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Country report

Gender equality

Spain

2019

Justice and Consumers

EUROPEAN COMMISSION

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

European Commission
B-1049 Brussels

Country report

Gender equality

How are EU rules transposed into national law?

Spain

Amparo Ballester

Reporting period 1 January 2018 – 31 December 2018

2019 Directorate-General for Justice and Consumers

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Luxembourg: Publications Office of the European Union, 2019

PDF ISBN 978-92-76-01795-0 ISSN 2600-0164 doi:10.2838/043833 DS-BD-19-010-EN-N

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1 Introduction

1.1 Basic structure of the national legal system

Spain has two law-making levels: the State and the Autonomous Communities. Spain recognises certain legislative autonomy in its Autonomous Communities for the execution of legislation but anti-discrimination legislation is an exclusive task of the State. According to Article 81 of the Spanish Constitution, anti-discrimination legislation must be approved by the Spanish Parliament and requires organic law, which means that it has to be approved by a qualified majority of the Parliament (absolute majority of the Parliament).[1] However, some Autonomous Communities have equality strategies or plans that serve the objective of promoting the equality of women and men at the local level (Andalusia, Galicia, Castile and León, Asturias, Canary Islands, Castilla-La Mancha, Murcia, Chartered Community of Navarre, Basque Country and Catalonia).[2] Most of the Autonomous Communities have specific regulations for the prevention of gender violence and for the care of victims of gender violence (Aragón, Canary Islands, Cantabria, Castilla-La Mancha, Castile and León, Valencian Community, Madrid, Extremadura, Galicia, La Rioja and the Chartered Community of Navarre).[3] Moreover, some Autonomous Communities establish benefits such as subsidies for the employment of women, for childcare etc.[4] Residences for the elderly and small children are also supported, in whole or in part, by the Autonomous Communities. The scope of these subsidies is different in each Autonomous Community. Some municipalities also invest in measures for equality between men and women, for example by means of childcare services, training workshops for women, etc.

The court which decides in a sex discrimination claim depends on the issue. If discrimination based on sex occurs in access to goods and services, the competent jurisdiction is civil jurisdiction.[5] If the discrimination occurs in relation to employment, the jurisdiction is labour jurisdiction.[6] If the discrimination is the consequence of an action by a public administration, it is the administrative jurisdiction which is competent.[7] All of them are courts of justice.

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

1) According to Article 11 of the Civil Procedure Act, when the victims are a group of unspecified persons or if they are difficult to identify, the following entities will have standing before the courts: public entities that have as an objective equality between women and men (for example, the Institute of Women and for Equal Opportunities), and most representative unions[8] and national associations that have amongst their objectives equality between women and men. This special legitimacy to intervene in judicial processes related to discrimination on the ground of sex was established so that entities with a certain level of representativeness could initiate judicial

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1 Spanish Constitution, approved 28 December 1978, www.boe.es/buscar/act.php?id=BOE-A-1978-31229.

2 For instance, Law 17/2015, of 21 July 2015 sets out a strategy for the equality of women and men in Catalonia, www.boe.es/diario_boe/txt.php?id=BOE-A-2015-9676.

3 For instance, Law 11/2007, of 27 July 2007, of Galicia, for the prevention and integrated treatment of gender violence (modified by Law 12/2016, of 22 July 2016), www.boe.es/diario_boe/txt.php?id=BOE-A-2007-1661.

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

5 Spain, Civil Procedure Act (*Ley de Enjuiciamiento Civil*), Law 1/2000, of 7 January 2000, www.boe.es/buscar/act.php?id=BOE-A-2000-323, Article 1.

6 Spain, Act Regulating Social Jurisdiction (*Ley reguladora de la Jurisdicción Social),* Law 36/2011, of 10 October 2011, www.boe.es/buscar/act.php?id=BOE-A-2011-15936, Article 1.

7 Spain, Law on Administrative Jurisdiction (*Ley Reguladora de la Jurisdicción Contencioso Administrativa*), Law 29/1998, of 13 July 1998, www.boe.es/buscar/act.php?id=BOE-A-1998-16718, Article 1.

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

proceedings in cases in which the specific victims were indeterminate or diffuse. However, these entities have never used this special standing.

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

1.2 List of main legislation transposing and implementing the directives

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

- Law 3/2007 of 22 March 2007, on Effective Equality between Women and Men (Law on Effective Equality);[9]
- Article 28 of the Workers' Statute (Royal Legislative Decree 2/2015, of 23 October 2015);[10]
- Article 26 of the Prevention of Labour-Related Accidents Law (Law 31/1995 of 8 November 1995);[11]
- Article 37 of the Workers' Statute (Royal Legislative Decree 2/2015 of 23 October 2015);
- Article 177 of the General Law of Social Security (Royal Legislative Decree 8/2015 of 30 October 2015).[12]

1.3 Sources of law

The main sources of gender equality law in Spain are the following. The norms of the European Union, as interpreted by the CJEU, are the highest hierarchical norms within the framework of sources of Spanish law (Article 93 of the Spanish Constitution). Below them is the Constitution and the interpretations thereof by the Constitutional Court. Below the Constitution are the International Treaties ratified by Spain (Article 96 of the Spanish Constitution). Below the International Treaties are the laws of the State and of the Autonomous Communities, approved by their Parliaments, in accordance with the interpretation thereof by the Supreme Court. In case of extraordinary and urgent need, the Government can approve provisional norms (Royal Decrees) that must be ratified by Parliament afterwards (Article 86 of the Spanish Constitution). Below these standards are collective agreements (Article 37 of the Spanish Constitution). If collective agreements are negotiated by trade unions and business associations with sufficient representation (in accordance with the provisions of the Workers' Statute), they have general effectiveness and apply to the whole company or sector of activity, including employers and workers not affiliated with the unions and signatory associations.

[9] www.boe.es/buscar/doc.php?id=BOE-A-2007-6115.
[10] Spain, Royal Legislative Decree 2/2015 of 23 October 2015, www.boe.es/buscar/act.php?id=BOE-A-2015-11430, which approved the Workers' Statute (*Estatuto de los Trabajadores)*.
[11] Spain Law 31/1995 of 8 November 1995, which approved the Prevention of Labour-Related Accidents Law (*Ley de Prevención de Risgos Laborales)* www.boe.es/buscar/act.php?id=BOE-A-1995-24292&tn=2.
[12] Royal Legislative Decree 8/2015 of 30 October 2015, www.boe.es/buscar/doc.php?id=BOE-A-2015-11724, that approved the General Law of Social Security (*Ley general de Seguridad Social).*

2 General legal framework

2.1 Constitution

2.1.1 Constitutional ban on sex discrimination

A general prohibition of discrimination on grounds of sex is established in Article 14 of the Spanish Constitution.[13] This article establishes, first, the principle of equality before the law and, second, a general principle of non-discrimination on the grounds of birth, race, sex, religion, opinion and any other personal or social condition or circumstance.

2.1.2 Other constitutional protection of equality between men and women

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

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

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

2.2 Equal treatment legislation

The Law on Effective Equality[14] is the specific law on gender equality. This Law is applicable in all areas, especially in political, civil, labour, socio-economic and cultural contexts. Before the Law on Effective Equality entered into force, legislation on gender equality was scattered among different texts. In addition, some of the basic principles of gender equality such as indirect discrimination or affirmative action did not exist explicitly in written legislation. The Law on Effective Equality of 2007 has had significant impact in Spain, as it expressly established and clarified the content of the right to non-discrimination on the ground of sex and established concrete strategies to achieve effective equality.

Other discrimination grounds covered by Spanish equal treatment legislation are racial or ethnic origin, religion or belief, disability, age or sexual orientation as prescribed in Law 62/2003.[15] The grounds of discrimination prohibited by Law 62/2003 are exactly the same as those in Directives 2000/43/EC and 2000/78/EC. Gender discrimination is addressed in the Law on Effective Equality. The scope of protection is the same as that established in those directives.

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

[14] Spain, Law 3/2007 of 22 March 2007, on Effective Equality between women and men.

[15] Spain, Law 62/2003 of 30 December, www.boe.es/buscar/act.php?id=BOE-A-2003-23936.

3 Implementation of central concepts

3.1 General (legal) context

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

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

3.1.2 Other issues

The concepts of anti-discrimination in relation to discrimination based on sex are regulated in the Law on Effective Equality. There is also specific legislation that refers to discrimination based on disability which also includes the main concepts (Royal Legislative Decree 1/2013 and General Law on the rights of persons with disabilities and their social inclusion).[16] However, the legislation corresponding to the other grounds of prohibited discrimination, part 2 of Law 62/2003, is much more limited, although it contains the basic concepts established in Directives 2000/43/EC and 2000/78/EC.[17]

3.1.3 General overview of national acts

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

3.1.4 Political and societal debate and pending legislative proposals

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

3.2 Sex/gender/transgender

3.2.1 Definition of 'gender' and 'sex'

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

3.2.2 Protection of transgender, intersex and non-binary persons

There is no State law (applicable to the whole of Spain) that specifically states the principle of non-discrimination against transgender, intersex and non-binary people. The judgement of the Constitutional Court 176/2008, of 22 December 2008,[18] stated that transgender discrimination is forbidden in Spain because it is included in Article 14 of the Spanish Constitution. This article first mentions the most common causes of prohibited discrimination (sex, origin and age) and then sets out a general non-discrimination clause against 'any other personal or social condition or circumstance'. According to the Constitutional Court, discrimination against transgender people would be included in this general clause. Nothing has been expressly stated in relation to intersex and non-binary people by the Constitutional Court.

The Spanish Criminal Code includes gender identity in the reasons that could lead a person to be condemned for a so-called 'hate crime' (*delito de odio*). The concept of this crime is in Article 510 of the Criminal Code which sets out the penalties for, 'Anyone who publicly

[16] Spain, Royal Legislative Decree 1/2013, of 29 November 2013, General Law on the rights of persons with disabilities and their social inclusion.
[17] Part 2 of Law 62/2003 of 30 December, www.boe.es/buscar/act.php?id=BOE-A-2003-23936.
[18] Spain, Constitutional Court, ECLI:ES:TC:2008:176: http://hj.tribunalconstitucional.es/es-ES/Resolucion/Show/6408.

encourages, promotes or directly or indirectly incites hatred, hostility, discrimination or violence against a group, a part of a group or against a particular person by reason of their belonging to a group, on the grounds of racist, anti-Semitic or other related to ideology, religion or beliefs, family situation, membership of a particular ethnic group, race or nation, national origin, sex, sexual orientation or gender identity, gender, illness, or disability.'[19] Anyone found guilty of this crime can be sentenced to between one and four years in prison.

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

1) Chartered Community of Navarre: Law 12/2009, of 19 November 2009, 'against discrimination on the grounds of gender identity and for the recognition of the rights of transsexual people'. This was the first law on gender identity in Spain. It refers only to the subject of gender identity, so it does not include any reference to sexual orientation. It states the principle of non-discrimination because of gender identity and it establishes a broad recognition of rights in the area of healthcare, education, labour contracts and social matters

2) Basque Country: Law 14/2012, of 28 June 2012, against discrimination on the grounds of gender identity and for the recognition of the rights of transsexual people. The scope of the law is quite close to the Chartered Community of Navarre law. Most recently, the Basque Country has passed legislation that guarantees that transsexual (sic) people have a specific identification according to their sexual identity (Decree 234/2015, of 22 December 2015, on the administrative documentation of transsexual people).

3) Galicia: Law 2/2014, of 14 April 2014, for equal treatment and non-discrimination of lesbian, gay, transsexual, bisexual and intersex people. This law states the principle of non-discrimination based on gender identity and sexual orientation together. The law provides for a fairly general description of rights without specific measures. Its scope is the following: police and justice; labour contracts; family relations; healthcare; education; culture and leisure; sport; young people; and communications.

4) Canary Islands: Law 8/2014, of 28 October 2014, on non-discrimination on the grounds of gender identity and for the recognition of transsexual persons. This law is quite similar to the Basque Country and Navarre laws.

5) Catalonia: Law 11/2014 of 10 October 2014, to guarantee the rights of lesbian, gay, transgender, bisexual, and intersex people and to fight against homophobia, biphobia and transphobia. This law states the principle of non-discrimination based on gender identity and sexual orientation together. Besides the general recognition of rights in the areas of healthcare, education, police and justice, labour contracts, social services, sport, culture and leisure, communications and family relations, the Law has two important elements. Firstly, it creates the National Council of Lesbian, Gay, Bisexual, Transgender and Intersex People, which is a consultative body within the Government of Catalonia. Secondly, the Law sets out a relatively complete list of offences and penalties to punish behaviour and acts which contravene people's rights because of their gender identity or sexual orientation.

[19] Spain, Criminal Code, Organic Law 10/1995 of 23 of November 1995, www.boe.es/buscar/act.php?id=BOE-A-1995-25444.

6) Extremadura: Law 12/2015 of 8 April 2015, on the social equality of lesbian, gay, transsexual, transgender and intersex people and on public policies against discrimination because of sexual orientation and gender identity. The law has a similar scope to the Catalonian law: it creates a specific consultative body (the Observatory against discrimination on grounds of sexual orientation and gender identity), and it states a detailed list of offences and penalties to punish behaviour and acts which contravene the rights of people because of their gender identity or sexual orientation.

7) Murcia: Law 8/2016 of 27 May 2016, on social equality of lesbian, gay, transsexual, transgender and intersex people and on public policies against discrimination on the grounds of sexual orientation and gender identity. This law is also quite similar to the Catalonian law as well.

8) Balearic Islands: Law 8/2016 of 30 May 2016, to guarantee the rights of lesbian, gay, transsexual, bisexual and intersex people and to fight against homophobia, biphobia and transphobia. This law is also quite similar to the Catalonian law. The consultative body is the Council of Lesbian, Gay, Transsexual, Bisexual and Intersex People of the Balearic Islands.

9) Madrid: Law 2/2016 of 29 March 2016 on gender identity and gender expression and on social equality and non-discrimination. This law is quite advanced in terms of respect for gender identity, since it recognises any expression of gender identity. It foresees specific units specializing in gender identity in the healthcare system.

10) Andalusia: Law 8/2017 of 28 December 2017, to guarantee rights, equal treatment and non-discrimination for lesbian, gay, transsexual, bisexual and intersex people and their families. It is similar to the Madrid law and it creates a consultative Council.

11) Valencian Community: Law 8/2017, of 7 April 2017, comprehensive law of recognition of the right to identity and gender expression. This is similar to the law of Andalusia.

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

3.2.3 Specific requirements

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

3.3 Direct sex discrimination

3.3.1 Explicit prohibition

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

3.3.2 Prohibition of pregnancy and maternity discrimination

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

3.3.3 Specific difficulties

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

3.4 Indirect sex discrimination

3.4.1 Explicit prohibition

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

3.4.2 Statistical evidence

Statistical evidence is used in Spain in order to establish a presumption of indirect sex discrimination. In 1991 the Spanish Constitutional Court recognised the application of the concept of indirect discrimination in relation to a remuneration system contained in a collective agreement that did not adequately value the conditions in which the jobs performed mostly by women were done.[20] More recently, the concept of indirect discrimination has been applied by the Constitutional Court in relation to the pejorative treatment given by the social security system to part-time workers, which will be explained in detail below.[21] In both cases the courts applied the presumption of indirect sex discrimination after it was shown that the majority of the people affected were women. Although most of the cases related to indirect sex discrimination have had to do with equal pay there have been some cases related to other issues. For instance, the Supreme Court has established that a system of promotion, with minimal transparency, which results in stagnation of women in lower positions (according to statistical analysis) constitutes indirect discrimination.[22] The statistical evidence was also used here to establish a presumption of indirect sex discrimination.

3.4.3 Application of the objective justification test

In the view of the author, the objective justification test is correctly applied by national courts. Three examples are the judgement of the Constitutional Court 145/1991 of 1 July 1991, the judgement of the Constitutional Court 61/2013 of 14 March 2013 and the judgement of the Supreme Court of 18 July 2011, appeal number 133/2010, as discussed in Section 3.4.2.

3.4.4 Specific difficulties

One of the most significant problems with implementing the prohibition of indirect sex discrimination relates to the deficiencies that exist in Spanish law when challenging

[20] Judgement of the Constitutional Court 145/1991 of 1 July 1991, ECLI:ES:TC:1991:145: http://hj.tribunalconstitucional.es/es-ES/Resolucion/Show/SENTENCIA/1991/145.

[21] Judgement of the Constitutional Court 61/2013 of 14 March 2013, http://hj.tribunalconstitucional.es/docs/BOE/BOE-A-2013-3797.pdf.

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

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

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

Another important problem in relation to indirect sex discrimination has to do with the fact that the Constitutional Court ruled that the male applicant in a case of indirect discrimination against women did not have the right to request nullification of a social security provision. This judgement has created quite a paradoxical situation since, if at any time a woman raised a legal claim for the same reason, the provision could be declared null and void due to discrimination and it could no longer be applied to anyone, men or women, but it would be too late for the original male claimant.[23]

3.5 Multiple discrimination and intersectional discrimination

3.5.1 Definition and explicit prohibition

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

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

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

3.5.2 Case law and judicial recognition

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

3.6 Positive action

3.6.1 Definition and explicit prohibition

Positive action measures are recognised as legitimate in Article 9.2 of the Spanish Constitution, which expressly refers to the obligation of public authorities to remove the obstacles to achieving real equality. Article 11 of the Law on Effective Equality and Article 17 of the Workers' Statute recognise the legal possibility of measures to achieve real

[23] Judgement of the Constitutional Court 156/2014, of 25 September 2014, www.boe.es/diario_boe/txt.php?id=BOE-A-2014-11052.

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

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

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

3.6.3 Specific difficulties

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

Firstly, there is a pension supplement established in the Spanish social security system exclusively for mothers that may go against what was established by the CJEU in the Leone case.[24] In fact, it may go against the provisions of the Griesmar case as well.[25] Article 60 of the General Law of Social Security[26] establishes the so-called 'maternity supplement', which consists of an increase directly applicable to the final pension, which is 5 % if the pensioner had two children, 10 % if she had three, and 15 % if she had four or more children. The measure is limited to mothers, of both birth and adopted children, who met the minimum requirements for access to the corresponding pension. Nothing in this regard has been established for fathers, not even for those who would have taken care of their children alone. This supplement is called the maternity supplement but is not intended to compensate the woman for the physical fact of motherhood. In fact, the supplement also applies to mothers in the case of adoption. This is the reason why it could contravene what was established by the CJEU in the Griesmar and Leone cases. So far there are two preliminary rulings submitted by Spanish Courts which have asked the CJEU whether the Spanish maternity supplement fits into European Union regulations or not.

Secondly, there is the sentence handed down in the Roca Alvarez case (resulting from a preliminary ruling from the Superior Court of Justice of Galicia (Spain)).[27] In this judgement the CJEU established that parental leave must be recognised without distinction to fathers and mothers, because if this is not the case, there is discrimination based on sex against women, since it perpetuates care roles. After this ruling, Spain changed the regulation on parental leave for breastfeeding, which was the parental leave that was the subject of the preliminary ruling. Presently, there is no parental leave in Spain that is foreseen to be exclusively or preferably taken by women.

[24] Judgement of 17 July 2014, C-173/13, *Maurice Leone and Blandine Leone v Garde des Sceaux*.
[25] Judgement of 29 November 2001, C-366/99, *Joseph Griesmar v Ministre de l'Economie*.
[26] Spain, General Law of Social Security, www.boe.es/buscar/act.php?id=BOE-A-2015-11724.
[27] Judgement of 30 September 2010, , C-104/09, *Pedro Manuel Roca Álvarez v Sesa Start España ETT SA*.

3.6.4 Measures to improve the gender balance on company boards

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

The concept of a balanced membership of women and men is contained in Additional Provision 1 of the Law on Effective Equality. According to this provision, the composition of women and men is well-balanced when the number of people of one sex does not exceed 60 % of the overall membership of the company board. The deadline established in Article 75 of the Law on Effective Equality was March 2015, but the objective was not reached by far, since recent studies show that in 2018 only 20.3 % of the members of company boards in Spain were women.[28]

The National Securities Market Commission is the body responsible for overseeing and inspecting the Spanish Securities Market and the activities of the companies involved in it. The chairperson of the National Securities Market Commission is appointed by the Government. The Unified Code of Good Governance of the National Securities Market Commission (*Comisión Nacional del Mercado de Valores*) recommends that listed companies have a selection procedure for non-executive board members which is concrete and verifiable and which ensures that proposals for appointments or re-election are based on an analysis of the needs of the board (Recommendation 14). The Unified Code establishes that the selection system should promote diversity of knowledge, experience and gender on the board and that it should promote the objective that in 2020 the number of female members represents at least 30 % of the total number of members of the non-executive boards of all the listed companies.[29] However, these are only recommendations and there are no established sanctions in the event that the objective is not met.

Article 540.4.c of Royal Legislative Decree 1/2010[30] states that listed companies must mention in their annual reports the procedures they are applying so that their company boards have a balanced composition of women and men. According to this article, if a policy of this type is not applied, a clear and motivated explanation should be given. It is only an obligation to provide information and does not require any results or establish any sanction mechanism.

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

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

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

[29] Comisión Nacional del Mercado de Valores (2015) *Código de buen gobierno de las sociedades cotizadas,* www.cnmv.es/docportal/publicaciones/codigogov/codigo_buen_gobierno.pdf.

[30] 2 July 2010, Law of Corporations (as modified by Law 11/2018, of 28 December 2018).

3.7 Harassment and sexual harassment

3.7.1 Definition and explicit prohibition of harassment

Article 7.2 of the Law on Effective Equality stipulates that: 'Harassment on the ground of sex constitutes any conduct based on the sex of a person, with the purpose or effect of threatening their dignity and creating an intimidating, degrading or offensive environment'. In Spanish legislation the term used is not the general definition of 'harassment' of the Recast Directive, but the most specific 'harassment on the ground of sex'. This is because Spanish legislation regulates and defines other kinds of harassment for other grounds of discrimination, such as racial or ethnic origin, religion or belief, disability, age or sexual orientation.[31]

In Spanish legislation, the concept of harassment is almost identical to the definition provided for in Article 2(1)(c) of the Recast Directive 2006/54/EC. The only relevant difference appears to be that the undesired nature of the behaviour is not specified as a component of harassment under Spanish Law.

The absence of the term 'undesired' does not breach European Union regulations because it improves the situation of victims of harassment in the matter of proof of the existence of it.

3.7.2 Scope of the prohibition of harassment

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

3.7.3 Definition and explicit prohibition of sexual harassment

According to Article 7.2 of the Law on Effective Equality sexual harassment is, 'Any verbal or physical conduct of a sexual nature, with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, offensive or degrading environment'.

As explained under Section 3.7.1, the Spanish concept of sexual harassment is contained in Article 7 of the Law on Effective Equality. In contrast to the concept contained in the Recast Directive 2006/54/EC, Spanish legislation does not expressly require that harassment should be undesired behaviour. However, the omission from Spanish law of the 'undesired' nature of harassment does not make much difference, because if this behaviour creates an intimidating, degrading or offensive situation, it will also be 'undesired' by the victim. Indeed, it improves the situation of victims of sexual harassment because it considerably facilitates the proof of their existence. This is because the Spanish Constitutional Court has interpreted that certain conduct may be considered as sexual harassment, even though there is no expressed and categorical opposition on the part of the victim and always if the behaviour concerned is serious enough to be considered offensive.[32]

3.7.4 Scope of the prohibition of sexual harassment

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

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[31] Art. 28 of Law 62/2003 of 30 December, www.boe.es/buscar/act.php?id=BOE-A-2003-23936.

[32] Judgement of the Constitutional Court 224/1999 of 13 December 1999, ECLI:ES:TC:1999:224: http://hj.tribunalconstitucional.es/HJ/es/Resolucion/Show/3966.

3.7.5 Understanding of (sexual) harassment as discrimination

Article 7 of the Law on Effective Equality expressly states that harassment and sexual harassment, as well as any less favourable treatment based on a person's rejection of or submission to such conduct, amounts to discrimination.

3.7.6 Specific difficulties

The main difficulty with the concept of harassment based on sex is ignorance of it on the part of the population, partly motivated by the fact that the concept is too generic and difficult to differentiate from discrimination based on sex. Nowhere does Spanish legislation establish any threshold for an attack on dignity to be considered harassment. In fact, as far as the author knows, there are no judgements in which a claim is made about harassment based on sex. There are also no sanctions imposed on companies for engaging in harassment based on sex, although Article 8.13 bis of the Law on Offences and Penalties in the Social Order[33] establishes that, when harassment occurs on the grounds of sex, the employer is responsible for a very serious offence liable to a fine of between EUR 6 000 and EUR 187 000.

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

3.8 Instruction to discriminate

3.8.1 Explicit prohibition

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

3.8.2 Specific difficulties

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

3.9 Other forms of discrimination

Discrimination by association or assumed discrimination is not expressly prohibited in Spanish legislation. There have been no cases on this issue but there is no reason to believe that the legislation would not be applied by the Spanish Courts as established by the CJEU in *Coleman*.[34]

3.10 Evaluation of implementation

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

[33] Approved by Royal Legislative Decree 5/2000, of 4 August 2000, www.boe.es/buscar/act.php?id=BOE-A-2000-15060.

[34] Judgement of 17 July 2008, C-303/06, *S. Coleman v Attridge Law and Steve Law*.

3.11 Remaining issues

Judicial doctrine regarding discrimination is not consolidated, which leads to ambiguous criteria and general ignorance and this in turn discourages legal claims in this area. For example, cases in which the existence of indirect discrimination has been judicially recognised were cases where the disadvantage affecting women was clear and indisputable.[35] Thus, it remains to be seen how courts will react to cases where the disadvantage experienced by women is less immediately visible or less clear-cut and first needs to be established. In Spain there are no percentage references for a prima facie case of discrimination. There is also no consolidated judicial doctrine that specifically establishes when there is indirect discrimination due to unequal pay for work of equal value. In short, there are fundamental problems with the effectiveness and application of anti-discriminatory concepts, rather than with their mere existence in normative texts.

[35] For example, Judgement of the Supreme Court of 18 July 2011, appeal number 133/2010, ECLI: ES:TS:2011:5798: www.poderjudicial.es/search/contenidos.action?action=contentpdf&databasematch=TS&reference=6134165&statsQueryId=105339384&calledfrom=searchresults&links=%22133%2F2010%22&optimize=20111003&publicinterface=true.

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

4.1 General (legal) context

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

The main survey of an official nature carried out in Spain in relation to the situation of women in the labour market is the report entitled 'Women and men at work', which was carried out jointly by the Institute of Women and for Equal Opportunities and the National Institute of Statistics.[36] This study should, in theory, be periodically updated but the latest data it contains regarding the wage gap are from 2016 (although the study is from 2018). In addition, the survey contains only economic data and does not analyse possible causes or strategies. According to the 2018 report, the most frequent annual salary for women (EUR 13 500) represented 77.1 % of the most frequent salary for men (EUR 17 509). When applied to the medium salary this percentage was 77.8 % and in relation to the gross average salary it was 77.7 %. According to the latest EUROSTAT data, which is based on data from 2016, the gender pay gap stands at 14.2 % and the gender overall earnings gap stands at 35.7 % in Spain.[37]

In 2018 the Foundation for Studies in Applied Economics (*Fundación de Estudios de Economía Aplicada* FEDEA), a cultural organisation mostly financed by large companies, financed a report on gender wage gaps in Spain.[38] The conclusions of the report established that: 'In this sense, our results underscore once again the need for policies and actions both from the public sector and at the company level which should be carried out to achieve gender equality or at least to guarantee equality of opportunities. In particular, there is a need for policies aimed at improving the balance between family life and work life and to foster co-responsibility in couples (universalise education from zero to three years, paternity leave and measures aimed at employment flexibility), policies that avoid discriminatory behaviour in promotion processes (blind CVs reinforcing the laws of equal pay and increasing salary transparency) and policies with the objective of correcting the problem of female under-representation in leadership positions (introducing progressive and temporary gender quota policies).'[39]

Trade unions have conducted studies into the wage gap in Spain. For instance, in 2018, the women's section of the General Union of Workers (UGT) published a report called 'The wage gap persists because women's work is undervalued'.[40] UGT is one of the two most representative unions in Spain. The UGT report includes the following recommendations: (i) An Equal Pay Act should be passed which includes the concept of 'work of equal value' and also includes effective penalties; (ii) Statistics on salaries should include more information, such as the number of variables analysed for all the autonomous communities of Spain, which allows for a comprehensive analysis of real wages received by women and men and the differences between them.

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[36] Women's Institute for the equality of opportunities, the National Institute of Statistics (2018) *Women and men at work*, www.ine.es/ss/Satellite?L=es_ES&c=INEPublicacion_C&cid=1259924822888&p=1254735110672&pagename=ProductosYServicios%2FPYSLayout&param1=PYSDetalleGratuitas.

[37] EUROSTAT (2018) *The gender pay gap in Spain,* https://ec.europa.eu/info/sites/info/files/aid_development_cooperation_fundamental_rights/equalpayday_factsheets_2018_country_files_spain_en.pdf.

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

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

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

4.1.2 Surveys on the difficulties of realising equal treatment at work

The report 'Women and men at work', carried out jointly by the Institute of Women and for Equal Opportunities and the National Institute of Statistics is the only official survey on the general situation of equal treatment in the workplace. This report contains statistical data related to eight topics: employment; wages, income and social cohesion; education; health; work and family balance; science, technology and the information society; crime and violence; power and decision-making. The survey does not contain an analysis of the causes of inequality and obstacles.[41]

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

4.1.3 Other issues

There are no further issues to be discussed.

4.1.4 Political and societal debate and pending legislative proposals

In March 2017, the Socialist Party presented a comprehensive bill for equal treatment and non-discrimination of women and men. The scope of the bill was very extensive and covered many aspects of life as well as work.[42] In October 2017, the Podemos party tabled a bill in the Congress of Deputies, the main objective of which was to transpose the 2014 European Commission Recommendation on pay transparency.[43] The content of the bill was quite ambitious and intended to remove all kinds of obstacles in Spanish legislation to ensure equal pay between women and men. Both bills were admitted in the Congress and consequently debated. In February 2018, the Socialist Party also presented a proposal for a law on equal remuneration for women and men which had a similar scope as the one presented by Podemos.[44] However, the bills did not go ahead because in 2019 the Parliament was dissolved and general elections were called for 28 April 2019.

After the cut-off date of this report (31 December 2018) a very important piece of legislation was approved in Spain which affects the equal pay legislation and other pieces of legislation related to the equality of women and men at work. This was Royal Decree 6/2019, of 1 March 2019, which came into force immediately after its approval.[45] The main objective of Royal Decree 6/2019 was to complement the Organic Law 3/2007 for effective equality between women and men, with the aim of making it effective in terms of employment and occupation. The Royal Decree introduces important developments in the following areas:

1) In the area of equality plans:

   a) The Royal Decree establishes that companies with more than 50 workers are obliged to carry out equality plans. Until now only companies with more than

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

[42] Comprehensive bill for equal treatment and non-discrimination between women and men, 10 March 2017, www.congreso.es/public_oficiales/L12/CONG/BOCG/B/BOCG-12-B-97-1.PDF.

[43] Bill for equal pay between women and men presented by Podemos, 10 November 2017, www.congreso.es/public_oficiales/L12/CONG/BOCG/B/BOCG-12-B-171-1.PDF.

[44] Bill for equal pay between women and men of the Socialist Party, 2 March 2018, www.congreso.es/public_oficiales/L12/CONG/BOCG/B/BOCG-12-B-214-1.PDF.

[45] Spain, Royal Decree 6/2019, of 1 March 2019, www.boe.es/buscar/act.php?id=BOE-A-2019-3244.

250 workers had this obligation. This increases the number of companies that, from now on, must make equality plans.

b) A registry of equality plans is created. Such a registry will make it easier to identify the different equality plans in place as well as to monitor their effectiveness.

c) A series of points are set out in the Royal Decree which must be addressed in the equality plans. This ensures that the relevant topics are not avoided in these plans. These matters are the following:
   - selection and recruitment process;
   - professional classification;
   - training;
   - professional promotion;
   - working conditions, including the gender pay audit;
   - co-responsible exercise of personal, family and work life rights;
   - female under-representation;
   - remuneration;
   - prevention of sexual harassment.

2) In the area of combating the pay gap:

   a) The Royal Decree establishes, for the first time in the Spanish legal system, the concept of work of equal value in the following way: 'Work has equal value in relation to other work when the work or tasks involved, the educational, professional or educational conditions, the training required for its exercise, the factors strictly related to its performance and the working conditions in which those activities are carried out are in fact equivalent'.

   b) It establishes the obligation for employers to keep a record of the average remuneration in the company, in relation to professional groups or jobs of equal value. Workers' representatives have the right to receive annual reports of this record.

   c) The Royal Decree establishes the presumption that there is a prima facie case of discrimination when, in companies with more than 50 workers, the average remuneration of workers of one sex is at least 25 % higher than the average remuneration of workers of the other sex.

3) In the area of parental leave:

   a) The Royal Decree establishes a new leave 'for the care of the infant who is breastfed' which substitutes 'breastfeeding leave. In this way the character of parental leave, as established by the CJEU in the *Roca Alvarez* case, is reinforced.

   b) This new leave has the same characteristics as the previous one (it consists of one hour of paid daily leave or, when used at the beginning or end of the day, half an hour of paid daily leave until the child is nine months old). However, the Royal Decree establishes that parental leave is individual and non-transferable.

   c) If both parents request it, the leave is extended for one of the parents to when the child is 12 months old. This is a mechanism to encourage both parents to participate in childcare. In this case, the amount of the leave from when the child is nine to twelve months old will not be paid by the employer but in the form of a social security benefit.

4) In the area of maternity and paternity leave:

   a) The Royal Decree changes the name of maternity leave and paternity leave to birth-related leave (granted to the 'other parent' in order to include homosexual couples).

b) The new birth-related leave will have the same duration for both parents (16 weeks with a possibility to extend in case of a child with disabilities or of multiple births). However, the duration of leave for fathers and mothers will only be equalised in 2021, because the Royal Decree establishes a transition period during which the father's leave will gradually be increased. Immediately after the Royal Decree, the leave for the father (or the other parent) will increase from five weeks to eight weeks.
c) The new birth-related leave also applies in the case of adoption, legal guardianship or fostering.

5) In the area of protection against unfair dismissal of pregnant workers:

The Royal Decree establishes the nullity of any termination of contract without cause of a pregnant worker during her probation period. It also establishes that, in cases of collective dismissal due to a company crisis, the company must specify the specific reason for the redundancy of each post. The first is a specific measure of protection for pregnant workers and the second is a general rule with a particular impact on pregnant workers, since they are protected by Article 10 of Directive 92/85/EC and, as the CJEU established in the *Porras Guisado* case, the specific reason for the selection of a pregnant worker for collective dismissal must be expressly stated.[46]

6) In the area of adaptation of the working day for people with caring responsibilities:

The Royal Decree establishes the right of workers with responsibilities for the care of children under 12 years of age or dependants to have their working day adapted to their needs. A reasonable balance between the needs of the worker and the organisational needs of the company must be established. In addition, the employer must justify any refusal. Before the Royal Decree, workers lacked the right to have their working day adapted to their needs relating to the care of children or dependants.

7) In the area of assistance for people who are exclusively engaged in a caring role for people with a high degree of dependence:

The Royal Decree states that the State will pay their social security contributions.

4.2 Equal pay

4.2.1 Implementation in national law

Article 28 of the Workers' Statute states that: 'The employer is obliged to pay for work of equal value the same remuneration, paid directly or indirectly, and whatever the nature of the work including, remuneration which is not considered a salary by Spanish legislation, without discrimination on the basis of sex in any of its items or conditions'. The Spanish Constitutional Court has issued several rulings,[47] pointing out that systems of professional classification and promotion must rely on criteria which should be neutral and not result in indirect discrimination, e.g. using 'physical effort' or 'arduous work' as a reason to give higher value to men's activities.[48] The Supreme Court also established that workers at the same company doing different work deserve the same payment if the difference is based

[46] Judgement of 22 February 2018, C-103/16, *Jessica Porras Guisado v Bankia SA and Others*.
[47] For instance, Judgement of the Constitutional Court 58/1994 of 28 February 1994, ECLI:ES:TC:1994:58: http://hj.tribunalconstitucional.es/es/Resolucion/Show/2575.
[48] For instance, Judgement of the Constitutional Court 145/1991, of 1 July 1991, ECLI:ES:TC:1991:145: http://hj.tribunalconstitucional.es/es/Resolucion/Show/1784.

on the fact that the kind of jobs done mostly by women are undervalued in relation to the jobs occupied mostly by men.[49]

4.2.2 Definition in national law

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

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

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

4.2.4 Related case law

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

4.2.5 Permissibility of pay differences

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

4.2.6 Requirement for comparators

Article 28 of the Workers' Statute does not make any reference to the 'would be' expression, as referred to in the Recast Directive 2006/54/EC , although Article 6 of the Law on Effective Equality contains this expression when defining direct discrimination, in the same way as referred to in the Recast Directive 2006/54/EC. However, the issue of a hypothetical comparator has never arisen in Spain.

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

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

At the time of the cut-off date of this report (31 December 2018) Spanish legislation did not lay down parameters for establishing the equal value of the work performed.[51]

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

[50] For instance, Central Labour Court Judgement of 6 June 1984.

[51] The Royal Decree 6/2019 stated a definition of work of equal value by introducing a new paragraph in Article 28 of the Workers' Statute stating: 'A job will have the same value as another when the nature of

Below are some relevant cases which make an approximation of the concept of work of equal value.

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

Judgement of the Supreme Court of 18 July 2011, appeal no. 133/2010: one of the factors which has most influenced the difference in pay between men and women is discrimination in career progression. The Supreme Court established that a system of promotion that lacked even minimal transparency constituted indirect discrimination. This was because the lack of transparency led to women stagnating in lower ranked positions, according to statistical analysis.

Judgement of the Supreme Court of 14 May 2014, appeal no. 2328/2013: the Supreme Court considered, in relation to a hotel, that the maids (predominantly women) were performing work of equal value to that of the bartenders (mostly men), on the basis of which they deserved equal pay. The jobs were considered to be of equal value because both were on Level IV of the wage structure set out in the applicable collective agreement.[52]

4.2.8 Other relevant rules or policies

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

4.2.9 Wage transparency

At the time of the cut-off for this report (31 December 2018) Spanish legislation did not address wage transparency in any way.[53]

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

At the time of the cut-off for this report (31 December 2018) Spain had not implemented the Recommendation of the European Commission of 7 March 2014 on strengthening the principle of equal pay for men and women through transparency.[54]

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the functions or tasks, the educational, professional or training conditions required for its exercise, the factors strictly related to its performance and the working conditions in which the activities are carried out are really equivalent'.

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

[53] The Royal Decree 6/2019 of 1 March 2019 established as a mechanism for wage transparency that employers must keep a record of the average remuneration in the company, in relation to professional groups or jobs of equal value, and that workers' representatives have the right to receive annual reports on this record.

[54] Royal Decree 6/2019 of 1 March 2019 implemented the Recommendation of the European Commission of 7 March 2014.

4.2.11 Other measures, tools or procedures

At the time of the cut-off for this report (31 December 2018) Spain had not developed other measures, tools or procedures to enhance pay transparency and the closure of the equal pay gap.[55]

4.3 Access to work, working conditions and dismissal

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

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

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

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

Article 5 of the Law on Effective Equality basically reproduces Article 14 of the Recast Directive 2006/54/EC, meaning that the material scope is the same. However, there are other articles in Spanish legislation that broaden the scope of the general principle of equal treatment in employment, particularly in relation to access to employment. For instance, Article 22 (*bis)* of the Employment Law[56] stipulates that the Public Employment Agency has an obligation to monitor all job offers so that they do not contain discriminatory criteria for access to employment. In addition, Article 51 of the Law on Effective Equality requires that the composition of women and men in staff recruitment and evaluation bodies for access to public sector employment is well-balanced. The concept of well-balanced is contained in the first Additional Disposition of the Law on Effective Equality: 'For the purposes of the Organic Law 3/2007, balanced composition shall be understood as the presence of women and men so that persons of each sex do not exceed 60 % nor fall below 40 %'.

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

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

[55] Royal Decree 6/2019 of 1 March 2019 established an interesting instrument: it established the presumption that there is a prima facie case of discrimination if, in companies with more than 50 workers, the average remuneration of workers of one sex is at least 25 % higher than the salaries of workers of the other sex. If this happens the employer will have to justify it in the record of the average remuneration in the company. This justification must explain that the difference is due to reasons not related to the sex of the workers.

[56] Spain, Law 56/2003 of 16 December 2003, www.boe.es/buscar/act.php?id=BOE-A-2003-23102.

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

Dismissal during maternity leave or during leave because of risks during pregnancy or breastfeeding, as well as dismissal of pregnant women, from the start of the pregnancy to the start of maternity leave, will be considered null and void except when the reason for the dismissal is a serious fault on the part of the worker or when the dismissal is objectively necessary for reasons not linked to pregnancy and maternity, such as economic or technical reasons.[57] The nullity of the dismissal in these situations is consistent with the consequence of nullity that Article 17 of the Workers' Statute establishes for any discriminatory act or conduct on the part of the employer. In theory, the nullity of the dismissal without cause of a worker who is pregnant or on maternity leave seemed adequate for the protection against dismissal without cause established by Article 10 of Directive 92/85/EEC. However, in the *Porras Guisado* case the CJEU established that Spain, with this system, did not guarantee adequate protection as required by Directive 92/85/EEC.[58] In this judgement, the CJEU established that effective protection requires preventive and not only restorative action and that Spain did not adequately comply with the former. To date there has been no regulatory change to introduce such preventive protection, as required by the CJEU, into Spanish law. There has not been a formal recognition that the employer has a general obligation to do everything possible to avoid the dismissal of a pregnant worker.

Protection against non-hiring, non-renewal of a fixed-term contract or non-continuation of a contract does not exist in Spanish law. However, the Spanish Constitutional Court has long established that the non-renewal of a pregnant woman's temporary contract, if the employer does not prove that there is a justified reason for it, means that they must proceed with the renewal.[59]

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

4.3.5 Implementation of the exception on the protection for women in relation to pregnancy and maternity (Article 28(1) of Recast Directive 2006/54)

In Spain it is impossible to prohibit women from performing certain professional activities. In fact the Constitutional Court has declared some cases to be non-constitutional where women had been denied access to certain jobs, based on possible risks to their health, if those working conditions could be equally hazardous to men.[60] However, certain general maternity protection measures exist in Spanish legislation (e.g. maternity leave, right to be transferred to a safe job in the case of pregnancy, etc.). In addition, the courts have established that employment conditions must be adjusted to take account of the state of pregnancy. For instance, the Supreme Court has ruled that, if possible, the time and/or place of a written test for access to a position in the public sector must be adapted to the particular circumstances of a female candidate who has just given birth.[61]

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[57] Article 55(5) of the Workers' Statute.

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

[59] Judgement of the Constitutional Court 173/1994, of 7 June 1994.

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

[61] Judgement of the Supreme Court of 14 March 2014, appeal number 4371/2012, ECLI: ES:TS:2014:1099: www.poderjudicial.es/search/contenidos.action?action=contentpdf&databasematch=TS&reference=7010892&links=&optimize=20140402&publicinterface=true.

4.3.6 Particular difficulties

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

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

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

1) Article 55.5 of the Workers; Statute establishes that, in the event that a pregnant worker is dismissed without cause, regardless of whether the employer knows about her pregnancy or not, the dismissal will be considered null and void and the worker will have the right to return to her job. The same happens when an employer terminates the work contract of a pregnant worker during her probation period. Article 55.5 of the Workers' Statute contains other situations in which dismissal without cause is considered null and void and therefore entitles workers to return to the same job. These situations are related to motherhood and childcare and greatly simplify the prima facie case of discrimination. According to Article 55.5 of the Workers' Statute, a dismissal without cause will be null and void and necessitates reinstatement in the following cases: if a pregnant worker is dismissed, if a person on parental leave to care for a breastfeeding child is dismissed, if a person working reduced hours to care for children or relatives is dismissed, if a person on birth-related leave (which includes maternity and paternity leave) is dismissed or if a person on parental leave is dismissed. This measure has been expressly considered to be positive action by the Constitutional Court.[62]

2) There are some measures which are aimed at preventing undeclared work and which have a particular impact on women because they are the ones who do most of these jobs. From this point of view, they are indirectly inclusionary measures. They include deductions to social security contributions as follows: (i) 50 % deduction for 18 months of self-employed social security contributions in the case of new registrations of self-employed family members (Law 3/2012, of 6 July 2012); (ii) 20 % deduction of the employer's contribution for domestic employees. This deduction does not apply in the case of domestic employees who work less than 60 hours per month and who directly assume the obligations of social security contributions; (iii) 45 % deduction in the employer's contribution when a caregiver is hired by a large family, that is one with at least three children (Law 40/2003, of November 18, and successive budget laws). This deduction does not apply in the case of caregivers who work less than 60 hours per month and who directly assume the obligations of social security contributions. It is difficult to know the effectiveness of these measures given that there are no official data. The fact that they are temporary measures suggests that there have been cases in which social security discounts have ended and people will have returned to undeclared work.

[62] Judgement of the Constitutional Court 173/2013, of 13 October 2013.

3) Article 60 of the Law on Effective Equality establishes preferences for access to training for people who return to a job in the Public Administration after maternity, paternity or parental leave. Article 60 states as follows: '1. In order to improve the training of public employees, preference will be given, for one year, in the allocation of places to participate in training courses to those who have joined the active service from maternity or paternity leave, or have re-entered from a situation of leave for reasons of legal guardianship and care for dependent elderly people or people with disabilities'. Likewise, in order to facilitate the promotion of women in the Public Administration, the following is established in Article 60.2 of the Law on Effective Equality: '2. In order to facilitate the professional promotion of women and their access to management positions in the General State Administration and in public bodies linked to or dependent on it, in the calls for the corresponding training courses, at least 40 % of the places will be awarded to women, provided they meet the established requirements'. There are no data about the effectiveness of this measure.

4) Article 17.4 of the Workers' Statute states that it is valid to establish quotas in collective agreements for the hiring of women whenever the preference occurs 'under equal conditions of suitability'. These quotas, however, are not common in private companies. In the view of the author, quotas are more frequent in Public Administration appointments, although there are no statistics or data to prove this.

5) The Law on contracts in the public sector, Law 9/2017, of 8 November 2017, establishes that mechanisms can be established by contracting Public Administrations which favour public contractors which have established positive action mechanisms in favour of hiring women and which favour the reconciliation of different responsibilities.

6) Article 75 of the Law on Effective Equality states that companies which are obliged to submit non-abbreviated profit and loss accounts must try to include on their company boards sufficient women to allow them to reach a balanced number of women and men over a period of eight years from the date of entry into force of the Law. The objective set in Article 75 of the Law on Effective Equality is to reach a balanced number of women and men. According to the Law on Effective Equality, the composition of women and men is well-balanced when the number of people of one sex does not exceed 60 % of the membership of the board. This means that the figure to be reached is 40 %. It is a soft target, since the companies only have an obligation to 'try' to reach it. The deadline was eight years from the date of entry into force of the Law. That point arrived in 2015 and the goal was not met.

7) According to Law 43/2006, of 29 December 2006, employers who hire women who are disabled receive special discounts in social security contributions which are higher for women than for men. The amount of the discounts varies, depending on the age of the worker and the severity of their disability, but in all cases the discount for hiring women is higher than for hiring men.

8) The concept of a balanced number of women and men is contained in Additional Provision 1 of the Law on Effective Equality. According to this provision, the proportion of women and men is well-balanced when the number of people of one sex does not exceed 60 % of the overall number. The objective of a balanced proportion of women is established for company boards (as described above) but the same provision is also made for other areas. The Law on Effective Equality recommends a balanced proportion of women and men (at least 40 % women) in the following fields: political candidate lists and decision-making bodies (Article 14 of the Law on Effective Equality); members of the governing bodies of the General State Administration and of the public entities linked to or dependent on it (Article 52 of the Law on Effective Equality); and tribunals and bodies for the selection of the

staff of the General State Administration and public entities linked to or dependent on it (Article 53 of the Law on Effective Equality).

4.4 Evaluation of implementation

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

4.5 Remaining issues

Although Spanish legislation on the issue of access to work, working conditions and dismissal is theoretically correct, very few claims have been filed for discrimination on the ground of sex, particularly in the area of wage discrimination, promotion discrimination and access to work. This suggests that there are problems with detection and with claims of discrimination practised within companies. The precarious situation in which workers find themselves in Spain, especially in positions of lower levels of responsibility, which are occupied mostly by women, means that judicial claims are rarely made. Similarly, the Labour Inspectorate does not appear to have a decisive role in the detection, monitoring and sanctioning of discriminatory behaviour, although in a few cases the Labour Inspectorate has initiated judicial proceedings of notable interest.[63]

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

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

5.1 General (legal) context

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

The only official survey on the practical difficulties linked to work-life balance is the report 'Women and men in Spain', produced by the Institute of Women and for Equal Opportunities and the National Institute of Statistics. The survey was most recently updated in this area in 2018. It only provides statistical data and does not analyse possible causes or possible solutions. Below are some of the points it raises in relation to work-life balance.

1) In Spain in 2017, the employment rate of men aged 25 to 49 years without children under 12 years was 83 %; for those with children in that age range the employment rate was higher (88 %). The highest employment rate among men is reached with one or two children under 12 years old (88.4 %). In the case of women, as the number of children under 12 increases, their employment rate decreases. For women between 25 and 49 years of age without children of that age, the employment rate in 2017 was 72.4 % and this is reduced to 66.6 % for those with children under 12 years of age. With a child under 12, the figure is 68.6 % and the employment rate is 66 % for women with two children under 12. With three children or more the rate is 50.3 %.[64] From this data it is possible to conclude that the tasks relating to the care of children fall mostly to women and that for many of care work is not compatible with paid work. In the opinion of the author, this may be due both to the greater difficulties for women in finding employment when they have children and to the tendency to abandon work while raising children, which at the same time shows that there may be problems with reconciling different responsibilities.

2) The percentage of men and women between the ages of 25 and 49 who work part-time involuntarily, that is because they cannot find full-time work, is considerably higher in Spain than in the EU-28. In 2017, 57.7 % of women aged 25 to 49 who worked part-time did so because they could not find a full-time job, compared to 24.1 % in the EU-28. In men this percentage is significantly higher: in 2017, 75.7 % of men working in Spain part-time did so because they could not find a full-time job. In EU-28 in 2017, this percentage was 47 %.[65] In the opinion of the author, the high percentage of non-voluntary part-time work among women, in relation to the high percentage of women who do not perform paid work during their fertile years, could indicate that part-time work is not an employment pattern which is seen in Spain as being adequate for the reconciliation of different responsibilities.

3) In 2017, the main reason alleged by women for working part-time due to caring for dependants is the lack of, or not being able to afford, adequate childcare (53.4 %). 3.3 % claim not to have or not to be able to afford adequate services for the care of sick, disabled or elderly adults. 2.0 % allege both reasons. A total of 43.4 % of men claim the reason for not being able to afford adequate childcare services as the main reason for working part time. 8.6 % of men claim not to have or not to be able to afford adequate services for the care of sick, disabled or elderly adults. 11 % allege

[64] Survey 'Women and men in Spain', section on 'Incidence in employment due to the existence of children', www.ine.es/ss/Satellite?L=es_ES&c=INESeccion_C&cid=1259925463094&p=1254735110672&pagename=ProductosYServicios%2FPYSLayout&param1=PYSDetalle&param3=1259924822888.

[65] Survey 'Women and men in Spain', section on 'Reasons for part-time work according to age groups', www.ine.es/ss/Satellite?L=es_ES&c=INESeccion_C&cid=1259925461773&p=1254735110672&pagename=ProductosYServicios%2FPYSLayout&param1=PYSDetalle&param3=1259924822888.

both reasons.[66] In the opinion of the author, these data may indicate that there is no adequate public or business investment in services for the care of children or dependants.

5.1.2 Other issues

The latest official data from the Labour Force Survey[67] on leave of absence are from 2010. They show that women took most of the parental leave (*excedencia*) that year. The results were the following: 8 100 male workers and 11 500 female workers took parental leave (*excedencia*) of less than one month; 4 100 male workers and 43 700 female workers took parental leave (*excedencia*) of between one and three months; 900 male workers and 42 700 female workers took parental leave (*excedencia*) of between three and six months; 1 000 male workers and 70 800 female workers took parental leave (*excedencia*) of between six and twelve months; 700 male workers and 38 000 female workers took parental leave (*excedencia*) of more than 12 months. In the opinion of the author, the imbalance between parental leave (*excedencia*) requested by women and men could indicate that there are no effective policies promoting co-responsibility.

Another important factor is the birth rate in Spain, which is one of the lowest in the world. According to the latest available data from the National Institute of Statistics, the birth rate in Spain in 2017 was 8.41 births per 1 000 inhabitants.[68] In the opinion of the author, these data could also serve to reflect the difficulties that families have in making paid work compatible with family life in Spain.

Women with higher levels of education are strongly represented in the labour market, with an upward trend. In 2018, 52.1 % of individuals with higher education were women, practically the same level as in 2017 and three points more than in 2007 (3.2 pp.). Economically active women of that educational level have increased by 34.4 % since 2007, compared to a smaller increase in men with this level of education (18.3 %). For women with lower levels of education, their presence in the workplace is lower: they represent 39.5 % of the total low studies jobs, with a downward trend. The figure has reduced by 10.1 % compared to 2007.[69]

5.1.3 Overview of national action on work-life balance issues

Spanish legislation on work-life balance has two fundamental elements: on the one hand, the regulation establishes several types of parental leave, including the right to reduce working hours. On the other hand, the legislation establishes a limited and conditional right of workers with caring responsibilities to adapt their working day and conditions of work to facilitate care-giving. The first of these (the right to parental leave) is of greater significance, since workers can decide when they wish to exercise this right, without the employer being able to oppose it. The latter (the right to adapt working hours and working conditions to favour the reconciliation of responsibilities) is of minor importance (both will be described below).

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66 Survey 'Women and men in Spain', section on 'Working people caring for dependants', www.ine.es/ss/Satellite?L=es_ES&c=INESeccion_C&cid=1259925472720&p=1254735110672&pagename=ProductosYServicios%2FPYSLayout&param1=PYSDetalle&param3=1259924822888.

67 http://www.ine.es/jaxi/Tabla.htm?path=/t22/e308/meto_05/modulo/base_2011/2010/l0/&file=01019.px&L=0.

68 National Institute of Statistics, Birth Indicators 2017 www.ine.es/jaxiT3/Datos.htm?t=1433.

69 Ministry of Labour, Migration and Social Security, the situation of women in the labour market in 2018, www.mitramiss.gob.es/es/sec_trabajo/analisis-mercado-trabajo/situacion-mujeres/situacion_mujer_trabajo_2018.pdf.

5.1.4 Political and societal debate and pending legislative proposals

There is a general awareness that reform of the Spanish system is necessary to promote the reconciliation of different responsibilities and co-responsibility. For example, on 13 November 2018 a bill on co-responsible working time was presented to the Congress of Deputies by the Podemos party.[70] The bill dealt with numerous issues related to the management of working time and also established corrections in parental leave to encourage co-responsibility. However, the bill did not complete its procedure in Congress due to the convening of a general election.

The Royal Decree 6/2019, of 1 March 2019 (approved after the cut-off date for this report), has several elements relating to pregnancy, maternity and leave related to work-life balance:

1) In the area of parental leave:

   a) The Royal Decree establishes a new type of leave 'for the care of the infant who is breastfed' which substitutes the 'breastfeeding leave'. In this way the character of parental leave, as established by the CJEU in the *Roca Alvarez* case, is reinforced.
   b) This new leave has the same characteristics as the previous one it (consists of one hour of paid daily leave or, when used at the beginning or end of the day, half an hour of paid daily leave until the child is nine months old). However, the Royal Decree establishes that parental leave is totally individual and non-transferable.
   c) If both parents request it, the leave is extended to when the child is 12 months old. This is a mechanism to encourage both parents to participate in childcare. In this case, the remuneration corresponding to the leave of one of the parents from when the child is nine to twelve months old will be paid in the form of a social security benefit.

2) In the area of maternity and paternity leave:

   a) The Royal Decree changes the name of maternity leave and paternity leave (granted to the 'other parent' in order to include homosexual couples) to 'birth-related leave'.
   b) The new birth-related leave will have the same duration for both parents (16 weeks, extendable in case of a child with disabilities or of multiple births). However, the duration of leave for fathers and mothers will only be equalised in 2021, because the Royal Decree establishes a transition period during which the father's leave will be gradually increased. Immediately after the Royal Decree, the leave for the father (or the other parent) will increase from five weeks to eight weeks.
   c) As was previously envisaged for maternity and paternity leave, the new birth-related leave also applies in the case of adoption, legal guardianship or fostering.

3) In the area of protection against unfair dismissal of pregnant workers:

   The Royal Decree establishes the nullity of any termination of contract without cause of a pregnant worker during her probation period. It also establishes that, in cases of collective dismissal due to a company crisis, the company must specify the concrete reason for the redundancy of each post. The first is a specific measure of protection for pregnant workers and the second is a general rule with a particular impact on pregnant workers, since they are protected by Article 10 of Directive

[70] Bill of law on co-responsible working time www.congreso.es/public_oficiales/L12/CONG/BOCG/B/BOCG-12-B-342-1.PDF.

92/85/EC and, as the CJEU established in the *Porras Guisado* case, the specific reason for the selection of a pregnant worker for collective dismissal must be expressly stated.[71]

4) In the area of adaptation of the working day for people with caring responsibilities:

The Royal Decree establishes the right of workers with responsibilities for the care of children under 12 years of age or dependants for their working day to be adapted to their needs. A reasonable adjustment between the needs of the worker and the organisational needs of the company must be sought and, in any case, the employer must justify any refusal. Before the Royal Decree, workers lacked the right to have their working day adapted to their needs related to the care of children or dependants.

5) In the area of assistance for people who are exclusively engaged in a caring role for people with a high degree of dependence:

The Royal Decree states that the State will pay their social security contributions.

5.2 Pregnancy and maternity protection

5.2.1 Definition in national law

There is no definition of pregnant worker in Spanish legislation.

5.2.2 Obligation to inform employer

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

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

The Supreme Court ruled in the same sense as the CJEU in a case similar to the one that gave rise to the judgement issued in the *Mayr* case.[72] Indeed, the Supreme Court established the nullity of the dismissal without reason of a worker who was at an advanced stage of *in vitro* fertilisation treatment, although the egg had not yet been transferred to the uterus.[73] The Supreme Court considered that the same protection should be applied as that established for cases of pregnancy.

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

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

> '1. The assessment of the risks [for the safety and health of workers] … must include determination of the nature, degree and duration of exposure of pregnant workers or workers who have recently given birth to agents, processes or working conditions liable to have an adverse effect on the health of the workers or the foetus in any activity likely to present a specific risk. If the results of the assessment reveal a risk to the health or safety or a possible effect on the pregnancy or breastfeeding of such workers, the employer shall adopt the measures necessary to avoid exposure to that

[71] Judgement of 22 February 2018, C-103/16, *Jessica Porras Guisado v Bankia SA and Others*.
[72] Judgement of 26 February 2008, C-506/06, *Sabine Mayr v Bäckerei und Konditorei Gerhard Flöckner OHG*.
[73] Judgement of the Supreme Court of 4 April 2017, appeal number 1584/2017, ECLI: ES:TS:2017:1584: www.poderjudicial.es/search/contenidos.action?action=contentpdf&databasematch=TS&reference=8003649&statsQueryId=106305208&calledfrom=searchresults&links=&optimize=20170502&publicinterface=true.

> risk by adjusting the working conditions and the working hours of the worker concerned. Such measures shall include, where necessary, the non-performance of night work or shift work. 2. Where the adjustment of working conditions or working hours is not feasible or where, despite such adjustment, working conditions are liable to have an adverse effect on the health of the pregnant worker or the foetus and a certificate to that effect is issued by the medical department of the [INSS] or the mutual insurer, depending on the entity with which the company has agreed cover for occupational risks, together with a report from the Spanish National Health Service (*Servicio Nacional de Salud*) medical practitioner who treats the worker, the latter will have to perform a different job or role which is compatible with her condition. After consultation with the workers' representatives, the employer must determine the list of jobs that are risk-free for these purposes. A move to another job or role shall be effected in accordance with the rules and criteria applied in cases of functional mobility and shall take effect until such time as the worker's state of health allows her to return to her previous job. (…) 3. If such a move to another job is not technically or objectively feasible or cannot reasonably be required on substantiated grounds, the worker concerned may have her contract suspended on the grounds of risk during pregnancy, pursuant to Article 45.1.d. of the Workers' Statute, for the period necessary for the protection of her health and safety and for as long as it remains impossible for her to return to her previous job or move to another job compatible with her condition. 4. The provisions of paragraphs 1 and 2 of this article shall also be applicable during the period of breastfeeding if the working conditions are liable to have an adverse effect on the health of the woman concerned or her child and a certificate to that effect is issued by the Social Security medical department or the mutual insurer, depending on the entity with which the company has agreed cover for occupational risks, together with a report from the National Health Service medical practitioner who treats the worker or her child. In addition, the worker concerned may have her contract suspended on the grounds of risk while breastfeeding children under nine months old, pursuant to Article 45.1.d. of the Workers' Statute, if the conditions set out in paragraph 3 of this article are satisfied.'[74]

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

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

In both the *Otero Ramos* and *Gonzalez Castro* cases the CJEU stated that, in the case of a risk to pregnancy in the workplace, Spain must adequately guarantee the reversal of the burden of the proof if a worker has provided evidence suggesting that the risk assessment of her work was not conducted in accordance with the requirements of Article 4(1) of

[74] Own translation.

Directive 92/85.[75] After these judgements of the CJEU the Supreme Court changed its previous doctrine and transferred to the employer the burden of proving that the work undertaken by the worker was compatible with breastfeeding.[76]

5.2.6 Prohibition of night work

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

5.2.7 Case law on the prohibition of night work

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

5.2.8 Prohibition of dismissal

Dismissal during maternity leave or during leave because of risks during pregnancy or breastfeeding, as well as dismissal of pregnant women, from the start of the pregnancy to the start of maternity leave, will be considered null and void except when the reason for the dismissal is a serious fault on the part of the worker or when the dismissal is objectively necessary for reasons not linked to pregnancy and maternity, such as economic or technical reasons.[77] The Constitutional Court has established that dismissal in these situations is automatically nullified if there is no just cause for dismissal, even if the employer has no knowledge of the pregnancy.[78] However, the Constitutional Court has also ruled that the dismissal of a pregnant woman during the probationary period is not automatically considered null and void if the employer argues that they were not aware of the pregnancy.[79] The main problem with this interpretation by the Constitutional Court is that the claim of lack of knowledge on the part of the employer in cases where there has been no communication by the pregnant worker about her condition could be virtually uncontested. This could result in ineffective protection against the termination of contracts

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

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

[77] Article 55(5) of the Workers' Statute.

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

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

of pregnant women during their probationary period, which could potentially counteract the principles laid down in Directives 92/85/EC and 2006/54/EC.[80]

5.2.9 Redundancy and payment during maternity leave

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

5.2.10 Employer's obligation to substantiate a dismissal

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

5.2.11 Case law on the protection against dismissal

The judgement of the CJEU issued in the *Porras Guisado* case was fundamental.[84] This ruling was the result of a preliminary ruling by the Superior Court of Catalonia, Spain. The preliminary question was raised because, according to the doctrine of the Spanish Supreme Court then applied, the employer should not specify at the time of individual dismissal after a collective dismissal, the specific causes for which a particular worker had been selected to be made redundant. When this doctrine was applied in the case of pregnant workers, the result was that the worker was not sufficiently protected and, therefore, it could be understood that the provisions of Directive 92/82/EC were not complied with. The CJEU stated in its judgement that national legislation which allows an employer to dismiss a pregnant worker in the context of a collective redundancy without giving any grounds other than those justifying the collective dismissal is not against Directive 92/85/EC only if 'the objective criteria chosen to identify the workers to be made redundant are cited'.[85] Subsequently, the Supreme Court expressly established the need to specify the specific reason for the selection of the pregnant worker in case of objective dismissal for redundancy.[86] After the cut-off date for this report (31 December 2018) the Royal Decree 6/2019 of 1 March 2018 expressly stated that, in all cases of dismissal for redundancy, and not only in the case of dismissals of pregnant workers, the specific reason must be specified for the worker being selected for redundancy.

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[80] After the cut-off date for this report (31 of December 2018), Royal Decree 6/2019 of 1 March 2019 was approved, which states that the termination without a reason of the contract of a pregnant worker during the probationary period must also be considered null and void.

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

[82] Article 10(1) of the Royal Decree 295/2009.

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

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

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

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

5.3 Maternity leave

5.3.1 Length

Article 48.4 of the Workers' Statute states that maternity leave lasts for 16 continuous weeks with two further weeks for each child, in the event of multiple births.[87]

5.3.2 Obligatory maternity leave

Article 48.4 of the Workers' Statute stipulates that six of the 16 continuous weeks of the maternity leave must be taken full-time by the mother immediately following the birth.

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

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

5.3.4 Legal protection of rights ensuing from the employment contract

Article 48.4 of the Workers' Statute expressly ensures that any employment rights relating to the employment contract will be guaranteed to the worker during maternity leave. The Supreme Court has pointed out that women on maternity leave cannot suffer any reduction in their annual salary as a consequence of their absence, not even if a concrete amount of their salary was variable in relation to the effective working days during the year.[88] The Constitutional Court has established as well that motherhood and pregnancy must not pose any prejudice to a woman's career, including the woman's seniority, which means that the initial date of the contract must be the one that she would have had if she had not been pregnant.[89] In another judgement, the Constitutional Court has also established that delaying the promotion of a female worker to a full-time position due to her maternity leave is unconstitutional.[90] The Supreme Court has also guaranteed that when a pregnant woman has to be transferred to a safer workplace because of a risk to her pregnancy, the

[87] After the cut-off date for this report (31 December 2018), Royal Decree 6/2019 of 1 March 2019 established important changes in the maternity leave regulations. One of the most important is that, from April 2019, there will no longer be maternity leave a paternity leave but a unique birth-related leave with similar features for each parent. However, fully equalized leave for both parents will not be effective until 2021. Another important feature of the birth-related leave established by Royal Decree 6/2018 is that, after the first mandatory six weeks after childbirth, the rest of the leave can be broken up and taken for full weeks until the child is 12 months old. This possibility of splitting the birth-related leave in the case of the mother could be contrary to Directive 92/85/EC because it stipulates that maternity leave must be uninterrupted.

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

[89] Judgement of the Constitutional Court 66/2014 of 5 May 2014, www.boe.es/diario_boe/txt.php?id=BOE-A-2014-5868.

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

entirety of her previous pay must be maintained, including the payment of the overtime that she could not do in the new position.[91]

5.3.5 Level of pay or allowance

There are two kinds of maternity leave: contributory maternity leave and non-contributory maternity leave. Contributory maternity leave is a social security benefit, so it is paid by the State. Pay during contributory maternity leave is higher than during sick leave, since employees are entitled to remuneration equivalent to 100 % of the previous month's social security contribution base (*base de cotización*).[92] The contribution base of the previous month is usually the same amount as the salary for the previous month, so workers on contributory maternity leave basically receive the same amount as they received when they were actively working. Theoretically, no ceiling is applied, although given that the contributory maternity leave payment depends on the previous social security contribution base and given that this base has a maximum, the maximum monthly amount that a beneficiary of maternity leave could receive in 2018 was EUR 3 803.70.

A non-contributory maternity leave is established by the social security system if a working mother does not comply with the minimum requirements that apply to the contributory maternity leave (basically, the previous working time). In this case she would receive a one-off payment for the amount equivalent to 42 days of her previous social security contribution base, with a ceiling of 42 times a daily indicator called the Public Indicator of Multiple Effects Income. For 2018 this ceiling amounted to EUR 753.06.[93] This payment guarantees that the mother receives a certain amount during the compulsory six weeks after the birth if she has not worked long enough to qualify for the contributory maternity leave. This is why the one-off payment guarantees only 42 days (six weeks) of the previous social security contribution, with the maximum of 42 times the daily indicator. In any case, this one-off payment will always be higher than the payment that the mother would receive if she was on sick leave, since she would not have access to sick leave payment due to not having worked long enough. The beneficiary of non–contributory maternity leave would be allowed to continue on maternity leave until completing the 16 weeks established in Article 48 of the Workers' Statute, although she would not receive the social security payment established for the contributory maternity leave. However, she could go back to work after the six compulsory weeks after birth and transfer the remaining ten weeks of the contributory maternity leave to the father, who could receive the corresponding maternity leave payment if he fulfilled the requirements. This system formally complies with Directive 92/85/EC since this allows a period of previous working time to be required in order to receive the maternity leave payment, but it creates a difficult situation for the mother since she will be forced to go back to work right after the six compulsory weeks after birth if she has not contributed sufficiently for contributory maternity leave.

5.3.6 Additional statutory maternity benefits

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

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

[92] Article 179 of the General Law of Social Security, https://www.boe.es/buscar/act.php?id=BOE-A-2015-11724.

[93] Article 182 of the General Law of Social Security, https://www.boe.es/buscar/act.php?id=BOE-A-2015-11724.

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

There are conditions for eligibility in the case of the contributory maternity leave but there are no conditions of eligibility for access to non-contributory maternity leave. According to Article 178 of the General Law of Social Security, for the contributory maternity leave a minimum period of previous working time is required, which varies depending on the age of the beneficiary at the age of the birth. If the worker is younger than 21, no previous working time will be required to have access to contributory maternity leave. If the worker is between 21 and 26 years old the working time required will be 90 days in the previous seven years or 180 days at any time. If the worker is older than 26, the working time required to have access to contributory maternity leave will be 180 days in the previous seven years or 360 days at any time.

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

Article 48.1 of the Workers' Statute expressly stipulates that the worker on maternity leave has the right to return to the same job as the one she had before maternity leave. Article 48.4 of the Workers' Statute expressly ensures that any employment rights relating to the employment contract will be guaranteed to the worker on maternity leave, which means that she will also benefit from any improvement in working conditions to which she would have been entitled during her absence.

5.3.9 Legal right to share maternity leave

If both parents work, the mother may choose to cede part of the remaining leave period (10 weeks) to the other parent. If the mother dies, the father can have the full maternity leave (16 weeks) even if the mother did not work.[94] The right to share maternity leave is not subject to agreement with the employer. Maternity leave is paid by the social security system in the same way for mother and father (100 % of his/her previous base).[95] Civil servants have the same right.[96] In case of transfer to the father of the maternity leave, he can access it on a part-time basis if there is an agreement with the employer or if it is provided for in a collective agreement. In 2021 there will be no possibility of transfer of maternity leave to the father because both parents will have non-transferrable leaves of equal duration.[97]

5.3.10 Case law

On 14 May 2018, the Constitutional Court admitted the application filed by a father who alleged that he had been discriminated against on the basis of sex, since his paternity leave (four weeks) was significantly shorter than the maternity leave (16 weeks). In its ruling, the Constitutional Court established that it did not constitute discrimination that paternity leave was shorter than maternity leave because the purposes pursued were different.[98]

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[94] Article 48.4 of the Worker's Statute.

[95] Article 179 of the General Law of Social security, www.boe.es/buscar/act.php?id=BOE-A-2015-11724.

[96] Article 49 of Basic Statute of Civil Servants, http://noticias.juridicas.com/base_datos/Anterior/r5-l7-2007.t3.html.

[97] According to Royal Decree 6/2019, the birth-related leave will be the same and non-transferable for both parents in 2021. Until then, a transition period is established that will work as follows: in 2019 the other parent will have their own leave of eight weeks but the mother may transfer up to four weeks of her leave; in 2020 the other parent will have leave of 12 weeks, but the mother can transfer up to two weeks of her leave.

[98] Judgement of the Constitutional Court 111/18 of 17 October 2018, ECLI:ES:TC:2017:111: http://hj.tribunalconstitucional.es/es/Resolucion/Show/25467.

5.4 Adoption leave

5.4.1 Existence of adoption leave in national law

In cases of adoption or fostering of a child younger than six, workers have the right to 16 weeks of contributory maternity leave. The duration is increased by two weeks for each additional child adopted at the same time. The duration of the maternity leave is also increased by two weeks if the adopted child has a disability. The same contributory maternity leave applies if the adopted or fostered child is older than six but has special needs regarding adaptation to the new social environment.[99] The amount of the payment will be the same as that in the case of general contributory maternity leave and the conditions in relation to previous working time are the same as well.[100] From 2021, the right to 16 weeks of leave will be granted to each of the two parents and six weeks will be compulsory for each parent immediately after the moment of the adoption or fostering.[101]

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

Parents on adoption leave have the same protection against dismissal as parents on ordinary maternity leave.[102] As a consequence, the dismissal of a parent on adoption leave will be considered null and void except when the reason for the dismissal is a serious fault on the part of the worker or when the dismissal is objectively necessary for reasons not linked to pregnancy and maternity, such as economic or technical reasons.

5.4.3 Case law

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

5.5 Parental leave

5.5.1 Implementation of Directive 2010/18

Directive 2010/18/EC has not been specifically implemented in Spain, but the previous Directive 96/34/EC was implemented by Law 39/1999 of 5 November 1999 to promote the reconciliation of family and work responsibilities and by the Law on Effective Equality.[103] There are no problematic consequences linked to this.

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[99] Article 48.4 of the Workers' Statute.

[100] Articles 178 and 179 of the General Law of Social Security, www.boe.es/buscar/act.php?id=BOE-A-2015-11724.

[101] After Royal Decree 6/2019 of 1 March 2019, adoption leave will be as follows: 'In cases of adoption, guardianship for adoption and foster care, in accordance with Article 45.1.d. (of the Workers'Statute), the leave will last for 16 weeks for each adoptive parent, guardian or foster carer. Six weeks must compulsorily be taken full-time and uninterrupted immediately after the court order establishing the adoption or administrative decision for adoption or foster care. The remaining ten weeks may be taken in weekly periods, accumulated or interrupted, within 12 months following the court decision establishing the adoption or the administrative decision of guardianship for adoption or foster care. In no case will the same minor be entitled to several periods of leave by the same worker. The taking of each weekly period or, as the case may be, of the accumulation of said periods, must be communicated to the company at least 15 days in advance. The suspension of these ten weeks may be exercised on a full-time or part-time basis, subject to agreement between the company and the affected worker, under the terms established by regulation. In cases of international adoption, when the parents must travel in advance to the adopted child's country of origin, the period of leave foreseen for each case in this section may be started up to four weeks before the resolution establishing the adoption. This right is individual to the worker and cannot be transferred to the other adoptive parent or guardian for adoption or fostering purposes. The worker must communicate to the company, at least 15 days in advance, the exercise of this right in the terms established, where appropriate, in collective agreements. When the two adopters, guardians or co-workers who exercise this right work for the same company, it may limit the simultaneous taking of the ten voluntary weeks for well-founded and objective reasons, duly provided and justified in writing'.

[102] Article 55.5 of the Workers' Statute.

[103] Law 39/1999, of 5 November 1999, www.boe.es/diario_boe/txt.php?id=BOE-A-1999-21568.

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

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

5.5.3 Scope of the transposing legislation

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

5.5.4 Length of parental leave

The four types of parental leave established in Spain have different features and durations. They have not been revised with the entry into force of Directive 2010/18/EC, since this was not considered necessary. There are some differences between the parental leave granted to workers and civil servants. The four Spanish forms of parental leave established in Spain at the time of the cut-off for this report (31 December 2018) were the following:[104]

- Firstly, workers with children younger than nine months, including adoptive and foster parents, and civil servants with children younger than 12 months have the right to paid leave of an hour a day.[105] If this leave is taken at the beginning or end of the day, as a reduction of working time, it will have a duration of only half an hour. There will be an allowance for each of the children born or adopted in the case of multiple births or multiple adoptions. Even though this leave is called 'breastfeeding leave' (*permiso de lactancia*) its objective is not only for breastfeeding but also, more generally, to take care of the child.[106]
- Secondly, workers and civil servants have the right to unpaid leave (*excedencia*) which can last until three years after the child's birth or after the adoption or fostering decision.[107]
- Thirdly, parents (both workers and civil servants), including adoptive and foster parents, of children younger than 12 can ask for a reduction in working time, in which case their salary is reduced proportionally.[108]
- Fourthly, parents, including workers and civil servants, can ask for a reduction in working time for the purpose of taking care of a child who is seriously ill, in which case the social security system guarantees that the worker receives 100 % of their previous full-time contribution base, which basically amounts to the full-time previous salary. However, this social security payment will only apply if both parents work.[109]

[104] After the cut-off date for this report Royal Decree 6/2019 of 1 March 2019 was approved which set out some changes in the regulation of these four parental leaves.

[105] The breastfeeding leave for workers is established in Article 37.5 of the Workers' Statute; The breastfeeding leave for civil servants is established in Article 30.1.e. of Law 30/1984, of 2 August 1984, www.boe.es/buscar/act.php?id=BOE-A-1984-17387.

[106] Before the Royal Decree 6/2019 of 1 March 2019 only one parent could have access to the breastfeeding leave. After the Royal Decree 6/2019, each of the parents of children younger than nine months old will have access to the breastfeeding leave. Another important innovation introduced by Royal Decree 6/2019 is that, if both parents have access to the breastfeeding leave, this will be extended until the child is 12 months old and, in that case, one of the parents will have the right to have this leave paid as a social security benefit. This is a mechanism to encourage both parents to participate in childcare.

[107] Unpaid leave for workers is established in Article 46.3 of the Workers' Statute; unpaid leave for civil servants is established in Article 29.4 of Law 30/1984, of 2 August 1984, www.boe.es/buscar/act.php?id=BOE-A-1984-17387.

[108] The reduction of working time for workers is established in Article 37.5 of the Workers' Statute; the reduction of working time for civil servants is established in Article 30.1.g of Law 30/1984, of 2 August 1984, www.boe.es/buscar/act.php?id=BOE-A-1984-17387.

[109] The reduction of working time for the purpose of taking care of a seriously ill child for workers is established in Article 37.6 of the Workers' Statute; the reduction of working time for the same purpose for civil servants is established in Article 49 of the Basic Statute of Civil Servants, Law 7/2007 of 12 April 2007.

5.5.5 Age limits

The age of the child to whom the parental leave applies depends on each type of leave in the terms described above

5.5.6 Individual nature of the right to parental leave

All parental leave options in Spain are granted individually, for each of the parents. At the time of the cut-off date for this report, the only type of leave which must be taken either by the father or by the mother, according to their choice, is the so-called breastfeeding leave.[110] By Law 3/2012, of 6 July 2012, Article 37.5 of the Workers' Statute was modified on the basis of the Roca Alvarez Case[111] so working parents (fathers or mothers) have equal access breastfeeding leave, given that it is in reality a parental leave. The rest of the parental leave can be taken without distinction and in full by women or men, without any possibility of a total or partial transfer to the other parent.

5.5.7 Transferability of the right to parental leave

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

5.5.8 Form of parental leave

Parental leave can take the following forms:

a) According to Article 37.5 of the Workers' Statute, breastfeeding leave (*permiso de lactancia*) can be used in three possible ways: firstly, the worker may be absent from work during each working day for an hour (or in two periods of half an hour each); secondly, the worker can arrive at work each day half an hour later or, alternatively, leave half an hour earlier; thirdly, the hours of the breastfeeding leave corresponding to the worker until the child is nine months old can be added up and taken in complete days if the worker so requests and as long it is established by collective agreement or accepted by the employer. The same applies to civil servants.
b) According to Article 46.3 of the Workers' Statute, the unpaid leave (*excedencia*) must be taken full-time. The same applies to civil servants.
c) According to Article 37.6 of the Workers' Statute, the reduction of working time must be taken daily. It can be determined by the worker, from a minimum of one eighth and a maximum of one half of their working day. No minimum or maximum applies to civil servants.
d) According to Article 37.6 of the Workers' Statute, the reduction in working time for the purpose of taking care of a child who is seriously ill can be determined by the worker. In this case the reduction must be at least half of the ordinary working day. The same applies to civil servants.

The unpaid leave (*excedencia*) can be freely taken when the worker decides. Since the right exists until the child reaches the age of three, the worker can apply for it on several occasions, returning to work in between. The concrete form of the breastfeeding leave or of the corresponding reduction of working time is also up to the worker, whose preferences take priority over the organisational needs of the employer. Only in extreme cases, of disproportionate harm to the company, could the employer alter this right. However, the

[110] Royal Decree 6/2019 of 1 March 2019 has established that each parent has the right to individual and non-transferrable leave for the care of a breastfeeding child.

[111] Judgement of 30 September 2010, Case C-104/09, *Pedro Manuel Roca Álvarez v Sesa Start España ETT SA*; in this judgement the CJEU established that the so-called breastfeeding leave in Spain was contrary to the Recast Directive because it constituted an ordinary parental leave. By establishing it as a preferential leave for mothers it had a discriminatory effect against women.

2012 law reform[112] has reduced the scope of this employees' right, since the unremunerated reduction of working time that can be requested, based on parental reasons, must be on a daily basis, which means that it is no longer allowed to apply for longer periods of a reduction of working time. In addition, the reform has introduced, for the first time, the possibility that collective agreements can establish concrete criteria for working time reductions. Before the 2012 reform there was a wide and almost absolute right of employees to establish the specific time when they wanted to take the leave. The current legislation means that the negotiators can decide the time within which the reduction of work time must be taken.

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

No length of work and/or length of service are required in order to benefit from parental leave. However, the social security payment established to guarantee 100 % of the worker's salary in the case of working time reduction for the purpose of taking care of a child who is seriously ill requires the same previous working time as that established to have access to maternity leave.[113]

5.5.10 Notice period

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

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

Article 46.3 of the Workers' Statute stipulates that, if both parents are workers at the same company and wish to take the unpaid parental leave (*excedencia*) simultaneously, the employer can establish limitations for organisational reasons. According to Article 37.5 of the Workers' Statute, the same applies to the reduction of working time.

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

There are no special arrangements for small firms.

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

In Spanish legislation, the only exceptional rule for access to parental leave to accommodate the needs of parents of children with a disability or a long-term illness is the reduction in working time for the purpose of taking care of a child who is seriously ill.[114]

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[112] Spain, Law 3/2012, 6 July 2012, on Urgent Measures for the Reform of the Labour Market, www.boe.es/boe/dias/2012/07/07/pdfs/BOE-A-2012-9110.pdf.

[113] Article 190 of the General Law of Social Security, www.boe.es/buscar/act.php?id=BOE-A-2015-11724; Article 49 of the Basic Statute of Civil Servants, Law 7/2007 of 12 April 2007, http://noticias.juridicas.com/base_datos/Anterior/r5-l7-2007.t3.html.

[114] Article 37.7 of the Workers' Statute and Article 49 of the Basic Statute of Civil Servants, Law 7/2007 of 12 April 2007, http://noticias.juridicas.com/base_datos/Anterior/r5-l7-2007.t3.html.

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

According to Article 48.4 of the Workers' Statute, in cases of international adoption, when the parents must travel in advance to the adopted child's country of origin is necessary, the period of suspension may be started up to four weeks before the resolution establishing the adoption.

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

There are at least four provisions in Spanish legislation which aim to protect workers who make use of parental leave. Firstly, if a dismissal takes place during any parental leave, under Article 108 of the Act Regulating Social Jurisdiction the dismissal will be considered null and void unless there is a justified reason, in the same terms as those governing pregnancy or maternity leave. A period of nine months after a child's birth is also protected by the nullity of the dismissal.[115] Secondly, under the same Act there is a shorter judicial procedure that aims to guarantee that any conflict between employee and employer about parental leave is resolved as soon as possible, so the worker can have access to their rights immediately (Article 139.1.b). Thirdly, the worker can ask for compensation of damages under the same Act (Article 139.1.a). Fourthly, under Articles 7.5 and 40.1.b of the Law on Offences and Penalties in the Social Order, the employer could be considered guilty of serious misconduct, in which case they could be ordered to pay an administrative sanction of EUR 626 to EUR 6 250.[116]

Theoretically, this protection framework is adequate but, in some specific cases, effective reparation of damages may not be guaranteed. This was true for a case that gave rise to the judgement of the European Court of Human Rights in *García Mateos v. Spain*, in which the Court established that Spain had to pay compensation of damages of EUR 16 000 to the worker who was unable to benefit from the parental leave which had been recognised by a Spanish Court since the child was too old to allow the working time reduction.[117]

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

Workers benefiting from any parental leave in Spain have the right to return to the same job or, if this is not possible, to an equivalent or similar job consistent with their employment contract or relationship. The situation of workers returning from unpaid leave is ambiguous in legislation: if a worker returns within one year of unpaid leave they have the right to return to the same job. If a worker returns after one year of unpaid leave they only have the right to 'similar' work. However, an employer has the right to move an employee to similar work, so long as the employee does not have to change residence and may, for example, move an employee to similar work the day after they return from unpaid leave. In practice, there is no difference between returning within or after one year of unpaid work. In addition, the Supreme Court has also expressly recognised that workers have the right to the same or a similar job upon their return.[118]

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

[116] Spain, Law on Offences and Penalties in the Social Order approved by Royal Legislative Decree 5/2000, of 4 August 2000, www.boe.es/buscar/doc.php?id=BOE-A-2000-15060.

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

[118] Judgement of the Supreme Court of 21 February 2013, appeal number 740/2012, ECLI: ES:TS:2013:1099: www.poderjudicial.es/search/contenidos.action?action=contentpdf&databasematch=TS&reference=6667409&links=&optimize=20130402&publicinterface=true.

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

Rights acquired or in the process of being acquired by the worker on the date on which parental leave starts are maintained as they stand until the end of the parental leave. In particular, during the unpaid leave the worker will maintain and increase their seniority.[119]

5.5.18 Status of the employment contract or relationship during parental leave

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

5.5.19 Continuity of entitlement to social security benefits

There is general continuity of entitlements to social security cover during a period of unpaid leave. Workers in this situation have the right to apply for pensions if they fulfil the requirements. Workers also have the right to healthcare. However, they cannot apply for maternity leave, paternity leave, unemployment or sickness leave.[120] For example, if a child is born during parental leave, this leave does not automatically turn into maternity leave for the mother; she would have to return to work for at least one day and then take maternity leave. Beneficiaries of breastfeeding leave and reductions in working time are active workers, so their social security rights are maintained.

5.5.20 Remuneration

The only parental leave remunerated by the employer (in the public as well as the private sector) is breastfeeding leave.

5.5.21 Social security allowance

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

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

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

a) The possibility for one parent to transfer part of the parental leave to the other parent does not exist in Spain. Breastfeeding leave has to be taken fully by the mother or by the father.[122] The remaining forms of parental leave can be taken fully by the mother and the father, even cumulatively.
b) Spanish legislation establishes the presumption that during unpaid leave there has been effective contribution to the social security system.[123]

[119] Article 46(3) of the Workers' Statute.
[120] Additional Provision 4 of Royal Decree 295/2009, of 6 March 2009.
[121] Royal Decree 6/2019 of 1 March 2019, approved after the cut-off date for this report, has established a social security allowance for part of the new leave for care of a breastfeeding child.
[122] After Royal Decree 6/2019 of 1 March 2019, approved after the cut-off date for this report, the leave for care of a breastfeeding child can be taken fully by the mother and the father, even cumulatively.
[123] Article 237 (1) of the General Law of Social Security.

c) During the first two years of the working time reduction the contribution to the social security system will be considered as if the worker had been working full-time. If the working time reduction is requested for the care of a seriously ill child the whole period concerned will also be considered as full-time contributions.[124]
d) Article 235 and Article 236 of the General Law of Social Security state a benefit of at least 112 additional days of contribution to social security when parents claim pensions. In order to have access to this special benefit the workers must have not worked for childcare reasons during a certain period. Only one parent is entitled to this. The benefit established in Article 235 of the general Law of Social Security applies only to mothers. Article 236 applies to both mothers and fathers.
e) Additional Provision 18 of the Workers' Statute stipulates that, in the case of the dismissal of a worker who was working part-time for family care-giving reasons, a dismissal indemnity will be calculated as if the worker was working full-time. Article 278 of the General Law of Social Security also states that the worker's unemployment insurance payment will be paid as if the last job was full-time. These two benefits give the worker the right to a higher dismissal indemnity and to a higher unemployment insurance payment.

5.5.23 Case law

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

1) The judgement of the Supreme Court of 25 April 2018 established that, in the case of the dismissal of a worker who was working reduced hours for childcare reasons, if the employer has to pay the salary that the worker would have received during the time elapsed from the dismissal until the sentence , the amount of these should correspond to the salary for full-time work.[125]
2) The judgement of the Supreme Court of 11 January 2018 stated that the dismissal without reason of a worker who was working reduced working hours for childcare reasons was null and therefore the employer was required to reinstate him to his job.[126]
3) The judgement of the Supreme Court of 14 June 2016 ruled that the benefit of 112 additional days of social security contributions granted to the mother when she claims a pension still applies, even if the birth took place outside Spain and even if the birth had happened before the mother worked for the first time.[127]

5.6 Paternity leave

5.6.1 Existence of paternity leave in national law

Paternity leave has been subject to important changes in recent years. In fact, after the cut-off date for this report it was altered again.[128] Until 31 December 2016, paternity leave lasted for 13 continuous days. From 1 January 2017 paternity leave was extended to four weeks. Law 6/2018, of 3 July 2018 (Final Disposition 38) changed Article 48.7 of the Workers' Statute and extended paternity leave from four weeks to five weeks. The same

[124] Article 237 (3) of the General Law of Social Security.
[125] Judgement of the Supreme Court of 25 April 2018, appeal number 2152/2016, ECLI: ES:TS:2018:2329: www.poderjudicial.es/search/contenidos.action?action=contentpdf&databasematch=TS&reference=8436528&statsQueryId=106645227&calledfrom=searchresults&links=&optimize=20180629&publicinterface=true.
[126] Judgement of 11 January 2018, appeal number 726/2016, ECLI: ES:TS:2018:89: www.poderjudicial.es/search/contenidos.action?action=contentpdf&databasematch=TS&reference=8269664&statsQueryId=106645746&calledfrom=searchresults&links=&optimize=20180126&publicinterface=true.
[127] Judgement of the Supreme Court of 14 June 2016, appeal number 215/16.
[128] Royal Decree 6/2019 of 1 March 2019 eliminated the old maternity and paternity leave and unified them into a single birth-related leave, of equal duration for mother and father. However, full equality will not be achieved until 2021. Until then, the birth-related leave corresponding to the father or to another parent other than the mother will be progressively increased: in 2019 it will be extended to eight weeks; and in 2020 it will be extended to 12 weeks.

was established for civil servants (Article 49.c) of the Basic Statute of the Public Employee). This was the regulation that applied in 2018. Paternity leave is a social security benefit, so it is paid by the State.[129] During paternity leave employees are entitled to remuneration equivalent to 100 % of the previous month's social security contribution base (*base de cotización*).[130] The contribution base for the previous month is usually the same amount as the salary for the previous month, so workers on paternity leave basically receive the same amount as they received when they were actively working.

At the time of the cut-off date for this report, paternity leave could be taken in two parts, so the fifth week could be taken separately during a period of nine months after the birth of the child. To do this, however, it is necessary to reach an agreement with the employer. Paternity leave can be taken part-time if this is established by collective agreement or if the employer accepts it, but the worker must reduce their previous working hours by at least half. Although this leave is intended for the father, the provision is drafted in neutral terms so as to be compatible with family structures where both parents are of the same sex. A minimum period of previous working time is required in order to have access to the related social security compensation: 180 days during the previous seven years or 360 days at any time. Paternity leave applies to adoption or fostering as well (as in the case of maternity leave).

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

Spanish legislation establishes the same protection against dismissal for workers who take paternity leave as that established for workers who take maternity leave.[131] Dismissal during paternity leave will be considered null and void except when the reason for the dismissal is a serious fault on the part of the worker or when the dismissal is objectively necessary, such as for economic or technical reasons.

5.6.3 Case law

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

5.7 Time off/care leave

5.7.1 Existence of care leave in national law (Clause 7 of Directive 2010/18)

Article 37.3.b of the Workers' Statute establishes a two-day paid leave when a second-degree relative dies, has an accident, becomes seriously ill, needs to be hospitalised or undergoes a surgical intervention that does not require hospitalisation. All of these are quite serious situations. This paid leave is extended to four days if the worker needs to travel to another town. The entitlement to such time off from work is not limited to a certain amount of time per year and/or per case. However, time off from work on the grounds of *force majeure* cannot be considered fully guaranteed, at least as required by Clause 7 of Directive 2010/18/EC, because there is no general leave applicable in cases of sickness or accident 'that makes the immediate presence of the worker indispensable' if they are not as serious as Article 37.3.b. of the Workers' Statute requires.

5.7.2 Case law

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

[129] Articles 183, 184 and 185 of the General Law of Social Security, www.boe.es/buscar/doc.php?id=BOE-A-2015-11724.
[130] Article 179 of the General Law of Social Security, www.boe.es/buscar/doc.php?id=BOE-A-2015-11724.
[131] Article 55.5 of the Workers' Statute.

5.8 Leave in relation to surrogacy

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

With regard to maternity leave, the Supreme Court has allowed that the intended father or mother in the case of a surrogate pregnancy can access maternity leave under the terms established for adoptive parents, even if the adoption has not formally taken place. This question raised some public debate at the time because surrogacy is not legal in Spain. However, the Supreme Court considered that, despite the illegality of the situation, and by analogy with regard to maternity leave by adoption, the intended father or mother in the case of a surrogate pregnancy has the right to maternity leave.[132]

5.9 Flexible working time arrangements

5.9.1 Right to reduce or extend working time

Parents (both workers and civil servants), including adopting and fostering parents, of children younger than 12 can ask for a reduction in working time, in which case their salary is reduced proportionally. No eligibility criteria applies. A person who takes direct care of a child can use the reduction in working time as well, even if they are not the father, mother or foster parent.[133] The reduction in working time also applies to the care of first and second degree relatives who are dependent on the worker. In this case the working time reduction can last a maximum of two years, unless otherwise stipulated in the collective agreement. The reduction of working time for the care of children or dependants is not tied to any specific trigger. The employer cannot refuse to comply with the working time reduction requested by the employee. However, if two or more workers at the same company exercise this right for the same individual, the employer may limit their simultaneous exercise for justified company operational reasons. Once the working time reduction expires, the worker has the right to return to the same working conditions they had before. Spanish law does not foresee anything in particular to encourage men to make use of reductions in working time.

5.9.2 Right to adjust working time patterns

At the time of the cut-off date for this report Spanish law did not provide workers with any legal right to adjust working time patterns on request.[134] In 2018 Article 34.8 of the Workers' Statute only recognised the worker's right to working time adjustments for family care reasons if this was expressly established in a collective agreement or if it was accepted by the employer. It is not usual that collective agreements establish any right to facilitate working time adjustments. The only measure that appears in some collective agreements to facilitate reconciliation of responsibilities is the granting of specific parental leave permissions. For instance, the national collective agreement applicable to banks establishes the right of workers with family responsibilities to unpaid leave of between one week and one month in length.[135]

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

[133] The reduction of working time for workers is established in Article 37.6 of the Workers' Statute.

[134] Royal Decree 6/2019 of 1 March 2019 stated the right of the worker with responsibilities for the care of children under 12 years of age or dependants for their working day to be adapted to their needs. A reasonable adjustment between the needs of the worker and the organisational needs of the company must be sought and, in any case, the employer must justify any refusal. Before the Royal Decree, workers lacked the right to have their working day adapted to their needs related to the care of children or dependants.

[135] *Convenio colectivo de Banca*, www.fesugt.es/documentos/pdf/sector-financiero/convenios/banca/convenio_banca_2011_2014.pdf.

5.9.3 Right to work from home or remotely

Spanish law does not provide workers with a legal right to work from home or remotely.

5.9.4 Other legal rights to flexible working arrangements

There was no legal right to flexible working arrangements in Spanish legislation in 2018. Article 34(8) of the Workers' Statute stipulated that certain types of flexible time arrangements will be promoted such as the continuous working day (without interruption for lunch), flexible working hours or other kinds of working time organisation in order to improve employees' work compatibility with their personal and family life. However, the Article did not contain any obligations or rights in this respect, so it cannot be used by the employee to support any time adjustment.

5.9.5 Case law

The Spanish Constitutional Court has declared that an effective balance between work and family life is an aim of constitutional importance that must be taken into account when interpreting and applying the law.[136] However, the Supreme Court established that the right to choose the time for the working time reduction as established in Article 37.7 of the Worker's Statute which was in force in 2018 did not allow the right to any other working time adjustment.[137] Spanish legislation in 2018 could be in violation of Clause 6 of Directive 2010/18/EC because nothing has been established in order to guarantee that employers shall consider and respond to requests for changes to parents' working hours and/or patterns for a set period of time when they come back to work after parental leave.

5.10 Evaluation of implementation

From the author's point of view, Spanish legislation fails to comply with the minimum requirements of Directive 2010/18/EU in the following respects:

a) Nothing has been established in order to guarantee that employers shall consider and respond to requests for changes to parents' working hours and/or patterns for a set period of time when they come back to work after parental leave.[138] This could be in violation of Clause 6 of Directive 2010/18/EU. Certainly, in the *Rodriguez Sanchez* Case[139] the CJEU did not expressly recognise what the claimant was requesting (a schedule adjustment), but the CJEU judged that the case submitted could not be considered to be included within the scope of the Directive, since the worker did not ask for the adjustment after returning from parental leave (as required by the Directive) but rather after returning from maternity leave. It could thus be said that the CJEU has not yet been confronted with this issue.

b) Time off from work on the grounds of *force majeure* cannot be considered as completely guaranteed by Spanish law, at least as required by Clause 7 of Directive 2010/18/EU, because there is no general permission applicable in cases of sickness or accident 'that makes the immediate presence of the worker indispensable'. Article 37.3.b of the Workers' Statute establishes a two-day paid leave when a second-degree relative dies, has an accident, becomes seriously ill, needs to be hospitalised or undergoes a surgical intervention that does not require hospitalisation, but no leave is recognised, not even unpaid, in cases of sickness or accident 'that makes the immediate presence of the worker indispensable'. Article 52 of the Workers'

[136] Judgement 26/2011 of the Constitutional Court of 14 March 2011, ECLI:ES:TC:2011:26: http://hj.tribunalconstitucional.es/es-ES/Resolucion/Show/6808.

[137] Judgement of the Supreme Court of 13 June 2008, Appeal No. 897/2007; after Royal Decree 6/2019, of 1 March, this interpretation could change.

[138] This has been changed by Royal Decree 6/2019, of 1 March 2019.

[139] Judgement of 16 June 2016, C-351/14, *Estrella Rodríguez Sánchez v Consum Sociedad Cooperativa Valenciana*.

Statute states that employers may dismiss workers due to lack of attendance at work, if they exceed a certain number of absences from work. Given that in Spanish legislation there is no general leave applicable in cases of sickness or accident of a child 'that makes the immediate presence of the worker indispensable', this could end in dismissal for lack of attendance

c) Spanish legislation does not consider the interests of workers in specifying the length of notice periods for parental leave as required by Clause 3.2 of Directive 2010/18/EU, since nothing is established in this respect and collective agreements can freely establish them.

5.11 Remaining issues

Apart from the types of parental leave referred to above, in Spain two additional types of leave exist for the care of relatives: firstly, workers have the right to unpaid leave for the care of a relative (up to second degree) who, for health or age reasons, need to be cared for. This period of leave can last for a maximum of one year (unless otherwise established by a collective agreement).[140] Secondly, workers can ask for a reduction in working time for the care of a relative (up to second degree) who for reasons of age or illness cannot take care of themselves, in which case the worker's salary is reduced proportionally.[141] The time reduction cannot be less than an eighth or greater than half of the previous working time and lasts as long as the circumstance that originated the right to time reduction

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

1) Although it seems that maternity leave has a correct scope of application, some women could have problems with claiming maternity leave when they are on unpaid leave. Workers in this situation have the right to apply for pensions and other social security benefits. However, from unpaid leave they cannot apply for maternity leave, paternity leave, unemployment or sickness leave.[142] As a consequence, if a child is born during parental leave, this leave does not automatically turn into maternity leave for the mother; she would have to return to work for at least one day and then take maternity leave (the same happens in the case of paternity leave).

2) Maternity leave is a social security benefit which consists of a payment equivalent to 100 % of the previous month's social security contribution base (*base de cotización*).[143] The contribution base for the previous month is usually the same amount as the salary for the previous month, so most workers on maternity leave basically receive the same amount as they received when they were actively working. However, this base has a maximum, so women with high salaries will not receive 100 % of their previous salaries. Considering that women in high-level positions are the ones who receive more pressure to come back to work before the end of their maternity leave, the fact of not receiving their whole salary during maternity leave could have an extra deterrent effect on taking maternity leave.

3) The most important threat to the enforcement of the prohibition of discrimination and/or unfavourable treatment (in particular indirect sex discrimination) in relation to the take-up of parental and/or adoption leave in Spain has been the Spanish law

[140] Article 46.3 of the Worker's Statute.
[141] Article 37.6 of the Worker's Statute.
[142] Additional Provision 4 of Royal Decree 295/2009, of 6 March 2009 https://www.boe.es/boe/dias/2009/03/21/pdfs/BOE-A-2009-4724.pdf.
[143] Article 179 of the General Law of Social Security, https://www.boe.es/buscar/act.php?id=BOE-A-2015-11724.

reform of 2012,[144] which has reduced the rights of workers in relation to their working time and has increased the powers of employers. This situation could have a severe impact on the vulnerability of people on parental and adoption leave. Firstly, the 2012 law reform has reduced the scope of employees' accessing part-time work for family reasons since the unremunerated general reduction of working time which can be requested must be applied on a 'daily' basis, which means that it is no longer allowed to use this option for longer periods of time (for instance, half of the week; or one third of the month). Secondly, the 2012 law reform introduced, for the first time, the possibility that collective agreements can establish criteria for the concrete determination of working time reduction. Before the 2012 reform there was a wide and almost absolute right for employees to establish their own specific time arrangements. The 2012 changes to the legislation mean that the negotiators can decide when the reduction of working time could take effect. Thirdly, the 2012 legal reform has also increased the percentage of working time that can be freely rearranged by the employer if the collective agreement doesn't establish any limit (Article 34.8 of the Workers' Statute). Finally, other powers of the employer have been increased as well with the 2012 legal reform, with the possibility of unilaterally changing substantial conditions of the employment contract (Article 41 of the Workers' Statute), including work centre transfers involving changes of residence (Article 40 of the Workers' Statute). All this could have the effect of expelling people from the labour market who cannot make their various work and family responsibilities compatible with each other (although there are no data available in this respect). The legislation does not establish any guarantee or preference or benefit in favour of people with dependants which counteracts the new powers of the employer.

4) Another problem has arisen in relation to the increased powers of employers to change individual working conditions, including when they need to be agreed with the employees' representatives at company level. In this way, taking as a reference Article 41 of the Workers' Statute, the Supreme Court has denied the possibility of individuals challenging, even for reasons of discrimination, the agreement that was reached at company level between the employer and employees' representatives to change substantial conditions of labour contracts due to economical, technical, productivity or organisational reasons. This was because Article 41 of the Workers' Statute (after the 2012 law reform) stipulates that the agreement reached in this way may not be challenged other than for fraud or abuse of rights. As a consequence, when an attempt was made to challenge one of these agreements because it was affecting mostly workers with family responsibilities, so it could be discriminatory, the Supreme Court responded that Article 41 of the Workers' Statute did not allow the agreement to be nullified except due to fraud or abuse of rights.[145]

5) In some particular cases, effective reparation of damages may not have been properly guaranteed. This was true for a case that gave rise to the judgement of the European Court of Human Rights in *García Mateos v. Spain*, in which the Court established that Spain had to pay compensation for damages of EUR 16 000 to a worker who was unable to benefit from the parental leave which had been recognised by a Spanish Court since the child was too old to allow the working time reduction.[146]

6) The paternity leave that was in force in 2018 was too rigid. Firstly, the paternity leave had to be taken at the same time as the maternity leave or immediately after

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

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

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

the mother had taken her maternity leave. Secondly, paternity leave had to be taken on a part-time basis (as a reduction of working time) only if it was established in the collective agreement or by agreement with the employer, and only if the reduction in working hours was greater than 50 %. If the leave was more flexible it would probably be more used.[147]

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

[147] Royal Decree 6/2019 has increased the flexibility of paternity leave (or birth-related leave corresponding to the parent other than the mother) in certain aspects. For example, after the first six weeks, birth-related leave can be divided into periods of complete weeks and can be used discontinuously until the child is 12 months old. However, Royal Decree 6/2019 has added other elements of rigidity. For example, the first six weeks of leave after delivery are compulsory and must be used simultaneously by father and mother.

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

6.1 General (legal) context

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

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

6.1.2 Other issues related to gender equality and social security

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

6.1.3 Political and societal debate and pending legislative proposals

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

6.2 Direct and indirect discrimination

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

The Spanish regulation on pension plans is the Royal Legislative Decree 1/2002, of 29 November 2002.[148] Article 4 of this Royal Legislative Decree establishes the possibility for an employer or group of employers to promote a pension plan for their employees. It is also possible that they join existing pension plans. In most cases these commitments acquired by the employer in the matter of pension plans are contained in a collective labour agreement, although they may arise independently of any collective labour agreement. They are considered improvements to the basic statutory schemes and therefore they are not used in all sectors of the economy or in all companies. Royal Legislative Decree 1/2002 does not expressly establish the prohibition of direct or indirect discrimination on the ground of sex, although this prohibition follows implicitly from Article 14 of the Spanish Constitution. Collective agreements must also respect the constitutional principle of equality and the prohibition of discrimination on the ground of gender. The promise (pension obligations) established in the collective agreement should be guaranteed through collective insurance or occupational pension schemes. All employees, including those with a special labour contract, can participate in occupational pension schemes, as one of the principles on which the occupational pension schemes are based is a general prohibition of discrimination in access to them.

6.3 Personal scope

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

6.4 Material scope

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

[148] Spain, Royal Legislative Decree 1/2002, of 29 November 2002, https://www.boe.es/buscar/act.php?id=BOE-A-2002-24252.

6.5 Exclusions

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

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

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

6.7 Actuarial factors

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

6.8 Difficulties

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

6.9 Evaluation of implementation

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

6.10 Remaining issues

There are no remaining issues in this respect.

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

7.1 General (legal) context

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

There are no official surveys on social security and its relation to gender. There are only general data about employment rates, activity rates, average amount of pensions, etc. prepared by the National Statistics Institute and by the Ministry of Labour, Migrations and Social Security (Labour Statistics Bulletin).[149] These official data are presented without analysis and without reference to gender, although many of them are differentiated between men and women. The pension gap between women and men, taking average pensions as reference, was 35 % in 2018.

7.1.2 Other relevant issues

Analysis of the official data in relation to gender has been carried out by researchers.[150] According to these studies some of the most common problems in female careers which have a negative impact on access and the amount they receive in retirement pension include their greater presence in part-time jobs compared to men, to the reduced amount of time they spend in paid work due to performing tasks of domestic organisation and raising children, the perception of lower wages and the gaps in their careers due to caring for children and relatives (discussed in detail in the corresponding sections of this report).

7.1.3 Overview of national acts

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

7.1.4 Political and societal debate and pending legislative proposals

In recent years, the Spanish social security system has been subject to great social and political debate. The Spanish Constitution establishes that social security must guarantee sufficient benefits for all citizens, which is understood as a mandate to the public authorities to guarantee the maintenance of the public pension system. However, the reduction in the birth rate, the high unemployment rate and the large number of pensioners threatens the system. In 2011 there was a legislative change which tightened the requirements for access to pensions, requiring more years of contribution and establishing a later retirement age.[151] This law also provided for the amount of pensions to be adjusted according to general life expectancy and the means available to the social security system at any given time. This adjustment was made through law 23/2013, of 23 December 2013, which established the so-called 'sustainability factor' which should begin to be applied to all pensions as of 1 January 2019. However, given the social debate, the entry into force of the sustainability factor was postponed to 2023.

[149] Labour Statistics Bulletin of the Ministry of Labour, Migration and Social Security, www.mitramiss.gob.es/estadisticas/bel/welcome.htm.

[150] For example, Alaminos, E. (2018) 'La brecha de género en las pensiones contributivas de la población mayor española' ('The gender gap in contributory pensions of the Spanish elderly population'), *Panorama Social*, 27, pp. 119-135.

[151] Spain Law 27/2011, of 1 August 2011, www.boe.es/boe/dias/2011/08/02/pdfs/BOE-A-2011-13242.pdf.

In 2018 a bill on pension reform was presented by the Podemos party. However, it did not proceed due to general elections being called in 2019. The main objective of this law was to ensure the maintenance of the purchasing power of pensions and to correct defects in financing the system. The debate about the future of pensions has a long history In 1995, the so-called Toledo Pact was signed by the political parties which were then part of the Congress of Deputies. It was a commitment that sought to establish guidelines for the reform of the pension system in Spain. In that pact, a brief reference was made to the situation of women in the social security system. Specifically, it was established that equal wage compensation should be ensured for women and men and that measures should be established to ensure the reconciliation of responsibilities. Although there have been several attempts to update the Toledo Pact, this has never been achieved. The last attempt took place in 2018, although the agreement of all the parties in the Parliament was not obtained, which is why the pact failed. It should be noted, however, that the pieces of legislation which have been approved in terms of social security have not taken into account any gender repercussions. In fact, as explained below, there have been regulatory changes which have been forced by judgements of the CJEU on discrimination against women in Spanish social security regulations.

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

Spain has no specific legislation that expressly transposes Directive 79/7/EEC, not even an article that expressly stipulates the prohibition of gender discrimination in statutory social security schemes. However, Article 14 of the Constitution, which prohibits gender discrimination in general, also applies to social security. Apparently, Spanish legislation complies with Directive 79/7/EEC. However, the existence of indirect discrimination in Spain was detected by the CJEU in the *Elbal* case in relation to the requirements regarding contributory pensions which apply to part-time workers.[152] Spanish legislation has been changed in accordance with the CJEU's ruling, so currently the minimum period of work required for access to pensions must be reduced proportionally depending on the duration of the working day of each part-time worker.[153] In the *Espadas Recio* case the CJEU also stated that the way in which unemployment insurance was determined for part-time workers in Spain constituted indirect discrimination on grounds of sex.[154] After the *Espadas Recio* case the Spanish legislation was corrected again, so as not to penalise part-time workers when they intend to access unemployment benefit.[155]

7.3 Personal scope

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

7.4 Material scope

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

7.5 Exclusions

There are some legal mechanisms in favour of people who have taken care of children which could be within the scope of Article 7(1)(b) of Directive 79/7/EEC, in the sense that

[152] Judgement of 22 November 2012, C-385/11, *Isabel Elbal Moreno v. Instituto Nacional de la Seguridad Social (INSS) and Tesorería General de la Seguridad Social (TGSS)*.
[153] Article 247 of the General Law of Social Security, www.boe.es/buscar/doc.php?id=BOE-A-2015-11724.
[154] Judgement of 9 November 2017, C-98/15, *Espadas Recio v. Servicio Público de Empleo Estatal (SPEE)*.
[155] Spain, Royal Decree 950/2018, of 27 July 2018, www.boe.es/diario_boe/txt.php?id=BOE-A-2018-10652.

they are advantages in respect of old-age pension schemes granted to people who have brought up children. They are the following: (i) Article 237 of the General Law of Social Security establishes that during unpaid leave there is effective contribution to the social security system; (ii) It is also established in Article 237 of the General Law of Social Security that during the first two years of working time reduction for family care the contribution to the system is considered as if the individual was working full-time; (iii) Article 236 of the General Law of Social Security lays down a benefit of at least 112 additional days of social security contributions when parents claim pensions. This benefit can apply to mothers or fathers; (iv) Article 235 of the General Law of Social Security also lays down a benefit of at least 112 additional days of contributions when claiming a pension, which applies only to women who have given birth; (v) Article 60 of the General Law of Social Security lays down a pension supplement exclusively applicable to mothers of at least two children. The supplement also applies to the mothers of adopted children. No equivalent measure is available to fathers who were responsible for taking care of their children. The supplement is an increase of between 5 and 15 % of the pension and may exceed the maximum pension established in the social security system.

7.6 Actuarial factors

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

7.7 Difficulties

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

7.8 Evaluation of implementation

Social security legislation has historically established, and continues to establish, a clear differentiation in access to pensions and benefits for full-time workers and part-time workers. There have been some attempts to harmonise the two systems but differences still exist. In fact, some of the corrections which have occurred recently, motivated by the need to implement judgements of the CJEU, have not produced full equality between full-time and part-time work in social security, but have been limited to modifying aspects which in each case had been submitted to the CJEU and which had been declared contrary to EU regulations. In this way, after the ruling in the *Elbal Moreno* case, the social security regulations were specifically amended in relation to the system of access to pensions, replacing the old system of access to pensions for part-time workers with another system specific to them (proportionality factor), without carrying out a full comparison. This is the reason why a new preliminary ruling against the new regulation was raised in 2018. The same can be said regarding the one-off correction made to the Spanish regulations after the sentence handed down in the *Espadas Recio* case.

There is also a concrete problem in relation to the supplementing of pensions which is established in Article 60 of the General Law of Social Security. This supplement is not really intended to compensate for the negative effects in social security for women as a result of the birth of children. The supplement is, instead, a benefit established to compensate for the impairment of their professional careers that women suffer as a result

of caring for their children. Spanish legislation has not considered that these impairments can also occur for men who care for their children. Certainly Article 7 of Directive 79/7/EEC allows Member States, 'to exclude from its scope ... (b) advantages in respect of old-age pension schemes granted to persons who have raised children'. However, Article 7.2 of Directive 79/7/EEC establishes that, 'Member States shall periodically examine matters excluded under paragraph 1 in order to ascertain, in the light of social developments in the matter concerned, whether there is a justification for maintaining the exclusions concerned'. The pension supplement implies a difference between mothers and fathers who take care of children which could be in violation of Article 7.2 of Directive 79/7/EEC, since these differences should tend to disappear, not be newly established as has happened in Spain.

7.9 Remaining issues

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

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

8.1 General (legal) context

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

In December 2018, the number of self-employed people was 3 254 663, a figure that represents an increase of 49 986 people (1.56 %) with respect to the same month in 2017. Of these, 64.5 % (2 101 826) were male and 35.5 % (1 157 061) female. The total number of people involved in family businesses was 197 495. Compared to 2007, there has been a significant increase in the number of self-employed women over the age of 35 years, with a greater number among those aged 50 and over, whereas among men the number has only increased among those over 50. These data indicate that the number of self-employed workers has increased significantly for those groups in which the unemployment rate is higher (women and older workers). This could suggest that the option for self-employment may not be a voluntary option in many cases, although there are no data in this regard.[156]

8.1.2 Other issues

According to the legislation (Article 310 of General Law of Social Security), self-employed workers can choose the basis on which they contribute to social security and 86 % have decided to contribute the minimum rate, in order to reduce their costs.[157] This has an impact on the amount of their pension, which is determined by the level of the contribution base.

8.1.3 Overview of national acts

The legislation that currently regulates the situation of self-employed workers in Spain is the Self-Employed Workers' Statute (*Estatuto del Trabajador Autónomo).*[158] This law was approved due to the increase in the number of self-employed workers and the need to have a standard that guarantees their rights. The Self-Employed Workers' Statute guarantees the right of the self-employed to the prevention of occupational hazards, the association in defence of their interests, social protection, economic guarantees, etc. In the field of social security, the self-employed are included in the system through a special regime currently regulated in Title IV of the General Law of Social Security. Historically, the trend has been to increase social security protection for self-employed workers to a level similar to that of employed workers. Currently, self-employed people are entitled to sick leave, maternity leave, paternity leave and coverage for work accidents and occupational diseases and cessation of activity (similar to unemployment benefit), as well as pensions and other social security pensions on almost the same terms as employed workers.

8.1.4 Political and societal debate and pending legislative proposals

Currently, the great debate about self-employment gravitates around their contribution to social security. Given that the amount of the base for which social security is paid is freely chosen by each self-employed person, the vast majority choose the minimum amount. This is a very low amount for the self-employed with a high level of income but quite high for those self-employed people who work part-time. In the area of benefits and pensions

[156] Ministry of Labour, Migration and Social Security, (*Datos estadísticos de afiliación del trabajo autónomo a 31 de diciembre de 2018*), www.mitramiss.gob.es/es/sec_trabajo/autonomos/economia-soc/NoticiasDoc/NoticiasPortada/Nota_Autonomos_Afiliacion_diciembre_2018.pdf.

[157] Ministry of Labour, Migration and Social Security, (*Datos estadísticos de afiliación del trabajo autónomo a 31 de diciembre de 2018*), www.mitramiss.gob.es/es/sec_trabajo/autonomos/economia-soc/NoticiasDoc/NoticiasPortada/Nota_Autonomos_Afiliacion_diciembre_2018.pdf.

[158] Spain, Law 20/2007, of 11 July 2007, www.boe.es/diario_boe/txt.php?id=BOE-A-2007-13409.

received, a serious problem also arises because pensions are very small. It has been tried on several occasions to accommodate the contribution to the real earnings of the self-employed but this has never been achieved. There have been no legal proposals in this regard.

8.2 Implementation of Directive 2010/41/EU

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

8.3 Personal scope

8.3.1 Scope

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

8.3.2 Definitions

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

8.3.3 Categorisation and coverage

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

8.3.4 Recognition of life partners

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

8.4 Material scope

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

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

8.4.2 Material scope

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

8.5 Positive action

There are several benefits that could be considered positive action since they intend to promote women's self-employment. One of them is the programme of corporate support for women, funded by the European Social Fund and the Ministry of Equality. It is a programme aimed at women who want to run a business or who, having already started a business, are looking for support for its implementation and/or consolidation. Most of the services offered by the programme are primarily dedicated to giving free advice to self-employed women.[159] Some regions have also established benefits for the promotion of female self-employment, including subsidies and access to credits.[160]

Another positive action measure for self-employed women in Spain is the establishment of discounts on their social security contributions:[161]

a) There is a discount for self-employed mothers returning to work after maternity leave or parental leave based on which they could qualify for a reduced contribution (EUR 60 per month) to social security for 12 months after their return to work.
b) Self-employed workers who, during the period of maternity leave, adoption, foster care, parenting, risk during pregnancy or risk during breastfeeding, have been replaced in their activity by an unemployed worker are entitled to a discount of 100 % of their monthly contribution to social security. The self-employed worker has the right to a 100 % discount of the social security contribution for the replacement as well. Both discounts are applied only if the self-employed person is replaced, since one of the objectives of this measure is to generate employment.
c) There is a discount of 100 % of the social security contribution for a maximum period of 12 months to care for a child under 12 years of age or a family member up to the second degree (by affinity or consanguinity) with dependency or disability, provided that the self-employed person hires a worker to substitute him/her.
d) A 50 % discount on the self-employed person's contribution applies to the family members of the self-employed worker who habitually, personally and directly work with the self-employed person if they live with them. The discount applies during the

[159] *Cámara de comercio de España*, https://empresarias.camara.es/.
[160] For instance, in Andalusia, see: http://www.juntadeandalucia.es/institutodelamujer/index.php/empleo-y-empresas/actuaciones-dirigidas-a-emprendedoras-y-empresarias.
[161] Law 6/2017, of 24 October 2017, https://www.boe.es/buscar/pdf/2017/BOE-A-2017-12207-consolidado.pdf.

first 18 months after the family member begins their activity. The purpose of this measure is to encourage the contribution of those family members of the self-employed person, primarily spouses and children, who are currently not registered, despite working in the family business, due to the economic difficulties that the crisis has caused in many small businesses. However, this benefit has not served to significantly increase the number of relatives who are registered. This is probably because the benefit has a very limited duration (18 months).

A series of positive action measures are recognised for the benefit of self-employed women who have been victims of gender violence. Article 21.5 of the Gender-Based Violence Law[162] states that if women have to cease their activity as a result of violence against them, they will be entitled to the period of suspension of their activity being considered as contributed for the purposes of future social security benefits, with a limit of six months. In addition, economically dependent self-employed workers (*TRADE*) who were victims of gender-based violence also have the right to changes in working hours or working conditions in order to increase their safety (Article 14.5 of the Self-Employed Workers' Statute).

8.6 Social protection

Self-employed workers are included in the Spanish system of social security. The way in which the contributions are made is rather unusual, since self-employed workers are free to declare the income which will be relevant in determining their monthly contribution.[163] This declared income will determine the amount of future benefits (including pensions). The self-employed are entitled to the following social security benefits: healthcare (including medical and pharmaceutical coverage), sick leave (which guarantees between 60 and 75 % of previously declared income), maternity leave, paternity leave and leave due to risk during pregnancy and/or breastfeeding (which guarantees 100 % of previously declared income), pension due to permanent disability (which guarantees a percentage of the previously declared average income depending on the degree of disability), retirement pension (which guarantees a percentage of the previously declared average income depending on the amount of years of contribution to the system of social security), widow's or widower's pension (which guarantees to the widow or widower –including life partners – of a deceased self-employed person a percentage of their previously declared average income) and cessation of activity benefit (or unemployment insurance) only if the self-employed chose to include this voluntary benefit and made the relevant contributions. There is only one system of social protection for self-employed people, although some slight peculiarities have been established for agricultural workers and for maritime workers. These peculiarities are basically related to organisational and bureaucratic matters. Social security is mandatory for spouses who work in the family business. Only occasional work by spouses is excluded from the system of social security

8.7 Maternity benefits

Maternity benefit for self-employed women is recognised in Spain in the same way as it is recognised for employees (100 % of the previously declared income for 16 weeks).[164] The coverage and contributions are compulsory for self-employed women, but only the first

[162] Article 21.5 of Organic Law 1/2014 of 28 December 2014, for Integral Protection Against Gender Violence, www.boe.es/buscar/pdf/2004/BOE-A-2004-21760-consolidado.pdf.

[163] According to Decree 2530/1970, of 20 August 1970, www.boe.es/buscar/pdf/1970/BOE-A-1970-1000-consolidado.pdf.

[164] After the cut-off date for this report (31 December 2018), the Royal Decree 6/2019 of 1 March 2019 established important changes in the maternity leave regulations that also affected self-employed women. From April 2019 maternity leave and paternity leave will be replaced by a unique birth-related leave with similar features for each parent. However, full harmonisation of leave for both parents will not be effective until 2021. Another important feature of the birth-related leave established by Royal Decree 6/2019 is that, after the first mandatory six weeks after childbirth, the rest of the leave can be broken up and taken as full weeks until the child is 12 months old.

six weeks after the birth have to be taken by the mother. The allowance can be considered sufficient, since it would be at least the same amount as she would receive in the event of a break in her activities on grounds connected with her state of health. However, given that self-employed people are allowed to declare an income lower than their real income,[165] the maternity allowance hardly serves to replace the loss of the previous income. In fact, self-employed women tend to go back to work immediately after the compulsory six weeks of leave after birth, dispensing with the rest of their maternity leave. There are no services supplying temporary replacements or other kinds of social services, other than the discounts to the social security contribution if the self-employed woman hires someone to replace her during her maternity leave. Spain has not used the option, as provided for in the last sentence of Article 8(4) of Directive 2010/41/EU, to provide for access to those services to be an alternative or part of the allowance.

8.8 Occupational social security

8.8.1 Implementation of provisions regarding occupational social security

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

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

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

8.9 Prohibition of discrimination

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

8.10 Evaluation of implementation

In the opinion of the author, Spanish Law correctly implements Directive 2010/41/EU and the Recast Directive in the matter of equality gender applied to self-employed workers. It cannot be said, however, that Spanish legislation goes beyond European Union law, nor that it has dealt with specific aspects of the Spanish reality related to the activity of self-employed workers in matters of gender equality.

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

8.11 Remaining issues

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

9 Goods and services (Directive 2004/113)

9.1 General (legal) context

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

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

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

In the opinion of the author, the collaborative economy incorporates new causes of indirect discrimination in the workplace on the grounds of sex, since it increases the level of availability that the worker must have to maintain their employment. In the opinion of the author, the application of algorithms when selecting workers, promoting them or establishing working conditions inevitably reproduces social stereotypes. Therefore, specific legislation should be established for this type of work to eliminate these dangers and guarantee effective equality in the company between women and men. However, in Spain such legislation has not been drafted.

9.1.3 Political and societal debate

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

9.2 Prohibition of direct and indirect discrimination

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

9.3 Material scope

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

9.4 Exceptions

The exceptions regarding the material scope as specified in Article 3.3 of Directive 2004/113/EC, with respect to the content of media, advertising and education, have not been implemented in Spanish legislation. Spanish legislation includes no provisions to exclude media, advertising and education from the material scope of the principle of non-discrimination in the access to goods and services, so the principle of gender equality fully applies in these areas as well.

9.5 Justification of differences in treatment

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

9.6 Actuarial factors

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

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

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

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

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

9.9 Specific problems related to pregnancy, maternity or parenthood

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

9.10 Evaluation of implementation

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

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

9.11 Remaining issues

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

(i) Article 512 of the Criminal Code[167] states that those who, in the exercise of their professional or business activities, deny a person access to a good or service to which they have a right, by reason of ideology, religion or beliefs, ethnic origin, race or nationality, sex, sexual orientation, family situation, gender, sickness or disability, will receive a penalty of one year of disqualification from the exercise of their profession, office, industry or commerce. In the case of a profession related to education, sport or leisure, the penalty of disqualification will increase from one to two years. As far as the author is aware, this article has only been applied on one occasion in the case of a violation of the rights under Directive 2004/113/EC. Criminal Court of Barcelona number 6[168] convicted the doorman of a discotheque to one year of professional disqualification for not having allowed a transsexual access to the discotheque.

(ii) Article 49.1. m. of the General Law for the Defence of Consumers and Persons who make use of Services[169] states that discrimination in access to goods and services will be considered an administrative offence (*infraccione administrativa*) against the Law so the offenders will be obliged to pay a fine. The amount is, however, uncertain, since it has never been applied. The sanctions appear dissuasive, since they are theoretically included in the Criminal Code. However, their application is almost non-existent, so it could hardly be said that the sanctions are effective.

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

(i) According to Article 72 of the Law on Effective Equality a victim of gender discrimination in the access to goods and services will have the right to compensation for loss and damages;

(ii) According to Article 10 of the Law on Effective Equality, any discriminatory act or clause will be considered null and void.

[167] Spain, Criminal Code, Organic Law 10/1995 of 23 of November 1995, www.boe.es/buscar/act.php?id=BOE-A-1995-25444.

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

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

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

10.1 General (legal) context

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

There is a detailed and permanently updated official survey on gender-based violence prepared by the Government Delegation for Gender Violence of the Ministry of the Presidency, Relations with the Courts and Equality.[170] From 2007 to 2016, annual reports were also prepared by the State Observatory on Violence against Women, a state agency specifically created to combat gender-based violence. However, since 2016 this agency has not produced any reports.[171] A report on violence against women in judicial statistics is also prepared annually by the Observatory against Domestic and Gender Violence of the General Council of the Judiciary.[172] These reports are effectively produced every year. They illustrate that intensive research is being undertaken by public institutions to analyse the causes of gender violence and the best way to combat it, which is confirmed by numerous academic studies. The surveys and studies identify several types of violence against women (physical, sexual, psychological control, psychological, emotional, economic, etc.). The consequences of this violence on the physical and mental health of affected women are also studied, looking at the extent to which these women have reported their situation or have gone to an aid service or have told others about their situation. They also analyse the impact that gender violence has on the sons and daughters of the victim and try to find a solution to gender-based violence. Unfortunately, this interest has not eliminated gender-based violence in Spain: from 2003 to 2018 the number of women murdered in Spain by their partners or ex-partners was 975. In the same period of time, the number of children murdered as a form of gender-based violence against their mothers was 27.

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

The legal framework in Spain on violence against women is Law 1/2004, of 23 December 2004, on Comprehensive Protection against Gender-Based Violence.[173] Law 1/2004 received an honourable mention in 2014 in the Future Policy Award (given by the World Future Council) as one of the best pieces of legislation on violence against women.[174] By means of Law 26/2015, of 28 July 2015, the protection system on gender-based violence was extended to children.[175] On 28 September 2017 the Spanish Parliament adopted a document which reflected the agreement of the majority of the political parties with parliamentary representation to work together in the fight against gender-based violence. The document contained 200 concrete measures, to be implemented mostly by the Government, the Autonomous Communities and local authorities over the next five years.[176] The Government approved a Royal Decree Law, in 2018, whose main points were

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

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

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

[173] Spain, Law 1/2004, of 23 December 2004: www.boe.es/buscar/doc.php?id=BOE-A-2004-21760.

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

[175] Spain, Law 26/2015, of 28 July 2015, that modifies the protection system for children and adolescents, www.boe.es/buscar/pdf/2015/BOE-A-2015-8470-consolidado.pdf.

[176] *El Derecho* (2017), 'El Congreso aprueba el Pacto de Estado Contra la Violencia de Género' (Congress approves the State Pact Against Gender Violence), www.elderecho.com/actualidad/Congreso-aprueba-Pacto-Estado-Violencia-Genero_0_1140375145.html.

the following: the mechanisms for the accreditation of victims were expanded; the law was modified so that the assistance women receive is compatible with other assistance; measures were included so that the children of victims do not need the permission of the abuser or murderer to receive psychological treatment; the victim was allowed to appear as a private petitioner at any stage of the procedure. The evaluation of the measures adopted to apply the pact against gender-based violence shows they are diverse and have a strong political component.[177]

10.1.3 National provisions on online violence and online harassment

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

10.1.4 Political and societal debate

The main criticism that arises in terms of legislation against gender-based violence in Spain is related to the limited protection provided in cases of gender-based violence which is not perpetrated by the partner or ex-partner of the victim. In particular, the issue has been raised in relation to the concept of rape in cases of lack of express consent by the victim. The issue arose when a judgement of the Provincial Court of Navarre of 20 April 2018 interpreted that, according to the Spanish Criminal Code, sexual relations without mutual consent cannot be considered rape but qualifies as sexual abuse in cases where express and clear violence and intimidation is absent.[178] This judgement triggered a massive public reaction opposing the judgement because it implicitly considered a woman responsible for being assaulted, unless she showed clear and express opposition, forcing her to put her life at risk. In the opinion of the author, the Spanish Criminal Code could be considered to be contrary to the Istanbul Convention because it does not provide that every sexual assault without the consent of the victim must be considered rape, but only those acts that have been perpetrated with violence or intimidation. Indeed, some political parties have requested a reform of the Criminal Code in this respect (the Socialist Party and Podemos party).

Another important public debate has arisen in Spain in relation to the legislation against gender-based violence with the appearance of extreme right parties, particularly the Vox party. This party advocates for a repeal of the legislation against gender violence because it considers that gender-based violence does not exist but only domestic violence. This party claims that the protection provided to victims of gender-based violence has been fraudulently used by alleged victims to obtain better conditions in the event of divorce and to obtain custody of children. In the author's opinion, in order to support this statement Vox presents false or manipulated data.

10.2 Ratification of the Istanbul Convention

Spain ratified the Istanbul Convention on 27 May 2014. The pre-existing legal framework in Spain is Law 1/2004, of 23 December 2004, for Comprehensive Protection against Gender-Based Violence. This legislation was considered in compliance with the obligations under the Convention so no legal provisions were introduced. However, at present, it is considered that a reform of the Criminal Code is necessary to reinforce the idea of the existence of rape when there is no consent by the victim.

[177] Spain, Royal Decree Law 9/2018 of 3 August 2018 on Urgent Measures for the Development of the State Agreement against Gender-Based Violence, www.boe.es/diario_boe/txt.php?id=BOE-A-2018-11135.

[178] Judgement of the provincial Court of Navarre of 20 April 2018 number 38/2018, https://cdn.20m.es/adj/2018/04/26/3934.pdf.

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

11.1 General (legal) context

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

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

11.1.2 Other issues related to the pursuit of a discrimination claim

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

11.1.3 Political and societal debate and pending legislative proposals

One of the main challenges facing regulation against discrimination based on sex in Spain is its lack of effectiveness. For this reason, a new law which complements the Law on Effective Equality of 2007 and incorporates concrete tools needs to be adopted for equality between women and men to be realised.[179]

11.2 Victimisation

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

11.3 Access to courts

11.3.1 Difficulties and barriers related to access to courts

In equal treatment cases, the persons affected have standing before the courts and, if the victim consents, so do trade unions and associations for the promotion of equality. If the victims are a group of unspecified persons or if they are difficult to identify, the following entities will have standing before the courts: public entities which have as an objective equality between women and men, and most representative unions and national associations which have amongst their objectives equality between women and men.[180] Theoretically there are many mechanisms for interventions by interest groups and legal entities for the defence of victims of discrimination. However, these actions are quite rare and most cases of gender discrimination submitted to the courts are pursued by individual victims. In the author's opinion the system is apparently correct but in reality there are serious difficulties. Firstly, the Institute of Women and for Equal Opportunities theoretically has the possibility to initiate proceedings against offenders in cases of discrimination but

[179] After the cut-off date for this report, Royal Decree 6/2019 of 1 March 2019 was approved, it's the principal objective of which is to establish mechanisms to make effective equality between men and women in the workplace.

[180] Article 11 of the Civil Procedure Act, Law 1/2000 of 7 January 2000, www.boe.es/buscar/act.php?id=BOE-A-2000-323.

it rarely does so. The same happens with most representative trade unions. Secondly, the Labour Inspectorate theoretically has the possibility to investigate employers who discriminate against women but its intervention depends on the instructions and preferences given by the Labour Authorities, which do not always take a sufficient interest in the issue. Thirdly, the Labour Authority could theoretically check collective agreements for illegal provisions in relation to gender discrimination, but it rarely does so. Fourthly, at the time of the cut-off date for this report (31 December 2018) employers did not have a legal obligation to disclose gender-disaggregated information on pay within companies, as established in the European Commission Recommendation on transparency of 7 March 2014. This situation made legal claims of pay discrimination particularly complex.[181]

11.3.2 Availability of legal aid

Alleged victims of gender discrimination have access to legal aid provided by public entities (the Institute of Women and for Equal Opportunities and entities responsible for equality in the Autonomous Communities and municipalities). If the victim does not have sufficient economic resources to initiate judicial proceedings against the offender she can benefit from the programme of free legal assistance which, in addition to legal assistance, provides exemption from payment of lawyer's fees, the costs of expert testimony, judicial fees, etc.[182]

11.4 Horizontal effect of the applicable law

11.4.1 Horizontal effect of relevant gender equality law

One of the issues raised in Spain regarding the horizontal effect of EU legislation on gender-based discrimination is related to the fact that, in some cases, the judgements of the CJEU do not allow its immediate application to individuals because they require specification by internal regulations. One of these complex situations arose in Spain following the *Elbal Moreno* case.[183] The CJEU established that the system for accessing pensions in Spain constituted indirect gender-based discrimination because it had adverse effects on part-time workers. Seven months later the Royal Decree 11/2013 of 2 August 2013 established a new system for calculating the contribution period in terms of part-time workers' pensions (the partiality coefficient). However, until the new legislation was approved and started to be applied, the Spanish Courts of justice had to resolve the issue and were thus faced with the dilemma that any decision meant replacing the action of the legislator. In the specific case that gave rise to the reference for a preliminary ruling that culminated in the *Elbal Moreno* case, the judgement settled the case by counting one full working day of contribution for every day of work by the part-time worker, as requested by the claimant.[184] However, the courts of justice did not generally apply this solution to all the cases brought before them in the interim period between the judgement passed in the *Elbal Moreno* case and Royal Decree 11/2013. There was a certain level of resistance by most of the courts which continued to apply the discriminatory legislation until it was expressly corrected by the legislator, arguing that there was no overlap in the subsequent cases since they were not totally 'equal' to the one resolved by the judgement handed down in the *Elbal Moreno* case.[185]

[181] Obligations of disclosure of information were passed by the Royal Decree 6/2019, of 1 March 2019.
[182] Spain Law 1/1996, of 10 January 1986, on Free Legal Assistance, www.boe.es/buscar/act.php?id=BOE-A-1996-750.
[183] Judgement pof 12 November 2012, C-385/11, *Isabel Elbal Moreno v. Instituto Nacional de la Seguridad Social (INSS) and Tesorería General de la Seguridad Social (TGSS)*.
[184] Judgement of the Social Court 33 of Barcelona of 30 November 2012, confirmed by Judgement of the Catalonia High Court of Justice of 27 November 2013, Appeal number 1339/2013.
[185] Catalonia High Court of Justice of 4 March 2013, Appeal number 7851/2013; this judgement had a dissenting vote signed by a large number of magistrates.

Another problematic situation related to the horizontal effect of the anti-discrimination Directives arose after the ruling issued by the CJEU in the *Porras Guisado* case.[186] In this Judgement the CJEU stated that Article 10(2) of Directive 92/85/EEC must be interpreted as not precluding national legislation which allows an employer to dismiss a pregnant worker in the context of a collective redundancy without giving any grounds other than those justifying the collective dismissal, 'provided that the objective criteria chosen to identify the workers to be made redundant are cited'.[187] The sentence seemed to be establishing the validity of the Spanish norm but in fact it was doing the opposite. This was because the CJEU established that the objective criteria chosen to identify the workers to be made redundant had to be expressly stated by the employer.

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

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

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

The Superior Court of Justice of Castile and León (Valladolid) interpreted that the *Porras Guisado* doctrine could be applied directly among individuals because Directive 92/85/EEC had horizontal effect. One of the arguments for this interpretation was Article 33.2 of the Charter which states that, 'in order to be able to reconcile family life and professional life, every person has the right to be protected against any dismissal for a reason related to maternity, as well as the right to paid maternity leave and parental leave on the occasion of the birth or adoption of a child'.[188]

11.5 Burden of proof

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

[186] Judgement of 22 February 2018, C-103/16, *Jessica Porras Guisado v Bankia SA and Others*.
[187] Judgement of 22 February 2018, C-103/16, *Jessica Porras Guisado v Bankia SA and Others*.
[188] Judgement of the Superior Court of Justice of Castile and León (Valladolid) of 28 May 2018.

11.6 Remedies and sanctions

11.6.1 Types of remedies and sanctions

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

There are several possible sanctions against the employer who fails to respect employees' rights not to be discriminated against. They are all compatible. Firstly, if a dismissal takes place on grounds of sexual discrimination, the employer's decision is declared null and void, with the immediate effect of reinstatement in the post and on the same conditions as previously applied.[189] Secondly, the worker can ask for compensation of damages which includes moral damages.[190] Thirdly, according to Articles 7(5) and 40(1)(b) of the Law of Offences and Penalties in the Social Order, the employer could be considered guilty of serious misconduct, in which case they could be ordered to pay an administrative sanction of EUR 626 to EUR 6 250.

11.6.2 Effectiveness, proportionality and dissuasiveness

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

11.7 Equality body

The Spanish body which seeks to implement the requirement of European Union gender equality law is the Institute of Women and for Equal Opportunities.[191] Some autonomous communities also have their own equality bodies.[192] Law 15/2014 of 16 September 2014 transformed the former Institute of Women into the Institute of Women and for Equal Opportunities. The current Institute has as its objective to combat discrimination on the grounds of birth, sex, racial or ethnic origin, religion or ideology, sexual identity, sexual orientation, age, disability or any other personal or social condition or circumstance.

The Institute of Women and for the Equal Opportunities is formally an 'autonomous body' attached to the Ministry of Health, Social Services and Equality. However, the fact that it is defined as an 'autonomous body' does not indicate its independence, since its staffing and by-laws are those of a Spanish government body. Its Director General is appointed by the Council of Ministers and hierarchically reports to the Minister. The Institute is not independent of the Government because it is part of the Government. In relation to gender discrimination, the general function of the Institute of Women and for Equal Opportunities is theoretically the promotion and encouragement of conditions that produce social equality of the sexes and allow women's participation in political, cultural, economic and social life. Additional Provision 27 of the Law on Effective Equality establishes that the Institute has the following competences: a) providing independent assistance to victims of discrimination in pursuing their complaints; b) conducting studies into discrimination;

[189] Article 55(5) of the Workers' Statute.
[190] Article 183 of the Act Regulating Social Jurisdiction.
[191] Institute of Women and for Equal Opportunities (*Instituto de la Mujer para la igualdad de oportunidades*), www.inmujer.gob.es/.
[192] For example, the Andalusian Institute of Women' (www.juntadeandalucia.es/organismos/igualdadpoliticassocialesyconciliacion/consejeria/adscritos/iam.html) or the Basque Institute of the Woman (www.emakunde.euskadi.eus/inicio/).

c) publishing reports and making recommendations regarding any issue relating to discrimination.

In the opinion of the author, the Institute of Women and for Equal Opportunities has had a very limited influence on progress in combating discrimination based on sex, particularly in recent years. In part, this has been due to cuts in public spending. It could also be as a result of the fact that the Institute is not body independent of the Government but is dependent on it. It should be noted that Spanish legislation establishes a wide range of competences for the Institute in combating discrimination. For example, it has the competence to file lawsuits in relation to certain discriminatory acts. However, the Institute has never exercised these competences.

11.8 Social partners

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

The role of collective agreements in the development of equality issues was not really relevant before the Law on Effective Equality entered into force. Since then, there is a general obligation for the social partners to negotiate, in collective agreements, measures promoting equal treatment and opportunities for women and men.[193] In addition, some companies have an obligation to negotiate and implement equality plans. The implementation of an equality plan is compulsory in the following cases: when the company has more than 250 workers; when it is established by collective agreement; or when the Labour Authority imposes the plan as part of an administrative sanction.[194] Some of the provisions on gender equality established by collective agreements and even in equality plans are mere formalities but others have served to increase gender equality in such companies. There are no data available.[195]

11.9 Other relevant bodies

In equal treatment cases, the individuals affected have standing before the courts and, if the victim consents, so do trade unions and associations for the promotion of equality. When the victims are a group of unspecified persons or if they are difficult to identify, the following entities will have standing before the courts: public entities which have as an objective equality between women and men (including equality bodies) and most representative trade unions and national associations which have amongst their objectives the equality of women and men.[196] Theoretically, therefore, there are many mechanisms for interventions by interest groups and legal entities for the defence of victims of discrimination. However, these actions are quite rare and most cases of gender discrimination submitted to the courts are pursued by individual victims.

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

[193] Article 45.1 of the Law on Effective Equality.
[194] Article 46 of the Law on Effective Equality.
[195] At the time of the cut-off date for this report there were no obligations to publish the equality plans. Later, the Royal Decree 6/2019, of 1 March 2019, established an official register for equality plans.
[196] Article 11 of the Civil Procedure Act, Law 1/2000 of 7 January 2000.

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

11.10 Evaluation of implementation

In theory, Spanish legislation implements EU Law adequately in the area of the compliance and enforcement aspects of the anti-discriminatory legislation on the ground of sex. Theoretically, there are many mechanisms for intervention by interest groups and legal entities for the defence of victims of discrimination. However, these actions are quite rare and most cases of gender discrimination submitted to the Courts are pursued by individual victims. The Institute of Women and for Equal Opportunities theoretically has certain possibilities to initiate proceedings against offenders in cases of discrimination but this rarely happens. The same applies for most representative trade unions. The Labour Inspectorate theoretically has the possibility to investigate employers who discriminate against women but its intervention depends on the instructions and preferences issued by the Labour Authorities. The Labour Authority does not take action to identify collective agreements with discriminatory provisions as expressly stipulated in Article 90.6 of the Workers' Statute.

11.11 Remaining issues

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

12 Overall assessment

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

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

There are certain aspects of the gender discrimination directives which have not been properly transposed into Spanish legislation. In relation to Directive 2010/18/EC, on parental leave, there are several deficiencies.

Firstly, nothing has been established in order to guarantee that employers consider and respond to requests for changes to parents' working hours and/or patterns for a set period of time when they come back to work after a period of parental leave, as established in Article 6 of Directive 2010/18/EC. Secondly, time off from work on the grounds of *force majeure* cannot be considered as completely guaranteed by Spanish law, at least as required by Clause 7 of Directive 2010/18/EC, because there is no general permission applicable in cases of sickness or accident, 'that makes the immediate presence of the worker indispensable.' Thirdly, Spanish legislation does not consider the interests of workers in specifying the length of notice periods for parental leave as required by Clause 3.2 of Directive 2010/18/EC. In relation to the Recast Directive, the Institute of Women and for Equal Opportunities is not independent of the Government because it is part of the Government, so it does not guarantee the independence that the Directive requires.

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

In the field of social security there is no formal recognition in Spain of the principle of non-discrimination based on sex. It seems that the legislator has less interest in real and effective equality between women and men in this area than in the field of labour law. Apparently, Spanish legislation complies with Directive 79/7/EEC. However, the existence of indirect discrimination in Spain was detected by the CJEU in relation to part-time workers. Social security legislation has historically established, and continues to establish,

a clear differentiation in access to pensions and benefits for full-time workers and part-time workers. There have been some attempts to harmonise the two systems but differences still exist. In fact, some of the corrections which have occurred recently, motivated by the need to implement judgements of the CJEU, have not produced full equality between full-time and part-time work in social security, but have been limited to modifying aspects which in each case had been submitted to the CJEU and which had been declared contrary to EU regulations. In this way, after the ruling in the *Elbal Moreno* case, the social security regulations were specifically amended in relation to the system of access to pensions, replacing the old system of access to pensions for part-time workers with another system specific to them (proportionality factor), without carrying out a full comparison. This is the reason why a new preliminary ruling against the new regulation was raised in 2018. The same can be said regarding the one-off correction made to the Spanish regulations after the sentence handed down in the *Espadas Recio* case. The issue which arises is that there could be many other provisions in Spanish social security legislation which could constitute indirect discrimination.

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

An important problem of Spanish legislation on gender discrimination is its lack of efficiency. Theoretically, there are many mechanisms for the intervention by interest groups and legal entities for the defence of victims of discrimination. However, these actions are quite rare and most cases of gender discrimination submitted to the courts are pursued by individual victims. The Institute of Women and for Equal Opportunities theoretically has the possibility to initiate proceedings against offenders in cases of discrimination but it rarely does so. The same happens with most representative trade unions. The Labour Inspectorate theoretically has the possibility to investigate employers who discriminate against women but its intervention depends on the instructions and preferences given by the Labour Authorities. The Labour Authority does not take action to identify collective agreements with discriminatory provisions as expressly stipulated in Article 90.6 of the Workers' Statute.

One of the most significant problems with combating discrimination in Spain relates to the deficiencies which exist in Spanish law when challenging collective agreements. For instance, there are few cases of indirect discrimination in relation to incorrect job evaluations in collective agreements, probably because Spanish legislation does not facilitate the challenging of illegal collective agreements. The labour authority rarely starts any judicial procedures against any collective agreement. In addition, the social partners with an interest in the issue are basically the same social partners which have agreed with the collective agreement or which could have agreed with the collective agreement. In practice, it is usually trade unions which have not signed a collective agreement which challenge illegal agreements. If those trade unions do not exist or do not have any interest in challenging the collective agreement, it remains unchallenged.

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

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

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

There are, however, some interesting measures which have been implemented in Spanish legislation which could be examples of good practice. One such example is Article 75 of the Law on Effective Equality, which states that companies which are obliged to submit a non-abbreviated profit and loss account will have to include on their company board enough women to allow them to achieve a balanced composition of women and men within a period of eight years from the date of entry into force of the Law (at least 40 % women). The deadline for this was March 2015 and the objective was not reached. However, between 2007 and 2018 women's participation on company boards has increased significantly. The Law on Effective Equality also recommends a balanced presence of women and men (at least 40 % women) in the following fields: political candidate lists and decision-making bodies (Article 14); members of the governing bodies of the General State Administration and of the public entities linked to or dependent on it (Article16); tribunals and bodies of selection of the staff of the General State Administration and public entities linked to or dependent on it (Article 53). Moreover, Article 60 of the Law on Effective Equality stipulates that at least 40 % of the training places for promotion in public administration will be reserved for women. Some of these recommendations of the Law on Effective Equality have been followed to a satisfactory degree.

Article 55.5 of the Workers' Statute is another example of good practice. It establishes that if a dismissal takes place during any period of parental leave, it is considered null and void unless there is a justified cause, in the same terms as those governing pregnancy or maternity leave. The period of nine months after a child's birth is also protected by the nullity of the dismissal. In relation to parental leave, it is also quite interesting to note that, in Spanish legislation, the possibility for one parent to transfer part of their parental leave to the other parent does not exist. Parental leave can be taken fully by the mother and the father, even cumulatively in certain cases. However, as the CJEU has stated, the nullity of the dismissal without cause of a worker who is pregnant or on maternity leave is not enough by itself to be considered an effective protection against the unfair dismissal of pregnant workers. In the *Porras Guisado* case the CJEU established that Spain, with this system, did not guarantee adequate protection with reference to that required by Directive 92/85/EEC. In this judgement, the CJEU established that effective protection requires preventive and not only restorative action, and that Spain did not adequately comply with the former.

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

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

However, all these measures are probably not sufficient to improve the working conditions of self-employed women, whose number has increased significantly in recent years, probably due to the high unemployment rate. For instance, in theory, social security protection for self-employed people is quite similar to that for employees, however, given that self-employed women usually declare an income lower than their real income, the maternity allowance hardly serves to replace the loss of the previous income. In fact, self-employed women tend to go back to work immediately after the compulsory six weeks of leave after birth, dispensing with the rest of their maternity leave. There are no services supplying temporary replacements or other kinds of social services, other than the discounts to the social security contribution if the self-employed woman hires someone to replace her during her maternity leave.

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

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