European Commission

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Country report

Gender equality

Bulgaria

2021

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?

Bulgaria

Genoveva Tisheva

Reporting period 1 January 2020 – 01 January 2021

2021 Directorate-General for Justice and Consumers

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Luxembourg: Publications Office of the European Union, 2021

PDF ISBN 978-92-76-32185-9 ISSN 2600-0164 doi:10.2838/244031 DS-BD-21-030-EN-N

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CONTENTS

1 Introduction 5
1.1 Basic structure of the national legal system 5
1.2 List of main legislation transposing and implementing the directives 7
1.3 Sources of law 7
2 General legal framework 9
2.1 Constitution 9
2.2 Equal treatment legislation 9
3 Implementation of central concepts 12
3.1 General (legal) context 12
3.2 Sex/gender/transgender 15
3.3 Direct sex discrimination 18
3.4 Indirect sex discrimination 18
3.5 Multiple discrimination and intersectional discrimination 20
3.6 Positive action 22
3.7 Harassment and sexual harassment 24
3.8 Instruction to discriminate 26
3.9 Other forms of discrimination 26
3.10 Evaluation of implementation 27
3.11 Remaining issues 27
4 Equal pay and equal treatment at work (Article 157 of the Treaty on the Functioning of the European Union (TFEU) and Recast Directive 2006/54) 28
4.1 General (legal) context 28
4.2 Equal pay 29
4.3 Access to work, working conditions and dismissal 33
4.4 Evaluation of implementation 36
4.5 Remaining issues 36
5 Pregnancy, maternity, and leave related to work-life balance for workers (Directive 92/85, relevant provisions of Directives 2006/54, 2010/18 and 2019/1158) 38
5.1 General (legal) context 38
5.2 Pregnancy and maternity protection 39
5.3 Maternity leave 42
5.4 Adoption leave 45
5.5 Parental leave 46
5.6 Paternity leave 49
5.7 Time off for *force majeure* 49
5.8 Care leave 50
5.9 Leave in relation to surrogacy 50
5.10 Flexible working time arrangements 50
5.11 Evaluation of implementation 52
5.12 Remaining issues 53
6 Occupational social security schemes (Chapter 2 of Directive 2006/54) .. 54
6.1 General (legal) context 54
6.2 Direct and indirect discrimination 54
6.3 Personal scope 54
6.4 Material scope 54
6.5 Exclusions 55
6.6 Laws and case law falling under the examples of sex discrimination mentioned in Article 9 of Directive 2006/54 55
6.7 Actuarial factors 55
6.8 Difficulties 55
6.9 Evaluation of implementation 55
6.10 Remaining issues 55
7 Statutory schemes of social security (Directive 79/7) 56

7.1 General (legal) context....56
7.2 Implementation of the principle of equal treatment for men and women in matters of social security....57
7.3 Personal scope....58
7.4 Material scope....58
7.5 Exclusions....59
7.6 Actuarial factors....59
7.7 Difficulties....60
7.8 Evaluation of implementation....60
7.9 Remaining issues....60
8 Self-employed workers (Directive 2010/41/EU and some relevant provisions of the Recast Directive)....61
8.1 General (legal) context....61
8.2 Implementation of Directive 2010/41/EU....61
8.3 Personal scope....62
8.4 Material scope....62
8.5 Positive action....63
8.6 Social protection....63
8.7 Maternity benefits....64
8.8 Occupational social security....64
8.9 Prohibition of discrimination....65
8.10 Evaluation of implementation....65
8.11 Remaining issues....65
9 Goods and services (Directive 2004/113)....66
9.1 General (legal) context....66
9.2 Prohibition of direct and indirect discrimination....66
9.3 Material scope....66
9.4 Exceptions....68
9.5 Justification of differences in treatment....68
9.6 Actuarial factors....68
9.7 Interpretation of exception contained in Article 5(2) of Directive 2004/113 68
9.8 Positive action measures (Article 6 of Directive 2004/113)....68
9.9 Specific problems related to pregnancy, maternity or parenthood....69
9.10 Evaluation of implementation....69
9.11 Remaining issues....69
10 Violence against women and domestic violence in relation to the Istanbul Convention....70
10.1 General (legal) context....70
10.2 Ratification of the Istanbul Convention....74
11 Compliance and enforcement aspects (horizontal provisions of all directives)....77
11.1 General (legal) context....77
11.2 Victimisation....77
11.3 Access to courts....77
11.4 Horizontal effect of the applicable law....78
11.5 Burden of proof....78
11.6 Remedies and sanctions....79
11.7 Equality body....79
11.8 Social partners....80
11.9 Other relevant bodies....81
11.10 Evaluation of implementation....82
11.11 Remaining issues....82
12 Overall assessment....83
Annexes....84

1 Introduction

1.1 Basic structure of the national legal system

In terms of direct sources of law, the Bulgarian legal system is based on a strictly defined hierarchy of the sources of law as follows:

EU Law has supremacy over the internal legal provisions of the legislation of Bulgaria (including Constitutional provisions) which contradict it and it can have direct effect. This is also valid for the field of legislation related to gender equality.

The Constitution

The provisions of the Constitution are directly applicable.

Decisions of the Constitutional Court

These are obligatory interpretations of the Constitution. The Constitutional Court is also entitled, among other competences, to declare provisions contained in an Act of Parliament to be anti-constitutional. The Court pronounces rulings on compliance with the Constitution of international treaties signed by Bulgaria, prior to their ratification, as well as rules on compliance of the laws with the universally recognised provisions of international law, including compliance with the international treaties to which Bulgaria has adhered.

International treaties

According to Article 5, paragraph 4 of the Constitution:

> 'International treaties, ratified in compliance with the constitutional procedure, promulgated and entered into force for the Republic of Bulgaria are part of the domestic law of the country and have supremacy over those provisions of the domestic law which contradict them.'

Acts of parliament and codifications

Among the major codes currently in force in Bulgaria are the Administrative Procedure Code of 2006, the Civil Procedure Code, effective as of 1 March 2008, the Social Insurance Code of 1999, the Labour Code (LC) of 1986, the Criminal Code of 1968, the Criminal Procedure Code of 2006 and the Family Code of 2009. The Law on Protection from Discrimination, adopted in 2003, is also a *sui generis* codification in the field. The Law on Equality between women and men from 2016 is applicable for the issues of gender equality.

Delegated legislation

The Constitution and a number of Acts of Parliament provide and delegate to the Council of Ministers, the Ministers separately, other public bodies and/or officials the authority to issue decrees, regulations, ordinances and instructions, to ensure the detailed regulation of specific areas of economic or social activity.

The practice of the courts

The judgments issued by the Bulgarian courts in individual proceedings have no universal applicability, i.e. they are binding on the parties involved. At the same time, some judgments and interpretative decisions and decrees of the Supreme Administrative Court (SAC) and of the Supreme Court of Cassation are a source of law and also have an impact on legislation and practice in the field of gender equality.

The judicial system

The administration of justice in Bulgaria is based on three instances. The courts are state bodies that administer justice in civil, criminal and administrative cases. The following courts exist in Bulgaria: district courts – 113; provincial/regional courts – 28; administrative courts – 28; specialised Criminal Court – 1; courts of appeal – 5; Specialised Criminal Court of Appeal – 1; military courts – 5; Military Court of Appeal – 1; Supreme Court of Cassation – 1; Supreme Administrative Court – 1. The organisation and activities of the Bulgarian courts are governed by the Law on the Judiciary.[1]

A case that is under consideration by a court cannot be considered by any other body.

Anti-discrimination and gender equality legislation

Developments in Bulgarian legislation and practice in the field of anti-discrimination, equal treatment and equal opportunities were made possible thanks to the process of the full integration of Bulgaria into the EU.

The National Assembly is the legislative body which adopts legislation, including in the field of anti-discrimination and gender equality. According to the Law on Equality between women and men from 2016, the Council of Ministers is the central authority responsible for defining policy on gender equality. The Council of Ministers adopts the National Strategy on Gender Equality and plans for its implementation. It adopts also regulatory acts and decisions regarding gender equality. Namely, it has adopted the National Strategy on Gender Equality 2016-2020 and the plans and reports on its implementation. By Decision of the Council of Ministers No. 969 from 30 December 2020, the new National Strategy for promoting equality between women and men for the period 2021-2030 was adopted.[2] The Strategy does not differ substantially from the previous strategy or from the national plans on gender equality. Despite the fact it is intended to cover the next 10 years, the document does not contain more advanced targets and benchmarks. Serious and transparent analysis of the period of implementation of the previous strategy, with identification of the gaps and weaknesses, is lacking; there is no mention of the backlash in Bulgaria on the understanding of gender equality in general and in the field of protection against gender-based violence and the concrete measures needed to tackle the situation.

A National Council on Gender Equality (NCGE) is established at the Council of Minister. It is a consultative body for cooperation and coordination between the structures of central and territorial bodies of the executive, and the structures of civil society.

The Law on Equality between women and men designates the Ministry of Labour and Social policy as the person who is responsible for the management, coordination of and control over the implementation of the state policy on gender equality. The Minister is the Chair of the NCGE.

The section in this Ministry of Labour and Social Policy 'Equal opportunities, anti-discrimination and social assistance', which is part of the Directorate on 'Policy for persons with disabilities, equal opportunities and social assistance', serves as the Secretariat of the National Council on Gender Equality. In the different ministries there are focal point coordinators on gender equality.

The Commission for Protection from Discrimination (*Комисия за защита от дискриминация,* CPD) was created in 2005 as an independent jurisdiction under the Law on Protection from Discrimination and its mandate covers all types of direct and indirect

[1] Law on the Judiciary, *Закон за съдебната власт*, *Zakon za sudebnata vlast*, Promulgated in S.G. No. 64/2007, available in Bulgarian at: https://www.lex.bg/bg/laws/ldoc/2135560660.

[2] National Strategy on Equality between women and men 2021-2030, available in Bulgarian at: https://www.mlsp.government.bg/uploads/41/ravni-vzmozhnosti/strategy-nsnrjm-2021-2030.pdf.

discrimination, including discrimination based on sex, prohibited by law and by international instruments to which Bulgaria is a party. The Commission has broad competences, including initiating discrimination cases of its own and assisting the victims of discrimination in bringing a claim. The administrative procedure before the Commission is very flexible and easy to follow by petitioners.

According to the Law on the Ombudsman, the latter is a public defender who promotes and protects human rights and fundamental freedoms.[3] The Ombudsman advocates through all legal means when there is a violation of human rights by act or omission of State and municipal bodies or their administration, of persons who provide public services, as well as acts or omissions by private persons. This institution has broad competences, including initiation through the competent bodies, of a procedure for the interpretation of the Constitution or for challenging the constitutionality of Bulgarian laws, or their conformity with the international standards in force for Bulgaria. The Ombudsperson also plays the role of National Prevention Mechanism according to the Optional Protocol to the UN Convention against Torture and other forms of inhuman and degrading treatment or punishment. Recently, the Bulgarian Ombudsperson obtained status A of compliance with Paris Principles. The institution had some initiatives but has not yet played an important role on the issues of gender equality and women's rights.

In fact, there is no institution dealing exclusively, on a permanent basis, with gender equality in Bulgaria. The author's observation is that over the last three years there have not been any substantial developments at the national level in the field of policy on gender equality; the functions of the governmental bodies were implemented formally and mainly just technically, which also created the conditions for the backlash of these issues conceptually and in practice in the country.

1.2 List of main legislation transposing and implementing the directives

- Law on Protection from Discrimination;[4]
- Code of Social Insurance;[5]
- Labour Code;[6]
- Law on Equality between Women and Men.[7]

1.3 Sources of law

Based on the basic structure of the national legal system indicated above, the main sources of gender equality law are:

- the Constitution with its main principles of equality and affirming the human rights and fundamental freedoms;
- the EU law – primary, secondary and the case law of the Court of Justice of the EU (CJEU);
- international treaties which form part of the domestic law and prevail over national legislation that contradicts them.

Namely, such treaties at UN level in the field of gender equality are the CEDAW convention which entered into force in 1982; its Optional Protocol, in force since 2006; the

[3] Law on the Ombudsman, *Закон за омбудсмана* Bulgarian version available at: https://www.lex.bg/laws/ldoc/2135467520.

[4] Law on Protection from Discrimination – LPFD, *Закон за защита от дискриминация*, S.G. 86/2003, in force since 1 January 2004, Bulgarian version available at: http://lex.bg/laws/ldoc/2135472223.

[5] Code of Social Insurance, COSI, *Кодекс за социално осигуряване*, S.G. No. 110/99, in force since 1 January 2000, full Bulgarian version available at: http://lex.bg/laws/ldoc/1597824512.

[6] Labour Code, *Кодекс на труда*, S.G. No. 26/86, in force since 1 January 1987, Bulgarian version available at: http://www.lex.bg/bg/laws/ldoc/1594373121.

[7] Law on Equality between Women and Men, *Закон за равнопоставеност на жените и мъжете,* S.G. 33/2016, in force since 26 April 2016, available in Bulgarian at: http://lex.bg/bg/laws/ldoc/2136803101.

International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, both in force since 1970.

In the framework of the Council of Europe, it is worth mentioning the European Convention on Human Rights and Fundamental Freedoms.

The Convention on preventing and combating violence against women and domestic violence (CETS No. 210) was signed by the Bulgarian government in April 2016 and has the force of a political document for Bulgaria.

Case law is binding only for the parties in the concrete case and this is valid also for case law of the Supreme Court of Cassation and Supreme administrative court. Bulgaria is not a country where the law of precedent is valid.

According to Article 130 paragraph 2 of the Law on the Judiciary, the interpretative decisions of the Supreme Court of Cassation are mandatory for the bodies of the judiciary and the executive, for the self-governing local authorities and for all bodies which issue administrative acts.

The decisions of the Commission for Protection from Discrimination are binding only for the parties to the concrete case. The opinions and suggestions of this body are not binding.

2 General legal framework

2.1 Constitution

2.1.1 Constitutional ban on sex discrimination

The Bulgarian Constitution of 1991 prohibits sex discrimination, among other discrimination grounds.

Article 6 of the Constitution[8] addresses these issues. This provision proclaims that all people are born free and equal in dignity and rights, and that all people are equal before the law. No limitations or privileges are allowed based on race, nationality, ethnic origin, sex, origin, religion, education, belief, political affiliation, personal and social status, or property status.

2.1.2 Other constitutional protection of equality between men and women

Article 14 of the Constitution stipulates that the family, maternity and children are under the protection of the state and society.

Article 46 of the Constitution stipulates that spouses have equal rights and obligations in the marriage and in the family. Marriage is a voluntary union between a man and a woman.

Another relevant provision is Article 47 of the Constitution, which declares that the care for and education of children until they reach the age of majority represent a right and obligation of their parents, with the support of the state. Special protection is ensured for mothers who are granted paid leave prior to and after giving birth, free obstetric care, an alleviation of working conditions and social assistance.

All citizens have the right to work and the state creates the conditions for the realisation of this right. Everybody has the right to choose freely his/her profession and workplace.

Workers and employees have the right to safety and health at work, to the minimum wage and to remuneration correspondent to the work implemented, as well as the right to a break and a right to a period of leave under the conditions defined by law (Article 48).

Article 51 of the Constitution guarantees the right to social security and social assistance.

The provisions of the Constitution have direct/immediate and horizontal effect (Article 5 paragraph 2 of the Constitution).

2.2 Equal treatment legislation

Bulgaria has adopted a Law on Protection from Discrimination[9] in force since 1 January 2004. The Law on Protection from Discrimination (LPFD) contains a prohibition of discrimination on a broad range of grounds, including on the ground of sex. Besides a prohibition of discrimination based on this ground, the ban encompasses the grounds of race, nationality, ethnicity, human genome, citizenship, origin, religion and belief, education, conviction, political affiliation, personal or social status, disability, age, sexual orientation, family status, property status, or any other ground, defined by law or in an international treaty to which Bulgaria is a party (Article 4 paragraph 1 of the LPFD).

[8] Constitution of Bulgaria, *Конституция на РБългария*, S.G. No. 56/1991, Bulgarian version available at: https://www.lex.bg/laws/ldoc/521957377.

[9] Law on Protection from Discrimination*, Закон за защита от дискриминация*, S.G. No. 86/2003, in force since 1 January 2004, last amended by S.G. 7/2018.

Apart from the Commission for Protection from Discrimination, which deals with concrete cases of discrimination based on sex, there is no official body defined by law with a gender equality policy remit, with all the functions required by the EU directives.

In order to fill the gap in the structure of the mechanism for gender equality and Government policy, a Law on Equality between Women and Men (hereinafter Gender Equality Law) was proposed by the Ministry of Labour and Social Policy in 2015. It was adopted by the Bulgarian National Assembly and promulgated on 26 April 2016.[10] The law regulates state policy on gender equality, sets out the main principles of this policy, including positive measures for promoting gender equality and the mechanism for the adoption of such measures. The law affirms the duties of the Ministry of Labour and Social Policy as the person that will manage, coordinate and control gender equality policy. State policy in this field is also implemented by units in the different ministries, in the regional administration and at the level of the local self-governance bodies.

The Gender Equality Law sets out the main principles of policy on gender equality which are (Article 2): the equal opportunities, equal access and equal treatment of women and men in all spheres of life; the prohibition of discrimination and gender-based violence; balanced representation of women and men in decision-making and overcoming gender stereotypes. The Law provides for a procedure for the adoption of temporary special measures for achieving gender equality.

The law is not so new anymore but in practice, it has not been actively implemented since its adoption. Its Final provisions envision that six months after its entry into force, the respective civil servants responsible for gender equality would be appointed and the rules and procedure of the consultative body on gender equality would be updated according to the new law. In fact, the Regulation on the structure, organisation and activities of the National Council on Gender Equality was adopted at the end of 2016.[11] The temporary special measures and the measures against gender-based violence have not been adopted yet.

By the end of 2018, only minor steps had been undertaken for the implementation of the law. Namely, in additional to the 30 coordinators at national level – persons responsible in the ministries and agencies, and independent bodies – 28 regional coordinators and 12 deputy coordinators for equality between men and women were appointed among regional administration representatives in the country. The newly selected coordinators underwent initial training on gender equality at the end of 2017. The results of the Report of the regional coordinators for 2017[12] show that the mechanisms on gender equality in Bulgaria are still very new and have to be developed. In the meantime, at the end of 2018, the National Action Plan for promotion of gender equality for the period 2019-2020 was adopted.[13]

The situation described above in the previous paragraph also indicates that the Gender Equality Law adopted as it is – an administrative law stating the principles and main mechanisms on gender equality – does not give much support to the policy on gender equality and its real implementation in practice. Since 2016 it has not achieved a substantial positive effect for equality and the protection of rights of women, including the most vulnerable.

For the implementation of Article 16 of the Law, a special symbol/award for effective implementation of gender equality policy was created. The Ministry of Labour and Social

[10] Law on Equality between Women and Men, *Закон за равнопоставеност на жените и мъжете,* S.G. 33/2016, in force since 26 April 2016, available in Bulgarian at: http://lex.bg/bg/laws/ldoc/2136803101.
[11] Regulation on the structure, organisation and activities of the National Council on Gender Equality, *Правилник за устройството, организацията и дейността на Националния съвет за равнопоставеност на жените и мъжете*, adopted by Decree of the CM No. 302 from 15 November 2016.
[12] Available at: https://www.mlsp.government.bg/index.php?section=POLICIESI&I=409.
[13] Available at: https://www.mlsp.government.bg/index.php?section=POLICIESI&I=409.

Policy, with the support of the Consultative body on gender equality – the NCGE – established the rules and procedures for the nominations for the award.[14] The award is presented each year in the form of a plaque and a special certificate. It represents a symbol of achievements and should work as an incentive for organisations and institutions to improve their management in accordance with the principles of equality. In 2018, several organisations in different categories were granted the award.

Besides the publicity of the ceremony of the awards and the formal adoption of the action plans and the reports on their implementation, there have been no concrete activities nor development of gender equality policy in Bulgaria.

Moreover, during the fierce campaign of external and internal forces against the Istanbul Convention and the whole issue of gender equality in Bulgaria in 2018, the Gender Equality Law and the mechanisms for gender equality policy did not provide an adequate reaction. They did not help for countering the attacks against legally recognised notions and standards in the field of equality between women and men, including attacks against explicitly accepted and adopted EU standards. The NCGE held just one face-to-face meeting of its members at the end of 2018.

[14] Report on gender equality for 2017 by the MLSP: www.mlsp.government.bg/ckfinder/userfiles/files/politiki/ravni%20vyzmojnosti/normativni%20aktove/bg%20zakonodatelstvo/REPORT_Equality_2017_FINAL.pdf.

3 Implementation of central concepts

3.1 General (legal) context

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

In the last five years there have been no surveys or reports published on the legal definition, implementation and limits in Bulgaria of central concepts of gender equality law, having a substantial impact on the theme.

As a good example of sources of legal interpretation of the concepts and practice of the issue of discrimination, also including gender equality, is the Compilation of reports from a scientific conference on the Legal regulation, problems and trends of protection from discrimination.[15] Special attention in this Compilation from 2018 present several articles of authors who tackle the issue of discrimination based on sex and gender. For example, the article 'Indirect discrimination in Bulgarian and European law' identifies insufficient knowledge and consequent gaps in the understanding of the concept also in Bulgarian legal practice. 'Some constitutional aspects of the protected ground of discrimination' explores the possibilities and limitations of the equality clause of the Constitution. 'Equality policies as "hostage" of hate speech' links the standards on education on gender equality in universities with the limitations imposed by fierce hate speech in Bulgaria in about the last two years. Some more general issues discussed are the burden of proof, the independence of equality bodies, etc.

3.1.2 Other issues

Among developments in 2018, it is worth mentioning the interpretation given by the Constitutional Court of the Republic of Bulgaria of the concepts of sex, gender and transgender in the motivation part of Ruling No 13 from 27 July 2018, issued on Constitutional file No 3/2018. The ruling was held on the conformity of an international treaty signed by the Republic of Bulgaria on 21 April 2016 – the Council of Europe Convention on preventing and combating violence against women and domestic violence (the Convention), done on 11 May 2011 at Istanbul – with the Constitution prior to the ratification of this treaty.[16]

The interpretations of the concepts by the Constitutional Court go far beyond the mandated task and concrete questions under the mentioned case and they represent restrictions of the meaning of some of these concepts, as well as contradictions to legal provisions in force and to other legal practice. This Ruling was strongly influenced by public debates and also by political pressure against the ratification of the Istanbul Convention by Bulgaria.

Here are quotations from the Ruling[17] which are indicative of the restrictive interpretation of the Constitution and of important concepts related to gender equality:

> '…In parallel with the policy of the Council of Europe on protecting women against gender-based violence and non-discrimination against women, the Council of Europe, in a number of its acts, calls on the member states of the Council of Europe to explicitly prohibit discrimination based on "gender identity" in national non-discrimination legislation and to include the human rights situation of "transgender people" in the mandate of national human rights institutions, with an explicit reference to "gender identity" as a form of discrimination against women…'

[15] Compilation of reports from a scientific conference on the Legal regulation, problems and trends of protection from discrimination – University of Economics – Varna (in cooperation with the Institute of Legal Studies to the Bulgarian Academy of Science and the Commission for Protection from Discrimination).

[16] Constitutional Court ruling No 13, Sofia, from 27 July 2018 promulgated in State Gazette No 65/07.08.2018.

[17] Unofficial English translation of the ruling by UNICEF – Bulgaria – September 2018.

'…The foregoing clearly shows the link between the policy of Council of Europe on preventing and combating violence against women as a form of gender-based discrimination against women and the protection of certain rights of "transgender" persons…'

'…The Constitutional Court finds that despite its undeniable positive aspects, the Convention is internally contradictory and this contradiction creates duality therein. Thus, the meaning of some of its provisions goes beyond the Convention's stated purposes and its title…'

'…In Article 1(1)(a) and (b) of the Convention the term "women", which is undoubtedly based on the biological understanding of the sexes, is used to define the subject of protection against all forms of violence and discrimination. At the same time the legal definitions in Article 3(c) of the Convention (the English and French texts) include the term "gender"/"*genre*", translated into Bulgarian as "*пол*" ("sex"), with the following meaning: "socially constructed roles, behaviours, activities and attributes that a given society considers appropriate for women and men". The term "gender" has been translated into Bulgarian as "*социален пол*" ("social gender") only in the provision of Article 4(3) of the Convention. In the Convention the terms "sex"/"*sexe*" and "gender"/"*genre*" exist together, with "gender" being included among the grounds of discrimination under Article 4(3) along with the biologically determined sex – "sex, gender ..."/"*sexe, genre …*". Thus, gender as a biological category ("sex"), but also gender as a social construct ("gender") determined by the subjective perceptions and notions of the individual and of society about the role of men and women, are elevated to autonomous and equivalent categories of the Convention with their own legal existence. The term "gender"/"*genre*" exists within the Convention as a separate category different from sex as a biological construct. The Convention divides the biological and social dimensions of gender and goes beyond the view of the gender binary of the human species. With the meaning specified in Article 3(c), "gender"/"*genre*" becomes a fundamental term that also defines the meaning of other phrases used in the Convention and based on this term…'

'…"Gender" is used in the phrases: "gender equality" (Preamble), "gender-based violence" (Preamble, Articles 2, 3, 4, 14), "gender identity" (Article 4(3)), "gender-sensitive policies" (Article 6), "gender perspective" (Article 6), "non-stereotyped gender roles" (Article 14), "gendered understanding of violence" (Article 18, Article 49(2)), "gender-based asylum claims" (Article 60), "gender-sensitive interpretation" (Article 60(2)), "gender-sensitive reception procedures" (Article 60(3)). These phrases, depending on the interpretation, may lead to different and contradictory understandings of the philosophy of the Convention. The Convention is the first international treaty signed by the Republic of Bulgaria which gives such a definition of the term "gender" (Article 3(c) of the Convention)….'

'…The …acts of the Council of Europe aimed against discrimination and violence on the basis of sexual orientation and gender identity clearly serve to clarify the meaning of the terms "gender" and "gender identity" in the context of the approach of the Council of Europe to promote the understanding that the biological and social dimensions of gender are not inextricably linked and exist independently of each other; the understanding of the ability of people to self-determine their gender; as well as to ensure full legal recognition by the State of the gender reassignment….'

'…The analysis of the terms "gender"/"*genre*", translated into Bulgarian, firstly as "*пол*" ("sex") and secondly as "*социален пол*" ("social gender"), and "gender identity"/"*l'identité de genre*", translated into Bulgarian as "*идентичност, основана на пола*" ("sex-based identity") indicates that the terms are connected and should be understood through one another. The term "gender"/"*genre*" with the meaning

"socially constructed roles, behaviours, activities and attributes that a given society considers appropriate for women and men" reflects certain social and cultural notions of men and women created within a given society at a given moment. These notions are evolving to the extent that newer notions can exclude the older ones, for example that gender is biologically determined. From this point of view, a biological man might have a female "gender"/"*genre*" and vice versa. This leads to the possibility of the individual choosing, at their own will, a different "gender identity" that might not coincide with the biological one. This understanding expresses aspects of the "gender ideology" – a collection of ideas, convictions and beliefs that the biologically determined sexual characteristics are irrelevant, and only the gender self-identification is relevant…'

'…The absence of a common understanding of the term "gender"/"*genre*" is also illustrated by the active public and political debate "for" and "against" the gender ideology that has been ongoing for over two decades in dozens of countries…'

'…As stated, the Convention uses two terms for gender – "sex" and "gender". It introduces the phrase "gender identity", which stems from the notion that the social dimension of gender is independent of the biological one. Any distancing from the term "gender" as a biological attribute (man/woman) distances the Convention from the stated purposes of protecting women against all forms of violence. The internal contradiction in the Convention is obvious when comparing the purposes stated in Article 1 of the Convention and its title with the term "gender" as defined in the Convention. Moreover, the very definition of the term "gender" would have been redundant, if the stated purpose of the international treaty actually corresponded to its title "… on preventing and combating violence against women …". This duality of the terminology, of the meaning of the terms used, in practice does not lead to the achievement of gender equality, but rather blurs the differences between sexes thus resulting in the principle of equality losing its meaning…'

Thus the Constitutional Court provides an interpretation of the term 'gender' which goes against the principle of gender equality and undermines the meaning and understanding of related terms and notions recognised in EU law and to which Bulgaria had already adhered. The Court deliberately dissociates the term of 'gender' from 'sex' and attributes it only to the blurred concept of 'gender ideology' which was introduced from abroad to public and political debate at the end of 2017 in Bulgaria. This wrong interpretation of the term 'gender' was broadly disseminated and applied, although it should be understood only in connection with the assessment of conformity of the Istanbul Convention with the Constitution. The ruling also contains clear limitations to already achieved standards of non-discrimination, like the recognition by Bulgarian Law of discrimination based on gender reassignment and limits the rights of transgender people, almost excluding the possibility for adding gender identity as a separate ground for discrimination.

The Constitutional Court did not take into account EU standards in the field of gender equality, and did not apply the CEDAW convention in relation to the notion of discrimination against women. Legislation in force and recent case law of the Supreme Court of Cassation were also overlooked. Namely, according to the definitions of the Gender Equality Law, equality of women and men means equal rights, equal opportunities for realisation and for overcoming obstacles in all spheres in society, where both sexes are free to develop their personal capabilities and to make choices without the limitations of the social roles defined by their respective gender.

The legal provisions, including of the Anti-Discrimination law, and case law of the Supreme Court of Cassation in favour of the recognition and the rights of transgender persons, were also disregarded by the Constitutional Court in its interpretations of these important concepts.

It is not clear yet to what extent this unprecedented ruling which may be called highly politicised will influence further practice and public debates.

3.1.3 General overview of national acts

The national acts that contain these central concepts are the above-mentioned Law on Protection from Discrimination (LPFD), the Labour Code (LC) and also the Code of Social Insurance (COSI) and the Law on Equality between Women and Men. The LPFD regulates the protection against all forms of discrimination and contributes to its prevention. The LC regulates the labour relations between the worker or employee and the employer and related relations. The COSI contains provisions about social relations in connection with statutory social insurance and supplementary social insurance. The Gender Equality Law regulates the implementation of state policy on equality between women and men.

3.1.4 Political and societal debate and pending legislative proposals

Since the end of 2017 and up to now, the issue of ratification of the Istanbul Convention has been at the centre of societal and political debates due to the introduction from abroad of the notion of gender ideology and the replacing of the legally recognised – at European (EU and Council of Europe) and UN level – concept of gender equality with this unclear notion. Moreover, this debate instigated from outside has been fuelled since the Bulgarian Presidency of the European Council (in the first half of 2018), the Euro-sceptic attitudes and those overtly against the European Union.

Unfortunately, the strong attacks against the Istanbul Convention and gender equality as a whole, against central concepts of equality – like sex, gender, transgender, gender equality, sexual orientation, gender-based violence – found governmental institutions in Bulgaria unprepared and they could not explain basic standards and concepts to the public. The burden fell on non-governmental organisations which did not have the resources and the authority for that. NGOs, namely women's NGOs, were the most active supporters and participants in the debates for the protection of the standards and basic concepts of equality. In the meantime, social media, political parties, and even people from government were the driving forces behind attacks against NGO human rights defenders.

All this created an atmosphere of mistrust and hatred and underestimation of gender equality and women's rights. It certainly weakened the protection of human rights in Bulgaria and will impact the situation beyond 2018.

The author illustrates the facts below with some of the numerous publications in the media.[18]

There is no new legislation pending concerning the main concepts of gender equality. The implementation of the standards already adopted on gender equality remains the main challenge in this complex situation.

3.2 Sex/gender/transgender

3.2.1 Definition of 'gender' and 'sex'

The terms 'gender' and 'sex' are not defined explicitly in Bulgarian legislation. The notion of 'gender' for the purpose of protection from gender-based violence and as provided in the Istanbul Convention was not adopted, as the ratification of the Convention was

[18] https://www.reuters.com/article/us-bulgaria-treaty/bulgaria-rejects-treaty-to-combat-violence-against-women-idUSKCN1FZ0FJ. https://www.rferl.org/a/bulgaria-s-top-court-rejects-european-treaty-to-combat-violence-against-women/29395266.html. https://www.bghelsinki.org/en/news/press/single/20180730-press-istanbul-convention_EN/. https://www.euractiv.com/section/future-eu/news/istanbul-convention-unconstitutional-in-bulgaria/.

rejected. The Ruling of the Constitutional Court, mentioned above in detail, gives the interpretation of the Court of this term, or rather, shows the misconception of this term which was, in practice, institutionalised by the court ruling. The ruling of the Court is not an interpretative decision on the constitutionality of a legal provision: it is the expression of another competency of the Court – the very rarely used competence to rule on constitutionality of treaties prior to their ratification. The ruling on the constitutionality of the Istanbul Convention is not related to a law in force in Bulgaria and the principle that the decisions of the Constitutional Court are valid *erga omnes* and are obligatory for all is not valid in this case. This particular ruling has limited application and might be obligatory for governmental bodies only in the context of future ratification. Despite that, the interpretation given by the Constitutional Court and the blurring of the notion of gender has been widely quoted and referred to in connection with application of Bulgarian legislation and policies. The ruling is also used wrongly against and for attacking those citizens and groups who think in a different way and hold a positive opinion about the Istanbul Convention.

3.2.2 Protection of transgender, intersex and non-binary persons

In Article 4 of the Bulgarian Law on Protection from Discrimination there is a ban on discrimination based on various grounds, including sexual orientation but not explicitly on gender identity. Non-discrimination against the mentioned persons – transgender, intersex and non-binary persons – is not explicitly declared as a principle.

According to paragraph 17 of the Additional provisions of the Law on Protection from Discrimination, the ground of sex/gender under Article 4 paragraph 1 of the Law also encompasses the cases of change of gender / gender reassignment. The persons who change their gender according to the law are protected upon change respectively as males and females.

It is worth quoting paragraphs from the Ruling of the Constitutional Court mentioned above.[19]

> 'The Constitution and the entire Bulgarian legislation are built on the understanding of the gender binary of the human species. In fact, the Constitution clearly perceives the social dimension of gender in interaction with its biological determination … In short, the term "gender" is used by the constitutional legislator as a unity of biological determination and social construct. The social dimension of the Constitution does not create a social gender independent of the biological sex as provided for in the Convention.
>
> Traditionally, human society is built on gender binary, that is the existence of two opposite sexes, each being assigned specific biological and social functions and responsibilities. Biological sex is determined at birth and is in the foundation of the sex for the purposes of civil matters. The importance of the sex for the purposes of civil matters in the legal regulation of social relations (cohabitation, parenthood) requires clarity, indisputability, stability and security.'

3.2.3 Specific requirements

The Bulgarian legislation in principle allows implicitly, although not explicitly, the change of sex / legal gender. It regulates the consequences related to the issuance of new personal documents, as well as the protection of transgender persons from discrimination.

[19] Constitutional Court ruling No 13, Sofia, from 27 July 2018 promulgated in State Gazette No 65/07.08.2018. Unofficial English translation of the ruling by UNICEF – Bulgaria – September 2018.

According to Article 9 paragraph 1 of the Law on Bulgarian Personal Documents from 2009:[20]

> 'Where there is a change in the names, personal identification number, gender, nationality, or substantial and permanent changes in facial image of a person, they are obliged to submit an application for a new Bulgarian identity document within 30 days.'

Pursuant to Article 16 paragraph 1 of the Regulation for Issuing Bulgarian Personal Documents from 2010,[21] the marker of sex/gender is among the obligatory personal data to be contained in the Bulgarian personal documents. Furthermore, pursuant to Article 20 paragraph 2 and Article 22 paragraph 7 of the Regulation:

When changing elements of the personal civil status, in the cases when the change is not reflected in the National Population Database, the application for change in the identity card or passport shall be accompanied by:

- in the case of change in the personal identification number – a certificate from the respective municipal administration on the permanent address of the applicant;
- upon change of the names – official document certifying the change, as well as a certificate from the respective municipal administration on the permanent address of the person for the change made in his personal registration card;
- in the case of gender change – an official document from the respective competent authorities.

Another relevant provision that might concern the gender change implicitly is Article 19 of the Civil Registration Act from 1999:[22]

> 'A change in the first, middle or last name of a person is accepted by the court based on the written request of the principal, where the name causes ridicule or disgrace, or is publicly unacceptable, and where important circumstances require.'

Change of gender may be included in 'important circumstances'.

The gender marker change is sought through a court decision in Bulgaria. Court Decision No. 16/30.05.2017 of the Supreme Court of Cassation[23] issued under civil case No. 2316/2016 *г.*, 4th civil division, provides a set of requirements.

Two cumulative criteria are drawn by the Supreme Court of Cassation (SCC) in order to consider and decide a case of gender change: a medical criterion – the existence of the status of transsexuality, which is defined by a complex medical expert opinion; a legal criterion, and namely, the need for the transsexual person to prove before the court her/his serious and unwavering intent to change the gender role performed psychologically and socially.

Therefore, individuals cannot be obliged to undergo a surgical intervention to modify their body without their consent as a prerequisite for changing legal sex / gender marker; on the other hand, the claimants who allege transsexuality need to prove before the court their serious and unwavering intent to change their legal sex / as a minimum, a hormone replacement therapy for sex transitioning initiated is required/. In the specific case, the claimant was an intersex person according to the definitions proposed above.

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[20] https://www.lex.bg/laws/ldoc/2134424576 Law on Bulgarian Personal Documents, *Закон за българските лични документи.*

[21] https://lex.bg/bg/laws/ldoc/2135663268 Regulation for Issuing Bulgarian Personal Documents, *Правилник за издаване на българските лични документи.*

[22] https://www.lex.bg/laws/ldoc/2134673409 Civil Registration Act, *Закон за гражданската регистрация*

[23] Issued under civil case No. 2316/2016 *г.*, 4th civil division.

As mentioned above, protection by anti-discrimination law requires change of the legal gender. Nevertheless, the author is of the opinion that the case decided by the SCC contains indication that protection is due even before change of legal gender and in all cases during the court procedure. The author of the report would suggest the use of the anti-discrimination ground of 'personal status' in order to justify and ensure protection before the change of legal gender.

3.3 Direct sex discrimination

3.3.1 Explicit prohibition

The definitions of direct discrimination and indirect discrimination correspond to the EU definitions. The prohibition of discrimination (as '(…) privileges or restriction of rights') is laid down in Article 6(2) of the Bulgarian Constitution. In Article 4 the LPFD contains the definitions of direct (paragraph 2) and indirect discrimination (paragraph 3). Direct discrimination represents any less favourable treatment of a person compared to how another person is, has been or would be treated under comparable circumstances. The Labour Code (Article 8 paragraph 3) ensures special protection against direct and indirect discrimination, including that based on sex, in the exercise of labour rights and obligations. There is no specific definition of direct discrimination in case law.

3.3.2 Prohibition of pregnancy and maternity discrimination

Pregnancy and maternity discrimination are not explicitly prohibited as direct sex discrimination.

3.3.3 Specific difficulties

There are no specific difficulties in the application of the concept of direct discrimination.

3.4 Indirect sex discrimination

3.4.1 Explicit prohibition

Indirect discrimination is explicitly prohibited in Article 4(3) of the LPFD and the Bulgarian definition is in compliance with the EU definition: to place a person or persons who bear the characteristics mentioned in Article 4 paragraph 1, or persons who without having these characteristics, together with those bearing these characteristics, suffer less favourable treatment or are put[24] in a less favourable position in comparison with other persons by means of an apparently neutral provision, criterion or practice, unless the said provision, criterion or practice can be objectively justified in view of a lawful aim and the means for achieving this aim are appropriate and necessary.

The provision is defined more in detail in order to encompass the outcome of the *CHEZ Razpredelenie* case, mentioned below.

3.4.2 Statistical evidence

Statistical evidence is not used in order to establish a presumption of indirect sex discrimination.

3.4.3 Application of the objective justification test

National courts correctly apply the objective justification test and identify the concept of indirect discrimination. Examples of case law encompass mainly cases of indirect discrimination based on grounds such as ethnicity and disability. As there is no typical case

[24] Amendments with O.J. 105/2016.

law on indirect sex discrimination to mention here, one case on indirect discrimination based on ethnicity can be given as an example – *CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia.* It was subject to Preliminary ruling under Article 267 TFEU from the *Administrativen sad Sofia-grad* (Bulgaria).[25]

The facts of the case: The third party, Ms Nikolova, runs a grocer's shop in the Gizdova Mahala district of the town of Dupnitsa (Bulgaria), a district inhabited mainly by persons of Roma origin. In 1999 and 2000, an electricity supply company, CHEZ Razpredelenie Bulgaria AD (CHEZ RB), installed electricity meters for all inhabitants of the Gizdova Mahala district on part of the overhead electricity supply network. The electricity meters were installed at a height between six and seven metres, whereas in other districts in the town, the meters were installed at a height of about 1.7 metres, making the meters more easily accessible to the consumer. In December 2008, Ms Nikolova, who is not Roma, lodged an application with the *Komisia za zashtita ot diskriminatsia* (Commission for Protection against Discrimination; the KZD) arguing that the reason for installing electricity meters at height in the Gizdova Mahala district was that most of the inhabitants of the district were of Roma origin and accordingly, she was suffering direct discrimination on the basis of nationality. On 6 April 2010, the KZD found that the installation of electricity meters at height amounted to prohibited indirect indiscrimination on the grounds of nationality. This decision was annulled on 19 May 2011 by the *Varhoven administrativen sad* (Supreme Administrative Court) on the basis that, inter alia, 'the KZD had not indicated the other nationality in relation to the holders of which Ms Niklova had suffered discrimination'. The case was referred back to the KZD, which later found that CHEZ RB had directly discriminated against Ms Nikolova on the grounds of her 'personal situation', as the placement of the meters put her in a disadvantageous position compared with other CHEZ RB customers whose meters were in accessible locations. CHEZ RB brought an appeal against the decision before the *Administrativen sad Sofia-grad* (Administrative Court, Sofia). In order to assist in making its decision, the Administrative Court sought a preliminary ruling from the Court of Justice of the European Union (CJEU) in February 2014.

The Administrative Court stated that the case should be considered from the point of view of the protected characteristic of ethnicity, rather than from the point of view of nationality or personal situation. In its view, by identifying herself with the population of Roma origin of the district, Ms Nikolova defined herself as a person of Roma origin and so the KZD was incorrect to hold her ethnic origin had not been established. Although inclined to consider that the practice of installing electricity meters at height was direct discrimination, the Court was unsure if the practice amounted to either direct or indirect discrimination. Finally, if the practice did amount to discrimination, the Court took the view that it would not be justified. It submitted 10 questions in relation to these points to the CJEU for its consideration.

The CJEU held that the indirect discrimination provisions of the EU Race Directive were intended to benefit persons who, although not themselves a member of the race or ethnic group concerned, nevertheless suffered less favourable treatment, or a particular disadvantage, on the grounds of race or ethnicity. It was enough that a person suffers the same disadvantage alongside those of a certain ethnic origin provided the treatment stems from a measure based on the ethnic origin.

The CJEU acknowledged that the practice was capable of objective justification; ensuring security of electricity supply and providing consumers with the ability to properly monitor electricity consumption were legitimate aims.

[25] European Court of Justice (Grand Chamber) Date of decision: 16 July 2015. Link to full case: http://curia.europa.eu/juris/document/document_print.jsf?doclang=EN&text=&pageIndex=0&part=1&mode=lst&docid=165912&occ=first&dir=&cid=4002632.

The national courts, however, had to determine whether the measures used by the electricity company to pursue those legitimate aims were appropriate and necessary. The prejudice suffered by the people living in the district would have to be weighed in the balance.

The case was decided as a case of indirect discrimination and justified changes in the legislation concerning indirect discrimination, providing broader interpretation also for cases of indirect discrimination by association.

There are specialist opinions in Employment Law in the UK, for example, that this is an important decision that employers should take into account when dealing with employee relations issues and when putting together rules and policies. Employers may now face claims from individuals who 'suffer' from a policy which disadvantages a group with a protected characteristic such as gender, race, religion, etc., even where the individual is not a member of that group. One such example would be a working father who may claim that he, too, suffers from a policy to require full-time work which is indirectly discriminatory against working mothers.

The potential for indirect discrimination claims has definitely been increased by this ruling.[26]

3.4.4 Specific difficulties

The case law of the Commission for Protection from Discrimination (CPD) and of the courts has so far mainly dealt with the notion of direct discrimination. Despite initial difficulties in dealing with the concept of indirect discrimination, the equality body and the Supreme Administrative Court show a better understanding in their practice.

3.5 Multiple discrimination and intersectional discrimination[27]

3.5.1 Definition and explicit prohibition

Multiple discrimination is explicitly addressed in the Law on Protection from Discrimination. Namely, multiple discrimination is addressed in the Additional Provisions (paragraph 1 p. 11) as discrimination based on more than one ground.

Furthermore, Article 11 paragraph 2 obliges governmental bodies, public bodies and the bodies of self-government to take priority measures for ensuring equal opportunities for people who are victims of multiple discrimination as groups in a disadvantaged position, and more specifically in the field of education and vocational training.

The anti-discrimination remedies in Bulgaria do allow applicants to simultaneously invoke several grounds of discrimination in the same claim. This is favoured both by explicit recognition of the concept itself but also by the procedure proposed in such cases by the Commission for Protection from Discrimination.

According to Article 48 of the LPFD, the Commission examines the incoming complaints in specialised chambers based on the alleged discrimination grounds. The chambers are permanent chambers for a specific ground and also a separate extended chamber of five members when multiple discrimination cases are at stake (Article 48 paragraph 2). The members of the latter are not fixed and it is defined *ad hoc*. The Commission notes in its reports that anti-discrimination provisions are contained also in other pieces of legislation,

[26] https://www.menzieslaw.co.uk/case-update-2-indirect-discrimination-wider-implications/.

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

like the Labour Code, the COSI, the Law on Health, the Law on Integration of Persons with Disabilities, the Law on Education, the Law on Employment Promotion, the Child Protection Law, the Law on Social Assistance, the Law on Higher Education, etc. Many of the provisions of these laws precede in time the Anti-Discrimination Law. Complex situations where more anti-discrimination grounds and provisions of national but also of European and international law are involved, are tackled by the extended chamber.[28]

Therefore, the author would assess that the legislative architecture of the protection against discrimination in Bulgaria favours recognition by the quasi-judicial body, but also by the courts of multiple/intersectional discrimination. There is explicit legal recognition of multiple discrimination in the anti-discrimination legislation, and the law and procedure are well codified, which make the prerequisite for this recognition.

3.5.2 Case law and judicial recognition

There is no specific case law in the field which has an impact on the concept of intersectionality, including gender, and specifically in the field covered by EU standards on equal treatment which are under consideration. Although there is good basis for developing further legal practice, there are few relevant examples of legal cases where sex/gender is one of the discrimination grounds at stake.

There follows an example of a case decided in 2017 by the Commission, where the ground of sex is involved in parallel with the one of family status.[29] The complaint challenges the Civil Registration Act based on these compound grounds. This act requiring that Bulgarian citizens must have a father's name is, according to the applicant, humiliating for mothers, single mothers and children with an unknown father, and it assigns to mothers a secondary role in defining the second and the family name of their children. The applicant proposes that the notion of 'father's name' be replaced by 'family name' or by 'father's and/or mother's name'. The Commission admits that the situation with the father's name in Bulgaria is really not so frequent and is part of the name tradition in the country. The use of the name of the father allows the manifestation of the child-father link and for affirming the emotional relations between the two of them. This is in the interest of the child as it ensures the care for the child by the two parents. Therefore, according to the members of the extended panel, this should be regarded as a positive measure in the interest of a vulnerable group – minor children. It is true that this solution contains inequality of women and men but in view of the objective pursued, this inequality is objectively justified. In addition, it is said that it is the right of the child and his/her parents to adopt the traditions of the community of their origin. These are practices which represent traditional norms of behaviour. The adoption of a different solution based on formal equality would bring negative solutions, even mocking and partial isolation of the child. Therefore, no discrimination was found.

It is the author's opinion that the arguments of the decision are not convincing. It is a pity that in this case the Commission did not identify the obvious direct discrimination faced by the complainant – but also by all women in Bulgaria – in this very important private sphere, including the clear non-compliance with the CEDAW convention. Furthermore, there is no clear analysis of the compound discrimination alleged and justification of the decision of the extended panel.

In cases where grounds of discrimination are alleged simultaneously, the practice of the Commission, and respectively of the courts, shows that the complaints are examined separately, rather than in their interaction. There is no good practice of using comparison-based tests in the case of several grounds of discrimination.

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[28] Report of the Commission for its activities in 2017 – http://www.kzd-nondiscrimination.com/layout/images/stories/2015/otchet/%D0%9E%D0%A2%D0%A7%D0%95%D0%A2.2017.pdf.

[29] Decision No. 10/2017 on file No. 244/2012.

There is good legal basis for progress in the field but the application of the concept in practice still presents difficulties.

3.6 Positive action

3.6.1 Definition and explicit prohibition

Positive action is allowed in Bulgarian legislation. There is no explicit definition of the term 'positive action'. Such measures are provided for in the Law on Protection from Discrimination (LPFD) and in the Law on Equality between Women and Men.

Here are the different measures and the terms used:

'temporary incentive / promotional measures' (justified and proportional initiatives of temporary nature aiming at removing obstacles to balanced representation of women and men or to equal status of the representatives of one sex or of the sex put in unequal position).[30] Article 15 of the Law provides that the temporary promotional measures are applied by the bodies of the executive for a defined period of time until the achievement of their objectives for balanced representation, equal opportunities and equality between women and men in the sphere where inequalities exist and persist. These measures are not yet defined and specified under the Law.

'promotional measures' – for encouraging/promoting persons belonging to the less represented sex (or ethnic group) to apply for a certain job or position and for encouraging/promoting the vocational development and participation of workers and employees belonging to the less represented sex or ethnic group.[31]

'hiring the candidate of the under-represented sex' –

Positive action measures are allowed in the process of hiring for positions in the state and local government administration. According to Article 39 of the LPFD, if the candidates for positions in the State central and local administration have equivalent qualifications in relation to the requirements for the position, the candidate from the under-represented sex will be appointed, except when there are specific circumstances for appointing the other candidate. This is also valid for determining the members of consultative and managerial and other bodies in this sphere, except when they are determined by elections or are subject to a competition/tender.

'balanced representation' (Sharing of the positions by women and men in power and decision-making in all areas of life which represents an important condition for equality of sexes).[32]

'measures for balanced participation' in education and training of men and women, as far and as long as these measures are needed.[33]

'special measures' for individuals or groups of persons in a disadvantaged position based on discrimination grounds under Article 4 paragraph 1 of the LPFD, as long and as far as these measures are necessary.[34]

'measures aimed at initiatives exclusively or mainly promoting entrepreneurship among women', when they are the under-represented sex and

[30] Additional provisions paragraph 1 p. 6 of the Law on Equality between Women and Men.
[31] Article 24 LPFD.
[32] Additional provisions, paragraph 1 p. 3 of the Law on Equality between Women and Men.
[33] Article 7 paragraph 1 p. 13 of the LPFD.
[34] Article 7 paragraph 1 p. 14 of the LPFD.

'measures aimed at initiatives for preventing or compensating for disadvantages in the professional careers of women'.[35]

'treating people differently in the provision of goods and services when they are aimed exclusively or predominantly at one of the sexes', if the aim is legitimate and if the means are adequate and necessary.[36]

It can be concluded that the Bulgarian legislation on positive action goes beyond the employment sphere and beyond EU standards in general. In the employment sphere, the regulation of positive action measures for the under-represented sex is an obligation for the employer. A general remark is that these measures still remain as a formal principle, despite detailed regulation, with limited practical implementation.

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

'Equal opportunities' is a concept adopted in the Law on Equality of Women and Men. It means creating conditions for realisation of equal chances and ensuring guarantees for access to all spheres of social life, as well as achieving personal and professional realisation and development. (Additional provision paragraph 1 p. 2 of the Law). Equal opportunities of women and men in all spheres of social, economic and political life is stated as the first principle of the State policy of equality. Equal treatment of women and men and the ban of discrimination and violence based on sex is another principle enshrined in the Law.[37]

3.6.3 Specific difficulties

A major constraint is the lack of knowledge and awareness of the principle by the representatives of the institutions. There is no reliable monitoring of the situation on gender equality in Bulgaria and the identification of areas where to adopt positive measures for ensuring equality.

One major obstacle to adoption and implementation of positive action is the widespread understanding of equality as formal equality, without any exception. In recent years, according to the author of this report, this understanding was reinforced by the anti-liberal trends and attitudes against the promotion of the rights of more vulnerable persons and groups, like minorities. It also affects the societal attitudes against encouraging the rights of women compared with those of men, where needed. Human rights, human rights standards and human rights defenders are all affected.

Another more concrete obstacle to the application of the concept of positive measures is the inappropriate interpretation of the concept by the Commission for Protection from Discrimination. For example, in the above-mentioned multiple discrimination case related to the father's name, according to the author inequality cannot be justified through the anti-discrimination principle of positive action in the interest of the child.

In other more recent cases, the Commission – in order to justify exclusion of men from educational courses provided by a private organisation – uses, among other things, the argument that this could be considered a positive action measure taken according to the Gender Equality Law. The author is of the opinion that this law cannot be applied in the concrete case as the positive measures provided in the Gender Equality law are only those taken by the governmental bodies as an element of the State policy. This is valid also for the temporary special measures for balanced participation of both sexes, mentioned in Article 7 paragraph 1 p. 13 of the LPFD. This is just for illustration of the difficulty the principle presents even for the equality body.

[35] Article 7 paragraph 1 p. 18 of the LPFD.
[36] Article 7 paragraph 17 of the LPFD.
[37] Article 2 p. 1 and 3 of the Law on Equality between Women and Men.

3.6.4 Measures to improve the gender balance on company boards

There are no measures, as provided or planned quota, for improving gender balance on company boards. The adopted approach by the government is soft policy with measures of a voluntary nature and also through the minimum standards for including information on gender balance in the annual activities' reports of large public companies which were introduced by the Accountancy Act[38] and with the amendment of the Law on Public Offering of Securities.[39] These provisions are not explicitly on gender representation and gender balance on the company boards and on priority measures but are aimed at harmonisation with CRD-Directive 2013/36 and Directive 2014/95 on the disclosure of non-financial information.

Nevertheless, they can form the basis for future steps for improving gender balance.

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

There are no positive action measures adopted in other fields, like in political decision-making.

3.7 Harassment and sexual harassment

3.7.1 Definition and explicit prohibition of harassment

Harassment, along with sexual harassment, is explicitly forbidden and defined by the Law on Protection from Discrimination. According to Article 5 of the LPFD, harassment and sexual harassment represent discrimination.

According to paragraph 1 p. 1 of the Additional Provisions, harassment is any unwanted conduct based on the grounds defined in Article 4 paragraph 1, expressed physically, verbally or in any other way, which has as its purpose or effect the violation of the dignity of the person and the creation of a hostile, degrading, humiliating, offensive and intimidating environment.

The definition complies with the EU requirements.

3.7.2 Scope of the prohibition of harassment

Bulgarian law goes beyond the regulation of harassment in the workplace and also explicitly covers protection from harassment in educational institutions (Article 31 of the Law), and harassment in the area of the establishment, equipping and expansion of an economic activity (Article 37 paragraph 3). Harassment in the latter sphere is explicitly defined as follows: the rejection or the acceptance by a person of conduct which represents harassment or sexual harassment cannot be a ground for taking a decision which affects this person.

As there is no limitation by law of the application of the concept of harassment in other spheres, it is the author's opinion that protection is valid for all spheres.

3.7.3 Definition and explicit prohibition of sexual harassment

According to paragraph 1 p. 2 of the Additional Provisions of the LPFD, sexual harassment is any unwanted conduct of a sexual nature, expressed physically, verbally or in any other

[38] 'Accountancy Act', *Закон за счетоводството, Zakon za schetovodstvoto*, available in Bulgarian at: https://www.lex.bg/bg/laws/ldoc/2136697598.

[39] Law on Public Offering of Securities, *Закон за публичното предлагане на ценни книжа, Zakon za publichnoto predlagane na zenni knizha*, available in Bulgarian at: https://www.lex.bg/laws/ldoc/2134697472.

way, which violates the dignity and honour of the person and creates a hostile, degrading, humiliating, offensive and intimidating environment. Namely, sexual harassment occurs when a person refuses to accept such behaviour or the compulsion to accept it which might influence the taking of decisions affecting this person.

The definition corresponds to the EU standards.

3.7.4 Scope of the prohibition of sexual harassment

Bulgarian law goes beyond the regulation of sexual harassment in the workplace and also explicitly covers protection from sexual harassment in educational institutions (Article 31 of the Law), and both harassment or sexual harassment in the area of the establishment, equipping and expansion of an economic activity (Article 37 paragraph 3). In the latter sphere, the rejection or the acceptance by a person of conduct which represents harassment or sexual harassment cannot be a ground for taking a decision which affects this person.

According to Article 17 of the Law on Protection from Discrimination, the employer who receives a complaint from a worker or employee who alleges he/she is subjected to harassment, including sexual harassment, has to immediately check the situation, to take measures for stopping the harassment and for applying disciplinary measures, if the harassment is committed by another worker or employee.

The employer has the obligation, together with representatives of the trade unions, to take all possible measures to prevent discrimination in the workplace (Article 18 of the LPFD). In addition, he/she has to make visible and accessible for the workers/employees the text of the LPFD and the respective regulations against discrimination in the collective agreement and the internal rules (Article 22 of the LPFD).

As there is no limitation by law of the application of the concept of sexual harassment in other spheres, it is the author's opinion that protection is valid for all spheres.

In addition to the regulation mentioned in the Anti-Discrimination Law, Article 127 paragraph 2 of the Labour Code[40] provides for the obligation of the employer, among other obligations for ensuring conditions of work for the employee/worker, to preserve his/her dignity during the implementation of his/her working obligations.

3.7.5 Understanding of sexual harassment as discrimination

According to Article 5 of the LPFD, harassment, along with sexual harassment, are explicitly forbidden and defined as discrimination by the Law on Protection from Discrimination.

3.7.6 Specific difficulties

The case law consists of court cases and cases before the equality body initiated mainly by women concerning sexual harassment. The difficulty derives also from the fact that in most cases there are no witnesses of the discriminatory behaviour and it makes it difficult for the alleged victim to provide initial evidence.

There are still gaps in the practical implementation: there are delays in proceedings, and the application of the burden of proof by the Commission for Protection from Discrimination (CPD) and by the courts has not always been in full compliance with EU standards. At the beginning of 2015, Article 9 (Burden of Proof) of the LPFD was amended and the correct wording was introduced in the definition of the rule on the burden of proof in cases of discrimination. Prior to that, the inconsistent practice of both the CPD and the courts was

[40] Labour Code, *Kodeks na truda*, adopted by S.G. 26/86, in force since 1 January 1987, last amended by S.G. 109/2020, Bulgarian version available at: https://www.lex.bg/laws/ldoc/1594373121.

reflected in the level of proof required from women who were complaining in most of the cases. As a result, their access to justice was limited. After the legal amendment the situation has improved but the refining of the analysis and the developing of the gender approach in cases of sexual harassment is still needed.

Namely, the broader scope of protection against harassment and sexual harassment, as in the private sphere, in the entrepreneurship sphere and in the educational environment has not yet been explored and discussed in the practice and case law of the Commission for Protection from Discrimination and of the courts.

The overall backlash in attitudes in Bulgaria towards gender equality and the issue of violence against women over the last four years is also negatively influencing the development and practical implementation of the concept of sexual harassment. In addition to other dissuasive and re-victimisation factors, additional pressure is exerted against women through public opinion and social media.

3.8 Instruction to discriminate

3.8.1 Explicit prohibition

In Bulgaria instruction to discriminate is explicitly prohibited as an element of the notion of 'incitement to discrimination'. '"Incitement to discrimination" is encouraging directly and intentionally, instruction to discriminate and persuading somebody to discriminate.'[41]

3.8.2 Specific difficulties

To the author's knowledge, there are no specific difficulties in the field of discrimination based on sex. There are no relevant cases in relation to this discrimination ground; the provision was used mainly in relation to other grounds such as ethnicity and sexual orientation. In cases related to other grounds, the equality body and the court had to deal with hate speech and incitement to discrimination, with both issues of harassment and incitement/instruction to discriminate. The courts have been cautious in their motivation and decisions, although positive outcomes have been achieved in some cases.

In the current circumstances of continuous attacks against gender equality, women's rights and women's organisations, it would be justified to initiate cases of harassment and instruction to discriminate, as these are often related to direct sex discrimination.

3.9 Other forms of discrimination

The author believes that other forms of discrimination, such as discrimination by association or assumed discrimination, although not explicitly defined as such, are encompassed in the definition of discrimination 'based on the grounds of Article 4 paragraph 1 of the LPFD'. Paragraph 1 p. 8 of the Additional Provisions provides that this means:

> '…on the basis of the real, current or past existence, or assumed existence of one or more grounds in connection with the person discriminated against or with a person connected to the discriminated person.'

'*Connected persons'* are also defined in the Additional Provisions (paragraph 1 p. 9).

Algorithmic discrimination is not specifically mentioned in the LPFD, or at least not yet. Nevertheless, the scope of protection under the law is very broad and any discrimination based on the grounds mentioned in Article 4 is forbidden, so implicitly also algorithmic discrimination in relation to one or more of the protected grounds.

[41] Additional provisions paragraph 1 p. 5 of the LPFD.

There are no specific issues related to case law on other forms of discrimination.

3.10 Evaluation of implementation

The author considers the implementation of the EU law concepts in Bulgarian law as formally satisfactory. The main concepts are introduced and explained. There is, however, discrepancy in the interpretation of main concepts of discrimination based on sex, gender, and transgender, including by the Constitutional court, that is a threat to the understanding and implementation of these principles by the institutions and by the magistrates.

3.11 Remaining issues

Despite some advances in the scope of positive action, the concept has not yet been applied in policy and practice. This is also true for the concept of multiple discrimination. The legislation and policy on gender equality remains in part declaratory and still in favour of formal equality.

The author would like to mention here that despite the widespread hate speech and harassment against women's rights defenders in the year 2018, in the course of the campaign against the Istanbul Convention, the Equality body did not use its broad competences under the law for initiating action, in compliance with their competencies, against those who perpetrated the harassment. So, amid the atmosphere of fierce opposition and intimidation which created obstacles for women and women's defenders to access justice, there was no reaction by competent institutions.

In a general Position of the Commission for Protection from Discrimination, from February 2018, at the beginning of the opposition campaign, the Commission just generally noted '…the frequent use of hate speech in public debate and action, including in social media…'. Furthermore, as another example of extreme positions, the Commission recently noted the debates around the Istanbul Convention:

> '…Among the normal conversations and debates on this important issue many extreme positions were expressed that went beyond the limit of democratic discussion and turned into hate speech against concrete vulnerable groups….'

In that respect, the author's opinion is that here again, in this timid reaction to awful aggression against women and women's defenders, it is obvious that women and women's NGOs are not identified as particular targets and victims of discrimination also in the form of harassment, either.

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

4.1 General (legal) context

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

There have not been surveys specifically focused on equal pay but the data given by official sources in Bulgaria are as follows:

According to the National Statistical Institute (NSI) from its latest report on data about women and men from 2018, the educational level of working women is higher compared to men. The percentage of women with a university education is 40.1 % and working men with such an education make up only 23.9 %. For the whole period from 2000 to 2016, the average remuneration of men is higher than that of women. After 2007, the tendency for an increase in men's remuneration is even more noticeable. In almost all economic activities the gender pay gap (GPG) is visible. The highest gap is recorded for the sector 'Health and social work', where the remuneration of women is 38.4 % lower than men's and in 'Finances and insurance', the GPG is 32.1 %. The remuneration amount is directly connected with the achieved educational level. The persons with a higher educational level of 'doctor' are the ones most highly paid – almost twice the average monthly salary for the country. For all educational levels, the salaries for men are higher than the ones for women. The GPG is highest at the educational level of bachelor's and master's degree – the gross monthly pay of women with the same levels of education is 26 % lower than men's.[42] This is official information about GPG in groups with the same or comparable level of education, within the same sectors and sub-sectors.

The GPG is expressed further in the value of pensions. In the segment of retired persons with low pensions, the ratio of women is higher. 89.5 % of women receive a basic pension of up to BGN 400 (about EUR 200), as do 62.7 % of men. 42.2 % of women and 17.3 % of men receive a basic pension of up to BGN 200 (about EUR 100). The maximum amount of BGN 910 (about EUR 450) is received by 45 567 men and only 8 189 women.[43] Here, it is not possible to say clearly if it is among same educational level. Such figures are not available.

It is indicative to mention the data presented by the Ministry of Labour and Social Policy (MLSP) in their Draft report for the implementation of gender equality policy for 2018: The report displays the GPG for 2017 according to the NSI – 12.7 %, which is said to be lower than the figure for 2016 – 13.2 %. Compared to the average percentage of GPG in the EU, which is 16 % according to EUROSTAT, the figure for Bulgaria is lower. It is the conclusion of the MLSP that the data mentioned about the GPG should not be regarded as an expression of inequality between women and men. It is said that differences are conditioned by characteristics of the employers and the concrete economic activity, the size of the firm, as well as by the individual characteristics of the employed persons – age, educational level, qualification, profession, and expertise. The reasons for the GPG include: traditions and stereotypes in the selection of education, which leads to sex segregation of the labour market; career development – delayed career development, longer maternity leave, difficult balance between work and family life; the new production technologies and the requirements for continuous training, vocational training and capacity building, which is a challenge for women who have to combine it with family obligations and chose family or work.[44]

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[42] National Statistical Institute – '*Women and men in Bulgaria*', '*Жените и мъжете в РБългария*' 2018, http://www.nsi.bg/bg/content/16817/публикация/жените-и-мъжете-в-република-българ ия-2018.

[43] National Statistical Institute – '*Women and men in Bulgaria*', '*Жените и мъжете в РБългария*' 2018, http://www.nsi.bg/bg/content/16817/публикация/жените-и-мъжете-в-република-българ ия-2018.

[44] Draft report on gender equality for 2018 – no official document yet, MLSP – April 2019.

4.1.2 Surveys on the difficulties of realising equal treatment at work

Other surveys concerning the groups at risk from discrimination in the labour market were conducted by the Commission for Protection from Discrimination in the period 2016-2018. In two surveys mandated to external agencies, it was confirmed that women, including pregnant women, are among the most affected in Bulgaria by employment discrimination in all its elements, including in hiring, granting leave for childcare, and harassment. In most of the cases, they face multiple forms of discrimination.[45]

4.1.3 Other issues

There are no other issues.

4.1.4 Political and societal debate and pending legislative proposals

The political environment, and the backlash in interpretation of main principles, especially in the last two years, may represent a threat even to the understanding of concepts largely accepted to date, such as equal pay and equal working conditions.

4.2 Equal pay

4.2.1 Implementation in national law

The principle of equal pay is regulated in the Labour Code and in the Law on Protection from Discrimination (Article 14). The employer shall ensure equal remuneration for equal or equivalent work / work of equal value. This principle shall apply to all types of pay – any remuneration, paid directly or indirectly, in cash or in kind. The notion of equal pay includes the assessment criteria in determining the labour remuneration and the assessment of work performance. These criteria shall be equal for all employees, regardless of the duration of the contract or the working time, and shall be determined by collective labour agreements or by internal administrative rules regarding salaries.

The principle enshrined in the Law on Protection from Discrimination is not defined as a typical equal pay clause between men and women only but encompasses all discrimination grounds.

Article 243 of the Labour Code (LC) defines the equal pay principle between men and women as ensuring equal remuneration for equal or equivalent work, by also encompassing all elements of pay.

The EU standards of equal pay are fully transposed in Bulgarian legislation. However, there is a big gap between the formal recognition of the equal pay principle and its implementation in practice. No specific and consistent legislative or policy measures have been adopted so far to address the gender pay gap.

There is a specific procedure for the assessment of civil servants.

In principle, no justifications for differences in pay for women and men are accepted. This is confirmed by the case law of the Commission for Protection from Discrimination.[46] The case law on this issue is not recent but this case was the first important case in the field and its outcome and main principles impacted further case law.

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[45] For example – National representative social science survey at territorial basis with the purpose of elaborating the profiles of groups who are most affected by discrimination (2016) – CPD – http://www.kzd-nondiscrimination.com/layout/index.php/obshtestweni-pory4ki.

[46] E.g. *Devnya Cement* – Decision of the CPD No. 29/4.07.2006, confirmed by Decision No. 10594/1.11.2007 of the Supreme Administrative Court.

The law provides, as an exception to the principle of non-discrimination in Article 7, for the possibility of more advantageous working conditions (which also include pay) in relation to different working experience or seniority, when it is objectively justified for achieving a legitimate aim with the means deemed necessary.

4.2.2 Definition in national law

There is no separate, explicit and general definition of pay in Bulgarian law.

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

Article 4 of Recast Directive is explicitly implemented through Article 14 of the LPFD, as mentioned above.

4.2.4 Related case law

The legal practice on ensuring equal pay is being developed by the Commission for Protection against Discrimination. The Commission is still the preferred forum for women who seek protection against unequal pay. Although the case law mentioned below is not recent, as the first case which had an impact, it is worth mentioning it.

The *Devnya Cement* case was decided by the *Second specialised panel of the Commission* and was confirmed by the Supreme Administrative Court 119. The Commission found continuous unequal treatment of the applicant, a female worker at Devnya Cement, in that she was provided with unequal pay for work of equal value, when compared to her male colleagues. The complainant was working as mill operator and was receiving lower pay than her male colleagues appointed to the same job position – the differences came both from the main remuneration and from additional payments for seniority, working conditions, like night work and overtime work, and bonuses.

The Commission declared that it constituted both a violation of Article 14 paragraph 1 (the equal pay provision) of the Law on Protection from Discrimination (LPFD), and direct discrimination based on sex within the meaning of Article 4 paragraph 2 of the law. Before the Commission, the defendant could not justify the difference of BGN 45 (around EUR 23) in pay on a monthly basis vis-à-vis the applicant and to her detriment, compared to her male colleagues. The Commission ordered Devnya Cement to discontinue the practice of unequal treatment based on sex in the enterprise, and to amend the collective agreement so as to include guarantees of equal pay, based on sex and on all other grounds, as required by Article 14 paragraphs 1 and 2 of the Law on Protection from Discrimination.[47]

There is no substantial development of case law concerning equal pay in Bulgaria. As a general comment we can mention the lack of a clear gender approach in cases of pay discrimination to the detriment of women. This is due, in the first place, to the fact that in the Anti-discrimination law (LPFD) equal pay is regulated as equal pay for all, based on all grounds.

Secondly, as mentioned in this report, the fact that Section 3 of Chapter II of the LPFD is called 'Protection in the exercise of the right to work' is interpreted by the Commission in its practice as a separate ground of discrimination – discrimination in employment. Thus claims for equal pay are considered without regard to any grounds for discrimination, especially not the ground of sex.

According to the author of this report, the interpretation of the provision of Article 14 paragraph 1 of the LPFD is problematic for the application of the provisions on equal pay and equality in working conditions as a whole. The provision of the LPFD which reads that

[47] Decision of the Commission for Protection against Discrimination No. 29/4.07.2006, confirmed by Decision No. 10594/1.11.2007 of the Supreme Administrative Court.

equal pay is ensured on all grounds, without a specific clause on women and men, is detrimental for the classical principle of equal pay which means equal pay of men and women. This general clause of the LPFD shifts the focus from the deep gender aspects of unequal pay cases and creates an obstacle to building relevant case law specifically on equal pay of men and women.

4.2.5 Permissibility of pay differences

As an exception to the principle of non-discrimination, in Article 7, paragraph 1 p. 5 of the LPFD, the law provides for the possibility of more advantageous working conditions (which also include pay) in relation to different work experience or seniority, when it is objectively justified for achieving a legitimate aim with the means for that aim deemed necessary. The principle of equal pay being very strict according to Bulgarian law, it would be in very rare cases that this provision could be used for pay differences.

The author refers to the data on gender pay gap and justifications given by the government in the Draft Report on Gender Equality for 2018, which was mentioned above. It is obvious that the pay differences representing the GPG are not correctly understood as such and are confused with other circumstances influencing these differences of pay between women and men. Therefore, despite the ban on pay discrimination based on sex, it might seem that differences are permissible as the reasons behind these differences are blurred.

4.2.6 Requirement for comparators

Comparators are not explicitly required by law but they may sometimes be required in practice.

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

Such parameters are not explicitly established by law. As mentioned above, the notion of equal pay includes the assessment criteria for determining labour remuneration and the assessment of work performance. These criteria shall be equal for all employees, regardless of the duration of the contract or the working time, and shall be determined by collective labour agreements or by internal administrative rules regarding salaries.

There are specific rules and procedures, for example for the assessment, including the periodic assessment of civil servants, regardless of the grounds defined in Article 4 paragraph 1 of the LPFD. These are Unified classification of positions in the administration and regulations on the remuneration of civil servants.

4.2.8 Other relevant rules or policies

To our knowledge there are no other relevant rules or policies.

4.2.9 Job evaluation and classification systems

There are as yet no such harmonised job evaluation and classification systems in Bulgaria. There are initial discussions about such systems.

4.2.10 Wage transparency

National law and case law do not significantly address the issue of wage transparency.

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

The European Commission's Recommendation of 7 March 2014 on strengthening the principle of equal pay between men and women was not specifically given attention and was not followed in Bulgaria.

No specific measures have been adopted in Bulgaria before or after the Recommendation entered into force. There is no mention of this issue explicitly in the respective priority areas on equal pay, as defined in the previous and the new Strategy for promotion of equality of women and men, or in the national plans on gender equality.

Even if there are no specific measures related to pay transparency, it must be mentioned that the equality body – the Commission for Protection against Discrimination – and the Labour Inspectorate have, as a matter of principle, the right to require information from the employers – in the course of the investigation in relation to the allegations of victims of discrimination, in the first case, and in relation to the control functions over observation of labour legislation in the case of the Labour Inspectorate. These general competencies are regulated in Article 56 of the LPFD and in Article 402 paragraphs 1 and 2 of the Labour Code. There are no specific obligations for providing information specifically about pay transparency and wage differences, and the refusal of or obstructing the gathering of information in such cases are not connected with specific concrete sanctions.

4.2.12 Other measures, tools or procedures

There are no other specific measures taken in the last year with substantial impact on equal pay and equal working conditions for women and men.

The following initiatives presented by the government can be mentioned, however:[48]

A priority issue for the Ministry of Education and Science in 2017 was the increase of remuneration for pedagogical experts in the pre-school and school sectors and attracting young specialists to the profession, as well as keeping them in this important sector, where possible. The sector being highly feminised, all improvements are pertinent to the problem of equal pay and the GPG. As a matter of fact, since 1 September 2017, the remuneration of the pedagogical staff was increased by 15 % as part of the political commitment undertaken by the government, in place since May 2017, for doubling the remunerations in the sector by the end of its mandate. Other incentives and additional payments were provided for those working in small towns, such as transport costs, payments for clothes, etc.

There is a special EU-funded project in which the NGO 'Gender project foundation/GPF' is a partner, and which deals with GPG. It is called 'Zero GPG – Gender equality: Innovative tool and awareness raising on GPG'. The project is about creating an enabling environment for tackling GPG through working with government, trade unions, employers' associations, academics, and NGOs. A manual for trainers on countering GPG was created, as well as an innovative web-based instrument created for calculating the GPG. The results of the project were followed by the government and endorsed by the Ministry of Labour and Social Policy.[49]

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[48] The Report on the implementation of the National plan on Gender equality for 2017, adopted by the Council of Ministers in July 2018 – http://www.gov.bg/bg/prestsentar/zasedaniya-na-ms/dneven-red-na-zasedanieto-na-ministerskiya-savet-na-18-07-2018-g.
The Report on the implementation of the Recommendations of the CEDAW Committee – https://www.mlsp.government.bg/ckfinder/userfiles/files/politiki/ravni%20vyzmojnosti/normativni%20aktove/bg%20zakonodatelstvo/Doklad%20CEDAW%202017.pdf.

[49] The project 'Innovative tool and awareness raising on GPG' – https://gender-bg.org/bg/proekti/archive-proekti/33-proekt-zero-gpg-gender-equality.html.

4.3 Access to work, working conditions and dismissal

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

The author considers that the definition of a worker in Bulgarian law is in line with the CJEU case law. Chapter 2 Section 1 of the Law on Protection from Discrimination regulates protection against discrimination in the employment sphere. Without explicitly indicating the personal scope of the protection, the law uses the term 'employer' which encompasses all relations between workers and employers under a labour contract. According to Article 28 of the Law on Protection from Discrimination, this protection is also extended to civil servants under the special civil servants' contracts. Those obliged to ensure equal pay and equal access to work and working conditions are the employers. The definition of the concept of 'employer' is contained in the Additional Provisions of the Labour Code, paragraph 1.1: the term 'employer' is associated with any physical or legal person, or its branches, or any other unit which is autonomous from an organisational and economic point of view, and who/which hires workers and employees independently under a labour contract, including home workers or workers for distance working, as well as in cases of sending a worker or employee for temporary work to another enterprise called the beneficiary. It is to be noted that the definition of an employer was extended so that it is also applicable to the categories of home workers, distance workers and temporary workers as a result of the amendments to the Labour Code in 2011 and 2012.[50]

Discrimination based on the grounds indicated in Article 4 paragraph 1 of the LPFD is also prohibited in the field of the public and the real (economic) sector, directly or indirectly, in relation to the implementation of an economic activity, including in relation to establishment, equipment and development of such an activity, according to Chapter 2 Section 3 Article 37 paragraph 2. It means that also in the business sector and economic initiative, and not only in employment relations, there is ban of discrimination on all grounds.

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

The protection given by Bulgarian legislation in the field of access to work and working conditions is almost in full compliance with the EU equal treatment directives (except for the lack of an explicit statement on equality in the benefits provided for by trade unions and other professional organisations). The main guarantees are provided by the Law on Protection from Discrimination, supplemented by the guarantees of the Labour Code (for labour contracts) and by the respective provisions of the Law on Civil Servants.[51] The detailed protection corresponding to the requirements of the directive is provided in the Law on Protection from Discrimination. Namely, Article 12 lays down the principle of non-discrimination in the field of recruitment and Article 13 ensures the right to equal working conditions. Article 14 relates to the right to equal pay. Article 15 guarantees the right to equal conditions for vocational training and retraining, for upscaling qualifications or re-qualification, for professional promotion, and promotion in terms of position or rank, by ensuring equal conditions for professional assessment. Equal criteria in applying disciplinary sanctions are required by Article 20 and Article 21 lays down equal conditions for the termination of employment.

The protection provided by the law covers all aspects of working life and is extended to all types of employment relations, including those related to sex discrimination in the implementation of military service in the armed forces, with the exception of activities and positions where sex constitutes a determining factor – Article 27 of the LPFD. The protection also covers civil service relationships. In addition to the requirements in the Directive, Bulgarian law also contains protection against discrimination in unemployment.

[50] S.G. 33/2011, 82/2011 and 7/2012.
[51] Law on Civil Servants, *Закон за държавния служител* – https://lex.bg/bg/laws/ldoc/2134673408.

Article 37 paragraph 2 mentioned above extends this protection to the public sector and the sector of the real economy in all cases of the establishment, initiation, equipping or expansion of any economic activity.

Article 36 lays down the principle of non-discrimination in the subscription to / adherence to, terms of membership and participation in trade unions and in all kinds of professional organisations, besides the requirement for specific education in professional organisations. Equality in the benefits provided by such organisations is not explicitly included but could be related to the equality in the terms of participation.

Concerning the material scope of protection by the LPFD, it is worth mentioning again and analysing the provision of Article 13 paragraph 1 – that the employer ensures equal working conditions regardless of the grounds under Article 4 paragraph 1. This broad wording creates problems, according to the author of this report. The expression 'regardless of the grounds under Article 4' may entail interpretations in the direction of considering the discrimination in the field of working conditions as a separate ground of discrimination, instead of regarding it as an area of life where discrimination based on the grounds indicated may take place. It is in fact the case that in some instances of case law this area is mentioned as a separate discrimination ground. The Equality body itself has a specialised section on discrimination in the exercise of the right to work. As explained above, the area of protection against discrimination in the sphere of work is interpreted in the practice and structure of the Commission as if it were a separate area of discrimination; it is considered as discrimination in itself, without the need to specify one of the grounds mentioned in Article 4 of the law. It often results in gender-neutral consideration of cases related to employment discrimination based on sex.

By this interpretation and broadening of the grounds of discrimination, the Commission for PFD has assumed a broader competence to consider and decide labour law cases even when there is not a strictly defined separate discrimination ground. Thus the Commission might turn into a sort of labour court, or rather, labour jurisdiction, without having such specialised courts in Bulgaria. In addition, the members of the Commission do not necessarily have the education and preparation for hearing such cases, which would be of the competence of a court.

The author mentions this because of the tendency which is in place. It shows how extended material scope can lead to extended procedural scope and competences.

The author is of the opinion that equality in employment conditions should always be measured and assessed against the discrimination grounds mentioned in Article 4 paragraph 1 LPFD.

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

As an exception, different treatment is allowed by reason of the nature of a particular occupation or activity, or of the conditions under which it is performed, when gender characteristics constitute an essential and decisive occupational requirement, the aim is legitimate and the requirement does not go beyond what is necessary for its achievement.[52]

More concrete and rigid exceptions are provided in cases of differential treatment based on religion, faith or sex in occupational activities and religious education or training at religious institutions or organisations[53] (Article 7 paragraphs 3 and 4). The author is of the opinion that the detailed regulation of these exceptions goes beyond EU law and presents a risk of non-compliance with the requirements for legality and proportionality, and the

[52] Article 7 paragraph 2 of the LPFD.
[53] Article 7 paragraphs 3 and 4.

exceptions based on religious considerations in relation to sex cannot be *a priori* justified. The exceptions should be removed also in view of more recent EU case law.[54]

As pointed out in *Case Bounauoi and ADDH* v *Micropole SA*, in accordance with Directive 2000/78, it is only in very limited circumstances that a characteristic related, in particular, to religion may constitute a genuine and determining occupational requirement.

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

According to Article 12 paragraph 3 of the LPFD, the employer does not have the right to refuse the appointment of a woman for reasons of pregnancy, maternity or the fact of caring for a child.

Under Article 13 paragraph 3, when the mother who is on pregnancy, maternity or childcare leave returns to work, she has the right to occupy the same position or an equivalent one, and to get advantage of all improvements of the working conditions.

Maximum protection is provided for a worker or employee who is on leave under Article 163 LC: Leave for pregnancy, giving birth. According to Article 333 paragraph 6 LC, this category of workers may only be dismissed when the enterprise has to close down (Article 328 paragraph 1). This most protected category also comprises the 15 days of paternity leave. It does not include adoptive parents. Leave for adoption is regulated already in a special section. If the employee is made redundant during her maternity leave until its end, she is entitled to maternity benefits up to 410 days, as guaranteed under Bulgarian legislation.

According to Article 335 LC, the dismissal must be in writing and in most cases written notice is required where the specific grounds are substantiated. The sanction for not respecting this provision is that the dismissal will be declared illegal by the courts.

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)

Article 7 paragraph 7 LPFD stipulates that the special protection for pregnant women and mothers under the law does not constitute discrimination. Also within this category are women at an advanced stage of in-vitro fertilisation. There is an exception to the exception, however: this protection does not apply when women in such situations do not want to avail themselves of this protection and they have informed their employer thereof in writing, accordingly.

4.3.6 Particular difficulties

The author mentioned some difficulties above about the risk of treating discrimination in the working conditions as a discrimination ground *per se* and broadening the competence of the Equality body for ruling on labour cases, regardless of the listed grounds in Article 4 paragraph 1 of the LPFD. This interpretation as a separate ground of discrimination is attributed to discrimination in the working conditions by the Commission and by the administrative courts, while the Supreme Court of Cassation rejects this interpretation and requires a violation of a specific protected ground.

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

A variety of positive measures of a general nature is also provided for in Bulgarian legislation, as mentioned above in Section 3.6 (Positive action).

[54] Ref. Case *Achbita* C-157/15 and Case *Bounaoui* C-188/15 of the CJ of the EU.

More concrete are opportunities for positive action in the sphere of work. Such concrete measures are provided as follows:

Hiring the candidate of the under-represented sex is allowed under certain conditions. Positive action measures are allowed in the process of hiring for positions in the state and local government administration. According to Article 39 of the LPFD, if the candidates for positions in the State central and local administration have equivalent qualifications in relation to the requirements for the position, the candidate from the under-represented sex will be appointed, except when there are specific circumstances for appointing the other candidate. This is also valid for determining the members of consultative and managerial and other bodies in this sphere, except when they are determined by elections or are subject to a competition/tender.

Promotional measures may be taken for encouraging/promoting persons belonging to the less represented sex (or ethnic group) to apply for a certain job or position and for encouraging/promoting the vocational development and participation of workers and employees belonging to the less represented sex or ethnic group (Article 24 LPFD).

4.4 Evaluation of implementation

In the sphere of working conditions for men and women, Bulgarian legislation is in line with EU standards. The barriers for access to employment in most spheres have been removed by law but implementation in practice still needs improvement. Some barriers remain, however – differential treatment based on religion, faith or sex in occupational activities and religious education or training at religious institutions or organisations is still allowed by law and recognised as an exception to discrimination without the need of particular scrutiny.

4.5 Remaining issues

It is important to further tackle the issue of interpretation of the scope of the protection from discrimination in the sphere of work, the contradictory definition and expanding in practice of the right to equal conditions of work as a separate discrimination ground. During the period of the COVID-19 pandemic, the main piece of legislation through which the Government has taken measures to tackle the pandemic and its consequences is the Law on the measures and actions in times of state of emergency and for overcoming the consequences, announced with the Decision of the National Assembly from 13 March 2020.[55]

The main measures provided for the period of the pandemic are in the following directions:

- the possibility for the employers to mandate work at home or from distance, depending on the specificity of the working process, with a specific order of the employer;
- the possibility for the employer to grant the annual paid leave for the workers or employees, upon the employer's own initiative;
- the possibility to grant up to 90 days per year as unpaid leave while maintaining the social insurance for the employee for this period;
- promotion of maintaining the employment in sectors affected by the epidemiological measures and related closing of businesses, for example, the sectors of tourism and hospitality. The measure of support for these businesses is called 60/40, where the state allocates 60 % of the staff costs, including social

[55] Law on the measures and actions in times of state of emergency and for overcoming the consequences, announced with the Decision of the National Assembly from 13 March 2020, *Zakon za merkite I deystvyata po vreme na izvanrednoto polozhenie, obyaveno s reshenie na NS ot 13 mart 2020 i za preodolyavane na posledizite*, S.G. 28/ 2020, last amended with S.G. 109/ 2020, Bulgaria; Bulgarian version available at: https://www.lex.bg/bg/laws/ldoc/2137201253.

insurance, if the employers prove that they will ensure the remaining 40 % and keep their staff.

There is no specific data on the impact of the pandemic on gender equality in employment and on the employment of women, and more specifically how the measures against the pandemic affected economic sectors which are most at risk and most sensitive for gender equality. These are sectors where women prevail in the workforce, like tourism, or the most feminised sectors.

At the end of December 2020 to January 2021, almost one year after the official start of the pandemic and after several periods of restrictions – and even closure – for some businesses, the average rate of unemployment was higher, at over 6 %, with figures like 14 % in the northwestern regions of Bulgaria. On average, six unemployed persons were waiting for one position of employment.[56]

In the National Plan for Recovery and Sustainability[57] which was prepared relating to the pandemic and is to be reviewed and considered by the European Commission, no specific attention was given to gender equality in employment or the impact and opportunities for women's employment.

[56] https://btvnovinite.bg/bulgaria/sredno-shestima-bezrabotni-se-sastezavat-za-edno-svobodno-mjasto-u-nas.html.

[57] National Plan for Recovery and Sustainability: https://nextgeneration.bg/14.

5 Pregnancy, maternity, and leave related to work-life balance for workers (Directive 92/85, relevant provisions of Directives 2006/54, 2010/18 and 2019/1158)[58]

5.1 General (legal) context

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

There are no important surveys on practical difficulties linked to work-life balance and the author will mention some data and considerations from the most recent governmental reports. In the Draft report on the implementation of Gender Equality policy for 2018,[59] it is recognised that female employment is lower when they have to care for dependent members of their families.

The coefficient of employment of women between 15 and 64 who care for at least one child under the age of 7, is 55.8 % for 2018, which is 8.1 percentage points lower than the average employment coefficient of women from the same age group. In the report after May 2019 which the author also consulted, the numbers are even more startling. The comparator is the average coefficient of employment for women in this age group

According to the State report, the Bulgarian State policy for work-life balance is linked with services for childcare or care for other dependent family members, with promotional measures for hiring unemployed women or women with small children, by including women in continuous training, and providing for flexible forms of employment. Legislative measures were taken in recent years as incentives for fathers to take leave for childcare and for women to return to work. Women are also encouraged to choose 'male' professions – in ICT, for example. The equalising of the pensionable age of men and women is in progress, which will lead, gradually, to more equality in income and to the economic empowerment of women.

5.1.2 Other issues

The Ministry of Labour and Social Policy also mentions important policy measures to tackle the challenges:

For example, the MLSP Operation 'Parents and Employment', financed by the ESF, is aimed at the work-life balance of parents with small children, combined with job opportunities for unemployed people. By the end of 2018, 2977 applications were received from parents with small children and 653 were from parents whose applications were eligible under the programme. 1 060 applications were from unemployed persons willing to take care of children up to 5 years old. The number of tri-partite contacts concluded (including with the MLSP) were 1 431, and 1 423 persons who were unemployed started caring for small children.

The other programme was the MLSP's Operation 'Active inclusion'. It is aimed at improving the quality of life of persons with disabilities, including children with disabilities, and their relatives, and aims to open job opportunities both for persons with disabilities and for those caring for them. By the end of 2018, about 300 persons who were carers started searching for jobs or started working; 338 persons with disabilities started a new job; and

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

[59] Unofficial Draft in process of preparation and approval.

1620 persons with disabilities received care and support through the programme.[60] There is no data disaggregated by sex concerning beneficiaries.

Although just based on programmes of the MLSP, these measures are of benefit to women who are the main carers for children and persons with disabilities, and have to be continued and broadened. Among their objectives, gender equality should be emphasised explicitly and result indicators should be disaggregated by sex.

5.1.3 Overview of national acts on work-life balance issues

The major national acts in this sphere are:

- The National Strategy on Gender Equality 2016-2020;[61]
- The National Plan on Equality between Women and Men 2019-2020.[62]

Both documents contain as a priority area 1 – Increasing the participation of women in the labour market and equal level of economic independence where work-life balance for both sexes is one of the most important elements.

- The Law on Protection from Discrimination;
- Labour Code;
- Code of Social Insurance.

5.1.4 Political and societal debate and pending legislative proposals

There is no political and societal debate or pending legislative proposals concerning work-life balance in Bulgaria.

5.2 Pregnancy and maternity protection

5.2.1 Definition in national law

Explicit definitions of main notions related to pregnancy and giving birth have been provided in joint Ordinance No. RD-07-4 of 15 June 2015 from the Minister of Labour and Social Policy and the Minister of Health: Ordinance for improving working conditions for pregnant women, women who have given birth or breastfeeding women.[63] This ordinance was meant to ensure full compliance with Directive 92/85. Paragraph 1 p. 1 of the Additional Provisions defines the notion of a pregnant worker as follows:

> `1. "Pregnant worker" is a worker or employee with a confirmed status of pregnancy as well as one in an advanced stage of in-vitro treatment within the meaning of paragraph 1, point 13 of the Additional Provisions of the LC and who has duly informed her employer about her status with a document issued by the competent health authorities.'

In this ordinance, the notions of a woman worker who has given birth and a breastfeeding worker are defined, as well.

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60 Unofficial draft of the Report on Gender Equality for 2018 – May 2019, MLSP

61 National Strategy on Gender Equality 2016-2020, *Национална стратегия за равнопоставеност на жените и мъжете,* https://www.mlsp.government.bg/ckfinder/userfiles/files/Strategy_Gender%20Equality_2016(2).pdf.

62 National Plan on Equality between Women and Men 2019-2020, *Национален план за равнопоставеност на жените и мъжете* 2019-2020, https://www.mlsp.government.bg/ckfinder/userfiles/files/Plan_Ravnopostavenost_2019-2020(2).pdf.

63 Ordinance No. RD-07-4 of 15 June 2015 from the Minister of Labour and Social Policy and the Minister of Health: Ordinance for improving working conditions for pregnant women, women who have given birth or breastfeeding women, *Наредба –РД-07-4 за подобряване на условията на труд на бременни работнички и на работнички родилки и кърмачки*, Promulgated in S.G. 46/2015, Bulgarian text available at: https://www.lex.bg/bg/laws/ldoc/2136553201.

'"A female worker or employee who has given birth" is one who has returned to work prior to 90 days after having given birth and has informed her employer of her status with a document issued by the health authorities.'

'"A breastfeeding female worker or employee" is one who breastfeeds her child herself and has informed her employer of her status with a document issued by the health authorities.'

It can be noted that in Bulgarian legislation, equal protection to that guaranteed to pregnant women is granted to female workers and employees who are at an advanced stage of in-vitro fertilisation treatment. Their rights were made consistent with those of pregnant female workers and employees and with those who are breastfeeding. According to paragraph 1 p. 13 of the Additional Provisions of the Labour Code (LC) and to p. 16 paragraph 1 of the Additional Provisions of the LPFD, this advanced stage corresponds to the period up to 20 days from the aspiration of the ova until the transfer of the embryo.

The definition of a pregnant worker is consistent with the requirements of the directive.

5.2.2 Obligation to inform employer

Notification of the employer by the pregnant woman is regulated in Article 313a of the LC as an obligation for the woman in order to avail herself of the rights of pregnant workers and employees provided for in the Labour Code. She has to present a relevant certificate issued by health authorities. In the case of termination of pregnancy, the worker/employee has to inform the employer within seven days. The employer and the respective officers in the enterprise have the obligation of confidentiality in relation to all these circumstances.

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

There is no such relevant case law.

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

These protective measures are ensured in Bulgarian legislation.

Articles 307 and 309 LC regulate this protection. The employer cannot compel a pregnant or breastfeeding woman, or a woman at an advanced stage of in-vitro fertilisation, to perform work which entails a risk to their health or safety. The pregnant woman has the right to refuse to perform work which is defined as harmful to her health or for the health of the child or which, as a result of a risk assessment, is defined as representing considerable harm to their health. The assessment is carried out, based on regulatory acts, such as an Ordinance by the Minister of Labour and Social Policy, issued jointly with the Minister of Health (No. 5 from 1999).[64] The assessment is carried out by the employer, with the participation of units dealing with labour medicine, the bodies dealing with health and safety at work and other specialists in the enterprise. The employer can also invite other external experts and organisations.

A list of the working activities and working conditions which pose a risk to the health and safety of pregnant workers is provided in a joint Ordinance from the Minister of Labour and Social Policy and the Minister of Health. This is currently regulated by the above-mentioned Ordinance No. RD-07-4 of 15 June 2015 of the Minister of Labour and Social Policy and the Minister of Health: Ordinance for improving the working conditions for

[64] Ordinance No. 5 from 1999 for the procedure, methodology and frequency of implementing risk assessment, *Наредба за реда, начина и периодичността на извършване на оценка на риска*, Promulgated in S.G. 47/99.

pregnant women, women who have given birth or breastfeeding women. In this ordinance there is also a reference to the above-mentioned Ordinance No. 5 of 1999 on the procedure, methodology and periodic review of the risk assessment for the health and safety of pregnant workers, workers who have given birth or are breastfeeding. The issued ordinance from June 2015 contains non-exhaustive lists of the risk factors, work processes and working conditions for women of the protected categories.

Under Bulgarian law, and according to Article 309 LC, the employer is obliged to adjust any working conditions which are not suitable for pregnant or breastfeeding women or, if this is not technically and objectively possible, the employer has to transfer the worker to other suitable work. The provisions by the health authorities are obligatory both for the pregnant worker and for the employer in such cases. Until the adequate adjustment is made, the pregnant or breastfeeding worker is exempted from the obligation to perform the unsuitable work. In all cases, the level of remuneration received prior to the adjustment for this category of workers should be maintained, and in the event of wage differences after the adjustment, the worker should be compensated up to the amount received prior to that. In addition to the Ordinance mentioned above, the Ordinance for an adjustment to the workplace for pregnant workers, workers who have given birth and breastfeeding workers is valid as well.[65]

In addition, the LC provides for a standing obligation for the employer to define on a yearly basis, in conjunction with the health authorities, the working positions and workplaces which are suitable for pregnant workers, workers in an advanced stage of in-vitro fertilisation treatment and breastfeeding workers.

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

There is no substantial case law on issues addressed in the mentioned provisions.

5.2.6 Prohibition of night work

According to Article 140 paragraph 4 of the LC, night work (from 10.00 p.m. until 6.00 a.m.) is forbidden for pregnant workers and workers in an advanced stage of in-vitro fertilisation treatment; this also applies to mothers with children up to six years old, and mothers who care for children with disabilities, notwithstanding their age, unless their explicit written consent is given. Fathers are not protected under this provision, even if they are sole parents, which could be regarded as direct sex discrimination. After the changes in legislation concerning the different sorts of parental leave, there is either a gap in legislation, or omission due to economic considerations.

The possibility for a transfer to daytime work or leave from work, or an extension of maternity leave, is not explicitly provided for in such cases. However, it can be considered to be an implicit possibility, in view of the protection provided by the provisions mentioned above. The long maximum duration of maternity leave in Bulgaria can be added to this.

5.2.7 Case law on the prohibition of night work

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

5.2.8 Prohibition of dismissal

The provisions on the conditions for the dismissal of these categories of workers are in compliance with the Directive.

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[65] Ordinance for adjusting of the working conditions, adopted by Decree No. 72/86 of the Council of Ministers *Наредба за трудоустрояването*, S.G. 7/87, Bulgarian text available at: https://www.lex.bg/laws/ldoc/-552857597.

The prohibition is not absolute. According to Article 333 paragraph 5 LC, a pregnant worker or a worker at an advanced stage of in-vitro fertilisation treatment may only be dismissed based on the grounds of Article 328, paragraph 1, pp. 1, 7, 8, 12 with previous notice, and without notice only based on Article 330 paragraph 1 and paragraph 2 p. 6 LC. In the latter case (Article 330 paragraph 2 p. 6) a dismissal will only be possible with the prior permission of the Labour Inspectorate. In the case of Article 328 LC, these hypothetical situations cover: the closing down of the enterprise, a refusal by the worker to follow the enterprise or its unit if it is moved to another location, when the position has to be vacated in favour of the return of an illegally dismissed worker or employee, and when there is an objective impossibility to perform the duties under the labour contract. Article 330 paragraph 1 covers cases when the worker is detained for the enforcement of a verdict and paragraph 2 p. 6 LC covers a dismissal for a breach of discipline.

Increased protection is provided in cases of the dismissal of a female worker or employee mother of a child up to three years of age. According to Article 333 paragraph 1, a preliminary approval for each individual case is required before a dismissal under Article 328 paragraph 1, pp. 2, 3, 5 and 11 and Article 330 paragraph 2 p. 6 LC. This covers the closing down of part of the enterprise or a reduction in personnel, a decrease in the volume of work, a lack of qualities and skills by the worker or employee for the effective performance of the work, a change to the job requirements and when the worker or employee does not comply with them.

This protection is not provided for fathers, even if they are sole parents. There is a separate ground, though, which provides the same level of protection from dismissal – for a worker or employee who started using the leave granted to him/her. It is not related directly to being a father of a small child. In the first months of maternity leave, it is understandable that the protection is for mothers. If then, after the first six months, the fathers take the rest of the leave, they will be protected based on that ground.

5.2.9 Redundancy and payment during maternity leave

Maximum protection is provided for a worker or employee who is on leave under Article 163 LC: for pregnancy, giving birth or adoption. According to Article 333 paragraph 6 LC, this category of workers may only be dismissed when the enterprise has to close down (Article 328 paragraph 1). If the employee is made redundant during her maternity leave until its end, she is entitled to maternity benefits up to 410 days, as guaranteed under Bulgarian legislation.

5.2.10 Employer's obligation to substantiate a dismissal

According to Article 335 LC, the dismissal must be in writing and in most cases written notice is required where the specific grounds are substantiated. The sanction for not respecting this provision is that the dismissal will be declared illegal by the courts.

5.2.11 Case law on the protection against dismissal

There is no case law related to protection against dismissal.

5.3 Maternity leave

5.3.1 Length

Female employees are entitled to pregnancy and maternity leave for 410 days for each child, 45 days of which must be used before the birth (Article 163 paragraph 1 LC).

Therefore, Bulgarian legislation goes beyond the minimum requirements of EU law.

5.3.2 Obligatory maternity leave

There is a period of 45 days which must be used before giving birth (Article 163 LC).

The maternity leave after giving birth is formulated as a right of the working mother (Article 163 paragraph 1 LC).

It is noted that according to Article 7 paragraph 1 p. 7, the special protection for pregnant women and mothers which is established by law does not constitute discrimination, except in cases where they do not want to benefit from this protection and they have notified the employer of this in writing.

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

Legal protection of employment rights is ensured.

5.3.4 Legal protection of rights ensuing from the employment contract

Employment rights are ensured during maternity leave.

5.3.5 Level of pay or allowance

The maternity benefits during pregnancy and maternity leave amount to 90 % of the average remuneration or the average insurance income based on which the worker or employee contributed to social security – or for the self-insuring persons, based on the contributions made for common illness and maternity for the previous 24 months (Article 49 of the Code of Social Insurance – COSI). It is equivalent to the maximum pay for sick leave. There is no fixed limit of the amount.

5.3.6 Additional statutory maternity benefits

There are not publicly known cases of employers supplementing statutory maternity benefits but it is not excluded by law and in practice.

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

According to Article 48a of COSI, the principle is that persons under a labour contract who are insured for common illness and maternity have the right to maternity benefits if they have 12 months of insurance contributions for this risk.

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

According to Articles 13 and 15 of the LPFD, a woman on maternity leave shall be entitled, at the end of her maternity leave, to return to her job or to an equivalent position under terms which are no less favourable to her and to benefit from any improvement in the working conditions. These rights are also granted to women on childcare leave. The father / adoptive father can also benefit from these rights upon his return from leave for raising a child. Those persons also have the right to be trained with regard to technological changes related to their job which have taken place in their absence. Thus they will be ensured the required professional qualification.

5.3.9 Legal right to share maternity leave

There is a legal right to share part of maternity leave in Bulgaria.

As mentioned above, female employees are entitled to pregnancy and childbirth leave for 410 days for each child, 45 days of which must be used before the birth (Article 163 LC).

With the consent of the mother, after the child is six months old, the father may use the remaining paid leave of up to 410 days, and the paid leave of the mother is interrupted. 'Interrupted' is the term used – the father may not use the full remaining leave but step into part of it, for example. For the time of this leave, the respective parent employee shall be paid cash compensation under the terms of and subject to the amounts specified in the Social Insurance Code.

Separate from this, since 2009, if the parents are married or live together in cohabitation, the father is entitled to 15 days of paid paternity leave upon the birth of his child, after the child is brought home from the hospital (Article 163 LC). In all cases, fathers have the same social insurance rights for this paternity leave, also when they replace the mother after the child is six months old (this is applicable in all cases after the child reaches the age of six months). In addition, if the father is unknown, this leave can be shared with one of the mother's parents. If the father has passed away, the leave can be used by one of the parents of both mother and father.

There are no explicit provisions allowing the choice of the mother or father to take over maternity, paternity and/or parental leave on a part-time or full-time basis. The size of the employer is irrelevant when it comes to the rules on and the models of sharing maternity and childcare leave.

Besides the legal possibility to share part of maternity leave, after the leave for pregnancy, childbirth or adoption has been used, if the child is not placed in a childcare establishment, the mother, regardless of the number of children, is entitled to additional leave to raise her child – the above- mentioned childcare leave – until the child reaches the age of two (Article 164 paragraph 1 of the LC). With the consent of the mother, this leave shall be granted to the father or to one of their parents if the grandparents work under an employment contract. During this leave, the mother, or the person who has taken over the raising of the child, is entitled to maternity benefits under the terms of and subject to the amounts specified in the Law on the Budget of the State Social Insurance Scheme. This solution, which is typical for Bulgarian legislation, is not fully in line with equality principles – firstly, the consent of the mother is also needed for this leave, and secondly, given the opportunities given to the grandparents, and usually to the grandmothers, mainly the latter and the mothers will take this leave. This is the leave that used to be called childcare leave.

In the same section of pregnancy and maternity leave (Article 163 LC), extended rights and opportunities have also been regulated for children and parents where small children are placed as a protective measure. These solutions have been extended to mothers and their husbands within whose families children have been placed as a measure of child protection under the Law on Child Protection. A female worker or employee within the family where a child has been placed as a protective measure under the Law on Child Protection (a family consisting of close relatives or having close connections or in a foster family) has the right to leave which is the same as maternity leave (410 days) from the placement of the child onwards. In this case, the female worker or employee has the right to maternity leave as mothers at birth. Therefore, there is no discrimination as it is the mother's leave. This means that when the child is placed in a family, usually at her/his early age, the woman in this family will take the leave first, on equal terms to the mother of the child. Since these are not the real mother and father of the child, the author does not think there is discrimination based on sex – it is not a question of gender equality in childcare. Moreover, the first part of the leave – the first six months – are maternity leave and it is normal that it goes to a woman who will take care of the child at this early stage. There is very low probability that a very small child will be placed in the care of a man as a sole foster parent or relative.

When a child has been placed within a family as a protective measure, with the consent of the woman, her husband can benefit from the remainder of the leave after the child has reached the age of six months (for up to 410 days, as mentioned above).

These provisions have been in force since 1 July 2018.

When the child is placed in a family, the persons with whom the child was placed have the right to additional childcare leave up to two years of the child. Only one of the spouses has the right to this leave. (Article 164a LC).

5.3.10 Case law

There is no substantial case law on these issues.

5.4 Adoption leave

5.4.1 Existence of adoption leave in national law

Recent provisions in the Labour Code in Article 164b LC[66] have consolidated the special provisions related to the leave of adoptive parents, the most recent changes in force since 1 July 2018. The special section is entitled 'Leave for adopting a child up to five years'.

An adoptive mother of a child up to five years old has right to leave of 365 days from taking the child but no later than the child reaching the age of five years. When the adoptive parents are married and the mother works under a labour contract, she can agree for the adoptive father to take the leave after the first six months. If the parent is deceased, the leave can be taken by either parent of the mother or father. When the female worker or employee is the sole adoptive parent of a child and works on a labour contract, after the six months from adoption of the child, her parents can step into the adoption leave until its expiry. In the mentioned cases, the leave of the mother is interrupted. The adoptive father, when he is the sole adoptive parent, has the same rights as the sole adoptive mother. Wherever there are rights to leave for the fathers, it is mentioned in the specific section. If this is not mentioned, it means that there are no separate issues in that respect.

Adoptive parents, or the other relative having a right to parental leave, have the right to additional leave for caring for a child up to her/his age of two years.

When the adoptive mother and father are married or if they cohabit, in cases of a full adoption, the adoptive father of a child under five years of age has the right to 15 days of paternity leave for adoption from the actual day of the adoption onwards until the child reaches the age of 5 years.

In all cases of the use of these forms of leave, the leave periods are recognised for seniority (length of service) purposes and compensation is paid according to the Code for Social Insurance under the same conditions as the compensation that the biological parents would be entitled to.

Therefore, Bulgarian legislation provides special protection for adoptive parents, especially with the extension of their rights also according to the latest amendments mentioned which have been in force since 1 July 2018. It puts the legislation in further compliance with EU directives related to the work-life balance.

[66] Labour Code at: https://lex.bg/bg/laws/ldoc/1594373121, amended with S.G. 30/2018.

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

Adoptive parents have the same rights as persons on childcare leave when they are on leave according to Article 164b LC. Upon return to work, they have the right to occupy the same or another equivalent position and to benefit from the improvement of the working conditions.

The adopting mothers of children up to three years of age who are on childcare leave have the right to increased protection against dismissal.

5.4.3 Case law

There is no relevant case law on sex discrimination in this field.

5.5 Parental leave

5.5.1 Implementation of Directive 2010/18

The compliance of Bulgarian legislation with Directive 2010/18 was achieved in its main part prior to the adoption of the Directive and within the expiry of the transposition period. Harmonisation was made possible mainly through amendments to the Labour Code (LC), and also to the Law on Protection from Discrimination (LPFD). Unpaid leave for raising a child until he/she reaches eight years of age was introduced in 2004 and is regulated in Article 167a LC. After having used the leave for raising a child up to the age of two, and the adoption leave under Article 164b, any of the parents (adopters) – if they work under a labour contract, and if the child has not been placed in an institution with full public support – upon request, shall have the right to make use of unpaid leave of up to six months to take care of a child until he/she reaches eight years of age. Each of the parents (adoptive parents) can make use of up to five months of the leave of the other parent, upon his/her consent, so most of the leave is transferable. The legislation is in compliance with the minimum standards set by the Directive.

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

There is no difference provided by law in the duration of parental leave in the public and the private sectors. By the end of 2016, there was a limitation to the right of the men in the armed forces to unpaid parental leave, introduced with Article 203 paragraph 2 of the Law on Defence and Armed Forces. The leave was limited to cases where a male officer was the sole parent taking care of a child. The situation was changed with the amendment of the law with S.G. No. 58/2017 and granting the full right to parental leave to men employed in the armed forces under the terms and conditions of Article 167a LC.

5.5.3 Scope of the transposing legislation

The only requirement for the applicability of parental leave is the availability of a labour contract under the Labour Code.

5.5.4 Length of parental leave

The duration of the leave is six months for each parent, if used individually, and there is no difference between the two sectors. Up to five months of the leave of each parent can be transferred to the other.

5.5.5 Age limits

The parental leave can be used by the parents until the child reaches eight years of age.

5.5.6 Individual nature of the right to parental leave

This is an individual right of each of the parents in principle.

5.5.7 Transferability of the right to parental leave

Up to five months of the parental leave can be transferred to the other parent upon consent. The transferring parent reserves his/her right to at least one month of the parental leave.

5.5.8 Form of parental leave

The unpaid leave for raising a child up to the age of eight years can be used in parts, the minimum being five days. The law does not require a regular sequence in using the leave, i.e. each parent decides when to use the right to parental leave. The person who would like to benefit from the leave has to notify the employer 10 days in advance of the planned leave. The leave is regulated as a right of the respective parent and has to be granted by the employer upon receiving notice thereof.

There is no specific form required for taking and using the parental leave.

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

There are no work and/or length of service requirements for the parents in order to take the leave.

5.5.10 Notice period

The notice period to the employer is 10 days in advance.

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

There is no legal provision allowing the employer to postpone the granting of parental leave for justifiable reasons related to the operation of the enterprise.

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

There are no special arrangements for small firms provided in the law.

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)

There are no special rules and exceptions for parents of children with a disability or long-term illness. Their rights are not regulated as an exception to the rules concerning parental leave.

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

Adoptive parents are specifically included and have the rights to parental leave upon expiry of their rights to childcare leave – the paid leave until the age of two years of the child, as explained above.

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

Workers and employees are protected against less favourable treatment and dismissal in relation to an application for or the taking of parental leave through the general anti-discrimination provisions of the Labour Code (Article 8) and the LPFD (Article 4) which introduce a prohibition on less favourable treatment, among other grounds, on the ground of family status.

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

Women on maternity and childcare leave as well as fathers on paternity and childcare leave are explicitly recognised as having the right to return to their job or to an equivalent position and to benefit from improvements in working conditions (Articles 13 and 15 of the LPFD). It is not explicitly provided for cases of parental leave – which is unpaid and after the childcare paid leave – but the author considers parental leave is also leave for caring for the child, although it is an opportunity for unpaid leave after the child is two years old. Therefore, according to the author, this clause is valid also for parental leave.

In view of the full compliance with Directive 2010/18/EU, a new Article 167b has been introduced.[67] It provides for the rights of persons returning from leave under Articles 163-167a LC, or interrupting such leave, including parental leave under the Directive. They can negotiate with their employer on the length and division of their working time, as well as other conditions under the labour contract, in view of facilitating their return to work. The employer has to take into account the suggestions of those returning, if they can be accommodated. The law also provides for the possibility of negotiations and changes to the employment conditions during the period of leave.

Even if the employer is obliged to consider the request of the worker/employee, the final arrangements are subject to negotiations and agreement. Based on that, it is also logical to conclude that returning to prior working arrangements is also a question of negotiations between the worker and the employer.

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

Maintenance of the rights acquired is secured in principle. There is no specific provision stating that but the fact mentioned above that the person can return to the same or equivalent job is a guarantee.

5.5.18 Status of the employment contract or relationship during parental leave

As mentioned above, the status of the employment contract is maintained in principle.

5.5.19 Continuity of entitlement to social security benefits

There is continuity of entitlement to social security benefits, including healthcare.

5.5.20 Remuneration

Parental leave is unpaid leave under Bulgarian law.

5.5.21 Social security allowance

There is no social security allowance during parental leave.

[67] S.G. No. 7/2012.

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

In the author's opinion, the minimum standards of the Directive have been formally met. The problem is that the existing regulation of the parental leave which is understood as unpaid leave for raising a child until he/she reaches eight years of age, as well as other related leave for raising a child, are still used predominantly by mothers, which is a substantive equality problem and an uneven balance in family and professional life for both parents.

The various forms of paid leave for both parents for raising a child until he/she reaches two years of age have more favourable provisions in Bulgarian law. The fact that the unpaid leave for raising a child between two and eight years of age is six months for each parent is also more favourable, compared to the minimum required of four months.

5.5.23 Case law

There is no relevant case law.

5.6 Paternity leave

5.6.1 Existence of paternity leave in national law

Since 2009, if the parents are married or live together in cohabitation, the father is entitled to 15 days of paid paternal leave upon the birth of his child after the child is brought home from the hospital (Article 163 LC). Fathers have the same social insurance rights as the mother (90 % of the average remuneration) for this paternity leave and also when they replace the mother after the child is six months old.

As mentioned above, paternity leave is granted also to adoptive fathers.

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

As mentioned above, according to Article 13 paragraph 3 of the LPFD, women on maternity and childcare leave, as well as fathers on paternity and childcare leave, are explicitly recognised as having the right to return to their job or to an equivalent post and to benefit from improvements in working conditions. Persons on leave under Article 163 also benefit from maximum protection against dismissal under Article 333 paragraph 6 LC. These persons can be fired only upon notification and in cases of closing down of the enterprise.

The general protection against discriminatory treatment based on family status under the LPFD is valid as well.

5.6.3 Case law

There is no relevant case law.

5.7 Time off for *force majeure*

5.7.1 Time off for *force majeure*

Paid leave for other urgent family reasons is regulated in Article 157 paragraph 1 p. 3 of the Labour Code – in the event of the death of a parent, child, spouse, sibling, or parent of the other spouse or other direct-line relatives. The leave is up to two working days and the payment during this period is based on that agreed in the collective agreement or by agreement between the employer and the employee.

Outside these provisions, the employee has the right to unpaid leave under Article 160 of the LC for up to 30 working days per year. This leave can be claimed by the worker or employee and may be granted by the employer. It is granted regardless of whether or not the employee has used his/her paid leave and does not depend on the length of service. The period of the unpaid leave is recognised as part of the length of service. The unpaid leave under Article 160 LC can be used for time off for *force majeure.*

For all the mentioned types of leave, there are no other requirements or conditions for granting the leave.

5.7.2 Case law

There is no relevant case law on the issue.

5.8 Care leave

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

There is a possibility for such leave in Bulgarian law and this is regulated along with sick leave and some hypothetical leave for *force majeure* as mentioned in 5.7.1 above.

According to Article 162 LC, the worker or employee has the right to leave as a result of a temporary inability to work due to general sickness but also due to the sickness of a child or another close relative or spouse, and due to medical examinations or other urgent family reasons related to a medical emergency. For this period the worker is entitled to social security benefits which amount to up to 70 % of his/her average remuneration during the first three days which are paid by the employer and to up to 80 % for the rest of the leave. The length of this type of leave is unlimited for urgent medical reasons when they pertain to a child, is limited to 60 calendar days in a calendar year for taking care of a sick child, and may be up to 10 calendar days in one year for taking care of an adult relative. The detailed regulation is provided in Articles 40-45 of the Code on Social Insurance (COSI).

Outside these opportunities, the above-mentioned possibility for unpaid leave under Article 160 LC is available for the purpose of care for family members. It is subject to consent by the employer.

There are no other requirements or conditions for granting the leave.

5.8.2 Case law

There is no case law relevant to the issue.

5.9 Leave in relation to surrogacy

Surrogacy is illegal in Bulgaria and no right to leave is recognised in relation to that.

5.10 Flexible working time arrangements

5.10.1 Right to reduce or extend working time

Only the employer has the initiative to reduce or extend working time. According to Articles 136-139 LC, the employer can issue written orders for extending working time, where there is a need for the productivity of the enterprise. It can be done upon consultations with respective trade unions and the extensions have to be according to the law and have to be compensated by reducing the working time during other periods.

The workers have no formal legal right to reduce or extend the working time on their request.

5.10.2 Right to adjust working time patterns

Adjustment of working time patterns can be negotiated with the employers, but only upon their initiative. There is no formal right for the workers to adjust the working time patterns.

Only in the case of Article 167b LC, the employer has to take into account the suggestions of those returning, if they can be accommodated. The law also provides for the possibility of negotiations and changes to the employment conditions during the period of leave. This solution is only in the case of this leave and only when returning. It does not affect the general rule that flexible arrangements are not common and are also upon the employer's initiative. Even in the event of returning from parental leave, flexible arrangements are up to the employer and there may be obstacles even in this case.

Bulgarian law provides for part-time work arrangements. According to Article 138 of the Labour Code, the parties to a labour contract can agree on work for part of the legally defined working time / part-time work. In such cases they define the duration and the distribution of the working time.

Amendments to the Labour Code[68] introduced additional possibilities for flexible working arrangements. The arrangements can be introduced in companies where the way in which the work is organised allows the establishment of variations of the working time arrangements. Under the principle set down in Article 139(2) of the Labour Code, the obligatory period during the day when the employee has to be at work and the means of its calculation are defined by the employer. A new paragraph 3 of Article 139 sets cases when flexible working time arrangements can be applicable. When established by the employer, the worker or employee can negotiate to complement her/his working hours during the next day or on other days of the working week. The calculation of the working time is done based on the internal rules of the company.

The aim of the LC amendments was to achieve more flexibility in favour of the worker and the establishment of a more liberal regime for adjusting working time and for opportunities for reconciliation of work and family life. The author notes that the workers or employees can benefit from such arrangements only upon the initiative of the employer in establishing flexible working time and outside the obligatory working periods established by the employer. In other words, the initiative is with the employer – the employee cannot ask for such general flexible arrangements.

Other individual flexible working arrangements are left to concrete agreements reached in the labour contract between the worker and the employer. Opportunities which are guaranteed by the law for such arrangements are provided also in Article 167b LC which was adopted in view of reaching full compliance with Directive 2010/18/EU. It provides for the rights of persons returning from leave under Articles 163-167a LC: maternity leave, paternal leave, leave for caring for a child up to his/her second birthday, leave for breastfeeding and parental leave. They can negotiate with their employer over the length and organisation of their working time, as well as other conditions of the labour contract, in view of facilitating their return to work. The employer has to take into account the suggestions of the returning parent, if they can be accommodated. The law also provides for the possibility for negotiations and changes to the employment conditions under the employment contract also in the course of any of the types of leave regulated under Articles 163-167 LC.

The author notes that the size of the employer is not a qualifying condition for part-time and flexible working time arrangements provided by law. There are no provisions explicitly

[68] Promulgated by State Gazette No. 54/2015 from 17 July 2015 https://www.lex.bg/laws/ldoc/1594373121.

allowing maternity leave or parental leave to be taken in the form of part-time working. Adopting part-time working arrangements as mentioned above is subject to the conditions under the labour contract. Concerning the other forms of flexible working arrangements which have been mentioned, the employer is obliged to consider the request of the worker/employee and the final arrangements are subject to negotiations and agreement. Based on that, it is also logical to conclude that returning to prior working arrangements is also a question of negotiations between the worker and the employer. There are no measures specifically aimed at encouraging men to make use of the legal rights for sharing parental responsibilities.

5.10.3 Right to work from home or remotely

There is a right to work from home, based on the contract with the employer. The answer is the same as the previous two answers. It can only be achieved on a contractual basis.

As a matter of fact, the Labour Code allows for arrangements to work from home or remotely as a result of the definition of the notion of 'employer' in the Additional Provisions of the Labour Code, paragraph 1.1: the term 'employer' is associated with any physical or legal person, or its branches, or any other unit which is autonomous from an organisational and economic point of view, and who/which hires workers and employees independently under a labour contract, including home workers or workers for distance working, as well as in cases of sending a worker or employee for temporary work to another enterprise, called the beneficiary.

Working from home and remotely is also regulated in detail in specific sections of the LC dedicated to this type of agreement between the parties under the labour contract and the respective arrangements.

There are no legal limitations as to the size or type of the employer. There are no positive measures aimed at encouraging specifically men to work from home or remotely.

Thus the regulation of flexible working agreements is left to a great extent to negotiations between the parties and the individual employment contract.

5.10.4 Other legal rights to flexible working arrangements

There are no other explicitly recognised legal rights to flexible working arrangements, such as arrangements by which workers can 'bank' hours to take time off in the future. Nevertheless, based on the above-mentioned amendments in the direction of more flexibility such models might also be possible.

5.10.5 Case law

There is no relevant case law under this section.

5.11 Evaluation of implementation

Thus the regulation of flexible working agreements is left to a great extent to negotiations between the parties and the individual employment contract. The system relies on the traditional leading role of the mothers in childcare; incentives for fathers can be introduced but there are no clear instances and cases of discrimination of men as fathers. There should be more incentives, such as having more flexibility to combine a possible longer period of parental leave with some working arrangements during the leave itself. Parental leave for both parents simultaneously could be provided for some periods, etc.

5.12 Remaining issues

Concerning work-life balance issues related to COVID-19, it can be assessed that the measures undertaken by the Government, including restrictions from attending school also for younger students, and quarantine periods in cases of COVID-19 being identified in schools, compelled parents of younger children, of minors up to 14 years, to stay at home and take care of them, in addition to organising the online home-schooling for them. Very often this is in addition to remote work for the parents concerned. In many cases it is for the mother to implement these functions but it was observed that the pandemic created opportunities for more equal participation of both parents, for contribution to a better work-life balance and for gender equality.

It was an opportunity for the Government to encourage these tendencies and support the working parents in these tasks. Despite discussions that took place and claims from NGOs and representatives of parents to introduce periods of special paid leave to balance during the pandemic and the days needed for quarantine, the solution proposed by the state provided for targeted social assistance for parents instead.

Briefly, the scheme for this assistance encompasses the following cases: when the parent(s) cannot benefit from distance work and have no opportunity for paid leave; when the unemployed parent(s) are not entitled to unemployment or other benefits; when the self-employed parent(s) cannot exercise their profession during this period; when the parent does not receive pregnancy and maternity benefits; when the family satisfies the means tests of average income equal to a maximum of 150 % of the minimum wage for each member of the family.[69] The amount per month per family in the case of 10 days of the child/children staying at home is about EUR 325 for 1 child and EUR 490 for two children.

This measure is additional to the pregnancy, maternity and parental leave. It is a measure of social assistance due to the pandemic and is therefore not universal for all families that need further support and other measures of the new type of paid leave in order to face the situation.

The author's assessment is that instead of a measure of social assistance, this situation needs real measures for ensuring the work-life balance for both parents and with clear connection and encouragement of the maintaining of their employment. This should be special leave for parents based on the required pandemic epidemiological measures.

[69] https://asp.government.bg/bg/deynosti/sotsialno-podpomagane/mesechna-tseleva-pomosht-za-semeystva-s-detsa-do-14-godishna-vazrast-pri-obyaveno-izvanredno-polozhenie-ili-obyavena-izvanredna-epidemichna-obstanovka.

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 surveys and reports on this issue.

6.1.2 Other issues related to gender equality and social security

Since the year 2000, the pension system in Bulgaria has consisted of three pillars. The model was based on the World Bank's advice and influence and is different from the pillars in the EU countries. The first pillar is the universal social security fund, a 'pay-as-you-go' type, which is obligatory for persons in an employment relationship or self-employed persons. The second pillar is a mandatory and fully-funded pension fund with defined contributions which are allotted to individual accounts run by licensed pension insurance companies or, based on the choice of the insured person, it is contributed to the state Pension fund. The third pillar includes supplementary voluntary pension schemes.

In Bulgaria there are no second pillar pension schemes comparable to the type of occupational pension schemes recognised in EU law. Provisions for the establishment of occupational pension schemes are contained in the Code for Social Insurance within the third pillar as part of Additional Voluntary Social Insurance (Part III of the COSI). These schemes are not yet well developed in Bulgaria.

6.1.3 Political and societal debate and pending legislative proposals

There are no pending proposals for legislation or societal debate on the specific issue.

6.2 Direct and indirect discrimination

Direct and indirect discrimination based on sex is forbidden, first in acceptance of persons into the schemes and also in the process of insurance under such schemes. Namely, no discrimination based on sex, including discrimination based on marital and family status, is allowed within the scope of application of the schemes and the conditions for accessing them; the obligation to pay contributions and the calculation thereof; the calculation of retirement payments and other terms of the related rights.

6.3 Personal scope

Since the new schemes are part of the third pillar in Bulgaria the occupational social security directive is not applicable to them. Nevertheless, it can be said that additional voluntary pension insurance is open to all physical persons aged 16 and over (Article 210 COSI). In Bulgarian legislation, there are no occupational social security schemes which form part of a second pillar of social security, as in other EU Member States. The situation in Bulgaria and other new Member States has been explained in reports within the framework of the Network.[70]

6.4 Material scope

Despite the fact that compliance cannot be sought, it is worth mentioning that voluntary insurance under the professional schemes of enterprises which are the insurers gives the right to a fixed-term pension, an ad hoc or postponed payment of the accumulated

[70] Renga, S., Molnar-Hidassy, D., Tisheva, G. (2010), *Direct and Indirect Gender Discrimination in Old-Age Pensions in 33 European Countries*, The European Network of Legal Experts in the field of Gender Equality, http://www.equalitylaw.eu/downloads/2810-discrimination-old-age-pensions.

amounts under the individual account, or an ad hoc or postponed payment of the accumulated amounts to the successors of a deceased insured person or of a retired person (Article 212 COSI).

6.5 Exclusions

The provisions are not applicable.

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

There are no relevant laws or case law falling under these examples as the schemes in Bulgaria are not of the type provided under EU law and they have not been well developed in practice.

6.7 Actuarial factors

Sex is not used as an actuarial factor and no exceptions to the principle are acceptable.

6.8 Difficulties

The differences and difficulties were explained above so there is no case law relevant to occupational social security schemes according to the Directive.

6.9 Evaluation of implementation

The pension system in Bulgaria does not correspond to the EU model, and more specifically, the second pillar of the type of occupational social security schemes as they exist in the old Member States are not known for our system. The system cannot be changed and will develop further in expanding models of occupational schemes, in third and fourth pillars, instead.

6.10 Remaining issues

There are no specific remaining issues.

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

7.1 General (legal) context

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

There are no such specific reports on the issue in question.

Here is some data from surveys including comparisons with the EU. For example, indicative of the level of stereotyping in Bulgaria are the results from a 2017 Eurobarometer survey showing that in Bulgaria, 81 % of men are of the opinion that women should stay at home rather than go to work. At the other extreme are Swedes, with only 11 % of Swedish men of this opinion.[71]

According to data from agency Infograf, from 2017, Bulgaria ranks second last in Europe in relation to labour longevity, based on data for 2015.[72] This figure was 32.1 years. Nevertheless, the difference between women and men is only 2.6 years and there is a tendency towards further closing of this gap.

There are analyses focusing on the problems of women who are retired because of the lower income and the higher risk of poverty. There are researchers with interest in this issue due to the low level of commentaries on these aspects of gender inequality and the increasing poverty among retired women. The most interesting intersection between poverty and the health status of women has to be explored, as there is a total lack of political sensitivity on the issue, and due to the social-economic environment itself, which is a condition for the reproducing of the problem at a higher scale.[73]

7.1.2 Other relevant issues

Here, the author mentions again the impact of the GPG on the pension gap, as illustrated in the publication of the National Statistical Institute, 'Men and women in Bulgaria 2018'.[74] The differences in pensions between the two sexes were mentioned above in the Equal pay section. Women prevail in the segments of the lower pensions and vice versa – men prevail in the higher pensions' levels and the maximum amount.

During the whole observed period, the risk of poverty for retired women is higher than that for men. In 2017, the relative ratio of poor women is higher than poor retired men, by 14.9 percent points.

As a matter of fact, periods that are most related to women as carers are counted as ensured periods for seniority but are not taken into account for defining the insurance income:

- the periods of leave for pregnancy and maternity, adoption leave from the child's age of two to five years, the paid and unpaid parental leave, unpaid leave from work;
- the periods of counted seniority for non-working mothers;
- the periods when a parent or adoptive parent has taken permanent care of his/her disabled child until 16 years of age, and due to that has not worked under labour or civil servants' contracts and was not insured;
- the periods when a parent (adoptive parent) of a disabled person or one of the parents of the mentioned parent (adoptive parent) of such a disabled person, or

[71] https://btvnovinite.bg/bulgaria/obshtestvo/ravenstvoto-mezhdu-polovete-u-nas-realnost-ili-dobro-pozhelanie.html.
[72] https://www.infograf.bg/article/1498390496000.
[73] https://www.challengingthelaw.com/biopravo/bednost-zdraven-status/.
[74] https://www.nsi.bg/sites/default/files/files/publications/WM2018.pdf.

spouse have cared for disabled persons who are permanently disabled and need such care, and as a result were not insured or had not received a pension.

7.1.3 Overview of national acts

The main act is the Code of Social Insurance (COSI).

7.1.4 Political and societal debate and pending legislative proposals

There is no political and societal debate on the specific issues of gender equality in pensions and there are no legislative proposals directly related to this issue. This is not because there would be no interest in the problem or no measures are needed; just the government, specifically in the last few years, maintains a low profile of problems related to gender equality and even tries to dissimulate all these issues. This is due to the strong conservative tendencies that the government of the dominant political force – which claims to be pro-European – complies with, due to pressure from allied political forces. The author would like to add to this that even the major opposition force, which is called the Bulgarian Socialist Party, over two years ago turned to conservatism and calls itself a conservative socialist party. Subsequently, the equal rights of both sexes – gender equality and the rights of women, both in employment and social security – are not among their focus and priorities.

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

Statutory social security has two pillars in Bulgaria – state social security (first Bulgarian pillar) and the supplementary obligatory funded pension (second Bulgarian pillar). The latter tier is privately managed. In the second Bulgarian pillar of the statutory social security scheme, until recently, the insurance companies used gender-related actuarial factors for the different life expectancy of women and men, as there was no explicit legal ban. The companies were allowed to implement such practices, with the sanction of the vice-president of the Commission for Financial Supervision.[75] This contradicted EU law and EU case law on equality in statutory pensions. The Commission is an independent body for financial supervision, for ensuring stability and transparency of the non-banking financial system in Bulgaria.

In Article 3 of the Code of Social Insurance (COSI) it is stated that one of the main guiding principles of the state /statutory/ social security system is equality between insured persons. This was fully valid only for the first state and statutory pillar. After positive changes, the COSI implemented S.G. 92/2017, Article 169 paragraph 4 prescribing as follows:

> 'It is not permitted to use sex as an actuarial factor in defining the amount of the pension for supplementary old age lifetime pensions'.[76]

There are no conditions regarding the affiliation to a scheme or entitlement to statutory benefits which are different for men and women and that directly or indirectly puts one gender/sex in a disadvantaged position.

There is no possibility for earlier retirement for women only, except the different pensionable age. There are no hypotheses when women are obliged to retire earlier, even if they would prefer to continue working. In many cases women can continue working after

[75] About the Commission for Financial Supervision, *Комисия за финансов надзор*: https://www.fsc.bg/bg/za-komisiyata/struktura/.

[76] This new provision was implemented in 2018 and will apply to the pensions still to come for people born after 1959.

reaching the retirement age and thus add to their insurance periods and to the amount of their pension.

7.3 Personal scope

The personal scope of state social security is in compliance with the Directive.

The law differentiates between the benefits of persons insured against all social insurance risks, those insured against employment injuries and occupational diseases and persons insured against disablement by general sickness / common illness, old age and death (Articles 11-13 COSI).

Namely, as a matter of principle, Article 4 paragraph 1 COSI provides for the coverage of all risks for workers and employees, civil servants, judges and prosecutors, and those working on management contracts. Paragraph 3 regulates those people who are insured for disablement due to common illness, old age and death – self-employed people, including agricultural workers. These people can also insure themselves for common illness and maternity.

According to Article 127 COSI, persons born after 31 December 1959 are obliged to contribute to the obligatory supplementary social insurance in a universal pension fund if they are insured in the state Fund 'Pensions' and have not opted for supplementary social insurance with increased contribution to the state Fund 'Pensions'.

According to Article 124 COSI, supplementary obligatory social insurance is realised through contributions to a universal pension fund by an individual contract with a pension insurance company. Between the end of 2014 and 2018, new provisions were put in place for persons born after 31 December 1959 – COSI and additional regulation provide for their possibility to choose and switch between the supplementary social insurance in a universal private pension fund and the supplementary social insurance through the state insurance in the Fund 'Pensions'. Persons already contributing through private companies can discontinue their contract and transfer their supplementary insurance to the state pension fund. As insecurity for the private funds was publicly expressed, and still remains, some people stopped trusting these companies, despite any eventual benefit related to future higher replacement rate for the insured persons.

Transfer of the supplementary insurance from the state fund back to the universal privately managed pension funds is also possible under certain conditions.

7.4 Material scope

The material scope and covered risks in Article 2 COSI are in compliance with the EU requirements.

According to Article 2 of the COSI, public social insurance provides benefits, allowances and pensions for the following conditions:

1) a temporary inability to work;
2) a temporarily reduced ability to work;
3) disablement;
4) maternity;
5) unemployment;
6) old age; and
7) death.

7.5 Exclusions

The main exclusion invoked by Bulgarian legislation is the difference in the pensionable age of men and women. Currently, according to Article 68 COSI, women acquire the right to a social insurance pension upon attaining the age of 60 years and 10 months and men at 63 years and 10 months, provided there are insured periods of 35 years and 2 months for women and 38 years and 2 months for men. Between 31 December 2016 and 31 December 2029, the pensionable age for women will increase by two months every calendar year and from 1 January 2030 by three months per year until the age of 65 is reached. For men, the scheme is as follows: from 31 December 2016 until 31 December 2017 the pensionable age for men will increase by two months, and from 1 January 2018 by one month per calendar year until the age of 65 is reached. As for the compulsory insurance periods for old age pension entitlement, from 31 December 2016 it will increase by two months for both men and women, until 37 years is reached for women and 40 years for men. These provisions entered into force on 1 January 2016. According to these calculations, by the end of 2018 the pensionable age for women was 61 years 2 months and for men 64 years 1 month.

The gender difference in the compulsory insurance periods is justified, among other things, by the risk for women of longer periods of interruption of their professional and career development due to their care obligations, and by increased risk of long-term unemployment compared to men.

Different pensionable ages for men and women for the moment are justified in Bulgaria, due to the impact of hardships of the transition and the heavy burden on a generation of working people during this period. The transition period for working people in Bulgaria was marked by numerous and fragmented changes in legislation, insecure and exploitative conditions of employment and also the risks of informal work and work without social security coverage. This is even more true for women than for men during this period. Furthermore, the difficulties led to a worsened health status and disabilities, of women especially. This is a burden on working people in Bulgaria who were living in a period of transition and this burden is above the average burden in Western countries. The initial increase in the pensionable age for a generation of women since the transition (this age used to be 55 years) is already very abrupt and equalisation with men at 64-65 years would be unbearable.

7.6 Actuarial factors

Actuarial factors are not used in the state pension fund. They were explicitly banned from the supplementary obligatory social security. Article 169 paragraph 4 currently reads that:

> 'It is not permitted to use sex as an actuarial factor in defining the amount of the pension for supplementary old age lifetime pensions'. (Amendment of COSI implemented with S.G. 92/2017).

Hopefully, private pension insurance companies will not use such factors in practice anymore. It was difficult to affirm the positive practice and implementation only for 2018; it must be ensured that no private companies will use such factors through monitoring and over a longer period.

Prior to the legislative changes introduced at the end of 2017, sex was used as an actuarial factor by pension insurance companies under the second Bulgarian pillar. This practice was in contradiction to Council Directive 79/7/EEC on the principle of equal treatment of men and women in social security. This violation of EU law was reported to the EU Commission by the Bulgarian Gender Research Foundation – an organisation dealing with gender equality issues since 1998 – and became an issue of concern also for the Commission in the EU Pilot No. 6013/14/JUST.

In addition to reporting the violation to the Commission, the gender equality NGO supported the claims of a group of Bulgarian women born after December 1959. The latter, for three consecutive years before the Supreme Administrative Court, attacked the decision by the Commission for Financial Supervision allowing use of sex as an actuarial factor used by private insurance companies. The Court rejected all three complaints (the last judgment was No. 11601 of 2 November 2016 under court file No. 2694/2015), with the main argument that there was no issue of discrimination based on sex. The court apparently confused the insurance through the second pillar and the additional obligatory insurance in private funds with the third pillar, where insurance is voluntary and where there was explicitly a ban of discrimination based on sex and of actuarial factors based on sex.

After receiving the final decisions from the Supreme administrative court, the women who complained decided, with the support of experts from NGOs, to submit a complaint to the ECtHR in Strasbourg. Unfortunately, as mentioned above, it was unsuccessful, being rejected at a very initial stage by a blanket letter from the Court. The European Court of HR does not give explanations in its letters, the justification is based on general initial admissibility of the complaint with no further explanation. The letters also say that one should not ask further questions and explanations from the Court. It may have been seen by the ECtHR as not such a significant issue of human rights protection.

Despite the negative outcome from the court cases, amendments in the COSI since 2014 are a fact – introducing the possibility to choose between supplementary contribution to the state pension fund and to the private insurance funds, as well as the ban on the use of sex as an actuarial factor. They are the result of the legal pressure by women applicants who challenged the court and through EU Pilot 6013/14/JUST brought to the Commission by the Bulgarian Gender Research Foundation.

7.7 Difficulties

The difficulties for the application and compliance with EU law are rooted in the different three-pillar system in Bulgaria. As explained above, the second Bulgarian pillar is part of the statutory social security system. Bulgaria does not have professional pension schemes of the type recognised as belonging to the second EU pillar.

Another difficulty were the existing inequalities in the second Bulgarian pillar – the supplementary obligatory social insurance for those born after 31 December 1959 and the use until the end of 2017 of sex as an actuarial factor. They were formally removed through the explicit ban on sex discrimination.

7.8 Evaluation of implementation

Currently there is no significant contradiction with respective EU anti-discrimination law in the pension schemes. Until recently, it was difficult to implement EU law in relation to actuarial factors, but finally, pressure led to a good outcome.

7.9 Remaining issues

There are no remaining issues in this section.

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

There are no such surveys and reports.

8.1.2 Other issues

There are no other issues.

8.1.3 Overview of national acts

- COSI regulates the main personal and material scope of the social insurance of such persons.
- The Regulation on social insurance for self-employed persons, Bulgarian citizens working abroad and those involved in maritime activities regulates the procedural requirements and concrete procedure of social insurance.

8.1.4 Political and societal debate and pending legislative proposals

There are no legislative proposals but here are some data about the self-employment and the employment of women. According to the National Statistical Institute 'Women and men in Bulgaria 2018', in 2017 there were 3 150 300 employed persons, of them 53.4 % were men and 46.6 % were women. In all categories and status in employment, the ratio of women is higher than the one of men only in the category of unpaid family workers, where the ratio is 2:1 in 'favour' of women. Out of the self-employed persons, women make 28.2 % among the employers in this group and 35.9 % of the self-employed.

Data from the end of 2018 show that at the end of December 2018, there were over 350 000 self-employed persons in Bulgaria.

8.2 Implementation of Directive 2010/41/EU

The transposition of the Directive was realised through amendments to the Law on Protection from Discrimination (LPFD), namely amendments by Articles 7 paragraph 1 point 19 and Article 37 paragraphs 2 and 3, as well as paragraph 1 points 1, 2 and 5 of the Additional Provisions to the Law. The amendments in Article 7 introduce an additional exception when differential treatment is not deemed discriminatory: in cases of differential treatment when taking measures aimed at initiatives exclusively or mainly promoting entrepreneurship among women in instances of their under-representation or to overcome and compensate for disadvantages in their professional careers. The provision in Article 37 paragraph 2 prohibits discrimination based on any of the grounds of Article 4 paragraph 1 of the Law in the public sector or real economy sector, direct or indirect, in relation to conducting an economic activity, including the establishment, equipping or expansion of an economic activity or in relation to starting or expanding any other form of such activity. paragraph 3 of Article 37 prohibits any harassment or sexual harassment within the framework of the activities mentioned above.

It is worth mentioning the already existing Article 26 of the LPFD which provides for equal conditions for access to a profession or an activity, for opportunities to exercise the activity or profession and for development in this sphere. It covers the scope of the equal treatment principle enshrined in Article 4(1) of Directive 2010/41/EU: the establishment, equipping and expansion of a business or the launching or expansion of any other form of self-employed activity, despite the different wording of the two provisions. The other

provisions which were amended in view of compliance with the Directive are those in Article 4 of the Code on Social Insurance (COSI), which enhance the insurance rights of persons covered by the Directive.

8.3 Personal scope

8.3.1 Scope

Bulgarian law does not contain a legal definition of self-employed persons, only a definition of different groups of the self-employed for the purposes of social security law. The COSI and related regulatory acts mention different categories of such persons. For example, Article 4 of the COSI mentions the following categories: persons registered for performing freelance activities and crafts; persons exercising commercial activities, single owners of companies, owners or associates in trading companies; registered agricultural and tobacco producers; and the spouses of the categories of persons mentioned above when they participate in their activities with their consent. Regulation on social insurance for self-employed persons,[77] Bulgarian citizens working abroad and those involved in maritime activities, the group of freelancers is further specified and can non-exhaustively comprise those performing the following types of activities: based on preliminary registration, legally required notaries public, attorneys-at-law (barristers and solicitors), accountants, licensed evaluators, experts in the courts and the prosecutor's office, medical experts, insurance agents; activities for which they are obliged to pay patent tax, without being single company owners; when the professional activity is conducted at their own risk and on their own account; scientists; experts in the field of culture and education; architects; economists; journalists; and other persons performing a freelance activity, when they are duly registered.

The author points out that these provisions of the regulation already existed before the adoption of the new Directive and this regulatory act was not amended for the purpose of harmonisation. In terms of rights as self-employed persons, all categories are treated equally, including freelancers, agricultural producers, small business operators and others.

8.3.2 Definitions

Bulgarian law does not contain a legal definition of self-employed persons.

8.3.3 Categorisation and coverage

As mentioned above, self-employed workers are included in this category, as well as agricultural workers.

8.3.4 Recognition of life partners

The status of life partners is not explicitly regulated in this sphere or in any other sphere. In terms of social security, the COSI only mentions contributing spouses as subjects of insurance rights.

8.4 Material scope

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

No specific information available.

[77] Regulation on social insurance for self-employed persons, *Наредба за общественото осигуряване на самоосигуряващите се лица, българските граждани на работа в чужбина и морските лица*, available in Bulgarian at: https://www.lex.bg/laws/ldoc/-549442559.

8.4.2 Material scope

Article 4 has been correctly transposed in Bulgarian legislation, firstly through the existing provision in Article 26 of the LPFD which provides for equal conditions for access to a profession or an activity, for opportunities to exercise the activity or profession and for development in this sphere. In addition, the equal treatment principle is ensured through the new provision in Article 37 paragraph 2 LPFD which prohibits any discrimination based on one of the grounds of Article 4 paragraph 1 of the LPFD in the public or real economy sector, direct or indirect, in relation to conducting an economic activity, including the establishment, equipping or expansion of an economic activity or to the undertaking or expansion of any other form of such activity.

The author notes that the provision in Article 26 is broader and also covers the requirements of Article 14(1)(a) of Directive 2006/54/EC.

8.5 Positive action

As mentioned above, the amendment in Article 7 paragraph 1 point 19 LPFD introduces additional positive action aimed at initiatives exclusively or mainly promoting entrepreneurship among women in cases of their under-representation or to overcome and compensate for disadvantages in their professional careers.

No specific real positive action in the implementation of this provision has been taken.

8.6 Social protection

According to Article 4 paragraph 3 of the COSI, the coverage for disability due to general illness, for old age and death is mandatory for the following categories of persons: 1. persons registered as freelancers or craftspeople; 2. persons exercising trading activities, company owners, and associates in a trading company; 3. registered agricultural and tobacco producers. These persons can insure themselves voluntarily for the risks of general illness and maternity.

Article 4 paragraph 9 of the COSI, amended in view of harmonisation with Directive 2010/41/EU, regulates voluntary insurance for spouses of the self-employed persons mentioned above. As a matter of principle, the spouses of the persons mentioned in points 1 and 4 (persons registered as freelancers or craftspeople; and registered agricultural and tobacco producers), when with their consent they participate in the activities of these persons, can be registered voluntarily for disability due to general illness, old age and death, as well as for general illness and maternity, if they are not already insured on other grounds.

The insurance contributions for the spouses of the persons mentioned in point 1 of Article 4(3) of the COSI are based on the minimum insurance income for self-employed persons, defined by the Law on the Budget of the State Social Security Scheme, and the contributions for the spouses of registered agricultural and tobacco producers are based on the minimum insurance income for agricultural producers, defined explicitly in the same Law.

The concrete procedure for the insurance of self-employed persons is regulated by the Regulation on social insurance for self-employed persons, Bulgarian citizens working abroad and those involved in maritime activities.

Voluntary social security pension schemes exist according to the COSI (Part III of the Code) and they are open to everyone who is in a position to pay the contributions. The insurance with companies and funds for supplementary voluntary insurance is individual.

This insurance gives the right to an individual pension for age or disability, a survivor's pension, etc.

8.7 Maternity benefits

The protection of pregnancy and maternity regarding self-employed persons and assisting spouses / life partners is in compliance with the requirements of the Directive both in terms of opportunities and minimum coverage. In fact, the self-employed women in these categories who are insured for general illness and maternity, according to the conditions mentioned above, have the right to maternity benefits which amount to 90 % of their average gross remuneration. The condition for the self-employed is to have paid contributions for these risks for at least 24 months preceding the month when the temporary inability to work occurs.

No system of existing services supplying temporary replacements or existing national social services is available either for the self-employed or their contributing partners.

8.8 Occupational social security

Although an occupational social security scheme is part of another pillar according to Bulgarian law, different from the second pillar referred to in the Recast Directive, voluntary social security pension schemes exist according to the COSI (Part III of the Code) and they are open to everyone who is in a position to pay the contributions. The insurance with companies and funds for supplementary voluntary insurance is individual. This insurance gives the right to an individual pension for age or disability, a survivor's pension, etc.

8.8.1 Implementation of provisions regarding occupational social security

The insurance in the private companies for supplementary voluntary insurance is not of the type of occupational social security as regulated by the Recast Directive. Each physical person from the age of 16 can insure himself/herself in a private fund or be insured voluntarily through an enterprise. This right is individual, and contributions to the fund are fixed and on fixed terms.

This is used as a means to increase the pension income and the replacement rate, which is far from the dream of having a replacement rate of 70-80 %. For individuals it is still an onerous task to contribute to a fund in addition to paying the high contributions to the statutory pension scheme. Even when it is practised as a voluntary pension scheme, higher levels of payments are necessary in order to be reflected as an increase in the pension income, which is very low in Bulgaria.

Therefore – and especially for women – it is an opportunity, a scheme based on contributions and on the investment capital and income of pension funds but it still seems not so affordable for the average category of employed persons. In addition, there is not yet enough confidence in the management capacity and transparency of private pension funds.

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

As the schemes are a different type from those regulated in the Directive, no such exceptions from the principle of equality are regulated and practised. According to Article 231 paragraph 1 of the COSI, the access to the supplementary pension insurance schemes is universally ensured, as discrimination based on a broad range of grounds is prohibited, including discrimination based on sex. Paragraph 2 explicitly prohibits discrimination based on sex, both direct and indirect, and discrimination based on family status, in all the contexts of insurance through a professional scheme, and namely:

- in the field of application and the requirements for access;
- in the obligation for contribution and calculation of the contributions;
- calculation of the pension payments, including the increases due to spouses and to persons who have a right to maintenance.

8.9 Prohibition of discrimination

The general provision of COSI on equality of insured persons is valid – Article 3 of COSI.

8.10 Evaluation of implementation

There are no issues of unequal treatment in law and no serious issues reported in practice. Implementation, of course, is always an issue, and especially the rights and insurance coverage of contributing spouses, where women prevail.

8.11 Remaining issues

The self-employed, and specifically self-employed women and gender equality in this field were not a focus of the measures of the Government during the pandemic. These professions were affected by the economic crisis as well but were not addressed, except for the possibility to receive bank loans for a period without bank interest, under the condition they present evidence of a decrease in their income of 20 % compared to similar periods in the past year, 2019. The fact that these groups of employed persons were not addressed was criticised as one of the gaps in the anti- COVID-19 measures.

Loans were addressed also to the self-employed who had to close their business, with the intention of reopening, based on declarations for interruption of business made before the respective authority – the National Income Agency.

9 Goods and services (Directive 2004/113)[78]

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 such relevant surveys or documents.

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

There are no specific problems of discrimination based on sex identified in this context.

9.1.3 Political and societal debate

There is no substantial political and societal debate on the issue.

9.2 Prohibition of direct and indirect discrimination

Article 37 of the LPFD prohibits any refusal to supply goods or services and to supply lower quality goods or services, or their supply under less favourable conditions, based on the discrimination grounds defined in the law.

9.3 Material scope

The material scope of the national law has broader material scope than that specified in Article 3 of the Directive. No sphere is explicitly excluded so the law also applies to the content of the media and advertising, and to education. Article 35 LPFD requires the application of methods aimed at the elimination of gender stereotyping in education and training. Educational institutions are obliged to include gender equality education.

The case law of the Commission for Protection from Discrimination has explicitly confirmed the application of the equal treatment principle also in the field of the media and advertising.

Nevertheless, some extreme cases of sexist advertisements brought before this equality body were not properly dealt with by the institution. The outcomes were as follows: either the equality body deferred the case to other institutions (e.g. the Council for Electronic Media), or it suggested that the cases are rather for the self-regulatory body on advertising (established by businesses in 2010). Thus the institution dealing with discrimination refused to examine the cases through a discrimination lens. The only case where the equality body issued a decision was the case against *Peshtera anisette* where the outcome was negative for the women complainants.[79] The arguments that it is rather a moral issue and that no discrimination was proved was upheld until the court of last instance – the Panel of five judges of the Supreme Administrative Court.[80]

As a matter of fact, in September 2008, 13 women brought a complaint of sex discrimination against a series of advertisements for the Peshtera anise aperitif, together with the producer, the joint stock company Vinprom Peshtera. They were entitled 'Passion in Crystals' and 'The Season of Watermelons' and were notorious for their television, print media and billboard versions. The advertisements displayed the '*chalga*' (a Bulgarian music

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

[79] Judgment No. 201 from 15 September 2010 on case file 217/2008.

[80] Judgment 3616 from 13 March 2012 on case file 12183/2011.

genre often referred to as pop-folk) singer Galena wearing a skimpy bathing suit patterned with watermelon motifs over her breasts. The advertisements are aimed at encouraging men to drink anise aperitif with watermelon. The woman and her body are directly connected with easy access and pleasure gained from alcohol, summer and a slice of watermelon.

This case was brought before the Commission for Protection against Discrimination against the producer, the advertising agency, the media and all connected with the dissemination of the advertisement. The case was supported by the Bulgarian Gender Research Foundation. The procedure for adjourning the first hearing was unusually lengthy and contradictory and it took ten months for the Commission to start considering the case. The complainants were not provided with timely information by the Commission and some of them were even unofficially advised to abandon this impossible cause and to drop the case. No support was provided to the women despite the explicit provision for this in the law.[81] The complainants were obliged – by the members of the panel of the CPD, ex officio, and without any request from the respondents – to explain repeatedly and one by one how they felt when they saw these adverts and why they felt discriminated against. Despite the explicit message in the adverts, the explanations by the women and four detailed experts' opinions, most of them in favour of the claim, at the end of 2010 the Commission found that no evidence of prima facie discrimination was available, and subsequently there was no sex discrimination in this case. It should be noted that one of the expert opinions solicited by the Commission was from a sexologist, as if there was something wrong with the perceptions and sexual lives of the women who complained. This decision, subsequently appealed by the women, was confirmed by the Supreme Administrative Court with a decision in June 2011.[82] The court confirmed the decision of the Commission and added that there was no empirical evidence that the adverts affected the majority of women in Bulgaria and that the 13 women cannot be representative of women in Bulgaria. It implied that they were possibly too sensitive to the adverts. The court said that the reference to international instruments, and namely to CEDAW, was not relevant for the court, as only the government and not the judiciary was bound by the international human rights instruments. It can be noted that in this case, the court refused to take into account not only international norms but any norms regulating discrimination and human rights, by saying that it is a problem which lies outside the scope of the law, a moral problem, raised through a subjective opinion.

Upon appeal, a final judgment on this case was issued by the special panel of the Supreme Administrative Court on 13 March 2012. It held that prima facie sex discrimination could not be proved. As to the gender stereotypes, the Court refused to deal with them as a source of such discrimination with the 'historic' argument:

> '…It has been a just and lawful assumption by the Commission that these are issues from the area of aesthetics, ethics, psychology and social science, and namely of a type of sub-culture, which issues have a philosophical dimension, which are characteristic of the state of society at the given historical moment and cannot, and could not, be solved within the limited factual frame of a concrete legal case.'

It is important to note at this stage that experts and women's NGOs are convinced that the decisions of the equality body and, respectively, the court, which are in fact in favour of the corporate sector, are also due to the fact that the media and advertising sectors are excluded from the scope of the Directive. So, no obligations and sanctions derive from the Directive for the government and private actors in this sphere. This situation has been

[81] According to Article 47 paragraph 9 of the Anti-Discrimination Act, the Commission provides independent support to victims of discrimination in the process of filing complaints against discrimination.

[82] Judgment No. 12450/2010.

particularly harmful for Bulgarian women as gender stereotypes and the role of women primarily as sex objects were broadly reinforced and disseminated on a very large scale.[83]

This first case on sex discrimination in advertising, although unsuccessful, influenced the further practice of the equality body concerning its arguments and the Commission also took positive decisions condemning discrimination not in advertisements but in relation to the content of the media. For example, at the end of 2014, the Commission issued a decision against a journalist for a sexist expression in an internet article.[84]

As condemning an individual journalist is much easier for the Commission, the author believes that the reactions of the equality body are not balanced as it would not have applied the same standard to a corporate actor whose discriminatory acts are detrimental to citizens.

9.4 Exceptions

There is no exception to the areas where equality in the field of goods and services is applied.

9.5 Justification of differences in treatment

Since the end of 2007, Article 7 paragraph 1 p. 18 of the LPFD allows differential treatment in the provision of goods and services in accordance with EU law – when the provision of goods and services exclusively or primarily to members of one sex is justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

9.6 Actuarial factors

Article 246 paragraph 3 of the COSI ensures that sex will not be used as an actuarial factor in the calculation of pension benefits in the third pillar, the supplementary voluntary social insurance scheme.

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

The *Test-Achats* ruling resulted in amendments related to the use of sex as an actuarial factor in the field of insurance and in the area of supplementary voluntary pension insurance. The provisions of the two codes were changed, respectively the Insurance Code (Article 65a) and the Social Insurance Code (Article 246 paragraph 3). The use of sex as an actuarial factor was prohibited for all contracts concluded after 20 December 2012. For contracts concluded up to 20 December 2012, the insurers may continue to include such factors if they use reliable and regularly updated statistical information, which is publicly available, and from which the determining importance of gender is obvious.

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

No general specific positive action measures are provided in the field but Article 7 paragraph 1 p. 18 of the LPFD allows differential treatment of persons based on sex in the provision of goods and services aimed exclusively at one of the sexes, provided that it has a legitimate aim and the means are appropriate and necessary.

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[83] Important research in this field is the following study: *Gender Stereotyping – a pervasive and overlooked source of Discrimination against Women in Bulgaria* (2012), Special Alternative Report to the 4th, 5th, 6th and 7th governmental report for the 52nd session of CEDAW Committee, 9-27 July. Available at: http://eige.europa.eu/rdc/library/resource/aleph_eige000005979 and also at: https://www2.ohchr.org/english/bodies/cedaw/docs/ngos/BGRF_for_the_session_en.pdf.

[84] Judgment of the Commission for Protection from Discrimination of 18 December 2014 – http://www.kzd-nondiscrimination.com/layout/index.php.

9.9 Specific problems related to pregnancy, maternity or parenthood

There are no specific problems related to pregnancy, motherhood and parenthood.

9.10 Evaluation of implementation

There are no issues of inequality in the law. It is necessary to ensure implementation, as in Bulgaria, the field covered by non-discrimination in goods and services is broader than the minimum EU standards.

9.11 Remaining issues

There are no relevant issues connected with the COVID-19 pandemic and the equal access for men and women to goods and services.

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

Bulgarian society has a deeply rooted notion of gender difference where there are still traditional gender roles without a real sense of gender inequality. Bulgarian society as a whole still denies the existence of a power imbalance between men and women as well as the prevalence of violence and abuse. Many women are silenced by social and cultural norms and endure violence and cruelty in their homes. In the last year and a half, over 55 women died – about 40 in 2018 alone – at the hand of their intimate partners or relatives but the protests and declarations against these cases of femicide were silenced by certain conservative circles, even openly by persons in positions of power. Out of 138 intentional murders in Bulgaria, according to official data of the Ministry of Interior, over 40 were the murders of women in an intimate and close relationship.[85] This all happened and was endured in the context of fierce opposition of these circles – political, religious, media circles – to the issue of violence against women and to the ratification of the Istanbul Convention. The term 'gender' and related notions of 'gender equality' and 'gender-based violence' were rejected, distorted and debased by these political and ideological circles. It can be noted that leading social scientists and women's rights experts mention the link between the increased number of murdered women and the failed ratification of the Istanbul Convention – it is an issue of a culture condoning violence against women and impunity for such acts of violence.

Every fourth woman in Bulgaria is a victim of domestic violence. More than 70 % of women who are being abused at home do not seek help and medical assistance. Between 4 % and 10 % of the domestic violence victims seek justice, an estimated 900 000 women in Bulgaria suffer from domestic abuse every year. Also, according to the author, there is a severe lack of adequate support services for victims, and Bulgaria does not fulfil the Council of Europe recommendation of safe accommodation in specialised women's shelters. Moreover, the absence of specific provisions criminalising domestic violence and marital rape, until recently, at the end of 2018, called for reforms in the legal framework to ensure the protection of victims of such violence.

All forms of GBV are known in Bulgaria and are encountered often – domestic violence/ physical, sexual, psychological, financial economic violence/, sexual violence, sexual harassment, early and child marriages, stalking, etc. The main groups of more vulnerable women and girls identified also through the work of NGOs, are Roma women and girls, women and girls with disabilities, and women and girls seeking international protection. As main groups of victims of multiple discrimination, they were identified through the work of the Alliance for Protection from GBV.[86]

There is a National Study on Domestic and Gender-Based Violence, conducted and published with the support of the teams of Partners Bulgaria Foundation, Centre for the Study of Democracy and Human Rights Academy, Norway: National Study on Domestic and Gender-Based Violence (DGBV) and Elaboration of Victims Support Model (VSM).[87]

The results and findings from this study confirm the trends mentioned above, and namely:

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85 https://www.novinite.com/articles/194972/Dramatic+Increase+in+Murders+of+Women+in+Domestic+Violence+in+Bulgaria.

86 The NGO is a registered network of 11 NGOs all working in the field of GBV in Bulgaria.

87 Policy Brief, 2016, available in English at: http://www.csd.bg/artShow.php?id=17883 and Domestic and Gender-Based Violence: Victims Support Model. (Practical advice for victims and guidelines for work of professionals in the area of domestic and gender-based violence), 2016, available in English at: http://www.csd.bg/artShow.php?id=17885.

- Low levels of awareness and willingness to share GBV;
- The reported prevalence is significantly lower than the real occurrence of GBV;
- Women are still more vulnerable in terms of multiple, repetitive and systematic GBV, and Roma women and girls are more vulnerable than the general population;
- The prevention measures are still occasional and dependent on the good will and resources available to specific actors, awareness of GBV victimisation and perpetration is very low;
- The inter-institutional cooperation lacks well-established and enforced rules, distribution of obligations and mechanisms of communication; its level in different regions of the country varies.

EIGE Gender Equality Index 2017 shows that Bulgaria ranks first in the EU in intensity by cumulation of factors for different forms of violence against women and is last among all countries according to the indicator of effectiveness of response of state institutions, which is also an indication of the exacerbation of the situation in the country. According to Eurobarometer for the same period, Bulgaria occupies the 'leading' position in the EU concerning gender stereotyping and sexism.[88]

There have been no other prevalent qualitative data and quantitative research data on violence against women in Bulgaria. Data collection on issues of violence against women, including regular research and monitoring and also risk assessment, are still problematic in Bulgaria. There are no special studies on programmes for perpetrators of violence.

The trends can be summarised as not so positive at the moment, also due to the current broader context in the EU and Europe.

In this context, it is also worth mentioning the negative trends in the field of violence in schools. School violence in the period 2015-2016 – 3043 cases; for 2017-2018 – 3616 cases, according to statistics of the Ministry of Education.[89] Violence against teachers is also on a rise – for 2016-2017 – 220 cases; for 2017-2018, it amounts to 391 cases.

The role of prevention emerges as one of the main recommendations for remedying the situation, as well as the increased role of and support for NGOs, whose effective work and promising practices in the field are an asset and bring hope. Despite the unfortunate process around the ratification of Istanbul Convention, at the end of 2018 and with the support of women's NGOs, the Government and Parliament initiated amendments in the Penal Code, providing for increased and strengthened penal protection from domestic violence – with qualifying and aggravating circumstances and with increased penalties.

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

The main national acts regulating these issues are:

- The Criminal Code;[90]
- The Law on Protection from Domestic Violence – (LPDV adopted in 2005).[91]

[88] https://sofiaglobe.com/2017/11/21/bulgaria-eu-sexism-champion-81-say-a-womans-most-important-job-is-taking-care-of-home-and-family/.

[89] https://m.dnes.bg/obshtestvo/2019/03/28/boi-zaplahi-unijeniia-agresiiata-v-uchilishte-s-ogromni-razmeri.405888.

[90] Criminal Code, *Наказателен кодекс*, Bulgarian version available at: https://www.lex.bg/laws/ldoc/1589654529.

[91] Law on Protection from Domestic Violence, *Закон за защита от домашното насилие – ЗЗДН* http://lex.bg/laws/ldoc/2135501151.

The Regulation on the Implementation of the Law on Protection from Domestic Violence[92] from 2010.

The judgment of the Constitutional Court No 13/2018 under Constitutional file No. 3/2018[93] promulgated in State Gazette No 65/07.08.2018. The case is described in detail below.

10.1.3 National provisions on online violence and online harassment

There are no specific national provisions on online violence yet. Protection can be obtained through civil and penal protection according to the law and the type of violence suffered.

10.1.4 Political and societal debate

The penal amendments in legislation proposed are in compliance with the IC and were adopted at the beginning of 2019, also through the pressure and support by NGOs.

Important changes in legislation were implemented at the beginning of 2019 and are in force in the Penal Code from 25 February 2019.[94] They are related to the following issues: enhanced penalties for homicide, bodily harm, kidnapping, illegal constraint, compulsion, threat or stalking (systematic stalking not committed in conditions of domestic violence), as well as other forms of violence against women, such as forced marriage, widening the scope of the protection by means of criminal law and increasing the punishment for coercion to marriage and cohabitation. The procedure in the conditions of domestic violence is either initiated by the prosecutor and publicly prosecuted, or is of private-public nature in some instances, but the procedure cannot be discontinued; there is protection of the victims in cases where the aggressor is released from detention or prison, etc.

Amendments and addenda to other laws, like the Criminal Procedural Code, were implemented through the Law on amendments of the Penal Code, in order to guarantee the right of a victim with specific needs of protection to be informed about decisions regarding the perpetrator on any ground: decisions to impose and modify detention orders, arrest or release them from prison.

According to the definitions in the Criminal Code, a crime is considered to have been committed in conditions of domestic violence

> 'if it is preceded by systematic physical, sexual or psychological violence, placing the person in economic dependence, coercive restriction of personal life, personal liberty and personal rights, and is enforced against [a parent or child,] a spouse or ex-spouse, a person with whom one shares a child, a person with whom one is or has been in a de facto marital cohabitation, or a person with whom one lives or has lived in a common household.'[95]

The term 'systematic' in the Criminal Code requires victims to document three prior instances of violence by the same perpetrator in order for a public prosecution, or 'ex officio' prosecution, to be opened against the abuser.

In the first half of 2020, the requirement for the acts of domestic violence to be systematic, in order to be criminally prosecuted, has been challenged both by NGOs and the Ombudsperson of Bulgaria and draft amendments are in progress.

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92 Regulation on the Implementation of the Law on Protection from Domestic Violence, *Правилник за прилагане на ЗЗДН*, https://www.lex.bg/laws/ldoc/2135684122.
93 Promulgated in State Gazette No. 65/07.08.2018.
94 S.G. No. 16/2019.
95 Penal Code, Article 93 p.31. Bulgarian text is available at https://www.lex.bg/laws/ldoc/1589654529.

A Draft Law for amendments in the Law on Protection from Domestic Violence was prepared by the working group in the Ministry of Justice, upon the initiative and with the participation of NGOs, like the Alliance for Protection Against Gender-Based Violence, and representatives of governmental institutions and other NGOs. The draft was not presented for public discussion and consideration by the Council of Ministers until December 2020.

The process and the debates related to the ratification of the Istanbul Convention are described in detail below.

During the period of the pandemic and from March 2020 to the end of December 2020 there has been a considerable increase in cases of domestic violence in the country, registered by the members of the Alliance for Protection from GBV and other NGOs in different cities and towns. The number of victims was almost double compared to similar periods of the year in the two previous years. The crisis centres of the Alliance were full during this period – the six specialised crisis centres for women and children victims of violence. Over 3 500 protection orders under the Law on Protection from Domestic Violence were issued by the courts in Bulgaria. As for femicide – during the mentioned period, over 25 women were murdered by their partners.

As a tendency, during the pandemic and closures and isolation, more hidden violence was registered and is expected to escalate and explode in the following periods as well.

There are two major national helplines for female victims of violence and namely for domestic violence. One of them is run by the Alliance – 080011977 – and is a 24-hour helpline for specialist support for victims of domestic violence. For the period mentioned above, the calls increased by 2.5 times.

The state only partially supports the work of telephone lines; the one of the Alliance for Protection from GBV is funded by private sources.

The measures in Bulgaria against COVID-19 were not so strict; there were restrictions and the obligation to wear protective masks but movement was not restricted in the private homes and spaces and people could move and walk also freely outside. Such were the measures even during the state of emergency, from the end of March to mid-May 2020.

Only those women who had to travel to shelters and crisis centres might have encountered difficulties. However, there were grounds for entering towns, several of which have crisis centres, as in the case of a medical emergency. It was possible to use the social service's order for accommodation as justification, or in a case of urgency, justification directly from the crisis centre managed by the NGO.

The main problem remains the non-availability of crisis centres in many places and the limited capacity, rather than the restrictions due to the pandemic.

The specialised crisis centres with special support and managed by NGOs are available and open, and work according to the requirements for the pandemic. In addition to the six specialised centres of the Alliance, another three to four centres are managed by other NGOs and also one or two by the local Government.

The court procedure for issuing protection orders under the Law on Protection from DV was available during the pandemic; even during the state of emergency (March to May 2020) the procedure for issuing emergency orders for protection was available to victims. For ensuring accessibility and due to limitation of contacts, NGOs proposed to victims that they avail themselves of free legal aid and also use the 24-hour helplines and the indicated contacts of lawyers and psychologists. Online consultations were widely proposed and used.

Challenges that remained during the whole period included limited access to face-to-face counselling; additional risk from isolation, and intimidation by the aggressor, with an increased risk of femicide.

10.2 Ratification of the Istanbul Convention

The decision of the Council of Ministers for the signing of the Istanbul Convention was adopted on 16 April 2016 and in this decision it is said that it is done 'in view of forthcoming ratification'. The Convention was signed by Bulgaria on 21 April 2016.

There was strong civil society pressure to ratify the Istanbul Convention (IC) and this was still the case in 2017 and 2018.[96] Among the reasons advanced by the government for non-ratification at that time were the lack of full compliance of the Bulgarian legislation with the IC and also financial reasons, as the State realised that ratification would have budgetary implications. The main problematic fields were, among others: the concept of rape in Bulgarian law which was not in compliance with the main standards of the IC, as not based on the concept of a lack of consent; the notion of rape in Bulgarian law is an act against the sexual integrity of women only; the majority of criminal acts of domestic violence (DV) were prosecuted as crimes of a private nature and a complaint by the victim is required; acts like stalking were not criminalised; there is no system in place for continuous support for active and relevant NGOs working in the field; there is no special policy encompassing all forms of violence against women (VAW) as gender-based violence (GBV); there is no effective mechanism for integrated policies against VAW and DV.

Reviews of the legislation were carried out by the government, by experts from the CoE and by civil society organisations. The independent reviews showed the need for amendments to the criminal law and to civil legislation and policies. As a matter of fact, since 2011, NGOs have been exerting pressure on the government to work on the necessary amendments and have offered their cooperation in order to achieve compliance much earlier. In June 2016, extensive working groups (composed of representatives of institutions, magistrates and civil society) were formed by the Minister of Justice with a view to making suggestions for changes to, respectively, civil law and criminal law. The suggestions for amendments were formulated, in order to be in compliance with the IC, by a special working group in December 2016-January 2017. The draft laws for amendments in the two spheres remained pending in the Ministry of Justice.

In 2017, the main challenge for the legislative process, for services for women and cooperation with the institutions in relation to VAW, was that in May-June 2017, upon national elections provoked by resignation of the previous government, new elections were held and a new government and senior administration were installed, the third consecutive government for the year 2017. A very bad sign was that the ruling coalition comprised the so-called United Patriots – an *ad hoc* coalition of three nationalistic parties. It played a very negative role in the whole process around the ratification of the IC.

Prior to the establishment of this new government, the Alliance for Protection from Gender-based Violence[97] had continued to exert pressure for the ratification of the Istanbul Convention which was signed by Bulgaria at the end of April 2016. This activity reached its peak in the second half of 2017, upon the formation of the new government. The

[96] http://bgrf.org/articles/bulgaria-signs-istanbul-convention-on-preventing-violence-against-women-506. http://www.alliancedv.org/articles/ратифицирането-на-истанбулската-конвенция-ще-защити-правата-и-на-децата-жертви-на-насилие-398. https://www.facebook.com/1531137970358869/photos/a.1532090413596958.1073741828.1531137970358869/1605640609575271/?type=3&theater.

[97] The Alliance is legally registered and its members in the country are: Bulgarian Gender Research Foundation Sofia and Haskovo, Women's Association Ekaterina Karavelova – Silistra, SOS – Families at Risk Foundation – Varna, Demetra Association – Burgas, NAYA Association – Targovishte, PULSE Foundation – Pernik, Open Door Centre Foundation – Pleven, Association Dinamika Centre – Russe, Foundation H and D Gender Perspectives – Haskovo and Dimitrovgrad, Bulgarian Fund for Women – Sofia and Knowledge, Success, Change Association – Dupnitza.

Alliance wanted to raise awareness in society concerning the need for protection for all groups of women, for every woman individually, and to ensure the provision of services, access to justice and financing for effective protection.

After the broadcasting of media reports in the summer of 2017, when several cases in which women were killed by their partners or husbands happened, the Alliance prepared a special campaign and lobbying and issued a strong statement by openly calling these cases femicide cases and demanding that the institutions take responsibility for their failures, take action and immediately ratify the Istanbul Convention, even before the adoption of the prepared legislative changes for harmonisation.

In addition, the Alliance called for strong penal sanctions for all cases of violence against women which result in injuries to women, often including life-changing injuries. The petition was sent to all institutions at national and local level, by all the members of the Alliance. The campaign by the Alliance triggered strong reactions in the media, as well as a very positive response from society as a whole. The campaign was provoked by tragic events and drastic violations of the standards of due diligence by the State. It was immediate and timely and very much to the point. It also called for security measures and the protection of the rights of all citizens.

The first deadline posed to the government to initiate legislative reforms in the penal sphere and to start the ratification process of the Istanbul Convention was 15 October 2017. After a short delay, responses from the government began in November 2017. Most importantly, the government recognised the need to first ratify the Convention by late 2017 or early 2018 and immediately afterwards to finalise the necessary legislative amendments together with experts, including civil society. The legislative changes also included the regulation of specialised services for victims of violence. This was an achievement by civil society and mainly by women's organisations.

As a result, the draft law for the ratification of the Istanbul Convention was introduced to the Council of Ministers on 3 January 2018 but opposition forces, well supported by conservative waves from abroad, were on the rise and reacted aggressively. From the end of 2017, once information about the forthcoming ratification process was available, the majority of electronic media, depending on unknown sources, started attacking the Convention, portraying it as a tool for introducing the 'third gender' and a means to promote education on these issues in schools. They argued that this represented a great risk to Bulgarian children, a way to affirm the controversial term 'gender' and to introduce gender ideology. These media sources argued that the Convention was not in fact about VAW, but concerned trans and intersex issues which they regarded as 'shameful issues'. The notion of combating gender stereotypes and stereotyped roles of men and women was also attacked as meaning that there was no limit to self-determination of people in their gender identity, including in different genders, described as 'third gender'. The same arguments were used by some people in the government, like the representatives of the United Patriots in the Council of Ministers, and some other members of the government who voted against the decision of the Council of Ministers to promote the ratification of the Istanbul Convention.

Despite all this, at the beginning of 2018, on 11 January, the draft law for the ratification was introduced in the parliament of Bulgaria. In March 2018 it was referred by a majority in the parliament to the Constitutional Court for a preliminary ruling on constitutionality. For this reason, the draft bill for ratification was withdrawn from the Council of Ministers as well. By the end of July 2018, the Constitutional Court ruled by simple majority that the Convention was not in compliance with the Bulgarian Constitution for reasons of 'going against the principle of legal certainty'. Although not being a convincing ruling and not fully in compliance with the Constitution, this decision had a very damaging effect on the whole theme for gender equality and for the fight against violence against women. Therefore,

Bulgaria remained just a signatory of the Istanbul Convention which is currently a political document and not a legally binding instrument.

According to the author of this report, the ruling was clearly politically influenced and its arguments are weak and not justified by the Constitution itself or by international law which is binding for Bulgaria, based on this same Constitution.

By wrongly assuming that:

> 'The rule of law in the formal sense (the state of legal certainty) requires the meaning of legal terms to be clear and unambiguous. The principle of legal certainty and predictability precludes the existence of two parallel and mutually exclusive terms for "gender". The ratification of the Convention would lead to the introduction in the national legal system of a concept that is contrary to the one established in the Constitution. …'

the Constitutional Court wrongly concludes:

> 'Contrary to this constitutional understanding of gender as a biological category, the term "gender"/"genre" as a social construct exists in the Convention individually and along with the term "sex"/"sexe".'

As stated above, this situation distances the scope of the Convention from the stated purposes of protecting women and opens up room for its contradictory implementation, which is contrary to the rule of law in a formal sense (Article 4(1) of the Constitution).[98]

As more of these 'arguments' were given above in the section about general concepts, presented here below are just several considerations:

- The decision was taken outside and beyond the concrete questions asked on constitutionality prior to ratification and it is inadmissible, according to the author, to rule in this case that the Convention is unconstitutional as a whole.
- The principle of legal certainty as applied in the formal sense is applied incorrectly: first of all, this principle has two important elements – the formal element of strict legal certainty and the second and most important element – the legal certainty of protection of rights of citizens. This element prevails and should have prevailed in the ruling of the Constitutional court. And here deliberately it was not discussed and deliberately citizens were left without any protection against gender-based violence. On the other hand, the arguments expressed for justifying the lack of legal certainty, the deliberations around the term 'gender' are not based on any legal ground, the extension of 'gender' to gender ideology is completely deliberate and without any concrete referral to legal terms and possible contradiction with concrete legal terms and notions.

The ruling impacted all further use and interpretation of the terms and limited the institutional and public debate also on the issue of violence against women.

Based on all these considerations, the author is of the opinion that the ruling can be revised by the Constitutional Court and that, in addition, the government and the parliament may decide to initiate again and finalise the ratification procedure by presenting their arguments and justification for that.

[98] Unofficial translation of judgment No 13 Sofia, 27 July 2018 (promulgated in State Gazette No. 65/07.08.2018)

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

11.1 General (legal) context

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

There are no specific surveys and reports about particular difficulties for obtaining legal redress.

11.1.2 Other issues related to the pursuit of a discrimination claim

There are no other issues to mention in this context, other than the ones mentioned already in this report.

11.1.3 Political and societal debate and pending legislative proposals

There are no important public debates on this particular issue or any pending legislative proposals.

11.1.4 Gender mainstreaming

Gender mainstreaming is regulated as a concept in the Law on Equality between women and men. According to Article 4 paragraph 1 of the Law, state policy for gender equality is implemented through several approaches and one of them is integrating the principle of gender equality in legislation and in all policies and strategies, programmes and plans at all levels. Gender mainstreaming is further defined as implementing analysis of the impact of legislation and policies on the situation of women and men for the purpose of undertaking respective action for real equality / equality de facto.

This approach is mentioned also in the National Strategy, namely in the new Strategy for Promotion of Gender Equality 2021-2030.

11.2 Victimisation

Victimisation is considered to be a form of discrimination, according to Article 5 of the Anti-Discrimination Law. Persons who have, or are supposed to have, instigated an action against discrimination, or those who intend to instigate such an action, are explicitly protected against discrimination. Persons related to such persons are also protected. Persons who have refused to discriminate are also protected from victimisation. This is according to the definition provided in the Additional provisions of the law (paragraph 1 p. 3).

11.3 Access to courts

11.3.1 Difficulties and barriers related to access to courts

There are no particular difficulties or barriers related to access to courts.

All persons whose rights have been violated have access to the courts (with the application of the Civil Procedural Code – CPC) or to the Commission for Protection from Discrimination (with the application of the special procedure under the special law, the Administrative Procedural Code and the CPC). Compensation can only be awarded by the courts. Article 71 of the LPFD stipulates that each person whose rights have been violated under this law or other laws on equal treatment has the right to instigate a claim before the district court in order to: identify the violation; order the defendant to discontinue the breach and to

restore the situation, as well as to refrain from violations in the future; and award compensation for damages.

Difficulties in access may be present in cases where the person discriminated against first resorts to the Commission to confirm the act of discrimination and, in such cases, despite the right to refer to the courts for compensation, this is often not sought or the procedure encounters obstacles. There are general obstacles related to seeking compensation for damages due to acts of discrimination – questions of evidence and proof, with low amounts of compensation, if any.

A positive element in the court procedure is the possibility for trade unions and civil society organisations to join the procedure as interested parties or to initiate a discrimination case on behalf of a person who has been discriminated against. When the rights of many individuals are violated, the organisations mentioned can initiate a discrimination procedure before the court. These rights are regulated in Article 71 paragraphs 2 and 3 of the LPFD.

11.3.2 Availability of legal aid

There is no specific category of legal aid available to victims of gender discrimination. Legal aid is available based on the general eligibility criteria and the required means test under the Legal Aid Act.[99] The main principle is that legal aid in civil and administrative cases is provided based on documents presented by the interested party to the court showing that he/she has no means to cover the lawyer's fees. The court takes into account the following circumstances when deciding about legal aid in civil and administrative matters/cases: the income of the person and her/his family; a declaration on the income status and property of the person; family status; health status; employment status; age; other circumstances (Article 23 paragraph 3).

According to Article 22 paragraph 1 p. 7 of the Legal Aid Act, legal aid is granted explicitly to victims of domestic violence, or sexual violence, or victims of trafficking, when they do not have sufficient means for the defence by a lawyer.

11.4 Horizontal effect of the applicable law

11.4.1 Horizontal effect of relevant gender equality law

There are no particular difficulties in the application of the horizontal effect of gender equality law in Bulgaria by the Equality body and the courts.

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

The effect of this relatively new decision has not yet been discussed properly in Bulgaria but it will certainly come.

11.5 Burden of proof

Currently the provision on the burden of proof corresponds with EU standards, including the case law. Until recently, Article 9 of the LPFD was not in full compliance. Until March 2015, in the procedure for protection against discrimination, persons who considered themselves to be victims of discrimination had to *prove* (instead of merely to *establish*) facts from which it may be presumed that there had been discrimination (Article 9). Then the burden of proof falls upon the respondent and he/she has to prove that there has been no breach of the principle of equal treatment. Based on the practice regarding cases of discrimination on the ground of sex from before the amendment, including in cases of

[99] Legal Aid Act, *Закон за правната помощ*, Bulgarian version available at: http://www.lex.bg/ldoc/2135511185.

harassment and sexual harassment, it can be concluded that the lack of full compliance in the definition of the burden of proof posed very high requirements, especially for women who claimed sex discrimination. Hopefully, the Equality body and the courts will apply the burden of proof rules consistently.

11.6 Remedies and sanctions

11.6.1 Types of remedies and sanctions

Upon finding a discriminatory act, the Commission for Protection from Discrimination has the power to impose coercive administrative measures and penal administrative sanctions. Coercive administrative measures are imposed according to Article 76 of the LPFD and include: obligatory orders to employers or other staff to discontinue the breaches of the law and the discrimination practices, as well as impeding the enforcement of unlawful decisions and orders of the employer that might lead to discrimination. Penal administrative sanctions are regulated in Articles 78-82 of the law and amount to fines and pecuniary sanctions for legal entities for identified acts of discrimination and breaches of the LPFD – the basic sanctions ranging from BGN 250 (around EUR 130) to BGN 2 000 (around EUR 1 000). Increased sanctions are provided for repeated acts of discrimination, and also for non-compliance with the decisions of the equality body.

According to Article 68 of the LPFD, the decisions of the Commission can be appealed according to the Administrative Procedural Code within 14 days. There is no deadline for complaining against a null and void decision of the Commission.

Discrimination cases can be brought before the Commission or before the courts but compensation can only be ordered by the civil courts when an act of discrimination is identified (Article 71 paragraph 1 p. 3 LPFD). The procedure for awarding compensation is based on tort law provisions and principles (Article 45 et seq. of the Law on contracts and obligations). There is no practice under the law for allocating compensation in cases of discrimination, especially discrimination based on sex. This fact alone is a barrier for victims seeking compensation. The other reason is that in Bulgarian legal practice, the amount of compensation for moral damages, which in most cases is involved in discrimination cases, is very low. The author believes that the issue of compensation is still a challenge for both lawyers and the courts in the effective application of the anti-discrimination legislation. If compensation is awarded then enforcement is another issue but in this field both public enforcement and private bailiffs can be used.

11.6.2 Effectiveness, proportionality and dissuasiveness

In the author's opinion, the general level of compensation, as well as compensation awarded for discrimination, is still very low in Bulgaria and is not proportionate to the damage suffered by the persons whose rights have been violated. As mentioned above, in practice, there is no case law on compensation awarded for sex discrimination. The sanctions imposed by the Commission are in many cases effective and proportionate but there are problems with their enforcement and their dissuasive effect. The fact that the decisions of the Commission are obligatory has to be used more effectively and awareness on their importance and value has to be increased.

11.7 Equality body

The Commission for Protection from Discrimination is the Equality body in Bulgaria:[100] www.kzd-nondiscrimination.com/.

The status and competences of the Commission are regulated in Chapter 3 of the Law on Protection from Discrimination: the Commission identifies violations, orders the prevention

[100] Website of the Equality body: www.kzd-nondiscrimination.com/.

of or the halting of the violations and the restoration of the initial situation, issues coercive prescriptions, imposes sanctions, makes suggestions to national and local governmental bodies, provides independent support to victims of discrimination, gives opinions on drafts for normative acts, and carries out independent research and monitoring. The Commission is a member of the National Council on Gender Equality.

The Commission for Protection from Discrimination is not a body that deals specifically with the promotion, monitoring or analysis of equal treatment based on sex. These functions of the equality body or other similar bodies, required by the EU standards, have not yet been implemented in a consistent manner by any of the bodies mentioned.

The Commission for Protection from Discrimination was created in 2005 as an independent jurisdiction under the law, and its mandate covers all types of direct and indirect discrimination prohibited by law and by international instruments to which Bulgaria is a party. The Commission has broad competences, including initiating discrimination cases on its own initiative and assisting victims of discrimination in bringing a claim. The administrative procedure before the Commission is very flexible and easy to follow for the petitioners. The position and competences of the Commission are regulated in Chapter 3 of the Law on Protection from Discrimination (Article 40 et seq.). More specifically, the competences of the Commission are provided in Article 47 of the law: the Commission establishes the violations, orders the prevention of or the discontinuing of violations and the restoration of the initial situation, issues coercive penalties, imposes sanctions, makes suggestions to national and local governmental bodies, provides independent support to victims of discrimination, gives opinions on drafts for normative acts, and carries out independent research and monitoring.

Besides the prohibition of discrimination based on sex, the ban encompasses the grounds of race, nationality, ethnicity, human genome, citizenship, origin, religion and belief, education, conviction, political affiliation, personal or social status, disability, age, sexual orientation, family status, property status, or any other ground defined by law or in an international treaty to which Bulgaria is a party (Article 4 paragraph 1 of the LPFD).

The Commission is not a body that deals with the promotion, monitoring or analysis of equal treatment based on sex and therefore the competence of the Commission is not sufficient for the fulfilment of all the requirements for an equality body dealing with gender equality according to EU standards.

11.8 Social partners

The social partners are not provided with a special role concerning this issue of gender equality by legislation. Besides the mentioning of the organisations of the workers and employees as part of the National Council of Gender Equality and as part of the regional and local mechanisms for gender equality policy, no other specific role is played by them in the field. The social partners have gender equality sections in their structures, participate in the consultative body on gender equality at the Council of Ministers and sometimes issue relevant research and statistics, although ideologically they do not always stand behind notions and the positions according to EU standards. In the author’s opinion, their role does not correspond to the higher requirements of the EU standards, and namely of the Recast Directive.

Collective agreements in Bulgaria are not used as a means to implement EU gender equality law. Collective agreements that are binding for the respective sectors do not generally have gender equality elements and do not promote specifically gender equality.

11.9 Other relevant bodies

The following can be mentioned as examples of gender equality interest groups: the Alliance for Protection from GBV, and the Bulgarian Gender Research Foundation – BGRF (separately and as a member of the Alliance). These organisations present opinions, position papers, as in the process for ratification of the IC, support and protect victims in court and before the Equality body. These NGOs also organise support of other NGOs, institutions and agencies around gender equality issues. As mentioned above, NGOs can support and initiate anti-discrimination cases, according to the LPFD.

Other examples of such actions are opinions officially provided to institutions and to the Constitutional Court. For example, the Alliance for Protection from GBV, and with the support of each of the member organisations, presented a very extensive opinion in 2018 before the Constitutional Court for the ratification of the IC. The opinion was very well grounded on the relevant international and national standards; despite this, it was not taken into account by the Constitutional Court in its ruling.[101]

Several anti-discrimination cases before the Equality body were supported by these NGOs, namely the *Peshtera case* about the discriminatory advertisement 'The season of the watermelons' (see sub-section 9.3). The cases before the Supreme administrative court against the use of sex as an actuarial factor in the supplementary obligatory social security scheme were also supported by the BGRF.

Thanks to the knowledge of experts and support by the BGRF, three cases related to different forms of violence and discrimination of women and girls were taken under the OP CEDAW: *V.K* v *Bulgaria; Jallow* v *Bulgaria; V.P.P.* v *Bulgaria.*[102]

Since 2004 and up to now, the BGRF and partners have organised the 'Women's Human Rights Training Institute' in Bulgaria. The Institute is a unique initiative and a first-of-its-kind programme aimed at building and developing the capacity of young lawyers from Central and Eastern European and the Newly Independent States (CEE/NIS) for litigation on women's rights issues, including in international and European law:

- violence against women;
- sexual and reproductive health and rights; and
- employment discrimination.

The Institute, organised by the BGRF in cooperation with its partners, has already successfully completed six rounds and trained over 120 lawyers.[103]

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[101] Website of the Const. Court – http://www.constcourt.bg/bg/Home/Home.

[102] *V.K.* v *Bulgaria*, Communication No. 20/2008; *Isatou Jallow* v *Bulgaria*, Communication No. 32/2012; *V.P.P.* v *Bulgaria*, Communication No. 31/2011.

[103] The WHRTI provides the participants with advanced and in-depth knowledge on women's human rights protection in the three areas noted above. The WHRTI improves their practical skills in writing and advocacy for development of strategic litigation in the region both at the national and international levels through the use of regional and universal human rights mechanisms such as the European Convention on Human Rights (ECHR), the UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), and the Optional Protocol to CEDAW as well as the International Covenant on Civil and Political Rights (ICCPR) and the Optional Protocol to ICCPR. The WHRTI also gives lawyers an opportunity to get acquainted with the EU standards in the field of equal treatment of women and men, including the case law of the Court of Justice of the European Union.
WHRTI encourages the development of professional connections and networks among women's rights lawyers in the region. Alumnae of the Institute include over 120 lawyers, including men lawyers from Albania, Armenia, Azerbaijan, Bosnia and Herzegovina, Bulgaria, Czech Republic, Croatia, Cyprus, Greece, Georgia, Germany, Hungary, Ireland, Latvia, Lithuania, Macedonia, Moldova, Poland, Romania, Russia, Serbia, Slovenia, Slovakia, Spain, Sweden, Tajikistan, Turkey, Ukraine, and Uzbekistan. And also several participants from Africa and Asia.

Since 2013, the Alliance for Protection from GBV has been conducting training courses for different stakeholders involved in the protection against GBV. Over 250 specialists, mainly from state institutions and also magistrates, were trained through the Academy.

Despite the achievements of Bulgarian civil society in this field, and maybe just because of these achievements, these NGOs as human rights and women's rights defenders have been subjected to attacks by conservative and nationalist circles, through media attacks, hate speech, threats and even attacks in their offices, since the end of 2017 and the situation still continues. The attacks are motivated by the sole fact that the NGOs support human rights and women's rights standards, as well as the adoption of the IC. They are blamed because they give support to victims of violence and discrimination and because they receive funds for that both from the State and from foreign sources.

11.10 Evaluation of implementation

Concerning the enforcement aspects of the anti-discrimination legislation, it can be stated that the law is in compliance with the EU standards, in some aspects it also goes beyond these standards. The implementation could also be more effective, through raising awareness of the role and importance of the law and mechanisms for protection.

11.11 Remaining issues

There are no other remaining issues. There are so many main issues that were exposed in detail.

12 Overall assessment

The following transposition problems were mentioned in this report:

1. There is not yet a specific body dealing with gender equality, including research, monitoring, coordination on a regular basis; the Advisory Council on Gender Equality has no regular functions, and even this format has been limited in the last two to three years to a maximum of one in-presence meeting per year. The Commission for Protection from Discrimination has little practice on gender equality cases. Women do not receive the continuous guidance and protection they need to bring complaints and during the process. Gender discrimination issues are not well known either by the Commission or the courts.
2. Gender equality has been compromised by limited and conservative views, unfortunately expressed also by the Constitutional Court in its ruling on the Istanbul Convention. The Court was subject to political pressure and was also trapped into the fake gender ideology theory with serious negative consequences for gender equality in Bulgaria.
3. Lack of knowledge and awareness, and no practice of positive action.
4. Lack of recognition of the practice of sexual harassment, and more specifically of it gendered nature and lack of sanctions for sexual harassment.
5. No real measures against GPG, no substantial practice on equal pay of men and women.
6. Need to achieve harmonisation of the standards on work-life balance both for men and women, and for more part-time and flexible arrangements of work.
7. Need for compliance and balanced reform for both sexes in the field of social security, both statutory and through private schemes, including insurance for self- employed persons.
8. Need to monitor, assess and evaluate the consequences and impact of the COVID-19 pandemic on gender equality and the situation of women in Bulgaria and more specifically, to take into account the issues of equality in employment and social security, and of violence against women, in the future plan for recovery from the pandemic.

In the overall assessment, in addition to evaluations given in the different sections of the report, it can be stated as follows: There is a good and reliable legal basis in Bulgaria for developing further practice, policies, and mechanisms for protection from sex discrimination and for achieving real, substantive gender equality, and in compliance with the EU standard. However, gender equality policy and mechanisms should be developed, as they are still rather weak and impact on the implementation of legislation and on real protection of rights. More clear definition of the role and competence of the courts vis-à-vis that of the Equality body is needed in cases of discrimination; additional mechanisms for support and legal aid of victims of discrimination are also needed.

The Judgment No. 13 from 2018 of the Constitutional Court had, and probably will have, very negative results and impact on the development of the legislation and policy, not only in relation to VAW and GBV, but also on all issues of gender equality in Bulgaria. If not further analysed and reviewed as soon as possible, this decision going against EU standards and all universal standards, will maintain and reproduce gender stereotyping which is damaging for any gender equality issue in Bulgaria.

Annexes

Judgment No 13 Sofia, 27 July 2018

Dissenting Opinions:
Georgi Angelov, Rumen Nenkov, Konstantin Penchev, Filip Dimitrov (promulgated in State Gazette No 65/07.08.2018).

In a closed session of 27 July 2018 the Constitutional Court in a panel composed of: Boris Velchev – Chairperson, and Members: Tsanka Tsankova, Stefka Stoeva, Rumen Nenkov, Keti Markova, Georgi Angelov, Anastas Anastasov, Grozdan Iliev, Mariana Karagyozova-Finkova, Konstantin Penchev, Filip Dimitrov, and Tanya Raykovska, with the participation of Clerk Gergana Ivanova, examined Constitutional Case No 3/2018, as reported by Judge Anastas Anastasov.

The proceedings are under the first alternative of Article 149(1)(4) of the Constitution of the Republic of Bulgaria (the Constitution).

The case was initiated on 8 February 2018 at the initiative of 75 members of the 44th National Assembly. The Constitutional Court was asked for a ruling on the conformity of an international treaty signed by the Republic of Bulgaria on 21 April 2016 – the Council of Europe Convention on preventing and combating violence against women and domestic violence (the Convention), done on 11 May 2011 at Istanbul – with the Constitution prior to the ratification of this treaty.

The Members of Parliament point out 'the social and societal relevance of the Convention, the significant public interest and the high degree of political commitment of the society' which motivated them to refer the matter to the Constitutional Court. The petitioners state that the National Assembly has received and continues to receive both positive and negative opinions on the Convention. According to the Members of Parliament, the negative opinions maintain that this international treaty introduces concepts that are incompatible with Bulgarian public policy and unknown in our national legal system and that the meaning contained in the provisions of the Convention is different from what is generally accepted and commonly used. According to the petitioners, the main arguments for non-conformity with the Constitution in most of the negative opinions expressed relate to the provisions of Article 3(c), Article 12(1) and Article 14(1) of the Convention and the terms used therein: '… "socially constructed roles", "stereotyped roles", as well as the term "gender" as objective elements of the meaning of the concept of "gender"…', in the sense of whether they are in conformity with the Constitution, including the provision of Article 46(1) of the Basic Law in the context of defining a 'third gender' and opening the possibility for same-sex marriages.

The petitioners also state that comparing the terms and phrases used in the Convention with the meaning of the constitutional provisions and the substantively assessing the conformity of the purposes, contents and nature of the Convention with the Constitution falls within the competence of the Constitutional Court, so it is for the latter to rule whether and to what extent fulfilling the obligations of the Republic of Bulgaria arising out of the Convention is compatible with the country's Constitution.

By its ruling of 20 March 2018, the court allowed the motion for substantive examination and joined the interested institutions to the case; it invited non-governmental organisations and prominent scientists and practitioners and gave them the opportunity to submit written statements and legal opinions.

Of the joined institutions, the President of the Republic of Bulgaria, the Minister of Foreign Affairs, the Minister of Justice, the Minister of Health and the State Agency for Child Protection have submitted statements.

The statement of the President of the Republic of Bulgaria expresses the view that the Convention contains concepts and phrases with ambiguous meaning, thus giving grounds for different and conflicting interpretations, allowing for 'additional' meanings to be attributed to these concepts and phrases outside their known and well-established meaning, but above all – outside the core values enshrined in the Bulgarian Constitution. According to the President, assigning the social attributes used in the Convention to the term 'gender' is not in conformity with the clear understanding (as contained in the Constitution) of the equality between men and women, of identifying the person as a man or a woman (Article 6(2) of the Constitution), of the voluntary union (in matrimony or otherwise) between a man and a woman, of the family entrusted with raising and upbringing of children, of the special protection provided by the State to mothers (Article 46 and Article 47(2) of the Constitution).

The Minister of Foreign Affairs believes that 'the concepts, norms and regime of the Convention conform fully to the constitutional principles, norms and traditions'. She gives an overview of the current Bulgarian legislation and of the existing international legal commitments and concludes that the terms 'gender', 'socially constructed roles' and 'stereotyped roles', which have been borrowed from sociology, are new neither to the international legal doctrine nor to the domestic law of the Republic of Bulgaria. The Minister points out that, in the context of the Convention, the term 'gender', based on the two sexes, male and female, takes into account the existence of socially constructed roles, behaviours, activities and attributes that a given society considers appropriate for women and men. She also points out that the Explanatory Report to the Convention explicitly states that the term 'gender' is not intended as replacement for the terms 'women' and 'men', and that the Convention also uses the term 'sex', which shows that the terms 'gender' and 'sex' have independent meanings. With regard to the obligations that will arise for the Republic of Bulgaria after the ratification of the Convention following its entry into force, the statement maintains that they are entirely related to specifying the measures for preventing and combating violence against women and domestic violence in the context of implementing gender equality.

In her statement, the Minister of Justice states that the Convention conforms fully to the Constitution and puts first the obligation to prevent and combat violence against women within the wider framework of achieving equality between women and men.

In his statement on the case, the Minister of Health does not take a specific position. On the one hand, he believes that no problems may arise with regard to the understanding of the term 'gender' and with regard to the implementation of the provisions of Article 3(c), Article 12(1) and Article 14(1) of the Convention highlighted by the petitioners, since the main indicator for defining the protection provided by the Convention is the sex, and none other than the only possible female and male sexes corresponding to their biological definition, as perceived by the Constitution, the Bulgarian legal order and Bulgarian case law. On the other hand, according to the Minister, there could be an issue with the implementation of Article 3(b), Article 4(3) and Article 12(3), where there is a deviation from the principle of two biological sexes – male and female. The Minister assumes that because of the meaning thus attributed to those and to other provisions of the Convention, as well as because of the lack of clarity as to the categories used in these provisions, there is reason to raise the question of whether and to what extent the fulfilment of the obligations of the Republic of Bulgaria arising out of the Convention would be compatible with certain parts of the Constitution.

In its statement, the State Agency for Child Protection states that the framework nature of the Convention should be taken into account when assessing its conformity with the Constitution, and that it would be wrong to use for the purposes of this assessment only the Bulgarian translation, which is inaccurate in a number of points, including in the definitions of basic terms. The Agency supports the need to ratify the Convention and its conformity with the Constitution.

In pursuance of the given opportunity, the following non-governmental organisations also submitted statements on the case: Bulgarian Lawyers for Human Rights Foundation, Animus Association Foundation, Alliance for Protection against Gender-Based Violence Association, Bulgarian Fund for Women Foundation and the Institute of Modern Politics.

The Bulgarian Lawyers for Human Rights Foundation supports the statement that the Convention is in conformity with the provisions and the spirit of the Constitution, as well as of the current legislation on protection against domestic violence in Bulgaria.

The Animus Association Foundation finds that the Convention is in conformity with the Constitution and does not impose anything different from the meaning of 'sex' used in the Bulgarian Constitution, the Gender Equality Act or the Protection against Discrimination Act.

The Alliance for Protection against Gender-Based Violence Association supports the statement that the provisions of the Convention conform to the Constitution, that they do not contain concepts that are unknown in our legal system, different from the generally accepted and commonly used ones and incompatible with the Bulgarian public order, and that the fulfilment of the obligations of the Republic of Bulgaria arising out of the Convention is compatible with the Constitution.

The Bulgarian Fund for Women Foundation takes the firm position that the Convention conforms to the Constitution and that although it requires amendments to the Bulgarian legislation in a number of areas, it does not imply any amendments to the Basic Law. It states that the term used in Article 3(c) of the Convention has been mistranslated simply as 'sex', but in fact the definition refers to a term that denotes the social rather than the biological dimensions of the sex and in no way affects the predetermined biological sex. This mistranslation has led to confusion in the translation of other key terms such as 'gender-based violence against women' in Article 3(d), 'gender identity' in Article 4(3), and 'non-stereotyped gender roles' in Article 14(1) of the Convention.

The Institute of Modern Politics considers that the Convention does not conform to the Constitution for the following reasons: Article 3(c) and Article 4(3) of the Convention violate the principle of legal certainty, which is a constituent element of the rule of law, because they contain terms and phrases the meaning of which is not clear, precise and unambiguous, thus creating unpredictability of the legal implications and the legal system; Article 12 and Article 14 of the Convention are not in conformity with Article 32(1), Article 47(1) and Article 47(2) of the Constitution, nor with the dignity of the individual as a fundamental constitutional value proclaimed in the Preamble of the Constitution; the philosophy of the Convention is not in conformity with the principle of equality and equal treatment of women and men, in so far as it focuses not on the unlawful social phenomenon itself – violence against the intimate partner and domestic violence – but rather on the idea that 'women, as a rule, are victims, and men, as a rule, are abusers'.

Written legal opinions have been given by Professor Pencho Penev, Professor Plamen Kirov and Professor Daniel Valchev.

Professor Pencho Penev argues that the Convention is not in conformity with the legal system established by the Constitution of the Republic of Bulgaria. According to him, when it comes to 'gender', the Bulgarian Constitution perceives it as its biological attribute – gender is biologically determined and the human individual is a man or a woman. According to Professor Penev, the perception of another nature, another attribute of the term 'gender' will lead to unacceptable contradictions, as there will be two parallel and mutually incompatible concepts of the same term, one of which is different from the constitutionally established one. Professor Penev also claims that Article 14 of the Convention does not conform to Article 47(1) of the Constitution. He maintains that the Convention adopts an educational approach involving the state 'at all levels of education', and calls for active

involvement of other educational structures, as well as of non-governmental organisations and the media, which is in contradiction with Article 47(1) of the Constitution, which entrusts the upbringing to the parents and not to the State or to the non-governmental sector.

Professor Plamen Kirov maintains that the Convention, in some of its parts, does not conform to the constitutional principles and norms of the Bulgarian Basic Law and is in sharp conflict with the Bulgarian constitutional identity. According to Professor Kirov, Article 3(c) and Article 4(3) of the Convention are not in compliance with the rule of law, in so far as their possible entry into force in the Republic of Bulgaria would create legal uncertainty and conflict with the Bulgarian constitutional identity as they contain terms ('gender', 'gender identity') which are foreign to the Bulgarian constitutional and legal system, do not have a clear, precise and generally accepted legal meaning, and would create implications harmful to our legal system. Professor Kirov also states that Article 12 and Article 14 of the Convention 'contrast' with the content of Article 32(1), Article 47(1) and Article 47(2) of the Constitution as they cause unacceptable interference with the private life of the citizens by obliging the Bulgarian State to take measures for changing the social and cultural patterns of behaviour of the Bulgarian citizens in order to eradicate 'stereotyped roles for men and women', without the latter being in any way connected with acts of violence, discriminatory behaviour or any other unlawful acts. At the same time, this would involve gross interference of the State in the upbringing of the children, in violation of the rights and responsibilities of the parents enshrined in the Basic Law.

Professor Daniel Valchev believes that the provisions of Article 3(c) and Article 4(3) of the Convention do not conform to the rule of law proclaimed in the Preamble and in Article 4 of the Constitution. According to Professor Valchev, the ratification of the Convention would result in the adoption in the Bulgarian legal system of an instrument that contains terms with ambiguous meaning, proportion and volume, which contradict terms that are already established in the legislation and the case law. He also states that this can also lead to provisional granting of additional rights and additional protection to individuals who have been selected not according to objective criteria but based on their claims about their own internal emotions. In view of this, he believes that Article 1, Article 2 and Article 3 of the Convention do not conform to the principle of equality proclaimed in Article 6 of the Constitution. Professor Valchev also asserts non-conformity of the provisions of Article 12(1) and Article 14(1) of the Convention with the provision of Article 47(2) of the Constitution.

The Constitutional Court finds it appropriate, first of all, to address some of the key points of the creation process of the Convention and its essential characteristics as an international legal instrument for combating violence against women and domestic violence, which are relevant to the further reasoning for the substantive ruling on the motion.

Under the Convention, the authentic text of the treaty is in English and in French, both texts being equally authentic. The assessment of the Constitutional Court, in the proceedings under the first alternative of Article 149(1)(4) of the Constitution, of the conformity of the international treaty with the Constitution prior to its ratification should be made on the basis of the Bulgarian translation of the text of the Convention presented in the case by the Council of Ministers of the Republic of Bulgaria. Parliamentary debates will be held on the Bulgarian version of this text upon submission of a bill for ratification to the National Assembly, this text will be promulgated in the State Gazette after the possible ratification of the Convention and on its grounds the obligations of the Republic of Bulgaria, arising out of the international treaty, will be carried out on the part of the State (Ruling of 23 October 1997 under Constitutional Case No 15/1997).

Combating violence against women is an issue of fundamental importance for Europe and is part of the underlying European values. Since the 1990s, the Council of Europe, in

particular its Steering Committee for Equality between Women and Men (CDEG), has undertaken a series of initiatives to promote the protection of women against violence. The first comprehensive strategy for the prevention of violence against women was Recommendation Rec (2002)5 of the Committee of Ministers to member states on the protection of women against violence adopted in 2002. The Parliamentary Assembly of the Council of Europe (PACE) has taken a firm political stance against all forms of violence against women by adopting a number of resolutions and recommendations on the various forms of violence against women. In 2008, the Committee of Ministers of the Council of Europe set up the Ad Hoc Committee on Preventing and Combating Violence Against Women and Domestic Violence (CAHVIO) mandated to prepare legally binding standards which cover these two fields – violence against women and domestic violence. In 2011, the efforts of the Council of Europe ended with a draft convention prepared by CAHVIO to protect women against all forms of violence, and prevent, prosecute and eliminate violence against women and domestic violence (Article 1(1)(a) of the Convention).

The Council of Europe Convention on preventing and combating violence against women and domestic violence is the first comprehensive international treaty aimed at setting standards on the grounds of which the countries can harmonise their domestic legislation

in this field. The Convention explicitly defines violence against women as a violation of human rights and a form of discrimination against women. It includes specific provisions aimed at promoting gender equality and the status of women in society. These legally binding obligations (Article 4, Article 6, Article 12, Article 14) are expected to give new impetus to achieving equality between women and men at national level and to reinforce a common objective of non-discrimination against women. The Convention expands the grounds of non-discrimination and takes an approach of gender-based understanding of violence against women and domestic violence.

In parallel with the policy of the Council of Europe on protecting women against gender-based violence and non-discrimination against women, the Council of Europe, in a number of its acts, calls on the member states of the Council of Europe to explicitly prohibit discrimination based on 'gender identity' in national non-discrimination legislation and to include the human rights situation of 'transgender people' in the mandate of national human rights institutions, with an explicit reference to 'gender identity' as a form of discrimination against women.

In 2010, the Committee of Ministers of the Council of Europe adopted Recommendation CM/Rec (2010)5 on measures to combat discrimination on grounds of sexual orientation or gender identity. Under the Recommendation, the member states of the Council of Europe should take appropriate measures to guarantee the full legal recognition of a person's gender reassignment in all areas of life, in particular by making possible the change of name and gender in official documents in a quick, transparent and accessible way. Member states should take all necessary measures to ensure that, once gender reassignment has been completed and legally recognised, the right of transgender persons to marry a person of the sex opposite to their reassigned sex is effectively guaranteed. The measures address a number of key issues for the rights of lesbian, gay, bisexual and transgender persons (LGBT).

In 2014, the Council of Europe set up a structure dedicated to issues of sexual orientation and gender identity. In addition, the Secretariat of the Council of Europe also set up a Working Party on Sexual Orientation and Gender Identity, also incorporated in 2014. The structure assists member states in implementing the LGBT Recommendations of the Committee of Ministers.

In April 2015, the Parliamentary Assembly of the Council of Europe adopted a resolution against the discrimination against 'transgender' people in Europe (Resolution 2048 (2015), Discrimination against transgender people in Europe). The Resolution and the related

report address the various forms of discrimination, including difficulties in gaining access to work, housing and health services. The Resolution also emphasises that the Assembly is concerned about the violations of fundamental rights, notably the right to private life and to physical integrity, faced by transgender people when applying for legal gender recognition and about the inadmissibility of the required preconditions such as sterilisation, divorce, a diagnosis of mental illness, surgical interventions and other medical treatments. The member states of the Council of Europe are called on to explicitly prohibit discrimination based on 'gender identity' in national non-discrimination legislation and include the human rights situation of 'transgender' people in the mandate of national human rights institutions, with an explicit reference to gender identity, as well as to develop quick, transparent and accessible procedures, based on self-determination, for changing the name and registered sex on the documents of transgender people, to make these procedures available for all people who seek to use them, irrespective of age, medical status, financial situation or police record, and to consider including a third gender option in identity documents for those who seek it.

In 2015, the Council of Europe published a guide to legal gender recognition and protecting human rights of transgender persons, which defines 'gender identity' as: 'each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including a personal sense of one's body and other expressions of gender, including dress, speech and mannerisms'.

The foregoing clearly shows the link between the policy of the Council of Europe on preventing and combating violence against women as a form of gender-based discrimination against women and the protection of certain rights of 'transgender' persons.

The Constitutional Court of the Republic of Bulgaria assessed the arguments in the motion of the Members of Parliament, in the statements of the institutions and the non-governmental organisations, in the submitted written legal opinions and the written evidence accepted in the case. In order to rule on the conformity of the Convention with the Constitution, the Court, having discussed the objectives of the Convention, the general and ad hoc principles, definitions and policies adopted therein, and the provisions of the Convention in their relation and correlation, established the following:

The Council of Europe Convention on preventing and combating violence against women and domestic violence is the first treaty in Europe establishing a comprehensive legal framework to protect women and girls against all forms of violence, and prevent, prosecute and eliminate violence against women, including domestic violence. The Convention places the elimination of violence against women within the wider context of achieving actual equality between women and men, thus recognising the violence against women as a form of discrimination. It expresses the determination of the Contracting States to also apply the general principles for the protection of human rights to women and girls who are victims of violence, as well as to the victims of domestic violence. This determination is based on the shared understanding of the member states of the aspirations of the Council of Europe to preserve and implement EU-wide principles and ideals.

The Preamble of the Convention states that the member States of the Council of Europe and the other signatories thereto aspire to create 'a Europe free from violence against women and domestic violence'. To this end, the Convention firmly establishes the link between achieving gender equality and the eradication of violence against women. Based on this premise, it recognises the 'structural nature' of violence against women and that it is a manifestation of the historically unequal power relations between men and women. The Convention consistently asserts that violence against women cannot be eliminated without investing in gender equality and that only actual (*de facto* and *de jure*) gender equality and change in attitudes can really prevent such violence.

Article 1 of the Convention sets out its purposes. Paragraph 1 states as the specific purpose of the Convention the protection of women against all forms of violence, as well as the prevention, prosecution and elimination of violence against women and domestic violence. In line with the recognition in the Preamble that there is a link between eradicating violence against women and achieving gender equality in law and in fact, it is specified that the Convention will contribute to the elimination of all forms of discrimination against women and promote substantive equality between women and men. This provision reflects the need for a comprehensive approach to the protection of and assistance to all victims of violence against women and domestic violence.

The stated purposes of the Convention fully conform to the fundamental constitutional principles of the Republic of Bulgaria. The Preamble of the Constitution highlights the loyalty of the Bulgarian people to the universal human values of which humanism, equality, justice and tolerance are specified explicitly. The rights of the individual and their dignity and security have been elevated to the rank of a supreme constitutional principle. Equality is among the fundamental principles of the current Bulgarian Constitution. There is an explicit constitutional prohibition on any discrimination on the grounds of 'sex' (Article 6(2) of the Constitution). Furthermore, the principle of equality in terms of dignity and rights is also proclaimed in the Basic Law as a fundamental human right. It is specified in a number of constitutional provisions and is embodied within the substance of individual fundamental rights and freedoms. The current legislative framework is also a testimony to the aspirations of the Republic of Bulgaria to protect the fundamental human rights and, in particular, to protect all victims of violence, including women and children, as well as to eliminate all forms of discrimination and achieve equality: Criminal Code (promulgated in State Gazette No 26/02.04.1968; last amended in State Gazette No 55/03.07.2018), Protection against Domestic Violence Act (promulgated in State Gazette No 27/29.03.2005; last supplemented in State Gazette No 50/03.07.2015), Child Protection Act (promulgated in State Gazette No 48/13.06.2000; last amended in State Gazette No 17/23.02.2018), Gender Equality Act (promulgated in State Gazette No 33/26.04.2016), Protection against Discrimination Act (promulgated in State Gazette No 86/30.09.2003; last amended in State Gazette No 7/19.01.2018).

The Constitutional Court finds that despite its undeniable positive aspects, the Convention is internally contradictory and this contradiction creates duality therein. Thus, the meaning of some of its provisions goes beyond the Convention's stated purposes and its title.

In Article 1(1)(a) and (b) of the Convention the term 'women', which is undoubtedly based on the biological understanding of the sexes, is used to define the subject of protection against all forms of violence and discrimination. At the same time the legal definitions in Article 3(c) of the Convention (the English and French texts) include the term 'gender'/'*genre*', translated into Bulgarian as '*пол*' ('sex'), with the following meaning: 'socially constructed roles, behaviours, activities and attributes that a given society considers appropriate for women and men'. The term 'gender' has been translated into Bulgarian as '*социален пол*' ('social gender') only in the provision of Article 4(3) of the Convention. In the Convention the terms 'sex'/'*sexe*' and 'gender'/'*genre*' exist together, with 'gender' being included among the grounds of discrimination under Article 4(3) along with the biologically determined sex – 'sex, gender ...'/ '*sexe, genre …*'. Thus, gender as a biological category ('sex'), but also gender as a social construct ('gender') determined by the subjective perceptions and notions of the individual and of society about the role of men and women, are elevated to autonomous and equivalent categories of the Convention with their own legal existence. The term 'gender'/'*genre*' exists within the Convention as a separate category different from sex as a biological construct. The Convention divides the biological and social dimensions of gender and goes beyond the view of the gender binary of the human species. With the meaning specified in Article 3(c), 'gender'/'*genre*' becomes a fundamental term that also defines the meaning of other phrases used in the Convention and based on this term. The many provisions of the Convention, which contain phrases based on this term – Article 2(2), Article 4(3), Article 6, Article 14, Article 18,

Article 49(2), Article 60(2) and Article 60(3) of the Convention – are also testimony to the autonomous role of the term 'gender'/'*genre*'. 'Gender' is used in the phrases: 'gender equality' (Preamble), 'gender-based violence' (Preamble, Articles 2, 3, 4, 14), 'gender identity' (Article 4(3)), 'gender-sensitive policies' (Article 6), 'gender perspective' (Article 6), 'non-stereotyped gender roles' (Article 14), 'gendered understanding of violence' (Article 18, Article 49(2)), 'gender-based asylum claims' (Article 60), 'gender-sensitive interpretation' (Article 60(2)), 'gender-sensitive reception procedures' (Article 60(3)). These phrases, depending on the interpretation, may lead to different and contradictory understandings of the philosophy of the Convention. The Convention is the first international treaty signed by the Republic of Bulgaria which gives such a definition of the term 'gender' (Article 3(c) of the Convention).

The provision of Article 4(3) of the Convention requires the Parties thereto to implement the provisions of the Convention, in particular measures to protect the rights of victims,

> '…without discrimination on any ground such as sex, gender, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth, sexual orientation, gender identity, age, state of health, disability, marital status, migrant or refugee status, or other status'.

According to paragraph 53 of the Explanatory Report to the Convention, accompanying its creation, and in the light of the broad case law of the European Court of Human Rights under Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, the list under Article 4(3) has been significantly expanded as it seeks to provide protection against discrimination on multiple grounds to a number of vulnerable groups. According to the Report, this also includes persons that do not correspond to what society has established as belonging to 'male' or 'female' categories.

Although the Convention does not specifically regulate the rights of 'transgender' people, it is also the first international treaty signed by the Republic of Bulgaria which explicitly includes 'gender identity' in Article 4(3) as a ground of discrimination. It should be specified that the phrase 'gender identity' / '*l'identité de genre*' does not refer to 'gender' as a biological category, but rather to 'gender' in the meaning given in the definition of the term in Article 3(c) of the Convention. The Convention does not define 'gender identity' / '*l'identité de genre*'. The Explanatory Report to the Convention (paragraph 53) defines 'gender identity' as follows:

> 'Certain groups of individuals may also experience discrimination on the basis of their gender identity, which in simple terms means that the gender they identify with is not in conformity with the sex assigned to them at birth. This includes categories of individuals such as transgender or transsexual persons, cross-dressers, transvestites and other groups of persons that do not correspond to what society has established as belonging to "male" or "female" categories'.

Given the absence of a definition of the term 'gender identity' in the Convention, its meaning should be understood not only in view of the Explanatory Report, but also in light of the policy of the Council of Europe on protecting certain rights of transgender persons. The above-mentioned acts of the Council of Europe aimed against discrimination and violence on the basis of sexual orientation and gender identity clearly serve to clarify the meaning of the terms 'gender' and 'gender identity' in the context of the approach of the Council of Europe to promote the understanding that the biological and social dimensions of gender are not inextricably linked and exist independently of each other; the understanding of the ability of people to self-determine their gender; as well as to ensure full legal recognition by the State of the gender reassignment.

The analysis of the terms 'gender'/'*genre*', translated into Bulgarian, firstly as '*пол*' ('sex') and secondly as '*социален пол*' ('social gender'), and 'gender identity' / '*l'identité de*

genre', translated into Bulgarian as '*идентичност, основана на пола*' (sex-based identity) indicates that the terms are connected and should be understood through one another. The term 'gender'/'*genre*' with the meaning 'socially constructed roles, behaviours, activities and attributes that a given society considers appropriate for women and men' reflects certain social and cultural notions of men and women created within a given society at a given moment. These notions are evolving to the extent that newer notions can exclude the older ones, for example, that gender is biologically determined. From this point of view, a biological man might have a female 'gender'/'*genre*' and vice versa. This leads to the possibility of the individual choosing, at their own will, a different 'gender identity' that might not coincide with the biological one. This understanding expresses aspects of the 'gender ideology' – a collection of ideas, convictions and beliefs that the biologically determined sexual characteristics are irrelevant, and only the gender self-identification is relevant.

The absence of a common understanding of the term 'gender'/'*genre*' is also illustrated by the active public and political debate 'for' and 'against' the gender ideology that has been ongoing for over two decades in dozens of countries.

As stated, the Convention uses two terms for gender – 'sex' and 'gender'. It introduces the phrase 'gender identity', which stems from the notion that the social dimension of gender is independent of the biological one. Any distancing from the term 'gender' as a biological attribute (man/woman) distances the Convention from the stated purposes of protecting women against all forms of violence. The internal contradiction in the Convention is obvious when comparing the purposes stated in Article 1 of the Convention and its title with the term 'gender' as defined in the Convention. Moreover, the very definition of the term 'gender' would have been redundant, if the stated purpose of the international treaty actually corresponded to its title '… on preventing and combating violence against women …'. This duality of the terminology, of the meaning of the terms used, in practice does not lead to the achievement of gender equality, but rather blurs the differences between sexes thus resulting in the principle of equality losing its meaning.

The equality of the genders before the law is proclaimed at constitutional level in Article 6(2) of the Basic Law. Equality does not mean treating both sexes equally, but rather taking into consideration the biological traits and differences between them. Sex is among the grounds explicitly established in Article 6(2) of the Constitution, on the basis of which no privileges or limitations of rights are admissible (Judgment No 1 of 27 January 2005 under Constitutional Case No 8/2004). The constitutional text examines biological sex as a term with unambiguous legal meaning. This is confirmed both by the discussions on the provision as part of the draft Constitution '... for equality between a man and a woman' (Minutes of the Committee for Drafting a Project of a Bulgarian Constitution of 13 February 1991 and 10 June 1991) and by the case law of the Constitutional Court on the interpretation of Article 6(2), where the criterion 'sex' is excluded from the group of attributes that are acquired or changed in the process of social realisation of the citizens in society (Judgment No 14 of 10 November 1992 under Constitutional Case No 14/92).

The Constitution and the entire Bulgarian legislation are built on the understanding of the gender binary of the human species. In fact, the Constitution clearly perceives the social dimension of gender in interaction with its biological determination – Article 47(2) of the Basic Law. In this constitutional provision, the biological sex 'woman' is linked to the social role 'mother' through 'birth' and 'obstetrical care'. In short, the term 'gender' is used by the constitutional legislator as a unity of biological determination and social construct. The social dimension of the Constitution does not create a social gender independent of the biological sex as provided for in the Convention.

At the level of international law, the understanding of gender as a unity of biological and social dimension is enshrined in the Rome Statute of the International Criminal Court

(promulgated in State Gazette No 68/16.07.2002) Pursuant to the provision of Article 7(3) of the Rome Statute:

> 'For the purpose of this Statute, it is understood that the term 'gender' refers to the two sexes, male and female, within the context of society. The term 'gender' does not indicate any meaning different from the above.'

Traditionally, human society is built on gender binary, that is the existence of two opposite sexes, each being assigned specific biological and social functions and responsibilities. Biological sex is determined at birth and is in the foundation of the sex for the purposes of civil matters. The importance of the sex for the purposes of civil matters in the legal regulation of social relations (cohabitation, parenthood) requires clarity, indisputability, stability and security.

The constitutional definition of matrimony, as it has always existed in the Bulgarian legal tradition, is contained in the provision of Article 46(1), which defines it as '…a voluntary union of a man and a woman'. The constitutional system of matrimony is built on the understanding of the existence of two biologically determined sexes – male and female. By defining matrimony as a voluntary union between a man and a woman the Constitution makes the different biological sex imperative for people who want to enter into marriage. The understanding of matrimony as a relationship between a man and a woman is deeply rooted in the Bulgarian legal consciousness, and is thus in the foundation of the constitutional system.

Contrary to this constitutional understanding of gender as a biological category, the term 'gender'/'*genre*' as a social construct exists in the Convention individually and along with the term 'sex'/'*sexe*'. As stated above, this situation distances the scope of the Convention from the stated purposes of protecting women and opens up room for its contradictory implementation, which is contrary to the rule of law in a formal sense (Article 4(1) of the Constitution).

The Convention paves the way for the introduction of the terms 'gender' and 'gender identity', as defined in Article 3(c), in the Bulgarian legal system. The requirements of Article 4(3) of the Convention would require the Republic of Bulgaria to establish procedures ensuring the legal recognition of genders other than the biological ones, which is contrary to the Constitution.

The rule of law exists in the case law of the Constitutional Court with familiar and well-established meaning, which combines formal and material aspects. Today the European legal area widely shares the understanding of the rule of law, which includes both the principle of legal certainty – the formal aspect – and the principle of substantive justice – the substantive aspect (judgment No 1 of 27 January 2005 under Constitutional case No 8/2004).

The rule of law in the formal sense (the state of legal certainty) requires the meaning of legal terms to be clear and unambiguous. The principle of legal certainty and predictability precludes the existence of two parallel and mutually exclusive terms for 'gender'. The ratification of the Convention would lead to the introduction in the national legal system of a concept that is contrary to the one established in the Constitution.

The rule of law is the foundation of the established constitutional order. The proceedings under the first alternative of Article 149(1)(4) of the Basic Law ensure the implementation of the international community's acquis in the national legal system while preserving the core values established by the Constitution.

The defining of 'gender' in the Convention as a social construct in fact blurs the lines between both sexes – man and woman as biologically determined. However, if society

loses the ability to distinguish between a woman and a man, combating violence against women remains only a formal but unattainable commitment.

The Constitutional Court holds that the Convention, due to the provisions of Article 3(c) and Article 4(3) which are imperative to the meaning of the international treaty in its entirety, does not conform to the Constitution. It is precisely in respect of these provisions that the Convention does not allow any reservation. Under Article 78(1) of the international treaty: 'No reservation may be made in respect of any provision of this Convention, with the exceptions provided for in paragraphs 2 and 3'. The Constitutional Court emphasises that, pursuant to Article 5(4) of the Basic Law, once this international treaty has been ratified, promulgated and enters into force for the Republic of Bulgaria, it will become a part of the domestic law of the country and will take precedence over any conflicting national legislation (Judgment No 7 of 2 July 1992 under Constitutional case No 6/1992).

Considering the above and on the grounds of the first alternative of Article 149(1)(4) of the Constitution, the Court

HEREBY RULES:
The Council of Europe Convention on preventing and combating violence against women and domestic violence, done on 11 May 2011 at Istanbul, signed by the Republic of Bulgaria on 21 April 2016, does not conform to the Constitution of the Republic of Bulgaria.

The judgment was rendered with eight votes.

Judges Rumen Nenkov, Georgi Angelov, Konstantin Penchev and Filip Dimitrov signed the judgment with dissenting opinion.

Chairperson: Boris Velchev

DISSENTING OPINION
of the judges Rumen Nenkov and Georgi Angelov on the Judgment in Case No 3/2018 of the Constitutional Court of the Republic of Bulgaria

We do not agree with the judgment rendered by the Constitutional Court's majority because, contrary to their opinion, we believe that the Council of Europe Convention on preventing and combating violence against women and domestic violence (the Convention) is compatible with the Constitution of the Republic of Bulgaria.

As a rule, given its place and purpose as defined by the Basic Law, the Constitutional Court must not participate in any struggles for public support through its acts nor may it evaluate any social theory or ideology. Its task in this case was to reveal through interpretation the precise meaning of the provisions of a multilateral international treaty and to assess on that basis whether there is compatibility with the spirit and letter of the Constitution of the Republic of Bulgaria.

This constitutional case was initiated on a request provisionally featuring three layers – constitutional, political and cultural. The only relevant question to the judgment is the constitutional question raised – whether the Convention is in conflict with the Basic Law.

The Convention subjected to constitutional review is applicable to all forms of violence against women, including domestic violence (Article 2(1)). Furthermore, the contracting Parties are encouraged by Article 2(2) thereof to apply it to all victims of domestic violence (i.e. human beings who may also be male), although particular attention is again to be paid to violence against women. The purposes of the Convention are clearly outlined in Article 1, namely: a) to protect women against all forms of violence (physical and psychological) and, in this regard, to prevent, prosecute and eliminate violence against women and domestic violence; b) to contribute to the elimination of all forms of

discrimination against women and promote substantive equality between women and men; c) to design a comprehensive framework, policies and measures for the protection of and assistance to all victims of violence; d) to promote international co-operation with a view to eliminating violence against women and domestic violence; and e) to provide support and assistance to organisations and law enforcement agencies to ensure effective co-operation with a view to adopting an integrated approach to eliminating violence against women and domestic violence.

The purposes and scope of the Convention stated are not only compatible with the spirit and letter of the Constitution of the Republic of Bulgaria (the Constitution) but also in full conformity with the guiding principles and ad hoc provisions contained therein, which condemn any unwarranted violence against anyone. Beginning with the Preamble of the Basic Law, its creators pledge their loyalty to such universal human values as humanism, equality, tolerance, liberty, dignity and security of the individual. The State has explicitly committed to protecting human life (Article 28), to combating the various forms of torture, cruel, inhuman or degrading treatment (Article 29), as well as to safeguarding the right to personal freedom and inviolability (Article 30). Even the right to express an opinion and publicise it is limited if used for incitement of violence against anyone (Article 39(2)).

The term 'sex' is used only in Article 6(2) of the Constitution. It does not have a legal definition, therefore its meaning should be derived from the common Bulgarian language. According to it, sex (also called biological sex, physiological sex) is a concept in biology according to which a group of individuals of a given species which has the potential for sexual reproduction are distinguished by their specialisation in the production of a certain type of reproductive cells. With humans, along with biological sex, the term 'gender identity' also exists and is used in sexology, psychology and sociology. Gender identity corresponds to the way one understands and perceives one's gender ('psychological sex') as one of the four elements of sexuality. It is different from 'social gender' – gender-based socially constructed characteristics and behaviours related to 'masculinity' and 'femininity.' In the modern Bulgarian language the term '*пол*' ('sex') conveys all these meanings.

The provision of Article 6(2) of the Constitution includes the term 'sex' as one of the protected elements on the grounds of which there can be no restrictions of rights or enjoyment of privileges. This norm is a specific projection of the freedom of people by birth and their equality in dignity and rights proclaimed in the preceding paragraph. The Basic Law recognises the division of people by gender without explicitly separating the group of individuals who are in specific borderline states more often conditioned by biological factors (genetic and hormonal) and less often by the social environment (family, friendships, etc.) which may objectively hinder or exclude the possibility of performing the natural human reproductive function. The constitutional provisions of Article 46(1) on matrimony and Article 47(2) on the special protection that the State owes to mothers lead to this conclusion.

What is more, the representatives of sexual minorities have special protection stemming from the general constitutional principles of respect for human dignity, inviolability, equality before the law and prohibition of discrimination on social grounds. The provision of Article 4(1) of the Protection against Discrimination Act treats the relevant public group as vulnerable and exposed to a higher risk and, therefore, expressly prohibits any direct or indirect discrimination based on differences not only of sex but also of sexual orientation. With regard to non-discrimination, the binding law of the European Union also recognises the ground 'genetic features,' which is undoubtedly related to the biology of the human being at birth (see Article 21 of the Charter of Fundamental Rights of the European Union).

The critics of the Convention argue that its ambiguity allows for violation of the above principles of the Basic Law of Bulgaria. We definitely cannot agree with this, because none of the Convention's clauses opens the possibility for the establishment of a 'third gender' or binds the State with a commitment to legitimise non-marital partnerships, which

objectively exist mainly on a heterosexual basis, rather than on a homosexual basis, and to equate them with matrimony.
As with the Constitution, the Convention does not define the terms 'man' and 'woman' as it is founded on the presumption that human beings can only be of two biologically determined sexes – male and female. Similarly, it recognises civil marriage as a union between two 'spouses' – a man and a woman. At the same time, it clearly and unambiguously distinguishes it from 'partnership.' The normative regulation of the various non-marital partnerships, which objectively exist, as we already noted, mainly on a heterosexual basis, rather than on a homosexual basis, is granted explicitly to national law, i.e. to the discretion of the ratifying country (for example, see Article 3(b), Article 36(3), Article 46(a) and Article 59(1) of the Convention). Therefore, it is the sovereign right of each State to decide whether to institutionalise them or not. In this regard, no binding obligation arises out of the multilateral international instrument.

It is not surprising that Article 9 of the Convention prescribes state support only for such civil society and non-governmental structures that aim to combat violence against women. The organisations whose goals are limited to combating domestic violence are not explicitly included. The obvious intention of the contracting Parties was to dispel the suspicions that, under the guise of combating domestic violence, the international treaty could also be used as a tool promoting non-traditional partnerships.

During the debate on the ratification of the Convention, the meaning of the definition under Article 3(c) of the Convention was raised as the main issue.

The definition under Article 3(c) of the Convention cannot be assessed separately as incompatible with the Constitution without said definition being linked to its use in specific other provisions of the international treaty analysed. Therefore, in this case, the constitutional review had to focus on the question of what obligations arise for the contracting Parties and to assess on this basis whether this commitment is compatible with the Basic Law of Bulgaria. The judgment rendered, however, adopts a different approach and the majority's conclusion of unconstitutionality is based mainly on an inaccurate and even perverse understanding of the actual meaning of Article 3(c) of the Convention.

The Convention was signed in the two official languages of the Council of Europe, English and French; therefore, minimum language skills are required to establish its legal effect for the Republic of Bulgaria. The thesis of unconstitutionality is based mainly on an interpretation of the provision of Article 3(c) of the Convention, which, as we already noted, is nothing more than a definition of the term 'gender' in the English text and '*genre*' in the French one, as it should be understood within the meaning of the international treaty with a view to its uniform and correct application by the contracting Parties. Separately, the two languages also use a word that is much more similar to the narrow understanding of 'gender' as belonging to one of two biologically determined groups of human beings, namely 'sex' in English and, respectively, '*sexe*' in French. At the same time, even a superficial reference in foreign language dictionaries indicates that there are a number of other translational meanings of 'gender', respectively '*genre*', such as '*род*' ('gender in grammar') in translation from English, as well as '*сорт*' ('sort'), '*категория*' ('category'), '*тип*' ('type'), '*вид*' ('kind') in translation from French. Therefore, in this case, the purely linguistic approach is futile, and thus cannot be decisive for achieving a precise interpretive result. To the legal analyst, it is not important what the translation means, but what is the particular meaning of the respective term used solely to achieve its purpose, i.e. for the purpose of the Convention itself, as explicitly stated at the beginning of Article 3 therein.

According to the definition of Article 3(c), the term 'gender' ('*genre*') in the Convention means: 'socially constructed roles, behaviours, activities and attributes that a given society considers appropriate for women and men.' On the one hand, the very definition clearly and unambiguously recognises the existence of the two sexes in biological terms – male and female, and in this respect it is in full harmony with the Bulgarian Basic Law. On the

other hand, it recognises that, in view of the specifics of traditions and understanding of morality, in the course of their historical development individual societies perceived human actions as typical, inherent only to women or accordingly – only to men. This perception is dynamic and changes over time – for example, 60 to 70 years ago, Bulgarian society attributed smoking and wearing trousers to men, and 30 to 40 years ago, practising sports such as wrestling, boxing and weightlifting was perceived the same way. The provision of Article 3(c) does not hint to any de facto differentiation, let alone to legalisation of a biologically undetermined 'third gender.' As to the assumed possibility therein of a different treatment in different societies, including in Bulgarian society, of a certain type of human behaviour, it would be more than absurd for an undeniable and undisputable truth to serve as a basis for establishing unconstitutionality.

Indeed, there may be incompatibility with the Constitution in the specific use of the term, as defined in Article 3(c) therein, in the other norms of the Convention. In our view, however, all cases serve the idea of combating violence alone (see Article 2(2), Article 6, Article 18(3), Article 60, etc.). Nowhere in the international treaty analysed can we find any approval or encouragement of such actions by the representatives of one sex that society deems inherent to the opposite sex, let alone any imposition of such an obligation on the contracting Parties to promote such behaviour. The only purpose is to prevent violence towards certain individuals simply because they act in a manner perceived by most members of society as not inherent to their biological sex. In civilized societies, humiliation through the use of psychological and physical violence cannot be justified by established habits, prejudices, traditions or other social practices based on women's inequality with respect to men (in this regard, see Article 12 of the Convention). While unappreciated by the constitutional judges' majority, this is the core of the Convention, which is in full conformity with the Constitution of the Republic of Bulgaria, which condemns any unwarranted and disproportionate violence even against the perpetrators of the most serious offenses.

In their statements, the opponents of the Convention maintain that, by prescribing the Parties the general obligation to take

> '...the necessary measures to promote changes in the social and cultural patterns of behaviour of women and men with a view to eradicating prejudices, customs, traditions and all other practices which are based on the idea of the inferiority of women or on stereotyped roles for women and men...,'

the provision of Article 12(1) of the Convention is incompatible with the Basic Law of Bulgaria, in particular Article 32(1) and Article 47(1) and (2) of the Constitution. The focus in this argument is placed on the obviously negative assessment that the international treaty gives to the idea of unconditional and uncritical consideration and imposition in life of, and subordination to, the temporarily predominant stereotypes in the public consciousness about what role in life has been assigned separately to men and women. It must be emphasised immediately that the disputed provision follows almost literally the version of Article 5(b) of the United Nations Convention on the Elimination of All Forms of Discrimination Against Women of 1979 (ratified and promulgated in State Gazette No 76 of 1981, in force for Bulgaria as of 10.03.1982, full text promulgated in State Gazette No 17 of 2010), by which the States Parties undertook to

> 'take all appropriate measures to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea on stereotyped roles for men and women.'

The vast majority of the countries that are members of the most prestigious and widespread global international organisation have signed and ratified the 1979 document. Among them are the European countries, including the Republic of Bulgaria. Therefore, the

hypothetical acceptance of the argument put forward in some of the statements, which suggest that the criticised Article 12(1) of the Convention is incompatible with the national Constitution, will result in the denial of universally adopted values and, respectively – in the isolation of the country by the international community.

According to social psychology, 'stereotype' means the generalised notion of the distinctive traits of people in a particular social group whereby one assumes that each individual in the group inevitably bears the common characteristic even if that is not really the case. Such clichéd generalisation can sometimes be useful in making quick judgment calls, but is harmful when used arbitrarily with regard to the individual.

The Convention does not deny in any way the right of the individual to have his/her own opinion, nor the possibility of a certain opinion in any given society prevailing on the matter of what the behaviour of women and, respectively, of men should be. On the other hand, however, the Convention has every reason to disapprove of narrow-mindedness as an excuse for violence and discrimination. In this sense, the comparison of the 'stereotyped roles for women and men' can by no means be considered in isolation from the purpose and scope of the Convention as laid down in the fundamental norms of Article 1 and Article 2 therein. Indeed, parents are free to bring up their own children, but it is absolutely unacceptable for society to use this upbringing to promote violence against those who are different from them. The correctional intervention of the State through the system of public education is required in such cases. It is particularly important to emphasise that the approach prescribed by the Convention is limited to 'promoting' changes in public thinking, i.e. it excludes coercion as a means of achieving this purpose. Therefore, it is completely unjustified to claim that the implementation of Article 12(1) of the Convention would lead to constitutionally illegitimate interference with citizens' privacy. The argument that the Convention, when speaking about the specific roles of women and men, does not refer to the specifics of human behaviour, but rather to the biological purpose of a man to create and of a woman – to give birth, is devoid of any legal grounds and even more absurd. Like any regulatory act, the Convention regulates public relations without making any claims or having the power to interfere with the laws of nature. Not only does it not deny the right of parents to raise and bring up their own children (Article 47(1) of the Constitution) or the protection of the mother due on the part of the State (Article 47(2) of the Constitution); it creates conditions for the implementation of the constitutional prescriptions in public practice.

It is unreasonable to fear that fulfilling the commitment arising from Article 14 of the Convention to organise educational programmes aimed at promoting tolerance, mutual respect and non-violent methods of solving interpersonal conflicts, including the study of any behaviour outside the established stereotypes, may undermine the traditional morals of the Bulgarian people, the foundations of matrimony and family. Well-planned public education is always more beneficial to the youth than the 'lessons' they learn on the street. On the other hand, commitment made does not in any way affect the sovereign right of the State to introduce any education it sees fit. In this case, the study of the objectively existing phenomenon is not bound by an obligation to create a positive attitude towards all forms of unconventional behaviour through education. For example, if we assume that homosexuality is a serious deviation from the typical innate behaviour of every sex and is deemed inappropriate by society, the Convention does not create any legal obstacle to educational programmes evaluating negatively any actions dictated solely by social factors, attention-seeking or self-interests.

The majority's judgment on the unconstitutionality of the Convention is based on a conflict with Article 6(2) (gender equality) and Article 46(1) (civil marriage). It also refers to the general principle of the rule of law under Article 4(1) of the Constitution, although the considerations set out therein are in conflict with this principle because they do not meet the requirements of objectivity and clarity as they contain a number of ambiguities and contradictions.

Before the beginning of the substantive legal analysis in the reasoning of the act decreed by the Constitutional Court, it is expressly maintained that the assessment of constitutionality '...should be made on the basis of the Bulgarian translation of the text of the Convention presented in the case by the Council of Ministers of the Republic of Bulgaria...'. Afterwards, however, the majority deviated from the approach they themselves declared a principled starting point. For example, contrary to the intention declared, they explicitly point out a number of provisions of the Convention which include in their contents the definition under Article 3(c) by quoting excerpts in English, although the French version has been completely equivalent to it as of the very signing of the international treaty. In our view, this obvious inconsistency is not accidental. If indeed only the Bulgarian translation was used, the meaning of the term 'gender' as laid down in the Convention would have been limited to the public opinion on the matter of what roles, manifestations, acts, actions, etc. are individually inherent to men and women. It would have been quite clear that the term concerns the external public assessment of a certain type of behaviour that not only does not deny the biological nature of people, but does quite the opposite – it stems from it. However, it would be difficult, even impossible, for the majority to link the constitutional review to external issues that are irrelevant to the subject matter of the case, such as gender identity in conformity with the subjective will of the individual (i.e. self-identification), the actions of the international community to protect persons who have unconventional sexual orientation or by nature are in a borderline state in terms of their sexual traits, the complex bio-ethical issues of the change in sexual characteristics through medical intervention, etc.

The motivation of the judgment rendered deliberately contain foreign language terminology so as to draw attention to publications available primarily in English, which cover the anti-discrimination policy of the Council of Europe policy with regard to the measures against discrimination in the case of unconventional sexual orientation and biologically-determined gender uncertainty, as well as the so-called 'gender ideology' in relation to the idea of gender identity (i.e. self-identification) maintained by individual representatives. Thus, instead of the constitutional review focusing on the true meaning of the Convention, the reader is being convinced that the international treaty also has another deliberately concealed meaning and profoundly conspiratorial purposes that lie beyond its stated purpose of combating violence against social groups at higher risk. In our view, however, any considerations based on politics or ideology go beyond the subject matter of the legal analysis due in this case. It is disturbing that the Constitutional Court is taking on this unsuitable role of a political and an ideological judge. We also ask whether the judgment rendered results in unconstitutionality and respective non-conformity on the part of the Bulgarian state with a certain category of acts of the first and largest intergovernmental human rights organisation of democratic Europe.

The judgment rendered by the majority's votes uses the phrase '*социален пол*' ('social gender') with an obvious negative connotation. We do not accept such an approach based on a preconceived public attitude because it is incompatible with the fundamental principles of law. The legal term 'gender' cannot have any meaning other than its social one because the law itself regulates only public (social) relations, but remains powerless before nature. This applies to all cases where legal meaning is given to the distinction between human beings on the basis of sex, including where the main biology factor relates to the public opinion, as is done in the Convention, or to the personal self-esteem to which the international treaty has no relevance.

Even during the most conscientious reading of the motives of the judgment rendered, one cannot find any clear and unambiguous finding stating that any specific provision of the Convention is incompatible with a given principle or a prescription of the Constitution of the Republic of Bulgaria. There is only one conclusion. The majority has accepted that Article 4(3) of the Convention is counter to the rule of law for the following reasons: first, because the absence of an explicit definition of the term 'gender identity' (in the motives,

the quotation is supplemented by an excerpt from the English and the French texts) will lead to insurmountable difficulties in the implementation of the international treaty, and second, because it requires the Bulgarian State to establish '...procedures ensuring the legal recognition of genders other than the biological ones...'. In our view, both of these arguments are unfounded. As we stated above, the term 'gender', within the meaning and for the purposes of the Convention, is defined very clearly and unambiguously in Article 3(c) therein. It not only does not deny the division of people into men and women, but quite the contrary – explicitly recognises it. Without denying the biological nature of people, the definition is based on the public assessment, albeit dynamic in time, of male and female roles, manifestations, actions, behaviours, etc. It is about a certain truth, a certain phenomenon that has always been a characteristic element of the Bulgarian national mentality. Article 4(3) of the Convention does not entail an obligation on the part of the State to legally recognise a new gender other than male and female, but rather its obligation to combat the various forms of violence against women and domestic violence, and to cooperate with the international community in this regard.

By misinterpreting, in our view, the constitutional concept of gender as based solely on the biological differences between people and by referring to the rule of law, the motives of the judgment, even though not very clearly and categorically, raise the question of the incompatibility of the Convention with the constitutional definition of civil marriage. Indeed, Article 46(1) of the Constitution defines marriage as a voluntary union between a man and a woman, so in this respect, the gender distinction (*de lege lata*) is heteronormative. Yet, as we have already pointed out, no text in the Convention obliges the Republic of Bulgaria to introduce homosexual or any other type of marriage, which is why there is also no unconstitutionality in this respect.

In view of the actual meaning and contents of the clauses of the Convention (in particular the definition under Article 3(c)), the reasoning of the majority based on a term newly introduced by them in the Bulgarian language, '*полова бинарност*' ('gender binary'), as the foundation on which human society is traditionally built and, in this regard, their argument that '...biological sex is determined at birth and is in the sex for the purposes of civil matters...' are irrelevant to this particular constitutional review. It is troubling that the Constitutional Court's motives could also be used as guiding principles beyond the subject matter of this particular case. Therefore, in the absence of a constitutional definition, we disagree with the narrow-minded and scholastic understanding of gender distinctions as based solely on the externally expressed primary and secondary sexual characteristics. Like their counterparts all over the world, people in Bulgaria are also born with undetermined, unclear sexual identity, and are not responsible for what nature has allotted to them. In relation to this objective reality, the questions of whether such people are subject to protection against gender-based discrimination, which gender should be assigned to them and who has the final word on this are indeed relevant. This issue is too complex to be solved by two or three isolated and very superficial conclusions.

In connection with the above, the judgment raises more questions that we hope will remain rhetorical. First, whether the majority would agree that biologically objectively existing individuals with unclear or mixed sexual characteristics ('intersexual' – hermaphrodites, eunuchs), unlike those included in the statistically predominant majority of individuals with clearly determined sexuality, are not subject to protection against discrimination on the grounds of 'sex.' Second, whether the same applies to the persons whose social or psychological profile is different from that of the majority of the population. There cannot be correct answers to these questions without taking into account mere humanity, which is referred to in the Preamble of the Constitution with the loanword '*хуманизъм*' ('humanism') to designate one of the highest constitutional values. For us, there is no doubt that all the above differences fall under the protection of Article 6(2) of the Constitution.
From a legal standpoint, the Convention, especially its Bulgarian translation, is far from perfect. The constitutional term sex, however, is contained only in Article 6(2) of the

Constitution and as a generic term includes not only biological sex, but psychological and social gender, solely as grounds for non-discrimination. For the same purpose and exactly in the same spectrum, the term is also used in the Convention now subjected to constitutional review, which is why there is no contradiction between its provisions and the constitutional principle of the rule of law. This is why the majority's argument for non-conformity with the rule of law is unfounded.

We cannot gloss over the question of whether the majority would give up their conclusion on unconstitutionality if another word or phrase had been used in the Bulgarian translation instead of the word '*пол*' ('sex'), which is also contained in Article 6(1) of the Constitution. It is hard to swallow that the judgment of the Constitutional Court, the highest protector of the rights and legitimate interests of citizens, can be based mainly on the translation of one legal term established in two foreign languages, instead of on an impartial, objective and accurate substantive analysis of the content of the multilateral international treaty.

The public debate on the ratification of the Convention on preventing and combating violence against women and domestic violence evolved into a dishonest, manipulative political project aimed at attracting voters against the backdrop of ostentatious protection of the traditional morals and national traditions of the Bulgarian people. Initially, it was maintained that the Convention was unnecessary and redundant, then it was labelled harmful and dangerous because it was said to promote the notion of a 'third gender.' A referendum was even proposed, which undoubtedly would have gone under the slogan of whether the already confused voter is 'for' or 'against' homosexuality, same-sex marriages, Pride parades, etc. All of this now culminates in this declaration of unconstitutionality, i.e. people should feel safe about their future. In our view, however, this safety may be deceptive and transient.

We recognise that the basic natural purpose of people is to ensure the survival of the human species and that reproduction should take place in the contact between men and women. In principle, we do not approve the vulgar and ostentatious display of one's intimate sexual life before a wide audience. However, the Convention does not address these issues at all. Therefore, it cannot be classified as either conservative or liberal. Its focus is different, namely – combating violence. At the same time, we cannot refrain from stating that the defenders of strictly straight sexual behaviour of men and women seem to avoid the answer to such an extremely relevant issue for Bulgarian society as the severe demographic crisis. For information only, according to UN statistics for 2017, Bulgaria is at the unenviable 210th place in the world by birth rate, with all countries which have institutionalised same-sex partnerships registering a higher birth rate, the only exception being Germany.

Even in conservative, clerical and totalitarian regimes, there are always individuals of one biological sex whose acts extend to homosexuality in their final form, and which society has deemed typical of the opposite sex. Such individuals are usually referred to by the Bulgarian people as '*женчовци*' ('sissies') and respectively – '*мъжкарани*' ('tomboys'). Let us remember that among them there were popular actors and singers, skilled doctors, renowned lawyers, elite athletes, etc. For better or worse, this phenomenon has accompanied human society since the dawn of its existence. Any attempts to prohibit it by law have always failed. On the other hand, of course, in no case can people be forced to perceive it as a good thing, or something positive, but the Convention also does not do this; it merely states an objective reality, i.e. a truth, without prescribing any measures for its support and encouragement by the State. The international treaty defends only the view that any reaction in the form of physical and psychological violence against human beings is absolutely unacceptable in societies that deem themselves civilized.

The Constitutional Court's judgment 'serves' politicians of all colours – it prevents a possible conflict in the ruling coalition and coincides with the view of most of the parliamentary and extra-parliamentary opposition. It also conforms to current public

attitudes. Time will, however, be the judge of whether it embodies the impartiality, civil courage and valour that are inherent in judicial independence. We doubt that any constitutional jurisdiction in another democratic European State would uphold that the truth may be incompatible with the Basic Law of a country, that the combat against different forms of violence can be opposed to constitutional requirements. Perhaps the Convention on preventing and combating violence against women and domestic violence is imperfect, perhaps it will not be as effective an international instrument as its creators expected, but the opposition of Bulgarian politicians and state institutions rests on a negative symbolism that clearly points to a departure from the ideal of a 'pure and holy republic.' We can only guess what the real reasons for refusing to follow the majority of civilized and democratic European countries in seeking a cure against violence as the most severe form of humiliation of the human dignity are. In this regard, we note only as an example that even in the United Nations General Assembly resolution of 10 June 2000 concerning further actions and initiatives to implement the Beijing Declaration and Platform for Action, the English word 'gender' is used multiple times, and this word is now being used solely as tool for instilling fear in Bulgarian society for political gains, but without any reason. It is a shame that this self-isolation of Bulgaria from the international community stemming from the Constitutional Court's judgment should happen at a time when brutal aggression has become part of our everyday lives at home, in the streets, in public transport, at stadiums, in schools, in parks, etc.

Judge: Rumen Nenkov
Judge: Georgi Angelov

Dissenting Opinion

of Judge Konstantin Penchev under Constitutional Case No 3/2018

My opinion is that the Council of Europe Convention on preventing and combating violence against women and domestic violence, done on 11 May 2011 in Istanbul, and signed by the Republic of Bulgaria on 21 April 2016, conforms to the Constitution of the Republic of Bulgaria.

1. In order to rule on the non-conformity of the Convention with the Constitution, the Constitutional Court has reasoned the following:
   1.1 The Court has upheld that the provisions of Article 3(c) and Article 4(3) of the Convention contradict Article 6(2) and Article 4(1) of the Constitution. Since no reservations may be made in respect of these provisions (Article 78), they make the entire Convention incompatible with the Constitution.
   1.2 It is recognised that the provisions of Article 3(c) and Article 4(3) define gender as both a biological category and a social construct determined by the subjective perceptions and notions of a given society about the role of men and women. This dual understanding of the term gender contradicts Article 6(2) of the Constitution, its provision referring to biological and not social gender. The interpretative decision No 14 of 1992 is also quoted; according to it, gender is excluded from the group of traits that may be acquired or changed in the process of social realisation of the citizens in society.
   1.3 It is further acknowledged that the Convention also contradicts the rule of law established in the Preamble and Article 4(1) of the Constitution. The rule of law in the formal sense requires the meaning of legal terms to be clear and unambiguous. By defining the term gender as both a biological and a social construct, the Convention makes it impossible to adopt any laws implementing the Convention and ultimately leads to instability of the legal system.
2. I do not share these legal conclusions on the following grounds.
   2.1 Article 3(c) defines the term gender only for the purposes of the Convention as 'socially constructed roles, behaviours, activities and attributes that a given society considers appropriate for women and men.' The concept of gender's

social roles is already embedded in our legislation. Paragraph 1(1) of the Additional Provision of the Gender Equality Act states that 'men and women are free to develop their own abilities and to make choices without the limitations of the social role of their sex.' Article 2(5) of the same Act refers to 'overcoming gender stereotypes' as a principle underpinning the state's policy on gender equality.

2.2 It is apparent that the purpose of the Convention and the Gender Equality Act is to protect the freedom of any individual, male or female, to define his/her behaviour regardless of the stereotypes concerning male and female social roles established at a given time and in a particular society, without questioning the understanding of the biological essence of gender.

2.3 The provision of Article 4(3) of the Convention also does not create a new term for gender other than the biological one. According to this provision, the measures to protect the rights of victims provided for in the Convention must be implemented without discrimination on any of the grounds listed. The concerns contained in the motives of the judgment are unjustified; they state that concepts such as 'gender' and 'gender identity' introduce new gender criteria other than biological ones, which not only violates Article 6(2) of the Constitution, but would lead to legal chaos inconsistent with the rule of law.

2.4 The controversial text also lists grounds other than the ones mentioned above on which discrimination is inadmissible; these include age, state of health, disability, sexual orientation. These grounds, as well as the grounds of 'gender' and 'gender identity', are not present in the provision of Article 6(2) of the Constitution. Some of them – age, state of health, disability, sexual orientation – are also used in the current legislation in force: Article 4(1) of the Protection against Discrimination Act, Article 15 of the Combating Trafficking in Human Beings Act, Article 3 of the Social Assistance Act, Article 2 of the Employment Promotion Act, Article 75(5)(2) of the Radio and Television Act, Article 8(3) of the Labour Code, Article 231(1) of the Social Insurance Code, etc.

2.5 These grounds fall within the general grounds of 'personal status,' as enshrined in Article 6(2) of the Constitution, and enrich its meaning. The grounds of personal status include the physical, psychological and intellectual characteristics of the individual, as well as any other significant, lasting and distinctive personality trait. This ground has no unambiguous objectively defined meaning. Disability, age, state of health and sexual orientation are traits of one's personal status. It is apparent that the meaning of personal status is subject to supplementation and enrichment in the course of social development. I believe that gender identity, as part of the individual's psychological characteristics, is also a trait of personal status.

2.6 Therefore, the provision of Article 4(3) of the Convention does not introduce any other meaning to the term 'gender' other than the biological one. It points out new personality traits that are included in the grounds of 'personal status', which excludes discrimination in the implementation of protective measures under the Convention.

2.7 On these grounds, I believe that the Council of Europe Convention on preventing and combating violence against women and domestic violence, done on 11 May 2011 in Istanbul, and signed by the Republic of Bulgaria on 21 April 2016, conforms to the Constitution of the Republic of Bulgaria.

3. The existing negative emotional attitudes in society towards the Convention should be taken into account when making the political decision as to whether to ratify this international treaty. Public opinion, however, must not influence the legal assessment of the Convention's conformity with the Constitution.

Judge: Konstantin Penchev

DISSENTING OPINION

of Judge Filip Dimitrov under Constitutional Case No 3/2018

I disagree with the judgment on Constitutional Case No 3/2018, with the majority's conclusions, as well as with the manner in which they were reached, on the following grounds:
The Constitutional Court should consider the request for a declaration of unconstitutionality in the following lines:

1. Is there a text or principle in the Bulgarian Constitution that is contrary to the purposes, scope or specific provisions of the Convention;
2. Are there any other acts forming part of the Bulgarian legal system which conform to the contents of the Convention; and
3. What is the responsibility assumed by the government, respectively by Parliament, that allows establishing whether there are risks of future actions that could jeopardise constitutional order.

By examining the request, without clearly distinguishing these elements, the majority fell prey to confusion and, in the context of a particularly raucous political campaign (which the Constitutional Court of course cannot ignore but must assess with appropriate precision), came to the judgment rendered.

The Convention sets out its purposes and scope in Articles 1 and 2 exclusively in the framework of violence against women and domestic violence. The fact that this issue has been addressed in other legislative acts and international treaties ratified by Bulgaria (detailed in the judgment) does not override in any way the government's right to sign a new international treaty that establishes additional guarantees for international cooperation in compliance with these norms. (This is exactly what is new in the Convention – a commitment to more comprehensive measures to ensure protection from violence against women and domestic violence. Whether Bulgaria should deny protection of beaten women due to poverty, however, is not a constitutional question but rather a question for the executive and, to some extent, for the legislature).

The majority chose as the main argument in the motivation for their judgment, the assumption that the reference to *gender in its social dimension (the use of the terms 'gender' or 'genre') expressed the 'notion that the social dimension of gender is independent of the biological one.'*

Thus, the majority, although formally pointing to the inextricable link between the biological and social characteristics of gender, in fact implicitly adopted the argument developed in the president's statement, stating that gender (both as a given and as behaviour) was only determined biologically under the Bulgarian Constitution. This argument is completely untenable. Quoting Article 47(2) of the Constitution, the majority points out the use of '*the term 'women,' which is undoubtedly based on the biological understanding of the sexes*.' Precisely by virtue of Article 47(2), the protection of women is linked to their social role as much as to their biological role. (Furthermore, motherhood is not necessarily 'biological.') This is precisely what the Convention means, not the invention of a 'non-biological' gender. This understanding matches the conclusion at the end of the motives for this judgment and it is astonishing that the majority has not been able to capture this match.

The majority has paid too much attention to translation efforts in connection with the concept of 'gender' or '*genre*' – efforts that are completely redundant because the translation is only a matter of facilitation and clarification for the ratifying countries. The only texts relevant to the application of the Convention (including as part of national legislation) are the English and the French versions, so each term can also be translated

descriptively as long as this clarifies its meaning. In languages in which the typical word for 'пол', 'sex', has a dual meaning, the term 'gender' or 'genre' strips the notion of its erotic sounding, which the word 'пол' achieves successfully in Bulgarian, but in no language are these words invested with a 'non-biological' meaning.

The motives for the judgment list exhaustively all cases where the term for sex, loaded with its social characteristics ('gender' or 'genre'), is used, and in none of these cases is there any reference to a third gender or anything other than women and men. On the contrary, rejecting violence against women, it explicitly mentions that there are non-stereotyped gender roles, i.e. there are people whose social behaviour is 'peculiar' (i.e. it deviates from what is specific to each gender – or 'genre' – which remain two). To think that a prohibition on violence against them may be unconstitutional is absurd. However, this almost creates the impression that in essence the majority's argument declares unconstitutional, for example, the prohibition to beat transgender people – something that also contradicts the constitutional principles and all anti-discriminatory and criminal law provisions in force.

Another misinterpretation by the majority is related to the term 'gender identity.' The existence of people who deviate from traditional male or female roles in their behaviour (and wish to do so) is a fact of life, not a normative fact, and no Constitution or law (even Nazi or communist) can determine whether these people exist or not, but only if they can be destroyed (in the case of Nazism), discriminated against and displaced (under Communism) or afforded basic protection against violence as provided for in the Convention. It is apparent that the public recognition of an existing fact helps, rather than hinders, the guaranteeing of this protection. To argue (as in some of the statements) that some 'Bulgarian constitutional identity' contradicts the recognition of facts of life is ridiculous. To argue that the Constitution prohibits to speak about it because it '*does not lead to the achievement of gender equality, but rather blurs the differences between sexes thus resulting in the principle of equality losing its meaning*' is also inexplicable. How exactly this blurring of the differences between sexes occurs remains a mystery to me (and perhaps to others with such simple perceptions as mine). This, finally, leads to the crowning phrase of the motives for the judgment, stating that '*if society loses the ability to distinguish between a woman and a man, combating violence against women remains only a formal, yet unattainable, commitment*.' It turns out that according to the constitutional legislator, the clarification of the fact that there are lesbians or transvestites people means that men and women will become equal. Thank God, nothing in the text of the Constitution indicates that the constitutional legislator had such thoughts.

The turbulent social response in Bulgarian society, albeit instigated by false interpretations and instilling false fears, clearly reflects some real concerns related to the possibility of the ratification of the Convention

a) becoming a means to pave the way to the recognition of same-sex marriage; and
b) to clear the way for extravagant non-governmental organisations to 'legally plant' among the children 'exceedingly free' ideas (such as the self-proclaimed 'gender ideology').

The first concern is unfounded. According to Article 46(1) of the Bulgarian Constitution, matrimony is a union between a man and a woman. Constitutional amendments are made only as described in Chapter IX of the Constitution, not through conventions.

The second concern has its grounds. The fact is that sometimes reasonable classical liberal ideas are defended by narrow-minded liberal fanatics or extravagant adventurers in a manner consistent with their mentality. The Constitutional Court is not supposed to guess whether these will rush to Bulgarian schools and whether any government will not allow them there – something that it has all the power to stop, and if there is a political will to

move in the opposite direction, it could allow them with or without the Convention discussed.
The term 'gender ideology' (to which the Bulgarian society was recently introduced) is just as popular as the terms 'ecofascism' and 'feminazi'. The common denominator is that all three terms may be used by enthusiastic intellectuals, but have no legal value.

Nevertheless, there is no reason – for fear that a given government will not do its job or that some parents are deemed incapable of bringing up their children – to declare an international convention, which does not contradict any text or principle of the Bulgarian Constitution, unconstitutional.

Judge: Filip Dimitrov

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