contrary to Council Directive 76/207/EEC.⁵⁰

The Court considers that women undergoing in-vitro fertility treatment (IVF) must be protected against dismissal from the start with the transplantation of the fertilized ova.⁵¹ When the dismissal occurs before the ova are technically transferred, the worker cannot be protected by Directive 92/85, but the ECJ has pointed out that to dismiss a woman because she is undergoing IVF was contrary to the Equal Treatment Directive.⁵²

The remuneration of pregnant workers and workers on maternity leave

The question of pay in relation to pregnancy and maternity rights has been a difficult issue. The Court has held that the position of workers on maternity leave is not comparable to that of a worker actually at work. Although male and female workers are entitled to equal pay for work of equal value under Article 157 TFEU, when a worker is on maternity leave, her right to remuneration (and to equal pay) falls under the regime of Article 11 of Directive 92/85/EEC. Women on maternity leave can only rely on the minimum guaranteed allowance set in Article 11(2)(b) of Directive 92/85/EEC, which cannot be less than the sick leave pay.⁵³ Workers on maternity leave are not therefore entitled to continue to receive their full pay or to be paid any allowances that are dependent on the performance of specific functions in particular circumstances and are intended to compensate for the disadvantages related to those functions.

However, the pay received during maternity leave must at least in part be determined on the basis of the pay earned before the maternity leave begins, and any pay rise awarded between the beginning of the reference period and the end of the maternity leave must be taken into account in calculating such pay. The Court decided that workers are entitled to have any pay increase received before the start of their maternity leave taken into consideration in the calculation of the earnings-related element of their statutory maternity pay.⁵⁴ In addition, the Court has held that maternity leave has to be included in the calculation of seniority when determining conditions for access to work.⁵⁵

With regard to the duration of remuneration based on a sick-leave scheme in the event of pregnancy-related illness, the Court has ruled that a sick-pay scheme is not discriminatory if it provides for a reduction in pay in cases where the absence exceeds a certain duration, with regard to female workers absent prior to maternity leave by reason of an illness related to their pregnancy, as well as with regard to male workers absent by reason of any other illness.⁵⁶ In such cases, the female worker should be treated in the same way as a male worker who is absent on grounds of illness. However, the amount of payment made should not be so low as to undermine the objective of protecting pregnant workers.

There is also a distinction between the legal regime applicable to pregnant workers and the one applicable to workers on maternity leave. The nature of the remuneration in question is important in terms of deciding whether a pregnant worker or indeed in some instances a worker on maternity leave is entitled to it or not. The problem is to define the relationship between the right to a minimum allowance as defined under Article 11 of Directive 92/85/EEC and the right to pay under Article 157 TFEU and to tie this in with the provisions on direct discrimination in the Recast Directive.

In the same vein, the Court also clarified⁵⁷ that Clause 2.6 and 2.8 of the framework agreement on parental leave does not preclude taking into account, in the calculation of an

⁵⁰ Case C-232/09 *Dita Danosa v LKB Līzings SIA* [2010] ECR I-11405.

⁵¹ Case C-506/06 *Sabine Mayr v Backerei und Konditorei Gerhard Flockner OHG* [2008] ECR I-1017.

⁵² Case C-506/06 *Sabine Mayr v Backerei und Konditorei Gerhard Flockner OHG* [2008] ECR I-1017.

⁵³ Case C-432/93 *Gillespie v Northern Health and Social Services Board* [1995] ECR I-4705 and Case C-411/96 *Boyle* [1998] ECR I-6401.

⁵⁴ C-147/02 *Alabaster v Woolwich plc and Secretary of State for Social Security* [2004] ECR I-3101.

⁵⁵ Cases C-294/04 *Carmen Sarkatzis Herrero v Instituto Madrileño de la Salud (Imasalud)* [2006] ECR I-1513 and C-284/02 *Land Brandenburg v Ursula Sass* [2004] ECR I-11143.

⁵⁶ C-191/03 *McKenna v North Western Health Board* [2005] ECR I-7631.

⁵⁷ Case C-537/07 *Evangelina Gómez-Limón Sánchez-Camacho v Instituto Nacional de la Seguridad Social (INSS)* [2009] ECR I-6525.

employee's permanent invalidity pension, the fact that he has taken a period of parental leave in the form of reduced working hours during which he made contributions and acquired pension entitlements in proportion to the reduced salary received. Clause 2.8 of the framework agreement on parental leave does not require Member States to ensure that during parental leave employees continue to receive social security benefits. The principle of equal treatment for men and women in matters of social security, within the meaning of Council Directive 79/7/EEC, does not preclude an employee, during part-time parental leave, from acquiring entitlements to a permanent invalidity pension according to the time worked and the salary received and not as if he had worked on a full-time basis.

The right to receive bonuses

The question of whether a bonus is payable at all or in part to an employee who has been absent on maternity leave for all or part of the relevant bonus period has been addressed by the Court of Justice in a number of cases. There is a technical distinction between the rules applicable to different kinds of payments granted to women on (extended) maternity leave. The complexity of applicable EU legal provisions on this issue and the answers given by the Court has led to confusion in the Member States. Two types of bonuses exist. The first types of bonuses are those which are aimed at all workers as an encouragement to work, which should be given to all workers regardless of whether the worker is pregnant or on maternity leave.⁵⁸ The second type of bonus depends on the performance of the worker at work. Women on maternity leave can be excluded from this latter bonus.⁵⁹

A pregnant worker is, in principle, entitled to equal pay under Article 157 TFEU, unless she cannot perform her normal duty for reasons connected to health and safety and is therefore transferred to another job or required to not continue working. In these cases her right to equal pay can be compromised. The Court held that workers given leave from work or transferred to another job because of pregnancy-related health and safety are entitled to their basic monthly pay and the supplementary allowances attached to their occupational status. However, they cannot claim the allowances and supplements which are intended to compensate for the disadvantages related to the performance of specific tasks in particular circumstances, where they do not actually perform those tasks.⁶⁰

Fixed-term contracts

The non-extension of fixed-term contracts because of pregnancy and maternity constitutes direct sex discrimination contrary to EU gender equality law. The Court has addressed this issue in a series of cases.⁶¹ In *Melgar*,⁶² for example, it clearly stated that 'where non renewal of a fixed term contract is motivated by the worker's state of pregnancy, it constitutes direct discrimination on grounds of sex' contrary to EU law.

Annual leave and maternity leave

A growing number of cases is concerned with the clashes between periods of annual leave and periods of maternity leave or parental leave. The Court of Justice addressed the issue of the interaction between the right to maternity leave as guaranteed by Directive 92/85/EEC and

⁵⁸ C-333/97 *Lewen v Denda* [1999] ECR I-7243.

⁵⁹ In C-194/08 *Susanne Gassmayr v Bundesminister für Wissenschaft und Forschung* [2010] ECR I-6285 an Austrian doctor was refused the on-call duty allowance, which was additional to her basic pay, because she had to stop working for health and safety reasons; C-471/08 *Parviainen v Finnair Oyj* [2010] ECR I-6533 involves the temporary transfer of an air hostess during her pregnancy to other duties and the pay she received during the period of transfer: upon being transferred to desk duties, she lost her right to a supplementary allowance, which was intended to compensate for the specific disadvantages connected with the organisation of working hours in the air transport sector.

⁶⁰ See the discussion further below in 3.3.1. on the right to receive bonuses.

⁶¹ Case C-32/93 *Webb v EMO Air Cargo* [1994] ECR I-3567 in Paragraph 26; Cases C-109/00 *Tele Danmark A/S v Handels- og Kontorfunktionærernes Forbund i Danmark (HK)*, acting on behalf of *Marianne Brandt-Nielsen* [2001] ECR I-2785 in Paragraph 34.

⁶² Case C-438/99 *Maria Luisa Jiménez Melgar v Ayuntamiento de Los Barrios* [2001] ECR I-6915 in Paragraph 47.

the right to paid annual leave under Article 7(1) of Directive 93/104/EC (now amended by Directive 2003/88/EC) in *Gomez*.⁶³ The Court of Justice held that a worker must be able to take her annual leave during a period that did not overlap with her maternity leave, even where a collective agreement fixed periods of leave for all workers.

Moreover, the Court held that although it is generally appropriate to apply the pro rata principle for holidays when an employee works part-time, this principle cannot be applied retrospectively to annual leave already accrued before the transition from full-time to part-time work.⁶⁴ It is expected that this decision will be relevant to workers who return from maternity leave and arrange with their employer to work on a part-time basis. As workers continue to accrue annual leave while on maternity leave, this judgment confirms that they will be entitled to take that accrued holiday upon their return to work as if they had worked on a full-time basis. In addition, the Court made it clear that holidays accrued before a period of parental leave should not be lost. A worker on parental leave is entitled to keep the annual leave she has accrued and should be permitted to carry it over to following leave years when she returns to work.

Dismissal and other unfavourable treatment during maternity and parental leave

Under Article 2(2) of the Recast Directive and Article 10 of the Pregnant Workers Directive, pregnant workers and workers on maternity leave are protected from dismissal during the period from the beginning of their pregnancy to the end of the maternity leave. In *Paquay*,⁶⁵ the Court ruled that the prohibition to dismiss pregnant women or women who are on maternity leave as determined in the Pregnant Workers Directive is not limited to the notification of a decision to dismiss but it also includes the steps leading up to such a decision during that protected period. Therefore the dismissal of a woman that takes place almost immediately after returning from maternity leave is considered to fall within the protected period.

The Court has also clarified the conditions for the calculation of compensation for dismissal when this occurs during part-time parental leave.⁶⁶ The Court of Justice held that the concept of ‘rights acquired or in the process of being acquired’ in the agreement must cover all the rights and benefits, whether in cash or in kind, derived directly or indirectly from the employment relationship. Accordingly, national legislation which would result in the rights flowing from the employment relationship being reduced in the event of parental leave could discourage workers from taking such leave and could encourage employers to dismiss workers who are on parental leave rather than other workers. The Court therefore concludes that the framework agreement on parental leave precludes, where an employer unilaterally terminates a worker’s full-time employment contract of indefinite duration, without urgent cause or without observing the statutory period of notice, and while the worker is on part-time parental leave, the compensation to be paid to the worker from being determined on the basis of the reduced salary being received when the dismissal takes place. In other words, the European Court of Justice decided that the indemnification in lieu of notice of an employee benefiting from parental leave should be calculated as if the employee had not reduced his/her working hours, thus on the basis of his/her full-time salary.

The Parental Leave Directive

In *Zoi Chatzi*⁶⁷ the Court interpreted the provisions of the Parental Leave Directive. The Court was asked whether Directive 96/34/EC, interpreted in conjunction with Article 24 of the Charter of Fundamental Rights of the European Union, can be regarded as also creating in parallel a right to parental leave for the child. If twins are born, does the granting of one period of parental leave constitute unfair discrimination on the basis of birth and a restriction on the right of twins? The European Court replied that the Parental Leave Directive does not

⁶³ Case C-342/01 *Gomez v Continental Industrias del Caucho SA*. [2004] ECR I-2605.

⁶⁴ Case C-486/08 *Zentralbetriebsrat der Landeskrankenhäuser Tirols v Land Tirol* [2010] ECR I-3527.

⁶⁵ Case C-460/06 *Paquay v Societe d’architectes Hoet and Minne SPRL* [2007] ECR I-8511.

⁶⁶ Case C-116/08 *Christel Meerts v Proost NV* [2009] ECR I-10063.

⁶⁷ Case C-149/10 *Zoi Chatzi v Ypourgos Oikonomikon* [2010] ECR I-8489.

award to the child a personal right of parental leave. In addition, the provisions of the Directive do not mean that the birth of twins establishes a right to a number of parental leaves equal to the number of children born. The Court clarified that under the light of the principle of equal treatment, the Directive imposes on the national legislators the establishment of a parental leave system, where, depending on the situation in the relevant Member State, it ensures to the parents of twins a treatment that takes into account their special needs as appropriate. It is for each Member State to ascertain whether national legislation meets this requirement and to interpret – to the extent possible – this national legislation in line with EU law.

Maternity or parental leave?

The ECJ has held that an employee who had been granted parental leave, and then discovered that she was pregnant and due to give birth part-way through her parental leave, should be allowed to end her parental leave early and return to work in order to benefit from paid maternity leave.⁶⁸

Similarly, in *Busch*,⁶⁹ the Court examined the case of a nurse wishing to return to work before the end of a period of parental leave and in order to do so she informed her employer that she was pregnant again. Although her new pregnancy was likely to prevent her from carrying out all of her normal duties, the Court held that the employer was not permitted to prevent her from returning early.

Effective judicial protection

The Court has established that a pregnant woman must be entitled to effective judicial protection.⁷⁰ Thus, if national law lays down a time limit for a pregnant woman dismissed from employment during pregnancy which is too short and also bars pregnant women from obtaining damages when other employees can get them, the law in question discriminates against female employees.

Whilst the decision in *Pontin* represents a clear case of direct discrimination, the Court has also addressed cases of indirect discrimination such as the requirement of flexibility and mobility and the length of service. In *Danfoss*⁷¹ the Court held that adaptability to variable hours, place of work or training was justifiable only if these criteria were ‘of importance for the performance of specific tasks entrusted to the employee’. However, it also added that, ‘length of service goes hand in hand with experience and since experience generally enables the employee to perform his duties better, the employer is free to reward it without having to establish the importance it has in the performance of specific tasks entrusted to the employee’.

Pending cases

A few cases on issues connected to pregnancy, maternity and parenthood have recently been referred to the Court. Two very similar cases coming from **Finland** concern issues of pay. In both *Terveys*⁷² and *Ylemmät Toimihenkilöt YTN ry*,⁷³ the Court has been asked whether to move an employee from unpaid childcare leave to maternity leave without paying remuneration in accordance with the national collective agreement is compatible with Directive 2006/54 and Directive 92/85. A further case which is an area already addressed by the Court⁷⁴ is that of *Betriu Montull*.⁷⁵ Here the Court has been asked to interpret the

⁶⁸ Case C-116/06 *Sari Kiiski v Tampereen Kaupunki* [2007] ECR I-7643.

⁶⁹ Case C-320/01 *Wiebke Busch v Klinikum Neustadt GmbH & Co. Betriebs-KG* [2003] ECR I-2041.

⁷⁰ Case C-63/08 *Virginie Pontin v T-Comalux SA* [2009] ECR I-10467.

⁷¹ Case [C-109/88](#) *Handels-og Kontorfunktionaernes Forbund I Danmark v Dansk Arbejdsgiverforening, acting on behalf of Danfoss* [1989] ECR I-3199.

⁷² Case C-512/11 *Terveys – ja sosiaalialan neuvottehjärjestö TSN ry v Terveyspalveluan Liitto ry, Mehiläinen Oy*, lodged on 3 October 2011.

⁷³ Case C-513/11, *Ylemmät Toimihenkilöt YTN ry v Teknologiateollisuus ry, Nokia Siemens Networks Oy*, lodged on 3 October 2011.

⁷⁴ This is a similar situation to the one discussed in Case C-104/09 *Roca Álvarez v Sesa Start España ETT SA*, [2010] ECR I- 08661.

compatibility of a Spanish legislative provision with the principle of equal treatment. The domestic legislative provision recognises the primary right of the mother, but not of the father, to suspend the contract of employment and to return to the same job, paid for by the social security system, even once the six-week period following the birth has elapsed. On the contrary, male employees can enjoy the same right only if the mother's health is at risk and/or if the child's mother enjoys the status of dependent employee.

In the case of *Riežniece*⁷⁶ the Court will decide on actions which might result in a female employee on parental leave losing her post after returning to work.

In the cases of *C.D.*⁷⁷ and *Z*⁷⁸ the Court has been asked, for the first time, to decide on maternity via surrogacy agreements. Finally, another new issue in this area was raised in the case of *Kalikauskas*⁷⁹ where the Court has been asked to interpret the concept of discrimination by association in the context of pregnancy.

3. Summary of the findings

This report looks at the national statutory rights related to the protection of pregnancy, maternity and parenthood across the EU Member States and their application in practice. Overall, these rights are of a reasonable standard. The EU has been successful in establishing a common ground and often the domestic provisions go beyond the obligations set by the EU. The fact that a platform of rights is available, however, does not mean that problems do not exist: these are more difficult to assess as they are often 'hidden'. One of the most fundamental findings of this report is the existence of a large gap between the letter of the law and its practice. In other words, if on paper the law exists and is comprehensive, it is too often circumvented in practice and individuals do not always attempt to enforce their rights. A number of recent national studies⁸⁰ into pregnancy and maternity discrimination reveals a considerable level of discriminatory practices towards pregnant workers and new mothers, including dismissal, harassment, the refusal to extend fixed-term contracts of employment or to recruit, and detrimental changes in the terms of the contract of employment upon return from maternity leave. It is clear that cultural stereotypes are still very much alive across Europe: in many countries, women are still perceived as the main carer, and therefore not primarily as a worker in their full right.

In terms of employment rights, it is possible to highlight some other common trends.

- (1) Generally speaking, the level of protection granted to pregnancy, maternity and parenthood is more sophisticated for those working in the public sector than for workers in the private sector (e.g. **Turkey; Portugal, Austria**). However, in **Greece**, the more favourable public-sector legislation is in certain respects disregarded, while it also contains some discriminatory provisions. The vast majority of women end up working in the public sector which is then seen as responsible for managing pregnancy and childcare related problems (e.g. **Finland, Portugal**). Similarly, workers in the private sector are more likely to suffer from discrimination than workers in the non-profit sector (e.g. **Croatia**).
- (2) Discrimination appears to be less common in larger compared to smaller businesses (e.g. **the Netherlands, United Kingdom**). Sometimes the protection offered may, in practice, differ according to the size of the company (e.g. **United Kingdom, Germany**).

⁷⁵ Case C-5/12 *Marc Betriu Montull v Instituto Nacional de la Seguridad Social (INSS)*, lodged on 3 January 2012.

⁷⁶ Case C-7/12 *Nadežda Riežniece v Zemkopības ministrija (Republic of Latvia), Lauku atbalsta dienests*, lodged on 4 January 2012.

⁷⁷ Case 167/12 *C.D. v S.T.* lodged on 3 April 2012.

⁷⁸ Case 363/12 *Z. v A Government Department and the Board of Management of a Community School*, lodged on 30 July 2012.

⁷⁹ Case C-44/12 *Andrius Kalikauskas v Macduff Shellfish Limited, Duncan Watt*, lodged on 30 January 2012.

⁸⁰ For example, this is the case in **Greece, France, Lithuania, the Netherlands, Spain** and the **United Kingdom**.

The impact of pregnancy and maternity rights on the ability and level of female engagement in the workplace is not clear. In short, employers generally claim that more entitlement to pregnancy and maternity rights leads to more discrimination against women, while parents claim that they require more protection and more rights in order to be able to access and retain paid employment. Although no specific studies is outlined in this report, it has been suggested that the extent of pregnancy and maternity rights is directly linked to lower employment rates for women in some cases (e.g. **Bulgaria, Poland, Greece, Lithuania**).⁸¹ Conversely, some research demonstrates a positive relationship between increased family leave coverage and women's return to work after childbirth (e.g. **United Kingdom**).⁸²

3.1. Discrimination in the access to employment – recruitment process and monitoring

Since the decision in *Dekker*,⁸³ the Court has established two pivotal principles. First, as only women can become pregnant, the refusal to engage a pregnant woman because of pregnancy or maternity amounts to direct discrimination. This is furthermore reinforced by Article 10 of the Pregnant Workers Directive. To qualify dismissal on grounds of pregnancy as direct discrimination means, in principle, that it cannot be justified in any way, in particular by economic considerations.⁸⁴ The dismissal of a pregnant worker or a new mother, however, can under certain conditions unrelated to pregnancy be justified.⁸⁵ Second, in certain circumstances, such as pregnancy, a male comparator is not necessary. This is reflected also in Article 15 of the Recast Directive, which provides that at the end of her maternity leave a woman is entitled 'to return to her job or to an equivalent post on terms and conditions which are no less favourable to her and to benefit from any improvement in working conditions to which she would have been entitled during her absence'. By now these principles appear to have been embedded in the relevant domestic legislation of the Member States.

A few experts have stated that the legal framework with regard to the prohibition of discrimination in the recruitment process is not yet of an acceptable standard. For instance, in the **Turkish** private sector, discrimination in selection procedures is not prohibited by the Labour Act, despite the existence of a criminal law prohibiting such behaviour.⁸⁶ In **Poland**, there is no clear legal provision that links sex discrimination to pregnancy and maternity discrimination.

Still, most experts state that the law prohibiting discrimination regarding recruitment of pregnant women and new mothers is sufficient and satisfactory. Nevertheless, this report highlights the existence of unfavourable treatment in practice against pregnant women or young mothers applying for a job. Indeed, in practice, these principles are often violated (e.g. **Poland, Hungary, Germany**) and in fact pregnant women tend to not apply for jobs during their pregnancy (e.g. **Romania**). Discriminatory practices regarding the wording of job offers

⁸¹ <http://www.efka.org.pl/index.php?action=dyskusje&ID=13>, accessed 16 August 2012. See also CAZES SANDRINE - NESPOROVA ALENA: Flexicurity. A relevant approach in Central and Eastern Europe. ILO, Geneva. 2007.

⁸² J. Waldfogel, Y. Higuchi and M. Abe *Maternity Leave Policies and Women's Employment after Childbirth: Evidence from the United States, Britain, and Japan* (1998, LSE), available on http://eprints.lse.ac.uk/6533/1/Maternity_Leave_Policies_and_Women's_Employment_after_Childbirth_Evidence_from_the_United_States_Britain_and_Japan.pdf, accessed 10 August 2012; see also J. Plunkett *The Missing Million: The potential for female employment to raise living standards in low to middle income Britain*, http://www.resolutionfoundation.org/media/media/downloads/The_Missing_Million.pdf, accessed 10 August 2012.

⁸³ Case C-177/88 *Dekker v Stichting Vormingscentrum voor Jonge Volwassenen Plus* [1990] ECR I-3941.

⁸⁴ This reasoning has also been applied in cases of indirect sex discrimination, where the Court held that budgetary considerations cannot in themselves justify sex discrimination. See for example Case C-343/92 *M. A. De Weerd, née Roks, and others v Bestuur van de Bedrijfsvereniging voor de Gezondheid, Geestelijke en Maatschappelijke Belangen and others* [1994] ECR I-571.

⁸⁵ Article 10(1) of the Pregnant Workers Directive provides that 'Member States shall take the necessary measures to prohibit the dismissal of workers, within the meaning of Article 2, during the period from the beginning of their pregnancy to the end of the maternity leave referred to in Article 8 (1), save in exceptional cases not connected with their condition which are permitted under national legislation and/or practice and, where applicable, provided that the competent authority has given its consent.'

⁸⁶ Of course the rules regarding criminal procedure and civil procedure would differ and for instance the reversal of the burden of proof might not apply in criminal proceedings, making it harder to prove discrimination.

is relatively easy to monitor, but it is a lot more difficult to control the substance of interviews conducted prior to hiring and to assess the real motivation behind recruitment decisions of employers. In **Hungary**, for example, during the process of recruiting, it is still common in practice to ask a woman questions concerning future plans for pregnancy and childcare arrangements. The expert points out that it is also rather widespread that women are not recruited because employers assume that mothers of young children will not be punctual in morning shifts.⁸⁷ One of the main issues is the ability to bring forward sufficient evidence in order to prove discrimination in this case (e.g. **Czech Republic, Germany, Greece**). Job applicants also rarely seek legal remedies because of the fear of being labelled as ‘troublesome’ or victimized when they look for another employment (e.g. **Croatia**).

A way around this difficulty could be to impose the systematic monitoring of recruitment processes. In **Spain**, an initiative taken by the Labour and Social Security Inspectorate⁸⁸ aimed amongst other things at monitoring companies' compliance with their obligations to achieve effective equality between women and men in the access to employment and recruitment processes. The study uncovered violations which were followed by penalties and involved a large number of workers.

If the recruitment process is not monitored and controlled by for instance the labour authorities, the existence of the legal prohibition to discriminate against pregnant applicants is often not sufficient to guarantee equal treatment in the recruitment process. However, in spite of the existence of a monitoring system in the **Romanian** recruitment process, pregnant women in practice refrain from applying for a job or to change jobs while they are pregnant. This situation is likely to exist in most Member States.

Good practice:

In **Belgium**, a person who claims pregnancy or maternity discrimination during the recruitment process can access two types of redress from the Labour Court which may be combined: an order to put an end to the discrimination and fixed damages if the employer is not able to demonstrate that the candidate would not have been recruited even if there had been no discrimination.

3.2. Adjustment of working conditions/leave for reasons connected to health and safety

The Pregnant Workers Directive creates two types of obligations for employers, who must, on the one hand, ensure the health and safety of pregnant workers and workers who have recently given birth or are breastfeeding and, on the other hand, must respect the principle of sex equality and refrain from discrimination against this category of workers. The two obligations should work in harmony. Although the Court of Justice has clearly stated that obligations regarding health and safety cannot be taken into consideration in such a way as to be detrimental to pregnant workers,⁸⁹ health and safety considerations have been used as a way of excluding women from the workplace (e.g. **Croatia**). In **Luxembourg**, for instance, many actors such as women's associations are denouncing the fact that, in practice, pregnant workers who are employed in the medical sector or in the social sector are systemically exempted from work. In **Croatia**, pregnant workers who want to continue working night shifts must make a request and present a medical certificate to their employer. This is seen as overprotection which is harmful to the employment of women in a general way. Failure to adjust working conditions and/or working hours of pregnant workers to avoid exposure to occupational risks, with the result that women may have lost their job, has been noted in **Cyprus**, but no complaints were made to the competent authorities.

In practice, some pregnant workers who requested the application of protection on health and safety grounds have experienced discrimination, victimization and bullying (e.g. **Lithuania**).

⁸⁷ <http://www.egyenlobanasmod.hu/jogesetek/hu/>.

⁸⁸ Labour and Social Security Inspectorate Action Plan for 2008-2010 to monitor effective equality between men and women in companies.

⁸⁹ Cases C-66/96 *Høj Pedersen and others* [1998] ECR I-7327 and C-207/98 *Mahlburg v. v Land Mecklenburg-Vorpommern* [2000] ECR I-549.

3.3. Remuneration

The legal framework relating to the remuneration of workers on maternity leave is complex, involving, on the one hand, the articulation of the principle of equal pay under Article 157 TFEU and the Recast Directive and, on the other hand, the right to be paid an allowance under Article 11 of the Pregnant Workers Directive. The Court of Justice has reviewed this area in a number of cases. The complexity of this area may be the result of the confusion of the domestic systems. The method for calculating the remuneration of a worker on pregnancy, maternity, paternity leave and in some cases also parental leave (with the exception of some Member States, e.g. the **United Kingdom**) differs from Member State to Member State.⁹⁰ In **Italy**, for example, employers are entitled to a daily indemnification paid by the National Institute for Social Protection. Such indemnification is granted to those employed in the private and the public sector and to the self-employed. However, it is granted differently, depending on whether the employee works in the private or the public sector: whilst in the former, payment is equivalent to 80 % of the employee's average daily wage – although most collective agreements provide for the full amount – in the latter, employees are generally entitled to 100 % of their wage. The same amount is paid to fathers who take advantage of paternity leave. In **Luxembourg**, maternity leave is paid 100 % of the average daily insurable income which is based on earnings during the three months before maternity leave. In the **United Kingdom**, to qualify for statutory maternity pay (SMP) a woman must have been continuously employed by the same employer for at least 26 weeks before the 15th week before the week her baby is due, and must have earned on average an amount at least equal to the applicable lower earnings limit for National Insurance contributions (currently EUR 133/GBP 107 per week). The level of SMP is set at 90 % of salary for the first six weeks followed by the remainder of the 39-week period during which maternity leave is paid at a flat rate of EUR 168.60 (GBP135.45), or 90 % of the woman's average gross weekly earnings if that is lower, but it is important to note that the statutory maternity allowance fills some of the gaps.

In **Latvia** maternity allowance is 80 % of the employee's gross salary,⁹¹ which means that, in practice, during maternity leave women receive maternity allowance in an amount which is higher than their net salary, because the net salary is around 67 % of the gross salary.⁹² The same applies to paternity allowance.⁹³

Although there are differences in calculation of the relevant benefits, under Article 11(3) of the Pregnant Worker Directive they must be adequate and at least equal to the allowance provided in case of sick leave. In **Lithuania**, there is a substantial difference between the entitlement to maternity allowance, which requires a longer period of social insurance record, and that of the sickness benefit, in violation of Article 11(3) of Directive 92/85/EC. In **Greece**, in some cases the maternity allowance is granted on stricter conditions than sick pay.

Finally, some women are denied their rightful access to the allowance by governmental agencies. In **Croatia**, for instance, the allowance during maternity leave is paid by the Institute for Health Insurance, which in practice commonly refuses to pay the allowance to women who have entered into a contract employment during their pregnancy on the assumption that such employment relationships are fictional and fraudulent, concluded with the sole intention to acquire maternity benefits.

3.3.1. Bonus

One of the contentious points with regard to the remuneration of workers on maternity leave is the question of bonuses and whether these should be taken into consideration when

⁹⁰ See below in Annex III for a table containing the different levels of payment allocated for various leaves, per country.

⁹¹ Law on Maternity and Sickness Allowances (*likums Par maternitātes un slimības pabalstiem*), OG No. 182, 23 November 1995, Article 10.

⁹² Until 1 January 2012, the maternity allowance was 100 % of the net salary, but the legislator on account of the lack of resources decided to provide maternity and paternity allowance in an amount that is equal to other allowances, e.g. sickness and paternal allowances. Amendments OG No. 202, 23 December 2011.

⁹³ Article 10³.

calculating maternity pay. The Court of Justice has interpreted the issue on a few occasions⁹⁴ but the situation is still complicated. In **the Netherlands**, the Equal Treatment Commission (ETC) (the main equality body) decided in 2011 that contrary to earlier cases, a bonus does not constitute pay and therefore the claimant did not have a right to this bonus during her pregnancy/maternity leave.⁹⁵ In many countries, it is common practice for employers to not pay specific bonuses, such as attendance bonus, productivity bonus, or meal or transportation bonus, that used to be attached to the salary when the worker was not on leave (e.g. **Portugal, Ireland**), or Christmas bonus (e.g. **Germany**).

Good practice:

A Supreme Court decision in **Poland** has established that workers on maternity leave are entitled to receive the so-called 13th-month salary, which can be considered to be a bonus if they have worked for at least six months in one calendar year.

3.3.2. Pensions

A further right, linked to pay is that to receive a pension. This can be very important as it will determine the wealth of individuals at the end of their working life. On the one hand, pension contributions are taken into consideration during the period of paid statutory maternity/paternity leave: in **Portugal** and in **Austria**, for example, maternity and parental leave can be treated as a period of effective work which is taken into account for the purpose of pension.

On the other hand, other (longer) periods of unpaid leave, which employees (generally mothers) take in order to look after their young children are not for example periods of parental leave (e.g. **United Kingdom, the Netherlands, Germany**). In some Member States periods off work taken in order to raise a family are taken into consideration in the form of ‘care credits’ when calculating an individual’s pensions (e.g. **Germany, Czech Republic**). In **Ireland**, employees have no entitlement to state benefit during parental leave, but they retain their ‘credits’ so that their social welfare cover is maintained.

Good practice:

In **Liechtenstein** advantages provided for parents who dedicate time to looking after their children are equally divided between them (unpaid parental leave). They profit from a fictitious income, which is added upon the calculation of the pension for the period dedicated to family work. However, caring periods for children and other relatives in the same household count less than the full crediting of work periods for pensions purposes.

3.4. Dismissal/pressure to resign – the impact of the economic crisis

The introduction of pregnancy and maternity rights has led some to argue that these rights have created a barrier in women’s employment ability. The recent economic crisis has further heightened the argument that women’s legal protections with regard to pregnancy and maternity make them the first ‘casualties’ on the list of employees to be disposed of.

In **Greece**, for example, women, and particularly pregnant workers and mothers, have been found by the Ombudsman and the ILO Committee of Experts on the Application of Conventions and Recommendations to be disproportionately affected by the recent legislative measures aimed at increasing labour market flexibility. Of particular interest for this report is the ‘dramatic increase’ of measures enabling employers to unilaterally convert full-time contracts into contracts for rotation work and part-time. The so-called ‘rotation employment’ is a change to employment conditions, which leads to ‘full-time employment for fewer days a week or fewer weeks a month or fewer months a year or a combination of these’. This new form of employment has drastically increased since 2010 and is in violation of Directive

⁹⁴ Case C- 194/08 *Gassmayr* [2010] ECR I-6285 and C-471/08 *Parviainen* [2010] ECR I-6533; see the section on *The right to give bonuses* above.

⁹⁵ ETC 19 May 2011, Reference number: ETC 2011-79-80-81; source: <http://cgb.nl> (search for number of the Opinion).

2006/54/EC because it is imposed disproportionately on women. In **Lithuania**, pregnant women are also reported to be pressured by employers to agree to work under amended (less favourable) working conditions. Also, in **Hungary**, women are more often selected for dismissal during workforce reductions because they are expected to be less able to meet the expectation of the increased workload following the reorganisation.⁹⁶ In **Latvia**, the economic crisis has meant a temporary capping on social insurance allowances.

A number of experts have referred to various pressure tactics used by employers to force employees who are pregnant or new mothers to resign (e.g. **Romania, Spain, Lithuania**). It is referred to as ‘mobbing’ practices in **Spain**, where the expert further explains that a 2012 study entitled ‘Mobbing maternal’ (harassment during pregnancy)⁹⁷ shows that 90 % of pregnant women suffer harassment in the workplace during pregnancy, and 25 % are dismissed or encouraged to voluntarily depart. In addition, there is strong evidence that in the **Greek** private sector pregnant women or mothers are ‘forced’ out of their employment.

Moreover, the particularly worrying practice of the so-called ‘blank (or white) resignation’ was identified in **Italy, Croatia and Greece**, and in **Portugal** in the past. As a precondition for recruitment, women are asked to sign a resignation letter without a date so as to be used by the employer to make the worker resign when needed (e.g. if the worker becomes pregnant, although this is certainly not the only reason for using such ‘white resignations’). This practice is always difficult to prove as women often fear the negative impact that this could have on them. Therefore, although women complaint to NGOs and the media, these are difficult prove. An exception, possibly, is **Italy** where there are a few reported cases concerning white resignations of working mothers. In that country the issues was also recently reported by an investigation of national newspaper *La Repubblica*, which claimed that around 2 million women were affected by this practice. This in turn triggered a political debate and, as a result, the Italian Parliament adopted Act No. 92/2012, ‘The labour market reform from a perspective of growth’, which now strengthen the rules prohibiting the use of ‘white resignations’.

Good practice:

In **Portugal**, the practice of white resignations has been eradicated by the legal requirement that resignations of contracts of employment need to be signed before a public authority and, should this not be the case, the worker can reverse the resignation in the first seven days after it was signed.

Termination of a contract of employment during the trial period on the ground of pregnancy is considered direct discrimination in **Austria** but not in **France** where, however, the general prohibition against discrimination on grounds of pregnancy applies

A serious cause for concern is the newly introduced legislation in **Hungary** that has considerably reduced the legal sanctions for unfair dismissals in general. Although protection against dismissal on grounds of pregnancy/maternity remains relatively robust, it diminishes after the expiry of the period of unpaid leave, i.e. when the child reaches the age of 3.

Good practice:

In **Portugal**, the dismissal of a pregnant worker or a worker who has returned from maternity leave must be submitted to an ex-ante authorisation by the labour inspectorate. Such process is thought to limit discrimination encountered by pregnant women and workers on maternity leave.

3.4.1. Women in executive positions

Highly qualified women and women in executive positions are not excluded from discrimination on the ground of pregnancy and maternity. In fact in **Hungary**, these rights are very much under threat, with the recent removal of the legal protection against, amongst other

⁹⁶ <http://www.egyenlobanasmod.hu/jogesetek/hu/95-2011.pdf>, accessed 30 October 2012.

⁹⁷ <http://www.comfia.net/fraternidad/html/10256.html>, accessed 30 July 2012.

situations, the dismissal on the ground of pregnancy and maternity for ‘executive employees’, the definition of which is very broad and also extends to lower-ranking employees and therefore deprives a wide array of workers (including pregnant women) of proper legal protection. This situation is likely to be contrary to the dictum of the Court in the *Danosa* case.⁹⁸ In this case, the Court of Justice held that company directors are workers if they provide services to and are an integral part of the company. The Court made it clear that even if directors cannot be classified as a ‘pregnant worker’ under the Pregnant Workers Directive, their dismissal on the ground of their pregnancy does constitute direct discrimination on grounds of sex contrary to the Recast Directive. Nevertheless, directors of companies are not always considered to be workers and therefore the protection against pregnancy and maternity discrimination does not apply to them (e.g. **the Netherlands, Estonia**).

Moreover, Hungarian legislation provides that the employer and the employee have the power to negotiate the status of the worker as being either an employee or an ‘executive employee’ for the purpose of applying employment legislation. This means that the minimum standards set by EU law in terms of the protection of pregnancy and maternity can be waived, which represents a violation of EU law.

A further example of a situation (wellknown but not documented by case law) very likely to be against the *Danosa* case occurs in **Belgium** where, especially in law firms and self-employed partnerships, a considerable number of collaborations are terminated following maternity. As the profession of barrister is not considered to constitute subordinate employment the prohibition of discrimination in ‘dismissal’ is not considered to be applicable. However, no young female barrister, ‘invited’ to leave her law firm after taking maternity leave, has attempted to seek redress in court.

3.4.2. Fixed-term employment and precarious forms of employment

The Court of Justice has held that refusal to extend a fixed-term contract of employment of a pregnant worker constitutes direct discrimination.⁹⁹ However, in many countries this is still common practice (e.g. **Luxembourg, Greece, the Netherlands, Germany, Austria, Croatia**). In **Italy** people employed in fixed-term contracts/working on a project or in other kinds of temporary positions do not tend to enforce their rights regarding pregnancy and maternity because they fear that their contract might not be extended. This is especially true for young people, who are also potential parents. The economic crisis tends to further reinforce the fear of victimization and therefore the strong reluctance to enforce individual rights (e.g. **Greece**).

The public service is not exempt from such practices as highlighted by the **Cypriot** Ombudsman, who condemned the institutionalised practice of not extending fixed-term contracts in the public service.¹⁰⁰ Such practices constitute direct and unlawful discrimination on the ground of sex prohibited by domestic and EU law. The problem is deteriorated by the general absence of statistical data or other evidence such as case law.¹⁰¹

Good practice:

In **Belgium**, the failure to extend a fixed-term contract following a maternity leave is now found to constitute direct discrimination by the Courts,¹⁰² provided that the employee can produce *prima facie* elements of proof.¹⁰³

⁹⁸ Case C-232/09 *Dita Danosa v LKB Līzings SIA* [2010] ECR I- 11405; see discussion above in the section on *The definition of worker and pregnant worker* above.

⁹⁹ Cases C-109/00 *Tele Danmark A/S v Handels- og Kontorfunktionærernes Forbund i Danmark (HK)*, acting on behalf of *Marianne Brandt-Nielsen* [2001] ECR I-2785 and C-438/99 *Maria Luisa Jiménez Melgar v Ayuntamiento de Los Barrios* [2001] ECR I-6915.

¹⁰⁰ Ombudsman (Cyprus Equality Authority) *Annual Report 2006* www.ombudsman.gov.cy, accessed 30 October 2012.

¹⁰¹ See further in 3.12. below.

¹⁰² See Labour Court in Namur, judgment of 28 April 2003 *Chroniques de droit social*, 2004, p.100 with comments by J. Jacquemain.

¹⁰³ See Labour Court in Nivelles, judgment of 14 September 2006 *Chroniques de droit social*, 2008, p. 31.

In **Portugal**, an employer's refusal to extend the fixed-term contract of a pregnant woman or a woman on maternity leave can be reported to the CITE (Commission for Equality in Employment and at the Workplace), which has assessment power regarding these situations.

In **Austria**, a fixed-term contract is automatically extended by law until the beginning of the period of maternity protection if the relevant worker becomes pregnant.

3.5. The right not to be discriminated against during pregnancy and maternity leave

Under Article 2(2) of the Recast Directive there should not be any discrimination on the grounds of pregnancy and maternity. The Court has confirmed in various cases that women on maternity leave retain their employment rights.¹⁰⁴

3.5.1. Promotions

Some women experience a subtle type of discrimination based on their pregnancy or their caring role, which affects their promotion and career prospects. In **Germany**, for instance, the law allows employers to refuse to take into account periods of parental leave in the granting of pay increases. This indirect discrimination is justified on the grounds that parents who have taken parental leave lack working experience (see also **Croatia**). In **Romania**, for example, employees in practice very rarely obtain a promotion during their pregnancy. In fact, in practice, it is commonly accepted that employers would not consider pregnant women for promotion, and furthermore assumed that such employees would not want to be exposed to role change complexities during pregnancy. Also in this case the difficulty lies in the ability of the worker to prove discrimination, which is very difficult to establish.

3.5.2. Holiday and maternity leave

Despite the judgment in *Gomez*¹⁰⁵ in which the Court of Justice held that a worker must be able to take her annual leave during a period that does not overlap with her maternity leave, many school teachers in **France**, **the Netherlands** and **Malta** for instance continue to face difficulties when their maternity leave overlaps with school holidays (especially the summer school holidays).

In **Spain** the law does not recognise an employee's right to take holidays at a date other than that established in the company's holiday calendar when the holiday period coincides with a long-term parental leave, which is in violation of the Court of Justice's decision in *Land Tirol*,¹⁰⁶ which establishes that a worker on parental leave is entitled to keep the annual leave she has accrued and is permitted to carry it over to following leave years when she returns to work.

3.5.3. Return from maternity leave

According to Article 15 of the Recast Directive, a 'woman on maternity leave shall be entitled, after the end of her period of maternity leave, to return to her job or to an equivalent post on terms and conditions which are no less favourable to her and to benefit from any improvement in working conditions to which she would have been entitled during her absence.' However, it appears that this obligation has not always been clearly implemented by the Member States, especially when the maternity leave in question covers a long period.

Some Member States have not implemented this provision at all. For instance under **Belgian** law, an employee who is transferred to an inferior job during or after her leave cannot claim to be reinstated in her job. The only remedy available is to challenge the transfer as constructive dismissal grounded on maternity, or to claim gender discrimination and apply for an order to put an end to it, but this method has never been tested in court.¹⁰⁷ Similarly, in **the Netherlands**, there is no explicit legal right to return to the same or a comparable job

¹⁰⁴ See above in the section on Dismissal and other unfavourable treatment during maternity and parental leave.

¹⁰⁵ See above in the section on *Annual leave and maternity leave*.

¹⁰⁶ Case C-486/08 *Zentralbetriebsrat der Landeskrankenhäuser Tirols v Land Tirol* [2010] ECR I-3527.

¹⁰⁷ Except by the clerk of an investigating magistrate who was reassigned when she took maternity leave. However, the *Raad van State* dismissed her claim for annulment on purely technical grounds: judgment of 16 February, n°218.060, *Coppens* on www.raadvst-consetat.be, accessed 17 July 2012.

after having taken pregnancy or maternity leave. Arguably this right is guaranteed under the right not to be treated unfavourably with respect to any condition of work, or the prohibition on dismissing somebody *because of* pregnancy, childbirth or motherhood.

Even if the Member States have implemented the measure, experts report that in practice there are many problems regarding the effectiveness of this provision (e.g. **Lithuania**, **Croatia**). For instance, in **Poland**, although most women in practice return to the same or an equivalent position, women lose out in the form of not being offered promotion or not being offered training because they are on maternity or parental leave.

Good practice:

In **France** the courts firmly control the right to return to the same job, requiring for instance that the employer provides adequate training so that the employee can indeed return to the same job or a job at the same level.¹⁰⁸

3.6. Breastfeeding breaks

EU law does not provide a right to breastfeeding breaks.¹⁰⁹ However, Directive 92/85/EEC provides that workers who are breastfeeding are entitled to enhanced measures regarding health and safety. Under Article 6(2) of Directive 92/85/EEC workers who are breastfeeding may under no circumstances be obliged to work with hazardous products and working conditions.¹¹⁰ Moreover, breastfeeding mothers cannot be forced to continue doing night work. At the same time, workers who are breastfeeding cannot be discriminated against on that basis according to Article 2(2) of the Recast Directive.

In addition to this, the World Health Organization recommends exclusive breastfeeding for babies until the age of 6 months, and continued breastfeeding, with appropriate complementary foods, for children until the age of 2 or beyond.¹¹¹ This recommendation can be rather problematic as it clashes with the participation of women in the labour market. This is one of the reasons why the International Labour Organisation (ILO) has further reinforced this health recommendation by developing an international right to breastfeeding breaks at work in the Convention on maternity protection (No. 3 of 1919), which obliges Member States to provide 30-minute nursing breaks twice a day for breastfeeding mothers during working hours. The later Conventions, No. 103 of 1952 and No. 183 of 2000, leave it to national laws and regulations to decide the number and duration of nursing breaks, as long as at least one break is provided. Convention No. 183 also introduced the possibility of transforming daily breaks into a daily reduction of working hours.

In the EU, breastfeeding breaks are a form of leave/break from work in order to breastfeed which exists in almost all countries that have contributed to this report (with the exception of for instance the **United Kingdom**) and range from a 30-minute break to 3 hours off work (**Turkey**). In **Liechtenstein**, there is no fixed time: breastfeeding workers can take the time that they deem necessary in order to breastfeed their infant. The breastfeeding break can take the form of a couple of hours daily or they can be accumulated and effectively result in shorter working days. In some cases the break is paid (e.g. **Lithuania**) but in others it is unpaid (e.g. **France**).

This right is a *de facto* right connected to the welfare of the child. For this reason, in many countries, if the child is bottle-fed, fathers can also use it (e.g. **Portugal**, **Hungary**, **Latvia**). In at least one case (**Spain**) the father's right is conditioned on both parents being employed. This was found incompatible with the principle of equality as established by EU law.¹¹² In other countries, however, it remains an exclusive right for women (e.g. **France**,

¹⁰⁸ Cass. Soc. 11 March 2009, n° 07-41821.

¹⁰⁹ See below in Annex III for a table relating to the entitlement to breastfeeding breaks, per country.

¹¹⁰ The list of hazardous agents and working conditions is listed under Article 7 of Directive 92/85.

¹¹¹ World Health Organization (WHO) 2001. *Resolution WHA54.2 of 18 May 2001: Infant and young child nutrition*, available on http://apps.who.int/gb/archive/pdf_files/WHA54/ea54r2.pdf, accessed 15 October 2012.

¹¹² Case C-104/09 *Roca-Álvarez v Sesa Start España ETT SA* [2010] ECR I-8661.

Cyprus, Estonia). In **Greece**, a working hours reduction is granted to mothers and fathers of babies and infants (alternatively) without pay reduction, irrespective of breastfeeding.

Although discrimination on the grounds of breastfeeding should automatically be prohibited as direct (or depending on the circumstances indirect) sex discrimination, some countries have adopted an express legal protection related to discrimination on the grounds of breastfeeding.

In **Luxembourg** a recent study has shown that only a small percentage of women use the right to reduce working hours because of breastfeeding.¹¹³ The reasons are not clear yet, but the Government decided to start a public campaign on the issue in order to encourage women to use this right.

3.7. *Self-employed workers*

The Self-Employment Directive 2010/41/EU,¹¹⁴ which replaces Directive 86/613/EEC¹¹⁵ had to be implemented by the Member States by 5 August 2012. Many Member States have already implemented the new Directive or are in the process of doing so (e.g. **Cyprus, United Kingdom**) while some other countries have not yet started the implementation process (e.g. **Greece, Italy, Liechtenstein, Lithuania, Luxembourg, Portugal, Romania**). According to the expert concerned, in **Italy** the impact of EU legislation has been minimal because in this area the Code of Equal Opportunities provides for more sophisticated protection.

The main problem in relation to the Self-Employment Directive is less about its implementation than about its inherent contradiction in terms of its legal requirements. Indeed, there is no employer to enforce the obligations against because by definition the workers are self-employed. **Iceland** provides an illustration of this point, where a self-employed pregnant woman is not entitled to payments from the Maternity/Paternity Leave fund when she cannot perform her work for reasons of safety and health as a result of a very strict interpretation of Directive 92/85, which addresses the responsibility of the ‘employer’ and since the self-employed by definition have no employer, they are not entitled to the payment. By contrast, in **Italy**, self-employed pregnant women and young mothers are automatically entitled to rights to leave and financial benefits whether or not they decide to take a leave from their self-employment.

Some gaps in domestic legislation, however, can be identified: self-employed persons are not always entitled to parental leave (e.g. **Cyprus, the Netherlands, United Kingdom, Poland**); are not entitled to adoptive and paternity leave (e.g. **United Kingdom**); and they might have no right to breastfeeding breaks (e.g. **Cyprus**).

It should be noted that all self-employed workers are not considered to be part of the same category. In particular, there might be quite differential treatment between people working in the agricultural sector and heads of small or medium-sized enterprises in the service sector or industrial sector. This is the case in **Poland** for instance where since December 2010, all EU equal treatment provisions and access to maternity benefits apply to most self-employed workers, with the exception of farmers and partners of farmers, who are governed by a different less favourable regime. Moreover, the **Spanish** Self-Employed Worker's Statute makes no reference to unmarried couples. The unmarried partner must therefore be registered as an employee in order to be eligible for the maternity rights granted to employees under the general social security system.

¹¹³ <http://www.ms.public.lu/fr/actualites/2011/09/07-alba/rapport-ALBA-2008-definitif.pdf>, accessed 4 October 2012.

¹¹⁴ Council Directive 2010/41/EU of the European Parliament and of the Council of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC.

¹¹⁵ Council Directive 86/613/EEC of 11 December 1986 on the application of the principle of equal treatment between men and women engaged in an activity, including agriculture, in a self-employed capacity, and on the protection of self-employed women during pregnancy and motherhood, OJ (1986) L 359/56.

Good practices:

In the liberal professions, some professional organisations apply the pregnancy, maternity and paternity rights applicable to employees to their entire profession. This is the case for instance for the solicitors' and barristers' association in **France**, which has negotiated within the profession that lawyers are entitled to take the same period of maternity and paternity leave as employees.

In **Belgium**, the maternity leave for self-employed women is composed of a period of compulsory leave which can only be taken directly before and after the birth of the child and can be supplemented by 5 to 6 optional weeks of leave which can be taken flexibly over a period of 21 weeks following the end of the compulsory period of post-natal leave. In addition, self-employed workers are entitled to 'services vouchers' which allow them to employ an unemployed person for some private household tasks.

The **Finnish** expert has pointed out that the existence of a family leave related benefit needs to be complemented by a system of stand-in services during the maternity and parental leave and other family-related leave periods. Such a system is already available for agricultural entrepreneurs who are parents of a sick child and for the period during which maternity, paternity and parental leave benefits are paid.

3.8. The role of fathers

The above discussion has emphasised that, at least formally, a largely satisfactory range of legal rights is available to pregnant women and young mothers across Europe. This is in contrast with the rights granted to fathers at both domestic and EU level where, despite the numerous soft-law instruments in this area,¹¹⁶ the situation is not as developed as it is for pregnancy and maternity.¹¹⁷ Yet, it is increasingly becoming clear that 'the position of a male and female worker, father and mother of a young child, are comparable with regard to their possible need (...) to look after the child.'¹¹⁸ The involvement of fathers represents an important element in the process of establishing equality when it comes to the reconciliation of work and family life and contributes to fighting gender stereotypes in the employment market.¹¹⁹ Finally, to be involved in the daily upbringing of the child will also help fathers to create and strengthen their bond with the child and therefore they will be more likely to be involved in childcare at a later stage. The relevant provisions take the debate on fathers and equality beyond the field of employment law to link it with other fields of law, most notably family law. This link is expressly made in **Iceland** where a parent's right to maternity/paternity leave is conditional on the fact that the parent has custody or joint custody of the child.¹²⁰

There are two main measures that allow fathers to be involved in the care of their child/children: paternity leave and parental leave. Paternity leave is normally a short period expressly granted to fathers around the birth of their child. In **Belgium** it also includes the transfer of unused maternity leave but only if the mother is deceased or unfit, for example because she is hospitalised, to look after the child.

¹¹⁶ See for example the 1992 Council Recommendation on childcare that encourages the equal sharing of family responsibilities between men and women. The position of men as carers was also echoed in the Council Resolution of 29 June 2000 on the balanced participation of women and men in family and working life, which provides that the balanced participation of women and men both in the labour market and in family life is an essential aspect of the development of society, and that maternity and paternity rights as well as the rights of children are current social values to be protected by society, the Member States and the European Community.

¹¹⁷ See the discussion in 3.8.1. below.

¹¹⁸ Case C-104/09 *Roca Álvarez v Sesa Start España ETT SA* [2010] ECR I- 08661, in Paragraph 24.

¹¹⁹ Presidency Conclusions of 23/24 March 2006, 777751/1/06 REV 1. See also Council Conclusions on the European Pact for Gender Equality (2011-2020) (2011/C 155/02). See also European Commission, Analysis Note *Men and Gender Equality tackling Gender-Segregated Family Roles and Social Care Jobs*, March 2010.

¹²⁰ See below in Annex III for tables relating to the length of maternity leave allocated maternally and paternally, per country.

Parental leave is a longer period of leave made available to both parents. In addition to this, fathers are increasingly using the right to breastfeeding breaks. This right can be considered to be a form of parental leave.¹²¹

3.8.1. *Paternity leave*

At EU level, paternity leave has recently been recognised in the context of the Amended Equal Treatment Directive¹²² and the Recast Directive.¹²³

The EU stance in this area reflects the position of the Member States which explains its limited advancement in terms of EU-specific paternity rights.¹²⁴ Although there are differences, paternity leave overall is very minimalistically formulated. It usually lasts between 2 (e.g. **the Netherlands**) to 14 days (e.g. **Poland**) with some exceptions where the period of entitlement is longer (18 weekdays, i.e. Mondays to Saturdays in **Finland** and 1 month in **Lithuania**) in connection with/around the time of the birth of the child. In Poland, the right to paternity leave ends if the father fails to use it during the first year of the child's life. There are some notable exceptions, i.e. **Lichtenstein, Germany and Ireland** where there are no statutory paternity rights. In **Germany**, however, civil servants can apply for one day of special leave. Not all of the paternity leave is paid. When it is paid, the level of pay might vary between the full or a part of the normal salary and a flat rate, as in the **United Kingdom**. It is generally paid by statutory entitlement, but in certain cases it is left to collective agreements.

The aim of paternity leave differs among the Member States: in **Finland** it is mainly used by fathers to get to know the baby and help the mother, rather than as a way for fathers to care for the child. In **Romania** the emphasis is more on the welfare of the child and is conditional on the father completing a course in infant care. In **Slovakia** it is linked to health and safety concerns: an employer is obliged to grant time off for the time necessary to transport the mother to a medical facility and back. The right is, however, not linked to marriage but to parentage. Although the take-up of this right is often high, it is difficult to see how this alone could trigger a much-needed change. A few days in connection with the birth of the child are not enough to tilt the gender unbalance when it comes to family responsibilities. The measure which could trigger a challenge is parental leave intended as a measure for both parents. At EU level this is provided by the Parental Leave Directive.¹²⁵

3.8.2. *Parental leave*

Parental leave is provided by the legislation of all Member States analysed. The right has, however, been implemented in very different ways. At one end of the spectrum there are the Scandinavian countries which have enacted a form of mild coercion (father's quota). In **Sweden**, for example, two months of the parental leave regarding each child are reserved for the father and thus non-transferable. Fathers are, generally speaking, known to take out these months of leave whereas the mothers take out most of the rest of the days of parental leave. This is normally explained by economic reasons. Along the same lines, in **Norway** the allocated quota for the father is 12 weeks, since 1 July 2011. These countries have a very

¹²¹ See the discussion above in 3.6.

¹²² Article 2(7) Directive 2002/73/EC, OJ [2002] L269/15 states that 'it is (...) without prejudice to the right of Member States to recognise distinct rights to paternity and/or adoption leave.' Directive 2002/73/EC, OJ [2002] L269/15.

¹²³ Article 16 of the Recast Directive states that the Directive 'is without prejudice to the right of Member States to recognise distinct rights to paternity and/or adoption leave. Those Member States which recognise such rights shall take the necessary measures to protect working men and women against dismissal due to exercising those rights and ensure that, at the end of such leave, they are entitled to return to their jobs or to equivalent posts on terms and conditions which are no less favourable to them, and to benefit from any improvement in working conditions to which they would have been entitled during their absence.' Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), OJ [2006] L/204.

¹²⁴ See E Caracciolo Di Torella 'Brave New Fathers for a Brave New World? Fathers as care givers in an evolving European Union', *European Law Journal*, (2013, pending).

¹²⁵ See above in the section on *The Parental Leave Directive*.

strong equality ethos and specific rights addressed to fathers have been in place for some time. In other cases it has been implemented in a very minimalistic fashion. This is, for example, the case of the **United Kingdom** where domestic legislation does not build on the minimum standards required by the EU legislator. This is, however, somehow mitigated by the fact that part of the very extensive period of ‘maternity’ leave is transferrable to the father.¹²⁶ In certain cases, the right to parental leave has been drafted in an unnecessarily complicated fashion, making the access to this right confusing for parents (**Belgium, Austria**).

At the other end of the spectrum, parental leave is not provided, and thus the national legislation is in violation of EU law (e.g. **Turkey**, where, however, fathers can use other forms of leave).

In **Italy** it is very unusual for fathers to take parental leave in practice. As a measure to encourage the take-up, the length of the leave awarded per child was increased from ten to eleven months if the father uses at least three months. This, however, has not changed the situation. As an alternative to parental leave the recent Act no. 92/2012 has introduced paid vouchers for baby-sitting services: these are available from the end of the compulsory maternity leave for the following eleven months, with the amount of the voucher depending on the family income. However, vouchers are only available to mothers – not fathers! This is not only against the principles of equality but also sends out a very clear message regarding the role of paternity.

Finally, although the Court of Justice has twice held in *Kiiski*¹²⁷ and *Busch*¹²⁸ that a woman on parental leave can end her parental leave if she is pregnant and wants to return to work in order to benefit from better conditions of employment, **Austrian** legislation prohibits such early return. In **Germany**, female employees cannot terminate their parental leave and switch to maternity leave with better conditions (although several courts have held this regulation to be incompatible with EU law), but they can return to work except for the last six weeks before childbirth, which is a compulsory period of ‘maternity leave’ under German law. **Croatian** law is unclear about the rights of women on this issue.

Good practices

In **Italy**, in order to reduce the negative effects of parental leave on the organisation or business, the employer is entitled to employ a worker on a fixed-term contract, starting up to one month before the parental leave begins (or longer if provided by collective bargaining), so that the worker taking the leave can train his or her replacement. In small companies (employing less than 20 workers), a 50 % reduction in contributions is provided for the recruitment of persons replacing workers on parental leave.

In **Sweden** in 2008 a so-called Equality Bonus was introduced to redress the inequalities inherent in the application of the parental benefits scheme. This is a form of tax credit for the parent having used most of the parental benefit days. The aim is to provide economic possibilities for a more equal distribution of parental benefits between the parents as well as to strengthen the relation of the child with both parents. So far, however, this reform has had limited effects.¹²⁹

In the **UK** the coalition Government is soon to announce that, from October 2015, parents will be able to share maternity/paternity leave and maternity/paternity pay so that the mother will be able to return to work sooner than at present: it could be after just two weeks. Following recommendations of the Children and Families Bill scheduled for 2013, the terms ‘maternity’ and ‘paternity’ leave will no longer be used and will be replaced instead by the phrase *flexible parental leave*: mothers will automatically continue to receive the rights that

¹²⁶ *Roodway v South Central Trains Ltd*, Court of Appeal [2005] IRLR 583.

¹²⁷ Case C-116/06 *Sari Kiiski v Tampereen Kaupunki* [2007] ECR I-7643.

¹²⁸ Case C-320/01 *Wiebke Busch v Klinikum Neustadt GmbH & Co. Betriebs-KG* [2003] ECR I-2041.

¹²⁹ Social Insurance Report 2010:5, Jämsställdhetsbonusen – en effekttutvärdering, the National Social Insurance Board 2010.

they have at the moment but the new option to share them (at the couple's preference) will be introduced.¹³⁰

From the evidence presented by the experts, the low take-up of fathers of parental leave is to be explained by the fact that the leave is often unpaid and by the influence of strong cultural perceptions/social stereotypes regarding care work/distribution of roles within the family. On the one hand, across the board, the very fact that men are still the main breadwinners of most families across the Member States under survey means that it is more convenient for families to lose part of the woman's pay. On the other hand, social stereotypes are more evident in some Member States (e.g. **Greece, Hungary, Italy, Estonia**).

Good practice

In **Lithuania** parental leave is granted to the person who is actually looking after the child (i.e. also grandparents or other relatives) until the child reaches the age of three. Employees entitled to it may take it in turns.

In conclusion, fathers' rights are still rather underdeveloped and a strong legislative framework would be needed in order to promote the development of such rights. Such framework should be complemented by financial entitlements to make its take-up feasible.

3.8.3. The rights of adoptive parents

The right to adoption leave generally mirrors that of pregnancy and maternity leave. However, sometimes there are subtle differences. In the **United Kingdom**, for example, employees who exercise their rights to adoptive, paternity or parental leave are protected from dismissal and detriment in relation thereto, although this protection is provided by the Employment Rights Act 1996 rather than the Equality Act 2010 and is therefore subject to the statutory caps on compensation.¹³¹

3.9. The Goods and Services Directive

The Directive on Goods and Services came into force in December 2004¹³² with the specific aim to extend the principle of gender equality beyond the realm of the internal market. Member States were given three years to implement it. Despite the fact that the Directive has been around for almost a decade, it is still highly difficult to assess its impact.

A 2009 report already emphasised the relatively limited impact of the Directive.¹³³ A few years later this conclusion still applies. With some exceptions (e.g. **Iceland** and **Latvia**), the Goods and Services Directive has generally been implemented in the Member States under survey, and in some cases, it has gone beyond the instructions of the legislator by also including the media and advertising (e.g. **Spain, Croatia**). At the moment, many Member States are working on a view to incorporate the recent Court of Justice decision in *Test-Achats*.¹³⁴ In this case the Court held that Article 5(2) of Directive 2004/113 which allows for different treatment of men and women based on actuarial and statistical data for the purpose of calculating insurance premiums, is invalid as from 21 December 2012.¹³⁵

¹³⁰ See http://www.publicservice.co.uk/news_story.asp?id=21122, accessed 30 October 2012.

¹³¹ Currently EUR 90 000 (GBP 72 300).

¹³² Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, OJ [2004] L373/37.

¹³³ *Sex Discrimination in the Access to and Supply of Goods and Services and the Transposition of Directive 2004/113*, European Network of Legal Experts in the Field of Gender Equality, 2009, in particular the Executive Report by A. McColgan, available on http://ec.europa.eu/justice/gender-equality/document/index_en.htm#h2-9, accessed 14 November 2012.

¹³⁴ Case C-236/09 *Association Belge des Consommateurs Test-Achats ASBL and others v Conseil des ministres (Test-Achats)* Judgment of 1 March 2011.

¹³⁵ C. Tobler 'Case note on Case C-236/09 *Association Belge des Consommateurs Test-Achats ASBL and others v Conseil des ministres (Test-Achats)*', 48 (2011) pp. 2060-2011.

Some national legislation does not make any specific reference to pregnancy and maternity as a form of gender discrimination in this field (e.g. **Portugal, Lithuania**), which makes discriminatory practices less visible and therefore more difficult to tackle.

Generally, the experts point out that there is very little discussion at policy/legislative level on this issue (e.g. ‘no attention whatsoever’ in **Belgium**, and ‘no debate’ in **Italy, Lithuania, Austria**).

Despite the lack of discussion, however, problems still occur. The following are the most common ones:

Insurance (in particular private health insurance)

In practice, in some Member States, pregnant women and women who suffer from pregnancy-related illness or maternity-related illness find it more difficult to access private health insurance or care insurance. Private health insurance also sometimes requires the expiry of a waiting period for the insurance to start covering the risks of loss of income related to pregnancy and maternity (e.g. **Germany**).

In **Spain**, for example, medical insurance companies would subject their prospective clients to a questionnaire designed to rule out existing medical conditions. Among the most common exclusion factors in medical insurance policies are chronic diseases and maternity care for women who are already pregnant at the time of taking out the policy. Another common practice is to demand waiting periods for pregnancy and maternity care of between 3 and 10 months for ante-natal care and childbirth. Some of these provide the option of paying an ‘extra premium’ or a lump sum when insuring pregnant women.

In **the Netherlands**, two cases heard by the national equality body have revealed that insurances companies have denied pregnancy and maternity leave benefits to self-employed women on the grounds that they did not fulfil the company’s requirements regarding the waiting period of 2 years. A number of other cases, where insurance companies had denied payment of maternity leave benefits or refused to pay for contraceptive pills, was dismissed on technical grounds. They nevertheless highlight the existence of discriminatory practices by insurance companies with regard to pregnancy and maternity.

Good practice

In many Member States, clinical tests related to pregnancy are exempted from fees and in **Italy** this exemption is also available for fathers when the tests are related to the health of the unborn child.

Other issues relate to the provision of goods and services

Other issues have been identified by the Possiblyexperts. One of the most common complaints is the one related to the *airline practices* that impose conditions on pregnant women. Generally, pregnant women can fly only if in possession of a medical certificate stating that they are ‘fit to fly’ after a certain period of about 28 weeks of pregnancy and after some more weeks there is a total ban. The number of ‘qualifying’ weeks varies depending on the airline, and thus also greatly varies between Member States. Such practice is often justified by the airline company on grounds of health and safety, but there appears to be no clear research backing these policies and it appears that the airline companies are only trying to avoid the inconvenience of an accidental delivery while in mid-air. The practice is reported by all the experts and its legality is questionable under the Goods and Services Directive, although there has not been any legal challenge.

A further specific issue has been raised in several reports, namely *homebirth*. In **Hungary** a Government Decree condemned a practice that excludes a certain age group of women from homebirth. In **Lithuania** a distinct lack of available information has been emphasised. In **Poland** although the woman has the right to deliver at home, this possibility is not used often in practice, because social security refuses to pay for such deliveries. In the **Czech Republic** a woman who wanted, but did not feel safe, to deliver her baby at home, brought her case before the Constitutional Court¹³⁶ arguing that domestic legislation and

¹³⁶ See the contribution of the Czech Republic, section 2.3.

public authorities discourage women from making such choice. The Court did not feel competent to discuss such issue but acknowledged that a problem exists. In some countries, while in theory at least women are afforded a large degree of choice as regards, for example, home deliveries and consistent care by a small team of midwives, acute shortages of midwives mean that this choice is more often theoretical than practical (e.g. **Germany**, **United Kingdom**).

Finally, the **Italian** expert has highlighted the fact that improving *childcare facilities*, such as kindergartens, would help the position of employed parents, in particular women. The recent introduction of paid vouchers for baby-sitting services available to mothers (and not to fathers) from the end of compulsory maternity leave for the following eleven months as an alternative to the parental leave represents a timid attempt at addressing this issue. This approach is, however, discriminatory as it gives preference to the mother.

Particularly worrying is the widespread practice in **Hungary** that mothers are prohibited from entering shops with a pram as this could be used for shoplifting.¹³⁷ Furthermore, there are cases of, possibly unintentional but *de facto*, discrimination where the access to restaurants/shops is hindered (e.g. **Liechtenstein**) because of the lack of infrastructure.

Perhaps because these problems are not perceived as legal, strictly speaking, there is very little case law available in this area. **The Netherlands** is one of the Member States surveyed where some cases have been handled regarding discrimination on grounds of goods and services towards pregnant women (six cases in total between 1994 and 2012 before the Equal Treatment Commission (equality body)).

3.10. Access to information

It is crucial to make rights visible and to make individuals aware of them. In many of the Member States surveyed, access to information on pregnancy/maternity/paternity and parenthood rights is a responsibility of a designated government-related body that tends to have a dedicated website (e.g. **Sweden**, **Norway**, **Luxembourg**, **Italy**). There are, however, some Member States (e.g. **Portugal**, **Poland**, **Greece**, **Czech Republic**) where the Government does not appear to be engaged in any specific form of dissemination.

Good practice

In **Italy**, the Equal Opportunities Code requires companies with more than 100 employees to draw up reports on the workers' situation (both male and female) every two years, concerning inter alia recruitment, professional training, career opportunities, remuneration, dismissal and retirement. These reports are submitted to the company union representatives and to the Regional Equality Advisors and can be used as quantitative/statistical data, also for the reversal of the burden of proof.

In addition to dedicated websites, there are also other ways to make sure that information is disseminated. For example, the use of the *Internet* as a source of information has proven an invaluable resource (see below **Iceland** in the good practice box). Some Member States (e.g. **Luxembourg**) have even made the effort to provide this information in multilingual format. In **Austria**, NGOs of migrant organisations and the Chambers of Labour also offer such services. However, many experts have warned that many people and especially certain categories of women are unable to access information on the Internet although this might improve in the future.

The mass *media* (television, radio, newspapers) appear to play a very important role in raising rights awareness among individuals.

Other sources of information also influence the access to these rights: in particular, it can be noted that *academic research* and *professional reports* play an important role in raising awareness of these rights. Indeed, in some Member States (e.g. **Romania**) the lack of media reports, academic research and professional reports on the issue of pregnancy/maternity and

¹³⁷ <http://www.egyenlobanasmod.hu/jogesetek/en/642-2010-en.pdf>, accessed 15 November 2012.

paternity rights means that people are missing out on their rights because they do not know about them.

Good practice

Awareness-raising media campaigns not only contribute to raising individuals' knowledge regarding their rights but also lead to more individuals claiming the application of their rights. In **France**, following the campaign mounted by the Halde (the equality body in that period), the number of claims based on pregnancy discrimination rose by 50 % between 2008 and 2010. After the Halde was replaced by another institution (Protection of Rights Body), which is less present in the media, there was a general reduction of the number of claims based on pregnancy and maternity.

In **Iceland** pregnant women receive relevant information as part of ante-natal care (to which they are entitled free of charge if they have been legally resident in the country for the past six months). This is particularly important for women who may be at a disadvantage because they belong to an ethnic minority or do not understand the language. Pregnant women are also informed by their trade unions, in larger workplaces etc.

Despite the fact that the vast majority of the Member States appears to have some sort of dedicated body, the level of awareness of rights may vary. According to the Swedish expert for example, all **Swedish residents** entitled to parental benefits can be expected to have a fairly good awareness of this. In other Member States, however, this is not the case. A possible explanation for this is likely to be linked to the level of education of women (**FYR of Macedonia** and **Greece**). Accordingly, specific groups, such as the Roma ethnic minority in **Hungary** and the Roma and Albanian minorities in **FYR of Macedonia**, are more likely to lack information.

In certain Member States (e.g. **Norway**) there are studies which monitor awareness of these rights. By contrast, in other countries, such as **Italy** and **Lithuania**, there are no studies (therefore no evidence) of individuals' awareness.

3.11. Involvement of other parties

Of course the national legislator and the judiciary are involved in the implementation and enforcement of pregnancy and maternity rights, but a vast range of parties such as social partners and NGOs can also play an active role in this area.

Generally in most Member States trade unions play an important role in providing information when it comes to pregnancy and related rights and supporting action, with some notable exceptions (e.g. **Turkey** and, to a certain extent **Cyprus**, where collective agreements are 'gentlemen's agreements').

Some professional bodies have been very active in awareness-raising campaigns. For instance, awareness-raising campaigns conducted by national equality bodies and media reports on case law have resulted in positive changes in some professions with the support of the professional bodies. In **France**, a report published by the legal profession¹³⁸ outlining discrimination faced by lawyers when they became pregnant or when they required some flexibility after they had their child, has resulted in a reform in the legal profession and the implementation of a maternity leave regime. Similarly, research conducted in relation to academic positions¹³⁹ showing that depending on when they gave birth, female academics were required to compensate for their 'lost hours' by teaching extra hours when they returned to work, has also resulted in reforms in academia.

Furthermore, commercial companies have promoted the implementation of good practices in relation to pregnancy, maternity, paternity and parental rights, including flexible work arrangements. Arguably, companies have much to gain in keeping their staff and providing them tools to reconcile work with family life. In **Spain**, for instance, the expert provides a number of examples of private companies that have introduced measures to

¹³⁸ Report published by the Paris Bar in November 2009.

¹³⁹ O. Bui-Xuan 'Le congé maternité des enseignantes-chercheuses' *Droit et Société* 2011/1.

facilitate work-life balances beyond their legal obligations. In the same vein in **Cyprus**, Cyprus Telecommunications Authority has adopted a range of family-friendly policies, such as flexible working hours and personal time schedules.

Finally, *national equality bodies* are generally viewed positively by experts who point out the many benefits of such institutions. The **Cypriot** Ombudsman is very active, with a role and powers that are quasi judicial. S/he is entitled to fine parties which are found to be in violation of their equality obligations and s/he has strong powers of investigation. In **Croatia**, the Ombudsperson liberally relies on the media to disseminate information to the public. In **Greece** the Ombudsman's role is also important, in particular in the framework of the economic crisis, while the opinions of the National Commission for Human Rights bring about improvements in legislation.

In **Italy**, Equality Advisors play an important role in this area by conducting independent surveys, publishing independent surveys, making recommendations on the implementation of gender equality law, and representing victims of discrimination.

In **Romania**, the dismantlement of the national equality body (not yet replaced) has proven to be detrimental to women. The absence of a national equality body is seen as a gap in the implementation of EU law on gender equality. In **Turkey** there is no equality body yet, although efforts are being made to create one. In **Hungary**, laws are drafted by the Government in force at the moment with no substantial involvement of any stakeholder.

Good practice:

Since 2001, in **France**, employers have had the legal obligation to negotiate with trade unions at company level in order to define the objectives concerning equality between men and women in the enterprise and to design the measures to be implemented in order to attain these objectives. Since 2011, the content of the collective agreement is also fixed by the legislator, together with severe sanctions for failing this obligation. These measures have led to an improvement in the quality of the agreements concluded, including the topic of pregnancy and maternity rights.¹⁴⁰

3.12. Enforcement and effectiveness

From the evidence provided by the experts, it emerges that the situation is far from homogeneous. Generally speaking, a good level of awareness of rights will lead to a higher degree of enforcement and effectiveness. Clear examples of this would be **Sweden** and **Finland** where widespread awareness is followed by a considerable amount of case law concerning this type of discrimination, coming from both the Labour Court and the Equality Ombudsman. Conversely, experts suggest that low awareness, including low awareness of procedural EU rules, such as the rules on the standing of organisations or the burden of proof, leads to fewer cases (e.g. **Greece**,¹⁴¹ **Croatia**). Awareness of rights is necessary for both the employee and the employer.

However, awareness is far from the only criterion for good enforcement of rights and a high level of effectiveness. Workers, especially young workers who are also potential parents, tend to refrain from exercising their individual pregnancy and maternity rights because they are afraid of the potential consequences, particularly those employed under fixed-term contracts, working on a project or in other kinds of temporary positions as they fear that their contract might not be extended. The crisis is exacerbating this situation which *de facto* deprives these individuals of the choice to exercise their rights (e.g. **Italy**, **Greece**).

Experts have provided a range of reasons why individuals are reluctant to go to court: it might be because they live in very small countries and there is the risk to be exposed (e.g. **Liechtenstein**, **Luxembourg** and **Malta**) or because they are aware that in practice it is very difficult to achieve redress (e.g. **Latvia**). Many female workers fear being victimized or

¹⁴⁰ Ministère du travail *La négociation collective en 2010 Bilan et Rapport 2011*, <http://lesrapports.ladocumentationfrancaise.fr/BRP/114000388/0000.pdf>, accessed 12 July 2012.

¹⁴¹ See the Greek National Commission for Human Rights' Comments on the Bill transposing Directive 2006/54 and the Letter to the Minister of Labour and Social Security dated 31 October 2010, <http://www.nchr.gr>, accessed 25 July 2012.

labelled trouble-makers during the economic crisis (e.g. **Greece, the Netherlands, Italy, Croatia**).¹⁴² Employees in the public sector might be more comfortable to file a claim than those working in the private sector (e.g. **Ireland**). In other cases, the problem is related to high costs of litigation combined with the lack of legal aid (e.g. **Norway, Finland, Croatia**) or any kind of help in the form of advice (e.g. **Lithuania**). Individuals choose other (cheaper) ways to seek compensation: the Gender Equality Discrimination Ombud and the Gender Equality Discrimination Tribunal (e.g. **Croatia**). Neither the Ombud nor the Tribunal, however, can award damages or impose other effective sanctions.

Other reasons for the limited effectiveness of the law as identified by the experts are linked to the complexity of the law (**Greece**), the length of the procedure (e.g. **Greece, Turkey, Ireland, Germany**), the lack of case law and lack of transparency because cases are not published (**Liechtenstein, Croatia**), employees' and employers' general lack of knowledge regarding pregnancy and maternity rights (e.g. **the Netherlands, Lithuania, Croatia**), and generally the difficulty of proving discrimination (e.g. **Germany**). In certain cases, such as **Greece**, the administrative bodies in charge of handling complaints have acknowledged shortages in both personnel and material means. In a number of Member States, the level of compensation for sex discrimination and discrimination on the ground of pregnancy and maternity is – contrary to the *acquis* and specifically *Marshall* – limited and therefore does not act as a deterrent (e.g. **Turkey, Belgium, Czech Republic**). Finally, in certain countries, there are simply very few cases filed regarding pregnancy and motherhood (e.g. **Hungary, Lithuania**).

The correct transposition and implementation of EU procedural rules is very important. These rules are meant to enhance judicial protection. They can encourage the use of recourse to courts and equality bodies or other competent authorities by victims of discrimination, and ensure their protection from any subsequent harmful consequences.

4. Conclusions

This report looks at the protection of pregnancy and maternity related rights in the EU and across its Member States, EEA and accessing countries. Most of these rights have been on the EU agenda for at least two decades. On the one hand, overall, a set of relevant statutory rights is now in place at domestic level: this is clearly the case for pregnancy and maternity rights, although on some occasions fathers are not expressly included. In many cases, EU legislation has triggered the implementation of a more sophisticated legal framework in the Member States. This report examines the situation in these Member States and endeavours to emphasise the most important good practices. On the other hand, however, in spite of the existing rights and good practices, discrimination still occurs in practice. This report seeks to uncover the reasons behind this.

There is no clear evidence in this report to suggest that discrimination against women is triggered by the *existence* of rights (i.e. women are discriminated against because the rights are too burdensome for the employer) but more complex reasons are likely to underpin it.

To start with, awareness of the relevant rights in some Member States is very low (e.g. **Greece, Spain**); in other Member States, individuals prefer not to initiate litigation because they fear the possible adverse consequences (e.g. **Italy, the Netherlands**) or because they do not wish to be exposed (**Luxembourg**). In other instances, the costs of starting litigation are simply too high (e.g. **Finland**). Some experts suggest that better access to justice (e.g. class actions) would be beneficial (e.g. **Finland and Turkey**).

There are also other reasons that are more complex as they are not, strictly speaking, legal and therefore more difficult to fully assess and fight using solely legislative instruments. Amongst these is that, although traditional roles are increasingly challenged,¹⁴³ the male

¹⁴² See the NCHR's Comments on the Bill transposing Directive 2006/54 and the Letter to the Minister of Labour and Social Security dated 31 October 2010, <http://www.nchr.gr>, accessed 25 July 2012.

¹⁴³ See, inter alia, C. Crompton, S. Lewis, and C. Lyonette (eds.) *Women, Men, Work and Family in Europe* Basingstoke, Palgrave MacMillan 2007.

breadwinner's role is still firmly entrenched in certain domestic policies and legislative agendas. Traditional ideas and cultural ideologies remain widespread: in many countries (e.g. **Cyprus, Germany, Croatia**) it is a common attitude to consider women fully responsible for the day-to-day care of their children. This is, however, also the case in countries where the principle of gender equality is well established. In **Sweden** for example, where there is great acceptance of women entering the employment market, according to the Equality Ombudsman young women are systematically discriminated against in working life due, inter alia, to stereotypes concerning pregnancy and maternity/parental leave. It is submitted that in order to address this situation, a number of measures aimed at complementing the existing rights would help. At the same time, in **Norway** some men who use their right to leave, have experienced the same forms of discrimination as women experiencing discrimination in relation to parental leave.

Some experts have also pointed out that the fact that the lack of relevant services, such as nurseries and kindergartens, strengthens the strict division of roles within the family (**Italy**). A further exacerbating issue is the current economic climate. This is particularly evident in certain Member States where women have been referred to as the first casualties of economic problems (e.g. **Greece, Spain, Portugal, Italy**). By contrast, the labour shortage is seen in some Member States as an opportunity to rethink the cultural make-up by building on long-term family-friendly policies (e.g. **Germany**, where, however, conflicting debates about so-called childcare benefits are taking place).

Finally, this report raises the need to address the existence of the broad gap between the letter of equality law and discriminatory practices. This report identifies a number of ways in which tackling discriminations could become more efficient. In particular, many national experts point out that there is value in complementing individual rights with hard, systematic and intrusive monitoring which would lead to effective sanctions for breach of equality rights are uncovered. The technicalities of who can efficiently provide such monitoring remains an issue for some countries where for instance there is no labour inspectorate or the national equality body lacks power and/or adequate funding. The recourse to raising awareness at all levels of societies is also an option which should be further explored. In this vein, adequately mainstreaming pregnancy and parenting rights into society should be considered in a holistic way. **Norwegian** Company Law can be cited as an example of good practice in mainstreaming effectively pregnancy and parental rights. It requires companies to report on progress relating to gender equality at companies level, in the same way as financial or environmental results are reported.

In the second part of this report the national experts provide more detailed information on the development of the domestic legislation as well as on any gaps and issues, most notably the discrepancy that exists between the statutory entitlements and the everyday practice. Such discrepancy become particularly evident not only when assessing the awareness and the effectiveness of the relevant statutory rights, but also when taking into account the impact of more complex and non-legal factors, such as expectation on women with young children and as well as gender stereotypes. Finally external considerations such as the lack of adequate services and the economic climate have created further difficulties. Combatting discrimination on the grounds of pregnancy, maternity and parenthood thus requires not only adequate legislation, but also additional policies both at national and EU level.

Part II

National Law: Reports from the Experts of the Member States, EEA Countries, Croatia, FYR of Macedonia and Turkey

AUSTRIA – Neda Bei

1. Existing legislation and case law

1.1. Employment

As to the private sector, Austrian legislation provides for two regimes that appear to be strictly separated at first: there is no provision that explicitly links maternity protection of employees including the rights to maternity and parental leave, covered by the Maternity Protection Act on the one hand, to equal treatment legislation on the other. The Maternity Protection Act does not mention discrimination, and the Equal Treatment Act does not mention pregnancy in the context of the ‘world of work’, as the relevant material scope is defined. Thus national legislation does not provide for a general prohibition on pregnancy and maternity discrimination in the private employment relationship. The Equal Treatment Act gives general definitions of direct and indirect discrimination without mentioning pregnancy. Pregnancy or related topics are not mentioned either in the legal definition of victimisation.¹ The Equal Treatment Commission has acknowledged pregnancy discrimination as direct sex discrimination since 1991, following the ECJ’s judgment in the *Dekker* case and furthermore the principle of direct applicability of Directive 76/207/EEC.² This has unequivocally been acknowledged also by the Supreme Court as a principle especially in the context of the termination of employment.³ Although pregnancy discrimination at the access to and at the termination of employment has remained a topic of case law of both equality bodies and courts, the focus has shifted to questions about parental leave (see 2.1., 2.4. and 4. of this country report).

As opposed to equal treatment legislation for the private sector, the definition of direct discrimination applying to the public sector explicitly refers to discrimination ‘of a person in the context of her pregnancy’ or in the context of maternity leave, the latter explicitly including extended maternity leave before birth having been prescribed in the event of medical complications.⁴ Public employees, in principle, have the same basic rights concerning parental leave and/or periods of protected part-time arrangements of their working hours (‘parental part-time’) as employees in the private sector. However, firstly, these entitlements are embedded in the framework of public employment law providing for strong protection of

¹ §§5 and 13 Equal Treatment Act OJ No. I/2004 as amended by OJ No. I 7/2011.

² Case C-177/88, 8 November 1990 *European Court reports 1990 Page I-03941*; Equal Treatment Commission 22 October 1991 – Questions to job applicants on planned or actual pregnancy are discriminatory; Equal Treatment Commission 28 February 1996 – Discrimination by denied access to employment on grounds of pregnancy, P. Smutny & K. Mayr *Gleichbehandlungsgesetz* Vienna ÖGB-Verlag 2001, p. 88.

³ OGH 30 June 1994, 8 ObA 271/94 – Pregnancy as prohibited motive of dismissal, P. Smutny & K. Mayr *Gleichbehandlungsgesetz* Vienna ÖGB-Verlag 2001, p. 291; OGH 31 August 2005, 9 ObA 4/05m, www.ris.bka.gv.at, accessed 2 October 2012, referring to the cases *Dekker*, *Mahlburg*, *Habermann-Deltermann*, *Webb* and *TeleDanmark*: the termination of a pregnant worker’s employment by the contractor during the trial period is to be considered direct discrimination at the termination, not discrimination at the access to employment.

⁴ §4a(2) Federal Treatment Act OJ No. 100/1993 as amended by OJ No. I 6/2011, entry into force 1 March 2011.

dismissal and various forms of unpaid leave,⁵ and secondly, there are more favourable provisions. For instance, vacancies due to parental leave must not be filled permanently, but by a substitute until the mother or father returns.⁶ As opposed to the private sector where fathers are entitled to fathers' leave at the earliest after the ending of maternity leave, civil servant fathers are entitled to parental leave immediately after birth.⁷ It is obvious that all this makes a significant difference in practice. Still, although the public law framework might eradicate many forms of discrimination parents have to face in the private sector, impediments to career advancement on the grounds of being a parent might appear in more subtle forms in the public sector.

The size of the enterprise is not relevant, neither to the scope of the legal provisions on maternity protection nor to protection against pregnancy discrimination.⁸

1.2. Social security and pension rights

Social security provisions on taking into account periods of childcare (*Kindererziehungszeiten*) for pension purposes are rather complicated. According to legislation from 2005 ('pension reform') applicable to mothers born after 1 January 1955 and to children born after 1 January 2005, periods of paid maternity leave and periods of childcare count as periods of social security contribution (*Beitragszeiten*), provided that the woman concerned was fully insured on the basis of employment for 84 months. When filing an application for her pension, she indicates the periods of childcare which are, in principle, taken into account to a maximum of 48 months per child.⁹

In the legal social security scheme applying to workers (employees), maternity benefits are the only benefits construed as a net substitute for previous income. During maternity leave, that is regularly eight weeks before and after birth as well as in the event of pregnancy-related illness preventing work ('early maternity leave'), the worker is entitled to 100 % of the average net income she had earned in a period of approximately three months before the beginning of maternity leave.¹⁰ Self-employed women (entrepreneurs) are entitled to pay for a substitute and additionally to a maternity benefit (*Wochengeld*) of EUR 50 daily (see below).

⁵ §75(3) Civil Servants Act OJ No. 333/1979, as amended, provides for the right to unpaid leave without indicating a specific purpose up to a total amount of 10 years, explicitly excluding any form of parental leave; cf. further sabbaticals of up to a year according to §78e Civil Servants Act.

⁶ §75b Civil Servants Act OJ No. 333/1979 as last amended by OJ No. I 165/2005.

⁷ *Frühkarenzurlaub* according to §75d Civil Servants Act OJ No. 333/1979 as amended by OJ No. I 111/2010.

⁸ Size matters, however, according to the Labour Constitution Act 1974. Only employees working in a business employing at least five persons are entitled to elect a representative who is, inter alia, entitled to protest against notices and dismissals. The protection against discriminatory termination of employment according to §12(7) Equal Treatment Act is an individual right applying also to persons in businesses employing less than five persons; this protection includes termination during trial periods and the change from fixed-term to permanent employment. Furthermore, positive action related to collective agreements on enterprise or plant level as regards parental rights and consultation rights presuppose the existence of elected workers' representatives.

⁹ For mothers born before 31 December 1955, periods of paid maternity leave and childcare are taken into account as 'substitute periods' (*Ersatzzeiten*); only *Beitragszeiten* are constitutive to the entitlement as well as to the amount of a pension, while *Ersatzzeiten* extend the periods relevant to the entitlement. As to rights of fathers and 'split models' see M. Thomasberger *Sozialrecht SR5. Pensionsversicherung II. Versicherungszeiten und Leistungen. Status: May 2012* Vienna, ÖGB Verlag 2012, pp. 10 s.

¹⁰ Slightly different regulations on calculating the net income as well as on determining the relevant period apply to workers on the one hand, employees on the other; in principle, the relevant net income is defined as the wages earned minus taxes and social insurance contributions, regular special payments are taken into account. Women employed below the thresholds for mandatory social insurance are entitled to maternity benefits of EUR 8.45 daily; women receiving unemployment benefits receive additional 80 % of the respective benefit as maternity payment; §162 General Social Insurance Act OJ No. 189/1955 as amended. There are, however, legal uncertainties about the entitlement to and the calculation of maternity benefits when previously having received child care allowance, see 2.4. as to Supreme Court 30 November 2010, 10 ObS 136/10p and related case law.

1.3. Self-employment

Equal treatment legislation for the private sector applies to ‘the conditions of the access to self-employment’ without discrimination on grounds of gender including pregnancy (see above).¹¹ Draft legislation includes the ‘extension of self-employment’.¹² There is broad consensus among practitioners that legislation specifically transposing Directive 2010/41/EU was not necessary. Self-employment (*Selbständigkeit, selbständige Erwerbstätigkeit*) is essentially defined by social security legislation. The general provisions in this field cover entrepreneurial activities in trade (industry), defined inter alia by reference to the mandatory membership of the Chambers of Commerce and furthermore to tax legislation.¹³ Self-employed persons within the meaning of the legislation mentioned including ‘free employees’ are entitled to benefits which are designed as pay for a substitute (*Betriebshilfe, Wochengeld*), according to the legal social security scheme for self-employed persons, regularly for eight weeks before and eight weeks after birth and furthermore in the event of pregnancy-related illness preventing work.¹⁴

In principle, ‘assisting’ spouses working in the business fall under two types of mandatory social security legislation: either they are self-employed themselves, or they are workers. In both cases they are entitled to maternity benefits as described. In practice most spouses ‘assisting’ in the business are fully insured as workers above the minimum threshold, provided that they are actually working in the business and not only formally registered. A self-employed person is entitled to insure his/her spouse keeping house for him/her by the so-called family insurance. The ‘family insurance’ of the self-employed includes married partners of both sexes or registered same-sex partners as well as domestic partners in de facto cohabitations existing longer than ten months. It furthermore includes other relations, which exceeds the extent of workers’ co-insurance by far.¹⁵ Pertinent case law could not be found.

1.4. Access to and the supply of goods and services

The Equal Treatment Act (private sector) transposes Directive 2004/113/EC by a general prohibition of direct and indirect discrimination, stating explicitly that ‘discriminations of women on ground of pregnancy or maternity are direct discriminations on ground of sex’.¹⁶ The personal scope is provided for in the most inclusive and general way possible (‘nobody’, ‘a person’).¹⁷ The material scope comprises goods and services, which are available to the public including housing and which are furthermore subject to the direct legislative

¹¹ §§1.4., 4(3) Equal Treatment Act; *Hopf et al*, GIBG (Vienna 2009), sub-apostilles 5-9 to §4, pp. 229–232.

¹² Article 1 Paragraph 3 [draft §§4.3 and 18.3 Equal Treatment Act] ministerial draft 407ME 24.GP http://www.parlament.gv.at/PAKT/VHG/XXIV/ME/ME_00407/fname_267210.pdf, accessed 3 October 2012.

¹³ §2 Trade (Industry) Social Insurance Act (*Gewerbliches Sozialversicherungsgesetz - GSVG*) OJ No. 560/1978; membership of the Chambers of Commerce is essentially based on self-employed entrepreneurial and certain managerial activities, §2 Chambers of Commerce Act (*Wirtschaftskammergesetz 1998 – WKG*) OJ No. 103/1998 as amended. The most detailed, descriptive and comprehensive definition of self-employment is to be found in tax law, cf. §§22 Nos. 1 – 3, 5, 23 Income Tax Act OJ No. 400/1988. Special social security legislation covers certain free professions according to the Social Insurance of Self-employed Persons in Free Professions Act (*Sozialversicherung freiberuflich selbständig Erwerbstätiger – FSVG*) OJ No. 624/1978.

¹⁴ In any case it is presupposed that a substitute should be employed to a minimum extent. If this, however, is not feasible, the benefit of EUR 50 daily is paid as well in practice; whereas various limits apply to the employment of a substitute in case of e.g. sickness, there are no such limits in the case of maternity (the wages of the substitute are paid directly by the social insurance institution). §102a Trade (Industry) Social Insurance Act (*Gewerbliches Sozialversicherungsgesetz - GSVG*) OJ No. 560/1978 as amended by OJ No. II 398/2011; information for members of the Chambers of Commerce at http://portal.wko.at/wk/format_detail.wk?angid=1&stid=618246&dstid=686&titel=Wochengeld%2C%C3%B4Cr%2CUnternehmerinnen accessed 13 February 2013. ‘Free employees’ are subject to the mandatory social security provisions of the *GSVG* and considered self-employed by tax law.

¹⁵ Family insurance according to §10 Trade (Industry) Social Insurance Act (*Gewerbliches Sozialversicherungsgesetz - GSVG*) OJ No. 560/1978 as amended by OJ No. I 135/2009 furthermore covers ascendants and descendants with the exception of children (who are covered by §83), persons related in the lateral line (siblings, cousins) up to the 2nd grade or related by marriage.

¹⁶ §31(1) 2nd sentence Equal Treatment Act as amended by OJ No. I 7/2011.

¹⁷ §§31, 32 Equal Treatment Act as amended by OJ No. I 7/2011.

competence of the federal State (as opposed to the legislative competence of the *Laender*).¹⁸ The wording of the exemptions corresponds literally to the provisions of the Directive (private and family life, media, advertising, education). There is no pertinent case law.

2. Gaps in national law

2.1. Employment

2.1.1. So-called ‘employee-like’ (*dienstnehmerähnliche*) persons, i.e. persons for whose employment the criteria of personal and economic dependency prevail over the criteria of self-employment, are considered dependent workers within the meaning of the legislation on mandatory full insurance.¹⁹ They are not, however, workers within the meaning of labour law and therefore not within the meaning of maternity protection provisions either. This concerns occupational health and safety, essentially the working conditions and various prohibitions of certain activities (*Verwendungsschutz*) as well as the contractual side of maternity protection, essentially the protection against notice or dismissal and furthermore the entitlement to parental leave. Thus, neither of these provisions apply to employee-like persons. Protection of employee-like persons against pregnancy discrimination is provided for only by the Equal Treatment Act, which refers to them as ‘persons who, without being in an employment relationship, perform work by order and for account of certain persons and who are to be considered employee-like (*arbeitnehmerähnlich*) on grounds of economic dependence, or the lack of economic independence (*Unselbstständigkeit*)’.²⁰ Protection under the Equal Treatment Act includes protection against discrimination at the choice of the type of contract.²¹ In practice, employee-like persons are known to perform all kinds of work in all kinds of professions, from supermarket cashier to media and advertisement: this construction is usually chosen, if the parties concerned do not wish the full commitment of an employment relationship. However, although employee-like persons *might* prefer flexible arrangements themselves, often they do not really do so and only accept the employee-like status as a kind of waiting position, e.g. because full employment – which would include inter alia sick leave paid by the employer (for a certain period, at least), paid holidays, regular special payments for holiday and Christmas (‘13th and 14th wage’) or seniority rights – is promised to them if their performance is satisfactory. Thus, the difference between such a position and plain circumvention of labour law might be minimal. At first, this might not be felt very strongly by the persons concerned, because, in principle, they are covered by mandatory social insurance. Furthermore, legal redress against circumvention, although possible, is strenuous and might put the only means of subsistence at risk, especially given the present situation in the labour market. Although mandatory social insurance of employee-like persons includes regular maternity benefits covering eight weeks before and eight weeks after birth (*Wochengeld*), this does not apply to extended maternity leave before birth having been prescribed in the event of medical complications. The exemption of employee-like persons from the personal scope of the Maternity Protection Act is to be considered a most serious gap in maternity protection.

¹⁸ §30(1) Equal Treatment Act as amended by OJ No. I 7/2011 (previously §40a).

¹⁹ §4(4) General Social Security Act OJ No. 189/1955 as amended by OJ Nos. 201/1996, 411/1996, I 139/1997, I 138/1998 and I 99/2001; see the comprehensive case law of the High Administrative Court, and furthermore §51(2), (3) Labour and Social Court Act OJ No. 194/1985 as last amended by OJ No. 135/2011.

²⁰ §1(3)2 Equal Treatment Act; K. Burger-Ehrhofer et al. *Mutterschutzgesetz und Väter-Karenzgesetz* Vienna, ÖGB-Verlag 2007, p. 38, with reference to cases C-207/98 *Mahlburg* and C-320/01 *Busch*. A certain protection is provided for employee-like persons who are firmly integrated in an enterprise’s organisational structure: in that case they can argue that they are workers, having access to the labour courts and the social insurance institutions on the grounds that compelling legislation was contravened.

²¹ If labour contracts are concluded with men only, employee-like contracts with women only; e.g. by H. Hopf et al. *GLBG. Gleichbehandlung - Antidiskriminierung* Vienna, Manz 2009, p. 111 sub-apostille 10.

2.2.2. Periods of maternity leave are to be taken into account for voluntary benefits.²² In any case, they are to be taken into account for seniority rights and for severance pay.²³ This does not apply as a principle to parental leave, however. The different approach is a consequence of the legal construction of maternity leave on the one hand (absolute prohibition to work, full substitute income paid by social insurance), and parental leave on the other hand (period in which the essential obligations of the labour contract, i.e. to work and to pay for it, are suspended); there are exceptions.²⁴ Periods of parental leave are taken into account for the purpose of severance pay or seniority rights only if legislation or a collective agreement expressly provides for it; if the collective partners choose not to do so, this, as confirmed by the most recent case law, is not considered discriminatory.²⁵

2.2.3. Previously signed resignations with the date left blank to be filled in later by the employer (*Blankoselbstkündigungen*, referred to as ‘white resignations’) are not known to be general practice in the context of pregnancy. However, what is known as common practice, are unlawfully prolonged probation periods and pressuring employees into agreeing to the termination of employment (*einvernehmliche Auflösung*) either during pregnancy or, more frequently, during parental leave. The former practice is supported by particularities of Austrian labour-law legislation, which allows employers to give notice (*Kündigung*) or not prolong a fixed-term contract at least once without giving any reasons; the same principle applies to trial periods, which are regularly defined by collective agreements or legislation up to an admissible maximum of one month (longer, i.e. unlawful probation periods, are legally considered fixed-term contracts). However, while informing the employer about a pregnancy in time renders the employer’s notice void and prolongs a fixed-term contract until the beginning of maternity leave, this does not apply to trial periods. Terminating employment during the trial period is considered as neither notice nor dismissal, but a form of lawfully rescinding a labour contract without further consequences, and is therefore not covered by the relevant protective provisions of the Maternity Protection Act. In principle, both parties to the labour contract are entitled to rescind during the trial period. In the event of pregnancy, however, the termination of employment by the employer in the trial period amounts to direct discrimination and might be challenged on the basis of the Equal Treatment Act.²⁶

2.2.4. In order to activate the protection against notice and dismissal, the worker has to inform the employer about her pregnancy in time, i.e. no later than five days after having been given notice, if the pregnancy was known to her; if she does not know that she is pregnant at the time, she has to do so immediately after becoming aware of her pregnancy. In both cases a medical statement is required (§10 Maternity Protection Act). A further temporal element is relevant: how the beginning of pregnancy is calculated. According to the presently relevant

²² Cf. Equal Treatment Commission 10 December 1992: employer’s voluntary contribution to an additional insurance. N. Bei & R. Novak ‘Das Gleichbehandlungsgesetz’ in: U. Aichhorn (ed.) *Frauen & Recht* pp. 83-158 (p. 113) Vienna/New York, Springer 1997.

²³ K. Burger-Ehrnhofer et al. *Mutterschutzgesetz und Väter-Karenzgesetz* Vienna, ÖGB-Verlag 2007, p. 450 with reference to Case C-333/97 *Lewen*.

²⁴ §15r Maternity Protection Act; K. Burger-Ehrnhofer et al. *Mutterschutzgesetz und Väter-Karenzgesetz* Vienna, ÖGB-Verlag 2007, p. 450 with reference to Case C-249/97 *Gruber*.

²⁵ OGH 29 March 2012, 9 ObA 58/11m – collective agreement of *Austrian Airlines* and *Lauda Air* (cabin crew) – not including periods of parental leave into the seniority regime does not constitute pay discrimination within the meaning of Article 141(1) ECT with reference to ECJ 15 June 1977, Case 149/77 *Defrenne III*, http://www.ris.bka.gv.at/Dokumente/Justiz/JJT_20120329_OGH0002_009OBA00058_11M0000_000/JJT_20120329_OGH0002_009OBA00058_11M0000_000.pdf, accessed 19 September 2012.

²⁶ In 2005, the Supreme Court had confirmed its constant jurisdiction, that the protection against dismissal according to §10 Maternity Protection Act does not apply to ending employment on probation, but had added that an employer’s declaration to end employment on probation, which was caused by pregnancy, was direct discrimination against the employee, OGH 31 August 2005, 9 ObA 4/05, K. Burger-Ehrnhofer et al. *Mutterschutzgesetz und Väter-Karenzgesetz* Vienna, ÖGB-Verlag 2007, p. 196. §12(7) Equal Treatment Act OJ No. I 66/2004 as amended by OJ No. I 98/2008 explicitly gives legal redress against the termination of employment during the trial period; H. Hopf et al. *GlBG. Gleichbehandlung - Antidiskriminierung* Vienna, Manz 2009, p. 199 sub-apostille 137.

case law, pregnancy begins with the coalescence of ovum and semen.²⁷ According to Article 8 Paragraph 2 of the European Social Charter (revised), the temporal elements mentioned should not matter as regards the protection against notice and dismissal, but informing the employer would suffice. Austria ratified the European Social Charter (revised) in 2011, but not Article 8(2). Whereas the Federal Ministry of Labour, Social Affairs and Consumer Protection envisaged extending ratification to Article 8(2), employers' organisations firmly opposed this measure which could certainly mitigate an undignified time pressure on pregnant women, contribute to better respect of privacy and lower the risk of bringing cases before the courts.²⁸

2.2.5. In 1992, legislation reacted to the tendency to contravene protection against notice and dismissal by introducing §10a Maternity Protection Act. According to this provision, a fixed-term contract is prolonged *ex lege* until the beginning of maternity protection. Accompanying case law of the courts is comprehensive and indicates that fixed-term contracts and the refusal to extend them are indeed a problem in practice.²⁹

2.2.6. Austrian legislation provides for a statutory entitlement to paternity leave. However, the involvement of fathers is a minority phenomenon.³⁰ In the case of a father who had been denied parental part-time leave, Senate I of the Equal Treatment Commission found that, by this denial, he had been discriminated against in his working conditions, but not with respect to the termination of employment. Furthermore, Senate I stated that he had been subject to sex-related harassment by a (male) colleague, not by being called a backstabber (*Kameradenschwein*) because of his plans to take parental part-time leave, but because he was mocked that he only wanted to do so because his wife had demanded it; the sex-related element in this, the Senate stated, was the connection to sex-role stereotypes.³¹ See, however, furthermore Supreme Court 25 October 2011, 9 ObA 78/11b as described under 4.2.

2.2. Self-employment

As to the entitlement to parental leave, it should be noted that the notion of self-employed worker is basically ambiguous, it being understood that in principle a worker is considered personally and/or economically dependent whereas a self-employed person is essentially considered as entrepreneur and therefore autonomous as regards his/her working arrangements. However, it is to be noted that entrepreneurs and so-called 'free employees'³² are not entitled to any form of parental leave, and that, in practice, many a free

²⁷ OGH 12 April 1995, 9 ObA 23/95; for in-vitro fertilisation the moment of transfer is decisive, OGH 16 June 2008, 8 ObA 27/08s in accordance with ECJ Case C-506/06 *Sabine Mayer*; G. Löschnigg *Arbeitsrecht*¹¹ Vienna, ÖGB-Verlag 2011, p. 919. 9 ObA 23/95 superseded previous case law which, in the context of protection against dismissal, had defined the (calculated) beginning of pregnancy by the date of the last regular menstruation.

²⁸ Article 8 of the European Charter (revised) reads: 'With a view to ensuring the effective exercise of the right of employed women to the protection of maternity, the Parties undertake [...] 2. to consider it as unlawful for an employer to give a woman notice of dismissal during the period from the time she notifies her employer that she is pregnant until the end of her maternity leave, or to give her notice of dismissal at such a time that the notice would expire during such a period; [...].'

²⁹ §10a Maternity Protection introduced by Article 1.8 OJ No. 833/1992; K. Burger-Ehrnhofer et al. *Mutterschutzgesetz und Väter-Karenzgesetz* Vienna, ÖGB-Verlag 2007, pp. 222 ss.

³⁰ According to data published by Austrian Broadcast, only 5 % of the persons receiving childcare allowance were men, <http://oesv1.orf.at/stories/461354>, accessed 25 October 2012.

³¹ GBK 1/271/1, see EGELR 2011-1 p.50 with further references.

³² The basic dichotomy of (heteronomous) labour contracts and (autonomous) work contracts (*Werkverträge*) as defined by §1151 Civil Code does not mention any in-between category. The essential criterion of a labour contract, as developed by case law and academia, is considered personal dependency, and a flexible combination of other criteria including subordination inter alia. If there is no personal dependency, a so-called free service contract is assumed as an in-between category. Whereas persons, for whose employment the criteria of personal and economic dependency prevail over the criteria of self-employment, are included as 'employee-like' into the notion of dependent worker within the meaning of the provisions on mandatory full insurance according to §4(4) General Social Security Act OJ No. 189/1955, as amended, the party to a free service contract, a free employee, is considered self-employed by social security legislation and tax law, cf. §2

employee should rightfully be treated as worker as regards labour law, social insurance and tax law. Again it should be noted, that the entitlement to childcare allowance is, in principle, independent from gender or any form of employment.

2.3. Access to and the supply of goods and services

Potentially discriminatory practices would have to be researched systematically. Gender-related discrimination does not really seem to be a mainstream concern of Austrian consumer protection institutions. In an opinion regarding most recent draft legislation, the *Österreichische Frauenring* pointed out that there was no legitimate reason to maintain the different levels of protection provided for by Directive 2000/43/EC on the one hand, and Directive 2004/113/EC on the other hand, especially as regards social protection including healthcare and furthermore education. In addition, the *Frauenring* challenged the exceptions applying to media and advertising.³³

2.4. Additional information

Whereas the entitlements to paid maternity leave are provided for by social security law and depend, in principle, on occupation or on periods of mandatory insurance which are equalled to occupation in this regard (e.g. after certain forms of termination of employment), this is no longer true for the childcare allowance (*Kinderbetreuungsgeld*). Since 2001, the childcare allowance, previously an extended unemployment benefit, is construed as a transfer payment independent from any form of employment. The periods of parental leave being protected against dismissal under labour law, up to the maximum of the child's 2nd birthday, and the admissible periods of payment of childcare allowance, which vary, according to the option chosen, between 15 up to 30 months, are not congruent. In addition, the option to choose between five models of childcare allowance confuses many parents. The incongruence mentioned causes other problems as well in practice, especially that the entitlement to paid maternity leave (*Wochengeld*) for a second child conceived during parental leave is subject to legal intricacies and thus uncertainties.³⁴

3. Involvement of other parties

The role of the social partners is crucial in social and labour legislation; around 98 % of the Austrian enterprises are small or medium-sized enterprises that are represented by the Chambers of Commerce (mandatory membership). The social partners take part in social and labour jurisdictions as lay judges, and they are also represented in the Equal Treatment Commission. The practice of the Equal Treatment Commission's Senate I might be considered comprehensive as regards pregnancy discrimination. The Advisory Council for Family Politics (*Familienpolitischer Beirat*), part of the Federal Ministry for Economic Affairs, Youth and Family, should be mentioned as an informal but influential stakeholder; catholic and conservative organisations hold a vast majority, some of them still advocating and upholding the concept of the nuclear family with a male breadwinner. A relevant civil society organisation with a less conservative approach is, for instance, the *Österreichische Frauenring*, an umbrella of women's organisations comprising all important democratic political tendencies.³⁵

Trade (Industry) Social Insurance Act OJ No. 560/1978 as amended. The most detailed, descriptive and comprehensive definition of self-employment is to be found in tax law, cf. §§22 Nos. 1 – 3, 5, 23 Income Tax Act OJ No. 400/1988.

³³ http://www.parlament.gv.at/PAKT/VHG/XXIV/ME/ME_00407_29/fname_270597.pdf, accessed 4 October 2012.

³⁴ Childcare Allowance Act OJ No. 103/2001; 50th amendment to the General Social Insurance Act, §122(3) OJ No 676/1991; as to the intricacies of this and other pertinent legislation see inter alia OGH 30 November 2010, 10 ObS 136/10p; OGH 30 November 2010, 10 ObS 137/10k; OGH 1 March 2011, 10 ObS 178/10i; OGH 13 March 2012, 10 ObS 103/11m; and OGH 5 June 2012, 10 ObS 68/12s, all to be found on www.ris.bka.gv.at, accessed 24 October 2012.

³⁵ <http://www.frauenring.at/>, accessed 23 October 2012.

4. Enforcement and effectiveness

4.1. General

The effect of active labour market policy measures (such as courses) as regards returning to work after parental leave or unemployment appears to be more favourable for women than for men.³⁶

4.2. Legal redress

Legal redress against discrimination, i.e. the enforcement of equal treatment legislation, is provided for by the courts and the equal treatment commissions, where the latter might be considered a soft-law conciliation mechanism. In the private sector, the protection against dismissal and of other rights under the Maternity Protection Act is enforced by the Labour and Social Courts (the monitoring by the Labour Inspectorates should be pointed out as well). The Chambers of Labour represent their mandatory members, i.e. workers and employee-like persons, before the Labour Courts according to their regulations, i.e. in principle without further costs for their members in cases that are not considered pointless.

However, there are significant legal uncertainties. The Equal Treatment Commission (private sector) and the Supreme Court differed on the question of extending fixed-term contracts combined with parental leave. If an employer refuses to extend a fixed-term employment contract for an indefinite period, so that the (male) employee could take parental leave, such a refusal is, according to the Supreme Court and as opposed to the Equal Treatment Commission's opinion, not to be considered discrimination as regards working conditions. The employer's refusal would have to be assessed in the light of the European Court's ruling in the *Jiménez Melgar* case, according to the prohibition of discrimination as regards access to employment.³⁷ Further legal uncertainties, some of them about the temporal scope of the relevant legislation, concern the childcare allowance (see 2.4. as to Supreme Court 30 November 2010, 10 ObS 136/10p and related case law).³⁸ Furthermore, the Supreme Court raised questions concerning the temporal scope of equal treatment legislation and ruled that, in the event of a discriminatory dismissal, a victim is only entitled to choose between claiming damages or contesting the dismissal if the discrimination occurred after 31 July 2008, i.e. after the relevant amendment to the Equal Treatment Act entered into force. Previous legislation did not entitle the victim to damages; the victim could only claim that her (his) employment should have continued.³⁹

In April 2012 the Federal Minister for Women's Affairs alleged that there was a significant rise of pregnancy-related, unlawful terminations of employment, and she called for imposing the full burden of proof on the employer in such cases. The Chambers of Commerce rejected the proposal, arguing that such a provision would infringe the rule of law. The Federal Minister of Economics, Family Affairs and Youth, however, said he was ready to enter into negotiations although he doubted the number of cases and the necessity of new regulations.⁴⁰ The Green Party added to this discussion by pointing out that the real reason for pregnant women receiving their notice or being dismissed more frequently was the more austere approach of the Federal Minister for Labour, Social Affairs and Consumer Protection

³⁶ H. Lutz *Wiedereinstieg und Beschäftigung von Frauen mit Kleinkindern* WIFO Monographs 3/2004, http://www.wifo.ac.at/www/jsp/index.jsp?fid=23923&id=24945&typeid=8&display_mode=2, accessed 19 September 2012.

³⁷ Supreme Court 25 October 2011, 9 ObA 78/11b; Case C-438/99 *Maria Luisa Jiménez Melgar v Ayuntamiento de Los Barrios* [2001] ECR I-06915.

³⁸ The Constitutional Court abolished two provisions relating to the reimbursement of benefits for parental leave, one dating back to the transition from the former type of benefits to the current type of transfer payments, the other concerning a legal provision which does not take into account the alimony that a parent who is living separately is obliged to pay for other children. Constitutional Court 24 February 2011, V 76/10; 4 March 2010, G 184/10.

³⁹ OGH 31 August 2005, 9 Ob A 4/05.

⁴⁰ *Kündigungsschutz für Schwangere oft verletzt* Wiener Zeitung 24 April 2012, http://www.wienerzeitung.at/nachrichten/oesterreich/politik/453038_Kuendigungsschutz-fuer-Schwangere-oft-verletzt.html, accessed 20 September 2012.

as regards the extended maternity leave before birth that is prescribed in the event of medical complications and paid by social insurance (putting a heavier burden on the budget of the *Gebietskrankenkassen*, the workers' social insurance institutions). The Green Party called for an evaluation of the new austerity regime, financial aid for employers from the accident insurance and more frequent controls by the Labour Inspectorates. They furthermore required extension of the protected period (regarding notice and dismissal) after parental leave from the present four weeks to six months.⁴¹

4.3. Access to information

A rather high level of awareness as regards parental rights and employment in general may, be supposed. Workers and employee-like persons are mandatory members of the Chambers of Labour, which offer comprehensive pertinent information services to their members (and in practice to non-members as well).⁴² This includes personal counselling in the languages most frequently spoken by migrant workers (Turks, Kurds, Croatians, Bosnians, Serbs). In spite of the general language barrier, migrant workers might find information at several associations, at least in cities such as Salzburg and Vienna.⁴³ Furthermore, the competent federal Ministry for Economic Affairs, Youth and Family offers information on its website.⁴⁴ However, it has to be stressed once again that there is no evaluation of antidiscrimination legislation and the relevant institutions, and so there is no research either on the awareness regarding parental rights and employment in the context of discrimination.

BELGIUM – Jean Jacqmain

1. Existing legislation and case law

1.1. Employment

It should first be stressed that historically Belgian labour law has always been designed as protective of the worker, who is considered as the weaker party in the contractual employment relation. Moreover, there are a number of circumstances in which a worker is deemed to be especially vulnerable *vis-à-vis* an ill-willing employer, so that reinforced protection appears indispensable. Starting in 1889 with a very modest measure in favour of female workers who were about to give birth (a four-week unpaid leave), this pattern of thinking which does not explicitly rest on any consideration of discrimination has been followed for more than a century, usually on its own (national) steam, and more recently when EC/EU law had to be taken into account, such as Directive 92/85/EEC and Directives 96/34/EC and 2010/18/EU.

As to discrimination, the norm now stated in Article 2(2)(c) of Directive 2006/54/EC is transposed in Article 4(1) of the present Gender Act of 10 May 2007: 'Any direct distinction grounded on pregnancy, giving birth and maternity is regarded as direct distinction grounded on sex' (and thus as direct discrimination under Article 11). There has never been any serious discussion in Belgium as to the 'direct' nature of the discrimination, given the mere consideration that 'this cannot possibly happen to a man'.

⁴¹ *Arbeitswelt: Schwangere zunehmend unter Druck* diestandard.at 10 May 2012; <http://diestandard.at/1336563090578/Frauenbericht-Arbeitswelt-Schwangere-zunehmend-unter-Druck>, accessed 20 September 2012.

⁴² See the publicly accessible content on <http://www.arbeiterkammer.at/berufundfamilie.htm> for the Chambers of Labour in all nine *Laender* and <http://wien.arbeiterkammer.at/berufundfamilie.htm> for Vienna. Pertinent content of the Site of the Chambers of Commerce is limited to members, http://portal.wko.at/wk/suche.wk?DstID=0&ChID=0&reiter=InternetAktiveInhalte&init=1&itemoffset=0&pagesize=20&details=1&sortierung=TopInhalte&suchbegriff= karenz&quicksearch_submit=Suchen, all accessed 20 October 2012.

⁴³ For Vienna see <http://www.wien.gv.at/sozialinfo/content/de/10/Institutions.do?senseid=180>, accessed 20 October 2012.

⁴⁴ <http://www.bmwfi.gv.at/Familie/Seiten/default.aspx>, accessed 20 October 2012.

More worthy of attention is the transposition of the present Article 28(1) of Directive 2006/54/EC, which dates back to the original Directive 76/207/EEC. As early as 1999, it was decided to stand that provision on its head, so that the present Article 17 of the Gender Act reads: ‘The provisions concerning the protection of pregnancy and maternity may not be analyzed as any form of discrimination, but are a condition to the achievement of equal treatment between men and women’. This formulation is meant as an incitement to seek a dynamic combination of ‘protection’ and ‘non-discrimination’.

Indeed, as early as 1981 an inspired judgment⁴⁵ had relied on the gender equality law then applicable (the Act of 4 August 1978) to decide that as an employer had no right to question a candidate for employment as to her possible pregnancy, he could not reproach her for giving a false answer. Ever since, both judges and other legal practitioners have learned how to rely on non-discrimination provisions when the protective rules were not applicable (e.g. when pregnancy was the employer’s motive for refusing to renew a fixed duration contract, or when an employee was dismissed after a miscarriage). However, the dominant protective ideology of labour law and the instinctive approach of many practitioners have not bridged the gap between protection and non-discrimination and this is even more obvious concerning more recent issues such as parental and paternity leaves.

The **protection of maternity** is organized in a fairly coherent way by Articles 39 through 45 of the Working Conditions Act of 16 March 1971, plus Articles 111 through 117 of the Consolidated Act of 14 July 1994 concerning the Healthcare and Sickness Insurance Scheme. Maternity leave has a duration of 15 weeks (with possible additional weeks in certain circumstances such as multiple pregnancy), of which 10 are compulsory (1 before the delivery and 9 as postnatal leave) and 5 are optional (i.e. the employee may use them as ante- or postnatal leave). No special attention is given to maternity-related illnesses, and indeed there is no relevant case law (except in the public services where the regulations applicable to tenured staff members had to be amended so that such illnesses do not result in adverse effects on the career). In contrast, much care was dedicated to the protection of the pregnant (or breastfeeding) employee and of the foetus (or infant) against health risks: e.g. if the employee must be withdrawn from her usual tasks, and the employer cannot assign her to any other activities, a ‘protection of maternity’ leave is provided. After resuming work, an employee is entitled to breastfeeding breaks (of twice 30 minutes per day) until the child is 9 months old. None of the various types of leave related to maternity is paid by the employer (except in the public services, for tenured staff members), but the Healthcare and Sickness Insurance Scheme provides benefits which are at least equal to the requirements of Directive 92/85/EEC. The protection of employment consists of a prohibition of any dismissal grounded on ‘the physical condition resulting of the pregnancy or delivery’. The burden of proof rests on the employer. In case of unlawful dismissal, fixed damages equal to six months’ pay (a standard in Belgian labour law) are due, and if the employer gave notice, the notice period is null and void so that payment in lieu is due as well.

There are no explicit provisions concerning either the protection of rights or the return from maternity leave as mentioned in Article 15 of Directive 2006/54/EC.

Adoption leave (for a child under 10: 6 weeks if the child is under 3, and 4 weeks if she/he is over 3) is a right for any employee (and for each of the parents if it concerns a couple adopting). A benefit (the same as during maternity leave) is provided by the Healthcare and Sickness Insurance Scheme. There is protection against dismissal (the employer carries the burden of proof; fixed damages are equal to 3 months’ pay). Again, nothing is provided concerning the protection of rights, and indeed no attention was paid to Directive 2006/54/EC in this respect.

Paternity leave is a phrase which covers two completely different situations. The first one concerns the transfer of the unused maternity leave to the father if the mother dies after giving birth, or if she is unfit to leave the hospital with the baby (in this case, two maternity leaves are in fact granted). The second one, of 10 days (usable entirely or separately until the child is 4 months old), is a right (but not an obligation). Remuneration is maintained during

⁴⁵ Labour Court in Ghent, judgment of 18 May 1981 *Journal des tribunaux du travail* (1981), p. 300.

the first 3 days, then a benefit is provided by the Health and Sickness Benefits Insurance Scheme. In the first case, protection against dismissal is the same as for the maternity leave, in the second one, a similar protection (but with fixed damages equal to 3 months' pay) was introduced in 2011, as a belated measure of transposition of Directive 2006/54/EC. Again, there is no provision as to the protection of rights. Finally, it should be mentioned that since 2011, both types of leave are available to the person (male or female) who is the spouse/registered partner/*de facto* partner of the mother.

Parental leave is organized in an excessively complicated way as there are two schemes, both available to all employees, one without pay or any social security benefit or coverage, the other without pay but with a benefit and coverage. Perhaps the expert will be allowed to concentrate on the second one, by far the more widely used for obvious reasons. This parental leave, aimed at implementing Directive 96/34/EC, was introduced in 1997 as part of the existing scheme of career breaks, now the time-credit scheme. The leave is available to any employee (i.e. to each parent in a couple, without any possibility of transfer) for every child born or adopted under 12 (since 2011, until 21 if the child is disabled). The duration used to be 3 months full time (fractionable by half or one fifth), it was increased to 4 months belatedly (as from 1 June 2012) in compliance with Directive 2010/18/EU. The leave is unpaid, but a monthly benefit (of EUR 771.33 as from 1 February 2012) is provided by the Unemployment Insurance Scheme. However, for disputable budgetary measures, the benefit corresponding to the fourth month is only available if the child was born or adopted on or after 8 March 2012. The standard protection against dismissal (with fixed damages equal to 6 months' pay and transfer of the burden of proof to the employer) is provided, but again the protection of rights has been overlooked.

All the provisions mentioned above are applicable in the public sector as well, with some variations due to the coexistence of staff members in tenured appointments and under employment contracts. Usually, more attention is paid to the protection of rights than in the private sector (e.g. all the various types of leave are taken into consideration for pay seniority). Concerning members of the judiciary, the provisions on the protection of maternity (including transfer of the unused maternity leave) are applicable given the very broad personal scope of the Working Conditions Act of 16 March 1971. In contrast, nothing is provided in respect of the other leaves envisaged in this report.

All the provisions mentioned above are applicable in the public sector as well, with some variations due to the coexistence of staff members in tenured appointments and under employment contracts. Usually, more attention is paid to the protection of rights than in the private sector (e.g. all the various types of leave are taken into consideration for pay seniority).

Victimization is only envisaged by anti-discrimination legislation (i.e. for the purposes of this report, the Gender Act of 10 May 2007) and by the legal machinery aimed at combating harassment, sexual harassment and violence at work, which is part of the Wellbeing at Work Act of 4 August 1996 (i.e. health and safety legislation). Either of these Acts might be used in case of victimization related to one of the types of leave, but there is no case law indicating that such an attempt was ever made.

1.2. Social security and pension rights

Full social security rights are maintained during all the types of leave mentioned in 1.1., and all those types of leave are taken into account with regard to future social security (including pension) rights.

However, so far, the situation is unclear as to the fourth month of parental leave, in the case of an employee (subject to the social security scheme for paid workers) who is not entitled to the benefit because the child has been born or adopted before 8 March 2012 (see 1.1.).

1.3. Self-employment

As from 1989 (to comply with Directive 86/613/EEC) and by way of successive limited increments, a minimal scheme aimed at the protection of maternity has been developed.

Essentially, the maternity leave has a duration of 8 weeks (or 9 in case of multiple births), of which 3 (one immediately before and two immediately after the delivery) are ‘compulsory’ (see below) and the remainder optional. Those 5 (or 6) weeks can be used to extend the antenatal leave (by 2 weeks) or the postnatal leave. In the latter case, the optional weeks can be taken entirely or separately over a maximum period of 21 weeks, following the ‘compulsory’ postnatal leave. A benefit of EUR 398.71 (as from 1 March 2012) per week is provided by Maternity Insurance, a branch of the Social Security Scheme for self-employed persons. In fact, a self-employed woman is entirely free not to take any leave at all, using the ‘compulsory’ leave is only a condition of entitlement to the benefit, which meets the requirements of Article 8(3)(a) of Directive 2010/41/EU. As to Article 8(1), the Belgian Government considers that the possibility of spreading the optional part of the leave over 21 weeks, combined with the provision of ‘service vouchers’ (see below), meets the requirement adequately.

The possibility of transferring the unused maternity leave to the spouse or partner if the mother dies or remains unfit after the child’s birth (see 1.1.) has been made available to self-employed workers as well.

Parental leave of the same length as for paid workers (see 1.1.) and with the same benefit as during a self-employed woman’s maternity leave, was made available to every self-employed worker (without any possibility of transfer between parents) in 2006.

As an extra help to self-employed mothers (which Belgium considers as meeting the requirements of Article 8(4) of the Directive), 105 free ‘service vouchers’ are provided after each birth. This is a scheme aimed at giving unemployed persons a possibility of performing (modestly) paid menial tasks in private households while remaining entitled to unemployment benefits.

Finally, in 2005 participation in the whole statutory social security scheme for self-employed persons (including Maternity Insurance) was made compulsory for all assisting spouses (as it already was for any other person assisting a self-employed worker, such as life partners).

1.4. Access to and the supply of goods and services

Given that the Gender Act of 10 May 2007 is meant to transpose all gender equality directives, including 2004/113/EC, Article 6(1)(1°) mentions access to and supply of goods and services in the material scope of the Act. For the rest, Articles 4(1) and 17, mentioned in 1.1., are transversal provisions and thus also apply to goods and services.

There is absolutely nothing else to report under this heading. No attention whatsoever has been given, either in legislation or even in academic literature, as to the implications of maternity (paternity, adoption, etc.) on equal treatment in the access to and supply of goods and services. Indeed, there is no known case law at all related with the transposition of Directive 2004/113/EC.⁴⁶ The yearly *Activity Reports* of the autonomous agency Institute for Equality of Women and Men mention a small number (say 50 per year) of applications for information and complaints (on which the Institute has no power of adjudication) related to goods and services, but the expert has no knowledge regarding whether maternity was even mentioned in any of those.

Overall, the Gender Act formally and most laconically meets the requirements of Directive 2004/113/EC. Its material scope does not exclude either media or advertisements. Nor does it exclude education, but the Gender Act only deals with issues which fall within the federal jurisdiction, while education is essentially the respective competence of the three Communities. The latter’s anti-discrimination provisions (Flemish: *decreet* of 10 July 2008; French-speaking: *décret* of 12 December 2008; German-speaking: *Dekret* of 19 March 2012) do not exclude education either, but they mostly copy the federal Act in the same off-handed manner.

⁴⁶ Except for the dispute which led to the ECJ’s decision in Case C-236/09 *Test-Achats* [2011], but that issue (the use of gender-related actuarial factors in life insurance) is not relevant to the present report.

Where transposition is lacking is in the persisting absence of ancillary royal decrees, five years after the Gender Act was promulgated. Relying on Article 4(5) of Directive 2004/113/EC, Article 9 of the Act allows that certain goods and services be provided to persons of one sex only, but a royal decree must define which ones and in the absence of it, no exception is lawful. In the same manner, Article 16, another transversal provision of the Act, allows positive action, which might be a way to deal with certain aspects envisaged by this report, but the lack of a royal decree to define under which conditions positive action may be taken makes it unlawful so far.

2. Gaps in national law

2.1. Employment

Recruitment process

The Gender Act offers a person who claims to be a victim of gender discrimination (including discrimination grounded on pregnancy or maternity) two ways of redress which may be combined: applying to the Labour Court for an order to put an end to the discrimination and applying to the same court for fixed damages (EUR 650, or 1300 if the employer is not able to demonstrate that the candidate would not have been recruited even if there had been no discrimination). These two ways are improvements on previous legislation, but there is no case law which would give any indication as to their effectiveness (however, see below in 4.2.).

Should the discrimination affect access to a tenured position in a public service, an application for annulment by the *Conseil d'État/Raad van State* (Administrative Court) would provide an effective way of redress, but – thankfully – there is no relevant case law either.

Employment relations and conditions of employment

As mentioned above in 1.1., Belgian legislation (for the private sector) uniformly fails to provide for the protection of rights during the various types of leave envisaged in this report. Although no case law is known in relation to this issue, there are probably unchallenged occurrences of contractual provisions (individual or collective) which make certain advantages conditional on effective presence at work, irrespective of the causes of absence.

Even more seriously, there is no provision to guarantee reinstatement in the job at the end of maternity leave: if an employee discovers that she has been transferred to an inferior job during the leave, the only remedy available is to challenge the transfer as constructive dismissal grounded on maternity. Of course, the employee might also challenge it as gender discrimination and apply for an order to put an end to it, but this method has never been tested in court.⁴⁷ However, the lack of an explicit provision on reinstatement in the job has no negative impact on tenured staff members in the public services, given that during maternity leave they are simply regarded as remaining in active service.

Protection against health risks is organized in rather a sophisticated manner (including, as an exception to what has just been reported, a legal guarantee of reinstatement if the pregnant employee has been removed from her usual job and transferred to an inferior one until she took maternity leave), and does not seem to raise any disputes. Overtime is prohibited for pregnant or breastfeeding employees. However, for this prohibition to apply to positions of trust or management a royal decree should be adopted, which is still lacking (except in public services) 45 years after the prohibition was introduced.

Remuneration

What has been mentioned above concerning the absence of a general provision on the protection of rights is particularly obvious as far as certain elements of remuneration are

⁴⁷ Except by the clerk of an investigating magistrate who was reassigned when she took maternity leave. However, the *Raad van State* dismissed her claim for annulment on purely technical grounds: judgment of 16 February, n°218.060, *Coppens* on www.raadvst-consetat.be, accessed 17 July 2012.

concerned. For instance, if a collective agreement on Christmas bonus makes the amount of the bonus proportional to effective presence at work during the past year, the consequent discrimination grounded on maternity might be challenged as such (see ECJ Case C-333/97 *Lewen* [1999] ECR I-7243). Still, should legislation contain a general provision to protect rights during absences related to maternity (or parental leave, etc.), such a provision would have a preventive effect on the adoption of clauses which may produce ‘unexpected’ discriminatory consequences.

The same applies to occupational social security schemes. Articles 6(1)(4°) and 12(1) of the Gender Act and Article 14(1) of the Occupational Pensions Act of 28 April 2003 both forbid gender discrimination, but these Acts contain no beacons to attract the employers’ or the social partners’ attention to the potential adverse effects of the various types of leave envisaged in this report.

For instance, many employers have instituted occupational healthcare insurance schemes, to supplement the coverage provided by the statutory scheme. Usually, a collective contract is concluded with an insurance company. This applies to all employees of the enterprise or institution, and in many cases the coverage can be extended to spouses/partners. The expert has knowledge of one company under whose contract such an extension is conditional on a 3-month waiting period during which no reimbursement is provided, whatever the cause of the healthcare costs, including pregnancy and delivery. Such a practice seems contrary to the provisions of the Gender Act mentioned above in 1.1. and 2.1.. However, there is no related case law in Belgium, and no known pending case. Moreover, the practice mentioned above may be isolated.

Termination of the employment contract

There are no known cases of forced resignation. Failure to renew a fixed-term contract after an employee took maternity leave, while such renewal is habitual practice in the enterprise or institution concerned, is now analyzed as direct discrimination by the Courts,⁴⁸ provided that the employee can produce *prima facie* elements of proof.⁴⁹

Involvement of fathers

As mentioned above in 1.1., ‘fathers’ has become a restrictive phrase as ‘paternity leave’ is now available to the mother’s spouse or life partner, even if she is a woman.

The introduction (in 2011) of a protection against dismissal was belated implementation of Directive 2006/54/EC (and in fact of Directive 2002/73/EC), but there is no known case law concerning this issue. According to a very recent (30 June 2012) press release from the federal Minister of Employment, the paternity leave is a great success as 80 % of ‘fathers’ seem to use it. There is no comparison to be made with annual leave, a sacred institution in the industrial culture (strongly protected by legislation, given that preventing an employee from taking annual leave is liable to penal sanctions).

Relevant gaps

To be entitled to maternity benefits, an employee (as well as her employer) must be subject to the Healthcare and Sickness Benefits Insurance Scheme, organized by the Consolidated Act of 14 July 1994. Apprentices in small businesses (a matter which falls within the respective jurisdictions of the three Communities, under the heading ‘vocational training’) are regarded as pupils, dependent on their parents as to social security coverage, and thus excluded from the insurance mentioned above. Consequently, a female apprentice is entitled to maternity leave (as the Working Conditions Act of 16 March 1971 applies to any subordinate employment relation), but not to any social security benefit. This is a blatant breach of Directive 92/85/EEC as well as of Directive 79/7/EEC, but no related case was ever brought to the Courts. Given the modest number of persons possibly concerned (there are perhaps

⁴⁸ See Labour Court in Namur, judgment of 28 April 2003, *Chroniques de droit social*, 2004, p. 100 with comments by J. Jacquemain.

⁴⁹ See Labour Court in Nivelles, judgment of 14 September 2006, *Chroniques de droit social*, 2008, p. 31.

25 000 such apprentices of both sexes in the whole country), no step was ever proposed to remedy the gap.

2.2. Self-employment

See the information provided above in 1.3.. The only known (but not documented by case law) issue to mention here is the termination of collaboration grounded on maternity in self-employed partnerships, especially law firms. It should first be made clear that under the Judicial Code, the profession of barrister is incompatible with subordinate employment.

In compliance with Directive 2006/54/EC, the Gender Act (Article 5(10°) and Article 6(2)(1°)) prohibits discrimination in the access to self-employed activities, and goes one step further by mentioning ‘partnership in associations of self-employed persons’ (as it had been noticed that in various law firms, women used to be accepted as trainees or members, but not as partners).

However, the provisions of the Gender Act concerning the prohibition of discrimination in ‘dismissal’ (Article 6(2)(3°)), while formulated in a general way, have never been interpreted by academic opinion (in the total absence of case law) as applicable outside a subordinate employment relation. The ECJ’s decision in Case C-232/09 *Danosa* [2010] was regarded as either a whim or a finger pointed at a gap in Directive 2006/54/EC.⁵⁰ Thus, so far no young female barristers, invited to leave a law firm after taking maternity leave, have attempted to seek redress in court.

2.3. Access to and the supply of goods and services

Given what he has reported under 1.4., the expert regrets not having anything at all to mention under this heading.

2.4. Additional information

Directive 92/85/EEC leaves the care of defining the notion ‘childbirth’ to national legislation. Consequently, it does not define ‘miscarriage’ either. Under Belgian law miscarriage (arbitrarily defined as the delivery of a stillborn foetus occurring less than 180 days after conception) has extremely unfavourable effects: the right to maternity leave is lost, only sickness benefits (lower than maternity benefits) are available if the employee cannot resume work immediately, and the protection against dismissal ceases to apply. Indeed, dismissing an employee who takes sick leave after a miscarriage may be challenged as direct discrimination.⁵¹ However, the provisions aimed at protecting maternity should include miscarriage, both in EU and national laws.

3. Involvement of other parties

Most political parties are interested in improving the various types of leave envisaged in this report, but usually regarding certain details to which lobbying forces (trade unions, women’s organizations of the more influential sickness insurance funds, etc.) have drawn their attention. Provided that no great expenses are imposed on the statutory social security scheme, limited progress has been achieved as a result: e.g. in 2011, four separate Acts, consecutively adopted by the federal Parliament, improved the parental leave and the two ‘paternity’ leaves (see above in 1.1.).

The social partners (i.e. the employers’ associations and the three trade union confederations) have reached a deadlock with the National Labour Council: essentially, any claim for improvement of any leave is blocked by the employers’ motto that there already are far too many types of leave (a shared position, irrespective of the size of the enterprises).

Meanwhile, although no statistics are available given the state of underdevelopment of data banks within the judicial apparatus, many observers (including this expert, relying on

⁵⁰ See J. Jacmain’s comments on *Danosa*, *Chroniques de droit social*, 2011, p. 42.

⁵¹ See Labour Court of Appeal in Brussels, judgment of 16 June 2009, *Chroniques de droit social*, 2010, p. 19 with comments by J. Jacmain.

30 years' experience) are convinced that there has been an increase of cases of dismissal. In a country with a strongly unionized workforce, a respectable number of these cases will involve unions who assist their members, but there also are many claimants who bear their counsel's fees alone.

Finally, the 'gender equality body', the Institute for Equality of Women and Men, has been swamped (in proportion to its very limited human and financial resources) by applications for information and assistance in such disputes (in 2010, 42 % of all applications concerning employment issues, according to the Institute's 2010 *Activity Report*).

The situation is generally better in the public services (although this is an awkward statement in a country with so many separate political authorities): trade unions have assumed an unexpected role in drawing these authorities' attention to developments in EU law and the ECJ's case law. Once this is achieved, the necessary amendments of regulations applicable to staff members are usually easy enough to adopt.

4. Enforcement and effectiveness

4.1. General

In 2010, the Institute for Equality of Women and Men conducted an empirical survey of the situation of pregnant employees and employees who had recently given birth. Although based on rather a limited sample and conducted from the employees' point of view, this report confirms that while a fair number of enterprises behave correctly, pregnancy and maternity remain a cause of legal vulnerability.

4.2. Legal redress

As far as *pregnancy and maternity* are concerned, the following comments can be based on existing case law.

The protection of employment provided by the Working Conditions Act of 16 March 1971 is insufficient, mainly because fixed damages equal to 6 months' pay, although a standard in labour law, are too weak a deterrent to dismissal.

The same applies to the fixed damages (in the same amount) provided by the Gender Act of 10 May 2007 if an employee challenges her dismissal as gender discrimination.

The other way of redress provided by the Gender Act, i.e. the possibility of applying to the Labour Court for an order to put an end to the discrimination, is radically hampered by the dogma according to which forced reinstatement is inconceivable in Belgian labour law. Twenty-four years ago, the Court of Cassation ruled⁵² that such an order, which was already available under the first Gender Equality Act (of 4 August 1978), could not be used to put an end to a dismissal. And quite recently, although concerning 'Article 19' criteria of discrimination (age and handicap), the Labour Court in Brussels took an identical stand.⁵³

There is certainly a remarkable improvement of awareness and dexterity in the use of EU law to be observed among legal practitioners and judges, leading to certain brilliant judgments, such as the one mentioned above (in footnote 5) concerning dismissal grounded on miscarriage, or another one which resulted in the ECJ's decision in Case C-460/06 *Paquay* [2007] ECR I-8511.

However, although the notion of good practice is generally mistrusted as soft law, or rather soft soap in Belgium, only a resolute joint initiative of the social partners (perhaps a report of the National Labour Council) to stress that pregnancy and maternity is a normal event among the workforce of an enterprise could stem the current flood of dismissals.

As to *paternity leave*, the total absence of case law makes it impossible to evaluate the effectiveness of the very recent protective provisions. As to parental leave, there is some very limited case law concerning dismissal: gender discrimination was mentioned in one case only,

⁵² Judgment of 20 June 1988, *Chroniques de droit social*, 1988, p. 345, *Rechtskundig Weekblad*, 1988-1989, p. 678.

⁵³ Judgment of 29 August 2008, *Chroniques de droit social*, 2009, p. 113 with comments by J. Jacquemain.

and in vain.⁵⁴ Essentially, most recent disputes were focused on the calculation of payment in lieu of a notice period when parental leave was used in part-time form, leading to the ECJ's decision in Case C-116/08 *Meerts* [2009] ECR I-10063.

4.3. Access to information

By and large, employees have very sketchy knowledge of the very complicated legislation on protection of maternity. Certain entirely misleading and contradictory 'legends of the workplace' are deeply enshrined (such as: 'Reveal your pregnancy as late as possible', while the protection against dismissal is conditional on the employer being informed of the employee's condition, or 'It is forbidden to dismiss a pregnant worker', while the law only restricts the employer's right of dismissal). This is clearly confirmed by the survey mentioned above in 4.1.

Among the legal services of the trade unions, the 'classic' provisions of the Working Conditions Act are usually familiar, but combining those with the more recent provisions of the Gender Act is not always self-evident.

Considering that the flood of dismissals mentioned above may even affect employees occupied in quite stable positions, the expert cannot provide any elements indicating that certain categories are particularly disadvantaged in this respect.

BULGARIA – Genoveva Tisheva

1. Existing legislation and case law

1.1. Employment

The Protection against Discrimination Act (PDA) bans any direct or indirect discrimination based on a range of grounds – sex, personal or family status included (Article 4). Family status encompasses marital status or living in partnership but also the status of caring for a dependent relative due her/his age or disability. Discrimination based on sex and family status is prohibited also by the Labour Code (Article 8 Paragraph 3).

Article 7 Paragraph 1 Item 7 of the PDA declares that special protection of pregnant women, of women at an advanced stage of in-vitro treatment and of mothers does not constitute discrimination, as long as the protection is defined by law, except if the woman does not want to benefit from this protection and has, accordingly, notified her employer in writing. When announcing a job position, the employer is not allowed to set requirements related to discrimination grounds specified in Article 4 or to require personal information related to these grounds in the process of hiring (Article 12 PDA). Hiring somebody under less favourable conditions is prohibited as well. The refusal to hire a woman due to pregnancy, maternity or the fact that she is raising a child is unlawful.

There is no legal provision explicitly prohibiting discrimination based on pregnancy and maternity. Victimization in relation to pregnancy/maternity/parental/paternity rights is not specifically regulated.

Pregnancy and maternity (adoption/parental/paternity) rights do not apply differently depending on the type or size of employer. There is no relevant practice or study on the prevalence of various violations of these rights depending on the characteristics of the employer.

The Labour Code (LC) defines a broad system for the protection of mothers at the workplace: protection against dismissal before and after giving birth – Article 333 LC; rules for job reassignment for pregnant and breast-feeding mothers – Article 309 LC; protection of pregnant women and women with small children from night work and working overtime – Articles 140 and 147 LC; different types of leave and respective duties of employers.

An employer may dismiss an employee who is mother of children under 3 only with prior consent of the Labour Inspection for each specific case: e.g. due to partial closing down of the

⁵⁴ Constitutional Court, judgment n°951/2008 of 13 March 2008, *Journal des tribunaux du travail*, 2008, p. 149.

enterprise or reduction of the staff or the volume of work, absence of skills of the woman for effective implementation of her tasks, lack of qualifications in case of changed requirements for the position; dismissal as a disciplinary measure.

A labour contract with a pregnant woman may be terminated under the following circumstances: closing down of the enterprise, job reassignment moving the position to another location where the woman refuses to go, return of a person who was unlawfully dismissed, inability of the woman to perform her tasks, detention for serving a sentence or dismissal as a disciplinary sanction.

The special protection of pregnant and breastfeeding women against work and working conditions that expose to risks or endanger their safety and health is regulated in Article 307 LC, with reference to the list of hazardous works and working conditions forbidden for these categories of women, issued by the Minister of Health. In late 2009, women at an advanced stage of in-vitro treatment were also added to this group of protected workers and employees.

According to Article 310 LC, the employer shall not send on a business trip a pregnant woman and mother of a child under 3 without her written consent. Work at home by the protected category of women with small children is regulated in Article 312 LC: an employee who is mother of a small child shall be entitled to work at home with the same or another employer until the child reaches the age of 6. The rights of the mother pursuant to Articles 310 and 312 LC may be used by the father, if the mother is not in a position to use them.

Female employees are entitled to pregnancy and childbirth leave of 410 days for each child, 45 days of which are used obligatorily before giving birth (Article 163 LC). A female employee who adopts a child is entitled to a leave equal to the difference between the child's age when he/she was given up for adoption and the expiration of the period of the maternity leave. With consent of the mother/adopter, after the child is 6 months old, the father/adopter may use the remaining paid leave up to 410 days, and the paid leave of the mother is interrupted. For the time of this leave, the respective parent employee shall be paid a cash compensation under terms and in amounts specified by the Social Insurance Code.

According to Articles 13 and 15 of the PDA, a woman on maternity leave shall be entitled, upon the end of her maternity leave, to return to her job or to an equivalent position under terms which are not less favourable to her and to benefit from any improvement of the working conditions. These rights are attributed also to women on childcare leave. The father/adoptive father can also benefit from these rights, as well as the grandparents who are entitled to childcare leave under Article 164 LC. Those persons also have the right to be trained regarding technological changes related to their job having taken place in their absence.

Since 2009, if the parents are married or live together in cohabitation, the father is entitled to 15 days of paid paternal leave at the birth of his child, after the child is brought home from the hospital (Article 163 LC). Fathers have the same social insurance rights for this paternity leave and also when they replace the mother after the child's 6th month.

Pursuant to Article 166 LC, a female employee who breastfeeds her child is entitled to a leave, fully paid by the employer until the child is 8 months old: 1 hour twice a day or, with her consent, 2 hours together. For a mother who has reduced her working hours to 7 hours or less, this leave shall be 1 hour per day. After the child reaches the age of 8 months, this leave shall be 1 hour per day and shall be granted to the employee only if the medical authorities find that it is necessary to continue breastfeeding the child.

After the leave for pregnancy, childbirth or adoption has been used, if the child is not placed in a childcare establishment, the mother is entitled to an additional leave to raise her first, second and third child until they reach the age of 2, and to a leave of 6 months for each subsequent child (Article 164 LC). With the consent of the mother (adopter), this leave shall be granted to the father (adopter) or to one of their parents if they work under an employment contract.

During this leave, the mother (adopter), or the person who has taken over the raising of the child is entitled to maternity benefits under terms and in amounts specified by the Law on the Budget of the State Social Insurance. The period of the leave is recognized as length of service.

After having used the paid leave under Article 164 LC, only working mothers having four and more children, upon request, shall have the right to an unpaid leave until the last child reaches the age of 2, if the child has not been placed in a childcare institution. The period during which such unpaid leave is used shall be recognized as length of service.

Parental leave was introduced in 2004 and is regulated in Article 167a LC. After having used the leaves for raising a child up to the age of 2, any of the parents (adopters), if they work under a labour contract, and if the child has not been placed in an institution with full public support, upon request, shall have the right to use unpaid leave of up to 6 months to take care of a child until he/she turns 8.

The law has introduced the principle of individual right of each parent to use the parental leave and since 1 January 2007 this leave is not transferable. The parental leave can be used in parts, the minimum being 5 days. The law does not require regular sequence in using the leave, i.e. each parent decides when to use the right to parental leave. The parental leave counts as insurance period, without making insurance contributions. Health insurance is paid by the employer. The legal regulation does not include parental leave that counts for insurance period for the self-employed.

In view of full compliance with Directive 2010/18/EU, a new Article 167b has been introduced. It provides for the rights of persons returning from the leaves under Articles 163-167a LC. They can negotiate with their employer about the length and division of their working time, as well as other conditions of the labour contract, in view of facilitating their return to work. In spite of all these positive amendments, women are still the predominant users of leave entitlements.

1.2. Social security and pension rights

The general rule is that all persons insured for general sickness and maternity have the right to cash benefits for pregnancy and childbirth instead of salary, provided that they have at least 12 months of insured length of service, in respect of such risk (48a Social Insurance Code – SIC, effective since 1 January 2009).

The amount of the benefit for the pregnancy and maternity leave under Article 163 LC is equivalent to 90 % of the average remuneration or the insured amount for the period mentioned above. The fathers/adoptive fathers have the same rights during the 15-day paternal leave and during the period that they substitute the mothers after the 6 months of maternity leave and up to 410 days, if they contributed accordingly to social insurance for general sickness and maternity (Articles 49 and 50 SIC).

The compensation for the period for childcare after maternity leave and until the child reaches the age of 2 is paid according to the standards set in the yearly Budget of the State Social Insurance. For 2012, the monthly amount is EUR 120 (BGN 240). The regulation in the SIC defines the persons who have the right to this leave and the requirements for insurance contributions in the last 12 months preceding the insured risk – the same as for the maternity leave benefits (Articles 52a and 53 SIC). This is valid for all persons who have the right to such a leave according to Article 164 LC.

The parental leave, as mentioned above, is unpaid. It counts as insured period for employed persons.

1.3. Self-employment

Directive 2010/41/EU is still in the process of transposition. The category of self-employed persons is not clearly defined and the principle of equal treatment of men and women is applied based on the general principles set out in the Protection against Discrimination Act.

The spouses of persons registered as practitioners of a liberal profession and/or a skilled craft and the spouses of registered agricultural producers and tobacco producers, when with the consent of those persons participating in these activities, may voluntarily pay contributions at their own expense for insurance against disability due to general sickness, old age and death, and for sickness and maternity. The contributions due are based on the minimum insurance income for these different categories of persons, as defined by the Law

on Budget of the State Social Insurance. This regulation was introduced by the amendments of the Social Insurance Code of 1 August 2012.

Self-employed persons who have been insured for general sickness and maternity for the 24 months preceding the period of temporary inability to work have the right to pregnancy and maternity benefits for the term recognized as maternity leave for workers and employees in the Labour Code: up to 410 days (Articles 49- 50 SIC). The self-employed also have the right to a leave for childcare until the child reaches the age of 2 if they are insured for the mentioned risks. The amounts of the benefits for the maternity and the childcare leave, respectively, are based on the same criteria as those that apply to employed persons. The rights related to parental leave do not apply to self-employed persons.

There is no specific case law on discrimination of self-employed persons in this field.

1.4. Access to and the supply of goods and services

The general anti-discrimination provisions are valid for the area of pregnancy and maternity protection. There are no specific provisions banning discrimination on these grounds in any type of access to and supply of goods and services and there is no clear distinction between direct and indirect discrimination. There are no special positive measures in the field of goods and services related to pregnancy and maternity, including in the financial sector. No specific case law is identified.

There are two major areas where pregnancy and maternity are important issues in terms of social, economic and financial vulnerability of women and also due to the protection given to children. These are the areas of social assistance and health services. As to the health services, pregnant women and women with small children are given clear priority. In social assistance, these are priority groups too, especially single pregnant women at risk of abandoning their children.

The protection in the field of access to and supply of goods and services also goes beyond the one ensured by Directive 2004/113/EC, as it also covers the areas of media and advertising, as well as education.

2. Gaps in national law

2.1. Employment

Discrimination in recruitment and in employment conditions based on the ground of pregnancy and maternity exists but is not sufficiently reported. Programmes for women returning from maternity leave are scarce and fragmented, and their effectiveness is not regularly monitored and assessed. No awareness programmes for employers on these issues exist. There is a need for legal counselling and legal aid for women in vulnerable situations, also for women who have difficulties negotiating about their employment rights.

Another area where more active, even positive measures have to be taken is the area of paternal leave and childcare leave taken by fathers. According to data from the National Insurance Institute for 2011, only 1 % of the fathers used their rights.

2.2. Self-employment

The category of self-employed persons has to be well identified, defined and made visible. The full transposition of Directive 2010/41/EU has to be ensured.

2.3. Access to and the supply of goods and services

The legal framework has to be improved by introducing more explicit protection against discrimination related to pregnancy and maternity, parental and paternity leave. Practices of discrimination, e.g. in the insurance and financial sectors, or in the area of housing, have not been observed.

2.4. Additional information

Other serious problems hindering the implementation of EU standards are related to the insufficient number of childcare facilities, ensured by the State, especially in the capital and

the bigger towns; to the lack of effective reconciliation measures; and to the general lack of legal support and legal aid for female victims of discrimination in Bulgaria. The gap related to the absence of legal mechanisms for the protection of women's rights has recently been identified by the CEDAW Committee.⁵⁵

3. Involvement of other parties

The major role in protection against discrimination, in this field as well, is played by civil society. Women's NGOs, and specifically a network of women's NGOs, members of the Alliance for Protection against Domestic violence⁵⁶ from 10 towns in Bulgaria, NGOs of mothers, including NGOs for the protection of women's rights related to in-vitro fertilization, are the main players in suggesting changes to legislation. They place on the agenda issues like the rights of mothers to regular payment of maternity benefits, sometimes delayed by the authorities, the right to non-discrimination and the right to special treatment of women during in-vitro procedures. A recent example is the action of mothers from the Silistra region claiming the review of a whole package of legislation and regulatory acts related to maternity protection and benefits. They presented their claims through the Regional Governor of Silistra in the spring of 2012 and the authorities promised to deal with their request in the near future.⁵⁷

4. Enforcement and effectiveness

4.1. General

There are no studies that we have access to that identify pregnancy and maternity as an obstacle for employment of women in Bulgaria.

4.2. Legal redress

Discrimination cases can be brought before the Commission for Protection against Discrimination or before the courts. Victims may be assisted by trade unions or NGOs, which can also initiate cases of discrimination on their own initiative.

Since the transposition of the Recast Directive, there has been no relevant increase in case law, including in the field covered by this report. We note that practically no compensation for sex discrimination cases have been handled by the courts and that in Bulgaria the issue of just and proportional compensation lags far behind EU standards.

4.3. Access to information

No research studies or good practices of dissemination of relevant information by the Government are available.

CROATIA – Nada Bodiřoga-Vukobrat

1. Existing legislation and case law

1.1. Employment

Labour-law protection of pregnant workers is regulated primarily in the Labour Act (Articles 67-74).⁵⁸

Although pregnancy discrimination is not defined as a form of sex discrimination, a number of provisions in the Labour Act, as well as the Occupational Safety and Health Act⁵⁹

⁵⁵ <http://www2.ohchr.org/english/bodies/cedaw/docs/co/CEDAW-C-BGR-CO-4-7.pdf>, accessed 22 October 2012.

⁵⁶ <http://www.alliancedv.org/>, accessed 22 October 2012.

⁵⁷ <http://rss-bg.info/index.php>, news from 24 April 2012.

⁵⁸ *Zakon o radu*, Official Gazette of the Republic of Croatia *Narodne novine* nos 149/09 and 61/11.

⁵⁹ *Zakon o zaštiti na radu*, Official Gazette of the Republic of Croatia *Narodne novine* nos 59/96, 94/96, 114/03, 86/08 and 75/09.

and the Act on Maternity and Parental Benefits⁶⁰ are designed with the purpose of protecting pregnant workers and workers on maternity/parental/adoption leave from discrimination in employment relationships. The Labour Act specifically prohibits discrimination of pregnant women in access to employment and dismissal. An employer must not refuse to employ a woman nor dismiss her because she is pregnant, nor ask any information about her pregnancy, unless the pregnant worker is personally seeking to acquire a certain pregnancy-related right (Article 68(1) and (2) of the Labour Act).

The wide-ranging protection of pregnant women in the Labour Act includes protection regarding the conditions of employment and termination of the employment relationship. Pregnant women or women who are breastfeeding are entitled to be transferred to another appropriate position at their request, whereas the employer is obligated to transfer them to another appropriate position if the health of a woman or a child is endangered. In both instances, the new position shall be at least equally paid (Article 69 of the Labour Act).

The absolute ban of dismissal applies during pregnancy, maternity/parental/adoption leave, part-time work, work with reduced working hours due to increased care for a child, leave of absence of a pregnant woman or breastfeeding mother, leave of absence or work with reduced working hours due to care for a child with developmental disabilities, and during 15 days after termination of a pregnancy or any of those rights (Article 71(1) of the Labour Act). However, all these circumstances do not prevent the expiration of a fixed-term contract (Article 71(3) of the Labour Act).

The Labour Act prescribes the right of the worker to return to the previous or to an equivalent post (if the necessity for the previous job has in the meantime ceased to exist) on terms and conditions which are no less favourable to that worker after the end of maternity/parental/adoption or other forms of childcare leave (Article 73(1) of the Labour Act). The worker is also entitled to additional vocational training and to benefit from any improvement in working conditions (Article 73(3) of the Labour Act). These provisions are consistent with Articles 15 and 16 of Directive 2006/54/EC.

However, some inconsistencies with the EU *acquis* in protection against discrimination remain. This is mainly due to (sometimes) overprotective pregnancy-related labour-law regulations. For example, employers are prohibited from ordering pregnant women to do night work, except if a pregnant woman explicitly *requires* such work *and presents* a medical certificate that such work is not harmful to her health or the health of the foetus (Article 49(1) of the Labour Act), which could in reality present an obstacle to equal treatment and thus regarded as inconsistent with Article 14(1)(c) of Directive 2006/54/EC. It goes beyond the protection guaranteed in Article 7(1) of Directive 92/85/EEC where an *exclusion* from performing night work is subject to submission of a medical certificate stating that this is necessary for the safety or health of the worker concerned. On the other hand, Article 20(6) of the Act on Maternity and Parental Benefits regulates night work of pregnant workers, workers who have recently given birth or are breastfeeding in a manner consistent with both Directives mentioned.

Another example is Article 39 of the Occupational Safety and Health Act, which *a priori* prohibits pregnant women and women who are breastfeeding from performing a number of explicitly listed jobs, without the assessment of the actual risk involved. This is contrary to Articles 4 and 5 of Directive 92/85/EEC. The latest Monitoring Report⁶¹ also emphasises the need for further legal alignment of the Occupational Safety and Health Act with Directive 92/85/EEC. Given that the Republic of Croatia has the obligation to completely align this area with the EU *acquis* before its full accession to the EU, the legislative draft of the new Occupational Safety and Health Act is currently open for public discussion. Pursuant to Article 21 of the legislative draft, the protection of pregnant women, persons who have recently given birth and persons who are breastfeeding is regulated in line with Articles 4 and

⁶⁰ *Zakon o rodiljnim i roditeljskim potporama*, Official Gazette of the Republic of Croatia *Narodne novine* nos 85/08, 110/08 and 34/11.

⁶¹ Commission Staff Working Document *Comprehensive Monitoring Report on Croatia*, Brussels, 10 October 2012, SWD(2012) 338, p. 30.

5 of Directive 92/85/EEC. The initiation of the legislative procedure for the adoption of the new Act is scheduled for the second quarter of 2013.

In addition, there is a limited freedom of workers to alter the rights to maternity and parental leave. If, during the use of maternity or parental leave in accordance with special provisions (i.e. the Act on Maternity and Parental Benefits), a worker intends to alter the manner of their usage or re-establish the rights which have not been completely exhausted, he/she has a duty to inform the employer about it. The employer is entitled to deny such request in the event of an unexpected increase in the size of work, force majeure and other similar cases of extreme necessity (Article 70(2) of the Labour Act). The worker's only option in that event is to withdraw the announcement (Article 70(4) of the Labour Act). It is rather questionable whether this provision is in line with the case law of the Court of Justice of the EU.⁶² Moreover, a potential contradiction could arise with the rights accorded under the Act on Maternity and Parental Benefits, which are much more comprehensive than the maternity and parental leave mentioned in the Labour Act. For example, the Act on Maternity and Parental Benefits distinguishes between a compulsory (a continuous period of 98 days, non-transferrable) and an additional maternity leave (upon expiry of the compulsory maternity leave, until the child is six months old, transferrable to the father) and includes other forms of leave of absence (i.e. adoption leave, breastfeeding breaks, part-time work, etc.) which are not mentioned in this provision of the Labour Act, leaving it open to different interpretations.

Both direct and indirect discrimination in employment, working conditions, including selection criteria and recruitment conditions, promotion, access to all types of vocational guidance, vocational training, advanced vocational training and retraining, in accordance with special provisions, is prohibited (Article 5(4) of the Labour Act). Definitions of direct and indirect discrimination are provided in the Gender Equality Act⁶³ (for discrimination based on sex) and the Anti-Discrimination Act⁶⁴ (as a *lex generalis* in the field of anti-discrimination which regulates the prohibition of discrimination in a unique manner for various discriminatory grounds (race or ethnical background, colour of skin, gender, language, religion, political preferences, national or social background, material conditions, trade union membership, education, social status, family or marital status, age, health, disability, genetic inheritance, gender identity and sexual orientation)).

Victimisation is not explicitly mentioned in connection with pregnancy/maternity/parental rights in the Labour Act. However, there is a general protection against dismissal provided in Article 109(2) of the Labour Act. Submission of a complaint or participation in court or administrative proceedings against the employer for violation of laws, regulations, collective agreements, employment and other rules is not a justified ground for dismissal of a worker. Other forms of less favourable treatment as a reaction of the employer to a complaint are not specifically mentioned. Victimisation in relation to sex discrimination and other discriminatory grounds is prohibited within the material scope of application of the Gender Equality Act and the Anti-Discrimination Act, respectively. Article 2 of the Gender Equality Act provides that no one shall suffer adverse treatment for giving a statement before competent bodies as a witness or victim of sexual discrimination or for alerting the public of sexual discrimination. Article 7 of the Anti-Discrimination Act provides protection against victimisation in a more detailed manner, specifically mentioning reporting or witnessing discrimination, refusing to comply with the discriminatory order or participating in any other proceedings in connection with discrimination.

Pregnancy and maternity rights depend neither on the type nor the size of the employer.

Although the position of women may be equally (un)favourable in the public and the private sector,⁶⁵ there is evidence that the position of workers who are returning to their jobs after having used maternity/parental/adoption leave seems much more difficult in the private

⁶² For example, Case C-116/06 *Sara Kiiski v Tampereen kaupunki* [2007] ECR I-07643.

⁶³ *Zakon o ravnopravnosti spolova*, Official Gazette of the Republic of Croatia *Narodne novine* no. 82/08.

⁶⁴ *Zakon o suzbijanju diskriminacije*, Official Gazette of the Republic of Croatia *Narodne novine* nos 85/08 and 112/12.

⁶⁵ Ombudsperson for Gender Equality, Annual Report for 2011, p. 15, <http://www.prs.hr/index.php/izvjesca/izvjesce-2011>, accessed 15 October 2012.

sector. Despite their obligation to the contrary (Article 73 of the Labour Act), employers often transfer women to less-paid jobs and even terminate their employment contract (or do not extend fixed-term contracts) shortly after they return from maternity/parental/adoption leave. However, according to the Ombudsperson for Gender Equality, the number of complaints received by that independent body or of initiated court proceedings based on this ground is still very low,⁶⁶ due to very poor knowledge of substantive and procedural equal treatment rights, duration and cost associated with court proceedings, as well as fear of victimization.⁶⁷

Due to the fact that the decisions of Croatian courts, especially at the first and second instance levels of the judiciary, are not published, tracking and reporting any case-law developments in the field of pregnancy and maternity related discrimination remains extremely difficult. The majority of identified instances of discrimination in this field comes either through the office of the Ombudsperson for Gender Equality (the summaries of the most important cases are published in the Annual Reports) or media (with sometimes very dubious quality of reporting).⁶⁸

1.2. Social security and pension rights

Employed or self-employed parents are entitled to remuneration of salary in the statutory defined amounts at the expense of the Croatian Institute for Health Insurance and state budget, depending on the type and duration of the maternity and parental leave. However, there is evidence that the Croatian Institute for Health Insurance applies discriminatory practices in determining the rights to salary remuneration of pregnant women and women who have recently given birth, since it frequently denies maternity benefits to women who have entered into an employment relationship during their pregnancy.⁶⁹ The Institute assumes that such employment relationships are fictional and fraudulent, concluded with the sole intention to acquire maternity benefits, which that person would not normally have been entitled to. This practice is unacceptable, firstly, because the question of validity of employment contracts lies solely within the jurisdiction of the courts, not the Institute. Furthermore, an employer is legally prohibited from asking female workers pregnancy and maternity related questions and must not refuse to hire a pregnant woman solely on that ground. The Institute completely ignores this obligation and presumes that pregnant women who enter into an employment relationship are acting fraudulently. The available legal mechanism for the protection of their rights in these cases might prove inadequate, as it is restricted to an administrative procedure and filing complaints before an administrative court.

1.3. Self-employment

The status of self-employed parents regarding maternity/parental rights is equal to that of parents who are employees (Article 9(1) of the Act on Maternity and Parental Benefits),

⁶⁶ There is one decision of the Supreme Court of the Republic of Croatia from 2009 (Revr 1227/09 of 10.7.2009) with factual background pointing to such discrimination, in which an employer served a regular dismissal due to business reasons to a woman only one day after she returned to work from her maternity leave. The Supreme Court upheld the judgements of the lower courts which declared the dismissal null and void. However, this finding was based on purely formal reasons: the Labour Act specifically prohibits dismissal during pregnancy or exercise of pregnancy and maternity related rights and 15 days thereafter. Consequently, discrimination issue was not even raised in the revision proceedings before the Supreme Court. Decisions of the lower courts in this case were not made publicly available, making it impossible to say whether the discrimination element was even discussed.

⁶⁷ Ombudsperson for Gender Equality, Annual Report for 2011, p. 31, <http://www.prs.hr/index.php/izvjesca/izvjesce-2011>, accessed 15 October 2012.

⁶⁸ Apparently triggered by the repeated media reporting about the discrimination of pregnant women and women with children under two years of age in the labour market and employment, the Ombudsperson for Gender Equality has launched an anonymous internet survey to establish the scope and effects of this form of discrimination. The survey was open on 17 February 2013 and on-line questionnaire is available at: <http://www.prs.hr/index.php/80-najave/587-poziv-za-sudjelovanje-u-istrazivanju-diskriminacija-temeljem-trudnoce-i-materinstva-iskustva-trudnica-i-zena-s-malom-djecom-na-hrvatskom-trzistu-rada>, accessed 15 March 2012.

⁶⁹ The specific cases of discriminatory practices are described in the Annual Reports for 2011 and 2010 of the Ombudsperson for Gender Equality; <http://www.prs.hr/index.php/izvjesca>, accessed 16 October 2012.

provided that they have the status of insured person in the compulsory health and pension insurance. The term ‘self-employed parents’ includes persons who perform craftsmen activities on the territory of the Republic of Croatia, activities of the liberal professions, activities of agriculture and forestry (if it is their main/only occupation, if they are registered income/profit taxpayers and are not insured based on employment) and activities of servants in religious communities (if they are not insured based on employment).

1.4. Access to and the supply of goods and services

The Gender Equality Act is the main instrument of transposition of Directive 2004/113/EC regarding sex discrimination, including pregnancy and maternity related discrimination, in the access to and the supply of goods and services. It goes beyond the scope of the Directive mentioned, insofar as it includes discrimination in the field of media, education and political life. Advertising is not specifically mentioned, but it could be argued that it is included in the prohibition of any public display and representation of women and men in an offensive, demeaning and humiliating manner, based on sex or sexual orientation (Article 16(2) of the Gender Equality Act). The material scope of the Act is wide, as it is meant to harmonise Croatian legislation in the field of gender equality and equal opportunities with 10 EU directives with the same subject matter.

2. Gaps in national law

2.1. Employment

Recruitment process

In practice, the statutory prohibition of pregnancy and maternity related discrimination in the access to employment is difficult to implement and monitor, mainly due to the fact that the legal protection mechanisms and their outcome are rarely visible and recognisable by the public (see more in 4.2.). The recruitment process is especially sensitive, given that persons applying for a job would hardly decide to seek legal protection, given the lack of financial resources and the fear of being labelled as ‘troublesome’ or victimized in their search for future employment. There are (mostly anonymous) complaints of discrimination reported in the media, e.g. regarding a recent case where a woman was thrown out of a job interview just for appearing there with her child.⁷⁰ Another example of direct discrimination in the access to employment, vocational training and practical work experience is noted in the implementation of vocational training as part of a recent effort to increase employment rates and employment opportunities of persons with no work experience. Pursuant to the Act on Stimulation of Employment,⁷¹ the possibility of vocational training without entering into an employment relationship was designed and implemented in combination with the active labour market policies. Public and private employers are thus given the option of hiring unemployed persons with no work experience without concluding an employment contract. Depending on the type of support awarded, employers are remunerated, for the paid compulsory pension and/or health insurance contributions, by the State, which also pays a monthly stipend to the hired unemployed persons. However, there is evidence that some employers (even from the public sector) include a contractual stipulation whereby the contract is terminated if a woman becomes pregnant and has to take maternity leave.⁷² This also implies that such person can no longer be hired under the same measure after the end of maternity leave, as she has already acquired some work experience. As these contracts are not publicly available, no further analysis is possible, especially with a view to the Instruction for the Application of the Act on

⁷⁰ <http://www.roditejski.info/magazin/2012/08/maika-s-djetetom-izbacena-s-razgovora-za-posao/>, accessed 21 October 2012.

⁷¹ Official Gazette of the Republic of Croatia *Narodne novine* no. 57/12.

⁷² <http://danas.net.hr/hrvatska/prekid-ugovora-zbog-trudnoce-jest-diskriminacija>, accessed 25 October 2012; <http://danas.net.hr/hrvatska/mrsicevo-osposobljavanje-ostanes-li-trudna-letis>, accessed 25 October 2012.

Stimulation of Employment regarding the obligation of the employer to enable the continuance of the vocational training after having used maternity/parental rights.⁷³

Employment relationships and conditions of employment

There are some normative inconsistencies in the regulation of night work of pregnant workers or workers who have recently given birth between the Labour Act and the Act on Maternity and Parental Benefits, as explained in 1.1.. The latter Act should apply as *lex specialis*, especially with a view to the fact that the solution provided in the Labour Act is not in line with the EU *acquis*.

Another point of concern is the overprotective provision of Article 20(4) of the Act on Maternity and Parental Benefits, which might have a negative impact on the employment of women: a pregnant worker or a worker who has recently given birth or is breastfeeding who performs job activities detrimental to her or her child's health is entitled to a paid leave of absence. During that period, the employer pays remuneration, calculated as an average of the salaries paid in the preceding three months. This means that the State shifts the burden of protecting motherhood to employers, which could, in turn, feel reluctant or completely avoid hiring women to perform such jobs altogether.

There is also evidence that some employers do not consider the period spent on maternity/parental leave as the period of professional experience required for certain jobs.⁷⁴

Remuneration

Generally speaking, women on average earn 89.8 % of the average male gross salary per month.⁷⁵ The main cause of the pay gap is gender-related perception of male or female jobs, with (predominantly) male jobs being paid and valued higher than the (predominantly) female ones. This results in horizontal and vertical segregation between men and women in the Croatian labour market.⁷⁶ The gender-related pay gaps and more frequent career breaks, due to the traditional perception that childcare is the primary responsibility of women, result in gaps in pension benefits between women and men upon retirement. Notwithstanding the current different retirement age (gradual equalisation of the retirement age between women and men will be completed in 2030), women may be at a disadvantage for using a form of unpaid leave from work to take care for a child until the child turns three (Article 22 of the Act on Maternity and Parental Benefits). That period is not counted as service time within the compulsory pension insurance system, unless a person specifically requests a so-called extended pension insurance within a certain time limit (Article 17 of the Pension Insurance Act) and pays contributions during that period her/himself. Although there are no available gender-disaggregated data on the frequency of using this type of leave, from the statistics on other forms of parental leave (see in this Section the part on the *involvement of fathers*) it is safe to conclude that women rather than men would be using this option.

Termination of employment contract

Pregnancy and maternity related circumstances do not prevent the expiration of a fixed-term contract (Article 71(3) of the Labour Act), which is a mechanism frequently used by Croatian employers to get rid of unwanted workers. Women make up the majority of persons employed on fixed-term contracts (52.9 %). Even with the legal constraints on using fixed-term contracts (objectively justified, foreseeable termination of employment relationship, maximum 3 years), this trend is not yielding. Out of all newly employed women in 2011 (87 747), only 8.4 % signed a contract for an indefinite time (7 450). There is evidence of

⁷³ Ministry of Labour and Pension System, www.hzz.hr/DocSlike/Provedbene_upute_ZOP_30_05_2012.pdf, accessed 20 October 2012.

⁷⁴ <http://www.prs.hr/index.php/praksa-esp/prema-podrucju-diskriminacije/rad-i-zaposljavanje/489-opis-slucaja-01-03-12-039-trudnoca-i-materinstvo>, accessed 30 October 2012.

⁷⁵ Croatian Bureau of Statistics, Women and Men in Croatia 2012, p. 38, http://www.dzs.hr/Eng/Publication/men_and_women.htm, accessed 23 October 2012.

⁷⁶ <http://www.prs.hr/index.php/analize-i-istrazivanja/obrazovanje-3/179-uzroci-jaza-u-placama-muskaraca-i-zena-na-hrvatskom-trzistu-rada-istrazivanje-u-2010>, accessed 3 October 2012.

work marginalization of women who return from maternity/parental leave, but there is no case law or further research available to substantiate the magnitude of this phenomenon.⁷⁷

Involvement of fathers

Pursuant to the Act on Maternity and Parental Benefits, as amended in 2011, fathers are entitled to additional maternity leave (if transferred from the mother), parental leave, part-time work, work with reduced working hours due to increased care for a child, leave of absence or work with reduced working hours due to care for a child with developmental disabilities, and unpaid leave of absence until a child turns three. One of the goals was to include and motivate more fathers to use parental leave (e.g. by granting an additional two-month leave if the father uses parental leave in the minimum duration of three months) with the projected increase in the usage of these rights of 10-15 % in the first year of the application of the amended Act.⁷⁸ However, out of the total number of maternity and parental leave registered in 2011, only in 2.57 % cases was the right used by men. For example, an additional maternity leave until the child is six months old was used by men in only 0.47 % of cases, whereas 181-900 days of parental leave was used by 4.67 % of men. The gender pay gap may be one of the causes for these low statistics, since women still on average earn less than men. Unsurprisingly, financial reasons (earning less than mothers) are the primary motivation for the fathers who decide to use one of the rights under the Act on Maternity and Parental Benefits.

2.2. Self-employment

Pregnancy and maternity related discrimination in the field of self-employment is probably among the least explored and documented. One of the reasons for this might be that it is very difficult to prove that the choice of services of one self-employed person over another is based exclusively on that person's sex. In addition, segregation between typically male and typically female activities exists in this segment as well, but not necessarily at a disadvantage of persons of one sex. For example, where personal contact between a client and a provider of services as self-employed person is involved, often a relationship of trust develops, regardless of any sex and pregnancy/maternity related considerations.

The status of female self-employed workers regarding maternity and parental rights is equal to that of female workers. However, being recognised as an insured person in compulsory health and pension insurance is a prerequisite for these entitlements. As previously mentioned, self-employed parents within the meaning of the Act on Maternity and Parental Benefits include persons who *themselves* perform certain activities (see explanation in 1.3.). Consequently, the position of female spouses of self-employed workers (including non-marital spouses) is determined according to their own employment, self-employment, unemployment or other status within the meaning of the Act on Maternity and Parental Benefits.

2.3. Access to and the supply of goods and services

There is a potentially discriminatory practice regarding the conditions for accepting on board pregnant women and women who have recently given birth by the Croatian national airline carrier Croatia Airlines: this is subject to 'prior arrangement' with the carrier (Article 7.2. of the General Conditions of Carriage). Further information is provided on the company's website.⁷⁹ Apparently, a system of differentiation based on the duration of the pregnancy (up to 28 weeks, between 28 and 35 weeks and longer than 35 weeks) applies. If a woman is pregnant up to 28 weeks, healthy and has no pregnancy-related complications, she may board a plane without a medical certificate. However, the question remains, whether practical proof of these facts is possible without presenting medical certificates and consequently, women

⁷⁷ See explanation in fn. 70.

⁷⁸ Draft Act on Amendments to the Act on Maternity and Parental Benefits, with explanations, <http://www.sabor.hr/Default.aspx?art=38252>, accessed 17 October 2012.

⁷⁹ <http://www.croatiaairlines.com/hr/Informacije-o-putovanju/Posebne-kategorije-putnika/Trudnice>, accessed 25 October 2012.

may be exposed to a discriminatory *ad hoc* approach of the boarding crew. If a woman is between her 28th and 35th week of pregnancy, a medical certificate stating that confinement (birth) will not occur within 4 weeks from the beginning of the journey is required. If a woman travels with the purpose of surgical intervention or other medical treatment, appropriate additional documentation is required, as it is for ill or disabled passengers. Women whose expected date of confinement is within a period of seven days or women who have given birth in the period of less than seven days before the beginning of their journey are absolutely prohibited from travelling.

3. Involvement of other parties

The Ombudsperson for Gender Equality plays a particularly important role in the field of gender discrimination in general and pregnancy and maternity related discrimination in particular. Although the authorities of Ombudsperson for Gender Equality are limited in the sense of sanctioning discriminatory practices and behaviour (e.g. the Ombudsperson may issue warnings, recommendations and proposals, inform other competent authorities of cases of violations and request their involvement), the influence of this independent body lies in its public involvement and visibility. The current Ombudsperson in office Ms Višnja Ljubičić and her deputy Mr Goran Selanec are very active in the press and media, commenting on instances of discriminatory practices based on sex, which contributes to alerting the public regarding their rights and possibilities of their enforcement.

The involvement of the Ombudsperson is evident from their workload increasing each year. In 2011, the Office of the Ombudsperson for Gender Equality worked on a total of 1 391 cases, out of which 315 were opened upon complaints filed by citizens, 25 were opened on the Ombudsperson's initiative concerning the violation of gender equality principles or sex-based discrimination, and 1051 cases were opened on the Ombudsperson's initiative concerning the monitoring of the application of the Gender Equality Act.⁸⁰

Oddly enough, the available data shows that it is the conduct of various state bodies, local and regional self-government authorities and other public legal entities (i.e. those that are particularly responsible for protecting the rights of citizens) which is obstructive and detrimental to achieving equal rights and opportunities.⁸¹ The conduct of the Croatian Institute for Health Insurance in recognising maternity and parental rights is one of the greatest causes for concern, especially because it has persisted for years.⁸² The majority of reported cases concern the failure to recognise the status of insured person for workers who have concluded employment contracts during pregnancy (as described in 1.2.) and an inconsistent interpretation of the Act on Maternity and Parental Benefits in different branch offices of the Institute which may lead to denial or limitation of certain rights.

4. Enforcement and effectiveness

4.1. General

Croatian employment legislation in general is sometimes criticised as overly rigid in terms of employment protection, which includes the pregnancy and maternity related guarantees. However, there is no comprehensive research available to show the impact of this protective legislation on the labour market and the employability of women. The available statistics do not necessarily lead to the conclusion that female workers are at a disadvantage *because* of the protective legislation. Women are 51.8 % of the total population in Croatia, but their share

⁸⁰ Ombudsperson for Gender Equality, Annual Report for 2011, p. 6, <http://www.prs.hr/index.php/izvjesca/izvjesce-2011>, accessed 15 October 2012.

⁸¹ The majority of complaints received by the Ombudsperson for Gender Equality in 2011 relates to the issue of exercising employment and social rights and are filed against entities from the public sector (57.1 %). Ombudswoman for Gender Equality, Annual Report for 2011, p. 12, <http://www.prs.hr/index.php/izvjesca/izvjesce-2011>, accessed 15 October 2012.

⁸² See Annual Reports of Ombudsperson for Gender Equality 2011, 2010, <http://www.prs.hr/index.php/izvjesca/>, accessed 15 October 2012.

in the total number of unemployed is 53.6 %.⁸³ The share of employed women among the active labour force is 46.1 %.⁸⁴ One indicator is particularly relevant in this connection, and that is the number of women employed under fixed-term contracts (which, as already stated, are terminated upon expiry of their term of duration, regardless of the pregnancy and maternity related condition of the worker). Out of all newly employed women in 2011 (87 747), only 8.4 % signed open-ended contracts, which is less than half of the share of men newly employed under open-ended contracts (19.5 %).⁸⁵

4.2. Legal redress

The lack of reliable and uniform case law in the field of equal treatment and equal opportunities in Croatia is the primary obstacle to any effective protection of rights. National courts are still quite reserved regarding the interpretation and application of the anti-discrimination guarantees. There are no appropriate mechanisms for monitoring and publishing court decisions in anti-discrimination cases and the courts lack proper guidance in the application of anti-discrimination legislation in general. Despite the existing prohibition to interpret and apply the Gender Equality Act in a manner which is not consistent or would limit the guarantees arising from the EU *acquis* (Article 4 of the Gender Equality Act), the national courts are either unfamiliar with EU legislation or with the decisions of the Court of Justice of the EU in this field. An analysis of case law in the field of anti-discrimination protection conducted by the Ombudsperson for Gender Equality in 2010 shows that the courts are reluctant to link anti-discrimination protection with the proportionality test, that they tend to ‘over-formalise’ protection, confuse equal treatment with completely identical treatment and overemphasise the importance of a comparator, narrowly interpret the discriminatory grounds, inappropriately manage the burden of proof in court proceedings and pay little or no attention to the established case law of the Court of Justice of the EU.⁸⁶ In addition, decisions on indirect discrimination are basically inexistent in practice.

According to the Ombudsperson for Gender Equality’s Annual Report 2011, there is very low awareness of their rights among the persons who consider themselves to be discriminated against, especially regarding indirect discrimination. These persons in general do not have any faith in court protection and more readily refer their complaints to the Ombudsperson. The primary reason lies in the fact that this procedure is free of charge, while court proceedings are traditionally associated with high costs and lengthy duration. The Ombudsperson is also regarded as an advisor on whether it would be wise to initiate court proceedings or not. On the other hand, the Ombudsperson has no authority to issue binding decisions and the parties cannot expect the same effectiveness that a binding court decision could have.

The fact, however, that court decisions are not available and published makes it very difficult to reach any conclusion regarding the dissuasive effects of compensations awarded in discrimination cases.

4.3. Access to information

Given the fairly well-established tradition of (normative) protection of female workers and pregnant women in general, individuals are rather well acquainted with the rights concerning maternity/parental leave, despite several amendments to the existing laws in recent years. Various non-governmental and civil society organisations and associations are very active in

⁸³ Ombudsperson for Gender Equality, Annual Report for 2011, p. 13, <http://www.prs.hr/index.php/izvjesca/izvjesce-2011>, accessed 15 October 2012.

⁸⁴ Records are provided for employment in 2010. Croatian Bureau of Statistics, *Women and Men in Croatia 2012*, http://www.dzs.hr/Hrv_Eng/menandwomen/men_and_women_2012.pdf, accessed 23 October 2012.

⁸⁵ Ombudsperson for Gender Equality, Annual Report for 2011, p. 14, <http://www.prs.hr/index.php/izvjesca/izvjesce-2011>, accessed 15 October 2012.

⁸⁶ <http://www.prs.hr/index.php/analize-i-istrazivanje/obrazovanje-4/181-istrazivanje-sudske-prakse-u-podrucju-antidiskriminacijske-zastite-2010>, accessed 1 October 2012.

familiarising the general public and their members with the various existing legal rights and entitlements.⁸⁷

Nevertheless, there have been cases of inconsistent interpretation among various branch offices of the Croatian Institute for Health Insurance which are detrimental to the exercise of those rights. More effort should also be put into familiarising the public with the existing legal remedies in cases of sex discrimination and violations of their rights. Pursuant to the survey 'Perception, experiences and attitudes about gender discrimination in the Republic of Croatia' conducted in 2009 on a national representative sample of 1 363 respondents, 63 % of participants do not know or do not believe that gender discrimination is punishable by law, and only 12 % of those who said that they knew that discrimination was prohibited stated that they knew which laws contained such prohibitions and sanctions.⁸⁸

As stated in 4.1., women on fixed-term contracts are especially vulnerable. A revision of the labour legislation regarding open-ended and fixed-term contracts should reach the agenda in 2013 at the earliest.

CYPRUS – Lia Efstratiou-Georgiades

1. Existing legislation and case law

The protection of pregnant workers and workers who have recently given birth or are breastfeeding, either employed or self-employed, against direct or indirect discrimination in the fields of employment relations and/or access to and supply of goods and services, is ensured through the following laws:

1. a) Equal Pay between Men and Women for the Same Work or for Work to which Equal Value is Attributed Law No. 177(I)/2002,⁸⁹ last amended by Law No. 38(I)/2009;
b) Equal Treatment between Men and Women as regards Access to Employment and Vocational Training Law No. 205(I)/2002,⁹⁰ last amended by Law No. 39(I)/2009;
c) Equal Treatment between Men and Women in Occupational Social Insurance Schemes Law No. 133(I)/2002,⁹¹ last amended by Law No. 40(I)/2002.
Amendment Laws a) No. 38(I)/2009, b) No. 39(I)/2009 and, c) No. 40(I)/2009 transposed into national legislation the provisions of Recast Directive 2006/54/EC.
2. Provident Funds Laws Nos. 1981-2005.⁹²
3. Social Insurance (Amendment) (No. 2) Law No. 51(I)/2001,⁹³ which incorporated the provisions of Directive 86/613/EEC on self-employed persons.
4. Equal Treatment between Men and Women as regards Access to and Supply of Goods and Services Law No. 18(I)/2008.⁹⁴
5. Organization of Working Time Law No. 63(I)/2002,⁹⁵ last amended by Law No. 15(I)/2007.
6. Maternity Protection Law No. 100(I)/1997,⁹⁶ last amended by Law No. 7(I)/2011.
7. The Maternity Protection (Safety and Health) Regulations of 2002.⁹⁷

⁸⁷ See, for example, *Vodič pri ostvarivanju prava za vrijeme trudnoće i nakon poroda* (A Guide for Establishing Pregnancy and Birth-Related Rights), http://www.fes.hr/E-books/pdf/VODIC%20rodilje_web.pdf, accessed 25 October 2012.

⁸⁸ Ž. Kamenov & B. Galić *Rodna ravnopravnost i diskriminacija u Hrvatskoj* Zagreb, Ured za ravnopravnost spolova Vlade Republike Hrvatske 2011, p.87, <http://www.ured-ravnopravnost.hr/site/hr/biblioteka-ureda/826-22-rodna-ravnopravnost-i-diskriminacija-u-hrvatskoj.html>, accessed 23 October 2012.

⁸⁹ Laws Nos. 177(I)/2002- 38(I)/2009 (Directives 75/117/EEC, 2006/54/EC).

⁹⁰ Laws Nos. 205(I)/2002-39(I)/2009 (Directives 76/207/EEC, 2002/73/EC, 2006/54/EC).

⁹¹ Laws Nos. 133(I)/2002-40(I)/2009, Directives 86/378/EEC, 96/97/EC, 2006/54/EC.

⁹² Laws Nos. 44/1981, 130(I)/2002-75(I)/2005.

⁹³ Law No. 51(I)/2001 (Directives 79/7/EEC, 86/613/EEC).

⁹⁴ Law No. 18(I)/2008(Directive 2004/113/EC).

⁹⁵ Laws Nos. 63(I)/2002-15(I)/2007 (Directives 93/104/EC, 2000/34/EC).

⁹⁶ Laws Nos. 100(I)/1997-70(I)/2011 (Directive 96/34/EC).

⁹⁷ Administrative Regulation P.I. 255/2002 (Directive 92/85/EEC).

8. Parental Leave and Time-Off Work on Grounds of Force Majeure Law No. 69(I)/2002,⁹⁸ last amended by Law No. 47(I)/2012.
9. Social Insurance Law No. 41/1980,⁹⁹ last amended by Law No. 59(I)/2010.
10. Annual Paid Leave Law No. 8/1967,¹⁰⁰ last amended by Law No. 42(I)/2011.
11. Termination of Employment Law No. 24/1967,¹⁰¹ last amended by Law No. 111(I)/2003.
12. Directive 97/80/EC relating to the burden of proof in cases of discrimination on the ground of sex has been transposed into the laws listed above.

It is noted that the burden of proof also rests on the employer under Laws No. 8/1967 and 24/1967, as amended, and applies to all reasons of termination of employment, except where there is an assertion by the employer of voluntary resignation of the worker.

1.1. Employment

In Cyprus protection of the labour market is ensured by the Constitution, legislation and collective agreements. In the public sector, recruitment and conditions of service are regulated by Public Service Law No. 1/1990 as amended, the Public Service Regulations and by circulars which incorporate and explain the provisions of the laws listed above on matters which affect public officers. In semi-government organizations recruitment and conditions of service are regulated by the law under which each such organization operates. In the private sector, recruitment and conditions of service are regulated either by collective agreements or by personal contracts, which contain the basic provisions of the laws listed above. Collective agreements are mainly constructed as gender-neutral or gender-blind, with the exception of maternity provisions. The social partners are obliged to include in the collective agreements the current provisions of legislation. The following are generally included: trial period, minimum wages, increments, *c.o.l.a.* (i.e. the cost of living allowance), working hours, overtime regulations, annual leave, sick leave, provident fund, medical care, maternity leave, parental leave, conflict resolution procedure and dismissal provisions. The Maternity Protection Law, Safety and Health at Work Law No. 89(I)/96,¹⁰² the Maternity Protection (Safety and Health) Regulations and the Equal Treatment between Men and Women as regards Access to Employment and Vocational Training Law all provide measures for the safety and health of pregnant workers from the moment that they inform their employer of their condition. These measures also extend to workers who have recently given birth or are breastfeeding and are as follows:

- (a) Every worker who presents a certificate from a registered doctor attesting to her pregnancy is entitled to a continuous period of maternity leave of 18 weeks. Maternity leave is paid by Social Insurance Services which is a governmental body under the control and supervision of the Ministry of Labour and Social Insurance. Maternity allowance is payable to an insured employed woman, a self-employed woman or a voluntary insured woman in the service of a Cypriot employer abroad, who is expecting a child or who has adopted a child herself, or her husband, within the first twelve years from the child's birth. The conditions for the payment of maternity allowance are:
 - the insured woman is on maternity leave and she does not receive her whole salary or wages from the employer;
 - the insured woman has been insured for at least 26 weeks and has paid, up to the day of maternity allowance, contributions on insurable earnings not lower than 26 times the weekly amount of the basic insurable earnings; and
 - the insured woman has paid or been credited with insurable earnings, in the previous contribution year not lower than 20 times the weekly amount of the basic insurable earnings.

⁹⁸ Laws Nos. 69(I)/2002-47(I)/2012.

⁹⁹ Laws Nos. 41/1980-59(I)/2010.

¹⁰⁰ Laws Nos. 8/1967-42(I)/2011.

¹⁰¹ Laws Nos. 24/1967-111(I)/2001.

¹⁰² Law No. 89(I)/96-33(I)/2011.

Maternity allowance is composed of a basic and a supplementary benefit. The weekly rate of the basic benefit is equal to 75 % of the weekly average of the basic insurable earnings of the claimant in the previous contribution year. The weekly amount of the basic benefit is increased to 80 % if she has one dependant, to 90 % if she has two dependants and to 100 % if she has three dependants. The weekly amount of the supplementary benefit is equal to 75 % of the weekly average of insurable earnings of the claimant beyond her basic insurable earnings. The amount of maternity allowance is determined according to the weekly amount of paid and credited insurable earnings of the insured woman in the previous contribution year. If for the period the insured woman is entitled to maternity allowance, she is paid by her employer part of her earnings, and maternity allowance is reduced so that the total amount of her earnings and the benefit payable does not exceed full wages.

- (b) For adoption of a child under the age of twelve, the maternity leave is 16 weeks. An adoptive mother ensures her maternity leave when she gives notice to her employer and to the Social Welfare Services that she will take care of a child under the age of twelve with the intention of adoption. Additional maternity leave is given if the infant is hospitalized in an incubator due to prematurity or any other health problem (one week for every 21 days up to a maximum period of six weeks).
- (c) A pregnant worker is entitled to time off work, fully paid, at the cost of the employer, for antenatal examinations if she gives an early warning to her employer and presents a medical certificate.
- (d) Any direct or indirect discrimination of a worker due to pregnancy, delivery, breastfeeding, maternity or pregnancy-related illnesses is prohibited.
- (e) Pregnant workers may under no circumstances be obliged to perform duties which have been assessed as posing a risk of exposure to health-endangering conditions.
- (f) At the end of the maternity leave the worker has the right to a daily one-hour work break or to start work one hour later or to leave work one hour earlier for a period of six months for breastfeeding and childcare and in the case of adoption from the day on which the maternity leave began, without any loss of pay.
- (g) Maternity leave may not affect employment rights such as the right to return to the same post or, if not possible, to a post of no less value, the right to seniority and the right to promotion.
- (h) An employer who fails to comply with the rules relating to maternity protection is guilty of an offence and is liable to a fine and/or imprisonment in case of conviction.
- (i) Employers must take measures to protect the safety and health of pregnant workers at work.
- (j) Dismissal or notice of termination of services is not allowed during the period from the beginning of the pregnancy when the worker gives a written notice to her employer that she is pregnant, up to three months after the end of her maternity leave. It is, however, possible to dismiss pregnant employees for reasons specified in the Maternity Law (not related to pregnancy and maternity). Termination of services and/or notice of termination of services to a pregnant worker when the employer is not aware of her pregnancy is revoked, if the worker presents a medical certificate within five days from the day the notice was given to her.
- (k) Dismissal or notice of termination of services is not allowed for an adoptive mother, from the time that she gives to her employer a certificate from the Social Welfare Services that she will take care of the child for adoption, up to three months after the end of her maternity leave.
- (l) A pregnant worker who has been dismissed either directly or indirectly because of pregnancy has the right to seek compensation, including reinstatement, either through the District Court or through the Industrial Disputes Tribunal.

Pregnancy and maternity rights (adoption/parental) do not apply differently depending on the type of employer (state/private) or the size of the employer. Furthermore, there is no evidence

that forms of discrimination on the grounds of pregnancy and maternity vary according to the type of employer or the size of the employer.

Law No. 205(I)/2002 as amended by Law No. 39(I)/2009 gives definitions of (a) direct discrimination on the ground of sex (no defence is accepted), which is less favourable treatment on the ground of sex, of (b) indirect discrimination on the ground of sex, which is when persons of one sex are put in a particularly disadvantaged position unless this can be objectively justified, and of (c) discrimination on the ground of sex, which means any direct or indirect discrimination and includes any less favourable treatment of a woman which relates to pregnancy, childbirth, breastfeeding, maternity or illness which is caused by pregnancy or childbirth. The Law in question expressly forbids any discrimination of pregnant women or mothers both in case of direct and of indirect discrimination (Article 11(I)). The discrimination of a woman is presumed to have been caused by any of the above situations until the contrary is proved (Article 11(2)). Law No. 205(I)/2002 does not specifically refer to victimization in relation to pregnancy/maternity/parental rights.

The Maternity Protection Law specifically forbids victimization in relation to pregnancy/maternity until three months after the end of the maternity leave. There is court and out-of court protection. The Parental Leave and Time-Off Work on Grounds of Force Majeure Law specifically forbids termination of services or notice of termination of services by the employer from the moment of submission of the application for parental leave until the end of the parental leave and provides that applying for or exercising the right to parental leave does not provide a reason for less favourable treatment of the employee. Moreover, applying for, or exercising the right, to parental leave does not provide a reason for terminating an employee's employment and does not give rise to any interruption in the continuity of his/her employment. Until today, there has not been any complaint or case law regarding parental leave.

The Safety and Health at Work Law No. 89(I)/96 provides for the safety and health of all employees, men and women.

The Maternity Protection (Safety and Health at Work) Regulations of 2002 (No. 255/2002) were drawn up in accordance with Directive 92/85/EEC aiming to protect the safety and health of pregnant workers and workers who have recently given birth or are breastfeeding. The Regulations refer to the measures that an employer must take in order to ensure safe and healthy conditions at work for pregnant workers or workers who have recently given birth or are breastfeeding. These measures are the following: (a) If necessary, to adjust working hours or working conditions for this category of workers; (b) if necessary, to transfer such workers to alternative duties or to another post; (c) to make sure these workers are not exposed to conditions that might endanger their health or safety; (d) to allow paid leave; (e) to take these workers off night work if a doctor considers this necessary for health and safety reasons, for as long as it is necessary without any prejudice to the workers' rights. If it is technically impossible to transfer the worker to day work, she must be relieved from her duties for the period necessary to protect her health and safety, without loss of any rights.

The Parental Leave and Time Off on Grounds of Force Majeure Law No. 69(I)/2002 last amended by Law No. 47(I)/2012 transposed Directives 96/34/EC and 2010/18/EC. It applies to all workers, men and women, who have been working for the same employer for a continuous period of six months. Unpaid parental leave is available on demand to both mothers and fathers. The period of parental leave is 13 weeks for the birth or adoption of a child. For a parent who is a widow or a widower the duration can be up to 23 weeks. Parental leave can be taken (a) by a natural mother after the end of maternity leave and before the child's eighth birthday, (b) by a natural father upon the child's birth and before the child's eighth birthday, (c) in the case of adoption after the end of maternity leave and for a period of eight years from the date of adoption provided the child is not older than twelve, (d) for a disabled child, up to the child's 18th birthday subject to the provisions of the Persons with Disabilities Law No. 127(I)/2000.¹⁰³

¹⁰³ Laws Nos. 127(I)/2000-146(I)/2009.

The minimum period of parental leave per year is one week and the maximum is five weeks. At the end of the parental leave, the worker is entitled to return to work in the same position or in a position similar to the one he or she held before taking parental leave.

The employee's parental leave shall in no way affect his or her employment rights, including his or her insurable earnings as provided in the Social Insurance Laws (Article 4). Furthermore, the period of absence from work is treated as a working period for the purpose of determining his or her entitlement to annual paid holidays under the Annual Paid Leave Law. The period of absence from work for the abovementioned reason does not interrupt the period of employment under the Termination of Employment Law.

On the matter in question there are decisions of the Ombudsman and a very limited number of decisions of the Industrial Disputes Tribunal.

*Ombudsman (Cyprus Equality Authority), Annual Report 2006*¹⁰⁴

Two women employees were working on a temporary basis in the public sector, one since 2002 and the other since 2003. Their services had been extended by consecutive contracts. Their contracts were not renewed after they expired because they were absent on maternity leave. Both women were rehired after the end of their maternity leave. The investigation brought to light that the way the cases of these two women were dealt with was not an isolated incident but was actually part of the general policy of the Public Administration and Personnel Department (PAPD) not to extend contracts of services to temporary employees who were absent on maternity leave. In her report the Ombudsman expressed the opinion that the above policy constitutes direct and unlawful discrimination on the ground of sex, which is prohibited by the Equal Treatment of Men and Women in Employment and Vocational Training Law and called upon the PAPD to terminate such policy.

Ombudsman File No. A.K.I. 06/2008 dated 26 January 2008

The Independent Movement of Teachers and Kindergarten teachers complained to the Equality Authority that although according to Article 5 of the Protection of Maternity Law employees were allowed to arrive one hour later or leave work one hour earlier for a period of 9 months after childbirth, teachers were allowed to be absent from work for only one period a day, that is for 40 minutes, on the basis of a circular issued by the Ministry of Education and Culture dated 14 September 2007.

In her report the Ombudsman stated that the provisions of Article 5 of the Protection of Maternity Law should be applied to all employees working either in the private or public sector and are binding on each employer, including the State. The facility given to mothers by the legislation is a right, the exercise of which does not depend on the employer to determine its duration and which should be enjoyed by all working women.

The Ombudsman decided that the contents of the aforesaid circular constituted a violation of Article 5 of the Maternity Protection Law, and requested the amendment of the circular. The Ministry of Education and Culture, in cooperation with the Department of Labour, issued a new circular, according to which teachers are able to be absent for 7½ periods a week to ensure that in one working week 5 hours are granted for childcare.

Ombudsman File No. A.K.I. 25/2009 dated 29 October 2010

A.P. worked as a work therapist in the Mental Health Services under contract on a casual basis from 29 January 2001 until 2 April 2006 and was given the highest mark of 'very satisfactory' in the appraisal reports. From 3 April 2006 until 3 April 2008 she was given a permanent post on probation and again achieved the highest mark of 'very satisfactory'. In both cases the evaluation was on six criteria and the highest mark mentioned in Regulations was 'very satisfactory'.

In April 2008 she acquired the status of permanent officer, but she worked only for two months in 2008 (November and December) because of serious pregnancy problems. The highest mark in the evaluation report for permanent officers is 'excellent' and the mark that

¹⁰⁴ www.ombudsman.gov.cy.

follows is ‘very satisfactory’. In the appraisal report for 2008 she was given the mark ‘very satisfactory’ for three criteria (out of eight). A.P. complained that the appraisal report referred to the entire year 2008, whereas in reality she had only worked for two months because she had serious problems during her pregnancy. She alleged that this reduction was due to her long absence from work because of a problematic pregnancy and that consequently it constituted discrimination on the ground of sex. The Public Service (Appraisal of Officers) Regulations of 1999 to 2009 provide that the annual appraisal reports of permanent public officers evaluate them on eight criteria and that if any health problems have adversely affected the quality of the work or effectiveness of the officer, this fact must be written in a separate note that must be attached to the report.

The Ombudsman reached the conclusion that the way the evaluation committee had carried out the work appraisal of A.P. for the year 2008 contravened the relevant laws and led to unfavourable treatment and discrimination against her because of sex in the sense of Law No. 205(I)/2002. Furthermore, the Ombudsman noted that the failure of the evaluation committee to write a separate note and attach it to the report in which it should have been stated that A.P.’s report referred only to the two months that she actually worked in 2008 rendered the evaluation defective.

1.2. Social security and pension rights

The General Social Insurance Scheme (GSIS) falls under Directive 79/7/EEC and covers all persons gainfully occupied in Cyprus either as employees or as self-employed persons. The GSIS provides pensions and other benefits, including maternity allowance which is payable to an insured woman for a period of 18 weeks. In the case of adoption the insured woman is entitled to maternity allowance for a period of 16 weeks from the date of adoption. Every insured person is credited with insurable earnings under the Social Insurance Laws for the periods of maternity and parental leave and of leave on grounds of force majeure. Parental leave and leave on ground of force majeure are unpaid.

Also, a maternity grant (one-off payment) is payable to the woman giving birth, either from her own or from her husband’s insurance.¹⁰⁵ Employed persons, self-employed persons and voluntary contributors are entitled to this payment.

1.3. Self-employment

Self-employed persons are protected by the Equal Treatment between Men and Women as regards Access to Employment and Vocational Training Laws. The purpose of these Laws is to apply equal treatment of men and women as regards access to employment, vocational orientation and training. They also lay down the terms and conditions which ensure equal treatment as regards access to open professions and participation in organizations of employees or employers (Article 3 of Law No. 39(I)/2009)).

In the Cyprus social security system every employed person, including the self-employed, is compulsorily insured under the GSIS. As described in 1.2. above, the GSIS provides a number of benefits, including maternity allowance during maternity leave. Maternity allowance is payable to an insured self-employed woman who is expecting a child or who has adopted a child herself, or her husband, within the first twelve years from the child’s birth. Maternity allowance is payable to an insured self-employed woman for a period of 18 weeks. For an adopted child, the insured self-employed woman is entitled to maternity allowance for a period of 16 weeks from the date of adoption.

Self-employed persons are not entitled to parental leave and have no right to breastfeeding breaks or time off.

Female helping spouses are considered to be self-employed persons and are compulsorily covered under the GSIS. Therefore they are liable to pay contributions. The GSIS does not recognize helping spouses and life partners as a separate category. There is equal treatment

¹⁰⁵ The Law provides that the insurance conditions taken into consideration are either those of the claimant or her spouse. An insured husband has no right to a maternity grant, but his wife has, either on her own, or as a spouse of an insured person.

between self-employed men and women. A female helping spouse or life partner has no right to breastfeeding breaks or time off or to parental leave unless she is an employee.

A maternity grant is payable to the woman giving birth, either from her own or from her husband's insurance, irrespective of her category of insurance (self-employed person, employed person or voluntary contributor). This means that a female helping spouse has the right to receive a maternity grant either from her own insurance or as a wife of an insured husband. A life partner can receive the maternity grant only if she is herself insured.

There are no court decisions on this subject.

1.4. Access to and the supply of goods and services

Law on Equal Treatment between Men and Women as regards Access to and Supply of Goods and Services No. 18(I)/2008 has incorporated all Articles of Directive 2004/113/EC.

The Law provides for a general prohibition of discrimination on the ground of sex (Articles 5(1), 7(1)). In December 2007 the Superintendent of Insurance decided to allow postponement of up to two years of the prohibition of difference between personal insurance premiums and grants on the grounds of pregnancy and maternity (Article 7(5) of the above Law). These two years have expired and as from the year 2010 insurance companies must not impose additional premiums for pregnancy expenses and maternity under contracts of health and medical insurance. The office of the Superintendent of Insurance, on the basis of the decision of the ECJ in *Association belge des Consommateurs Test-Achats ASBL*, has submitted a draft Bill to the Ministry of Justice and Social Order in which they suggest amendments to the Law, including the deletion of Article 7(5) of Law No. 18(I)/2008.

The Association of Insurance Companies agrees with the deletion of Article 7(5) of this Law. There have been no complaints for imposing additional premiums on the grounds of pregnancy/maternity. Article 2 of Law No. 18(I)/2008 has a definition of 'discrimination on the ground of sex' stating that it means 'any direct or indirect discrimination on the ground of sex, including a less favourable treatment of women because of pregnancy or maternity'. It does not distinguish between direct and indirect discrimination in relation to pregnancy and maternity.

The Law does not apply in education, in mass media and in advertisements.

Any discrimination on the ground of sex in applying the scope of the Law is forbidden, but the Law allows for different treatment in providing goods and services to persons of one sex if there is a good justification for this.

2. Gaps in national law

2.1. Employment

The laws described above provide measures and mechanisms to protect women in relation to access to employment, to training and to promotion and prevent pregnancy/maternity discrimination. Some problems have been noted in the private sector, which related to failure to adjust working conditions and/or working hours of pregnant workers to avoid exposure to occupational risks, with the result that women may have lost their job, but no complaints were made to the competent authorities. In the public service and the broader public sector there is no discrimination against women due to pregnancy or maternity as regards pay and other benefits such as pensions. Maternity/adoption/parental leave can be taken into account for the calculation of pension rights under the GSIS and the Occupational Pension Schemes. Under all occupational pension schemes, men and women enjoy equal treatment as provided in Equal Treatment for Men and Women in Occupational Social Insurance Scheme Law No. 133(I)/2002 and Provident Funds Laws Nos. 1981-2005. The use of parental leave by fathers is very limited. Only 3.4 % of eligible parents have taken parental leave, among whom men were only 11 %. Fathers may take their annual leave, but there is no evidence that this is done to help working mothers.

There is no law in Cyprus to provide for paternity leave.

2.2. Self-employment

There is no information and there are no examples to show discrimination against a pregnant self-employed worker or a self-employed worker who has recently given birth because she is perceived as being less committed or reliable. Directive 2010/41/EC has not yet been transposed to national law. The contents of the Directive have been discussed by the social partners and a relevant Bill is under consideration at the Ministry of Justice and Public Order.

Self-employed persons are not entitled to parental leave.

2.3. Access to and the supply of goods and services

The airlines flying to/from Cyprus have their own rules for pregnant passengers. Most airlines do not allow pregnant women to fly during the last few weeks of pregnancy, not because it is dangerous, but because they would prefer them not to give birth on the plane. Usually airlines require a medical certificate after 28 weeks of pregnancy.

Cyprus Airways, the Cyprus national carrier, allows expectant mothers to travel until up to the 28th week of pregnancy, i.e. as late as eight weeks prior to the expected delivery. After this period, a medical certificate is required stating that she is fit to travel and the date of the expected delivery.

In my opinion providers of services can deny pregnant women access to services which, in their view, may endanger a pregnant woman, not only to minimize their liability, but also in order to protect the woman and the child. As far as I know there are no examples of discriminatory practices in relation to access to and the provision of medical care for pregnant women and new mothers and also in relation to insurance, state/regional/municipality financial and non-financial benefits or to loans from banks and any other financial services (e.g. access to a mortgage).

There is no prohibition or restriction of breastfeeding in public or restricted access of breastfeeding mothers to sporting or entertainment places.

2.4. Additional information

There is no additional information to report.

3. Involvement of other parties

Since 1960, the system of collective bargaining in Cyprus has developed on the basis of two key principles: voluntarism and tripartite co-operation between Government, employers' organisations and trade unions.

Collective agreements currently have no force of law (in January 2012 the three main unions made a proposal to the Minister of Labour concerning the legal status of collective agreements). The social partners are obliged to include in collective agreements the conditions that exist in legislation, including maternity and parental leave.

The Industrial Relations Code (IRC) is a gentlemen's agreement (i.e. not legally binding) which was signed by the social partners in 1977 and sets out in detail the procedure for resolving conflicts.

The Commissioner for Administration (Ombudsman) was set up by Law No. 3/91 as amended by Law No. 98(I)/94. Law No. 36(1)/2004 amended the above Laws and gave the Ombudsman jurisdiction to deal with matters of gender equality and human rights and liberties.

The Law on Equal Treatment for Men and Women in Employment and Vocational Training, and Equal Treatment in Employment and Occupation Law No. 58(1)/2004¹⁰⁶ provide that any person or trade union, or organization as a representative, has the right to file a complaint to the Ombudsman concerning discriminatory treatment as regards matters covered by the Laws.

The Ombudsman has the right either *ex pro prio motu* or after a complaint is filed by a person or group of persons (NGOs, associations, committees, trade unions, funds, municipal

¹⁰⁶ Laws Nos. 58(I)/2004-86(I)/2009 (Directives 2000/78/EC, 2000/43/EC).

councils and public utility bodies), to investigate discriminatory provisions/terms/criteria/practices, collective agreements, articles of association of legal persons, societies, bodies and institutions, contracts for the supply of goods and services and terms of membership of organizations including professional ones. If discriminatory behaviour is proved, the Ombudsman is empowered to order the person or authority responsible either to pay a fine or to recommend them to take specific practical measures.

For more than eight years the Ombudsman has conducted a large number of investigations on grounds of discrimination and equality and has published reports, made recommendations and given independent assistance to the victims of discrimination.

The Law on Equal Treatment for Men and Women in Employment and Vocational Training provides for the establishment of a Gender Equality Committee. This Committee, known as the Gender Equality Committee in Employment and Vocational Training (GECEVT) was set up on 15 June 2009. The GECEVT has an advisory role and is responsible, *inter alia*: (a) for the provision of advice in respect of the determination or revision of national policy in matters falling within the objects of the above laws, (b) for submitting recommendations for the introduction of measures and the implementation of programmes aiming to promote equality of sexes, (c) for the promotion of studies and investigations, and (d) for the hearing of complaints which are then forwarded to the Chief Inspector for proper handling.

The National Machinery for Women's Rights (NMWR) was set up by the Council of Ministers (Decision no. 40.609, dated 16 February 1994) as the continuation of the Permanent Central Agency for Women's Rights (established in 1988). It is an advisory body under the auspices of the Minister of Justice and Public Order and deals with all matters concerning women, focusing on the elimination of discrimination against women. The NMWR consists of four bodies: a) the Central Committee (14 members including Women's NGOs); b) the General Body (Women's NGOs); c) the Ministerial Committee; and d) the General Secretary. Employer's organizations and trade unions are represented in the Central Committee by the secretary of their women's branches.

The field of activities of NMWR includes the promotion of research and surveys as well as recommendations, training networks, investigations, suggestions to the Government and representation in international forums.

The Cyprus Telecommunications Authority (CYTA) can be mentioned as a public stakeholder that uses good practices in order to reconcile work and family life of its employees, such as flexible working hours and if an employee has special problems he/she can ask to work on a personal time schedule as long as the problems exist and work from home. CYTA is also studying the creation of a nursery and kindergarten near places of work. The University of Cyprus provides paid parental leave (70 % of salary), has a kindergarten and organizes seminars and other activities for parents and children. The Crowne Plaza Hotel in Limassol has flexible working hours and provides care and occupation to the children of its employees. At Cyprus Airways, cabin crew employees are banned from flying upon learning they are pregnant and they are expected to work on the ground, at check-in desks or as administrative staff.

There is no information that small enterprises oppose the extension of pregnancy/maternity rights or their proper implementation, but I believe that small enterprises face difficulties in applying the Maternity Protection Law and Law No. 205(I)/2002 when there are only 1-3 employees.

NGOs, especially women's NGOs, and civil societies play an important role both within NMWR and also independently, through various actions, including interventions to the Ombudsman and the GECEVT.

4. Enforcement and effectiveness

4.1. General

There are no studies that support or refute the argument by employers that pregnancy and maternity rights for women lead to lower participation of women in the labour market. It is

true that the number of female workers is lower than the number of male workers, but this is the result of other factors, e.g. stereotypes and attitudes that a woman has the responsibility and care for the children and the family or shortage in the number of public and community nurseries and kindergartens and the high cost of private nurseries and kindergartens. The passing of legislation intending to reconcile family and working life and to protect maternity and the grant of an allowance during maternity leave has led to increased participation of women in the labour market.

The Labour Force participation rate for the age group 15-64 in the 4th quarter of 2011 was 73.1 % of the total population of this age group (males 79.9 %, females 67.0 %), whereas in the 1st quarter of 2011 the rate was 74.1 % (males 80.6 % and females 68.2 %). Unemployment in Cyprus due to the economic crisis stood in August 2012 at 11 % of the economically active population, the majority being men. In October 2012 it was about 12,2 %.

4.2. Legal redress

All of these laws relating to maternity protection expressly state that in case of violation of their provisions the complainant can have recourse to judicial process and/or to out-of-court protection (e.g. Ombudsman and/or GECEVT). The competent court for these cases is the Industrial Disputes Tribunal.

Laws Nos. 177(I)/2002, 205(I)/2002 and 133(I)/2002 as amended by the transposition of the Recast Directive provide that associations, organizations or other legal entities that have a legitimate interest in ensuring the application of the Laws are allowed to instigate, either on behalf or in support of a complainant, with his/her approval, any judicial procedure before the Industrial Disputes Tribunal (IDT) and/or an administrative procedure before the Ombudsman or the GECEVT.

The cost of the procedure before the IDT on matters of pregnancy, maternity, adoption or parental rights is not dissuasive. If the complaint succeeds the competent authority can order the employer or other transgressor to pay compensation. The length of the procedure is about a year from the day the application is handed to the defendant.

The compensation and other remedies to the victim of violation of the legal provisions related to pregnancy, maternity and adoption rights are higher compared to the compensation provided by the Termination of Employment Law. Furthermore the applicant can ask for an order of re-employment.

4.3. Access to information

There is no research that shows whether individuals are aware of their rights.

Information to stakeholders regarding the right of pregnant women and parents to maternity, adoption and parental leave is disseminated by the Ministry of Labour and Social Insurance through booklets and leaflets circulated to trade unions and by the National Machinery for Women's Rights and women's organizations through seminars and workshops.

There is no evidence that some women (women from ethnic minorities or from poorer economic backgrounds, or women with disabilities) are at a particular disadvantage with regard to pregnancy, maternity, adoption and/or parental rights. All women who satisfy the conditions of the relevant laws can enjoy their rights according to the Equal Treatment in Employment and Occupation Law.

A study that was carried out in 2011 for the Ministry of Labour and Social Insurance on the subject of parental leave entitled 'Potential to increase the use of parental leave by men and women through pay benefits', showed, among other things, that the vast majority (67.6 %) of parents did not know about the existence of parental leave and that only 5 % of parents had adequate knowledge of the provisions regarding parental leave. The study also showed that the major source of information for those who knew about parental leave was colleagues from work (55 %).¹⁰⁷

¹⁰⁷ The study was produced for internal use of the Ministry of Labour and Social Insurance. The full study will not be published, only the main findings.

1. Existing legislation and case law

The existing legal measures guarantee mothers and fathers special protection of their labour relationship until their child reaches the age of three.

Pregnancy and maternity related rights, especially the right not to be discriminated against, are included in:

- Act No. 262/2006, the Labour Code;
- Act No. 198/2009 Coll., the Anti-Discrimination Act;
- Act No. 187/2006 Coll., on sickness insurance; and
- Act No. 117/1995 Coll., on state social support.

1.1. Employment

According to relevant provisions of the Labour Code (Act No. 262/2006 Coll.), pregnant women are protected against being obliged to carry out work unsuitable for their condition. If a pregnant woman's job involves tasks that might endanger her pregnancy, according to medical opinion, her employer must temporarily transfer her to more suitable work for an equal wage. Similar rules apply to young mothers up to nine months after the birth and to breastfeeding women. Pregnant women who do night work may request to be transferred to day work and the employer must not refuse such request.

According to Section 242 of the Labour Code, an employer must grant a female employee who is breastfeeding her child special breaks for breastfeeding. Breaks for breastfeeding are included in the working hours and a compensatory wage or salary equivalent to the amount of average earnings must be paid for such breaks.

If a pregnant woman or a parent looking after a child under the age of 15 requests that his/her working hours be reduced, or some other suitable adjustment be made to the prescribed weekly working time, the employer is obliged to comply with this request, provided that he is not prevented from doing so for serious operational reasons – e.g. if it is necessary to finalize a project with a fixed deadline and no other employee is able to do so.

According to Section 196 of the Labour Code, the employer must grant a male or female employee parental leave if requested. Parental leave is granted to the mother of the child at the end of her maternity leave (the general duration of maternity leave is 28 weeks; the period can be extended up to 37 weeks if the woman gives birth to two or more children at the same time) and to the father of the child from the day that the child is born, for the amount of time applied for, until the child reaches the age of three. The parents of the child are entitled to take maternity and parental leave concurrently.

No special paternity leave is foreseen as yet. Two years ago, the Ministry of Labour and Social Affairs wanted to propose some changes to current legislation in order to enforce the rights of parents. The proposals also included the idea of non-transferable paternity leave. The whole package of planned changes did not progress any further, however, because the political situation changed (the Government was newly constituted after the election in 2010) and other priorities were set for the labour and social affairs area. Cuts in social expenditure and pension reforms became such top priorities on the agenda, that almost nothing else received any attention.

Pregnant women and parents looking after children under the age of three who are on parental leave are protected against dismissal.

Czech law guarantees their return to the same job not only after maternity leave, but also after parental leave, which may last until the child reaches the age of three. If the employee returns to work later, i.e. after the parental leave finishes, he or she is only entitled not to be dismissed and to be given work that is in accordance with the employment contract (Section 53 of the Labour Code).

According to Section 197 of the Labour Code, the right to maternity and parental leave is also accorded to a female or male employee if such employee has taken a child into their care, substituting for parental care (foster care or adoption).

Pregnant women and self-supporting mothers looking after children under the age of three are also specially protected against dismissal. They may be dismissed only when their employer terminates or relocates the enterprise, or if they commit serious breaches of discipline, but for no other reason (Paragraphs 52 - 54 LC).

The Anti-Discrimination Act (Act No. 198/2009 Coll.) defines discrimination on the grounds of pregnancy or maternity (Section 2 Paragraph 4 of Act No. 198/2009 Coll.) as discrimination on the ground of sex. As in all other cases, it therefore distinguishes between direct and indirect discrimination on the grounds of pregnancy or maternity, i.e. on the ground of sex.

There is no case law of Czech courts. However, the equality body – the public defender of rights – has published several cases that were referred to him. One of them was the case of a woman, who addressed the Office of the public defender of rights with a complaint of discrimination in the access to employment on the ground of parenthood and opinions. Two potential employers refused to hire her, and she suggested that in the first case the reason was the fact that she was a mother, and in the second case the fact that unlike the person in charge of the hiring process she was in favour of alternative methods of childbearing. The public defender of rights conducted an investigation and concluded that because of the lack of evidence it was not possible to prove discrimination in this case.¹⁰⁸

In another case, the public defender of rights also decided negatively. It was the case of a pregnant woman complaining of the fact that after she got pregnant and was temporarily incapable of work due to her high-risk pregnancy, she was told she could not benefit from the cultural and social needs fund to the full amount. The public defender of rights conducted an investigation and concluded that this case cannot be considered discrimination on the ground of sex (pregnancy), because the reduction of the benefit was rationalized with the legitimate goal of fulfilling the cultural and social needs of all employees, the regular ones as well as those engaged as replacement.¹⁰⁹

National legislation does not specifically refer to victimization in relation to pregnancy/maternity/parental/paternity rights.

The aforementioned pregnancy and maternity (adoption/parental/paternity) rights apply without any differences based on the type (state/private) or size of employer.

It could be said however that forms of discrimination on the grounds of pregnancy or maternity (adoption, parental or paternity leave) vary according to the type (state/private) or size of the employer. Discrimination on the aforementioned grounds probably occurs more often in the private sector and at smaller or medium-sized employers. There are, however, no studies or statistics to prove this.

1.2. Social security and pension rights

In the Czech system, care periods are counted as insured periods for the purposes of pension rights.

The full period of maternity leave – 28 or 37 weeks – counts as an insured period. All parental leave, which may last until the child reaches the age of four, is also included. Moreover, the Czech Pension Insurance Act envisages that care periods until the child reaches the age of four will be counted (Section 5 Paragraph 1(r) and Section 12 of the Pension Insurance Act). As many more women take parental leave than men, it is often the mother whose child-raising period is counted as an insurance period.

The aforementioned periods of bringing up children are taken into full account when determining pension eligibility and also for amount calculation purposes.

The earnings base for these non-contribution periods is the amount that would apply if the person earned the same average earnings as s/he earned during the years when s/he

¹⁰⁸ The reaction of the public defender of rights No. 182/2011/DIS/JŠK is available on http://www.ochrance.cz/fileadmin/user_upload/DISKRIMINACE/Kauzy/prace/Neprijeti_do_zamestnani_v_souvislosti_s_rodicovstvim_a_jinym_svetonazorem.pdf, accessed 20 August 2012.

¹⁰⁹ The reaction of the public defender of rights No. 117/2010/DIS/JKV is available on http://www.ochrance.cz/fileadmin/user_upload/DISKRIMINACE/Kauzy/prace/Neposkytnuti_prispevku_z_FKSP_tehotne_zamestnankyni.pdf, accessed 20 August 2012.

worked. Care periods are counted in the same manner as the full crediting of work periods for the purposes of eligibility for a pension. Care credits are equally recognised for men and women, although they are more often credited to women who still continue to be the main carers.

There have also been automatic mechanisms of allocating care credits to women/mothers as the main carers. This was recently abolished by the Constitutional Court.

On the other hand, it should be recalled that in a way the Czech basic pension system is still based on the traditional one-caregiver model. The most obvious example of this is the issue of pensionable age. In fact, as a ‘residue’ from communist times, there are advantages in lowering the pensionable age of women who have raised two or more children. This is an advantage only for women as men are not eligible, even if for example a man has looked after his children for his whole life after his wife died or abandoned the family. There has been a tentative attempt to abolish the relevant provision (Section 32 of the Pension Insurance Act). The Constitutional Court, however, refused to abolish the provision, arguing that it should be abolished in the next big pension reform.¹¹⁰ The European Court for Human Rights confirmed this position.¹¹¹ This issue is discussed in the media from time to time, but there has not been any serious social debate.

1.3. Self-employment

As regards conditions for establishing and continuing self-employed activity, there do not seem to be any differences between men and women according to Czech law, nor as regards pregnancy, maternity leave, breastfeeding, adoption leave, paternity leave or parental leave.

Self-employed persons merely have voluntary access to sickness insurance, but this is totally gender neutral. In the system of sickness insurance (Act No. 187/2006 Coll.), entitlement to the maternity allowance (according to the Czech law ‘financial aid in maternity’) is conditional upon a certain period of insurance: 270 days of insurance in the last two years before maternity leave – for self-employed persons at least 180 days must be insured immediately before the maternity leave starts. This condition is gender neutral, as it is also possible for the benefit to be claimed by the spouse of the mother of the child or the father of the child, if there is a written agreement to that purpose between them. In such a case, entitlement for the man starts six weeks after the birth of the child.

If the aforementioned conditions are fulfilled, maternity allowance may be provided for 28, or sometimes 37 weeks (when two or more children are born).

Helping spouses are covered by social security schemes – by sickness insurance and pension insurance – if they have taxable income from self-employed activity. In such cases both schemes are mandatory for such helping spouses and they derive individual rights from these schemes. There are no specific benefits or conditions for helping spouses as regards pregnancy and maternity.

1.4. Access to and the supply of goods and services

The Anti-Discrimination Act ensures the general right to equal treatment regarding access to goods and services, including housing, if these are provided to the public.

There are specific laws regulating access to specific services, which also include an equal treatment rule when accessing these services (for example legislation on consumer protection, market inspection, access to information services, libraries and so on).

There are however no specific rules regarding pregnancy and maternity rights. There is only a general prohibition of discrimination, which could be interpreted as covering discrimination on the grounds of pregnancy/maternity. There have not, however, been any cases that would require such an interpretation by the equality body or by courts.

¹¹⁰ Pl.ÚS 53/04; to be found in Czech on <http://nalus.usoud.cz/>, accessed 17 August 2012.

¹¹¹ *Andrle v The Czech Republic*, Application No. 6268/08, 17 February 2011. For detailed information and commentary see K. Koldinská ‘Shouldn’t fathers raise their children?’ *European Gender Equality Law Review* No. 2 (2011).

National legislation is very modest in the field of access to goods and services, and pregnancy/maternity discrimination in the area of media and advertisements and education is not specifically covered.

However, national law has implemented the basics of Directive 2004/113/EEC. In practice, the ban on discrimination is probably breached sometimes, but this is difficult to prove, as no case law exists, since Czech pregnant women or breastfeeding mothers are not keen to fight service providers before the courts.

2. Gaps in national law

2.1. Employment

Recruitment process:

Czech law does not lack effective protection against pregnancy discrimination in relation to access to employment. As described above, there are many instruments to protect employees against pregnancy/maternity discrimination. However, the written law is often not sufficiently effective in practice.

There are many cases of discrimination against women during the recruitment process on the basis of possible future pregnancy. Although it is prohibited by the Employment Act and the Anti-Discrimination Act, it is quite frequent for employers, while recruiting, to ask young female candidates about their future plans as regards marriage and having children. Men are never asked similar questions.¹¹²

The problem is that women do not go to court, and even if they were to do so, there is a strong possibility that they could lose their case due to a still very old-fashioned attitude of many judges.

In short, if something is lacking in this regard, it is not in legislation, but rather in awareness raising and the development of non-discriminatory attitudes throughout society.

Employment relations and conditions of employment

There are no gaps in national law with respect to the provision of adequate rights, at the workplace, to protect women who are pregnant or on maternity leave.

Remuneration

There have been no cases that would identify existing gaps in the guarantee of equal access to pay.

It is difficult to say whether periods of maternity leave are taken into consideration for the purpose of occupational pensions, as this system as such does not yet exist in the Czech Republic. Many employers provide bonuses to their employees, which seem to be similar to occupational pensions, but there is no law on this issue yet. The so-called second pillar, which was recently adopted under Act No. 426/2011 Coll., on pension savings, is not however an occupational pension scheme, as the employer is neither obliged to contribute nor to establish any pension or similar fund.¹¹³ The law allows persons insured by the public pensions to opt out from the obligatory public system with 3 % of their obligatory contributions to the pension savings system. In this case, the person has to add a further 2 % from their own money, so that the minimum contribution to the pension savings is 5 % of the relevant person's average salary. The system will be quite strictly controlled and for the pension savings companies it will be possible to invest the money from the pension savings system only in quite safe financial products.

¹¹² Case C-320/01 *Wiebke Busch proti Klinikum Neustadt GmbH & Co. Betriebs-KG*, [2003] ECR I-02041.

¹¹³ The idea is more about allowing part of the contributions made to the state pension system to be taken from the state system and transferred to private pension funds that could be invested in capital markets. In such a way, private pension companies have the possibility to use part of the public pension contributions and invest them in the private sector under certain limitation rules.

Termination of the employment contract

Pregnant women or mothers are sometimes ‘forced’ out of their employment, but there is almost no evidence of such behaviour on the part of the employers, and almost no case law in this regard, although such behaviour is strictly prohibited by national law (see above, regarding protection against dismissal).

At the same time, it is a quite frequent practice for fixed-term contracts not to be renewed for reasons connected to pregnancy, maternity, or parental leave. It is however very difficult to prove that a contract was not renewed because of pregnancy or maternity and not for other reasons.

Involvement of fathers

As explained above, under Czech law fathers may be allowed parental leave, parental benefit and under certain conditions also maternity benefit. Although the situation has been improving recently, there are still few fathers who make use of the aforementioned rights. One of the main reasons is the economy of the family. As the gender pay gap is quite high in the Czech Republic (more than 25 %), it is normally the woman who takes the maternity leave, and then also the parental leave, in order to keep the higher income in the family. According to statistics, parental benefits are claimed by more than 95 % of women.

As a consequence, employers are not used to fathers taking parental leave. The personnel department will often be confused if a father declares that he wishes to take parental leave. Sometimes such an employee may consequently be considered less committed to the job. In fact, many fathers take at least a good part of their annual leave immediately after childbirth in order to stay at home with the family and help the mother. After a few weeks (usually a maximum of two to three)), they return to work.

So far there has not been any case law regarding parental leave involving a father, to the knowledge of the author of this report.

2.2. Self-employment

To the best of the knowledge of the author of this report, there has been no research or concrete examples showing discrimination against pregnant self-employed workers or self-employed workers who have recently given birth.

As explained above, female self-employed workers and female assisting spouses or life partners are able to access maternity allowance, which can be provided for 28 or 37 weeks. There are no specific difficulties for such women to be granted maternity benefits. Male self-employed workers and male assisting spouses or life partners are able to access parental allowance provided under the system of state social support (Act No. 117/1995 Coll.) on the same conditions as any other person.

2.3. Access to and the supply of goods and services

A recent practical experience of the author of this report demonstrated that in the field of air transport it is normal to ask for medical confirmation that a woman pregnant for more than 30 weeks is ‘fit to fly’. Some companies refuse to allow such women on board, if they do not present a similar document.

Also, access to some restaurants or cafés with very small children is sometimes not very easy. Many restaurants still do not have any non-smoking areas or do not provide special chairs for feeding young infants.

As regards access to some other services, there is no information about possible restrictions for pregnant women. However, this does not exclude the strong possibility that a service provider would prevent pregnant women from entering e.g. a sauna, aerobics classes, or rides at an attraction park, on the grounds of health and safety.

As regards access to medical care for pregnant women and new mothers, there has been a recent case before the Constitutional Court¹¹⁴ initiated by a woman who wanted to deliver her baby at home. She did not feel free to do so as she was not provided the necessary assistance,

¹¹⁴ Pl.ÚS 26/11 of 28 February 2012.

and the public authorities and also national legislation, according to her, discourage women from giving birth at home.¹¹⁵ Her arguments were based inter alia on ECHR case *Ternovszky v Hungary*,¹¹⁶ where the ECHR accorded this right to a woman in a similar situation. Moreover, she argued, there are also several CEDAW reports noting that women in the Czech Republic experience many obstacles when they decide to give birth at home.

The Constitutional Court did not find itself competent to decide on the case in the material part (due to the principle of subsidiarity – the applicant did not appeal to the regional court and went directly to the Constitutional Court), but strongly recommended to all public authorities, including Parliament and the Government, to reflect seriously on the problem and to start a serious debate on possible amendments to Czech legislation. In the meantime, the applicant has submitted an application to the ECHR.

To the knowledge of the author of this report, no cases of discrimination against pregnant women in the insurance sector have been made public. In the area of access to mortgages or loans, it sometimes occurs that the income of a pregnant woman is only considered up to the future parental allowance, which is not very high and will last a maximum of four years, whereas a mortgage is taken out for 20-30 years. Such behaviour of banks reduces the eligibility of pregnant women for mortgages or long-term loans.

2.4. Additional information

There is no additional information to report.

3. Involvement of other parties

Social partners pay more attention to families with children in general, than to pregnant women/young mothers. Some of the major employers provide their employees with services for children (e.g. kindergarten), flexible working hours and benefits for family holidays with children.

The national equality body as well as NGOs are not very active in this area, as they focus on more general discrimination issues.

There is no particular good/or bad practice which could be of relevance in the area of discrimination on the grounds of pregnancy/maternity/parental leave.

4. Enforcement and effectiveness

4.1. General

In the Czech Republic it is often claimed by employers that pregnancy and maternity rights for women in the labour market lead to lower numbers of women in employment. This is partly true, as it is mostly women who stay at home with children for quite a long time. There are still many women who decide to take care of their child for three years and then often have a second child. It is therefore no exception (especially in areas with a higher unemployment rate) for women at their peak productive age (because it coincides with the fertility age) to be away from the labour market for some 6-8 years.

Unfortunately, there have as yet been no studies to analyse this phenomenon in depth and propose solutions to this far from positive situation.

4.2. Legal redress

As explained above, there are general difficulties linked to enforcing rights regarding equal treatment, including pregnancy, maternity, adoption, parental or paternity leave. However, this is due to the general attitude in society more than to bad legislation. Still, there are no provisions in national legislation that would provide hands-on support, financial support and/or advice for individuals who want to enforce their pregnancy, maternity, adoption, parental or paternity rights.

¹¹⁵ This case was reported in Newsflash 2-2012.

¹¹⁶ *Ternovszky v Hungary*, Application no. 67545/09, 14 December 2010.

There are no studies that address the difficulties involved in gaining access to legal redress concerning rights regarding pregnancy, maternity, adoption, parental or paternity leave. Nor can it be argued that since the Recast Directive was implemented there has been any increase in national case law regarding pregnancy, maternity, adoption, parental or paternity rights initiated by associations, organizations or other legal entities.

At the same time, it can generally be argued that remedies or compensation in equality cases (if any) do not dissuade transgressors and do not adequately compensate victims of violations of pregnancy, maternity, adoption, parental or paternity rights. The remedies in this area (if any) are normally provided at the level of some hundreds of Euros (some tens of thousands of CZK).

4.3. Access to information

In the Czech Republic, access to information specializing in pregnancy, maternity, paternity, adoption and parental leave is unfortunately almost non-existent.

From time to time, surveys on discrimination in the labour market are published. A recent survey produced by the STEM agency¹¹⁷ states that 75 % of the population consider disability to be the most frequent discriminatory ground in the labour market, while 73 % consider it to be pregnancy, and 64 % race or ethnic origin.

There are a few studies on the status and situation of families with children in connection with the situation in the labour market, but no study focusing on pregnant women or young mothers. Of these studies, the following can be briefly cited:

- V. Kuchařová, S. Ettlerová, O. Nešporová, K. Svobodová *Zaměstnání a péče o malé děti z perspektivy rodičů a zaměstnavatelů* (Employment and childcare from parents' and employers' perspectives) Praha, VÚPSV 2006¹¹⁸ – a research report that describes the results of three surveys focusing both on finding ways in which parents are able to reconcile childcare with their careers, and on the limitations concerning and discrimination against the parents of small children in the labour market. Views of both mothers and employers were observed. The main focus is on formal measures that should enable parents to fulfil the duties of parenthood at the same time as their need to succeed in the labour market.
- Z. Haberlová & V. Kyzlíková *Rodinné potřeby zaměstnanců* (Family needs of employees) Praha, VÚPSV 2009¹¹⁹ – a study that describes the main features of opinions and attitudes of representatives of firms and organizations concerning the conflicting relations between the family and employment as well as the role of employers in creating conditions for the alleviation of this conflict. When analyzing particular spheres, differences in employers' approaches were found, e.g. between firms of different sizes, with different qualification structures of their staff and between private and public sector firms. An expected influence of the share of women among employees was proven, too, divided by economic sector and branch.
- S. Höhne, V. Kuchařová, K. Svobodová, A. Šťastná, L. Žáčková *Rodina a zaměstnání s ohledem na rodinný cyklus* (Family and employment with respect to the family cycle) Praha, VÚPSV 2010¹²⁰ – a monograph that presents the results of a series of empirical surveys focusing on the specific stages of the life cycle. The aim is to identify individual requirements and the chances of balancing three spheres – family, employment and education – within families and family relationships. Special attention is paid to the issue of time management of family life and employment.

If there are any information campaigns, they address discrimination and equal treatment as a general topic. No information campaigns have focused on pregnancy or maternity – with the

¹¹⁷ Available on <http://www.stem.cz/clanek/2513>, accessed 17 August 2012.

¹¹⁸ Available in Czech on http://praha.vupsv.cz/Fulltext/vz_195.pdf, accessed 17 September 2012.

¹¹⁹ Available in Czech on http://praha.vupsv.cz/Fulltext/vz_304.pdf, accessed 17 September 2012.

¹²⁰ Available in Czech on http://praha.vupsv.cz/Fulltext/vz_310.pdf, accessed 17 September 2012.

exception of a few billboards focusing on parental leave, arguing that taking parental leave as a father is a normal step.

Unfortunately, there are no relevant studies on discrimination against pregnant women or women who have recently become mothers that would evidence their disadvantaged role, or the disadvantaged role of some groups of women.

DENMARK – Ruth Nielsen

1. Existing legislation and case law

In Denmark, statutory provisions on discrimination related to pregnancy and maternity, maternity leave, parental leave, adoption leave and paternity leave are mainly found in the Equal Treatment Act, which contains a ban on discrimination on grounds related to pregnancy and maternity, maternity leave, parental leave, adoption leave and paternity leave, and in the Maternity, Paternity and Parental Leave and Benefit Act (*Barselloven* in Danish) which entered into force on 3 July 2006. In addition, the force majeure clause in the Parental Leave Directive (96/34/EC) has been implemented in the Act on Employees' Rights to Leave for Special Family-Related Reasons, which entered into force on 1 April 2006.

1.1. Employment

The Equal Treatment Act¹²¹ contains a ban on discrimination on grounds of sex. This includes discrimination related to pregnancy and maternity, maternity leave, parental leave, adoption leave and paternity leave either as direct or indirect sex discrimination.

Before the adoption of the Equal Treatment Act in 1978, which implemented the Equal Treatment Directive (76/207/EEC), it was both lawful under Danish law and common practice for employers to dismiss or otherwise treat women unfavourably on grounds of pregnancy. The adoption of the Equal Treatment Act vastly improved the protection of pregnant women.

The Pregnancy Directive (92/85/EEC) was implemented in 1994 by an amendment of the Equal Treatment Act. The provision in Article 2(7) of Directive 2002/73/EC, stating that less favourable treatment of a woman related to pregnancy or maternity leave (within the meaning of Directive 92/85/EEC) shall constitute discrimination within the meaning of the Directive, was implemented in the Danish Equal Treatment Act in 2005 by a provision stating that direct discrimination on grounds of sex shall be considered to have occurred in all cases of negative treatment taking place in connection with pregnancy and during the maternity leave taken by the woman during the 14 weeks after confinement.

In Section 9 of the Equal Treatment Act, there is a prohibition against the dismissal of a person because he or she has claimed or exercised his or her right to absence on ground of maternity, paternity or parenthood. By 3 July 2006, the rules delimiting the rights to leave on these grounds had been incorporated in the Maternity, Paternity and Parental Leave and Benefit Act, see below, and the Equal Treatment Act was amended, so that there is now a reference to the new Maternity, Paternity and Parental Leave and Benefit Act in the Equal Treatment Act.

Until 2006, Denmark had only implemented the force majeure clause in Directive 96/34/EC on parental leave in a number of collective agreements allowing parents to stay home on the first day of a child's illness. The Act on Employees' Rights to Leave for Special Family-Related Reasons was adopted to remedy this and entered into force on 1 April 2006.

Parents are only entitled to wages during absences related to pregnancy and parenthood if such a right follows from a collective agreement or an individual employment contract.

¹²¹ Consolidation Act no. 645 of 8 June 2011 on Equal Treatment between Men and Women.

1.2. Social security and pension rights

The Maternity, Paternity and Parental Leave and Benefit Act (*Barselloven* in Danish)¹²² provides for two kinds of rights for parents: right to absence from work and right to maternity, paternity or parental benefit from public funds.

As mentioned above, parents are only entitled to wages during absences related to pregnancy and parenthood if such a right follows from a collective agreement or an individual employment contract. Wages usually include contributions to a pension fund. If the parent is only entitled to the benefit and not to wages he/she will not earn pension rights during absences related to pregnancy.

In 2006, the rules on the right to absence from work on grounds of maternity, paternity and parenthood were moved from the Equal Treatment Act to the new Maternity, Paternity and Parental Leave and Benefit Act. The substantive content of the rules on maternity, paternity and parental leave and benefit has not been changed. Under the present rules, parents are, between them, entitled to 52 weeks of parental leave on full benefit, which for most workers is considerably lower than full pay. The 52 weeks of parental leave are composed firstly of maternity leave, to commence four weeks before the expected confinement and lasting until 14 weeks after the birth of the child, secondly of paternity leave for two weeks, and thirdly by parental leave benefit for 32 weeks. Maternity leave can only be taken by the mother. In the maternity leave period, the father is entitled to two weeks' paternity leave.

After the 14 weeks after the birth of the child have elapsed, the parents are entitled to 32 weeks of parental leave benefit, which they can share as they please. They are each entitled to absence from work 32 weeks but they will only receive benefit for a period of 32 weeks. There are possibilities of extending the parental leave period by accepting a reduced benefit and also possibilities of postponing the leave period until later.

Pregnancy/maternity/paternity related benefits from public funds are equal to the benefits for unemployed or sick persons.

Childcare facilities are mainly tax-financed in Denmark. Public childcare is a public service of general economic interest financed primarily via taxes. Most Danish children of pre-school age attend public childcare facilities. There is no legislation specifically related to the labour market providing for support for childcare facilities.

1.3. Self-employment

Self-employed persons are protected against sex discrimination in Section 5 of the Equal Treatment Act and entitled to pregnancy-related benefits under the Maternity, Paternity and Parental Leave and Benefit Act (*Barselloven*).

1.4. Access to and the supply of goods and services

Directive 2004/113/EC has mainly been implemented in the Equality Act¹²³ which as the main rule prohibits sex discrimination in access to and supply of goods and services. Article 5 in Directive 2004/113/EC has been implemented in the Act on Equal Treatment between Men and Women in connection with insurance, pension and similar financial services as amended in 2009.¹²⁴ This Act has not yet been adapted to the judgment of the CJEU in *Test-Achats*.

2. Gaps in national law

2.1. Employment

There are – of course – different political views on what the rules ought to be. In practice mothers use the parental leave more than fathers. Some argue that legislation ought to force parents to share the parental leave more equally.

¹²² Consolidation Act no. 1084 of 13 November 2009 on Maternity, Paternity and Parental Leave and Benefit.

¹²³ Consolidation Act no. 1095 of 19 September 2007 on Equality between Men and Women.

¹²⁴ By Act no. 133 of 24 February 2009.

As stated below (in 3.) there is no right to full wages unless it follows from a collective or individual agreement. In practice most workers/employees in Denmark are covered by collective agreements between employers and trade unions which give them a right to full or partial wages during the whole or part of the period of pregnancy, maternity, paternity or parental leave.

As a result, pregnancy etc. may be costly for an employer. In recent years, efforts have been made to render it cost-neutral for employers by obliging all employers to contribute to covering the costs of pregnancy, maternity, paternity and parental leave. In the spring of 2004, the Confederation of Danish Trade Unions (Danish LO) and the Confederation of Danish Employers' Organisations (DA) concluded a collective agreement on reimbursement, up to a certain maximum, of all pregnancy etc. payments made by employers who are members of a DA organisation. Through legislation, this solution was extended to include the whole private sector: the Act on Reimbursement of Pregnancy Payments in the Private Sector (*Barselsudligningsloven*) came into force on 1 October 2006.¹²⁵

The new Act requires all employers in the private sector who are not under a similar duty by collective agreement to pay contributions to a pregnancy fund. When they do make pregnancy-related payments to their staff, they can claim reimbursement from the fund.

Over the years, there has been a trend to strengthen the protection of both women and men as regards pregnancy, maternity and paternity. In my view, it is very important for the effectiveness of these rules that pregnancy etc. is as cost-neutral as possible for the individual employer. The above initiatives concerning reimbursement of payments by employers are limited to a maximum which is still considerably lower than full pay for women and men with higher than average wages.

2.2. Self-employment

Directive 2010/41/EU has not yet been implemented in Danish law.

2.3. Access to and the supply of goods and services

As mentioned above, Danish law has not yet been adapted to the judgment in *Test-Achats*.

2.4. Additional information

There is no additional information to report.

3. Involvement of other parties

As mentioned above, the Maternity, Paternity and Parental Leave and Benefit Act only provides for benefits that for most workers amount to considerably less than full pay. There is no right to full wages unless it follows from a collective or individual agreement. In practice most workers/employees in Denmark are covered by collective agreements between employers and trade unions which give them a right to full or partial wages during the whole or part of the period of pregnancy, maternity, paternity or parental leave.

4. Enforcement and effectiveness

4.1. General

In Denmark, the majority of cases related to equal treatment are about pregnancy, maternity, paternity and parental leave. During the 1990s, a rule was developed in case law concerning the reversal of the burden of proof in cases of dismissal during pregnancy, maternity/paternity or parental leave. When the Burden of Proof Directive was implemented, two provisions were inserted into Section 16(4) and Section 16(a) of the Equal Treatment Act. Under Section 16(4), which is usually considered a codification of the rule on the reversal of the burden of proof in pregnancy dismissal cases, established in Danish case law, the employer must prove that a dismissal is not due to pregnancy or related grounds if the dismissal takes place during

¹²⁵ Act no. 417 of 8 May 2006.

pregnancy, maternity or parental leave. This provision probably goes beyond what is required by EU law.

In other discrimination cases, e.g. discrimination at the recruitment stage, Section 16(a) provides for a sharing of the burden of proof in accordance with the requirements of EU law.

4.2. Legal redress

Danish questions to the ECJ under Article 267 TFEU have concerned pregnancy-related issues in a number of cases.¹²⁶ The *TeleDanmark* case ended with a judgment of the Danish Supreme Court, delivered on 13 August 2002.¹²⁷ The case concerned Ms Brandt-Nielsen, who, while she was pregnant, entered into a six-month employment contract (from 1 July 1995 to 31 December 1995) in June 1995. In August 1995, she informed her employer, TeleDanmark, that she was pregnant and that her confinement was expected on 6 November. Shortly afterwards, on 23 August 1995, she was dismissed with effect from 30 September, i.e. with the notice she was entitled to under the Danish Salaried Employees Act, on the grounds that she had not informed TeleDanmark that she was pregnant when she was recruited. The relevant trade union, HK, acting on behalf of Ms Brandt-Nielsen, brought proceedings against TeleDanmark before the District Court, *Århus*, for compensation, on the grounds that her dismissal by TeleDanmark was contrary to the Equal Treatment Act. The District Court, *Århus*, ruled in favour of the employer. On appeal, the *Vestre Landsret* (Western Regional High Court), ruled in favour of Ms Brandt-Nielsen by two votes to one and awarded her a compensation of three months' pay on the grounds that it was not disputed that the dismissal was linked to her pregnancy. TeleDanmark appealed to the *Højesteret* (Supreme Court) which stayed proceedings and referred preliminary questions to the ECJ as to whether Article 5(1) of the Equal Treatment Directive and/or Article 10 of the Pregnancy Directive, or other provisions in those two Directives or elsewhere in Community law, precluded a worker from being dismissed on the grounds of pregnancy in a case such as that of Ms Brandt-Nielsen. In this case, the ECJ held that Article 5(1) of the Equal Treatment Directive and/or Article 10 of the Pregnancy Directive are to be interpreted as precluding a worker from being dismissed on grounds of pregnancy from a job to which she was recruited for a fixed period, even if the employee failed to inform the employer of her pregnancy despite being aware of this when the contract of employment was concluded, and even if she was unable to work during a substantial part of the term of that contract due to her pregnancy.

The Danish Supreme Court raised the compensation up to six months' pay, which has since been used in practice as the minimum compensation for dismissal on grounds of pregnancy.

The typical remedy in discrimination cases is compensation. When a woman is dismissed on grounds of pregnancy, maternity or parental leave, a compensation of six months' pay has become the minimum compensation since the *TeleDanmark* case (see above). The typical level of compensation for dismissal on grounds of pregnancy is nine months' pay.

In a case concerning a man who was dismissed on grounds of paternity or parental leave¹²⁸ the court awarded six months' pay in compensation.

4.3. Access to information

There are no special rules on access to information.

¹²⁶ Case 179/88 *Handels-og Kontorfunktionærernes Forbund i Danmark acting for Birte Vibeke Hertz v Dansk Arbejdsgiverforening acting for Aldi Marked K/S* [1990] ECR I-3979 (pregnancy-related illness), Case C-400/95 *Handels- og Kontorfunktionærernes Forbund i Danmark acting for Helle Elisabeth Larsson v Dansk Handel & Service acting for Føtex Supermarked A/S* [1997] ECR I-2757 (pregnancy-related illness), Case C-66/96 *Handels-og Kontorfunktionærernes Forbund i Danmark acting for Berit Høj Pedersen v Fællesforeningen for Danmarks Brugsforeninger acting for Kvickly Skive et al* [1998] ECR I-7327 (pregnancy-related illness and other matters), Case C-109/2000 *TeleDanmark A/S v Marianne Brandt-Nielsen* [2001] ECR I-6993 (pregnant women on fixed-term contracts).

¹²⁷ U 2002, 2435.

¹²⁸ U 2005.2269.

ESTONIA – Anu Laas

1. Existing legislation and case law**1.1. Employment**

Regulations regarding employment and labour issues are set out in the Estonian Employment Contracts Act (ECA).¹²⁹ Work relations are also dealt with in the Law of Obligations Act (LOA),¹³⁰ the Individual Labour Dispute Resolution Act (ILDRA),¹³¹ and the Occupational Health and Safety Act (OHSA).¹³²

Estonia implemented a new ECA in 2009. Since 2009 several amendments have been made to the ECA and related national legislation due to the need to transpose EU directives. The ECA stipulates the general principle of equal treatment applicable in employment relationships. Article 3 of the ECA requires that employers should ensure the protection of employees against discrimination, follow the principle of equal treatment and promote equality in accordance with the Equal Treatment Act (ETA) and Gender Equality Act (GEA).¹³³ The GEA was adopted in 2004 and has seen several amendments in recent years. The ETA entered into force on 1 January 2009.

National legislation provides a general prohibition on pregnancy and maternity discrimination. All forms of discrimination, including harassment, are prohibited. Discrimination is regulated in the Equal Treatment Act (ETA) and Gender Equality Act (GEA). Article 3(1)3 of the GEA states that direct discrimination based on sex also means less favourable treatment of a person in connection with pregnancy, childbirth, parenting and performance of family obligations. This means, that the GEA applies not only to mothers, but also to fathers and adoptive parents with parental and family obligations. The GEA protects a woman from direct discrimination because she is breastfeeding or is suffering pregnancy-related health problems or illness.

The ETA refers directly to prohibition of discrimination on grounds of nationality (ethnic origin), race, colour, religion or other beliefs, age, disability or sexual orientation.¹³⁴ The ETA prohibits discrimination of other people with family obligations, specific social status and employees' representation duties not mentioned in the Act in relation to access to employment, education, training, health and welfare services, supply of public goods and services, as well as upon promotion and recruitment.

An employer may not terminate an employment contract due to the fact that an employee is pregnant or that the employee has the right to pregnancy or maternity leave. The Health Insurance Act (HIA) ensures insurance coverage for pregnant women whose pregnancy has been established by a physician.¹³⁵ Employers are obliged to provide pregnant employees with time off to undergo pre-natal medical examinations, which should take place at a time indicated by the physician's and should be counted as working time. For pregnant or breastfeeding women, the employer must ensure, if necessary, changes in working conditions, shortened workdays, suitable breaks, transfer to daytime work and changes in job duties corresponding to the state of health of the pregnant or breastfeeding employee. The employee should submit to the employer a certificate from a doctor or midwife indicating the restrictions on work due to her state of health and, where possible, proposals regarding duties and working conditions corresponding to her state of health.

The duration of maternity leave is 140 days, and the woman has the right to commence pregnancy and maternity leave up to 70 days before the estimated date of delivery. If the pregnancy leave is taken 30-70 days before the childbirth, 70 days will be paid. A pregnant woman may work until the end of her pregnancy, but for a leave shorter than 30 days she will

¹²⁹ Employment Contracts Act (ECA), RT I 2009, 5, 35.

¹³⁰ Law of Obligations Act (LOA), RT I 2001, 81, 487; 08.07.2011, 21.

¹³¹ Individual Labour Dispute Resolution Act (ILDRA), RT I 1996, 3, 57.

¹³² Occupational Health and Safety Act (OHSA), RT I 1999, 60, 616.

¹³³ Equal Treatment Act (ETA), RT I 2008, 56, 315; Gender Equality Act (GEA), RT I 2004, 27, 181.

¹³⁴ Article 1(1) ETA.

¹³⁵ Health Insurance Act, RT I 2002, 62, 377.

be paid only for a certain number of days, not for 70 days. If she has not used her right to the pregnancy leave, she loses her right to compensation. A father has the right to receive a total of ten working days of paternity leave during the two months before the estimated date of birth determined by a doctor or midwife and during the two months after the birth of the child.

Immediately before and after pregnancy and maternity leave or immediately after parental leave women have the right to demand annual holiday at a suitable time. Men have the same right immediately after parental leave or during the pregnancy and maternity leave of the mother of their child.

Estonia has progressive childcare leave and a mother or father has the right to childcare leave until his or her child reaches the age of three. An employee has the right to compensation for the period of childcare leave in accordance with the Parental Benefit Act (PBA), and to a childcare allowance in accordance with the State Family Benefits Act (SFBA).¹³⁶

Estonian law lacks any provisions regarding less favourable treatment due to a person's assertion of legal rights in line with equality legislation.

1.2. Social security and pension rights

The Act on Amendments to the Funded Pensions Act and the State Pension Insurance Act and Other Associated Acts was passed in June 2012 and the Act enters into force on 1 January 2013. Clauses 2 5) and 10) enter into force on 1 January 2015. The wider aim of the amendments is to support a birth-rate increase by implementing the parental pension. The Act provides for the creation of a supplementary funded pension contribution related to raising a child and the payment of a pension supplement on the basis of the provisions of the State Pension Insurance Act with the aim of compensating for the potential reduction of pension of the parent in the future as a result of raising a child. According to the Act, the State will pay 4 % of the national average remuneration subject to social taxes to the second-pillar pension of the parent to one parent of any child born on 1 January 2013 or later for raising the child, until the child reaches the age of three.

The State will also pay a pension supplement in the amount of the value of two years of pensionable service to one parent of any child born in the period of 1 January 1991 to 31 December 2012 with a view to ensuring solidarity between generations, and, as of 1 January 2015, an additional pension supplement in the amount of the value of one year of pensionable service to one parent of any child born before 1 January 2013.

In contrast, the law allows three years of job-protected childcare leave and the second half of this leave is not paid. A social contribution in this period is paid by the State on a minimum salary level and this is much less than one pensionable year. Two years of pensionable years do not compensate for the legally accepted childcare leave period for one parent.

1.3. Self-employment

Transposition of requirements of the new Self-Employment Directive took place in June 2012 and amendments to the Social Tax Act (STA) and other related acts entered into force in August 2012.¹³⁷ The Act ensures equal treatment of female and male self-employed workers and an opportunity for equal social protection of spouses participating in the activities of their business (Article 6¹). An opportunity for equal social protection is granted without an obligation to enter into a formal contract of employment and a self-employed worker is given the right to reduce his or her business income by the amount of social taxes paid for the spouse participating in the activities of the enterprise.

Self-employed workers should pay social taxes for her or his spouse assisting in their family business and the starting and ending of this 'assistance' equalled to work is documented by the tax authorities, where self-employed persons should submit their applications. Previously the only possibility to provide the spouse assisting in the family

¹³⁶ Parental Benefit Act (PBA), RT1 I 2003, 82, 549; State Family Benefits Act (SFBA), RT1 I 2001, 95, 587.

¹³⁷ Social Tax Act. RT I, 02.07.2012, 8.

business was to conclude a formal employment contract with her/him and to pay social security contributions for her/him.

1.4. Access to and the supply of goods and services

All pregnant women are entitled to health insurance from the 12th week of pregnancy. In addition, a pregnant woman is entitled to a dental care refund. A pregnant woman is entitled to healthcare without having to pay social taxes from the moment pregnancy is medically determined.

2. Gaps in national law

2.1. Employment

Termination of the employment contract

There are some hidden problems with the termination of employment contracts of pregnant employees or with the right to pregnancy and maternity leave and employees who perform important family obligations. The number of individual labour dispute cases following termination of employment contract of pregnant employees or of persons with a right to maternity leave and care obligations has declined in recent years.¹³⁸ This decline has not been analysed, but several reasons could be found: Firstly, the total number of individual labour dispute cases has declined. According to a statement of the Labour Inspectorate, the number of labour disputes declined in 2011 due to economic growth: last year even 24 % fewer applications were submitted to Labour Dispute Committees than the year before.¹³⁹ Secondly, the new version of the ECA provides weaker protection to this vulnerable group of employees compared with the older version of the ECA.¹⁴⁰ Termination of employment contract cannot be excluded and pregnant women or mothers might be ‘forced’ out of their employment. An employer is allowed to cancel employment contracts with pregnant women and mothers of minors upon cessation of the activities of the employer or declaration of the employer’s bankruptcy if the activities of the employer cease or upon termination of bankruptcy proceedings, without declaring bankruptcy, by abatement. The employer should be ready to argue the reasons of cancellation, and cancellation due to the employee’s pregnancy or employee’s family obligations is prohibited. Employers should participate in labour dispute cases and a court or labour dispute committee has the right to decide on cancellations of employment contracts. Thirdly, in employment contract termination procedures employees’ rights may not be violated and filing a labour dispute case is avoided. Fourthly, during the economic recession years employers optimised their number of employees and termination of employment contracts has taken place before.

Under Estonian law, members of management boards of organisations are excluded from the scope of the ECA and are not protected against dismissal. They can be dismissed from their positions without any grounds being specified. Whether they have the right to prior notice or severance pay depends solely on the service agreements concluded between them and the organisation concerned.

Remuneration

The Gender Equality and Equal Treatment Commissioner has investigated a specific discrimination case of AS G4S, the Estonian branch of a multinational company. It investigated whether the company had discriminated against an employee who wanted to continue her work after her childcare leave. The company wanted to keep her salary ‘frozen’ at the level that was paid some years before, when the employee had left for maternity and

¹³⁸ Statistical data from the Labour Inspectorate show that the number of individual labour dispute cases was 53 in 2008, 21 in 2009 and only 5 in 2011.

¹³⁹ E. Kivimaa *The number of labour disputes decreased due to economic success last year*, homepage of the Labour Inspectorate 2012: http://www.ti.ee/index.php?article_id=2071&page=1526&action=article&, accessed 19 August 2012.

¹⁴⁰ The Employment Contracts Act entered into force on 1 January 2009.

childcare leave. As salaries increased during these three years, the employee felt discriminated against on grounds of childcare leave and family obligations. Other employees in the same position were paid higher salaries. The employee submitted an application to the Gender Equality and Equal Treatment Commissioner for an opinion. The Commissioner asked the company to explain the case, but this explanation seemed unreasonable to the Commissioner, following which the Commissioner found discrimination and violation of the equal treatment principle.¹⁴¹

Childcare leave and working conditions

A mother or father has the right to childcare leave until his or her child reaches the age of three. Childcare leave may be used by one person at a time, despite the fact that there may be two or more children under three. However, both parents can use childcare leave several times a year. It is presumed that an employee notifies the employer of his/her intention to take childcare leave or interrupt childcare leave 14 calendar days in advance, unless parties have agreed otherwise. In contrast, it should also be taken into account that an employee with parental obligations has the right to childcare leave without pay of up to ten working days every calendar year, if the child is under 14 or, for a disabled child, under 18.

A mother or father of a disabled child has the right to childcare leave of one working day per month until the child reaches the age of 18, which is remunerated on the basis of the average wages, but the claim for childcare leave expires after the end of the calendar year in which the claim became collectible.

Since 2009 only a mother breastfeeding a child younger than 18 months can use breaks for feeding the child. Only breaks for breastfeeding are applicable (30 minutes every 3 hours). This is unequal treatment of fathers and step-parents, who might need to feed the baby.

Involvement of fathers

In addition to the job-protected childcare leave of three years, fathers have the right to a total of ten working days of paternity leave in the two months prior to the expected due date as determined by a doctor or midwife and the two months after the birth of the child. On average only one out of ten fathers use this unpaid paternity leave. The law has now been amended so that from 1 January 2013 these ten days will be paid leave.

In 2007 it was analysed why the majority of men do not use paternity leave.¹⁴² One of the reasons was found to be social pressure and support of men's main breadwinner's position. Men were not ready to accept a weaker economic position compared with their spouses. In 2007 a father, who wanted to stay on parental leave and leave his position of head of municipality for three years, received a vote of no confidence by the municipal council and this case received media attention for several months. These matters were also discussed in the *Riigikogu* sittings.¹⁴³ This case demonstrated public understanding of the incompatibility of father's and civil servant's roles. In this case, the father lost his job and he was not prepared to go to court. Avoiding going to court for employment relations may be caused by a lack of legal literacy, time-consuming procedures, poor case law, and low enthusiasm for fighting for one's own rights.

After the adoption of the ETA and amendments in Estonian equality legislation, cases such as those described above are things of the past.

¹⁴¹ Gender Equality and Equal Treatment Commissioner, Opinion No. 19 (in Estonian), 13 February 2012, www.svv.ee, accessed 24 March 2012.

¹⁴² L. Järviste (ed.) 'Isad ja lapsehoolduspuhkus Eestis (Fathers and childcare leave in Estonia)', *Sotsiaalministeeriumi toimetised* 9/2007, Tallinn, 2007, pp. 1-20, http://www.sm.ee/fileadmin/meedia/Dokumendid/V2ljaanded/Publikatsioonid/2007/9_2007_isad_ja_lapsehoolduspuhkus.pdf, accessed 16 October 2012.

¹⁴³ Shorthand report from the parliamentary debate held on 10 December 2007, <http://www.riigikogu.ee/?op=steno&stcommand=stenogramm&pkpkaua=1&date=1197291898&paevakord=1249#pk1249> (in Estonian), accessed 12 August 2012.

The number of fathers who use childcare leave has slowly increased. About 8 % of the parents who took childcare leave in 2009 were fathers. Marre Karu has studied parental leave and changes towards the dual earner/dual carer family model in Estonia.¹⁴⁴

Kutsar and Tarum have studied the current vision and resources for the development of inclusive national family policies and found that any vision is lacking and resources are scarce.¹⁴⁵ They analysed data from different sources and also parliamentary debates, finding that the role of fathers was not valued in these debates.

Payments for childbirth and parental benefits

In addition to universal child-support measures, local governments have the right to introduce local childcare and parental allowances. Local governments offer services and also make efforts to ensure that persons living in their territory register themselves as residents. On 8 March 2011, the Constitutional Review Chamber of the Supreme Court found that the arrangements for payment of childbirth allowance in Tallinn are constitutional. The application for a constitutional review was filed by the Chancellor of Justice on 28 October 2010, asking to review the Tallinn City Council regulation regarding procedures for payment of social benefits not depending on family income, which stipulates inter alia the conditions and procedure for receiving childbirth allowance. The judgment of the Supreme Court of Estonia stated: 'Although the local government has an obligation to consider the equal treatment requirement provided by the Article 12 of the Constitution, the local government has more freedom in decision making if support or services for needy persons are not at issue.'¹⁴⁶

The Constitutional Review Chamber and the general assembly of the Supreme Court analysed the procedure of the calculation of the amount of parental benefits regulated in Article 3 of the Parental Benefit Act and verified the conformity of the Act with the Constitution based on the Tallinn Administrative Court's judgment. The Chamber did not find any conflict between Articles 3(7) and 3(7¹) of the PBA and Article 12 of the Constitution.¹⁴⁷

Childcare leave may also be used by grandparents. The actual caregiver of a child is eligible for parental leave if the parents do not use any leave themselves. Where it concerns a non-parental caregiver, he or she is eligible for childcare benefit, but not parental benefit.

2.2. Self-employment

The Chancellor of Justice should ensure that laws and regulations are constitutional and in compliance with other laws. The Chancellor of Justice submits opinions about legal texts and draws attention to any gaps in legislation. The Chancellor also makes recommendations. In July 2012 the Chancellor of Justice made a recommendation to the Minister of Social Affairs and to the Minister of Finance about good governance for administering payments of social security contributions for self-employed persons, who take care of a child or children under the age of 3.¹⁴⁸ It concerns a problem with the implementation of Article 6(1)1 of the STA. Article 6(1)1 states that the State or legal persons in public law shall pay social taxes for the parent, guardian or caregiver residing in Estonia and raising a child under the age of 3 residing in Estonia with whom a written foster care contract has been concluded, or the person who uses parental leave instead of a parent and who is raising a child under the age of 3 in

¹⁴⁴ http://dspace.utlib.ee/dspace/bitstream/handle/10062/18103/karu_marre.pdf?sequence=1, accessed 13 August 2012.

¹⁴⁵ D. Kutsar & H. Tarum 'Eesti vanemahüvitis Euroopa Liidu tööhõive strateegilise eesmärgi taustal' ('Estonian parental benefit in the framework of the European employment strategy'), *Riigikogu Toimetised (RiTo)*, 25, 2011, <http://www.riigikogu.ee/rito/index.php?id=14435> (in Estonian), accessed 12 August 2012.

¹⁴⁶ Constitutional Judgment No. 3-4-1-11-10 by the Constitutional Review Chamber and the general assembly of the Supreme Court, <http://www.riigikohus.ee/?id=1270>, accessed 13 August 2012.

¹⁴⁷ Constitutional Judgment No. 33-4-1-23-11 by the Constitutional Review Chamber and the general assembly of the Supreme Court (in Estonian), <http://www.riigikohus.ee/?id=11&tekst=RK/3-4-1-23-11>, accessed 13 August 2012.

¹⁴⁸ Õiguskantsler (2012) 'Soovitus: sotsiaalmaksu tasumine alla 3-aastast last kasvatava vanema eest' ('Recommendation on social security contributions for self-employed persons who take care of a child under three'), 16 July 2012, <http://oiguskantsler.ee/et/seisukohad/seisukoht/soovitus-sotsiaalmaksu-tasumine-alla-3-aastast-last-kasvatava-vanema-ees> (in Estonian), accessed 14 August 2012.

Estonia. If the State makes social security contributions for self-employed persons, the procedure for the payment of social taxes should be harmonised with the tax calendar of self-employed persons. Sole proprietors are expected to make advance payments of social taxes, therefore the procedure for payments by the State should be changed and Article 9(4) should be reformulated. The Chancellor of Justice expects an answer from the Ministers before 12 September 2012.

2.3. Access to and the supply of goods and services

A medical referral from a family physician is not necessary to visit a gynaecologist. There is no in-patient fee for cases related to pregnancy and childbirth. There is a problem with waiting lists, which may be as long as four weeks or often several months. Therefore women are forced to choose medical services from the private sector, whereas there is no reimbursement for the costs paid to private doctors. However, sometimes some private doctors offer services according to the terms of their contractual agreements, if any, with the Health Insurance Fund.

3. Involvement of other parties

The Estonian Trade Union Confederation (EAKL) expressed a protest on behalf of weakly protected pregnant employees in 2011.¹⁴⁹ EAKL gives advice on legal matters and issues related to employment, wages and social security and also participates in solving labour disputes and arguments. The unionisation rate among Estonian employees is low and union offices have a lack of resources.

The Estonian Employers' Confederation represents the largest number of employers among local employers' organisation and covers all economic sectors of Estonia. The Confederation has issued the 'Employers' Manifesto 2011-2015', also including a vision regarding the labour market.¹⁵⁰ Employers see a need for the development of various forms of flexible work arrangements. They want to promote part-time work, tele-work and temporary agency work, which brings to the labour market the knowledge and skills of those people who for whatever reason cannot work in traditional forms of work or whom employers cannot hire full time. Employers think that the role of the labour dispute committee in administering justice as an extrajudicial body is problematic. It must be made possible to present an individual or collective labour dispute to an arbitration tribunal.

NGOs have carried out several projects on good and shared parenting and supporting practices of reconciliation of work and family.¹⁵¹ Many EU-funded projects have supported the promotion of corporate social responsibility and family-friendly policies.

4. Enforcement and effectiveness

4.1. General

Karu and Kasearu have argued that Estonia has taken slow steps towards the dual earner/dual carer model.¹⁵² It has been relatively successful in keeping women in the labour market. At the same time, childcare is still the responsibility of women and the participation of fathers in

¹⁴⁹ EAKL has prepared amendments to the ECA and related Acts for tripartite negotiations and has mentioned a need for more effective protection of pregnant workers in 'Policy Proposals for 2011-2015'.

¹⁵⁰ <http://www.tooandjad.ee/images/pdf/employers%20manifesto%202011-2015.pdf>, accessed 16 August 2012.

¹⁵¹ The Tartu Folk High School ran the project 'WHOLE – Work and Home in Our Life in Europe' (EQUAL) in 2005-2008; NGO Avitus' target groups include families with children and it has run several projects (more information available in Estonian), <http://www.avitus.ee/files/1%C3%A4biviidud%20projektid%20ja%20summad.pdf>, 10 October 2012; the Estonian Employers' Confederation and its partners ran an EQUAL project 'Choices and Balance' (<http://www.cb.ee/index.php?id=718>), which included a handbook on work-life balance ('Töö ja pere. Paindlik töökorraldus ja lastevanemate tööhõive'), http://www.cb.ee/raamat/too_sisu_low.pdf, accessed 10 October 2012.

¹⁵² M. Karu & K. Kasearu 'Slow Steps towards Dual Earner/Dual Carer Family Model: Why Fathers Do not Take Parental Leave', *Studies of Transition States and Societies*, 2011 pp. 24 - 38. <http://www.tlu.ee/stss/wp-content/uploads/2011/06/vol3-issue-1-karukasearu.pdf>, accessed 19 August 2012.

parental leave remains low despite the good preconditions created by the Nordic type of parental leave benefit scheme. The Estonian Social Insurance Board reports that fathers constituted only about 6 % of the parental leave benefit receivers in 2009 and 2010. Karu and Kasearu state that the dual carer/dual earner model supposes that both parties feel comfortable in fulfilling both roles. Women are closer to this ideal model than men: they are active in the labour market and at home.

4.2. Legal redress

Chapter 5 of the ETA covers the resolution of discrimination disputes. It stipulates that discrimination disputes should be resolved by a court or a labour dispute committee. Discrimination disputes shall be resolved by the Chancellor of Justice by way of conciliation procedure. A person whose rights are violated due to discrimination may demand compensation – a reasonable amount of money for non-material harm caused by the violation. The reasonable amount is specified by a court or a labour dispute committee, where the scope, duration and nature of the discrimination will be taken into account.

In 2011 the labour dispute committees of the Labour Inspectorate received nearly three thousand (2 909) applications and the majority of them (2 628 applications), were submitted by employees and included pecuniary claims. There were some claims in which employees were dissatisfied about discrimination by their employer on grounds of gender, religious or some other grounds. Employers submitted 281 applications of labour disputes in 2011. In most of these cases an employee had cancelled a contract, stating that it was due to the employer's failure to perform obligations. In such cases the employer must pay compensation in the amount of three months' average wages (Article 109(1) of the ECA).

If the employment relationship is terminated in court or by a labour dispute committee, the employer must pay the employee compensation in the amount of six months' average wages, if the employee is pregnant or has the right to pregnancy and maternity leave.

4.3. Access to information

Information about rights regarding pregnancy, maternity, adoption, parental and paternity leave is widely spread by government agencies, NGOs and media. There is a State Portal 'www.eesti.ee', where the State (public, private and third sector) offers its public services pursuant to the legislation valid in the Republic of Estonia. The portal administrator is the State Information Systems Development Centre and services of the portal are free of charge. There are about 600 Public Internet Access Points throughout Estonia, many of which are located in public libraries.

Information is provided in Estonian, Russian and English. The number of people with Estonian citizenship is increasing: according to population census it has increased to 84 %. One of the requirements to obtain Estonian citizenship is knowledge of the official language (Estonian). Citizens of foreign origin constitute 9 % and citizenship is not specified by 7 %.¹⁵³

Information in women's and family magazines is important for people who lack Internet access.¹⁵⁴ The Labour Inspectorate operates a free-of-charge hotline service (+3726406000, jurist@ti.ee).

¹⁵³ <http://estonia.eu/about-estonia/society/citizenship.html>, accessed 11 November 2012.

¹⁵⁴ According to Eurostat data from 2011, every fifth individual aged between 16 and 74 has never used the Internet in Estonia. An Estonian specificity is that Internet usage among women is higher than among men. 71 % of households has Internet access and 66 % has broadband in Estonia. The majority of individuals aged between 16 and 24 use the Internet regularly, http://epp.eurostat.ec.europa.eu/cache/ITY_OFFPUB/KS-SF-11-066/EN/KS-SF-11-066-EN.PDF, accessed 16 August 2012.

FINLAND – Kevät Nousiainen**1. Existing legislation and case law****1.1. Employment**

The Act on Equality between Women and Men (1986/609), Section 7 (which contains a general prohibition of gender discrimination and the definitions of discrimination) under Subsection 2 defines ‘treating someone differently for reasons of pregnancy or childbirth’ as direct discrimination. Justiciable prohibitions, which may incur compensation, are placed under further sections, of which Section 8 on discrimination in working life is one. Under Section 8(2) of the Act, the action of an employer shall be deemed to constitute prohibited discrimination if the employer ‘upon employing a person, selecting someone for a particular task or training, or deciding on the duration or continuation of an employment relationship or the pay or other terms of employment, acts in such a way that the person finds herself/himself in a less favourable position on the basis of pregnancy or childbirth or by some other gender-related reason’. Subsection 8(3) defines differential treatment on the basis of parenthood and family responsibilities as indirect discrimination.

Further, the Employment Contracts Act (2001/55) contains a prohibition of discrimination under Chapter 2, Section 2. Sex is not among the prohibited grounds, but discrimination on the basis of ‘family ties’ is listed under this Section. Thus, while sex discrimination per se is prohibited under the Act on Equality, maternity-related discrimination as a form of discrimination based on parenthood or family relations may also be considered under the Employment Contracts Act.

The provisions on family-based leaves are contained in Chapter 4 of the Employment Contracts Act, and they cover both private and public sector employment. Under Chapter 4, Section 1, employees are entitled to leave from work during maternity, special maternity, paternity and parental benefit periods referred to in the Sickness Insurance Act (2004/1224), as explained below.

At the end of family-based leave (maternity, paternity and parental leave), employees are entitled to return to their former duties. If this is not possible, they are to be offered equivalent work in accordance with their employment contract, or if that is not possible, other work in accordance with their employment contract. The provisions are placed under Chapter 4, Section 9 of the Employment Contracts Act.

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

According to Finnish commentaries on the Act on Equality, dismissal on the basis of pregnancy may be established without comparison with another employee.¹⁵⁵ The Employment Contracts Act contains further protection. The employer is not entitled to terminate the employment contract of an employee who is pregnant or on family leave on normal grounds of termination. Termination is possible, if the employer ceases all operations. If the employment contract of a pregnant employee or an employee on family leave is terminated by the employer, the termination shall be deemed to have taken place on the basis of the employee’s pregnancy or family leave, unless the employer can prove that there was some other reason, under Chapter 7, Section 9 of Employment Contract Act. Under Chapter 12, Section 1 of the said Act, the employer is liable for the loss suffered by the employee by intentional or negligent breach of obligations arising from the employment relation or the Act on Employment Contracts. Section 2 of the Chapter provides rules on compensation for unfounded termination of employment contract (3-24 months’ pay). An unfounded dismissal of a state employee may be considered void by an administrative court,

¹⁵⁵ K. Ahtela, N. Bruun, P. Koskinen & A. Nummijärvi *Tasa-arvo ja yhdenvertaisuus* Talentum Media Oy, Helsinki 2006 pp. 153-154.

and the employee reinstated in his or her post. While an employee may be dismissed during a trial period, the contract may not be terminated on discriminatory grounds (Employment Contracts Act, Chapter 1, Section 4(4)).

There is both case law and legal literature on whether a specific form of pay should be compensated for a person on maternity leave. The Labour Court did not consider it discriminatory that extra pay based on hourly wages was not included in the pay to a person on maternity leave, although such extras were paid for persons on sick leave.¹⁵⁶ The related decision is very unclear, as it includes no definition of what type of extras based on working hours are meant. The case concerned nurses' pay, which seems to have consisted of a basic salary and a part based on how many hours the nurse has worked. The Court decided that pay during maternity leave, based on collective agreement, meant just the basic salary. However, people on sick leave were paid these extras. In the said case, the Court referred to Cases C-411/96 *Boyle* and C-342/93 *Gillespie*. In another case, an employee on maternity leave was not considered to have a right to compensation for a religious holiday which falls on a weekday (Monday-Saturday), while an employee on sick leave was entitled to such leave.¹⁵⁷ Where pay increases were based on experience, the Labour Court considered that maternity and parental leave were to be calculated into the time that entitles employees to such experience bonus.¹⁵⁸ The collective agreement under consideration in that case did not classify time spent on maternity and parental leave as time entitling the employee to a pay increase while time spent in obligatory (male) military service entitled the employee to a pay increase. The agreement was in breach of the Act on Equality.

Many collective agreements grant the employee pay during at least part of maternity leave. The conditions of such agreements shall not be discriminatory. In 2006, the European Court of Justice decided the Finnish Case C-116/06 *Kiiski* concerning a collective agreement provision that prevented an employee from having a new paid maternity leave period after having been on 'home care leave'. The collective agreement contained requirements about the spacing of maternity leaves and informing the employer about leave periods as conditions of pay – the employee was allowed to change the timing of the home care leave only for unexpected and substantial reasons, such as illness or death in the family. Birth of a new baby was not considered as such a reason. The European Court of Justice considered, however, that the birth of a baby was comparable to the other grounds for changing the time periods of family leaves. Ms Kiiski was entitled to have a paid maternity leave in the middle of her family care leave.

The Equality Board considered in 2010 that the condition that an employee had to work a certain length of time between two periods of maternity leave that carry pay was discriminatory. The Equality Board stated that a person who does not fulfil this condition was in a situation comparable to that of a person who had worked the required length of time, and also with a person who had been on sick leave due to pregnancy-related sickness between leave periods. These persons were comparable because whether the condition was fulfilled or not is often accidental, and not planned by the employee in question. One can seldom prevent a premature birth or pregnancy-related sickness, and it is not always possible to premeditate or plan the beginning of a new pregnancy.¹⁵⁹

1.2. Social security and pension rights

As said, provisions on maternity, paternity and parental leave are included in the Employment Contracts Act, Chapter 4, but the right to benefit during those leaves as well as the length of the leave period are defined under the Sickness Insurance Act, Chapter 9.

Pay during the maternity leave is not obligatory, but is paid where stipulated in a collective agreement. In these cases the benefit under the Sickness Insurance Act is paid to the employer during the period that the employee receives pay during maternity leave. Maternity

¹⁵⁶ Labour Court, Case TT 2003:86.

¹⁵⁷ Labour Court, Case TT 2010:139.

¹⁵⁸ Labour Court, Case TT 1998:34.

¹⁵⁹ Opinion of the Equality Board 1/2010.

benefit is paid for 105 weekdays (Monday-Saturday) (Chapter 9, Section 3 of the Sickness Insurance Act). The level of benefits is defined in Chapter 11 of the Act. The maternity benefit is more favourable than the ordinary sickness benefit for the first 56 weekdays, as the mother receives 90 % of her work-based income during that period, instead of the 75 % paid as sickness benefit (Section 1(2)1 of Chapter 11). The benefit is capped at EUR 50 602, however, above which sum the mother receives 32.5 % of her former income. The higher level of benefit was introduced by amendment of the Sickness Insurance Act in 2010 (2010/1142). The aim of the amendment was not only to provide a higher level of income for mothers, but to reduce the losses of employers who employ many women, as collective agreements often stipulate pay for the first part of the maternity leave. As in these cases the employers receive the maternity benefit, they are compensated for the losses caused by maternity leaves.

If an employee is absent from work due to a pregnancy-related sickness before her maternity leave begins, the European Court of Justice has considered that she need not be paid her former pay, insofar as she is not paid less than an employee who is absent from work due to another sickness. In Finland, the rules that apply to employees on sick leave are also applied to a person who is on sick leave due to a pregnancy-related sickness.¹⁶⁰

Paternity leave is paid for a maximum of 18 weekdays (Monday – Saturday) during the maternity and parental leave periods, and the leave may be divided into a maximum of four separate periods (Sickness Insurance Act Chapter 9, Section 6). Paternity leave is therefore used when the mother is also on family-based leave, and is quite popular. On the other hand, few fathers use their parental leave, which is available only to one of the parents at a time.

The right to parental leave and benefit begins immediately after the maternity leave period (Chapter 9, Section 8). The leave period is 158 weekdays (Chapter 9, Section 10), and the leave is transferable between parents. The Section entitled ‘Father’s Month’ entitles a father who uses paid parental leave to a minimum of 12 weekdays (either immediately after the maternal leave period or later, as agreed between the parents), and after his parental leave period ends the father is entitled to another leave period of a maximum of 24 weekdays (Sickness Insurance Act 2004/1224, Chapter 9, Section 10 a). This means that by using part of the parental leave he earns an extension of the parental leave period. The ‘father’s month’ was introduced in 2006 in order to improve the gender balance in parenting. At first, the father got 12 weekdays extra after he had used a period of parental leave. Still, the father’s month which required that the father took independent care of the baby was not very popular. In 2009, it was estimated that circa 60 000 children were born in Finland, and that 49 000 fathers took paternity leave at the time when the mother was also on family-based leave. On the other hand, less than 3000 fathers used the ‘father’s month’ at the end of the parental leave, to take care of a baby after the mother had returned to work. In order to improve the gender balance, 12 more weekdays were added to the father’s month, provided that the father uses 12 days of parental leave at the end of the parental leave period.¹⁶¹ After the amendment of the Sickness Insurance Act in 2009, the father can now spend 36 weekdays (six weeks) with the baby.

One of the reasons that even after the amendment relatively few fathers currently use their right to the ‘father’s month’ may be the frequent use of the right to home care leave after the parental leave period. Home care leave is available until the child is three years old. The home care leave is not covered by an income-related benefit, merely by a flat-rate benefit, and it is seldom used by the father. If the mother intends to use the home care leave, it is inconvenient for her and her employer that she has to return to work during the ‘father’s month’, only to return back on leave after that.

Provisions on the right to parental leave regarding adoption are under Chapter 9, Section 12 of the Sickness Insurance Act. The parental leave period lasts 254 weekdays from the birth

¹⁶⁰ The question is discussed by Ahtela et al. 2006, pp. 133-139 and A. Nummijärvi *Palkkasyrjintä. Oikeudellinen tutkimus samapalkkaisuuslain säädännön sisällöstä ja toimivuudesta* Edita Publishing, Helsinki 2004 pp. 260-265.

¹⁶¹ See preparatory works to amendment of Sickness Insurance Act, Government Bill HE 131/2009.

of the child, but never less than 200 weekdays. The adoptive father is entitled to paternity leave and benefit.

The Finnish pension system was reformed in the early 2000s. Differences between the public and private pensions were reduced, although public (state and municipal) and private employment-related pensions remained governed by different pieces of legislation. All paid work must be insured under some statutory scheme. The old-age pension system now consists of the National Pensions resembling the mandatory public-pillar pensions of the European three-pillar system and occupational pensions are both statutory and mandatory. With the reform, the timeframe to be taken into account in building up pension benefits was made longer, from 18 to 68 years, and the pensionable age was made flexible, from 63 to 68 years.

With the reform, all income from employment (broadly taken, including entrepreneurial income) as well as from income received on unemployment, family-related or sick leave which is earnings-related is taken into account when calculating the benefit. Even unpaid periods caused by maternity, paternity and parental leave are included into the time taken into account, as well as periods spent on so-called home care leave, which may be taken after parental leave until the child is 3 years old. The home care leave benefit is a low flat-rate, not an income-related benefit, and therefore the impact on the carer's pension tends to remain small. Yet, where a person's 'stable level of income' drops by 20 % or more, the income is calculated at the level at which it was before the home care leave.

1.3. Self-employment

Maternity, paternity and parental leave benefits under Sickness Insurance Act are paid to all parents, regardless of their being gainfully employed or not. The level of the benefit varies on the basis of the income from employment or entrepreneurship, and persons without sufficient income are paid a minimum benefit. Persons under the Entrepreneurs' Pension Scheme or Agricultural Entrepreneurs' Pension Scheme receive a benefit, the level of which depends on their annual income level.

1.4. Access to and the supply of goods and services

Finland chose to allow the use of gender as an actuarial factor in consumer insurances when Directive 2004/113/EC was implemented, and also allowed the use of gender in optional insurances bought by the employer for the employee. The amendment made necessary by Case *Test-Achats* C-236/09 has not yet been carried through. A Government Bill was presented to Parliament in May 2012¹⁶² and is at present being considered by Parliament Standing Committees.

The amendment is meant to fulfil minimum requirements of EU law. It would disallow the use of gender as an actuarial factor in consumer insurances, but continue to allow them in insurances taken out by an employer for an employee. Thus, gender shall not be an actuarial factor in life, risk and pension insurances offered to consumers. Obligatory pension schemes in both the public and the private sector are based on legislation which is gender neutral. Voluntary pension schemes entered into by the employer for an individual employee have been relatively rare. In these insurances, the use of gender as an actuarial factor is to be allowed also in the future.

2. Gaps in national law

2.1. Employment

Fixed-term employment contracts cause problems for women at child-bearing age and may be an incentive to discrimination, when it comes to access to employment, and especially because Finnish employers very often use 'chains' of fixed-term contracts in branches where many women work, such as teaching, childcare and nursing. Traditionally Finnish legal practice tended to consider that an employer is justified in not employing a pregnant person especially for short periods, or when it is important that the same person does the work from

¹⁶² Government Bill 55/2012 vp.

beginning to end, or when the job is not expected to continue. Such opinions were cited by the Committee that prepared a reform of equality law ten years ago.¹⁶³ It has been pointed out in legal literature that as pregnancy discrimination is a form of direct discrimination, it cannot be justified.¹⁶⁴ Still, in practice it seems to be difficult to prevent pregnancy discrimination in fixed-term work.

It would seem that the Finnish labour market is structured in a manner that relegates women (who strongly ‘overachieve’ in childcare) to the public sector, and men to the private sector jobs. The public sector is thus made responsible for managing pregnancy and childcare related problems.

2.2. Self-employment

The most problematic issue for female entrepreneurs is that so far there is no organized system of stand-in services required during the maternity and parental leave and other family-related leave periods. Many female entrepreneurs try to operate from their home, and thus combine childcare with entrepreneurship, but for many of them, family-related leave will threaten the continuity of the enterprise. In these cases, having family leave related benefit is not enough to guarantee the future income for the self-employed. The organization for women entrepreneurs has propagated a stand-in service similar to the one available for agricultural entrepreneurs, for whom there is a system that provides a stand-in for a parent of a sick child and for the period that maternity, paternity and parental leave benefits are paid (Act on Stand-in Services for Entrepreneurs 1996/1231, Sections 7 b and 7 c).

2.3. Access to and the supply of goods and services

It is disappointing that the proposed amendment required by *Test-Achats* would even remove official supervision concerning optional employer-paid insurances. The Equality Ombudsman who supervises the Act on Equality has no competence concerning insurances that use gender as an actuarial factor, as the provisions on supervision are presently placed in the Insurance Companies Act (1062/1979) and other pieces of insurance legislation. These are supervised by the Financial Supervisory Authority. As the use of gender as a factor is to be prohibited, the insurance companies would no longer be obligated to present information on risk assessment to the Financial Supervisory Authority, even concerning the employer-paid insurance policies that may still use gender as a factor. The Equality Ombudsman has given an opinion on the Bill and criticized the amendment on this issue.¹⁶⁵

It seems that different airlines operating in Finland have somewhat different policies concerning pregnancy. According to a medical article published in 2010, most companies allow pregnant passengers on flight until the 36th week of pregnancy, but usually after week 28 they require a medical testimony that the pregnancy has been normal.¹⁶⁶ At present, airline webpages confirm that the situation has not changed. For example, Finnair allows pregnant women on flights until the end of week 36, referring to an IATA recommendation as the basis of the practice. However, shorter domestic and Scandinavian flights are allowed until the end of week 38. After week 28, Finnair requires a specific form signed by a doctor that the pregnancy has been normal.¹⁶⁷ Flybe does not recommend flying after week 28, but allows it until week 34.¹⁶⁸ There has been no public discussion about these conditions, or their possibly discriminatory nature.

¹⁶³ Committee Report of the Committee for Reform of the Act on Equality, KM 2002:9, p. 84.

¹⁶⁴ O. Alarotu ‘Perheen ja pätäkätyn yhdistäminen: Raskaussyrjinnän kiellosta määräaikaissa palvelussuhteissa’, *Oikeus* 32:4 (2003) pp. 376-396 and O. Anttila ‘Siunatussa tilassa? Raskaussyrjinnän kiello tasa-arvolain ja Euroopan unionin tuomioistuimen oikeuskäytännössä’ in: J. Kantola, K. Nousiainen & M. Saari (eds) *Tasa-arvo toisin silminä* Gaudeamus, Helsinki (to be published 2012).

¹⁶⁵ Equality Ombudsman’s Opinion, Dnro TAS/186/2012.

¹⁶⁶ V. Stefanovic, H. Siikamäki & A. Kantola ‘Raskaus ja matkustaminen’ *Lääketieteellinen aikakauskirja Duodecim* 126(4) (2010) pp. 451-458.

¹⁶⁷ <http://www.finnair.com/FI/FI/information-services/before-the-flight/special-services-health/pregnant-women-newborn-children>, accessed 16 August 2012.

¹⁶⁸ <http://fi.flybe.com/assistance/pregnant.htm>, accessed 3 October 2012.

I have not found examples of pregnancy discrimination in the access to spas, saunas or gyms. The public maternity care offices, discussed below, give advice and recommendations as to various activities on the basis of medical evidence. For example, pregnant women with low blood pressure are recommended not to visit a sauna alone, as high temperatures may cause dizziness. I believe that pregnant women limit their activities more on the basis of such semi-official recommendations than due to limitations set by service providers.

Provision of medical care for pregnant women and new mothers is almost exclusively an issue of public services. Municipal maternity and childcare offices (*äitiysneuvola*) monitor the health of the mother and the foetus/child. Under Regulation 388/2011, the municipalities shall offer both expecting parents a comprehensive health check at least once during the pregnancy. The health screening and checks by these municipal offices are not obligatory, but they are free, and encouraged by binding certain benefits to having undergone a minimum number of checks. Municipalities have had the obligation to provide maternity services since 1949. Due to the long tradition and popularity of the municipal service, private services are not very well developed and there is little information available about their practices. Because deliveries are also highly concentrated in public-sector hospitals, the discussion on parents' (mothers') choices of methods of delivery has been strongly connected to the debate on policies of centralizing the hospital network, motivated by economic reasons. Especially the closing down of a smaller delivery hospital in Tammisaari (Ekenäs) that concentrated on 'soft' deliveries was much criticized, as the public facility attracted families from a wider area in southern Finland. Because of the great distances in the eastern and northern parts of the country, the choice of delivery method is very limited for families living in these regions. Most mothers just worry about getting to the nearest delivery hospital in time and avoid giving birth in a taxi.

Traveller's insurances sold in Finland usually cover such pregnancy-related complications that a medical practitioner considers as sickness. The Equality Ombudsman does not supervise insurance conditions, as supervision of the insurance business is in the hands of the Financial Supervisory Authority, which also supervises banking, investment and the stock exchange. Gender discrimination is hardly the focus of its activities. As long as gender is used as an actuarial factor, it is difficult to distinguish pregnancy-related and other gender-related terms in the policies.

No cases of discriminatory practices in the access to bank loans or other similar services have come to my knowledge.

2.4. Additional information

Mapping problems related to pregnancy-based discrimination is made difficult by the fact that they may be hidden behind neutral terminology, if the cases are handled as violations of rights under the Employment Contract Act or occupational health issues. It may not appear in the title of the case that pregnancy was a major issue in such a case. The Equality Ombudsman has noted that pregnancy discrimination is not always recognized as such.¹⁶⁹ The Act on Equality and the Employment Contract Act may both be referred to in cases concerning dismissal especially, but it may also happen that a case is built on only one of these Acts. All cases of illegal dismissal can be traced in the materials gathered for court statistics, but in order to trace what the cause of illegal dismissal was, one has to have access to the court materials, which is very time consuming. Consequently, there is no reliable empirical study on the issue. One reason why the Employment Contracts Act, rather than the Act on Equality, would be relied on is that trade union lawyers are more familiar with the former. It has been pointed out, however, that pregnant women may not have the strength to take a case of illegal dismissal based on pregnancy to court, even when the case has come to the knowledge of the trade unions.¹⁷⁰

¹⁶⁹ P. Romanov '*Raskauden ja vanhemmuuden perusteella syrjintään yhä*' in: *Tasa-arvo* 3 (2003) p. 17.

¹⁷⁰ L. Kostianen (Finnish Confederation of Professionals), unpublished lecture at the University of Helsinki, 14 February 2002.

3. Involvement of other parties

The Equality Ombudsman is entitled to assist a victim of discrimination in court, but may not take a case to court on his/her own initiative. The Ombudsman and the other equality body that supervises the Act on Equality, the Equality Board, are not legally entitled to conciliate parties in a discrimination case. Yet, the Equality Ombudsman typically advises the parties, and at this stage also tries to find a solution that is acceptable to both sides. In practice, the Ombudsman has never assisted a victim in court.

Labour Unions often assist their members legally, but the activity varies between unions. Labour lawyers tend to be more familiar with the Employment Contracts Act and collective agreement conditions than with the Act on Equality, which may have an impact on which piece of legislation is preferred if a case is taken to court. Occupational safety officials do not act as representatives of the alleged victim of discrimination. Their task is of the ‘umpire’ type, and they are expected to remain neutral with respect to both parties (employer and employee). Their preferred mode of dealing with cases of discrimination seems to be to refer to the Criminal Code and inform public prosecutors.

Civil-society actors have very little involvement with discrimination cases.

4. Enforcement and effectiveness

4.1. General

Cases of suspected pregnancy and family leave related discrimination are very common in the case load of the Equality Ombudsman. They form the third largest group of cases after cases concerning access to work and pay discrimination.¹⁷¹ Pregnancy is a frequently occurring cause for cases of gender discrimination in courts. It is difficult to assess the number of pregnancy or family leave related cases altogether, as these cases may be handled either under the Act on Equality or under the Employment Contract Act, or possibly both. Occupational safety officials have the competence to deal with certain types of discrimination in working life. These officials have local representatives and have better access to workplaces and good local contacts with employees through labour union representatives. The occupational safety officials often rely on Criminal Code provisions regarding discrimination at work. The bonus here is that less activity is required by the victim of discrimination, as the public prosecutor takes over the case. On the other hand, the cases covered by the Criminal Code are cruder and the rules of evidence less favourable to the victim than those under the Act on Equality. The most frequent issue concerning work discrimination under the Criminal Code is pregnancy discrimination.¹⁷²

4.2. Legal redress

As noted above, the Equality Ombudsman is entitled to assist a person in a case of gender discrimination, but has not done so in practice. The lack of resources is usually given as motivation for this reticence. The Ombudsman concentrates on giving advice and opinions, which may help the victim to decide whether to proceed to court. There are no specific rules on legal assistance connected to discrimination cases. Legal aid may be available under general rules, depending on the economic situation of the victim. Many households have home insurance which covers legal services.

Studies made on court costs in general show that the risk of cost is a real obstacle, especially for persons in the middle income bracket, who are not entitled to free legal aid, but also find it difficult to pay costs from their private funds. The cost of civil proceedings seems to have risen since a procedural reform in the 1990s,¹⁷³ but as the E-Just study carried out in

¹⁷¹ *Tasa-arvovaltuutetun vuosikertomus* 2009, p. 17.

¹⁷² Opinion of the Equality Ombudsman Dnro TAS/84/2010.

¹⁷³ K. Ervasti *Oikeudenkäyntikulut uudessa alioikeusmenettelyssä Oikeuspoliittinen tutkimuslaitos*, Helsinki 1993; K. Ervasti *Oikeudenkäyntikulut pääkäsitteeseen edenneissä riita-asioissa Oikeuspoliittinen tutkimuslaitos*, Helsinki 1997.

2007 showed, there is little research on court costs in Finland.¹⁷⁴ A recent study on lawyers' clients showed that they were on the whole satisfied with the service received, but less satisfied with the cost of the service. Only 8 % of the clients received wholly or partly free legal aid, and 16 % had their costs covered from insurance. The majority (76 %) paid the costs themselves. Fewer women participated in the enquiry, but no differences were discovered between men and women.¹⁷⁵ Persons entitled to free legal aid were targeted in a study carried out by the Research Institute of Legal Policy in 2009. Half of these persons held that they had adequate access to legal services. They did not see the cost risk as an obstacle to access to justice. There were no significant differences between the sexes in these respects, but men more often than women thought that the law is not on their side, but protects the wealthy.¹⁷⁶ On the whole, people in Finland trust courts to a greater extent than in any other EU country, save Denmark.¹⁷⁷ However, special measures aiming to improve access to justice are few in the Finnish procedural system – e.g. group (class) action is not available in discrimination cases.

There is no special study on redress concerning pregnancy-related cases. When the Act on Employment Contracts was amended in 2001, the Equality Ombudsman carried out a gender assessment of the Government Bill. The provisions on fixed-term work were considered problematic. According to the assessment study on the Act on Employment Contracts 2001 carried out in 2004, based on expert information, the provisions on fixed-term work were viewed very differently by labour union lawyers, who almost uniformly held that the provisions were unclear and that the rule on 'chaining' fixed-term work should have been made stricter, and employer union lawyers who were of the opposite opinion.¹⁷⁸ The latter assessment did not discuss the gender impacts of the Act, or refer to problems connected with pregnant workers or the fact that women at child-bearing age work under fixed-term contracts more often than other persons.

4.3. Access to information

Information on gender equality and discrimination is disseminated by the Equality Ombud's website¹⁷⁹ and a special website on equality, *Minna-portaali*.¹⁸⁰ Surprisingly, neither of these sites offers information on pregnancy discrimination.

FRANCE – Sylvaine Laulom

1. Existing legislation and case law

1.1. Employment

In employment relationships, discrimination based on pregnancy is specifically prohibited in France. Article L 1132-1 of the Labour Code which prohibits various types of discrimination, including gender discrimination, specifically forbids discrimination based on pregnancy. Article L. 1225-1 also states that employers cannot take pregnancy into consideration in the employment relationship. Pregnant women are not obliged to announce their pregnancy during a hiring process.

The period of maternity leave is six weeks before the presumed date of confinement and ten weeks after confinement. These provisions also apply to civil servants. It is possible to obtain from a doctor an authorization for two supplementary weeks before giving birth in case

¹⁷⁴ https://e-justice.europa.eu/content_costs_of_proceedings-37-fi.do, accessed 16 August 2012.

¹⁷⁵ M. Lasola 'Asianaajopalvelut asiakkaiden näkökulmasta' in: M. Lasola (ed.) *Oikeusolot 2009*. Research Institute of Legal Policy, Helsinki 2009 pp. 37-42.

¹⁷⁶ M. Lasola 'Oikeusjärjestyksen laatu julkisen oikeusavun asiakkaiden näkökulmasta' in: M. Lasola (ed.) *Oikeusolot 2009* Research Institute of Legal Policy, Helsinki 2009 pp. 27-36.

¹⁷⁷ Eurobarometer 69. Public Opinion in the European Union.

¹⁷⁸ M. Kairinen et al. *Työsopimuslain toimivuusarviointi Työministeriö*, Helsinki 2004 pp. 32-34.

¹⁷⁹ <http://www.stm.fi/tasa-arvo/lainsaadanto>, accessed 10 August 2012.

¹⁸⁰ <http://www.minna.fi/web/guest>, accessed 10 August 2012.

of complications during pregnancy and/or four additional weeks after birth in case of complications during the birth. During her maternity leave, the worker is entitled to maternity benefits on the condition that she has been registered under the social security system for at least ten months on the presumed date of confinement. Otherwise some other specific benefits can be requested. The amount of the maternity benefit is calculated on the basis of the average salary received over the last three months. However, many collective agreements provide that the worker receives full pay during maternity leave.

Dismissal is prohibited from the beginning of the pregnancy until four weeks after the end of the maternity leave, even if the employer was not notified of the pregnancy, except in the case of a serious fault by the worker or if the dismissal is objectively necessary for reasons not linked to pregnancy, confinement or adoption. The *Cour de cassation* has allowed a right of reinstatement when this rule is infringed.¹⁸¹ During the whole period of suspension of the contract of employment of the maternity leave dismissal is not possible even for reasons not connected with the maternity leave. This specific protection does not apply to the trial period. However, during the trial period, the prohibition of direct discrimination based on pregnancy applies (art. L 1132_1 of the Labour Code) and the dismissal of a worker, during the trial period, on ground of pregnancy will be considered as discriminatory and will be null and void. The *Cour de Cassation*, in the line of the ECJ decision in *Paquay*,¹⁸² states that during the maternity leave it is also forbidden to take preparatory measures for the replacement of the woman on maternity leave.¹⁸³

The same rules apply for adoption leave.

At the end of her maternity leave, the worker will be reinstated in her previous job or given similar work.¹⁸⁴ The wages must be increased after the maternity leave in order to follow any general increases received by individual co-workers of the same category during the period of the employee's leave. In general, the worker is also entitled to all advantages having occurred during her leave that she would have been entitled to if she had not been on maternity leave. She is entitled to normal paid leave and to the normal rights to vocational training as if she had not been absent.

Since the Second World War, employed fathers have enjoyed 3 days of paid leave for the birth of their child. These 3 days are fully paid by the employer. In 2002, this leave was extended by 11 days to be taken within 4 months of the birth of the child (18 in case of multiple births) with the guarantee that he will be reinstated in his previous work after returning from leave, just like the mother (L. 1225-35 and L.1225-36 of the Labour Code). It is for the Social Security Department to pay a daily allowance for the duration of the paternity leave. The amount of the paternity leave is calculated on the basis of an average salary with a maximum of EUR 80.04 per day in 2012.

For one year after the birth, women who are breastfeeding can use one hour a day during working hours (Article L. 1225-30 of the Labour Code). The Labour Code does not require this hour to be paid. Some collective agreements provide that this break during working hours should be fully paid by the employer. This break is dedicated to breastfeeding.

Parental leave is provided for in Articles L. 1225-47 et seq. of the Labour Code and L.161-9 of the Social Security Code. According to the Labour Code and to civil servant statutes, any worker, irrespective of the size of the enterprise, has an individual right to parental leave in case of the birth or adoption of a child. Parental leave may be taken for a maximum of three years if the employee has been working in the enterprise for at least one year before the birth or adoption of the child. Parental leave cannot be refused on any grounds. The period of parental leave is initially one year, and can be renewed twice until the child is three years old. In case of adoption, parental leave can also last a maximum of three years after the child's arrival. Parental leave can be granted on a full-time or part-time basis, although part-time leave must allow for at least 16 working hours per week. Both parents are

¹⁸¹ Cass. Soc. 30 April 2003, Bull. No. 152.

¹⁸² ECJ, 11 October 2007, C-460/06.

¹⁸³ Cass. Soc. 15 September 2010, n° 08-43299.

¹⁸⁴ Cass. Soc. 3 February 2010, n° 08-40.338.

entitled to parental leave and they can even take the leave simultaneously. This is, however, unlikely to happen as parental leave in France is unpaid even if some compensatory incomes are provided by the law and paid by Social Security. During parental leave, the employment contract is suspended without any special protection against dismissal. However, the employer cannot dismiss a worker because he/she is on parental leave. After parental leave, the worker has the right to return to the same job or, if this is not possible, to an equivalent or similar job, where the same advantages as before apply. She also has the right to training in case of a change in the techniques or methods of work.

French legislation does not specifically refer to victimization in relation to pregnancy, maternity, parental or paternity rights. However, Article L.1132-3 of the Labour Code which refers to victimization applies to every discrimination prohibited by Article L. 1132-1 which includes pregnancy.

The rights of women are the same in the public and the private sector and they do not depend on the size of the company. However, generally the protection of workers is better in the public sector. For example, more women use parental leave in the public sector, maybe because they fear less for their jobs than in the private sector. In large companies, with trade unions and negotiation platforms, women's rights can also be more protected. Companies with trade unions are obliged to negotiate on gender equality. More and more agreements are concluded on this topic and can include some provisions on pregnancy and maternity leave, e.g. to help women get back to their jobs after a period of leave. Their situation could then be better than in small companies.

1.2. Social security and pension rights

In France, the duration of maternity leave is 16 weeks for the first two children and 26 weeks from the third child. Maternity leave is treated as pensionable service. With the adoption of decree n°2011-408, of 15 April 2011, maternity leave is now also included in calculations for pension allocations. Now, the daily stipend a mother receives while on maternity leave is to be counted as part of her salary and thus pension contributions.

Parental leave and paternity leave are also treated as pensionable service (both in state pensions and in occupational pensions).

Traditionally, France has had specific rights for mothers in occupational old-age pension schemes. The *Griesmar* case¹⁸⁵ challenged these rights for public servants but some rights are still granted in the general pension scheme. Under this scheme, women are granted contribution credits (4 trimesters for each child) to increase the contribution period. Some other benefits are granted to the parents (mother and father) who have contributed to raising children.

1.3. Self-employment

Self-employed women have a right to a lump-sum payment for resting, which aims at compensating the decrease of their activity. The first half of this allowance is paid at the end of the 7th month of the pregnancy and the second half after the birth. Its amount for 2012 is EUR 3 031. Second, self-employed women have a right to a daily maternity benefit for a period of 44 days, a period which can be extended to twice 15 days. The maximum period for this benefit is therefore 74 days, which is less than the 14 weeks provided by Directive 2010/41/EU. The amount of this benefit for 2012 is EUR 2 192.08 for 44 days, EUR 2 939.38 for 59 days and EUR 3 686.68 for 74 days. In case of adoption, the benefit is due but it is lower. In case of pregnancy-related sickness, another benefit is due for a 30-day period of interruption of work of EUR 1 494.60.

Specific rules can apply to various categories of self-employed workers. For example, the same rules apply to agricultural workers under a specific regime. Another example are solicitors and barristers. Since 2012, associated lawyers have a right to a maternity leave of 16 weeks (against 12 before). The extension of this period is a result of Directive 2010/41/EU.

Fathers also have a right to a paternity leave of 11 days.

¹⁸⁵ ECJ, *Griesmar* C-366/99.

1.4. Access to and the supply of goods and services

Directive 2004/113/EC has been implemented by two Acts, both of which intended to implement various Directives, including the EC Directives on discrimination. The first Act of December 2007 copied Article 5 of the Directive. The 2008 Act also copied the scope and most of the exceptions in Directive 2004/113/EC. It provides a general prohibition of direct or indirect discrimination based on sex in the access to and the supply of goods and services. The Act has also adopted the exception by using almost the same terms as the Directive.

There is no specific definition for pregnancy and maternity discrimination in relation to access to and supply of goods and services. There is no specific protection for women from discrimination related to breastfeeding. In France, there is no general debate regarding sex-segregated services in general. There has been no interest in the implementation of the Directive in French law. As a consequence, it is difficult to know if women in general, and pregnant women and women having recently given birth in particular, know their rights. Although legislation seems clear enough, it is not very well known. For example, the Act does not codify the provisions related to the goods and services field. The 2008 Act does not exclude, as the 2004/113/EC Directive does, the non-discrimination principle for the content of media or advertising. Concerning public or private education, the Act merely states that the non-discrimination principle does not prohibit the organisation of non-mixed schools.

2. Gaps in national law

2.1. Employment

It is difficult to say whether there are any gaps in French legislation. The French legal framework on gender equality is extensive and various rights are granted to pregnant women and women on maternity leave. The Labour Code explicitly provides that women can hide the fact that they are pregnant during recruitment procedures. During the pregnancy, the employer is also obliged to adapt their working conditions. Dismissals are prohibited. However, it is obvious that women are still suffering of discrimination because of their pregnancy. For example, the last annual report of the French Protection of Rights Body states that very often after a maternity or a parental leave the professional situation of women deteriorates, and women sometimes even suffer harassment or dismissal.¹⁸⁶ According to an opinion poll held for the Halde in 2009, 46 % of people still think that maternity and pregnancy are a problem for women in their career.¹⁸⁷

From 2008 to 2010, the number of claims based on pregnancy discrimination brought before the Halde rose by 50 %. 126 claims were based on pregnancy in 2008, 259 in 2009 and 618 in 2010. In 2011 there was a reduction of the number of claims (388) but this year was characterised by a general reduction of the number of claims brought before the French Protection of Rights Body. This reduction is certainly due to the replacement of the Halde by the Protection of Rights Body. This decrease could be explained by the impact on the general public of the disappearance of the Halde and the absence of identification of the Defender of Rights as being competent in matters of discrimination. Indeed, claims based on pregnancy still represent 4.7 % of the total amount of claims in 2011, against 4.5 % in 2010. These figures clearly show that pregnancy- and maternity-related discrimination is still important for women. The important rise of claims based on pregnancy had been explained by the Halde by a better knowledge and awareness of their rights by women and also by the effect of a communication and information campaign that the Halde held in 2009. Some cases also received extensive attention in the media, contributing to better awareness among women.

Some case law also shows the still existing difficulties for women to conciliate work and family life. At the end of their pregnancy leave, workers have the right to return to the same job or to an equivalent or similar job. In a particular case,¹⁸⁸ a worker was working as a

¹⁸⁶ *Rapport annuel 2011 du défenseur des droits*, <http://www.defenseurdesdroits.fr/documentation>, accessed 16 July 2012.

¹⁸⁷ *Femmes, Carrières et discriminations*, Halde, mars 2009, http://halde.defenseurdesdroits.fr/IMG/pdf/DP_Femmes_Mars_2009-2-2.pdf.

¹⁸⁸ Cass. Soc. 3 février 2010, n°08-40.338.

teacher with an assistant. After her maternity leave, the director of the school wrote to her to inform her that she would be working in a class with another teacher. She refused to continue working under these conditions. The *Cour de cassation* considers in this case that the employer violated his/her obligation to offer the worker the same job or a similar job. The new job offered was different from the previous one as she lost part of the management of the class. The breach of the contract should then be analysed as a dismissal without a serious and genuine reason which gives rise to a compensation. The case is a good example of the control by the courts on the modifications of jobs after maternity leave. In another case,¹⁸⁹ a woman, who was a financial advisor at a bank, was on maternity leave and parental leave for 11 years. When she returned to her job, her employer considered that she had been out for such a long period that a period of training was necessary. The woman refused as she considered that the job and the training offered was not the same as the one she had before. For the *Cour de cassation*, the training was not adapted to her previous job. The job proposed was not similar and was indeed less qualified. Here again, if the case shows control by the courts, it also shows how difficult it could be for women to have their rights respected after a parental leave.

Some gaps may also exist because of specific rules for particular situations. A good example is the situation of professors with regard to their maternity leave. The right to maternity leave for female teachers who are employed by the State is defined by the general Statute establishing statutory provisions relating to state civil servants (*Loi n°84-16 du 11 janvier 1984 modifiée, art. 34*). When maternity leave coincides with the general period of annual leave, civil servants can take their annual leave. However, the situation is different for teachers when maternity leave overlaps with the summer holidays, even if there is no specific rule applying to this situation. The administration considers that the annual leave for teachers does not coincide with the summer holidays. Taking annual leave is not accepted and teachers do not have the right to take annual leave during school term if part of their summer holidays is taken up by maternity leave. The administration considers that they already take this annual leave during the other holidays (Christmas, February, Easter). A decision by an administrative tribunal has explicitly rejected this (TA Caen, 19 May 2006, n°0501566). In the relevant case, a teacher had taken maternity leave during the summer holidays and asked to take her annual leave after her maternity leave, thus during school term. The tribunal rejected her claim. For the tribunal, the school holidays are outside the scope of the general Statute of 1984. The particular necessities of this public service (education) determine that teachers cannot take their annual leave outside school holidays. However, in a recent decision of the administrative tribunal of Besançon,¹⁹⁰ another position was adopted. Here, again, the case was about a teacher who had taken maternity leave during the summer holidays and asked to take her annual leave after her maternity leave, during school term. The administration rejected her demand. However, referring to European Directive 2003/88/EC and its Article 7, the administrative tribunal accepted her claim and decided that she had a right to postpone her annual leave until after her maternity leave. For teachers who are employed by the State, prior to this decision, French legislation was not in conformity with the case law of the ECJ in Case C-342-01, which states that a worker must be able to take her annual leave outside her maternity leave. This decision, directly applying European Directive 2003/88/EC, definitely improves the situation of female teachers but it is not sure that public administration have stopped applying the previous rule and a claim may need to be made for teachers to be able to take their annual leave outside their maternity leave.

Concerning the involvement of fathers, France has a paternity leave of 14 days (3 days plus 11 days). This leave is increasingly often used by fathers. However, according to a report published in 2005,¹⁹¹ only two out of three fathers used the 14 days. It is mostly executives and some private sector employees who are still hesitant to use this right (because of difficulty in taking time off and also because of the wages lost over the period). In order to

¹⁸⁹ Cass. Soc. 11 March 2009, n° 07-41821.

¹⁹⁰ Administrative Tribunal of Besançon, 24 March 2011, n°101222, AJDA juillet 2011, p. 1389.

¹⁹¹ DREES, *Le congé paternité*, novembre 2005, <http://www.drees.sante.gouv.fr/IMG/pdf/er442.pdf>, accessed 22 October 2012.

make it more attractive for fathers it will be necessary to increase the benefit. A proposal was recently made by the head of the Medef, the main employers' organization, Laurence Parisot, to make the paternity leave mandatory.

A longer leave could also increase the involvement of fathers. Parental leave is mainly taken by women and this could have negative consequences on the position of women on the labour market. One of the gaps in French legislation is that there is no incentive to get fathers to share the parental leave. The same can be said for part-time work.

2.2. Self-employment

The main problem for self-employed women is the fact that the benefits are not very high and only paid during a short period. Therefore, many self-employed women do not interrupt their activities for pregnancy- or maternity-related reasons or do so only for a very short period.

2.3. Access to and the supply of goods and services

In France, there has been very little debate regarding sex-segregated services in general and regarding the implementation of the Directive. No example of potentially discriminatory practices toward pregnant women has been noticed. The French airline, Air France, allows pregnant women to fly. There is no restriction in health and safety access. No case about restricted access to services regarding pregnant women has been noted.

2.4. Additional information

There is no additional information to report.

3. Involvement of other parties

If NGOs and civil organisations can play a role, the two main actors, in shaping the key issues related to pregnancy and/or maternity leave, are the national equality body (first the Halde and now the Protection of Rights Body) and the social partners.

A recent case about entertainment workers, published in the last annual report of the Protection of Rights Body,¹⁹² highlights some of the gaps in the legislation covering this field and the role this Body can play. In France, entertainment workers have a specific unemployment scheme. Some women submitted their cases to the Protection of Rights Body when they realised that they were not always entitled to the daily maternity benefit, and that the period of maternity leave was not included entirely as a period of work for the calculation of unemployment benefit. For the Protection of Rights Body, this situation clearly constituted discrimination based on pregnancy contrary to French and European legislation. The Protection of Rights Body presented its observations to the Social Security Tribunal, which also considered that the situation was discriminatory.

The Protection of Rights Body also has an important information role.

Regarding social partners, since 2001, at company level, the employer has the duty to negotiate with trade unions in order to define the objectives concerning equality between men and women in the enterprise and to design the measures to be implemented in order to achieve these objectives. A decree was adopted (7 July 2011) to specify the content of the collective agreement and more importantly, sanctions are now prescribed when enterprises employing at least 50 employees have not concluded any agreement on sex equality. An annual report on collective bargaining in France is published every year in June and presents the general figures on collective agreements concluded in the year before. According to the report published in 2011, despite a legal framework based on the obligation to negotiate on gender issues, the number of collective agreements on gender equality is still insufficient. However, the report notes an improvement in the quality of the agreements concluded.¹⁹³ The last report

¹⁹² Rapport annuel 2011 du défenseur des droits, <http://www.defenseurdesdroits.fr/documentation>, accessed 16 July 2012.

¹⁹³ *Ministère du travail, La négociation collective en 2010, Bilan et Rapport*, 2011 <http://lesrapports.ladocumentationfrancaise.fr/BRP/114000388/0000.pdf>, accessed 12 July 2012.

published in 2012 notes that the number of collective agreements on equality have particularly increased in 2011 at the level of companies. This is a consequence of the new system of sanctions adopted in 2011. The content of the agreements has improved and some good practices are presented (most of them deal with the issue of wages), including measures on working hours (possibility to pay for a full contribution to pension when working part-time, development of opportunities for telework).¹⁹⁴

A recent report¹⁹⁵ presents 10 good practices in companies to improve the situation of women. The main idea is that the situation could only improve if men get more involved in the family.

The main good practices identified are the following: to fight gender stereotypes, to fight long hours at work (in French managerial culture, it is necessary to stay at work for long hours), to recognize the role of fathers in companies, to organize an annual family day in companies, to extend the duration of paternity leave and parental leave (used by men), to extend the use of part-time work for men, to enhance the practice of telework, and to make managers aware of the link between gender balance and economic performance. For example, to encourage paternity leave some companies offer fully paid leave or also provide better information on paternity leave. For part-time work, some companies experiment with annual part-time work, where it is possible not to work during school holidays.

4. Enforcement and effectiveness

4.1. General

In France, pregnancy and maternity rights are important and are combined with an active childcare policy. Even if this policy and the rights could be improved, France still has a high employment rate of women (around 60.1 %, against 68.5 % for men).

4.2. Legal redress

In terms of the defence of rights, there are no specific provisions regarding the enforcement of pregnancy, maternity, adoption, parental or paternity leave rights. All mechanisms applying to discrimination (system of proof, Equality Body) also apply without specificity. Financial support is possible through legal aid on the usual conditions.

There is no information about a possible increase of case law on pregnancy discrimination. However, the annual reports of the Halde and of the Protection of Rights Body clearly show a significant increase in claims based on pregnancy (see above).

4.3. Access to information

In 2010, the Halde published an information leaflet on women's rights in case of pregnancy.¹⁹⁶ A number of lawsuits on discrimination based on pregnancy have also received extensive attention in the media and this may have improved the awareness of women regarding their rights. Recently also, some articles were published on the situation of women lawyers frequently dismissed after maternity leave. According to a report published by the Paris Bar in November 2009,¹⁹⁷ 71 % of women state that they had difficulties during their pregnancy, 1 woman out of 5 had a maternity leave that was too short, 25 % did not take any maternity leave, and 7 % were dismissed after their maternity leave. The publication of this report and the publication of some examples could lead to an improvement of the situation.

In 2011, another article was published on the maternity leave for academics.¹⁹⁸ Here again, the situation of women on maternity leave at the universities was criticized. Indeed,

¹⁹⁴ *Ministère du travail, La négociation collective en 2011*, Bilan et Rapport, 2012, http://travail-emploi.gouv.fr/IMG/pdf/Bilans_et_rapports_-_la_negociation_collective_en_2011.pdf, accessed 12 July 2012.

¹⁹⁵ J. Ballarin *Parentalité et égalité professionnelle hommes-femmes: Comment impliquer les hommes?* Rapport remis à Madame Claude Greff, Secrétaire d'Etat chargée de la famille, février 2012, http://www.social-sante.gouv.fr/IMG/pdf/Rapport_Ballarin_-_Fevrier_2012.pdf, accessed 12 July 2012.

¹⁹⁶ http://halde.defenseurdesdroits.fr/IMG/pdf/Depliant_grossesse.pdf, accessed 17 October 2012.

¹⁹⁷ Source Avocat Profession Le Magazine, novembre 2009.

¹⁹⁸ O. Bui-Xuan, 'Le congé maternité des enseignantes-chercheuses' *Droit et Société*, 2011/1.

most of the time the duration of the maternity leave depended on the moment of the childbirth. The situation is slowly changing now. For example, my university has just changed the rules on maternity leave. Now, the duration of the maternity leave no longer depends on the moment of the childbirth, but it will be the same for all women and will correspond to an annual decrease of the number of teaching hours.

These two examples show that highly qualified women are not protected against discrimination because of pregnancy and maternity leave.

GERMANY – Ulrike Lembke

1. Existing legislation and case law

1.1. Employment

There is no explicit legislation combating pregnancy and maternity discrimination other than the General Equal Treatment Act (*Allgemeines Gleichbehandlungsgesetz, AGG*).¹⁹⁹ Any less favourable treatment of a woman in the field of employment due to her pregnancy or maternity is legally defined as direct discrimination on the grounds of sex. There are no differences in how statutory regulations concerning the protection of pregnancy, maternity and parenthood apply depending on whether the State or a private employer is involved (but collective agreements or by-laws might differ). The size of the employer may be relevant for the opportunity to use parental leave in the form of part-time work. Small and very small employers (with fewer than 15 employees) are not legally obliged to give their consent to a reduction of working hours, e.g. if the employer prefers a replacement.

Pregnant and breastfeeding workers; maternity leave and allowances; paternity leave

During their pregnancy, employees may not perform work that is dangerous to their own health or that of the unborn child under the Maternity Protection Act (*Mutterschutzgesetz, MuSchG*)²⁰⁰ – the same protection is granted for civil servants under the Maternity Protection Order (*Mutterschutzverordnung, MuSchVO*). Pregnant and breastfeeding employees and civil servants also enjoy special protection, such as additional breaks or the possibility to sit down or the prohibition on night work. Additional breaks for breastfeeding are defined as working time and may not cause a loss of earnings or the need for subsequent work. The employer must grant a dispensation to the pregnant or breastfeeding employee for the purpose of medical examinations concerning pregnancy or maternity and of examinations or other activities by the midwife. The state employer may not refuse his consent to the shortening of parental leave and returning to work on the grounds of a pregnancy-related medical employment prohibition.²⁰¹

The MuSchG grants pregnant employees a right to a fully paid leave six weeks before, and eight weeks after childbirth. To be precise, the term ‘maternity leave’ is misleading. The MuSchG prohibits any employer from requiring a pregnant woman to work for these fourteen weeks. During the prenatal protection period, the pregnant worker is allowed to work voluntarily as long as she remains free to withdraw her consent at any time. The prohibition of work in the postnatal protection period does not include any exceptions. Due to this concept of maternity leave, the question of ‘returning to the job’ does not arise because the

¹⁹⁹ Allgemeines Gleichbehandlungsgesetz of 14 August 2006, Official Journal (*Bundesgesetzblatt BGBl*), part I p. 1897.

²⁰⁰ Gesetz zum Schutz der erwerbstätigen Mutter (*Mutterschutzgesetz*) of 24 January 1952, Official Journal (*Bundesgesetzblatt BGBl*), part I p. 2318.

²⁰¹ See Higher Administrative Court of Saxony-Anhalt, judgment of 21 April 2011, 1 L 26/10: direct discrimination on the grounds of sex.

employment relationship remains unaffected.²⁰² (For example: The holiday entitlement is completely preserved.)

Pregnant workers may not be dismissed during their pregnancy and four months after childbirth,²⁰³ except under exceptional circumstances not related to the pregnancy²⁰⁴ and with the special approval of the supervising authority. When the employee herself terminates the contract with her employer during maternity leave and the contract is re-entered into within a year after the confinement, the law presumes the labour relation uninterrupted with regard to the duration of the employment as a condition for benefits, premiums or promotion. Any other disadvantage suffered by an employee due to her pregnancy is covered by the AGG.

During maternity leave, employees are entitled to maternity allowances in the amount of their last net income. Maternity allowances are financed by sharing the costs between the statutory health insurance and all employing enterprises under a complicated contribution procedure. In the past, the costs were shared between the statutory health insurance and the concrete employer of the pregnant or breastfeeding worker until the Federal Constitutional Court declared this regulation to be unconstitutional due to its gender-discriminatory effects.²⁰⁵

Paternity leave is not granted under German law, but civil servants can apply for a day's special leave on the occasion of their partner's confinement.

Parental and adoption leave

Parental and adoption leave is provided under Sections 15-21 of the Federal Law on Parental Allowance and Parental Leave (*Bundeselterngeld- und Elternzeitgesetz, BEEG*).²⁰⁶ Mothers and fathers are entitled to parental leave up to three years after birth or, in the case of an (intended) adoption or full-time foster care, beginning with the child's entry into the household. Parental leave requires that the child lives in the parent's household, that the parent cares for the child personally and that the parent does not work more than 30 hours a week during parental leave. The parental leave can be taken by performing part-time work when employer and parent agree upon the conditions. The employee is entitled to the employer's consent to a reduction of working hours when he or she has been working for an employer with more than 15 employees for more than six months, unless there are urgent adverse operational reasons. The employer bears the burden of presentation and proof for the adverse operational reasons and he/she has to present a comprehensive organisational concept with working time regulations.²⁰⁷ The holiday entitlement of the employee can be reduced by one twelfth for every month of parental leave.

The BEEG provides for a parental allowance to parents for up to 14 months,²⁰⁸ provided that at least two months are taken by the other parent (normally the father), otherwise the parental allowance is limited to 12 months. The allowance amounts to 67 % of the average

²⁰² The Labour Court of Wiesbaden, judgment of 18 December 2008, 5 Ca 46/08, decided that the transfer to a non-equivalent post after maternity leave is direct discrimination under the AGG and that the pregnant worker has to be awarded compensation.

²⁰³ Before, German courts confirmed the dismissal of pregnant workers when they did not reveal an actual pregnancy during their recruitment. It was not until 2003, that the Federal Labour Court, judgment of 6 February 2003, 2 AZR 621/01, decided that questions concerning the possible pregnancy of a female candidate are unlawful.

²⁰⁴ See Administrative Court of Darmstadt, judgment of 26 March 2012, 5 K 1830/11.DA.

²⁰⁵ Federal Constitutional Court, judgment of 18 November 2003, 1 BvR 302/96. For further information see Rüdiger Krause 'Schutzvorschriften und faktische Diskriminierung' in: C. Hohmann-Dennhardt et al. (ed.) *Geschlechtergerechtigkeit. Festschrift für Heide Pfarr* pp. 392-404 Baden-Baden, Nomos 2010.

²⁰⁶ Gesetz zum Elterngeld und zur Elternzeit (Bundeselterngeld- und Elternzeitgesetz, BEEG) of 5 December 2006, Official Journal (*Bundesgesetzblatt BGBl*), part I p. 27-48.

²⁰⁷ The Federal Labour Court, judgment of 15 December 2009, 9 AZR 72/09, decided that the employer's wish for the performance of certain tasks in full-time employment does not constitute an adverse operational reason, not even when the tasks of a leading position are in question. This was approved by the State Labour Court of Rhineland-Palatinate, judgment of 22 November 2011, 3 Sa 305/11, which stresses the necessity of the fundamental importance of operational reasons to be identified as urgent and adverse.

²⁰⁸ Parental allowances under state law must not exclude the entitlement on the grounds of the nationality of the parents, see Federal Constitutional Court, judgment of 7 February 2012, 1 BvL 14/07.

salary of the parent using the leave, but may not surpass EUR 1 800 and may not be less than EUR 300.²⁰⁹ The parents can take parental leave simultaneously or one after the other, but simultaneous parental leave results in a significantly reduced amount of the allowance. Surprisingly, the Federal Social Court decided that the applicable regulations for calculating the amount neither violate the constitutional protection of the family, especially the free decision on the optimal division of labour between the parents, nor the principle of equality, especially gender equality.²¹⁰

From the moment of applying for parental leave (but not more than eight weeks before the leave starts) up to the end of the parental leave, parents enjoy special protection against dismissal: they may not be dismissed except under special circumstances such as a threat to the employing company's existence or its (partial) closure²¹¹ and with the approval of the supervising authority. Dismissal by the end of the parental leave can become effective when the notice of termination was given at least three months before. The BEEG does not cover the right to return to the former job or to an equivalent post or to benefit from any improvement of working conditions.

Under Section 16(3) of the BEEG, female employees expecting another child cannot terminate their parental leave to switch to maternity leave with clearly better conditions. Several administrative courts decided that this legislation constitutes an infringement of Article 14(1) of Directive 2006/54/EC.²¹²

1.2. Social security and pension rights

Women insured under the statutory health insurance are entitled to medical and midwife care, medication, confinement in hospital, domestic care and a household assistant due to their pregnancy and maternity under the MuSchG. During maternity and parental leave, employees remain entitled to the benefits of the statutory unemployment, health, care and retirement insurance schemes without contributions. Contributions to private insurances and voluntary insurance under the statutory health system as well as contributions related to part-time work during parental leave have to be paid.²¹³ Moreover, the contributions to private insurances are increased by the contributions for the newborn.

Average contributions to the statutory pension funds are legally considered to be paid for child-raising periods up to three years after birth. Thus, the raising parent (usually the mother) is entitled to a supplemental pension of EUR 78 per month and child. Parents working part-time after the third and before the tenth birthday of the child and not earning an average income can apply for a further increase of their pension entitlement. The raising of more than one child at a time leads to a further increase as well. Only one parent can apply for the supplemental pension.

Unemployed mothers are entitled to maternity allowances that might substitute their unemployment assistance or increase their unemployment benefits. From the 13th week of pregnancy on, unemployed mothers can apply for allowances to meet additional requirements in the amount of 13 % of their regular unemployment assistance as well as a one-off amount for the basic equipment of their newborn child. After long-term parental leave, employees might suffer from reduced unemployment benefits due to the calculation which is not based

²⁰⁹ The amended provisions of the BEEG entering into force in 2013 will provide for siblings' bonuses (10% of the parental allowances and at least EUR 75) and an additional allowance of EUR 300 per child in case of multiple births.

²¹⁰ Federal Social Court, judgment of 15 December 2011, B 10 EG 1/11 R.

²¹¹ Due to the Administrative Court of Oldenburg, judgment of 20 February 2012, 13 A 451/11, the restructuring of an employing company or parts of it may be equated with partial closure. This decision gives additional latitude for employers to dismiss caring parents, especially in times of economic crisis.

²¹² Administrative Court of Berlin, judgment 15 May 2012, 7 K 48/11, and Administrative Court of Augsburg, judgment of 29 September 2011, Au 2 K 11/1018. Concerning identical regulations for civil servants: Administrative Court of Gießen, judgment of 18 March 2010, 5 K 1084/09.GI.

²¹³ Contributions to private insurances related to self-employed part-time work during parental leave are not taken into account for the calculation of parental allowances and can thus result in a profoundly reduced amount of parental allowance, see Federal Social Court, judgment of 5 April 2012, B 10 EG 6/11 R.

on the average salary during the past three years before the unemployment but on a fictitious salary which the applicant could have earned at the time when the application is submitted.²¹⁴

Parents with disabilities are entitled to a household assistant when they wish childcare at home but cannot manage it without help due to their disabilities.²¹⁵

A major problem for members of the liberal professions is that child-raising periods are not taken into account by every professional pension fund, although the Federal Constitutional Court decided that professional pension funds for lawyers have to offer non-contributory membership during child-raising periods for up to three years to meet the requirements of the gender equality principle under the German constitution.²¹⁶ Nowadays, some of the professional pension funds offer non-contributory membership for up to three years but no solutions for part-time work after childbirth, which is the norm in the liberal professions. Members of the liberal professions can apply for benefits from the statutory pension funds when their professional pension fund does not pay for child-raising periods. For children born after 1991, child-raising periods for up to three years can be taken into account.

1.3. Self-employment

Helping spouses and self-employed women are not covered by the MuSchG.²¹⁷ In the opinion of the Ministry for Family, Seniors, Women and Youth, there is no necessity to implement Article 8 of Directive 2010/41/EU in national law,²¹⁸ because self-employed women who are voluntarily insured under the statutory health insurance including sickness benefits are entitled to maternity allowances in the amount of these sickness benefits (usually 70 % of their former income).²¹⁹ The Federal Constitutional Court decided that the unequal treatment between employees and self-employed women related to maternity allowances is compatible with the general principle of equality under the German constitution.²²⁰ Quasi-subordinate workers for public service broadcasting are entitled to maternity leave and maternity allowances under the applicable collective agreements.

Self-employed parents are not entitled to parental leave because there is no employer to whom such a claim can be addressed. But they are entitled to parental allowances on the same conditions as employees. With the provisions of the BEEG, the differences between employed and self-employed parents were substantially reduced, but the calculation of the amount of parental allowances for self-employed parents still places them at a disadvantage.

1.4. Access to and the supply of goods and services

The provisions of Directive 2004/113 have been implemented by the AGG. But the definition of pregnancy and maternity discrimination as direct sex discrimination does not apply beyond the field of employment. Under Section 20(2) of the AGG, costs related to pregnancy or maternity may on no account lead to payment of different premiums and benefits by private-law insurances. Apart from this special provision,²²¹ pregnancy and maternity discrimination is not explicitly addressed concerning the access to and the supply of goods and services. Under Section 193(6) of the Insurance Contract Act (*Versicherungsvertragsgesetz, VVG*),²²²

²¹⁴ The Federal Social Court, judgment of 25 August 2011, B 11 AL 19/10 R, decided on the applicable law and found no indirect discrimination on the ground of sex.

²¹⁵ State Social Court of Lower Saxony, judgment of 23 February 2012, L 9 SO 26/11; proceedings are pending before the Federal Social Court.

²¹⁶ Federal Constitutional Court, judgment of 5 April 2005, 1 BvR 774/02.

²¹⁷ See Georg Pepping in: F. Rancke (ed.) *Mutterschutz, Elterngeld, Elternzeit. Handkommentar* Section 1 MuSchG para.26 ff., Baden-Baden 2007.

²¹⁸ See Parliamentary Publication (*Bundestags-Drucksache*) 17/9615 p. 53 ff.

²¹⁹ Concerning the problems involved see Social Court of Reutlingen, judgment of 24 June 2010, S 14 KR 3892/09.

²²⁰ Federal Constitutional Court, judgment of 3 April 1987, 1 BvR 1240/86.

²²¹ Private health insurances are the main problem, see Higher Regional Court of Hamm, judgment of 12 January 2011, 20 U 102/10, I-20 U 102/10: compensations in the amount of EUR 2 000 for the non-pecuniary damage suffered by the applicant whose private health insurance was terminated due to her alleged concealing of pregnancy complications.

²²² Gesetz über den Versicherungsvertrag (*Versicherungsvertragsgesetz*) of 23 December 2007, Official Journal (*Bundesgesetzblatt BGBI*), part I p. 2631.

private insurance companies are obliged to grant benefits for pregnancy and maternity even when the contributions remained unpaid temporarily at some point.

2. Gaps in national law

2.1. Employment

Recruitment process

Some employers still show reluctance to employ women of child-bearing age, especially in leading positions, but this behaviour is difficult to prove in court.²²³ And their reluctance can hardly be addressed legally because it is grounded on cultural reasons²²⁴ such as the image of the always-available model employee which is hostile to family life, the assumption that decision-making positions cannot be filled by part-time work, persisting gender and maternity stereotypes and the fact that the reconciliation of work and family life is still a ‘female problem’. The increasing labour shortage might cause a fundamental rethink. This can be supported by the establishment of sufficient childcare institutions, school hours compatible with full-time work, emergency care arrangements, legal provisions for long-term flexible hours models, qualified part-time work, measures to ensure employability after long-term leave and the repeal of adverse legal provisions such as the regulation of matrimonial tax splitting especially discouraging to mothers who wish to work.

Employment relations and conditions of employment

The legal protection of pregnant and breastfeeding workers is extensive in some areas. Many working activities are generally prohibited although mothers(-to-be) might prefer to do their normal work with some exceptions for actually dangerous activities.²²⁵ Female employees call for sector-specific catalogues of non-risky activities, being the same in all federal states, and for greater active involvement of the pregnant or breastfeeding employee herself.

Female employees may suffer disadvantages in promotion decisions due to their pregnancy or maternity,²²⁶ but their legal protection faces the problem of proof. Discrimination can only be proved in rare cases: Contrary to her justified expectations, a pregnant employee was not promoted to a management position and in this context was told that she should look forward to her childbirth and motherhood. The labour courts decided that the employer had failed to prove the non-discriminatory character of his promotion decision: his statement that he chose the best candidate was not sufficient in the light of his former remark about motherhood.²²⁷ The courts awarded compensation in the amount of EUR 17 062,50.

Apart from this, the legal situation is complex and fragmented, but it seems that employees in the civil service²²⁸ might enjoy better protection against disadvantages connected to parental leave and childcare. Some collective agreements for the civil service and private employment relationships do not take parental leave into account concerning the

²²³ See Federal Labour Court, judgment of 24 April 2008, 8 AZR 257/07, which tries to ease the burden of proof within the legal framework.

²²⁴ See the 2010 study on career perspectives of working mothers by Y. Ziegler & R. Graml, conclusion on http://www.spitzenfrauen-bw.de/fileadmin/News/graml_gip_2_2011.pdf, accessed 19 August 2012.

²²⁵ See for criticism concerning medical professions: http://www.aerztezeitung.de/politik_gesellschaft/berufspolitik/article/810724/schwangere-aerztinnen-wenn-mutterschutz-diskriminierung.html, accessed 18 August 2012.

²²⁶ See the 2010 study by Y. Ziegler & R. Graml, footnote 26.

²²⁷ Federal Labour Court, judgment of 27 January 2011, 8 AZR 483/09, and State Labour Court of Berlin, judgment of 28 June 2011, 3 Sa 917/11.

²²⁸ Federal Labour Court, judgment of 24 May 2012, 6 AZR 586/10: entitlement to bonuses and additional payment; State Labour Court of Munich, judgment of 29 September 2011, 4 Sa 452/11: higher remuneration grade; Administrative Court of Saarland, judgment of 4 July 2007, 2 L 500/07: promotions. Moreover, the maximum age for appointing a probationary official can be extended for three years due to child-raising periods under the career regulations of the states (*Laufbahnverordnungen*).

assignment to a higher wage group. According to case law, this indirect discrimination is justified by the lack of work experience of parents who have taken parental leave.²²⁹

Section 16(3) of the BEEG constitutes an infringement of Article 14(1) of Directive 2006/54/EC (see above) and must be repealed.

Remuneration

Occupational pension schemes are covered primarily by the Act on Occupational Pension Schemes (*Betriebsrentengesetz*, BetrAVG)²³⁰ and additionally by the AGG. The AGG is applicable insofar as the BetrAVG, which applies to benefits for retirement, invalidity, or for surviving family members under occupational pension schemes set up by private employers, does not contain special precedent provisions.²³¹ The BetrAVG does not contain a prohibition on sex discrimination and the courts are mainly concerned with age discrimination if any. The consideration of periods of maternity leave depends on the applicable by-laws or the applicable collective agreements. The Federal Labour Court held that the failure to take periods bringing up children into consideration for the purpose of occupational pensions constitutes neither direct nor indirect discrimination on the grounds of sex and does not violate European or national constitutional law.²³² Normally, the employee has the opportunity to pay her contributions to the occupational pension schemes during parental leave, or the occupational pensions can be deferred for up to three years.

In the civil service, occupational pensions are calculated by means of a points system. The statutory period of maternity leave is fully taken into consideration for the purpose of occupational pensions.²³³ Parental leave under the BEEG is considered on the basis of a fictitious income of EUR 500 per month and child since 2002. Further periods of bringing up children are not taken into account. Civil servants may lose their entitlements to the Christmas bonus during parental leave under some states' law (e.g. Hamburg).

Termination of the employment contract

There is no more comprehensive evidence of pregnant women or young mothers being forced out of their employment, but a significant number of women have reported problems when returning to their job.²³⁴ The legal protection against dismissal of pregnant women is very strict and effective.²³⁵ Legal protection against dismissal because of maternity or parenthood in general faces the problem of proof and thus clearly demonstrates the limitations of legal provisions. The same is true for fixed-term contracts not being renewed for reasons connected to pregnancy, maternity or parental leave: this discrimination can only be proved in rare

²²⁹ Federal Labour Court, judgment of 27 January 2011, 6 AZR 526/09, State Labour Court of Baden-Württemberg, judgment of 17 June 2009, 12 Sa 8/09, and Labour Court of Heilbronn, judgment of 3 April 2007, 5 Ca 12/07. The hope remains that no other justifications are accepted, see State Labour Court of Baden-Württemberg, judgment of 17 January 2012, 22 Sa 7/11: Contractually agreed profit participation must not be reduced due to the consideration of parental leave.

²³⁰ Gesetz zur Verbesserung der betrieblichen Altersversorgung (Betriebsrentengesetz) of 19 December 1974, Official Journal (*Bundesgesetzblatt BGBl*), part I p. 3610.

²³¹ Federal Labour Court, judgment of 11 December 2007, 3 AZR 249/06, see also T. Cisch & V. Böhm 'Das Allgemeine Gleichbehandlungsgesetz und die betriebliche Altersversorgung in Deutschland' *Betriebsberater* 2007 pp. 602-610, and G. Hellkamp & B. Rinn 'Gleichbehandlung in der betrieblichen Altersversorgung nach dem AGG' *Betriebliche Altersversorgung* 2008, pp. 442-448.

²³² Federal Labour Court, judgment of 20 April 2010, 3 AZR 370/08.

²³³ The Federal Constitutional Court, judgment of 28 April 2011, 1 BvR 1409/10, decided that the failure to take maternity leave of before 1990 into account was unconstitutional. See as well Federal Court of Justice, judgment of 1 June 2005, IV ZR 100/02, with regard to the applicable European directives.

²³⁴ See the 2010 study by Y. Ziegler & R. Graml, footnote 26, and the facts presented in the decision of the State Labour Court of Hamm, judgment of 14 June 2011, 14 Ta 289/11, which moreover doubts that the legal period of time for compensation claims in these cases is compatible with European law.

²³⁵ The Labour Court of Dresden, judgment of 23 November 2010, 9 Ca 576/10, held a dismissal because of the sole *intention* of an employee to become pregnant to be invalid and awarded compensation. Concerning the differences between the legal protection against dismissal during pregnancy and maternity leave on the one hand and during parental leave on the other based on European law see: Administrative Court of Darmstadt, judgment of 26 March 2012, 5 K 1830/11.DA.

cases.²³⁶ The contractual reduction of full-time work to permanent part-time work in case of maternity or parental leave constitutes a direct discrimination on the grounds of sex.²³⁷

Involvement of fathers

The BEEG provides for a parental allowance to parents for up to 14 months, provided that at least two months are taken by the other parent, otherwise the parental allowance is limited to 12 months. ‘The other parent’ is usually the father. Some courts have considered the requirement of caring by the other parent without any exceptional provision to be in breach of the Constitution by violating the freedom of choice concerning the division of work and parental care.²³⁸ The Federal Constitutional Court held the BEEG to be in accordance with the Constitution by very shortly recalling the importance of gender equality, the necessity to overcome existing gender-role allocations and the legislative discretion including incentives for more partnership-based divisions of work and parental care.²³⁹

About one quarter (25.3 %) of fathers took parental leave and received parental allowances in 2010.²⁴⁰ But 76 % of these fathers took parental leave for the minimum duration of two months to save their entitlement to parental allowances. In most cases, this short period of childcare took place in parallel with maternity leave or parental leave of the mother. Only 6 % of fathers taking parental leave decided on a childcare period of 12 months. The vast majority of men work full time and their working time increases when they become fathers, whereas around half of the women work part time and their working time decreases when they are mothers.²⁴¹ There is still a long way to go before the equal division of labour becomes the norm. The main causes are persisting gender stereotypes, the legal framework of parental leave (the two additional months are called ‘father’s months’) and the gender pay gap. Newspapers sometimes report on discrimination of male employees who have used their rights to parental leave or part-time work, but more comprehensive evidence on an academic level is not available.²⁴²

2.2. Self-employment

Self-employed mothers are faced with prejudices and stereotypes. On the one hand it is still broadly believed in (western) Germany that toddlers will suffer irreparable harm when they are not raised by their mothers at home.²⁴³ On the other hand, working mothers might be perceived as being less committed and reachable.²⁴⁴ It is difficult to tackle these cultural norms by law. But self-employed parents complain about the statutory regulations on the calculation of parental allowances as well.²⁴⁵ The amended BEEG entering into force in 2013²⁴⁶ will provide for the consideration of voluntary contributions to statutory social security systems and fixed operating costs of 25 % of the income. Whether the situation of self-employed parents will improve remains to be seen because of the hardly understandable

²³⁶ See Labour Court of Mainz, judgment of 2 September 2008, 3 Ca 1133/08: When the mother of the pregnant employee called the employer to ask why the fixed-term contract of her daughter was not renewed in spite of prior promises, the employer plainly told her that the reason was the pregnancy of the employee. The judicial proceedings are pending before the State Labour Court of Mainz.

²³⁷ State Labour Court of Cologne, 11 August 2011, 6 Sa 1561/10.

²³⁸ State Social Court of Bremen and Lower Saxony, judgment of 13 April 2011, L 2 EG 20/10.

²³⁹ Federal Constitutional Court, judgment of 19 August 2011, 1 BvL 15/11. Concerning the incentives for paid employment of mothers see Federal Constitutional Court, judgment of 6 June 2011, 1 BvR 2712/09.

²⁴⁰ Federal Agency for Statistics, https://www.destatis.de/DE/PresseService/Presse/Pressemitteilungen/2012/06/PD12_221_22922.html, accessed 19 August 2012.

²⁴¹ <http://www.boeckler.de/38985.htm>, <http://www.boeckler.de/40586.htm>, accessed 19 August 2012.

²⁴² But see G. Vedder & J. Reuter (ed.) *Die Vielfalt der Work-Life-Balance* München 2008.

²⁴³ See B. Vinken *Die deutsche Mutter: Der lange Schatten eines Mythos* Frankfurt 2007.

²⁴⁴ See Arbeitsgemeinschaft Anwältinnen (ed.) *Anwältin und Mutter – Klar geht das!* Berlin 2012 p. 42, http://www.dav-anwaeltinnen.de/data/files/davin/docs/TextfertigAnwaeltin_und_Mutter.pdf, accessed 19 August 2012. More comprehensive research on this topic is not available.

²⁴⁵ See R. Lühr *Wenn Selbstständige Kinder kriegen* August 2012, http://www.mediafon.net/upload/mediafon_kinder_kriegen.pdf, accessed 19 August 2012. But see further Federal Social Court, judgment of 5 April 2012, B 10 EG 6/11 R, rejecting such claim.

²⁴⁶ See Federal Council Publication (*Bundesrats-Drucksache*) 347/12.

complexity of the amendments. Every self-employed mother should be entitled to maternity allowances whether insured under the statutory system or not, and the regulations granting parental allowances should be understandable and encourage self-employed persons to become parents.

According to the prevailing opinion of legal commentaries, quasi-subordinate workers are not entitled to maternity leave and maternity allowances under the MuSchG.²⁴⁷ With regard to the criteria of comparable need for social protection, these mothers(-to-be) should be covered as well.

2.3. Access to and the supply of goods and services

Women insured in the statutory health system can benefit from its full protection and moreover, they are entitled to special benefits related to their pregnancy or maternity. But it is becoming more and more difficult to choose a delivery method and place outside the hospital. One reason is that midwives are not appropriately paid by the health insurance schemes and at the same time, the contributions to their professional liability insurance have massively increased.²⁴⁸ Thus, more and more independent midwives give up work.

When pregnant women try to enter into contracts with private health insurances they might face discriminatory practices.²⁴⁹ Some insurance companies deny new contracts after the third month of pregnancy, some impose waiting periods of up to one year, some demand additional contributions (not only during the pregnancy but permanently) and some will only contract on the condition that benefits for the pregnancy and childbirth are excluded.²⁵⁰

There are no indications that pregnant women or women on maternity leave have been denied or offered limited access to state/regional/municipality financial or non-financial benefits. (On the contrary: state institutions and companies offer special services for pregnant women and young mothers, for example extra time and courses in public swimming pools.) Pregnant women or parents without a well-earning partner, especially single parents, might face problems in the area of financial services offered by private companies.²⁵¹ For example, many banks do not consider parental allowances as income for their credit ratings.

Breastfeeding in public is not legally prohibited or restricted in Germany.²⁵² But many people have serious problems watching it and mothers report hostility by other passengers in public transport, passers-by, customers or owners of hotels or restaurants. It is highly doubtful whether this problem can be solved by legal measures.

2.4. Additional information

There is no additional information to report.

3. Involvement of other parties

The Minister for the Family, Senior Citizens, Women and Youth has set up a programme in cooperation with leading industry associations to promote family-friendly working environments in German companies.²⁵³ The programme includes a network of more than 4 200 companies, a competition for the most family-friendly companies (differentiated according to their size), concepts for family-friendly working hours and a support programme for company-supported day-care facilities for children. Moreover, there are local alliances

²⁴⁷ H. Buchner & U. Becker *Mutterschutzgesetz und Bundeselterngeld- und Elternzeitgesetz* Section 1 MuSchG para.90, München 8th ed. 2008; P. Meisel & H.-H. Sowka *Mutterschutz und Erziehungsurlaub* Section 1 MuSchG para.21, München 5th ed. 1999; G. Pepping in: F. Rancke (ed.) *Mutterschutz, Elterngeld, Elternzeit. Handkommentar* Section 1 MuSchG para.30, Baden-Baden 2007; B. Willikonsky *Kommentar zum Mutterschutzgesetz* Section 1 MuSchG para.17, Neuwied 2nd ed. 2007. For further information see M. Müller *Die Arbeitnehmerähnliche Person im Arbeitsschutzrecht*, Frankfurt 2009.

²⁴⁸ See M. Albrecht et al. *Versorgungs- und Vergütungssituation in der außerklinischen Hebammenhilfe* Berlin 2012.

²⁴⁹ See http://wirtschaft.t-online.de/pkv-keine-vertraege-fuer-schwangere/id_45689000/index, accessed 19 August 2012.

²⁵⁰ Confirmed by the District Court of Hannover, judgment of 26 August 2008, 534 C 5012/08.

²⁵¹ See <http://www.online-finanzen.info/kredite/kredit-waehrend-schwangerschaft>, accessed 19 August 2012.

²⁵² It is very interesting that only male exhibitionism in public is punishable under German law.

²⁵³ See <http://www.erfolgsfaktor-familie.de/>, accessed 20 August 2012.

(cooperation of companies, associations, social partners, municipalities, trade unions, welfare services, churches, families etc.) for the improvement of family-friendliness.²⁵⁴

The Hertie Foundation developed a list of criteria for the ‘work and family audit’ and has promoted the family-friendliness of German companies since 1998,²⁵⁵ the Bertelsmann Foundation supports individual as well as operational strategies for a better work-life balance.²⁵⁶ The national equality body (*Antidiskriminierungsstelle des Bundes*) is not especially engaged in matters of pregnancy, maternity and parenthood, maybe because of the broad involvement of the Ministry.

The German Trade Union Federation (*Deutscher Gewerkschaftsbund, DGB*) tries to promote the family-friendliness of companies by respective publications, conferences, development of criteria, best practices, advisory services and general information.²⁵⁷ Publications of the Association of German Chambers of Industry and Commerce (*Deutscher Industrie- und Handelskammertag, DIHK*) especially aim at operational changes in small und medium companies.²⁵⁸ But although many collective agreements include regulations concerning maternity and/or parenthood,²⁵⁹ most of them still show a lack of binding regulations and of innovative working hours models.²⁶⁰ These deficiencies give rise to serious concern because collective agreements play a very important role in German labour law.

4. Enforcement and effectiveness

4.1. General

Nearly 60 % of mothers (part-time: 54 %) and nearly 90 % of fathers (part-time: 5 %) are employed in Germany. Normally, employers would not show any adversity to pregnancy and maternity protection in public. (On the contrary, the Confederation of German Employers’ Associations (*Bundesvereinigung der Deutschen Arbeitgeberverbände, BDA*) explicitly rejected the draft law on childcare benefits (*Betreuungsgeld*) due to its adverse effects on the working commitment of mothers and thus the gender equality in the labour market.)²⁶¹ But the discussion about the extension of pregnancy and maternity rights by a decision of the European Parliament caused rejection by employers and politicians of various parties, and led to a debate on possible risks for the employment rate of women.²⁶² This is not the normal state of affairs in Germany: public discussions are generally characterised by strong rhetoric of family-friendliness, the blessing of maternity and the necessity of reconciliation.

4.2. Legal redress

Pregnant employees and self-employed persons, breastfeeding mothers and parents in general can claim their statutory rights (or rights granted by collective agreements or by-laws) by judicial proceedings. Although courts try to ease the burden of proof (see above) or there is a shift of the burden of proof under the AGG, the protection against pregnancy or maternity discrimination still faces the practical problem of proof. Employers have learned not to mention pregnancy or parenthood when placing pregnant employees or working parents at a disadvantage or dismissing them. A further practical problem is the length of judicial

²⁵⁴ See <http://www.lokale-buendnisse-fuer-familie.de/>, accessed 20 August 2012.

²⁵⁵ See <http://www.beruf-und-familie.de/index.php?c=15>, accessed 20 August 2012.

²⁵⁶ See http://www.bertelsmann-stiftung.de/cps/rde/xchg/SID-F497E8E5-16FECF30/bst/hs.xsl/prj_91390.htm, accessed 20 August 2012.

²⁵⁷ See <http://familie.dgb.de/>, accessed 20 August 2012.

²⁵⁸ DIHK & BMFSFJ (ed.) *Familienorientierte Personalpolitik* Berlin 2010, with strategies and best practices, available on <http://www.bmfsfj.de/BMFSFJ/Service/Publikationen/publikationen.did=17296.html>, accessed 20 August 2012.

²⁵⁹ For best practices see: BMFSFJ (ed.) *Familienfreundliche Regelungen in Tarifverträgen und Betriebsvereinbarungen* Osnabrück 2005.

²⁶⁰ See http://www.boeckler.de/21165_21171.htm, accessed 20 August 2012.

²⁶¹ See [http://www.arbeitgeber.de/www/arbeitgeber.nsf/res/0A928606290F6A27C1257A32004622F6/\\$file/Stn-Betreuungsgeld.pdf](http://www.arbeitgeber.de/www/arbeitgeber.nsf/res/0A928606290F6A27C1257A32004622F6/$file/Stn-Betreuungsgeld.pdf), accessed 20 August 2012.

²⁶² See for example <http://www.euractiv.de/341/artikel/milliardenkosten-durch-europaeischen-mutterschutz-003794>, https://www.bavc.de/bavc/web/web.nsf/id/li_ib_122009_st1.html, and <http://www.spd-kirchentumbach.de/nt71.html>, accessed 20 August 2012.

proceedings: Courts seem actively to strive for short durations of the proceedings, but the periods of maternity leave or parental leave are short as well. One more problem is that anti-discrimination interest organisations do not have standing in court, but may only support individual claimants. There is no case law (regarding pregnancy, maternity, adoption, parental, or paternity rights) available which was initiated by trade unions within their narrowly restricted right to bring actions before the labour courts.

4.3. Access to information

There is a broad variety of guides and other publications on pregnancy, maternity and parental rights available on the Internet and from governmental bodies, state agencies or local authorities. Social authorities, trade unions, works councils, welfare services and other institutions offer counselling and support. These efforts are temporarily obstructed by the complexity of the legal situation, especially concerning social security, but overall the access to information is satisfactory. However, well-targeted publications and information to reach particularly disadvantaged groups are still desirable.

GREECE – Sophia Koukoulis-Spiliotopoulos

1. Existing legislation and case law

The Greek Constitution requires that the State protect the family, marriage, motherhood and childhood (Article 21(1)) and requires gender equality (Article 4(2)). These rules have vertical and horizontal effect. Their scope is broader than that of EU law: it includes, inter alia, matters related to maternity and parenthood. The courts, relying directly on these rules and EU law, uphold claims on such matters (see 1.1.5. and 1.1.9. below). All courts review the conformity of statutory provisions with the Constitution, EU law and ratified treaties and set aside those they find contrary thereto.

Civil servants and permanent employees of legal persons governed by public law are covered by the Civil Servants' Code (CSC).²⁶³ CSC provisions on leaves also apply to permanent employees of local authorities²⁶⁴ and special categories of public officials, when the relevant legislation refers to the CSC²⁶⁵ or is silent;²⁶⁶ other such categories are covered by specific legislation.²⁶⁷ CSC provisions also apply to persons employed by the State, legal persons governed by public law and local authorities under a private-law contract of indefinite duration;²⁶⁸ those employed by the same employers under a fixed-term contract are covered by the lower private-sector standards.

The rules on leaves are therefore very complex, uneven and scattered, in several – often amended and difficult to spot and combine – pieces of legislation. This creates legal uncertainty, all the more so as, due to the reluctance of women to bring cases to the courts and due to great delays in judicial proceedings, as explained below under 4.2.1., case law cannot catch up with new legislation. There is no case law on maternity, paternity or parenthood relying on Act 3896/2010 (OJ A 207/08.12.2010) transposing Directive 2006/54/EC, or even on Act 3488/2006 transposing Directive 2002/73/EC, while Act 4075/ 2012 (OJ A 89/11.04.2012) transposing Directive 2010/18/EU is too recent. This means that problems of interpretation accumulate and stereotypes persist. The situation is exacerbated by the growing financial crisis.

²⁶³ Act 3528/2007, OJ A 26/09.02.2007, as amended.

²⁶⁴ This is provided by the Second Article of the CSC.

²⁶⁵ E. g. permanent state school teachers and female judges: maternity leave (1.1.4. below).

²⁶⁶ This is provided by Article 2(2) of the CSC.

²⁶⁷ E.g. judges: curtailed parental leave (1.1.8. below); female military personnel: no post-confinement maternity leave (1.1.4. below); male schoolteachers: no parental leave (1.1.8. below).

²⁶⁸ Article 4(5) Act 2839/2000, OJ A 196/12/09.2000.

1.1. Employment

1.1.1. A *general prohibition* of direct and indirect discrimination related to pregnancy, maternity and parenthood is based on several provisions of Act 3896/2010 transposing Directive 2006/54. Article 3(1) prohibits ‘any forms of direct and indirect discrimination on grounds of sex, in relation in particular to family status’ in all areas covered by this Act. Article 3(4) stipulates that ‘less favourable treatment of women on grounds of pregnancy or maternity constitutes discrimination in the cases of Decree 176/1997²⁶⁹ [...] and Article 142 of Act 3655/2008’.²⁷⁰ Article 18 prohibits less favourable treatment of parents related to any type of leave for raising or taking care of a child, and for adoption or fostering. This means that the prohibition of discrimination includes all leaves granted by legislation which often exceed minimum EU-law requirements. Let us recall that the ECJ also condemns adverse treatment related to leaves granted by national legislation which exceed minimum EU-law requirements.²⁷¹

While Act 3896/2010 (like Act 3488/2006 transposing Directive 2002/73/EC) has copied the Directive’s definition of indirect discrimination, there is no case law on such discrimination related to maternity, paternity or parenthood.

1.1.2. The *scope* of Act 3896/2010 covers workers or candidates for employment in the public and the private sector, and any relationship or form of employment, including contracts for services and remunerated mandates (e.g. in-house lawyers), irrespective of the nature of the services provided, persons who exercise liberal professions, vocational trainees and candidates for vocational training (Article 17).

Judges, civil servants and employees of local authorities and other legal persons governed by public law also enjoy constitutional guarantees against dismissal, downgrading and transfer (Articles 87 and 103 of the Constitution). Persons employed by the State, local authorities and other legal persons governed by public law under a private-law contract of indefinite duration enjoy similar guarantees by virtue of legislation.²⁷² Act 3896/2010 covers all these workers. It also covers *de facto* employment relationships (without a valid contract); this also results from legislation transposing Directive 92/85/EEC²⁷³ and legislation prohibiting dismissal during pregnancy and for a period thereafter (see 1.1.11. below) which refer to ‘working women’ in general.²⁷⁴

1.1.3. *Hiring*: The employer must not refuse to hire a woman on grounds of pregnancy or maternity. Where hiring is subject to presentation of a medical certificate, the pregnant woman is hired without it when the medical examinations required are dangerous for her health or the health of the foetus. In this event, the medical certificate is presented after expiry of the maternity leave (Article 20(2) of Act 3896/2010). This concerns e.g. candidates for jobs which involve the handling of food or drinks or direct contact with people (restaurants, hotels, hairdressers etc.), who must have a ‘health booklet’ certifying that they do not suffer from an infectious disease. When the assessment includes fitness tests, pregnant candidates must be allowed to perform them after pregnancy.²⁷⁵ For *pregnancy-related illness*, see 1.1.5. and 1.1.11. below.

1.1.4. *Maternity leave* for women employed in the private sector is at least seventeen weeks (119 days): eight weeks (56 days) before (mandatory) and nine weeks (63 days) after

²⁶⁹ Implementing Directive 92/85/EEC.

²⁷⁰ Providing for the additional six-month leave to mothers (1.1.4. below).

²⁷¹ See e.g. ECJ Case C-284/02 *Sass* [2004] ECR I-11143 (maternity leave longer than 14 weeks).

²⁷² Decree 410/1988, OJ A 191/18/30.08.1988.

²⁷³ Decree 176/1997, OJ A 150/15.7.1997, as amended by Decree 41/2003, OJ A 44/21.02.2003.

²⁷⁴ SCPC, Civil Section, 892/2003 (unlawful dismissal of a *de facto* employed pregnant woman).

²⁷⁵ Athens Administrative Court of Appeal 396/2010; Larissa Administrative Court of Appeal 56/2006, relying on the Constitution and Directive 76/207.

childbirth. The wages are paid partly by the employer and partly by the woman's social security scheme²⁷⁶ and a scheme of the Agency for Manpower Employment (OAED).²⁷⁷

Women covered by the CSC (see 1. above) receive a fully paid five-month maternity leave (two months before and three after childbirth) plus two months for every birth following the second; for multiple births, one month for each further child is added.²⁷⁸ Adoptive mothers receive three months of maternity leave (Article 52(4) CSC). Women employed by the State, local authorities and other legal persons governed by public law under a private-law contract of indefinite duration receive the same leaves. However, those working for the same employers under a fixed-term contract receive the less favourable private-sector maternity leave, and when they lack 200 days of previous employment, they are deprived of any income during the leave. This obviously conflicts with Directives 92/85/EEC and 2006/54/EC (see also 2.1.4. below). Sectoral collective agreements, such as those for bank personnel, have extended the CSC maternity and parental leaves to the private sector workers that they cover.

Female judges,²⁷⁹ permanent state school teachers²⁸⁰ and policewomen²⁸¹ are granted the CSC maternity leaves. Female military personnel receive a five-month pregnancy leave, until confinement only, while (compulsory) parental leave (for both parents) starts immediately thereafter.²⁸² This does not serve the dual purpose of maternity leave, as recognised by the ECJ (protecting a woman's biological condition during and after pregnancy as well as the special relationship between a woman and her child over the period which follows pregnancy and childbirth), since the woman has no leave of her own after childbirth.²⁸³ Moreover, the right to maternity leave must not be affected or substituted by the right to parental leave which serves a different purpose.²⁸⁴

Mothers employed in the private sector can take a further 'special' six-month leave, after maternity leave or the agreed leave replacing reduced working hours (see 1.1.6. below), which is paid by the OAED (cf. 1.1.4. above) at the legal minimum wage rate.²⁸⁵ This leave is independent both from maternity and parental leave. It can be considered that it should be available to both parents, since it follows maternity leave.²⁸⁶

1.1.5. A woman returning from maternity leave is entitled to the same post or an equivalent post, on no less favourable terms and conditions, and to any improvement in working conditions to which she would have been entitled in her absence (Article 16 of Act 3896/2010).

Prior to the transposition of Directives 2002/73/EC and 2006/54/EC, the Supreme Civil and Penal Court (SCPC), Civil Section, relying on Act 1414/1983 transposing Directives 75/117/EEC and 76/207/EEC, Article 4(2) of the Constitution and Article 141(1) TEC (now Article 157 TFEU), held that any prejudicial modification of the working conditions of a woman returning from maternity leave constituted discrimination on grounds of sex.²⁸⁷ However, it also held that a woman was not entitled to the pay rise (which would include bonuses) given to all her colleagues who performed the same work, as she had been absent for

²⁷⁶ Article 11 of Act 2874/2000, OJ A 286/29.10.2000, which sanctions Clause 7 of the national general collective agreement for 2000; Article 39 of Act 1846/1951, OJ A 179/21.06.1951.

²⁷⁷ http://www.oaed.gr/Pages/SN_46.pg, accessed 19 August 2012.

²⁷⁸ Article 52(1) CSC, as amended by Article 18 of Act 3801/2009, OJ A 163/04.09.2009.

²⁷⁹ Article 44(20) of Act 1756/1988, OJ A 35/1988 (Code on Courts' Regulation and Judges' Status), as repeatedly amended, most recently by Act 4055/2012, OJ A 51/12.03.2012.

²⁸⁰ Article 53 Act 2721/1999, OJ A 112/03.06.1999.

²⁸¹ Articles 10 and 10A Decree 27/1986, as amended by Article 2 Decree 66/2000, OJ A 57/2000.

²⁸² Articles 8-9 of Ministerial Decision F.400/32/82424/S.343, OJ B 1139/03/06/2011; Athens Administrative Court of Appeal 921/2010.

²⁸³ ECJ Cases C-320/01 *Busch* [2003] ECR I-2041, Paragraph 42; 421/92 *Habermann-Beltermann* [1994] ECR I-1657, Paragraph 21; C-32/93 *Webb* [1994] ECR I-1963, Paragraph 20.

²⁸⁴ ECJ Cases C-116/06 *Kiiski* [2007] ECR I-7643, Paragraph 56; C-519/03 *Commission v. Luxembourg* [2005] ECR I-3067, Paragraphs 32-33.

²⁸⁵ Article 142 of Act 3655/2008, as amended by Article 36 of Act 3996/2011, OJ A 170/05.08.2011.

²⁸⁶ See S. Koukoulis-Spiliotopoulos 'Retirement and Harmonization of Family and Work (ECJ 26.3.2009 C-559/07)' *Review of Social Security Law (EDKA)* 2009 pp. 753-785 (in Greek).

²⁸⁷ SCPC, Civil Section, 37/2004.

the whole previous year due to pregnancy-related illness and to maternity and parental leave.²⁸⁸

1.1.6. In the private sector, national general collective agreements (n.g.c.a.s) grant natural and adoptive mothers, and subsidiarily fathers, a paid *working time reduction* ‘for breastfeeding and childcare’: one hour per day for two and a half years after maternity leave.²⁸⁹ A two-hour reduction per day for one year and one hour for the subsequent six months or a paid leave of analogous length may be agreed. The employer’s agreement depends on business needs, but his/her refusal may constitute an abuse of rights.²⁹⁰

Parents covered by the CSC (see 1. above) are granted a paid transferable *reduced working day* (by two hours until the child reaches the age of two and one hour until the child reaches the age of four), as an alternative to a transferable nine-month paid leave. For a fourth child, the reduction lasts two more years (Article 53(2)).

The provisions of Act 4075/2012 transposing Directive 2010/18 are silent on this matter, but since the above rules are more favourable, they prevail (see 1.1.9. below).

1.1.7. Paid *paternity leave* of two days upon the birth of each child is granted in the private sector,²⁹¹ and by the CSC to both natural and adoptive fathers.²⁹²

1.1.8. The *scope* of Act 4075/2012 transposing Directive 2010/18 covers all natural, adoptive or foster parents employed in the private and the public sector, in any relationship or form of employment, including part-time and fixed-term contracts, contracts or relationships *via* temporary agencies and remunerated mandates, irrespective of the nature of the services provided (Article 49(2)).

Article 52(1) grants *parents returning from parental leave* the same rights as those of women returning from maternity leave (see 1.1.5. above). Article 52(3) prohibits dismissal and any less favourable treatment which is related to the request for or taking of parental leave or special leaves provided by this Act. The prohibitions also concern the reduced working day granted by n.g.c.a.s and the CSC (see 1.1.6. above), paternal leave (see 1.1.7. above), special leaves and the reduced working hours granted by Act 1483/1984 (see 1.1.10. below), since Article 14 of Act 1483/1984 prohibits dismissal related to family responsibilities, while the general prohibition of less favourable treatment of workers with family responsibilities and those returning from leaves are also based on Articles 18 and 20(3) of Act 3896/2010 (see 1.1.1. above). Decree 80/2012 (OJ 138/14.06.2012) transposing Directive 2010/18/EU as regards men and women employed under a contract of maritime work on commercial ships bearing the Greek flag grants the same protection.

This means that *natural, adoptive and foster parents* have the same rights regarding *any child/family-related leave, reduced working day and time off*: prohibition of dismissal and of any less favourable treatment, as well as rights upon return.

1.1.9. Article 50 of Act 4075/2012 transposing Directive 2010/18/EU grants each natural, adoptive or foster parent, after one year of continuous or discontinuous employment with the same employer, an individual right to *unpaid parental leave* of at least four months, until the child reaches the age of six. This concerns each child, provided that one year of employment with the same employer has followed the previous leave. The leave is granted by priority of requests, but parents of children with a disability or long-term or sudden illness and single parents have absolute priority. These minimum requirements do not affect more favourable

²⁸⁸ SCPC, Civil Section, 1221/2004.

²⁸⁹ N.g.c.a.s 1993, 2002-2003 and 2004-2005.

²⁹⁰ SCPC, Civil Section, 10/2010.

²⁹¹ N.g.c.a. 1993, one day 2000-2001 (two days).

²⁹² Article 50(1) CSC, as amended by Article 18 of Act 3801/2009, OJ A 163/04.09.2011.

rules. Article 54 vaguely repeals ‘any less favourable provision’. This means that in the private sector, the law is improved,²⁹³ but the parental leave remains unpaid.

As Act 4075/2012 did not specifically repeal conflicting provisions, there is legal uncertainty for other rules, such as those of the CSC granting a nine-month *parental leave* (see 1.1.6. above). The CSC exceeds Act 4075/2012 in pay and total length (one month longer), but falls short of it regarding the child’s age (until the age of four, instead of six); it is not granted to adoptive and foster parents; and CSC rights are not individual (the leave is transferable). An adoptive mother claimed the CSC parental leave, after the three-month adoption leave (see 1.1.4. above), and won her case in the Council of State (the Supreme Administrative Court (CS)),²⁹⁴ but the problem remains for adoptive fathers.

The CSC grants widow(er)s, unmarried or disabled parents longer periods of leave and reduced working hours, which prevail as more favourable. If the spouse of a parent covered by the CSC is a private sector worker, the reduced working day or leave is granted to him/her to the extent that it exceeds his/her spouse’s rights. There are no individual rights. If the wife of a man covered by the CSC does not work, he has no parental leave, unless she is unfit for childcare due to serious illness or handicap; we must consider that this provision was repealed by Act 4075/2012 (Article 54, above).

The CSC provisions on the reduced working day and parental leave also apply e.g. to the police²⁹⁵ and military personnel (for the latter, right after confinement, see 1.1.4. above). Only female permanent state school teachers receive the CSC parental leave.²⁹⁶

The entitlement of male and female judges to the CSC nine-month parental leave, which was previously upheld by well-established case law based on the Constitution and EU law,²⁹⁷ has recently been curtailed by four months on the occasion of its formal extension to fathers.²⁹⁸ This reduction of the level of protection is in breach of Directive 2010/18/EU.²⁹⁹

1.1.10. ‘*Special leaves*’ are granted e.g.:

- a) by Act 4075/2012 transposing Directive 2010/18 as individual rights of natural, adoptive and foster parents with a child under eighteen who: i) suffers from a disease which requires blood transfusion or dialysis or from cancer or needs a transplant (ten working days a year, *paid*); ii) is hospitalized due to a disease or accident requiring the parent’s presence (during hospitalization and otherwise no more than thirty days a year, *unpaid*), provided that the parent has exhausted his/her parental leave (Article 51); the latter condition, which was introduced by Act 4075/2012 transposing Directive 2010/18/EU, seems unallowable, as the purpose of the special leave differs from that of parental leave (cf. 1.1.4. above); moreover, this constitutes a reduction of the level of protection which is prohibited by the Directive. If an employee needs more days due to the above reasons, he/she may seek unpaid leave, whose granting, however, is not compulsory.
- b) by the CSC: i) for employees with a spouse or child suffering from a disease which requires regular blood transfusion or periodic hospitalization, or a child suffering from a serious mental handicap or Down syndrome: up to twenty-two working days a year, transferable, *paid* (Article 50(2) and (3)); ii) for school visits: up to four working days a year or five days for two or more children, transferable, *paid* (Article 53(6)); for persons covered by the CSC (see 1. above) these provisions prevail to the extent that they are more favourable than those of Act 4075/2012 and Act 1483/1984 (c) below).

²⁹³ Article 5 of Act 1483/1984, OJ A 153/1984: three and a half unpaid months for each parent until the child reaches the age of three and a half; continuous employment required; no take-up priority.

²⁹⁴ CS 607/2007, relying on Article 21(1) of the Constitution, the European Convention on the Adoption of Children, Directive 96/34 and Civil Code provisions equalling adopted to natural children.

²⁹⁵ Article 10A of Decree 27/1986, as added by Article 1 Decree 70/2011, OJ A 169/04.08.2011.

²⁹⁶ Article 53(2) of Act 2721/1999, as amended by Act 3687/2008, OJ A 159/01.08.2008.

²⁹⁷ See leading cases CS (Plen.) 3216/2003; CS 1 and 2/2006.

²⁹⁸ Article 89 of Act 4055/2010, OJ A 51/12/03.2012 amending Article 44(21) of Act 1756/1988.

²⁹⁹ See Greek National Commission for Human Rights (NCHR) *Comments and proposals on the Ministry of Justice bill ‘for the fair trial and its reasonable duration’*: www.nchr.gr, accessed 20 August 2012; S. Koukoulis-Spiliotopoulos ‘Act 3896/2010 and Occupational Social Security Schemes. The Confusion is Heightened’ *Review of Social Security Law (EDKA)* 2012, pp. 27-39 (39) (in Greek).

- c) by Act 1483/1984, as improved by n.g.c.a.s.³⁰⁰ (private sector), for natural, adoptive and foster parents with children under sixteen or older children needing special care due to serious or chronic illness, or other dependents: i) in the event of illness of any of the above: up to six working days a year, eight for two children, and fourteen for three children and more, non-transferable, *unpaid* (Article 7); this leave is not granted either by Act 4075/2012 or by the CSC, but it applies anyway to the private sector, as well as to the public sector, by virtue of Decree 193/1988 (OJ A 84/1988); ii) for school visits: up to four working days a year, transferable, *paid* (Article 9).

Act 1483/1984 also grants parents with mentally or physically disabled children a transferable *working day reduction* by one hour with an analogous *pay cut* (Article 8). This provision is broader than the above disease-related provisions of Act 4075/2012 and the CSC. It therefore applies to the private sector, as well as to the public sector by virtue of Decree 193/1988, for situations not covered by Act 4075/2012 and the CSC.

1.1.11. Article 15(1) of Act 1483/1984 prohibits *dismissal* during pregnancy and 18 months after childbirth or during a longer absence due to pregnancy or confinement related illness, save on a serious ground. ‘The protection against dismissal concerns the employer by whom the woman is hired, without having previously been employed elsewhere, before expiration of the 18-month period or the longer period provided by this provision, as well as the new employer by whom the woman is hired and until the above periods are completed. Possible decrease of the pregnant worker’s output due to pregnancy may in no event be considered a serious ground’. This period of protection includes the additional six months leave granted to mothers (see 1.1.4. above). Article 10 of Decree 176/97 (OJ A 150/15.07.1997) transposing Directive 92/85 refers to the above provision, adding that in the event of termination on a serious ground, the employer must ‘duly justify the termination in writing’ and notify the Labour Inspectorate.

The SCPC Civil Section held that this protection also concerns a fixed-term contract, but does not extend beyond its expiry. It held, furthermore, that a dismissal shortly after the expiry of the protected period, while the contract was still in effect, on grounds of the woman’s longer absence due to pregnancy-related illness, was an abuse of rights, and hence was null and void.³⁰¹

There is a ‘*serious ground*’, when one or more facts, objectively and according to good faith, make the continuation of the employment relationship unbearable for the employer, irrespective of any fault of the worker, the particular circumstances of the case being taken into account. Such a fact may be the poor performance of the worker’s duties or her non-compliance with the employer’s instructions, provided that this is not due to her situation.³⁰² The closing down of the business is also such a ground.³⁰³

Since dismissal on the grounds of a request for or taking of any child/family-related leave (parental and paternal leave, special leaves), reduced working day and time off is prohibited by Act 4075/2012, in conjunction with Acts 1483/1984 and 3986/2010 (see 1.1.8. above), the above applies to such situations by analogy.

1.1.12. *Victimization*, i.e. dismissal or other adverse treatment ‘as a reaction of the employer or the vocational training provider to a complaint, denunciation, testimony or other action of a worker or trainee or a representative thereof, within the undertaking or place of vocational training, before a court or other authority, which is related to the application of this Act’ (Article 14 of Act 3896/2010 transposing Directive 2006/54/EC), is prohibited. This prohibition also concerns pregnancy, maternity, paternity and parental rights, since these

³⁰⁰ Act 1483/1984, OJ A 153/08.10.1984, as improved by n.g.c.a.s 2000-2001 and 2008-2009, Act 3488/2006 transposing Directive 2006/54 and Act 3996/2011, OJ A 170/05.08.2011.

³⁰¹ SCPC, Civil Section, 1341/2005, 317/2011, and 1591/2010, respectively.

³⁰² SCPC, Civil Section, 308/2011, 622/2008.

³⁰³ Thessaloniki Court of Appeal 47/1991.

rights fall within the scope of the Act. There are no cases related to this provision, whose wide scope is due to a proposal of the NCHR.³⁰⁴

1.1.13. The rules on pregnancy, maternity, paternity and parental rights are mostly more favourable for state employees and those considered equal to them, in length and pay, as shown above (see 1., and further, regarding each right). The law makes, in principle, no distinction according to the employer's size. However, some rights, such as the right of parents of mentally or physically disabled children to a reduction of working hours (see 1.1.10. above) are only granted in relation to employers of at least fifty workers.

1.2. Social security and pension rights

Maternity and child/family-related leaves, in the private and the public sector, constitute *periods of service*. Paid leaves are fully covered by *social security*, including pensions, in contrast to unpaid leaves. This means that maternity, paternity, parental and special leaves and working hours reductions granted by the CSC (see 1.1.6., 1.1.7., 1.1.8., 1.1.9. and 1.1.10.(b) above), are fully covered. In the private sector, maternity leave and the special six-month leave (see 1.1.4. above) are also covered, as pay is replaced by social security benefits, and so is paternity leave, since it is paid. In fact, the provisions of Act 4075/2012 transposing Directive 2010/18/EU only concern parental leave and special leaves of workers not covered by the CSC (see 1. above).

According to Article 52(2) of Act 4075/2012, all periods of *parental leave* and *special leaves* granted by this Act (see 1.1.8. and 1.1.10. above) constitute a *period of service* for calculating pay, granting annual leave and annual leave allowance, professional development and redundancy compensation. Regarding *social security*, including pensions, according to Article 52(4) and (5) of Act 4075/2012, *unpaid* leaves granted by this Act (parental and child hospitalization leaves; see 1.1.8. and 1.1.10.(a) above) are covered, provided that the worker pays his/her contributions and the employer's.³⁰⁵ The leaves for a seriously ill child (Act 4075/2012; see 1.1.10.(a)(i) above) and for school visits (Act 1483/1984 (see 1.1.10.(c) above), also have full social security coverage, as they are *paid*; the leave for a dependent's illness and the working hours reduction (Act 1483/1984; see 1.1.10.(c) above) are not covered, as they are *unpaid*.

1.3. Self-employment

Directive 2010/41/EU has not yet been transposed. The social security schemes for the self-employed grant directly affiliated women (only) a very low maternity allowance as a lump sum. For example, the Fund for Lawyers' Welfare (TPDA) pays self-employed female lawyers and trainees a pregnancy allowance of EUR 470 (i.e. EUR 116 less than the lowest minimum salary for employees, see 3. below) and a post-confinement allowance of another EUR 470.³⁰⁶ There are no other provisions specifically concerning the self-employed, but the scope of Act 3896/2010 transposing Directive 2006/54/EC also covers the liberal professions (see 1.1.2. above) meaning that unfavourable treatment related to pregnancy, maternity, paternity or parenthood is prohibited. However, this matter has not been addressed in any way.

1.4. Access to and the supply of goods and services

Directive 2004/113/EC has been transposed by Act 3769/2009 (OJ 105/01.07.2009). Article 4(1)(a) contains a *general prohibition of any direct or indirect discrimination* on grounds of sex, including less favourable treatment of women on grounds of pregnancy and maternity, within the scope of the Act, which is the same as the Directive's scope, i.e. the areas excluded

³⁰⁴ NCHR 'Comments on the Bill transposing Directive 2006/54' and Letter to the Minister of Labour and Social Security dated 31 October 2010: <http://www.nchr.gr>, accessed 25 July 2012.

³⁰⁵ Article 52(4) of Act 4075/2012 refers to Article 40 of Act 2084/1992, as replaced by Article 10(18) of Act 3863/2010 and then by Article 40 of Act 3996/2011, OJ A 170/05.08.2011.

³⁰⁶ Decree 162/1998, OJ A 122/05.06.1998, as amended, regarding the relevant amounts, by Ministerial Decision F.40222/oik.3368/213, Paragraph 6, OJ B 344/12.02.2004.

from the Directive's scope are also excluded from the scope of this Act. However, this exclusion must be considered invalid, since gender discrimination in all areas (including the areas excluded from this scope) is prohibited by Article 4(2) of the Constitution (see 1. above). The Act also prohibits *victimization*.³⁰⁷ The equality bodies designated by this Act are the Ombudsman for the public sector, and the Consumer's Ombudsman for the private sector (Article 11 of the Act). Neither these Ombudsmen nor the courts have yet dealt with any matter covered by this Act. More generally, neither this Act nor the Directive seems to have attracted any attention. There are no cases and no discussion regarding either the Act or the Directive.

2. Gaps in national law

2.1. Employment

2.1.1. Substantive provisions protecting the beneficiaries of maternity, parental and special leaves and reduced working hours from discrimination are satisfactory. However, *discrimination* is common *in practice*, mainly in the private sector, and is rapidly increasing along with the financial crisis. This is particularly deplored by the Ombudsman,³⁰⁸ who stresses that 'the austerity measures contributed to a massive loss of employment in the private and public sectors, unprecedented deregulation of labour legislation and increase in atypical employment. Women's complaints are increasing as they are more exposed to adverse working conditions, particularly during pregnancy and upon return from maternity leave. They are under greater pressure to accept flexible forms of employment that do not ensure adequate living standards and do not allow them to meet family obligations (in particular, *downgrading*,³⁰⁹ imposed *part-time* or *rotation employment*).'

2.1.2. According to Article 2(3) of Act 3846/2010 (OJ A 66/11.05.2010) rotation employment is 'full-time employment for fewer days a week or fewer weeks a month or fewer months a year or a combination of these'. This is allowed if agreed in writing upon the conclusion of the contract or in the course of employment. However, 'in case of decrease of activity, the employer may, instead of terminating the contract, impose a system of rotation employment in the undertaking for a period not exceeding nine months within the same calendar year, provided that he/she has previously informed and consulted with the workers' lawful representatives'. 'These agreements or decisions shall be notified to the Labour Inspectorate within eight days of the day on which they were concluded or taken'. The 'decrease of activity' must be serious and have permanent features; mere liquidity difficulties or a bad market context does not suffice; the information and consultation must include exact financial data; the consultation period must be reasonable and any margin of alternative solutions must be exhausted. If any of these conditions is not (sufficiently) fulfilled, the unilateral conversion of the contract is invalid and the original contracts of employment apply.³¹⁰

In 2011, the number of agreed conversions into rotation contracts increased by 193 % and the unilateral conversions by 631.89 %, in relation to 2010. Most of the latter regarded women returning from maternity leave and the legal requirements were mostly ignored.³¹¹ Rotation was mostly imposed on women only, while the law allows only it if it concerns all or part of the personnel; the financial grounds invoked were vague and fictitious; consultation was superficial; the women worked one to three days a week, with pay cuts, and often for an

³⁰⁷ Article 8 prohibits 'unfavourable treatment or provoking unfavourable effects against a person who makes a complaint or is involved in a procedure aiming at imposing compliance with the principle of equal treatment in the sense of this Act'.

³⁰⁸ Greek Ombudsman (Deputy Ombudsman for Gender Equality) *Gender and Employment Relationships*, Special Report 2011, spring 2012: www.synigoros.gr, accessed 15 August 2012.

³⁰⁹ SCPC, Civil Section, 37/2004. Downgrading was common in the state-owned bank concerned, but only the claimant dared bring an action, which an expert lawyer dealt with as a test case, *pro bono*.

³¹⁰ SCPC, Civil Section, 468/2012, Athens First Instance Civil Court 8606/2011.

³¹¹ Greek Ombudsman *Gender and Employment Relationships*, Special Report 2011: www.synigoros.gr, accessed 15 August 2012.

indefinite time.³¹² The Ombudsman has stressed these violations of Directive 2006/54/EC and Act 3846/2010 (above).

2.1.3. This situation has been strongly deplored by the ILO Committee on the Application of Conventions and Recommendations. Regarding the application by Greece of ILO Conventions 100 (equal pay) and 111 (discrimination), the Committee stressed ‘*the disproportionate impact of the crisis on women*’. It found that women, especially pregnant women and mothers were very much affected by the recent legislative measures aimed at increasing labour market flexibility, especially measures enabling employers to unilaterally convert full-time contracts into contracts for rotation work which led to a ‘*dramatic increase*’ of such conversions, and part-time work. There were ‘*no sufficient safeguards and existing safeguards were not effectively enforced*’. While full statistical and sex-disaggregated data still had to be provided, the Committee was deeply concerned at the disproportionate impact of these measures on women’s levels of pay.³¹³ This Report followed communications by the Greek General Confederation of Labour on the incompatibility of austerity measures with several ILO Conventions, including the above, and ILO High Level Mission (HLM) visits to Greece and meetings with European Commission and International Monetary Fund officials.

2.1.4. There is, moreover, *statutory discrimination* against women in the private sector regarding maternity allowances replacing pay (see 1.1.4. above). While sickness allowance is subject to 100 working days in the year preceding the notification of the sickness, the maternity allowance paid by the woman’s scheme is subject to stricter conditions: 200 working days during the two years preceding the commencement of maternity leave. This means that women with shorter employment are excluded from both this allowance and the OAED allowance, which means that they are deprived of any income during maternity leave. Before the transposition of Directive 92/85/EEC, this condition and the starting point for the retroactive calculation of the 200 working days was the date of childbirth and this concerned the main social security scheme for workers under a private-law contract (IKA) only.³¹⁴ Decree 176/1997 transposing Directive 92/85/EEC extended this condition to all schemes and fixed an earlier starting point (the commencement of maternity leave), extending the required employment period. So, regarding substitutes for pay, women are less favourably treated than sick workers, while the existing level of their protection has been lowered, which constitutes a violation of Directive 92/85/EEC. The fact that the leaves exceed minimum EU-law requirements in length and pay is irrelevant (see 1.1.1. above).

2.1.5. In the private sector, there is strong evidence of pregnant women or mothers being ‘*forced*’ out of their employment, which the Ombudsman deplores.³¹⁵ A female MP recently asked the Minister of Employment and Social Security what measures he intended to take in order to combat this practice. In his reply, the Minister mainly listed the legislative provisions prohibiting such practices, which the MP had quoted.³¹⁶ A judgment, based on Article 15 of Act 1483/1984 (see 1.1.11. above), condemned the forcing of a pregnant lawyer under a remunerated mandate³¹⁷ to quit her job, through downgrading and moral pressure.³¹⁸ ‘White’

³¹² Greek Ombudsman (Deputy Ombudsman for Gender Equality) *Abusive unilateral imposition of rotation employment upon workers returning from maternity leave*: http://www.synigoros.gr/?i=isotita-ton-fylon.el.if3_2_2mitrotita.70878; see also Greek Ombudsman *Second Special Report* December 2010: <http://www.synigoros.gr/diakriseis/index.htm>, summary in English, both accessed 20 August 2012.

³¹³ International Labour Conference, 101st Session 2012 *Report of the Committee of Experts on the Application of Conventions and Recommendations*, Greece, ILO Conventions 98, 100, 102, 111 and 156: <http://www.ilo.org/dyn/normlex/en/f?p=1000:11003:0::NO>, accessed 18 August 2012.

³¹⁴ Article 39 of Act 1846/1951 which governs IKA.

³¹⁵ See e.g. Greek Ombudsman *Second Special Report* 2010, and *Gender and Employment Relationships*, Special Report 2011: <http://www.synigoros.gr/diakriseis/index.htm>, both accessed 20 August 2012.

³¹⁶ MP K. Papakosta-Sidiropoulou, Question 598/31.07.2012. Ministry of Social Security and Welfare, Reply, Reg. No 128/14.08.2012: <http://www.katerinapapakosta.gr>, accessed 20 August 2012.

³¹⁷ It is mainly lawyers who provide their services under a remunerated mandate, i.e. are not under the employer’s control like salaried employees, but have more freedom to act.

resignations are often mentioned in the media and in complaints to NGOs, but they are very difficult to prove. There is unofficial information from the Gender Equality Ombudsman about complaints regarding such practices, but the women withdrew the complaints for lack of evidence and fear that the employer would bring criminal charges against them for slander. Such complaints are also submitted to the Labour Inspectorate, but for the same reasons they are not taken further. At the request of the women, no record of such complaints is kept by either the Ombudsman or the Labour Inspectorate. There is no relevant case law, obviously for the same reasons.

2.1.6. In the public sector, a strange unlawful practice has formed:³¹⁹ When the CSC parental leave is not requested upon the expiry of maternity leave, but later, while the child is still under the required age, by a parent who made no use of the reduced working day, a ‘fictitious use’ of the reduced working day is taken into account and the leave is proportionately curtailed. The Legal Council of the State (LCS) and the Special CS Committee, whose task is to ensure the execution of judicial decisions by the authorities concerned, have agreed with this practice, which violates the CSC and EU law.³²⁰

2.1.7. The notion of ‘occupational scheme’ remains almost unknown even after the transposition of Directive 2006/54/EC, which is vague and complex.³²¹ The courts apply Article 4(2) of the Constitution (see 1. above) to all social security schemes, without making any distinction between statutory and occupational schemes. On the taking into account of the periods of maternity and other child/family-related leaves, see 1.1.2. above.

It is common knowledge that fixed-term contracts are often not renewed for reasons connected to pregnancy, maternity or parental leave. Examples are provided by cases dealt with by the SCPC, which finds this practice lawful and does not apply EU law or CJEU case law,³²² which condemns this practice, and which has never made a preliminary reference to the CJEU (see 1.1.11. above).

It is common knowledge that in the private sector few mothers and no fathers take parental leave, as it is unpaid and payment of all social security contributions (see 1.2. above) is required. In the public sector, where parental leave is fully paid and covered by social security, it is mostly taken by women. There are no relevant official data, but take-up by fathers seems to be on the increase. Discrimination of fathers in this respect is very probable, but it has not been addressed. Fathers use other forms of leaves, e.g. annual leave which is paid and compulsory. Most case law involving fathers concerned claims of those covered by the CSC or provisions referring to it (see 1. above), under the previous CSC (before 2007) which granted it to women only, and of male judges, who were in the same situation until 2012. These claims mostly succeeded (see CS case law referred to above, see 1.1.9.).

2.2. Self-employment

Discrimination against self-employed workers who are pregnant or have recently given birth is very probable, but it has not been addressed. The problem with allowances is that they only concern women directly affiliated with the scheme and their amount is very low (see 1.3. above).

2.3. Access to and the supply of goods and services

There probably are problems in this respect, but they have not been addressed.

³¹⁸ Piraeus Court of Appeal 461/2004.

³¹⁹ See S. Koukoulis-Spiliotopoulos ‘Retirement and Harmonization of Family and Work. (ECJ 26.3.2009 C-559/07)’ *Review of Social Security Law (EDKA)* 2009, pp.753-785 (in Greek).

³²⁰ LCS *Opinion* 64/2008 (the LCS represents the State before national and international/European courts and gives opinions at the request of public authorities, which are not binding, unless the competent Minister endorses them); CS *Special Committee Decision* 16/2009.

³²¹ S. Koukoulis-Spiliotopoulos ‘Act 3896/2010 and Occupational Social Security Schemes. The Confusion is Heightened’ *Review of Social Security Law (EDKA)* 2012, pp. 27-39 (in Greek).

³²² In particular Case 438/99 *Melgar* [2001] ECR 2001, I-6915.

2.4. Additional information

In 2008 the CS ruled that a public official is not entitled to more than one period of parental leave for *multiple births*.³²³ Then, the Thessaloniki Administrative Court of Appeal (ACA) referred the issue to the ECJ. In the *Chatzi* judgment³²⁴ the CJEU held that Directive 96/34 did not require the birth of twins to give entitlement to two periods of parental leave. However, ‘it obliges the national legislature to establish a regime which, according to the situation obtaining in the Member State concerned, ensures that parents of twins receive treatment that takes due account of their needs. It is up to national courts to determine whether national rules meet that requirement and, if necessary, to interpret them, insofar as possible, in conformity with [EU] law’. The ECJ also gave examples of proper measures. As, in Greece, neither the parental leave regime nor the childcare structures met the above requirement, the ACA upheld the claim for a second parental leave.³²⁵ This judgment has not been appealed before the CS and has therefore become irrevocable. Anyway, the situation is worse now: no legislative measures have been taken and the number of childcare centres is shrinking due to budget cuts.

In addition, decisions of the Minister of Education exclude maternity and parental leave time from the period required for teachers to apply for the posts of school director and school counsel.³²⁶ A female MP asked the Minister whether this discriminatory practice would cease. The Minister’s response was vague and the practice still continued.³²⁷ However, following a petition for annulment lodged by the Greek League for Women’s Rights (GLWR), the CS annulled one of the above ministerial decisions regarding school counsels. An important feature of the CS judgment is that it upheld the standing of the GLWR, because it considered that parental leave, as a measure aimed at facilitating the harmonization of professional and family life, was a means to promote the effective implementation of gender equality. Since the objective of the GLWR was to promote gender equality and women’s rights, the GLWR had standing to seek annulment of the decision.³²⁸

3. Involvement of other parties

Collective agreements (c.a.s), in particular n.g.c.a.s and sectoral c.a.s, have strengthened maternity, paternal and parental rights (see e.g. 1.1.4., 1.1.6., 1.1.10.(c) above). However, recent legislation applying the requirements of the ‘support mechanism for the Greek economy’ by Euro-area Member States and the IMF, has abolished the fundamental protective principle of favourability by interfering with the conclusion and content of c.a.s and even individual agreements. Inter alia, priority was given to enterprise c.a.s (which are negotiated by new types of workers’ representation not enjoying the guarantees of independence applying to trade unions) over sectoral c.a.s; the *minimum* wages fixed by the 2010-2012 n.g.c.a. were reduced (by 22 % for all workers and by 32 % for those under 25 years of age) and any wage increase was blocked.³²⁹

As a result, for workers over 25, the minimum daily salary is now EUR 26.18 (unmarried) and EUR 28.80 (married); the minimum monthly salary is EUR 586.08 (unmarried) and EUR 644.69 (married), while further reductions have been announced. These amounts prevail over those in individual contracts and the employer can impose them. This means that the collective bargaining system has been dismantled, in violation of fundamental labour law principles. The workers, in particular women, whose bargaining power is low and unemployment much higher than male unemployment, have been deprived of possibilities to

³²³ CS 2637 and 2638/2008.

³²⁴ Case C-149/10 *Zoe Chatzi v Ipourgos Ikononikon* [Minister of Finance] [2010] ECR.

³²⁵ ACA 1842/2010; see S. Koukoulis-Spiiotopoulos ‘Greece’ *European Gender Equality Law Review* 1-2011: http://ec.europa.eu/justice/gender-equality/document/index_en.htm, accessed 30 July 2012.

³²⁶ See e.g. Decision F 351.1/03/19075/D1, OJ B 247/15.02.2022.

³²⁷ MP E. Tsoumani-Spentza, Question dated 18 March 2011: www.tsoumani.gr, accessed 31 July 2012.

³²⁸ CS 4875/2012.

³²⁹ Acts 3845/2010, OJ A 65/06.05.2010; 4024/2011, OJ A 226/27.10.2011; Cabinet Order 6/2012, OJ A 38/28.02.2012.

improve or even safeguard their *acquis*. The ILO Committee and the HLM (see 2.1.3. above) are deeply concerned about this situation.³³⁰

Most complaints to the Ombudsman concern pregnancy, maternity and parental rights. Due to the importance of the Ombudsman's action, the ILO Committee (see 2.1.3. above) welcomed the extension of her powers by the Act transposing Directive 2006/54/EC.

The National Commission for Human Rights (NCHR)³³¹ makes detailed comments and proposals on Bills aimed at transposing Directives, which are often accepted, and it evaluates the implementation of legislation. It has achieved important improvements of legislation (e.g. of the Acts transposing Directives 2002/73 and 2006/54).³³²

The Parliament's Scientific Service³³³ drafts reports on the compatibility of Bills with the Constitution, ratified international treaties and EU law, some of which are accepted.

The Greek Economic and Social Commission (OKE) also makes comments on Bills and practices related to employment, including those regarding maternity and parenthood, some of which are accepted.³³⁴

The Greek League for Women's Rights draws attention to discriminatory provisions and practices and mobilises other NGOs in order to lobby, often successfully, the competent authorities.³³⁵

The General Secretariat for Gender Equality, a public service under the Ministry of the Interior, engages in important activities regarding gender equality policies and legislation.³³⁶

4. Enforcement and effectiveness

4.1. General

There is a general impression that women's pregnancy and maternity rights lead to lower numbers of women being employed, but there are no specific data or studies.

4.2. Legal redress

4.2.1. Article 22 of Act 3896/2010 transposing Directive 2006/54/EC requires *access* to judicial and administrative procedures by aggrieved persons and organisations with their 'consent'. However, the Directive requires 'approval', not 'consent'. Under Greek law, the 'consent' must be obtained before lodging the request for a judicial remedy, while the 'approval' can be obtained later.³³⁷ This means that, until the consent is given, the remedy may well be time-barred (e.g. a dismissal can be challenged within three months of its notification; an administrative act within sixty days of cognisance thereof). Moreover, this rule and the burden of proof rule are left out of the procedural codes,³³⁸ meaning that both remain generally unknown. There are no judgments applying these rules. This is a very serious problem, all the more so as the reluctance of workers, in particular women, to use the recourse they have to Justice, due to the fear of being victimized or labelled troublemakers and due to lack of evidence, is increasing with the crisis.³³⁹ Other deterrents are the great

³³⁰ Report quoted above in 1.1.16., pp.160-164 (Convention 98, collective bargaining).

³³¹ The NCHR, an independent body established according to the UN 'Paris Principles' (UN General Assembly, 85th Plenary Assembly, 20 December 1993, A/RES/48/134), gives non-formally binding opinions to the Government on matters related to human rights: <http://www.nchr.gr>, accessed 24 July 2012.

³³² See NCHR 'Comments on the Bill transposing Directive 2006/54' and Letter to the Minister of Labour and Social Security dated 31 October 2010: <http://www.nchr.gr>, accessed 25 July 2012.

³³³ <http://www.hellenicparliament.gr>, accessed 30 July 2012.

³³⁴ <http://www.oke.gr>, accessed 30 July 2012.

³³⁵ <http://www.leaguewomenrights.gr>, accessed 30 July 2012.

³³⁶ <http://www.isotita.gr>, accessed 5 August 2012.

³³⁷ See Articles 236-238 of the Greek Civil Code for the meaning of 'consent' and 'approval'.

³³⁸ The CS had recommended the incorporation of the burden of proof rule in its Opinion 348/2003.

³³⁹ See NCHR 'Comments on the Bill transposing Directive 2006/54' and Letter to the Minister of Labour and Social Security dated 31 October 2010: <http://www.nchr.gr>, accessed 25 July 2012.

length of proceedings, for which the ECtHR has often condemned Greece and has even given a ‘pilot judgment’,³⁴⁰ and the sharply rising litigation costs (see 4.2.3. below).

4.2.2. *Remedies and sanctions* in civil and administrative cases, including gender equality cases, are proportional and dissuasive and can serve as a model.³⁴¹ A discriminatory dismissal is declared null and void (by civil courts) or annulled (by administrative courts). The dismissal is deemed never to have occurred and the worker retains his/her post, reinstatement being unnecessary. A discriminatory refusal to hire or promote is declared null and void by civil courts and the hiring or promotion is deemed to exist from the time it should have occurred. Administrative courts annul such refusals and order the issuance of an administrative act of retroactive hiring or promotion. In all cases, the worker is entitled to full back pay plus legal interest and moral damages. The Acts transposing Directives 2002/73 and 2006/54 have added disciplinary sanctions for civil servants and extended the administrative fines already provided for employers to directors or their representatives. They also increased the penal sanctions for a ‘violation of sexual dignity’ when it constitutes exploitation of workers or candidates for work. However, courts often do not have the opportunity to apply these sanctions in gender equality cases, due to workers’ reluctance to initiate such cases (see 4.2.1. above). Moreover, the Labour Inspectorate, which has the power to impose fines, does not often do so, due to acknowledged shortages in personnel and material means.³⁴²

4.2.3. Litigation *costs* have recently been sharply raised. This is a means to reduce litigation in order to avoid delays (see 4.2.1. above.). Particularly, one amount whose payment is a condition for admissibility was abruptly raised to EUR 300-400 (i.e. 50 %-66 % of a *minimum* monthly salary, see 3. above). This amount must be paid at every stage of the trial (at first instance, on appeal and on final appeal). This violates the right to access to court, all the more so as legal aid is highly insufficient.³⁴³

4.3. Access to information

The low gender equality litigation levels show that individuals are not aware of their rights, but there is no specific research available. The State does not disseminate any information. Moreover, as an employer, the State itself is currently in violation of certain national and EU rules (see 2.1.6. above).

Minority and migrant women are in an inferior position in the labour market, due to their low educational level, little or no knowledge of the Greek language or even illiteracy, and/or the fear of being expelled, which lead to them being exploited by employers and traffickers. They are therefore often reluctant to go to hospital or are prevented from doing so. Muslim women are accompanied to hospital by male family members who demand that they are examined by female doctors. This demand usually seems to be satisfied, unless it is not feasible (e.g. if there is no female doctor with the necessary specialism on duty, or in emergency cases).³⁴⁴ Women from lower economic backgrounds, disabled women or women with precarious or atypical employment contracts are also increasingly disadvantaged due to budget cuts which seriously affect the national health system and the supply and distribution of medication. Many people either cannot obtain their medication or must pay for it themselves, something impossible for the unemployed and low-salaried workers (see 3.

³⁴⁰ ECtHR *Athanasiou v Greece*, 21 December 2010 (final since 21 March 2011).

³⁴¹ See S. Koukoulis-Spiliotopoulos ‘Gender equality in Greece and effective judicial protection: issues of general relevance in employment relationships’ *Neue Zeitschrift für Arbeitsrecht* Beilage 2/2008, pp.74-82, and ‘Les sanctions non pécuniaires’ in: M. Verwilghen (ed.) *Access to Equality between Men and Women in the EC* pp.133-159 Louvain-la-Neuve, Presses Universitaires de Louvain 1993; C. McCrudden ‘The Lessons of the Conference’ in the same volume, pp.231-259.

³⁴² See Labour Inspectorate Annual Reports: <http://www.ypakp.gr>, accessed 15 August 2012.

³⁴³ See e.g. ECtHR *Kreuz v Poland*, 19 June 2001; *V. M. v Bulgaria*, 8 September 2006; NCHR Comments and proposals on the Bill ‘for a fair trial and a reasonable length thereof’: <http://www.nchr.gr>, accessed 20 August 2012.

³⁴⁴ University of Athens, Faculty of Medicine, Laboratory of Hygiene, Epidemiology and Statistical Medicine *Report on the Health of Migrants in Greece* March 2009: www.mighealth.net/el, accessed 18 August 2012.

above), and for many whose salary or pension has gradually been reduced by at least 40 %, while direct and indirect taxes are soaring.

HUNGARY – Beáta Nacsa

1. Existing legislation and case law

According to political declarations, the protection of motherhood, fatherhood and family relationships is one of the prime aims of the new central-right Orbán Government, in order to prevent any further decrease of fertility in Hungary.³⁴⁵ Contrary to the clarity of political statements, however, the content of new pieces of legislation is less than clear and is highly controversial, especially with regard to *Act I of 2012 on the new Labour Code*.

The Orbán Parliament has enacted *Act CCXI of 2011 on the Protection of Families*, which aims to provide a legislative framework on the legal standing of families and family members. The Act starts with a lengthy preamble containing a philosophical explanation on the traditional role of families in society and is packed with regulations, which refers to further pieces of legislation concretizing particular rules in the future.³⁴⁶

The generally applicable legal framework on equal treatment of pregnant women is regulated by *Act CXXV of 2003 on Equal Treatment and Promotion of Equal Opportunities* (abbreviated as 'Ebkvt' in Hungarian). Point L. of Article 8 of the Ebkvt prohibits discrimination on the basis of motherhood (pregnancy) and fatherhood.

1.1. Employment

1.1.1. Maternity and paternity related leaves

Short-term leaves:

Employees are exempted from the requirement of availability and from work duties:

- for the period of receiving IVF treatment in a healthcare institution;
- for the duration of mandatory medical examination (covering pregnancy-related examinations as well); and
- for nursing the child: for one hour twice daily, or two hours twice daily in the case of twins during the first six months of breastfeeding, and thereafter for one hour daily, or two hours daily in the case of twins until the end of the ninth month.³⁴⁷

Upon the birth of his child, the father is entitled to five days of leave (seven working days in the case of twins), until the end of the second month from the date of birth, which is allocated on the days as requested by the father. The leave is also provided if the child is stillborn or dies.³⁴⁸ The leave is paid from the central budget (and not by the employer.)³⁴⁹

Long-term leaves:

- Mothers are entitled to twenty-four weeks of maternity leave, of which four weeks are supposed to be provided prior to the expected date of birth. The starting date of maternity leave is decided by the mother, so she is not prevented from working as long as she is able to before giving birth. If the child receives treatment in an institute for premature infants, the unused portion of the maternity leave may be used after the child has been released from the institute up to the end of the first year following the birth. The duration of maternity leave, except where entitlement is specifically connected to work, shall be recognized as time spent at work.³⁵⁰

³⁴⁵ National Reform Programme 2012 of Hungary, April 2012, available on: http://ec.europa.eu/europe2020/pdf/nd/nrp2012_hungary_en.pdf, accessed 17 August 2012.

³⁴⁶ At the time of writing, this framework legislation had not substantively changed previous legislation regarding rights and obligations of families, or that of family members, but still created opportunities to restructure family law according to a more traditional fashion.

³⁴⁷ Article 55(1)b, c and e of Act I of 2012 on the Labour Code (hereafter: new Labour Code) came into force on 1 July 2012.

³⁴⁸ Article 118(4) of the New Labour Code.

³⁴⁹ 305/2002. (XII. 27.) Gov. Decree on payment of expenses in relation to father's leave due to childbirth (*a gyermek születése esetén az apát megillető munkaidő-kedvezményrel összefüggő költségek megtérítéséről*).

³⁵⁰ Article 127(1)-(4) of the new Labour Code.

- Employees (mothers and fathers alike) are entitled to leave work at the times requested by the worker for the purpose of taking care of their child, until the child reaches the age of three or, in case of a permanently and seriously ill child until the age of ten.³⁵¹ Such leave is not paid by the employer, but the parents might be entitled to different types of allowances which will be explained in point 1.2. below.
- Following the end of the above long-term unpaid leaves, the employer is obliged to re-employ the employee and to make an offer for having her/his wages adjusted by the amount of the average annual wage increase for employees in the same position. In the absence of such employees, the rate of actual annual wage increases implemented by the employer apply.³⁵²

Paid holidays:

- Every calendar year, both parents are entitled to extra holiday time calculated according to the number of their children under the age of sixteen: two working days for one child, four working days for two children – with a total of seven working days for more than two children.³⁵³ These extra holidays enable parents to spend more time with their child(ren) during school holidays.

1.1.2. *Obligation to re-employ and protection against unfair dismissal*

During maternity leave, and during the long-term parental leave until the child reaches the age of three, the parent-on-leave is protected against dismissal. However, parents who decide to return to work lose the legal protection against dismissal. The new Labour Code has seriously reduced the legal sanctions of unfair dismissal in general,³⁵⁴ although the legal protection of pregnant workers against unfair dismissal has remained similar to previous legislation, which provided strong protection for all unfairly dismissed employees. The legal protection of mothers and single fathers of a child under the age of three has been reduced considerably after the period of unpaid leave. Legislation here reinforces the traditional role of women in society and should be considered discriminatory, because the role and obligation to take care of a child is generally attached to the mother, and according to the law, the father only replaces the mother if the mother is not able to (has died) or is not willing (left the family) to fulfil her caring obligations. The employer is prohibited from dismissing a pregnant woman from the date that she notifies the employer of her pregnancy. (The same legal protection covers IVF-treated women from the notification of the employer of the treatment, for the duration of the treatment, with a maximum of six months.) If the employer still dismisses a pregnant woman, the dismissal shall be deemed to be unfair (illegal) and the employee is entitled to reinstatement in her previous job. Compared to previous legislation, the amount to be paid to the reinstated employee in lost wages has been reduced from the actual monetary loss arisen to a maximum of one year's 'absentee pay' (*távolléti díj*), which is equal to the worker's basic salary in most cases.³⁵⁵

Under previous legislation (Act no. XXII of 1992), until the child reached the age of three, the mother and the single father could not be dismissed by the employer by ordinary dismissal, regardless of whether the parent had returned to work or stayed at home with the child. According to the new Labour Code of 2012, the dismissal protection only applies if the parent does not return to work. If (s)he does return to work, a special set of rules will apply, depending on the underlying reason for dismissal. If the reason for dismissal is related to the parent's behaviour, then it must be so serious that it could justify immediate dismissal without any notice period. If the reason for dismissal is related to either the capabilities of the employee or the operation of the employer's business, the employee cannot be dismissed as long as there is a vacancy in the employer's given premises in which (s)he could be further employed. This rule only applies if the capabilities, experience and qualification used by the employee in his/her current job could be used in (activities relevant to) the other position.

³⁵¹ Articles 128 and 130 of the new Labour Code.

³⁴⁷ Article 59 of the new Labour Code.

³⁵³ Article 118(1) of the New Labour Code.

³⁵⁴ Reinstatement is available only for a handful of cases; the employee may instead sue for an amount equal to payment due during the notice period (e.g. 45 calendar days' payment after 5 years of service), or for damages, for which the upper limit of lost income is equal to one year's payment (Article 82 of new Labour Code).

³⁵⁵ According to previous legislation (Act No. XXII of 1992), the employee was entitled to all her lost wages, calculated based on her average salary.

The dismissal protection of a parent, who has temporarily been away from work in order to take care of a sick child, was also repealed by the new Labour Code. In this event, the parent can be lawfully dismissed, but the start of the notice period is delayed until (s)he returns to work.

Executive employees (either male or female) do not enjoy any of the legal protection as described above, according to Article 201 (1) of the new Labour Code.³⁵⁶ Though the Article 201 (1) does not prohibit the application of dismissal protection during pregnancy and maternity leave expressly, Article 209 (1) makes it possible for the employer and the executive to agree in the executive's employment contract³⁵⁷ that these protective rules will not apply to their legal relationship. Even without such agreement, the circumvention of the legal protection during pregnancy and maternity leave indirectly facilitated by the rule that the employer is not obliged to give reasons of dismissal.³⁵⁸ The new legislation deepened the already existing approach of the Hungarian legislator that not only the CEO and its deputies are considered to be executive employees, and extended the definition of executive employees to different groups of lower-ranked employees, as it is discussed in more details in 2.1., therefore under the new legislation wide range of workers are deprived of proper legal protection.³⁵⁹

1.1.3. Further pregnancy-related regulations

If a woman is unable to work in her original position according to medical opinion, from the time that her pregnancy is diagnosed until her child reaches the age of one, the employee must be offered a job appropriate for her state of health. During this period she will be given the basic wages normally paid for the job offered, which must not be less than her basic wages as fixed in the employment contract. If no position appropriate for her medical condition is available, the pregnant worker is discharged from work duties. In this event, her original basic wages are paid, except if the position offered is refused without good reason.³⁶⁰ The breach of duty to cooperate (to accept the appropriate position) is sanctioned by wage loss in the new legislation. The case law has not specified yet which is considered to be "appropriate position" or "refusal without good reason", nonetheless - taking into account the legal regulations and case law of similar issues - qualifications, skills, working conditions, and hierarchical position previously occupied will fall among the factors to be considered in such cases.

Pregnant women must not be transferred to work at another location without their consent. This rule also applies after childbirth until the child reaches the age of three, or for single parents, until the child reaches the age of sixteen.³⁶¹

The following preferential rules apply to working hours and rest periods of female employees from the time that pregnancy is diagnosed until the child reaches the age of three, or for single parents, until the child reaches the age of three: an irregular work schedule may be introduced only with the employee's consent; weekly rest days must not be allocated irregularly; overtime, stand-by duty and work in night shifts cannot be made obligatory.³⁶²

³⁵⁶ According to the Article 201 (1) of the new Labour Code the following rules of dismissal law are not applied to executive employees: Article 65 (3) on dismissal protection during leave of absence due to care the child (without pay from the employer) after maternity leave until three years of age of the child; Article 66 (1)-(6) on detailed rules on obligation to give reasons of dismissal; Article 68 (2) in case of dismissal issued during incapacity of work due to illness (either that of the employee or its child) notice period begins on the working day when the employee returns to work.

³⁵⁷ According to Article 209 (1) regulations on individual labour law (Second Part of the new Labour Code) are considered to be *dispositive* in case of executive employees, therefore the parties could derogate any protective laws freely in the executive's employment contract, including those rules which prohibit dismissal during pregnancy and maternity leave.

³⁵⁸ Article 201 (1) and Article 66 (1).

³⁵⁹ See the discussion in 2.1.

³⁶⁰ Article 60 of the new Labour Code.

³⁶¹ Article 53 of the new Labour Code.

³⁶² Article 113 of the new Labour Code.

1.2. Social security and pension rights

Maternity and paternity related leaves and holidays have been described above in 1.1.1. Here, only the relevant allowances are listed, which are partly regulated by Act LXXXIII of 1997 on compulsory health insurance and Act LXXXIV of 1998 on support provided for families.

A pregnancy-confinement benefit (*terhességi gyermekágyi segély*) is paid to women who in the two years preceding the birth of their child were covered by health insurance for at least 365 days, except if they are paid their full salary during their maternity leave or if they are engaged in any sort of gainful employment – except for remuneration for services covered by royalty rights or fees exempted from personal income tax. This benefit is paid to mothers during their maternity leave, for a maximum of 168 days, the amount of which is equal to 70 % of the average daily pay (with no ceiling on payments) in the calendar year preceding the first day of maternity leave. The mother or the woman who intends to adopt a child is also entitled to this benefit. In cases where there has been previous employment but there is no relevant current income (e.g. the pregnant woman was on sick leave for a longer period, or the self-employed person did not have income), the payment is twice the amount of the official daily minimum wage. This benefit is paid by the State Treasury.

Paternity benefit is equal to 100 % of the father's daily wages, with no ceiling on payments and is funded from the central budget.

There are two types of parental benefit which are paid from the central budget for the duration of long-term leave taken following maternity leave: (1) childcare benefit (*Gyermekgondozási segély, GYES*); (2) childcare fee (*Gyermekgondozási díj, GYED*). Both are family entitlements, except for GYED until the child reaches the age of one, which is provided only for mothers.

GYES is a flat-rate benefit, equal to the amount of the minimum old-age pension, in 2012 EUR 102.50 (HUF 28.500)³⁶³ per month. It is paid until the child reaches the age of three for uninsured parents, and from the end of GYED (until the child reaches the age of two) until the child reaches the age of three for insured parents. For more children, it is multiplied by the number of children. During the first year, the recipient cannot work, but afterwards paid work is allowed for less than 30 hours a week, or for unlimited hours if the work is done at home; or if the child is disabled or permanently ill. GYES can also be received by grandparents from the first to the third birthday of the child, if the child is looked after in the grandparents' home provided that the parents agree to transfer their entitlement.

GYED is paid to insured parents only, from the end of the maternity leave until the child reaches the age of two. Until the child's first birthday, only the mother can receive GYED, afterwards any parent living with the child is eligible as long as she/he has been employed for at least 365 days in the two years before the birth of the child. Foster parents are not eligible. The amount of GYED is equal to 70 % of average daily earnings, with a ceiling of twice 70 % of the minimum daily wage (EUR 468 or HUF 130 200) per month in 2012. It is paid from the National Health Insurance Fund.

Finally, childcare support (*Gyermekevelési támogatás, GYET*) is paid to either parent with three or more children between the second and the eighth birthday of the youngest child. The applicable rules are the same as those for GYES.

It is important to note that all of the aforementioned leaves are credited towards old-age pension insurance, and are covered by healthcare insurance.

1.3. Self-employment

The prohibition of discrimination against pregnant women applies to all 'other relationships for work' (*munkavégzésre irányuló egyéb jogviszony*) as well.³⁶⁴

As far as the 'duty holder' is concerned, Article 5.d. stipulates that in other relationships for work (including self-employment), the person who has the right to give orders to the self-

³⁶³ Calculated according to the exchange rate on 15 August 2012.

³⁶⁴ Articles 5.d., 3.b. and 21.f of the Ebktv. In this regard there is some confusion of terminology in legislation, because several forms of dependent work are listed under the heading of 'other relationships for work' (relationships of homeworkers and that of members of co-operatives) which usually only cover relationships between independent parties.

employed person is supposed to follow the rules of equal treatment. This rule applies to all aspects of equal treatment with respect to the self-employed.

The regulations for GYES (see 1.2.) meet the requirements set in Article 8 of Directive 2010/41/EU.

1.4. Access to and the supply of goods and services

According to Article 5.a-b of the Ebktv. ‘The principle of equal treatment is observed (also in regard of pregnancy and motherhood) in respect of the relevant relationships: a) those who make a proposal to persons not defined preliminarily to enter into contract or those who invite such persons to tender, b) those who provide services or sell goods at their premises open to customers.’ Beyond the generally applicable prohibitions there are, however, no specific equal treatment rules regarding pregnancy and motherhood.

The Advisory Board that operated along with the Equal Treatment Authority until 2012 published a decision that banks are also covered by equal treatment regulations while providing loans to private individuals and are therefore obliged to follow the rules of equal treatment (Opinion No. 10.007/2/2006. of Advisory Board).³⁶⁵

2. Gaps in national law

2.1. Employment

Kádár András Kristóf has pointed out that despite the extremely wide scope of the Act, its protection is weak because in gender discrimination cases the accused can exculpate him/herself from liability almost every time, and in this regard Hungarian law has always been contrary to the EU equal treatment regulations.^{366, 367} In this regard there has been no improvement in legislation.

During recruitment, (only) women are frequently asked questions regarding future plans for pregnancy and childcare arrangements. The Advisory Board therefore published an opinion about lawful questions that can be asked during recruitment.³⁶⁸ It is a rather widespread practice that women are not recruited because employers assume that mothers of young children will not be punctual in morning shifts.³⁶⁹ Women are more often selected for dismissal during workforce reductions because they are expected to be less able to meet the expectation of the increased workload following the reorganisation.³⁷⁰

The new Labour Code introduced new regulations on executive employees which could detrimentally affect the promotion possibilities of women, and could leave women in executive positions without any legal protection in case of pregnancy.³⁷¹ Under the new Labour Code, executive employees (either male or female) do not enjoy any of the legal protection against dismissal as described in 1.1.3. above. The most worrisome aspect of the new legislation is that it covers a wide range of employees, not only the CEO and his/her deputies. Paragraph (1) Article 208 of the new Labour Code already goes much further than the traditional definition, when stating that any worker could be considered to be an executive

³⁶⁵ http://www.egyenlobanasmod.hu/tt/TTaf_feb10, accessed 10 December 2012.

³⁶⁶ According to Article 7 of [Act CXXV of 2003 on equal treatment and the promotion of equal opportunities \(2003. évi CXXV. törvény az egyenlő bánásmódról és az esélyegyenlőség előmozdításáról](#), hereafter: ‘Ebktv’). The principle of equal treatment is not violated by any legal act ‘a) which limits a basic right of the entity brought into a disadvantageous position in order to enforce another basic right in an unavoidable situation, assuming that such a limitation is suitable for this purpose and is also in proportion to it; b) which is found by objective consideration to have a reasonable explanation directly related to the relevant relationship’.

³⁶⁷ A.K. Kádár *Az egyenlő bánásmódról szóló törvény kimentési rendszere a közösségi jog elveinek tükrében*, available on: <http://www.egyenlobanasmod.hu/tanulmanyok/hu/kimentesirendszer.pdf>, accessed 10 December 2012.

³⁶⁸ Resolution No. 1/2007 of Equal Treatment Advisory Board on questions that may be asked during a job interview by the employer (*Az Egyenlő Bánásmód Tanácsadó Testület 1/2007. TT. sz. állásfoglalása az állásinterjún feltehető munkáltatói kérdésekről*), http://www.egyenlobanasmod.hu/tt/TTaf_200702, accessed 20 August 2012.

³⁶⁹ <http://www.egyenlobanasmod.hu/jogesetek/hu/43-2009.pdf>, accessed 10 December 2012.

³⁷⁰ <http://www.egyenlobanasmod.hu/jogesetek/hu/95-2011.pdf>, accessed 10 December 2012.

³⁷¹ Article 208-211. of the new Labour Code.

employee whose work is directly controlled by the CEO, and all those who may replace the CEO fully or partly.³⁷² In this regard the partial replacement of the CEO raises further questions, especially with regard to the so-called ‘internal representation’ of the company, which is very frequent in employment relationships.³⁷³ For example immediate supervisor at work partly replaces the CEO with regard to the direct supervision of work and could therefore theoretically lack any legal protection provided by labour law.

Paragraph (2) goes even further when stating that the employee and the employer may agree in the employment contract that the rules of managerial employees will be applied to any employee if he/she has ‘a job of great importance with regard to the employer’s operation’, or has ‘a job of greater confidentiality’ provided that his/her basic salary is at least sevenfold of the applicable minimum wage. On the basis of recent court practice which considers a dismissal fair if the employer proves that they have lost confidence in the employee, we could expect that the criteria of ‘importance’ and ‘confidentiality’ will not de facto limit the application of Paragraph (2) Article 208, but the single relevant limiting factor will be the sevenfold amount of the minimum wage (approximately EUR 2 340 – equal to 7 X HUF 93 000³⁷⁴ = HUF 651 000).³⁷⁵ Taking into account the power structure of the employment relationship, the employer can almost freely determine who would be considered to be an executive employee among those earning enough to fall within the minimum-wage-based threshold, and would consequently be employed without any legal protection (in a United States type of employment-at-will relationship).

It must also be noted that all regulations which enable the employer to dismiss the employee without justification (whose number has seriously increased in the public sphere under the Orbán Government) increases the risk that female employees are dismissed due to some discriminatory reason. For such cases the Equal Treatment Authority (ETA) (*Egyenlő Bánásmód Hatóság, EBH*) has requested solid justification from the employer. In the event of a lack of lawful justification, the employer is liable due to violation of the law on equal treatment.³⁷⁶

As far as the effect of Article 208 of the Labour Code is concerned, this new law could have a detrimental effect on the promotion and remuneration of women at the workplace regardless of their actual employment-related decisions. Women will most probably be aware of the serious legal risks involved in a promotion to a position with a salary higher than seven times the applicable minimum wage and women in vulnerable positions (e.g. older workers, and those who are planning a pregnancy or adoption) will avoid such promotion, further decreasing the number of women in executive positions in Hungary. Surely there will be some women who will accept the challenge of such promotions and will lose their jobs without any legal protection when they get pregnant, adopt a child, become seriously ill, etc.³⁷⁷

Hungarian legislation also violates the Parental Leave Directive insofar as it does not provide fathers with at least one month’s leave on a non-transferable basis.³⁷⁸

³⁷² See also 1.1.2. and 3. above.

³⁷³ According to general practice, for more than a few dozen employees, the execution of managerial rights and obligations are shared between different managerial levels from the top executive down to the foremen.

³⁷⁴ The national minimum wage in 2012 is EUR 334.50 (HUF 93 000; calculated according to the exchange rate of 15 August). 298/2011. (XII. 22.) Government Decree.

³⁷⁵ Such salary is approximately three times the average salary and is paid to a wide range of employees from medium-rank managers to professionals of university degree in the private sector, especially in multinational enterprises.

³⁷⁶ From established case law, see e.g. <http://www.egyenlobanasmod.hu/jogesetek/hu/694-2009.pdf>; and <http://www.egyenlobanasmod.hu/jogesetek/hu/122-2010.pdf>, both accessed 10 December 2012.

³⁷⁷ Hungarian employers are rather intolerant of pregnant employees or employees with young children. 9 out of 10 Hungarian women, after taking unpaid leave for raising a child up to the age of three, are not taken back by their employer despite the legal obligation to do so.

³⁷⁸ Clause 2 Council Directive 2010/18/Eu and Articles 118(4), 128 and 130 of the New Labour Code.

2.2. Self-employment

According to the rules of the Ebktv. an agency contract or a contract of services of a pregnant self-employed woman cannot be terminated because of her pregnancy. In practice, however, this rule is not enforced, most probably because it is socially accepted that the contract of self-employed women will be terminated by mutual consent of the parties or by some other lawful means when she becomes unable to work either due to the pregnancy or to childbirth and at the same time she becomes entitled to some form of social security payment as described in 1.2. Later on, the parties may re-establish their relationship by mutual consent if both are willing to. Nonetheless, if the quasi-employer unilaterally terminates the contract due to pregnancy and/or childbirth, they violate the rules of the Ebktv,³⁷⁹ and in theory, sanctions for breach of contract could be imposed by the courts,³⁸⁰ or a fine can be imposed by the EBH.³⁸¹

2.3. Access to and the supply of goods and services

Despite the clear prohibition in law, there are several discriminatory practices regarding mothers of small children. It is quite widespread – especially in the countryside – that mothers with small children are prohibited from entering a shop with a pram.³⁸² The usual justification of this discriminatory practice is that prams can be used for the purposes of shoplifting. The Equal Treatment Authority sanctions this unlawful practice.

The recent Government Decree on homebirth is discriminatory on the ground of age, because entire groups of women are excluded from homebirth (women below 18 and over 40, the latter in case of a first birth), and discriminatory on the ground of wealth,³⁸³ as well, because only women who can pay for the extremely expensive private insurance can enjoy the right to freely determine the conditions of her delivery.³⁸⁴

2.4. Additional information

The societal norms (which are strengthened by the ruling political forces, although in a contradictory way) are contrary to the ideas explained in the Council Resolution of 29 June 2000 on the balanced participation of women and men in family and working life. Public opinion has for long been against the employment of mothers with young children. Mothers are not willing to return to work before their children reach the age of 2 or 3 because of traditional attitudes.³⁸⁵ In this sense, the regulations on generous parental allowances and attitudes towards caring for a child mutually reinforce each other in Hungary. In line with parental leave policies that allow mothers to stay at home until the child reaches the age of three, the majority of the population tends to agree with the idea that the development of young children is harmed if mothers return to work. Nonetheless, as recent research has revealed, the social norm of ‘mothers staying at home for three years’ is flexible, and is at least partly maintained by the lack of family-friendly workplaces and also by a serious

³⁷⁹ Articles 4, 5.d, 7.8.1 of the Ebktv.

³⁸⁰ Sanctions for breach of contract are regulated by Articles 298-318 of Act IV of 1959 on the Civil Code (*1959. évi IV. törvény a Polgári Törvénykönyvről*).

³⁸¹ In the latter regard see also point 4.2. below. The rules on imposing fine are regulated by Act CXL of 2004 on procedures of public administration (*a 2004. évi CXL törvény a közigazgatási hatósági eljárás... szabályairól*).

³⁸² <http://www.egyenlobanasmod.hu/jogesetek/en/642-2010-en.pdf>, accessed 10 December 2012.

³⁸³ Though wealth is not a protected ground of discrimination under EU law, it is under Hungarian law according to the Article 8. q of [Act CXXV of 2003 on Equal Treatment and the Promotion of Equal Opportunities](#).

³⁸⁴ 35/2011 (III. 21.) Korm. rendelet az intézeteken kívüli szülés szakmai szabályairól, feltételeiről és kizáró okairól (Government Decree 35/2011 (III.21.) on the rules, conditions and excluding factors regarding giving birth outside (healthcare) institutions).

³⁸⁵ Z. Drjenovsky *Kismamák a munkahelyen, avagy hogyan számíthat a munkahely a nőkre a gyermekvállalást követően?* (Mothers at work, or how can an employer count on women after childbirth?) *Munkaügyi Szemle*, 2010/2: 95-102 (2010).

shortage of childcare facilities for children under the age of three.³⁸⁶ The traditional ‘male breadwinner’s role’ is still deeply rooted in societal norms.³⁸⁷

The number of places in nurseries is rather limited, and therefore parents (especially mothers) are forced to stay at home with the child until the child reaches the age of three, when the entitlement to go to (the more numerous) kindergarten becomes applicable. For the third year of parental leave, however, only the very low flat-rate GYES is available, which hardly provides mothers and their children (especially single mothers) with a sufficient income.

3. Involvement of other parties

Under the Orbán Government, laws are made by the ruling political forces (FIDESZ-KNDP coalition) with no substantial involvement of any other stakeholders in the decision-making process.³⁸⁸

4. Enforcement and effectiveness

4.1. General

Very few cases are filed with the Equal Treatment Agency regarding pregnancy and motherhood: approximately 5 - 7 cases per year.³⁸⁹ There are no specific statistics with regard to cases filed with Labour Courts, and other courts. Nonetheless, we may assume that the number of cases is equally low.

4.2. Legal redress

The new Labour Code still provides proper legal protection to pregnant women and mothers of young children (as long as the woman is on leave, but not thereafter), and a violation of law is severely sanctioned by the possibility of reinstatement in the original job. The amount to be paid to the unfairly dismissed and reinstated employee in lost wages has been seriously reduced by the new Labour Code: under the previous Labour Code of 1992 the employer was obliged to reimburse all lost wages, while under the new Labour Code of 2012 lost wages are only compensated up to a maximum of one year’s ‘absentee fee’ (*távolléti díj*). The amount of the absentee fee is equal to the worker’s basic salary in most cases.³⁹⁰

The sanctions that the EBH can impose are rather weak and lack any preventive effect (a fine and publication of the decision on the Agency’s and the violator’s webpage).

4.3. Access to information

In 2012, the EBH has organised several seminars in the countryside to disseminate information about the regulations on equal treatment and best practices.³⁹¹

In June-July 2012, the EBH’s monthly newsletter was dedicated to pregnancy and motherhood discrimination.³⁹²

³⁸⁶ Z. Blaskó ‘Három évig a gyermek mellett – de nem minden áron. Közvélemény a kisgyermekes anyák munkába állásáról’ (Stay at home for three years – but not at all costs. Social values on employment of mothers of young children in Hungary), *Demográfia*, 2011/1: 23-45 (2011).

³⁸⁷ Z. Spéder ‘Ellentmondó elvárások között. Családi férfiszerepek, apaképek a mai Magyarországon’ (Between contradictory expectations: Family-related male and father roles in contemporary Hungary) in: I. Nagy & T. Pongrácz (eds.) *Changing roles, report on the status of women and men, 2011* Budapest: TÁRKI-NEFMI 207-229 (2011).

³⁸⁸ E.g. organisations of independent midwives have not been consulted with regard to the new law on homebirths, certain groups of trade unions were only consulted about the new Labour Code when contractors of the Government had already prepared the first draft of the new Labour Code.

³⁸⁹ Data provided by the Equal Treatment Agency.

³⁹⁰ According to previous legislation (Act No. XXII of 1992), the employee was entitled to all her lost wages, calculated based on her average salary.

³⁹¹ For more details see <http://www.egyenlobanasmod.hu/tamop/kepzesek#t20101019>, accessed 14 December 2012.

³⁹² http://www.egyenlobanasmod.hu/data/Hirlevel_EBH_2012_JUN-JUL.pdf, accessed 10 December 2012.

Women in the countryside, especially women with a low education, with no access to the Internet, and belonging to the Roma ethnic minority are especially likely to lack information about equal treatment.

ICELAND – *Herdís Thorgeirsdóttir*

1. Existing legislation and case law

The scope of the Act on Maternity/Paternity Leave and Parental Leave, No. 95/2000 (hereafter the MPPL Act) with subsequent amendments, applies to the rights of parents working in the labour market to be granted maternity/paternity leave and parental leave. It applies to parents who are employed by others or are self-employed. The MPPL Act also applies to parents who are not active in the labour market and parents attending full-time educational programmes as to receiving a maternity/paternity grant. The aim of the MPPL Act is to ensure a child's access to both her/his parents and to enable both women and men to reconcile work and family life.

Under the MPPL Act each parent has an independent entitlement to maternity/paternity leave for up to three months due to birth, primary adoption (adoption of foreign children, or adoption of Icelandic children, for example adoption by a step-parent of a spouse's child) or reception of a child in permanent foster care (as opposed to temporary foster care). *This entitlement shall not be transferable.* In addition, the parents have a joint entitlement to an additional three months, which either parent may use in its entirety or which the parents may divide between them. If the other parent dies before the child reaches the age of 18 months the other parent acquires the right to up to nine months. A parent's right to maternity/paternity leave is conditional on the fact that the parent herself/himself has custody of the child, or has joint custody with the other parent at the beginning of the maternity/paternity leave. A non-custodial parent is only entitled to maternity/paternity leave with the consent of the parent exercising custody, authorising the non-custodial parent to have access to the child during the period of maternity/paternity leave.

A parent acquires the right to payments from the Maternity/Paternity Leave Fund after she/he has been active on the domestic labour market for six consecutive months prior to the birth of the child or the date on which the child enters the home in case of adoption or permanent foster care.

The MPPL Act (Article 10) provides that an employee has the right to take maternity/paternity leave in one continuous period. She/he is also permitted to make arrangements for the leave to be divided into a number of periods and if the employer is unable to accept such wishes, the employer, having consulted the employee, shall propose another arrangement.

1.1. Employment

Participation in the domestic labour market means working in the service of others, for at least 25 % of full-time working capacity each month, or working in one's own business operation, irrespective of corporate structure, to the extent to which the person concerned is obliged to pay the insurance levy each month or at regular intervals as decided by the tax authorities. A detailed definition of what constitutes participation in the labour market is in Article 13a of the MPPL Act.

The MPPL Act provides in its Article 30 that employment relations between the employee and her/his employer shall remain unchanged during maternity/paternity leave and parental leave. The employee shall be entitled to return to her/his job upon the completion of maternity/paternity leave or parental leave. Should this not be possible, she/he shall be entitled to a comparable position with the employer according to a contract of employment.

There is protection against dismissal due to the fact that an employee has given notice of the intended maternity/paternity leave or parental leave, *without giving reasonable and sufficient reasons (reasonable cause)*, and in such case, the dismissal shall be accompanied by

reasons in writing. The same rule applies to pregnant women and women who have recently given birth. The term ‘recently given birth’ is defined in Article 7(4) of the MPPL: when the child is 14 weeks or younger.³⁹³

The MPPL Complaints Board ruled on 2 August 2012 in the case of a woman against the State Hospital.³⁹⁴ The woman’s complaint concerned the decision of the State Hospital to terminate her job and dismiss her and subsequently to refuse to pay her, after she postponed her parental leave during the postponement period which overlapped with the notice period.

The two disputed matters in this case were (a) whether the dismissal was in breach of the MPPL Act and (b) whether the State Hospital was entitled not to pay the woman during the period that she postponed her parental leave. Regarding the dismissal the Complaints Board found no breach as the employer had provided a reasonable cause for dismissing the woman (structural changes) and had done so in the manner required according to the MPPL Act, providing reasons in writing.

Regarding the latter dispute: whether the State Hospital was permitted to refuse to pay her salary during the notice period while postponing the parental leave. According to the Complaints Board the woman was entitled to payments during the three-month notice period. The MPPL Act contains a provision in Article 33 (4) that provides that a parent receiving payments during a notice period is not permitted to make use of her/his rights to receive payments from the Maternity/Paternity Leave Fund during the same period.³⁹⁵ The woman had to repay the Maternity/Paternity Fund Leave her payment for the first month of her notice period (as she had not been able to foresee her dismissal and inform the Directorate of Labour of the change). Due to the incompatibility of receiving payments from the two above sources at the same time, the Complaints Board provided that the woman was entitled to postpone her parental leave on the basis of Article 13(9), cf. 15(5) of the MPPL Act. Accordingly, the State Hospital had not been permitted to refuse to pay her during the notice period and it was not to have any impact on this conclusion that the woman had not delivered any work during the notice period. The State Hospital argued that she had been offered to do so but could not prove this.

1.2. Social security and pension rights

Article 14 of the MPPL provides for the accumulation and protection of rights. During maternity/paternity leave, a parent shall pay a minimum of 4 % of the maternity/paternity leave payment into a pension fund and the Maternity/Paternity Leave Fund shall pay a minimum of 8 %.³⁹⁶ In addition, the parent has a right to pay into a defined contribution plan. Maternity/paternity leave counts as working time for the purpose of assessing work-related rights, such as the right to holidays or the extension of the holiday period under wage agreements, wage increases due to seniority, entitlement to wages in the event of illness, a notice period of termination of employment and the right to unemployment benefit.

The above also applies to pregnant women regarding leave of absence from work to protect their safety and health, cf. Article 11 of the MPPL Act (see discussion of case No. 36/2011 in the case of a self-employed woman, in 1.3. below).

1.3. Self-employment

The self-employed are protected under the MPPL Act. A self-employed parent acquires the right to payments from the Maternity/Paternity Fund based on the payment of the insurance levy on calculated remuneration for six consecutive months prior to the birth of the child or the date on which the child enters the home in the case of adoption or permanent foster care.

In a recent case, a self-employed film director submitted a complaint to the Maternity/Paternity and Parental Leave Complaints Board that the Maternity/Paternity Leave

³⁹³ See also Article 10 of EC Directive 92/85.

³⁹⁴ Case No. 43/2011.

³⁹⁵ The amendment to Article 33(4) by Act No. 136/2011, adopted by Parliament on 17 September 2011, is not yet to be found in the English translation of the MPPL Act, cf. <http://www.althingi.is/lagas/nuna/2000095.html>, accessed 20 August 2012. See also Supreme Court Case No. 257/2011: dismissal of a medical doctor.

³⁹⁶ Act No. 167/2006, Article 13.

Fund had refused to pay for her leave of absence outside her maternity leave to protect her safety and health due to circumstances in her working environment.³⁹⁷ Article 11 of the MPPL Act states that ‘if the safety and health of a pregnant woman, a woman who has recently given birth to a child, or a woman who is breastfeeding a child, is considered to be in danger according to a special assessment, her employer shall make the necessary arrangements to ensure the woman’s safety by temporarily changing her working conditions and/or working hours. If this is not possible for technical reasons, or other valid reasons, the woman’s employer shall entrust her with other tasks; if this is not possible she/he shall grant her leave of absence for the length of time necessary to protect her safety and health. This provision shall be implemented under further rules.’

The complainant handed in a medical doctor’s assessment and an explanatory report regarding the necessity to be absent from work to protect her safety and health. The Complaints Board did not decide in her favour, referring inter alia to Article 2 of Directive 92/85/EC where pregnant worker is defined as ‘a pregnant worker who informs her employer of her condition, in accordance with national legislation and/or national practice’. Accordingly the Directive applies to employees and binds their employers but does not apply to self-employed individuals. Article 7(2) of the Act states that: ‘employee’ refers to anybody who is employed in salaried position in the service of others amounting to at least a 25 % of a full-time position each month. On the basis of the scope of Directive 92/85/EC, the implementation of that Directive into Icelandic law, the wording of Article 11 of the Act and the definition of ‘employee’ in Article 7(2), a self-employed individual is not entitled to payments from the Maternity/Paternity Leave fund in cases where safety and health in the workplace requires absence from work. This conclusion, according to the Complaints Board, is in accordance with Directive 92/85/EC and the rules issued on that basis. Directive 2010/41/EU has not been implemented.

1.4. Access to and the supply of goods and services

Directive 2004/113/EEC has not been implemented into Icelandic legislation yet. Article 10 of the Directive on victimisation is realised in Gender Equality Act No. 10/2008, which in its Article 27 prohibits dismissal etc. in connection with a complaint or a demand for redress. This provision furthermore places a positive obligation on employers to ensure that employees are not subjected to injustice in their work, e.g. as regards job security, terms of employment or performance assessment, on the grounds of having submitted a complaint or provided information regarding gender-based or sexual harassment or sexual discrimination.

2. Gaps in national law

There are no apparent gaps in the national legislation designed to tackle pregnancy- and maternity-related discrimination in Iceland.

Gender Equality Act No. 10/2008 provides that employers are prohibited from discriminating between applicants for jobs on the grounds of maternity/paternity or parental leave or other circumstances relating to pregnancy and childbirth, and must prevent any negative effects of these aspects on decisions regarding promotion, changes of position, retraining, continuing education, (life-long learning) vocational training, study leave, notice of termination, the working environment and employees’ working conditions (Article 26 of Gender Equality Act No. 10/2008).

Article 11 of the MPPL Act is in accordance with Article 5 of Directive 92/85/EEC, which requires the employer to temporarily adjust the working conditions and working hours when considered necessary and stipulates that such changes must not affect her wages so as to reduce them or curtail her other job-related rights.

³⁹⁷ Case No. 36/2011.

The accumulation and protection of rights is provided for in Article 14 of the MPPL Act but does not apply to extended unpaid maternity leave which is not under any wage agreement or due to factors such as entitlement to wages in the event of illness etc.

On the whole, Icelandic legislation does not appear inadequate.

2.1. Employment

There is no information to report.

2.2. Self-employment

There is no information to report.

2.3. Access to and the supply of goods and services

Directive 2004/113/EC has not yet been implemented. It is, however, safe to state that there are no examples of potentially discriminatory practices towards pregnant women in relation to access to goods and services. Icelandair permits pregnant women to fly with them until the end of their 36th week of pregnancy. If a female passenger is in her last month of pregnancy (36-40 weeks) she must provide a statement from a medical doctor issued 72 hours before. Icelandexpress has stricter rules regarding pregnant passengers and requires a statement from a medical doctor after the 28th week and does not allow a pregnant woman to fly after the 34th week of pregnancy.

The author is not aware of any discriminatory practices towards pregnant women in relation to insurance or in relation to access to other goods or services, e.g. restrictions on access to loans or access to a mortgage. Breastfeeding in public places is common practice.

2.4. Additional information

There is no additional information to report.

3. Involvement of other parties

The author is not aware of any reluctant or obstructive organisations opposed to the proper implementation of pregnancy/maternity rights. There is a website providing advice on breastfeeding (<http://www.brjostagjof.is/>).

4. Enforcement and effectiveness

4.1. General

The author is not aware of any examples where fewer women are employed due to pregnancy and maternity rights. The MPPL Act has been in force since 2000 and the right to maternal/paternal and parental leave has become part of labour market culture.

4.2. Legal redress

The Maternity/Paternity and Parental Leave Complaints Board delivers rulings on disputes which may arise under the MPPL Act. The rulings of the Complaints Board on recourses of excess payments under the MPPL Act are enforceable. Its rulings are not subject to appeal to a higher authority. The costs of the Complaints Board's rulings are paid by the State Treasury (all this provided for in Article 5 of the MPPL).

Any person who considers herself/himself to have been wronged on the basis of the MPPL Act shall submit a written complaint to the Complaints Board within three months from the time that the party to the dispute was notified of the relevant decision. The Complaints Boards' proceedings shall, in general, be carried out in writing. However, the Complaints Board may summon the parties or their representatives. The Complaints Board shall ensure that a party to a case is given the opportunity to express her/his views before the Complaints Board renders its ruling, provided that the Complaints Board is of the opinion that neither her/his position nor her/his argumentation may be surmised from the documents in the

case. In other respects, the Complaints Boards proceedings shall be conducted under the provisions of the Administrative Procedures Act.

The Complaints Board shall render its ruling as quickly as possible, and no later than two months from the time that a case is submitted.

4.3. Access to information

Pregnant women receive prenatal care free of charge, if they have had legal residence in Iceland for the past six months. The purpose of this care is to promote the health of the mother and child with professional care, support and training. As the level of prenatal care is high in Iceland, all mothers-to-be receive the necessary information during the stage of prenatal care, if not elsewhere. This would in particular apply to women that may be at a disadvantage because they belong to an ethnic minority or do not understand the language. Pregnant women are also informed by their trade unions, in larger workplaces etc.

IRELAND – Frances Meenan

1. Existing legislation and case law

1.1. Employment

The Employment Equality Acts 1998-2011 provide that there cannot be discrimination on grounds of gender, civil status, family status, sexual orientation, religion, age, disability, race, and Traveller Community grounds. The Irish Equality Tribunal and the Labour Court have followed the case law of the ECJ in respect of any discrimination in relation to pregnancy and matters connected therewith.³⁹⁸ Discrimination occurs when a person is treated less favourably than another person which exists, existed but no longer exists, may exist in the future, or is imputed to the person concerned. A person may also be discriminated against by association. In *Trailer Care Holdings Limited v. Healy*,³⁹⁹ the Labour Court stated ‘... [T]he law recognises that during pregnancy women are physically and emotionally vulnerable and the effects of dismissal can have a particularly deleterious effect on their physical and mental health. It is for that reason that the law provides special protection to pregnant women against dismissal except in exceptional circumstances’. The Court further said in the same case that it was ‘abundantly clear’ that women were to be afforded ‘special protection from adverse treatment’ from the commencement of their pregnancy until the end of their maternity leave. Furthermore, this entitlement to that protection is to be regarded as ‘a fundamental and inviolable right within the legal order of the European Union which the Courts and Tribunals of the Union must vindicate within the limits of their jurisdiction’. The issue of dismissal during a pregnancy-related illness has also been considered, for example in cases where there was a genuine redundancy situation or where there was no discrimination when a female employee was notified of redundancy whilst absent due to a pregnancy-related illness prior to commencement of maternity leave.⁴⁰⁰

³⁹⁸ E.g. *Dekker v Stichting Vorminventrum voor Junge Volwassenen* [1990 ECR I – 3841] and all subsequent cases to date.

³⁹⁹ EDA 8/2012, dated 16 March 2012. In this case, the claimant had difficulties in relation to taking time off for her antenatal visits, she also needed special accommodation as she had mobility problems due to her pregnancy and the grounds for her dismissal arose from an alleged redundancy. In addition, there was a further issue where the claimant was not included in a performance appraisal for the purposes of assessing a pay increase and there was a failure to pay her a holiday bonus to which she considered that she was entitled. The claimant consulted the Equality Authority and recited this advice to her employer. Whilst the claimant was paid this bonus, the employer was annoyed at her contacting a statutory agency and stopped the bonus for all staff. Arising from this, the claimant asserted that she was subjected to adverse treatment by her work colleagues and that this amounted to victimisation. Holding that the claimant was discriminated against on grounds of gender, that she was victimised and that she was subject to discriminatory dismissal, the Labour Court awarded the claimant EUR 40 000 (plus interest from 24 January 2008, the date she filed her claim) for the effects of discrimination and EUR 10 000 for the victimisation.

⁴⁰⁰ *Winston’s Jewellers v Mason* EED032 (Labour Court). However, it should be noted that there was the application of last in–first out in this case and it may be distinguished from the case of *Intrium Justitia v*

There cannot be discrimination in respect of pay,⁴⁰¹ access to employment, conditions of employment, training or experience in relation to employment, promotion or re-grading, or classification of posts.⁴⁰² If there is an alleged breach of the conditions of employment, an employee can resign and claim constructive dismissal. Such a change in the conditions of employment may be discriminatory.⁴⁰³ There may be a transfer to suitable alternative employment on the return to work following protective leave, if it is not reasonably practicable for the employee to return to their original job.⁴⁰⁴ ‘Protective leave’ means maternity leave, additional maternity leave, father’s leave on the death of the mother or health and safety leave.⁴⁰⁵

In addition to the Employment Equality Acts, the Unfair Dismissals Acts 1977-2007 prohibit a dismissal on grounds of an employee’s pregnancy, attendance at ante-natal classes, giving birth or breastfeeding or anything connected therewith. The Maternity Protection Acts 1994 and 2004 provide for maternity leave amounting to 26 consecutive weeks. There is no obligation on the employer to pay an employee when she is on maternity leave. However, such employees are entitled to state maternity benefit and their employers may ‘top up’ such payment to complete their normal remuneration. Self-employed women are also entitled to this maternity benefit under the social welfare legislation. There is provision for paid time off for ante-natal and post-natal medical checks. In addition to maternity leave there is also provision for additional maternity leave (for which no state benefit is payable). During maternity leave an employee remains in employment. There is a right to return to work to the same job which the employee had prior to her maternity leave subject to notification by the employee. In the event that the employee cannot return to their same job they are entitled to suitable alternative employment.⁴⁰⁶ On return to work, an employee may be offered suitable alternative employment, if it is not practicable that the employee returns to her usual job. The employee may not be willing to accept the alternative employment on the grounds that it is not suitable alternative employment and that in fact it is a demotion. In such circumstances, an employee may decide to resign and claim constructive dismissal. It is the duty of every

McGarvey EDA095, where the Labour Court stated there was a level of control over who was let go. The claimant was pregnant and known to be at the time of selection for redundancy; there had been previous remarks made to her about family status; there was a selection method used for redundancy which involved various weighting in respect of a matrix devised by the HR department to include skills and experience etc. The Court considered that the basis for the matrix was unsatisfactory, unclear, complex, opaque, subjective and open to manipulation in order to achieve a particular result. The Court held that the respondent discriminated against the claimant on both the gender and family status grounds.

⁴⁰¹ Section 19 of the Employment Equality Act 1998, as amended.

⁴⁰² Section 8 of the Employment Equality Act 1998.

⁴⁰³ In *Kay Ryan v O’Connell* EDA092, the claimant had previously worked for the respondent. On this occasion there was an advertisement for the position in question and the claimant had no reason to think that she was coming back on different terms and conditions of employment. However, once she told her employer that she was pregnant, she was told that the employer was thinking of winding up his business on grounds of ill health in about three months’ time and that the job should not stand in her way of obtaining alternative employment. The claimant also stated that she had never previously been given advice about health and safety. The Labour Court was of the opinion that the nature of this advice was to dissuade her from taking up the position on account of her pregnancy. The business carried on operating. It was considered that there was a case of discrimination on the grounds of pregnancy.

⁴⁰⁴ Section 27 of the Maternity Protection Act 1994. If the employee was not working in their usual job before protective leave, then the employee will be entitled to return to their usual job as soon as is practicable without contravention by either employer or employee of any statute or instrument (Section 26(2) of the Maternity Protection Act 1994). It is unclear as to who is allowed to exercise this option.

⁴⁰⁵ Section 21 of the Maternity Protection Act 1994, as amended.

⁴⁰⁶ The claimant may elect to bring a claim under either the Employment Equality Acts 1998 – 2011 where if she brings her claim to the Circuit Court, she may effectively be awarded unlimited compensation (but there is the risk of legal costs if unsuccessful); hence more usually claimants opt for the Equality Tribunal where they may be awarded reinstatement, re-engagement or up to two years’ compensation or bring a claim under the Unfair Dismissals Acts 1977–2007 where the claimant may be awarded reinstatement, re-engagement or up to two years’ compensation. If an employee is going on maternity leave they complete Form MB10 and Part IV of the Form must be completed by the employer authorising the dates of maternity leave. In *Noel Corcoran Auctioneering v Martin* EDA1133, the respondent stated that he was not aware of the claimant’s date of return. In this case, that as the claimant wished to return to work after her maternity leave and as there was no job available for her, she was dismissed from the date that she was due to return.

employer to carry out a risk assessment to the health and safety of employees who are pregnant or breastfeeding resulting from any activity at the employee's place of work which is likely to involve a risk of exposure to an agent, process or hazardous working conditions.⁴⁰⁷ The employer pays the first 21 days of health and safety leave and thereafter the employee is entitled to health and safety benefit, which is the same as disability benefit. An employee who is breastfeeding and has informed her employer that she is doing so shall be entitled for the 26-week period from the date of confinement, without loss of pay to either breastfeeding breaks, where facilities for breastfeeding are provided at the workplace, or the reduction of working hours.⁴⁰⁸ In the event that the mother dies during maternity leave, the father is entitled to the balance of maternity leave. The Adoptive Leave Acts 1995 and 2005 virtually mirror the maternity legislation and cover exactly the same categories of female employees (and sole male adopters). An adopting mother is entitled to 20 consecutive weeks. Paid adoptive leave is 24 weeks and unpaid adoptive leave is 16 weeks. There are particular provisions in relation to when the adoptive leave can be taken arising from placement and foreign adoptions. Once again, an adopting father may have the balance of the adopting mother's adoptive leave in the event of her death. The Parental Leave Acts 1998 and 2006 provide for parental leave. An employee who is the natural or adoptive parent is entitled to 14 weeks of unpaid leave from his or her employment to enable him or her to take care of the child. The employee must have at least one year's continuous service and any period of leave is not transferable between parents. Leave is transferable where both parents work for the same employer (but subject to the consent of the employer). Where there is a multiple birth, the employee is entitled to leave for each child. The employee must have one year's continuous service.⁴⁰⁹ Parental leave may consist of a continuous period of 14 weeks or with the agreement of the employer (individually or collectively) a number of periods of leave, each of which comprises days off, hours or a combination of either. Dismissals under any of these Acts may be brought under the Unfair Dismissals Acts and the redress may be reinstatement, re-engagement or up to two years' gross remuneration. Alternatively, a claim where there is gender discrimination can be brought under the Employment Equality Acts where there is exactly the same redress or in the event of gender discrimination, a claimant can elect to bring their claim to the Circuit Court where compensation may be awarded for discrimination over the previous six years (without any limit).

There is also a provision for *force majeure* leave where for urgent family reasons owing to an injury or illness of a relation, the immediate presence of the employee is indispensable. Such persons are defined as a person of whom the employee is the parent or the adoptive parent, or the spouse of the employee or a person with whom the employee is living as husband or wife, a person to whom the employee is *in loco parentis*, a brother or sister of the employee, a parent or grandparent of the employee and other persons as may be prescribed. The 2006 Parental Leave Act extended such leave to include people in a relationship of domestic dependency and same-sex partners. The amount of paid time 'shall not exceed three days in any period of 12 consecutive months or five days in any period of 36 consecutive months'.

There is also a provision allowing employees to take 104 weeks leave to care for an ill person and retain a right to return to work under the Carer's Leave Act 2001. Such employee is entitled to carer's benefit during such time off and there is a general right to return to work on the same terms as under the Maternity Protection Acts which also gives a right to alternative employment. Before an employee is so entitled they must have 12 months continuous service and they are also allowed to have some limited employment or self-employment during such leave.

⁴⁰⁷ E.g. *HSE Midlands Area v Sweeney* EDA0819. In this case the claimant, employed as an emergency medical technician, was moved to alternative employment during the course of her pregnancy following a risk assessment to include a medical opinion. Such alternative employment consisted of no loss of salary or diminution of her terms and conditions of employment. This was not considered to be discriminatory.

⁴⁰⁸ Maternity Protection (Protection of Mothers who are Breastfeeding) Regulations 2004, S.I. No. 654 of 2004.

⁴⁰⁹ However, if the employee has three months' service, the employee may have one week of leave for each month of service if the child is nearing the upper age for the taking of parental leave.

There is some evidence⁴¹⁰ that there is a proportionately higher number of claims against the state sector and a large unionised supermarket (Tesco). However, in particular in relation to claims against the state sector generally, the high numbers of staff and general security of employment would have to be taken into account. Gender claims appear to have been the highest number of claims but it is hard to break that down into the specific subject matter.

1.2. Social security and pension rights

Employees and the self-employed have an entitlement to state maternity benefits during maternity leave. To qualify for maternity benefit the employee must have 39 weeks of PRSI (pay related social insurance) paid in the 12-month period before the first day of maternity leave or at least 39 weeks of PRSI paid since first starting work and at least 39 weeks of PRSI paid or credited in the relevant tax year, or 26 weeks of PRSI paid in the relevant tax year and 26 weeks paid in the tax year prior to the relevant tax year. The expected date of confinement must be certified by a registered medical practitioner. Maternity benefit is calculated by dividing gross income in the relevant tax year by the number of weeks actually worked in that year. 80 % of this amount is payable subject to a minimum payment of EUR 217.80 and a maximum payment of EUR 262 per week (rates as of January 2012). Employees retain their PRSI ‘credits’ when they take the additional maternity and adoptive leave. Employees have no entitlement to state benefit during parental leave, however, they retain their ‘credits’ so that their social welfare cover is maintained. State employees will have their state entitlements to pensions continued during such leave. As there is no obligation to pay remuneration during maternity, adoptive, parental or carer’s leave the employer has no obligation to pay any employer pension contributions during such periods of leave. However, given that the provision of pension schemes is becoming more problematic (as a result of so many of them being in deficit) due to the economic crisis, this may be academic.

1.3. Self-employment

Self-employed women are entitled to maternity and adoptive state benefits in accordance with their income for the same period of time as employees. However, they have no other entitlements. A self-employed person must have 52 weeks of PRSI contributions paid at Class S (the rate for self-employed persons, which for example does not provide for job-seekers’ benefit) in the relevant tax year, in the tax year immediately before the relevant tax year, or in the tax year immediately following the relevant tax year. If a worker is going on maternity leave in 2012, the relevant tax year is 2010. Also, the self-employed cannot take additional (unpaid) maternity leave because, as they are self-employed, they feel that they may lose their business due to their unavailability. There are also provisions in the state social welfare scheme where a worker transfers between employment and self-employment and *vice versa*. There is a similar provision for adoptive leave. The female assisting spouse or life partner does not have an entitlement to such state benefit unless they can show a partnership arrangement, e.g. family farm but this clearly excludes the assisting partner of a doctor, for example.

1.4. Access to and the supply of goods and services

The Equal Status Acts 2000-2011 have the same grounds of discrimination as those under the Employment Equality Acts. In April 2012, there were reports that a pregnant school girl was denied access to a secondary school with a catholic ethos. The girl had originally been interviewed by the school in 2009 and it was understood that she was offered a place. She subsequently became pregnant and her parents informed the school of her pregnancy. In one case, where a pregnant traveller was denied return passage by an airline, the Equality Tribunal

⁴¹⁰ M. O’Sullivan & J. MacMahon *Employment Equality Legislation in Ireland: Claimants, Representation and Outcomes* ILJ 2010 39(32). This was a survey of Equality Tribunal cases in the period 2001 to 2007. Within the public sector the largest proportion of claims were against state and semi-state bodies. A higher number of public-sector organisations as opposed to private sector companies had multiple claims against them, e.g. University College Dublin, the State Training Development Agency, FÁS, the state bus service, Bus Éireann and Dublin Bus, the state postal organisation, An Post, and the Revenue Commissioners.

decided that it was not the pregnancy that was the reason for the refusal but the stage of the pregnancy and the issue of safety.⁴¹¹ A theatre insisted that a mother breastfeeding a two-year old child must pay for a ticket which was held not to be discriminatory. It was considered that the mother and child were not one and the same and thus the claimant did not succeed in her claim.⁴¹²

2. Gaps in national law

2.1. Employment

On the face of it, the legislation and its application appears to be sufficient, except that there is no statutory paternity leave (other than on the death of the mother). However, many employers may provide for paternity leave of usually three days on the birth of a child (e.g. in the civil service). However, the key area where there are difficulties for female employees is when they return to work following maternity leave. Given that maternity leave is 26 weeks and there is an entitlement in addition to that of a further 16 weeks, it can be difficult for an employee to return to their job and as a result may be offered suitable alternative employment. In practice, many redundancies arise at this point when a female employee returns to work. She may also argue that the job that she has been offered is not suitable alternative employment and as a result she only has the option of remaining in that job and bringing a claim under the Employment Equality Acts on the grounds of discrimination (which case will be not be heard for two years), or resign and bring a constructive dismissal claim. There is an argument that the length of time that an employee is out on maternity leave is considerable and depending on the nature of employment it can prove problematic. The only way that I can see that such provision can be strengthened is for the employer to have to show ‘good reason’ as to why the employee cannot return to their contractual job. Another issue that can arise more particularly where an employee has been out on maternity leave is in relation to remuneration and bonuses, in particular. Bonuses are generally discretionary.

2.2. Self-employment

It is very hard to assess whether there is discrimination against pregnant self-employed workers or self-employed workers who have recently given birth, because of the fact that they may not have been available for work and even if they are available given that they are self-employed there may be no direct evidence that they are not getting work arising from pregnancy or matters related thereto. However, it is arguable that there is discrimination more generally against the female self-employed, more particularly in higher management and from time to time in the liberal professions. Male self-employed persons do not have any entitlement to either paternity, (paternity) adoptive or parental leave. However, maternity and adoptive leave legislation allows for the father to take over any balance of the mother’s leave in the event of her death during leave, so a self-employed father is entitled to take over the balance of the leave and receive the benefit. There is also provision in the adoptive leave legislation for the ‘sole male adopter’ and in such circumstances, he is entitled to adoptive leave and benefit. A male self-employed person and a male assisting spouse have no entitlements to paternity leave (other than as above) or parental leave.

⁴¹¹ In *Kelly v Panorama Holiday Group Limited* DEC – S2008 – 007, the claimant maintained that she was discriminated against on grounds of pregnancy where she was refused passage on a return flight as she was over 28 weeks pregnant. The tour operator stated that it was the air carrier who refused her passage. At the time of the refusal, the claimant did not seek clarification as to the precise nature of the refusal to provide clearance to fly or the requirement for her to have medical certification. She did not seek the precise identity of the person or the company who was refusing clearance. Therefore in the circumstances it is uncertain as to whether the correct respondent was named. The issues involved raised safety issues for everyone and it was for this reason that medical clearance was required. It was also noted that the airline could have sought medical clearance in a range of situations involving medical difficulties. As it was not the pregnancy which was the reason but the stage of the pregnancy which could give rise to medical difficulties on the flight, the equality officer decided that the claimant had not established a *prima facie* case.

⁴¹² *Stevens v The Helix Theatre* DEC – S2008 – 033.

2.3. Access to and the supply of goods and services

Private health insurance and related products are community rated, which means that the age of the insured is not relevant (with the exception of children or students). Various policies provide for private maternity cover. However, it is envisaged that in time, private health insurance may become extremely expensive arising from matters of competition in the Irish insurance market. There does not appear to be any evidence in respect of access to housing⁴¹³ in respect of pregnant women, more particularly single mothers.

There are no apparent practices in respect of the provision of medical care for pregnant women and new mothers save for major cuts in the health service generally. There is a debate in Ireland again in respect of access to termination of pregnancy following a case two years ago in the Court of Human Rights. In Irish law, abortion is prohibited under Sections 58 and 59 of the Offences against the Person Act 1861. Under Article 40.3.3 of the Irish Constitution the State acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees to respect the mother in national laws. The facts of *A, B and C v Ireland*⁴¹⁴ were that A and B travelled to the United Kingdom for abortions for reasons of health and/or wellbeing. C, who was in remission from cancer, argued that there was no procedure by which she could have established whether she qualified for a lawful abortion in Ireland on grounds of the risk to her life. She therefore travelled to the UK for an abortion. All three applicants claimed that the restriction on abortion in Ireland violated their right to respect for their private life under Article 8 of the ECHR. With regard to the first and second applicants, A and B, the Court concluded that the existing prohibition on abortion in Ireland struck a fair balance between the right of A and B to respect for their private lives and the rights invoked on behalf of the unborn. The Court thus found that there had been no violation of Article 8 of the ECHR by eleven votes to six. With regard to C, the Court concluded unanimously that Ireland had breached C's right under Article 8 given the State's failure to secure effective respect for her private life by reason of the absence of any implementing legislative or regulatory regime providing an accessible and effective procedure by which she could have established whether she qualified for a lawful abortion in Ireland.

2.4. Additional information

There is no additional information to report.

3. Involvement of other parties

The main employer's body, the Irish Business and Employers' Confederation, along with some major companies, has produced a Maternity and Parenting Toolkit⁴¹⁵ which identifies many issues and good practices for employers. There have also been working groups⁴¹⁶ comprised of the social partners to advise on amendments to the legislation⁴¹⁷ which resulted in the Maternity (Amendment) Act 2004 and the Parental Leave (Amendment) Act 2006.

⁴¹³ A housing authority or approved body may provide for different treatment in accommodation to persons based on family size, family status and civil status (*inter alia*). (Section 6(6) of the Equal Status Act 2000).

⁴¹⁴ Judgment of 16 December 2010.

⁴¹⁵ IBEC Maternity and Parenting Toolkit (2010); available at http://www.ibec.ie/IBEC/ES.nsf/vPages/HR_best_practice~Diversity_and_the_integrated_workplace~maternity-and-parenting-toolkit-16-03-2011?OpenDocument, accessed 19 November 2012.

⁴¹⁶ Comprising the social partners, i.e. the various Government Departments, the employer bodies, the trade unions and other pillars of society.

⁴¹⁷ *Report of the Working Group on the Review and Improvement of the Maternity Protection Legislation* dated 6 July 2001, <http://www.justice.ie/en/JELR/Maternity.pdf/Files/Maternity.pdf>, accessed 23 October 2012 and *Report of the Working Group on the Development of the Parental Leave Act 1998* dated 29 April 2002, <http://www.justice.ie/en/JELR/reviewparentalleave.pdf/Files/reviewparentalleave.pdf>, accessed 23 October 2012.

4. Enforcement and effectiveness

4.1. General

Presently there is a very serious issue in relation to the effectiveness of the legislation as it now takes approximately two years from the date of claim for a claim to commence hearing. This delay has arisen due to the volume of claims and the lack of resources due to the economic situation. This very seriously undermines the effectiveness of the legislation as claimants and indeed respondents cannot get ready access to justice or to defend a claim. The procedure is that a claim is filed with the Equality Tribunal and within a short period the claimant has to send in their submission and then the respondent employer will also file a replying submission some 18 months prior to the hearing, which is problematic given that there may be new case law in the intervening period. Of course, if the parties are agreeable, there may be mediation but if the mediation fails the case goes back to the end of the queue. The Department of Jobs, Innovation and Enterprise are presently drafting legislation which is to have the effect of speeding up the adjudication process in employment disputes. It should be noted that a claimant can elect to bring their equality claim (at first instance) on the gender ground to the Circuit Court where if the case can be heard on the Dublin circuit, it can come on for hearing within approximately three months if the legal pleadings can be completed speedily (of course, there is the risk of being liable for costs if unsuccessful). It should also be noted that on appeal to the Labour Court, the case will be heard generally within six months and likewise if there is an appeal on a point of law, it will only take a matter of months to come up for hearing.

4.2. Legal redress

The Equality Authority may provide legal assistance by advising or representing a claimant. Trade unions may act on behalf of a claimant but the claimant must bring proceedings in their own name. However, in cases where there are sensitive issues involved their names may not appear on the decision, in order to preserve anonymity. In the event of dismissal, a claimant can be reinstated or re-engaged (more usually in cases where there are disciplinary issues involved) or receive up to two years' compensation under the Unfair Dismissals Acts 1977–2007. Under the Employment Equality Acts 1998–2011, in the event of a dismissal an employee may be awarded reinstatement or re-engagement or compensation of an amount equal to the greatest of 104 weeks' remuneration, 104 weeks' remuneration which the claimant would have received at the date of the reference of the case but for the act of discrimination or victimisation, or EUR 40 000. Alternatively, the employee may bring a claim on the gender ground to the Circuit Court where that Court may award compensation (without limit) for discrimination going back six years. This is the approach that the Irish statutory regime has taken taking into account the provisions of Marshal II, although bringing a claim to the Circuit Court provides an additional risk to a claimant because there is the risk of costs of the action being awarded against them in the event that they lose their action. There may also be interest awarded in the making of an order for compensation. Where the claimant is not an employee, the maximum award is EUR 13 000. In addition, there is provision for access to information prior to issuing proceedings in a case and if the employer does not provide such information, this will be taken into account in respect of redress. The Equality Tribunal or the Labour Court can award an order for equal treatment in whatever respect is relevant to the case and that a person or persons specified in the order take a specified course of action. In the recent case of *O'Brien v Persian Properties*,⁴¹⁸ a senior manager was awarded EUR 315 000 (plus interest) for discrimination and victimisation whilst pregnant. In general, if there is discrimination on grounds of pregnancy, the redress can be significant.

The maximum award under the Equal Status Acts 2000–2011 is EUR 6 350, which is a very low compensatory threshold. Alternatively a claim may be brought on the gender ground

⁴¹⁸ DEC – E2012 – 10, <http://www.equalitytribunal.ie/Database-of-Decisions/2012/Employment-Equality-Decisions/DEC-E2012-010-Full-Case-Report.html>, accessed 21 August 2012.

to the Circuit Court where the same open-ended compensation provision applies as under the Employment Equality Acts. Again of course there is the risk of costs.

4.3. Access to information

It has been reported that there should be improved information for women regarding their entitlements around pregnancy, maternity leave and return to work. This is relevant, in particular, among younger women, women with lower levels of education and non-Irish women. It was also reported that there should be greater employer awareness in relation to return to work, health and safety and risk assessment.⁴¹⁹

The Equality Authority has a statutory duty to provide information to the public in respect of equality, maternity, adoptive, and parental leave legislation.

Research, to date, has advised that there should be further investigation to increase understanding of the low take-up of maternity benefits among the self-employed and on temporary contracts. The risk of unfair treatment at work during pregnancy was higher for younger women and women expecting their second child. Women working in the retail and wholesale sector or in craft occupations were more likely to have experienced unfair treatment. Women working in organisations that support the work-life balance or that offered flexible hours and time-off for family reasons, and women who experienced low levels of work-family conflict during pregnancy were less likely to have experienced unfair treatment. Women working in managerial/administrative or skilled manual (craft) occupations during pregnancy were at greater risk of negative health effects.⁴²⁰ The issue of financial security was also considered, e.g. receiving full pay during maternity leave, i.e. the state benefit being topped up to normal remuneration. Receipt of such payment was more common among women who were already financially secure or who had the support of a partner, had higher earnings, had degree-level education, were able to take time-off for family reasons and who worked in the public sector. More vulnerable women such as lone mothers, non-Irish mothers, women with lower earnings and those with an unemployed partner were less likely to be in jobs where a top-up of state benefit was provided. Women in more highly paid occupations are more likely to take up additional (unpaid) maternity leave. The distribution of employer-provided maternity benefit was strongly skewed towards the more advantaged groups and those in higher level occupations and could be seen as part of a reward package for such employees as employers would seek to recruit and retain such employees. The take-up of parental leave is low. The survey showed that just 18 % of women who returned to work after maternity leave went on parental leave. Banks et al. stated that the last systematic study of parental leave was carried out in 2002 by the Department of Justice, Equality and Law Reform and that only 20 % of eligible workers took the leave and of those women were 84 % and men 16 %. The report mentioned another study in 2001 which found that 40 % women and 5 % men take parental leave.⁴²¹ There was a higher take up of parental leave in the public sector (apart from education) and there is also a link to affordability by the employee concerned. In conclusion, employees in the public sector and in large private sector firms can give greater access to benefits to a more diverse group of women. It was also stated that there should be further investigation into the take-up of parental leave and the reasons for employer refusal to grant leave or to grant leave in the form requested.

⁴¹⁹ J. Banks, D. Watson & H. Russell *Pregnancy at Work: A National Survey* (2011) Health Service Executive, Crisis Pregnancy Programme and Equality Authority, <http://www.equality.ie/Files/Pregnancy%20at%20Work%20A%20National%20Survey.pdf>, accessed 21 August 2012.

⁴²⁰ J. Banks, D. Watson & H. Russell *Pregnancy at Work: A National Survey* (2011) Health Service Executive, Crisis Pregnancy Programme and Equality Authority, Chapter 3, pp. 21-42, <http://www.equality.ie/Files/Pregnancy%20at%20Work%20A%20National%20Survey.pdf>, accessed 21 August 2012.

⁴²¹ EFILWC 2007 Parental Leave in European Companies, European Foundation for the Improvement of Living and Working Conditions.

ITALY – *Simonetta Renga***1. Existing legislation and case law*****1.1. Employment***

The relevant legislation as regards pregnancy and maternity related discrimination is provided by Decree No. 198/2006, a consolidation Act called ‘Code of Equal Opportunities between Men and Women’ which gathers all anti-discriminatory provisions regarding gender, and by Decree No. 151/2001 on the Protection of Motherhood and Fatherhood.

According to Article 25 of the Code of Equal Opportunities, less favourable treatment related to pregnancy, motherhood or fatherhood, also adoptive, as well as to the respective rights, is regarded as direct gender discrimination.

At the end of the maternity, paternity or parental leave, workers have the right to return: a) to the same workplace or, if not possible, to a workplace in the same municipality as the previous one; b) to the same job or, if that is not possible, to an equivalent job. Furthermore, Article 56 lays down the right of a woman on maternity leave to benefit at the end of this period from any improvement in working conditions to which she would have been entitled during her absence (Article 56 of Decree No. 151/2001).

As regards dismissal, it must also be noted that the protection afforded is much stronger than required by EU legislation, as it is ensured purely on grounds of pregnancy, regardless of whether the employer has been informed or not. Moreover, protection is granted during pregnancy and maternity leave and for a period of 12 months following childbirth. This dismissal, as well as dismissals on the ground of an application for, or the taking of, parental leave, is considered equal to discriminatory dismissal and the special remedy (reinstatement) provided by Article 18 of the Worker’s Statute is enforceable (Article 54 Decree No. 151/2001).

All provisions just described are always granted, also for national and international adoption and official custody of a child.

Type and size of the employer do not influence the scope of application of the anti-discriminatory legislation.

The Code of Equal Opportunities provides general protection against victimisation for all employees and other persons who become the victim of detrimental treatment by their employer in reaction to obtaining compliance with the principle of equal treatment between men and women, including the pregnancy, maternity and paternity provisions.

The main items dealt with by published case law regard the interpretation of the exceptions to the ban on dismissal during pregnancy and the right to the allowance for the compulsory maternity leave (vertical part-timers, workers performing their job in seasonal activities, workers whose employment relationship legitimately ended during pregnancy). Several other cases regard: dismissal on the ground of marriage; the consequences of the lack of confirmation of the resignation given to the Labour Inspectorate by a working mother or a pregnant woman (this is the issue of blank resignations);⁴²² the right to time off for illness of the child (interpretation of the notion of ‘illness’, power of control of the employer etc.); time off for breastfeeding (personal scope, rights of adoptive parents, including international adoption, extension of the right for twins). A few cases are to be recorded about conditions to take parental leave (previous notice to be given by worker), considering compulsory maternity leave as part of the length of service in a public competition, the right to return to the same job after taking maternity leave and the legitimacy of the worker’s behaviour if she does not inform the employer of her pregnancy before recruitment on a fixed-term contract.

⁴²² White dismissals or blank resignations occur when employers force new female workers to sign undated resignation letters which they use to dismiss them if they become pregnant or are faced with a long-term illness.

1.2. Social security and pension rights

Italian law stipulates a period of compulsory absence for working mothers, during which any work activity is absolutely forbidden. This period lasts 5 months. Working fathers may obtain paternity leave of the same duration as the mother. This leave, however, is allowed only if the mother dies or becomes seriously ill, or in the event of abandonment of the child, or if the child is under the exclusive custody of the father. According to Article 4 of Act No. 92/2012 (temporarily, from 2012 to 2015), fathers are also entitled to three days of paternity leave in the first five months following the child's birth, of which two days can be an alternative for the mother and one day is compulsory for the father. These leaves are also granted for national and international adoption or fostering.

During the whole period of maternity leave, mothers are entitled to a daily benefit paid by the National Institute for Social Protection. This benefit is granted to those working in the private and public employment sectors, to self-employed persons and to professionals. In the private sector, the amount of the maternity benefit is 80 % of their average overall daily wage, but most collective agreements provide for a payment of up to 100 %. Women in the civil service, according to their employment contract, are entitled to an amount equal to their full wage: thus the social security benefit is supplemented by the employer so as to reach the normal wage. The same is paid to fathers who take advantage of paternity leave.

To all effects and purposes, periods of leave count towards length of service. During the leave, figurative contributions are taken into account for pension rights and amounts.

Parental leave is optional and lasts a total of ten months. It may be taken by either the father or the mother during the first eight years of the child's life. Parental leave is also granted for national and international adoption and fostering. During the periods of parental leave, for the first three years of the child's life, parents are entitled to a benefit equal to 30 % of their normal wage for a total of six months for both parents. Figurative contributions are taken into account for pension rights and amounts. For any leave taken after the child reaches the age of three, or over the maximum period of six months, benefit is only paid if the claimant's earnings are less than 2.5 times the minimum pension paid under the general compulsory insurance system. In this case, the figurative contribution calculations for pension purposes are reduced, but the amount can be fully supplemented through redemption of contributions. Parental leave counts towards length of service.

Occupational schemes, in contrast, do not provide for the recovery of wasted contributions during pregnancy, motherhood and fatherhood.

1.3. Self-employment

Italy has notified transposition of Directive 2010/41/EU. However, the actual impact of Directive 86/613/EEC on national regulations has been very weak because the regulations on access to professions, self-employment, the establishment of companies, small entrepreneurs (including farmers), family enterprises, agrarian families and conjugal enterprises were not discriminatory and they did not require any specific intervention.

Article 27 of the Code of Equal Opportunities extends the ban on discrimination to self-employment, as well as to the establishment, equipment or extension of a business or the launching or extension of any other form of self-employed activity, as regards access to work, promotion, professional training and working conditions. The discrimination is expressly forbidden in relation to marriage, family status or pregnancy, motherhood or fatherhood, also for adoption.

As a matter of fact, Italian legislation even exceeds EU provisions. The Code of Equal Opportunities (Article 52-55) implements the principle of substantial equality in the field of entrepreneurial activity, providing for the promotion of female self-employment through preferential measures meant to favour access to bank credits and public funds, to improve professional training and qualifications for women in this field, and to promote the presence of businesses owned or managed by a high percentage of women in the most innovative sections of different production sectors.

According to Decree No. 151/2001 (on Sustaining Fatherhood and Motherhood), self-employed women are entitled to a maternity allowance, independent of their decision whether

or not to suspend their work activity. The allowance is paid for five months and amounts to 80 % of the minimum pay for contribution purposes. Self-employed women also have a right to a parental leave of three months during their child's first year. During maternity and parental leave, pension contributions are calculated as if the woman were working.

Ministerial Decree 12-7-2007 provides for women employed on project work, who are de facto employees, although technically self-employed, a 5-month compulsory leave period, during which they are paid a maternity allowance. During this leave period, pension contributions are calculated as if the woman were working.

Women practising a liberal profession are also entitled to five months of maternity allowance, independent of work. The allowance amounts to 80 % of five/twelfths of the yearly income earned during the two years preceding the birth. During this leave period, pension contributions are calculated as if the woman were working.

All the described leaves are also granted for national and international adoption and fostering.

Article 4, Paragraph 5, of Decree No. 151/2001 states that in businesses where self-employed women are engaged, if women go on maternity leave they can be replaced, in the first year after childbirth or after the child entered the family in the event of adoption, by an employee working on a fixed-term contract and (if the enterprise employs less than 20 people) with special reductions in contributions for the business. In this respect, therefore, there is equalization as regards women in the legislation governing employees and self-employed persons.

1.4. Access to and the supply of goods and services

EC Directive 2004/113/EC has been implemented by Decree No. 196/2007, which adds ten articles to the Code of Equal Opportunities. The Decree repeats the text of the Directive literally.

There is no definition of pregnancy and maternity discrimination as regards the access and supply of goods and services in our legislation, and nor is specific protection provided for women against discrimination related to breastfeeding.

Less favourable treatment of women for reasons of pregnancy and maternity is, however, expressly considered equal to direct gender discrimination by Decree No. 196/2007, following the copying out of the Directive, which in this case has produced positive results. We do not use a comparator for discrimination related to pregnancy and maternity.

In Italy there is no special attention to rights and obligations linked to pregnancy and maternity in the goods and services sectors. The effectiveness of women's rights provided by legislation mainly depends on the efficiency of Health and Social Services at the local level. Specific protection is provided for pregnant women in the National Health System, as all clinical tests related to pregnancy as well as the majority of other clinical tests are free of charge. Specific exemption from fees is also provided for fathers for tests linked to the health of their child.

2. Gaps in national law

2.1. Employment

The protection of working mothers and fathers under Italian law is very comprehensive in comparison with EU standards and complies with the relevant directives, sometimes even greatly exceeding EU protection.

The situation as regards pregnancy and maternity/paternity has even further improved after the implementation, through Decree No. 5/2010, of the Recast Directive, when less favourable treatment related to pregnancy, motherhood or fatherhood, also adoptive, as well as to the respective rights, was finally considered equal to direct gender discrimination (Article 25 Code of Equal Opportunities). This feature allows the claimant to benefit from specific procedural rules and to obtain stronger remedies provided by the law for cases of discrimination. This amendment even exceeds the obligations stated at EU level, as it is not limited to women, as expressly provided by Article 2 Paragraph 2c) of the Recast Directive,

but also includes men and adoptive parents. Moreover, Article 27 of the Code of Equal Opportunities, as modified by Decree No. 5/2010, bans discrimination as regards access to work, promotion, professional training and working conditions. In particular, discrimination is expressly forbidden in relation to marriage, family status or pregnancy, motherhood or fatherhood, also for adoption. As regards the provisions of adequate rights during leave, it is important to refer to Article 56 of Decree No. 151/2001, as modified by Act No. 101/2008, which lays down the right of a woman on maternity leave to benefit, at the end of this period, from any improvement in working conditions to which she would have been entitled during her absence. Furthermore, Article 22 of Decree No. 151/2001 stipulates that compulsory maternity leave is to be counted as actual work as regards seniority, annual holidays and thirteenth-month bonus and that, for the purposes of promotion, maternity leaves are to be regarded as periods of employment, unless special requirements have been made for that purpose by collective agreements. Women are also granted paid time off from work for antenatal examinations. The EU requirements on guidelines for the assessment of hazardous agents/processes and assessments/information on specific risks and consequent actions to be taken have been transposed into the Italian system by Decree No. 151/2001. If the working conditions are held to be prejudicial to the mother or the child, the Labour Inspectorate may change the woman's job; if the woman is moved to an inferior job she maintains her pay level. Moreover, the Labour Inspectorate may, on the basis of a medical examination, exempt the employee from work if the mother or the child has serious health problems or if the working or environmental conditions are held to be prejudicial to their state of health and the worker cannot be transferred to a more suitable job; for this period of work suspension an extension of paid maternity leave is provided. Article 53 of this Decree also provides for a ban on night work for pregnant women and for a period of 12 months following childbirth. Periods of paid leave are taken into account for pension purposes.

The issue of the so-called 'blank resignation' has recently come to the attention of public opinion and political debate. It refers to an undated resignation letter signed by a worker at the time of recruitment so as to be used by the employer to make the worker resign when needed (i.e. when pregnant). Often the employer makes recruitment conditional on signing such a letter. An investigation of national newspaper *La Repubblica*, which caused a certain echo on many websites, highlighted the remarkable increase of this unlawful practice and its negative impact on women, who are already particularly affected by the serious economic crises, including a high percentage of unemployment. The paper reports that 15 % of workers, i.e. about two million, has been subjected to this form of blackmail. According to the data published by *La Repubblica*, about 800 000 women each year leave their job before giving birth and the risk that they have been forced to take this decision by their employer is very high. Recently, 14 women submitted an appeal to the new Minister of Labour Elsa Fornero to tackle this problem.⁴²³ In response to this, the recent Act No. 92/2012, known as 'The labour market reform from a perspective of growth', changed Article 55, Paragraph 4 of Decree No. 151/2012, extending the period during which mutual termination of the employment contract or resignations of working mothers shall be signed in front of an inspector of the Minister of Labour. This period now starts at the beginning of the pregnancy and ends when the child reaches the age of three. The same rule applies to the father as well as to adoptive parents or persons who have been given the official custody of a child from birth/entering the family. The personal scope and the length of the period of protection have surely been strengthened by the recent reform. However, at first, some doubts arose from the new rules regarding the consequences of violation of the procedure. In fact, the previous rules referred to validation as a condition of validity and case law deemed the non-confirmed resignation to be null and

⁴²³ See: <http://www.senonoraquando.eu/?tag=dimissioni-in-bianco>; <http://www.lettera43.it/economia/aziende/35121/le-donne-contro-le-dimissioni-in-bianco.htm>; http://www.asca.it/news-Lavoro_Finocchiario_cancellare_la_vergogna_delle_dimissioni_in_bianco-1115958-FOT.html; <http://www.basilicatanet.it/basilicatanet/site/Basilicatanet/detail.jsp?sec=1005&otype=1012&id=581125>; http://inchieste.repubblica.it/it/repubblica/rep-it/inchiesta-italiana/2012/01/19/news/quella_legge_cancellata_da_berlusconi_che_piega_i_neo-assunti-28433142/; <http://www.cgil.it/rassegnastampa/articolo.aspx?ID=7722>; http://www.lavoro.gov.it/Lavoro/AreaStampa/comunicati/2012_01_03.htm, accessed 7 November 2012.

void, while Article 55 provides that the efficacy of the resignation is suspended until it is signed in front of the Labour Inspectorate, and this could give rise to an interpretation which allows the resignation lawfully produces its effect after the period of three years.

In addition, the reform reintroduced a general mechanism of validation of all workers' resignation or mutual termination of employment contracts, which had existed in the past before being abolished by the centre-right Government just a few months after its coming into force. Now resignations or mutual termination must be validated by an official of the Minister of Labour or the local public employment services or by the bodies specified by national collective agreements or by the completion of a specific form to be sent to the employment services.

If they are not validated, the employer has to request by written the employee to confirm the resignation and the termination of the working relationship is on condition that, within seven days from this written request, the employee does not withdraw the resignation or just does not answer. During this period the employee can withdraw the resignation or the consent to mutual termination so as to be reinstated at work. Moreover, after thirty days from resignation or mutual termination, in case the latter were not validated and the employer did not request the employee to confirm them as mentioned above, the resignation or mutual termination has definitely no effect.

The employer who uses blank resignation forms will be subject to an administrative or, in certain circumstances, a penal sanction.

Several published cases regard blank resignation of working mothers. The Tribunal of Firenze on 12 December 2005⁴²⁴ stated that if the resignation is not validated this means that the work relationship is not terminated; the employee, therefore, has the right to go back to work and to receive remuneration, plus compensation, currency revaluation and legal interest for the months in which the worker was kept out of work (in the same sense as the Tribunal of Milano on 12 July 2007).⁴²⁵ Other cases concern the relevance of being aware of the pregnancy for these rules to be enforced. The Court of Appeal of Firenze on 9 September 2006 ruled that Article 55 was enforceable despite the fact that the employer did not know about the pregnancy of the worker⁴²⁶ and the Tribunal of Treviso on 4 January 2007⁴²⁷ ruled that Article 55 was enforceable only if the employee knew about her pregnancy when she resigned.

As regards the practice of blank resignation in general, no cases are to be recorded nor on the new neither on the previous general mechanism of validation of all workers' resignation or mutual termination of employment contracts.

As regards the period before the issue of this ruling, very scanty case law directly reflected the difficulty to give evidence of the blackmail by the employee. This obstacle has been expressly taken into consideration in judgment of Tribunal of Arezzo of 21 October 2008 (*Il Lavoro nella Giurisprudenza* 2009, p. 398) where the judge deemed that the real will of the worker could be inferred by a series of factors, in contrast with the resignation: the text of the letter was typewritten while only the date was written in ink; no specific facts showed the will of the worker to resign as the investigation proved he came back to work after the illness taking with him his workbag and the same day of the resignation he asked for the intervention of a union representative; moreover, it was very unlikely he decided straight off to leave the job, considering his familiar burden and mortgage.

Another similar case dates back to 1984 where the Pretura of Milano of 22/06/1984 (*Lavoro* 1984, p. 1195) ruled the blank resignation, which allows the employer to date it at will, is null and void as it infringes the imperative ruling of dismissal; however, if it disguises a different agreement between the employer and the employee aimed at interrupting the working relationship it can be valid and this last agreement prevails on the blank resignation.

⁴²⁴ *Rivista Critica di Diritto del Lavoro* 2006, p. 616.

⁴²⁵ In *Orientamenti di giurisprudenza del lavoro* 2007, I, p. 847.

⁴²⁶ *Toscana giurisprudenza* 2006, p. 301.

⁴²⁷ *Rass.giur.lav.Veneto* 2007, I, 49.

Another case dealing with the issue and especially with the penal relevance of blank resignation has been ruled by the Court of Cassation. The Court of Cassation no. 32525 of 1 July 2010 (*Foro Italiano* 2011, part II, col. 100) ascertained a crime of extortion in a case where the employer exploited economic difficulties and the precarious situation of labour market so as to oblige the employees to accept worst working conditions. The case regarded an activity of illegal hiring where the formal/apparent employer kept for himself a part of the remuneration due to the workers, who were sent to different undertakings; the interceptions gave evidence that he stressed the workers to induce them to stop leaves for illness or accidents at work and that he obliged them to sign blank resignation with the aim of avoiding legal limits to dismissal and of facilitating business' winding up or closing. In this case, the ordinary custom to oblige the workers to sign a letter of blank resignation to be used also without their knowledge has been valued by the judge as the evidence that the workers were permanently blackmailed in order to obtain their acceptance of all requirements and decisions of the employer.

It is quite unusual in Italy for fathers to take parental leave. The gender pay gap and the fact that men are the main breadwinners have a great influence on this. As parental leave is calculated as a percentage of the worker's pay, it is more convenient for families to lose part of the woman's pay than of the man's pay, because men earn much more than women and the percentage of pay lost in the event of parental leave is higher for men than for women. As a measure to encourage fathers to take parental leave, the maximum total length of the leave awarded per child was increased from ten to eleven months if the father uses at least three months. Moreover, to reduce the negative effects of parental leave on the organisation or business, it is provided that employers can offer fixed-term contracts and the worker who will substitute the working mother can begin to work under this contract already up to one month before (or even earlier if provided by collective bargaining) she will leave, so that the worker taking leave can train his or her replacement. For small companies (employing less than 20 workers), a 50 % reduction in contribution is provided for the recruitment of persons replacing workers on parental leave.

2.2. Self-employment

As described above, the ban on discrimination has been extended to self-employment, as regards access to work, promotion, professional training and working conditions, and discrimination related to marriage, family status or pregnancy, motherhood or fatherhood, also for adoption, is expressly prohibited.

As regards maternity, paternity and parental leave, there are two main gaps. The first one involves fathers, as they are not granted any kind of allowance, neither paternity nor parental allowance. The Constitutional Court intervened in this issue with a decision of 11-14 October 2005, No. 385, declaring illegitimate the provisions that denied maternity leave to a father practising a liberal profession instead of the mother.⁴²⁸ The problem remains for all other self-employed categories of fathers, compared with fathers under a contract of employment.

The second gap concerns helping spouses, who can only benefit from measures that do not depend on the performance of a specific work activity, such as the maternity allowance provided for mothers who are not covered by the social security system and earn less than a certain amount.

2.3. Access to and the supply of goods and services

From a general point of view, in Italy there is no debate as regards differences in access to or prices of services based on pregnancy and maternity, and such differential treatment seems to be, on the basis of the information available, very rare.

The effectiveness of women's rights provided by legislation mainly depends on the efficiency of Health and Social Services at the local level. In Italy sex-segregated services are regarded as a very marginal problem. The general opinion is that it could only have a slight

⁴²⁸ Published in OJ 19 October 2005, No. 42 – Special Issue No. 1.

indirect influence on the achievement of gender equality at work, by avoiding social stereotypes.

Article 4(2) of Directive 2004/113/EC has been applied to maintain the exemption from fees for all clinical tests related to pregnancy and for certain clinical tests during the same period. Moreover, having children is regarded as a preferential ground to have access to public housing, while having more than one child is a preferential ground to gain access to a public kindergarten.

2.4. Additional information

The main problem in Italy is not related to a lack of legislation. Indeed domestic legislation is in line with the EU directives and most of the time even exceeds EU legislation. The main issue is that of effectiveness of legislation: workers tend to refrain from exercising their rights as they are afraid of the consequences with their employer. In particular, in case of fixed-term contracts or project work or other types of temporary work positions, they are afraid that their contract will not be renewed. This is especially true for new generations: the majority of young people, the potential parents, work in precarious jobs, lacking a secure and constant income as well as the respective pension and insurance contributions. This deprives them of the choice to exercise their rights.

The only answer to this is to change the social stereotypes of the distribution of roles within the family. This means improving leave provisions for men and improving services facilities, such as kindergartens. In particular, access to social services, such as crèches, school holiday camps and other school activities, mainly depend on the revenue of the parent/s and the offer is dramatically insufficient in comparison with the needs of families (both of employed and self-employed parents). A weak attempt at making services more readily available was made by recent Act No. 92/2012, which introduces paid vouchers for baby-sitting services: these will be made available to mothers from the end of their compulsory maternity leave for the following eleven months as an alternative to the parental leave. The amount of the voucher will depend on the family income. The fact that the vouchers are not made available to fathers can be regarded as a step in the wrong direction regarding the recognition of the relevance of the role of paternity in the labour market, which is very difficult to reconcile with the principle of equality.

Provisions on reconciliation would also be useful. A good example here is Article 9 of Act No. 53/2000, as modified by Article 38 of Act No. 69/2009, which provides for an important measure for the promotion of reconciliation, namely the allocation of part of the Fund for Family Policies to public or private businesses and to associated businesses that enforce collective agreements on the targeted positive actions: i.e. adopting a flexible working schedule allowing part-time work, tele-work, home-work, flexible hours and other measures; providing for innovative systems of job evaluation of those who are involved in family care activities in order to avoid their marginalisation; re-entry of workers into the labour market after a period of leave; organising innovative services to meet the workers' needs of reconciliation, e.g. by coordinating working and opening hours within the relevant town, with the participation of businesses, trade unions and public authorities. These projects are oriented towards both parents and those engaged in the care of disabled family members.

3. Involvement of other parties

A central role in the field of prevention of pregnancy and maternity discrimination is played by the Equality Advisors (i.e. the Equality bodies), who can conduct independent surveys, publish independent reports and make recommendations on the implementation of gender equality. Moreover, Italian legislation empowers the Equality Advisors to assist victims of discrimination. They can act directly in their name in cases of collective discrimination, even where the employees affected by the discrimination are not immediately identifiable. Regional and Provincial Advisors can also proceed when delegated by an individual employee or can intervene in a procedure initiated by the latter.

Associations and organizations promoting the respect for equal treatment between male and female workers are entitled as well to act on the workers' behalf.

Trade unions can be delegated by the worker to act on his/her behalf in the event of discrimination, receive gender data on personnel from businesses employing more than 100 workers, and can ask to be allowed to participate in the financing of positive action plans. There are no other legislative provisions aimed at supporting the social partners' role in compliance with and enforcement of gender equality law in general. The social partners' sensitivity in these issues, however, is still not uniform in all regions and sectors.

Decree No. 5/2010 provides that collective agreements can adopt specific measures, including guidelines and codes of best practice, aimed at the prevention of all forms of discrimination, but does not mention any kind of incentive for it.

Unfortunately, our country has not yet cultivated a culture of good practices. Furthermore, there is no systematic collection of data on good practices, hampering their promotion and quality improvement.

We can, however, recall, as an example, the agreements of cooperation between Equality Advisors and labour law inspectors, which have been signed by local Equality Advisors and Provincial Labour Inspectorate on the implementation of gender equality legislation. These agreements were concluded after the 2007 national convention between the National Labour Inspectorate at the Ministry of Labour and the National Network of Local Equality Advisors. The parties to these agreements committed themselves to taking any initiative useful to implement gender equality and to prevent discrimination. These agreements are an extremely important step for maintaining and improving the coordination of activities between provincial inspectorates and local Equality Advisors for the purpose of implementing gender equality and monitoring the labour market from the perspective of the gender dimension.

A local initiative can be also recorded as an attempt to counteract the phenomenon of white dismissals, before the approval of Act No. 92/2012. In recent years, the Department of the Ministry of Labour of Pistoia in Tuscany has run a campaign against blank resignation in local newspapers, on the radio and in businesses as well, trying to inform workers and inviting them to denounce this unlawful practice. In particular, they advised workers who signed such a resignation to get in touch with the local department of the Ministry of Labour and send a letter where she/he declares that she/he was forced to resign by the employer. The Office will not open this letter but keep it as pre-established proof of 'hidden dismissal' to be used also many years later. The officers of the Ministry of Labour helped many workers to return to their job in this way.⁴²⁹

4. Enforcement and effectiveness

4.1. General

We do not have empirical studies on this issue. However, see the discussion in 2.4. above.

4.2. Legal redress

As we said, less favourable treatment related to pregnancy, motherhood or fatherhood, also adoptive, as well as the respective rights, is regarded as direct gender discrimination. The same goes for dismissals linked to pregnancy, maternity and the taking of maternity or parental leave, which are considered equal to discriminatory dismissal.

The consequence is that all remedies and sanctions provided by anti-discrimination legislation are applicable. In particular, as regards dismissals, the special remedy of reinstatement provided by Article 18 of the Worker's Statute is enforceable (Article 54 Decree No. 151/2001). More in general, the remedy of annulment is enforceable for discriminatory acts. The revocation of public benefits or even the exclusion, for a certain

⁴²⁹ See in: http://inchieste.repubblica.it/it/repubblica/rep-it/inchiesta-italiana/2012/01/19/news/quella_legge_cancellata_da_berlusconi_che_piega_i_neo-assunti-28433142/; http://qn.quotidiano.net/politica/2012/01/03/646937-basta_dimissioni_bianco_donne.shtml; (http://inchieste.repubblica.it/it/repubblica/rep-it/inchiesta-italiana/2012/01/19/news/quella_legge_cancellata_da_berlusconi_che_piega_i_neo-assunti-28433142/; <http://www.cgil.it/rassegnastampa/articolo.aspx?ID=7722>), accessed 7 November 2012.

period, from any further awarding of financial or credit incentives or from any public tender is also provided as a remedy in the event of established direct or indirect discrimination. Minor criminal sanctions are provided for the infringement of the prohibition on discrimination in access to work and working conditions, and administrative sanctions are provided for the protection of motherhood and fatherhood. Compensation for economic harm can be awarded following the general principles on contractual and extra-contractual liability. Compensation for non-economic harm, which in the Italian system is limited to cases expressly defined by law, is also provided by the Code on Equal Opportunities, but only for special and urgent proceedings.

Cases on equality rights are adjudicated under procedures for labour disputes. Ordinary or special urgent legal proceedings can be brought to court, according to different circumstances. In the area of discrimination partial reversal of the burden of proof applies.

Italian legislation empowers the Equality Advisors to assist victims of discrimination. They can act directly in their name in cases of collective discrimination, even where the employees affected by the discrimination are not immediately identifiable. Regional and Provincial Advisors can also proceed when delegated by an individual employee or can intervene in a procedure initiated by the latter. Also associations and organizations promoting respect for equal treatment between male and female workers are entitled to act on the workers' behalf.

In labour disputes, employees pay reduced costs of proceedings and lawyers' fees are also reduced.

There has not been an increase in case law on pregnancy, maternity and paternity discrimination initiated by associations/organizations since the implementation of the Recast Directive.

4.3. Access to information

Information on maternity/paternity rights is mainly supplied by the local Equality Advisors and by the National Equality Advisor, who coordinates the network of local Equality Advisors; websites are also used for this purpose.

Information is also available on the INPS website (National Social Security Institute)⁴³⁰ and on the Equal Opportunities Department website;⁴³¹ the latter is part of the Prime Minister's Office.

Moreover, the Code of Equal Opportunities requires companies with more than 100 employees to draw up reports on the workers' situation (male and female) every two years, as regards e.g. recruitment, professional training, career opportunities, remuneration, dismissal and retirement. These reports are delivered to the company's Trade Union representatives and to the Regional Equality Advisors and can be used as quantitative/statistical data, also for the reversal of the burden of proof.

There is no evidence of multiple discrimination in the area of pregnancy and maternity/paternity.

There are no studies on workers' awareness of their rights.

LATVIA – Kristine Dupate

1. Existing legislation and case law

1.1. Employment

The main piece of legislation applicable to employment relationships is the Labour Law.⁴³² It is applicable to all employees in the private and the public sector. Rights of persons in the public service are regulated by special laws. However, such special laws contain references to

⁴³⁰ <http://www.inps.it/portale/default.aspx>, accessed 21 September 2012.

⁴³¹ <http://www.pariopportunita.gov.it>, accessed 21 September 2012.

⁴³² *Darba likums*, Official Gazette (OG) No. 105, 6 July 2001.

the Labour Law with regard to gender equality and non-discrimination provisions.⁴³³ The references provide that norms provided by the Labour Law regarding equal treatment and non-discrimination are applicable to persons in the public service. Therefore the Labour Law is the key legal instrument for the protection against discrimination in employment.

Article 29(5) of the Labour Law expressly provides that less favourable treatment on the grounds of pregnancy or in connection with the use of the right to maternity or paternity leave is to be considered as direct discrimination on the ground of sex.⁴³⁴ Moreover, although Article 29(5) of the Labour Law expressly stipulates that less favourable treatment on the grounds of pregnancy, maternity or paternity leave constitutes direct discrimination, some of the special laws regulating the public service especially stress application of non-discrimination rights provided by the Labour Law with respect to pregnancy, maternity and paternity leave.⁴³⁵

The Labour Law provides for an individual right of each employee to maternity,⁴³⁶ paternity⁴³⁷ and parental leave.⁴³⁸ Only one of the adoptive parents may enjoy the right to adoption leave.⁴³⁹ The right to return to the same or equivalent post with the same working conditions is provided for employees after maternity,⁴⁴⁰ paternity, adoption⁴⁴¹ or parental⁴⁴² leave. In addition, Article 149(6) provides that after said leaves an employee has a right to all improvements in working conditions that were introduced during his/her absence, as if she/he was not on leave. It covers working conditions and pay if there was a general pay increase in the relevant business or institution. If however the pay increase during a parent's absence was defined on the basis of an assessment of the performance of workers during an absence, then this condition with regard to pay is not applicable.

There is a right to additional breaks during working time for breastfeeding. Breaks for breastfeeding may not be shorter than 30 minutes, each 3 hours. However the mother may choose to combine such breaks and make the workday 1 hour shorter.⁴⁴³

The concepts of 'pregnant worker' and 'maternity' are not expressly defined. However, such definitions derive from other provisions. Article 37(7) of the Labour Law stipulates that a pregnant worker is a worker who informs her employer of her pregnancy for the purposes of demanding working conditions that are safe and healthy for her and her expected child. Article 109(1) prohibits giving notice of dismissal to a pregnant worker, a female worker one year after childbirth and during the entire period of breastfeeding, except in special cases defined by law, for example if an employee appears at work in a state of intoxication or in case of liquidation of the employer. It follows that special maternity protection in Latvia lasts at least a year after childbirth, which is a long period of time in comparison to other EU Member States.

⁴³³ For example, State Civil Service Law (*Valsts civildienesta likums*), OG No. 331/333, 22 September 2000, with respective amendments on equal treatment, OG No. 180, 9 November 2006.

Law on Service in the System of the Interior and Imprisonment System (*Iekšlietu ministrijas sistēmas iestāžu un ieslodzījuma vietu pārvaldes amatpersonu ar speciālajām dienesta pakāpēm dienesta gaitas likums*), OG No. 101, 30 June 2006; Military Service Law (*Militārā dienesta likums*), OG No. 91, 18 June 2002; Home Guards of Republic of Latvia Law (*Latvijas Republikas Zemessardzes likums*), OG No. 82, 26 May 2010.

⁴³⁴ Amendments OG No. 47, 24 March 2010.

⁴³⁵ Article 3(2) of the Law on Service in the System of the Interior and Imprisonment System (*Iekšlietu ministrijas sistēmas iestāžu un ieslodzījuma vietu pārvaldes amatpersonu ar speciālajām dienesta pakāpēm dienesta gaitas likums*), OG No. 101, 30 June 2006; Article 12(2) of the Military Service Law (*Militārā dienesta likums*), OG No. 91, 18 June 2002; Article 6(8) of the Home Guards of Republic of Latvia Law (*Latvijas Republikas Zemessardzes likums*), OG No. 82, 26 May 2010.

⁴³⁶ Article 154.

⁴³⁷ Article 155(1).

⁴³⁸ Article 156.

⁴³⁹ Article 155(5).

⁴⁴⁰ Article 154(5).

⁴⁴¹ Article 155(6).

⁴⁴² Article 156(4).

⁴⁴³ Article 146. Such provision has been 'borrowed' from the old Soviet Labour Code. The author considers that such norm was necessary at the time because there was (for a certain period of time) no right to childcare leave and mothers were forced to return to work 8 weeks after childbirth.

The only special provision prohibiting giving notice of dismissal to pregnant workers and workers during the maternity period, except in a few special circumstances,⁴⁴⁴ is mentioned in Article 109(1). Other categories of employees (after parental, paternity or adoptive leave) may be dismissed under generally applicable dismissal rules (grounds).⁴⁴⁵ Dismissal based on pregnancy, maternity or paternity leaves would be considered as direct sex discrimination under Article 29. It is unclear if dismissal based on adoption leave would be considered as discrimination under Latvian law. It is still unclear if less favourable treatment or dismissal based on parental leave would be considered as indirect discrimination on the grounds of sex.

Article 9(1) of the Labour Law protecting against victimisation does not expressly mention pregnancy, maternity, paternity or parental rights. This may be explained by the fact that this provision has general application, i.e. it protects an employee against victimisation in all cases where he/she has made use of his/her employment rights in general.

There are no studies on the sectors of employment and types of employer where pregnancy, maternity, paternity or parental discrimination is likely to occur more frequently. However, it is likely that the risks to be discriminated against in the public sector and/or in institutions/businesses with more employees would be smaller. This is because employers in the public sector have no business interests, while in larger institutions/businesses there are more opportunities to organize replacement or change in employment conditions of a worker on account of pregnancy and maternity.

1.2. Social security and pension rights

Maternity, paternity and parental leave allowances are statutory insurance scheme allowances.⁴⁴⁶

Working women are entitled to 112 days of paid pregnancy and maternity leave. If she has registered with a doctor for medical supervision of her pregnancy before the 12th week the mother acquires the right to an extra 14 days' leave, in total constituting 126 calendar days.⁴⁴⁷ Paternity leave is 10 calendar days.⁴⁴⁸ Parental leave with the right to parental allowance lasts until the child is 12 months old.⁴⁴⁹ If a parent takes parental leave after the child's first birthday, statutory social insurance allowance is not available. Such leave is available to both parents,⁴⁵⁰ but the right to parental leave allowance is only available to one of them.⁴⁵¹

Maternity allowance constitutes 80 % of the gross salary,⁴⁵² i.e. during maternity leave women receive a maternity allowance in an amount that is higher than their net salary, because the net salary is around 67 % of the gross salary.⁴⁵³ The same applies to paternity allowance.⁴⁵⁴

Parental allowance constitutes 70 % of the gross salary, which again is a bit higher than the net salary (67% of the gross salary).

However, because of the economic crisis, the amount of social insurance allowances has been restricted.⁴⁵⁵ A person is entitled to an allowance of 100 % (of the calculated allowance) if the daily allowance does not exceed EUR 16.37 (LVL 11.51) and 50 % (of the calculated allowance) of the daily allowance exceeding EUR 16.37. Such restriction applies to

⁴⁴⁴ For example, liquidation of the employer or appearing at work while intoxicated.

⁴⁴⁵ Article 101 of the Labour Law.

⁴⁴⁶ Law on Maternity and Sickness Allowances (*likums Par maternitātes un slimības pabalstiem*), OG No. 182, 23 November 1995.

⁴⁴⁷ Article 5.

⁴⁴⁸ Article 10¹.

⁴⁴⁹ Article 10⁴.

⁴⁵⁰ Article 156(1) of Labour Law, *Darba likums*, OG No. 105, 6 July 2001.

⁴⁵¹ Article 10⁴ Law on Maternity and Sickness Allowances (*likums Par maternitātes un slimības pabalstiem*), OG No. 182, 23 November 1995.

⁴⁵² Article 10.

⁴⁵³ Until 1 January 2012 maternity allowance amounted to 100% of the net salary, but due to the lack of resources the legislator decided to provide maternity and paternity allowance in an amount that is equal to other allowances, such as sickness and paternal allowance. (Amendments OG No. 202, 23 December 2011).

⁴⁵⁴ Article 10³.

⁴⁵⁵ Law on Payment of State Allowances in 2009-2014 (*likums Par valsts pabalstu izmaksu laika periodā no 2009.gada līdz 2014.gadam*), OG No. 100, 30 June 2009.

maternity, paternity, parental, sickness and unemployment allowances as a transitional measure which has to be cancelled at the end of economic crisis. However, the end of the economic crisis cannot be predicted: initially, such restriction was intended to last from 2009 until 2012 but it was then extended to 2014.⁴⁵⁶ The author doubts whether such restriction may be considered as discriminatory on the basis of sex, because it equally applies to all statutory social insurance allowances. If there had been no cuts in expenditure of statutory social insurance budget it could have endangered the Latvia's access to foreign loans (from the International Monetary Fund and the EU) and could have caused other financial problems such as sustainability of the statutory social insurance system.

During maternity, paternity and parental leave, as is true for sickness and unemployment, it is the State that provides insurance against other social insurance risks instead of the person in question.⁴⁵⁷ During maternity, paternity and parental leave the State provides insurance against risks of disability, old age and unemployment.⁴⁵⁸ In other words, it is the State that contributes to the insurance of a person who is recipient of a respective statutory social insurance allowance.

However such insurance is not provided in the full amount. Persons on maternity and paternity leave are insured to an amount in line with their allowance. Taking into account that the amount of such allowances is restricted on account of the economic crisis, parents are ensured during maternity and paternity leave at a lower amount than what could be insured if remaining in employment. The period of parental leave is even worse: during this period the State insures the parent against old age, disability and unemployment risks for only EUR 71.14 (LVL 50), i.e. as if their income were only EUR 71.14.⁴⁵⁹ This leads to a situation where the use of the right to parental leave diminishes the amount of old-age pension. Using the right to parental leave may diminish the amount of unemployment allowance as well, although the legislator has adopted norms trying to tackle indirect discrimination regarding the calculation of the unemployment allowance if a period taken into account for the calculation coincides with parental leave.⁴⁶⁰ However, the State Social Insurance Agency frequently applies such norms restrictively and thus discriminates against women indirectly.⁴⁶¹

1.3. Self-employment

There is no umbrella law regulating self-employment in Latvia, and therefore for the purposes of implementation, the norms of EU directives prohibiting discrimination with regard to access to self-employment have been adopted. It is the Law on Prohibition of Discrimination of Persons Performing Economic Activities.⁴⁶² This Law does not contain any special provisions with regard to pregnancy, maternity, pregnancy-related illness, breastfeeding or related leaves. However, the Law on Prohibition of Discrimination of Persons Performing Economic Activities provides that the definitions and types of discrimination as provided by the Law on Protection of Consumer Rights⁴⁶³ are applicable. Article 3¹(9) of the latter law

⁴⁵⁶ Amendments to the Law on Payment of State Allowances in 2009-2012 (*grozījumi likumā Par valsts pabalstu izmaksu laika periodā no 2009.gada līdz 2012.gadam*), OG No. 99, 29 June 2011.

⁴⁵⁷ Law on Statutory Social Insurance (*likums Par valsts sociālo apdrošināšanu*), OG No. 274/276, 21 October 1997.

⁴⁵⁸ Article 6.

⁴⁵⁹ The Cabinet of Ministers Regulation No. 230 On mandatory contributions from state budget and special statutory social insurance budget (*Noteikumi par valsts sociālās apdrošināšanas obligātajām iemaksām no valsts pamatbudžeta un valsts sociālās apdrošināšanas speciālajiem budžetiem*), OG No. 91, 13 June 2001.

⁴⁶⁰ Law on Insurance in Case of Unemployment (*likums Par apdrošināšanu bezdarba gadījumam*), OG No. 416/419, 15 December 1999. In comparison, the statutory monthly minimum pay currently is EUR 284 (LVL 200), the Cabinet of Ministers Regulation No. 1096 Regulations on minimum monthly pay and minimum hourly rate (*Noteikumi par minimālo mēneša darba algu un minimālo stundas tarifa likmi*), OG No. 193, 7 December 2010.

⁴⁶¹ For example, decision of the Supreme Court in Case No. SKA – 480/2010, 15 October 2010, available in Latvian on <http://www.tiesas.lv/index.php?id=3465>, accessed 26 July 2012.

⁴⁶² *Fizisko personu – saimnieciskās darbības veicēju – diskriminācijas aizlieguma likums*, OG No. 89, 9 June 2006.

⁴⁶³ *Patērētāju tiesību aizsardzības likums*, OG No. 104/105, 1 April 1999.

explicitly provides that less favourable treatment during pregnancy, within one year after childbirth and during the entire period of breastfeeding must be considered as discrimination. It does not specify if such discrimination is direct or indirect.

Acts regulating the right of a self-employed person to maternity, paternity and parental leave are those regulating statutory social insurance schemes.

Self-employed persons are subject to statutory social insurance schemes only if their annual income in total attains the level of 12 minimum statutory salaries.⁴⁶⁴ If so, the self-employed person is obliged to provide statutory social insurance contributions at least based on the minimum statutory salary or a higher amount, but not exceeding the actual income. This provision has led to the situation where some categories of self-employed persons (e.g. attorneys at law and medical doctors) earn far more than the minimum statutory salary, but pay minimum contributions and for social risk they are not entitled to any adequate allowances corresponding to their previous income. Self-employed persons are insured against risks of old age, disability, sickness, maternity and parenting.⁴⁶⁵

The Legislator has also provided, in the Law on Statutory Social Insurance, that spouses of the self-employed may voluntarily join the statutory social insurance schemes regarding old-age and disability pensions, maternity, sickness and parenting. This was done to implement the former Directive 86/613/EEC.⁴⁶⁶ It is however hardly likely that such opportunity is frequently used in practice on account of the aforementioned fact of low incomes of self-employed persons and also the fact that the majority of couples are not married while Latvian law only recognizes married couples as spouses. Moreover if a spouse helps a self-employed person, she/he has to be an employee⁴⁶⁷ and has to be fully insured under statutory schemes, because all employees are subject to mandatory statutory social insurance.⁴⁶⁸ However, again taking into account the high costs of legal employment and the low income from self-employment (especially for farmers and craftsmen), official employment of helping spouses is rare.

For maternity and/or parenting, a self-employed person who is insured is entitled to periods of leave and allowances for the same periods and using the same calculation methods as those that apply to employed persons according to the Law on Maternity and Sickness Allowances.

1.4. Access to and the supply of goods and services

The main piece of legislation prohibiting sex discrimination in the field of access to and supply of goods and services is the Law on Protection of Consumer Rights.⁴⁶⁹ Article 3¹(9) of the said law explicitly provides that less favourable treatment during pregnancy, within one year after childbirth and during the entire period of breastfeeding, must be considered as discrimination.

Also the Law on Prohibition of Discrimination of Persons Performing Economic Activities⁴⁷⁰ covers protection against discrimination of self-employed persons for the purposes of access to and supply of goods and services necessary for the performance of their economic activities.⁴⁷¹ Since the said law refers to the definition of discrimination and its

⁴⁶⁴ The Cabinet of Ministers Regulation No. 992 Regulations on minimum amount of statutory social insurance object and its determination for self-employed (*Noteikumi par valsts sociālās apdrošināšanas obligāto iemaksu objekta minimālo apmēru un tā noteikšanas kārtību pašnodarbinātajam*), OG No. 190, 5 December 2008.

⁴⁶⁵ Article 6(3) of the Law on Statutory Social Insurance (*likums Par valsts sociālo apdrošināšanu*), OG No. 274/276, 21 October 1997.

⁴⁶⁶ Article 5(3) of the Law on Statutory Social Insurance (*likums Par valsts sociālo apdrošināšanu*), OG No. 274/276, 21 October 1997; the Cabinet of Ministers Regulation No. 976 Regulations on voluntary participation in statutory social insurance (*Noteikumi par brīvprātīgu pievienošanās valsts sociālajai apdrošināšanai*), OG No. 166, 20 October 2010.

⁴⁶⁷ Articles 3 and 4 of the Labour Law.

⁴⁶⁸ Article 5(1) of the Law on Statutory Social Insurance (*likums Par valsts sociālo apdrošināšanu*), OG No. 274/276, 21 October 1997.

⁴⁶⁹ *Patērētāju tiesību aizsardzības likums*, OG No. 104/105, 1 April 1999.

⁴⁷⁰ *Fizisko personu – saimnieciskās darbības veicēju – diskriminācijas aizlieguma likums*, OG No. 89, 9 June 2006.

⁴⁷¹ Adopted for the purposes of implementation of Article 4 of Directive 86/613/EEC and Article 4(1) of Directive 2010/41/EU.

types provided by the Law on Protection of Consumer Rights it explicitly covers pregnancy and maternity discrimination.

The third piece of legislation that protects against discrimination in this field is the Law on Insurance Companies and their Supervision.⁴⁷² Article 5¹ of this law prohibits sex discrimination and Article 5¹(5) provides that ‘In any event, costs related to pregnancy and maternity shall not result in differences in individuals’ premiums and benefits’. However, the practical application of the latter provision by Latvian insurance companies undermines its purpose (see detailed description in 2.3. below).

There is no other legislation prohibiting discrimination in the field of access to and supply of goods and services. Current legal regulations do not cover goods and services offered publicly by private persons outside their commercial activities and state and municipal services that are not covered by the Law on Protection of Consumer Rights. Although national legal regulations refer to pregnancy and maternity discrimination, it does not clarify whether it constitutes direct or indirect discrimination.

The prohibition of discrimination is also provided in the field of education and advertisement. The Education Law⁴⁷³ refers to the definitions and types of discrimination provided by the Law on Protection of Consumer Rights, and therefore contains references to pregnancy and maternity discrimination. The Advertisement Law does not explicitly refer to pregnancy, maternity, paternity or parenting.⁴⁷⁴

2. Gaps in national law

2.1. Employment

First, as pointed out in other reports, judges lack any protection against discrimination, because the Law on Judicial Power⁴⁷⁵ lacks any provisions or references to other laws containing non-discrimination provisions.

A definition of pregnant worker is not expressly provided. However, it follows from Article 37(7) of the Labour Law that a pregnant worker is a worker who informs her employer of her pregnancy for the purposes of demanding working conditions that are safe and healthy for her and her expected child. The Labour Law also fails to provide for a clear definition of the maternity period, but this also follows from other provisions stipulating the rights to special employment conditions.⁴⁷⁶

Although Article 29(5) of the Labour Law explicitly provides that less favourable treatment based on of pregnancy and maternity or paternity leave is to be considered as direct discrimination, it lacks reference to less favourable treatment on the grounds of maternity, i.e. less favourable treatment of a female worker during the maternity period.

Although the Labour Law provides for the right to contest discrimination in the hiring process⁴⁷⁷ and prohibits asking any questions unrelated to employment, including pregnancy and family status in job interviews,⁴⁷⁸ it is very complicated to prove before a national court that the refusal to employ was based on pregnancy, maternity or parenting because it is highly difficult to establish evidence of such facts. Usually an employer possesses plenty of arguments based on professional qualifications of candidates. In addition, there are no mechanisms regarding how to obtain information on professional qualifications of other candidates unless required by a court during proceedings.

The Labour Law provides special rights to pregnant workers or workers during the maternity period with regard to adjustment of working conditions. Article 99 requires transfer to another workplace or, if this is not possible, granting a leave to provide health and safety protection. In addition, Article 134(2) provides for the right to pregnant workers or workers

⁴⁷² *Apdrošināšanas sabiedrību un to uzraudzības likums*, OG No. 188/189, 30 June 1998.

⁴⁷³ Article 3¹ (*Izglītības likums*), OG No. 343/344, 17 November 1998.

⁴⁷⁴ *Reklāmas likums*, OG No. 7, 10 January 2000.

⁴⁷⁵ *Likums Par tiesu varu*, Official Gazette No. 1, 14 January 1993.

⁴⁷⁶ For example, Articles 53(3) and 109(1).

⁴⁷⁷ Article 34.

⁴⁷⁸ Article 33.

during maternity to request working on a part-time basis. However, those are only provisions of law and, although no studies are available, it may be presumed that there may be problems with the enforcement of the said rights in practice, because employers in general are unwilling to have part-time workers.⁴⁷⁹ Statistics show that only 9.2 % of workers work part time in Latvia.⁴⁸⁰ Article 29(1) of the Labour Law prohibits discrimination in the promotion of workers, but it remains silent on an obligation to take into account time spent on maternity leave as an actually worked period for the purposes of assessment of performance, promotion or increase of salary.

Problems may arise with dismissal on account of pregnancy-related illness. Article 101(1)(11) of the Labour Law allows dismissing an employee if she/he is on sick leave for more than six months. Latvian law does not distinguish (also with regard to doctor's notification and with regard to sickness allowance under statutory social insurance scheme) between sickness and pregnancy-related sickness. Article 101(1)(11) does not refer to pregnancy-related illness as an exception, only to maternity leave which may not be taken into account as a sickness period for the purposes of dismissal.

So far problems with remuneration have been identified in connection with parental leave. The problem originates from Article 75 of the Labour Law regulating the calculation of average pay. Average pay is calculated for various purposes, including pay during annual leave, compensation for dismissal and compensation for idle time in the event of unfair dismissal. Article 75 provides that if a worker was not in active employment (was on justified leave) for 12 months, his/her average pay must not be calculated on the basis of normal pay stipulated in the employment contract but on the basis of the statutory minimum pay. Such provision negatively affects workers after parental leave, which normally lasts at least 12 months together with maternity leave. The Grand Chamber of the Supreme Court finally (after an earlier incorrect decision)⁴⁸¹ held that calculating the compensation for idle time in the event of unfair dismissal based on statutory minimum pay because a worker was on parental leave for longer than 12 months amounts to indirect discrimination on the grounds of sex and is contrary to Article 157 TFEU.⁴⁸² However, even after this decision, the legislator has not taken any steps to clarify Article 75 of the Labour Law.

Occupational social security schemes hardly exist in Latvia. In addition, there are no possibilities to access information on private agreements on any occupational social security schemes concluded between private employers and insurance companies/private pension funds.

There is also a problem related to the dismissal of pregnant workers or workers during maternity. Article 109(1) prohibits giving a notice of dismissal to pregnant workers and workers during maternity, except in very special cases. At the same time, there is an unresolved problem: Directive 92/85/EEC prohibits dismissal, while the Labour Law prohibits the giving of a dismissal notice. Normally, a notice of dismissal must be given one month before the actual dismissal. This still leaves the question of whether the notice of dismissal is void and protection under Article 109(1) is applicable to a worker who informs her employer of her pregnancy after receiving a notice of dismissal.

A highly topical issue in Latvia is the retention of a workplace after returning from parental leave. The Labour Law and EU law require retention of the workplace during parental leave, meaning that an employee has the right to return to the same or equivalent post. It is not clear, however, if such obligation also extends to the period immediately

⁴⁷⁹ In general in Latvia employers do not like part-time employment. It has been demonstrated by statistics that only 7 % of all employees work part time. On account of this it may in practice be problematic to acquire the right to work part time for a certain period of time. In addition, if a pregnant worker chooses to work part time she will be entitled to smaller maternity/parental allowance because it depends on previous earnings.

⁴⁸⁰ Database of Central Statistical Bureau of Latvia, in Latvian on <http://data.csb.gov.lv/Dialog/Saveshow.asp>, accessed 24 September 2012. In 2011 there were 48 700 female and 30 500 male workers employed on a part-time basis.

⁴⁸¹ Decision of the Supreme Court (3 July 2009) in Case No. SCK-589/2009, not published.

⁴⁸² Decision of the Supreme Court (15 December 2010) in Case No. SKC-694/2010, available in Latvian on <http://www.at.gov.lv/files/archive/departments/2010/694-10.pdf>, accessed 27 July 2012.

following parental leave.⁴⁸³ It is not clearly stipulated either by Latvian or by EU law if an obligation to retain the workplace during parental leave also entails an obligation to retain in employment a parent after his/her return from parental leave. In Latvia especially during the economic crisis it has been widespread practice that a workplace was retained during leave but after returning from parental leave a parent was immediately given his/her notice of dismissal (usually on the grounds of liquidation of the workplace in question). It is also unclear if such dismissal may be considered as indirect discrimination against female workers. For the purposes of clarification of related issues the Supreme Court of Latvia⁴⁸⁴ referred several questions to the CJEU,⁴⁸⁵ which will hopefully provide some clarity regarding these questions.

According to the information provided by the Ministry of Welfare on 2011, 38 % of fathers of newborn children used their right to paternity leave. Paternity leave was introduced in 2004. In 2004, only 22 % of fathers of newborn children used this right.⁴⁸⁶ In January 2012 only 7 % of recipients of parental allowance were fathers. Data shows that fathers in 2011 were entitled to parental allowance in a higher amount than mothers, which demonstrates the negative effect of the pay gap on statutory social insurance allowances, which are calculated on the basis of the income from employment in the period preceding the leave (see also 1.2. above).⁴⁸⁷

There has been one case where a father claimed unlawful dismissal on the grounds that he wished to use both paternity and parental leave. However, due to a lack of evidence proving *prima facie* discrimination his claim was rejected.⁴⁸⁸

2.2. Self-employment

In addition to the problems described above (1.3.) there is one more fundamental structural problem.

The law does not allow combining part-time employment with parental leave and the right to parental allowance.⁴⁸⁹ For self-employed persons it is usually crucial to remain in at least part-time employment, because there is a genuine threat to lose all clients. The legislator has so far ignored the fact that there are no possibilities to combine parental leave with employment and that at the same time there is no legal protection against termination of service contract by reason of parental leave.

There are no studies available on the situation of self-employed persons with regard to discrimination.

2.3. Access to and the supply of goods and services

Current legal regulations do not cover goods and services offered publicly by private persons outside their commercial activities and state and municipal services which are not covered by the Law on Protection of Consumer Rights.

There is also a serious problem regarding insurance of the risks related to pregnancy and maternity (Article 5(3) of Directive 2004/113/EC). In practice Latvian insurance companies do not comply with such obligations, especially in travel and health insurance.

⁴⁸³ It has not been clearly stipulated either by Latvian nor by EU law whether the obligation to retain the relevant position during parental leave also entails an obligation to keep a parent in employment after his/her return from parental leave. In Latvia, especially during the economic crisis there has been a practice of giving employees their notice of dismissal on their first day after returning from parenting leave.

⁴⁸⁴ Decision of 27 December 2011 of the Senate of the Supreme Court of Latvia in Case No. SKA-398/2011, not published.

⁴⁸⁵ Reference for preliminary ruling C-7/12, OJ C65/9, 3 March 2012, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2012:065:0009:0009:EN:PDF>, 27 July 2012.

⁴⁸⁶ 2005 – 25 %, 2006 – 29 %, 2007 – 35 %, 2008 – 40 %, 2009 – 39 %, 2010 – 37 %.

⁴⁸⁷ In 2011, the average amount of childcare allowance for fathers was EUR 475 (LVL 334) while for mothers it was EUR 387 (LVL 272).

⁴⁸⁸ Decision of the Supreme Court (26 October 2011) in Case No. SKC-921/2011, available in Latvian on <http://www.at.gov.lv/lv/info/archive/departments/2011/>, accessed 27 July 2012; Decision of Kurzeme Regional Court (29 February 2012) in Case No. C 19074509, not published.

⁴⁸⁹ Article 10⁴ of the Law on Maternity and Sickness Allowances (*likums Par maternitātes un slimības pabalstiem*), OG No. 182, 23 November 1995.

The problem regarding health insurance lies in the fact that in general health services are provided to all residents of Latvia by the State under a statutory health service scheme that is fully financed by the State and no contribution by a natural person/resident of Latvia (except co-payment for a visit to a doctor) is required. State-paid medical services are not always accessible due to insufficient state funding, and they do not include all types of medical care necessary. Also, they may be provided at much lower quality than that offered by private medical services, and it is therefore important to have private health insurance giving the right to access to private medical services. It is especially important if private health insurance is provided by an employer. The range of medical services included in private health insurance and financial coverage of such services is defined by each separate private health insurance plan offered by an insurance company and depends on the financial means allocated (by the person him/herself or by the employer) for that purpose. This leads to the situation where medical services included in private health insurance plans do not provide equal treatment with regard to sex. Especially it concerns medical services relating to pregnancy and maternity. Usually such services are excluded. The same applies to travel insurances. Insurance companies justify such situation by relying on the provisions of the Law on Insurance Companies and their Supervision⁴⁹⁰ stipulating that insurance premiums and benefits may not differ on account of pregnancy and maternity. Namely, they insist on the fact that particular private health or travel insurance plans do not include pregnancy and maternity risks, and therefore the aforementioned norm is not breached because since such risks are not included there are no unequal premiums and benefits on account of pregnancy and maternity.

Consequently, Latvian insurance companies in practice fail to comply with Article 5(3) of Directive 2004/113/EC and implementing measures provided by the Law on Insurance Companies and their Supervision by not including in insurance plans the risks related to pregnancy and maternity.

There is no information available on cases of discriminatory practices with regard to the denial of access to goods and services on the basis of pregnancy or maternity, except with regard to aviation services requiring a doctor's notification that flying is not dangerous for a pregnant passenger or her expected child.

The personal experience of the present author with banking services (loans, mortgages) demonstrates that banks require data on marital status and the number of dependents in a household. There is no institution to monitor if such data collected by banks are used in a discriminatory way. The author fails to see that there are any reasonable arguments for the requirement to provide data on marital status (married or unmarried).

2.4. Additional information

There is no additional information to report.

3. Involvement of other parties

The functions of national equality body in Latvia are performed by the Ombudsman (*Tiesībsargs*) which is in charge of the supervision of all human rights issues.⁴⁹¹ The Ombudsman's office receives a proportionate number of complaints about pregnancy and maternity discrimination in employment. Since there are no relevant quantitative studies on pregnancy and maternity discrimination the Ombudsman has stressed several times that the problem is not visible but it does exist in reality.⁴⁹² In 2011 the Ombudsman's office carried out a poll on the perception of discrimination in employment. 50 % of respondents stated that their employers had asked questions on family status and 47 % replied that they had been asked about the number of children in their family.⁴⁹³ The Ombudsman's office declared that

⁴⁹⁰ OG No. 188/189, 30 June 1998.

⁴⁹¹ Ombudsman Law (*Tiesībsarga likums*), OG No. 65, 11 May 2006.

⁴⁹² *Diskriminācija – neredzama, bet jūtama*, <http://www.kvestnesis.lv/index.php?menu=DOC&id=166970>, accessed 17 September 2012.

⁴⁹³ *Tiesībsarga 2011.gada ziņojums* (Annual Report of Ombudsman for 2011), http://www.tiesibsargs.lv/files/gada_zi%C5%86ojumi/ties%C4%ABsarga_gada_zi%C5%86ojums_2011.pdf, accessed 17 September 2012.

during 2011 half of the investigation cases initiated in the field of discrimination was connected with pregnancy or maternity.⁴⁹⁴

There are no data on any activities of social partners to fight pregnancy, maternity and parenting discrimination.

At the same time all actors involved – high officials of the Ministry of Welfare, employees of the Latvian Confederation of Trade Unions – in their interviews carried out for the purposes of the European Commission's research on precarious work pointed out pregnancy, maternity and parenting as one of the most widespread grounds for precariousness in employment.

Women's NGOs are well aware of pregnancy, maternity and parenting discrimination especially in employment, but they usually lack sufficient financial resources to work on strategic litigation or awareness raising.

4. Enforcement and effectiveness

No special measures have been taken by official institutions to tackle pregnancy and maternity related discrimination. It is stressed by officials and politicians that pregnant persons and persons during maternity are awarded many rights by the law and that it is obviously an individual choice of the relevant persons if they wish to defend their rights. In other words they consider that the decision on the defence of rights is a matter of individual choice. They do not see pregnancy/maternity/paternity/parental discrimination as a structural problem in society. It is also doubtful that institutions in charge of the supervision of private entities with respect to compliance with law carry out effective control. One example is the Financial and Capital Market Commission,⁴⁹⁵ which is a state institution in charge of supervising financial companies – banks, insurance companies and private pension funds. It is still unclear how and if they check, for example, whether insurance companies do not take into account sex in their health, life or travel insurances. This institution, contrary to the obligation to possess transparent information, may not provide a clear answer to such question.

4.1. General

According to information provided by the Ministry of Welfare, which is in charge of equal opportunities policies, there are no relevant studies.⁴⁹⁶

4.2. Legal redress

Although legal norms for the protection of pregnant persons, persons during maternity and paternity are strong, nevertheless there are considerable difficulties in enforcing them.

In practice, the only way to defend rights is to bring a claim before a national court. This involves a number of practical obstacles. First, there are the relatively high costs for legal aid and representation before court. Second, there are usually problems in proving *prima facie* discrimination because of the difficulties to collect evidence, especially in employment disputes.⁴⁹⁷ Third, the term for bringing a claim on discrimination in employment is only three months (instead of two years for other claims in employment). This frequently makes litigation impossible, especially for pregnant workers, because during that special period they choose to avoid excessive stress. A selection of published Supreme Court decisions

⁴⁹⁴ Telephone interview with a senior legal advisor of the Ombudsman's office, 27 July 2012.

⁴⁹⁵ Homepage in English on <http://www.fktk.lv/en/>, accessed 25 July 2012.

⁴⁹⁶ Telephone interview with a civil servant of the Equal Opportunities Policy Unit of the Ministry of Welfare (27 July 2012).

⁴⁹⁷ Such conclusion is based on personal experience as a representative in various pregnancy, maternity and parenting related employment disputes and also on the selection of the decisions of the Supreme Court demonstrating particular difficulties in the application of the principle of reversed burden of proof. See, in particular, the decision of the Supreme Court (26 October 2011) in Case No. SKC-921/2011, available in Latvian on <http://www.at.gov.lv/lv/info/archive/departments1/2011/>, accessed 27 July 2012; decision of the Supreme Court (6 June 2012) in Case No. SKC-684/2012, available in Latvian on <http://www.at.gov.lv/lv/info/archive/departments1/2012/>, accessed 27 July 2012.

demonstrates that usually claimants in discrimination cases are well-educated and well-situated women,⁴⁹⁸ which proves the presumption stated above that the average woman in Latvia does not possess sufficient knowledge or the financial means to access a national court.

The only out-of-court redress procedure is available under the Ombudsman Law. Any person may submit a complaint to the Ombudsman and if the Ombudsman's office finds that the complaint is well-grounded, it may initiate an investigation and even represent the victim before a national court. At the moment, however, the Ombudsman lacks the financial and therefore the human resources to bring strategic litigation cases before national courts.

4.3. Access to information

According to information provided by the Ministry of Welfare, which is in charge of equal opportunities policies, there are no relevant studies.⁴⁹⁹

LIECHTENSTEIN – Nicole Mathé

1. Existing legislation and case law

It needs to be mentioned first that for this topic, case law from the courts and/or opinions of equality bodies are still entirely lacking.

1.1. Employment

Several laws contain norms that are relevant to the subject, namely the Civil Code⁵⁰⁰ (*Allgemeines Bürgerliches Gesetzbuch, ABGB*), the Labour Code (*Arbeitsgesetz*) and the Sickness Insurance Act (*Krankenversicherungsgesetz, KVG*). Furthermore, the Gender Equality Act (*GLG*) distinguishes between direct and indirect discrimination on the grounds of pregnancy and maternity. Recently introduced by the amendment of the GLG, which entered into force on 8 June 2011, is the prohibition of discrimination also applying to maternity (e.g. the return to work after maternity leave) pursuant to Article 3(1) GLG.⁵⁰¹ The GLG is applicable to all private and public employment contracts. Distinct rights to paternity are not recognized but the national legal system recognizes distinct rights to parenthood and adoption leave.

Articles 35, 35a and 35b of the Labour Code entered into force on 1 January 1998 and regulate health protection, occupational activities, alternative work⁵⁰² and the continued payment of wages during maternity, in particular during employment whilst pregnant. According to these provisions, working conditions for pregnant workers and women who are breastfeeding have to be adapted so that their health and that of their children are not affected. Women in this condition can only be employed with their consent. They are allowed to leave work by simple notification. Breastfeeding mothers are entitled to time off which is necessary for breastfeeding. Women are not allowed to work for eight weeks after childbirth. Pregnant workers are not allowed to work between 8 p.m. and 6 a.m. during the eight weeks preceding childbirth. The employer is obliged to offer them equal work between 6 a.m. and 8 p.m. The same applies in the case of a medical indication at any other moment during the pregnancy and for the period between 8 and 26 weeks after childbirth. Women are entitled to the continued payment of 80 % of their salary plus adequate compensation for the rest if their employer is not able to offer them equal work between 6 a.m. and 8 p.m. During the entire

⁴⁹⁸ For example, see Case C-232/09 *Danosa v. LKB Līzings SIA*.

⁴⁹⁹ Telephone interview with a civil servant of the Equal Opportunities Policy Unit of the Ministry of Welfare (27 July 2012).

⁵⁰⁰ Official Gazette, LGBI. 1967/34 last update 2011/366. Legislation is published on the Internet, see <http://www.gesetze.li>, accessed 3 July 2012.

⁵⁰¹ Official Gazette, LGBI. 1999/96 last update LGBI. 2011/212, <http://www.gesetze.li/Seite1.jsp?LGBI=1999096.xml&Searchstring=Gleichstellungsgesetz&showLGBI=true>, accessed 3 July 2012.

⁵⁰² Equivalent work which replaces the actual work of a pregnant worker because the actual work is too dangerous to her health.

period described, the woman must not be deprived of any advantage with respect to her professional position in the company, her seniority or any promotion linked to her regular work.

Paragraph 1173a Article 18 Section 3 ABGB prescribes that the employer has to continue to pay salary to the employee during absence due to pregnancy and childbirth, provided that the employment contract was concluded for a period of more than at least three months, or that the employment relationship has already lasted for more than three months. A reduction in the annual leave is not allowed if the employee is absent from work for up to five months a year on the grounds of pregnancy and childbirth. According to Paragraph 1173a Article 49 Section 1(b) ABGB the employer is not allowed to give a notice of dismissal to the employee during her pregnancy and up to 16 weeks after childbirth. This last provision was introduced in 1992.

Furthermore, Paragraph 1173a Article 36b ABGB provides for a return to the same or equivalent work after maternity leave. This provision refers to the legal norm governing the return to work after parental leave.

Article 15 KVG provides that benefits shall be paid to women for 20 weeks, at least 16 of which after childbirth, provided that the woman in question has been insured before childbirth for a period of at least 270 days, of which three months must have been consecutive. The allowance under this maternity insurance scheme amounts to 80 % of the insured salary.

Protection is also foreseen with regard to parental leave and for employees with family obligations, if they have to raise children aged up to 15 or need to take care of relatives or persons closely connected with the family. This has to be taken into account when fixing their working hours. Such an employee has to agree to work overtime and he or she can ask for a lunch break of at least an hour and a half (Article 36 Labour Code).

If the employee has been employed for more than a year or if the contract is concluded for more than one year, the employee is entitled to three months' parental leave. The right to parental leave is established upon the birth of a child and leave can be taken until the child is three years old. In the case of adoption or the permanent care of a foster child, leave can be taken until the child is five years old. The employee has to inform the employer of the intended period of parental leave three months in advance. The employer may request that the employee select a different period if there are reasonable work-related grounds, such as the fact that the work in question is seasonal work, that no replacement can be found in time, that a certain number of other employees are all asking for parental leave at the same time, or because the employee's position in the company is of strategic importance. In companies with less than 30 employees the employer has the right to defer the period of parental leave in all cases where the planned leave would interfere with the operations of the company. The employee is entitled to take parental leave on a full-time, part-time or hourly basis, provided he/she respects the justified interests of the employer. After parental leave, the employee has the right to return to his or her previous work or, if this is not possible, to equivalent or similar work (Paragraph 1173a Article 34(a-c) ABGB).

1.2. Social security and pension rights

Recently introduced by the amendment of the GLG, which entered into force on 8 June 2011, is Article 1a(f) GLG containing the definition of social security systems existing in Liechtenstein. The prohibition of discrimination shall cover statutory as well as occupational social security schemes. Following existing traditional stereotypical roles, mostly women benefit from family and survivors' benefits. Paid maternity leave will be taken into account as insured salary, which means that it will be taken into account like a normal period of employment when calculating the pension. However, Liechtenstein's legislation has been changed in order to eliminate gender discrimination as much as possible. In general, spouses of both sexes are treated equally.

In this field gender equality has gone rather far. Since 2010 the pensionable age is equal between men and women (64 years) (Article 55 AHVG, *Alters- und Hinterlassenenversicherung*). Advantages for parents who dedicate time to the upbringing of their children are equally divided between them (unpaid parental leave). They benefit from so-called

‘*Erziehungsgutschriften*’, a fictitious income, which is added upon the calculation of the pension for the period dedicated to family work. In any case, caring periods for children and other relatives in the same household count less than the full crediting of work periods for pensions purposes (Article 63 *sexies*(c) AHVG).

1.3. Self-employment

In Liechtenstein Directive 2010/41/EU has not yet been implemented. National provisions concerning sickness insurance are also applicable to self-employed women. Article 15 KVG provides that benefits shall be paid to women for 20 weeks, at least 16 of which after childbirth, provided that the woman in question has been insured before childbirth for a period of at least 270 days, of which three months must have been consecutive. The allowance under this maternity insurance scheme amounts to 80 % of the insured salary.

With regard to breastfeeding, adoption leave, paternity leave and parental leave I am not aware of any specific regulations.

1.4. Access to and the supply of goods and services

National law falls short of implementing Directive 2004/113/EEC. It introduces a new Section into the GLG⁵⁰³ in Article 4(a) and 4(b). National legislation distinguishes between direct and indirect discrimination in relation to pregnancy and maternity. It does not go beyond the relevant provisions in terms of rights and protection and does not cover pregnancy/maternity discrimination in the area of media and advertisement and education. Pursuant to Article 4(a)(5) *lit* c(4) GLG, discrimination on the grounds of pregnancy and maternity e.g. in life/health insurance and loans/mortgages is prohibited.

2. Gaps in national law

2.1. Employment

As there are no judicial cases or other reported instances of alternative dispute resolution, the situation is not very transparent concerning gaps. Some employers take initiatives to facilitate work-life balance in order to better reconcile family duties with work. Normally, however, parents and especially mothers organise themselves in such a way as to function at work under the same conditions as before motherhood, or they leave work for longer than their maternity leave and restart later in another job.

Unfortunately fathers are still insufficiently involved. Paternity leave does not exist at all and parental leave is not often taken by fathers. Stereotypical and traditional roles are still firmly entrenched in society, so that fathers only take a few days of annual leave when a child is born.

2.2. Self-employment

I am not aware of any research or examples showing discrimination against pregnant self-employed workers or self-employed workers who have recently given birth. However, in the light of stereotypical roles still being traditionally female or male, prejudices against pregnant women’s working commitment certainly exist.

2.3. Access to and the supply of goods and services

In practice, it can be stated that the access for parents with children to public institutions as well as restaurants, stores etc. is still problematic from a technical and infrastructural point of view. Discrimination exists when entering stairs to stores, public transport, restaurants, public toilets etc. Once inside, discrimination exists if there is not enough room to sit down with a child and a baby buggy, if toilets do not have any changing tables and if toilet cabins are so small that you have no choice but to leave the buggy outside. In fact, in these situations parents tend to use the technical infrastructure for handicapped people which unfortunately is

⁵⁰³ Official Gazette, LGBI. 1999/96 last update LGBI. 2011/212, <http://www.gesetze.li/Seite1.jsp?LGBI=1999096.xml&Searchstring=Gleichstellungsgesetz&showLGBI=true>, accessed 3 July 2012.

not usually adequately adapted to children's needs. These forms of discrimination are especially experienced by women on maternity leave.

Furthermore, transport restrictions exist with regard to parents with babies/children travelling by taxi if there is no child-safety seat provided.

2.4. Additional information

There is no additional information to report.

3. Involvement of other parties

The Gender Equality Office⁵⁰⁴ is part of the governmental administration in Liechtenstein and works independently on gender equality issues. It especially organises information and awareness-raising campaigns related to pregnancy and maternity discrimination.

Another institute is INFRA⁵⁰⁵ (Information and Contact Point for Women) and works as an NGO on all topics concerning gender equality issues. It offers information and legal counselling to women.

Social partner LANV⁵⁰⁶ (*Liechtensteinischer ArbeitnehmerInnenverband*) an institution representing employees, is competent and available to answer all questions concerning gender equality issues.

4. Enforcement and effectiveness

4.1. General

On its Internet homepage, the abovementioned institute INFRA cites a study⁵⁰⁷ from the Swiss canton Basel for the year 2005, showing that family-friendly measures give companies an 8 % return. The benefits especially result from costs for family-friendly measures being lower than the costs of recruiting new personnel.

4.2. Legal redress

Even if the legal situation is rather satisfactory and complete with respect to implementing EU Directives, it is still not satisfactory regarding enforcement and effectiveness.⁵⁰⁸ Given the demographic situation in Liechtenstein, being a very small country with a small number of employers, people are reluctant to go to court in order to enforce their rights. Since there are involved parties other than the employer, such as the Gender Equality Office and INFRA, where people can get information and assistance, it seems that any gender equality problems are solved in another way and not transparently, or they are not confronted at all. However, case law is still lacking.

4.3. Access to information

The Gender Equality Office as part of the governmental administration constantly produces publications⁵⁰⁹ regarding gender equality issues, including information about rights of pregnant women and parents to maternity, adoption and parental leave. This information is available on the Internet but is also disseminated to all stakeholders concerned as part of regularly organised awareness-raising campaigns.

⁵⁰⁴ <http://www.llv.li/amtstellen/llv-scg-home.htm>, accessed 4 July 2012.

⁵⁰⁵ <http://www.infra.li/home.html>, accessed 4 July 2012.

⁵⁰⁶ <http://www.lanv.li/>, accessed 5 July 2012.

⁵⁰⁷ <http://www.infra.li/themen/familien-managerinnen/familienfreundlichkeit-8-rendite-fuer-die-betriebe.html>, accessed 5 July 2012.

⁵⁰⁸ Information Brochure '25 years equality between woman and man' (2011), http://www.llv.li/pdf-llv-scg-doppelseiten_ansicht_ganze_version.pdf, accessed 8 October 2012.

⁵⁰⁹ <http://www.llv.li/amtstellen/llv-scg-gleichstellung-publikationen/llv-scg-gleichstellung-publikationen-der-scg-bestellen.htm>, accessed 5 July 2012.

However, the central focus is still on ‘networking’ with regard to gender equality issues. This takes place within the *Frauennetz*⁵¹⁰ (Women’s Network) which brings together 18 member organisations in Liechtenstein working in the field of gender issues.

LITHUANIA – Tomas Davulis

1. Existing legislation and case law

Lithuania has three main pieces of legislation dealing with gender equality: the Labour Code, the Equal Opportunities Act for Women and Men and the Equal Opportunities Act. The Labour Code of 4 June 2002⁵¹¹ mentions, among the principles of labour law, the general principle of equality of subjects of labour law irrespective of, inter alia, their gender, family and marital status and intention to have children. It consolidates the principle of fair remuneration for work and provides for guarantees to pregnant women, breastfeeding women and women having recently given birth. The Equal Opportunities Act for Women and Men (hereinafter ‘EOAWM’)⁵¹² is aimed at transposing gender equality directives, as provided in the Annex to this Act. The Equal Opportunities Act of 18 November 2003,⁵¹³ as amended on 17 July 2008, aims to transpose EU Equality Directives 2000/43/EC and 2000/78/EC. In the amendments of 16 December 2008⁵¹⁴ of the Act, sex was added to the list of prohibited grounds of discrimination. This legislative step has resulted in double coverage of discrimination on the ground of sex. The EOAWM is *lex specialis* but the later Equal Opportunities Act is more advanced in terms of coverage, because it addresses the public service *expressis verbis*. The Equal Opportunities Act is also more precise as far as obligations of persons are concerned, but the competences of the Equal Opportunities Ombudsperson are regulated by the EOAWM in a more precise way.

The EOAWM and the Equal Opportunities Act provide most important definitions. They also define direct and indirect discrimination and consolidate other important rules and in this way complement and explain labour legislation. In addition, in some clearly defined cases they expand the equality rules to also cover matters outside employment relationships because the Labour Code only deals with employment relationship *stricto sensu*. The Labour Code applies to the sphere of the public service by way of legal analogy, which is why some rules of the EOAWM and the Equal Opportunities Act may also be applicable to the public service. However, the application of equality provisions in the private sphere (provision of services, self-employment) requires explicit regulations.

1.1. Employment

The Labour Code provides for very specific guarantees for pregnant workers against dismissal: an employment contract must not be terminated with a pregnant woman from the day on which her employer receives a medical certificate confirming her pregnancy, and for another month after her return from maternity leave, except for the cases specified in the law (death of the employee, liquidation of the employer, the employee’s inability to provide work due to a court decision imposing a sentence on the employee that prevents her from continuing her work, deprivation of special rights to perform certain work such as, for instance, driver licence, medical licence or similar, illness-related inability, and expiry of a short-term (2 months)⁵¹⁵ employment contract (Section 132(1) of the Labour Code)). Pregnant women are also entitled to work part time and to choose the time of their annual leave

⁵¹⁰ http://www.llv.li/pdf-llv-scg-leitlinien_februar_2008.pdf, accessed 5 July 2012.

⁵¹¹ State Gazette, 2002, no. 64-2569.

⁵¹² State Gazette, 1998, no. 112-3100.

⁵¹³ State Gazette, 2003, no. 114-5115.

⁵¹⁴ State Gazette, 2008, no. 76-2988. A translation into English is available on the Internet site of the Lithuanian Parliament on http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=389500, accessed 1 September 2011.

⁵¹⁵ However, Section 132(1) of the Labour Code is applicable in the event of expiry of a longer fixed-term contract.

(Sections 146(1) p. 3 and 169(4) p. 2 of the Labour Code). In addition, they may be assigned to work overtime, to work night shifts, to work on rest days or to go on business trips only with their consent (Sections 150(4), 154(4), 161(6), 220(3) of the Labour Code). The same guarantees are provided to women who have recently given birth, breastfeeding women and employees who are raising a child under the age of three. All three categories of employees must not be assigned to perform work in conditions that may be hazardous and affect the health of the woman or the child (Section 278 of the Labour Code). If this is not technically feasible, they shall be transferred (upon their consent) to another workplace (another job) and shall retain the same salary. If transfer is not possible pregnant women are entitled to paid leave until they go on maternity leave, and women who have recently given birth and breastfeeding women are entitled to unpaid leave until their child reaches the age of one. Where a pregnant woman, a woman who has recently given birth or a breastfeeding woman has to attend medical examinations, she must be released from work for such examinations without loss in her average pay, if such examinations have to take place during working hours.

‘Breastfeeding woman’ is defined as a mother who submits to her employer a certificate issued by a healthcare institution confirming that she is raising and breastfeeding her child (Section 146(1) of the Labour Code). In addition to the guarantees described above, a breastfeeding woman shall be allowed breaks of at least 30 minutes and at least every three hours to breastfeed. At the mother’s request the breaks for breastfeeding may be combined or added to the break to rest and eat or given at the end of the workday, shortening the workday accordingly. Payment for these breaks to breastfeed shall be calculated according to the average daily pay of the employee.

Pregnancy-related illness is not reflected in Lithuanian labour legislation. This means that pregnancy-related illness is treated like any other illness. In particular, the law does not provide for any exceptions if the employer is allowed to dismiss an employee due to sickness-related absence for more than 120 successive days or for more than 140 days within the last 12 months (Section 133(2) of the Labour Code). This may be perceived as discriminatory in cases where the female employee is dismissed due to pregnancy-related illness.

The duration of maternity leave is 70 calendar days before childbirth and 56 calendar days after childbirth (in the event of complicated childbirth or the birth of two or more children this is 70 calendar days) (Section 179(1) of the Labour Code). Soviet labour law provided for a maternity leave of 56 calendar days before and 56 calendar days after childbirth, but the Law on Holidays of 1991 extended the first part of the leave to 70 days to increase the protection of the pregnant woman. The rationale behind it is not sufficiently clear but there probably was a political will to increase the maternity protection standard compared to previous Soviet standards.

The two parts of maternity leave shall be combined and granted to the woman as a single period, regardless of the days used prior to childbirth. However, the woman may use part of it or even not take any maternity leave at all, because there is no provision imposing a duty to take all or part of the maternity leave. In practice the woman’s considerations with respect to taking maternity leave are strongly linked to social insurance benefits: if she is not entitled to maternity allowance or the allowance is not high enough, the maternity leave is usually left unused.

An allowance provided for in the Law on Social Insurance of Sickness and Maternity shall be paid for the period of leave. In accordance with Section 21(1) of the Law on Sickness and Maternity Social Insurance of 21 December 2000,⁵¹⁶ the amount of the allowance is 100 % of the reimbursed remuneration, subject to certain minimum and maximum limits. Since 1 July 2009 the insured period required for entitlement to this allowance is twelve calendar months before the maternity leave. A legislative novelty of 18 December 2008 introduced quite substantial differences regarding the entitlement to maternity allowance compared with sickness benefits: a longer period of social insurance is required for maternity benefits than for sickness benefits. This may not be in conformity with Article 11(3) of

⁵¹⁶ State Gazette, 2000, no. 111-3574.

Directive 92/85/EEC despite the fact that the level of sickness benefits is lower (80 % of the average salary paid by the employer for the first two days, 40 % of the reimbursed remuneration for the next five days and 80 % for the remaining period of sickness paid by the state social insurance fund).

Section 179(4) of the Labour Code explicitly states that the employer shall ensure the right to return to the same or an equivalent job (position) after maternity leave on conditions which are no less favourable, including the wage, as well as to benefit from any improvement in conditions, including the wage, to which they would have been entitled during their absence. This provision is relatively new and there is no experience with its application in practice. However, the practical implementation can be difficult here, since many women suffer from the employer's ignorance regarding the need to adjust working conditions to the highly improved salary situation. For changes to working conditions, especially remuneration, individual agreement with the employer to change the contract is necessary because wages are set by individual agreements, not by collective agreement, in the absolute majority of Lithuanian enterprises. The problem lies in the fact that the female employee usually takes parental leave straight afterwards and the Labour Code foresees no obligation regarding improvement in working conditions after return from parental leave (see below).

Men are entitled to paternity leave for the period from the date of the birth of their child until the child reaches the age of one month (Section 197-1 of the Labour Code). An allowance equal to 100 % of reimbursed remuneration subject to certain minimum and maximum limits shall be paid for the period of paternity leave. The right to return to the same job and to benefit from any improvement in working conditions is not explicitly mentioned in the Labour Code, which is not in conformity with Article 16 of Directive 2006/54/EC.

Parental leave for men and women is provided in Section 180 of the Labour Code. The maximum length of parental leave is set to three years. The leave must be granted at the choice of the family to the mother (adoptive mother), father (adoptive father), grandmother, grandfather or any other relative who is actually raising the child. The leave may be taken with 14 days' notice as a single period or be distributed in portions. During the period of this leave the employee shall retain his job (position), with the exception of cases when the enterprise is dissolved. A social allowance shall be paid for the period of parental leave which may differ depending on the choice of the family – 100 % of the reimbursed remuneration, subject to certain maximum and minimum limits if the employee chooses to receive the allowance for the period of one year, or 70 % for the first year and 40 % for the second year of parental leave, if the period of two years is chosen (Section 21(1) of the Law on Social Insurance of Sickness and Maternity). The right to return to the same job and to benefit from improvement in working conditions is not explicitly mentioned here, which is not in conformity with the requirements of Directive 2010/18/EU.

In accordance with Section 179(2) of the Labour Code employees who have adopted newborn babies or who have been appointed as their guardians shall be granted leave for the period from the date of adoption or guardianship until the baby is 70 days old. Allowances equal to those for paternity leave shall be paid for the period of the adoption leave, but not longer than 3 months. The amount of the allowance equals the amount paid by the state social insurance fund for the period of parental leave. The right to return to the same job and to benefit from improvement in working conditions is not explicitly mentioned here and again this is a breach of Article 16 of Directive 2006/54/EC.

The law grants fully paid annual leave after one year of employment. The periods during which the employee is on sickness, maternity or paternity leave are included when deciding on the entitlement to full paid annual leave. However, parental leave is not taken into account here and this can be regarded as indirect discrimination of women because, compared with men, a much greater number of women use parental leave. Different treatment of women and men by the State is allowed when justified by a legitimate aim, and if the means of achieving this aim are appropriate and necessary. However, this question has not been raised in Lithuania yet regarding this issue.

Dismissal of employees due to exercising their rights to maternity, paternity, parental or adoption leave is not possible in Lithuania. First of all, Section 2(1) p. 4 of the Labour Code

expressly prohibits discrimination based on family and marital status as well as on the employee's intention to have children. Secondly, Section 129(3) of the Labour Code states that inter alia gender and family and marital status shall not be seen as valid grounds for dismissal. Thirdly, the Labour Code defines the principle of dismissal on valid grounds, and marital or family status of an employee cannot be found among the statutorily provided grounds of dismissal.

Procedural guarantees in the event of dismissal is provided to all employees who are on leave: in accordance with Section 131 of the Labour Code they cannot be dismissed whilst on leave.

The Equal Opportunities Act for Women and Men (EOAWM) does not specifically refer to victimization in relation to pregnancy/maternity/parental/paternity rights. There is only a general obligation for the employer to take measures to ensure that an employee who testifies or provides explanation is protected from hostile behaviour, negative consequences and any other type of persecution as a reaction to the complaint or other legal procedure concerning discrimination (Section 5 p. 5 of the EOAWM).

Generally speaking, pregnancy and maternity (adoption/parental/paternity) rights are not applied differently depending on the size or type of employer (state/private). There is only a slight difference in the fact that public servants are not directly covered by labour legislation and the EOAWM but by way of legal analogy.

1.2. Social security and pension rights

Employees on sickness, maternity, paternity, parental or adoption leave are covered by the state social insurance scheme. If the person is not working under a contract of employment but raising a child until s/he reaches the age of three, he/she is insured by the State for the basic part of the old-age pension only.

There is a general prohibition to discriminate on the grounds of gender in the state and private social security systems (Section 5-3 of the EOAWM). Pregnancy, maternity and paternity are not distinguished here.

Section 7-3 p. 7 of the EOAWM defines the violation of the principle of equal treatment in social security schemes: those are the situations where there is different treatment of employees on the grounds of maternity/paternity leave or any other special purpose leave for family reasons, when the leave was granted and the employer pays the contributions during the period of leave. However, if the person does not have any insured income (salary) and receives state social security benefits, including benefits from the state social insurance scheme (maternity/paternity allowances or allowances for parental leave), these benefits will not be reflected in the accumulative part of the old-age pension which is collected in private pension funds that in general receive part of the person's state social security contributions (currently 1.5 %).

1.3. Self-employment

Neither the Equal Opportunities Act nor the EOAWM address the status of self-employed persons. Only Section 5-3 of the EOAWM explicitly mentions self-employed persons: it shall be prohibited to discriminate against them on the ground of gender in the state and private social security systems.

Self-employed persons are not entitled to maternity, paternity, parental, or adoption leave, or to protection related to pregnancy or breastfeeding.

Article 8 of Directive 2010/41/EU, which requires Member States to take the necessary measures to grant female self-employed workers and female assisting spouses or life partners the right to a maternity allowance for at least 14 weeks, has not been implemented in Lithuanian law so far. There are no other provisions exceeding those of Directive 2010/41/EU protecting female self-employed workers and female assisting spouses or life partners in relation to pregnancy and maternity.

1.4. Access to and the supply of goods and services

Section 7-1 of the EOAWM states that the actions of a seller or producer of goods or a provider of services shall be treated as violating equal rights for women and men, if, on the grounds of a person's sex, different conditions of payment or guarantees for the same goods, services or products of equal value or different opportunities for selecting goods and services are established.

As we can see, this general prohibition for the seller, producer or service provider to discriminate on the grounds of sex is not directly linked to pregnancy, maternity leave, breastfeeding, adoption leave, paternity leave or parental leave. So there are no measures expressly regulating the access to goods and the provision of services designed to address discrimination on the ground of pregnancy (including pregnancy-related illnesses), maternity leave, breastfeeding, adoption leave, paternity leave or parental leave. Currently, there are no debates to improve the legal basis.

2. Gaps in national law

2.1. Employment

In general, the legal basis for combating discrimination in the area of employment looks sufficient. There are legal provisions prohibiting and punishing the refusal to employ an employee because of pregnancy. Pregnant employees and employees on leave are generally strongly protected against changes in working conditions or dismissal.

However, in practice the situation is unsatisfactory. Research done by sociologist N. Daukantiene has proved that after the restoration of independency in 1990, women's situation in the labour market became less favourable than that of men. This has been reflected not only in a decrease of employability of women and in pay differences, but also in discrimination in the access to the labour market. As shown by the study, women have fewer professional career opportunities, being confronted by a Lithuanian labour market phenomenon: the so-called 'glass ceiling'.⁵¹⁷

There are still many employers who are unwilling to employ women due to the uncertainty regarding the length of their ability to work,⁵¹⁸ their flexibility and the high level of maternity protection. Research done by A. Atmanaviciene in 2006 was based on interviews with more than 150 women working in the sectors of healthcare, education, and the textile industry, and has shown that there are widespread discriminatory practices as far as access of women to employment, career opportunities and remuneration is concerned. Discrimination against women has been reported since their first entry into the labour market because the selection of candidates is usually based on age/sex criteria. Popular stereotypes about roles of women and men work to justify actual discrimination related to promotion, remuneration and other aspects of work. Traditionally, the dominant opinion is that the role of women in the workplace and society is less important than that of the man. Prevailing public perception is that women are the weaker sex and its main 'mission' is to raise children and manage the household. Moreover, one has to admit that there is a lack of solidarity among women: they often support the same stereotypical views.⁵¹⁹

The difficulties in enforcement of the rights of pregnant women and young mothers have become more obvious in these times of financial crisis. As was officially reported by the Equal Opportunities Ombudsperson, the number of complaints of pregnant women rose in the years 2009 and 2010.⁵²⁰ Pregnant women experienced pressure from employers to agree to

⁵¹⁷ N. Daukantiene 'Darbo rinkos pokyčiai Lietuvoje: moterų ir vyrų padėties aspektai' (Changes in the Lithuanian Labour Market: The Situation of Women and Men) in: *Sociologija.Filosofija* 2006. No. 4. pp. 46-54.

⁵¹⁸ One of the examples to be provided here concerns the employer who made employment of women conditional upon their agreement not to get pregnant for a period of five years. The article is available on http://www.netylek.lt/problema/laukiesi_nesileisk_diskriminuojama_darbe, accessed 8 October 2012.

⁵¹⁹ A. Atmanaviciene *Moteru diskriminacija darbe Lietuvoje* (Discrimination of Women at Work in Lithuania) 2006, pp. 2, 8-9.

⁵²⁰ Report of the Equal Opportunity Ombudsperson 2010, p.8, available on the Internet on <http://www.lygybe.lt/?pageid=7>, accessed 8 October 2012.

work under amended working conditions or to resign from work, or they were subject to unlawful refusal to grant the rights under existing labour legislation.⁵²¹ *Prima facie*, the health protection of pregnant women is in line with the Pregnant Workers Directive. However, mothers' movement activists have been arguing that there have been many new cases where pregnant women suffered discriminatory treatment or even bullying after requesting the protection provided by the Labour Code.⁵²²

Another survey, which was based on interviews with 137 employers, both in the private and in the public sector, has shown a relatively positive formal attitude of employers toward family-friendly policies, but has also highlighted negative paternalistic attitudes of employers to employees' difficulties in the work-family life balance – family-related issues shall remain outside the workplace. It is difficult to expect any significant changes to the situation of single women, because any improvement is possible only on the basis of individual agreement with the employer.⁵²³ Atmanaviciene's survey reflects repeated complaints by women regarding the lack of preschools and kindergartens. Companies often fail to address employees' problems regarding transportation and flexible working time arrangements. There is a perceived lack of support for studying mothers and a need for special programmes, including counselling and career guidance. Companies and the State fail to provide funding for vocational training and retraining of women returning to the labour market after maternity leave. Employers are not interested in women's qualification because it is associated with additional funds.⁵²⁴

Special attention should be paid to the right to improvement in working conditions after paternity leave, sick leave, parental leave or adoption leave. Legislation simply fails to provide for such rights. The general opinion is that the status of the employee is 'frozen' while on leave. Therefore, the employee does not usually benefit from any positive changes in working conditions, such as promotion or increase of salary. These kinds of benefits are usually defined on an individual basis, and not collectively. The right to improvement does apply as far as return after maternity leave is concerned, but it is very formally formulated and has almost never been used in practice.

The statutory entitlement of fathers to paternity leave has been in place since 2006 and is used very often because of the related social security allowance, which is set at 100 % of the reimbursed remuneration, subject to certain minimum and maximum limits.

As far as social security is concerned, Section 7-3 p. 7 of the EOAWM defines as violation of the principle of equal treatment in social security any situation where there is a different establishment of rights accumulated for the periods of maternity/paternity leave or any other special purpose leave for family reasons. However, if the person concerned receives state social security benefits, including benefits from the state social insurance scheme (maternity/paternity allowances or allowances for parental or adoption leave), these benefits will be not reflected in the accumulative part of the old-age pension which is collected in the private pension funds that in general receive part of the person's state social security contributions (currently 1.5 %).

2.2. Self-employment

There are no legal provisions as far as the special protection of self-employed persons is concerned, except in the area of state and private social insurance. This obvious lacuna in the transposition of European legislation has not been challenged in the courts or addressed by the Equal Opportunities Ombudsperson so far. One of the obstacles in perceiving the need to

⁵²¹ Report of the Equal Opportunity Ombudsperson 2010, pp.8, 78, available on the Internet on <http://www.lygybe.lt/?pageid=7>, accessed 8 October 2012.

⁵²² Report of the Conference in Parliament on 12 September 2012. Information available on the Internet on http://www.alfa.lt/straipsnis/15056182/Dirbanciu.nesciuiu.teises.ir.paminamos..ir.ispucciamos.=2012-09-12_17-58/, accessed 8 October 2012.

⁵²³ A. Kolbergyte *Darbo ir šeimos sferu derinimo galimybės darbdaviu požiūriu* (Employers' Attitudes towards the Combination of Work and Family), available on http://www.lygus.lt/seimairdarbas/files/MIC_magistrinis.pdf, accessed 14 October 2012.

⁵²⁴ A. Atmanaviciene *Moteru diskriminacija darbe Lietuvoje* (Discrimination of Women at Work in Lithuania) 2006, p. 8.

address the situation of self-employed persons who fall under Directive 2006/54/EC and other directives may lie in the fact that the Lithuanian translation of the directives uses the notion ‘independent employment’ (in Lithuanian *savarankiškai įsidarbinant*) but this is not the term used in the terminology of Lithuanian legislation.

There is no research or examples known regarding discrimination against pregnant self-employed workers or self-employed workers who have recently given birth.

Female self-employed workers and female assisting spouses as well as male self-employed workers and male assisting spouses are not entitled to any type of leave and consequently are not entitled to any of the allowances because they are not employees. The group of persons working on the basis of a ‘copyright contract’ (i.e. art, literature, translations) constitutes an exception: they are covered by the statutory social insurance scheme as far as maternity, paternity and parental allowances are concerned. The benefits are much lower, however, since the contributions to the scheme are much lower than those paid by regular employees.

Life partners are not recognized in Lithuania.

2.3. Access to and the supply of goods and services

No experience or knowledge on pregnancy-related discriminatory practices can be reported, and neither are any illustrative examples known of discriminatory practices on grounds of pregnancy/maternity towards women, pregnant women or new mothers in relation to:

- medical care;
- state/regional/municipality financial and non-financial benefits;
- social housing;
- the area of banking or financial services.

The Law on Insurance⁵²⁵ allows different treatment of men and women, for insurance companies to take into account the sex of the person when assessing the risk in life insurance. In practice, this results in cheaper life insurance products for women than for men because of the different life expectancy. In August 2012, Draft Law no. XIP-4723 was proposed by the Ministry of Finances aiming to amend said provision to keep legislation in line with the CJEU Ruling in Case C-236/09 (*Test-Achats*).

It is not prohibited for a pregnant woman to choose her own delivery method or place, such as homebirth or non-medicated delivery, but further medical assistance to these women is not regulated. The lack of rules on homebirth is considered a serious problem by some NGOs and Human Rights lawyers.⁵²⁶

3. Involvement of other parties

National social partners are not very interested in the subject. The survey done by Atmanaviciene clearly indicated that in general workplace-level trade union activists are aware of the practical difficulties for pregnant women and employees with family responsibilities in enforcing their rights at the workplace, but they do not see their role in improving the situation.⁵²⁷ The social partners at the national and sectoral levels have not addressed the equality issue so far.

⁵²⁵ State Gazette, 2011, no. 145-6816.

⁵²⁶ See for instance the article on the picket by NGOs for the ‘legitimization’ of homebirths, <http://kauno.diena.lt/naujienos/lietuva/nevyriausybininkai-ragina-iteisinti-gimdyma-namuose-439604#axzz26fjiUgg8>, accessed 12 September 2012.

⁵²⁷ A. Atmanaviciene *Moteru diskriminacija darbe Lietuvoje* (Discrimination of Women at Work in Lithuania) 2006, pp. 6, 8.

The most important stakeholders are women's NGOs and mothers' movements. They constantly draw attention to existing problems and initiate discussions related to the status of pregnant women and women with children.⁵²⁸

No examples of good or bad practices or information on reluctant or obstructive bodies can be reported.

4. Enforcement and effectiveness

4.1. General

The existing Labour Code preserves many Soviet-type legal provisions concerning the protection of vulnerable groups of workers. Today, many of these provisions are perceived as outdated rules that do not work in practice. Employers, liberal NGOs and conservative government parties strongly advocate abolishing these provisions, because strong statutory protection hinders the employment of these vulnerable employees. Against this background it has been argued in informal discussions that even strong protection of pregnancy and maternity rights leads to lower numbers of women being employed. There are, however, no empirical data or studies to prove or refute this argument.

One example that is used to show the possible exaggeration of pregnancy protection is related to the dismissal of pregnant women: in fact, the law prohibits dismissal even in the event of bad performance or guilty behaviour or gross breach of work duties (Section 132(1) of the Labour Code). However, there are no serious attempts to diminish the statutory protection of pregnant workers.

4.2. Legal redress

There are no court cases directly related to maternity and pregnancy protection. Only a few complaints have actually been investigated by the Equal Opportunities Ombudsperson and discrimination was not always found.⁵²⁹ It seems that the existing legislative framework is not sufficient to combat discriminatory practices or to improve the work–family life balance in practice. For instance, the principle of equal pay and other benefits such as bonuses at the workplace is consolidated in the law (Section 186(3) of the Labour Code, Section 5(1) p. 1 and Section 6-1 p. 1 of the EOAWM) but no single case has been handled regarding this issue for decades. The failure to effectively combat such treatment can be explained by the latent nature of these violations of equal treatment, the reluctance of victims to bring their cases before court and slow progress in the application of the reversal of proof principle in the courts. Additional measures to prevent violation of equal opportunities are necessary and they may include the compulsory establishment of a women's ombudsperson at the workplace, stronger legal assistance of the Equal Opportunities Ombudsperson for victims, stronger position of NGOs in legal proceedings when initiating litigation on behalf of a victim, representing a claimant or bringing class actions.

The rules to deal with pregnancy and maternity related discrimination do not differ from other cases of discrimination or from other civil cases very much, with the exception of the reversal of burden of proof rule. National law provides no additional or different support and/or advice for individuals who want to enforce their pregnancy, maternity, adoption, parental or paternity rights. No changes have been consolidated in the relation to compensation to victims for violation of pregnancy, maternity, adoption, parental or paternity rights. NGOs do not initiate any cases before the courts, simply because they are not entitled to do so. The right to lodge a complaint with the Office of the Equal Opportunities Ombudsperson is also not exercised by NGOs.

⁵²⁸ See, for instance, the article on the recent discussion on whether pregnant women have sufficient rights, http://www.alfa.lt/straipsnis/15056182/Dirbanciu.nesciuju.teises.ir.paminamos..ir.ispuciamos.=2012-09-12_17-58/, accessed 12 September 2012.

⁵²⁹ See for instance the Report of the Equal Opportunity Ombudsperson 2010, p.78, available on the Lithuanian Parliament's website on <http://www.lygybe.lt/?pageid=7>, accessed 8 October 2012.

There is a lack of studies in Lithuania to address the difficulties involved in the access to legal redress concerning rights regarding pregnancy, maternity, adoption, parental or paternity leave.

4.3. Access to information

Generally speaking there is no evidence or research showing that some women are at a particular disadvantage with regard to pregnancy, maternity, adoption and/or parental rights as far as information rights are concerned. These rights have a longstanding history and society is well aware of their existence and content. There has recently been some strong debate, but only in relation to the cuts in social benefits paid by under the state social insurance scheme during parental leave. The novelties introduced by the latest EU legislation deserve little attention in society and politics: there is a perception that the most recent aspects of equality related to pregnancy, maternity, paternity, adoption and parental leave rights are already included in the national legislation.

LUXEMBOURG – Anik Raskin

1. Existing legislation and case law

1.1. Employment

The protection of pregnant workers and workers who have recently given birth or are breastfeeding was reformed by the Law of 1 August 2001, which is now part of the Labour Code. The law distinguishes between direct and indirect discrimination.⁵³⁰ It does not distinguish between the type or size of employer.

Pregnant workers cannot be required to work during the eight weeks preceding the expected date of confinement. Also, workers cannot be required to work during the eight weeks following childbirth. These are mandatory provisions with no flexibility. The total duration of the maternity leave can exceed 16 weeks however, for example when the birth takes place after the expected date.

Maternity leave is granted on the basis of a medical certificate and it is treated as a period of sick leave. This means that a worker who is on maternity leave continues to receive her normal salary and that all the advantages which she would benefit from while working are guaranteed. In Luxembourg, absence from work on the grounds of sickness is fully paid. Social security schemes and labour law both remain applicable. The pregnant worker is exempted from work to allow her to attend the antenatal check-ups. The pregnant worker is protected against dismissal from the notification of her pregnancy to the employer.

Pregnant and breastfeeding workers are protected regarding health, safety and night work. The protection requires a specific procedure involving the opinion of a ‘work doctor’. If the work and/or workplace cannot be adapted to the worker’s situation, the worker is exempted from work and the salary is paid from social security funds.

During maternity leave, the employee’s job has to be preserved. The dismissal of workers is prohibited during the period from the beginning of their pregnancy to the end of the maternity leave.

Workers are entitled to two 45-minute breaks at the beginning and end of the working day if they are breastfeeding after maternity leave. If the working day is interrupted by a one-hour break only, and/or if the worker cannot breastfeed her child at a location close to the workplace, she is allowed to have a single 90-minute period. Breastfeeding breaks are considered as working time and are paid accordingly. These breaks are not transferable to the father and are only for mothers who are breastfeeding the child, also by expressing milk.

⁵³⁰ *Code du Travail* (Labour Code), Article L. 241-1. (1).

Parental leave was introduced by law in 1999.⁵³¹ According to this law, workers who have worked in Luxembourg for at least twelve months at the time of the birth of the child are entitled to parental leave.

Parental leave is an individual right and cannot be transferred from one working parent to the other. The monthly flat-rate parental allowance is paid by the State (EUR 1 709.78 net October 2012). It is a fixed allowance.

There are two types of parental leave. Full-time parental leave is six months and cannot be refused by the employer. Part-time parental leave is twelve months and depends on the employer's agreement. Throughout parental leave, employment relationships are maintained and the worker is entitled to reinstatement or, in the event that this is impossible, similar work corresponding to his/her qualifications must be provided with equivalent remuneration.

The dismissal of workers when on parental leave is prohibited. The Supreme Court of Justice has stated⁵³² that if the employer proves that it is impossible to reinstate the worker in his/her original work, he can propose other work, even if this is of a different kind. In the case concerned, the relevant worker had refused the proposed new work in particular because of less favourable career expectations, which was not proved. The contested dismissal was declared valid.

In another case concerning a dismissal, the Supreme Court of Justice held⁵³³ that the prohibition of dismissal does not exclude a dismissal due to the reorganization of the company involving the abolishment of the position in which the employee worked before her parental leave. After the period of protection during parental leave, a dismissal due to these reasons remains valid. The worker in question had been dismissed on the day after returning from parental leave.

Paternity leave is a short-period mandatory paid leave for fathers. The duration of the leave granted to male workers for the birth of a legitimate or a legally recognised child born out of wedlock is 2 days. It is part of the so-called 'leaves for personal reasons' and has the same effect as the normal annual leave.

In case of adoption of a child under 16, the worker has an unconditional right to 2 days of paid leave⁵³⁴ (similar to the paternity leave). If the adopted child is too young to be admitted to the first year of primary school, the adoption leave is extended to 8 weeks for a single adoption and 12 weeks for a multiple adoption. The leave cannot be refused by the employer, but must be requested. Only one of the adoptive parents is entitled to take the adoption leave. However, both of the adoptive parents are entitled to take parental leave.

Single adoptive parents are entitled to adoption leave on the condition that the adopted child has not already lived with him/her before the adoption.

Adoption leave has the same effects as maternity leave. During the adoption leave, the worker receives maternity benefit, which is paid by the State. The employment contract remains intact during the leave and the employer has to keep the same or similar job available during the leave. The adoption leave is taken into account for seniority and related benefits. It is also taken into account for the calculation of the legal annual leave.

The worker on adoption leave is protected against dismissal during the period of adoption leave. If the worker does not want to go back to work after the adoption leave, he/she may resign without notice at the end of the leave.

Regarding victimisation, national equal treatment law guarantees protection from adverse treatment for complainants as well as for witnesses. This also applies to the field of access to and the supply of goods and services as well as to work and employment, without any specific reference to pregnancy/maternity/parental or paternity rights.

There are no decisions or recommendations regarding these types of leave from the national equality body.

⁵³¹ <http://www.legilux.public.lu/leg/a/archives/1999/0013/a013.pdf>, accessed 4 October 2012.

⁵³² Judgment C.S.J. 07 30 2007 No. 31422.

⁵³³ Judgment C.S.J. 06 12 2007 No. 32095.

⁵³⁴ *Code du Travail* (Labour Code), Article L.233-16.-6.

1.2. Social security and pension rights

The maternity leave is granted on the basis of a medical certificate and is treated as a period of sick leave. It is part of the sickness and maternity insurance. Workers who are on maternity leave remain in the social security system and continue to contribute to the pension scheme.

The maternity allowance is 100 % of the insured's average daily insurable income which is based on earnings during the three months before maternity leave. The minimum benefit is equal to the social minimum wage. The maternity allowance is paid by the social security authorities.

The principle of equal treatment between women and men in matters of social security was introduced by the amended law of 15 December 1986. This law concerns workers, self-employed persons as well as workers and self-employed persons whose activity is interrupted by illness, accident or involuntary unemployment and persons seeking employment. Retired or incapacitated workers and self-employed persons are also covered.

Periods of interruption (without benefit) for childcare immediately after birth or adoption are taken into account as a pension accumulation period up to a maximum of 24 months per child. These unpaid interruptions are not related to parental leave. The period can be extended to 48 months if, at the moment of the birth, there are two other children being raised in the family or in case of severe disability of the newborn child.

For mothers, periods of maternity leave are taken into consideration for the purpose of pension rights and amounts during the whole time that they are absent from work for maternity reasons.

Periods of parental, paternity and adoption leave are also taken into consideration for pension rights.

Finally, 24 months for the first and second child and 48 months starting from the third child are credited for pension right and amount purposes, at the request of the parent who stops working to bring up the children.

1.3. Self-employment

Directive 2010/41/EU has not been implemented yet. Self-employed workers are required to affiliate with the Joint Social Security Centre, which handles the data, registration of affiliations and collection of contributions for the different insurance funds.

Assisting spouses do have access to voluntary social insurance coverage. Assisting spouses have to assist their spouse or partner in his/her principal activity.

Self-employed workers and assisting spouses who have access to voluntary social insurance coverage have the same rights as dependent workers. Self-employed workers and assisting spouses are entitled to maternity, parental and adoption leave on the same conditions as dependent workers.

1.4. Access to and the supply of goods and services

Discrimination between women and men is prohibited in the access to and the supply of goods and services which are available to the public and which are offered outside the area of private and family life. Since July 2012, this prohibition also applies to the content of media and advertising and to education.⁵³⁵ The prohibition of discrimination is formulated in a general way and distinguishes between direct and indirect discrimination, reproducing the exact terms of Directive 2004/113/EC, but pregnancy and maternity are also mentioned specifically.

For contracts concluded after 20 December 2009, the expenses related to pregnancy and maternity cannot result in differences in insurance premiums and benefits.⁵³⁶

The law is about to be amended to reflect the outcome of the *Test-Achats* case.

⁵³⁵ <http://www.legilux.public.lu/leg/a/archives/2012/0137/a137.pdf#page=3>, accessed 4 October 2012.

⁵³⁶ <http://www.legilux.public.lu/leg/a/archives/2012/0137/a137.pdf#page=3>, accessed 4 October 2012.

2. Gaps in national law

2.1. Employment

National law is quite strict regarding protection against pregnancy discrimination in relation to access to employment. However, even without any statistics or studies on the topic, one must assume that discrimination does occur. For instance, one can assume that fixed-term contracts of pregnant workers are not renewed, but there is no evidence of this.

The provisions as regards parental leave and maternity leave exceed the minimum required by EU law. However, a recent study has shown that only a small percentage of women use the right to reduce working time because of breastfeeding.⁵³⁷ The reasons are not clear, but still the Government has decided to start a public campaign on the issue in order to encourage women to use this right.

In fact, in contrast with possible gaps, many public actors such as women's associations have denounced the fact that, in practice, pregnant workers who are employed in the medical sector or in the social sector are exempted from work in a systemic way. This is viewed as overprotection, which is harmful to the employment of women in a general way.

As the 2 days of paternity leave are mandatory, all working fathers use it. However, fewer men than women use the parental leave, which is not mandatory. Parental leave is treated in the same way for men and women.⁵³⁸

2.2. Self-employment

There are no indications of any gaps regarding self-employed workers, as this subject has not been discussed nor have any claims been made.

2.3. Access to and the supply of goods and services

The prohibition of pregnancy discrimination in the area of access and the supply of goods and services is not a subject which is often addressed in Luxembourg. Even before the specific law regarding the issue, special needs of pregnant women were taken into consideration in different areas such as public transport (reserved seats) and stores (priority in queues).

There are no concrete examples of potentially discriminatory practices, but they may exist. In December 2007, the law⁵³⁹ implementing Directive 2004/113/EC established platforms of dialogue between the ministries concerned and stakeholders having a legitimate interest in contributing to the fight against discrimination based on sex. This quite interesting and innovative provision has not had any concrete result as no platforms have actually been created yet. If they had, they could be able to identify discriminatory practices.

3. Involvement of other parties

The *Comité du Travail Féminin* (Women's Labour Committee) consists of women's NGOs, employers' and workers' organisations and ministries. This advisory body is responsible for studying, either on its own initiative or at the Government's request, all matters connected with the work, training and professional advancement of women. This committee constitutes a very good platform for exchanges between the various actors in the field of gender equality.

Social partners can negotiate collective agreements which can be declared a general obligation. In that case, the sectors concerned must obey the rules thus laid down.

The State gives financial support to associations which inform and support pregnant women and their family.

There is opposition against an extension of maternity leave in Luxembourg. This opposition comes from employers as well as from associations who work in the field of equal treatment between women and men. The abovementioned Women's Labour Committee adopted an opinion on that topic which opposes an extension of maternity leave, but does not

⁵³⁷ <http://www.ms.public.lu/fr/actualites/2011/09/07-alba/rapport-ALBA-2008-definitif.pdf>, accessed 4 October 2012.

⁵³⁸ <http://www.legilux.public.lu/leg/a/archives/1999/0013/a013.pdf>, accessed 4 October 2012.

⁵³⁹ <http://www.legilux.public.lu/leg/a/archives/2007/0232/a232.pdf#page=2>, accessed 8 October 2012.

oppose the extension of pregnancy/maternity rights in general, which has not yet been discussed.

4. Enforcement and effectiveness

4.1. General

Claims regarding discrimination in general are very rare in Luxembourg. Most of them are about international protection rights, which means that they are submitted by people seeking asylum. This might partly be explained by the costs that these claims may imply. However, the national equality body, which works free of charge, does not register many claims either.⁵⁴⁰ One explanation could be that the risk of being exposed is much higher in Luxembourg than in bigger countries. Another explanation could be the absence of a ‘claiming culture’ in the country. Case law is not easy to access and it could prove beneficial to publish judgments and decisions regarding discrimination cases in order to encourage people who feel victims of discrimination to initiate proceedings.

4.2. Legal redress

The law does not provide any support or advice for individuals who want to enforce their pregnancy, maternity, adoption, parental or paternity rights. However, people may address the national equality body in order to obtain information and advice on these issues. They may also submit their questions or requests to the associations which are supported by the State or to the trade unions regarding labour law.

4.3. Access to information

The State has recently launched the website ‘guichet.lu’, where information on various issues can be found in different languages. The rights regarding pregnancy, maternity, paternity, adoption and parental leave are also included.

As mentioned above, the ministry in charge of health is planning to run a campaign in order to inform breastfeeding workers about their rights. A project group is working on this. Furthermore, trade unions, public services and associations produce information papers on pregnancy, maternity, paternity, adoption and parental rights.

The State issued a report on parental leave in 2002.⁵⁴¹ The report is to be reviewed in 2012 in order to measure developments.

FYR of MACEDONIA – Mirjana Najcevska

1. Existing legislation and case law

1.1. Employment

All of the reproductive rights in the area of employment in the Macedonian legal system, except the issues related to salary compensation, are addressed by the Law on Working Relations⁵⁴² (further on: Labour Law).

The general provisions include the obligation to introduce multiple risk assessments and respective measures in addressing those risks (Article 42); declaring confirmed pregnancy, childbirth and parenthood and care for a family member leave as an unfounded reason for dismissal, as well the ban on dismissal on the same ground (Articles 77 and 101); the general ban on performing work beyond full-time hours (Article 120) to which further measures against assessed risks could be added; and the flexibility of the period for annual leave in accordance with maternity or childcare leave.

⁵⁴⁰ <http://cet.lu/wp-content/uploads/2012/03/rapport-final-site.pdf>, accessed 4 October 2012.

⁵⁴¹ KPMG *Etude d'évaluation de l'impact du congé parental au Grand-Duché de Luxembourg* Novembre 2002.

⁵⁴² Law on Working Relations.

Chapter 12 of the Labour Law, entitled Special Protection, starts with a general declaration on protection of pregnancy and parenthood (Article 161), and an obligation for the two relevant ministers, of Labour and of Health, to jointly adopt a rulebook on assessing work-related risks and measures to deal with them (Article 162, Paragraph 2).

Concerning pregnancy, birth and parental⁵⁴³ leave, the Macedonian Labour Law, in Article 165, stipulates for the female worker a nine-month leave for one child, and one year for more than one child (twins, triplets etc.). The same Article, later on, allows due to health reasons of the children (temporary hospitalisation or institutionalisation) that the parent (mother or father) may interrupt the leave and has the right to continue the leave afterwards. The same Article regulates adoption leave on practically the same conditions as maternity leave, while Article 167 stipulates the same rights for a father or foster father if the mother decides not to use these rights. It is not an independent right of the father.

It is worth mentioning that the maternity leave may start 45 days before childbirth, but it is obligatory from 28 days before childbirth. On the other hand, the female employee taking pregnancy, childbirth and maternity leave, may return to work, from her own will, before the expiry of the leave, but not before 45 days following the child's birth.

The Labour Law also has provisions (Article 168) on extending the parental leave due to a stillborn child (for at least 45 days), a child with developmental problems or special educational needs etc.

The possibility for part-time work is regulated in Article 169, which states that one of the parents of a child with developmental problems and special educational needs shall be entitled to work half of the full-time hours if both parents are employed or if it concerns a single parent. Also, confirmation from a 'competent medical commission' (the Law does not elaborate on this; in practice it means that the medical commission is either established or licensed by the Ministry of Health) is necessary, provided that the child is not placed in a health or social care institution.

The right to additional and paid breaks during working hours until the child reaches the age of one is stipulated in Article 171 for mothers who breastfeed their child(ren).

Returning to work is regulated (Article 166[3]) on a general basis, meaning that at the end of the parenthood leave the employee shall have the right to go back to the same position or, if it is not available, to a corresponding position in accordance with the terms and conditions of the employment contract.

All of these privileges, according to Article 8(2) of the Labour Law, are protected against discrimination. However, it does not distinguish between direct and indirect discrimination or victimization strictly related to reproductive situations.

Adoption and its respective employment rights are included in the concept of parenthood, providing priority to the mother as adoptive parent: the 'female worker' is entitled to maternal leave (Article 165[6]), yet if she does not take it, then the child's father or adoptive parent shall be entitled to take a parenthood leave. However, the Law on Family⁵⁴⁴ does not follow this differentiation, and in its Article 104-i stipulates that the adoptive parent has the right to parental leave while the compensation of the wage is on the account of the Health Insurance Fund.

Parallel to the provisions of the Labour Law on risk assessment, there is a special Law on Safety and Health at Work,⁵⁴⁵ whose Article 47 was used as the legal basis for the Labour Minister to adopt the *Rulebook on Minimum Requirements for Safety and Health at Work of Pregnant Workers, Workers that have recently given Birth or are Breastfeeding* of 25 August 2011. This Rulebook transposes almost literally Council Directive 92/85/EEC of 19 October 1992, including the annexes as non-exhaustive lists of agents and processes posing risks to working conditions.

⁵⁴³ In 2005, the traditional term 'maternity leave' was changed into 'parental leave'.

⁵⁴⁴ Law on Family (consolidated text) Official Gazette of the Republic of Macedonia No. 80/1992; 9/1996; 38/2004; 33/2006; 84/2008; 67/2010; 156/2010; 39/2012 и 44/2012).

⁵⁴⁵ Law on Safety and Health at Work, Official Gazette No. 92/2007, <http://vlada.mk/node/87>, accessed 6 March 2012.

In court practice, there are no notable problems in the implementation of these rights, probably due to the long court tradition to protect them. This includes cases involving private employers even if the employee is employed on a fixed-term contract.

The issue of waving in writing special protection rights related to pre-natal and post-natal maternity envisaged in Article 15(1) of the Anti-Discrimination Law was contested before the Constitutional Court as discrimination. The Court, in its Decision U No. 111/2010-0-0 of 3 November 2010, rejected this claim offering lengthy argumentation in favour of the women to choose to enjoy these rights or not based on her own will. It could be contrary to EU law.

In Prilep, a private employer tried to dodge the provision on maternity leave as unfounded reason for dismissal by formally accepting the mother returning to work, but offering her a post that soon afterwards was to be closed due to 'economic restructuring', while the workers of that unit were dismissed. The Basic Court of Prilep accepted the employer's arguments that the dismissal of the pregnant woman was due to mere economic reasons. However, the Appellate Court of Bitola (ROŽ-591/10 of 6 October 2010) quashed this verdict and instructed the Basic Court to treat this employer as any other (state) employer and re-examine the reasons for dismissal comparing them to the reasons for not dismissing other employees (including other working units of that enterprise).

Case ROŽ-647/09 of 28 January 2010 of the Appellate Court in Shtip is not directly related to maternity leave, yet the key argument of the Court is exactly the same legal basis: Article 77 of the Labour Law where pregnancy, childbirth, parenthood, and care for a family member leave as well as illness and injury leave are declared an unfounded reason for dismissal. Thus, the Court reaffirmed the findings of the Basic Court that a worker that had been on sick leave was wrongfully dismissed from work.

However, there are cases where the first-level courts did not rule in favour of the pregnant woman. Yet, in one such case, Rev. No. 1251/2009 of 21 October 2010, the Supreme Court quashed the verdict and decided in favour of the pregnant woman, although based on technicalities. This case was related to a pathological pregnancy which at first was not perceived by the physicians, and they issued approval for regular illness leave. Once they detected that it was not an illness but a pathological pregnancy, they converted the leave into a maternity leave. However, the employer, claiming that they received no timely information (within 48 hours, the sick worker is to inform the employer in writing), dismissed the pregnant worker. The Supreme Court's decision did not mention anything about the ban on dismissing a pregnant worker.

Also, there is a case, Rev2. No. 927/2010 of 22 December 2011, where a private employer disregarded the decisions of the Basic and the Appellate Court and applied for a decision of the Supreme Court claiming that its female worker did not perform her duties properly. This Court confirmed the verdicts of the lower courts specifically stressing that the illness leave was connected with pregnancy problems.

There is a number of court cases related to the money paid as compensation during pregnancy and/or paternal (in all cases maternal) leave by the Funds for Medical Insurance. Verdicts were mainly in favour of the claimant, i.e. the female worker that sued. There are no cases related to the payment of paternity leave.

Based on court practice it could be stated that there is no evidence in the stricter sense that forms of discrimination on the grounds of pregnancy and maternity (adoption, parental or paternity leave) vary according to the type or size of the employer.

1.2. Social security and pension rights

During maternity leave women receive salary compensation. According to the Law on Health Insurance⁵⁴⁶ this compensation is 100 % of the basis for compensation defined in Article 16.⁵⁴⁷ From 1 January 2012, 100 % of the amount of compensation paid during absence from

⁵⁴⁶ Law on Health Insurance, Official Gazette No. 25/2000 (last amendment No. 26/2012).

⁵⁴⁷ Basis for the calculation of salary compensation is the average monthly amount of paid salary which represents paid contributions for compulsory health insurance in the last twelve months prior to the case because of which the right to compensation has arisen.

work due to pregnancy, childbirth and motherhood is to be paid to the cost of the State Budget instead from the Health insurance fund.

Among the conditions for receiving the compensation for maternity leave is continuous health insurance at least 6 months before the start of the maternity leave and regularly paid contributions to that end.⁵⁴⁸ This was not a condition for sick leave, for instance. Therefore, the Constitutional Court recognized it as discrimination in its decisions from 1991, 1992, 1996, and 2000 (on the basis of violation of Articles 8,⁵⁴⁹ 9,⁵⁵⁰ 34⁵⁵¹ and 42⁵⁵² of the Constitution). Since the condition of the prior 6 months for all leaves was legally introduced in the meantime, in the last decision⁵⁵³ the Constitutional Court assessed today's Article 15 as equally applying to everybody (meaning that this condition applies not only to maternity leave but also to all other leaves – sick leave etc.) thus not including the need for protection of women on the basis of maternity leave. However, there is an exception in the event of injury at work and professional illness where the 6-month conditions is not applied. Furthermore, reproductive leave is considered equal to illness.

The amount of salary compensation calculated on the basis of Article 16 of this Law until 2011 could not be any higher than the sum of two average monthly salaries; for 2012 this limit is three average monthly salaries; while afterwards it is to be four average monthly salaries paid in the previous calendar year. This is a disadvantage for women with higher salaries and it also means that their pension will be lower than that of women (and men) who did not take maternity (or parental) leave since the pension base is determined according to the salary compensation received during maternity leave (Article 25 Law on Pension).⁵⁵⁴ Furthermore, the absence from work due to pregnancy, childbirth and motherhood (but not illness related to pregnancy) is equal to the temporary absences from work due to professional illness or injury at work.

There are special provisions in the Law on Employment and Insurance in Case of Unemployment⁵⁵⁵ related to the period in which an unemployed person receives salary compensation. The general provision makes a link between the time of employment and period for receiving this compensation (Article 71). However Article 72 states that 'Compensation to the unemployed person shall continue to be paid after the expiry of the period specified in Article 71 of this Law, inter alia for a woman beneficiary of this allowance during her pregnancy and childbirth'.⁵⁵⁶ This means that unemployed women will receive the unemployment benefit even after expiry of this period.

1.3. Self-employment

There is a constitutional provision according to which the Republic particularly protects mothers, children and juveniles. Minors and mothers are entitled to special protection at work.⁵⁵⁷ This means that self-employed women are covered by this general protection. There are several specific strategies dealing with the support of self-employed women and promotion of self-employment as a tool in the fight against poverty and the fight against discrimination, specifically of women (see footnote 20). However, there are no specific laws or legal regulations on self-employment other than the general ones on labour and on insurance. Furthermore, none of the strategic documents dealing with support of the

⁵⁴⁸ Article 15, Law on Health Insurance.

⁵⁴⁹ Constitution of the Republic of Macedonia: fundamental values of the constitutional system of the Republic are humanism, social justice and solidarity.

⁵⁵⁰ Citizens are equal before the Constitution and laws.

⁵⁵¹ Citizens have the right to social security and social insurance established by law and collective agreement.

⁵⁵² The Republic particularly protects mothers, children and minors, and promotes that minors and mothers are entitled to special protection at work.

⁵⁵³ U.No. 175/2006-0-0 form 01/11/2006.

⁵⁵⁴ Law on Pension and Disability insurance, Official Gazette No. 98/2012.

⁵⁵⁵ Law on Employment and Protection in Cases of Unemployment, Official Gazette No. 37/1997 (last amendment No. 80/2012).

⁵⁵⁶ Law on Employment and Protection in Cases of Unemployment, Official Gazette No. 37/1997 (last amendment No. 80/2012).

⁵⁵⁷ Article 42 of the Constitution of the FYR of Macedonia.

Government for self-employment mention pregnancy, maternity leave or breastfeeding.⁵⁵⁸ As soon as the payment on the basis of insurance is finished, they enjoy the same rights as other employed women. There is no structure to monitor the use of pregnancy and maternity leave.

1.4. Access to and the supply of goods and services

Concerning the access to and the supply of goods and services, national legislation does not address pregnancy and maternity discrimination on a topic-by-topic basis. However, if there is such a case, Article 4[7] of the Anti-Discrimination Law could be applied.⁵⁵⁹

2. Gaps in national law

2.1. Employment

According to the law, a pregnant worker may decide to start maternity leave 28 days before childbirth, and return to work 45 days after childbirth (Articles 165 and 166 of the Labour Law). This would mean that the total period of maternity leave is **not** 14 weeks (or 98 days), **but ten weeks and three days** (or 73 days). It is conceivable that employers could use this legal possibility to pressure employees into this direction. Hence, it could be contrary to EU law. Furthermore, a specific concern might be the possibility (Article 166[1], Labour Law) of a mother returning to work from maternity maternal leave exactly 45 days after giving birth, if she in writing waves her right to the rest of the nine months of leave. This to be rewarded (Article 166[2], Labour Law) with 50 % of the salary compensation added to the regular salary. In practice this would mean that for almost seven months the female worker is to be paid almost 150 % salary. In situations of scarcity, one could question the ‘own will’ for such a decision, while it might seriously endanger the process of breastfeeding and the health of the woman having recently given birth. This also means that paternal leave is discouraged. In such a case the father cannot substitute the mother for the rest of almost seven months of leave.

The formulation of the conditions for part-time work (Labour Law, Article 169) is that when one of the parents of a child with developmental problems and special educational needs shall be entitled to work half of the full-time hours **if both parents are employed**. It seems to echo the situation covered by the decision by the Court of Justice in Case C-104/09 *Roca Alvarez* [2010] ECR I-8661 (judgment of 30 September 2010): a self-employed mother could not be assisted in taking care of the child by the child's father working part time. Since there is no provision in the Labour Law equalling employment to self-employment, whereas reproductive rights are only covered by the Labour Law, a situation like the one in the *Alvarez* case is quite possible.

Maybe not a gap, but a strange situation is created in the area of health risk: the Law on Safety and Health at Work⁵⁶⁰ does not mention pregnancy or other maternity and parental issues, yet the Labour Law imposes an obligation on **the two relevant ministers**, of Labour and of Health, to jointly adopt a rulebook on assessing work-related risks and measures to deal with them (Article 162, Paragraph 2). Nevertheless, the Labour Minister alone adopted such a rulebook which only deals with pre-natal and post-natal maternity health risks.

Keeping in mind that paternity leave is **alternative** to maternity leave according to the Labour Law, the Governmental Cabinet plans to introduce a special, parallel leave for fathers during the first two months of the baby's life. It has been announced that it will be introduced by 2014.⁵⁶¹ Although there is no mention of the different approaches in the Labour Law and

⁵⁵⁸ Amended Operating Plan for Active Programmes and Employment Measures for 2012-2013 (Ministry of Labour and Social Politics); National Action Plan for Gender Equality 2007-2012; Operating Plan for Active Programmes and Employment Measures for 2012-2013 (Ministry of Labour and Social Politics); Operating Plan for Implementation of the National Plan of Action for Gender Equality for 2012-2013 (Ministry of Labour and Social Politics).

⁵⁵⁹ Law on Prevention and Protection from Discrimination, Official Gazette No. 50/20120.

⁵⁶⁰ Law on Safety and Health at Work, Official Gazette No. 92/2007.

⁵⁶¹ <http://vlada.mk/node/87>, accessed 6 March 2012.

the Law on Family, it seems that introduction of a parallel leave for fathers (adoptive fathers) might address the current inconsistency between the two laws.

2.2. Self-employment

The compensation for maternity leave is based on the contributions made by self-employed women.

There are very few studies where the issue of pregnancy and maternity leave related to employment are even mentioned. In none of them, self-employment is mentioned as specific issue related to discrimination of pregnant women or women on maternity leave.

The state labour inspectorate has no information on cases related to pregnancy and maternity leave and there are no any studies or reports on this issue.⁵⁶² Anecdotal data and information and newspapers indicate that there are such cases.⁵⁶³

Female assisting spouses or life partners are entitled to maternity allowances if the employed women give up using their maternity leave. According to the Law on Health Insurance,⁵⁶⁴ there are no differences related to self-employment concerning male self-employed workers and male assisting spouses or life partners in the access to paternity/parental leave or any related allowances. However, there are no cases or studies to show how it will work in practice.

2.3. Access to and the supply of goods and services

There are no examples of potentially discriminatory practices toward pregnant women in relation to access to goods and the supply of services. It concerns recently introduced legislation, so there are no studies or notable debate. However, there are manuals or guidelines that mention this issue.⁵⁶⁵

Insurance contracts do not mention pregnancy or maternity leave. Some contracts on a collective basis mention pregnancy and maternity leave in the positive sense, including a provision that provides that the whole amount will be paid in cases of death due to pregnancy and/or delivery. Inquiries by the author have shown that there are no notable problems in this area.

There are several general provisions on equality of women and men in the access to and supply of goods and services. These general provisions are not further developed and there is no relation with pregnancy or maternity leave.⁵⁶⁶

2.4. Additional information

There is no additional information to report.

3. Involvement of other parties

Collective agreements are very different. In general collective agreements, such as in the public or economic sector, and in most of the so-called ‘branch’ collective agreements (such as the textile industry or the health sector), pregnancy, maternity leave and related issues are not mentioned. Pregnancy and maternity leave are only mentioned in several specific collective agreements (e.g. for the Ministry of Internal Affairs, the tobacco industry and the social care sector).⁵⁶⁷ There are no specific solutions concerning reproductive rights; simply integrally or partially quoting the regulations from the Labour Law.

⁵⁶² <http://www.dit.mk/>, accessed 12 November 2012.

⁵⁶³ <http://www.utrinski.com.mk/?ItemID=47F249F46AE7C941866FD46F9A317DF2>, accessed 12 November 2012.

⁵⁶⁴ Law on Health Insurance, Article 5[1].

⁵⁶⁵ G. Scullion & S. Rogers *Training Manual EU Antidiscrimination Law* British Council and Ministry of Labour and Social Policy 2010.

⁵⁶⁶ The Law on Equal Opportunities of Women and Men, Official Gazette No. 6/2012.

⁵⁶⁷ http://www.ssm.org.mk/index.php?option=com_content&view=article&id=349&Itemid=141&lang=mk, accessed 12 November 2012.

In the specific analyses on gender equality done by the Ombudsman,⁵⁶⁸ pregnancy and maternity leave are not mentioned. Yet, in the annual reports some cases are mentioned. In the last annual report (for 2011)⁵⁶⁹ there is an interesting case under the title *Public Revenue Office (PRO) charged tax on the money paid on the basis of maternity leave*. Because of the delay in paying salary compensations for maternity leave, there were situations where this money was received once the women had already returned to work. Although there is no income tax on salary compensation, these women were charged as if it was salary. The Public Revenue Office did not act upon the requests of the Ombudsman to refrain from charging taxes in these situations and to refund these women. Concerning the other individual claims related to payments on the basis of maternity leave, according to this report, there was a smaller number of cases which were solved with positive results.

There are several NGOs, professional associations and governmental institutions which run websites offering information on the rights related to pregnancy and maternity leave.⁵⁷⁰

The Ministry of Health is involved in the development of a strategy called ‘Improving Maternal and Infant Health: Macedonian Safe Motherhood Strategy (SMS) 2011–2015’.⁵⁷¹ The ‘mother’s healthcare book’ (*majchina knishka*) has been introduced by this strategy according to which ‘Its implementation would nicely complement the information flow by keeping key information directly with the beneficiary. The book could also be used to provide mothers with some pregnancy related information (danger signs, nutritional information and other)’. According to this strategy ‘The long duration of maternity leave for employed women as well as the available social packages for the first child (Ministry of Labour and Social Policy) ascertains maternal protection and good infant care. The informal sector is not included, unemployed mothers have no motivation, and the initiative for support for third and fourth child is repealed due to collision with the Constitution.’⁵⁷²

The definition of ‘informal sector’, which is not included in this Strategy, varies, yet mainly encompasses the grey economy. Concerning the absence of the motivation on the part of unemployed mothers, this most probably means that these mothers show no interest in the programmes offered by the Government.

4. Enforcement and effectiveness

4.1. General

Pregnancy and maternity leave are not perceived as possible grounds for discrimination. In the national strategy for equality and non-discrimination on the ground of ethnic origin, age, mental and physical disability and sex,⁵⁷³ pregnancy and maternity are not mentioned at all. However, in the relevant literature, all directives related to equal treatment of women and men are mentioned, which creates the impression that they have been implemented in the strategy.

There are no studies on the claim that pregnancy and maternity rights for women in the labour market lead to lower numbers of women being employed. However, some official documents state that: ‘Despite high levels of specified violations of labour rights, it is also present practice to dismiss pregnant women and mothers and nursing mothers’.⁵⁷⁴ On page 129 of the same document it is also underlined that there is a need to strengthen the operation

⁵⁶⁸ http://www.mtsp.gov.mk/WBStorage/Files/analiza_zem.pdf, accessed 12 November 2012.

⁵⁶⁹ <http://www.ombudsman.mk/ombudsman/upload/documents/2012/Izvestaj%202011-MK.pdf>, accessed 12 November 2012.

⁵⁷⁰ http://www.ssm.org.mk/index.php?option=com_content&view=article&id=441&Itemid=143&lang=en;
<http://www.roditeliideca.com.mk/>;
<http://www.mtsp.gov.mk/default.asp?ItemID=2D765BA645F99442A4B4CCD7B6ABB71D>;
<http://www.uslugi.gov.mk/Prasanja.aspx?UslugaID=f60b833a-4b2e-4fa6-ba8f-04e1902c71f5>, all accessed 12 November 2012.

⁵⁷¹ [http://www.unicef.org/tfymacedonia/SM_strategy_final_ENG\(1\).pdf](http://www.unicef.org/tfymacedonia/SM_strategy_final_ENG(1).pdf), accessed 12 November 2012.

⁵⁷² Macedonian Safe Motherhood Strategy. p.11.

⁵⁷³ <http://www.mtsp.gov.mk/?ItemID=BD66FCC3A7FBCB47AB9150CBFECD2C96>, accessed 12 November 2012.

⁵⁷⁴ *The road to EU: Contribution of Civil Society in Development of Policy for Social Inclusion in Macedonia*, p. 113, http://www.mtsp.gov.mk/WBStorage/Files/Final_Reports_MAK.pdf, accessed 12 November 2012.

and control of labour inspection services, to improve legislation in terms of protection of labour rights of pregnant women and mothers, to strengthen awareness among women of their rights in the labour market and of opportunities for protection.

The demographic development strategy contains a range of measures which should address the problem of the status of pregnant women.⁵⁷⁵ Some of the proposals in this strategy are to develop an effective control system to implement the laws related to employment and parenthood, with emphasis on the protection of pregnant women and young mothers and single mothers; to encourage the employment of young unemployed parents who independently take care of young children, and parents with special needs; to protect women during childbirth and parenting by creating incentives for additional leave for parental leave to raise children after paid leave in the Labour Law. Particularly elaborated is the proposal to create the right conditions for all mothers to use the right to maternity leave, and not only working mothers. Keeping in mind that there are regions that have a fertility rate of under 2.1 live-born child per woman, this proposal advocates to allow non-working mothers to enjoy state benefits of at least 30 % of the average salary during the legally stipulated time for absence from work due to pregnancy, childbirth and motherhood. So far none of these proposals has been implemented in practice.

In the strategy of gender budgeting,⁵⁷⁶ and subsequently in the operating plan for gender equality⁵⁷⁷ and in the operating plan for employment,⁵⁷⁸ the leaves for pregnancy, birth, maternity or maternity are not mentioned.

Even more, despite the general constitutional protective provision, in practice, pregnant women and women on maternity leave are not protected. For example, according to the Law on Enforcement⁵⁷⁹ (Article 104), compensation for maternity leave is not exempt from enforcement procedures, while there are other grounds for exemption (for instance: student's loan). This means that during implementation of court or administrative decisions related to financial obligations, the executing party may deduct money from the pregnancy allowance.

4.2. Legal redress

There is a general possibility according to the Law on Prevention and Protection⁵⁸⁰ from Discrimination.

National law does not provide hands-on support, financial support and/or advice for individuals who want to enforce their pregnancy, maternity, adoption, parental or paternity rights. Some advice is offered on Internet sites of various ministries, which are not accessible for the vast majority of women who need it.

There are no remedies or compensation specifically for victims of violations of pregnancy, maternity, adoption, parental or paternity rights. However, victims can use general legal remedies.

4.3. Access to information

According to some studies done in this field, 40 % of the interviewed women are informed about their rights as pregnant employee and 50 % are informed about their maternity leave rights.⁵⁸¹

⁵⁷⁵ Strategy for demographic development of the Republic of Macedonia 2008-2015, <http://www.mtsp.gov.mk/default-mk.asp?ItemID=BD66FCC3A7FBCB47AB9150CBFECD2C96>, accessed 12 November 2012.

⁵⁷⁶ Strategy for introducing gender responsible budgeting 2012-2017, <http://www.mtsp.gov.mk/default-mk.asp?ItemID=BD66FCC3A7FBCB47AB9150CBFECD2C96>, accessed 12 November 2012.

⁵⁷⁷ Operating Plan for Implementation of the National Plan of Action for Gender Equality for 2012-2013, (Ministry of Labour and Social Politics).

⁵⁷⁸ Operating Plan for Active Programmes and Employment Measures for 2012-2013 (Ministry of Labour and Social Politics).

⁵⁷⁹ Law on Enforcement, Official Gazette No. 35/2005.

⁵⁸⁰ Law on Prevention and Protection from Discrimination, Official Gazette No. 50/20120.

⁵⁸¹ Research: Women in the Macedonian Economy, REAKTOR Civil Association – Research in Action 2010, Skopje (pp. 11-14):

Awareness depends on the relevant women's education, and usually women from the rural regions are less informed than women from the urban regions. Ethnic origin is an important factor regarding the level of information that women have (Macedonian women are much better informed than Roma or Albanian women).

Most of the information regarding the rights of pregnant women and parents to maternity, adoption and parental leave is offered on the Internet. The number of women with proper access to the Internet, who are in a position to use this information is very limited.

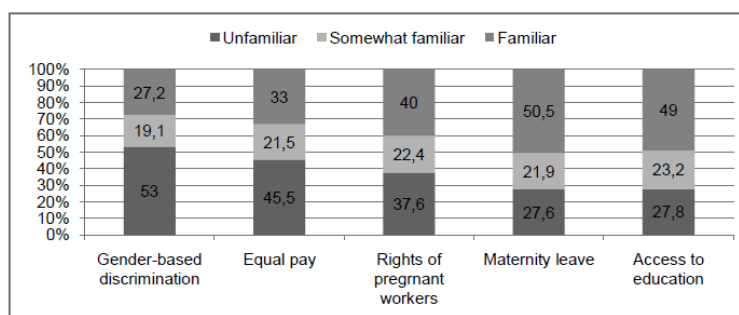
According to some studies, Roma women are at a particular disadvantage with regard to pregnancy, maternity, adoption and/or parental rights.⁵⁸² Basic problems which are uncovered in these studies are: lack of insurance, lack of access to preventive health examinations during pregnancy, lack of proper information, lack of (multi-)cultural competences of doctors and administration.

MALTA – Peter G. Xuereb

1. Existing legislation and case law

1.1. Employment

Directive 92/85/EEC was implemented by the Protection of Maternity (Employment) Regulations (Legal Notice 439 of 2003⁵⁸³ as amended). A maternity leave of 16 weeks is provided for, paid by the employer as to 14 weeks and as to 2 weeks at a flat rate of EUR 160 payable by the State. A further 2 weeks is due to be added in January of 2013. Regulation 11 protects the employee's rights whilst she is on leave, and gives her the right to return to the same job or, if this is no longer possible for any valid reason, to return to equivalent work which is consistent with her original contract of employment. Regulation 12 protects the employee from dismissal by making it unlawful for the employer to dismiss a pregnant employee, an employee who has recently given birth or a breastfeeding employee, either from the date she notifies the employer of her pregnancy or from the moment she seeks to exercise her rights as set out in the Regulations. Regulation 13 provides for redress for any unfair dismissal. Regulation 14 makes any contravention of the regulations an offence punishable by a fine. The Employment and Industrial Relations Act of 2002 (Chapter 456 Laws of Malta, henceforth EIRA) and the Equality for Men and Women Act of 2003 (Chapter 452 Laws of Malta, henceforth EMWA) provide for civil liability in cases of discrimination. One issue that is still unresolved, despite relevant ECJ case law, is the interplay between maternity leave taken during the summer months when teachers are on their summer leave, for the practice is to refuse the periods of leave 'lost' once the school year resumes. It seems that discussions between the teachers' union (the Malta Union of Teachers) and the Government are taking place, although at one time it was denied that such talks were taking place.



⁵⁸² S. Skenderovska *Report from the focus groups in Kumanovo, Shtip, Kriv Palanka, Kochani and Bitola, and interviews with institutions* April-October 2011, <http://static.nationalromacentrum.org/pdf/istrazuvanje-zdravstvo.pdf>, accessed 12 November 2012.

⁵⁸³ As amended by Legal Notices 3 of 2004 and 427 and 431 of 2007. Part-time employees are protected by virtue of Legal Notice 46 of 2007 and Legal Notice 140 of 2007.

Directive 96/34/EC was implemented by the Parental Leave (Entitlement) Regulations of 2003 (Legal Notice 225 of 2003)⁵⁸⁴ and by the Urgent Family Leave Regulations 2003 (L.N. 296 of 2003), both adopted under EIRA. Parental leave of four months is given on grounds of birth, adoption or legal custody, until the child is eight years old. The right is non-transferable and must be exercised in periods of one month each. However, in the public sector one year per child is provided for and this can be shared. Rights apply to full-time employees and part-time employees who qualify for pro-rata leave in terms of the Part-Time Employees Regulations (Regulation 6, see 5. below). The right to return is safeguarded by Regulation 8, Regulation 9A provides for the right to request changes to working hours or patterns on return, and protection from unfair dismissal is provided by Regulation 10. A breach of the Regulations is an offence punishable by a fine of up to EUR 1 164.69, which many practitioners feel⁵⁸⁵ is an insufficient figure to act as a deterrent.

Directive 2002/73/EC was implemented by the EIRA and the EMWA. Remaining matters of doubt will be clarified through judicial interpretation in the light of the Directive. The entitlement to a one-year leave was provided for in the Collective Agreement for Employees in the Public Service for 2005-2010. This agreement introduced greater flexibility as regards the utilisation of the one-year parental leave for parents with children up to the age of six (as well as greater flexibility in working reduced hours and in taking vacation leave). A circular from the head of the Civil Service then extended the application of all family-friendly measures in force for public servants⁵⁸⁶ to the entire public sector, thus covering all public entities.

There are only a couple of reported cases concerning pregnancy, parental leave, parenthood etc. as such in Malta. Industrial tribunal cases are not adequately reported. Searches have been restricted to the Government's judgments reporting service (<http://www.gov.mt/justice/legalservices/judgments>). However, in one recent ruling an accounts clerk was awarded EUR 12 000 by the Industrial Tribunal by way of damages for unfair dismissal. Her employment was terminated one month after she informed her employer of her pregnancy.⁵⁸⁷ Another interesting and potentially important case (the *Psaila Savona* Case) is pending in connection with alleged unfair dismissal on grounds of pregnancy by a high-flying lawyer. She claims to have been unfairly dismissed on grounds of pregnancy. Her employer has argued that she was not an employee but a 'legal consultant' operating as a self-employed person and was not covered by employment legislation, as well as that she was not dismissed on grounds of pregnancy. The case is before the Industrial Tribunal, where it has been pending for some two and a half years. It might possibly test the limits of the antidiscrimination provisions of the EIRA and the Protection of Employment (Maternity) Regulations by reference to the definitions of 'employer', 'employee', 'contract of service' and 'contract of employment'. The proviso recently added to the definitions of contract of service and contract of employment by Legal Notice 44 of 2012⁵⁸⁸ might indicate an outcome in favour of the claimant if the facts show that she acted under instruction to a high degree; the Legal Notice was meant to 'clarify' certain provisions of the EIRA, and the claimant is likely to be arguing that irrespective of profession and designation she was in fact and in law an employee at the time of the occurrence of her dismissal, albeit as a highly qualified professional. The case might possibly give rise to the sort of preliminary reference that the author of this report considers may bring before the Court of Justice the issue of the personal (and/or relational) scope of EU anti-discrimination employment law.

⁵⁸⁴ As amended by Legal Notices 427 and 430 of 2007 and Legal Notice 204 of 2011. Legal Notice 433 of 2007 extended the Parental Leave and Urgent Leave Regulations to service with the Government.

⁵⁸⁵ This is not an empirical statement but a personal observation reporting opinions expressed in conversation.

⁵⁸⁶ These include, for fathers, birth leave of two working days.

⁵⁸⁷ 'Court: Woman who fell pregnant awarded £12000 for unfair dismissal' *The Malta Independent*, 25 May 2012, available on <http://www.independent.com.mt/news.asp?newsitemid=144843>, accessed 23 July 2012.

⁵⁸⁸ Employment Status National Order, available on <http://justiceservices.gov.mt/DownloadDocument.aspx?app=lp&itemid=22846&l=1> accessed 24 October 2012.

While the annual reports of the National Commission for the Promotion of Equality (NCPE) have sometimes referred to pregnancy discrimination complaints, these are very few in number as far as can be ascertained and no case details are divulged.

EIRA contains a general prohibition. The relevant law applies to direct and indirect discrimination. Article 28 prohibits victimisation in connection with complaints or proceedings brought in connection with any alleged breach of the provisions of the Act and therefore covers pregnancy/maternity/parental or paternity rights as referred to in Article 10 of the Act.

For some time there has been different treatment based on whether the employee worked in the public or private sector, with the former enjoying better rights to parental leave. However, there is no evidence as to variations in *the type* of discrimination that may be suffered across the public/private sectors or by reason of size of employer, and it is impossible to tell in the absence of raw data of such cases in the form of court judgments or specific studies and reports.

1.2. Social security and pension rights

Social security and pension rights remain unaffected by paid maternity and paternity leave.⁵⁸⁹ However, they can be affected by the taking of unpaid parental or adoption leave.

1.3. Self-employment

The Equality for Men and Women Act (EMWA) applies to all gainful activity including self-employment. The Act was amended in June to include a new definition of self-employed worker. It now provides that ‘self-employed workers in line with directive 2010/41/EU means all persons pursuing a gainful activity for their own account, and the spouses of self-employed workers not being employees or business partners, where they habitually participate in the activities of the self-employed worker and perform the same tasks or ancillary tasks’. The Act prohibits discrimination whether direct or indirect based on sex or because of family responsibilities, defining the latter as including treating a woman less favourably for reasons of actual or potential pregnancy or childbirth (Article 2(3)(b)), as well as treating men and women less favourably on the basis of parenthood, family responsibility or for some other reason related to sex (Article 2 (3)(c)). Article 7 of the Act grants assisting spouses the right to receive from their spouse fair compensation for their activity. This does not apply where the system of community of acquests or community of residue under separate administration exists between the spouses, as here the spouse shares in the income, but there is no specific reference to pregnancy or maternity. Then the Equal Treatment in Employment Regulations 2004⁵⁹⁰ (Legal Notice 461 of 2004, henceforth ETE Regulations), passed in order to implement Council Directive 2000/78/EC, were made applicable to the conditions for access to self-employment or to occupation by the Equal Treatment in Self-Employment and Occupation Order 2007 (Legal Notice 86 of 2007). The ETE Regulations apply to the public and private sector, including service with Government. Regulation 2(1) classifies as prohibited ‘discriminatory treatment’ any less favourable treatment of a woman related to pregnancy or maternity leave within the meaning of Directive 92/85/EEC. It may be that the Government feels that this combination of provisions provides adequate implementation of Article 8 of the Directive. It is arguable that Maltese law has already implemented Article 8 of Directive 2010/41 regarding maternity benefits for the self-employed by Legal Notice 86 of 2007 which extends the ETE Regulations to the self-employed. Regulation 2(1) of the ETE Regulations defines ‘discrimination’ as including any less favourable treatment of a woman related to pregnancy or maternity leave within the meaning of Directive 92/85/EEC. Regulation 3(1) provides that it shall be unlawful for a person to subject another person to discriminatory treatment, whether directly or indirectly, on the grounds, inter alia, of sex, including discriminatory treatment related to pregnancy or maternity leave as referred to in

⁵⁸⁹ See Fathers on Parental Leave, <http://www.eurofound.europa.eu/ewco/2010/02/MT1002019I.htm>, accessed 24 September 2012.

⁵⁹⁰ As amended by Legal Notices 53 and 338 of 2007, Legal Notice 137 of 2008 and Legal Notice 444 of 2011.

the Protection of Maternity (Employment) Regulations. Further, Regulation 12A, to be read *mutatis mutandis*, provides that it shall be the duty of the employer to take effective measures to prevent all forms of discrimination on grounds of sex, in particular harassment and sexual harassment in the workplace, in access to employment, vocational training and promotion. However, it is also arguable that this does not make for sufficiently clear implementation, in that it does not of itself clearly grant an individual substantive right to maternity benefits, nor indicate the ‘duty holder’ with sufficient clarity. In general, the piecemeal and cross-referencing approach does not provide for clarity, or certainty for the self-employed. One may note firstly that Regulation 15 of the ETE Regulations provides that ‘These regulations shall be without prejudice to the Protection of Maternity (Employment) Regulations, the Parental Leave Entitlement Regulations, and the Urgent Family Leave Regulations’, and secondly that the Equal Treatment in Self-Employment and Occupation Order 2007 (Legal Notice 86 of 2007, on which the first possible argument made in this section is premised) provides in Regulation 3 that the object of the Order is to ‘further implement the provisions of Directives 2000/43/EC and 2000/78/EC’. On this basis one might conclude that there is not, at the time of writing, a clear-cut provision in Maltese law unequivocally implementing Article 8 of Directive 2010/41/EU.

1.4. Access to and the supply of goods and services

The EMWA itself provides for non-discriminatory advertising, and access to banking, financial services and insurance services and educational and training opportunities, and for fair compensation for spouses participating in the activities of a self-employed partner (with an exception where a community of property regime exists between the spouses). The latter are now also included within the scope of the Act in general terms through inclusion in a new definition of ‘self-employed workers’.⁵⁹¹

The Access to Goods and Services and their Supply (Equal Treatment) Regulations (SL 456.01) (henceforth the Access Regulations), made under EMWA, implement Directive 2004/113/EC (Regulation 1(2)). Article 3(1) of the Directive is implemented by repetition in Regulation 1(3), while Article 3(4) of the Directive is rendered in Regulation 1(5) as: ‘These regulations shall not apply to matters of employment and occupation, nor to matters of self-employment, insofar as these matters are covered by other laws and regulations.’ This exclusion potentially creates borderline issues and puts an onus on Malta to continue to ensure that such other EU instruments as apply to employment, occupation and self-employment are properly implemented or amended in a timely manner.

2. Gaps in national law

2.1. Employment

No major gaps exist as far as legislation is concerned. This applies to the recruitment process, employment relations and conditions, promotion, remuneration etc. Nor has there been any reporting of difficulties with Article 5 of the Pregnant Workers Directive. As far as paternity leave is concerned, the NCPE has been conducting a campaign to make fathers and employers more disposed to its use, but it is too early to know what impact this has had. There is no reporting of discrimination, nor have there been any court proceedings.

2.2. Self-employment

As argued above, a clear-cut provision or set of provisions would appear to be needed in order to ensure full application of Article 8 of Directive 2010/41/EU. The law is not specific about the rights of fathers in the area of self-employment, but it is thought to be the case that male self-employed workers and male assisting spouses enjoy the same rights as females. This has not been the subject of case law.

⁵⁹¹ In virtue of Article 2(b) of Act No. IX of 2012, the Equality for Men and Women (Amendment) Act 2012, available on <http://justiceservices.gov.mt/DownloadDocument.aspx?app=lp&itemid=23428&l=1>, accessed 4 October 2012.

2.3. Access to and the supply of goods and services

Article 6 of the EMWA, which deals with insurance, is drafted in narrow terms (e.g. it speaks of insurance of a business or of the person in self-employment) and has not been amended since the judgment of the ECJ in *Test Achats*. Article 6(2) continues to provide that nothing in Article 6(1) containing the prohibition against discrimination in insurance shall be deemed to constitute discrimination *insofar as the conditions under which the insurance cover is offered or withheld* reflect genuine considerations based on the financial risk in the granting of such facilities or of such insurance cover. However, there seem to have been no court cases on this matter, nor studies produced to show the prevalence of any discriminatory practice.

2.4. Additional information

There is no additional information to report.

3. Involvement of other parties

The National Equality Body (the NCPE) is extremely active, through studies and research projects, awareness campaigns, information dissemination, and no doubt in advising the Government. Equally so are some NGOs such as the National Council of Women, which is most active on the lobbying and dissemination of information fronts.

Of course, employers would be bound to resist such family-friendly measures as the extension of maternity leave on a paid basis, where they were expected to foot the entire bill. They, through the Malta Employers' Association, considered that in a time of recession, such demands needed to be closely moderated and indeed at least partly funded by the Government.

4. Enforcement and effectiveness

4.1. General

In general sanctions are often not a sufficient deterrent. Civil damages are awardable, and in one recent case a sum of EUR 12 000 was awarded to an accounts clerk (a not negligible sum) but cases are few in number. Complaints to the NCPE are also low in number. The smallness of the country operates as a severe deterrent for complainants fearful of being labelled 'difficult'. I am not aware of any specific study that empirically shows that fewer women are employed because of the existence of pregnancy and maternity rights for women.

4.2. Legal redress

Delays in judicial proceedings, including in the supposedly fast Industrial Tribunal, are a major deterrent for potential claimants. The NCPE is there to provide information and assistance. It has conducted information campaigns in the past. However, the number of complaints can be counted on the fingers of one hand. The NCPE is also empowered to assist in the bringing of proceedings, but can only act with the consent of the complainant and in support of her application; there is great reluctance on the part of aggrieved parties to go down the litigation path. The NCPE's annual reports do not detail any cases of conciliation. Nor have any scientific studies been conducted in this regard. There does not appear to have been any rise in the number of cases since the introduction of the Recast Directive. The prevailing view is that the statutory sanctions are not dissuasive: the fines set out in the law are quite clearly inadequate for this purpose.

4.3. Access to information

As to research on awareness, there has not been any general study on the matter, but the NCPE conducted two quantitative research studies in 2011 in relation to rights and discrimination awareness among youths and public employees, and found that in general there was a good level of awareness as to what constitutes discrimination.⁵⁹²

⁵⁹² See NCPE Annual report 2011 p. 42, available on www.equality.gov.mt, accessed 18 August 2012.

The Government regularly makes public announcements as to any new women's rights or benefits introduced. Each time that the rights are improved (as a result of EU Directives, for example) the development is announced. However, on-going information is not a matter of daily practice. It is strongly suspected that women who have precarious or atypical employment contracts are at a general disadvantage, but there is little hard evidence of this. Current NCPE research is meant to throw light on this matter, as well as on the position of women from ethnic minorities.⁵⁹³

THE NETHERLANDS – Rikki Holtmaat

1. Existing legislation and case law

1.1. Employment

Protection against discrimination on the ground of pregnancy and motherhood/parenthood

The definitions of direct sex discrimination in Article 7:646(5) sub(b) Civil Code (CC)⁵⁹⁴ and in Article 1(2) Equal Treatment Act for men and women in employment (ETA)⁵⁹⁵ explicitly include discrimination on the grounds of pregnancy, giving birth/delivery and maternity into this concept. A similar inclusion of pregnancy etc. in the concept of direct discrimination is lacking in the General Equal Treatment Act (GETA);⁵⁹⁶ however, in Article 4 the GETA stipulates that it leaves the provisions of the Civil Code and the ETA intact. All of these laws contain a prohibition of indirect sex discrimination. This may include indirect discrimination on the ground of pregnancy/parenthood. The ETA and GETA have a wide *material* scope as regards the aspects of the employment relations that are covered (in conformity with the Directives).

The Civil Code also explicitly prohibits termination of an employment relationship with a worker *because a female worker is pregnant* (in Article 7:667(8) CC), and provides for protection against dismissal *during pregnancy or illness after the delivery* (Article 7:670(1 and 2) and (2)). It is equally prohibited to terminate an employment relationship *because someone has used his/her right to parental leave or other forms of care leave* (in Article 7:670(7) CC). On 1 March 2012, the provision in the Civil Code which prohibits dismissal because of using the right to parental leave (Article 7:670 (7) CC), was complemented by a provision in the Work and Care Act (WACA),⁵⁹⁷ (new: Article 6:1a) which offers protection against suffering any kind of disadvantage because someone has used his/her right to take parental leave or has assisted someone else to use such leave.⁵⁹⁸

Article 7:610 CC defines who may qualify as a worker. Temporary workers or flex workers are to some extent covered under Article 7:610a CC, which states that if someone works for someone else for at least three months on a weekly basis or at least for 20 hours a month, it is assumed that there is an employment relationship. According to a recent Act, for listed companies, the director of the company cannot be qualified as a worker in the sense of Article 7:610 CC.⁵⁹⁹ This means that women in high executive functions become more vulnerable to discrimination in this area.

The *personal* scope of the ETA is wider than that of the CC. The ETA is not only applicable to women with a civil-law or public-law (civil servant) employment relationship, but also to other categories of persons doing work (Article 1c ETA; e.g. volunteers,

⁵⁹³ But see Research Report: *Unlocking the Female Potential* ESF 3-47, NCPE 2012, available on www.equality.gov.mt, accessed 18 August 2012.

⁵⁹⁴ *Burgerlijk Wetboek*.

⁵⁹⁵ *Wet Gelijke Behandeling Mannen en Vrouwen bij de Arbeid*.

⁵⁹⁶ *Algemene Wet Gelijke Behandeling*, N.B.: This Act covers a broader scope than employment only and covers more grounds than only sex.

⁵⁹⁷ *Wet Arbeid en Zorg*.

⁵⁹⁸ Tweede Kamer 2010-2011, 33 197, nrs 1-3.

⁵⁹⁹ Act of 6 June 2011, Stb. 2011, 275; the date of coming into force has been postponed for technical reasons (see Tweede Kamer 2010-2011, 32 873, nr. 3).

apprentices, persons working in sheltered employment, homeworkers, tele-workers, persons employed/paid by a manpower agency, and persons who are assigned to do community work while receiving a social security or welfare benefit.)

Article 5 GETA covers all possible contractual relations where ‘work’ (in the widest possible sense) is involved, including situations where the ‘instruction element’ or ‘subordination element’ (required in Article 7:610 CC) might not be clearly established. Article 5 GETA therefore also covers persons doing all possible kinds of ‘flexible work’ and all situations that fall under Article 1c ETA (see above). It even covers membership of supervisory boards of institutions or even persons who are representatives in a public body (Members of Local Councils, Parliament, etc.).

Victimisation is prohibited in general, i.e. not specifically in relation to pregnancy discrimination.

There is no explicit right to return to the same or a comparable job after having taken pregnancy or maternity leave. According to the Government this right is guaranteed under the right not to be treated unfavourably with respect to any condition of work, or the prohibition on dismissing somebody *because of* pregnancy, childbirth or motherhood.⁶⁰⁰

There is no difference in the level of protection between employees of private companies (private employment) and civil servant (public employment).

Case law: Most discrimination cases in this area are dealt with by the Equal Treatment Commission (ETC)⁶⁰¹ (the main equality body). There are a great many cases; see below under *factual information*. An important case was decided in 2011, when the ETC, contrary to earlier cases, decided that a bonus did not constitute pay and that the claimant did not have a right to this bonus during her pregnancy/maternity leave.⁶⁰²

Measures to protect pregnant women and mothers (workers)/to facilitate the combination of work and care.

The following (administrative) laws are relevant:

The *Work and Care Act* (WACA) regulates the right to maternity leave, parental leave, adoption leave, short-term care leave and the right to leave for medical purposes, including IVF treatment. This law applies to all workers in a civil-law or public-law employment relation (Article 1:1b and b WACA).

Pregnancy/maternity leave: This provides for a 16-week pregnancy/maternity leave with 100 % of the salary in the form of a social benefit.

Parental leave: a right to unpaid leave for 13 times the weekly working time. Parental leave can be spread out. This right to leave is restricted to employees who have worked for the same employer for least one year, and is available if the relevant child is under 8. There is a Bill pending in Parliament in which it is proposed to abolish the waiting period of one year.⁶⁰³ Both parents have an individual right to parental leave according to art. 6:1 WACA. There is no right whatsoever to transfer the right to parental leave to the other partner under the Dutch legislation.

Adoption and foster-parent leave: the law includes fully-paid leave for both parents up to 4 consecutive weeks, to be taken between 2 weeks before the actual adoption of a child and 16 weeks following it. See Article 3:2 WACA, which provides for a right to fully-paid leave for both parents up to 4 consecutive weeks, to be taken between 2 weeks before the actual adoption of a child and 16 weeks following it.

Paternal leave: The term paternity leave (=‘*vaderschapsverlof*’) does not exist in the Dutch legislation. The law speaks of *kraamverlof*, which may be translated as: childbirth-

⁶⁰⁰ There are some court cases in which the court obliged employers not to make any changes in the position or tasks of an employee who was/had been on leave. See Willemijn Roozendaal *Werk en Privé; de strijd om tijd in het arbeidsovereenkomstenrecht* University of Nijmegen 2011, p. 197, referring to inter alia Cantonal Court The Hague, 30 June 2006, JAR 2006/196.

⁶⁰¹ *Commissie Gelijke Behandeling*.

⁶⁰² ETC 19 May 2011, Reference number: ETC 2011-79-80-81; source: <http://cgb.nl> (search using the number of the Opinion).

⁶⁰³ Tweede Kamer 2010-2011, 32 855, nr. 1-3.

leave or – literally: delivery leave) The WACA grants male and female (married, registered or living-together) partners of the mother of new-born babies the legal right to stay at home for two days after the birth of the child.⁶⁰⁴ Employers have to pay the full salary for those two days. In some collective agreements this right is extended by a few more days.⁶⁰⁵

Apart from this, the WACA also includes a right to *short-term care leave* (*kortdurend zorgverlof*), leave in case of *unexpected grave events* (*calamiteitenverlof*) and long-term care leave (*langdurend zorgverlof*).⁶⁰⁶

In 2011, the Government proposed a Bill to Parliament in which several of the procedural regulations concerning parental leave and adoption leave in the WACA will be changed in order to make it easier for workers to take leave and to arrange this leave in such a (flexible) way that it will meet their specific needs.⁶⁰⁷ In that context, it has been proposed to extend the period of pregnancy and maternity leave for women who are pregnant of twins by 4 weeks.⁶⁰⁸

The *Working Time Act* (WTA)⁶⁰⁹ contains a regulation regarding night work for pregnant workers, meaning that pregnant women may ask to be exempted from doing night shifts, the right to resting time and to medical examination leave. The WTA applies to categories of workers broader than only those who have employment relations under civil and public law (including quasi/para-subordinate persons).⁶¹⁰

The *Working Conditions Act* (WCA),⁶¹¹ and Governmental Decrees on the basis of the WCA regulate the health and safety of pregnant workers and women who have recently given birth. This Act has the same personal scope as the WTA.

Adjustment of working time is addressed in the *Adjustment of Working Time Act* (AWTA). The scope of this Act is restricted to businesses of at least 10 employees. Only employees who have worked for at least one year can submit a request for adjustment of working time. An employee's request for reduction or extension may only be rejected due to 'substantial business/service interests'.

According to the *Working Time Discrimination Act* (WTDA),⁶¹² unequal treatment on the ground of (the quantity of weekly) working time is prohibited. Furthermore, Article 3 of the AWTA guarantees that employees may never be dismissed due to a legal or extralegal request for adjustment of working time. In March 2012, a new provision was included in the WTA (Article 4:1b) in which the person who has used his/her right to take parental leave receives the right to request for adapted working hours during a period of one year after the parental leave period has expired. The request needs to be submitted 3 months before the end of the parental leave. The employer has to decide within a period of 4 weeks after the request has been made.⁶¹³

⁶⁰⁴ Article 4.2 WACA.

⁶⁰⁵ In 2007, Members of Parliament of the Green Left Party (*Groen Links*) initiated a Bill in which they proposed to extend this paternity leave to two weeks of paid leave for all 'partners' of the mother (including married, registered or lesbian partners). See Tweede Kamer 2006-2007, 31 071, nrs 1-3. This proposal was rejected on 18 February 2010. (See: <http://www.parlementairemonitor.nl/9353000/1/j9vviJSepmJ1ev0/vidf8ojvfxxg>, accessed 12 July 2012.) A new proposal was submitted in 2011, but did not obtain enough support either. However, a renewed proposal to extend paternity leave to one week was submitted on 16 June 2012. (See <http://nos.nl/artikel/384579-voorstel-langer-vaderschapsverlof.html>, accessed 12 July 2012.)

⁶⁰⁶ '*Levensloopverlof*' is a form of leave that existed between 2006 and 2012. It was in fact a fiscal scheme which allowed workers to save money in a fiscally-friendly way and to use this money at a later stage in life to replace their regular income when they wanted to take unpaid leave. Examples are leave for family reasons, leave for a sabbatical or leave for educational purposes. On 1 January 2013 it will be replaced by 'vitality leave', a similar fiscal programme to save money to take unpaid leave when convenient.

⁶⁰⁷ Tweede Kamer 2010-2011, 32 855, nrs 1-3: Voorstel van Wet houdende modernisering regelingen voor verlof en arbeidstijden (Proposal for a law modernising regulations concerning leave and working hours). According to the latest agenda of Parliament, the Bill will be discussed after the 2012 summer holidays.

⁶⁰⁸ Tweede Kamer 2010-2011, 32 855, nr 8.

⁶⁰⁹ *Arbeidstijdenwet*.

⁶¹⁰ More information about the personal scope is included in the Network Report on Personal Scope, submitted on 2 May 2012.

⁶¹¹ *Arbeidsomstandighedenwet*.

⁶¹² *Wet Onderscheid Arbeidsduur*.

⁶¹³ Tweede Kamer 2010-2011, 33 197, nrs 1-3.

Case law

Case law in this area mainly concerns the extent of the duties of employers to make adaptations to working time (i.e. what constitutes an *undue burden* for them or what would be *reasonable grounds* to refuse such a request) or their obligations under the WCA (protection of pregnant women).⁶¹⁴ In the past (until 2007) many court cases were initiated by female teachers about the connection/overlap between their pregnancy and maternity leave and the (compulsory) annual leave/school holidays.⁶¹⁵

Factual information

The ETC has conducted a study into pregnancy-related discrimination and discrimination of women with young children at the workplace this year (2012).⁶¹⁶ The reason for this report was that a relatively large percentage of all cases concerning (possible) sex discrimination that are brought to the attention of the ETC concern issues related to pregnancy/maternity or having to care for young children.⁶¹⁷

The ETC found that 45 % of the women who had given birth to a child in the previous 4 years (between 2007-2011) had suffered discrimination in relation to that fact.⁶¹⁸ The highest risks concern the refusal to conclude a contract (38 %), or to renew a temporary contract because of pregnancy (44 %). 3 % of the women with a permanent contract indicated that they were dismissed (partly) because of their pregnancy.⁶¹⁹ There is some evidence that in small firms there is more pregnancy-related discrimination than in large firms. There is also some evidence that higher-educated women suffer more often with respect to their possibilities for career advancement – after coming back from leave they often experience that their function has changed to their disadvantage. Lower-educated women more often suffer discrimination in the phase of concluding a contract/extension of a temporary contract. According to the report, the following groups suffer most from discrimination on these grounds: workers who have a managerial function (because they cannot be replaced easily), workers with a temporary contract, workers in the profit sector (as compared to the non-profit sector), women who are frequently on sick leave as a consequence of the pregnancy, women who had a complicated delivery, and women with children who suffer from health problems.⁶²⁰

The survey also reveals that women experience a lot of ‘trouble’ related to the enjoyment of their rights under the WACA, WTA and WCA. For example, 40 % of the women who wanted to breastfeed their child, indicated that the employer did not want to give them time off to do so.⁶²¹

⁶¹⁴ See for an in-depth analysis of this case law Willemijn Roozendaal *Werk en Privé; de strijd om tijd in het arbeidsovereenkomstenrecht* University of Nijmegen 2011, Section 4.6.

⁶¹⁵ See the overview presented in the Ad Hoc Request Report on Maternity Leave and Annual Leave, April 2011.

⁶¹⁶ See: Commissie Gelijke Behandeling: *Hoe is het bevallen? Onderzoek naar discriminatie van zwangere vrouwen en moeders van jonge kinderen op het werk* Utrecht March 2012. To be downloaded from: http://www.cgb.nl/publicaties/publicatie/225042/hoe_is_het_bevallen Onderzoek naar discriminatie van zwangere vrouwen en moeders van jonge kinderen op het werk. An English summary is available from this webpage; accessed 12 July 2012. For this study 1000 women filled in an online questionnaire and 6 in-depth interviews/case studies were carried out with working women and 19 with employers/personnel managers.

⁶¹⁷ Of the 139 sex discrimination cases that were investigated by the ETC between 2007 and 2010, 62 (45 %) were related to these issues. In approximately 50 % of these cases the ETC found that there was indeed unlawful discrimination (Commissie Gelijke Behandeling: *Hoe is het bevallen? Onderzoek naar discriminatie van zwangere vrouwen en moeders van jonge kinderen op het werk* Utrecht March 2012, p. 75.). In addition to formal requests for an Opinion, in the same period the ETC received 288 requests for information related to these issues (idem, p. 77).

⁶¹⁸ Commissie Gelijke Behandeling: *Hoe is het bevallen? Onderzoek naar discriminatie van zwangere vrouwen en moeders van jonge kinderen op het werk* Utrecht March 2012, p. 7 and p. 81.

⁶¹⁹ Commissie Gelijke Behandeling: *Hoe is het bevallen? Onderzoek naar discriminatie van zwangere vrouwen en moeders van jonge kinderen op het werk* Utrecht March 2012, p. 81.

⁶²⁰ Information derived from the conclusions of the ETC Report, p. 81 et seq.

⁶²¹ Commissie Gelijke Behandeling: *Hoe is het bevallen? Onderzoek naar discriminatie van zwangere vrouwen en moeders van jonge kinderen op het werk* Utrecht March 2012.

1.2. Social security and pension rights

Workers have a right to a social security benefit during pregnancy leave under the WACA. The WACA is applicable to workers who have an employment relation under civil or public law (Article 1:1a and b WACA). In this regard, the personal scope of the WACA is extended to workers who do not qualify as worker in the sense of Article 7:610 CC, but who work under similar conditions; i.e. to employment relations characterized by a certain dependency of the worker (quasi/para-subordinate persons).⁶²² Examples are various types of flex-workers or homeworkers. For some of these ‘quasi-subordinate workers’ a threshold is applicable: their employment relation must have a duration of at least 30 days, and the income must amount to at least 40 % of the minimum income as regulated by law. Also, for some employment relations the possibility of having social insurance is restricted to those who work at least on two days a week.⁶²³ Excluded from the scope of social security insurances are, among others, directors of a company who own a majority of the shares of the company and domestic staff that works on less than four days a week for the same employer.⁶²⁴ According to the Central Court of Appeal, the interpretation of ‘domestic staff’ includes not only persons cleaning the house or childminding and likewise, but also ‘professional carers’ such as trained nurses giving medical care at home in the service of an individual employer.⁶²⁵

Pregnant workers who are absent because of pregnancy outside the period of official pregnancy leave, receive income protection during two years on the basis of Article 7:629 CC and Article 29a Sickness Act (SA). Domestic workers who work on less than four days a week for the same employer, only enjoy income protection during six weeks under Article 7:629 CC.

Social benefits of self-employed persons: In the period between 2004 and 2008, the Dutch system did not include a right for self-employed women to enjoy a social security benefit during the period before and after the birth of their children. If they wanted compensation for their loss of income in that period, they had to conclude a private insurance contract. However, many insurance companies imposed severe conditions on these women (e.g. a waiting period of 2 years), so that it was practically impossible for most of them to get a pregnancy and maternity benefit.⁶²⁶ At the initiative of some MPs in 2008, the WACA was amended in order to (re)include a right for self-employed women to pregnancy and maternity leave benefits in the WACA. They now have a right of 16 weeks of pregnancy and maternity leave benefit at the maximum of 100 % of the (gross) minimum wage if they have worked at least 125 hours in the year before (Article 3:17 WACA). This benefit is much lower than for employees. A right holder of this benefit is, among others, the director/owner of a business. The domestic worker, working on less than four days a week for the same employer, is explicitly mentioned as a right holder in this regard (Article 3.17.1.a WACA).

Pensions: pregnancy/maternity-related discrimination in the area of pensions is prohibited in Article 12a ETA. This provision covers occupational pensions and contains a wide definition thereof; it includes pension arrangements both in the private and in the public sector of the labour market, and arrangements or regulations for organisations of professionals (liberal professions). Article 12b(1) ETA explicitly states that not only the employer (as addressed in Article 7:646 CC) and the public authorities (as addressed in Article 1b ETA) may not discriminate on grounds of sex in respect of occupational pensions, but that also ‘others’ are bound to this norm. This refers to the (boards of) the pension funds or other parties that set the conditions for participation in or benefiting from a fund (e.g. social

⁶²² See Article 4 Sickness Act (*Ziektewet*) and Article 8 Decree for special cases in social security (*Besluit aanwijzing gevallen waarin arbeidsverhouding als dienstbetrekking wordt beschouwd – Rariteitenbesluit*).

⁶²³ See Article 1 and 5 *Besluit aanwijzing gevallen waarin arbeidsverhouding als dienstbetrekking wordt beschouwd – Rariteitenbesluit*, Stb. 2008, 574.

⁶²⁴ Article 6 Sickness Act.

⁶²⁵ CRvB 29 April 1996, RSV 1996/247.

⁶²⁶ The Supreme Court established that this was in compliance with CEDAW and EU law. Supreme Court of the Netherlands (Hoge Raad der Nederlanden), 1 April 2011, LJN BP3044. <http://zoeken.rechtspraak.nl/> (search: LJN: BP3044), last accessed 12 July 2012.

partners who conclude collective agreements to that effect). The ETC has indeed heard cases that were directed against boards of pension funds or social partners.

The right to statutory pensions (AOW) is not affected by taking any kind of leave, as long as the person continues to be an inhabitant of the Netherlands. During the period of pregnancy/maternity leave occupational pension rights will continue to accrue. It depends on the scheme whether there is an accrual of such pension rights during periods of unpaid parental leave. If so, it depends on the pension scheme whether the employer will continue to pay its part of the premium. Periods of unpaid leave for raising children or other care responsibilities are not taken into account for the accrual of an occupational pension.

1.3. Self-employment

Measures to protect against discrimination on the ground of pregnancy and motherhood/parenthood

Self-employed workers are covered under the ETA (Article 2) and the GETA (Article 6), prohibiting discrimination in the ‘liberal professions’. This covers the conditions for access to and the possibilities to exercise and to develop oneself within a liberal profession.

The term ‘liberal profession’ (‘*vrij beroep*’; literally: ‘free occupation’) not only covers doctors, architects etcetera, but also freelancers, sole traders, entrepreneurs, etcetera. Anyone who wants to conclude a contract with someone who works in a ‘liberal profession’ or who wants to engage into a kind of permanent co-operation with such a ‘worker’ (e.g. in an association of lawyers or notaries working together in one office), or who is involved in a professional organisation (*beroepsorganisatie*) of these workers, has to refrain from discrimination on the ground of sex. This includes discrimination on the ground of pregnancy/parenthood. It is commonly held that spouses of self-employed persons who work with/for their partner are covered by these provisions as well. There may be an overlap with the protection against discrimination in the area of goods and services where the self-employed person offers her services on the market (see below, in 2.3. of this country report).

The ETC has only dealt twice with pregnancy discrimination of self-employed persons: one case concerned a lawyer whose period of leave was not taken into consideration for the required period of traineeship, the other case concerned a private sickness benefit insurance that excluded sickness related to pregnancy.⁶²⁷

Measures to protect pregnant self-employed persons/to facilitate the combination of work and care

Self-employed persons do not fall under the scope of the WTA and WCA. The WTA provides for the possibility to include self-employed persons (Article 2:7 WTA). This inclusion is applicable in some sectors.⁶²⁸ However, the section of the WTA on pregnant workers is not applicable to these self-employed persons. They do fall under the WACA insofar as the right to a benefit during pregnancy and maternity leave is concerned (see above, in 1. 2 of this country report).

1.4. Access to and the supply of goods and services

Discrimination as regards access to and supply of goods and services is prohibited in Article 7(1) GETA if the alleged discriminatory acts are committed (a) in the course of operating a business or exercising a profession, (b) by the public service, (c) by institutions which are active in the field of housing, social services, healthcare, cultural affairs or education, or (d) by private persons not engaged in operating a business or exercising a profession insofar as the offer is made publicly. This covers pregnant women/breastfeeding women/parents who offer such services (but they can also be covered in their capacity as self-employed persons!) and also customers of services/goods who are pregnant/breastfeeding or parents.

⁶²⁷ A search on the ETC’s website (using search terms ‘pregnancy’ and ‘self-employed’) showed two cases between 1994-2012, Opinion 99-95 and 96-19.

⁶²⁸ Kamerstukken II 1994/95, 23646, nr. 3, p. 84-85; see inter alia Working Time Regulation of 4 December 1995, Stb. 1995, 599; Working Time in the Transport Sector, Regulation of 14 February 1998, Stb. 1998, 125.

Between 1994 and 2012 only seven cases were brought to the attention of the ETC in which pregnant women complained about discrimination in the area of goods and services.⁶²⁹ Five cases concerned sickness and disability insurance schemes for self-employed persons. In one case, the insurance normally did not pay benefits for the first month of sickness, but extended this waiting period to 3 months in the case of pregnancy-related inability to work (Opinion 2007-63). The ETC Opinions 2004-44, 2006-232 and 2005-80 concerned pregnancy/maternity leave of self-employed women who were not eligible for pregnancy and maternity benefits because they did not fulfil the company's requirements in terms of a waiting period of 2 years. The ETC found that such long waiting periods were discriminatory against women. These cases were also brought before regular (civil) courts, which decided that the insurance company was allowed to offer two different types of insurance contracts: one for sickness and disability, and one for pregnancy and maternity leave as a cause of loss of income; therefore their practice of having a long waiting period for pregnant women was not discriminatory against women.⁶³⁰ ETC Opinion 2006-44 concerned a woman who was already pregnant when she concluded an insurance contract. In that case, the ETC found that she could not claim a benefit, because insurances are meant for 'uncertain events', which requirement was not fulfilled in this case. In another case a woman complained about the fact that a health insurance company only refunded costs for contraceptive pills for women. She made this complaint because she had two sons who could not claim any refunding of money spent on 'male' contraception. However, the ETC decided that the woman did not have a case because she had already terminated the insurance contract with this company for other reasons (Opinion 2006-225). The last case (2009-71) concerned a female student who complained that her university had refused to allow her to do a re-sit for an exam on another than the fixed date (which was the date that she was due to give birth) with the consequence that she had to take the same course again in the next year. The ETC found that this policy, in which no exceptions were possible for pregnant women, constituted direct discrimination against this student and recommended the university to change the regulations in order to allow exceptions for pregnant women in the future.

2. Gaps in national law

2.1. Employment

In terms of legal measures being in place, there are no gaps, apart from an explicit provision that women who return from pregnancy/maternity leave may not suffer any negative consequences as a result (see above, in 1.1. of this country report). In practice, it appears difficult for women to enjoy all their employment-law rights (to non-discrimination and to protection), see the report issued by the ETC in 2012 (mentioned in 1.1.).

A legislative gap is the fact that fathers/partners only have 2 days of paid leave when their baby is born. This should be extended to at least 2 weeks, as was proposed in the European Parliament in March 2011.⁶³¹

A great practical problem is the fact that nowadays young women are very often employed on the basis of temporary contracts, and that they run a high risk that the contract is not renewed as soon as the employer finds out about the pregnancy/wish to have children. Although there is legal protection against such discrimination, this does not suffice to stop this practice (see the report of the ETC, discussed in 1.1.).

⁶²⁹ Found after a search on the ETC's website using the terms 'pregnancy' and 'goods and services'.

⁶³⁰ These are the so-called Movir cases, named after the insurance company involved. *Rechtbank Utrecht* (District Court) 2 April 2008, LJN: BC8320 and Supreme Court Judgment of 11 July 2008, LJN: BD1850.

⁶³¹ See press release EP 20-10-2010, to be downloaded from <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/10/509>, accessed 16 March 2011.

2.2. Self-employment

The fact that self-employed women do not fall under the protective legislation (WTA and WCA) means that they themselves have to ensure that their working conditions do not harm their own and/or their child's health or mental condition (stress). However, it would be difficult to 'grant' self-employed women such protective rights under the law, since there would be no duty holder who could be held accountable for the non-implementation/violation of such norms.

As far as I know, there are no parental-leave schemes for male or female partners of a self-employed woman/mother, let alone any financial allowances to compensate for the loss of income during that period. (There is no parental leave for mothers either!)

2.3. Access to and the supply of goods and services

In principle, all examples of discrimination mentioned in the questionnaire could be contested on the basis of the GETA (Article 7).

2.4. Additional information

There is no additional information to report.

3. Involvement of other parties

Social partners and the ETC (equality body) are very much involved in enhancing the rights of pregnant women, women who have recently given birth and of parents who have care obligations. Social partners make much effort in terms of improving conditions (through collective agreements) and the ETC supervises the implementation of the legal norms (by means of Opinions in individual cases and studies into the structural nature of this kind of discrimination). In addition, there is a designated role for the Working Conditions Services (*Arbodiensten*) who assist employers in the implementation of the norms under the WTA/WCA, and for the Labour Inspectorate (*Arbeidsinspectie*), which implements/supervises the WTA/WCA. The Labour Inspectorate also has a role in supervising the prevention of discrimination in the workplace. They require the employer to make an annual 'risk assessment', in which all conditions at work that may become a potential risk for the physical and mental health of the employees are described and in which an adequate plan of action is included. The Works Council can play an active role as well. It is not known to what extent Works Councils are inclined to propose specific measures for pregnant women/women who have recently given birth and/or parents.

4. Enforcement and effectiveness

4.1. General

To my knowledge, there are no studies that explicitly address the allegation (by employers) that pregnancy and maternity rights for women in the labour market lead to lower numbers of women being employed.

4.2. Legal redress

Legal remedies in this area are the same as for all other forms of discrimination. The ETC study (see 1.1.) has revealed that women who are aware (also see below, in 4.3.) that they are being discriminated against are nevertheless reluctant to bring claims against their employer. They fear that the employment relationship will be seriously negatively affected as a result of such claims. The fear of victimisation is a general problem in non-discrimination law.⁶³² However, the situation may be worse in respect of pregnant women, who know that they have a very vulnerable position and are strongly dependent on the employer's cooperation, e.g.

⁶³² See M. van Genugten & J. Svensson *Dubbel de dupe? Een studie naar de benadeling van werknemers die ongelijke behandeling aan de orde stellen* University of Twente/ CGB, 2010; to be downloaded from <http://cgb.nl/publicaties/onderzoeken>, accessed 12 July 2012.

with respect to the way that they want to take parental leave or the adaptation of working time after the period of leave has expired.

4.3. Access to information

The research conducted by the ETC in 2011 shows that many women who have experienced situations that would formally qualify as pregnancy-related discrimination do not consider them as such.⁶³³ Also many women indicated that they had not submitted a formal complaint about the (discriminatory) situation, neither with their superior/employer nor with the ETC or a court. The ETC states that it found that women as well as employers lack knowledge about the relevant rights. It therefore recommends that both the Government and employers increase their knowledge about the legal regulations concerning pregnancy, maternity and parental leave and care leave. The ETC has a specific website giving information about all issues related to pregnancy and work.⁶³⁴

NORWAY – Helga Aune⁶³⁵

1. Existing legislation and case law

Existing legal stipulations designed to tackle pregnancy and maternity-related discrimination in Norway are found in three distinct pieces of legislation. The Gender Equality Act (GEA)⁶³⁶ provides protection against discrimination because of gender, including pregnancy and maternity/paternity-related discrimination. The Working Environment Act (WEA)⁶³⁷ covers rights of employees in relation to the rights to leave/absences and working hours/working arrangements. The National Insurance System (NIA)⁶³⁸ provides financing of some of the rights set forth in the WEA, and also covers the economic loss of income for the self-employed. Additionally, rights are found in collective agreements and in individual employment contracts.

The legislative framework addressing rights in relation to pregnancy, maternity, paternity and parental leave contains enforcement bodies set up according to the different frameworks, which are either alternative dispute mechanisms or enforcement bodies necessary for court litigation. These enforcement bodies include the National Insurance Court, the Dispute Resolution Board, the Gender Equality and Anti-Discrimination Ombud and its complaints body the Gender Equality and Anti-Discrimination Tribunal. The use of these administrative bodies implies that a major part of the case law linked to the legislative reconciliation framework is found in the administrative bodies, and not within the ordinary court case law.

Most complaints regarding discrimination on grounds of pregnancy and/or related leaves are brought before the Gender Equality and Anti-Discrimination Ombud.⁶³⁹ The Ombud's decision may be appealed before the Gender Equality and Anti-Discrimination Tribunal. The complaint system is a free-of-charge, low-threshold system and appears to be so sufficient that hardly any cases on pregnancy discrimination reach the ordinary courts. Any complaint may be brought before the ordinary courts without having been tried in advance by the equality bodies. However, the Supreme Court has not handled cases concerning pregnancy/paternity leave discrimination since a now outdated verdict in 1988 (Rt-1988-

⁶³³ Commissie Gelijke Behandeling *Hoe is het bevallen? Onderzoek naar discriminatie van zwangere vrouwen en moeders van jonge kinderen op het werk*. Utrecht March 2012 p. 81.

⁶³⁴ See www.zwangerenwerk.nl. Also see <http://www.arbo-advies.nl/zwangerschap.htm>, a website of the main organisation that implements the WCA (*Arbodienst*), accessed 12 July 2012.

⁶³⁵ The expert was assisted by Else Leona McClimans in the elaboration of this report.

⁶³⁶ Act of 9 June 1978 No. 45 on Gender Equality.

⁶³⁷ Act of 17 June 2005 No. 62 relating to working environment, working hours and employment protection etc.

⁶³⁸ Act of 28 February 1997 No. 19 on National Insurance.

⁶³⁹ Statistics on the Ombud's cases are available on the homepage of the Ombud, see www.ldo.no, accessed 24 September 2012. The cases of the Equality Tribunal can be found on www.diskrimineringsnemnda.no, accessed 24 September 2012.

766).⁶⁴⁰ The landmark case in terms of establishing the level of compensation relating to pregnancy discrimination was handled by the Appellate Court of Hålogaland in 2009.⁶⁴¹

1.1. Employment

GEA Section 3 establishes the main rule that direct or indirect differential treatment of men and women is not permitted. The GEA has a general scope and covers all sectors, both public and private. In 2002 the prohibition against pregnancy discrimination was ‘upgraded’ to specify that the prohibition against pregnancy-related discrimination was considered direct discrimination. The legislative change also sought to cover the discrimination that men are subject to when carrying out their role as care givers, so that the leave of absence due to the birth or adoption of a child was sought to be covered.⁶⁴² National legislation thus specifies in Section 3(2)2 that the term ‘direct differential treatment’ shall mean actions that place a woman in a worse position than that in which she would otherwise have been because of pregnancy or childbirth, or place a woman or a man in a worse position than that in which the person concerned would otherwise have been because of her or his exercise of rights to take leave of absence that are reserved for one of the sexes. The latter part of the section specifies that differential treatment occurring either during the 12 compulsory weeks of paternity leave or the 9 compulsory weeks of maternity leave shall be considered direct discrimination. Any differential treatment occurring during the parental leave is assessed as indirect discrimination. The various rights to periods of leave not reserved to the one or the other of the parents will be evaluated according to the prohibition of indirect discrimination.

Discrimination because of pregnancy-related illnesses is also covered by the GEA. The WEA furthermore has a number of specific entitlements for pregnant workers in order to allow them to work in a safe environment.

The mother has the right to pregnancy leave for up to 12 weeks during pregnancy.⁶⁴³ In reality, most women stop working 3 weeks before giving birth, which is compulsory. If they need additional time off before the birth for health reasons, most women opt for sick leave paid through the national insurance system, so that the right to the full 12 weeks of (unpaid) leave during pregnancy as secured in the WEA is seldom invoked in practice. The mother is also entitled to 6 weeks of leave after the birth of a child, unless she produces a medical certificate stating that it is better for her to resume work.⁶⁴⁴ These weeks are compulsory also if the mother is not awarded child custody, or if the child is stillborn.⁶⁴⁵ A miscarriage will allow for sick-leave benefits. For a stillborn child born after 26 weeks, the mother has a right to maternity leave benefits for 30 days after the birth if she qualifies for maternity benefits. If not, she has a right to a cash benefit.⁶⁴⁶

The father is entitled to a two-week leave of absence from work (*care leave*) in connection with childbirth in order to assist the mother.⁶⁴⁷ If a person other than the biological father assists the mother, as a result of the parents not living together, this other person may be granted the two-week leave. This is a right to leave in connection with the actual birth of the child, and is a right to time off that is independent of the father’s quota as described below. The father is also entitled to leave if the child is stillborn (after 26 weeks).

Parents are entitled to leave of absence – parental leave – for a total of 12 months.⁶⁴⁸ The right to paid maternity leave, paternity leave and parental leave are regulated in the National Insurance Act, Sections 14-4 to 14-13. The parental leave with full pay is currently at 47

⁶⁴⁰ Here the Supreme Court accepted pregnancy as a reason to terminate an employment contract as the employer alleged that the pregnancy was a ‘lacking prerequisite’ in terms of fulfilling the contract.

⁶⁴¹ See Court of Second Instance/Hålogaland Appellate Court, Judgment of 21 January 2009 LH-2008-99829 (*Bang*). The other case regarding pregnancy/maternity discrimination handled by the appellate court is the Court of Second Instance/Eidsivating Appellate Court 12 December 1994, Case no. LE 1994-892 (*Lufthansa*).

⁶⁴² See proposal to the *Odelsting* no. 77 (2000-2001) Chapter 6.6.2.

⁶⁴³ See WEA Section 12-2.

⁶⁴⁴ See WEA Section 12-4.

⁶⁴⁵ See legislative proposal to Parliament, Ot.prp.nr.3 (1975-1976) kap. IX 4.3.3.

⁶⁴⁶ See Circular from NAV of 18 December 2006, revised 9 July 2012.

⁶⁴⁷ See WEA Section 12-3.

⁶⁴⁸ See WEA Section 12-5(1).

weeks, or 57 weeks at 80 % pay. From this, 9 weeks are reserved for the mother and 12 weeks are reserved for the father (the father's quota); the remaining 26 weeks can be shared between the parents according to their wishes. In order to stimulate equality in parenthood, the father's quota introduced in 1993 is a compulsory part of the paid parental leave scheme. Parents each also have the right to a further year's leave without pay (the 'toddler leave'). The right to maternity leave, paternity leave and parental leave are individual rights largely based upon the individual employee fulfilling qualification requirements. The purpose of parental benefits is to substitute the loss of income during the leave. A key requirement is previous occupational activity for at least six of the last ten months before the benefit period starts.

Adoption: All regulations concerning parental leave and discrimination because of leave apply accordingly in the case of adoption.

Returning from maternity leave: At the end of every type of leave, whether maternity, parental or adoptive, employees have a right to return to their former positions at the workplace in the same job or 'equivalent or similar job' as well as maintaining their salary. In Norway, cases from the Equality Ombud and Equality Tribunal show that this requirement in practice is not always complied with. Tribunal Case 22/2006 is a good illustration: A woman was given different work responsibilities upon her return from maternity leave. A large part of the accounting tasks that she had had prior to taking leave had been taken away from her. The substitute who was employed when the appellant went on leave and who had since been given permanent employment, was now carrying out the tasks that the appellant had been deprived of. The parties agreed that the appellant's tasks had been more varied before she went on leave, and that the tasks she had had at that time offered greater potential for developing and maintaining accounting expertise. The employer had not proved to a sufficient degree that all the employees in the company had been subjected to similar changes while the appellant was on leave. The changes in the appellant's work responsibilities were therefore in breach of Section 3 of the Gender Equality Act.

Breastfeeding: Women have a right to time off from work for breastfeeding at least thirty minutes twice a day or the mother can demand a reduction of the working time by one hour each day, as per WEA Section 12-8. This is only a right to time off, not a right to paid leave. However, the right to paid leave is found in a number of collective agreements.⁶⁴⁹

Dismissals: WEA Section 15-9 regulates protection against termination of an employment contract in relation to pregnancy, maternity leave or adoption. In short: dismissal because of any of these leaves is prohibited. Although a specific protection exists against dismissal during pregnancy or following the birth or adoption of a child meaning that the employee cannot be dismissed for this reason alone, court cases show that this is still an area in which discrimination occurs. These dismissals are seen both when pregnant workers are rejected from a job they have been hired to do, or dismissed because of pregnancy.

In a judgment of the Oslo Court of First Instance (TOSLO-2006-52718 *Barista*), an employee working within the six-month probationary period was dismissed three days after she informed her employer about her pregnancy. The dismissal was grounded in the employer's dislike of the employee receiving private visits in the coffee bar where she worked, and various complaints regarding tidiness and cleanliness. The Court found the dismissal unjustified, as the employer had not managed to justify the dismissal by other circumstances than the pregnancy. Similarly in another judgment in the Oslo Court of First Instance (TOSLO-2009-154182), the dismissal of a pregnant worker was found unjustified, although

⁶⁴⁹ This is a proposal to introduce an obligation on the employers to pay for the time off from work due to breastfeeding; the deadline for comments to the proposal is 12 September 2012, see <http://www.regjeringen.no/nb/dep/bld/aktuelt/nyheter/2012/ammefri-med-lonn.html?id=685046>, accessed 17 August 2012.

the justification given by the employer – unproved embezzlement – was not related to the pregnancy. The Court found the real reason to be the pregnancy.

In addition to the specific protection against dismissal of the WEA, GEA Sections 3 and 4 prohibit direct differential treatment due to pregnancy or maternity leave and indirect differential treatment due to pregnancy and parental leave regarding working conditions and termination of the employment contract.

In the judgment from Hålogaland Appellate Court (Case LH-2008-99829) as referred to above, the Court found that a recently hired employee could not be dismissed before she had commenced working in the position. The key issue of the case was whether or not a binding employment contract had been entered into and if the pregnancy was the reason why the employee was not accepted as the general manager in a travel agency. The Court found that the decision not to hire her in reality was a dismissal. The dismissal was thus found to be a violation both of WEA Section 15-9 as well as GEA Section 3(2)2.

Victimization: National legislation does not specifically refer to victimization in relation to pregnancy/maternity/parental or paternity rights. Pregnancy or parental rights do not depend upon the type or size of the employer, but maternity/adoption/parental/paternity rights apply differently depending on whether the employee was a self-employed person or an employee.

There is no evidence that discrimination on the grounds of pregnancy and maternity (adoption, parental or paternity leave) vary according to the type of employer or the size of the employer. What is noticeable, however, when assessing the cases of the Gender Equality Ombudsman/Gender Equality Tribunal is that there seems to be a majority of public-sector employees among the complainants. This is probably not necessarily because more pregnancy-related discrimination occurs in the public sector, but rather because public-sector employees have a higher degree of job security in their positions, and thus have the courage to stand up for their rights.

1.2. Social security and pension rights

As the benefits received from the National Insurance Scheme during maternity/paternity and parental leave are accrued before the employee goes on leave, the acquired rights are still intact. Paid maternity and parental leave are treated as paid leave regarding social security and pension rights. The different phases of the leave are treated similarly. However, for the generation of women now becoming pensioners, many stopped working for several years when their children were young, and thus lost out on this in relation to pension rights. This was challenged from a gender perspective in a Supreme Court case in 2003, but the claim was denied.⁶⁵⁰

In order to mitigate the challenge for women who stop working or start working part time after having children, a system of *care credits*⁶⁵¹ was introduced in relation to pension credits in the National Insurance system. Periods of interruption of employment due to bringing up children are credited through care credits. ‘Persons’ who take unpaid care of children under the age of 7, and of disabled, sick or elderly people at home are credited with 3 pension points in the supplementary pension scheme, corresponding to pension entitlements based on an income from work of approximately EUR 32 677 (NOK 281 024). All mothers (or fathers, if the parents wish) of small children are given these credits, but if the mother (father) works outside the home, with a pensionable income higher than that worth 3 credits, their care credits are disregarded.

1.3. Self-employment

The protection against discrimination in GEA Section 3 also applies to self-employed persons. Self-employed persons may voluntarily insure themselves under the NIA, see Section 8-36. They may choose to pay premiums allowing 100 % coverage of lost income to a

⁶⁵⁰ See Supreme Court judgment of 27 November 2003, Rt-2003-1657.

⁶⁵¹ ‘*Pensjonspoeng*’: pension points.

maximum of 6 G (EUR 64 270,79),⁶⁵² either from the first day of leave or from the seventeenth day of the leave, provided that the self-employed person in question has been running a business for at least ten months before the birth. In case of premature birth, an exception will be made to the ten-month rule. Where the self-employed persons/couple are farmers, the mother or the father may receive compensation for hired help to take over from the parent who is on leave to take care of the child.⁶⁵³

1.4. Access to and the supply of goods and services

The GEA covers all sectors and all areas through the general prohibition of discrimination as described above.

2. Gaps in national law

In general, Norwegian legislation appears to be sufficiently implemented as far as the Directives are concerned. However, the vast number of cases shows that in practice discrimination because of pregnancy/maternity/paternity/parental/ adoption leave continues.

2.1. Employment

Recruitment process: In principle national legislation includes effective protection against pregnancy discrimination in relation to access to employment. In 2010 legislation was enacted to prohibit the employer seeking information concerning pregnancy, adoption or family planning in the hiring process of new employees. GEA Section 4(3) reads as follows: ‘During the hiring process, including during the interview, the employer may not ask the applicant, irrespective of gender, to provide any information on pregnancy, adoption or family planning. Nor may the employer implement measures to obtain such information in some other way.’

This does not mean that these issues in reality are not somehow mentioned in interviews – there are many ways of asking a question – but the prohibition does send a clear signal to both employers and employees that family planning is not a condition that may be used as part of the hiring process. Evidence of discussions on family planning may also shift the burden of proof to the employer, as the fact that the issue has been raised with the applicant may signal that it has been a consideration in the hiring process.⁶⁵⁴

Remuneration: Although acquired rights – including pay – shall be maintained during leave, remuneration continues to be a problematic area. White Paper no. 6 ‘*Gender and Pay. Facts, analysis and measures*’ published in 2008 sums up the findings of the Equal Pay Committee in five points explaining the reasons for the current pay gap of 15 % between men and women. It is well documented that this pay gap increases during the time of parenthood.⁶⁵⁵ Two measures proposed by the Committee to address these findings are a more balanced sharing of the parental leave between men and women, and strengthening the rights to an average pay increase after return from parental leave. More balanced sharing of parental leave was enacted by amendments to Chapter 14 in the NIA in May 2012, to enter into force on 1 July 2013.⁶⁵⁶ The amendment divides the leave into three parts: 12 weeks reserved to each of the parents and the remaining weeks to be divided between the parents as they see fit. However, the 12 weeks for mothers include the compulsory maternity leave covering the first six weeks after birth. This is not equal treatment considering the very specific biological situation of women who have just given birth. As concerns strengthening the rights after return from parental leave as regards pay etc. the legislative process is still at the level of discussions, but the proposals are to specifically provide a right to the same position or at the

⁶⁵² Exchange rate 7,4 Norwegian Krone for 1 Euro, on 3 October 2012.

⁶⁵³ See Regulations regarding substitutes for positions within the agricultural business of 23 November 1998, no. 1086653.

⁶⁵⁴ See GEA Section 16.

⁶⁵⁵ White paper NOU 2008:6 on *Gender and Pay. Facts, analysis and measures*. See <http://www.regjeringen.no/nb/dep/bld/dok/NOUer/2008/nou-2008-6.html?id=501088>, accessed 24 September 2012.

⁶⁵⁶ See <http://www.stortinget.no/no/Saker-og-publikasjoner/Saker/Sak/?p=52906>, accessed 17 August 2012.

same level as before the leave as well as a right to start pay negotiations upon return from leave.⁶⁵⁷

Termination of the employment contract: There is no further evidence of pregnant women or mothers being ‘forced’ out of their employment in other respects than those currently being addressed in the case work of the Equality Ombud/Tribunal/courts. However, an important aspect of job security is actually getting a job. The Equality Tribunal has handled a number of cases in which applicants for a job were passed over because they were pregnant.⁶⁵⁸ There is furthermore ample evidence that fixed-term contracts are not renewed for reasons connected to pregnancy, maternity or parental leave. In Norway, an area that remains problematic is the extended use of temporary employment contracts in the public sector, especially within sectors where (young) women form a large part of the workforce, e.g. the health sector. In many instances, the contracts of pregnant employees working on a temporary contract are not renewed before giving birth, but they are rehired only at the end of the parental leave. An interesting illustration is the decision of the Equality Tribunal in its Case 13/2009, which ironically concerned a hiring situation in the Women’s Department (!) of a hospital: A young medical doctor did not get her temporary position renewed. The employer was cited as stating: ‘it would be strange to hire someone in an announced vacancy that would be going on parental leave and not work’. Based on the facts of the case (earlier renewals of temporary contracts, lack of qualified staff in the department), the Tribunal found that the woman had been discriminated against because of her pregnancy leave.⁶⁵⁹

As a consequence of this practice, the person on leave is technically not an employee during the leave period and is therefore derived any rights in relation to pension, insurances etc. This can be unfortunate for the person e.g. in relation to pregnancy-related illnesses etc., and is therefore an area of concern.

Involvement of fathers: On 1 July 2011 the father’s allocated amount of parental leave was increased by an additional week and it now amounts to twelve weeks altogether.⁶⁶⁰ None of the weeks of the father’s quota may be transferred to the child’s mother, or vice versa. If the father does not use his quota, the time is lost.⁶⁶¹ Furthermore the remaining 26 weeks can be shared between the parents according to their wishes. It is also possible to divide the leave over a longer period of time, to a maximum of three years, by working part-time.⁶⁶² The father can take the paternal quota at any time during the benefit period, but after the first six weeks following the birth. These weeks are earmarked for the mother for medical reasons. The father can choose whether to take his entire period of paternity leave in one go or take flexible parental leave whereby a reduced parental benefit is combined with reduced working hours. Statistics show that fathers are using their right to leave. Cases brought before the Equality Ombud show that men are also subject to discrimination in relation to leaves. The claimants in the Ombud’s Cases 8/2007, 9/2007, 41/2009 and 19/2010 were men who claimed that they were passed over either because of using parental leave, or because of their caring responsibilities in relation to small children.

Statistics show that mothers both use the majority of the total leave period and have a significantly longer parental leave than fathers, although fathers have a high uptake of the father’s quota. Mothers use an average of 88 % of the parental leave days.⁶⁶³ Studies furthermore show that a number of women use this right to unpaid leave, but fewer men. In

⁶⁵⁷ See <http://www.stortinget.no/no/Saker-og-publikasjoner/Saker/Sak/?p=53952>, accessed 17 August 2012.

⁶⁵⁸ The Equality Tribunal has handled alleged gender discrimination in the hiring process in a number of cases, e.g. in Cases 5/2006, 8/2006, 19/2006, 23/2006, 25/2006, 26/2006, 6/2007, 10/2007, 6/2008, 13/2008, 16/2008, 25/2008, 4/2009, 13/2009 and 5/2011, which all concerned women. The claimants in Cases 8/2007, 9/2007, 41/2009 and 19/2010 were men who claimed that they were passed over either because of using parental leave, or because of their caring responsibilities in relation to small children.

⁶⁵⁹ Similar issues were also handled in Tribunal Cases 5/2011, 32/2009, 18/2009 and 13/2008.

⁶⁶⁰ See NAI Section 14-12.

⁶⁶¹ See NAI Section 14-10.

⁶⁶² See NAI Section 14-10(3) and WEA Section 12-6.

⁶⁶³ See Report no. 6 to the Storting (Parliament) (2010–2011) on *Gender Equality for Equal Pay*, point 6.1.6.

the statistical material used by the Norwegian Welfare Administration (NAV), they found that unpaid leave was used in 10 % of the leave-periods studies. In 73 % of the cases, only the mother had used this right. In 17 % of the cases it was the father who used the right to unpaid leave.⁶⁶⁴

2.2. Self-employment

There are few cases brought before the Ombud and the Tribunal and little research has been done on possible discrimination against pregnant self-employed workers or self-employed workers who have recently given birth.

Both female self-employed workers and female assisting spouses or life partners are able to access maternity allowances as per Directive 2010/41/EU. Also male self-employed workers and male assisting spouses or life partners are able to access paternity/parental leave or any related allowances.

2.3. Access to and the supply of goods and services

To my knowledge – apart from a restriction from airlines regarding pregnant women in the late stages of pregnancy – there are no legal gaps in the area of access to and the supply of goods and services. I am not aware of any instances where pregnant women or women on maternity leave have been denied insurance or offered limited or more expensive insurance terms because of pregnancy or maternity. Insurance contracts to my knowledge do not impose waiting periods before covering costs related to pregnancy and maternity. There are no indications that private health insurance and related products are generally more expensive for women who are in an age bracket where they could become pregnant.

There are no prohibitions or restrictions regarding breastfeeding in public. Nursing children at cafés and restaurants is quite common.

3. Involvement of other parties

Gender equality and pregnancy-related issues are referred to or regulated in many collective agreements in Norway. However, legislation is by far the most important means of regulation work-related equality issues, and collective agreements generally tend to repeat the legislative provisions. Some examples exist where collective agreements provide better arrangements than the law, e.g. providing paid breastfeeding leave or providing fathers with two weeks of paid leave in connection with the birth of the child.

The Equality Ombud has played an active public role in informing women about their rights in relation to pregnancy discrimination.

4. Enforcement and effectiveness

4.1. General

As the labour market and financial situation in Norway is very good at the moment, there is no evidence that the extensive pregnancy and maternity rights offered to women lead to lower numbers of women actually being employed.

4.2. Legal redress

There is no national study addressing the difficulties involved in having access to legal redress concerning rights regarding pregnancy, maternity, adoption, parental or paternity leave specifically. A comparative study on access to justice in gender equality and anti-discrimination law from 2010⁶⁶⁵ addresses the challenge that despite the comprehensive legal anti-discrimination framework that exists, few discrimination cases are heard by the ordinary

⁶⁶⁴ See A.C. Grambo og S. Myklebø (2009) p. 61.

⁶⁶⁵ Comparative study on access to justice in gender equality and anti-discrimination law, National Report for Norway, Else Leona McClimans, Milieu Ltd., contract VC/2009/0288 European Commission, DG Employment, February 2011.

courts. This is not because of a lack of legal standing or a problematic implementation of the burden of proof. The effectiveness of procedural guarantees is mainly related to money. The high cost of litigation before the ordinary courts seen in conjunction with the current lack of legal aid in relation to discrimination cases makes it almost impossible for victims of discrimination to assert their rights in court, as shown by the current, very low figures on discrimination cases handled in courts. The main feature regarding access to justice in discrimination cases in Norway is thus the dominant role played by the Ombud and the Tribunal. Their role and the number of cases they handle each year demonstrates the need for this kind of low-cost service in assessing whether or not discrimination has taken place. However, the fact that neither the Ombud nor the Tribunal has the power to award damages or other efficient sanctions might be questioned in light of the EU requirement of ‘dissuasive and effective’ sanctions.

There has not been a specific increase in national case law regarding pregnancy, maternity, adoption, parental, or paternity rights initiated by associations, organizations or other legal entities which have a legitimate interest in this area since the implementation of the Recast Directive. In fact, all court cases cited above were initiated by individual complainants.

Compensation: The rules on compensation and reparation are stated in GEA Section 17, which regulates liability for damages. Any employee who has been subject to differential treatment in contravention of GEA Sections 3 to 6 (regarding which the general rules on equal treatment, equal working conditions and equal pay are all applicable in cases relating to discrimination on grounds of pregnancy or related leaves) shall be entitled to compensation regardless of whether the employer is at fault or not. Compensation shall be fixed at the amount that is reasonable, with reference to the financial loss that was suffered, the situation of the employer and the employee and all other relevant circumstances. The very few cases handled by the courts as cited above show that the level of compensation awarded by the courts in cases of pregnancy discrimination is adequate, dissuasive and proportionate. However, as most cases are brought before the Ombudsman, and the Equality Ombud cannot award compensation – this can only be done through the court system – this signifies weak protection against discrimination and weak access to the court structure.

4.3. Access to information

There has been research to analyse whether individuals are aware of their rights (regarding pregnancy, maternity, paternity, adoption and parental leave), such as a study on the assessment of consequences of maternity/parental leaves.⁶⁶⁶

A number of initiatives are carried out by the State, in terms of disseminating adequate information to all stakeholders regarding the rights of pregnant women and parents to maternity, adoption and parental leave, through all local NAV offices as well as by giving information on their website www.nav.no.

As described above, women who have precarious or atypical employment contracts are at a particular disadvantage with regard to pregnancy, maternity, adoption and/or parental rights since they risk the non-renewal of their contracts.

⁶⁶⁶ See C. Egeland, H. Enehaug, S. Halrynjo, S.T.Lyng og H. Svare *Erferinger med og konsekvenser av graviditet og uttak av foreldrepermisjon i norsk arbeidsliv* (Experiences with and consequences of pregnancy and utilization of parental leave in Norwegian employment) Report 2-2008 Arbeidsforskningsinstituttet, Oslo 2008.

POLAND – Eleonora Zielińska

1. Existing legislation and case law

1.1. Employment

The Labour Code (LC) of 26 June 1974⁶⁶⁷ offers relatively broad protection from discrimination in employment with regard to pregnancy and parenthood. It applies to all ‘employees’ (persons employed on the basis of employment contract, designation, election, nomination or cooperative labour contract).⁶⁶⁸ The Labour Code provides for a prohibition to employ women for tasks that have been specified as potentially detrimental to health (Article 176 LC) and to employ pregnant women to work at night or outside the workplace (Article 178 LC). It is the duty of the employer to assign a pregnant (or breastfeeding)⁶⁶⁹ woman to another job and, if impossible, to release her from performing work while remuneration is maintained, along with the guarantee to return to the previous work position (Article 178¹, 179 LC). A pregnant woman, employed for an indefinite period of time, cannot be dismissed from work by notice (Article 177 of LC) even if such notice was delivered earlier, when the employee was not pregnant yet.⁶⁷⁰ Exceptions constitute bankruptcy, liquidation of the enterprise or dismissal for disciplinary reasons. Employment contracts concluded for a probationary period exceeding 1 month and for a fixed term are extended until the date of delivery (Article 177(3) LC).

Paid maternity leave consists of two parts: an obligatory and an optional one. In general the obligatory maternity leave has five time limits (from 20 up to 37 weeks) depending on the number of children born from the pregnancy. The optional maternity leave, taken after expiry of the obligatory leave, has 2 time limits, which increase gradually (in 2012 they are 4 and 6 weeks). After 14 weeks of maternity leave the woman can transfer the remaining part to the father of the child (Article 180 (5) LC). Additional leave may also be used by the father (Article 182² LC). Irrespective of this right the father is entitled to paid⁶⁷¹ paternity leave amounting to 2 weeks (Article 182³ LC),⁶⁷² which will lapse if the father fails to use it during the first year of the child’s life.⁶⁷³ Similar rules regarding these leaves, both for mothers and fathers, are applicable to adoptive parents (or non-profit foster parents) taking children under the age of 7 (10 if the child is disabled) (Article 183 LC). Its length depends on the number of children adopted (to raise them) at the same time. The Labour Code contains the prohibition of dismissal from work during all the above types of leaves (with exception of bankruptcy or liquidation of the enterprise) and it provides for an explicit guarantee regarding the possibility to return to their previous or equivalent position, with remuneration equal to that received by other employees working in the same position, who did not profit from maternity benefits (Article 183³ LC).⁶⁷⁴

Parental leave (as a rule unpaid), to which parents are entitled who have been employed for at least 6 months, may generally be granted for 3 years, but no longer, until the child’s 4th birthday. It may be divided into 4 parts at the most; both parents may take it simultaneously

⁶⁶⁷ Unified text published in *Dziennik Ustaw Rzeczypospolitej Polskiej* (Journal of Law of Polish Republic; hereafter: Dz.U.) 1998 No. 21 Item 94 with amendments.

⁶⁶⁸ The list of persons qualifying as employees has an exhaustive character. Therefore, as a rule, the LC’s protection does not cover defined work, mandate or agency contracts, nor does it apply to outworkers. These persons are treated in the same way as self-employed persons (see 1.3. of this country report).

⁶⁶⁹ In addition breastfeeding workers are entitled to additional breaks for feeding their children (Article 187 (1) LC).

⁶⁷⁰ Judgment of the Supreme Court of 13 April 1972, III PZP 7/72.

⁶⁷¹ For detailed regulations on payment see 1.2. of this country report.

⁶⁷² The employee may use paternity leave at any time, i.e. also while the child’s mother is taking leave. A. Gwarek ‘Zwiększenie uprawnień rodzicielskich’ (Extending the rights connected with parenthood) *Śłużba Pracownicza* 2010. No. 1 p. 1.

⁶⁷³ The opinion has been expressed that since the LC does not require that fathers on paternity leave shall take personal care of their child, they may work for another employer during their leave. K. Tymorek ‘Zasiłki macierzyńskie dla ojca’ (Maternity benefits for fathers) *Śłużba Pracownicza* 2010 No. 4 p.15.

⁶⁷⁴ FFR: M. Podgórska ‘Ujednolicenie standardów ochronnych pracowników korzystających z urlopów rodzicielskich’ (Unification of protective standards for parents benefiting from leaves connected with parenthood) *Śłużba Pracownicza* 2010 No. 2 p.1.

for up to 3 months (Article 186 LC).⁶⁷⁵ The protection granted to employees during and after parental leave is similar to that in case of other types of leave (Article 186¹ LC and Article 186⁴ LC).⁶⁷⁶ In 2008 a protective period of 12 months was introduced, during which the employer is forbidden to dissolve the employment contract with the employee entitled to parental leave, who decides to start working part time (Article 186⁷ and Article 186⁸ LC).

The Polish Labour Code does not provide for a general provision that would consider pregnancy and maternity related discrimination as sex discrimination nor does it state explicitly that the concepts of direct and indirect discrimination, victimization and horizontal protection against violation of the principle of equal treatment, provided for in Chapter IIa LC, also apply in cases of discrimination related to parenthood, regulated in Chapter VIII LC. Nevertheless the courts recognize these interrelations.

1.2. Social security and pension rights

Employees on maternal/paternity/adoption/parental leave, are subjected to compulsory pension/disability insurance.⁶⁷⁷ Social insurance contributions for the duration of such leaves shall be collected by Social Security Agency (ZUS) from the funds of the State Treasury (instead of the recipient of the allowance). On 1 January 2012 the new provision of the Law on the System of Statutory Social Pension⁶⁷⁸ came into force, providing for a new basis, more favourable for employee, of estimating pensions contributions for persons taking parental leave.⁶⁷⁹

The allowances connected with maternity/paternity are covered by sickness insurance, which for employees is compulsory. The contributions for sickness insurance are collected by ZUS from the employee's salary exclusively and constitute 2.45 % of its monthly amount. In order to receive these allowances (which include sick pay and maternity allowances) the employed person should be insured without discontinuity for a minimum of 30 days. In case of maternity/paternity/adoption leaves the allowance is paid in the amount of 100 % of salary, during the entire period of leave.⁶⁸⁰

During parental leave low income families are granted an allowance of 60 % of the monthly minimum wage.

A woman, whose incapacity to work occurred during her pregnancy has larger entitlements than other employees. She retains the right to sick pay, amounting to 100 % of the remuneration (instead of 80 % which employees usually receive in other cases of incapacity) and for a longer period of time (270 instead of 180 days).⁶⁸¹

1.3. Self-employment

The principle of equal treatment for working persons not qualifying as employees in the meaning of the LC is provided for in the Law of 3 December 2010 on the Implementation of

⁶⁷⁵ This protection applies independently from the employee's length of service, his working hours or whether he is taking the leave for the first time or not. R.Sadlik '*Ochrona zatrudnienia pracowników przebywających na urloпах wychowawczych*' (Protection of employment of employees on paternal leave) *Prawo Pracy* 2004 No. 11 p. 15.

⁶⁷⁶ Although the formulation of this provision on parental leave is not identical to that of other leaves, the Supreme Court interpreted it in the same way. Judgment of the Supreme Court from 29 January 2008 II PK 143/07.

⁶⁷⁷ Article 6(1) Point 19 of the Law of 13 October 1998 r. on the Statutory System of Social Security, consolidated text: Dz.U. 2009 No. 205 Item 1585, with amendments. As a consequence the whole duration of the above leaves is calculated into the length of service required for granting pension.

⁶⁷⁸ Article 18(5b) of the Law of 13 October 1998 on the Statutory System of Social Security, as amended by Articles 4 and 16 of the Law of 6 December 2008, Dz.U. 2008, No. 237, Item 1654.

⁶⁷⁹ It will equal 60 % of the average monthly wage, but may not exceed the average monthly salary paid to the relevant employee. Increasing the rate should result in higher benefits in the future.

⁶⁸⁰ Articles 4 and 10 of the Law of 25 June 1999 on Financial Social Insurance Benefits with Respect to Sickness and Maternity, consolidated text: Dz.U. 2010 No. 77 Item 512 with further amendments (hereafter: 1999 Law on Financial Social Insurance Benefits).

⁶⁸¹ Article 8 of the 1999 Law on Financial Social Insurance Benefits.

Selected EU Provisions on Equal Treatment.⁶⁸² Article 12 of this Law explicitly provides for the possibility of awarding special damages, in situations when the violation of the equal treatment principle occurs with regard to pregnancy or maternity leave (and in cases of less favourable treatment of women (men) related to pregnancy or maternity (paternity) leave). The opinion has been expressed that all provisions of this law should be interpreted in such a way as to guarantee a level of protection against discrimination that is similar to that of employees.⁶⁸³

Persons performing non-agricultural activity and persons cooperating with them are subject to compulsory pension and disability insurance and they may request to be included in the voluntary sickness insurance.⁶⁸⁴ When this occurs they are entitled to sickness/maternity allowances similar to those of employees, however the conditions for receiving them may differ.⁶⁸⁵ The only group still falling outside the scope of this Law are farmers (and persons cooperating with them) who are covered by the separate Law on the Social Security System of Farmers⁶⁸⁶ providing for specific, less favourable, insurance conditions, but lower pension premiums. For farmers or members of their households, health insurance is mandatory only if the size of their agricultural enterprise exceeds one hectare. According to Article 15 of the Act on Social Insurance of Farmers, when giving birth to a child or adopting one, the insured person is entitled to a lump-sum maternity allowance in the amount equal to four basic (minimum) monthly pensions.

1.4. Access to and the supply of goods and services

The protection against sex-related discrimination in the access to goods and when acquiring rights and energy, as well social security and social services including housing, offered to the public, is provided for in the Anti-Discrimination Law, which also implemented Directive 2004/113/EEC (Article 6). When it comes to discrimination on grounds of sex this Law does not go beyond the relevant provisions of Directive 2004/113/EEC.⁶⁸⁷ On the basis of this Law no case law or opinions of Equality Body have been identified yet.

2. Gaps in national law

2.1. Employment

The LC provisions dealing with pregnancy and maternity, despite numerous amendments, have several shortcomings. Subject to criticism is the fact that prohibition of dismissal of pregnant woman fails to apply to employees hired for a shorter trial period (not exceeding one month) and that the possibility of extending the duration of employment contract for a specified time (until delivery) is excluded if the contract was concluded for substitute purposes (Article 177 (2 and 31) LC). The regulations of the Labour Code may also raise some objections with regard to the relatively short length of non-transferable paternal leave, the lack of options to divide it into parts, and the fact that the regulations do not differentiate its length depending on the number of simultaneously born (adopted) children. For the birth of two or more children at the same time, the employee is entitled to parental leave on the

⁶⁸² Dz.U. 2010, No. 254 Item 1700. Hereafter cited as Anti-Discrimination Law or AL. This Law e.g. implemented Directives 2006/54/EC and 86/613/EEC, but did not transpose Directive 2010/41/EU. Article 2 of the Anti-Discrimination Law underlines its complementary nature, providing that it does not apply to employees, insofar as their situation is covered by provisions of the existing Labour Code.

⁶⁸³ FFR: K. Walczak 'Zakaz dyskryminacji w stosunku do osób wykonujących prace na podstawie atypowych form zatrudnienia', (Prohibition of discrimination of persons performing atypical work) *Monitor Praw Pracowniczych* 2012 No. 3 p. 119. Atypical work includes tele-work and employment by intermediation of agencies of temporary contracting.

⁶⁸⁴ Article 14(2) of the Law on the Statutory System of Social Security.

⁶⁸⁵ Articles 29 and 29a of the 1999 Law on Financial Social Insurance Benefits.

⁶⁸⁶ Law on the Social Security System of Farmers of 20 December 1990, consolidated text: Dz.U. 1998 No. 7 Item 25 with amendments.

⁶⁸⁷ The application of the Anti-Discrimination Law was specifically excluded, with respect to the content included in mass media and advertisements (Article 5(2)) and with respect to educational services (Article 5(4)). In terms of healthcare unequal treatment is prohibited solely on the ground of race, ethnicity and nationality (Article 7).

same conditions as in the situation where only a single child is born. The LC fails to regulate this issue, but the Supreme Court, in its judgment of 28 November 2002 (II UK 94/02), considered the provision to carry the above meaning.⁶⁸⁸ It may also be criticized that only very low-income families are entitled to an allowance (of symbolic value) connected with parental leave, as well as the fact that the right to sick pay is excluded if the employee is on such a leave. Many inconsistencies also derive from the fact that pregnancy and maternity (adoption/parental/paternity) rights for employees are regulated differently depending on the type of work engagement (other than contract of employment).⁶⁸⁹

As a gap in legislation can also be regarded that neither the Labour Code nor the Anti-Discrimination Law explicitly mention that sex-related discrimination includes any less favourable treatment of a woman related to her pregnancy or maternity leave. Nor is there any reference to pregnancy and maternity when the LC or AL regulate direct and indirect discrimination and victimization.

Polish regulations seem to provide sufficient protection against discrimination in connection with pregnancy and motherhood, with respect to employment recruitment.⁶⁹⁰ Research has shown, however, that in practice these principles are often violated.⁶⁹¹ As discrimination in access to employment can also be considered the practice of ZUS consisting in treating employment contracts concluded by women during pregnancy as ostensible agreements aimed at circumventing the law, especially when a woman has benefited from sick leave during pregnancy. This happened despite the fact that already in 2006 the Supreme Court ruled that the ostensibility of employment contracts concluded with pregnant women cannot be automatically presumed. Such conduct would result in actual prohibition of concluding employment contracts with pregnant women.⁶⁹² However, even after this Supreme Court ruling, the practice of ZUS did not change much.⁶⁹³ In addition, the adjustment of the woman's salary during pregnancy was treated as aiming at abusing the entitlement to benefits.⁶⁹⁴

Research has proved that the requirement to employ women after maternity leave in the same or equivalent position has generally been observed in practice. Only 2 % of interviewed

⁶⁸⁸ It is worth noting that a different position is represented by the Court of Justice of the EU, pursuant to Directive 96/34/EC. See CJEU judgment of 16 September 2010 in Case C-149/10 *Zoi Chatzi v Ipourgos Ikonomikon* [2010] ECR I-8489.

⁶⁸⁹ In literature the opinion prevails, shared by the Supreme Court, that one cannot exclude the application of the LC's protection, to the extent appropriate, when the employment relation arises from appointment or election (e.g. for teachers and state officials). Nevertheless, due to the unclear legal situation, the practice of application of those provisions was frequently discriminatory, both for women and men trying to use their rights connected with parenthood. See: W. Patulski in: W. Muszalski (ed.) *Kodeks pracy. Komentarz* (Labour Code. Commentary) C.H. Beck, Warsaw 2011, pp. 860-861; K. Rączka in: M. Gersdorf, K. Rączka & J. Skoczyński, *Kodeks Pracy. Komentarz* (Labour Code. Commentary) 6th edition Lexis Nexis, Warsaw 2004, p. 15.

⁶⁹⁰ There is an explicit provision stipulating what types of personal information employers may request from candidates for employment (Article 221(1) LC). *A contrario* from this provision results the impossibility to pose questions about pregnancy status or family plans.

⁶⁹¹ In the last decade, one out of five women applying for a job was asked during recruitment about the person to take care of the child during her absence from home and/or about her plans for having children. Most recently a change in the role of fathers in the process of raising children has resulted in the situation where recruitment questions about childcare and reproductive plans are also presented to men (in case of 7 % of women and 4 % of men). See: P. Antosz & J. Górniak (ed.) *Równe traktowanie warunkiem dobrego rządzenia. Raport z badań sondażowych* (Equal Treatment as condition for good governance. Report of poll research) Uniwersytet Jagielloński, Kraków 2012. Project financed by EU Funds pp. 106-107. Accessible from the website of the Government Plenipotentiary for Equal Treatment: http://rownetraktowanie.gov.pl/sites/default/files/rowne_traktowanie_standardem_dobrego_rzadzenia_-_raport_z_badan_ilosciowych_ost_0.pdf, accessed 15 August 2012.

⁶⁹² See judgment of the Supreme Court of 6 February 2006, III UK 156/05. The Court ruled that there can be no question of circumventing the law, even if one of the goals of employment was to obtain social security benefits. The goal of human labour is getting paid, and possibly obtaining insurance benefits. Therefore such conduct cannot be considered as negative.

⁶⁹³ See: the cases reported by the Helsinki Foundation for Human Rights, who presented one of the Court of Appeal with its *amicus curiae*, www.hfhrpol.waw.pl/precedens/, accessed 17 August 2012.

⁶⁹⁴ Judgment of Supreme Court of 4 August 2005, II UK 16/05.

women declared to have been employed in a lower position.⁶⁹⁵ There were however cases of discrimination against women in relation to pregnancy in the form of suspending the claimant's function supplement during sick leave or passing her over in promotion procedures⁶⁹⁶ or refusing access to professional training offered to employees, because of frequent use of parental leave.⁶⁹⁷

Recently an issue of constitutionality arose with regard to application of Article 2(3) of the Law of 12 December 1997 on Additional Annual Salary for Employees of the Budgetary Sphere (so-called 13th salaries), during maternity leave.⁶⁹⁸ Employees are entitled to such remuneration if they have worked for at least 6 months in one calendar year, unless one of the situations listed in the Law occur. From the rights associated with childbirth the exceptions listed only include parental leave, meaning that no other periods of justified absence from work may be added to this category, such as maternity leave.⁶⁹⁹ The Constitutional Tribunal in the judgment of 9 July 2012 (P 59/11) declared this provision incompatible with the constitutional prohibition of discrimination and principle of protection of maternity, to the extent to which it excluded the period of maternity leave.

There have been cases of discrimination in access to maternity social security benefits. It became common practice that hospitalized pregnant women, awaiting delivery, did not receive sick leave on this account, but instead had to use part of their maternity leave.⁷⁰⁰ There has been a practice among employers to conclude employment contracts with women for a specified period, making it impossible for them to make use of parental leave. According to the LC such contracts are automatically extended until the day of delivery and the women may benefit of maternity leave. However, the protection in such cases does not cover parental leave.⁷⁰¹

Despite the clearly defined rights of working fathers in Poland, they very rarely decide to take paternity leave. Statistical data shows that in the first two years following the introduction of paternity leave only one out of a hundred working fathers or even less, chose to take such leave.⁷⁰² This rate seems to have increased in 2012, however.⁷⁰³ Lack of comprehensive research makes it impossible to determine all causes of this phenomenon, as well as to answer the question whether fathers are using any other forms of leave instead.⁷⁰⁴

⁶⁹⁵ See: P. Antosz & J. Górniak (ed.) *Równe traktowanie warunkiem dobrego rządzenia. Raport z badań sondażowych* (Equal Treatment as condition for good governance. Report of poll research) Uniwersytet Jagielloński, Kraków 2012.

⁶⁹⁶ Judgment of Supreme Court of 7 January 2009, III PK 43/08.

⁶⁹⁷ One such case was brought to the Supreme Court, in which a woman sued her employer before the Labour Court, accusing him of discrimination based on sex, age and family status (five children). This was manifested in large disparities in income (her wage amounted to 58 % of the average salary of the entire crew) and passing her over with regard to training. The Supreme Court in its judgment of 8 January 2008, II CP 116/07 found discrimination.

⁶⁹⁸ Dz. U. 1997 No. 160, Item 1080. Hereafter: the 1997 Law.

⁶⁹⁹ Such interpretation was accepted by the Supreme Court in Resolution of 25 July 2003 r. III PZP 7/03.

⁷⁰⁰ The issue was addressed by the Ministry of Health who noted that hospitalized pregnant women awaiting delivery should receive a certificate of incapacity for work and the hospital has no right to expect a pregnant woman in hospital to use her maternity leave and explained that the provision of Article 180 Paragraph 3 LC, which provides that at least 2 weeks of maternity leave may fall before the expected date of delivery, constituted no obligation for women to exercise this right, but only a possibility, <http://www.mz.gov.pl/wwwmz/index?mr=m15&ms=739&ml=pl&mi=739&mx=0&ma=14022>, accessed 11 August 2012.

⁷⁰¹ D. Wojdat 'Wychowawczy bez etatu' (The parental leave without being permanently employed), <http://prawo.rp.pl/arttykul/713614.html>, accessed 20 November 2012.

⁷⁰² According to information from ZUS in 2010, 6 % of working fathers exercised their right (17 244 persons) and in 2011 this number decreased to 14 897 fathers, http://praca.wp.pl/title,Przybywa-mezczyzn-korzystajacych-z-urlopow-ojcowskich_wid,13391767,wiadomosc.html?tid=1ef99, accessed 9 August 2012.

⁷⁰³ Data from the first half of 2012, the year when the duration of parental leave increased to 2 weeks, shows that already 9 800 men went on paternity leave, which constitutes an increase compared to the first half of 2011 by about 40 %, <http://www.gazetaprawna.pl/tagi/urlop-ojcowski>, accessed 9 August 2012.

⁷⁰⁴ In the literature however reasons are noted such as lack of awareness of existing regulatory provisions, fear of losing position in the company or experiencing discrimination from the employer or other employees. The barriers for men wishing to take advantage of paternity leave are still stereotypes: childcare is considered 'unmanly', although presently it is more often emphasized that being a 'real man' is more concerned with being very involved and caring as a father, than with demonstrating his strength and power. See: M. Sikorska

2.2. Self-employment

Poland has a relatively high rate of self-employed women. Research shows that nearly one out of five Poles in 2010 was self-employed. The percentage of women's participation in running agricultural farms is around 20 %.⁷⁰⁵ Characteristic is the fact that women treat self-employment as an opportunity to perform work in a flexible system, enabling them to effectively organise childcare. Meanwhile, surveys show that self-employed persons often work more than 50 hours per week, receive lower salary and have limited access to social security benefits.⁷⁰⁶ In particular the situation of insured women farmers and women sharing households with a farmer hardly meet the requirements of Directive 2010/41/EU, especially when it comes to the amounts of the maternity allowances.⁷⁰⁷

Also some differences in the detailed regulations regarding self-employed non-agricultural workers and employees are to be observed. For example there are different periods of insurance required in order to qualify for sickness benefit (compared to employees, this period is three times longer), as well different rules (more favourable for employees) regarding the calculation of sickness/maternity allowances if they were not insured for a full month. The Constitutional Tribunal however, in general, did not challenge the legality of less favourable treatment of self-employed persons, compared to employees, with regard to rules for determining the basis for benefits.⁷⁰⁸

In contrast to the situation of employees who can take advantage of parental leave, self-employed persons, both in agriculture and outside agriculture, are not subject to pension insurance during the period of interruption of employment in connection with performing childcare.⁷⁰⁹ This means that self-employed persons take advantage of replacement services.⁷¹⁰ It is worth noting that an employed person on parental leave, combining her employment with the management of her own enterprise, still has to pay insurance premiums for her economic activity. A woman in the same situation, but taking her maternity leave, has

Niepokoje matek związane ze sferą domu oraz życiem rodzinnym (Mothers' concerns related to the sphere of home and family life); M. Sikorska (ed.) *Ciemna strona macierzyństwa. O niepokojach współczesnych matek* (The dark side of maternity. What mothers worry about) Report AXA 2012, http://www.axa-polska.pl/download/gfx/axa/pl/defaultaktualnosci/140/123/1/raport_ciemna_strona_macierzynstwa_maj_2012.pdf accessed 20 November 2012. See also: T. Szlendak *Socjologia rodziny* (Sociology of the Family) Warszawa PWN 2010. In relation to parental leave, which is taken only by 2 % of fathers, the economic factor plays an important role. Given the fact that men usually earn more than women, the financial situation of the family becomes worse if the father takes unpaid parental leave. See: M. Fuszara, *Nowi mężczyźni? Zmieniające się modele męskości we współczesnej Polsce* (New men? Changing patterns of masculinity in contemporary Poland), Trio 2008.

⁷⁰⁵ Report: A. Terelak Sytuacja kobiet w rolnictwie i na obszarach wiejskich. Specyfika, standardy, parytety i oczekiwania (The situation of women in agriculture and rural areas. The specificity, standards, quotas and expectations) Focus Group Konsorcjum Badawcze, Centrum Rozwoju Społeczno-Gospodarczego 2012 p. 67, published on the website of the Government Plenipotentiary for Equal Treatment: http://rownetraktowanie.gov.pl/sites/default/files/raport_koncowy.pdf, accessed 9 August 2012.

⁷⁰⁶ M. Trawińska 'Samozatrudnienie – lekiem na całe zło?' (Self-employment - the cure to all evil?) in: A. Czerwińska (ed.), Z. Łapniewska & J. Piotrowska *Kobiety na zielonej wyspie. Kryzys w Polsce z perspektywy gender* (Women on a green island. The crisis in Poland from the gender perspective), Warszawa, Fundacja Feminoteka 2010, http://www.feminoteka.pl/downloads/Kryzys_a%20kwestiegender_www.pdf, accessed 10 August 2012, and A. Młodawska 'Sytuacja kobiet na rynku pracy' (The situation of women on the labour market) in: M. Sikorska (ed.) *Ciemna strona macierzyństwa. O niepokojach współczesnych matek* (The dark side of maternity. What mothers worry about) http://www.axa-polska.pl/download/gfx/axa/pl/defaultaktualnosci/140/123/1/raport_ciemna_strona_macierzynstwa_maj_2012.pdf, accessed 20 August 2012.

⁷⁰⁷ They are much less favourable compared to self-employed persons (or their collaborators) in the sphere of non-agricultural activity. The total sum women farmers will receive is EUR 1500 (PLN 6000) compared to EUR 5000 (PLN 20 000), which will be received by a woman performing a non-agricultural occupation earning the average monthly salary.

⁷⁰⁸ Judgment of 24 May 2012, P 12/10.

⁷⁰⁹ If such care were necessary, a person engaged in economic activity outside agriculture may take advantage of the option to suspend it for up to two years, but then she will not be subject to mandatory social insurance.

⁷¹⁰ It is however planned to provide for parental leave for self-employed persons performing both agricultural and non-agricultural work as well as their replacement services, http://www.polskieradio.pl/5/3/Artykul/591485_Ludowcy-budzet-ma-placic-za-urlop-wychowawczy accessed 15 August 2012.

no such obligation (during this time the premiums are paid by the State Treasury). The Constitutional Tribunal in its judgment of 13 April 2011 (SK 33/09) decided, however, that such differentiation of the rights of insured persons benefiting from maternity and parental leaves raises no constitutional doubts.⁷¹¹

2.3. Access to and the supply of goods and services

Some airlines operating in Poland have set limitations for pregnant women, which (as is the usual explanation) have been established with regard to health and safety of the mother and the unborn child. LOT, the national carrier, does not accept pregnant women after their 32nd week of pregnancy; at Wizz Air the limit is 34 weeks, while Lufthansa, Ryanair and Easyjet allow women to fly until the 36th week of pregnancy (in case of multiple pregnancy they accept women until the 32nd week).⁷¹²

Some restrictions can also be found in access of pregnant women to saunas.⁷¹³

There are many examples of potentially discriminatory practices in relation to the access to and the provision of medical care for pregnant women (e.g. in the access to home birth⁷¹⁴ to Caesarean section upon request,⁷¹⁵ to free pain relief procedures during labour⁷¹⁶ or to prenatal diagnosis).⁷¹⁷ The high number of examples make us aware of the fact that this lack of special protection against discrimination on the grounds of sex in the access to health services constitutes a serious gap in the national system of law.

Until 2009 insurance companies applied increasing premiums for life and health insurances of pregnant women. The situation was expected to change after 18 June 2009,

⁷¹¹ On the other hand, the Constitutional Tribunal found as conforming to the Constitution the law allowing insurance premiums for non-agricultural business for the time spent on parental leave to remain unpaid, given the fact that the ambiguous legal situation (which could be misleading in terms of the obligation to pay pension premiums) arose as a fault of the State. Judgment of Constitutional Tribunal of 12 July 2012, P 24/10, http://www.trybunal.gov.pl/Rozprawy/2012/P_24_10.htm, accessed 9 August 2012.

⁷¹² http://www.tipy.pl/artukul_10671_jak-podrozowac-samolotem-w-ciazy.html and <http://www.easyjet.com/pl/Zarezerwuj/regulations.html>, accessed 12 August 2012.

⁷¹³ The regulations mostly specify that the existence (or suspicion) of pregnancy constitutes a contraindication to use the facility. Sometimes however, the restriction is formulated as a ban, <http://www.osir.wolomin.pl/osir/dokumenty/50-regulamin-korzystania-z-sauny.html>, accessed 17 August 2012.

⁷¹⁴ The standard rules of care for pregnant women issued in 2011 by the Ministry of Health stipulate that a woman has the right to choose the place of delivery, which might be situated outside the hospital. However the possibility to deliver at home is not used often in practice, because the National Health Fund refuses to pay for such delivery. Annex to the resolution of the Minister of Health of 23 September 2010, Pt. 11(2), http://www.mz.gov.pl/wwwfiles/ma_struktura/docs/zal_opiek_24092010.pdf and http://wiadomosci.gazeta.pl/wiadomosci/1,114873,9396665,Nowe_standardy_ws_porodow_Mozna_rodzic_w_domu_ale.html, both accessed 15 August 2012.

⁷¹⁵ Physicians expressed strong opposition to this idea. (Recommendations for C-section, published in *Polish Gynecology* 2008 No. 79 pp. 378-384). The Ministry of Health also supports inadmissibility of such procedure. (Response of the Minister of Health to an interpellation of a deputy to the Parliament) <http://orka2.sejm.gov.pl/IZ6.nsf/main/05E0CCE2>, accessed 15 August 2012. The legal situation is confusing since several private hospitals publicly advertise this kind of service (<http://www.damian.pl/270,59,263.cesarskie-ciecie-warszawa-przebieg-zabiegu-operacyjnego.news.htm>, accessed 15 August 2012) and some international insurance companies (e.g. IHI BUPA with the European Health Plan), cover it in their insurance plans, also C-section at the patient's request, http://www.ubezpieczenie.com.pl/drukuj_artukul/31,1143.html, accessed 15 August 2012.

⁷¹⁶ For many years hospitals charged additional costs for pain relief procedures during labour. In 2010, the Ministry of Health issued a memorandum stating that such procedures during delivery are funded by the National Health Fund, if provided according to medical indications, <http://www.mz.gov.pl/wwwmz/index?mr=m15&ms=739&ml=pl&mi=739&mx=0&ma=16595>, accessed 15 August 2012. The decision, however, if there are medical indications, is made by doctors. There are signs that doctors opposing this procedure refuse to prescribe it under the pretext of lacking medical indications.

⁷¹⁷ There were cases of pregnant patients who were refused pre-natal examination although they were older or the family was genetically burdened, http://prawo.gazetaprawna.pl/artykuly/24791,100_tys_zl_odszkodowania_od_szpitala_i_renta_za_odmowe_badan_prenatalnych.html, accessed 15 August 2012. With regard to the patient-friendly judgment of the European Court of Human Rights of 26 May 2011, *RR v Poland* (application no. 17617/04), the Minister of Health declared that in case of pre-natal diagnostics, health service providers should not be able to rely on the clause of conscience. Memorandum of the Ministry of Health of 18 May 2012, <http://www.mz.gov.pl/wwwmz/index?mr=m15&ms=739&ml=pl&mi=739&mx=0&ma=20002>, accessed 15 August 2012.

when legislation came into force prohibiting such practices.⁷¹⁸ Reality proved otherwise, however. Some companies did not even change their general conditions of insurance. Others, in turn, only made formal changes but e.g. exclude liability in the event of childbirth⁷¹⁹ or exclude C-sections from their list of surgery covered by special medical insurance.⁷²⁰ Most companies practice apply extended waiting periods (from 8 to 12 months) before costs related to pregnancy and maternity are covered by the insurance.⁷²¹ There are no indications that private health insurance and related products in general are more expensive for women who are in the age bracket where they might become pregnant. Several cases of discriminatory practices with regard to breastfeeding mothers have been reported in the media. Recently, such an incident took place in the Labour Office.⁷²² No cases have been identified where women were denied access to public financial or non-financial benefits because of their pregnancy. It is common knowledge, however, that homeowners avoid renting out flats to pregnant women (or families with small children) mainly because it would be more difficult to have them evicted.⁷²³

2.4. Additional information

Until 1 April 2011 there was no clarity as to the scope of the rights related to maternity or paternity of persons belonging to various public uniformed services regulated by administrative law.⁷²⁴ The Law of 1 April 2011⁷²⁵ almost equalled parental rights⁷²⁶ of officers to those of employees provided for in the LC with regard to the police, fire fighters, officers protecting governmental officials (BOR) and the officers of the interior security and intelligence service (ABW). The military are the last group of uniformed services who have none of these parental rights.

3. Involvement of other parties

The Defender of Human Rights, in Poland performing the tasks of the equality body, has intervened on several occasions with regard to discrimination against uniformed officers in connection with parenthood.⁷²⁷ Similar efforts have also occasionally been made by the Government Plenipotentiary for Equal Treatment.⁷²⁸ There is no information that social

⁷¹⁸ The prohibition to differentiate insurance premiums and benefits for insurance purposes, with regard to pregnancy and maternity is provided in Article 18b of the Law of 22 May 2003 on Insurance Activity. Consolidated text: Dz.U. 2010 No. 11 Item 66 with amendments.

⁷¹⁹ http://www.zdrowotne.ubezpieczenie.com.pl/koniec_z_dyskryminacja_kobiet_w_ciazy_w_ubezpieczeniach/31.7595.html, accessed 15 November 2012.

⁷²⁰ E.g. Compensa, belonging to the Vienna Insurance Group, in specific conditions of insurance benefits in case of surgery, http://www.ubezpieczeniaonline.pl/pasaz/_zasoby/_zalaczniki/zalacznik_13.pdf, accessed 15 August 2012.

⁷²¹ http://www.zdrowotne.ubezpieczenie.com.pl/najlepsze_ubezpieczenie_zdrowotne_dla_kobiety_w_ciazy/31.1143.html, accessed 25 September 2012.

⁷²² A woman came into the office with her five-month old daughter and asked to indicate the place where she would be able to breastfeed. Officials told her to leave the building. This case caused an intervention of the Plenipotentiary for Equal Treatment, <http://rownetraktowanie.gov.pl/interwencje/matka-karmiaca-niemowle-upokorzona-w-urzedzie-pracy>, accessed 14 August 2012.

⁷²³ This is due to the fact that, according to the Tenant Protection Act of 21 June 2001 (consolidated text: Dz.U. 2005 No. 31 Item 266), in their case courts cannot award evictions without determining eligibility for social housing. This means that the execution of eviction is suspended until after the tenant is presented by the municipality with an offer to social housing tenancy agreement. As a rule the waiting period for assigning this is very long.

⁷²⁴ In the meantime important observations in this regard have been made by the Constitutional Tribunal in its judgment of 29 June 2006, P 30/05.

⁷²⁵ Law of 1 April 2011, amending the Law on Police and some other laws, Dz.U. 2011 No. 117, Item 677.

⁷²⁶ These rights encompass the right to maternity/paternity/adoption/parental leave with general protection of employment during each of those leaves (however, the exceptions from this protection are different from those that apply to employees). In addition, persons belonging to different uniformed services entitled to parental leave are not authorised to apply for part-time work, which means that Article 186⁷ LC, as a rule, does not apply to them.

⁷²⁷ <http://www.rpo.gov.pl/?md=7663>, accessed 16 August 2012.

⁷²⁸ <http://rownetraktowanie.gov.pl/interwencje>, accessed 16 August 2012.

partners have played any significant role in the field of protection of pregnancy/maternity rights. There are, however, many NGOs involved in the prevention of sex-related discrimination with regard to maternity.⁷²⁹

4. Enforcement and effectiveness

4.1. General

No study has been found that would prove that the introduction of pregnancy and maternity rights for women in the labour market leads to a decrease in the numbers of women being employed. This opinion is, however, often expressed.⁷³⁰ The statistics available do not reflect how many complaints are connected with discrimination regarding pregnancy or parenthood. However, an insignificant percentage of complaints connected with discrimination in general on all grounds (2 % of all complaints lodged with the National Labour Inspectorate)⁷³¹ and the relatively small number of court cases related to sex discrimination (in 2009: 535),⁷³² may indicate that the actual possibilities of successful legal intervention are limited.⁷³³ In addition, the courts in discrimination cases rule in favour of claimants (in whole or in part of the claim) in less than 10 % of recognized cases, after lengthy proceedings (obtaining a court decision in labour matters took on average five months).⁷³⁴ There is no reason to believe that, since the legislation implementing the Recast Directive entered into force, there has been any increase in national case law regarding pregnancy and parental rights.

4.2. Legal redress

Also, in most discrimination cases, the compensation awarded tends to be rather moderate, never exceeding 10 times the minimum wage.⁷³⁵ The compensatory and dissuasive effects of court decisions are therefore limited. In case law regarding discrimination in relation to pregnancy, the Supreme Court stressed that the compensation provided for in such cases (Article 183d LC) should reimburse both pecuniary and non-pecuniary harm and realize preventive effect.⁷³⁶ The employer's breach of the prohibition of discrimination in relation to pregnancy, leading to termination of employment, gives ground to a separate claim for damages for discrimination, regardless of compensation for wrongful dismissal.⁷³⁷ The potential effectiveness of legal redress in discrimination cases varies depending on which provisions are being applied, the LC or the Anti-Discrimination Law. Although the AL also

⁷²⁹ Active in this field are both anti-discrimination associations of very general mandate, i.e. the Helsinki Foundation (<http://www.hfhr.pl>, accessed 25 September 2012), the Polish Society of Anti-Discrimination Law (<http://www.ptpa.org.pl>, accessed 25 September 2012), Feminoteka (<http://www.feminoteka.pl>, accessed 25 September 2012) and NGOs specializing in protection against discrimination in connection with motherhood, the MaMa foundation (<http://fundacjamama.pl>, accessed 16 August 2012), whose project 'Oh Mamma Mia! I can't get there in my wheelchair' aimed to examine the urban space in terms of accessibility to wheelchairs and strollers for children, may serve as an example of good practices.

⁷³⁰ <http://www.efka.org.pl/index.php?action=dyskusje&ID=13>, accessed 16 August 2012.

⁷³¹ Annual reports of the Inspectorate generally include only information about complaints on discrimination and mobbing (without identifying discrimination based on sex). See e.g. http://www.pip.gov.pl/html/pl/sprawozd/10/spraw_10.htm, accessed 18 August 2012. The last analysis of complaints on sex discrimination dates from 2004, when 94 such complaints were counted, 2- of which the inspectors eventually accepted. See: <http://www.pip.gov.pl/html/pl/html/07010001.htm>, accessed 18 August 2012.

⁷³² The number of cases of discrimination against men and women in 2009 had a high growth rate (of 192 %), compared to 2004, and amounted to 525 cases. In 2008, when there were many group redundancies, it amounted to 1028 cases. *Analiza dyskryminacji w zatrudnieniu w latach 2004-2009* (Analysis of sex discrimination in employment in the years 2004-2009), <http://bip.ms.gov.pl/pl/dzialalnosc/statystyki/statystyki-2010>, accessed 19 August 2012.

⁷³³ A. Młodawska 'Sytuacja kobiet na rynku pracy' (The situation of women on the labour market) in: M. Sikorska (ed.) *Ciemna strona macierzyństwa. O niepokojach współczesnych matek* (The dark side of maternity. What mothers worry about) Report AXA 2012.

⁷³⁴ Ministry of Justice. Statistical information on evidence of cases and case law of common courts, <http://bip.ms.gov.pl/pl/dzialalnosc/statystyki/statystyki-2011/>, accessed 19 August 2012.

⁷³⁵ The minimum wages for work in 2012 amount to approximately EUR 1 500 (PLZ 1 500 375).

⁷³⁶ Judgment of the Supreme Court of 7 January 2009, III PK 43/08.

⁷³⁷ Judgment of the Supreme Court of 3 December 2009, I PK 142/09.

provides for compensation (Article 13), it does not set a minimum limit (which according to the LC cannot be lower than the minimum wage) and makes the reservation that with regard to compensation the general tort liability rules of the Civil Code apply. This means that the amount of compensation must not exceed the actual harm suffered. This rule does not apply to employees seeking compensation under Article 183d LC. It is also unclear which procedural rules will apply in proceedings under the AL. Although both the LC and the AL generally provide for the application of the Code of Civil Procedure (CCP), only the LC stipulates that employment disputes are to be decided by labour courts (Article 262 LC), which operate according to a special procedure, beneficial to employees.⁷³⁸

4.3. Access to information

No comprehensive research has been found that would show whether individuals are aware of their rights related to pregnancy and paternity. Some other studies, however, include partial information on this subject.⁷³⁹ It is also believed that the growing number of court cases indicates an increase in public awareness and improved access and usability of existing legal remedies.⁷⁴⁰

The State does not make sufficient efforts in order to disseminate adequate information among all stakeholders, regarding their rights as parents. Proof of this is e.g. the fact that the introduction of paternity leave was not accompanied by any special social campaign. Only recently, with the support of the Ministry of Labour and Social Policy, has a website been created, the purpose of which is to raise awareness and promote paternity leave among employees and employers.⁷⁴¹ So far however the service has not provided any relevant content, beyond general information about the legal provisions.

PORTUGAL – Maria do Rosário Palma Ramalho

1. Existing legislation and case law

1.1. Employment

Legal provisions related to the protection of maternity and paternity and addressing discrimination on these grounds in the field of employment are part of the Labour Code (Law No. 7/2009 of 2 February 2009) and, as regards civil servants, of Law No. 59/2008 of 11 September 2008. Since the content of these provisions is very similar, we will limit our references to the provisions in the Labour Code (LC).

The key legal measures in this area are the following:

- *Pregnancy* – Pregnant women are protected as regards working conditions related to the activity performed, working time arrangements, including night work, and pregnancy-related illnesses, including antenatal examinations. In relation to working conditions, all types of work that may be dangerous either for the woman or for the baby are forbidden or restricted, and the woman is entitled to change to non-dangerous work, or, if such change

⁷³⁸ The Anti-Discrimination Act, unlike the LC, does not mention the possibility of an amicable settlement of the dispute. Such proceedings may however be conducted according to the general provisions of the CCP. Both under general rules of CCP as well as special proceedings before the labour courts, civil society organizations (whose statutory tasks include protection of equality) can at any stage lodge claims on behalf of citizens and join proceedings.

⁷³⁹ The Report 'Equal treatment for the condition of good governance' e.g. shows that a relatively large number of people are wrongly convinced that the recruiter in employment may ask about the number of children (35 %), about the person who will take care of the child (22 %) or about future reproductive plans (18 %). P. Antosz & J. Górniak (ed.) *Równe traktowanie warunkiem dobrego rządzenia. Raport z badań sondażowych* (Equal Treatment as condition for good governance. Report of poll research) Uniwersytet Jagielloński, Kraków 2012.

⁷⁴⁰ Ref.: Analysis of discrimination in employment in the years 2004-2009, <http://bip.ms.gov.pl/pl/dzialalnosc/statystyki/statystyki-2010/>, accessed 15 August 2012.

⁷⁴¹ <http://www.urlpojcowski.info/strona-glowna.html>, accessed 15 August 2012.

is not possible, to go on leave, paid by social security (Article 62 of the LC).⁷⁴² In relation to working time arrangements, pregnant women are entitled to refuse night work, extra work and flexible time/work arrangements and as regards night work they are entitled to be transferred to a day-time position, or, if such position is not available, to go on leave paid by social security (LC, Articles 60, 59 and 58, respectively).⁷⁴³ Finally, in relation to pregnancy-related illnesses, women have the right to go on paid leave in the event of pregnancy risks affecting their ability to work as well as in the event of abortion, and to normal sick leave in the event of other illnesses during pregnancy (LC, Articles 37 and 38); they also have the right to attend antenatal examinations, with no loss of salary (Articles 46 and 65 No. 2 of the LC).

- *Maternity leave* – Maternity leave is granted to women and to men and is in fact divided into several leaves: ‘initial maternity leave just for the mother’ with the minimum duration of 6 weeks after giving birth (Article 41 of the LC); ‘initial parental leave’⁷⁴⁴ which can go up to 120 days or 150 days and which can be divided between both parents (Article 40 of the LC); and ‘initial parental leave of one of the parents in replacement of the other parent’ (e.g. leave for the father to replace the mother who died during the leave (Article 42 of the LC)). These types of leave are paid by social security, on the basis of 100 % of the salary of the worker, or, for the 150-days option, on the basis of 80 % of the salary.
- *Returning from maternity leave* – When returning from maternity leave, as from other leaves related to maternity, paternity or adoption, the woman/man has the right to resume her/his previous job or activity (Article 65 No. 5 of the LC).
- *Breastfeeding* – Mothers who are breastfeeding have the right to a leave of absence of 2 hours per day (in two periods of 1 hour each) while breastfeeding lasts and with no loss of salary; if the child is bottle-fed, this leave of absence can also be taken by the father, provided the mother also works and until the child is one year old. The period of absence is paid by the employer (Articles 47 and 65 No. 2 of the LC).
- *Adoption leave* – This leave is granted to both parents on the same conditions as those for initial parental leave (meaning for a period of 120 or 150 days and paid accordingly), provided the adopted child is under the age of 15 and did not live with the adoptive parents prior to adoption; the parents can divide the period of the leave between them (Article 44 of the LC).
- *Paternity leave* – In addition to other parental leaves that they can share with the mother, as stated above, fathers have the right to a specific and compulsory paternity leave of 10 days, during the first 30 days after his child is born, which can be followed by an optional period of 10 more days; this leave is paid by social security (Article 43 of the LC).
- *Parental leave* – Parental leave in Portuguese legislation integrates several types of leave that greatly go beyond the concept of parental leave developed by EU law. These leaves are the following: ‘supplementary parental leave’, which corresponds to the EU-law concept of parental leave, and which is granted to the mother and the father to take care of a child under the age of 7, for a period of 3 months or, on the basis of part-time work, for a period that can go up to 1 year (Article 51 of the LC);⁷⁴⁵ ‘special leave to take care of the child’, which may follow supplementary parental leave and has a maximum duration of 2 years (Article 52 of the LC); ‘specific leave to take care of a handicapped child and of a child with a severe and long-term illness’, which can go up to 4 years (Article 53 of the LC). Parental leave taken in the form of the 3-month suspension from work and

⁷⁴² The list of activities forbidden or restricted during pregnancy is part of the legislation concerning health and safety at the workplace: Law No. 102/2009 of 10 September 2009, Articles 51 et seq. The legislation regarding social security benefits related to all leaves regarding pregnancy, maternity and paternity is Decree-Law No. 91/2009 of 9 April 2009.

⁷⁴³ Payment of sick leave is made on the basis of 60 % of the average salary.

⁷⁴⁴ This specific type of leave corresponds to ‘maternity leave’, as regulated by EU law. The Portuguese term for this type of leave (‘initial parental leave’) intends to draw attention to the fact that both parents can enjoy it, alternatively, but the expression can be misinterpreted.

⁷⁴⁵ In relation to this type of leave, Portugal has not yet transposed Directive 2010/18/EU, but it is doubtful that such transposition is necessary, since the other types of leave described already go beyond EU legislation in this respect.

immediately after maternity leave gives the right to a social security allowance, and this is also true for the specific leave to take care of a handicapped child or a child with a severe and long-term illness. In addition to these leaves, there are several schemes of part-time work and other specific working-time arrangements to attend to childcare needs, but all these schemes rely on the agreement of the employer.

- *Dismissal related to pregnancy, maternity and related forms of leave* – Dismissal during pregnancy and maternity or paternity leaves as well as during parental leave is unlawful and therefore forbidden (Article 53 of the Portuguese Constitution, and Articles 338 and 63 No. 2 of the LC). In addition to this general prohibition, if any form of dismissal occurs while the worker is pregnant or during any type of leave (e.g. collective dismissal or other objectively motivated dismissal), the dismissal is still presumed unlawful and has to follow a different procedure involving the CITE (Commission for Equality in Employment and at the Workplace), which has to approve the dismissal in advance (Article 63 of the LC).

Portuguese legislation does not explicitly include discriminatory practices based on pregnancy and maternity or paternity among the several grounds of discrimination in the field of employment (Article 24 No. 1 of the LC), but only includes a general reference to discrimination based on family status and situation (which is more directly connected with marital status but also includes the status of mother and father) and a reference to emphasize that protective measures concerning pregnancy, maternity and paternity rights, as well as the reconciliation of family and professional life are not to be considered as a discrimination (Article 24 No. 3 b) of the LC). In this sense, there is no explicit connection, in national law, between equality provisions and maternity and paternity provisions.

Nevertheless, the LC explicitly extends discrimination provisions, namely the provision concerning the reversal of the burden of the proof, to actions concerning pregnant women, as well as to women and men on maternity, paternity or parental leave (Article 25 No. 6 of the LC). Also the relationship between maternity and paternity provisions and discrimination is established by the legal requirement of the involvement of the Equality Commission (CITE) prior to the dismissal of pregnant women as well as women or men on maternity, paternity or parental leave, as described above (LC, Article 63). In practice, due to this provision, the courts often recognise the relationship between dismissal related to pregnancy or maternity as a gender discrimination issue.

National legislation does not specifically refer to victimization in relation to pregnancy/maternity/parental/paternity rights.

In relation to the application of pregnancy and maternity (adoption/parental/paternity) rights, these rights do not vary according to the size of employer, and are also very similar in the private and in the public sector. There is, however, a general feeling that some discriminatory practices regarding maternity and especially pregnancy are much more common in the private sector than in the public sector – e.g. the dismissal of pregnant women and the refusal to extend fixed-term labour contracts due to pregnancy are quite common in the private sector. There is no evidence if these practices are more common among small companies than in larger companies.

1.2. Social security and pension rights

In Portuguese legislation, all the types of leave related to maternity and paternity rights that are paid (as stated above, maternity leave, paternity leave, adoption leave, parental leave, as well as pregnancy-related leaves, such as abortion leave, leave for pregnancy-related sickness and leaves related to night work and to dangerous work, when there is no alternative job available) are paid by the public social security system, with the exception of absences from work to attend antenatal examinations and for the purpose of breastfeeding, where the period of absence is paid by the employer.

The social security allowances related to these leaves are established by Decree-Law No. 91/2009 of 9 April 2009, and the amount paid varies according to the types of leave:

- Maternity leave (meaning ‘initial parental leave’, as it is called in Portugal) and paternity leave, as well as leave due to abortion and leave due to pregnancy risks, and adoption

- leaves, are paid on a basis of 100 % of the average salary of the worker (Decree-Law No. 91/2009 of 9 April 2009, Articles 29, 30 a), 31 and 34);
- Maternity leave and adoption leave when taken in the 150-days option (and not on the basis of 120 days) are paid on a basis of 80 % of the average salary of the worker (Decree-Law No. 91/2009 of 9 April 2009, Articles 30 b) and 34);
 - Other pregnancy-related leaves, such as pregnancy-related sickness leave and leaves related to night work and to dangerous work, when there is no alternative job available, are paid on the basis of 65 % of the salary (Decree-Law No. 91/2009 of 9 April 2009, Articles 18, 19 and 35);
 - Parental leave taken in the form of the 3-month suspension from work and immediately after maternity leave gives the right to a social security allowance, calculated on the basis of 25 % of the salary of the worker (Articles 16 and 33 of Decree-Law No. 91/2009 of 9 April 2009); specific leave to take care of a handicapped child and of a child with a severe and long-term illness gives the right to a social security allowance calculated on the basis of 65 % of the salary but with an upper limit (Articles 20 and 36 of Decree-Law No. 91/2009 of 9 April 2009).

With regard to pension rights, maternity and parental leaves are treated as a period of effective work that is taken into account for the purposes of pension rights and other social security rights (Article 65 No. 1 of the LC).

1.3. Self-employment

Independent workers are covered by the same social security legislation regarding the protection of pregnancy, maternity and paternity rights as that which applies to dependent workers, as established in Decree-Law No. 91/2009 of 9 April 2009 (Article 4 No. 1).

Therefore, with the exception of the measures directly related to the employer-employee relationship, independent workers benefit from the same rights as dependent workers in relation to pregnancy, maternity and paternity. The key legal measures regulating self-employment in this area are the following:

- *Pregnancy* – independent workers do not have the right to any leave during pregnancy, in the sense of the LC (meaning a right that can be imposed on the employer), because they have no employer-employee relationship. However, if they cease their activity during pregnancy for pregnancy-related reasons, including pregnancy-related illnesses, or due to abortion, they are entitled to a social security allowance, either on the basis of 100 % of their average income (in the event of pregnancy risks and in the event of abortion) or on the basis of 65 % (in the event of illness and pregnancy-related illness and in the event of dangerous activities) – Decree-Law No. 91/2009, Articles 9, 10, 29, and 35;
- *Maternity leave, paternity leave and adoption leave* – independent workers do not have the right to maternity leave, paternity leave and adoption leave in the same way as dependent workers (meaning a right that can be imposed on the employer), but if they decide to stop working on the grounds of maternity, paternity or adoption, they are entitled to the social security allowance, which is calculated in the same way (100 % of the average income, in the event of maternity or adoption leave if they decide to stop for 120 days, or 80 % of the average income, in the 150-days option, and 100 % of the average income, in the event of paternity leave) – Articles 30, 31 and 34 of Decree-Law No. 91/2009;
- *Parental leave* – independent workers do not have the right to parental leave in the same way as dependent workers (meaning a right that can be imposed on the employer), but they can stop working if they want to, with a right to the same social security allowance as that granted to dependent workers (25 % of the income of the worker if parental leave is taken in the form of the 3-month suspension from work and immediately after maternity leave) – Articles 16 and 33 of Decree-Law No. 91/2009 of 9 April 2009.

In relation to breastfeeding and antenatal examinations, there is no specific protection for independent workers, since the leave of absence for these purposes with no loss of salary, as included in the LC, is meant for dependent workers.

Directive 2010/41/EU, in relation to Article 8, has not been formally transposed into national legislation. However, the national rules regarding maternity allowance that we described above already cover this right, depending on the requirement of the worker (i.e. on a voluntary basis). It is also worth mentioning that these rules are applicable not only to independent workers (throughout Decree-Law No. 91/2009, Article 30), but also to assisting spouses or life partners of independent workers, who benefit from the social security protection of independent workers (Article 5 No. 2 of Decree-Law No. 91/2009 of 9 April 2009, and Articles 133 No. 1 b) and Article 141 of Law No. 110/2009 of 16 September 2009, which approved the Social Security Code). However, the fact that the allowance is based on the worker's requirement means that it is granted for the period requested by the worker, during which he cannot perform any activity, and this period may not necessarily cover 14 weeks.

In Portuguese law we do not know of any other provisions exceeding the requirements of Directive 2010/41/EU protecting female self-employed workers and female assisting spouses or life partners in relation to pregnancy and maternity.

1.4. Access to and the supply of goods and services

Gender equality in the access to and the supply of goods and services is dealt with in Law No. 14/2008 of 2 March 2008, which transposed Directive 2004/113/EC into national legislation.

This Law explicitly considers as discrimination all practices or contractual clauses based on gender or harassment that may lead to: the refusal of access or supply of goods and services; the supply of goods and services on less favourable conditions; the refusal or the conditioning of buying, selling or house-renting contracts; the refusal or conditioning of access or supply of healthcare services, both in public and in private facilities (Article 4 No. 1 and 2). Therefore, the refusal or the conditioning of the access or supply of goods and services on the grounds of pregnancy and maternity is to be considered as a discriminatory practice under this legislation.

In addition to this general provision, this piece of legislation has several measures regarding pregnancy and maternity. The following ones are worth mentioning:

- The law explicitly considers as non-discriminatory practices the more favourable measures taken in protection of women during pregnancy, childbirth and breastfeeding (Article 4 No. 6);
- The law explicitly forbids that in the process of supplying goods and services, a woman is subjected to any questions concerning her pregnant state, except for reasons related to her health (Article 5);
- Finally, as regards insurance contracts and other financial contracts, the Law prohibits that the costs of these contracts related to pregnancy and maternity result in different premiums or benefits (Article 7).

The system described shows that there is no general and explicit prohibition of discrimination on the grounds of pregnancy and maternity in Portuguese law, in the access to and the supply of goods and services, but rather a topic-by-topic approach (mainly in the field of housing, healthcare services and access to financial benefits, and insurance contracts). Unlike Directive 2004/113/EC (Article 4 No. 1a), national law does not explicitly qualify less favourable treatment of women on the grounds of pregnancy or maternity as direct gender discrimination.

National legislation in this area distinguishes direct and indirect discrimination, as well as harassment and sexual harassment (Article 3) but in a general way, related to all forms of gender discrimination, and not specifically in relation to pregnancy and maternity.

National legislation complies with Directive 2004/113/EEC and exceeds these provisions mainly in the area of insurance and other financial contracts, where the possible exceptions and derogations regarding these contracts have not been used by Portugal when transposing the Directive. Where education, media, and advertising are concerned, national law explicitly leaves them out of its scope (Article 2 No. 2).

2. Gaps in national law

2.1. Employment

In the field of employment, the Labour Code protects pregnant women, as well as workers on maternity, paternity, adoption or parental leave, against discrimination, in the recruitment process and for the duration of the labour contract, as well as upon termination of the contract. Nevertheless, the main gap in the national legal system lies in the fact that there is no formal and explicit identification of discriminatory practices on the grounds of pregnancy, maternity or paternity as gender discrimination, but only includes the stipulation that the more favourable treatment intended to protect maternity and paternity is not to be considered as discrimination (Article 24 No. 3 b) of the LC).

This general gap in the legal system influences all phases of the labour contract.

In the *recruitment process*, the protection granted by the LC is effective due to some direct prohibitions imposed on the employer: the general prohibition of discrimination in the access to employment, on the grounds of family status (Article 24 No. 1 of the LC); the specific prohibition to ask a candidate applying for a job regarding a possible pregnancy, except for reasons related to the specific activity for which she is applying; and the specific prohibition to subject the candidate to pregnancy/medical examinations during the recruitment process (Article 17 No. 1 b) and 19 No. 2 of the LC).

Of course, in practice, these practices are still common mainly in the private sector, but whenever these situations are denounced by the Commission for Equality (CITE), which controls this process, the action of the Commission proves to be successful.⁷⁴⁶

As regards *employment relations and conditions of employment*, women who are pregnant or on maternity leave are also protected by the legal system: the rule prohibiting questions or pregnancy tests applies for the full duration of the contract, maternity and parental leaves are of no consequence for the effects of promotion or employment rights (Article 65 No. 1 of the LC), and the law requires the employer to temporarily adjust the working conditions and/or working hours of pregnant workers to avoid exposure to occupational risks (Articles 60 No. 2 and 62 No. 3 a) of the LC).

However, the real effectiveness of some of these rules remains uncertain, especially in relation to the rule concerning the adaptation of working conditions or working hours in the event of occupational risks, because the law also establishes the possibility of the employee going on leave when the adaptation is not possible, so this is the more common solution.

In relation to *remuneration*, there are gaps concerning remuneration supplements and other benefits, especially for maternity or parental leave. Although in these situations the worker is not paid because she/he benefits from a social security allowance, it is also common practice among companies not to pay other specific allowances that used to go along with the salary when the worker was not on leave, e.g. presence bonus, productivity bonus, or meal or transportation bonus.

These practices are difficult to eradicate for two reasons: on the one hand, there is no clear legislative link between maternity and paternity issues and gender equality issues, as stated above; on the other hand, the national concept of remuneration, for the purposes of equal pay between men and women (Article 24 No. 2 c) of the LC), is not as clear as the EU concept, and this uncertainty makes it possible to interpret the notion in a strict sense. Some court decisions have already allowed that women on maternity leave had no right to supplementary remuneration.

As regards the taking into consideration of the periods of maternity, parental and adoption leave for the purposes of occupational pensions, we do not know of special limitations.

⁷⁴⁶ We recall a case regarding a recruitment form for the hiring of workers for an international chain of supermarkets, which had a specific section addressed only to female candidates, asking them if they were pregnant or intended to become pregnant in the following 18 months. This form was presented to the CITE, which denounced this situation, forced the employer to change the form and imposed a fine on the employer.

In relation to the *termination of the employment contract*, the law protects pregnant women and women/men on maternity, paternity and parental leave, by the following measures: dismissal during pregnancy and maternity or paternity leaves as well as during parental leave is unlawful and forbidden (Article 53 of the Constitution, and Articles 338 and 63 No. 2 of the LC); any form of dismissal that occurs while the worker is pregnant or during leave (including collective dismissal or other objectively motivated dismissal), is presumed unlawful and has to follow a different procedure involving the CITE, which has to approve the dismissal in advance (Article 63 of the LC); finally, any refusal by the employer to extend a fixed-term contract that affects a pregnant woman or a woman on maternity leave must be communicated to the CITE, which has assessment power over these situations (Article 144 No. 3 of the LC). On the whole, the CITE's assessment powers have proven to be effective, but this only occurs when the situations are presented for review to this agency by the worker.

In Portugal, there used to be so-called 'white resignations' – by which we understand the situations where, as signing the labour contract, the employee was also «invited» (as a condition to get the job) to sign a resignation document undated, that the employer would date and use afterwards, if he wanted to terminate the contract. These practices were very common but, provided the employee proved before the court that he/she had been forced to sign the document in the first place, the courts declared such resignation null and void. However, these practices have been eradicated, due to the introduction of a new legal requirement, now included in the LC: the dissolution of a labour contract by both parties or by the employee's resignation has to be signed before a public authority or, if not, the worker can reverse the resignation in the first seven days after it was signed (Article 350 of the LC).

In practice, despite the assessment of fixed-term contracts extensions by the CITE, many of these contracts are not extended for reasons connected to pregnancy, maternity or parental leaves.

In relation to the *involvement of fathers*, the Portuguese situation is the following:

- In relation to paternity leave, fathers take advantage of the compulsory period of 10 days, and more and more frequently are also using the voluntary period of an additional 10 days; there is no evidence of specific discrimination, mainly in relation to promotion, or feelings that the employee might be considered less committed to the job.
- In relation to maternity leave (which the father can also take, either when replacing the mother or by sharing the duration of the leave with the mother, in mutual agreement) and to parental leave, fathers seldom take this leave, or any other forms of long-term leave. In our opinion, this is due to the social stigma attached to the reconciliation of family and working life, which mostly lies with women, but also to the salary gap between men and women, which continues to favour men, making the women taking this leave a less costly option for the family.

We do not know of any court cases involving fathers.

2.2. Self-employment

We do not know of any research or examples of discrimination against pregnant self-employed workers or self-employed workers who have recently given birth, but this may be due to the general practice of these women to return to work shortly after giving birth, despite the right to a social security allowance. This being the case, the period of absence is not significant and therefore its effect on the clients may not be relevant.

In relation to the access of female self-employed workers and female assisting spouses or life partners to maternity allowances, there are no identifiable difficulties.

In relation to self-employed workers and male assisting spouses or life partners, they are able to access paternity/parental leave and the related allowances under the same conditions of female self-employed workers and female assisting spouses or life partners with no specific difficulties.

2.3. Access to and the supply of goods and services

In relation to this topic we must note that there is no trustworthy information available. Therefore our answers are to be considered as a personal opinion only.

We do not know of any examples of potentially discriminatory practices towards pregnant women in relation to access to goods and services, but we could not obtain more precise data on this subject, so there is a risk that this information is incorrect.

We also have no data concerning potentially discriminatory practices justified on the ground of health and safety or other grounds, not directly linked to pregnancy/maternity that may lead to restricting the liability of the providers of goods and services. Nevertheless, in relation to some sports or leisure activities, there is often a notice regarding the possible dangers of such an activity for pregnant women that could be used in Court to limit responsibility.

We have no examples of potentially discriminatory practices either in relation to the access to and the provision of medical care for pregnant women and young mothers, or of instances where pregnant women or women on maternity leave have been denied access to healthcare or healthcare benefits because of their pregnancy or maternity, but again we must emphasize the lack of data in this area.

We do not know of potentially discriminatory practices on grounds of pregnancy/maternity towards women, pregnant women or young mothers in relation to insurance, in particular the denial of access, waiting periods and exclusions from coverage. However, since these practices mostly rely on insurance contracts they are difficult to pinpoint and may occur in actual fact. We also have no information regarding specific costs of private health insurance products in relation to the age of the woman.

We do not know of any instances where pregnant women or women on maternity leave have been denied access or offered limited access to state/regional/municipality financial and non-financial benefits, in the area of banking or financial services, or of potentially discriminatory practices toward breastfeeding mothers.

What we would emphasize as a general gap in national legislation in the area of equality in the access to and the supply of goods and services is the lack of reference to pregnancy and maternity as gender discrimination. The lack of this reference *per se* makes discriminatory practices less visible and therefore more difficult to pinpoint.

2.4. Additional information

We have no additional information to report on this topic.

3. Involvement of other parties

In addition to the Government/legislator, other entities play a positive role in the field of pregnancy/maternity rights in Portugal. We emphasize three categories:

- The *social partners*: by adopting collective agreements, which often reinforce pregnancy and maternity and paternity rights, by establishing more favourable regimes, such as supplementary remuneration in addition to the social security allowances attached to pregnancy, pregnancy-related illness, or other illness during pregnancy, or to maternity, paternity and parental leave; also, collective agreements include other favourable measures in relation to the care of children (e.g. preschool facilities or student allowances); by contrast, however, flexible working-hours arrangements that are more and more frequently established in collective agreements tend to make the exercise of maternity and paternity rights more difficult, especially in the area of reconciliation of family and working life;
- The *national equality bodies*: the role of these bodies is very important, since they have the competence to survey the application of legal measures in this area; in Portugal, two bodies have this competence: the CITE (Commission for Equality in Employment and at the Workplace), which acts in the field of employment; and the CIG (Commission for Citizenship and Gender Equality), which acts in other areas, including the access to and the supply of goods and services.
- The *labour inspection services*: these services also act in the area of employment.

We do not know of any particularly good practices initiated by private or public stakeholders relevant in the area of discrimination on the ground of pregnancy/maternity/parental leave. On the contrary, the extension of pregnancy and maternity/paternity rights may be seen as a threat by some sectors, because the current system is already costly for employers that have to hire replacement workers and train them. However, we do not know of any formal position of enterprises or employers' associations in this respect.

4. Enforcement and effectiveness

4.1. General

We do not know of any studies on the possible negative or positive effects of the exercise of pregnancy and maternity rights on the number of women in the labour market. However, Portugal may not be a good example in this respect, since in our country most women work full time and return to work just after maternity leave, seldom using parental leave.

4.2. Legal redress

In terms of the defence of rights, we underline the following:

- There are no particular difficulties linked to enforcing rights regarding pregnancy, maternity, adoption, parental or paternity leave, in the sense that the judicial proceedings are neither more costly nor more lengthy than other proceedings brought before labour courts. In this area, women and men can benefit from the support of the CITE, which gives advice to individuals who want to enforce their rights. Finally, for the purpose of proof, the rule establishing the reversal of the burden of proof is applicable (Article 25 Nos 5 and 6 of the LC). We do not know of any studies indicating otherwise in this area.
- The Recast Directive has not had any significant impact in national case law regarding pregnancy, maternity, adoption, parental or paternity rights initiated by associations, organisations or other legal entities with a legitimate interest in this area, because those associations already had the power to bring claims on these issues.
- In terms of compensation, the remedies for the violation of the rights attached to pregnancy, maternity and paternity is adequate. These remedies may consist in damages being awarded (Article 28 of the LC), or, in the event of dismissal, the right to return to the same job, if the worker prefers this to compensation (Article 389 of the LC), and the employer is also subject to fines; where collective agreements are concerned, discriminatory clauses can be eradicated in a process conducted by the CITE (Article 479 of the L); outside the employment area, the remedies can be damages being awarded and the right to replace the discriminatory contractual clause by a non-discriminatory clause (Article 10 of Law No. 14/2008, regarding equality in the access to and the supply of goods and services).

4.3. Access to information

We do not know of any research showing whether individuals are aware of their rights (regarding pregnancy, maternity, paternity, adoption and parental leave), in relation to Portugal.

To our knowledge, the State does not make any specific efforts in terms of disseminating adequate information to all stakeholders regarding the right of pregnant women and parents to maternity, adoption and parental leave, apart from general dissemination of information by the publication of legislation, the websites of several Ministries and organisations involved which are easy to access, and the information provided by the equality agencies and by the social security services, which are well distributed throughout the country.

Women with precarious or atypical employment contracts are at a particular disadvantage with regard to pregnancy, maternity, adoption and/or parental rights. We have no data concerning other groups.

ROMANIA – Roxana Teșiu

1. Existing legislation and case law

Romanian national legislation on maternity and pregnancy protection has been substantially and constantly modified since December 2010, when the Child-Raising Ordinance⁷⁴⁷ was adopted. The Child-Raising Ordinance was subsequently implemented through the Methodological Norms adopted in January 2011⁷⁴⁸ and further modified and adopted through Act No. 132 of 2011.⁷⁴⁹ The 2010 Child-Raising Ordinance provides for a new scheme to apply for parental leave, by expressly indicating two types of parental leave and corresponding allowances. Any natural, adoptive or otherwise involved parent⁷⁵⁰ may benefit, on the grounds of the birth or adoption of a child, from parental leave and the corresponding allowance. The length of the parental leave may be for a period until the respective child reaches the age of 1 or 2, or the age of 3 for disabled children. The employee applying for this leave must indicate, at the time of the request, which of the two types of child-raising leave they are applying for.

Under the 2010 Child-Raising Ordinance, such leave and the corresponding allowance could only be granted to one parent during the entire period chosen. The parent had to exercise such right after informing his or her employer, thus resulting in the voluntary suspension of the individual employment contract, and after informing the local public authorities that are charged with the payment of the child-raising allowance.

Following the applicability of the 2011 Social Benefits Ordinance,⁷⁵¹ in line with the provisions of the Parental Leave Directive, at least one month of the child-raising leave must be allotted to the other parent, i.e. the one not having exercised his or her right to apply for child-raising leave.

National legislation on maternity protection was completed with the provisions of the 2003 Emergency Ordinance No. 96 on maternity protection at the workplace.⁷⁵²

1.1. Employment

The 2002 Equal Opportunities Act⁷⁵³ provides for measures to promote equality of opportunities and treatment between women and men in Romania in all spheres of public life (employment, education, health, information and communication, political affairs, decision-making, supply of and access to goods and services, with the exception of religious denominations and private life) with the aim of eliminating all forms of sex based discrimination. According to Article 10(1) of the 2002 Equal Opportunities Act, maternity cannot constitute a ground of discrimination. The provisions of Article 4(a) and (b) of the 2002 Equal Opportunities Act include specific definitions of the concepts of direct and indirect discrimination, which are in line with the Directive's requirements.

⁷⁴⁷ Emergency Ordinance No. 111 of 8 December 2010 on the childcare leave and corresponding allowance, published in Official Gazette No. 830 of 10 December 2010.

⁷⁴⁸ Methodological Norms of 31 January 2011 on the application of provisions of Emergency Ordinance No. 111 of 2010 on the childcare leave and corresponding allowance, published in the Official Gazette.

⁷⁴⁹ Law No. 132 on the adoption of Emergency Ordinance No. 111 of 8 December 2010 on the childcare leave and corresponding allowance, published in Official Gazette No. 452 of 28 June 2011.

⁷⁵⁰ An 'otherwise involved parent' refers to the so-called 'social parents', persons who are authorised to take care of children, who live with abandoned children typically in a state-funded organisation (social house). Each such parent or social family can take care of up to 10 children.

⁷⁵¹ Governmental Emergency Ordinance No. 124 of 27 December 2011 on the modification and completion of certain legal norms regulating the granting of social assistance benefits, published in Official Gazette No. 938 of 30 December 2011.

⁷⁵² Emergency Ordinance No. 96 of 14 October 2003 on maternity protection at the workplace, published in Official Gazette No. 750 of 27 October 2003, further modified and adopted by Law No. 25 of 2004, published in Official Gazette No. 214 of 11 March 2004.

⁷⁵³ Law No. 202 of 19 April 2002 on the equality of treatment and opportunities between women and men, republished in Official Gazette No. 150 of 1 March 2007.

In terms of scope coverage, the 2002 Equal Opportunities Act applies to all employers, public or private, regardless of any other distinction. There is no evidence in Romania that the forms of discrimination tend to vary according to the type or size of employer.

In the field of employment and with reference to employment termination, the provisions of Article 10 of the 2002 Equal Opportunities Act stipulate that dismissal is prohibited during pregnancy, maternity leave and parental leave, with the exception of the employer being declared bankrupted. This means that even dismissal based on poor performance or disciplinary grounds is forbidden during pregnancy. Furthermore, the provisions of Article 25(3) of the 2010 Child-Raising Ordinance provide that employment termination is forbidden for up to 6 months following the employee's definitive return from parental leave. At the end of maternity leave or parental leave, the employee has the right to return to the same job or to an equivalent one and to benefit from the same or equivalent work conditions, as well as to benefit from all work conditions improvements that may have taken place in his/her absence.

1.2. Social security and pension rights

Maternity leave and parental leave periods are considered as part of the total length of service, therefore pension rights are not affected, with no distinction between paid or unpaid parental leave.⁷⁵⁴

1.3. Self-employment

The 2002 Equal Opportunities Act represents the main legal framework on protection of equal opportunities and equal treatment between women and men in Romania. Currently, the Act does not specifically include references to self-employed workers or to female assisting spouses or life partners, which means that the provisions of Directive 2010/41/EU have not been adequately transposed into the Romanian legal framework.

Maternity protection for self-employed women, parental leave and the corresponding allowances are granted to all persons who, for 12 months before the child was born, have earned an income generated by independent and agricultural activities on which income tax has been levied. Furthermore, maternity leave and its corresponding allowance are granted to self-employed women for the same duration and on the same conditions as those applying to employed women. According to the provisions of Article 1 of Emergency Ordinance No. 158 of 2005,⁷⁵⁵ persons who are insured under and contribute to the national social insurance system, have the right to a maternity leave of 126 days, granted before and after birth, with a minimum of 42 days granted after birth. On the condition of contributing to the health national social insurance system, persons who perform independent activities, members of family associations, administrators or managers who have concluded a management contract, as well as all persons who work on the basis of an individual employment contract have a right to maternity leave.

1.4. Access to and the supply of goods and services

Directive 2004/113/EEC has been transposed into Romanian legislation by provisions of Emergency Ordinance No. 61 of 2008 on the implementation of the equality of treatment between women and men with regard to access to and supply of goods and services.⁷⁵⁶ Article 7(1) of Emergency Ordinance No. 61 stipulates that the use of gender-based information for calculating the premiums and benefits in insurance services must not trigger differences with regard to premiums and benefits for the insured person. This is applicable to all new insurance contracts concluded after 21 December 2007.

⁷⁵⁴ Article 22(2) of Emergency Ordinance No. 111 of 8 December 2010 on the childcare leave and corresponding allowance, published in Official Gazette No. 830 of 10 December 2010.

⁷⁵⁵ Emergency Ordinance No. 158 of 17 November 2005 on leaves and corresponding allowances granted from the health social insurances budget, published in Official Gazette No. 1074 of 29 November 2005, as further modified and approved by Law No. 399 of 2006.

⁷⁵⁶ Emergency Ordinance No. 61 of 14 May 2008 on the implementation of the equality of treatment between women and men with regard to access to and supply of goods and services, further modified and approved through Law No. 62 of 2009, published in Official Gazette No. 229 of 8 April 2009.

Furthermore, with regard to access to and supply of goods and services, Article 10 of the 2000 Anti-Discrimination Ordinance lists different types of services and goods without distinguishing between the goods and services available to the public and those who are available privately, to members or to private associations. Article 3 of the 2000 Anti-Discrimination Ordinance⁷⁵⁷ stipulates that its provisions apply to individuals and legal persons, public and private, as well as to public institutions, including in the field of access to goods and services. The list of services includes prohibition of the following:

- the refusal to ensure legal and administrative public services;
- denying a person or of a group of persons access to public health services (choice of a family doctor, medical assistance, health insurance, first aid and rescue services or other health services);
- the refusal to grant a bank credit or to conclude any other kind of contract, excepting the cases when such a restriction is objectively justified by a legitimate purpose and the methods used to reach such a purpose are adequate and necessary;
- denying a person or a group of persons access to services offered by theatres, movie theatres, libraries, museums and exhibitions, excepting the cases when such a restriction is objectively justified by a legitimate purpose and the methods used to reach such a purpose are adequate and necessary;
- denying a person or a group of persons access to services offered by stores, hotels, restaurants, pubs, discos or any kind of service provider, whether private or public, excepting the cases when such a restriction is objectively justified by a legitimate purpose and the methods used to reach such a purpose are adequate and necessary; and
- denying a person or a group of persons access to services provided by public transport companies – airplane, ship, train, subway, bus, trolley, tram, cab, or any other means of transportation – excepting the cases when such a restriction is objectively justified by a legitimate purpose and the methods used to reach such a purpose are adequate and necessary.

2. Gaps in national law

2.1. Employment

Recruitment process

In the recruitment process, pregnant women enjoy protection based on two sources. Article 9(1)(a) of the 2002 Equal Opportunities Act stipulates that it is forbidden for the employer to use practices that would discriminate against persons of one sex in relation to job advertisements and selection criteria, applicable to both public and private employers. According to Article 10(3) of the 2002 Equal Opportunities Act it is forbidden for an employer to require a job applicant to do a pregnancy test, as well as to request her to sign a statement that she will not become pregnant or give birth during employment.

However, in practice, pregnant women whose pregnancy becomes visible do not usually seek a job change, due to the fact that they know that their chances of being hired are very small. The recruitment process itself does not include any monitoring and control mechanism of the labour authorities, such as the Labour Inspection. Typically, the Labour Inspection tends to monitor the implementation of employment law provisions in addition to the main employment aspects, such as the existence of legal employment contracts, payroll and modalities of salary payments, overtime compensation, night work compensation, existence of internal regulations enforced under legal provisions, etc.

For a number of industries, such as retail, especially at entry level the personnel turnover rate is very high, due to low salaries and shift work. Recruitment departments are very much under pressure to fill the vacancies. For this reason, the entire procedure of selecting candidates is based primarily on information submitted in CVs, including civil status and

⁷⁵⁷ Governmental Ordinance No. 137 of 2000 on preventing and sanctioning all forms of discrimination, republished in Official Gazette No. 626 of 20 July 2006, by giving the texts a new numbering.

personal family information. Candidates who apply and who indicate in their CVs or during interviews that they have plans to have children in the near future or who are already pregnant will not be selected for the respective job. In practice it is extremely difficult to detect to which extent a candidate has been rejected due to pregnancy-related plans or due to lack of job skills. By law, this could be done if the respective candidate lodges a complaint with the National Council for Combating Discrimination that he/she felt discriminated against in the selection process. It would be the respective potential employer who needs to prove how the selection process was conducted and how the candidates were ranked based on job requirements. However, so far no such cases have been submitted to the National Council. On the other hand, due to the abovementioned practice and supported by the level of protection offered by law to pregnant employees once they notify their employer of their status, pregnant women in practice tend to exclude a job change after having informed their employer in writing. They are aware of the protection level offered by law during their pregnancy, maternity leave and parental leave. In conclusion, there hardly is any evidence of pregnant women being discriminated against at the recruitment stage, but this is not necessarily because the protection offered by law is effective, but because women choose to exclude the possibility to change jobs.

Employment relations and conditions of employment

In relation to job security, except for cases where the employer is declared bankrupt (where all jobs are lost with no exception), pregnant employees enjoy adequate and effective protection. Termination of the employment contract (based on reasons related to the employee, such as poor performance or disciplinary procedure, or based on reasons related to the employer, such as job restructuring) is very difficult.

There is no evidence in practice of cases where the pregnant employee is forced to submit a resignation or a request for mutual termination of the employment contract during pregnancy. Absence of cases submitted to the National Council for Combating Discrimination regarding pregnancy-based discrimination in employment does not necessarily indicate that such discrimination does not exist, but it rather reflects the lack of awareness of pregnant employees of options to seek legal redress.

With regard to promotion, while there is a general principle of protection foreseen by law, pregnant employees very rarely obtain a promotion during their pregnancy. It is a widespread and accepted practice that employers do not even consider pregnant women for promotion and such employees accept that they do not want to be exposed to changing working conditions during pregnancy. The same is applicable to training enrolment during pregnancy, especially given that due to the absence from the labour market for 1 or 2 years, both the employee and the employer are aware that training is naturally needed after the employee's definitive return to work.

Interestingly enough, the Romanian legal framework has a gap with regard to parental leave that primarily affects the employers and, subsequently, the workers who pursue their parental leave, with regard to their level of remaining attractive in the labour market and adapted to labour force requirements. Women are more strongly affected than men, as they apply for the parental leave scheme as provided by law. Under current enforced law, after maternity leave ends the parent has the right to opt, for one of the following two parental leave schemes:

- paid childcare leave until the child turns 1 (childcare leave allowance of 75 %, calculated based on the average salary earned within 12 months before the leave starts, but no less than 1.2 of the ISR⁷⁵⁸ and no more than 6.8 of the ISR per month); or
- paid childcare leave until the child turns 2 (childcare leave allowance of 75 %, calculated based on the average salary earned within 12 months before the leave starts, but no less than 1.2 of the ISR per month and more than 2.4 of the ISR per month).

⁷⁵⁸ ISR represents the social reference indicator. For the year 2012, ISR amounts to approximately EUR 112 (RON 500). Information available on the website of the Minister of Labour <http://www.mmuncii.ro/ro/articole/2011-12-28/print-2424-articol.html>, accessed 12 August 2012.

The respective parent benefits of a 6-month protection against any dismissal (including poor performance or disciplinary measure), with the exception of the employer being declared bankrupted. Supposing the parent employee initially opts to apply for paid parental leave until the child turns 1 and the employee returns to work on the respective date, during 6 months after returning he/she is protected against dismissal as mentioned above. However, if the employee in the 5th month after returning to work submits an unpaid leave request for parental leave up to the date that the child turns 2, the employer cannot reject this request, and the employee benefits of a new protection of 6 months after the definitive return to work. This option for the parent to return to parental leave, even if unpaid, represents a burden for the employer to properly fill the vacant position and does not contribute to fluent business decisions with regard to the respective job.

The parent employee may choose to apply for unpaid parental leave mainly due to the new 6-month protection offered by law, after the definitive return to work. However, such option does not help the parent to reintegrate into an active labour market, to benefit from continuous and effective training programmes aimed at upgrading his/her professional skills, and does not offer the parent adequate financial resources to raise the child. The employer, in turn, perceives such option as a barrier in effectively running the business and will tend to use all means to push the employee to leave the job, once he/she returns to work, through actions that could be categorised as ‘mobbing’.⁷⁵⁹ Among the coercive practices associated to mobbing the most frequent ones are related to limiting the communication means at the workplace (such as Internet and telephone access), isolation of the employee by allocating a different workstation, not inviting the employee to internal meetings, and changing work-related responsibilities resulting in a dilution of the job content.

Involvement of fathers

Following the applicability of the 2011 Social Benefits Ordinance,⁷⁶⁰ in line with the provisions of the Parental Leave Directive, at least one month of the child-raising leave must be allotted to the other parent, i.e. the one not having exercised the right to apply for child-raising leave. These changes have been adopted in Romania recently and it is therefore too early to analyse the extent to which the parental leave is also used by fathers.

Under Romanian legislation, fathers are also granted paternity leave.⁷⁶¹ Paternity leave is granted only to fathers who have an employment contract. It can be granted for a period of 5 paid working days with an additional 10 working days being granted provided that the father can show that he has completed a course on infant care. The paternity leave is granted within the first 8 weeks after the child’s birth. Paternity leave is covered by an allowance paid from the employer’s salary fund, which is equal to the salary that would have been granted for the same period of time. The legal provisions with regard to the length of paternity leave are rather insufficient when compared to their affirmed scope: such a short paternity leave cannot contribute to nor does it stimulate effective participation by the father in caring for the newborn child. Granting the additional paternity leave on the condition of taking a course on infant care sets up a discriminatory practice, knowing that maternity leave is not accompanied by any conditions. Also, the condition itself of the father completing a course on infant care is completely irrelevant, as it could be inferred that all fathers who do not complete such a course are less skilled to be good fathers. Such an approach maintains the prejudice that

⁷⁵⁹ C. Tomescu & S. Căce (coordinators) *Study on the mobbing phenomenon and on some forms of discrimination at the workplace* Research Institute on Life Quality, 2011, page 2, <http://www.revistacalitateavietii.ro/2010/CV-1-2-2010/07.pdf>, accessed 10 August 2012. According to the research authors, the concept of *mobbing* indicates a practice exclusively related to the workplace through which the employer promotes a series of practices of psychological pressure aimed at forcing an employee to leave his/her job through coercive means, given that otherwise the dismissal would be unlawful.

⁷⁶⁰ Governmental Emergency Ordinance No. 124 of 27 December 2011 on the modification and completion of certain legal norms regulating the granting of social assistance benefits, published in Official Gazette No. 938 of 30 December 2011.

⁷⁶¹ Law No. 210 of 31 December 1999 on paternal leave published in Official Gazette No. 654 of 31 December 1999.

women are by nature equipped with mother skills, while fathers need to do a course to become full fathers.

2.2. Self-employment

There is no evidence or research carried out in Romania on the discrimination against pregnant self-employed workers or self-employed workers who have recently given birth. In the context of the current economic climate in Romania the assumption can be made that people who use services of self-employed workers will remain focused on the quality and competitiveness of the services offered, being sensitive to the way the services are managed rather than who is behind such services.

2.3. Access to and the supply of goods and services

Article 5(2) of Directive 2004/113/EEC has been transposed into Romanian legislation through provisions of Article 7(2) of Emergency Ordinance No. 61 of 2008 on the implementation of the equality of treatment between women and men with regard to access to and supply of goods and services.

By way of exception to the provisions of Article 7(1) of Emergency Ordinance No. 61, Article 7(2) provides that the use of gender-based information for calculating the premiums and benefits in insurance services is permitted in the situations in which gender is (a) a determining factor for risk evaluation, and (b) the calculation method for premiums and benefits is based on actuarial data that is relevant and realistic, being published and updated on a regular basis. A legal proposal is currently open for public debate by the Minister of Labour with regard to modifying Emergency Ordinance No. 61 of 2008, by removing Article 7(2). The mentioned legal draft stipulates that as of 21 December 2012 all newly concluded insurance contracts will consider that insurance premiums and benefits are ‘unisex-based’, without any further differentiation based on sex as is currently possible under Article 7(2).⁷⁶²

In Romania, the area of access to and supply of goods and services has so far received very little attention in research, most of the investigated cases of discrimination being focused on the Roma population being denied access to services. There is no evidence of potentially discriminatory practices targeting pregnant women.

2.4. Additional information

The current report for Romania cannot describe any court cases showing the level of practical implementation of equal opportunities legislation with regard to pregnancy and maternity. This reality does not necessarily imply that there are no such court cases, but indicates difficulties in accessing the respective information, due to the decisions not being made available for public usage and broader population education. Since even experts do not have the possibility to check for the existence of court decisions on gender-based discrimination, communication media such as mass media, studies or research have very rarely brought court decisions on gender discrimination to public attention or they do so only when the story is commercially newsworthy.⁷⁶³ Consequently, there is a gap between legislation standards and the public awareness of how can legislation is practically implemented and legality restored through the judiciary system. Simply put: citizens do not believe justice can be achieved in court in discrimination cases, as they are not made aware that the judicial system works in this field. Courts in Romania do not benefit from a decisions and sentences database that would offer information on gender-based discrimination cases being addressed. Still decisions are confidential or can be studied in archives, needing special access. Similarly, decisions of the National Council for Combating Discrimination (NCCD) pertinent to this area could not be identified.

⁷⁶² <http://www.mmuncii.ro/ro/articole/2012-06-06/proiectul-legii-pentru-modificarea-art7-din-ordonanta-de-urgenta-a-guvernului-nr-61-2008-modificata-si-aprobata-prin-legea-nr-62-2009-2646-articol.html>, accessed 16 August 2012.

⁷⁶³ For example: recently, Romania was sanctioned at CEDO because a father enlisted in the army was refused parental leave. All important media channels covered the news, but the angle of the story was rather that of exotic news about the army, and not that of a father being deprived of his rights, no matter what his occupation is.

While there is a number of reports and legislation compendiums available as a result of projects funded from structural funds sources, such projects are still limited to broad awareness objectives, by making visible legal provisions enforced in the field of equal opportunities protection. Substantial work in the field of research carried out especially by legal professionals is lacking. Such a gap can be filled by conducting research projects designed to go one level up from a simple inventory of legal provisions by addressing the way in which the respective legal provisions are implemented in specific areas. On the other hand, since the National Agency on Equal Opportunities was dismantled, no other public specialised body has been appointed to act as a coagulating force for studies and research being carried out at national level and targeting deeper areas than merely information campaigns. Undoubtedly the information projects and campaigns are essential to cover the broad awareness needs. However, if such initiatives are not paralleled by projects carried out at national level aimed to showcase how legislation works in practice to benefit citizens, information efforts alone will not have further impact.

3. Involvement of other parties

The economic crisis that Romania has been experiencing for the past two years, as well as the very complicated political context have resulted in the focus being shifted to structured actions of state bodies towards improving and enhancing the broader social agenda to budget reductions and freezing expenses until Romania reaches new economic growth. For individual citizens, their interest in rights enforcement and getting educated about their rights is temporarily replaced by objectives of maintaining job security and ensuring economic survival. Major employers in the country are carrying out substantial reorganisations with the related redundancies.

While employment-related legislation underwent significant changes in 2011, with subsequent measures planned to be taken in 2012, the reform efforts started a year ago have not been completed as there has been a change of Government and the President has been suspended. This has led to delays in the completion of the reforms initiated in 2011 in fields such as social assistance, health insurance system, pensions reforms and social dialogue legislation.

4. Enforcement and effectiveness

4.1. General

The current legal context in Romania with regard to parental leave and the options for the parent to apply for paid/unpaid parental leave until the child reaches the age of 1 or 2, has a triple set of consequences:

- In the current economic context, where an increasing number of jobs is lost, becoming pregnant and applying for maternity/parental leave seems to have become an option for parents to counteract job restructurings, due to the level of protection offered to employees. Managers of Human Resources departments in large companies in Romania, either Romanian companies or multinationals, have reported an increased number of pregnant employees. While the birth rate in Romania was negative in 2011, major employers who had to announce redundancies in 2012 have also experienced a 4 % - 5 % pregnant employees' headcount. This indicates a practice in the market of employees who decide to become parents in order to benefit from job security, although in the very short term. In the very short term such practice might safeguard the job.⁷⁶⁴ However, it will imply further difficulties for parents to raise the child and apply for a new job once they return to work.
- Confronted with the reality of facing a rather ambiguous legal framework with regard to maintaining production as a result of maternity replacement, employers look for alternative

⁷⁶⁴ This represents the opinion of the expert, based on informal contact with HR and legal professionals involved in restructuring plans for various multinationals in Romania.

ways to trigger pregnant employees into resigning or leaving the company based on a mutual agreement regarding employment termination.⁷⁶⁵ Employers' practices in such cases include a number of ways to trigger a pregnant employee into leaving the company before starting their maternity leave, such as pressure from HR departments or management layers to sign mutual agreements, modifying working conditions by removing job responsibilities resulting in major dissatisfaction at the workplace for the respective employee, and limiting the employee's access to promotion mechanisms, training programmes or bonus schemes during pregnancy.

- In the current context of redundancies, combined with the more pressing need for professional retraining and skills upgrade aimed at increasing the opportunities of integration into the labour market for job seekers, a long parental leave does not facilitate enrolment in adequate professional training programmes.

4.2. Legal redress

Romanian law does not provide for hands-on support, financial support and/or advice for individuals who seek to enforce their pregnancy, maternity, adoption, parental or paternity rights. There are no studies addressing the difficulties involved in trying to access legal redress concerning rights regarding pregnancy, maternity, adoption, parental, or paternity leave.

There is no evidence of any increase in national case law regarding pregnancy, maternity, adoption, parental or paternity rights initiated by associations, organizations or other legal entities which have a legitimate interest in this area.

In terms of compensation, as long as court cases are not available there is no evidence of remedies or compensation which does not dissuade transgressors or does not adequately compensate the victim of violations of pregnancy, maternity, adoption, parental or paternity rights.

4.3. Access to information

No research has been carried out in Romania specifically on discrimination related to pregnancy and maternity by any of the traditional stakeholders in this area such as non-governmental organisations, union bodies, research institutes or any other public body. Also, no papers have been produced on the actual level of implementation of legal provisions at employers' level, nor have any surveys been dedicated to the topic.

SLOVAKIA – Zuzana Magurová

1. Existing legislation and case law

1.1. Employment Legislation

The *Antidiscrimination Act*⁷⁶⁶ (*Antidiskriminačný zákon*) includes a general prohibition on pregnancy and maternity discrimination. According to Article 8 Section 7 b) of the Antidiscrimination Act, objectively justified differences of treatment on grounds of sex are allowed, where their purpose is the protection of pregnant women and mothers.

Article 6 of the Fundamental Principles of the *Labour Code*⁷⁶⁷ (*Zákoník práce*) provides that for pregnant women, mothers until the completion of the ninth month after confinement and breastfeeding mothers, working conditions shall be secured that will protect their biological state with respect to pregnancy, childbirth, care for the child after birth, and their special relationship with the child after birth. For women and men, working conditions shall

⁷⁶⁵ This represents the opinion of the expert, based on informal contact with HR and legal professionals involved in restructuring plans for various multinationals in Romania.

⁷⁶⁶ Act No. 365/2004 Coll. on Equal Treatment in Certain Areas and on Protection against Discrimination and on amendment of certain Acts (Antidiscrimination Act), as amended. According to Article 2a Section 11 a) discrimination on the ground of sex shall also mean discrimination on the ground of pregnancy or motherhood.

⁷⁶⁷ Act No. 311/2001 Coll. Labour Code, as amended.

be secured that will enable them to perform their social function in the upbringing of children and childcare.

To these persons the legislator therefore basically grants special protection, which is manifested in the relation to working conditions, adaptation of working hours and prohibition of the termination of the employment relationship within a protected period, maternity or parental leave and childcare, in the individual provisions of the Labour Code.

Before the beginning of the employment relationship: the employer must not require from the applicant any information on pregnancy or family background. If the employer violates these obligations, the job applicant is entitled to adequate financial compensation which he or she may enforce before a court, even if the employment contract is not concluded.

Pregnancy during the employment relationship: the term ‘pregnant employee’ is defined in Article 40(6) of the Labour Code. For the purposes of the Labour Code a pregnant employee is an employee who has informed her employer in writing of her condition and who has submitted a medical confirmation of this. However, the Labour Code does not impose on a woman the obligation to inform the employer about her pregnancy. If a woman does not inform the employer about her pregnancy in writing and does not submit the medical certificate, she will not be entitled to the special legal protection, e.g. as regards the adaptation of working conditions and working hours.⁷⁶⁸ The prohibition of the termination of the employment relationship within a protected period will not apply in that event.

Termination of employment relationship during the probation period: The employer may only terminate the employment relationship with a pregnant woman, a mother after the completion of the ninth month after confinement and a breastfeeding mother in the probation period in writing and in exceptional cases⁷⁶⁹ that do not concern her pregnancy or maternity, and must properly indicate the reasons in writing, otherwise the termination is invalid, which means that the employment relationship has not ended. Since August 2011 the employer is no longer allowed to terminate the employment relationship with a pregnant employee in the probation period without indication of the reason.

Adaptation of working hours: If a pregnant woman needs a medical examination or treatment, and such examination or treatment cannot be performed outside working hours, the employer is obliged to allow the pregnant employee paid leave from work for the time necessary for preventive medical examinations related to her pregnancy. However, the employer is not obliged to allow the pregnant employee paid leave from work to attend prenatal courses. In all events, the employee may agree with the employer on such leave. When designating employees to work shifts, an employer shall be obliged to take into account the needs of pregnant women and of women and men caring for children. If a pregnant woman, or a man or woman continuously caring for a child younger than fifteen years old requests a reduction in working hours or other arrangement regarding the fixed weekly working hours, the employer shall be obliged to accommodate their request if such is not prevented by substantive operational reasons. Upon the request of a pregnant woman working during night time, the employer is obliged to arrange an assessment of her fitness for night work. A pregnant woman may be employed for overtime work only with her agreement. Stand-by work may only be agreed upon with her. The same holds for a woman or man continuously caring for a child younger than three, and a single man or woman continuously caring for a child younger than fifteen. The employer must not unevenly distribute the working hours (e.g. some hours of work in the morning and then again in the evening) of a pregnant woman without her previous agreement.

⁷⁶⁸ According to the Labour Code, a woman is not obliged to inform the employer that she is pregnant. If she does not inform the employer, although it is clear that she is pregnant, she is not entitled to special legal protection.

⁷⁶⁹ The Labour Code does not define what is meant by exceptional cases. According to expert opinion the probation period must not serve as a tool for the discriminatory dismissal of female workers on the ground of their pregnancy, i.e. for a reason that has no relation to their ability or inability to carry out certain work, or to the quality of this work.

Breastfeeding: An employer shall be obliged to allow a mother⁷⁷⁰ who breastfeeds her child special breaks for breastfeeding, in addition to the normal work breaks. A mother who works fixed hours shall be entitled to two 30-minute breaks per child for breastfeeding until the child reaches the age of six months, and in the succeeding six months one 30-minute break for breastfeeding per work shift. These breaks may be combined and taken at the beginning or end of the work shift. When working shorter working hours, but at least half of the fixed weekly working hours, she shall be entitled to only one 30-minute break for breastfeeding per child until the child is 6 months old. Breaks for breastfeeding shall count as working time and shall be provided with wage compensation in the amount of the average earnings (paid by employer).

Transfer to other work: Pregnant women, mothers until the end of the ninth month after confinement and breastfeeding women must not be employed in work activities that are physically inappropriate or harmful for them. A pregnant woman must not be employed even in such work activities that according to medical opinion jeopardise her pregnancy due to her individual condition of health. The same holds for mothers until the end of the ninth month following childbirth and breastfeeding women. If a pregnant woman performs work that is prohibited to pregnant women, or which according to medical opinion threatens her pregnancy, the employer shall be obliged to implement a temporary change to her working conditions. If a change to the woman's working conditions is not possible, the employer shall temporarily transfer her to work that is suitable and in which she may earn the same salary as the salary that she earns for her normal work within the scope of the employment contract. If this is not possible, the employer shall transfer her, upon her agreement, to a different type of work. If transfer of a pregnant woman to day work or transfer to other suitable work is not possible, the employer shall be obliged to give the pregnant employee time off and wage compensation. If a woman, in work she was transferred to by no fault of her own, earns a salary that is lower than that earned in her normal work, for the purpose of balancing out the difference she shall be provided with an equalization benefit for pregnancy and motherhood according to the Social Insurance Act.⁷⁷¹ The employer is also obliged to transfer a pregnant woman working nights to day work, if the pregnant woman applies for such transfer. If she cannot be transferred to day work, the employer is obliged to give a pregnant employee time off and wage compensation. If the employer has not transferred a pregnant woman to different work, although the employer was obliged to do so, the employee has the right to refuse further performance of work. Such employee is then entitled to wage compensation in the amount of average earnings. She is entitled to such compensation also when it can be presumed that employer had no other work for her.

Immediate termination of employment relationship: An employer cannot immediately (without notice) terminate the employment relationship with a pregnant employee, a female employee on maternity leave, or a female or male employee on parental leave, with a single female or male employee caring for a child younger than three, or with an employee who personally cares for a relative with a severe disability. An employer may, however, terminate an employment relationship with such employee by giving notice, except for a female employee on maternity leave and a male employee caring for a new-born child on parental leave (with the same scope as maternity leave), if he or she is validly convicted for an intentional crime or has seriously violated work discipline.

Notice given by the employer: The employer cannot give notice to an employee within the period of a female employee's pregnancy, to a female employee who is on maternity leave, to a female employee or a male employee who is on parental leave, or to a single female employee or a single male employee who takes care of a child under the age of three. This provision does not apply if the employer or its business unit is being closed down or relocated and the employment relationship terminates by expiration of the notice period,

⁷⁷⁰ Fathers or other persons nursing a child are not entitled to breastfeeding breaks. Only women who have given birth to a child are entitled to such breaks.

⁷⁷¹ The amount of the equalization benefit is 55 % of the difference between the monthly assessment basis and the assessment basis for which the female employee pays sickness insurance premiums in separate calendar months after being transferred to another job.

which starts on the first day of the calendar month following the delivery of the notice and ends on the last day of the respective calendar month. In the event of notice given on the ground of closing down or relocation of the employer or its business unit, the employee has the right before the start of the notice period to request the employer for termination of the employment relationship by agreement. The employer is obliged to grant such request. In this case the employee will be entitled to a severance allowance equal to not less than his/her average monthly earnings multiplied by the number of months that a notice period would last.

Notice given by the employee: A pregnant employee may terminate the employment relationship by notice at any time, also without indication of reason. If the notice is given by an employee whose employment relationship with the employer lasted at least one year before the date of delivery of the notice, the term of notice will be two months. If the employment relationship lasted less than one year, the notice period will be one month.

The employer is obliged to give an employee time off from work for the birth of his child and time off from work with wage compensation for the time necessary to transport the mother of the child to a medical facility and back. This right of the employee is thus not bound to marriage (as it was until the end of August 2011), but to parentage. During the discussion on the amendments to the Labour Code in 2010, non-governmental organisations (NGOs) submitted observations on the draft amendment relating to the conditions for the dismissal of pregnant women during the probation period⁷⁷² as well as to the elimination of discriminatory rules on granting time off work to take the employee's wife to a maternity clinic. They argued, that the provision '*The employer must grant the employee leave to assist the employee's wife who gives birth to a child; time off with wage compensation shall be given for the period of time necessary for transportation of his wife to the medical facility and back.*', was discriminatory on grounds of marital status (unmarried persons were disadvantaged compared to married persons) and also because of sexual orientation (because women cannot enter into a marriage with their female partner). The Government did not accept the proposal of NGOs to replace the expression 'wife' with the expression 'female partner'. The current wording (effective from 1 September 2011) is: '*The employer must grant the employee time off from work for the birth of the **employee's child**; time off from work with wage compensation shall be given for the time necessary to transport **the mother of the child** to a medical facility and back.*' This means that this provision is not applicable for couples of the same sex.

Maternity leave: In connection with childbirth and to care for a new-born child, female employees are entitled to maternity leave, or male employees are entitled to parental leave. Maternity leave (parental leave for men) is given by the employer to its employees in the form of time off. During this time the employees are provided for by the social endowment - maternity allowance. . Maternity leave of a woman connected with childbirth must not be shorter than 14 weeks and if the woman goes on maternity leave before childbirth, the maternity leave must not end before the sixth week after childbirth. Female employees are entitled to maternity leave in connection with childbirth and to care for a new-born child either for the duration of 34 weeks, or 37 weeks in the case of single mothers, or 43 weeks in the case of multiple births. Maternity leave generally commences 6 weeks prior to the expected date of confinement. A woman goes on maternity leave from the date stated by the doctor..

Parental leave: In order to enhance the care of a child the female employees and male employees are entitled to parental leave.⁷⁷³ During this time the employee is provided for by the state social benefit parental allowance. In the case that both parents draw the parental leave, only one of them is entitled for parental allowance. The employer is obliged to give parental leave to the parents (women or men) upon request. Parental leave shall be allowed until the child turns three and if the child is in ill health until the child turns six. Parental leave

⁷⁷² This proposal was accepted. See the part on termination of the employment relationship during the probation period.

⁷⁷³ Male employees are entitled to parental leave in two separate cases: 1. from the birth of a child in connection with the care of a new-born child (the same scope as maternity leave) or 2. if he requests parental leave in order to enhance the care of a child until the age of three.

is allowed for the time requested by the parent, usually for a period not shorter than one month. Male employees are entitled to parental leave on the same conditions as women, only if they are the ones who care for a new-born child. The right of the father to parental leave can be claimed from the birth of the child.

Distribution of parental leave: Since 1 September 2011, a mother or father is not obliged to use the parental leave all in one go in the first three years of the child's life (and for a child with a long-term health condition requiring special care in the first six years), but they can spread it over a period of five (eight) years. The total length of parental leave remains the same. Any part of parental leave that has not been used but is still available on the date on which the child reaches the age of three (and for a child with a long-term health condition requiring special care on the date on which the child reaches the age of six) may move up to the date on which the child reaches the age of five (and for a child with a long-term health condition requiring special care until the day on which the child reaches the age of eight). This means that parental leave cannot be 'shared' between the parents.

The Labour Code applies to all employees regardless of whether they work in the state sector or in the private sector and regardless of the size of the employer. It also applies to employment relationships of civil servants and public servants.

The Antidiscrimination Act contains the general regulations of victimization, but it does not refer to victimization in relation to pregnancy/maternity/parental/paternity rights specifically.

Opinions of equality bodies: In its annual *Reports on the Observance of Human Rights* the Slovak National Centre for Human Rights (the Centre) regularly publishes information on the problem of pregnant women often being dismissed during the probation period and that of the factual impossibility for them to claim their rights retroactively. The increase in the number of reported cases of discrimination on the ground of pregnancy was registered especially in 2008 and 2009. The Centre's 2010 report says that in spite of the large number of women who approached them claiming discrimination on the ground of pregnancy, according to official available sources the institutions specialized in the protection of rights of male and female employees (Centre of Legal Assistance, the National Union of Employers, the Federation of Employers' Associations, the Confederation of Trade Unions) in the said year did not receive any complaints regarding violation of the principle of equal treatment on the ground of gender or pregnancy. The Ministry of Labour, Social Affairs and Family has communicated that based on data from the Department of Control, Government Audit and State Supervision none of the three reported cases of alleged violation of the principle of equal treatment involved discrimination on the ground of pregnancy. The information system of the National Labour Inspectorate does not register specific data on the subject of the complaints, so data on potential discrimination on the ground of pregnancy were not available either.

Case law: Despite the fact that the Centre has reported many cases of discrimination due to pregnancy, there is no information available regarding courts' decisions on cases on discrimination⁷⁷⁴ at the recruitment stage, discrimination at work during pregnancy, discrimination during maternity leave, discrimination after maternity leave, discrimination in relation to parental leave, paternity leave, adoption leave or parenthood except one *case of Supreme Court (No. 2 Cdo 183/2008)*. The Court decided on the appeal lodged by a claimant, whose employer, having learnt about her pregnancy, removed her from the post of deputy director and decreased her salary. The claimant regarded the unilateral act of the defendant, changing her employment contract and decreasing her salary, as invalid.

The first-instance court allowed her complaint, declared the defendant's conduct unreasonable and ordered the defendant to pay the claimant the sum of EUR 670 in damages (because of decreasing her salary), the sum of EUR 1 330 in immaterial damages caused by indirect discrimination based on pregnancy, plus a quantified compensation of legal costs.

The regional appeal court in its judgment upheld the ruling of the first-instance court in the part ordering the defendant to pay damages and establishing that the defendant had

⁷⁷⁴ The courts have been obliged to publish their decisions on the Internet only since 1 January 2012.

violated the principle of equal treatment by discriminating against the claimant on the ground of her pregnancy. Nevertheless, the regional court changed the ruling of the first-instance court in the part ordering the defendant to pay immaterial damages by dismissing this part of the action. The regional court also quashed the said ruling in the part ordering the defendant to pay the court fee and did not award either party compensation for costs of legal proceedings. It agreed with the conclusion of the first-instance court that facts revealing indirect discrimination against the claimant had been established in the legal proceedings and that the defendant had been unable to fulfil the obligation to prove that the principle of equal treatment had not been violated. In the opinion of the regional appeals court the claimant had not sufficiently proved in the proceedings that her dignity, social respect and social self-realization had been considerably impaired.⁷⁷⁵

The Supreme (extraordinary appeal) Court changed the ruling of the regional court in the disputed part, because the Supreme Court considered the decision of the first-instance court as correct.

1.2. Social security and pension rights

According to Article 8 Section 9) of the Antidiscrimination Act, costs related to pregnancy and maternity must not lead to differences in the amount of insurance premiums and benefits.

On 1 January 2012, new wording in the Social Insurance Act⁷⁷⁶ (*Zákon o sociálnom poistení*) entered into effect, changing the then-existing rules, especially in the pension and sickness scheme. The maternity allowance paid during the maternity leave by the Social Insurance Agency (SIA)⁷⁷⁷ increased from 60 % to 65 % of the mother's gross wage (which is based on her income/wage before the maternity leave). The minimum monthly amount of maternity allowance in 2012 is EUR 220.93 and the maximum monthly maternity allowance is EUR 749.78. At the same time, the period for receiving this allowance was extended from 28 weeks to 34 weeks, or 37 weeks for single mothers. To mothers who have given birth to two or more children at once (multiple births), the maternity allowance is paid during 43 weeks.

The maternity allowance is a social endowment, the amount of which depends on the contributions paid to the social security scheme. The maternity allowance is to be provided only if the woman has been insured for a minimum of 270 days in the two years before childbirth. The maternity allowance can also be provided to a man who takes care of a new-born child,⁷⁷⁸ but only for a maximum of 22 weeks or 31 weeks.⁷⁷⁹

If the mother does not take care of her child, the maternity allowance will be provided to the person (insured under the social insurance scheme for a minimum of 270 days in the two years before the child is born) who has the child in his/her care. This person might be the father of the child, the husband of the child's mother, the wife of the child's father or another person caring for the child upon decision of the relevant authority (adoptive parent).

The female employee is entitled to an equalization benefit, if redeployed in another job, if the work performed before is prohibited to pregnant women or, according to a medical report,

⁷⁷⁵ According to the Antidiscrimination Act a victim of discrimination may seek that the person violating the principle of equal treatment be made to refrain from such conduct and, where possible, rectify the illegal situation or provide adequate financial compensation. Should adequate financial compensation prove to be insufficient, especially where the violation of the principle of equal treatment has considerably impaired the victim's dignity, social status and social functioning, the victim may also seek immaterial damages in cash. The amount of immaterial damages in cash shall be determined by the court, taking into account the extent of immaterial damage and all underlying circumstances.

⁷⁷⁶ Act No. 461/2003 Coll. Social Insurance Act, as amended.

⁷⁷⁷ SIA has been designated to be the competent and liaison institution for the following branches of social security: sickness benefits, maternity and equivalent paternity benefits, invalidity benefits, old-age benefits, survivors' benefits, benefits in respect of accidents at work and occupational diseases, and unemployment benefits.

⁷⁷⁸ If the mother dies or decides to return to work.

⁷⁷⁹ The Social Insurance Act also changed the length of maternity leave from 28 weeks to 34 weeks. A single woman is entitled to a maternity leave of 37 weeks and a woman who has given birth to two or more children at once is entitled to a maternity leave of 43 weeks. In connection with caring for a new-born baby a man is also entitled to a parental leave of the same duration if he takes care of the new-born baby.

threatens her pregnancy, and the work she is transferred to provides for a lower income without her fault, compared to the income she earned before her redeployment. The equalization benefit is also paid by the SIA. The amount of the equalization benefit is 55 % of the difference between the monthly assessment basis and the assessment basis for which the female employee pays sickness insurance premiums in separate calendar months after being transferred to another job.

During parental leave, the parent is entitled to parental allowance (state social benefit), which is provided under the Act on Parental Allowance⁷⁸⁰ (*Zákon o rodičovskom príspevku*) by the State to the beneficiary to ensure proper care of the child. The parental allowance is a state social benefit, the amount of which does not depend on any contributions paid to the social security scheme and amounts to EUR 194.70 for one child. Parents who have two or more children at the same time receive the basic amount plus 25 % for each additional child: EUR 243.40 for twins, EUR 285.10 for triplets, etc. Women on maternity leave are also entitled to parental allowance, if they are not entitled to maternity benefit because they were not insured for a minimum of 270 days in the two years before childbirth.

1.3. Self-employment

A special act only regulating the issues of self-employed persons does not exist in Slovakia. The term ‘self-employed person’ was previously regulated by several Acts,⁷⁸¹ which however included different definitions of this term. The definition of this term was unified in 2011.⁷⁸²

The maternity allowance paid by the SIA and the parental allowance paid by the State are also paid to self-employed women on the same conditions as employed women.

1.4. Access to and the supply of goods and services

The Antidiscrimination Act includes a general prohibition on discrimination on the grounds of pregnancy and maternity in the field of employment and similar legal relationships, social security, healthcare and the supply of goods and services and education. The Act goes beyond the protection against discrimination on the grounds of pregnancy and maternity in the field of education, but it does not in the field of media and advertising.

There is no special legislation prohibiting discrimination on the grounds of pregnancy and maternity specifically in the field of transport,⁷⁸³ access to financial benefits, insurance etc. National legislation does not distinguish between direct and indirect discrimination in relation to pregnancy and maternity. There were no reported cases where women have suffered discrimination.

⁷⁸⁰ Act No. 571/2009 Coll. on Parental Benefit, as amended.

⁷⁸¹ Act No. 461/2003 Coll. Act on Social Insurance, as amended; Act No. 5/2004 Coll. Act on Services of Employment, as amended.

⁷⁸² The Act on Social Insurance defines the self-employed person as an individual who has reached the age of 18 and is registered in accordance with the tax regulations as: an entrepreneur who has income from agricultural production, forestry and water management, an entrepreneur who conducts business on the basis of a trade licence (trader), an entrepreneur who conducts business on the basis of an authorisation other than a trade licence (e.g. auditor, tax consultant, notary public), a partner in a public company, active partners in a special partnership, an entrepreneur who has income from author's activity, industrial or other intellectual property, an expert and interpreter, and an entrepreneur who has income from intermediary business according to other regulations.

⁷⁸³ Airline companies (providing services in Slovakia) issue detailed conditions of carriage for passengers, baggage and goods according to Article 4 of the Decree of the Ministry of Transport No. 17/1966 Coll. on air carriage by order and with the consent of the Ministry of Transport. According to these conditions, pregnant women (not longer than up to the end of the 28th or 34th week of pregnancy) need to submit confirmation of the attending physician that the passenger is able to fly. Pregnant women after the 28th or 34th week of pregnancy travel at their own risk and at the risk of the child, and air carriers reject all responsibility. The carrier reserves the right to refuse a pregnant woman on board.

2. Gaps in national law

2.1. *Employment*

Slovak legislation complies with the directives and the regulations on the length of maternity and parental leave go further than the directives require. However, there is still a great deal of room for improvement from a legislative point of view, which could contribute to achieving gender equality in practice. One of the obstacles is the practical impossibility for both parents to take parental leave at the same time, because during this period of time leave is only available to one of the parents. Slovak legislation does not offer paternity leave for fathers at the time of the birth of their child or in the weeks after the birth, which they can use at the same time when the mother is on maternity leave.

2.2. *Self-employment*

The spouses of self-employed workers, not being their employees or partners in the business, are not protected under the social security scheme for self-employed persons. They are, however, allowed to join the social security scheme voluntarily. Previous legislation, which was repealed by the current Act on Social Insurance, defined a co-operating person as a spouse who participates in the activities of a self-employed worker. This had a significant meaning in terms of voluntary social insurance which a co-operating member could opt for if his or her self-employed worker was insured. According to current legislation there is practically no legal definition of a helping spouse and no legal/social protection for such persons, and issues relating to their social protection are not resolved in a satisfactory manner.

2.3. *Additional information*

Until February 2012, women who were not compulsorily insured and wanted to participate in voluntary sickness insurance (in order to receive maternity allowance) had to contribute 4.4 % of the daily assessment basis to an individual sickness insurance scheme. Since 1 February 2012, according to the new wording of the Social Insurance Act, the conditions for participation in voluntary sickness insurance and for parallel participation in compulsory and voluntary sickness insurance have been tightened. The percentage of such voluntary contributions increased from 4.4 % to 35.15 %, because they now have to pay the whole package—: voluntary sickness insurance (4.4 %), pension insurance (24 %) and unemployment insurance (6,75 %). NGOs have warned that many women will not be able to participate voluntarily because of the high insurance contributions and will consequently not receive maternity allowance (the minimum amount of which is EUR 220.93 and the maximum amount EUR 749.78). They will only be entitled to the parental allowance (the amount of which is EUR 194.70).

3. Involvement of other parties

Generally the social partners include protective measures for women during pregnancy and maternity in collective agreements in accordance with regulations contained in the Labour Code. Some sectoral collective agreements contain the complete text of relevant articles.

There is a significant lack of programmes and projects designed to reconcile work and family life and to promote more parent-friendly attitudes of the employer to working parents.

The National Centre for Human Rights, acting as the equality body under EU legislation, has not been active in this field during the period of its functioning although it annually reports cases of discrimination on the ground of pregnancy.

In its 2011 report, the Centre noted that in 2010 it had been the non-governmental organisations who during the process of amendment of the Labour Code had requested the Slovak Republic, in a collective comment ⁷⁸⁴, to provide consistent legal protection to

⁷⁸⁴ During the discussion on amendments to the Labour Code in 2010, NGOs have submitted observations (in the form of collective comments) on the draft amendment relating to the conditions for the dismissal of pregnant women during the trial period, as well as to the elimination of discriminatory rules on granting time off work

pregnant women threatened with dismissal in the probation period and to eliminate the discrimination of persons living outside marriage who take leave to transport the mother of their child to the maternity hospital, because this right was only granted to married employees. They also requested that the Labour Code be harmonized with the Antidiscrimination Act and the EU anti-discrimination directives. However, the required change was only implemented by the amendment of the Act on 1 September 2011, when national legislation was harmonized with the EU anti-discrimination directives.

4. Enforcement and effectiveness

4.1. General

There are no studies or empirical reports available concerning pregnancy and maternity rights of women in the labour market.

4.2. Legal redress

According to the Antidiscrimination Act, everyone who considers him/herself to have been wronged because the principle of equal treatment has not been applied to them may pursue their claims according to the judicial process. He/she may, in particular, seek that the person violating the principle of equal treatment be made to refrain from such conduct and, where possible, rectify the illegal situation or provide adequate financial compensation. Should adequate financial compensation prove to be insufficient, especially where the violation of the principle of equal treatment has considerably impaired the victim's dignity, social status and social functioning, the victim may also seek immaterial damages in cash. The amount of immaterial damages in cash shall be determined by the court, taking into account the extent of immaterial harm and all underlying circumstances.

The application of this provision in practice has so far shown that court protection in proceedings in such cases is very limited. It particularly applies to cases where the aggrieved party can only claim adequate financial compensation or immaterial compensation. In many cases in which women are discriminated against, only a claim for adequate compensation or immaterial compensation is possible. If the sanction in the form of redress is to be effective, proportionate and dissuasive, the amount of money claimed needs to reflect this. Many women who have been discriminated against are therefore deterred from filing a complaint with the court, as the high court fees often constitute a real barrier to exercising their right to equal treatment and protection from discrimination.

4.3. Access to information

The central portal of the public administration provides central and unified access to information sources and government services on portal.gov.sk. The Social Insurance Agency portal is <http://www.socpoist.sk/>. Many NGOs also have their own website.

to take employee's wife to a maternity clinic. They argued that the provision "*The employer must grant the employee leave for an employee's wife gives birth to a child; time off with wage compensation shall be provided for a necessary period of time for transportation of his wife to the medical facility and back*", was discriminatory on grounds of marital status (unmarried persons were disadvantaged compared to married) and also because of sexual orientation (because women cannot enter into marriage with their partner). The government did not accept the proposal of NGOs to replace the expression "wife" with the expression "female partner". The current wording (effective from 1st September 2011) is: "*The employer must grant the employee time off from work for the birth of the employee's child; time off from work with wage compensation shall be provided for the time necessary to transport the mother of the child to a medical facility and back.*" It means that this provision is not applicable for couples of same sex.

SLOVENIA – Tanja Koderman Sever

1. Existing legislation and case law**1.1. Employment**

Slovene legislation to tackle pregnancy and maternity related discrimination are the Act Implementing the Principle of Equal Treatment⁷⁸⁵ adopted in 2002 (hereinafter the AIPET), the Employment Relationship Act⁷⁸⁶ adopted in 2004 (hereinafter the ERA), the Regulation on the Protection of Health in the Workplace of Pregnant Workers and Workers who have Recently Given Birth or are Breastfeeding⁷⁸⁷ adopted in 2003 (hereinafter the Regulation) and the Parental Care and Family Benefits Act⁷⁸⁸ (hereinafter the PCFBA). The AIPET and the ERA were amended in 2007.

The basis for ensuring equal treatment for all persons in asserting their rights, performing their duties and exercising their human rights and fundamental freedoms is stipulated by the AIPET. It prohibits discrimination irrespective of gender, nationality, racial or ethnic origin, religious or other belief, disability, age, sexual orientation or other personal circumstance in the area of employment, education, social protection, including social security and healthcare, access to and supply of goods and services, which are available to the public, including housing etc.⁷⁸⁹ In addition, it defines direct and indirect discrimination⁷⁹⁰ and refers to victimization⁷⁹¹ of discriminated persons and persons who assist a victim of discrimination in general.

The ERA prohibits discrimination on the grounds of gender and defines direct and indirect discrimination. In addition to the abovementioned definitions, it specifically defines less favourable treatment of workers in connection with pregnancy or parental leave as discrimination.⁷⁹² It refers to victimization in relation to pregnancy, maternity and parental rights.⁷⁹³ During the exercise of rights regarding maternity leave, parental leave, adoption leave and paternity leave, workers remain employed under the terms of the existing employment contract and are entitled to return to the same job at the end of the leave. As regards dismissals related to pregnancy, maternity and related forms of leaves, the ERA includes among the unlawful reasons for the ordinary termination of an employment contract absence from work due to maternity leave, parental leave, adoption leave and paternity leave and bringing an action or participation in proceedings against the employer due to an alleged violation of the contract and other obligations arising from employment before arbitration, judicial or administrative authorities.⁷⁹⁴ Furthermore, the dismissal of women is absolutely prohibited during the period of pregnancy and during the time that they are breastfeeding. The dismissal of parents is also absolutely prohibited during the period when they are on parental leave in the form of a full absence from work and during one month after taking such leave.⁷⁹⁵ In addition, the ERA contains some general provisions regarding the right to parental leave;⁷⁹⁶ the salary compensation during periods of parental and sickness leave;⁷⁹⁷ provisions on protection of data related to pregnancy;⁷⁹⁸ provisions regarding the prohibition of carrying out work during pregnancy and the breastfeeding period presenting a risk to the mother's or her

⁷⁸⁵ Act Implementing the Principle of Equal Treatment, Official Gazette of the Republic of Slovenia, No. 61/2007.

⁷⁸⁶ Employment Relationship Act, Official Gazette of the Republic of Slovenia, Nos 42/02 and 103/07.

⁷⁸⁷ Regulation on the protection of health in the workplace of pregnant workers and workers who have recently given birth or are breastfeeding, Official Gazette of the Republic of Slovenia, No. 82/2003.

⁷⁸⁸ Parental Care and Family Benefits Act, Official Gazette of the Republic of Slovenia, No. 110/2006.

⁷⁸⁹ Article 2 AIPET.

⁷⁹⁰ Article 4 AIPET.

⁷⁹¹ Article 3 AIPET.

⁷⁹² Articles 6(3) and 6(4) ERA.

⁷⁹³ Article 6(8) ERA.

⁷⁹⁴ Article 89 ERA.

⁷⁹⁵ Article 115 ERA.

⁷⁹⁶ Article 191(1) ERA.

⁷⁹⁷ Articles 137 and 192 ERA.

⁷⁹⁸ Article 188 ERA.

child's health due to the exposure to risk factors and working conditions;⁷⁹⁹ provisions on prohibiting female workers from working overtime or doing night work during pregnancy and breastfeeding.⁸⁰⁰

Maternity leave, parental leave, adoption leave and paternity leave, conditions for obtaining them, their duration and the amount of benefits are further specified in the PCFBA. Pregnancy and maternity rights apply equally to all employees if they are insured according to the PCFBA.⁸⁰¹ There is no distinction between state and private employees or regarding the size of the employer.

Concerning health protection at the workplace for pregnant workers and workers who have recently given birth or are breastfeeding and leave from work for antenatal examinations the Regulation is relevant. It contains provisions on the assessment of any risk to the safety or health and any possible effects on the pregnancy or breastfeeding of the workers concerned, and on measures and actions to be taken with respect to health and safety at work further to the results of the assessment.

In recent years, there has been an increase in case law regarding pregnancy and maternity due to greater awareness of women of their rights. The majority of cases deal with unlawful dismissal on account of pregnancy and breastfeeding, i.e. with the violation of Article 115 of the ERA.⁸⁰²

1.2. Social security and pension rights

When receiving parental benefits, persons entitled to them are covered by the compulsory pension and disability insurance, unemployment insurance and parental protection insurance by rates applicable to social security contributions. Different phases of the leave, with the exception of the second, unpaid part of the paternity leave, were treated equally until the adoption of the Public Finance Balance Act (hereinafter the PFBA) in May 2012. According to the PFBA, which was adopted within the scope of cost-cutting measures, parental benefit will no longer be equal to 100 % of the average salary over the 12 months prior to the date on which the benefit was claimed, but will amount to 90 % of the abovementioned basis for the calculation of parental benefits. The second exception is the abovementioned unpaid part of the paternity leave, where the Republic of Slovenia ensures to the father only the payment of social security contributions applicable to the minimum salary for the duration of 75 days.

There is no case law on this subject.

1.3. Self-employment

Self-employed persons are directly protected by provisions of the AIPET. According to its Article 2, equal treatment shall be ensured irrespective of sex, nationality, racial or ethnic origin, religious or other belief, disability, age, sexual orientation or other personal circumstance, in relation to conditions for access to self-employment, including selection criteria and recruitment conditions irrespective of the type of activity and at all levels of the occupational hierarchy. In the social security area, self-employed persons are covered by mandatory social security schemes (the health insurance scheme, pension and invalidity insurance scheme, parental insurance scheme and unemployment insurance scheme). Therefore, all pregnancy and maternity rights that apply to employed persons also apply to self-employed persons included in the system of insurance for parental protection.

The Companies Act and the Institutes Act are neutral as regards gender and therefore provide equal opportunities for women and men in relation to the establishment, equipment or extension of a business or the launching or extension of any other form of self-employed activity.

Slovenia has not yet taken the necessary measures to grant female assisting spouses or life partners of self-employed persons the right to a maternity allowance for at least 14

⁷⁹⁹ Article 189 ERA.

⁸⁰⁰ Articles 145(2) and 190 ERA.

⁸⁰¹ Article 14 PCFBA.

⁸⁰² Judgments of the Labour and Social Court of Appeal Nos Pdp 778/2011, Pdp 613/2011, Pdp 1352/2011, 1153/2011, Pdp 216/2009, Pdp 1046/2008, Pdp 493/2010.

weeks., Regarding help provided by spouses, only Article 34 of the Pension and Invalidity Insurance Act (hereinafter the PIIA)⁸⁰³ and Article 6 of the PCFBA are relevant since other laws do not regulate this issue. Article 34 of the PIIA provides for voluntary membership in the mandatory pension and invalidity insurance for persons (usually the spouses of farmers) engaged in an independent agricultural activity who do not meet the conditions for mandatory insurance and Article 6 of the PCFBA provides for mandatory parental care insurance for persons engaged in an independent agricultural activity in the Republic of Slovenia as their sole or principal occupation who are already included in the mandatory pension and disability insurance scheme.

There is no case law on this subject.

1.4. Access to and the supply of goods and services

Directive 2004/113/EEC has been transposed in Slovene legislation mainly by the AIPET, which is the basic and general antidiscrimination act. According to the general prohibition of discrimination from the AIPET⁸⁰⁴ equal treatment shall be ensured irrespective of sex, nationality, racial or ethnic origin, religious or other belief, disability, age, sexual orientation or other personal circumstance in relation to education and access to and supply of goods and services, which are available to the public, including housing. Maternity and pregnancy discrimination is not explicitly mentioned, but is covered by sex discrimination. Definitions of direct and indirect discrimination are general.

In addition, the AIPET⁸⁰⁵ allows for differentiated treatment based on gender regarding insurances and linked financial services regulated by the Insurance Act (hereinafter the IA). The IA therefore provides for equal treatment of all insured persons and prohibits differences in insurance premiums and benefits on grounds of sex, maternity and pregnancy in general but permits differences in insurance premiums and benefits in case of life insurances, insurances arising from accidents and health insurances where the use of sex is a determining factor in the assessment of risk based on relevant and accurate actuarial and statistical data.⁸⁰⁶

The implementation of Directive 2004/113/EEC is satisfactory. It even goes beyond the relevant provisions in terms of rights and protection since it also covers sex discrimination in the area of education.

There is no case law on this subject.

2. Gaps in national law

2.1. Employment

Slovene law provides for effective protection against pregnancy and maternity discrimination. However, in practice, the majority of employers may not choose a pregnant woman or a woman with young children if there are other applicants that are not pregnant or have no children who also fulfil the conditions for carrying out the work. Namely, according to the ERA, employers are free to decide on which applicant, who fulfils the conditions for carrying out the work, they will conclude the employment contract with.

During maternity leave, parental leave, adoption leave and paternity leave workers remain employed under the terms of the existing employment agreement and are therefore generally entitled to return to the same job at the end of the leave. However, there is no specific provision which would guarantee the right to return to the same job or if that is not possible, to an equivalent or similar job consistent with the employment contract. Since women in Slovenia are on maternity and parental leave for a minimum of one year, they often face discrimination due to their work positions having been taken over by co-workers or newly recruited employees. Therefore, a specific provision on the right to return to the same job or if that is not possible to an equivalent or similar job would be appreciated.

⁸⁰³ Pension and Invalidity Insurance Act, Official Gazette of the Republic of Slovenia, No. 109/2006.

⁸⁰⁴ Article 2 AIPET.

⁸⁰⁵ Article 2a AIPET.

⁸⁰⁶ Article 83 IA.

Furthermore, women sometimes complain that their fixed-term contracts are not renewed after they have become pregnant. Unfortunately, women frequently ventilate their complaints informally on Internet forums and sometimes submit formal complaints with the Labour Inspectorate, but rarely decide to bring cases to court since it is difficult to prove that the reason for not renewing a fixed-term contract is connected to pregnancy or maternity.

Despite the effective and precise legislation on this matter, cases of unlawful dismissal of women during the period of pregnancy, the time that they are breastfeeding and in the period when they are on parental leave are not uncommon.

In Slovenia, fathers are entitled to a period of paternity leave of 90 days, out of which 15 days must be used before the baby is 6 months old and 75 days before the child is 3 years old. The problem is that only 15 days of the paternity leave are fully paid. For the second part, the Republic of Slovenia only pays the father the social security contributions from the minimum salary. As a consequence, fathers only use the first part of paternity leave. In recent years, there has been an increase in fathers using the first, paid period of the paternity leave. Nevertheless, employers still prefer employees who do not use it. Although fathers have a right to share parental leave with mothers or to use it instead of them, the cases of sharing or using it are extremely rare according to the statistical data and research. According to the analysis of the situation from 2005⁸⁰⁷ this is mainly because the traditional stereotypes regarding the role and responsibilities of women and men in family life and in society in general are still deeply present. There is no case law available on this subject.

2.2. Self-employment

Female self-employed workers and male self-employed workers are able to access maternity, paternity and parental allowances like all other insured persons. The main problem is that in order to obtain allowances they are not allowed to work during the period of maternity and parental leave. And if they do not work for a year or even for a few months they lose their customers. These are usually small entrepreneurs whose work depends on their personal work, which means that finding a replacement is extremely difficult. Cases of becoming unemployed after the end of parental leave are therefore not uncommon. Self-employed persons are usually dependent on contributions to their business of assisting spouses or life partners.

2.3. Access to and the supply of goods and services

There are no relevant examples of potentially discriminatory practices toward pregnant women in relation to the access to and the supply of goods and services.

2.4. Additional information

There is no additional information to report.

3. Involvement of other parties

Since collective bargaining is of considerable importance (because trade unions are very influential) and collective agreements are generally applicable and have a similar legal status as legislation, they should deal more often with equality issues, including issues related to pregnancy and/or maternity discrimination. So far, however, provisions are rare and mostly deal with the neutral use of expressions for a worker in the masculine grammatical gender, the prohibition of discrimination, damages, and the reconciliation of work, private and family life.

In addition, the Slovene equality body, the International Cooperation and European Affairs Service, replacing the Office for Equal Opportunities, plays an important role in the field of pregnancy and maternity rights in Slovenia. The former Office for Equal

⁸⁰⁷ Based on this the Resolution on the National Programme for Equal Opportunities for Women and Men for the period 2005-2013 was prepared; http://www.arhiv.uem.gov.si/fileadmin/uem.gov.si/pageuploads/NPZEMZM_analiza_stanja.pdf, accessed 20 September 2012.

Opportunities ran several research studies, projects and awareness-raising campaigns aimed at more equal distribution of family responsibilities between women and men, especially a more active role of fathers when raising and bringing up children.

There are no relevant NGOs or other particularly good practices in the area of discrimination on the ground of pregnancy, maternity or parental leave.

4. Enforcement and effectiveness

4.1. General

There are no studies or empirical reports supporting or refuting the argument that pregnancy and maternity rights for women in the labour market lead to smaller numbers of women being employed.

4.2. Legal redress

In Slovenia, the number of cases enforcing rights regarding pregnancy and maternity is increasing. There is no special hands-on support, financial support or advice for individuals who want to enforce their pregnancy, maternity, adoption, parental or paternity rights.

Furthermore, there are no studies addressing the difficulties in having access to legal redress concerning rights regarding pregnancy, maternity, adoption, parental or paternity leave.

There has been no increase of national case law, or in fact no case law at all regarding pregnancy, maternity, adoption, parental, or paternity rights initiated by associations, organizations or other legal entities that have a legitimate interest in this area. Access to the courts is only ensured for alleged victims of discrimination. Interest groups and other legal entities are excluded

Remedies and sanctions in Slovenia are effective, proportionate and dissuasive.

4.3. Access to information

There are no studies showing whether individuals are aware of their pregnancy, maternity, adoption, parental or paternity rights; on disseminating adequate information to all stakeholders regarding these rights or evidence that some women are at a particular disadvantage with regard to pregnancy, maternity, adoption and/or parental rights.

SPAIN – Berta Valdés de la Vega

1. Existing legislation and case law

1.1. Employment

The prohibition on discrimination relating to pregnancy and maternity is based on the general prohibition on gender discrimination provided for in Article 14 of the Spanish Constitution. Act 3/2007 for effective equality between men and women (LOI in its Spanish acronym) is applicable to all individuals and companies, both public and private, and includes measures to eliminate discrimination against women in all areas of life, and specifically in the political, civil, occupational, economic, social and cultural spheres (LOI, Articles 1 and 2). Article 3 of the LOI establishes that ‘The principle of equal treatment for women and men represents the absence of all direct or indirect gender discrimination, in particular as regards maternity, the assumption of family obligations or marital status’. The Act defines direct and indirect discrimination in the same terms as those used in Article 2.1 of Directive 2006/54/EC, and establishes that direct discrimination on the grounds of gender includes ‘Any less favourable treatment of women relating to pregnancy or maternity’ (LOI, Article 8). Instructions to directly or indirectly discriminate based on gender are also considered discriminatory (LOI, Article 6.3), as is any unfavourable treatment or negative effect arising as a result of lodging a complaint, claim, accusation, suit or appeal intended to prevent gender discrimination (LOI, Article 9), including, of course, discrimination related to pregnancy or maternity.

Article 22bis of Employment Act 56/2003 prohibits discriminatory practices when seeking employment and focuses on the recruitment process. Any offer of employment restricted to only one sex is considered discriminatory, unless the restriction is based on an essential professional requirement determined by the activity involved, provided it is not related to physical effort. The Spanish Constitutional Court analysed alleged discriminatory practices when seeking employment in judgment 214/2006. In this case, a female jobseeker's employment request was suspended because she was on maternity leave. The Spanish Employment Service decided to suspend an unemployed woman's employment request when she notified them that her situation had changed and she was now on maternity leave. This prevented her from having access to suitable job offers she might have received during her maternity leave, and specifically for a job for which she was apparently well qualified. The Constitutional Court considered that the Spanish Employment Service had discriminated against the woman.

The Spanish Worker's Statute (ET in the Spanish acronym) bans discrimination in private-sector employment (Article 17), implementing the LOI, and defines maternity rights. Article 48.4 of the ET deals with maternity leave and adoption leave (of children under 6), in both cases establishing the right to 16 weeks' uninterrupted leave, which can be extended for multiple birth or adoption, or if the child or minor has a disability.

Both parents are entitled to maternity or adoption leave, although after a birth it is the woman who decides how the leave will be allocated, and can choose to take the entire leave herself or share it with the other parent. The other parent may take the part of the leave granted by the mother, even if she is unfit for work when due to report back to her job after her maternity leave. For maternity, the other parent is entitled to take the leave provided for in Article 48.4 of the ET when the mother is not eligible to take leave and to receive a government maternity benefit, or in the event of the death of the mother.

Paternity leave lasts for 13 uninterrupted days (this can be extended in certain cases) and can be taken by the other parent in the event of the birth of a child, or by only one of the parents in cases of adoption (Article 48bis of the ET). Maternity leave, adoption leave or paternity leave may be taken on a full-time or part-time basis. All three types of leave are paid with benefits to the equivalent to 100 % of the salary. Adoption leave has the same economic treatment as maternity leave.

Article 26 of the Prevention of Occupational Risks Act 31/1995 establishes measures to protect the health of pregnant workers or those who have recently given birth. Employers have an obligation to take any measures necessary to prevent risks that could affect the pregnancy or the breast/bottle-feeding stage by reorganising the working conditions or the working day of the employee in question. These measures may include, when necessary, releasing the employee from night work or shift work. When reorganisation is not feasible or is not sufficient, the employee should be assigned to a different position, and if this is not possible, her contract should be suspended due to risk during pregnancy or risk during the breastfeeding of children younger than nine months. During her leave, the employee is entitled to receive her corresponding government benefit.

During the period of maternity, adoption or paternity leave, or during the suspension of their contract due to risk during pregnancy, or during the breastfeeding stage, employees are entitled to benefit from any improvements to their working conditions for which they would have been eligible during the period in question. In all of these cases, once the suspension of the contract has ended, the employee is entitled to return to the same position occupied previously.

Workers (men or women), including those on a part-time or temporary contract, are entitled to up to three years' parental leave to care for each natural or adopted child (Article 46.3 of the ET). Parental leave need not be taken all in one go. When both parents work for the same company, the employer does have the right to limit the simultaneous exercise of this right for reasons related to the effective operation of the company. This right is regulated in Article 46.3 of the ET and establishes that the duration of parental leave 'shall be taken into account when calculating seniority, and the worker shall be entitled to attend continuing professional development courses and be informed by the employer of their existence,

particularly upon his/her return'. According to case law, seniority has been held to be a component in establishing salary and for calculating severance pay if the contract is terminated. During the first 12 months of leave (or up to 18 months for a family with 5 or more members) employees are entitled to return to their previous job. After this period, they are entitled to return to the company and take a job within the same professional group.

Pregnant employees have the right to be absent from work, with pay, for the purpose of pre-natal doctor's appointments and birth preparation courses, provided they have previously notified their employer and justified the need for these activities during working hours.

The Worker's Statute also deals with permission to be absent from work, with pay, or to reduced working hours (with or without a proportional loss of salary) for reasons relating to breast/bottle-feeding, care of children under 8, care of hospitalised premature babies, or the care of children suffering from cancer or other serious illnesses (Article 37 of the ET).

On the issue of reconciling work and family life, or work-family balance, the Spanish Constitutional Court found that gender discrimination had taken place when an employee was denied the right to reduce her working hours in order to care for a child under 6. Judgment 3/2007 finds the existence of discrimination caused by refusal to agree to the female worker's request to reduce her working day. The failure to balance company circumstances with the needs of the female employee were considered to be discriminatory. In this situation, the denial of the right is considered an unjustified impediment. The Spanish Constitutional Court, particularly in judgment 26/2011, declares that effective balance between working and family life is an aim of constitutional importance, and this must be taken into account when interpreting and applying the law.

Under laws banning discriminatory dismissal motivated by the exercise of rights (leaves, reduction of working hours) related to pregnancy, maternity, paternity, breast/bottle-feeding, pregnancy/birth/breastfeeding-related illnesses, adoption or care of children, such dismissal is null and void. The same status is given to the dismissal of workers returning to work after a period of maternity, adoption or paternity leave taken for the aforementioned reasons, provided that less than nine months has elapsed since the birth or adoption of the child. As a result of a null and void dismissal, the worker shall be immediately reinstated and paid any outstanding salary (Article 55 of the ET).

Unfavourable treatment in the workplace because of pregnancy is considered gender discrimination by the Spanish Constitutional Court. In judgments 94/1984 and 166/1988, a pregnant woman's employment contract was terminated during her trial period. Although special rules, including unilateral termination without justification, are applied to terminating a contract during a trial period, this becomes discriminatory if it is due to the employee's pregnancy. Judgment 173/1994 of the Spanish Constitutional Court found that a female employee's temporary contract was not renewed because she was pregnant. The judgment considers that the decision not to renew the existing contract or draw up a new contract constituted gender discrimination.

Dismissal of a female employee due to pregnancy is null and void. The dismissal is automatically deemed null and void when there are no reasons unrelated to the employee's pregnancy to justify the decision (judgment 342/2006 of the Spanish Constitutional Court). The Spanish Constitutional Court has on several occasions ruled on the issue of the employer's knowledge of the pregnancy. In judgment 41/2002, the claim brought by a pregnant employee who had been dismissed was rejected when evidence proved that the employer was unaware of the fact that she was pregnant. Later, in judgment 17/2003, the Spanish Constitutional Court ruled that the fact that the pregnancy was visibly obvious or that it was common knowledge in the workplace was sufficient proof that the company was aware of the employee's condition, although the employer had not been notified. Finally, judgment 92/2008 interprets Article 55.5 b) of the ET, amended by Act 39/1999 transposing Directive 92/85/EEC. The Spanish Constitutional Court considers that the new wording of Article 55 of the ET extends the scope of protection against dismissal, indicating that it is 'automatically null and void based exclusively on proof of the employee's pregnancy and that the dismissal may not be considered fair for any other reasons not related to the pregnancy'.

The Worker's Statute regulates labour relations for subordinated or dependent work at private companies, but also applies to subordinated work within the public sector. The maternity and pregnancy rights of public servants are similar to those provided for in the Worker's Statute, and are governed by Act 7/2007 on the Basic Statute of Public Employees.

1.2. Social security and pension rights

Workers on maternity, adoption or paternity leave, or whose contract is suspended due to risk during pregnancy or breastfeeding, are entitled to receive a government allowance, provided they fulfil certain conditions. For maternity, employees not eligible for maternity benefits because they do not meet the requirements may receive a non-contributory benefit for 42 calendar days (which can be extended in certain cases) from the date of the birth. Because they continue to pay their social security contributions during these periods, this period is included in the calculation of their pension.

Parental leave includes a non-financial benefit in the sense that contributions towards certain benefits (e.g. retirement, incapacity, maternity or paternity) are effectively considered to have been made during the first two years of the leave (from 1 January 2013, this will be increased to covering all three years of parental leave).

1.3. Self-employment

Self-employed workers and economically dependent self-employed workers⁸⁰⁸ have the right to suspend their activity during maternity or paternity, risk during pregnancy or risk during breastfeeding. When activity has been suspended for these reasons, self-employed workers are entitled to receive social security benefits. For economically dependent self-employed workers, maternity or paternity are considered justified grounds for interruption of occupational activity. Termination of the contract by the client, in these circumstances, constitutes a breach of contract, and economically dependent self-employed workers would be entitled to the corresponding compensation for harm caused (Articles 4(3g), 15, 16 and 26 of Act 20/2007, the Self-Employed Workers' Statute).

Maternity leave lasts 16 weeks, during which the employee is entitled to receive a maternity allowance provided she fulfils certain requirements. As with employees, self-employed workers are also entitled, during maternity leave, to a non-contributory benefit for 42 calendar days (which can be extended in certain cases) from the day of birth.

All the indicated rights are recognized for all self-employed workers, including among them family members of the self-employed worker who habitually, personally and directly work with the self-employed subject, but are not registered as employees. Such family members would include the spouse and relatives in the descending or ascending line, provided they live with the worker in question.

1.4. Access to and the supply of goods and services

Directive 2004/113/EC has been transposed into Spanish law by the LOI, mainly in Articles 69 to 72. Generally speaking, the principle of non-discrimination set forth in Article 3 of the LOI discussed above (in 1.1.) has been implemented. In addition, Article 69 of the LOI expressly states that the principle of equal treatment for men and women must be applied to the supply of goods or services available to the public, avoiding any direct or indirect gender discrimination. Article 70 specifically deals with the protection of pregnant women, making it unlawful to enquire whether a woman seeking goods or services is pregnant, the sole exception being related to health protection. On the subject of insurance contracts or related financial services, under Article 71 pregnancy and maternity related costs must not be used to justify differences in an individual's premiums and benefits.

⁸⁰⁸ The economically dependent self-employed worker ('quasi-subordinate' category of workers) is regulated in Act 20/2007 for the Self-Employed Workers' Statute. These regulations define economically dependent self-employed workers as 'workers who engage in an economic or professional activity to gain earnings habitually, personally, directly and predominantly for one individual or legal entity known as the 'client', on which they are economically dependent since they receive from that client at least 75 % of their income from economic or professional activities'.

Through Article 71.1 of the LOI, Spain had made use of the possibility provided for in Article 5.2 of Directive 2004/113/EC. Article 76.7 of Royal Decree 2486/1998, approving the Rules on the organisation and supervision of private insurance companies, establishes that ‘when gender is a key factor in the assessment of risk based on relevant and accurate actuarial or statistical data stemming from the risk assessment made by the company, proportional differences in the premiums and benefits of persons assessed individually may be applied. Notwithstanding the foregoing, pregnancy and maternity related costs and risks may never justify differences in the premiums and benefits established for persons assessed individually’. Obviously, following the ruling by the Court of Justice of the European Union in Case C-236/09 (*Test-Achats*), the guidelines on the application of Directive 2004/113/EC on insurance companies (2012/C 11/01) must be followed.

The LOI is generally applicable in all sectors and spheres of society, including media, advertising and education. Specifically, discriminatory practices are prohibited in the media and in advertising, a prohibition that naturally includes those relating to pregnancy and maternity. These aspects are addressed both in the General Advertising Act 34/88 of 11 November 1988 (making it unlawful to depict women in a demeaning way or associated with stereotypical behaviour) and in the General Audiovisual Communication Act 7/2010 of 31 March 2010 (audiovisual communication must not encourage gender discrimination, and commercial communication encouraging gender discrimination is prohibited).

2. Gaps in national law

2.1. Employment

Article 37.4 of the ET was amended by Act 3/2012 of 6 July 2010 on urgent measures to reform the labour market, in order to transpose the provisions of the CJEU judgment in Case C-104/09 *Roca Alvarez* into national law. Breastfeeding leave is now recognised as an individual right of all workers, men and women, but may only be taken by one of the parents if both are working. This regulation limits joint responsibility, as it does not allow the leave to be shared between both parents.

Clause 7 of Directive 2010/18/EU can be considered transposed by Article 37.3 b) of the ET, which describes the grounds on which an employee may be absent from work (two days on full salary) in the event of accident or serious illness, hospitalisation or surgery without hospitalisation. Permission, however, is subject to notifying the employer, and is limited to relatives up to the second degree of consanguinity or affinity. This is why a wider interpretation is needed that deals with emergencies of *force majeure* without the requirement to give notification and with no limitation on the degree of kinship.

The provision on holiday periods in Article 38 of the ET was amended by the LOI in order to adapt it to the Court of Justice judgment in Case C-342/01 *Merino Gómez*. Now, this provision has been further amended in Act 3/2012 to adapt it to subsequent Court of Justice rulings. However, the new text of Article 38.3 of the ET does not recognise an employee's right to take his/her holidays on dates other than those established in the company's holiday calendar when the holiday period coincides in time with a long-term parental leave. Regarding this issue, the principle established in the Court of Justice (first chamber) judgment of 22 April 2010, *Zentralbetriebsrat der Landeskrankenhäuser Tirols*, C486/08 has been poorly transposed.

Parental leave provided for in Article 46.3 of the ET is acknowledged to be an individual right of each worker, man or woman, but the employer can limit the simultaneous exercise of this right when both parents work for the same company. Insufficient guarantees are in place, however, to ensure that this limitation merely postpones exercise of the right (provided for in Clause 3.1c) of Directive 2010/18/EU), and no criteria have been established to evaluate the objectivity of the reasons given by the employer. The right to attend continuing professional development courses organised by the company is undermined by Article 46.3 of the ET, which states that the employer must inform the worker of these courses ‘particularly’ upon his/her return, when this should in fact be an ongoing obligation of equal importance. Finally,

following their return, no provision is made to allow workers to request a change of working hours or working patterns (Clause 6.1 of Directive 2010/18).

Access to employment is a particularly vulnerable time with regard to non-discrimination against women. The prohibition on discrimination in access to employment set forth in Article 22bis of the Employment Act 56/2003 focuses particularly on the discriminatory wording of job offers. However, it is hard to check the substance of interviews conducted prior to hiring and the real motivation behind recruitment decisions. The Labour and Social Security Inspectorate approved the 'Labour and Social Security Inspectorate Action Plan for 2008-2010 to monitor effective equality between men and women in companies'. The aim of the plan was to monitor companies' compliance with their obligations to achieve effective equality between women and men, prevent gender discrimination, guarantee the right of women and men to find a balance between work and family, and guarantee measures to protect the health and safety of women with regard to maternity, pregnancy and breast/bottle-feeding. In total 10 000 inspections were conducted in all types of companies between 2008 and 2010. The situations targeted by the inspections included: a) discrimination in access to employment (inspection of employment offers drawn up by companies thought to engage in gender discrimination); b) discriminatory in-house labour relations (gender discrimination in recruitment processes, wages and professional advancement); c) the right to balance family and work; d) protection of maternity, pregnancy and breast/bottle-feeding (to verify that risk assessments are in place if there are pregnant or breast/bottle-feeding female employees, and if risks exist, to verify compliance with the provisions of Article 26 of the LPRL concerning adapting working conditions or working hours during pregnancy and breast/bottle-feeding of a child younger than 9 months). The 2010 results of the action plan saw 6 491 gender-equality and non-discrimination inspections that uncovered 151 breaches resulting in penalties amounting to EUR 1 551 451 that affected 15 783 workers. The report highlighted the difficulties that some pregnant employees have in ensuring that 'they receive the benefits due to them for pregnancy risks, particularly when at times no position compatible with their condition is available. Particular emphasis is placed on the refusal of private occupational-risk management companies (*mutuas*) to recognise this without taking into account the risk assessments that companies are obligated to draw up (at times not even these are in place) and their use of purely objective criteria, such as the week of pregnancy⁸⁰⁹ without taking into consideration the special characteristics of each job and each employee'.⁸¹⁰ Small and medium-sized businesses, meanwhile, find it difficult to comply with the obligation to adapt working conditions when the health of the pregnant employee is at risk or during the months of breastfeeding due to economic and organisational burdens. This can be seen in many collective bargaining agreements that directly ignore the requirement to adapt workplace conditions, enforcing instead the option of reassignment to another job as standard practice.

Harassment of pregnant women in the workplace is presented in a study entitled '*mobbing maternal*' (harassment during pregnancy), which analyses 111 000 calls made to a foundation that helps young, destitute pregnant women at risk of social exclusion.⁸¹¹ According to the report, 90 % of pregnant women suffer harassment in the workplace during pregnancy, and 25 % are dismissed. The paper goes on to point out that maternity leave, reduction of working hours and expressing a wish to start a family have a detrimental effect on the renewal of a female employee's contract and on a company's willingness to recruit women. In total, 90 % of cases never come before the courts, either because they involve temporary contracts, or because the pregnant women in question opt for an early exit from the job market. Legal protection against dismissal of pregnant employees has led to the practice

⁸⁰⁹ Meaning that the private occupational-risk management companies do not recognise the women's pregnancy benefits. They ignore the risk assessments of the companies and they argue, instead, the (low) number of weeks of pregnancy.

⁸¹⁰ 2010 Annual report published by the Labour and Social Security Inspectorate, available on http://www.empleo.gob.es/itss/web/Que_hacemos/Estadisticas/doc/Memoria_2010/Memoria_2010.pdf, accessed 30 July 2012.

⁸¹¹ The report is not available online, but the findings are presented on <http://www.comfia.net/fraternidad/html/10256.html>, accessed 30 July 2012.

of dismissing the person in question again following her obligatory reinstatement. This merely adds to the harassment and finally leads to the employee's voluntary departure.

2.2. Self-employment

Recognition of certain rights helps facilitate a balance between the professional activity and family life of self-employed workers, who are authorised to take leave for maternity, paternity, risk during pregnancy and risk during breast/bottle-feeding, under the terms set forth in social security legislation. However, shared responsibility between women and men is still a distant goal. Unlike employees, self-employed workers are not entitled to a period of parental leave that counts as an insurance period for the purpose of their future entitlement to a pension.

Act 20/2007 of the Spanish Self-Employed Worker's Statute makes no reference to unmarried couples. This means that an unmarried partner is not considered a family member of the self-employed worker for the purpose of Act 20/2007 (and is not covered by this law). The unmarried partner must therefore be registered as an employee in order to be eligible for the maternity rights granted to employees under the general social security system.

2.3. Access to and the supply of goods and services

Most medical insurance companies subject their prospective clients to a questionnaire designed to rule out existing medical conditions. Among the most common exclusion factors in medical insurance policies are chronic diseases and maternity care for women who are already pregnant at the time of taking out the insurance. Another common practice is to demand waiting periods for pregnancy and maternity care, such as that established by Allianz Salud in their comprehensive policy (ante-natal care has a waiting period of three months, with a two-year waiting period for childbirth care). Other companies establish a waiting period of between 6 and 10 months for ante-natal care and childbirth, although some of these provide the option of paying an 'extra premium' or a lump sum when insuring pregnant women.

2.4. Additional information

There is no additional information to report.

3. Involvement of other parties

Currently, the best tools for securing the commitment of social agents (trade unions and business associations) to principles of non-discrimination on the grounds of pregnancy or maternity are the equality plans introduced by businesses and public administrations. In order to put such plans into effect, the situation of the company in question must be analysed and diagnosed, followed by measures devised to eradicate discrimination. According to the 2008 Labour and Social Security Inspectorate Report, gender discrimination mainly occurs in companies with more than 50 employees, particularly in companies with more than 250 employees, and these are specifically targeted by the LOI, which makes it mandatory for them to draw up equality plans.

The Spanish Institute for Women's Affairs receives complaints lodged by women with regard to specific cases of gender discrimination. There is ample information on their website.⁸¹² The Institute then forwards the complaints to the relevant government agencies, such as the Labour and Social Security Inspectorate, but not to the courts. Complaints can also be lodged with the equality body of any Autonomous Region or with the corresponding trade union.

Some companies have introduced measures to facilitate the balance between family and work that go beyond their legal obligations. These are examples of good practices that can play an important part in preventing discrimination that could arise in relation to maternity and paternity leave and childcare. The Universidad Oberta de Catalunya, for example, allows

⁸¹² <http://www.msc.es/ssi/igualdadOportunidades/instMujer/home.htm>, accessed 31 October 2012.

employees to work from home for two hours (teleworking) per day for 12 months after their maternity or paternity leave. The Thyssen-Bornemisza Museum has drawn up individual working schedules for each employee in order to adapt the demands of their job with those of their family. Indra has also opted for flexible working hours, paid leave for emergency personal circumstances and many opportunities for teleworking. Telefónica has equipped many of its employees with the technology needed to enable them to work from any location for part of their day. The Mutua de Accidentes de Canarias, a medium-sized company that won an award in 2007, has presented its 'Committed to gender equality' programme, a professional advancement system with which they have managed to balance their top management with 50 % female directors, and bring the total of female staff employees to 60 %.

The newspaper *Diario Médico* (www.diariomedico.com) published an article entitled '*La feminización, una realidad mal gestionada*' (Feminisation, a badly-managed situation) in July 2012. The heads of Spain's obstetrics and gynaecology (SEGO), paediatrics (AEP) and endocrinology (SEEN) medical associations addressed the challenges presented by the high percentage of female doctors in their respective specialist fields. The presence of female doctors in the field of obstetrics and gynaecology (85 %), and paediatrics (84 %) or haematology and paediatrics (79 %) is overwhelming, according to a report published by the Study Centre of the Medical Association of Granada. An article published in *Diario Médico* suggested that this preponderance of female doctors would lead to increasing problems in these services due to the frequency of maternity leave or absences stemming from the need to balance family life and work.

4. Enforcement and effectiveness

4.1. General

No studies or empirical reports have been found on this matter.

4.2. Legal redress

The scarcity of legal disputes is in stark contrast with the evidently discriminatory situation, suggesting that tools available to enforce individual rights to non-discrimination are not effective in reality. One of the main obstacles to initiate legal proceedings to eliminate gender discrimination is, in many cases, lack of awareness that such discrimination exists. Once the victim becomes aware of the discrimination against her, the options available to her may be severely limited due to practical difficulties in bringing the complaint before the courts. This is due not only to fear of reprisals (although such reactions are prohibited), but also to the peculiarities of the labour market in Spain which, apart from the current astronomical level of unemployment, is characterised by a high rate of temporary and precarious jobs that mainly affects women. Because of the reigning climate of instability, affected employees do not lodge complaints nor bring proceedings to redress discriminatory situations. There is probably room for public and private women's rights organisations and trade unions to step up their activity by, for example, making greater use of their *locus standi* provided for in Article 177 of the Labour Procedure Act 36.2011.

4.3. Access to information

No studies have been found on whether individuals are aware of their rights or not.

With the creation of the Ministry of Equality in 2008 they also started a policy to disseminate information. From a political point of view, the creation of this Ministry placed equality between women and men within the Cabinet and, therefore, on the political agenda of Spain. The disappearance of this Ministry in October 2010 supposed a backward movement and smaller visibility of equality policies. It has also affected the dissemination of information organized from the Ministry of Equality.

SWEDEN – Ann Numhauser-Henning

1. Existing legislation and case law

In Sweden, since a legal reform that entered into force on 1 January 2009, there is now a single non-discrimination act – the (2008:567) Discrimination Act (DA) – implementing all EU legislation in the field of non-discrimination regardless of the protected group or area of activities. This Act therefore also applies to the area of pregnancy/maternity discrimination dealt with in this report. Of importance as regards pregnancy/maternity discrimination is also the (1995:584) Parental Leave Act (PLA) regulating the different *rights to leave* in connection with small children (including a general prohibition on detrimental treatment while making use of these rights) and also the (2010:110) Social Security Code (SSC) with its rules in Section B Chapters 11-14 on *social security benefits* – parental leave benefits – related to such leave. There are six different types of *leave*; maternity leave, full-time leave with or without parental benefits until the child is 18 months old (or 18 months after having received a child in adoption until the child is 8 years old), part-time leave with parental benefits and part-time leave without parental benefits, respectively, leave with occasional parental benefits and leave with municipal care benefit. Parental *benefits* are paid out as *parental benefits* following birth or adoption of a child (Chapters 11-12) and as *occasional parental benefits* when taking care of a sick child (Chapter 13). *Parental benefits* are paid for a maximum of 480 days for each child until the child is 8 years old. 390 days are paid out at income-replacement level and 90 days at minimum level (is there no income to replace, then parental benefits are paid for 480 days at minimum/basic level). Parental benefit is paid to the parent – whether mother or father – who actually abstains from work to take care of the child and is therefore, generally speaking, transferable between parents. 60 days at income-replacement level are, however, non-transferable and thus *reserved for* the mother and *the father* respectively. (60 days are thus labelled *parental benefit* and the rule is ‘neutral’ in form, but in reality these days relate to the father.)⁸¹³ *Occasional parental benefit* is paid out as a *special paternity benefit* for a maximum of ten days related to the birth or adoption of a child. (This can be used despite of the mother being on maternity leave). (Occasional parental benefit is therefore also paid out to one of the parents – whether the mother or the father – actually caring for a sick child.) Generally speaking, there is no difference with regard to the right to benefits concerning adoption as compared to having a biological child. The date when the parent received the adoptive child into his/her care equals that of birth in any rule *except for* the rules referring to the specific age of the child. The costs for the statutory parental benefit scheme are paid for by employers through general pay-roll taxation.

1.1 Employment

Whereas Chapter 1 of the DA contains the definitions of the different types of discrimination such as direct and indirect discrimination, Chapter 2 contains the actual bans on (any type of) discrimination in a very ‘synthesised’ form area by area ‘tacitly’ covering all grounds of discrimination. In its Section 18, this Chapter also contains a general prohibition of reprisals. Chapter 2 Section 1 thus contains the ban on working life discrimination. This ban covers (any type of) discrimination on the grounds of sex and thus also pregnancy and maternity discrimination since according to the case law of the CJEU this amounts to direct discrimination on the ground of sex. It also covers any other situation of discrimination related to adoption leave, paternity leave and parental leave in situations where this amounts to sex discrimination. For situations of dismissal there is a special ban in Section 17 of the PLA stating that a dismissal related to parental leave in a broad sense can be declared null and void. Such a dismissal would also not be compatible with the (1982:80) Employment Protection Act (EPA) and its requirement for a just cause for termination. Moreover,

⁸¹³ As mothers – in the Swedish experience – always use more than 60 such days the rule only makes a difference for fathers. Should they not use at least 60 days of parental leave these days will ‘be lost’, as they cannot be transferred to the mother!

according to Section 11 of the EPA, should a person on parental leave be (justifiably) dismissed for other reasons, the notice period only starts when the worker is/or should have been back at work. This rule implements Article 10 of the Pregnant Workers Directive.

However, for all these situations (including pregnancy and maternity) related to leave there is also the more technical ban on detrimental treatment in Section 16 of the PLA stating that ‘an employer may not disfavour a job applicant or an employee for reasons related to (any form of) parental leave under this Act’. The PLA thus contains rules on different types of ‘parental’ leave such as maternity leave (related to pregnancy, giving birth and breastfeeding), parental leave proper, paternity leave and leave for temporary care of a sick child. Generally speaking, these rights to leave correspond to different types of parental benefits under the SSC, Part B. All these rules apply equally regardless of the employer.

If we look at the activities of the Equality Ombudsman, a considerable part or about 40 % of all applications in 2011 concerned alleged *employment* discrimination. Of these about 24 % concerned *sex* discrimination and out of these cases about half (50 %) regarded detrimental treatment related to pregnancy/maternity. Another 61 applications concerned detrimental treatment according to the PLA directly. If we look into the figures for the first half of 2012 139 cases or 14 % concerned alleged discrimination on the grounds of sex whereas 44 cases or 5 % related directly to the ban on detrimental treatment in the PLA. According to a press release dated 8 March 2012 the Equality Ombudsman claims that young women despite the regulation in place (see above) are systematically discriminated against in working life due to actual pregnancy or stereotypes concerning pregnancy and maternity/parental leave.⁸¹⁴ Alleged discrimination frequently concerns access to employment as well as disadvantages when they are not entitled to bonuses or work-related rewards during absences due to pregnancy-related illness and/or maternity leave.

There is also a considerable amount of case law from the Swedish Labour Court concerning these types of discrimination and it can be said that there is a tendency to rather apply the PLA ban on detrimental treatment than the ban on sex discrimination in the DA when both these bans simultaneously apply. One example is Labour Court Case 2009 No. 45. A pregnant woman had applied for a study leave concerning a one-week course planned to take place the week preceding her maternity leave. The study leave was denied by her employer arguing that it would be difficult to consolidate the competence improvement due to the planned pregnancy/maternity leave. The Labour Court found detrimental treatment on the grounds of parental leave according to Section 16 of the PLA to be at hand. Despite reference to CJEU Cases *Dekker*, *Webb* and *Hertz* the Court did not qualify the act under the sex discrimination regulation, since the employer’s decision was also in breach of the PLA.

Labour Court Case 2009 No. 13 may also be of some interest. An employer decided to pay a gratification for the year 2006 in relation to hours worked that year. Among the employees who only received a reduced gratification were 3 employees who had been on parental/maternity leave during 2006. The reduction was calculated in relation to the reduced working time due to the leave in question. The Court found no detrimental treatment/sex discrimination to be at hand. The gratification was found to constitute wages *ex post*. The reduction was found to be ‘a natural consequence’ of the parental leave and thus in compliance with Section 16 of the PLA. Nor did the Court – referring to the *Lewen* case – find the reduced wage gratification to be in conflict with EU law.

1.1. Social security and pension rights

Chapter 2 Section 14 of the DA contains the ban on discrimination concerning the social insurance system, thus covering all grounds (including sex) and types of social benefits (including maternity, paternity and parental benefits). Private and occupational pension schemes are covered by the ban on working life discrimination in Section 2 only just described above, since pension is regarded as delayed pay. Notably, in Case 2009 No. 15 the Swedish Labour Court found, however, that the non-payment of customary pension premium reservations during a period of parental leave was lawful, since premiums are by nature

⁸¹⁴ This information was obtained from the EO’s website: www.do.se, accessed 10 August 2012.

indirect wages and the non-payment of wages (when in line with the collective agreement) is a ‘natural consequence’ of parental leave. Still, occupational schemes are known to include rules on the payment of pension contributions also during parental leave – these rules differ with regard to different conventions, however.

With regard to the income-related statutory pension scheme any type of parental benefit is equalled to income when it comes to accumulating pension points. However, also the right to so-called ‘child years’ is of interest here. Normally, the parent with the lower income (and thus amount of pension points including any possible parental benefits) is entitled to pension points for a period of four years per child, amounting to 75 % of the average pensionable income that year if this is higher than the individual pensionable income.

Recent case-law developments with regard to the general sickness insurance may be of some interest here, too. In four cases from the Stockholm District Court (judgments T 10670-07, 10671-07, 10702-07 and 15410-07 of 3 November 2009) four pregnant women with pregnancy-related physical problems were denied sickness benefits with reference to pregnancy being ‘a natural state’ and not an illness. Four different women, all pregnant, were thus denied sickness benefits by *Försäkringskassan* despite them being prevented to work during parts of their pregnancy due to (mainly) pregnancy-related back problems. Ms A (a pre-school teacher) had, according to her doctor, a total loss of ability to work from week 33 of her pregnancy. The medical expert of *Försäkringskassan* regarded her problems ‘a natural’ consequence of her pregnancy and *Försäkringskassan* denied her sickness benefits arguing that ‘a right to sickness benefits requires the pregnancy to deviate from what could be regarded as ‘the normal process of pregnancy’ in that there were complications amounting to ‘illness’. ‘Illness’ was defined as ‘any abnormal physical or psychological condition not related to the normal process of life’. Only certain quite specific complications during pregnancy were regarded as such ‘abnormal’ conditions amounting to illness. Ms B (a nurse) suffered from back problems which prevented her to perform her work from week 26 of her pregnancy, Ms C (a bus driver) lost her capacity for work for 50 % by pregnancy-related problems as of week 21 of her pregnancy and later on for 100 %, and Ms D (a work-environment inspector) was unfit for work due to diverse problems for 50 % as of week 31 of her pregnancy. All three (B, C and D) were also denied sickness benefits by *Försäkringskassan* based on the same line of argument. The Equality Ombudsman brought the four situations of alleged discrimination to court arguing that a non-pregnant person suffering from symptoms of the same kind and severity would have been provided sickness benefits. The Stockholm District Court found for the claimants. These cases were later appealed to the *Appeal Court Svea Hovrätt* which delivered its judgment in 2011 (reported in EGELR 2011-01). The Appeal Court also found direct discrimination on the grounds of sex to be at hand. The Appeal Court began by stating that the underlying cause of the symptoms amounting to an illness is of no relevance for the application of sickness-benefit insurance. The mere fact that *Försäkringskassan* took into account that, in these cases, the symptoms were pregnancy-related implied that it had applied a special and more severe reference norm than the one used for the relevant comparator – a ‘non-pregnant’ man. It is ‘obvious that the four women due to their pregnancies were treated worse than a man with similar symptoms’, said the Appeal Court and this amounts to a *prima facie case of direct discrimination*. *Försäkringskassan* had not been able to show that the denial of sickness benefits was not related to pregnancy, nor that a man with equivalent symptoms would also have been denied benefits. Indemnification was, however, restricted to EUR 1 500 (SEK 15 000) each, taking into account that discrimination was ‘unintentional’ and that the consequences were limited (sickness benefits were later on approved). An appeal was not provided by the Supreme Court. The fact that this judgment now stands proves very important for pregnant women in Sweden, in that pregnancy-related symptoms will qualify for sickness benefits to the same extent as other, non-pregnancy related symptoms. Until this judgment, women had to use their limited days of parental leave benefits in this situation.

1.2. Self-employment

Self-employed workers are covered by the general social security parental benefits scheme in the SSC in the same way as other workers. Also non-economically active residents are covered by the scheme at a basic level. The scheme provides for benefits during no less than 480 days per child until the child is 8 years old. To my knowledge there is no relevant case law specifically concerning the self-employed.

1.3. Access to and the supply of goods and services

Chapter 2 Section 12 of the DA contains the ban on (any type of) discrimination concerning the access to and supply of goods and services. This ban (as was described in relation to discrimination in working life) thus ‘tacitly’ covers sex, including pregnancy and maternity/paternity, but there is no special mention of the latter. Moreover, as of 21 December 2012 the existing exemption for insurance services will be cancelled as a response to the ECJ’s judgment in C-236/09 *Test-Achats*.⁸¹⁵ According to the amended DA ‘as insurance services are concerned there must not be a difference between women and men in insurance premiums or insurance compensation for the individual on the ground of gender-related factors’. This amendment will also have a bearing on pregnancy/maternity-related issues. To my knowledge there is no relevant case law concerning these areas. Nor does the Equality Ombudsman’s website contain any information about such allegations: all pregnancy/maternity-related applications mentioned there concern working life and/or the PLA.⁸¹⁶

The DA also prohibits discrimination in the area of education according to the rules in Chapter 2 Sections 5-8. This ban, in principle, covers all areas of education and all protected groups including sex and therefore also covers pregnancy and maternity. Non-discrimination legislation and the DA do not cover the area of media and advertisements.

2. Gaps in national law

2.1. Employment

There are, in my opinion, no real gaps in this area: the relevant regulations are in place. This also goes for the new Parental Leave Directive. It was also the opinion of the Swedish Government that the latter did not call for any further implementation measures in Sweden.⁸¹⁷ However, the DA can be criticised for being too subtle in its design, only ‘tacitly’ covering pregnancy and maternity in their quality of constituting direct sex discrimination. One can also criticise the Swedish Labour Court for, frequently, taking the ‘easy way out’ by condemning detrimental treatment related to pregnancy, maternity, etc. under the PLA, thus avoiding qualifying it as sex discrimination proper.

With the exception of ten days of paternity leave proper in connection with the birth of a child, two months of ‘parental leave’ regarding each child are reserved for the father and thus non-transferable. Fathers are, generally speaking, known to use these months of leave whereas the mothers use most of the rest of the days of parental leave. This is normally explained by the fact that fathers often enough earn more than mothers and that it is therefore economically favourable for the family that the mother uses most of the leave. In 2008 rather complicated rules on a so-called Equality Bonus was introduced to meet these inequalities in application of the parental benefits scheme. The aim is therefore to provide the economic possibilities for a more equal distribution of parental benefits between the parents as well as to strengthen the relation of the child with both parents.⁸¹⁸ So far, this reform has had limited effects.⁸¹⁹

⁸¹⁵ Government Bill 2011/2012:122.

⁸¹⁶ www.do.se/sv/Om-DO/Stamningar-och-forlikningar/, accessed 11 June 2012.

⁸¹⁷ Compare Ds 2010:44 *Genomförandet av det nya föräldraledighetsdirektivet*.

⁸¹⁸ See further Government Bill 210/11:146.

⁸¹⁹ Compare Social Insurance Report 2010:5 *Jämställdhetsbonusen – en effektutvärdering*, The National Social Insurance Board 2010.

Concerning the statutory parental benefit scheme as such this can be criticised in relation to Article 11 of the Pregnant Workers Directive. It is true that income-related parental benefits are paid out at sickness benefit level. However, as concerns the first 180 days of benefits a compensation at income level requires a qualifying period of 240 days immediately prior to the birth of the child – a requirement without parallel in the sickness benefit scheme.

2.2. Self-employment

In the area of (various types of) parental benefits as such, generally speaking there is no problem with the self-employed since their cover is equal to that of workers in these public social benefit schemes. It may be worth mentioning, however, that generally speaking under Swedish law there is a clear binary divide: there are workers and self-employed persons. Only workers are covered by labour law and by the ban on discrimination in working life in the DA. (The discrimination ban related to social security does apply generally however.) Also with regard to the PLA concerning the self-employed Section 16 and the ban on detrimental treatment do not apply since there is no ‘employer’. There is no general scheme to compensate for interruptions of activities due to pregnancy and maternity as such. This can possibly be dealt with through private insurance.

To my knowledge, there is no case law concerning this area of application.

2.3. Access to and the supply of goods and services

I am not aware of any special problems of discrimination in this area related to pregnancy and/or maternity, nor is this an issue for the general debate or research.

Chapter 2 Section 13 of the DA contains a special ban on discrimination concerning health, medical care and social services. According to Paragraph 2 this ban ‘does [sic] not prevent women and men being treated differently if there is a legitimate purpose and the means that are used are appropriate and necessary to achieve that purpose’. I have no knowledge of the detailed application of this exception.

2.4. Additional information

There is no additional information to report.

3. Involvement of other parties

Pregnancy and maternity/paternity issues are not currently a crucial subject of political and/or legislative activities – that period of history has basically passed and the appropriate regulations are in place. However, these issues are of course still crucial areas for the Equality Ombudsman monitoring the application of such regulations. Since 2009 Sweden has a single Equality Ombudsman covering all areas of discrimination including sex and a number of other grounds. Its activities are regulated in the DA as well as in the (2008:568) Act concerning the Equality Ombudsman and their main purpose is to ensure that discrimination does not occur in any areas of life and society as well as to promote equal rights and opportunities regardless of group. Information about activities in general is provided through the authority’s website (www.do.se).

The social partners are also known to have taken an interest in these issues through collective bargaining. Most collective agreements contain special rules on extra remuneration in relation to maternity/paternity/parental leave. This has proven necessary since there is a ceiling on the public parental benefit scheme – incomes exceeding 7.5 ‘basic amounts’ or SEK 300 000 (approximately EUR 33 000) are not replaced. These collectively bargained conditions vary strongly between the various sectors of the labour market. Basically the extra protection is known to be better in sectors of the labour market dominated by women (such as the municipality sector) since trade unions tend to try and meet the special needs of their members. However, through their collective agreements the social partners can be said to further a tradition where mostly women use parental leave, which is what is most convenient

for the family as a whole since working conditions related to parenting tend to be better in sectors/branches dominated by women.⁸²⁰

4. Enforcement and effectiveness

4.1. General

Generally speaking there is great acceptance of women workers in the Swedish labour market, with women for a long time having worked to almost the same extent as men. Still, it is (as was indicated above) the opinion of the Equality Ombudsman that young women, despite the regulations in place, are systematically discriminated against in working life due to pregnancy or stereotypes concerning pregnancy and maternity/parental leave. The assessment was made with reference to the relatively high number of applications related to pregnancy and maternity in working life that reaches the Equality Ombudsman.

4.2. Legal redress

Talking about discrimination in employment, there are two main routes of legal redress in Sweden: through the relevant trade union or through the Equality Ombudsman. Both ways are free of cost for the individual/alleged victim. Firstly, for members of a trade union (and most Swedish workers, or about 70 % on average, are still affiliated to a union) the union has the privilege to represent their member in a trial if they choose to do so. Secondly, or if the individual is not unionised, an alleged victim may be represented by the Equality Ombudsman. The Swedish Labour Court is the first and only instance in both cases. Should the Ombudsman not want to take on the case a third alternative remains for the individual, which is to take the case to court himself/herself.

The Equality Ombudsman also has the competence to represent an alleged victim of discrimination in any area other than working life covered by the DA. Such cases are dealt with within the general court system or by the administrative courts depending on the area of discrimination. Should the Ombudsman choose not to represent the individual, he or she can take the case to court himself/herself.

According to the DA (Chapter 6 Section 2) there is also the possibility that a non-profit organisation brings an action, as claimant, on behalf of an individual who consents to this. To be allowed to bring an action, the association must be suited to represent the individual in the relevant case, taking account of its activities and its interest in the matter, its financial ability to bring an action and other circumstances. This option was only introduced in 2009 and there have been very few lawsuits brought by NGOs. To my knowledge, no cases have been brought in the area of pregnancy/maternity.

4.3. Access to information

The National Social Security Board (*Försäkringskassan*) is known to provide broad information on the social security schemes including parental benefits through its website (www.fk.se) as well as local offices throughout Sweden. Generally speaking, everybody residing in Sweden, being entitled to parental benefits in one form or the other, can be expected to have a fairly good awareness of this. When it comes to additional rights regulated by collective agreements, the union is the crucial entity providing information as well as fellow workers. Also in this respect, general awareness can be supposed to be high. Moreover, employers are expected to apply collective agreements automatically.

When it comes to possible discrimination the Equality Ombudsman has a general duty to provide information. This is mainly done through its website (www.do.se).

⁸²⁰ See further Carlson.

TURKEY – Nurhan Süral

1. Existing legislation and case law

Legal rules on fighting pregnancy and maternity related discrimination are found mainly in the Labour Law,⁸²¹ Civil Servants Law⁸²² and the Social Insurances and General Health Insurance Law.⁸²³ The Criminal Law⁸²⁴ criminalizes discrimination at the time of contract conclusion. The so-called Sack Law⁸²⁵ (a law amending quite a number of laws is called a sack law) introduced new types of leave and substantial (generous) increases in the duration of the current forms of leave for civil servants and workers with a permanent employment contract in the public sector. The relevant provisions are analyzed below.

1.1. Employment

Pregnancy

There is no specific anti-discrimination legislation in Turkey. Article 5 of the Labour Law is the most extensive general provision on the prohibition of discrimination. This Article regulates the principle of equal treatment prohibiting discrimination on the basis of race, sex, language, religion and sect, political opinion, philosophical belief, or any such considerations. ‘Any such considerations’ implies that the listing is non-exhaustive.

The rules on pregnancy and childbirth in the Labour Law and the By-Law (implementing legal instrument) on the Working Conditions for Pregnant or Nursing Workers, and Nursing Rooms and Day Nurseries,⁸²⁶ draw almost completely on Directive 92/85/EEC, and especially the part on risks repeats the text of the Directive almost word for word. Definitions given for a ‘pregnant worker’, a ‘worker who has recently given birth’, and a ‘breastfeeding worker’ are the same as in Directive 92/85/EEC (By-Law, Article 4) and so are the rules on pregnancy accommodation.

A pregnant worker shall mean a pregnant worker who informs her employer of her condition using a document to be obtained from any health institution; a worker who has recently given birth shall mean a worker who has recently given birth and who informs her employer of her condition; a worker who is breastfeeding shall mean a worker who is breastfeeding her child until the age of one (By-Law, Article 4).

Pregnant workers are entitled to time off, without loss of pay, in order to attend ante-natal examinations, if such examinations have to take place during working hours (By-law, Article 12). If the pregnant/recently having given birth/breastfeeding worker’s physician asks for a position that is less strenuous or hazardous, the employer has to transfer her to another position if there is one or if he can provide one without being unduly burdened, without a reduction in wage. If such a transfer is not possible, then the worker shall be granted a leave without pay upon request for a period necessary for safety and health of the worker (By-Law, Article 8).

There are limitations as regards access to night work. A pregnant worker cannot be obliged to perform night work during the period starting from the time that her pregnancy is specified in a medical certificate until delivery. Night work may be performed after maternity leave or by a nursing worker, after a six-month period following the maternity leave if she is fit to resume night work. If the worker presents a medical certificate stating that it is necessary for her safety or health that she does not perform night work, she cannot be compelled to do so for the period specified in the medical certificate. The six-month night work prohibition may be extended to one year upon a medical certificate. By contrast, a

⁸²¹ *İş Kanunu*, Official Gazette 10 June 2003, no. 25134.

⁸²² *Devlet Memurları Kanunu*, Official Gazette 23 July 1965, no. 12056.

⁸²³ *Sosyal Sigortalar ve Genel Sağlık Sigortası Kanunu*, Official Gazette 10 June 2006, no. 26200.

⁸²⁴ *Türk Ceza Kanunu*, Official Gazette 12 October 2004, no. 25611.

⁸²⁵ *Torba Kanun*, Official Gazette 25 February 2011, no. 27857 bis.

⁸²⁶ *Gebe veya Emziren Kadınların Çalıştırılma Şartlarıyla Emzirme Odaları ve Çocuk Bakım Yurtlarına Dair Yönetmelik*, Official Gazette 14 July 2004, no. 25522.

female civil servant could not perform night work starting from the 26th week of her pregnancy until one year after the delivery. According to the amendment introduced by the Sack Law to the Civil Servants Law, a female civil servant can perform night work until the 24th week of her pregnancy unless she presents a medical certificate stating otherwise. For the period between the 24th week of pregnancy and one year following the delivery there is an absolute prohibition of night work.

Maternity leave

Duration of maternity leave: In Turkey, there is a compulsory maternity leave of 16 weeks. The eight-week ante-natal resting period may be reduced to three weeks at the request of the worker and after approval of a doctor, and the unused period is added to the eight-week post-natal rest period. For a multiple pregnancy, two more weeks are to be added to the ante-natal leave. These ante-natal and post-natal resting periods may be increased with a medical report on the basis of the worker's health and the nature of the work to be performed. The total period of maternity leave in Turkey is compulsory. An employer who requires a woman to work during this period is punishable by a fine of approximately EUR 522 (TL 1 200).

Effect of early delivery on the length of maternity leave: According to the Sack Law, if childbirth occurs before the due date, the unused ante-natal portion of the leave is added to the post-natal portion of the leave. Short-term incapacity benefits are also to be paid for this portion added to the post-natal leave. Parallel amendments have been made to the Civil Servants Law. Another amendment made to the Civil Servants Law concerns the death of a female civil servant during maternity leave. Where this occurs, the civil servant father, if he so requests, may use the leave granted to the mother.

Additional maternity leave: The worker, if she so requests, has to be granted unpaid leave of up to six months following the post-natal period. The two periods, compulsory leave and additional leave, must be consecutive, producing an entitlement to 16 weeks (18 in the case of a multiple pregnancy) plus 6 months leave. There can be no gap between the two periods.

Additional unpaid maternity leave upon request previously was one year for female civil servants. The Sack Law has extended this one-year period to two years and extended it to (civil servant) husbands (*see: paternity leave*).

Return from maternity leave: All rights linked to the employment contract continue to apply. Following the maternity and/or additional maternity leave, the worker shall return to her previous job or a similar job without any reduction in payment.

Breastfeeding

The daily nursing period is 1½ hours during weekdays for women workers until the child is one year old. This also applied to female civil servants, but now, with the Sack Law, it is 3 hours a day for a period of six months following the termination of maternity leave and 1½ hours a day for the second six-month period. In practice, nursing civil servants preferred adding up these hours and taking one full day off per week. The Sack Law prohibits compilation of nursing periods as this is against the rationality of having daily nursing periods.

The so-called 'milk money' (a nursing allowance) is a lump-sum payment made to a breastfeeding worker or to the uninsured (unregistered) breastfeeding wife of the male worker for each newborn child provided that the child is alive (Social Insurances and General Health Insurance Law, Article 16). To qualify for the nursing allowance, a female worker or the working husband of the woman has to have paid contributions (premiums) for at least 120 days in the year before the birth. The amount of this payment is laid down in a tariff to be issued by the managing board of the Social Security Organization and to be approved by the Minister of Labour and Social Security. In 2012, the amount is TL 89 (approximately EUR 40).

Adoption leave

Adoption leave was first introduced (only) for civil servants by the Sack Law.

If a child below the age of three is adopted, there will be, upon request, an unpaid adoption leave of up to 24 months. If both spouses are civil servants, then these periods can be taken at the same time or consecutively.

For workers this issue is left to individual/collective labour agreements.

Paternity leave

Paid or unpaid paternity leave for male workers is left to individual and collective labour agreements.

As stated, additional unpaid maternity leave upon request was one year for female civil servants. The Sack Law has extended this one-year period to two years and ensured a parallel extension in the paternity leave of the (civil servant) husbands. According to the former law, a male civil servant was granted paid paternity leave of three days upon the birth of his child. The Sack Law extended this to ten days. Moreover, it introduced an unpaid paternity leave of 24 months for male civil servants, upon request. However, whereas the additional unpaid maternity leave starts after the maternity leave for the female civil servant, paternity leave will start immediately after the child's birth for the (civil servant) husband.

Parental leave

In the Labour Act and the Civil Servants Act, there is no leave under the title of 'Parental leave'. For workers this issue is left to individual/collective labour agreements. A worker may request leave for a valid reason and this may be a family-related reason.

For civil servants and workers with a permanent employment contract in the public sector, the Civil Servants Act does not include any leave under the title of 'Parental leave'. In the Civil Servants Act, there are forms of leave entitled 'excuse leave' and 'sickness and patient companionship leave' that may be used for family-related reasons. An 'excuse leave' (leave for a valid reason/justifiable cause) is a ten-day paid leave to which a second ten-day paid leave may be added in a period of one year. A 'sickness and patient-companionship leave' is 3 months' paid leave plus 3 months' paid leave plus 18 months' unpaid leave. An unpaid sabbatical leave of one year to be used altogether or in two parts is granted to civil servants who have completed five (previously ten) years of service. The sabbatical leave can only be taken once throughout the entire period of service. It cannot be used when the civil servant is serving in a region which is subject to martial law, a state of emergency or a disaster. Permanent workers employed in the public sector are entitled to an unpaid patient-companionship leave of 6 months plus 6 months. Workers permanently employed in the public sector are also entitled to an unpaid sabbatical leave of 6 months upon the completion of ten years of employment. This sabbatical leave can only be taken once throughout the entire period of employment.

Dismissal related to pregnancy, maternity and related forms of leave

In Turkey, the labour contract is deemed to have been suspended during maternity leave. Therefore, dismissal for any reason during the period of maternity leave is legally non-permissible. An exception is the automatic expiry of the prescribed period coinciding with the leave in the case of a fixed-term labour contract. Until the time she takes her maternity leave the worker can be dismissed for a just cause/valid reason and economic redundancy dismissal constitutes a valid reason.

The Labour Act restricts the right of an employer to dismiss a pregnant worker. Between the employer and the worker there may be a fixed-term or an open-ended labour contract. A fixed-term labour contract cannot be terminated before the expiration of a specified period unless there is a just cause, clearly indicated in Article 25 of the Labour Act, leading to an immediate dismissal⁸²⁷. Needless to say, pregnancy does not constitute a just cause. However,

⁸²⁷ Immediate dismissal may occur for specified serious offences known as gross misconduct (zero tolerance offences). Examples are résumé fraud, sexual harassment of other workers, verbal or physical abuse directed at

excessive absenteeism for health reasons is a just cause for dismissal. The employer is entitled to terminate the fixed-term or open-ended labour contract for excessive absenteeism. If a woman worker who fails to report to work for reasons of health for more than six weeks beyond the prescribed notice period varying between two to eight weeks⁸²⁸ following her confinement leave of 16 weeks (exceeding 24 to 30 weeks of absenteeism), she can be dismissed for excessive absenteeism (LA, Article 25/1). If the worker is laid off for excessive absenteeism, she shall be entitled to severance pay only if she has been employed in that particular workplace for at least one year.

If a woman worker employed under an open-ended labour contract is dismissed due to her pregnancy, the types of pay (compensation) will differ based on whether she is a worker with regular or with increased job security. Workers employed under open-ended labour contracts either enjoy regular job security or increased (enhanced) job security. The total length of employment of the relevant worker and his/her status are decisive here. Workers with increased job security enjoy greater protection against dismissal on notice. A worker who has been working under an open-ended labour contract for more than six months at a workplace where at least thirty (fifty in agriculture) workers are employed benefits from increased job security if he/she is not in the position of an employer's representative managing the whole business or workplace with authority regarding recruitment and dismissal. Where the employer owns more than one workplace in the same industry, the total number of workers shall be considered (LA, Article 18). The 30-worker threshold is to avoid imposing administrative, financial and legal constraints in a way which would hinder the creation and development of small and medium-sized businesses.

Where a worker with regular job security is dismissed due to her pregnancy, this will be deemed an 'abusive dismissal' entitling the worker to so-called 'bad-faith pay', equalling to thrice the amount of pay corresponding to the worker's notice period. The employer has to present the termination in writing but there is no legal obligation for him/her to specify the reason of dismissal clearly and precisely.

Where a worker with increased job security is dismissed, the employer has the legal obligation to specify the reason of dismissal clearly and precisely (LA, Article 18). The worker has to be provided an opportunity to defend himself/herself when the allegations are related to his/her capacity or conduct (LA, Article 19). Where no reason is specified or the reason specified is not valid, the worker can pursue court action to protect his/her rights and can be reinstated by the court (LA, Article 20). If the employer does not reinstate him/her, as is usual due to the fear of retaliation, the worker shall be entitled to job security pay. The minimum amount of this compensation corresponds to the worker's four months' basic wages and the maximum to the worker's eight months' basic wages.

On the basis of the ILO C158,⁸²⁹ Article 18 of the Labour Act on increased job security presents a non-exhaustive list of incidents that do not constitute a valid reason for contract termination amongst which are sex, marital status, family obligations, pregnancy, confinement and absenteeism due to maternity leave. If the discriminatorily dismissed worker is one with increased job security, she shall be entitled to reinstatement, and if not reinstated by the employer, to the so-called 'job security pay', equalling to 4-8 months' wages. There shall also be severance pay to be paid to such a worker with regular or increased job security if she has completed at least one year of service at the relevant workplace.

Under Article 5 of the Labour Act on prohibition of discrimination at work, in an employment relationship, excluding selection procedures, specified acts of discrimination are

the employer or the members of his family, illegal drug usage, wilful neglect of duty that is not trivial, and has not been condoned by the employer, abuse of trust such as theft, embezzlement, disclosure of trade secrets, use of employer's equipment (e.g. vehicles and computers) to engage in non-work-related activity. Some workers dismissed for gross misconduct may face additional consequences like criminal prosecution (e.g. bank teller stealing money from the cash drawer) or a civil lawsuit.

⁸²⁸ If the length of employment at the workplace concerned is less than six months, the corresponding notice period is two weeks, four weeks for employment between six months to 1½ years, six weeks for employment between 1½ years and three years, and eight weeks for employment of more than three years (LA, Article 17).

⁸²⁹ Convention on the termination of employment relationship at the employer's initiative, 1982.

reasons to justifiably claim wrongful treatment or termination. Proof of discrimination shall suffice, and consequent loss or suffering shall not be sought. A woman worker, be it one with regular or increased job security, who considers herself discriminatorily treated on the basis of sex during the course of employment or dismissal may pursue her claims and demand payment of four months' basic wages. This is so-called 'discrimination pay'. Introduction of a ceiling to the amount of discrimination pay contradicts the EU *acquis*. If in the case of discrimination based on sex the worker proves *prima facie* that there may be discrimination, it is up to the employer to prove the contrary (LA, Article 5).

1.2. Social security and pension rights

In cases of pregnancy and giving birth, there are benefits in kind and benefits in cash. Medical maternity benefits cover medical examinations, medication, *in-vitro* fertilization, and hospitalization designed to cover care for the insured woman or the uninsured wife of the male worker.

Maternity allowance is a short-term incapacity benefit designed to compensate for a worker's loss of earnings due to pregnancy and giving birth. Unless there is a provision to the contrary in the individual or collective labour contract, there will be no pay by the employer during maternity leave: the worker will be paid maternity allowance equalling sick pay by the social security organization (Social Insurances and General Health Insurance Law, Law no. 5510, Article 18). To qualify for this maternity allowance, a female worker has to have paid contributions for at least 90 days in the year before the birth.

In some schemes, the worker can make up for any unpaid leave by way of extra contributions. During a period of unpaid maternity leave, neither the worker nor the employer will be expected to contribute. The worker may, if she chooses, pay contributions during the statutory (compulsory) maternity leave but the employer will not have a duty to contribute. If the worker pays contributions during the statutory maternity leave period, this period counts as pensionable service. Also, where a worker resigns due to pregnancy or having given birth, she may, if she chooses, pay contributions for a maximum period of two years during which she remains unemployed. This period starts at the birth and the worker may benefit from this provision for two separate births (Article 41).

If a female worker is the mother of a disabled child in need of constant care, she will be entitled to early retirement: 90 extra pensionable days will be added to each year of service (Article 28). It is the Social Security Organization Health Board⁸³⁰ that determines the child's condition on the basis of the relevant By-Law.⁸³¹

1.3. Self-employment

A self-employed person is a service provider and he/she is considered independent. The term 'self-employed worker' does not exist because this term implies dependency and independency at the same time. In Turkey, the term 'worker' implies subordination (dependence) whereas the term 'self-employed' implies independency. The employed and the self-employed enjoy the same benefits as regards pregnancy and birth under the Social Insurances and General Health Insurance Law. Self-employed women will receive full maternity benefits just like women workers.

1.4. Access to and the supply of goods and services

There is no specific anti-discrimination legislation and therefore the rules are scattered. There is the principle of equal treatment as regards access to and the supply of goods and services. The terms 'direct' and 'indirect' discrimination are used in Article 5 of the Labour Act on the prohibition of discrimination, but are not defined.

⁸³⁰ Sosyal Güvenlik Kurumu Sağlık Kurulu.

⁸³¹ Article 15, By-Law on Incapacity for Work and Schemes for Invalidity (*Çalışma Gücü Ve Meslekte Kazanma Gücü Kaybı Oranı Tespit İşlemleri Yönetmeliği*), Official Gazette, 11 October 2008, no. 27021.

2. Gaps in national law

2.1. Employment

Turkey has to:

1. encourage the social partners to promote equal treatment;
2. allow class actions (e.g. introduce procedural provisions to allow associations and organizations to bring legal or administrative lawsuits in the name or in support of a victim of discrimination or harassment with the complainant's approval); and
3. extend the rules on the prohibition of gender discrimination to the contexts of access to employment, vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience, and promotion.

In the private sector, discrimination in selection procedures has is not prohibited by the Labour Act but, according to Article 122 of the Criminal Code on discrimination, anyone who conditions employment or non-employment upon discrimination on the basis of language, race, sex, disability, political opinion, philosophical belief, religion, sect and similar cases shall be sentenced to between 6 months and 1 year of imprisonment or a fine. ISKUR, the Turkish Employment Office, issued a notice in April 2006 outlawing discriminatory job advertisements. Requests, including statements or specifications in job notices or advertisements, concerning preferences and limitations constituting discrimination shall not be put into effect by employment offices.

There are on-going attempts to establish an equality body.

2.2. Self-employment

There are no gaps.

2.3. Access to and the supply of goods and services

There are airline restrictions for pregnant passengers. A medical report approving the flight is required from passengers between the 28th and 36th week of pregnancy (28-32 weeks for multiple pregnancy). Following the 36th week (32nd for multiple pregnancy) there is a complete prohibition.

2.4. Additional information

There is no additional information to report.

3. Involvement of other parties

The social partners do not play any significant role as regards gender equality in the labour market and the role of collective agreements in the development of equality issues has never been really relevant.

4. Enforcement and effectiveness

4.1. General

Sanctions in cases of discrimination are applied by the courts. The worker with increased job security can demand to be reinstated in her job if discriminatorily dismissed. If not reinstated, she can claim pecuniary damages under the system of sanctions in general labour law.

4.2. Legal redress

The worker concerned can claim particular types of compensation, specified under 'Dismissal related to pregnancy, maternity and related forms of leave'.

There are no studies, surveys or statistics on pregnancy discrimination complaints filed with employers and/or courts.

4.3. Access to information

There are no studies, surveys or statistics on access to information. Established practices in the workplaces are probably the main source of information.

UNITED KINGDOM – Aileen McColgan

1. Existing legislation and case law

1.1. Employment

The Equality Act 2010 defines ‘pregnancy and maternity’ as a ‘protected characteristic’ (Section 4), Section 18 going on to provide that ‘A person (A) discriminates against a woman if’:

- during the period beginning with the start of her pregnancy and ending with the end of her period of maternity leave or, if she is not entitled to such leave, until two weeks after her pregnancy ends, A treats her unfavourably;⁸³²
 - because of the pregnancy,
 - because of illness suffered by her as a result of it;
- because she is on compulsory maternity leave; or
- because she is exercising or seeking to exercise, or has exercised or sought to exercise, the right to maternity leave.

In Northern Ireland the Sex Discrimination (Northern Ireland) Order 1976, as amended, uses the term “less favourably” rather than “unfavourably” but does not otherwise require a comparator in the case of discrimination on grounds of pregnancy or maternity leave, Reg 5A providing that:

- (1) ... a person discriminates against a woman if—
 - (a) at a time in a protected period [as above], and on the ground of the woman's pregnancy, the person treats her less favourably; or
 - (b) on the ground that the woman is exercising or seeking to exercise, or has exercised or sought to exercise, a statutory right to maternity leave, the person treats her less favourably . .
- (2) In any circumstances relevant for the purposes of a provision to which this paragraph applies, a person discriminates against a woman if, on the ground that Article 104(1) of the Employment Rights (Northern Ireland) Order 1996 (compulsory maternity leave) has to be complied with in respect of the woman, he treats her less favourably . . .
- (3) For the purposes of paragraph (1)—

where a person's treatment of a woman is on grounds of illness suffered by the woman as a consequence of a pregnancy of hers, that treatment is to be taken to be on the ground of the pregnancy;

Part 5 of the Equality Act 2010, which regulates discrimination in connection with work, then prohibits discrimination related to pregnancy and maternity in relation (broadly) to access to work, the terms on which work is offered, terms and conditions of employment and access to benefits associated therewith, dismissal and any other detriment. The Sex Discrimination (Northern Ireland) Order 1976 is materially similar.

Indirect discrimination related to pregnancy and maternity is not expressly regulated by the Equality Act 2010 or the Sex Discrimination (Northern Ireland) Order 1976, though such is likely to amount to indirect sex discrimination in any event. Direct pregnancy and maternity discrimination being prohibited by the Act, victimization related to such is prohibited by the Act which prohibits unfavourable treatment because of “protected acts” (broadly, complaints

⁸³² Or treats her unfavourably after this period, having decided to do so during this period.

of breaches of the Equality Act 2010). The Sex Discrimination (Northern Ireland) Order 1976 prohibits victimization in respect of complaints made under the Order.

There is no express protection in relation to breast-feeding in the context of employment (*cf* ss13(6)(a) and 17(4) of the Equality Act 2010 which apply other than in the context of work) but the prohibition on discrimination because of sex is likely to cover at least some cases of such discrimination. Pregnant and breastfeeding women are entitled to have a place in the workplace set aside for resting.

Maternity leave is regulated by the Employment Rights Act 1996 and associated Regulations and in Northern Ireland by the Maternity and Parental Leave etc Regulations (Northern Ireland) and the Employment Rights Order (Northern Ireland) and associated regulations. Broadly, all women who are employed are entitled to 52 weeks' Statutory Maternity Leave as long as they comply with the relevant notice requirements. Women must take two weeks' compulsory leave (four weeks if they work in a factory) after the birth. Up to 26 weeks' of the total period may be transferred to a woman's partner who can benefit from whatever period of statutory maternity pay (a total of 39 weeks) has not been utilised by his partner.

A woman who is returning to work after maternity leave is entitled to the same job and the same terms and conditions as if she had not been away if she returns after the first 26 weeks of leave (referred to as 'ordinary maternity leave'). The next 26 weeks of leave are known as 'additional maternity leave' and a woman returning after such leave is similarly entitled unless the employer shows that it is not reasonably practical for her to return to her original job in which case she must be offered alternative work with terms and conditions as if she had not been away. At least eight weeks' notice must be given by a woman who intends to return before the end of the 52-week period. A man who is returning to work after no more than 26 weeks of 'additional paternity leave' (transferred from his partner), and up to 4 additional weeks of parental leave, is entitled to the same job and the same terms and conditions as if he had not been away. At least six weeks' notice must be given by a man who intends to return before the end of his additional paternity leave entitlement.

Adopters are entitled to adoptive leave in terms broadly similar to those taking maternity leave. Employees who exercise their rights to adoptive, paternity or parental leave are protected from dismissal and detriment in relation thereto though this protection is provided by the Employment Rights Act 1996 in GB, the Maternity and Parental Leave etc Regulations (Northern Ireland) and the Employment Rights Order (Northern Ireland) in NI, and is therefore subject to the statutory caps on compensation (currently EUR 90 000/ £72 300). Discrimination against those exercising such rights may also amount to discrimination because of sex in which case the statutory cap would not apply.

Statutory rights to pregnancy and maternity, adoptive, parental and paternity leave do not differ according to sector or size of the employer, although public-sector employers may be more likely to provide enhanced contractual entitlements. Employers are entitled to recover 92 % of the cost of statutory maternity/adoptive leave pay from the State, with small employers (those whose National Insurance payments are less than EUR 56 000 per annum (GBP 45 000)) being entitled to cover 103 % of the cost from the State.

1.2. Social security and pension rights

To qualify for statutory maternity pay (SMP) a woman must have been continuously employed by the same employer for at least 26 weeks before the 15th week before the week her baby is due, and must have earned on average an amount at least equal to the applicable lower earnings limit for National Insurance contributions (currently EUR 133 (GBP 107) per week). The level of SMP is set at 90 % of salary for the first six weeks followed by the remainder of the 39-week period during which maternity leave is paid at a flat rate of EUR 168.60 (GBP 135.45), or 90 % of the woman's average gross weekly earnings if that is lower. There is no statutory entitlement to pay for parental leave but normal pension contributions should continue to be paid if the parental leave is in fact paid. The normal social security contributions are payable on maternity pay (SMP or contractual) and any pay received during parental leave.

1.3. Self-employment

As far as discrimination is concerned the Equality Act 2010 and Sex Discrimination (Northern Ireland) Order protect self-employed workers in like terms as it protects the employed, as long as the self-employed worker is working under a contract personally to execute work or services (as distinct from operating, for example, as a plumber or gardener paid by clients in respect of individual jobs arranged on an *ad hoc* basis). Self-employed women who have paid the appropriate National Insurance contributions or are exempt therefrom are eligible for Maternity Allowance (identical in terms to SMP) but no adoptive, paternity or parental leave is available to self-employed people.

On 23 January 2012 the Minister for Employment, Chris Grayling, stated that the Government was ‘considering the date for implementation’ of Directive 2010/41/EU. The gap in coverage, pre-implementation, concerns assisting spouses of self-employed persons who are not (the spouses) themselves self-employed in the sense of paying National Insurance contributions to the State. There are no provisions above and beyond Directive 2010/41/EU which protect female self-employed workers and female assisting spouses or life partners in relation to pregnancy or maternity.

1.4. Access to and the supply of goods and services

The Equality Act 2010 provides express protection from discrimination in relation to pregnancy, maternity and breastfeeding in relation to access to goods and services, Section 17 prohibiting unfavourable treatment of a woman ‘because of’ her pregnancy, ‘because she has given birth’ within the previous 26 weeks or because she is breastfeeding. The provision is relatively new and there have been no reported decisions on it. The term ‘because of’ pregnancy and the requirement for ‘unfavourable’ rather than ‘less favourable’ treatment should ensure that women are also protected in this context from discrimination because of pregnancy-related illness. No specific provision is made in this context in relation to maternity, adoption, paternity or parental leave. This provision applies in relation to services (including goods, insurance, financial benefits and transport) and public functions, premises, education and associations. Only direct discrimination is prohibited although indirect discrimination in connection with pregnancy or maternity, etc., is likely also to amount to indirect discrimination on grounds of sex. The Equality Act regulates pregnancy/maternity discrimination in the area of media and advertisements and education.

The Sex Discrimination Order (Northern Ireland) Order prohibits discrimination in access to goods services and facilities on grounds of pregnancy or early maternity (i.e., for twenty six weeks after a birth). It does not cover breast feeding expressly and it provides exceptions where the less favourable treatment is “because [the discriminator reasonably] thinks that providing [the goods, facilities or services, or doing so on the same terms as they are provided to others] would, because of her pregnancy, create a risk to her health or safety, and the discriminator also refuses to provide the services etc to others because s/he “thinks that to do so would, because of such physical conditions, create a risk to the health or safety of such persons”.

2. Gaps in national law

2.1. Employment

Employment relations and conditions of employment

It is notable that there is no express prohibition on indirect discrimination in relation to pregnancy and maternity, and the employment-related prohibition on discrimination does not extend to breastfeeding (further, in Northern Ireland, there is no express protection in respect of breastfeeding in relation to goods, services and facilities). Having said this, discrimination on the grounds of breastfeeding is likely to amount to at least indirect, and more likely direct, sex discrimination. The real problems in this area are those of enforcement: pregnancy-related discrimination is endemic. Research conducted by the Equal Opportunities Commission in 2005 found that 36% of employers in large workplaces and 48% in small workplaces

(including 65% of those in those workplaces where there had not been a pregnancy in the last three years) felt that some women abused their rights to maternity leave. Small employers were more likely to believe that maternity rights did not take account of the operational needs of employers.⁸³³ The EOC's major investigation into pregnancy discrimination, published in the same year, concluded that "Each year almost half of the 440,000 pregnant women in Great Britain experience some form of disadvantage at work, simply for being pregnant or taking maternity leave. 30,000 are forced out of their jobs" and that "All women of childbearing age are potentially affected... 80% of HR professionals replying to one on-line survey said that they think twice before employing women of childbearing age". It also reported that "Women working in workplaces with fewer than 10 people were more likely to say they lost their jobs as a result of their pregnancy than those in larger workplaces – 11% compared with 7%".⁸³⁴

Among the specific difficulties is the failure of national law (in GB and in NI) to treat the dismissal of pregnant as void absent an *ex ante* authorisation. It is difficult to imagine who in the UK context might provide such an authorisation in the absence of a labour inspectorate and given the time delays associated with applications to employment tribunals. There are no legal gaps as such in relation to the prohibition on maternity etc discrimination in recruitment/ promotion/ training or otherwise. Nor is there a legal gap as regards health & safety related adjustments: in theory at least women who are unable to perform their functions in these circumstances are entitled to redeployment or, if that is unavailable, leave with pay protection.

Specific provision is made for equal pay during maternity leave and there are no legal gaps of which I am aware. Periods of ordinary maternity and adoption leave are only taken into consideration for the purpose of occupational pensions (that is, the first 26 weeks) unless the worker received maternity/adoptive pay after this period, in which case entitlement continues to accrue. Periods of paternity leave are similarly taken into account whereas periods of (unpaid) parental leave are not.

It was reported in the *Guardian* newspaper in January 2010 that only 60 % of fathers took the two weeks of (ordinary) paternity leave to which they were statutorily entitled, a take-up figure attributed in part to the fact that employers are only required to pay such leave at the low flat rate figure also applicable to the bulk of maternity leave (see 1.1 above). There is no evidence of which I am aware that fathers taking such paternity leave experience discrimination: given the short period involved it would perhaps be surprising if this was a significant problem. I am not aware of evidence pertaining to the use of annual leave in lieu of paternity leave and I have not come across any case law in this context.

Additional paternity leave has only been in place since April 2011, too soon for evidence to have emerged regarding discrimination. It was reported on the day of its introduction, however, that a survey of 1 000 men 'showed that 41 % of men will not take up the extended leave, partly because they are afraid of losing their jobs or believe they would not be able to take time off.'⁸³⁵

2.2. Self-employment

As above, the gaps here relate to adoptive, parental and paternity leave which is not available to self-employed people and to the position of assisting spouses of self-employed persons who are not (the spouses) themselves self-employed, and who are at present ineligible for maternity allowances. I am unaware of the existence of any research dealing specifically with discrimination against self-employed workers in relation to pregnancy etc. but it is to be expected that the levels of such discrimination are as high as they are for employed workers. Male self-employed workers and male assisting spouses or life partners are not entitled to paid paternity leave, whether ordinary or additional.

⁸³³ "Pregnant & productive", see references below.

⁸³⁴ "Greater Expectations", see references below, 4, 12.

⁸³⁵ 'Paternity leave is great news for Dads' *Guardian* 4 April 2011.

2.3. Access to and the supply of goods and services

Restrictions on air travel by pregnant women are commonplace. British Airways and Ryanair, for example, do not allow pregnant women to fly when they are more than 36 weeks' pregnant (32 weeks in the case of BA for women carrying more than one foetus), and require medical certification of fitness to fly in the case of those between 28 and 36 weeks' pregnant. The legality of such a practice was at least questionable under the Sex Discrimination Act 1975 (although I am aware of no legal challenges) but the Equality Act 2010 now provides (Schedule 3, Paragraph 14) as follows:

- (1) A service-provider (A) who refuses to provide the service to a pregnant woman does not discriminate against her in contravention of section 29 because she is pregnant if—
 - (a) A reasonably believes that providing her with the service would, because she is pregnant, create a risk to her health or safety,
 - (b) A refuses to provide the service to persons with other physical conditions, and
 - (c) the reason for that refusal is that A reasonably believes that providing the service to such persons would create a risk to their health or safety.
- (2) A service-provider (A) who provides, or offers to provide, the service to a pregnant woman on conditions does not discriminate against her in contravention of section 29 because she is pregnant if—
 - (a) the conditions are intended to remove or reduce a risk to her health or safety,
 - (b) A reasonably believes that the provision of the service without the conditions would create a risk to her health or safety,
 - (c) A imposes conditions on the provision of the service to persons with other physical conditions, and
 - (d) the reason for the imposition of those conditions is that A reasonably believes that the provision of the service to such persons without those conditions would create a risk to their health or safety.

The exception provided by the Sex Discrimination (Northern Ireland) Order are discussed above. I am unaware of other travel-related restrictions on pregnant women. The above exception would presumably extend to permit discrimination against pregnant women (in the form of denial of or restriction of access to) with respect to saunas, massages, yoga, aerobic classes, rides in theme parks, horse riding and hiking etc. Certainly there are some essential oils which are not safe for use during pregnancy and yoga and massage generally have to be adapted to pregnancy at least in the later stages. The Equality and Human Rights Commission suggests on its website that a hang-gliding club could lawfully restrict the access of a heavily pregnant woman 'to the full activities of the club until after she has given birth as it is reasonable to believe that some activities would create a risk to her health or safety, and the club would do the same thing in relation to members with different physical conditions. If the woman is not yet a member but wants to join, the club must not refuse her membership altogether just because of health and safety concerns, but it could restrict her activities whilst she was pregnant.'⁸³⁶ It is commonplace for warning signs to advise that saunas and steam baths are not suitable during pregnancy but I am not aware of practices of pregnant women commonly being denied access as such.

The National Health Service constitution, which provides a right to choose the organisation which provides a person's NHS care when that person is referred for his or her first outpatient appointment with a service led by a consultant, does not apply to maternity services (the only other exceptions are those 'where speed of access to diagnosis and treatment is particularly important, e.g.: emergency attendances/admissions, attendances at a Rapid Access Chest Pain Clinic under the two-week maximum waiting time, and attendance at cancer services under the two-week maximum waiting time' and 'mental health services').

⁸³⁶ <http://www.equalityhumanrights.com/advice-and-guidance/service-providers-guidance/what-equality-law-means-for-your-association-club-or-society/what-equality-law-means-for-a-membership-of-an-association/>, accessed 9 August 2012.

It is not at all clear how this discrimination may be justified. In theory women are afforded a large degree of choice as regards, for example, home deliveries and consistent care by a small team of midwives, but acute shortages of midwives mean that this choice is more often theoretical than practical. Women in childbirth have the same right to refuse specific treatments as does anyone who is competent to make their own decisions regardless of medical views as to what is best for the child, but the experience of childbirth for many is medically driven and disempowering. I am unaware of any practice of denial of medical treatment to pregnant women because of increased costs and I am not aware of discrimination against pregnant women as regards access to health insurance but it is my understanding that pregnancy and childbirth and conditions such as pre-eclampsia are not generally covered by private health insurance, and women are subject to waiting periods in relation to pregnancy-related conditions such as ectopic pregnancy or a retained placenta after a stillbirth.

I am not aware of discrimination against pregnant women in access to state/regional/municipality financial and non-financial benefits, banking or financial services. Restrictions on breastfeeding are now simply unlawful and service providers who engaged in such practices would probably find themselves the subject of rapid unwanted publicity.

2.4. Additional information

Not applicable.

3. Involvement of other parties

The main relevant body is the Equality and Human Rights Commission (the national equality body) and, more particularly the predecessor Equal Opportunities Commission which carried out the major 2005 study on pregnancy discrimination and engaged in extensive campaigning on the issue of pregnancy discrimination. More recently, the Fawcett Society, UK's leading campaign for equality between women and men, has been campaigning on pregnancy discrimination as part of the Alliance Against Pregnancy Discrimination. Other members of the alliance include the NGOs Maternity Action and Working Families. These bodies and their campaigning have certainly helped raise the profile of pregnancy discrimination as an issue, and their lobbying resulted in improvements to the Equality Bill, which became the Equality Act 2010. Specifically, the Bill was amended during the Committee Stage to define pregnancy discrimination in terms of 'unfavourable' rather than 'less favourable' treatment related to pregnancy, a move which was intended to prevent difficulties with comparators.

Unions generally and the Trade Union Congress in particular have also been active in campaigning against pregnancy discrimination and for improved maternity rights, the TUC having worked with the Alliance Against Pregnancy Discrimination and having been involved in guidance being produced by ACAS (the Advisory, Conciliation and Arbitration Service) for employers on pregnancy, maternity leave, and selection for redundancy. Large public sector union UNISON has also been at the forefront of campaigning to defend maternity rights against the possibility of reductions (such rights being regarded as particularly vulnerable to the Government's desire to 'cut excessive red tape' (i.e. employment rights for workers). The CBI (Confederation of British Industry) and the IOD (Institute of Directors) are generally hostile to 'red tape' including maternity rights, in particular arguing that they impose undue burdens on small and medium-sized enterprises and hamper job creation.

4. Enforcement and effectiveness

4.1. General

It is frequently asserted by bodies such as the IOD and CBI that maternity rights damage women's employment. I am not aware of any empirical research which demonstrates this to be so, although there has been research including that of Waldfogel et al.,⁸³⁷ which

⁸³⁷ J. Waldfogel, Y. Higuchi & M. Abe *Maternity Leave Policies and Women's Employment after Childbirth: Evidence from the United States, Britain, and Japan* (1998, LSE), available on <http://eprints.lse.ac.uk/>

demonstrates a positive relationship between increased family-leave coverage and women's return to work after childbirth. A 2011 paper by James Plunkett (*The Missing Million*)⁸³⁸ states as follows:

... There is a strong correlation between more generous leave entitlements and female participation but the impact of leave policies depends on their length^[839]. Very short periods of maternity leave increase the likelihood that women will drop out of the labour market altogether, an effect that is stronger for women with low levels of education.^[840] Yet very long periods of leave also have a detrimental effect on employment and earning potential. Long absence from the labour market can lead to detachment, reducing the chance of returning to work (or delaying a return) and reducing the earning prospects of those who do. Estimates of the optimum length of maternity leave (in terms of employment effects alone) vary from 3 to 6 months^[841]. Long maternity leave is more detrimental when paternity leave is very short by comparison, entrenching a division of care- and work-responsibilities within the household^[842].

4.2. Legal redress

There are tremendous difficulties associated with the enforcement of maternity/paternity and other employment rights in the UK. Employment Tribunal proceedings are difficult and, although at present such Tribunals do not impose fees on users, it is very difficult to win a claim in a complex area such as pregnancy discrimination without expert (and expensive) assistance. Even if the claimant is successful s/he will generally not recover legal costs (although on the other hand unsuccessful claimants will not have to pay the costs of the other side). There is no financial support available in such cases although trade unions will generally support members and the Equality and Human Rights Commission may support and/or finance what are seen as important test cases.

The leading research is that carried out by the Equal Opportunities Commission in 2005 and discussed above (in 2.1.). It suggested that there were 'four prerequisites for women to be able to enforce their rights effectively, none of which is currently being fully met'. The prerequisites were as follows:

- They need to be aware of their rights, so they can recognise their treatment as discrimination rather than, say, a personal issue between them and their manager.
- There needs to be a culture of resolving disputes in the workplace, so that women feel able to take up their grievance with their employer, without fear of being labelled as a troublemaker or a burden.

[6533/1/Maternity Leave Policies and Women's Employment after Childbirth Evidence from the United States, Britain and Japan.pdf](#), accessed 10 August 2012.

⁸³⁸ J. Plunkett *The Missing Million: The potential for female employment to raise living standards in low to middle income Britain*, http://www.resolutionfoundation.org/media/media/downloads/The_Missing_Million.pdf, accessed 10 August 2012.

⁸³⁹ Citing F. Jaumotte *Female labour force participation: past trends and main determinants in OECD countries* OECD Economics Department Working Papers, No. 376, 2003; De Henau, Meulders and O'Dorchai 2007. C.D. Pronzato *Return to work after childbirth: Does parental leave matter in Europe?* Dondena Working Paper No. 14.

⁸⁴⁰ Citing D. Del Boca, Pasqua and C. Pronzato *Motherhood and market work decisions in institutional context: A European perspective* Dondena Working Paper No. 11, 2008.

⁸⁴¹ Citing Bertrand, Goldin and Katz 2009 *Dynamics of the Gender Gap for Young Professionals in the Corporate and Financial Sectors* NBER Working Paper No. 14681, 2009 (available on <http://www.nber.org/papers/w14681>, accessed 10 August 2012); J. Misra, M. Budig & I. Böckmann *Work-Family Policies and the Effects of Children on Women's Employment and Earnings* Luxembourg Income Study Working Paper No. 543, 2010.

⁸⁴² Citing D. Del Boca, S. Pasqua and C. Pronzato, *Motherhood and market work decisions in institutional context: A European perspective* Dondena Working Paper No. 11, 2008, F. Jaumotte, *Female labour force participation: past trends and main determinants in OECD countries* OECD Economics Department Working Papers, No. 376, 2003) and N. Datta Gupta, N. Smith & M. Verner *Child Care and Parental Leave in the Nordic Countries: A Model to Aspire to?* IZA Discussion Papers 2014, 2006.

- They need to be able to explain their rights clearly to their employer and point to a standard or benchmark, against which their treatment can be measured, and to which they can ask their employer to adhere.
- They need sufficient advice and support to be able to take their complaint to a tribunal if the matter remains unresolved, and be confident that they will not be victimised as a result.

None of these conditions is currently being met.

- 71 % of those who suffer dismissal or disadvantage take no action at all, not even to raise it their line manager or employer.
- Many women are not aware of their legal position: 45 % of those who experienced discrimination or unfavourable treatment said they did not take any formal action because they did not recognise it as an employment problem. Women saw the treatment as ‘something that happened to them and was dependent upon individual managers within an organisation and not organisational culture’.
- But even when women appreciate that they have been unfairly treated, around half of women do not raise the issue internally in case it alienates their employers...
- Of the 30 000 who are dismissed annually, four-fifths write off their loss without taking any action or seeking advice...
- (Less than one third of) ... the remaining 170 000 who are not dismissed but suffer financial loss or other disadvantage at work due to their pregnancy or maternity... even go as far as taking the initial step of raising it with their line manager on an informal basis.
- There is no single authoritative document on the law that can be used as a basis for resolving workplace disputes.
- Overall, less than one in 20 women with a pregnancy-related problem at work seek any advice and – even where advice is given – in most cases it does not enable a woman to take a claim. Less than 1 in 30 attempt to seek financial compensation for their dismissal or other discrimination at the Employment Tribunal.
- The reasons for not doing so include concern for their health and that of their unborn child, given the stress and anxiety involved, concern for their career prospects, and also the belief that they cannot prove their case...
- The three-month time limit for starting ET proceedings also presents an obvious and significant barrier for many pregnant women and new mothers.⁸⁴³

I am not aware of any increase in national case law since the implementation of the Recast Directive.

In theory, compensation is available to cover all losses flowing from discrimination related to sex/pregnancy, including injury to feelings, but recovery is difficult for the reasons set out above.

4.3. Access to information

It is clear from the EOC research discussed above that individuals are not aware of their rights. Such information is available from the direct.gov website and from materials produced, inter alia, by ACAS and the EHRC but the legal framework is very complex. I am not aware of research dealing particularly with maternity/pregnancy and disadvantaged women but it stands to reason that such women will be particularly impaired by their generally disadvantaged workplace situations.

⁸⁴³ *Greater Expectations*, pp. 23-24.

Annex I

Questionnaire

Questionnaire for the report *Fighting Pregnancy and Maternity-related Discrimination. The application of EU and national law in practice in 33 European countries (working title)*

European Network of Legal Experts in the Field of Gender Equality

Introduction

Pregnancy and maternity-related discrimination still occurs in many European countries in access to employment.¹ Sometimes the discrimination can be direct, but is more often indirect. This is when, for example, a pregnant woman is not hired even if she is the best qualified candidate or when a fixed-term contract is not renewed and other reasons are advanced but in reality it is because of the pregnancy of the worker. Women also suffer from pregnancy and maternity-related disadvantages when they are not entitled to bonuses or work-related rewards during absences due to pregnancy-related illness and/or maternity leave. Some insurance companies only offer insurances to remedy the loss of income of self-employed workers in relation to maternity leave after a waiting period of several years. Some airline companies refuse to allow pregnant women on their flights.

The purpose of this thematic report is to provide information on discriminatory practices suffered by individuals as a result of pregnancy and maternity (in particular in relation to maternity leave). Attention should also be paid to discriminatory practices in relation to other forms of leave which are relevant in this context, such as adoption leave. The position of fathers and paternity leave should also be included and analysed. The latter has recently been the subject of a decision by the Court of Justice in Case C-104/09 *Roca Alvarez* [2010] ECR I-8661 (Judgment of 30 September 2010). Paternity leave can be useful not only for men but it can also represent a source of support for mothers. The report shall have a broad material scope and will cover pay and (access to) employment, self-employment, occupational and statutory pension schemes, and (access to) the supply of goods and services. Not only relevant national legislation should be described, but also the case law of national courts and the opinions of equality bodies.

The legislative context in European Union law

The issue of (discrimination in relation to) pregnancy and maternity, maternity leave, parental leave, adoption leave and paternity leave is addressed by Treaty provisions, secondary legislation (directives), the case law of the Court of Justice, soft law and policies.

A summary of the Treaty provisions, secondary legislation (directives), and a number of relevant soft law and policies is provided hereunder for your information and convenience.

¹ As acknowledged, inter alia, in the Report from the Commission on the application of Directive 2002/73 COM(2009) 409 final.

1. Treaty Provisions and the Charter of Fundamental Rights which has had the same status as Treaty provisions since the 1st of December 2009

Article 157 of the Treaty on the Functioning of the European Union (TFEU) provides the general legal basis for the adoption of measures in the field of gender equality, which includes equality and anti-discrimination on the ground of pregnancy or maternity within the workplace. Article 19 TFEU (an enabling clause) and Directive 2004/113/EC extend the principle of anti-discrimination outside the strict confines of the workplace (to the exclusion of the content of the media, advertisements and education).

Furthermore, the EU Charter of Fundamental Rights² firmly establishes the importance of the concept of equality in Article 20 and more specifically gender equality in Article 23, which in turn reinforces protection in relation to pregnancy/maternity, parental and paternity leave. For this purpose, Article 33 states that ‘to reconcile family and professional life, everyone shall have the right to protection from dismissal for a reason connected with maternity, and the right to paid maternity leave and to parental leave following the birth or adoption of a child.’ This provision guarantees that issues related to pregnancy, maternity and parental leave are to be considered as fundamental rights. The protection offered to the European citizen is therefore reinforced as issues of pregnancy, maternity and parental rights are transformed from employment and social law to human rights law. The Charter itself should be considered as providing for minimum protection, allowing for measures that are further reaching. The Charter itself stipulates that nothing in the Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms.

2. Secondary Legislation

The Pregnant Workers Directive

The Pregnant Workers Directive³ is primarily aimed at improving health and safety at work for pregnant workers, workers who have recently given birth and workers who are breastfeeding. It provides for two sorts of measures, namely health and safety and protection against unfavourable treatment. In terms of leave, Directive 92/85/EEC provides for a number of specific forms of leave for pregnant workers and women who have recently given birth. Article 5(3) of Directive 92/85/EEC obliges employers to grant a pregnant worker a leave of absence to protect her health and safety if moving her to another job is not technically and/or objectively feasible or cannot reasonably be required on duly substantiated grounds.

Leave must also be granted if a pregnant or breastfeeding worker is exposed to prohibited substances or is required to do night work, if moving her to another job or changing to daytime work is not possible (Article 5(4)). Pregnant and breastfeeding workers are not obliged to perform night work during their pregnancy and for a period following childbirth, if performing night work would be detrimental to the safety or health of the worker concerned (Article 7). A transfer to daytime work or, if this is technically and/or objectively feasible, leave from work or the extension of maternity leave should be possible. Article 9 further provides that pregnant workers must be entitled, where necessary, to time off work without loss of pay to attend antenatal examinations. Article 8 provides for a minimum of 14 continuous weeks of maternity leave before and/or after birth, including at least two weeks of compulsory maternity leave, and Article 11 addressed the issue of rights related to the employment contract and specifically the right to continued wages and/or the entitlement to an adequate allowance during the period of maternity leave, which should not be set at a lower rate than the level of sickness benefits. Finally, Article 10 provides that Member States shall take the necessary measures to prohibit the dismissal of pregnant workers, workers who

² (OJ [2010] C82/02).

³ Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding, OJ [1992] L348/1.

have recently given birth and workers who are breastfeeding, during the period from the beginning of their pregnancy to the end of the period of maternity leave.

Amendments to the Pregnant Workers Directive have been proposed by the European Commission as part of the Work-Life Balance Packet.⁴ They included, inter alia, a longer period of paid maternity leave and paternity leave. However, due to ‘the broad diversity of maternity protection and social security amongst the member States (...) [and] the financial implications, especially during the crisis’, the Presidency of the European Council has not yet adopted its first reading position. Future discussions aiming at achieving further progress in this area are welcomed.⁵

The Parental Leave Directive

The measures contained in the Pregnant Workers Directive are supplemented by the Parental Leave Directive,⁶ which sets minimum standards designed to facilitate the reconciliation of work with family life. This Directive implements the Framework Agreement of the European social partners on parental leave and time off on grounds of *force majeure*. It provides that Member States shall grant all employees, in principle, a non-transferable and unpaid right to four months parental leave which can be used until the child has reached the age of 8, although the precise age is to be determined by the Member States (clause 2). An important change was introduced in 2010 when the Directive was amended. It now provides that in order to encourage a more equal take-up of leave by both parents, at least one of the four months shall be provided on a non-transferable basis. However, the modalities of application of the non-transferable period are left to the Member States. A further problem is that this right remains unpaid and this has proven to be a considerable deterrent, in particular amongst fathers. This is regrettable because to expressly place fathers in the maternity equation is a step towards a more balanced share of family responsibility and thus towards the achievement of the principle of equality.

The Parental Leave Directive further provides protection from discrimination for workers on the grounds of applying for or taking parental leave and, at the end of the leave, workers have the right to return to the same job or, if that is not possible, to an equivalent or similar job consistent with their employment contract or employment relationship (clause 5). Workers also have the right to request changes to their working hours for a limited period; in considering such requests, employers must balance the needs of the workers and the company (clause 6). The Directive also provides a right to leave on grounds of *force majeure* for urgent family reasons (clause 7). Finally the Directive also grants these rights in the case of adoption.

The Recast Directive

The Recast Directive⁷ incorporated and updated the following now repealed Directives: the Equal Pay Directive 75/117/EEC, the Equal Treatment Directive 76/207/EEC as amended by Directive 2002/73/EC, the Occupational Social Security Directive 86/378/EEC as amended by Directive 96/97/EC and the Burden of Proof Directive 97/80/EC.

It provides for the principle of equal treatment between women and men which means that there should be no discrimination whatsoever - direct or indirect - on grounds of sex.

Article 2(2)(c) of the Recast Directive provides that the definition of discrimination includes ‘any less favourable treatment of a woman related to pregnancy or maternity leave’. Over the years, the Court of Justice has interpreted the prohibition of pregnancy

⁴ Proposal for a Directive of the European Parliament and of the Council amending Council Directive 92/85/EEC on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding, COM(2008) 637.

⁵ Council of the European Union 21 November 2011, Progress Report, SOC 1002/ SAN 246/CODEC 2061.

⁶ Council Directive 2010/18/EU of 8 March 2010 implementing the revised Framework Agreement on parental leave concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC and repealing Directive 96/34/EC, OJ [2010] L68/13.

⁷ Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), OJ [2006] L204/23.

discrimination generously and proactively. Article 28(1) also provides that the Directive shall be without prejudice to provisions concerning the protection of women, particularly as regards pregnancy and maternity. This is further reinforced by the dictum in recitals 23 to 25 of the preamble to the Recast Directive, which provide a safeguard in the form of an acknowledgment of the Court of Justice’s case law in this area. Article 15 grants a woman on maternity leave or a man on paternity leave in the Member States that recognise such a right (Article 16), the right to return to her or his job or to an equivalent post on terms that are no less favourable to her/him and to benefit from any improvement in working conditions to which s/he would be entitled during her/his absence. Article 16 moreover includes protection against dismissal for fathers who exercise those rights. The same rights are granted to either parent on adoption leave (in the Member States that recognise this right). In these cases, the rights are tied to the event of the adoption itself.

The Statutory Social Security Directive

The Statutory Social Security Directive 79/7/EEC⁸ applies to statutory social security schemes and statutory pensions as set out in Article 1. Article 4 prohibits both direct and indirect sex discrimination, in particular with reference to family or marital status with respect to the scope of the schemes and the conditions for accessing them; the obligation to contribute and the calculation of contributions; as well as the calculation of benefits and the conditions governing the duration and retention of an entitlement to benefit. It specifies that measures for the protection of women on the ground of maternity shall not be affected by the principle of equal treatment. However, Member States may exclude the following from the scope of the Directive: the determination of the pensionable age; advantages granted to retired persons who have brought up children, specifically concerning periods of interruption of employment; old-age or invalidity benefit entitlement connected with the derived entitlements of a spouse; and long-term benefits accorded to a spouse connected with the invalidity, old age, accidents at work or the occupational disease of their spouse.

The Self-Employment Directive

Directive 86/613/EEC⁹ is applicable until the 5th August 2012, when it is to be replaced by Directive 2010/41/EU.¹⁰

Under Directive 86/613/EEC, all provisions contrary to the principle of equal treatment must be eliminated by the Member States, in particular in respect of the establishment or extension of a business or of any other form of self-employed activity. Member States have an obligation to examine all initiatives concerning the recognition of the work of spouses and, in particular, concerning the interruption of activities owing to pregnancy or motherhood; Member States shall examine under what conditions female self-employed workers and the wives of self-employed workers may have access to services supplying temporary replacements or to social services, or be entitled to cash benefits (under a social security scheme or public social protection system).

From 5th August 2012, under the new Directive 2010/41/EU, the obligation for Member States towards pregnant self-employed workers will be more precise. Article 8(1) requires Member States to take the necessary measures to grant female self-employed workers and female assisting spouses or life partners the right to a maternity allowance for at least 14 weeks. This principle is, however, diluted by Article 8(2) which states that it is left to the

⁸ Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security, OJ (1979) L 6/24.

⁹ Council Directive 86/613/EEC of 11 December 1986 on the application of the principle of equal treatment between men and women engaged in an activity, including agriculture, in a self-employed capacity, and on the protection of self-employed women during pregnancy and motherhood, OJ (1986) L 359/56.

¹⁰ Council Directive 2010/41/EU of the European Parliament and of the Council of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC.

Member States to decide whether the maternity allowance referred to is granted on a mandatory or voluntary basis.

When the allowance is granted it shall be equivalent to:

- the allowance provided at the national level in the event of an interruption in activities on health grounds; and/or
- the average loss of income or profit. This amount may however be subject to a ceiling limit; and/or
- any other family-related allowance provided for and determined by national law.

During the interruption of their activities due to maternity, women shall have access to replacement services and national social services. The provision of these services may replace all or a part of the maternity allowance.

The Goods and Services Directive

Article 4(1)(a) of the Goods and Services Directive¹¹ provides for the protection of pregnancy and maternity rights outside the workplace. Article 4(2) provides that “this Directive shall be without prejudice to more favourable provisions concerning the protection of women as regards pregnancy and maternity”. Of particular relevance is Article 5(1) which requires Member States to ensure that the use of sex as a factor in the calculation of premiums and benefits for the purposes of insurance and related financial services shall not result in differences in individuals' premiums and benefits. This principle is further reinforced by Article 5(3), which expressly prohibits the use of pregnancy or maternity as a way to discriminate in the calculation of premiums and benefits for the purposes of insurance and related financial services. Increased costs related to pregnancy and maternity shall not result in differences in individuals' premiums and benefits. Article 5(2) contains an exception to Article 5(1) – but not to Article 5(3) – according to which, under certain circumstances, it remained possible to differentiate on the basis of gender. This provision, however, has been declared invalid as from 21 December 2012 by the CJEU in case C-236/09 *Test-Achats*.

3. Soft law provisions

Finally, there are a number of important developments in terms of soft law which shows the Member States' commitment to curb discrimination in this area. These measures have been used as a platform to trigger further intervention. Amongst these, the 1992 Council Recommendation on childcare was the first measure to encourage the equal sharing of family responsibilities between men and women. It also addresses the issue of childcare services (Article 3), as well as recommending that Member States should take and/or encourage initiatives, for example for special leave (Article 4).

Furthermore, the Council Resolution of 29 June 2000 on the balanced participation of women and men in family and working life provides that the balanced participation of women and men in both the labour market and in family life is an essential aspect of the development of society, and that maternity and paternity rights as well as the rights of children are current social values to be protected by society, the Member States and the European Community.

The commitment has been reiterated on several other occasions. Most notably in the Presidency Conclusions of 23/24 March 2006 which acknowledged the need to promote a better work-life balance and to combat gender stereotypes in the employment market.¹² This commitment was also more recently emphasised by the Council in the European Pact for Gender Equality.¹³

¹¹ Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, OJ [2004] L373/37.

¹² Presidency Conclusions of 23/24 March 2006, 777751/1/06 REV 1.

¹³ Council Conclusions on the European Pact for Gender Equality (2011-2020) (2011/C 155/02).

QUESTIONNAIRE FOR THE EXPERTS

1. Please outline the existing legal measures designed to tackle pregnancy and maternity-related discrimination in your country

National rights in relation to pregnancy/maternity have been described in the past in publications by the Network;¹ therefore, we would be grateful if you could provide only a short summary of the national legislation, case law and opinions of the equality body in order to give an impression of the legal situation in your country.

1.1. The relationship between employee and employer

Provide a brief overview of the key legal measures (in terms of legislation and case law from the courts and/or opinions of equality bodies) regulating the relationship between employees and employers designed to address discrimination in relation to:

- pregnancy (including pregnancy-related illnesses)
- maternity leave
- returning from maternity leave (see in particular Article 15 of Directive 2006/54/EC)
- breastfeeding
- adoption leave (see Article 16 of Directive 2006/54/EC)
- paternity leave (see Article 16 of Directive 2006/54/EC)
- parental leave
- dismissal related to pregnancy, maternity and related forms of leave (such as pregnancy and maternity leave, adoption leave, paternity leave, parental leave).

In your overview, please mention the following issues:

Does national legislation provide a general prohibition on pregnancy and maternity discrimination in these situations or does it distinguish between direct and indirect discrimination?

Does national legislation specifically refer to victimization in relation to pregnancy/maternity/parental or paternity rights?

Do pregnancy and maternity (adoption/parental/paternity) rights apply differently depending on the type of employer (State/private) or the size of the employer?

Is there evidence that forms of discrimination on the grounds of pregnancy and maternity (adoption, parental or paternity leave) vary according to

- a) the type of employer (State/private); or
- b) the size of the employer (for example: very small [3 or less employees], small [3 to 10 employees], medium [10-20 employees], large [20+ employees])?

1.2. Social Security and Pension rights

How are paid maternity and parental leave treated with regard to social security and pension rights? For instance, are different phases of the leave treated differently in this regard?

¹ See in particular the following reports produced by the European Network of Legal Experts in the Field of Gender Equality or previous networks:

- Report on Pregnancy, Maternity, Parental and Paternity Rights, March 2007

- Legal Approaches to some aspects of the reconciliation of work, private and family life in 30 European Countries, August 2008.

These reports are available at: http://ec.europa.eu/justice/gender-equality/document/index_en.htm#h2-9, accessed 16 May 2012.

1.3. Self-employment

Provide a brief overview of the key legal measures (in terms of legislation and case law from the courts and/or opinions of equality bodies) regulating self-employment designed to address discrimination on the ground of:

- pregnancy (including pregnancy-related illnesses)
- maternity leave
- breastfeeding
- adoption leave
- paternity leave
- parental leave

In your overview, please mention the following issues:

In particular, has Article 8 of Directive 2010/41/EU, which requires Member States to take the necessary measures to grant female self-employed workers and female assisting spouses or life partners the right to a maternity allowance for at least 14 weeks, already been implemented in national law?

In your national law are there any other provisions above and beyond Directive 2010/41/EU protecting female self-employed workers and female assisting spouses or life partners in relation to pregnancy and maternity?

1.4. Access to goods and the provision of services

Provide a brief overview of the key legal measures (in terms of legislation and case law from the courts and/or opinions of equality bodies) regulating the access to goods and the provision of services designed to address discrimination on the ground of:

- pregnancy (including pregnancy-related illnesses)
- maternity leave
- breastfeeding
- adoption leave
- paternity leave
- parental leave

In your overview, please mention the following issues:

How has Directive 2004/113/EEC been transposed into national law with regard to pregnancy and maternity rights?

Does it include a general prohibition of discrimination or does the national law address pregnancy and maternity discrimination on a topic-by-topic basis? (For instance, does national law prohibit discrimination on the grounds of pregnancy/maternity specifically in the field of transport, access to financial benefits, insurance etc.)

Does national legislation distinguish between direct and indirect discrimination in relation to pregnancy and maternity?

Overall: does the national legislation go beyond the relevant provisions in terms of rights and protection? For instance, does your national legislation cover pregnancy/maternity discrimination in the area of media and advertisements and education?

Alternatively, on the contrary, does national law fall short of implementing Directive 2004/113/EEC?

2. Are there any gaps in national law?

Gaps can be identified through various sources: judicial cases or other reported alternative dispute resolution; reports and opinion from the national equality body; academic scientific studies.

Please note that the issues described below are meant as examples that you could consider for your answers. You might not have answers to each and every one of these questions hereunder; indeed there might not be many gaps in your national law, so please do not feel obliged to answer all questions posed, only those that are relevant to your country. If, however, you have extensive examples in this area, we would be grateful if you could choose the most significant examples to report; describe the situations of discrimination in a short manner and include the relevant references.

2.1. Provide an assessment of identified legal gaps in the area of employment:

Recruitment process:

Does your national law lack effective protection against pregnancy discrimination in relation to access to employment?

In particular can you identify where procedures/mechanisms/safeguards are lacking in relation to employment recruitment in order to prevent pregnancy/maternity discrimination?

Employment relations and conditions of employment:

Are there gaps in national law with respect to the provision of adequate rights designed to protect women who are pregnant or on maternity leave in the workplace?

In particular is there any gap in the rights relating to the application and the procedure to obtain promotion or any other employment rights (such as, *inter alia*, training, places on courses offered to employees).

Are there problems with the implementation of Article 5 of the Pregnant Workers Directive, which requires the employer to temporarily adjust the working conditions and/or working hours of pregnant workers to avoid exposure to occupational risks? (Some studies show that this is an area where women often lose their job).

Remuneration:

Is it possible to identify existing gaps with regard to procedures/mechanisms/safeguards in order to guarantee equal access to pay and other benefits such as bonuses?

Are periods of maternity leave taken into consideration for the purpose of occupational pensions? Are there any limitations with regard to maternity/paternity/adoption/parental leave? (For example, in some countries extended unpaid maternity leave might not be taken into account, or only partially taken into account for the calculation of occupation pensions).

Termination of the employment contract:

Is there evidence of pregnant women or mothers being ‘forced’ out of their employment? For example, in Italy there are instances of so-called ‘white resignations’.² Are you aware of the same situation occurring in your country? Is the law able to address these cases?

Is there evidence that fixed-term contracts are not being renewed for reasons connected to pregnancy, maternity, parental leave?

² This means that when an employment contract is signed, workers also have to sign an undated resignation form that can be used at any time, for example, when a woman is pregnant.

Involvement of fathers:

If your country provides for a statutory entitlement to fathers (e.g. paternity leave) is there evidence that fathers are using it?

If there is such entitlement, is there evidence of specific discrimination? (For instance, in relation to promotion, the employee might be considered less committed to the job).

If fathers are not taking their right to paternity leave, are you aware whether they are using any forms of leave at all (e.g. annual leave)?

Are you aware of any judicial dispute (case law) involving fathers?

Please outline any other relevant gaps which you are aware of in the law with respect to the protection of pregnancy/maternity/parental rights in employment law.

2.2. Provide an assessment of identified legal gaps in the area of self-employment.

- Are you aware of any research or do you have examples showing discrimination against pregnant self-employed workers or self-employed workers who have recently given birth? For example, when people who use the services of self-employed workers deliberately choose a man rather than a woman who is pregnant or has recently given birth because she is perceived as being less committed or reliable?
- Are female self-employed workers and female assisting spouses or life partners able to access maternity allowances as per Directive 2010/41/EU? Are they able to access any type of allowance to compensate for interruptions to activities due to pregnancy and maternity? Are there some identifiable difficulties for these women to be granted maternity benefits?
- Are male self-employed workers and male assisting spouses or life partners able to access paternity/parental leave or any related allowances?

2.3. Provide an assessment of identified legal gaps in the area of access to and the supply of goods and services:

- Are you aware of examples of potentially discriminatory practices toward pregnant women in relation to access to goods and the provision of services? (e.g. airline restrictions on pregnant passengers or any other mode of transport restrictions).

Directly linked to the previous question: often providers justify the restriction on health and safety grounds as a way to minimise their liability. Are you aware of any potentially discriminatory practices justified on the ground of health and safety or other grounds not directly linked to pregnancy/maternity? E.g.: access to saunas, massages, yoga, aerobic classes; rides in attraction parks such as Disneyland or riding some animals like horses; access to hiking etc.

- Are there examples of potentially discriminatory practices in relation to access to and the provision of medical care for pregnant women and new mothers? (e.g.: the ability to choose a delivery method or place such as a home birth or non-mediatised; access to prescription or non-prescription medications). Are you aware of any instances where pregnant women or women on maternity leave have been denied access to health care or health-care benefits because of their pregnancy or maternity? (e.g.: medical treatment which is denied to pregnant women because of increased costs).
- Are there examples of potentially discriminatory practices on grounds of pregnancy/maternity towards women, pregnant women or new mothers in relation to insurance, in particular the denial of access, waiting periods and exclusions from coverage? More specifically:

- Are you aware of any instances where pregnant women or women on maternity leave have been denied insurance or offered limited or more expensive insurance terms because of pregnancy or maternity?
- Do insurance contracts generally impose waiting periods before covering costs related to pregnancy and maternity? How long are they on average in the Member State you cover?
- Are there indications that private health insurance and related products are generally more expensive for women who are in an age bracket where they could become pregnant?
- Are you aware of any instances where pregnant women or women on maternity leave have been denied or offered limited access to state/regional/municipality financial and non-financial benefits? (e.g.: access to social housing).
- Are there examples of potentially discriminatory practices towards pregnant women or mothers of young children in the area of banking or financial services? (e.g.: restrictions on access to loans or access to a mortgage).
- Are there examples of potentially discriminatory practices toward breastfeeding mothers? (e.g.: the prohibition or restriction of breast feeding in public; restricted access to swimming pools or any other sporting or entertainment places such as cinemas or theatres).

Please outline any other relevant examples to show gaps in the application of Directive 2004/113/EC?

2.4. Do you have any additional information regarding gaps in the national law that you could not fit into the above headings?

3. What is the involvement of other parties in shaping the key issues related to pregnancy and/or maternity discrimination?

- Briefly describe the involvement of any private or public stakeholders, beside that of the legislator/government that is/are playing a particularly positive and/or important role in the field of pregnancy/maternity rights in your country?
Please consider in particular the role of:
 - **the social partners** (e.g. collective agreements)
 - **national equality bodies**
 - **NGOs/civil societies**
- Do you know of any particularly good practices which have been initiated by alternative private or public stakeholders which could be relevant in the area of discrimination on the ground of pregnancy/maternity/parental leave?
- On the contrary, is it possible to identify reluctant or obstructive bodies? (For instance, there might be an association of small enterprises opposed to the extension of pregnancy/maternity rights or to their proper implementation). Please give short examples if you can provide any.

4. The effectiveness of the measures in tackling pregnancy and maternity-related discrimination

4.1. General

It is often claimed by employers that pregnancy and maternity rights for women in the labour market lead to lower numbers of women being employed. Are you aware of any studies, or any empirical reports which support or refute this argument? (Please summarise such studies briefly and provide references where needed).

4.2. Legal redress

However well drafted statutory rights can be, if they are not easily accessible, their effectiveness will be limited.

In terms of the defence of rights, Article 12 of the Pregnant Workers Directive provides that Member States shall introduce into their national legal systems such measures as are necessary to enable all workers who are themselves wronged by a failure to comply with the obligations arising from this Directive to pursue their claims by judicial process (and/or, in accordance with national laws and/or practices) by having recourse to other competent authorities.

Another, more recent Directive, the Recast Directive (Article 17), provides that the defence of a right might be exercised through conciliation or judicial procedures. Article 17(2) of the Recast Directive further provides that associations, organisations or other legal entities which have a legitimate interest in ensuring the application of the Directive are allowed to instigate, either on behalf or in support of a complainant, with his/her approval, any judicial and/or administrative procedure provided for the enforcement of obligations under the Directive.

It is often criticized that it is difficult to enforce individualized rights through the national courts.

- Are you aware of any difficulties linked to enforcing rights regarding pregnancy, maternity, adoption, parental, or paternity leave (e.g. the length of the procedure, the cost of the proceedings)? Does national law provide hands-on support, financial support and/or advice for individuals who want to enforce their pregnancy, maternity, adoption, parental or paternity rights?
- Are you aware of any studies which address the difficulties involved in having access to legal redress concerning rights regarding pregnancy, maternity, adoption, parental, or paternity leave? (Please provide a brief summary of the findings and references).
- Since the implementation of the Recast Directive, are you aware of an increase in the national case law regarding pregnancy, maternity, adoption, parental, or paternity rights initiated by associations, organisations or other legal entities which have a legitimate interest in this area?
- In terms of compensation, the various Directives require Member State to introduce, in their national legal systems, effective compensation or reparation in a way which is dissuasive and proportionate to the damage suffered. Are you aware of any remedies or compensation which does not dissuade transgressors or does not adequately compensate the victim of violations of pregnancy, maternity, adoption, parental or paternity rights?

4.3. Access to information

This question is not based on legal facts; however, experts might be aware of a number of studies which address these points.

- Is there any research which shows whether individuals are aware of their rights (pregnancy, maternity, paternity, adoption and parental leave)? (Please give a brief summary of the findings and references).
- What, if anything, is done by the State in terms of disseminating adequate information to all stakeholders regarding the right of pregnant women and parents to maternity, adoption, and parental leave?
- Is there any evidence that some women are at a particular disadvantage with regard to pregnancy, maternity, adoption and/or parental rights? For instance:
 - women from ethnic minorities
 - women from lower economic backgrounds
 - women with disabilities
 - women who have precarious or atypical employment contracts

5. Relevant national literature

Please identify the main national academic literature in relation to discrimination on the grounds of pregnancy, maternity rights, adoption, parental and paternity leave. (Please limit your reference to a maximum of 5 references).

Annex II

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Annex III

Tables

Levels of Payment for Different Leaves

	Pregnancy leave	Maternity leave	Paternity leave	Parental leave
Austria	Social security benefit equal to net average income over last 3 months.		State transfer benefit; depending on prior income according to the calculation model chosen (among five different models).	State transfer benefit; depending on prior income according to the calculation model chosen (among five different models).
Belgium	Pay of salary (public sector) Benefit of 82 % of gross remuneration during first 30 days, 75 % during remainder of leave (private sector).		Public sector: Pay of salary. Private sector: payment of salary for 3 days, benefit of 75 % during remainder of leave.	1 type without remuneration or benefits. 1 with benefits for 4 months of EUR 771.33 per month.
Bulgaria	Benefits amounting to 90 % of salary.	Benefits amounting to 90 % of salary, minimum social security benefits (EUR 120) for childcare leave after maternity leave.	Benefits amount to 90 % of salary.	Unpaid.
Croatia	Allowance of average salary.		No leave.	Allowance of average salary which may not exceed 80 % of average calculation base, during 6-8 months of entitlement to leave (if prior qualifying period is satisfied, otherwise 50 %). After 6-8 months may not exceed 50 %.
Cyprus	Basic benefit: 75 % of average basic insurable earnings. Supplementary benefit: 75 % of average insurable earnings beyond basic insurable earnings. The weekly amount of the basic benefit is increased to 80 % if she has one dependent to 90 % if she has two dependents, and 100 % if she has three dependents.		No leave.	Unpaid.
Czech Republic	70 % of daily salary.	70 % of daily salary.	If the mother transfers the remainder of the maternity leave to the father, the father takes 70 % of his daily salary.	During parental leave, the benefit is paid from family benefits system up to 4 years of child's age (in total 220 000CZK – some 9000 EUR).
Denmark	100 % of benefit paid to persons absent from work due to unemployment or sickness.		100 % of benefit paid to persons absent from work due to unemployment or sickness.	100 % of benefit paid to persons absent from work due to unemployment or sickness.
Estonia	Benefit of 100 % of average pay of previous calendar year.		10 days paid leave.	3 years; 435 days of which are paid (100 % of former salary, with a monthly ceiling of not more than 3 average salaries).
Finland	Benefit of 90 % of work-based income for first 56 weekdays, after that 70 % up to EUR 32 892, above that 40 % up to EUR 50 606, above that 25 %.		Benefit of 70 % of work-base income up to EUR 32 892, above that 40 % up to EUR 50 606, above that 25 %.	Benefit of 75 % of work-based income for the first 30 weekdays up to EUR 50 606 EUR, above that 32,5 %. For the next weekdays, 70 % of work-based income up to EUR 32 892, above that 40 % up to EUR 50 606, above that 25 %.

	Pregnancy leave	Maternity leave	Paternity leave	Parental leave
France	Benefits based on average salary received in last three months (collective agreements can provide for full pay).		Daily allowance based on average salary up to a ceiling of EUR 80.04 per day (some companies have adopted full pay).	Unpaid but can be eligible for specific allowances.
Germany	Maternity allowances in the amount of the employee's last net income. Maternity allowances in the amount of sickness benefits (usually 70 % of the last income) for self-employed when voluntarily insured under the statutory health insurance.		No leave.	Allowance of 67 % of the average salary during the past 12 months which may not exceed EUR 1 800 or be less than EUR 300. For salary beyond EUR 1 200, entitled to 65 % of salary. For salary below EUR 1 000, an increase up to 100 % is possible.
Greece	8 weeks before birth paid (partly by employer, partly by social security scheme) leave (private sector) 2 months before birth fully paid (public sector).	9 weeks after birth paid leave (partly by employer, partly by social security scheme), plus a 6 month 'special' leave paid by a social security scheme at the legal minimum wage rate (private sector) 3 months after birth fully paid (public sector).	2 days in the private and the public sector fully paid.	4 months unpaid leave (private sector) 9 months paid leave or, alternatively, working time reduction, for either parent (public sector).
Hungary	70 % gross salary (up to 70 % of twice the amount of statutory minimum wage).		100 % of daily salary paid leave.	3 years flat-rate childcare benefit of EUR 102.50 2 years 70 % of wage up to 140 % of statutory minimum wage (EUR 468).
Iceland	Payment is 80 % average salary of a parent (not exceeding 350.000 ISK). Reduced to 131.578 ISK if working 50-100 %, 94.938 ISK if working 25-49 %, and 57.415 ISK if working less than 25 %, and if in full time education then increased to 131.578 ISK. In the 2 latter cases a maternity/paternity grant is also received.		Same information.	
Ireland	Benefit of 80 % of gross income divided by number of weeks worked in that year with a minimum payment of EUR 217.80 and maximum of EUR 262 per week, which may be topped up by employers to normal remuneration. Effective July 1, 2013 such sums will be taxable as income.		Unpaid (unless on the death of the mother when the father takes over the balance of maternity leave).	Unpaid.
Italy	Benefits of 80 % of average overall daily wage (collective agreements provide up to 100 %) in private sector; full wage in public sector.		Same conditions of maternity leave in cases where the father is entitled to substitute the mother.	6 months paid benefits of 30 % of normal wage. Rest of leave benefit only paid to parents earning less than 2.5 times minimum pension paid under the general compulsory insurance system.
Latvia	Allowance of 80 % of the gross salary. If the allowance does not exceed EUR 32,75 per day, 100 % is paid. If it does exceed this amount, 50 % of the calculated allowance is paid.		Allowance of 80 % of gross salary. If the allowance does not exceed EUR 32,75 per day, 100 % is paid. If it does exceed this amount, 50 % of the calculated allowance is paid.	Allowance of 70 % of the average salary, if the allowance does not exceed EUR 32,75 per day, 100 % is paid. If it does exceed this amount, 50 % of the calculated allowance is paid.

	Pregnancy leave	Maternity leave	Paternity leave	Parental leave
Liechtenstein	Allowance of 80 % of insured salary.		No leave.	Unpaid.
Lithuania	Allowance of 100 % of reimbursed remuneration, subject to certain minimum and maximum limits.		Allowance of 100 % of reimbursed remuneration, subject to certain minimum and maximum limits.	Allowance of 100 % of reimbursed remuneration subject to certain minimum and maximum limits for the period of 1 year or 70 % for the 1 st year and 40 % for the second year.
Luxembourg	Preservation of normal salary.		Normal salary.	Monthly flat-rate allowance of EUR 1 709.78 net.
FYR of Macedonia	Salary compensation of 100 %; maximum payment cannot be higher than two average monthly salaries from the previous year.		If father is using the leave he is receiving 100 % payment that cannot be higher than two average monthly salaries from the previous year.	Minimum social security benefit.
Malta	14 weeks paid by employer, 4 weeks at a flat-rate of EUR 160 paid by State (to be revised up).	14 weeks paid by employer, 4 weeks at a flat-rate of EUR 160 paid by State (to be revised up).	Normal salary.	Unpaid.
The Netherlands	100 % salary.		Full pay.	Unpaid.
Norway	Full pay.		Full pay.	47 weeks full pay or 57 weeks 80 % pay, including 9 weeks for mother and 12 weeks for father Further 1 year leave: unpaid.
Poland	100 % of salary paid leave.		100 % of salary paid leave.	Low income families are entitle to and allowance of 60 % of the minimum wage, for other, unpaid.
Portugal	Paid by social security as sick leave (average 65 % of salary).	Paid by social security on the basis of 100 % of salary (80 % for 150 day option).	Paid leave paid by social security on the basis of 100 % of salary.	Social security allowance of 25 % of the salary in cases of very reduced salary, unpaid in other situations.
Romania	Maternity risk leave = paid by the state from the social insurance budget. Maternity leave = Allowance of 85 % from the average gross salary.		Paid with an allowance equal to salary. Paid by the employer, by contrast to maternity and parental leave that are paid by state insurance budget.	Allowance of 85 % of the average of the net salary for the last 12 months prior to child's birth, subject to limitations basis the Social Reference Indicator. Covered by the state budget.
Slovakia		Maternity benefit (for 34 weeks) in the form of a social endowment provided by the Social Insurance Agency, amounting to 65 % of the mother's daily income, totalling a minimum of 222 EUR and a maximum of 762 EUR per month.	No leave provided for.	Parental benefit (until the child is aged 3 years) provided for by the state social benefit, amounting to 199,60 EUR per month.

	Pregnancy leave	Maternity leave	Paternity leave	Parental leave
Slovenia	100 % of average salary over the 12 months immediately prior to the date on which the benefit was claimed.		15 days 100 % of average salary over the 12 months immediately prior to the date on which the benefit was claimed (due to temporary austerity measures 90 % of average salary), remainder of leave unpaid.	100 % of average salary over the 12 months immediately prior to the date on which the benefit was claimed (due to temporary austerity measures 90 % of average salary or 100 % of average salary if the average salary does not exceed EUR 763,06. The parental benefit cannot amount to double average monthly salary.
Spain	100 % of monthly salary.		100 % of monthly salary.	Unpaid.
Sweden	Parental Leave benefits can be taken out during the 60 last days of pregnancy.	Benefits during maternity leave are deducted from the 480 days of parental leave.	10 days of special paternity benefits when the child is born (+ 60 days of parental leave benefits are non-transferable).	Benefits during 480 days, 390 days of income replacement and 90 days at minimum level per child to be divided between the parents, 60 days at income replacement level are non-transferable.
Turkey	Allowance equalling sick pay for women workers; normal salary for women civil servants.	Allowance equalling sick pay plus 6 months unpaid optional leave for women workers; normal salary for women civil servants.	Depending on collective agreements for worker husbands; 3 days paid leave plus 24 months unpaid leave for civil servant husbands.	No leave.
The United Kingdom	90 % pay of normal salary for 6 weeks and 33 weeks of fixed rate (EUR 168.60 or 90 % of salary, whichever is less).		EUR 168.60 or 90 % of salary, whichever is less.	Unpaid.

Entitlement to Breastfeeding Breaks

	Entitlement to breastfeeding break	Limitation on time period	Paternal entitlement	Entitlement to payment
Austria	Entitlement to necessary time as a principle. On days the breastfeeding mother works more than 4.5 hours: one break of 45 minutes at the minimum. On working days of 8 or more hours: two breaks of 45 minutes each, or, if there is no facility available near the working place, one break of 90 minutes at the minimum.	No limit mentioned in pertinent legislation (no case law).	Pertinent legislation applies to mothers breastfeeding their own child(ren).	To be paid by employer who may require a medical certificate (that the woman is actually breast-feeding). Explicit prohibition of counting breastfeeding breaks against other breaks, and of 'making up lost time' (reworking, 'nacharbeiten').
Belgium	Two breaks of 30 minutes each.	Until child is aged 9 months.	No.	Healthcare and Insurance Scheme provides for benefits as during maternity leave (private sector). Fully paid by the employer (public sector).
Bulgaria	1 hour twice a day or 2 hours together. 1 hour a day if working hours have been reduced to 7 hours. Reduced to 1 hour a day subject to approval of medical authorities.	Until child is aged 8 months. 8 months to indefinite period.	Only available to female employees who are breast-feeding.	Fully paid by the employer.
Croatia	Two hours a day or one hour twice a day (if a breastfeeding mother works full-time).	Until child is aged 1 year.	Granted only to female workers who are breast-feeding.	Classified as working time and paid by Institute for Health Insurance in the amount of 100% of average calculation base, calculated on hourly basis for the corresponding month (if the condition of prior qualifying period is satisfied, otherwise 50% of average calculation base).

	Entitlement to breastfeeding break	Limitation on time period	Paternal entitlement	Entitlement to payment
Cyprus	Daily 1 hour break, or to start 1 hour later, or to leave 1 hour earlier. Self-employed persons are not entitled to breastfeeding breaks.	For the period of 6 months.	Available only to those who have given birth or who are breastfeeding.	Fully paid by the employer.
Czech Republic	Entitled to 2 breaks, 30 minutes each until the child's one year, then for further 3 months one break of 30 minutes.	Until child is aged 1,5 years.	Granted to female employees only.	Fully paid by the employer.
Denmark	There are no explicit rules on breastfeeding breaks in Denmark.			
Estonia	One 30 minute break every 3 hours.	Until the child is aged 18 months.	Only available to the mother.	Paid. If the mother is not paid parental benefit, then the breaks are compensated by the state to the employer.
Finland	Breastfeeding mothers are entitled to a rest in a break room when necessary. The provision only mentions resting, not breastfeeding.			
France	1 hour a day during working hours.	Until the child is aged 1 year.	Only available to women who are breastfeeding.	Not legally required to be paid.
Germany	Entitled to 'necessary' additional breaks, at least 30 minutes twice a day or 1 hour once a day; the breastfeeding mother may demand longer or more breaks When working continuously for more than 8 hours a day, two breaks of 45 minutes or one break of 90 minutes once a day (continuously means without a break of at least two hours) The competent supervisory authority may order more detailed provisions regarding the number, position and duration of breastfeeding breaks.	There is no statutory limitation, but many courts agree that normally breastfeeding is terminated when the child is aged 12-18 months.	Only mothers are entitled.	To be classified as working time and as such fully paid by the employer.

	Entitlement to breastfeeding break	Limitation on time period	Paternal entitlement	Entitlement to payment
Greece	<p>In the private sector, 1 hour daily or, if agreed with employer, 1 hour daily for 1 year and 1 hour daily for the subsequent 6 months.</p> <p>In the public sector: 2 hours.</p> <p>In the public sector: 1 hour.</p>	<p>For 2,5 years after maternity leave.</p> <p>Until the child reaches the age of 2.</p> <p>From the age of 2 until 4 years.</p>	<p>Fathers are entitled as subsidiaries.</p> <p>Either parent is entitled (transferable).</p>	Fully paid to both the mother and father in all cases.
Hungary	<p>One hour twice daily, or two hours twice daily in the case of twins.</p> <p>One hour daily or two hours daily in the case of twins.</p>	<p>For the first 6 months of breastfeeding.</p> <p>From 6 months until the end of the 9th month.</p>	Only available to women who are breastfeeding.	Fully paid by the employer.
Iceland	No information available.			
Ireland	An employee is entitled to time – off or breastfeeding breaks at the option of the employer. This comprises one hour off from work for each working day which may be one break or reduction of 60 minutes, or two breaks or reduction of 30 minutes, or 3 breaks or reduction of 20 minutes, (or as agreed with the employer). This is proportional for part-time workers.	26 weeks from the day of birth.	Only available to an employee who is breastfeeding.	No loss of pay in either scenario, fully paid by the employer.
Italy	<p>Entitled to two periods of rest (of one hour each or of half an hour in case the worker benefits by a crèche in the enterprise).</p> <p>In case of twins the periods are doubled and the additional hours can be taken also by the father.</p>	Until the child is aged 1 year.	The working father is entitled to time off for breastfeeding in alternative to the working mother, or in cases where the mother is seriously ill or where the father has been given the official custody of the child.	Fully paid by the National Insurance System.

	Entitlement to breastfeeding break	Limitation on time period	Paternal entitlement	Entitlement to payment
Latvia	Breaks a minimum of 30 minutes in duration, every 3 hours, or, the working day shortened by 1 hour.	Until 18 months after child-birth	Formally the law provides for the right to ‘feeding of a child/children’ thus the law does not limit such entitlement to the breastfeeding mothers. However in practice, it is most likely to be granted only to mothers who breastfeed.	The breaks must be included into working time and paid in full
Liechtenstein	Breastfeeding mothers are entitled to time off necessary for breastfeeding. No specific regulations pertaining to self-employed persons.	No further information.	Only applies to breastfeeding mothers.	No further information.
Lithuania	Breaks a minimum of 30 minutes in duration, every 3 hours. Breaks may be combined, or added to the break to rest and eat, or given at the end of the workday, which shall be shortened accordingly. No protection is afforded to self-employed persons with regard breastfeeding.	No further information.	Only applies to breastfeeding mothers.	Payment calculated as the average daily pay of the employee and fully paid by the employer.
Luxembourg	Two 45 minute breaks are granted at the beginning and the end of the day, or, in the event that the worker is unable to breastfeed at a location close to her workplace, a single 90 minute break will be granted	No further information.	Not transferrable to fathers, only mothers who are breastfeeding are entitled	Considered as working time and thus fully paid by the employer
Macedonia, FYR	The right to additional and paid breaks for breastfeeding are stipulated under Article 171 Labour Law. Workers who breastfeed the child after the expiration of maternity leave and are working full time, are entitled to a paid break during the working hours for a period of one and a half hours a day.	Until the child is aged 1 year	Not transferrable to fathers, only mothers who are breastfeeding are entitled	Time is calculated the daily break and is therefore paid by the employer.
Malta	There is no specific provision to facilitate breastfeeding for women.	Protection of the law for breastfeeding mothers is for 26 weeks after the date of confinement.	Women only.	There would seem to be no right to payment.

	Entitlement to breastfeeding break	Limitation on time period	Paternal entitlement	Entitlement to payment
The Netherlands	The Working Time Act regulates in Art 4:8 the right to breastfeed a child as often and as long as necessary but not more than during 25% of the working time per shift. The employer is obligated to provide a secluded area.	Until the child is aged 9 months,	Only women are entitled.	Considered as working time and fully paid by employer.
Norway	Normally 30 minutes twice a day or a reduction of the working time by 1 hour per day, but stated also on a need based evaluation, the time needed for breastfeeding. The public sector operates with a two hour time limit.	No information available.	Only women who are breastfeeding.	Regarded as a right to time off, not paid leave, but dependent upon a number of collective agreements which may provide for paid leave
Poland	Mothers entitled to breastfeed during work hours twice a day; each break for half an hour.	For as long as breastfeeding lasts	No information available.	No loss of salary – fully paid by the employer.
Portugal	Mothers entitled to leave of absence for 2 hours each day, taken in two 1-hour periods. No specific protection for the self-employed	For as long as breastfeeding lasts. If the child is bottle-fed, this leave of absence can be taken until the child is aged 1 year.	If the child is bottle-fed this leave of absence can be taken by the father.	Fully paid by the employer.
Romania	Women employees are entitled to leave of absence for 2 hours each day, or the shortening by 2 hours of the daily schedule.	Until the child is aged 1 year.	Only available to female employees who are breastfeeding.	Fully paid by the employer.
Slovakia	A mother who works fixed hours is entitled to two 30 minute breaks per child A mother who works shorter hours, but at least half of her fixed weekly hours is entitled to one 30 minute break One 30 minute break per work shift for a mother working fixed hours	Until the child is aged 6 months From 6 months until 12 months	Only available to mothers	Regarded as working time and therefore fully compensated by the employer

	Entitlement to breastfeeding break	Limitation on time period	Paternal entitlement	Entitlement to payment
Slovenia	Breastfeeding mothers are entitled to minimum 1 hour break per day during working hours.	For as long as they are breastfeeding.	Only available to women working full time who are breastfeeding.	Employers are not legally obliged to pay.
Spain	One hour a day is granted (“breastfeeding permit”), though not for the exclusive purpose to breastfeed but rather to spend 1 hour a day with the baby. This can be divided into two, half hour slots.	Until the child is aged 9 months	The permit extends to fathers only if it is not taken by the mother; it does not operate jointly.	Fully paid by the employer.
Sweden	Sec. 4 par. 2 of The Parental Leave Act entitles the (female) employee to be on leave for breast feeding the child.	No information available.	No.	Parental Leave Benefits can be used – also part-time – within a maximum of 420 (full) days.
Turkey	3 hours per day for female civil servants One and a half hours per day for female civil servants One and a half hours per weekday for women workers	For the first 6 months following end of maternity leave From 6 months following end of maternity leave until end of 12th month Until the child is aged one year	No entitlement to fathers	A social security nursing allowance is paid to the breastfeeding worker or wife of the working father, providing the required premiums have been paid for 120 days in the year preceding the birth
The United Kingdom	There is no entitlement as such to breastfeed at work but the Health and Safety Executive encourages employers to provide facilities for expressing and storing breastmilk and/or to facilitate breastfeeding at or near the workplace.	Not applicable.	Not applicable.	Not applicable.

Length of Maternity Leave

	Maternity leave	Shared with father?
Austria	8 weeks before and 8 weeks after confinement; extended maternity leave before birth prescribed individually in the event of medical complications.	As a general principle, no.
Belgium	15 weeks leave.	No, unless leave is transferred to the other parent after the mother deceased.
Bulgaria	410 days leave, 45 of which before confinement. After this leave there is an additional leave until the child reaches the age of 2.	The additional leave may be granted to father with consent of the mother.
Croatia	28 days before and at least 70 days after confinement, additional maternity leave from 70 th day after confinement until the child reaches 6 months.	The additional leave may be transferred to father with his consent and written declaration of mother.
Cyprus	18 weeks.	No.
Czech Republic	28 weeks.	6 weeks after the child's birth the mother may transfer the remainder of the maternity leave to the father.
Denmark	4 weeks before and up to 14 weeks after confinement.	No.
Estonia	70 days before and 70 days after confinement.	
Finland	105 weekdays.	
France	6 weeks before and 10 weeks after confinement.	No.
Germany	6 weeks before and 8 weeks after confinement.	No.
Greece	8 weeks before and 9 weeks after confinement (private sector); 2 months before and 3 months after confinement (public sector).	No.
Hungary	24 weeks, if not agreed otherwise 4 weeks before and 20 weeks after confinement.	No.
Iceland	1 month before and 2 months after confinement, plus a joint entitlement to additional 3 months.	The parents have a joint entitlement to additional 3 months, which either parent may draw in its entirety or parents may divide between them.

	Maternity leave	Shared with father?
Ireland	26 weeks.	
Italy	5 months.	One day. In case the mother dies or becomes seriously ill, or in the event of abandonment of the child, or if the child is under the exclusive custody of the father he is entitled to the same period of leave of the mother.
Latvia	56 days before and 56 days after confinement plus 14 days if a woman has registered to a doctor until the 12 th week of pregnancy.	a father is entitled to maternity leave to 70 days after child birth if a mother has died.
Liechtenstein	4 weeks before and 16 weeks after confinement.	No.
Lithuania	70 days before and 56 days after confinement.	
Luxembourg	8 weeks before and 8 weeks after confinement.	
FYR of Macedonia	Up to 45 days, or a mandatory 28 days before, and optional 8 months after confinement. May be given up after 4 months.	(If mother is not using maternity leave it could be used by the father).
Malta	18 weeks, 6 of which are compulsory after the date of confinement, and 4 weeks beforehand (unless otherwise agreed). The remaining weeks may be taken in whole or in part.	No.
The Netherlands	16 weeks.	
Norway	3 weeks before and 6 weeks after confinement. From 1. July 2013. The leave is 3 weeks before and 12 weeks after confinement.	No. Fathers are entitled to two weeks unpaid leave in relation to the birth.
Poland	20 weeks obligatory and 4-6 optional weeks.	After 14 weeks the mother may transfer the remainder of the maternity leave to the father.
Portugal	120-150 days before and a minimum of 6 weeks after confinement, 30 days of which can be taken prior to confinement.	The remaining period of the leave after the mandatory confinement period of the mother can be divided between the parents.
Romania	63 days before and 63 days (of which 42 days mandatory) after confinement. After confinement a minimum of 42 days are mandatory.	No.
Slovakia	6 weeks before and 34 weeks (14 of which mandatory) after confinement.	

	Maternity leave	Shared with father?
Slovenia	105 days, of which at least 28 days before confinement.	
Spain	16 weeks of which 6 weeks compulsory after confinement. 2 additional weeks granted in the cases of (i) multiple births, besides the first born; and (ii) a baby born with a disability.	10 weeks maternity leave may be ceded to the father. If the mother dies all maternity leave goes to the father.
Sweden	7 weeks before and 7 weeks after confinement.	No.
Turkey	8 weeks before and 8 weeks after confinement; total period is compulsory; 2 weeks added to ante-natal leave if there is multiple pregnancy. Additional optional maternity leave of 6 months for women workers. Additional optional maternity leave of 2 years for women civil servants.	If female civil servant dies during her maternity leave, the (civil servant) father, if he so requests, may use the remaining period.
The United Kingdom	52 weeks.	

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