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# Country report

## Gender equality



France

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# **Country report**

## **Gender equality**

How are EU rules transposed into national law?

### **France**

Marie Mercat-Bruns

Reporting period 1 January 2019 – 31 December 2019

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**CONTENTS**

<b>1</b>	<b>Introduction .....</b>	<b>5</b>
1.1	Basic structure of the national legal system .....	5
1.2	List of main legislation transposing and implementing the directives .....	8
1.3	Sources of law .....	10
<b>2</b>	<b>General legal framework .....</b>	<b>12</b>
2.1	Constitution .....	12
2.2	Equal treatment legislation .....	13
<b>3</b>	<b>Implementation of central concepts .....</b>	<b>14</b>
3.1	General (legal) context.....	14
3.2	Sex/gender/transgender .....	19
3.3	Direct sex discrimination .....	21
3.4	Indirect sex discrimination .....	23
3.5	Multiple discrimination and intersectional discrimination .....	26
3.6	Positive action.....	28
3.7	Harassment and sexual harassment.....	37
3.8	Instruction to discriminate .....	41
3.9	Other forms of discrimination .....	41
3.10	Evaluation of implementation .....	42
3.11	Remaining issues.....	43
<b>4</b>	<b>Equal pay and equal treatment at work (Article 157 of the Treaty on the Functioning of the European Union (TFEU) and Recast Directive 2006/54) .....</b>	<b>44</b>
4.1	General (legal) context.....	44
4.2	Equal pay .....	45
4.3	Access to work, working conditions and dismissal .....	51
4.4	Evaluation of implementation .....	54
4.5	Remaining issues.....	55
<b>5</b>	<b>Pregnancy, maternity, and leave related to work-life balance for workers (Directive 92/85, relevant provisions of Directives 2006/54, 2010/18 and 2019/1158) .....</b>	<b>56</b>
5.1	General (legal) context.....	56
5.2	Pregnancy and maternity protection .....	58
5.3	Maternity leave .....	61
5.4	Adoption leave .....	63
5.5	Parental leave .....	64
5.6	Paternity leave .....	68
5.7	Time off for <i>force majeure</i> .....	69
5.8	Care leave .....	69
5.9	Leave in relation to surrogacy .....	70
5.10	Flexible working time arrangements.....	70
5.11	Evaluation of implementation .....	71
5.12	Remaining issues.....	72
<b>6</b>	<b>Occupational social security schemes (Chapter 2 of Directive 2006/54) ..</b>	<b>73</b>
6.1	General (legal) context.....	73
6.2	Direct and indirect discrimination .....	74
6.3	Personal scope .....	74
6.4	Material scope.....	74
6.5	Exclusions .....	74
6.6	Laws and case law falling under the examples of sex discrimination mentioned in Article 9 of Directive 2006/54 .....	74
6.7	Actuarial factors .....	74
6.8	Difficulties .....	75
6.9	Evaluation of implementation .....	75
6.10	Remaining issues.....	75
<b>7</b>	<b>Statutory schemes of social security (Directive 79/7) .....</b>	<b>76</b>

7.1	General (legal) context.....	76
7.2	Implementation of the principle of equal treatment for men and women in matters of social security.....	76
7.3	Personal scope .....	76
7.4	Material scope.....	77
7.5	Exclusions .....	77
7.6	Actuarial factors .....	77
7.7	Difficulties .....	77
7.8	Evaluation of implementation .....	77
7.9	Remaining issues.....	77
<b>8</b>	<b>Self-employed workers (Directive 2010/41/EU and some relevant provisions of the Recast Directive).....</b>	<b>78</b>
8.1	General (legal) context.....	78
8.2	Implementation of Directive 2010/41/EU.....	79
8.3	Personal scope .....	79
8.4	Material scope.....	80
8.5	Positive action.....	81
8.6	Social protection .....	81
8.7	Maternity benefits.....	82
8.8	Occupational social security .....	82
8.9	Prohibition of discrimination .....	82
8.10	Evaluation of implementation .....	83
8.11	Remaining issues.....	83
<b>9</b>	<b>Goods and services (Directive 2004/113) .....</b>	<b>84</b>
9.1	General (legal) context.....	84
9.2	Prohibition of direct and indirect discrimination .....	86
9.3	Material scope.....	86
9.4	Exceptions.....	87
9.5	Justification of differences in treatment .....	87
9.6	Actuarial factors .....	87
9.7	Interpretation of exception contained in Article 5(2) of Directive 2004/113.....	87
9.8	Positive action measures (Article 6 of Directive 2004/113).....	87
9.9	Specific problems related to pregnancy, maternity or parenthood.....	87
9.10	Evaluation of implementation .....	87
9.11	Remaining issues.....	87
<b>10</b>	<b>Violence against women and domestic violence in relation to the Istanbul Convention .....</b>	<b>88</b>
10.1	General (legal) context.....	88
10.2	Ratification of the Istanbul Convention .....	90
<b>11</b>	<b>Compliance and enforcement aspects (horizontal provisions of all directives) .....</b>	<b>92</b>
11.1	General (legal) context.....	92
11.2	Victimisation .....	92
11.3	Access to courts .....	93
11.4	Horizontal effect of the applicable law .....	93
11.5	Burden of proof.....	94
11.6	Remedies and sanctions .....	94
11.7	Equality body .....	95
11.8	Social partners .....	95
11.9	Other relevant bodies.....	96
11.10	Evaluation of implementation .....	96
11.11	Remaining issues.....	96
<b>12</b>	<b>Overall assessment .....</b>	<b>97</b>
	<b>Bibliography.....</b>	<b>98</b>

## 1 Introduction

### 1.1 Basic structure of the national legal system

France has a long-standing tradition of legislating for gender equality in the field of employment and professional life. The principle of equality between men and women was first recognised in 1946 in the Preamble to the French Constitution. The law of 11 February 1950 first regulated the principle of equal pay between men and women and states that this principle must be incorporated into collective agreements. In 1972, in order to integrate ILO Convention No. 100 into the French system, the principle of equal pay for work of equal value for men and women was introduced into the Labour Code.<sup>1</sup> Since then, at least 14 laws have been adopted dealing with gender equality. Despite this important legislative framework, the implementation of the European Directives on equality has had a very profound influence on pushing the French legislature to address new issues and to adopt new measures, albeit sometimes with significant delays. For example, until May 2008, the main concepts of EU gender discrimination law had not been properly implemented in France, as French legislation included no legal definition of the concepts of direct and indirect discrimination, although the courts had applied the European definitions in some gender case law.

If we look at the basic structure of the French legal system, it is important to note that the principle of equality between women and men has a constitutional value. In the field of employment and professional life, most of the rules can be found in the Labour Code in the part dealing with discrimination in general (Article L 1132-1 et seq. of the Labour Code) and in the part specifically dealing with gender equality at work (Article L 1141-1 et seq. of the Labour Code). The Labour Code only applies to private employment relationships. In the public sector, specific regulations apply, usually with similar content.<sup>2</sup> Therefore the two supreme courts in France, the Court of Cassation (*Cour de cassation*) for private law and the Council of State (*Conseil d'Etat*) for public law, apply the rules on gender equality and sometimes with slightly different assessments of cases. It seems, for example, much more difficult for the Council of State to integrate the concept of indirect discrimination into its jurisprudence than it is for the Court of Cassation. However, the two Courts now clearly aim to apply the concepts. An important piece of this legislative framework is the law adopted on 27 May 2008 (Act No. 2008-496) implementing the various directives on discrimination.<sup>3</sup> Among other elements, the law finally defines direct and indirect discrimination<sup>3</sup> and it applies to public and private relationships. Some provisions of the Criminal Code also deal with penal sanctions for discrimination.

Outside the influence of the European Union, gender equality policies in France may also follow the French policy makers' own agenda. For example, various acts have been adopted with the aim of implementing parity in politics and decision-making bodies. One of the most important and recent developments in gender equality policy is the adoption of Law No. 2014-873, of 4 August 2014, on real equality between men and women. This law promotes an integrated and cross-cutting approach to sex equality. Many bodies (boards of directors, work councils etc.) have to produce reports on gender equality and this also applies to private firms, administrative bodies, cities and regions.

The Labour Code has undergone important changes. Six 'ordonnances' (administrative acts) published on 22 September 2017 were adopted by Parliament at the beginning of 2018. Equality is not the main topic of these 'ordonnances', but some provisions do intersect with issues of gender equality. For example, reports on gender equality are still

<sup>1</sup> ILO Equal Remuneration Convention, 1951 (No. 100) adopted in Geneva, 34th ILC session on 29 June 1951, entered into force 23 May 1953 available at:

[https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100\\_ILO\\_CODE:C100](https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C100).

<sup>2</sup> Act No. 83-634, 13 July 1983 (*Loi n° 83-634 du 13 juillet 1983 portant droits et obligations des fonctionnaires*) amended by Act No. 2019-828 6 August 2019 on the transformation of the civil service (*Loi n° 2019-828 du 6 août 2019 de transformation de la fonction publique*).

<sup>3</sup> However, the definition is still not included in the Labour Code, which refers to the 2008 law.

requested and must be discussed by representative bodies. But under the new law, these bodies are smaller with fewer members and it may be feared that this topic will be given less priority.<sup>4</sup>

More recently, there has been a stronger emphasis on compliance to enforce sexual harassment law, equal pay law and the ban on sexism, with burgeoning case law.<sup>5</sup> After the Government designated gender equality a 'national cause' in 2017<sup>6</sup> following the global #metoo movement,<sup>7</sup> two laws<sup>8</sup> were implemented to improve the detection and punishment of sexual harassment, sexism and equal pay disparities through pay gap indicators.<sup>9</sup> A similar effort was initiated in March 2019 in the public sector.<sup>10</sup>

The recurring acts of femicide each year (resulting in 122 deaths of women in 2019)<sup>11</sup> also created a need for additional measures in October 2019 to prevent these acts and protect the victim's residence.<sup>12</sup> These measures can be seen as essential in the mandatory period of confinement of 2020 to counter the Covid-19 epidemic.<sup>13</sup> These public policy actions were launched following three months of local and national brainstorming (from 3

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<sup>4</sup> Executive Order (*Administrative Act*) No. 2017-1386 of 22 September 2017 on the new organisation of economic and social dialogue in company and promoting union responsibilities, Title 1, Article 1 (*Ordonnance n° 2017-1386 du 22 septembre 2017 relative à la nouvelle organisation du dialogue social et économique dans l'entreprise et favorisant l'exercice et la valorisation des responsabilités syndicales*).

<sup>5</sup> Ambivalent case law: evidence of confession of sexual harassment is sufficient for dismissal, Court of Cassation No. 18-12666, 15 May 2019, <https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000038508151&fastReqId=1125943005&fastPos=1>; on moral harassment, the lack of investigation of the acts by the employer can constitute prejudicial harm to the claimant, Court of Cassation, No. 18-10.551, 27 November 2019, but see Court of Cassation No. 17-31171, 25 September 2019, case rejecting sexual harassment because the claimant participated in seductive game with sex texting, <https://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000039188588>.

<sup>6</sup> <https://www.egalite-femmes-hommes.gouv.fr/legalite-entre-les-femmes-et-les-hommes-declaree-grande-cause-nationale-par-le-president-de-la-republique/>.

<sup>7</sup> Muller S. (2018), *#balancetonporc*; Lévy-Willar A. (2018), *Chroniques d'une onde de choc: #MeToo secoue la planète* (Chronical of a shock wave: #MeToo saves the planet); Murat L. (2018), *Une révolution sexuelle? Réflexions sur l'après-Weinstein* (A sexual revolution? Post-Weinstein reflections).

<sup>8</sup> Act No. 2018-703 of 3 August 2018 reinforcing the fight against sexual and sexist violence (*Loi n° 2018-703 du 3 août 2018 renforçant la lutte contre les violences sexuelles et sexistes*); Act No. 2018-771 5 September 2018 on the individual's freedom to choose their future professional life (*Loi n° 2018-771 du 5 septembre 2018 pour la liberté de choisir son avenir professionnel*).

<sup>9</sup> Decree No. 2019-15 of 8 January 2019, implementing the provisions to eliminate the gender pay gap between women and men in companies and pertaining to the fight against sexual violence and sexism at work (*Décret n° 2019-15 du 8 janvier 2019 portant application des dispositions visant à supprimer les écarts de rémunération entre les femmes et les hommes dans l'entreprise et relatives à la lutte contre les violences sexuelles et les agissements sexistes au travail*).

<sup>10</sup> Law introducing in the public sector a whistleblowing right given to a contact person in case of sexual harassment and sexist conduct, amending Act No. 83-634, 13 July 1983 (*Loi n° 83-634 du 13 juillet 1983 portant droits et obligations des fonctionnaires*) amended by Act No. 2019-828 of 6 August 2019 on the transformation of the civil service (*Loi n° 2019-828 du 6 août 2019 de transformation de la fonction publique*).

<sup>11</sup> On average, a woman is killed by her husband or partner every three days in France. See: L'Express (2019) 'At least 122 femicides in 2019' 16 December 2019 [https://www.lexpress.fr/actualite/societe/au-moins-122-femicides-en-2019-un-chiffre-en-hausse-par-rapport-a-2018\\_2111451.html](https://www.lexpress.fr/actualite/societe/au-moins-122-femicides-en-2019-un-chiffre-en-hausse-par-rapport-a-2018_2111451.html).

<sup>12</sup> Act No. 2019-1480 of 28 December 2019 to combat violence in the family (*Loi n° 2019-1480 du 28 décembre 2019 visant à agir contre les violences au sein de la famille*); implemented by the Decree of 27 May 2020 on restraining orders, which has been criticised because it only gives victims 24 hours to inform their spouse or ex-partner of the order, after which the request for the order expires, (*Décret n° 2020-636 du 27 mai 2020 portant application des articles 2 et 4 de la loi n° 2019-1480 du 28 décembre 2019 visant à agir contre les violences au sein de la famille*); [https://www.lemonde.fr/societe/article/2020/06/09/violences-conjugales-les-ordonnances-de-protection-menacees-par-un-decret\\_6042245\\_3224.html](https://www.lemonde.fr/societe/article/2020/06/09/violences-conjugales-les-ordonnances-de-protection-menacees-par-un-decret_6042245_3224.html).

<sup>13</sup> It seems appropriate to consider the scope of the measures adopted in 2019 in light of the subsequent amplifying effect of the Covid-19 pandemic on gender inequality. The health crisis has taken its toll particularly on women during the period of mandatory confinement from March to May 2020. The Government has taken measures to curtail the increase in domestic violence. Some of the most essential jobs during the health crisis (healthcare workers, cashiers, cleaning services) are in sectors dominated by women, which exposed them more to risks of contamination and finally the period of confinement has limited access to healthcare for pregnant women and women requiring abortions. Telework has been particularly hard on families with small children.

September to 25 November 2019) instigated by the Prime Minister to adopt new measures<sup>14</sup> on the issue of domestic violence and femicide.<sup>15</sup> The budgetary support for violence prevention and a gender mainstreaming perspective in public policy is included in a French public policy brief that pinpoints six different directions for equality measures for 2020:

'1) building a culture of gender equality in the early stages of life (awareness raising against bias of youth); 2) combating poverty and social exclusion of men and women; 3) eliminating the barriers against effective equality in employment; 4) limiting inequalities in the health sector; 5) combating violence against women, protecting victims and preventing criminal recidivism; 6) promoting women in diplomacy on the international level'.<sup>16</sup>

Some of these broad objectives are in line with the 2020-2025 equality strategy of the European Commission.<sup>17</sup>

Parental leave has also been a hot topic with improvements to rights to parental leave in the public sector,<sup>18</sup> following the new law on public service<sup>19</sup> as well as financial support and easier access to a family 'care' leave.<sup>20</sup> Moreover, a bill was introduced in 2019 for paid bereavement leave for families who have lost a child, which was finally adopted in the Senate in 2020.<sup>21</sup> Furthermore, the Court of Cassation, citing EU law, handed down a groundbreaking decision in 2019 on how the refusal to allow the return of an employee to her same or equivalent job after parental leave constitutes indirect sex discrimination.

In the social security realm, the proposed plan introduced in 2019 to reform and harmonise the pension system, which encountered strong resistance and debates over its disparate impact on women, has been suspended until further notice.

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<sup>14</sup> This initiative is called the 'Grenelle des violences conjugales': it took the form of over 100 local and national meetings between stakeholders on the issue (healthcare workers, local politicians, lawyers, judges, NGOs, families of victims) to discuss future policies. New measures to protect women victims of violence adopted by the Assembly, [http://www.assemblee-nationale.fr/dyn/15/textes/l15t0390\\_texte-adoptee-seance](http://www.assemblee-nationale.fr/dyn/15/textes/l15t0390_texte-adoptee-seance) just adopted unanimously by the Senate, <https://www.senat.fr/petite-loi-ameli/2019-2020/483.html>; [https://www.lemonde.fr/societe/article/2020/06/10/une-proposition-de-loi-destinee-protoger-les-victimes-de-violences-conjugales-adoptee-au-senat\\_6042318\\_3224.html](https://www.lemonde.fr/societe/article/2020/06/10/une-proposition-de-loi-destinee-protoger-les-victimes-de-violences-conjugales-adoptee-au-senat_6042318_3224.html). The provisions include a right given to doctors to inform authorities of an immediate danger to the victim 'under influence' prevailing over the confidentiality rule, increased sanctions for harassment if there is a possible threat of suicide, banning the geolocating of victims without their consent and for cyberviolence through recurring messages to victims.

<sup>15</sup> [https://www.egalite-femmes-hommes.gouv.fr/wp-content/uploads/2019/11/veille\\_actualite\\_2019.10.30.pdf](https://www.egalite-femmes-hommes.gouv.fr/wp-content/uploads/2019/11/veille_actualite_2019.10.30.pdf).

<sup>16</sup> [https://www.performance-publique.budget.gouv.fr/sites/performance\\_publique/files/farandole/ressources/2020/pap/pdf/DPT/DPT2020\\_0\\_egalite\\_femmes\\_hommes.pdf](https://www.performance-publique.budget.gouv.fr/sites/performance_publique/files/farandole/ressources/2020/pap/pdf/DPT/DPT2020_0_egalite_femmes_hommes.pdf).

<sup>17</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - A Union of Equality: Gender Equality Strategy 2020-2025 COM/2020/152 final, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2020%3A152%3AFIN>.

<sup>18</sup> Decree No. 2020-528 of 4 May 2020 defining the conditions to create and implement plans of action for professional equality in the civil service, (*Décret n° 2020-528 du 4 mai 2020 définissant les modalités d'élaboration et de mise en œuvre des plans d'action relatifs à l'égalité professionnelle dans la fonction publique*), Decree No. 2020-529 of 5 May 2020 amending the provisions on parental leave for civil servants and their time for *childrearing* (*Décret n° 2020-529 du 5 mai 2020 modifiant les dispositions relatives au congé parental des fonctionnaires et à la disponibilité pour élever un enfant*).

<sup>19</sup> Act No. 2019-828 of 6 August 2019 on the transformation of the civil service.

<sup>20</sup> Act No. 2019-1446 of 24 December 2019 on social security financing of benefit for persons caring for a parent or loved one (*Loi n° 2019-1446 du 24 décembre 2019 de financement de la sécurité sociale pour 2020*), Articles 68 and 69.

<sup>21</sup> Amended Bill No. 2729 to improve the rights of workers and support to families after the loss of a child; the bill has been adopted by the Senate and the final version is being compiled, (*Proposition de loi, modifiée par le Sénat, visant à améliorer les droits des travailleurs et l'accompagnement des familles après le décès d'un enfant, n° 2729 rectifié*), 3 March 2020, [http://www.assemblee-nationale.fr/dyn/15/dossiers/conge\\_de\\_deuil\\_enfant\\_mineur](http://www.assemblee-nationale.fr/dyn/15/dossiers/conge_de_deuil_enfant_mineur).

Finally, the public policy perspective on the risks of algorithmic discrimination in artificial intelligence is developing. President Macron had promised to follow the proposals of the Villani Report on the impact of artificial intelligence requested by the Prime Minister<sup>22</sup> in a speech at the Collège de France in 2018.<sup>23</sup> The President reiterated the need for several initiatives set out in the report, including developing more inclusiveness of women in the tech industry because it is a male-dominated industry and developing a more ethical use of AI through tools to 'track biases', develop 'transparency' in the use of algorithms and 'avoid decision making exclusively on the basis of algorithms'. The idea was to promote interdisciplinary research in the field through the National Institute for Research in Computer Science and Automation (INRIA).<sup>24</sup> President Macron called for a specific commitment to non-discrimination and the development of a code of ethics linked to the digital world and its impact.<sup>25</sup> In October 2019, at the Global Forum on Artificial Intelligence for Humanity in Paris, the French President confirmed his personal and financial investment in the issue<sup>26</sup> in a commitment to monitor AI and work on transparency by 'developing an AI which uses personal data in a fair way and with the consent of each individual.'<sup>27</sup> The Defender of Rights and the Data Protection Agency have published a comprehensive report on the impact of algorithmic discrimination and possible recommendations.<sup>28</sup>

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

The main relevant legislation on gender equality and the prohibition of sex discrimination are available on the Legifrance website.<sup>29</sup>

The global labour law reform of 2017 safeguards the general provisions on equality in conformity with Recast Directive 2006/54/EC:

- Act No. 2017-1385 of 22 September 2017 on collective bargaining;
- Act No. 2017-1386 of 22 September 2017 on the new organisation of social dialogue;
- Act No. 2017-1387 of 22 September 2017 on the predictability of and securing working relationships;
- Act No. 2017-1718 of 20 December 2017 modifying the previous acts.

All four acts were inserted into Act No. 2018-217 of 29 March 2018.<sup>30</sup>

A new general statute on the growth and transformation of companies, which introduces more digital tools in relation to administrative proceedings and their transparency, is intended to promote corporate social responsibility. The amendments to the Civil Code and the Commercial Code recognise the need for all businesses to take into account

<sup>22</sup> Villani, C (2018) *Donner un sens à l'intelligence artificielle : pour une stratégie nationale et européenne, Report for the Prime Minister*, (Giving meaning to artificial intelligence: for a national and European strategy) 8 September 2018, p. 163 available at

[https://www.aiforhumanity.fr/pdfs/9782111457089\\_Rapport\\_Villani\\_accessible.pdf](https://www.aiforhumanity.fr/pdfs/9782111457089_Rapport_Villani_accessible.pdf).

<sup>23</sup> <https://www.elysee.fr/emmanuel-macron/2018/03/29/discours-du-president-de-la-republique-sur-lintelligence-artificielle>.

<sup>24</sup> INRIA, Institut national de recherche sur les sciences du numérique, <https://www.inria.fr/>.

<sup>25</sup> The President explicitly mentioned the need for codes of ethics to combat social, ethnic and sexual discrimination: '*Et au cœur de cette réflexion, nous devons inscrire des engagements de non-discrimination sociale, ethnique, sexuelle et l'Etat, pour ce qui le concerne, rendra donc par défaut public le code de tous les algorithmes qu'il serait amené à utiliser*', <https://www.elysee.fr/emmanuel-macron/2018/03/29/discours-du-president-de-la-republique-sur-lintelligence-artificielle>.

<sup>26</sup> President Macron promised to invest EUR 1.5 billion in AI to implement his policies.

<sup>27</sup> <https://www.elysee.fr/emmanuel-macron/2019/10/30/cloture-du-global-forum-on-artificial-intelligence-for-humanity-par-le-president-emmanuel-macron>.

<sup>28</sup> Defender of Rights and CNIL (joint report) (2020), *Algorithmes: prévenir l'automatisation des discriminations* (Algorithms: preventing the automation of discrimination), <https://www.defenseurdesdroits.fr/fr/rapports/2020/05/algorithmes-prevenir-lautomatisation-des-discriminations>.

<sup>29</sup> <http://www.legifrance.gouv.fr/>.

<sup>30</sup> As explained below (Section 11.6.1) the laws have modified the structure of representative bodies and negotiations and modified their competence in many regards.

environmental and social issues in their acts of incorporation and the implementation of their strategic policies:<sup>31</sup>

- Act No. 2019-486 of 22 May 2019 on the growth and transformation of undertakings

The following acts are also relevant for the topic of gender equality in conformity with the Recast Directive 2006/54/EC:

- Decree No. 2020-528 of 4 May 2020 defining the conditions to create and implement plans of action for professional equality in the civil service;
- Decree No. 2020-529 of 5 May 2020 amending the provisions on parental leave for civil servants and their time for childrearing;
- Act No. 2019-1480 of 28 December 2019 to combat violence in the family;
- Act No. 2019-1446 of 24 December 2019 on social security financing (Articles 68 and 69 on social benefit for persons caring for a parent or loved one);
- Act No. 2019-828 of 6 August 2019 on the transformation of the civil service; Decree No. 2019-15 of 8 January 2019 implementing the provisions to eliminate the gender pay gap between women and men in companies and pertaining to the fight against sexual violence and sexism at work;
- Act No. 2018-771 of 5 September 2018 on the individual's freedom to choose their future professional life;
- Act No. 2018-703 of 3 August 2018 reinforcing the fight against sexual and sexist violence;
- Act No. 2016-1547 of 18 November 2016 on modernisation of justice in the 21st century;
- Act No. 2016-1088 of 8 August 2016 on labour, modernisation of social dialogue and securing career paths;
- Act No. 2015-994 of 17 August 2015 on social dialogue and employment;
- Act No. 2014-873 of 4 August 2014 on real equality between men and women, JO No. 179, 5 August 2014, p. 12949;
- Act No. 2012-954 of 6 August 2012 on sexual harassment, JO No. 182, 7 August 2012, p. 12921;
- Act No. 2006-340 of 23 March 2006 on equal pay between men and women, JO No. 71, 24 March 2006 p. 4440;
- Act No. 2012-347 of 12 March 2012 on access to the civil service and improvement of conditions of employment for contractual employees in the civil service and combating discrimination;
- Act No. 2001-397 of 9 May 2001 on equality between men and women, JO No. 108, 10 May 2001, p. 7320;
- Act No. 83-635 of 13 July 1983, the 'Roudy' Act, JO 14 July 1983, p. 2176;
- Labour Code Articles L.1141-1 to L.1144-3 concerning equality between men and women; Articles L.1151-1 to L.1155-4 concerning harassment;
- Labour Code Articles L.3221-1 to L.3222-2 concerning equal pay between women and men;
- Act No. 83-634 of 13 July 1983, amended by Act No. 2019-828 of 6 August 2019 on the transformation of the civil service.

Directive (EU) 2019/1158 of the European Parliament and of the Council of 20 June 2019 on Work-Life Balance for Parents and Carers and Repealing Council Directive 2010/18/EU:

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<sup>31</sup> The new law (*LOI n° 2019-486 du 22 mai 2019 relative à la croissance et la transformation des entreprises*/ called PACTE) amends two important articles to promote corporate social responsibility outside of soft law: Article 1835 Civil Code suggests that acts of incorporation can detail a purpose ('à raison d'être') of the company which includes principles that the company should follow and invest in accordingly and Article 225-64 of the Commercial Code requires the executive boards should determine the focus of their activity according to their corporate interests, taking into account social and environmental stakes at issue in conformity with Article 1835 of the Civil Code.

- Decree No. 2012-1061 of 18 September 2012 modifying the rules on parental leave applicable to public servants and contractual civil servants, JO No. 218, 19 September 2012, text No. 26.

Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation:

- Act No. 2011-334 of 29 March 2011 on the Defender of Rights, JO No. 75, 30 March 2011, p. 5504;
- Act No. 2008-496 of 27 May 2008 implementing the various directives on discrimination, JO No. 123, 28 May 2008, p. 8801;
- Act No. 2004-1486 of 30 December 2004 creating the equal opportunities and anti-discrimination commission, JO No. 304, 31 December 2004, p. 22567;
- Act No. 2001-1066 of 16 November 2001 concerning the fight against discrimination, JO No. 267, 17 November 2001, p. 18311;
- Labour Code, Articles L.1131-1 to L.1134-4 concerning discrimination;
- Criminal Code, Articles 225-1 to 225-4; Article 222-32; Article 222-33-2; and Article 432-7.

Proposal for a Directive of the European Parliament and the Council on improving the gender balance among non-executive directors of companies listed on stock exchanges and related measures/2012/0614 final - 2012/0299 (COD):

- Act No. 2011-103 of 27 January 2011 relating to a Balanced Participation Between Men and Women on Company Boards, JO No. 23, 28 January 2011, p. 1680.

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

- Act No. 2010-1330 of 9 November 2010 on pension reform, JO No. 261, 19 November 2010, p. 20034;
- Act No. 2003-775 of 21 August 2003 reforming pensions, JO No. 193, 22 August 2003, p. 14310.

Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications:

- Act No. 2007-1774, 17 December 2007, implementing various European provisions in economic and financial fields, JO No. 293, 18 December 2007 p. 20354.

Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding:

- Articles L.1225-1 to L.1225-72 concerning pregnancy, maternity protection, and maternity, parental and paternity leave.

### 1.3 Sources of law

The main sources of gender equality law in France are both international and national. International treaties, once they are ratified, prevail over legislation, according to Article 55 of the Constitution.<sup>32</sup> The International Covenant on Civil and Political Rights was ratified in 1980.<sup>33</sup> France ratified the Convention on the Elimination of all Forms of

<sup>32</sup> Council of State (*Conseil d'Etat*), No 108243/20 October 1989 Nicolò.

<sup>33</sup> With the example of Article 26 of the Covenant on equality before the law. Ratification by the Law of 25 June 1980, in force on 4 February 1981.

Discrimination Against Women (CEDAW) on 14 December 1983.<sup>34</sup> A Government report on real equality between women and men published in 2017 mentions CEDAW as a fundamental text<sup>35</sup> to justify 'a systematic recognition of inequalities between women and men in order to take, if necessary, actions to correct them'.<sup>36</sup>

The Council of Europe Convention on preventing and combating violence against women and domestic violence was ratified by France on 4 July 2014. French Courts must disapply all legal rules contrary to EU equality law.<sup>37</sup> Case law, which is not a binding source of law in France, refers directly to ECJ case law<sup>38</sup> and to the EU gender directives, recognising equal treatment as it applies to sex discrimination as a general principle.<sup>39</sup>

Outside of legislative and executive orders, in the Labour Code, collective bargaining on gender equality is an essential source of law.<sup>40</sup> The Defender of Rights, an equality body created by constitutional amendment,<sup>41</sup> has been instrumental in targeting gender and transgender discrimination by private entities and public authorities.<sup>42</sup> The body uses its powers of investigation and interventions such as: resolving a conflict by mutual agreement by making recommendations or through mediation; intervening in support of a civil or criminal settlement; making observations before a court during the hearings and recommending sanctions by the administration against a physical person or legal entity responsible for the gender discrimination.<sup>43</sup> Authoritative academic interpretation is not a binding source of law but, like case law, has a strong influence on judges and legislative reform in France.<sup>44</sup> The Defender of Rights has also been asked to make a formal evaluation of the implementation of the new French class action in matters of discrimination<sup>45</sup> and describes its potential role in furthering equality and its inherent limits, thus justifying future legislative changes.<sup>46</sup>

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<sup>34</sup> In 2006, the French Supreme Court (1st Civil Chamber) recognised implicitly the direct application of CEDAW in a case where a female authorised liquidator felt she had not been given sufficient bankruptcy files in the commercial court, based on Decree No. 84-193 of 12 March 1984 certifying the publication of the CEDAW Convention, even though the Court rejected the claim of sex discrimination.

<sup>35</sup> Secrétariat d'Etat chargé de l'égalité entre les femmes et les hommes (2017) *Vers l'égalité réelle entre les femmes et les hommes: Chiffres clés 2017* (Towards real equality between women and men: key figures 2017), p.4; See also combined seventh and eighth periodic reports of States parties to the UN, published in 2014, available at: [https://www.refworld.org/publisher,CEDAW,STATEPARTIESREP,FRA,577e02564,0.html](https://www.refworld.org/publisher/CEDAW,STATEPARTIESREP,FRA,577e02564,0.html).

<sup>36</sup> Secrétariat d'Etat chargé de l'égalité entre les femmes et les hommes (2017) *Vers l'égalité réelle entre les femmes et les hommes: Chiffres clés 2017* (Towards real equality between women and men: key figures 2017), p. 4.

<sup>37</sup> ECJ 6/64, *Costa v. Enel*, 15 July 1964.

<sup>38</sup> Recently, Court of Cassation, (*Cour de Cassation*) No. 18-15682 14 November 2019.

<sup>39</sup> Recently again, Court of Cassation (*Cour de Cassation*) No. 17-11.970, 3 April 2019.

<sup>40</sup> Article L.2242-8 Labour Code: duty to negotiate collective agreements on equality between women and men.

<sup>41</sup> Constitutional amendment No. 2008-724 of 23 July 2008, Article 71, available at: <https://www.conseil-constitutionnel.fr/les-revisions-constitutionnelles/loi-constitutionnelle-n-2008-724-du-23-juillet-2008>.

<sup>42</sup> <https://www.defenseurdesdroits.fr/fr/institution/competences/lutte-contre-discriminations>.

<sup>43</sup> <https://www.defenseurdesdroits.fr/fr/institution/moyens/protection>.

<sup>44</sup> Jamin C, Jestaz, P. (2004), *La doctrine* (Doctrine), pp. 8-9.

<sup>45</sup> Law No. 2016-1547 on the modernisation of justice, Part VII (Article 60 et seq.) (*Loi n° 2016-1547 du 18 novembre 2016 de modernisation de la justice du XXI<sup>e</sup> siècle*).

<sup>46</sup> Defender of Rights No. 20601, 5 February 2020, Opinion, *Report on the application of the class action mechanism*, (*Avis du Défenseur des droits n°20-01 du 5 fév. 2020*).

## 2 General legal framework

### 2.1 Constitution

#### 2.1.1 Constitutional ban on sex discrimination

According to the Preamble to the Constitution of 27 October 1946, 'The Law guarantees women equal rights to those of men in all spheres.' This recital is broad in scope and applies to the public and private sectors.

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

According to Article 1 of the Constitution, 'Statutes shall promote equal access by women and men to elective offices and posts as well as to professional and social positions'. This paragraph of the Constitution was first introduced in 1999 and later modified in 2008 to allow positive action in political elections (gender quotas in political decision making) and also in the professional sphere. However, this article does not institute an obligation for Parliament to adopt such positive action measures.<sup>47</sup>

A current constitutional reform is now pending to remove the word 'race' in Article 1 of the Constitution and to insert the word 'sex' in the prohibition of all distinctions before the law, reinforcing an attachment to formal equality. The reform process was suspended for a while during the 'yellow vest' protests. The adoption process for the amendments to the Constitution affecting institutions<sup>48</sup> and the principles of the Constitution itself (including Article 1) were separated into three parts.<sup>49</sup> For now, only the amendments affecting institutions were presented to the Council of Ministers on 28 August 2019.<sup>50</sup>

The Constitutional Council (*Conseil Constitutionnel*) recently clarified an ongoing debate on the constitutionality of the law of 2016 on combating prostitution which fines customers and was considered by detractors as an infringement of sex workers' personal sexual liberty.<sup>51</sup> The Court ultimately decided that the intent of the legislator was to consider that the vast majority of prostitutes were victims of procuring and human trafficking and that the law was constitutional by achieving a balance which was not excessively disproportionate between the constitutional aim of the law to achieve public order, prevent criminal violations and safeguard the dignity of the person, on the one hand, and personal liberty on the other hand.<sup>52</sup>

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<sup>47</sup> Xenidis, R., Masse-Dessen, H. (2018), 'Positive action in practice: some dos and don'ts in the field of gender equality law', *European Equality Law Review* Vol. 2, pp. 50-57.

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[https://www.legifrance.gouv.fr/affichLoiPreparation.do?sessionId=70761FF5EF85D820ED9DC3ECFD15022E.tplqfr32s\\_3?idDocument=JORFDOLE000038982496&type=contenu&id=2&typeLoi=proj&legislature=15](https://www.legifrance.gouv.fr/affichLoiPreparation.do?sessionId=70761FF5EF85D820ED9DC3ECFD15022E.tplqfr32s_3?idDocument=JORFDOLE000038982496&type=contenu&id=2&typeLoi=proj&legislature=15).

<sup>49</sup> <https://www.lesechos.fr/politique-societe/politique/la-revision-des-institutions-et-de-la-constitution-140935>.

<sup>50</sup> Until the constitutional reform is passed (it has been postponed since 2019 presumably because of the two waves of protest in the country such as the Yellow vests grass roots movement originally resisting additional environmental taxes, <https://www.economist.com/europe/2019/03/28/frances-yellow-jacket-protests-are-smaller-but-still-fierce> and the general strikes resisting the pension reform, <https://www.economist.com/europe/2019/12/12/french-workers-strike-to-keep-their-lavish-pensions>), Article 1 does not mention sex and still states that 'France shall be an indivisible, secular, democratic and social Republic. It shall ensure the equality of all citizens before the law, without distinction of origin, race and religion'. On the reform: see [http://www.assemblee-nationale.fr/dyn/15/dossiers/democratie\\_plus\\_representative\\_responsable\\_efficace#node\\_51536](http://www.assemblee-nationale.fr/dyn/15/dossiers/democratie_plus_representative_responsable_efficace#node_51536); [https://www.lemonde.fr/politique/article/2018/07/12/l-assemblee-supprime-dans-la-constitution-le-mot-race-et-interdit-la-distinction-de-sexe\\_5330615\\_823448.html](https://www.lemonde.fr/politique/article/2018/07/12/l-assemblee-supprime-dans-la-constitution-le-mot-race-et-interdit-la-distinction-de-sexe_5330615_823448.html).

<sup>51</sup> Constitutional Council (*Conseil Constitutionnel*), QPC Decision No. 2018-761 of 1 February 2019, judicial review of the Act to combat prostitution and support sex workers (*Loi n° 2016-444 visant à renforcer la lutte contre le système prostitutionnel et à accompagner les personnes prostituées*), 13 April 2016, Article 611-1 Criminal Code.

<sup>52</sup> Constitutional Council (*Conseil Constitutionnel*), QPC Decision No. 2018-761 of 1 February 2019.

## 2.2 Equal treatment legislation

The Labour Code explicitly prohibits sex discrimination and provides for equal treatment between men and women according to Article L.1132-1 and Articles L.1142-1 et seq.

Other discrimination grounds are covered. Article L.1132-1 of the Labour Code prohibits discrimination based on origin, sex, mores, sexual orientation and gender identity, age, family situation or pregnancy, genetic characteristics, membership or non-membership, real or supposed, of an ethnicity, a nation or a presumed race, political opinions, union activities, religious convictions, physical appearance, family name, place of residence or place of banking, state of health, loss of autonomy or disability, and the capacity to speak a language other than French. This list is regularly modified in order to add new prohibited grounds.<sup>53</sup> For example, in 2016, the ground of 'gender identity' replaced the ground of 'sexual identity' to cover transgender discrimination more rigorously.<sup>54</sup>

The Court of Cassation recently confirmed that Article L.2263-13 of the Labour Code, introduced by the global labour law reform of 2017, which creates a presumption of justification of equal treatment related to collective bargaining agreements, must conform to the evidentiary standard in cases of prohibited differences of treatment, including sex, covered by EU law.<sup>55</sup> The High Court also considered that a company policy to compensate wage disparities in employment does not violate the principle of equal pay for work of equal value.<sup>56</sup>

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<sup>53</sup> Most recent prohibited ground added: holding a local elected office, Act No. 2019-1461 of 27 December 2019 on commitment at the local level and proximity of public action (*L. No 2019-1461, 27 déc. 2019, relative à l'engagement dans la vie locale et à la proximité de l'action publique*).

<sup>54</sup> Act on the modernisation of justice in the 21st century (*LOI n° 2016-1547 de modernisation de la justice du XXIe siècle*, Article 86, 18 November 2016, available at: <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000033418805&categorieLien=id>).

<sup>55</sup> Court of Cassation (*Cour de cassation*), No 17-11.970 3 April 2019. See also Court of Cassation (*Cour de cassation*), No. [17-16.642](#) 9 October 2019.

<sup>56</sup> Court of Cassation (*Cour de cassation*) 6 November 2019 No. 18-13.235: a male claimant contested that a female colleague who had started at the same time as him at the same pay grade should benefit from an increase in pay. The Court of Cassation confirmed the court of appeal's analysis, which justified the pay raise as a compensation for the extra diplomas and additional experience the female colleague had acquired before being hired for the job and had in fact not been taken into account. In other words, for the Court of Cassation, the corrective (preferential) measure to compensate the wage disparity was justified and in conformity with the principle of equal pay for work of equal value.

### 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

Surveys<sup>57</sup> and reports on the implementation and effectiveness of discrimination law and collective bargaining for all grounds<sup>58</sup> and studies on the implementation of gender equality law more specifically have flourished in the last five years in France.<sup>59</sup> This is a relatively new trend since the issue of sex discrimination was more often construed in the past as an issue of sex equality, before the first general anti-discrimination law in 2001,<sup>60</sup> which referred explicitly to both direct and indirect discrimination. The issue of algorithmic discrimination and its impact on gender equality is also the subject of increasing investigation.<sup>61</sup>

General reports and surveys on the application of laws note sex as a significant factor in discrimination in all sectors and particularly in the realm of employment in the private sector<sup>62</sup> where equality of access to employment does not mean equality of opportunity for women.<sup>63</sup> In the public sector, in relation to access to certain jobs through a seemingly neutral competition, studies based on testing show the difficulty of implementing equal

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<sup>57</sup> Defender of Rights and ILO (2017) *10e Baromètre de la perception des discriminations dans l'emploi* (10th Barometer on the perception of discrimination in employment); Defender of Rights and ILO (2018) *11e Baromètre de la perception des discriminations dans l'emploi* (11th Barometer on the perception of discrimination in employment).

<sup>58</sup> Sciberras, J-C., Barbezieux, P. (2015) *Rapport de synthèse des travaux du groupe de dialogue inter-partenaires sur la lutte contre les discriminations en entreprise* (Summary Report of the discussion group on combating discrimination in companies) May 2; Sciberras, J-C., Barbezieux, P. (2016), *Rapport sur le suivi de la mise en œuvre des propositions du groupe de dialogue sur la lutte contre les discriminations en entreprise* (Report on the implementation of the proposals made by the discussion group on combating discrimination in companies), November 2016, pp. 22-24, available at: [https://travail-emploi.gouv.fr/IMG/pdf/rapport\\_sur\\_le\\_suivi\\_de\\_la\\_mise\\_en\\_oeuvre\\_des\\_propositions\\_du\\_groupe\\_de\\_dialogue\\_sur\\_la\\_lutte\\_contre\\_les\\_discriminations\\_en\\_entreprise.pdf](https://travail-emploi.gouv.fr/IMG/pdf/rapport_sur_le_suivi_de_la_mise_en_oeuvre_des_propositions_du_groupe_de_dialogue_sur_la_lutte_contre_les_discriminations_en_entreprise.pdf) Pecaut Rivoirier L., Pons, D. (2016), *Les discriminations collectives en entreprise - Lutter contre les discriminations au travail : un défi collectif* (Collective discrimination in companies: Combating discrimination at work: a collective challenge), p. 18, available at: <https://www.ladocumentationfrancaise.fr/var/storage/rapports-publics/134000863.pdf>.

<sup>59</sup> See especially the national reports on the implementation of equality law in employment from the High Council on Equality in Employment (*Conseil Supérieur à l'Égalité Professionnelle*), <https://www.egalite-femmes-hommes.gouv.fr/category/publications-csep/>; also national reports of the High Council on Equality between women and men, especially on sexism, violence against women and the implementation of parity rules, <http://www.haut-conseil-egalite.gouv.fr/>.

<sup>60</sup> Act No. 2001-1066 of 16 November 2001 concerning the fight against discrimination, JO No. 267, 17 November 2001, p. 18311.

<sup>61</sup> After the general scope of the Villani report on the impact of artificial intelligence which mentions gender discrimination and a need for more transparency on recruitment and promotion procedures for men and women at work, Villani, C (2018) *Donner un sens à l'intelligence artificielle: pour une stratégie nationale et européenne*, (Giving meaning to artificial intelligence: for a national and European strategy) 8 September 2018, p. 171 available at [https://www.aiforhumanity.fr/pdfs/9782111457089\\_Rapport\\_Villani\\_accessible.pdf](https://www.aiforhumanity.fr/pdfs/9782111457089_Rapport_Villani_accessible.pdf); in terms of employment, other private studies of engineering schools have shown how recruitment selection, ranking of employees and evaluations use algorithms that ignore or increase the disadvantage of women by misrepresenting them; Telecom Paris Tech (2019), *Biais, discriminations et équité*, <https://www.telecom-paris.fr/wp-content-EvDsK19/uploads/2019/02/Algorithmes-Biais-discrimination-equite.pdf>; Defender of Rights and CNIL (joint report) (2020), *Algorithmes: prévenir l'automatisation des discriminations* (Algorithms: preventing the automation of discrimination), <https://www.defenseurdesdroits.fr/fr/rapports/2020/05/algorithmes-prevenir-lautomatisation-des-discriminations>.

<sup>62</sup> Age and sex are the foremost grounds of perceived discrimination in employment (15 %): Defender of Rights and ILO (2017) *10e Baromètre de la perception des discriminations dans l'emploi* (10th Barometer on the perception of discrimination in employment).

<sup>63</sup> Pecaut Rivoirier, L., Pons, D. (2016) *Les discriminations collectives en entreprise - Lutter contre les discriminations au travail: un défi collectif* (Collective discrimination in companies: Combating discrimination at work: a collective challenge), pp. 18-19, available at: <https://www.ladocumentationfrancaise.fr/var/storage/rapports-publics/134000863.pdf>.

treatment for female North African candidates.<sup>64</sup> Other general reports on discrimination on all grounds recognise formally the economic cost of violations of sex discrimination law, reflected as a loss of profit (3 to 14 % of GDP) and 'economic' sanctions linked to the gender pay gap<sup>65</sup> and its pervasiveness, for example, against single parent families headed by women, in access to housing.<sup>66</sup> Another report highlights systemic discrimination (expressly defined in relation to a segregated workforce)<sup>67</sup> to justify introducing collective action to litigate discrimination cases.<sup>68</sup> In the report, systemic discrimination is defined as:

'discrimination that derives from a system; in other words, an established order resulting from practices, voluntary or involuntary, neutral in appearance, but which produce pay disparities or differences in career paths between one category of workers and another. This systemic discrimination combines four factors: stereotypes and biases; segregation in the workplace affecting categories of employment; the devaluation of certain types of employment; a goal of short term economic efficiency. (...) It is not necessarily detected without an in-depth examination of situations by category.'

Systemic discrimination can result from intentional organised forms of subordination, for example against undocumented workers on construction sites, as was formally recognised in December 2019, in the French Employment Tribunal, with evidence produced in court by a sociologist studying this specific work environment and the input of the *amicus curiae* of the Defender of Rights also acknowledging the existence of systemic discrimination.<sup>69</sup>

A survey by the Defender of Rights with the ILO uncovered the intersectional dimension of gender discrimination and how the experience is more often linked to several grounds rather than gender alone.<sup>70</sup>

The more specific surveys and reports on gender equality flesh out the diversified nature of direct and indirect discrimination. They call for a broadening of the legal scope of direct discrimination through recognising the prevalence of sexism,<sup>71</sup> including that perpetrated

<sup>64</sup> L'Horty Y. (June 2016), *Les discriminations dans l'accès à l'emploi public Rapport au Premier Ministre* (Discrimination in access to public employment, Report to the Prime Minister), pp.4-5, available at [https://www.fonction-publique.gouv.fr/files/files/Espace\\_Presse/qirardin/Rapport\\_LHorty\\_final.pdf](https://www.fonction-publique.gouv.fr/files/files/Espace_Presse/qirardin/Rapport_LHorty_final.pdf).

<sup>65</sup> Bon-Maury G., Bruneau C., Dherbécourt C., Diallo A., Flamand J., Gilles C., Trannoy, A. (2016), *Le coût économique des discriminations* (The economic cost of discrimination), pp. 44-57, available at: [https://www.strategie.gouv.fr/sites/strategie.gouv.fr/files/atoms/files/19-09-2016\\_fs\\_rapport\\_cout\\_economique\\_des\\_discriminations\\_final\\_web\\_0.pdf](https://www.strategie.gouv.fr/sites/strategie.gouv.fr/files/atoms/files/19-09-2016_fs_rapport_cout_economique_des_discriminations_final_web_0.pdf).

<sup>66</sup> Defender of Rights (2017) *Enquête sur l'accès aux droits* (Survey on access to rights), p.31, available at: [https://juridique.defenseurdesdroits.fr/doc\\_num.php?explnum\\_id=16974](https://juridique.defenseurdesdroits.fr/doc_num.php?explnum_id=16974).

<sup>67</sup> Pecaut Rivolier, L., Pons, D. (2016), *Les discriminations collectives en entreprise - Lutter contre les discriminations au travail: un défi collectif* (Collective discrimination in companies: Combating discrimination at work: a collective challenge), pp. 27-28, available at: <https://www.ladocumentationfrancaise.fr/var/storage/rapports-publics/134000863.pdf>.

<sup>68</sup> Pecaut Rivolier, L. Pons, D. (2016), *Les discriminations collectives en entreprise - Lutter contre les discriminations au travail: un défi collectif* (Collective discrimination in companies: Combating discrimination at work: a collective challenge), p. 98, available at: <https://www.ladocumentationfrancaise.fr/var/storage/rapports-publics/134000863.pdf>.

<sup>69</sup> Conseil de prud'hommes Paris, 17 December 2019, No. 17/10051; see comments on the case in Mercat-Bruns, M.,(2020); 'A comparative study on collective redress in Romania, Norway and France: the challenges of strategic litigation', *European Equality Law Review* (forthcoming); Mercat-Bruns, M. (2020), 'The different forms of discrimination at work: what coherence?', (*Les différentes figures de la discrimination au travail: quelle cohérence ?*) *RDT* 2020, p. 25).

<sup>70</sup> Defender of Rights and ILO (2017) *10e Baromètre de la perception des discriminations dans l'emploi* (10th Barometer on the perception of discrimination in employment), p. 8.

<sup>71</sup> Bousquet, D., Vouillot, F., Collet, M., Oderda, M. (2019), Report of the High Council on Equality between women and men (2019), *Premier Etat des lieux du sexisme en France: lutter contre une tolérance qui persiste* (First evaluation of sexism in France: combating persistent tolerance), available at: <https://www.vie-publique.fr/sites/default/files/rapport/pdf/194000047.pdf>; Grésy, B., Becker, M. (2015), Report of the High Council on Equality in employment, *Rapport sur le sexisme dans le monde du travail: entre déni et réalités* (Sexism in the workplace: between denial and reality), available at: <https://femmes.gouv.fr/wp-content/uploads/2015/03/RAPPORT-CSEP-V7BAT.pdf>; last report of the High

against employees who have no managerial responsibilities,<sup>72</sup> and sexual harassment,<sup>73</sup> creating impetus for new rules that ban sexist conduct and generalise sanctions. The surveys and reports also expose more structural forms of gender inequalities. Reports indicate direct and indirect discrimination when analysing HR processes: explicit biases in discretionary professional evaluations as well as processes that seem neutral in appearance but are discriminatory in their effects.<sup>74</sup> One report focuses on the challenges of parenting and work-life balance.<sup>75</sup> Another one identifies the limited access for women to the right to training,<sup>76</sup> especially linked to part-time work<sup>77</sup> and some lingering barriers to the implementation of parity rules on executive boards.<sup>78</sup> One last report scrutinises the indirect discrimination in grading systems ingrained in collective bargaining agreements that devalue or ignore the skills linked to certain positions generally held by women, an effect that is enhanced by a sex-segregated workplace.<sup>79</sup>

A comprehensive report on homophobia in France was drafted by a French NGO in 2018.<sup>80</sup> In 2017 the NGO recorded an increase in the number of complaints of transphobia received: 51 % take the form of discrimination, 38 % concern insults and 13 % threats, and 8 % concern physical assaults, mostly by men.<sup>81</sup>

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- Council of Equality (2020), Evaluation of sexism at work in 2019, *Haut conseil de l'Égalité, Rapport annuel de l'Etat des lieux du sexisme au travail*, Etat [http://haut-conseil-egalite.gouv.fr/IMG/pdf/rapport\\_etat\\_des\\_lieux\\_du\\_sexisme\\_2019.pdf](http://haut-conseil-egalite.gouv.fr/IMG/pdf/rapport_etat_des_lieux_du_sexisme_2019.pdf).
- <sup>72</sup> 74 % of employees (non-managers), Survey of the High Council on Equality in Employment, *Les relations de travail entre les femmes et les hommes au sein de la population non-cadre* (Employment relations between women and men in non-managerial posts), available at: <https://www.egalite-femmes-hommes.gouv.fr/wp-content/uploads/2016/11/CONSULTATION-2016-CSEP-BVA-Sexisme-chez-les-non-cadres-presentation-globale-Novembre-2016.pdf>.
- <sup>73</sup> In 2014, 20 % of working women declare having been sexually harassed during their career and 20 % of French people say they know at least one person who has been a victim of sexual harassment at work, Defender of Rights (2014), *Survey on harassment at work*, available at [https://www.defenseurdesdroits.fr/sites/default/files/atoms/files/ddd\\_etu\\_20140301\\_harcelement\\_sexuel\\_synthese\\_0.pdf](https://www.defenseurdesdroits.fr/sites/default/files/atoms/files/ddd_etu_20140301_harcelement_sexuel_synthese_0.pdf).
- <sup>74</sup> Grésy, B., Lebert, S. (2019), *Égalité entre les femmes et les hommes dans les procédures RH: Le réflexe égalité à chaque étape* (Equality between women and men in HR processes: the equality reflex at each stage), available at: <https://www.egalite-femmes-hommes.gouv.fr/wp-content/uploads/2019/03/Version-finale-RAPPORT-Egalite-dans-les-procedures-RH.pdf>. See also how forms of intentional indirect discrimination can be uncovered by the Court of Cassation, Mercat-Bruno, M. (2019), 'Indirect Discrimination in Employment in France: a relative success?', in Havelkova B., Möschel M., *Anti-Discrimination Law in Civil Law Jurisdictions*, Oxford University Press, p. 244.
- <sup>75</sup> Grésy, B., Amouzou, A. (2019), *Enquête sur la prise en compte de la parentalité au travail* (Survey on how parenting is considered in the workplace), available at: <https://www.egalite-femmes-hommes.gouv.fr/wp-content/uploads/2019/02/Prendre-en-compte-la-parentalite-au-travail-Presentation-des-resultats-du-22-fevrier-2019.pdf>.
- <sup>76</sup> Smadja, C. (2018), *Note du CSEP sur le bilan de la prise en compte de l'égalité dans la formation professionnelle* (Summary report from the High Council on Equality in Employment on equality in professional development), available at: <https://www.egalite-femmes-hommes.gouv.fr/wp-content/uploads/2018/05/Note-CSEP-sur-bilan-de-la-prise-en-compte-de-legalite-dans-la-formation-professionnelle.pdf>.
- <sup>77</sup> Smadja, C. (2018), *Note du CSEP sur le bilan de la prise en compte de l'égalité dans la formation professionnelle* (Summary report from the High Council on Equality in Employment on equality in professional development), p. 7.
- <sup>78</sup> Bousquet, D., Grésy, B. (2016) *La part des femmes dans les conseils d'administration et de surveillance* (The proportion of women on executive boards), available at: [https://www.egalite-femmes-hommes.gouv.fr/wp-content/uploads/2016/02/hcefh\\_rapport\\_parite\\_eco\\_20160115-par-0191.pdf](https://www.egalite-femmes-hommes.gouv.fr/wp-content/uploads/2016/02/hcefh_rapport_parite_eco_20160115-par-0191.pdf).
- <sup>79</sup> Grésy B., Becker M. (2017), for the High Council for Equality in Employment *Guide fondé sur la méthodologie issue des travaux du groupe paritaire sur les classifications* (Guide based on the methodology derived from study groups on the promotion of equality in grading systems within collective bargaining), available at: [https://www.egalite-femmes-hommes.gouv.fr/wp-content/uploads/2017/05/GUIDE\\_EGALITE\\_SYSTEMES\\_DE\\_CLASSIFICATIONS-V2.pdf](https://www.egalite-femmes-hommes.gouv.fr/wp-content/uploads/2017/05/GUIDE_EGALITE_SYSTEMES_DE_CLASSIFICATIONS-V2.pdf); see also Briard, K. (DARES, Department of research, studies and statistics), Job Segregation between women and men: links with part time work?, (*Ségrégation professionnelle entre les femmes et les hommes: quels liens avec le temps partiel ?* Doc. No. 234 July 2019 [https://dares.travail-emploi.gouv.fr/IMG/pdf/dares\\_etudes\\_segregation\\_professionnelle\\_femmes\\_hommes\\_temps\\_partiel.pdf](https://dares.travail-emploi.gouv.fr/IMG/pdf/dares_etudes_segregation_professionnelle_femmes_hommes_temps_partiel.pdf)).
- <sup>80</sup> SOS Homophobie (2018), *Rapport sur l'homophobie* (Report on homophobia), available at: [https://www.sos-homophobie.org/sites/default/files/rapport\\_annuel\\_2018.pdf](https://www.sos-homophobie.org/sites/default/files/rapport_annuel_2018.pdf).
- <sup>81</sup> SOS Homophobie (2018), *Rapport sur l'homophobie* (Report on homophobia), p. 46.

### 3.1.2 Other issues

Other issues that have been at the forefront of national studies and discussions on equality concern reproductive rights and obstetric violence,<sup>82</sup> the legislative reform on sexual violence pertaining to the issue of rape and sexual consent by minors,<sup>83</sup> continued sexual violence against women after the #metoo movement and exposure through social media<sup>84</sup> and the evaluation of persistent inequalities between women and men in the field of art and culture.<sup>85</sup> In the midst of discussions on the pending pension reform, which are currently at a standstill because of the health crisis, there have been several Government reports that pay attention to the plight of older women. The Pensions Advisory Council (Conseil d'orientation des retraites) recently pointed out the current wage inequalities between men and women, which affect the amount of pension awarded at the end of a woman's career regardless of the pension scheme.<sup>86</sup> Moreover a report on pensions in the civil service explained how reforms have progressively taken away gendered service credits for women after the *Griesmar* and *Leone* EU cases, whereas in the past the *Quintanel* French case accepted compensation measures.<sup>87</sup>

### 3.1.3 General overview of national acts

The Labour Code has a specific section on anti-discrimination covered by Articles L.1131-1 to L.1134-4. It does not define direct and indirect discrimination but refers back to Act No. 2008-496 of 27 May 2008, implementing the various directives on discrimination, which defines these concepts as applicable in public and private law.

Other articles, amended by a series of acts on equality between women and men since the Roudy Act of 1983, L.1141-1 to L.1144-3 of the Labour Code, concern specifically a contextual notion of equality between men and women in employment and describe situations which give rise to sex discrimination, including mentioning the ground of sex in job advertisements and recruitment processes or taking into account pregnancy in any decision pertaining to employment.

Articles L.1225-1 to L.1225-72 of the Labour Code cover positive measures to protect pregnancy, maternity and paternity leave and have been enhanced by Act No. 2014-873 of 4 August 2014, on real equality between men and women. This act gives a more substantive view of equality by adopting a gender mainstreaming perspective, for example, in employment, self-employment and domestic life by preventing violence or promoting gender diversity (*mixité*), as well as extending parity rules. It consists of, 'systematically taking into consideration the differences in situations between women and men in all policies and public programmes and providing,

<sup>82</sup> See reports of the High Council on Equality between women and men, available at: [https://www.haut-conseil-egalite.gouv.fr/IMG/pdf/guide\\_pour\\_une\\_communication\\_publicque\\_sans\\_stereotype\\_de\\_sexe\\_vf\\_2\\_016\\_11\\_02.compressed-3.pdf](https://www.haut-conseil-egalite.gouv.fr/IMG/pdf/guide_pour_une_communication_publicque_sans_stereotype_de_sexe_vf_2_016_11_02.compressed-3.pdf).

<sup>83</sup> Opinion given by the Council of State (*Conseil d'Etat*) on 21 March 2018, which influenced the new Act No. 2018-703 of 3 August 2018 reinforcing the fight against sexual and sexist violence. The opinion advised against a presumption of non-consent to sex by young people under the age of 15 on the basis of the presumption of innocence, favouring easier fact-finding in cases of sexual assault: 'when the sexual assault is committed against a person who is a minor of 15 years old, what characterises coercion or surprise is the abuse of the vulnerability of the victim who does not have the required discernment for these acts' (Article 222-22-1 of the Criminal Code), <https://www.conseil-etat.fr/ressources/avis-aux-pouvoirs-publics/derniers-avis-publies/projet-de-loi-renforcant-la-lutte-contre-les-violences-sexuelles-et-sexistes-commises-contre-les-mineurs-et-les-majeurs>.

<sup>84</sup> See discussion on the limited impact on continued sexual violence against women one year after the #metoo movement in France, <http://www.haut-conseil-egalite.gouv.fr/violences-de-genre/actualites/article/cp-un-an-apres-metoo-la-lutte-contre-les-violences-sexistes-et-sexuelles-doit>.

<sup>85</sup> See report by the High Council on persistent stereotypes in the field of French art and culture, <http://www.haut-conseil-egalite.gouv.fr/stereotypes-et-roles-sociaux/travaux-du-hcefh/article/egalite-dans-la-culture-le-temps-de-l-action#top#t1>.

<sup>86</sup> Pensions Advisory Council (COR) (2019), Secretary, The inequalities between women and men during employment and at retirement, [https://www.cor-retraites.fr/sites/default/files/2019-12/2019\\_12\\_02\\_FNR.pdf](https://www.cor-retraites.fr/sites/default/files/2019-12/2019_12_02_FNR.pdf).

<sup>87</sup> Report on pensions in the civil service, <https://www.budget.gouv.fr/documentation/file-download/4131>.

if necessary, targeted actions to correct inequalities'.<sup>88</sup> Without defining positive action, the concept of parity, as the balanced representation of women and men,<sup>89</sup> beyond equality, is central to Act No. 2011-103 of 27 January 2011, relating to a balanced participation between men and women on company boards in the private sector, and Act No. 2012-347 of 12 March 2012, on access to the civil service and improvement of conditions of employment for contractual employees in the civil service and combating discrimination.<sup>90</sup>

Articles L.1151-1 to L.1155-4 of the Labour Code concern concepts of harassment and sexual harassment. The latter is defined broadly since Act No. 2012-954 of 6 August 2012 on sexual harassment and equality law now also includes sexist acts (*agissements sexistes*), according to Act No. 2015-994 of 17 August 2015 and reinforced by Act No. 2018-703 of 3 August 2018 strengthening the fight against sexual and sexist violence.

Articles L.3221-1 to L.3222-2 of the Labour Code concerning equal pay between women and men, which were first amended by Act No. 2006-340 of 23 March 2006, now offer a more quantitative standard of compliance, through pay gap indicators and correcting measures following Act No. 2018-771 of 5 September 2018 on the individual's freedom to choose their future professional life.

The most recent legislation covers the most intimate sphere of domestic life, increasing prevention mechanisms to avoid domestic violence. The Act of 28 December 2019 to combat violence in the family was introduced on 3 December 2019 to introduce even more protective measures for victims including increasing sanctions for harassment.<sup>91</sup> There is now financial support and easier access to a family 'care' leave.<sup>92</sup> A bill was introduced in 2019 for paid bereavement leave for families who have lost a child, which was finally adopted in the Senate in 2020.<sup>93</sup> In terms of more pending legislation, the proposed plan introduced in 2019 to reform and harmonise the pension system has sparked major protests<sup>94</sup> as well as debates over its disparate impact on women.<sup>95</sup> It has been suspended until further notice because of the 2020 Covid-19 crisis.

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<sup>88</sup> Secrétariat d'Etat chargé de l'égalité entre les femmes et les hommes (2017), *Vers l'égalité réelle entre les femmes et les hommes: Chiffres clés 2017* (Towards real equality between women and men: key figures 2017), p. 4, available at: [https://www.egalite-femmes-hommes.gouv.fr/wp-content/uploads/2017/03/Chiffres-cles-2017\\_PDF-pour-mise-en-ligne.pdf](https://www.egalite-femmes-hommes.gouv.fr/wp-content/uploads/2017/03/Chiffres-cles-2017_PDF-pour-mise-en-ligne.pdf).

<sup>89</sup> The Constitutional law of 8 July 1999 completed Article 3 of the Constitution and describes parity not as preferential treatment for women only, but as balanced representation: 'The law favours equal access for women and men to elected offices and posts'.

<sup>90</sup> For appointments to the top management positions of the public sector, there must be a 40 % representation of each sex.

<sup>91</sup> Awaiting final version of bill first passed at the Assembly, [http://www.assemblee-nationale.fr/dyn/15/textes/l15b2478\\_proposition-loi](http://www.assemblee-nationale.fr/dyn/15/textes/l15b2478_proposition-loi); the new measures to protect women victims of violence adopted by the Assembly in 2020, [http://www.assemblee-nationale.fr/dyn/15/textes/l15t0390\\_texte-adopte-seance](http://www.assemblee-nationale.fr/dyn/15/textes/l15t0390_texte-adopte-seance) just adopted unanimously by the Senate, <https://www.senat.fr/petite-loi-ameli/2019-2020/483.html>; [https://www.lemonde.fr/societe/article/2020/06/10/une-proposition-de-loi-destinee-protoger-les-victimes-de-violences-conjugales-adoptee-au-senat\\_6042318\\_3224.html](https://www.lemonde.fr/societe/article/2020/06/10/une-proposition-de-loi-destinee-protoger-les-victimes-de-violences-conjugales-adoptee-au-senat_6042318_3224.html): provisions include a right given to doctors to inform authorities of an immediate danger to the victim 'under influence' prevailing over the medical confidentiality rule, increased sanctions for harassment if possible threat of victim's suicide, banning geolocating of victims without their consent and for cyberviolence through recurring messages to victims.

<sup>92</sup> Act No. 2019-1446 of 24 December 2019 on social security financing of benefit for persons caring for a parent or loved one (*LOI n° 2019-1446 du 24 décembre 2019 de financement de la sécurité sociale pour 2020*), Articles 68 and 69.

<sup>93</sup> Amended Bill No. 2729 to improve the rights of workers and support to families after the loss of a child; the bill has been adopted by the Senate and the final version is being compiled, (*Proposition de loi, modifiée par le Sénat, visant à améliorer les droits des travailleurs et l'accompagnement des familles après le décès d'un enfant, n° 2729 rectifié*), 3 March 2020, [http://www.assemblee-nationale.fr/dyn/15/dossiers/conge\\_de\\_deuil\\_enfant\\_mineur](http://www.assemblee-nationale.fr/dyn/15/dossiers/conge_de_deuil_enfant_mineur).

<sup>94</sup> Bringing the economy almost to a halt at the end of the year 2019 in Paris because of strikes in the transportation system, [https://www.lemonde.fr/politique/article/2019/12/12/la-mobilisation-contre-la-reforme-des-retraites-entre-dans-sa-deuxieme-semaine\\_6022637\\_823448.html](https://www.lemonde.fr/politique/article/2019/12/12/la-mobilisation-contre-la-reforme-des-retraites-entre-dans-sa-deuxieme-semaine_6022637_823448.html).

<sup>95</sup> Pensions Advisory Council (COR) (2019) *The inequalities between women and men during employment and at retirement*, <https://www.cor-retraites.fr/sites/default/files/2019-06/doc-4404.pdf>.

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

Since 2016, interministerial plans for equality have been launched to ensure the effectiveness of rights. One of them pertains to employment equality (2016-2020)<sup>96</sup> and was developed with the Secretariat of State in charge of equality in coordination with public authorities, employers, social partners, NGOs and families. This plan follows the strategic goal of ensuring equality in employment both in terms of equal pay, job desegregation, work life balance and information on these rights (in other words soft and hard rules).

In 2018, in the wake of the #metoo movement,<sup>97</sup> the political and societal debate has focused on sexual violence and sexism. Since 2017 and the President's plan for equality as a national cause,<sup>98</sup> the goal is to foster both 'equality of rights' and 'equality in practice'. Priority is given to compliance to monitor and correct the gender pay gap and develop internal rules to prevent sexual harassment. The most significant changes in legislation focus on promoting equality, gender diversity and combating the gender pay gap in the public sector through the current reform of the civil service. Both the Act of 5 September 2018 in the private sector and its 2019 decree for specific provisions on implementation<sup>99</sup> and the Act of 6 August 2019 on the transformation of the civil service introduce provisions on equality as legislative implementations of this Presidential plan.<sup>100</sup>

## 3.2 Sex/gender/transgender

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

Sex is the ground of classification between men and women which is typically distinguished by the presence of the y chromosome in male cells and its absence in female cells. This is considered a 'biological' definition of sex which is put into question by the issue of intersexuality.

Gender is the socially constructed difference between men and women who conform to specific social roles depending on their sex.

The relationship between gender and sex is defined only indirectly in a law of 2016 introducing the three requirements for a sex change in the civil register:<sup>101</sup> 1) The individual presents themselves publicly as being of the invoked sex; 2) the individual is known by their circle (family, friends and colleagues) as a member of the sex; 3) The individual has changed their first name (to one which corresponds to the preferred sex).

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<sup>96</sup> *Plan interministériel en faveur de l'égalité professionnelle entre les femmes et les hommes 2016-2020* (Interministerial plan for professional equality between women and men 2016-2020), available at: <https://www.egalite-femmes-hommes.gouv.fr/wp-content/uploads/2017/04/Plan-interministeriel-en-faveur-de-l%E2%80%99egalite-professionnelle-entre-les-femmes-et-les-hommes-PIEP-revu13042017.pdf>.

<sup>97</sup> With its French equivalent (*#squealonyourpig*).

<sup>98</sup> <https://grande-cause-quinquennat.gouv.fr/>.

<sup>99</sup> Decree No. 2019-15 of 8 January 2019 implementing the provisions to eliminate the gender pay gap between women and men in companies and pertaining to the fight against sexual violence and sexism at work.

<sup>100</sup> Act No. 2019-828 6 August 2019 on the transformation of the civil service, Article 80 (*LOI n° 2019-828 du 6 août 2019 de transformation de la fonction publique*) See comments on provisions: alert given to a contact person in case of sexual harassment and sexist conduct is also introduced in the public sector and similar pay gap indicators as in the private sector are required with the new reform of the civil service), Bill presented to the Council of Ministers on 23 March 2019, (*Projet de loi sur la transformation de la fonction publique*) <https://www.vie-publique.fr/actualite/panorama/texte-discussion/projet-loi-transformation-fonction-publique.html> (Article 80 introduces specifically the Article 6 quater amending the Act of 1983 on civil servants, adopted since then). Subsequent decrees: Decree No. 2020-528 of 4 May 2020 defining the conditions to create and implement plans of action for professional equality in the civil service; Decree No. 2020-529 of 5 May 2020 amending the provisions on parental leave for civil servants and their time for childrearing.

<sup>101</sup> Act No. 2016-1547 of 18 November 2016 on the modernisation of justice in the 21st century, Article 61-5.

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

Discrimination based on gender identity is protected by Act No. 2016-1547 of 18 November 2016, on Modernisation of Justice in the 21st Century<sup>102</sup> in the Labour and Criminal Codes; it replaces the term sexual identity introduced in the legislation on sexual harassment in 2012. Act No. 2017-86 of 27 January 2017 on equality and citizenship<sup>103</sup> reinforces the sanctions in case of discrimination and insults against persons based on gender identity. This act does not specify whether the term gender identity covers the full spectrum (transgender, intersex and non-binary). However the decision of the Constitutional Council defines gender identity relatively broadly as any disparity between self-identification as belonging to 'a gender which is or is not the registered sex or corresponds or does not correspond to the different expressions of membership of the male sex or female sex'.<sup>104</sup> A decision of the Court of Cassation denied the existence of a gender neutral identity on appeal from a district civil court that had authorised the neutral sex as a civil registration in the case of an intersex person. The Court considered that, 'French law does not allow the introduction of another sex outside of male and female in the civil register'.<sup>105</sup> This case tends to implicitly signify that non-binary people are not yet recognised as a category in law.

Before discrimination based on gender identity or sexual identity was banned by law, in a decision concerning gender reassignment discrimination (a worker was dismissed immediately after he informed his employer of his intention to undergo gender reassignment surgery), the Equal Opportunities and Anti-Discrimination Commission (*Haute autorité de lutte contre les discriminations et pour l'égalité* – HALDE) (now the Defender of Rights), referring to Directive 2006/54/EC and to its Recital 3, stated that discrimination based on gender reassignment is discrimination on the ground of sex and should be prohibited (deliberation No. 2008-29 of 18 February 2008).<sup>106</sup> The Defender of Rights also issued a recommendation, taking into account discrimination based on gender reassignment, to influence the adoption of the law of 2016 amending and simplifying the procedure for individuals to change their name in cases of gender reassignment.<sup>107</sup>

The Cour de cassation has, for the first time, approved the application of criminal sanctions in a case of 'gender identity discrimination', following a law enacted in 2017 that reinforced the sanctions for transgender discrimination was introduced. A public official was convicted for writing on his Twitter account that he pitied 'these poor trans-people wanting to change sexes who are perverted, mentally sick and need to see a psychiatrist'. The Court confirmed that the reference to 'perversion' is, in itself, an 'insult' to a group based on their gender identity.<sup>108</sup>

The still pending reform on bioethics, (the bill was introduced in 2019),<sup>109</sup> which seeks to recognise the right to parenting through in vitro fertilisation of lesbian couples, does not

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<sup>102</sup> Act No. 2016-1547 on modernisation of justice in the 21st century of 18 November 2016 (*Loi de modernisation de la justice du XXI<sup>e</sup> siècle*), available at:

<https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000033418805&categorieLien=id>.

<sup>103</sup> Act No. 2017-86 of 27 January 2017 on equality and citizenship (*LOI n° 2017-86 du 27 janvier 2017 relative à l'égalité et à la citoyenneté*), available at:

<https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000033934948&categorieLien=id>.

<sup>104</sup> Constitutional Council (*Conseil Constitutionnel*) Décision No. 2016-745 DC of 26 January 2017, available at <https://www.conseil-constitutionnel.fr/decision/2017/2016745DC.htm>.

<sup>105</sup> Court of Cassation (First Chamber), (*Cour de Cassation*) No. 16-17189, 4 May 2017

[https://www.courdecassation.fr/communiqués\\_4309/etat\\_civil\\_36682.html](https://www.courdecassation.fr/communiqués_4309/etat_civil_36682.html).

<sup>106</sup> Haute Autorité de lutte contre les discriminations et pour l'égalité (HALDE) (Equal Opportunities and Anti-Discrimination Commission), decision of 18 February 2008, available at:

[https://juridique.defenseurdesdroits.fr/index.php?lvl=notice\\_display&id=890](https://juridique.defenseurdesdroits.fr/index.php?lvl=notice_display&id=890).

<sup>107</sup> Defender of Rights, Decisions of 24 June 2016, available at:

[https://www.defenseurdesdroits.fr/sites/default/files/atoms/files/decision\\_cadre\\_mld-msp-2016-164.pdf](https://www.defenseurdesdroits.fr/sites/default/files/atoms/files/decision_cadre_mld-msp-2016-164.pdf).

<sup>108</sup> Court of Cassation (*Cour de Cassation*) No. 19-80.796, 7 Janvier 2020.

<sup>109</sup> [http://www.assemblee-nationale.fr/dyn/15/dossiers/bioethique\\_2](http://www.assemblee-nationale.fr/dyn/15/dossiers/bioethique_2).

apply to female to male transgender persons who have changed sexes but still have a female reproductive system.<sup>110</sup>

### 3.2.3 Specific requirements

Since discrimination based on gender identity is considered as a difference in treatment based on the disparity between 'the gender which is or is not the registered sex or corresponds or does not correspond to the different expressions of membership of the male sex or female sex', this protects all individuals regardless of their particular stage in transitioning, according to the above-mentioned Decision of the Constitutional Council on gender identity.<sup>111</sup> The Act of 2016 also confirms this interpretation, disregarding sterilisation surgery since it is not a condition for changing sex in the civil register.<sup>112</sup>

## 3.3 Direct sex discrimination

### 3.3.1 Explicit prohibition

Article 1 of Act No. 2008-496 of 27 May 2008<sup>113</sup> defines direct discrimination in accordance with the European definition. The Act applies to public and private relationships. According to this Act, there is direct discrimination where one person is, has been or will be treated less favourably than another on the grounds of sex. The only difference between the French and the European definition is the use of 'will be' and not 'would be.' There is no hypothetical comparator. However, this difference does not seem to be significant: the Courts interpret the French definition in compliance with its European counterpart and French judges find the existence of discrimination even with no comparator. For example, if the judge finds that a decision has been taken for discriminatory reasons – such as an advantage like a bonus or a leave not granted to a woman on grounds of her sex – and there are no men in the company who can be used as comparators, this does not represent an obstacle to a finding of discrimination.

Unfortunately, the definition itself has not been integrated into the Labour Code, which refers to the law of 2008 in Article L.1132-1, and this could damage its visibility.<sup>114</sup>

### 3.3.2 Prohibition of pregnancy and maternity discrimination

Article L.1132-1 of the Labour Code explicitly prohibits discrimination on the grounds of pregnancy. Specific provisions of the Labour Code also prohibit this type of discrimination in Articles L.1225-1 and L.1225-2.<sup>115</sup> These provisions comply with Article 2(2)(c) of Directive 2006/54/EC.

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<sup>110</sup> The amendment was rejected in front of the National Assembly, [https://www.francetvinfo.fr/societe/loi-de-bioethique/bioethique-l-assemblee-rejette-la-pma-pour-les-hommes-transgenres\\_3633415.html](https://www.francetvinfo.fr/societe/loi-de-bioethique/bioethique-l-assemblee-rejette-la-pma-pour-les-hommes-transgenres_3633415.html).

<sup>111</sup> Constitutional Council (*Conseil Constitutionnel*) Decision No. 2016-745 DC of 26 January 2017, available at: <https://www.conseil-constitutionnel.fr/decision/2017/2016745DC.htm>.

<sup>112</sup> Act No. 2016-1547 on modernisation of justice in the 21st century of 18 November 2016 (*Loi de modernisation de la justice du XXIe siècle*) Article 61-5: To change sex in the civil register, the individual must prove by any means that: 1) The individual presents themselves publicly as being of the invoked sex; 2) the individual is known by their circle (family, friends and colleagues) as a member of that sex; 3) the individual has changed their first name (to one which corresponds to the sex they identify with).

<sup>113</sup> Act No. 2008-496 of 27 May 2008 implementing the various directives on discrimination (*LOI n° 2008-496 du 27 mai 2008 portant diverses dispositions d'adaptation au droit communautaire dans le domaine de la lutte contre les discriminations*), available at: <https://www.legifrance.gouv.fr/affichTexteArticle.do?cidTexte=JORFTEXT000018877783&idArticle=LEGIART1000034110511&dateTexte=&categorieLien=id>.

<sup>114</sup> Article last amended in Law No. 2017-256 of 28 February 2017 on real equality in overseas territories in social and economic matters (*Loi de programmation relative à l'égalité réelle outre-mer et portant autres dispositions en matière sociale et économique*).

<sup>115</sup> Executive Order (*Ordonnance*) No. 2007-329 of 12 March 2007, available at: <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000465978&dateTexte=20080122>.

Article 81 of the new Act No. 2019-828 on the transformation of public service amended Article 6 of the Act of 13 July 1983 on civil service<sup>116</sup> to include pregnancy as a prohibited ground of discrimination in the public employment sector.

### 3.3.3 Specific difficulties

The definition of direct discrimination itself has not been integrated into the Labour Code which only refers, in Article L.1132-1, to the Act of 2008 which defines it<sup>117</sup> and this could limit its visibility for citizens in terms of access to justice and in this way limit the effectiveness of conformity with EU law.

Recently, there have been new cases on maternity discrimination linked to economic lay-offs. One, after an investigation and an amicus curiae of the Defender of Rights, a Court of Appeals recognized a case of maternity discrimination concealed after a pretextual unwanted job transfer to another company within a corporation for supposedly economic reasons: so the issue in question was the unjustified economic lay off of an employee, following her maternity leave and the period of time which bans firing after her return to work.<sup>118</sup> In another similar case, the Court of Cassation case<sup>119</sup> denounced a new way to hide pregnancy discrimination when a pregnant woman was laid off after she refused to change job following the conclusion of a collective bargaining agreement that imposed job transfers on workers from one branch of the company with lower levels of activity to another more flourishing branch. There is an exception to the protection against dismissal of pregnant workers if the worker has committed a 'serious faulty act or if it is impossible for the employer to maintain the contract'.<sup>120</sup> The Court of Cassation considered that the refusal of the pregnant employee to change jobs did not constitute a situation in which it was impossible to preserve the contract.<sup>121</sup>

This case law development might highlight new ways employers use collective bargaining agreements on worker mobility to circumvent protection against pregnancy discrimination and how the French courts are resisting these prohibited, but more subtle, collective practices.<sup>122</sup>

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<sup>116</sup> Law No. 83-634 of 13 July 1983 on rights and obligations of civil servants (*Loi n° 83-634 du 13 juillet 1983 portant droits et obligations des fonctionnaires. Loi dite loi Le Pors*).

<sup>117</sup> Article 1 of Act No. 2008-496 of 27 May 2008 implementing the various directives on discrimination, (*LOI n° 2008-496 du 27 mai 2008 portant diverses dispositions d'adaptation au droit communautaire dans le domaine de la lutte contre les discriminations*), available at: <https://www.legifrance.gouv.fr/affichTexteArticle.do?cidTexte=JORFTEXT000018877783&idArticle=LEGIART1000034110511&dateTexte=&categorieLien=id>.

<sup>118</sup> Court of Appeal of Paris 19 June 2019 No. 17/08690, [https://juridique.defenseurdesdroits.fr/doc\\_num.php?explnum\\_id=18999](https://juridique.defenseurdesdroits.fr/doc_num.php?explnum_id=18999).

<sup>119</sup> Court of Cassation No. 18-19.189 4 March 2020, [https://www.courdecassation.fr/jurisprudence\\_2/arrets\\_publics\\_2986/chambre\\_sociale\\_3168/2020\\_9595/mars\\_9683/265\\_04\\_44578.html](https://www.courdecassation.fr/jurisprudence_2/arrets_publics_2986/chambre_sociale_3168/2020_9595/mars_9683/265_04_44578.html).

<sup>120</sup> Labour Code Article L.1225-4: economic reasons are not necessarily a justification for the impossibility to maintain the contract (Court of Cassation 31 October 1996 *Revue Jurisprudence Sociale* 1996, p. 55).

<sup>121</sup> Court of Cassation No. 18-19.189 4 March 2020.

<sup>122</sup> See Mouly, R. (2020), 'Protection de la femme enceinte versus accord de mobilité interne', *Droit social* 2020, p. 565.

### 3.4 Indirect sex discrimination

#### 3.4.1 Explicit prohibition

Article 1 of the Act adopted on 27 May 2008<sup>123</sup> defines indirect discrimination in accordance with the European definition and the Labour Code refers back to the 2008 law.<sup>124</sup> Under this Act, the following constitutes indirect discrimination: 'a provision, a criterion or a practice which is apparently neutral, but which could disadvantage a person on the grounds of sex (and other prohibited criteria) compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary'. The French definition is similar to the European one.

#### 3.4.2 Statistical evidence

Until 2012, there had been very few cases on indirect sex discrimination. Statistical evidence can be used and is sometimes used in order to establish a presumption of indirect sex discrimination. This was done, for example, in a case decided by the Court of Cassation on 3 July 2012,<sup>125</sup> where the French Supreme Court noted that, in the company in question, the percentage of women working part time was about 81.45 %, while only 40 % of men were working part time. Of course, in this case, statistical evidence on part-time work was not difficult to establish. In 2019, the Court of Cassation mentioned numbers in a case on indirect sex discrimination. The Court of Cassation struck down a decision of the Court of Appeal of Lyon that should have considered whether, since a considerably higher number of women than men take parental leave, the employer's decision in violation of the Labour Code to refuse to re-employ a female worker in her initial position after her parental leave, giving her administrative tasks, constituted indirect discrimination based on sex and if so, if it could be objectively justified. The Court's decision enhances the role of prosecuting indirect discrimination to smoke out discriminatory practices embedded in recurring practices that violate Labour Code rules to protect workers - mostly women who choose to go on parental leave - without requiring specific statistics on the number of women affected.<sup>126</sup>

In light of the *Praxair* C-486/18 case of 8 May 2019 (a preliminary ruling requested by the Court of Cassation 11 July 2018), the Court of Cassation has decided<sup>127</sup> that Article 157 TFEU must be interpreted as precluding Articles L.3123-13 and R.1233-32 of the French Labour Code. According to the CJEU ruling, Article 157 TFEU precludes legislation

'which provides that, where a worker employed full-time and for an indefinite duration is dismissed at the time he is on part-time parental leave, that worker receives a compensation payment for dismissal and a redeployment leave allowance determined at least in part on the basis of the reduced salary being received when the dismissal takes place, in circumstances when a far greater number of women

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<sup>123</sup> Act No. 2008-496 of 27 May 2008 implementing the various directives on discrimination (*LOI n° 2008-496 du 27 mai 2008 portant diverses dispositions d'adaptation au droit communautaire dans le domaine de la lutte contre les discriminations*): <https://www.legifrance.gouv.fr/affichTexteArticle.do?cidTexte=JORFTEXT000018877783&idArticle=LEGIART1000034110511&dateTexte=&categorieLien=id>.

<sup>124</sup> Article 1132-1 refers to Article 1 of Act No. 2008-496 of 27 May 2008 implementing the various directives on discrimination: <https://www.legifrance.gouv.fr/affichTexteArticle.do?cidTexte=JORFTEXT000018877783&idArticle=LEGIART1000034110511&dateTexte=&categorieLien=id>.

<sup>125</sup> Court of Cassation, 3 July 2012, available at: <https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000026157202&fastReqId=1001547528&fastPos=1>.

<sup>126</sup> Court of Cassation, Social chamber, 14 November 2019 No. 18-15682, [https://www.courdecassation.fr/jurisprudence\\_2/arrets\\_publics\\_2986/chambre\\_sociale\\_3168/2019\\_9139/n\\_ovembre\\_9548/1567\\_14\\_43913.html](https://www.courdecassation.fr/jurisprudence_2/arrets_publics_2986/chambre_sociale_3168/2019_9139/n_ovembre_9548/1567_14_43913.html).

<sup>127</sup> Court of Cassation No. 16-27825, 18 March 2020.

than men choose to take part-time parental leave and when that difference in treatment which results therefrom cannot be explained by objective factors unrelated to any sex discrimination.<sup>128</sup>

### 3.4.3 Application of the objective justification test

There is little case law relating to indirect discrimination, therefore it is difficult to analyse how judges apply the objective justification test. It seems that they are applying it correctly.<sup>129</sup>

More recently, after taking into account observations of the Defender of Rights,<sup>130</sup> the Court of Appeal of Paris rejected a justification of indirect discrimination based on a right to a service credit for a pension based on childrearing.<sup>131</sup> The Court decided that there was indirect sex discrimination in a case where a company did not justify objectively why it limited the duration of an early retirement scheme with subsequent limitation of contribution to pension benefits for a female employee who could be entitled to a service credit to benefit from an earlier pension for childrearing, still applicable only to women at the time.<sup>132</sup> The Court recognised that, without an objective justification to impose the application of the service credit, the company's practice disproportionately disadvantaged women, limiting their access to the early retirement plan and amount of related subsequent pension benefit. The company's justification was based essentially on an erroneous perception that it was required to apply the service credit under the law when this was not a condition to benefit from the early retirement scheme. In the 2019 case concerning indirect sex discrimination based on parental leave, the Court of Cassation inquired whether the court of appeal had applied the objective justification test.<sup>133</sup>

However, the interpretation by the Council of State may be questioned when dealing with pension rights. Following the CJEU decision in July 2014 (Case C-173/13 *Leone and Leone*), the Council of State reached an unexpected decision (27 March 2015, *Quintanel*, No. 372426). As in the *Leone* case, the decision concerned a service credit, which is determined over four quarters and awarded for the calculation of the pension of any civil servant, for each child born or adopted prior to 1 January 2004, or fostered before that date and nurtured for at least nine years, provided that the civil servant can demonstrate that he or she has taken a career break for a continuous period of at least two months, in the form of maternity leave, adoption leave, parental leave, parental care leave or leave in order to be available to bring up a child of less than eight years of age.<sup>134</sup>

The Council of State used the same terms as the CJEU and stated that, if the CJEU could provide guidance to enable the national court to give a judgment, it is exclusively for the national judge to determine whether and to what extent the national provisions could be justified by a legitimate social policy. The Council of State then proceeded to analyse the justification for and the proportionality of the measure at stake. The French Government considered that the scheme reflected a legitimate aim, as the purpose of the service credit in question was to compensate for the career-related disadvantages resulting from career breaks for reasons of birth, the arrival of an adoptive child in the home, or the raising of children. The CJEU rejected this argument, notably because maternity and adoption leave are accompanied by the maintenance of acquired pension and promotion rights. However,

<sup>128</sup> Judgment of 8 May 2019, *Praxair* C-486/18, ECLI:EU:C:2019:379, 88.2.

<sup>129</sup> See, for example, Court of Cassation, Social chamber, 3 July 2012, No. 10-23013 and Court of Cassation, Social chamber, 6 June 2012, No. 10-21489.

<sup>130</sup> Defender of Rights, Decision No. 2018-030, 5 February 2018, available at: [https://juridique.defenseurdesdroits.fr/doc\\_num.php?explnum\\_id=17242](https://juridique.defenseurdesdroits.fr/doc_num.php?explnum_id=17242).

<sup>131</sup> Court of Appeal of Paris, No. 17/02708, *Cour d'appel de Paris*, 12 February 2019.

<sup>132</sup> Article L.351-4 of the Social Security Code.

<sup>133</sup> Court of Cassation, Social chamber 14 November 2019 No. 18-15682, [https://www.courdecassation.fr/jurisprudence\\_2/arrets\\_publics\\_2986/chambre\\_sociale\\_3168/2019\\_9139/novembre\\_9548/1567\\_14\\_43913.html](https://www.courdecassation.fr/jurisprudence_2/arrets_publics_2986/chambre_sociale_3168/2019_9139/novembre_9548/1567_14_43913.html).

<sup>134</sup> See generally Hennette-Vauchez S, Fondimare E. (2019), 'The "French Republican Model" and anti-discrimination laws', in Havelkova B, Möschel M, *Anti-discrimination law in civil jurisdictions*, OUP p. 66.

according to the Council of State, even if women maintained their pension and promotion rights during maternity leave, the fact remains that women with one or more children progress more slowly in their careers than men, and their pensions are lower.

Statistics were used in the decision to support this argument: without the service credit for a pension the difference in the level of pensions between men and women would increase from 9.8 % to 12.7 % for one child; from 11.5 % to 17.3 % for two children; from 13.3 % to 19.3 % for three children; and from 23 % to 30 % for four children. The measure does not aim to prevent unequal treatment but to partially compensate the damage and harm to the careers of women.

Another important element in the decision is the fact that the measure at stake is temporary as it is applied concerning children born, adopted, or taken into the home before 1 January 2004. Thus the service credit scheme for pensions can be objectively justified by a legitimate social policy aim, and it is both appropriate and necessary to achieve that aim. The Council of State then analysed the scheme for early retirement with the immediate payment of a pension. Following exactly the same reasoning, the Council of State came to the same conclusions on the early retirement scheme.

Up until now, the Council of State has generally avoided considering or referring to the applicability of indirect discrimination. In this regard, this decision is important as the Council of State directly refers to this concept, and analyses it using the same terms as the CJEU. If the decision does not formally contradict the decision of the CJEU and remains within the limits that the CJEU defined, the question is still open as to whether it is a correct application of the objective justification test. The Council of State is very careful when justifying unequal treatment between men and women. The use of statistics clearly shows that the differences in pensions between men and women are still very high. Paradoxically, the consequence of the *Leone* decision was to call into question those few rights that could improve the position of women. This is why, at the conclusion of the reasoning, it seems that the Council of State reached a balanced solution.

An important change was brought about by another decision (Conseil d'Etat 17 November 2017 No. 403275), which offered a definition of the concept of indirect discrimination, although no discrimination (against Roma) was recognised. In that case, the League for Human Rights challenged a decision of a city that banned scavenging in rubbish bins, thus specifically targeting Roma people and constituting indirect discrimination against them. Although the appeal was rejected because the discrimination was not established, the Council of State admitted that it could have been. On this point, it should be noted that decisions of principle are often decisions of rejection: a principle – here the unlawfulness of indirect discrimination – is admitted but not applicable to the case. The consequence is that the concept is now clearly accepted in French jurisprudence.

#### 3.4.4 Specific difficulties

The Council of State has recently applied the concept of indirect sex discrimination in a way that may seem to contradict the CJEU.<sup>135</sup> The Council of State refused to find that equal treatment of men and women, in terms of the calculation for rights to pension, disadvantaged women, despite the fact that they need to pay contributions over longer periods if they are to benefit from full pensions. The Council of State discarded the relevance of the inequality in factual determination arising from women's more frequent interruptions of professional activity related to issues of care resulting in an increased number of years worked.<sup>136</sup>

<sup>135</sup> Council of State, *Conseil d'Etat*, 27 March 2015, *Quintanel*, No. 372426.

<sup>136</sup> Hennette-Vauchez S., E. Fondimare E. (2019) 'The "French Republican model" and Anti-discrimination Law? Deconstructing a Familiar Trope of Narratives of French Law', in Havelkova B., Möschel M., *Anti-discrimination law in civil law jurisdictions*, Oxford University Press.

However, the frame of mind of the administrative courts' reasoning is evolving concerning indirect discrimination based on other grounds.<sup>137</sup>

It seems that, with increased reference to collective bargaining agreements as a source of labour law in France following the labour law reform of 2017, there is an increased risk of indirect sex discrimination, since collective norms rely on apparently neutral grading systems that value male-dominated jobs more highly compared to female-dominated jobs according to recent studies of the gendered effect of grading systems.<sup>138</sup> The same could be said for HR processes which favour promotion in certain career paths linked to less administrative posts, held predominantly by men.<sup>139</sup>

### 3.5 Multiple discrimination and intersectional discrimination<sup>140</sup>

#### 3.5.1 Definition and explicit prohibition

For some time, legal scholars,<sup>141</sup> academic case commentaries<sup>142</sup> and the Defender of Rights have referred to multiple discrimination<sup>143</sup> but there are no pending proposals which aim to incorporate the concept of multiple discrimination into law. It seemed for a while that, 'there was scarce research and no specific policy targeting women who face multiple discrimination and their access to employment and economic independence. France seemed to be lagging behind with respect to the analysis of intersectional discrimination that has been developed at the European level'.<sup>144</sup> The attachment to gender equality in France seemed to resist the identification of intersectional groups including women. However, a recent survey in employment by the Defender of Rights with the ILO in 2017<sup>145</sup> and a symposium and studies for the Ministry of Justice, which focused on access to justice and effective enforcement of anti-discrimination law,<sup>146</sup> seem to recognise multiple

<sup>137</sup> Outside of the realm of sex discrimination, an important change of mindset was brought about by another decision (Council of State, 17 November 2017 No. 403275), which offered a definition of the concept of indirect discrimination, although no discrimination (against Roma) was recognised.

<sup>138</sup> Grésy B., Becker, M. (2017), for High Council for Equality in Employment: *Guide fondé sur la méthodologie issue des travaux du groupe paritaire sur les classifications* (Guide based on the methodology derived from study groups on the promotion of equality in grading systems within collective bargaining), available at: [https://www.egalite-femmes-hommes.gouv.fr/wp-content/uploads/2017/05/GUIDE\\_EGALITE\\_SYSTEMES\\_DE\\_CLASSIFICATIONS-V2.pdf](https://www.egalite-femmes-hommes.gouv.fr/wp-content/uploads/2017/05/GUIDE_EGALITE_SYSTEMES_DE_CLASSIFICATIONS-V2.pdf).

<sup>139</sup> Grésy, B., Lebert, S. (2019), *Egalité entre les femmes et les hommes dans les procédures RH: Le réflexe égalité à chaque étape* (Equality between women and men in HR processes: the equality reflex at each stage), available at: <https://www.egalite-femmes-hommes.gouv.fr/wp-content/uploads/2019/03/Version-finale-RAPPORT-Egalite-dans-les-procedures-RH.pdf>.

<sup>140</sup> See for more information Fredman, S. (2016) *Intersectional discrimination in EU gender equality and non-discrimination law*, European network of legal experts in gender equality and non-discrimination, available at: <https://www.equalitylaw.eu/downloads/3850-intersectional-discrimination-in-eu-gender-equality-and-non-discrimination-law-pdf-731-kb>.

<sup>141</sup> Möschel, M. (2014), 'L'intersectionnalité dans le contentieux de la non-discrimination relatif au domaine de l'emploi en France' ('Intersectionality in employment discrimination litigation in France'), in Hennette-Vauchez, S., Pichard, M., Roman, D., *La loi et le genre* (Law and gender), pp. 697-714; Mercat-Brunns, M. (2015), 'Les discriminations multiples et l'identité au travail au croisement des questions d'égalité et de libertés' ('Multiple discrimination and identity in the workplace at the intersection of equality and freedoms'), *Revue de droit du travail* (Employment law review), p. 28.

<sup>142</sup> For example, since 2014, for annual case commentaries on gender law with a section on intersectional and multiple discrimination see *Chronique, Recueil Dalloz REGINE Droit et genre* – D. 2014, p. 954; D. 2015, p. 1007; D. 2016, p. 915; D. 2017, p. 935; D. 2018, p. 919; D. 2019, p. 856.

<sup>143</sup> See the annual reports of the Defender of Rights. For example, *Report 2016*, p. 97, mentioning discrimination against women with disabilities, available at: [https://juridique.defenseurdesdroits.fr/doc\\_num.php?explnum\\_id=17006](https://juridique.defenseurdesdroits.fr/doc_num.php?explnum_id=17006).

<sup>144</sup> Lépinard, E., Lieber, E. (2015), *The policy on gender equality in France, in depth analysis*, European Parliament, Directorate General for Internal Policies department C PE 510.024.

<sup>145</sup> Defender of Rights and ILO (2017), *10e Baromètre de la perception des discriminations dans l'emploi* (10th Barometer on the perception of discrimination in employment). This focuses particularly on the 'intersectional approach to discrimination in employment to see the heterogeneity', p. 2.

<sup>146</sup> Report for the GIP Justice (Ministry of Justice) and the Defender of Rights, Mercat-Brunns, M., Perelman, J. (2016), *Les juridictions et les instances publiques dans la mise en œuvre du principe de non-discrimination: perspectives pluridisciplinaires et comparées* (Courts and public institutions and their enforcement of the principle of non-discrimination), p. 118, available at: <http://www.gip-recherche-justice.fr/publication/les->

disadvantage and the asymmetric dimension of multiple discrimination as being harder to prove in the absence of the right comparator.<sup>147</sup> The Defender of Rights has rendered several decisions on multiple discrimination with one explicitly referring to a woman discriminated against because of her sex, pregnancy and family situation.<sup>148</sup> In 2019, the Defender of Rights was instrumental in presenting a case involving systemic discrimination against undocumented Malian construction workers (all male), in which the Labour Tribunal<sup>149</sup> recognised the concept. The equality body showed how multiple discrimination is structural in nature: 'the cumulative grounds of nationality and origin affect the stigmatised group - male undocumented Malian workers - by producing a recurring disadvantage proving, beyond multiple discrimination, systemic discrimination'.<sup>150</sup>

There has been a series of cases in which the Court of Cassation has discovered indirect age discrimination in amendments to collective bargaining agreements depriving workers with higher levels of seniority (36 to 40 years of seniority) from financial bonuses despite their length of service in the company (these agreements have an intersectional impact on older women).<sup>151</sup> Although such cases are not recognised as multiple or intersectional discrimination, they cover the issue of older female workers, which is starting to be tackled at the national level in France through the discussion of pension reform.

### 3.5.2 Case law and judicial recognition

As such, there is no case law referring explicitly to multiple discrimination or intersectional discrimination. However, French law prohibits many grounds of discrimination and cases that combine them can lead to the recognition of discrimination: the Court recognised 'discrimination based on physical appearance related to sex' when a waiter was fired because the employer explained in the letter of dismissal that, 'customer preference does not tolerate a male waiter wearing two earrings'.<sup>152</sup> The Court may also consider that there are several grounds of discrimination apart from sex, e.g. in the case of an older woman dismissed from a lingerie department.<sup>153</sup> Other cases deal with women subject to trade union discrimination and the difficulty of proving combined discrimination in the absence of the right comparator.<sup>154</sup> The Court of Cassation can opt to disregard the need for a

[juridictions-et-les-instances-publiques-dans-la-mise-en-oeuvre-du-principe-de-non-discrimination-perspectives-pluridisciplinaires-et-comparees/](#).

<sup>147</sup> See Defender of Rights Symposium (2018), *Multiplication des critères de discriminations: enjeux, effets et perspectives* (Multiplication of discriminatory grounds: issues, effects and perspectives), with a whole section focused on intersectional and multiple discrimination, pp. 146-197, available at: <https://www.defenseurdesdroits.fr/sites/default/files/atoms/files/actescolloq-2018-num-07.01.19.pdf>.

<sup>148</sup> One concerned discriminatory harassment after parental leave on the grounds of pregnancy, sex and family situation (elimination of the job and refusal by the employer to allow participation in a voluntary buy-out), Decision MLD 2017-188, 12 October 2017, available at:

[https://juridique.defenseurdesdroits.fr/index.php?lvl=notice\\_display&id=25060&opac\\_view=-1](https://juridique.defenseurdesdroits.fr/index.php?lvl=notice_display&id=25060&opac_view=-1); others did not concern sex but others grounds (age, disability and trade union discrimination, Decision 2017-274, 12 September 2017, available at:

[https://juridique.defenseurdesdroits.fr/index.php?lvl=notice\\_display&id=23101&opac\\_view=-1](https://juridique.defenseurdesdroits.fr/index.php?lvl=notice_display&id=23101&opac_view=-1); or workplace bullying linked to origin and state of health, Decision MLD 2015-269 of 17 November 2017, available at: [https://juridique.defenseurdesdroits.fr/index.php?lvl=notice\\_display&id=16519&opac\\_view=-1](https://juridique.defenseurdesdroits.fr/index.php?lvl=notice_display&id=16519&opac_view=-1).

<sup>149</sup> Labour Tribunal, No. 17/10051 (*Cons. Prud'h. Paris, 17 déc. 2019, n o 17/10051*).

<sup>150</sup> Defender of Rights, Decision No. 2019-108, 19 April 2019 (*Décision du Défenseur des droits n°2019-108*), [https://juridique.defenseurdesdroits.fr/doc\\_num.php?explnum\\_id=19433](https://juridique.defenseurdesdroits.fr/doc_num.php?explnum_id=19433).

<sup>151</sup> Court of Cassation (*Cour de cassation*) No. 17-16642 09 October 2019.

<sup>152</sup> Court of Cassation, 11 January 2012, No. 10-28213: so sex and physical appearance combined indicate the Court implicitly recognises intersectional discrimination (gender bias arising because sex is associated with a specific social conduct: acting like a man with no earrings); another case recognised bias and mistrust in North African women as employees, Court of Cassation, No. 10-16.92618 January 2012.

<sup>153</sup> Court of Appeal of Versailles of 7 May 2014 No. 13/03766: refusal to hire a part-time female worker as a full-time worker because of her age and physical appearance.

<sup>154</sup> Court of Cassation, Social chamber, 10 April 2013, No. 11-26.986, admitting the absence of sufficient evidence of discrimination because a retired female employee could not produce sufficient evidence of pay discrimination compared to her male counterparts in the trade union, see comment by Mercat-Bruns, M., *Regine Dalloz 201*, p. 954; Labour Court of Paris 14 December 2017 (*Conseil de prud'hommes de Paris*): female trade union representative was refused a promotion (cumulative effect of sex and trade union discrimination).

comparison with others and opt for a comparison of the situation of the claimant, e.g. before and after a strike.<sup>155</sup> The Court sometimes just prefers to decide on harassment on multiple grounds, e.g. in the case of a sick female employee<sup>156</sup> or a North African employee with disabilities.<sup>157</sup> The issue of French employees who wear headscarves and the adoption of internal neutrality rules in companies and NGOs has never been litigated as multiple discrimination,<sup>158</sup> even though the UN monitoring committee on human rights violations recently criticised France for discrimination, particularly affecting Muslim women, in the famous *Babyloup* case concerning the dismissal of a childcare centre employee.<sup>159</sup>

Moreover, some case law on indirect discrimination based on origin could be interpreted as dealing with multiple discrimination when the Court refers to the 'exploitation' of an undocumented domestic worker and the impossibility of comparing her with other French domestic workers.<sup>160</sup> Finally, there are recurring cases of sexual harassment in certain employment sectors where the Court recognises that, apart from sexual harassment, women are also the subject of discrimination in the form of sexism and retaliation in precarious, low level jobs.<sup>161</sup>

Outside of the previously mentioned Labour Tribunal case on systemic discrimination and the particular vulnerability of male undocumented construction workers, which was also seen as multiple discrimination by the Defender of Rights,<sup>162</sup> there have been cases on amended collective bargaining agreements that deprive older women and men with seniority (36 to 40 years) of bonuses.<sup>163</sup>

## 3.6 Positive action

### 3.6.1 Definition and explicit prohibition

Proactive measures for the under-represented sex are allowed by the Constitution or in statutory law<sup>164</sup> but are optional. Since 1999, the Constitution allows positive action measures in the political sphere and, since July 2008, in employment relations. The revision of the Constitution, which now states in its Article 1 that 'Statutes shall promote equal access by women and men to elective offices and posts as well as to professional and social positions', has allowed the adoption of statutes imposing some quotas for political elections and on company boards.<sup>165</sup> However, there is no obligation for Parliament to adopt such positive action measures.<sup>166</sup> A current constitutional reform is now pending to remove the word 'race' from the Constitution and insert the word 'sex' in

<sup>155</sup> Court of Cassation, Social chamber, 10 November 2009, No. 07-42849.

<sup>156</sup> Court of Cassation, Social chamber, 21 May 2014, No.12-28407.

<sup>157</sup> Labour Court of Paris, 5 July 2018, No. 15-13122.

<sup>158</sup> It is still the case - the Court of Cassation rejects security reasons with no other justification as a genuine, legitimate and justified occupational requirement to ban the beard of an employee see as provocative and there is still no mention of intersectional discrimination based on religion and the male gender, Court of Cassation No. 18-23743 8 July 2020, [https://www.courdecassation.fr/jurisprudence\\_2/chambre\\_sociale\\_576/715\\_8\\_45097.html](https://www.courdecassation.fr/jurisprudence_2/chambre_sociale_576/715_8_45097.html).

<sup>159</sup> UN Human Rights Committee, International Covenant on Civil and Political Rights, available at: <https://undocs.org/en/CCPR/C/123/D/2662/2015>.

<sup>160</sup> Court of Cassation Social chamber, 3 November 2011, No. 10-20765.

<sup>161</sup> Labour Court of Paris, 10 November 2017, No. 15-03130: case where the Defender made observations to the Court about short-term employment in catering services, Court of Cassation, Social chamber 30 January 2019 No. 17-28905.

<sup>162</sup> Employment Tribunal, No. 17/10051 (*Cons. Prud'h. Paris, 17 déc. 2019, no 17/10051*).

<sup>163</sup> See supra note 156.

<sup>164</sup> Such as Act on real equality between women and men (*Loi n° 2014-873 du 4 août 2014 pour l'égalité réelle entre les femmes et les hommes*), available at: <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000029330832&categorieLien=id>.

<sup>165</sup> For example, the Law on departmental elections was reformed to introduce a binomial system by which voters no longer choose one candidate but a team composed of a man and a woman, Article 3 of Act No. 2013-403 of 17 May 2013, amending Article L.191 of the Electoral Code.

<sup>166</sup> For a detailed history, see Xenidis, R., Masse-Dessen, H. (2018) 'Positive action in practice: some dos and don'ts in the field of gender equality law', *European Equality Law Review* 2018/2, p. 36 and on France, p. 50-57.

the prohibition of all distinctions before the law, reinforcing an attachment to formal equality.<sup>167</sup>

In the private sector, an entire chapter of the Labour Code is dedicated to professional equality between men and women.<sup>168</sup> There is a binding duty for the employer to post all information on measures for equality between women and men in the workplace<sup>169</sup> and in the place where interviews are held.<sup>170</sup>

The prohibition of sex discrimination does not prevent the adoption of

'temporary measures for the exclusive benefit of women to promote equal opportunity between women and men in order to compensate for the inequality in practice affecting the opportunities of women. These measures can take the form either of decrees covering recruitment, training, promotion and working conditions, or industry-wide collective bargaining agreements or company plans for equality between women and men'.<sup>171</sup>

However, the law and case law do not explicitly describe these measures as 'positive action'.

The general obligation of employers to negotiate on equality between women and men is mandatory at least every four years if there is a group of union representatives.<sup>172</sup> The frequency of this negotiation can be set at a minimum of every four years by an agreement at company level. If there is no agreement on the timetable, the negotiation is held every year. The scope of the negotiations must include the gender pay gap.<sup>173</sup> The financial penalty in the absence of negotiations on equality reflects its binding nature.<sup>174</sup>

Article 1 of the Law of 2014<sup>175</sup> already described both the hard and soft nature of measures to promote equality: 'The State and the local government and its public institutions enforce a policy of equality between women and men according to an integrated approach and evaluate all their actions'.

The equality policy includes a broad approach, resembling a form of gender mainstreaming across the board, through prevention mechanisms, education, parity rules and positive action for equal pay and against sex segregation in employment, soft rules on dissemination of information about gender roles as well as through sanctions in terms of equal pay.

The list of actions in the law includes prevention and protection to combat violence against women and infringement of their dignity; reinforcing measures to tackle prostitution;

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<sup>167</sup> Until the constitutional reform is passed, Article 1 does not mention sex and still states that, 'France shall be an indivisible, secular, democratic and social Republic. It shall ensure the equality of all citizens before the law, without distinction of origin, race and religion'; on the reform, see: [http://www.assemblee-nationale.fr/dyn/15/dossiers/democratie\\_plus\\_representative\\_responsable\\_efficace#node\\_51536](http://www.assemblee-nationale.fr/dyn/15/dossiers/democratie_plus_representative_responsable_efficace#node_51536); [https://www.lemonde.fr/politique/article/2018/07/12/l-assemblee-supprime-dans-la-constitution-le-mot-race-et-interdit-la-distinction-de-sexe\\_5330615\\_823448.html](https://www.lemonde.fr/politique/article/2018/07/12/l-assemblee-supprime-dans-la-constitution-le-mot-race-et-interdit-la-distinction-de-sexe_5330615_823448.html).

<sup>168</sup> Starts at Article L.1141-1, Labour Code.

<sup>169</sup> Articles L.3221-1 to L.3221-7, Labour Code.

<sup>170</sup> Article R.3221-2, Labour Code.

<sup>171</sup> Article L.1142-4, Labour Code.

<sup>172</sup> A 'Section syndicale', Article L.2242-1, Labour Code, Executive order No. 2017-1385 of 22 September 2017, Article 7, [https://www.legifrance.gouv.fr/affichTexteArticle.do;jsessionid=F8AE21B6103C2E0DAB89A4A342C59D81.tplgfr43s\\_2?cidTexte=JORFTEXT000035607311&idArticle=LEGIARTI000035608867&dateTexte=20190406&categorieLien=id#LEGIARTI000035608867](https://www.legifrance.gouv.fr/affichTexteArticle.do;jsessionid=F8AE21B6103C2E0DAB89A4A342C59D81.tplgfr43s_2?cidTexte=JORFTEXT000035607311&idArticle=LEGIARTI000035608867&dateTexte=20190406&categorieLien=id#LEGIARTI000035608867).

<sup>173</sup> Article L.2242-1, Labour Code.

<sup>174</sup> Article L.2242-8, Labour Code.

<sup>175</sup> Act on real equality between women and men (LOI n° 2014-873 du 4 août 2014 pour l'égalité réelle entre les femmes et les hommes), available at: <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000029330832&categorieLien=id>.

actions to prevent and combat sexist stereotypes; actions to ensure that women's procreative rights are safeguarded including access to contraception and abortion; actions to limit women's poverty; actions to guarantee equal pay and equality in employment and against sex-segregated jobs; actions to improve work-life balance and shared family responsibilities; actions to favour equal access of women and men in elective mandates and posts, union organisations and boards of social funds; actions to ensure equal treatment of women and men in the creative and culture sector and promotion of their art; and actions to promote awareness about French and international research about the social construction of sex roles.<sup>176</sup>

In the public sector, for a long time, women were granted specific rights linked to their family responsibilities. In 1988, France was referred to the CJEU because of special benefits offered to women in collective agreements.<sup>177</sup> 'Positive action was not invoked as such, the French government merely defended the existence of a compensation measure deemed admissible because, France argued, the aim of the directive 76/207/CEE was not to transform gender relations in work and family relations'.<sup>178</sup>

In the *Griesmar* case (C-366/99), contrary to the argument put forward by the French Government, the European Court of Justice took the view that the credit granted to civil servants who were mothers could not be authorised as being a measure designed to help women in their career since, being granted at the date of their retirement, it did not provide a remedy for the problems which they might encounter in the course of their professional career.<sup>179</sup> Another case subjected to a preliminary ruling concerned enhanced pension benefits in the public sector for child rearing and led to a judgment of indirect sex discrimination.<sup>180</sup> Since then, in 2015, the French Council of State approved a French provision in relation to the past, supporting its decision with a quantitative analysis of inequalities that penalise women's careers.<sup>181</sup>

Thus, the principle is that civil servants have equal rights and general positive action measures are excluded. Nevertheless, some attempts were made by the legislator to create some quotas. For example, the law on equal pay adopted in 2006 intended to create mandatory quotas in different areas. But on 16 March 2006, the Constitutional Council invalidated many provisions of this law.<sup>182</sup> The mandatory provisions related to access for women to deliberative and jurisdictional boards were cancelled. The Council specified that the Constitution does not permit restrictive rules grounded on sex, and, for that reason, refused provisions that imposed predetermined proportions between men and women on boards. In short, all incentive provisions were saved, especially those regarding equal representation of men and women in courses of initial and continuous vocational training, but the Constitutional Council censured all restrictive provisions. With the amendment of Article 1 of the Constitution in 2008, the position of the Council changed and the legislator is now allowed to adopt laws that promote 'equal access by women and men to elective offices and posts as well as to positions of professional and social responsibility'.

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<sup>176</sup> Act on real equality between women and men (*LOI n° 2014-873 du 4 août 2014 pour l'égalité réelle entre les femmes et les hommes*), available at:

<https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000029330832&categorieLien=id>.

<sup>177</sup> CJEU, judgment of 25 October 1988, *Commission v. France*, C-312/86, ECLI:EU:C:1988:485.

<sup>178</sup> The Court rejected this analysis, See Xenidis, R. and Masse Dessen, H. (2018) 'Positive action in practice: some dos and don'ts in the field of gender equality law', *European Equality Law Review*, No. 2, cited p. 52.

<sup>179</sup> The Court concluded that career-related difficulties encountered by mothers could not be resolved by means of the service credit at issue in this case.

<sup>180</sup> CJEU, C-102/14 *Leone*: civil servants who are the parents of at least three children may opt for early retirement with immediate payment of pension, subject to certain conditions, including having taken a career break of at least two consecutive months for each child.

<sup>181</sup> CE Ass. 27 March 2015, M. Quintanel No. 372426 (Council of State Assembly 27 March 2015 No. 372426): 'while noting the divergence from the EU case, the Council of State sought to establish the social facts from which the conclusions were to be drawn', Xenidis, R. and Masse-Dessen, H. (2018), 'Positive action in practice: some dos and don'ts in the field of gender equality law', *European Equality Law Review*, No. 2, cited p. 55.

<sup>182</sup> Decision 2006-533 DC of 16 March 2006.

Since 2002, one third of the members of juries and commissions in the recruitment or promotion of civil servants must be qualified individuals of each sex.<sup>183</sup> The aim of this quota was to allow a balanced participation of both sexes in these juries. In 2007, the Council of State stated that the decision of a commission that did not respect this quota could not be void, as the law only defines an objective of balanced representation, and that the criterion of gender cannot prevail against competence and skills.<sup>184</sup> The 2019 Act on the transformation of the French civil service<sup>185</sup> reaffirms these obligations in juries and recruitment commissions and attempts to facilitate its implementation according to the public sector concerned.<sup>186</sup> The law incorporates the content of the collective bargaining agreement on equality in the civil service of 30 November 2019, which extended the obligations of all employers of the civil service: all public authorities including all administrations, public hospitals and local authorities, including all bodies that work across different municipal governments (covering areas with more than 20 000 residents) must produce a renewable action plan on equality between women and men to cover a maximum of three years.

This plan must include broad provisions on: evaluating wage disparities, equal access to management positions in the civil service, work-life balance, prevention and treatment of issues of discrimination, violence, moral and sexual harassment and sexist acts. In the absence of a plan or its renewal, the 'employer'/administration will have to pay a fine equivalent to 1 % of the total wages, before taxes, of all its employees. Moreover, all administrations must introduce, before 1 May 2020, a hotline to receive all reports linked to violence, discrimination or harassment from victims or bystanders. The Decree of 13 March 2020 details the reporting process.<sup>187</sup>

The 2019 Act on the transformation of the public service also reinforces parity in management positions in the public service extending it to local government in grouped municipalities or regions with more than 40 000 residents. The obligation is monitored during the whole term of the local government and the cycle of appointments (but limited to four rounds of appointments). These changes are integrated in the new reform of local government. Parity has been extended to other key positions<sup>188</sup> and a decree of 30 December 2019 gives more detail on the implementation of these rules.<sup>189</sup> The

<sup>183</sup> Article 6 bis Law of 13 July 1983 on the civil service (modified by the Law Génisson of 9 May 2001 then by the law of 12 March 2012), see Bui-Xuan, O. (2015) 'La "représentation équilibrée entre hommes et femmes", une catégorie juridique équivoque' ("Balanced representation of women and men", an ambiguous legal category'), *RDP* 2015, p. 431-450; Bui-Xuan, O. (2018) "'Représentation équilibrée" et "représentation proportionnée" des femmes et des hommes: convergence ou concurrence?' ("Balanced representation" and "proportional representation" of women and men: convergence or competition?'), *AJFP* 2018, p. 319-323.

<sup>184</sup> Council of State, CE 22 June 2007, No. 288206, published in the *Recueil Lebon*.

<sup>185</sup> Act No. 2019-828 of 6 August 2019 on the transformation of the civil service (LOI n° 2019-828 du 6 août 2019 de transformation de la fonction publique), <https://www.legifrance.gouv.fr/eli/loi/2019/8/6/CPAF1832065L/jo/texte>. Bill presented to the Council of Ministers on 23 March 2019.

<sup>186</sup> Article 29 of the new bill, modifying the law of 1983 on the civil service: 'the idea is to clarify the principle of balanced representation in selection committees grouping different provisions of the civil service regulations to improve its application. It also facilitates its implementation in different administrations (provisions on rotating presidency between the sexes of selection committees over a period of four sessions of competitions to adjust to the culture of certain public professions and levels instead of every session which compromised its application).

<sup>187</sup> Decree No. 2020-256 13 March 2020 on the scheme/alter device against violent acts, discrimination, harassment and sexist acts in the civil service, (*Décret n° 2020-256 du 13 mars 2020 relatif au dispositif de signalement des actes de violence, de discrimination, de harcèlement et d'agissements sexistes dans la fonction publique*), <https://www.legifrance.gouv.fr/eli/decret/2020/3/13/CPAF1934186D/jo/texte>.

<sup>188</sup> National Center on local civil service (CNFPT) and posts of directors of public institutions nominated by the Council of Minister (*Centre national de la fonction publique territoriale (CNFPT) et aux emplois de dirigeants d'établissements publics de l'État nommés en Conseil des ministres*).

<sup>189</sup> Decree No. 2019-1561 of 30 December 2019 on parity in nominations to management positions in the civil service (*Décret n° 2019-1561 du 30 décembre 2019 modifiant le décret n° 2012-601 du 30 avril 2012 relatif aux modalités de nominations équilibrées dans l'encadrement supérieur de la fonction publique*), <https://www.legifrance.gouv.fr/eli/decret/2019/12/30/CPAF1929372D/jo/texte>: for administrations managing municipalities or regions (40 000-80 000 inhabitants), fines for a violation in terms of

implementation of new rules for parity in recruitment panels for competitions are integrated in the general Civil Service Code and the principle of alternating the presiding member of panel is improved and is extended to all civil service administrations.<sup>190</sup>

The agreement of 30 November 2018 included a scheme to ensure more options in career advancement for men and women in the civil service and the chart of promotion (*tableau d'avancement*) must respect standards of equality and detail what percentage of men and women put up for promotion are drawn from the pool of possible candidates because of their seniority and evaluations.<sup>191</sup>

Finally, to compensate the disparities between men and women created in promotions, the new Act on the transformation of public service and the decree that implements its provisions provides that civil servants on parental leave to raise a child under eight, will maintain their right to promotion. This right is preserved for five years during the whole career. These time periods are assimilated to effective work in the civil service.<sup>192</sup>

The law of 2019 expands the scope of the previous law of 2012 regarding civil servants in the three main pillars of the civil service: the civil service of the State, the civil service of public hospitals and the civil service of local governments.<sup>193</sup> The main provision of the law was the adoption of quotas in the same way as in the private sector.<sup>194</sup> The law also required that women fill 40 % of high-level civil service posts.<sup>195</sup> The recent law introduced on 23 March 2019 on the transformation of the public sector introduces provisions on equality as legislative measures to implement the Presidential Equality Plan 2017-2020. Decrees adopted in 2019 and 2020 have previously detailed the implementation of the law of 23 March 2019.

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

Traditionally, the term 'positive action' is not directly used in gender equality or employment policies. Positive action measures were not really welcomed in the French system, because they were very often viewed as contrary to the French concept of equality.<sup>196</sup> Positive action measures were also presented as a danger to the Republican idea of equality because they could lead to or favour communitarianism. This is why,

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appointments for parity will amount to EUR 50 000 instead of EUR 90 000 for the other administrations. Sanctions apply after municipal elections of 2020. An annex in the Decree lists the additional employment positions which require parity including the elite schools (on administration (École nationale d'administration), Top engineering school (École Polytechnique)), the Unemployment agency (Pôle emploi), the Institute on media (Institut national de l'audiovisuel), the Pension Fund (CNAV).

<sup>190</sup> Alternating the gender of the presiding member of panels is limited to four sessions of selection processes.

<sup>191</sup> Since the budgetary law (*Loi de finances*) for 2018, another specific advantage is awarded to pregnant women in case of sick leave, there is now no waiting period of one day (with no wages or social security benefit replacing wages), which is applied to civil servants in the public sector (it is three days in the private sector), Law No. 2017-1837 of 30 December 2017 (Budget 2018) ([LOI n° 2017-1837 du 30 décembre 2017 de finances pour 2018](#)), Article 115.

<sup>192</sup> Decree No. 2019-234 of 27 March 2019 on conditions of breaks in civil service (*Décret n° 2019-234 du 27 mars 2019 modifiant certaines conditions de la disponibilité dans la fonction publique*), <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000038277205>.

<sup>193</sup> Law No. 2012-347 of 12 March 2012 on access to permanent posts and improving employment conditions for contract workers in the civil service, on combating discrimination and introducing various provisions relating to the civil service (*Loi n° 2012-347 du 12 mars 2012 relative à l'accès à l'emploi titulaire et à l'amélioration des conditions d'emploi des agents contractuels dans la fonction publique, à la lutte contre les discriminations et portant diverses dispositions relatives à la fonction publique*).

<sup>194</sup> The law required that women fill 40 % of the various board positions of public companies (Article 52 of the Law of 2012). This percentage should have been reached by the second renewal of the boards after the adoption of the law. All the consultative bodies representing public servants should also have reached this percentage by their next renewal (the 'joint civil service council' and the councils for each category of the civil service: State, local government and hospital).

<sup>195</sup> 20 % for the nominations in 2013 and 2014 and 30 % between 2015 and 2017. This means that in 2018 at least 40 % of the nominations for high-level civil service posts should be women.

<sup>196</sup> See Article 1 of the Declaration of Human and Civic Rights of 1789 (*Déclaration des droits de l'homme et du citoyen*), Articles 1 and 6.

regarding the issue of quotas, the Constitutional Council in 1982<sup>197</sup> declared unconstitutional a law whose purpose was to introduce quotas for the election of municipal officers. A revision of the Constitution was thus needed to allow the legislator to adopt gender quotas.

Even with the modifications of the Constitution in 1999 and 2008, the Constitutional Council has not always interpreted in an extensive way the possibility left to the legislator to adopt positive action measures (see below the recent decision of the Constitutional Council).<sup>198</sup> Although explicit positive action measures are often criticised and not necessarily defined as positive action, the French system includes many specific rights granted to specific groups which are totally accepted, perhaps because they are not presented as positive action measures. For example, there are many specific rules for younger workers or older workers, specific measures for disabled groups, etc.

For a very long time, specific rights, notably in the pension system, were also granted to women as a consequence of family policies. In order to address a social reality, namely the disadvantages which they incur in their professional career by virtue of the predominant role assigned to them in bringing up children, mothers who have raised children were granted an increase in their insurance coverage. Other measures were justified by a more stereotypical view of their role as assuming domestic work outside of their jobs, excluding them from night work.<sup>199</sup> The purpose of these measures was to offset the disadvantages which female workers who have had children encounter in their professional life. These measures were not analysed as positive action measures.

Proactive measures for the under-represented sex are allowed by the Constitution or a Statute but are optional. Since 1999, the Constitution has allowed positive action measures in the political sphere and since July 2008 in employment relations. The revision of the Constitution, which now states in its Article 1 that, 'Statutes shall promote equal access by women and men to elective offices and posts as well as to professional and social positions', has allowed the adoption of statutes imposing some quotas for political elections and on company boards.<sup>200</sup> However, there is no obligation for Parliament to adopt such positive action measures.<sup>201</sup> A current constitutional reform is now pending to remove the word 'race' from the Constitution and insert the word 'sex' into the prohibition of all distinctions before the law, reinforcing an attachment to formal equality.<sup>202</sup>

A more recent term used is the notion of 'real equality': the law of 4 August 2014 on real equality between women and men<sup>203</sup> adds to the measure promoting the enforcement of these rights already in place and the fair representation of women and men in society as a whole. This term seems to refer to the enforcement of substantive equality and gender mainstreaming since the law of 2014 and covers a wide array of areas (employment and sex segregation of the workforce, equal representation in public institutions and union organisations, prostitution and reproductive rights). Article 1 of the law imposes on the

<sup>197</sup> Decision 82-146 DC of 18 November 1982.

<sup>198</sup> Decision 2010-618 DC of 9 December 2010.

<sup>199</sup> Until ECJ 25 July 1991 *Stoekel* C-345/89.

<sup>200</sup> For example, the law on departmental elections was reformed to introduce a binomial system by which voters no longer choose one candidate but a team composed of a man and a woman, Article 3 of Law No. 2013-403 of 17 May 2013, amending Article L. 191. of the Electoral Code.

<sup>201</sup> For a detailed history of these measures see Xenidis, R. and Masse-Dessen, H. (2018) 'Positive action in practice: some dos and don'ts in the field of gender equality law', *European Equality Law Review* 2018/2, 36 and on France, p. 50-57.

<sup>202</sup> Until the constitutional reform is passed, Article 1 does not mention sex and still states that 'France shall be an indivisible, secular, democratic and social Republic. It shall ensure the equality of all citizens before the law, without distinction of origin, race and religion'; on the reform, see [http://www.assemblee-nationale.fr/dyn/15/dossiers/democratie\\_plus\\_representative\\_responsable\\_efficace#node\\_51536](http://www.assemblee-nationale.fr/dyn/15/dossiers/democratie_plus_representative_responsable_efficace#node_51536); [https://www.lemonde.fr/politique/article/2018/07/12/l-assemblee-supprime-dans-la-constitution-le-mot-race-et-interdit-la-distinction-de-sexe\\_5330615\\_823448.html](https://www.lemonde.fr/politique/article/2018/07/12/l-assemblee-supprime-dans-la-constitution-le-mot-race-et-interdit-la-distinction-de-sexe_5330615_823448.html).

<sup>203</sup> Law No. 2014-873 of 4 August 2014 on real equality between women and men (*Loi n° 2014-873 du 4 août 2014 pour l'égalité réelle entre les femmes et les hommes*), available at: <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000029330832&categorieLien=id>.

State and its institutions an integrated approach to enforcing its policy on equality. For the Government, it consists of 'systematically taking into consideration the differences in situations between women and men in all policies and public programmes and providing, if necessary, targeted actions to correct inequalities'.<sup>204</sup>

The term 'real equality' stems directly from the Government's will to conform to EU law on equality and anti-discrimination which refers directly to the Charter of Fundamental Rights (Article 23), the 'possibility of enforcing positive actions', the Women's Charter signed by the EU in 2010 and the conclusion of the European Pact for Gender Equality (2011-2020).<sup>205</sup> There seems to be a last effort to enrich the meaning of substantive equality based on a more quantitative evaluation of corrective measures in the private sector with the new decree on the gender pay gap of 2019 which was adopted to implement the law of 5 September 2018.

An interesting recent case from the French Court of Cassation of 2017 takes into account positive action and EU law in order to justify a difference of treatment between men and women founded on inequalities in practice between women and men.<sup>206</sup> The Court of Cassation, applying the French Labour Code (Articles L.1142-4, L.1143-1 and L.1143-4) 'in the light of Article 157 § 4 of the TFEU', decided that a collective agreement may provide for a half day's leave only for women if this measure seeks to address equal opportunities in remedying de facto inequalities that generally affect women. What is striking is that the Court, in a commentary on this case posted on its website, directly refers to *Kalanke, Marshall* and *Badeck* and explains that ECJ case law has evolved concerning positive action which would actually not constitute an exception to equal treatment in this instance but rather represent a form of equal treatment, 'positive discrimination', in accordance with Article 157 TFEU and the enforcement of Directive 2006/54/CE (Articles 2 and 3). In sum, the Court, without using the term 'positive action' but referring to 'positive discrimination' and 'equal opportunities' (*égalité des chances*) does seem to be influenced by EU case law on positive action. However, allowing an extra holiday for women, despite its symbolic nature to promote women, does not seem like a positive action measure (understood as concrete measures to combat inequalities in practices through equal opportunities *in* employment within the meaning of the EU case law).<sup>207</sup>

Currently, the trend in the public sector is to reinforce existing parity procedures and pair them with the fight against discrimination, which is reflected in the 2019 Act on the transformation of the civil service, Part V of which is headed, 'Reinforcing professional equality', the first chapter covers 'professional equality and prevention of discrimination'.<sup>208</sup>

### 3.6.3 Specific difficulties

In the public sector, it seems there is a form of subtle resistance to upholding temporary measures which compensate for inequalities linked to women's less linear careers and to take into account past inequalities. The Leone case subjected to a preliminary ruling concerned enhanced pension benefits for child rearing in the public sector and led to a

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<sup>204</sup> Secrétariat d'Etat chargé de l'égalité entre les femmes et les hommes (2017), *Vers l'égalité réelle entre les femmes et les hommes: Chiffres clés 2017* (Towards real equality between women and men: key figures 2017), p. 4.

<sup>205</sup> Secrétariat d'Etat chargé de l'égalité entre les femmes et les hommes (2017), *Vers l'égalité réelle entre les femmes et les hommes: Chiffres clés 2017* (Towards real equality between women and men: key figures 2017), p. 4.

<sup>206</sup> Court of Cassation, Social chamber, 12 July 2017, No. 15-26262.

<sup>207</sup> See Flash report by Laulom, S. ELR, <https://www.equalitylaw.eu/downloads/4518-france-a-court-decision-on-positive-action-pdf-135-kb>.

<sup>208</sup> Act No. 2019-828 of 6 August 2019 on the transformation of the civil service (*LOI n° 2019-828 du 6 août 2019 de transformation de la fonction publique*), <https://www.legifrance.gouv.fr/eli/loi/2019/8/6/CPAF1832065L/jo/texte>.

judgment of indirect sex discrimination.<sup>209</sup> In 2015, the French Council of State approved a French legal provision giving service credit for a pension in relation to the right to leave for women for childrearing, a provision which has been abolished since then to be in conformity with EU law. At the time, the Council still defended a quantitative analysis of inequalities between women and men, arguing that maternity and parental leave combined directly affect women's career paths and reduce the amount of their pensions more than those of men, despite the standards applied in the Leone and Griesmar CJEU cases which the French Council of State explicitly acknowledged in the case.<sup>210</sup>

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

A law was adopted on 27 January 2011<sup>211</sup> in order to improve the representation of women on company boards. The law imposed a quota for each sex. Firms with more than 500 employees and revenue of over EUR 50 million had to ensure that each sex has at least 20 % of boardroom seats by 2014 and 40 % by 2017.<sup>212</sup>

Non-complying companies would see their board elections nullified but not the decisions adopted by the board. New elections had to be held in order to fulfil the obligation of gender representation. The principle was extended to 40 % parity in 2012 for state-owned companies and institutions with both private and public support in which the employees have private contracts.<sup>213</sup> Act No. 2014-873 of 4 August 2014 on real equality between women and men extended the obligation to all administrators of public institutions in matters of cultural cooperation, commissions and central agencies under the Social Security Code. Monitoring of parity in the civil service is reinforced by the new pending bill on the transformation of the civil service of 2019. Finally, a new agreement on equality in employment between men and women in the public sector was signed on 20 November 2018.<sup>214</sup> This agreement is on equal access to professions and responsibilities for balanced representation in senior management positions to head public administrations or regional institutions, taking into consideration the pool of available women candidates for recruitment and promotion.<sup>215</sup>

In terms of enforcement, the parity rule was adopted progressively, first 20 % until 2014, then increasing to 40 %, but there is no transparency in the recruitment procedure. The law in listed companies required a report by the president of the board on the balanced representation of women in conformity with the law, with no official built-in monitoring outside of the effect of the illegal appointment of men (decisions null and void).

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<sup>209</sup> CJEU, C-102/14 *Leone*: civil servants who are the parents of at least three children may opt for early retirement with immediate payment of pension, subject to certain conditions, including having taken a career break of at least two consecutive months for each child.

<sup>210</sup> CE Ass. 27 March 2015, M. Quintanel No. 372426 (Council of State Assembly 27 March 2015 No. 372426): 'while noting the divergence from the EU case, the Council of State sought to establish the social facts from which the conclusions were to be drawn', Xenidis, R. and Masse-Dessen, H. (2018) 'Positive action in practice: some dos and don'ts in the field of gender equality law', *European Equality Law Review*, No. 2, cited p. 55.

<sup>211</sup> Act of 27 January 2011, No. 2011-103, on the balanced representation of women and men on boards of directors and supervisory boards and on gender equality in the workplace (*Loi du 27 janvier 2011 relative à la représentation équilibrée des femmes et des hommes au sein des conseils d'administration et de surveillance et à l'égalité professionnelle*).

<sup>212</sup> Between 2013 and 2018, the number of women on the boards of directors of SBF 120 companies increased by 17.1 %, and their share jumped from 26.2 % to 43.3 %. The prospect of directors' fees being frozen and of new appointments to boards being cancelled, together with naming and shaming in the media, played a decisive role. However, while the Cope-Zimmerman law has been able to give the necessary impetus within the governance of large French companies, the feminisation of executive committees and the top 100 remains insufficient. Since 2013, there have been only 6 and 4 points of progression respectively in the CAC 40 (9.5 % to 15.6 % for comex and 15.6 % to 19.5 % in 2017 for the top 100).

<sup>213</sup> Law No. 2012-347 of 12 March 2012.

<sup>214</sup> Agreement on equality between women and men in the civil service, available at: [https://www.fonction-publique.gouv.fr/files/files/publications/politiques\\_emploi\\_public/20181130-accord-egalite-pro.pdf](https://www.fonction-publique.gouv.fr/files/files/publications/politiques_emploi_public/20181130-accord-egalite-pro.pdf).

<sup>215</sup> Agreement on equality between women and men in the civil service, p. 12, available at: [https://www.fonction-publique.gouv.fr/files/files/publications/politiques\\_emploi\\_public/20181130-accord-egalite-pro.pdf](https://www.fonction-publique.gouv.fr/files/files/publications/politiques_emploi_public/20181130-accord-egalite-pro.pdf).

Other evaluation reports have been conducted by researchers<sup>216</sup> and the High Council on Equality on the implementation of parity rules in the private and public sectors.<sup>217</sup> Studies on the profile of women on executive boards<sup>218</sup> show that they have equivalent degrees to the men but different backgrounds and ages. The latest studies seem to reveal that the mandatory quota has worked relatively well: France is the only country with 43 % of women on executive boards,<sup>219</sup> but feminisation of other supervisory positions is still lacking.<sup>220</sup>

The last report of 2019 of the High Council on Equality on the evaluation of parity rules in executive boards, leverage and the role of public financial support<sup>221</sup> recommends three areas of future policy: (1) to pursue parity and increase its scope to other strategic committees in companies; (2) to monitor further its effects from the outside (this could be done through commercial courts) and eventually impose sanctions in the same way that wage indicators were adopted for equal pay in France; and finally, (3) gain leverage by conditioning public finance of companies on an evaluation of the companies' inclusion of women in governance (the report shows that start-ups launched by women have a hard time obtaining financing).<sup>222</sup>

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

France has adopted various provisions in order to improve gender balance in political elections and also in various other fields. Regarding political candidate lists, the rules depend on the type of elections. For example, for departmental elections, for the first time Law No. 2013-403 of 17 May 2013 (applied for the first time in 2015) states that there must be two candidates for each departmental district, a man and a woman. Since 2000, the law has stated that all political parties should include equal numbers of men and women on party lists for elections conducted via proportional representation (European Parliament, municipal and regional elections). For elections to the National Assembly, political parties should also present the same number of candidates of each sex and non-compliance with this rule will result in a financial penalty. The problem here is that it does not prevent political parties from standing women in 'unwinnable' seats.

In 2012, a new law<sup>223</sup> introduced a 40 % gender quota to be reached by 2018 for nominations to executive functions in the civil service. It applies to administrative and supervisory boards of public institutions, high councils, juries and selection committees in

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<http://www.datapressepremium.com/rmdiff/2010544/EtudeObservatoireSkemaDeLaFeminisationDesEntreprisesVF2.pdf>.

<sup>217</sup> High Council for Gender Equality (2018), *Guide to gender parity*, available at: [http://www.haut-conseil-egalite.gouv.fr/IMG/pdf/parite-court-ang\\_nov-2018-135x210-v2.pdf](http://www.haut-conseil-egalite.gouv.fr/IMG/pdf/parite-court-ang_nov-2018-135x210-v2.pdf).

<sup>218</sup> Bender, A.-F., Dang, R., Scotto, M.-J. (2016), 'Les profils des femmes membres des conseils d'administration en France' ('Profiles of female board members in France'), *Travail, genre et sociétés* 2016/1 No. 35, pp. 67-85.

<sup>219</sup> [https://www.challenges.fr/femmes/exclusif-les-resultats-du-premier-barometre-de-la-parite-ethics-boards\\_588217](https://www.challenges.fr/femmes/exclusif-les-resultats-du-premier-barometre-de-la-parite-ethics-boards_588217).

<sup>220</sup> Between 2013 and 2018, the number of women on the boards of directors of SBF 120 companies increased by 17.1 %, and their share jumped from 26.2 % to 43.3 %. The prospect of directors' fees being frozen and of new appointments to boards being cancelled, together with naming and shaming in the media, played a decisive role. However, while the Cope-Zimmerman law has been able to give the necessary impetus within the governance of large French companies, the feminisation of executive committees and the top 100 remains insufficient. Since 2013, there have been only 6 and 4 points of progression respectively in the CAC 40 (9.5 % to 15.6 % for comex and 15.6 % to 19.5 % in 2017 for the top 100).

<sup>221</sup> High Council of Equality (2019), *Report on Access of women to high responsibilities and the leverage of public financial intervention (Accès des femmes aux responsabilités et rôle levier des financements publics)* 17 December 2019, [http://www.haut-conseil-egalite.gouv.fr/IMG/pdf/synthese\\_rapport-parite-gouvernance\\_17122019.pdf](http://www.haut-conseil-egalite.gouv.fr/IMG/pdf/synthese_rapport-parite-gouvernance_17122019.pdf).

<sup>222</sup> High Council of Equality (2019), *Report on Access of women to high responsibilities and the leverage of public financial intervention (Accès des femmes aux responsabilités et rôle levier des financements publics)* 17 December 2019, p. 4 [http://www.haut-conseil-egalite.gouv.fr/IMG/pdf/synthese\\_rapport-parite-gouvernance\\_17122019.pdf](http://www.haut-conseil-egalite.gouv.fr/IMG/pdf/synthese_rapport-parite-gouvernance_17122019.pdf).

<sup>223</sup> Law No. 2012-347 of 12 March 2012.

civil service procedures. The 2014 law for real equality extended quotas to civil society organisations such as sports federations.<sup>224</sup>

Finally, Act No. 2015-994, of 17 August 2015 on social dialogue and employment also contains some provisions regarding parity in the elections of workers' representatives. The lists of candidates being proposed for these representative positions must reflect the gender balance of the employees represented. Thus the list should represent the same proportion of men and women as the proportions of the electoral college. The lists are composed alternatively of men and women. The Constitutional Court recently confirmed that this provision is in accordance with the Constitution (Decision No. 2017-686 QPC of 19 January 2018) subject to the condition that one sex is not totally excluded. This exception is included in the new Article L.2314-30 (Ord. 22 September 2017). The sanction is very severe. If the quota is not respected, the excess number of representatives of one sex will be dismissed.

A report published by DARES (the research service of the Ministry of Labour) shows that equality is far from being achieved in these bodies.<sup>225</sup> It shows that, 'Between 2001 and 2012, the percentage of women elected to French labour representation bodies or establishment committees (EC) and Single Personnel Delegations (DUPs) increased from 32 % to 40 %'. The numbers are therefore close to the percentage of female employees in these positions in the private sector (43 % in 2012).

Although the gender balance of the representative bodies depends on the gender balance in each sector, women remain under-represented among elected officials in the vast majority of industries. The rate of gender representation of elected women workers and employees in work councils increased from 37 % to 42 %, which is closer to the proportion of women in the corresponding professional sectors (44 %). On the other hand, women only make up 28 % of the elected representatives on the committee of 'engineers and managers' where they represent more than a third of employees involved in the professional elections. While the non-union lists established mainly in the SMEs generally respect the relative parity of women, the proportion of women elected on the union list varies greatly according to the organisation. These differences partly reflect the gendered structure of the industry's labour force for which unions are established. The concentration of women in trades and occupational categories which are rather distant from the organisations could also explain their under-representation among elected representatives and bodies made up of a combination of representatives,<sup>226</sup> known as the unique staff delegations.

Finally, union-specific cultural and organisational factors explain the persistence of inequalities.

### **3.7 Harassment and sexual harassment**

#### **3.7.1 Definition and explicit prohibition of harassment**

At first, harassment was not defined in relation to discrimination. Thus, according to Article L.1152-1 of the Labour Code, employees shall not be subjected to repeated actions constituting psychological harassment (or bullying) the aim or effect of which may result

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<sup>224</sup> Law No. 2014-873 of 4 August 2014 on real equality between women and men.

<sup>225</sup> DARES (2018) *Les femmes dans les instances représentatives du personnel : bientôt la parité ?* (Women on workers' representative bodies: parity soon?), available at: <http://dares.travail-emploi.gouv.fr/IMG/pdf/2018-007.pdf>.

<sup>226</sup> This was called a '*délégation unique du personnel*' (DUP), a representative body composed of union members, health and security representatives and elected representatives in companies of 50 to 300 employees, Act No. 2015-994 of 17 August 2015. This elected body was replaced by a new elected body, the *comité social et économique* (CSE) following the labour law reform, Act No. 2017-1386 of 22 September 2017 on the new organisation of social dialogue.

in a deterioration of their working conditions and which are likely to violate their rights and dignity, impair their physical or mental health or jeopardise their professional future.

Article 1 of Act 2008-496 of 27 May 2008<sup>227</sup> adds a new definition, as required by EU law. According to this Article, discrimination includes 'any action relating to one of the reasons mentioned in the first paragraph (including sex) and any action with a sexual connotation, to which a person is subjected, with the purpose or effect of violating their dignity or creating a hostile, degrading, humiliating or offensive environment'. This definition complies with the EU definition. The 2008 Act has not repealed the existing definition. As a result, there are now two different definitions of psychological harassment under French law, which are applicable in different circumstances. According to the Labour Code (before its amendment of 2018) harassment supposes repeated acts and is not assimilated to a form of discrimination. In contrast to the new provisions, Law 2018-703 of 3 August 2018<sup>228</sup> has since given a new definition in the new Article 222-33 and 222-33-2 of the Penal Code.

Since the Rebsamen Law of 17 August 2015, sexist behaviours are also prohibited. Sexist behaviours are defined as any behaviour based on gender, with the purpose or effect of harming dignity or creating an intimidating, hostile, degrading, humiliating or offensive work environment (see Article L.1142-2-1 of the Labour Code)

### 3.7.2 Scope of the prohibition of harassment

Article 1 of the 2008 law has the same scope as Directives 2006/54/EC and 2004/113/EC. It covers working conditions (including access to employment, vocational training and promotion) in the private and public sectors, and it now also covers access to and the supply of goods and services. Otherwise psychological harassment (not defined in relation to sex discrimination) has a broader scope and is prohibited in general (Article 222-33-2-2 of the Criminal Code) and in particular in family relationships (Article 222-33-2-1).

### 3.7.3 Definition and explicit prohibition of sexual harassment

A first definition of sexual harassment<sup>229</sup> was found to be unconstitutional by the French Constitutional Court, which stated that the definition was not sufficiently clear or precise for criminal law.<sup>230</sup> This decision came as a bombshell, as it removed the prohibition on sexual harassment from the French Criminal Code. This decision and, more importantly, its consequences were clearly unexpected, as the decision left a legal vacuum in the Criminal Code, given its immediate effect. The main consequence of this decision was that, from the date of its publication, no one could be convicted or punished on the ground of sexual harassment, as the offence no longer existed, and alleged offenders were systematically discharged.

The new French legislature quickly addressed this issue and a new law was adopted in August 2012.<sup>231</sup> It includes a new definition of sexual harassment which is very similar to the European one (see Article 222-33 of the Criminal Code and Article L.1153-1 of the Labour Code). The new law is based on a two-prong definition: first, sexual harassment is understood as imposing on someone, in a repeated manner, words or actions that have a

<sup>227</sup> Act No. 2008-496 of 27 May 2008 implementing the various directives on discrimination ([https://www.legifrance.gouv.fr/affichTexte.do;jsessionid=D575B835FE60A4ADE9CDF816A841011E.tplqfr43s\\_2?cidTexte=JORFTEXT000018877783&dateTexte=20191107](https://www.legifrance.gouv.fr/affichTexte.do;jsessionid=D575B835FE60A4ADE9CDF816A841011E.tplqfr43s_2?cidTexte=JORFTEXT000018877783&dateTexte=20191107)).

<sup>228</sup> Act No. 2018-703 of 3 August 2018 reinforcing the fight against sexual and sexist violence.

<sup>229</sup> Act No. 2002-731 of 17 January 2002 on social modernisation; Article 179 introduced Article 222-33 of the Criminal Code without defining what sexual harassment was: 'the act of harassing someone in order to obtain sexual favours is punishable by one year's imprisonment and a fine of EUR 15 000'.

<sup>230</sup> Constitutional Council (*Conseil Constitutionnel*), No. 2012-240, 4 May 2012, QPC, No. 2012-240 abolishes the provision on sexual harassment in Act of 17 January 2002 (*Loi n° 2002-73 du 17 janvier 2002 de modernisation sociale*).

<sup>231</sup> Act No. 2012-954 of 6 August 2012, on sexual harassment, (*Loi n° 2012-954 du 6 août 2012 relative au harcèlement sexuel*).

sexual connotation and either affect the person's dignity because of their degrading or humiliating nature or put him or her in an intimidating, hostile or offensive situation; secondly, one single act can also be assimilated to quid pro quo sexual harassment where someone is using any kind of serious pressure, with the real or visible goal of obtaining an act of a sexual nature.

Public institutions are asked to pay more attention to sexual harassment following President Macron's equality plan, which was introduced as a 'national cause' for his presidential term. The priority of this plan is to improve enforcement of sanctions against perpetrators of sexual harassment and improve the means of protecting victims of sexual harassment:<sup>232</sup> training and education on this topic is encouraged for public officials (the police, justice, education etc.) and private actors. In force since 1 January 2019 in the chapter of a law on equal pay and combating sexual harassment,<sup>233</sup> employers must inform by any means their workers, candidates for employment or any person in training or internship of Article 222-33 of the Criminal Code. They must also provide information about the possible legal action, both civil and criminal, in cases of sexual harassment, as well as the addresses and phone numbers of the company doctor, the labour inspector, the new contact person for cases of sexual harassment or sexist behaviour (companies with more than 250 employees) and the contact person named on these issues appointed by the works council (*comité social et économique*).<sup>234</sup> In practice, this information will be posted in the workplace and in areas where recruitment activities are held.<sup>235</sup> These measures are now required in the public sector.<sup>236</sup> The Decree of 13 March 2020 implementing the Act on the transformation of public service of 2019 has introduced a hotline for sexual harassment in public sector employment, open to victims and bystanders.<sup>237</sup>

The fifth interministerial plan (2017-2019) on prevention and punishment of violence against women has been described as 'a plan to raise awareness and reinforce existing mechanisms to support victims', including sanctions against cyber harassment<sup>238</sup> and street harassment.<sup>239</sup> It is mentioned in a booklet of government policies on equality produced by the Secretary of State, in the chapter on real equality between women and men.<sup>240</sup> Apparently the plan was not sufficiently effective. The recurring acts of femicide

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<sup>232</sup> <https://www.egalite-femmes-hommes.gouv.fr/25948-2/>.

<sup>233</sup> Article L1153-5 amended by Article 105 (V) of Act No. 2018-771 of 5 September 2018 on the freedom of choosing a future professional life (*Loi pour la liberté de choisir son avenir professionnel*).

<sup>234</sup> *Décret n° 2019-15 du 8 janvier 2019 portant application des dispositions visant à supprimer les écarts de rémunération entre les femmes et les hommes dans l'entreprise et relatives à la lutte contre les violences sexuelles et les agissements sexistes au travail*, <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000037964765&categorieLien=id>.

<sup>235</sup> The internal regulations of companies with more than 20 employees already included this information, Article L.1321-2, Labour Code.

<sup>236</sup> In the law on the transformation of the civil service, since then alert given to a contact person in case of sexual harassment and sexist conduct is also introduced in the public sector; Bill presented to the Council of Ministers on March 23 2019, available at: <https://www.vie-publique.fr/actualite/panorama/texte-discussion/projet-loi-transformation-fonction-publique.html> (Article 6 quater adopted in 2019, amending law of 1983 for civil servants, cited).

<sup>237</sup> *Décret n° 2020-256 du 13 mars 2020 relatif au dispositif de signalement des actes de violence, de discrimination, de harcèlement et d'agissements sexistes dans la fonction publique*, <https://www.legifrance.gouv.fr/eli/decret/2020/3/13/CPAF1934186D/jo/texte>.

<sup>238</sup> See Article 222-33 of the Criminal Code: 'sexual harassment also occurs when words or behaviours are imposed on the same person by several persons, in a concerted manner, at the instigation of one person, or successively with the knowledge that the words or behaviours are being repeated'. It also 'increases the penalties for violation of the statute when the conduct is committed using a public online communication service or an electronic or digital medium'.

<sup>239</sup> Article 621-1 of the Criminal Code targets sexist or sexual insult (*outrage sexiste et sexuel*): the act of imposing a verbal or non-verbal act with sexual or sexist connotation that either affects the dignity of the person because of its degrading and humiliating nature or creates an intimidating, hostile or offensive situation. It can lead to fines from EUR 750 to EUR 3000 or impose rehabilitation training.

<sup>240</sup> Secrétariat d'Etat chargé de l'égalité entre les femmes et les hommes (2017) *Vers l'égalité réelle entre les femmes et les hommes: Chiffres clés 2017* (Towards real equality between women and men: key figures 2017), available at: [https://issuu.com/ministere-solidarite/docs/chiffres\\_cl\\_s\\_2017\\_pdf\\_pour\\_mise\\_e](https://issuu.com/ministere-solidarite/docs/chiffres_cl_s_2017_pdf_pour_mise_e).

each year in France (resulting in 122 deaths of women in 2019)<sup>241</sup> created a need for additional measures in October 2019 to prevent these acts and protect the victim's residence, introduced by Act No. 2019-1480 of 28 December 2019 to combat violence in the family.<sup>242</sup>

### 3.7.4 Scope of the prohibition of sexual harassment

The Criminal Code prohibits sexual harassment in general and not only in employment relationships (see Article 222-33) and therefore it also covers access to goods and services.

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

Article 3 of the 2008 law states that any less favourable treatment cannot be based on the person's rejection of or submission to such conduct.

The definition of sexual harassment still describes it as a hostile 'situation'<sup>243</sup> and not a hostile 'environment' so does not seem to conform exactly with the definition of sexual harassment in the directives. This may pose a difficulty for judges who will still see sexual harassment as only being interpersonal and not as a form of sex discrimination, even though there was one case in 2017 where the Court of Appeal of Orléans considered sexual harassment to relate to the working environment.<sup>244</sup>

The case law is evolving to take into account sexist acts as forms of sexual harassment in certain sectors like the police,<sup>245</sup> the cleaning industry and in trains, for example, where female employees are both physically and verbally harassed.<sup>246</sup> Cases highlight the fact that sexist insults are also prevalent in catering services.<sup>247</sup>

There was a recent case on the proof of sexual harassment, where the court found that the confession of the perpetrator of sexual harassment is sufficient to require his dismissal.<sup>248</sup> There was also an extremely interesting case on moral harassment that could be extended to sexual harassment in terms of remedy, where the lack of investigation of the presumed acts by the employer constituted prejudicial harm to the claimant.<sup>249</sup>

### 3.7.6 Specific difficulties

Some of these changes in the laws of August 2018 are seen as counterproductive because they just pile up more criminal sanctions related to different forms of sexual violence and sexism and might create confusion or limit harsher sentencing. For example, street harassment is now sanctioned with a fine of up to EUR 3 000 when the law already

<sup>241</sup> On average, a woman is killed by her husband or partner every three days in France, L'express 16 December 2019 [https://www.lexpress.fr/actualite/societe/au-moins-122-femicides-en-2019-un-chiffre-en-hausse-par-rapport-a-2018\\_2111451.html](https://www.lexpress.fr/actualite/societe/au-moins-122-femicides-en-2019-un-chiffre-en-hausse-par-rapport-a-2018_2111451.html).

<sup>242</sup> Act No. 2019-1480 of 28 December 2019 to combat violence in the family (*Loi n° 2019-1480 du 28 décembre 2019 visant à agir contre les violences au sein de la famille*); implemented by Decree 27 May 2020 on restraining orders which has been criticised because it only gives victims 24 hours to inform their spouse or ex-partner of the order after which the request for the order expires, (*Décret n° 2020-636 du 27 mai 2020 portant application des articles 2 et 4 de la loi n° 2019-1480 du 28 décembre 2019 visant à agir contre les violences au sein de la famille*); [https://www.lemonde.fr/societe/article/2020/06/09/violences-conjugales-les-ordonnances-de-protection-menacees-par-un-decret\\_6042245\\_3224.html](https://www.lemonde.fr/societe/article/2020/06/09/violences-conjugales-les-ordonnances-de-protection-menacees-par-un-decret_6042245_3224.html).

<sup>243</sup> Article L.1153-1 of the Labour Code.

<sup>244</sup> Court of Appeal of Orléans, No. 15-02566, 7 February 2017.

<sup>245</sup> Administrative Court of Appeal 15 January 2019 No. 17MA00578.

<sup>246</sup> Labour Court of Paris, 10 November 2017, No. 15-03130: case where the Defender made observations to the Court.

<sup>247</sup> Court of Cassation, Social Chamber 30 January 2019 No. 17-28905.

<sup>248</sup> Court of Cassation No. 18-12666, 15 May 2019, <https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000038508151&fastReqId=1125943005&fastPos=1>.

<sup>249</sup> Court of cassation (*Cour de cassation*), No. 18-10.551, 27 November 2019.

prohibits sexual harassment with a harsher punishment.<sup>250</sup> Sexist insults are already prohibited with a fine of EUR 45 000 and a one-year prison sentence.<sup>251</sup> Furthermore, as some French academics observe, sanctioning street harassment in certain neighbourhoods might serve as a pretext for racial profiling and fining young individuals of foreign origin, instead of enforcing sexual harassment law at work or in affluent neighbourhoods.<sup>252</sup>

The most recent report of the Defender of Rights signals increasing instances of discriminatory harassment often linked to the return to work after maternity leave.<sup>253</sup>

A worrying case came up recently that seems to represent a step back in the investigation of sexual harassment, since it focuses on the presumed victim's attitude vis à vis her supervisor, ignoring the influence of authority and power in these circumstances. The Court of Cassation rejected a claim for sexual harassment because the presumed victim had, prior to her claim, participated in a seductive game with sex texting.<sup>254</sup>

### 3.8 Instruction to discriminate

#### 3.8.1 Explicit prohibition

Instruction to discriminate is explicitly prohibited in French legislation. Article 1 of the 2008 law states that discrimination includes instructing someone to discriminate.

One case considered that there was discrimination when a middle manager told an employee who wanted a job reassignment to come a week later when her boss was away because 'she did not trust North African women'.<sup>255</sup>

#### 3.8.2 Specific difficulties

There is no specific difficulty with enforcing this ban on an instruction to discriminate except with regard to proving it. This might explain the low number of cases on the issue.

### 3.9 Other forms of discrimination

Discrimination by association or assumed discrimination are not explicitly prohibited, but the list of prohibited grounds is long and can be used to prohibit these types of discrimination.

A case was litigated on the issue when a trade union representative's wife suffered from retaliation as an employee from the same company and the Court recognised implicitly discrimination by association as discrimination based on family situation which is itself a ground in France.<sup>256</sup>

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<sup>250</sup> The Criminal Code already prohibits sexual harassment with a similar definition, see supra note 243.

<sup>251</sup> Law of 29 July 1881 on freedom of the press (*Loi du 29 juillet 1881 sur la liberté de la presse*), Article 32, available at: <https://www.legifrance.gouv.fr/affichTexteArticle.do?idArticle=LEGIARTI000006419738&cidTexte=LEGITEX000006070722>. See interview with Maude Beckers, 'Le harcèlement sexuel doit être sanctionné plus lourdement' (Sexual harassment should be more harshly punished), *Semaine Sociale Lamy*, 3 December 2018, No. 1839, p. 12.

<sup>252</sup> *Libération* (2017), 'Contre la pénalisation du harcèlement de rue' (Against penalisation of street harassment), 26 September 2017, available at: [https://www.liberation.fr/debats/2017/09/26/contre-la-penalisation-du-harcèlement-de-rue\\_1599121](https://www.liberation.fr/debats/2017/09/26/contre-la-penalisation-du-harcèlement-de-rue_1599121).

<sup>253</sup> Court of Appeal of Versailles, 27 September 2018, with observations of the Defender of Rights, [https://juridique.defenseurdesdroits.fr/index.php?lvl=notice\\_display&id=25507](https://juridique.defenseurdesdroits.fr/index.php?lvl=notice_display&id=25507).

<sup>254</sup> Court of Cassation No. 17-31171 25 September 2019, <https://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000039188588>.

<sup>255</sup> Recognising bias and mistrust in relation to North African women as employees, Court of Cassation, No. 10-16.92618 January 2012.

<sup>256</sup> Labour Court of Caen, 25 November 2008 with observations of the HALDE (former French equality body), [https://www.lemonde.fr/idees/article/2008/11/28/ed-condamne-pour-discrimination-par-association-par-bertrand-bissuel\\_1124455\\_3232.html](https://www.lemonde.fr/idees/article/2008/11/28/ed-condamne-pour-discrimination-par-association-par-bertrand-bissuel_1124455_3232.html).

### 3.10 Evaluation of implementation

Direct and indirect sex discrimination seem to be integrated into French law, as the case law reveals, and the existing measures cover legislative provisions, collective bargaining agreements and employer practices.

In terms of positive action, it seems that there is a search for a delicate balance in France between the acceptance of certain forms of preferential treatment for disadvantaged categories (parity rules through balanced representation of equally qualified individuals) and specific measures and corrective measures in legislation that implement equal opportunities by giving social rights linked to certain needs that can be gender neutral such as parenting.<sup>257</sup>

In terms of enforcement of the parity rule, it was adopted progressively by companies: with a 20 % rule first until 2014 and then a 40 % rule, but there is no transparency in the recruitment procedure. The law for listed companies requires a report by the president of the board on the balanced representation of women in conformity with the law, but with no official built-in monitoring outside of the foreseen sanctions in case of illegal appointment of men (decisions null and void).

Other evaluation reports have been conducted by researchers<sup>258</sup> and the High Council on Equality on the implementation of parity rules in the private and public sectors.<sup>259</sup> Studies on the profile of women on executive boards<sup>260</sup> show that they have equivalent degrees to men but different backgrounds and ages. The latest studies seem to reveal that the mandatory quota has worked relatively well: France is the only country with 43 % of women on executive boards,<sup>261</sup> but feminisation of other supervisory positions is still lacking.<sup>262</sup> The last High Council on Equality report in 2019 on how to expand the scope of the parity rule to other strategic positions in companies, to provide outside monitoring to enforce parity rules and create leverage through financial public support for companies and start-ups run by women offers stimulating proposals for the future of positive action at the highest levels.<sup>263</sup>

Sexual harassment law has broadened to cover hostile situations and sexism is both an explicit form of discrimination and a form of sexual harassment. The multiplication of sanctions adopted in 2018 in this regard might make the legislative reform more complex to implement but the emphasis on compliance might enhance opportunities for prevention in the workplace. Violence against women in France is still a serious challenge as is

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<sup>257</sup> As confirmed by the Vice-President of the Council of State, Jean-Marc Sauvé, himself recently: Allocution Introductive JCP ed Admin. No. 29, July 2018, p. 20.

<sup>258</sup> <http://www.datapressepremium.com/rmdiff/2010544/EtudeObservatoireSkemaDeLaFeminisationDesEntreprisesVF2.pdf>.

<sup>259</sup> [http://www.haut-conseil-egalite.gouv.fr/IMG/pdf/parite-court-ang\\_nov-2018-135x210-v2.pdf](http://www.haut-conseil-egalite.gouv.fr/IMG/pdf/parite-court-ang_nov-2018-135x210-v2.pdf).

<sup>260</sup> Bender, A.-F., Dang, R., Scotto, M.-J. (2016) 'Les profils des femmes membres des conseils d'administration en France' ('Profiles of female board members in France'), *Travail, genre et sociétés* 2016/1 No. 35, pp. 67-85.

<sup>261</sup> [https://www.challenges.fr/femmes/exclusif-les-resultats-du-premier-barometre-de-la-parite-ethics-boards\\_588217](https://www.challenges.fr/femmes/exclusif-les-resultats-du-premier-barometre-de-la-parite-ethics-boards_588217).

<sup>262</sup> Between 2013 and 2018, the number of women on the boards of directors of SBF 120 companies increased by 17.1 %, and their share jumped from 26.2 % to 43.3 %. The prospect of directors' fees being frozen and of new appointments to boards being cancelled, together with naming and shaming in the media, played a decisive role. However, while the Cope-Zimmerman law has been able to give the necessary impetus within the governance of large French companies, the feminisation of executive committees and the top 100 remains insufficient. Since 2013, there have been only 6 and 4 points of progression respectively in the CAC 40 (9.5 % to 15.6 % for comex and 15.6 % to 19.5 % in 2017 for the top 100).

<sup>263</sup> High Council of Equality (2019), *Report on Access of women to high responsibilities and the leverage of public financial intervention (Accès des femmes aux responsabilités et rôle levier des financements publics)* 17 December 2019, p. 4 [http://www.haut-conseil-egalite.gouv.fr/IMG/pdf/synthese\\_rapport-parite-gouvernance\\_17122019.pdf](http://www.haut-conseil-egalite.gouv.fr/IMG/pdf/synthese_rapport-parite-gouvernance_17122019.pdf).

reflected in the introduction of the most recent measures to prevent and combat these acts in 2019.<sup>264</sup>

### 3.11 Remaining issues

There might be a need to emphasise the fact that sexual harassment in certain industries and collective forms of discrimination linked to collective bargaining agreements that ignore sex segregation of jobs perpetuate systemic gender discrimination requiring collective action and prevention in the public and private sectors, outside of a general duty to bargain regularly on professional equality.<sup>265</sup>

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<sup>264</sup> Act No. 2019-1480 of 28 December 2019 to combat violence in the family ([Loi n° 2019-1480 du 28 décembre 2019 visant à agir contre les violences au sein de la famille](#)); implemented by Decree 27 May 2020 on restraining orders which has been criticised because it only gives victims 24 hours to inform their spouse or ex-partner of the order, after which the request for the order expires, (*Décret n° 2020-636 du 27 mai 2020 portant application des articles 2 et 4 de la loi n° 2019-1480 du 28 décembre 2019 visant à agir contre les violences au sein de la famille*); [https://www.lemonde.fr/societe/article/2020/06/09/violences-conjugales-les-ordonnances-de-protection-menacees-par-un-decret\\_6042245\\_3224.html](https://www.lemonde.fr/societe/article/2020/06/09/violences-conjugales-les-ordonnances-de-protection-menacees-par-un-decret_6042245_3224.html).

<sup>265</sup> Mercat-Bruns M. (2018), 'Systemic discrimination: rethinking the tools of gender equality', *European Equality Law Review*, p. 1.

## **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 has been a series of reports on gender pay disparities<sup>266</sup> including one in 2015 which reported an average annual income disparity in 2012 of 25.7 % between women and men, to the disadvantage of women.<sup>267</sup> In 2019, the Secretary of State on equality indicated that the annual disparity between sexes is 24 % but for equivalent jobs, there is a wage gap of 9 % between women and men.<sup>268</sup>

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

The Secretary of State for equality also publishes the statistics annually showing the unequal treatment of women linked mostly to a sex-segregated workplace and the glass ceiling.<sup>269</sup> A report by the High Council on Equality of Women and Men in Employment focuses on the direct and indirect unequal treatment produced by the grading system in employment.<sup>270</sup> A report from the Observatory of Inequalities in 2019 specifically covers gender inequalities at work<sup>271</sup> and incorporates the protests of the yellow vest movement in 2019 launched by some female workers (healthcare workers) in a larger debate on the increased disparity in income over 10 years (+ EUR 10 000) between the 10 % richest members of the French population and the 10 % poorest French citizens.

#### 4.1.3 Other issues

In 2015, the Defender of Rights produced a comprehensive study of the multiple factors that interact to produce the gender pay gap in France.<sup>272</sup> First, ingrained stereotypes about male and female work lead to gendered orientation by schools of girls into certain types of jobs. This explains the segregation of the workplace, with some jobs being predominantly male and other positions predominantly female. In these predominantly female jobs, career advancement is not always possible and in predominantly male jobs there is no critical mass of women in the highest ranks, producing a glass ceiling for women. The impact of maternity enhances the risk that employers limit female promotions. As a result of these barriers and child rearing, more women end up in part-time work. They suffer from discrimination, stereotypical images of women and biased representations of their contribution to the workplace which perpetuate the recurring systemic sex discrimination in employment, affecting their pay. Hence this report explains how all these factors correlate in a vicious circle and can prevent the effective application of equal pay for work of equal value.

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<sup>266</sup> See also in 2016, Marie, E., Mochel, F. (2016) *Evaluation des outils de mesure par les entreprises des écarts de rémunération entre les femmes et les hommes* (Evaluation of tools for companies to measure the gender pay gap), report of the General Social Affairs Inspectorate, available at: <http://www.igas.gouv.fr/IMG/pdf/2016-007R.pdf>.

<sup>267</sup> Chamki A., Toutlemonde F. (2015), *Ségrégation professionnelle et écarts de salaire femmes-hommes*, *Dares Analyse*, No. 82, p. 1, <https://dares.travail-emploi.gouv.fr/IMG/pdf/2015-082.pdf>.

<sup>268</sup> <https://www.egalite-femmes-hommes.gouv.fr/wp-content/uploads/2019/05/30652-DICOM-CC-2019-essentiel.pdf>.

<sup>269</sup> <https://www.egalite-femmes-hommes.gouv.fr/wp-content/uploads/2019/05/30652-DICOM-CC-2019-essentiel.pdf>.

<sup>270</sup> <https://www.egalite-femmes-hommes.gouv.fr/guide-du-conseil-superieur-de-legalite-professionnelle-csep-pour-la-prise-en-compte-de-legalite-entre-les-femmes-et-les-hommes-dans-les-systemes-de-classification/>.

<sup>271</sup> Observatory on Inequalities, Brunner A., Maurin L. Ed. (2019), Report on inequalities in France, (*Rapport sur les inégalités en France*), June 2019, <https://www.inegalites.fr/Rapport-sur-les-inegalites-en-France-edition-2019>.

<sup>272</sup> [https://www.defenseurdesdroits.fr/sites/default/files/atoms/files/ddd\\_fic\\_20150629\\_salaire\\_egal\\_fh.pdf](https://www.defenseurdesdroits.fr/sites/default/files/atoms/files/ddd_fic_20150629_salaire_egal_fh.pdf).

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

Since 2017 and the President's plan for equality as a 'national cause', there seems to be an explicit effort to enrich the meaning of substantive equality by means of a more quantitative evaluation of corrective measures in the private sector, with the new decree on the gender pay gap of 2019 which was adopted to implement the law of 5 September 2018.<sup>273</sup> Companies<sup>274</sup> must publish indicators each year relating to the pay gap between women and men. When the results obtained are under 75 points, the collective bargaining negotiations on equality will focus on adequate and relevant measures to correct the gender pay gap and programme annual or pluri-annual financial measures to close it.<sup>275</sup> A parallel governmental impetus is introduced in the public sector with the new Act on the transformation of the civil service presented on 23 March 2019 which imposes the development before 31 December 2020 of a plan for equality between women and men and measures to close the gender pay gap and promote equal access of women and men in the public sector.<sup>276</sup>

## 4.2 Equal pay

### 4.2.1 Implementation in national law

Article L. 3221-2 of the Labour Code provides for equal pay for men and women 'for the same job or a job of equal value'.

### 4.2.2 Definition in national law

Article L.3221-3 of the Labour Code provides exactly the same definition of pay as Article 157(2) TFEU. According to the Labour Code, pay means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his or her employment, from his or her employer.

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

Article L.1132-1 of the Labour Code prohibits direct and indirect discrimination on the grounds of sex in all aspects of employment and professional life, explicitly including remuneration. Article L.3221-6 of the Labour Code also states that a job classification system (grading system) shall be based on rules allowing for the implementation of the equal pay principle.

### 4.2.4 Related case law

The application of the principle of equal pay for equal work is challenging and, for various reasons, a very limited number of victims actually lodge complaints.

The Court of Cassation in 1997 was initially faced with an equal pay claim from a female mushroom packer comparing her work with more highly paid male packers.<sup>277</sup> The Court stated that it was clear that female packers were systematically paid less than their male

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<sup>273</sup> Act No. 2018-771 5 September 2018 on the individual's freedom to choose their future professional life (*Loi n° 2018-771 du 5 septembre 2018 pour la liberté de choisir son avenir professionnel*), available at: <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000037367660&categorieLien=id>.

<sup>274</sup> More than 50 employees.

<sup>275</sup> Article D.1142-6; Decree No. 2019-15 of 8 January 2019; Guidelines No. 2019/03, Ministry of Labour on gender gap measures 25 January 2019 - Instruction, Ministère du Travail available at [http://grand-est.directe.gouv.fr/sites/grand-est.directe.gouv.fr/IMG/pdf/instr\\_egalite\\_professionnelle\\_25\\_janv\\_2019.pdf](http://grand-est.directe.gouv.fr/sites/grand-est.directe.gouv.fr/IMG/pdf/instr_egalite_professionnelle_25_janv_2019.pdf).

<sup>276</sup> Act No. 2019-828 of 6 August 2019 on the transformation of the civil service (*Loi n° 2019-828 du 6 août 2019 de transformation de la fonction publique*).

<sup>277</sup> Judgment of the Court of Cassation of 12 February 1997, No. 95-41694.

counterparts. For the Court of Cassation, men and women were doing equivalent work and the employer could not give any objective reasons for paying them differently.

In 2010, a case illustrated the judicial standard used to assess work of equal value in a case where a female employee held the position of 'human resources, legal and office department manager'.<sup>278</sup> Following her dismissal, the employee decided to file a claim for back pay on the grounds that there had been sexual discrimination against her. The employee provided evidence that her salary, despite an equal classification and greater seniority than her direct male colleagues, was substantially lower than that of her male colleagues. For the French Supreme Court, the functions of the employee and those of her direct colleagues were identical as to their hierarchical level, classification and responsibilities. Moreover, their importance was comparable with regard to the functioning of the company, as each of the managerial positions required comparable qualifications and involved a comparable level of stress. The French Supreme Court concluded that the employees performed work of equal value.

In 2014, the Court of Cassation confirmed its position on the equal value of work in a similar case.<sup>279</sup> The decision concerned a female employee who held the position of 'human resources manager' and who claimed that she was paid less than male colleagues who were members of the executive board. The Court of Cassation decided that the decision of the Court of Appeal was not well founded because it did not compare the situation of the woman to the situation of the men in terms of tasks and responsibilities in its finding that the jobs compared were not of equal value.<sup>280</sup>

#### 4.2.5 Permissibility of pay differences

Pay differentials can only be justified if the work is not of the same value. Therefore, judges concentrate on the value of jobs and not really on the justification in the context of sex discrimination. Seniority, if it is not already included in a separate bonus, can be a justification for a disparity in pay.<sup>281</sup>

There has been a very stimulating case which justified pay difference linked to positive action for women.<sup>282</sup> A male claimant contested that a female colleague who had started at the same time as him at the same pay grade should benefit from an increase in pay. The Court of Cassation confirmed the court of appeal's analysis, which justified the pay raise as compensation for the extra diplomas and additional experience that the female colleague had acquired before being hired for the job and that had in fact not been taken into account. In other words, for the Court of Cassation, the corrective (preferential) measure to compensate the wage disparity was justified and in conformity with the principle of equal pay for work of equal value.

#### 4.2.6 Requirement for comparators

For the Court of Cassation, 'the existence of discrimination does not necessarily imply a comparison with other workers'.<sup>283</sup> If a judge finds that a decision might amount to sex discrimination and there are no men in the company who can be used as comparators, it does not represent an obstacle to a finding of discrimination.

Therefore, there is not really any need for a hypothetical comparator.

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<sup>278</sup> Judgment of the Court of Cassation of 6 July 2010, No. 09-40021.

<sup>279</sup> Judgment of the Court of Cassation of 22 October 2014, No. 13-18362.

<sup>280</sup> Judgment of the Court of Cassation of 25 March 2015, No. 14-10149.

<sup>281</sup> Judgment of the Court of Cassation Social chamber 19 December 2007, No. 06-44.795.

<sup>282</sup> Judgment of the Court of Cassation 6 November 2019 No. [18-13.235](#).

<sup>283</sup> See, for example Court of Cassation Social chamber 12 June 2013, No. 12-14153, <http://www.legifrance.gouv.fr/>.

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

According to Article L.3221-4 of the Labour Code, in order to establish the equal value of a job, the parameters which could be taken into account are the following: a title, diploma, professional experience, responsibilities, physical or mental stress. This list is not exhaustive. For example, a difference in level of diploma acquired in five years for a male graphic artist as opposed to two, if it is 'relevant and useful for certain tasks of the job' can reflect the value of the work and justify a pay difference between a woman and a man.<sup>284</sup>

#### 4.2.8 Other relevant rules or policies

The general obligation of employers to negotiate on equality between women and men is mandatory at least every four years when there is a group of union representatives.<sup>285</sup> The frequency of this negotiation can be set at a minimum every four years by an agreement at the enterprise level. If there is no agreement on the timetable, the negotiation is held every year. The scope of the negotiation must include the gender pay gap.<sup>286</sup> The financial penalty in the absence of negotiation on equality reflects its binding nature.<sup>287</sup>

#### 4.2.9 Job evaluation and classification systems

Article L.3221-6 of the Labour Code states that a job classification system (grading system) must be based on rules allowing for the implementation of the equal pay principle.

According to a new decree of 2019,<sup>288</sup> for companies with more than 250 employees (Article D.1142-2 Labour Code) indicators that guarantee more visibility on barriers to promotion must be published, including: the rate of disparities in promotions between women and men; the percentage of employees who benefited from a pay rise during the year of their return from maternity leave if there were increases in pay during their leave period; the number of workers of the under-represented sex among the ten employees who earn the highest wages in the firm.

A parallel governmental impetus was introduced in the public sector with the new Act on the transformation of the civil service introduced on 23 March 2019, which imposes a duty to develop a plan for equality between women and men and measures to close the gender pay gap and promote equal access of women and men in the public sector before 31 December 2020.<sup>289</sup>

A report by the High Council on Equality of Women and Men in Employment focused on direct and indirect unequal treatment produced by the grading system in employment.<sup>290</sup> The same High Council produced a report in 2019, 'Older Women in Employment', which concluded that older female workers are often less qualified, in part-time work and do not benefit as much from continuing education, which is necessary for promotion and changes

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<sup>284</sup> Judgment of the Court of Cassation, 17 March 2010, No. 08-43088.

<sup>285</sup> A 'Section syndicale', Article L.2242-1, Labour Code, [Executive order No. 2017-1385 of 22 September 2017, Article 7.](#)

<sup>286</sup> Article L.2242-1, Labour Code.

<sup>287</sup> Article L.2242-8, Labour Code.

<sup>288</sup> Decree No. 2019-15 of 8 January 2019; Guidelines No. 2019/03, Ministry of Labour on gender gap measures 25 January 2019 - Instruction, Ministère du Travail available at: [http://grand-est.direccte.gouv.fr/sites/grand-est.direccte.gouv.fr/IMG/pdf/instr\\_egalite\\_professionnelle\\_25\\_janv\\_2019.pdf](http://grand-est.direccte.gouv.fr/sites/grand-est.direccte.gouv.fr/IMG/pdf/instr_egalite_professionnelle_25_janv_2019.pdf).

<sup>289</sup> Act No. 2019-828 of 6 August 2019 on the transformation of the civil service (*Loi n° 2019-828 du 6 août 2019 de transformation de la fonction publique*).

<sup>290</sup> <https://www.egalite-femmes-hommes.gouv.fr/guide-du-conseil-superieur-de-legalite-professionnelle-csep-pour-la-prise-en-compte-de-legalite-entre-les-femmes-et-les-hommes-dans-les-systemes-de-classification/>.

in their job classification.<sup>291</sup> However, among the younger generations, when they enter the workforce women tend to be more qualified than men and there is more of a convergence in terms of professional career development because the situation of men has deteriorated.<sup>292</sup>

#### 4.2.10 Wage transparency

One of the most important measures obliging employers to address the issue of equal pay is the information they have to give to workers' representatives (works councils and trade union representatives) on equality. Businesses employing 50 or more staff used to have to produce a distinct written annual report<sup>293</sup> for the works council comparing the situation of men and women in the company. This used to comprise a comparative analysis in terms of recruitment, training, qualifications, pay, working conditions and a balance between professional and private life, supported with relevant statistically-based indicators (Article L.2323-17, Article L.2323-8 and R.2323-12 of the Labour Code replaced by current legislation in 2017 and 2018 mentioned below on annual statistics on men and women in companies).

The employer had to record measures taken in the company over the previous year to attain employment equality, and an outline of the objectives for the year ahead. The publication of relevant indicators in the workplace was mandatory according to the law, so as to enable the report to be analysed in detail.

Employers still have to provide information on equality in annual negotiations. They have to give month-by-month data on trends regarding the number of staff and their qualifications according to sex, and must state the number of employees on permanent contracts, the number of fixed-term contracts and the number of part-time employees (Article L.2242-5 of the Labour Code).

At the first meeting in compliance with the annual obligation for unions and employers to negotiate at enterprise level, the employer must provide trade union representatives with information that enables them to carry out a comparative analysis of the situation of men and women in terms of jobs, qualifications, pay, the hours worked and the organisation of working time. The accompanying information must explain the situation reflected in the statistics. Companies with fewer than 300 employees can conclude an agreement with the State to receive financial assistance to carry out a study of their employment equality situation and of the measures they would need to take to ensure equal opportunities between men and women (Article R.1143-1 of the Labour Code).

The new general labour legislation<sup>294</sup> and recent provisions, especially the Law of 29 March 2018, now detail new obligations for private companies<sup>295</sup> with regard to collecting the statistics necessary to monitor the participation of women and men in employment. However, a historical view shows that, in practice, in the private sector, these more recent legislative developments seem to limit the scope of these obligations in three ways.

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<sup>291</sup> Gresy B, Milewski, F, Chappert F. Amouzou, A (2019), *Les femmes seniors dans l'emploi : état des lieux, Conseil Supérieur de l'Égalité Professionnelle entre les femmes et les hommes*, June 2019, p. 80.

<sup>292</sup> Couppié T. et Epiphane D. (2019), 'Et les femmes devinrent plus diplômées que les hommes', *Céreq Bref* n° 373, March 2019, <https://www.cereq.fr/et-les-femmes-devinrent-plus-diplomees-que-les-hommes>.

<sup>293</sup> *Rapport de situation compare*.

<sup>294</sup> Article L.2323-17 abolished by the new labour law reform, Executive Order (Ordonnance) n°2017-1386 du 22 September 2017, Article 1.

<sup>295</sup> See *Travail, genre et sociétés* 2017/1 No. 37 p. 129-171. 'Des lois à la négociation, quoi de neuf pour l'égalité professionnelles', <https://www.cairn.info/revue-travail-genre-et-societes-2017-1.htm>.

First, today there is more limited visibility of the report on the comparative situation of men and women,<sup>296</sup> dating back to the Roudy Equality Law in 1983<sup>297</sup> and reinforced by the Act on equality of 9 May 2001 and the 2014 Act on real equality.<sup>298</sup> Companies<sup>299</sup> previously had to inform the employee representatives of this numerical analysis annually, according to a decree, presenting for each job category, the situation of women and men in hiring, training, promotion, in terms of qualifications, grade, working conditions and pay.<sup>300</sup>

However, from 2015 onwards, these data were added to the economic and social data of companies on the website of the Ministry of Equality. Employee representatives now have to find this data themselves and annually negotiate collective bargaining agreements on the participation of women and men in employment within wider negotiations on the quality of life in the workplace.<sup>301</sup> So there is less visibility of the data in a more general database and the scope of the negotiations on equality at work is not separate from other issues relating to working conditions.

Secondly, the Macron executive order on the Labour Code reform of 2017<sup>302</sup> also concerns the general obligation of employers to negotiate on equality between women and men, which is still mandatory at least every four years when there is a group of union representatives.<sup>303</sup> However, the frequency of this negotiation can be set at a minimum of every four years by an agreement at company level. It is only if there is no agreement on the timetable that the negotiation is held every year. The scope of the negotiation must include the gender pay gap.<sup>304</sup> The financial penalty in the absence of negotiation on equality reflects its binding nature.<sup>305</sup>

Thirdly, the recent decree on indicators to close the gender pay gap and monitor the promotion of women and men with specific actions might not be sufficiently effective to detect disparities and correct them.<sup>306</sup> The decree was adopted to implement Law No. 2018-771 of 5 September 2018<sup>307</sup> which provides that, in companies with more than 50 employees, the employer must publish indicators each year relating to the pay gap between women and men and the actions implemented to eliminate it. The decree also defines the methodology used to establish the indicators (L.1142-8 of the Labour Code).

According to the decree, the following indicators for companies with more than 250 employees (Article D.1142-2 Labour Code) must be published:

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<sup>296</sup> *Rapport de situation comparée.*

<sup>297</sup> Law No. 83-635 of 13 July 1983 (Roudy Law) (*Loi n° 83-635 du 13 juillet 1983 portant modification du Code du travail et du Code penal en ce qui concerne l'egalite professionnelle entre les femmes et les hommes*).

<sup>298</sup> Law No. 2014-873 of 4 August 2014 on real equality between women and men (*Loi n° 2014-873 du 4 août 2014 pour l'égalité réelle entre les femmes et les hommes*); Act No. 2001-397 of 9 May 2001 on professional equality between men and women, (*Loi sur l'égalité professionnelle entre hommes et femmes*).

<sup>299</sup> Article L.2323-57 of the Labour Code (over 300 employees) or Article L.2323-47 of the Labour Code (for companies under 300 employees).

<sup>300</sup> This grid of analysis was common to all companies with over 50 employees and the measures were in ratios. For the guide that used to be applied, see: [https://travail-emploi.gouv.fr/IMG/pdf/Guide\\_RSC\\_aout\\_2008.pdf](https://travail-emploi.gouv.fr/IMG/pdf/Guide_RSC_aout_2008.pdf).

<sup>301</sup> Rebsamen Law of 17 August 2015 (*Loi n° 2015-994 du 17 August 2015 relative au dialogue social et à l'emploi*).

<sup>302</sup> Executive Order No. 2017-1385 of 22 September 2017 on strengthening collective negotiations (*Ordonnance n° 2017-1385 du 22 septembre 2017 relative au renforcement de la négociation collective*).

<sup>303</sup> A 'Section syndicale', Article L.2242-1, Labour Code, [Executive order No. 2017-1385 of 22 September 2017, Article 7](https://www.legifrance.gouv.fr/eli/loi/2017/9/5/MTRX1808061L/loi/2017-1385).

<sup>304</sup> Article L.2242-1, Labour Code.

<sup>305</sup> Article L.2242-8, Labour Code.

<sup>306</sup> Decree No. 2019-15, 8 January 2019 on closing the gender pay gap and combating sexual violence and sexism (*Décret n° 2019-15 du 8 janvier 2019*): <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000037964765&categorieLien=id>.

<sup>307</sup> Chapter IV, Article 104-107 <https://www.legifrance.gouv.fr/eli/loi/2018/9/5/MTRX1808061L/loi/2018-771>.

- 1) The gender pay gap between women and men, calculated in reference to the average pay of women compared to the average pay of men, by age cohorts and categories of equivalent jobs.
- 2) The rate of disparities in individual pay rises that do not reflect promotions between women and men.
- 3) The rate of disparities in promotions between women and men.
- 4) The percentage of employees who benefited from a pay rise during the year of their return from maternity leave if there were increases in pay during their leave period.
- 5) The number of workers of the under-represented sex among the ten employees who earn the highest wages in the firm.

On point 1), it is useful to look at the gender pay gap according to age cohorts because it reveals when exactly in their career women benefit from similar pay to men, to avoid only comparing pay according to comparable positions held by men and women, regardless of how much time it took for women to reach those positions. However, the decree gives considerable leeway to employers to determine what constitutes categories of 'equivalent jobs' (after consulting the works council/CSE, the employer can classify workers according to their level, their hierarchical grade linked to job sector classifications or another method to rate jobs).

On point 2), focusing on the 'rate' of disparities in individual rises means publishing the disparity in the number of pay rises given to women and men but does not reveal the amount of pay actually awarded to both categories.

On point 3), publishing the rate of disparities in promotions between women and men reveals the difference in the amount of promotions awarded and says nothing about the nature of the promotions given to men and women.

On point 4), the percentage of employees who received a pay rise after their maternity leave is already a requirement (Article 1225-26 Labour Code).

On point 5), the number of workers of the under-represented sex among the ten best paid employees is more of a powerful symbol than a key provision to fight gender pay disparities across the board in companies.

The same indicators for companies of between 50 and 250 employees (Article D.1142-2-1) must be published except on the rate of promotions awarded to women and men.

It is regrettable that no indicators are required for smaller companies (under 50 employees), since the majority of the job pool is within these companies. For companies of between 50 and 250 employees, the same indicators are to be published except one: there is no obligation to publish the rate of disparities in promotion between women and men. It is problematic to think that the differences in the number of promotions for women and men should not be monitored in these medium-sized companies.<sup>308</sup>

Under the new decree (Article D.1142-4), the results of the company in view of the indicators are published each year on the company's website, or in the absence of such a website, the indicators are circulated to employees by other means.

In the public sector, similar pay gap indicators will soon be required with the new reform of the civil service adopted in the summer of 2019.<sup>309</sup>

<sup>308</sup> See EELN Flash report on gender pay gap reform 2019/20, <https://www.equalitylaw.eu/downloads/4859-france-new-decree-on-gender-pay-gap-in-france-pdf-106-kb>.

<sup>309</sup> Act No. 2019-828 of 6 August 2019 on the transformation of the civil service (*Loi n° 2019-828 du 6 août 2019 de transformation de la fonction publique*).

#### 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

Most of the recommendations of the European Commission have been adopted by France (see point 4.2.10 and supra footnote 311). Therefore, there was no need to revise the law in order to implement it.

#### 4.2.12 Other measures, tools or procedures

There are new measures to correct the gender pay gap detected by the new indicators (Article L.1142-9 Labour Code). First, there is a duty to inform the works councils and engage in negotiations on professional equality. In companies where the results in points obtained with regard to the indicators are fewer than 75 points, the collective bargaining negotiations on equality will focus on adequate and relevant measures to correct and, eventually, programme annual or pluri-annual financial measures to close the gender pay gap (Article D.1142-6). Works councils can dispose of these indicators. The results are presented by socio-professional categories, levels or hierarchical pay grades or other rankings according to jobs. If the indicators cannot be calculated, the employer must explain these challenges. In the event that no agreement is found on measures with employee representatives, the employer takes its own measures after consultation with the works council. This decision is monitored by the public authorities.

There are also financial sanctions if the indicators reflect a certain level of disparity (L.1142-10). In companies of at least 50 employees, if the result of points linked to indicators is under 75, the company has three years to comply and limit the pay disparities. If the company achieves a result of 75 points before the three years have elapsed then a new time limit of three years is awarded to correct the disparities which starts the year the 75 points result is published (Article D.1142-8).<sup>310</sup>

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

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

Article 5 of the 2008 law states that the law applies to all private and public bodies.<sup>311</sup> Traditionally, there is no legal definition of a worker.

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

The protection of employees from sex discrimination covers every aspect of working life. Article L.1132-1 of the Labour Code covers hiring practices, training, remuneration, appointment, promotion, transfer, classification of qualifications, the renewal of contracts, redeployment and dismissals.

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<sup>310</sup> This encourages companies to introduce measures to comply, postponing the sanction if the pay disparity decreases within the three years. However, it can result in companies decreasing their pay disparity once every three years to postpone any possible sanction.  
The decree describes the procedure to sanction the company if the three-year time limit is not respected: an agent from the labour inspectorate sends a report to the regional director (Article D.1142-9.). The director informs the company it is considering a financial sanction within the next two months after the report and the director can take into account justifications for the non-compliance and correction of the pay disparity (economic hardship, company restructuring or merger or bankruptcy (Article D.1142-11)). The director has two choices: impose a sanction of the equivalent of 1 % of the earnings and company profits from the past calendar year based on revenues from activities (social security contribution base Article D.1142-13) or award extra time to comply within a year maximum.  
Public authorities enforce the rules, which avoids the constraints of judicial adjudication. However, in view of the possible exemptions to enforcement in case of economic hardship in the company, the sanctions might be less rigorously enforced and this would undercut the binding and dissuasive nature of the publication of the indicators and their effect.

<sup>311</sup> See also Article 1131-1, Labour Code.

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

Article L.1142-2 states that the prohibition of discrimination does not apply when the sex of the worker constitutes a determining factor in employment and that the objective sought is proportionate and the exception is also proportionate. Article R.1142-1 of the Labour Code has also defined the types of employment concerned: it only covers actors and models. Some other exceptions previously existed on submarines and in some specific police forces but these jobs have finally been opened to women.

#### 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

Article 1132-1 of the Labour Code provides protection in all these circumstances.

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

The exception as such has not been implemented but, of course, it does not impede the definition of some specific rules for pregnant women.

#### 4.3.6 Particular difficulties

There are no particular difficulties related to the personal or material scope of French Law.

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

Positive action measures have covered both private and public sector employment with variable success. First, these measures have coexisted and have often been derived often distinct laws and, secondly, since President Macron's plan designating equality as a 'national cause', legislation promoting corrective measures to attempt to bridge the gender pay gap concern legislative reforms in the private and public sectors simultaneously.

For a long time, women in the public sector were granted specific rights linked to their family responsibilities. In 1988, France was referred to the CJEU because of special benefits offered to women in collective agreements.<sup>312</sup> 'Positive action was not invoked as such, the French government merely defended the existence of a compensation measure deemed admissible because, France argued, the aim of Directive 76/207/CEE was not to transform gender relations in work and family relations'.<sup>313</sup> In the *Griesmar* case (C-366/99), contrary to the argument put forward by the French Government, the European Court of Justice took the view that the credit granted to civil servants who were mothers could not be authorised as being a measure designed to help women in their career since, being granted on the date of their retirement, it did not provide a remedy for the problems which they might encounter in the course of their professional careers.<sup>314</sup> Another case subjected to a preliminary ruling concerned enhanced pension benefits for child rearing for employees in the public sector and led to a judgment of indirect sex discrimination.<sup>315</sup> Since then, in 2015, the French Council of State approved a French provision in relation

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<sup>312</sup> Judgment of 25 October 1988, *Commission v. France*, C-312/86, ECLI:EU:C:1988:485.

<sup>313</sup> The Court rejected this analysis, see Xenidis, R. and Masse Dessen, H. (2018), 'Positive action in practice: some dos and don'ts in the field of gender equality law', *European Equality Law Review* No. 2, p. 40.

<sup>314</sup> The Court concluded that career-related difficulties encountered by mothers could not be resolved by means of the service credit at issue in the present case.

<sup>315</sup> CJEU, C-102/14 *Leone*: civil servants who are the parents of at least three children may opt for early retirement with immediate payment of their pension, subject to certain conditions, including having taken a career break of at least two consecutive months for each child.

to the past, supporting its decision with a quantitative analysis of inequalities that penalise women's careers.<sup>316</sup>

Thus, the principle is that civil servants have equal rights and general positive action measures are excluded. Nevertheless, some attempts were made by the legislator to create some quotas. For example, the law on equal pay passed in 2006 intended to create mandatory quotas in different areas. But on 16 March 2006, the Constitutional Council invalidated many provisions of this law.<sup>317</sup> The mandatory provisions related to access for women to deliberative and jurisdictional boards were cancelled. The Council specified that the Constitution does not permit restrictive rules grounded on sex and, for that reason, refused provisions that imposed predetermined proportions between men and women on boards. In short, all incentive provisions were retained, especially those regarding equal representation of men and women in courses of initial and continuous vocational training, but the Constitutional Council censured all restrictive provisions. With the amendment of the Constitution in 2008 of Article 1, the position of the Council changed and the legislator is now allowed to adopt laws that promote 'equal access by women and men to elective offices and posts as well as to positions of professional and social responsibility'.

Since 2002, one third of the members of juries and commissions for the recruitment or promotion of civil servants shall be qualified persons of each sex.<sup>318</sup> The aim of this quota was to allow a balanced participation of both sexes in these juries. In 2007, the Council of State stated that the decision of a commission which did not respect this quota could not be void, as the law only defines an objective of a balanced representation, and that the criterion of gender cannot prevail against competence and skills.<sup>319</sup> A recent law in 2019 on the transformation of the French civil service<sup>320</sup> reaffirms these obligations in juries and recruitment commissions and attempts to facilitate its implementation according to the public sector concerned.<sup>321</sup>

A turning point was the adoption of a law of 2012 regarding public servants in the three main pillars of the civil service: the civil service of the State, the civil service of public hospitals and the civil service of local governments.<sup>322</sup> The main provision of the law was the adoption of quota in the same way as in the private sector.<sup>323</sup> The law also required

<sup>316</sup> CE Ass., 27 March 2015, M. Quintanel No. 372426 (Council of State Assembly, 27 March 2015 No. 372426): 'while noting the divergence from the EU case, the Council of State sought to establish the social facts from which the conclusions were to be drawn', Xenidis, R. & Masse-Dessen, H. (2018), 'Positive action in practice: some dos and don'ts in the field of gender equality law', *European Equality Law Review*, No.2, p. 55.

<sup>317</sup> Constitutional Court, Decision 2006-533 DC of 16 March 2006.

<sup>318</sup> Article 6 bis Law of 13 July 1983 on the civil service modified by the Law Génisson of 9 May 2001 then by the law of 12 March 2012), see Bui-Xuan, O. (2015) 'La "représentation équilibrée entre hommes et femmes", une catégorie juridique équivoque' ("Balanced representation of men and women", an ambiguous legal category'), *RDP* 2015, p. 431-450; Bui-Xuan, O. (2018) "'Représentation équilibrée" et "représentation proportionnée" des femmes et des hommes : convergence ou concurrence ?' ("Balanced representation" and "proportional representation" of women and men: convergence or competition?'), *AJFP* 2018, pp. 319-323.

<sup>319</sup> Council of State, 22 June 2007, No. 288206, published in the *Recueil Lebon*.

<sup>320</sup> Act No. 2019-828 of 6 August 2019 on the transformation of the civil service (*Loi n° 2019-828 du 6 août 2019 de transformation de la fonction publique*).

<sup>321</sup> Article 80 of the new law, modifying the Law of 1983 on the civil service; the idea is to clarify the principle of balanced representation in selection committees grouping different provisions of the civil service regulations to improve its application. It also facilitates its implementation in different administrations (provisions on rotating presidency between the sexes of selection committees over a period of four sessions of competitions to adjust to the culture of certain public professions and levels instead of every session which compromised its application).

<sup>322</sup> Law No. 2012-357 of 12 March 2012 on access to permanent posts and improving employment conditions for contract workers in the civil service, on combating discrimination and introducing various provisions relating to the civil service (*Loi No. 2012-347, 12 mars 2012 relative à l'accès à l'emploi titulaire et à l'amélioration des conditions d'emploi des agents contractuels dans la fonction publique, à la lutte contre les discriminations et portant diverses dispositions relatives à la fonction publique*).

<sup>323</sup> The law required that women fill 40 % of the various board positions of public companies (Article 82 of the Law of 2012). This percentage should have been reached by the second renewal of the boards after the adoption of the law. All the consultative bodies representing public servants should also have reached this

that women fill 40 % of high-level civil service posts.<sup>324</sup> Other measures against sexual harassment and sexism were adopted in the public sector.<sup>325</sup> The recent bill presented on 23 March 2019 on the transformation of the public sector introduces provisions on equality as legislative measures to implement the Presidential Equality Plan of 2017-2020.

In the private sector, the Labour Code provides that temporary measures in favour of women to promote equal opportunities for men and women, in particular by removing existing inequalities which affect women's opportunities, are possible (Article L.1142-4). This rule was not constitutionally challenged when it was first adopted, certainly because there were no obligations for employers to adopt such measures. Such provisions can be included either in administrative provisions regarding access to employment, vocational training or promotion, and as regards working conditions and organisation or in extended collective agreements at branch level or in an 'equality plan'.

The Law of 9 May 2001 creates an obligation to negotiate on sex equality. Every year, the employer has a duty to negotiate with trade unions in order to define the objectives concerning equality between men and women in companies and to design the measures to be implemented in order to attain these objectives. To facilitate the negotiation, a written report on the comparative situation between men and women in the company must be drawn up by the employer. The 2001 Law also recognised a duty to negotiate every three years on equality at professional branch level, on the measures to be taken towards attaining occupational equality and on catch-up measures intended to remedy inequalities which have been ascertained. To improve negotiations, the law adopted on 23 March 2006 specified that the pay gap must be eliminated before 31 December 2010.

In the private sector, a law was adopted on 27 January 2011<sup>326</sup> in order to improve the representation of women on company boards. Firms must ensure that each sex has at least 20 % of board seats within three years and 40 % in six years.

There are new measures to correct the gender pay gap. These measures are the new pay gap indicators (Article L.1142-9, Labour Code), the duty to inform works councils and engagement in negotiations on equality at work (Article D.1142-6 Labour Code). If the indicators cannot be calculated, the employer must explain why. In the event that no agreement is found on measures with employee representatives, the employer takes its own measures after consultation with the works council. This decision is monitored by the public authorities. There are also financial sanctions if the indicators reflect a certain level of disparity (L.1142-10).<sup>327</sup> In the public sector, similar pay gap indicators are required in the new reform of the civil service.<sup>328</sup>

#### 4.4 Evaluation of implementation

The requirement of 2018<sup>329</sup> to correct pay disparities when they reach a certain cap through collective bargaining or a personal initiative of the employer is a positive step

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percentage by their next renewal (the 'joint civil service council' and the councils for each category of the civil service: State, local government and hospital).

<sup>324</sup> 20 % for the nomination in 2013 and 2014 and 30 % between 2015 and 2017. This means that in 2018, at least 40 % of the nominations for high-level civil service workers should be women.

<sup>325</sup> Article 6 bis of the Law of 1983 amended by Law No. 2017-86 of 27 January 2017 on [equality and citizenship](#).

<sup>326</sup> Law No. 2011-103 of 27 January 2011 on the balanced representation of women and men on boards of directors and supervisory boards and on gender equality in the workplace (*Loi n° 2011-103 du 27 janvier 2011 relative à la représentation équilibrée des femmes et des hommes au sein des conseils d'administration et de surveillance et à l'égalité professionnelle publiée au Journal Officiel du 28 janvier 2011*).

<sup>327</sup> See Section 4.2 on equal pay for details on these new corrective pay gap measures.

<sup>328</sup> Act No. 2019-828 of 6 August 2019 on the transformation of the civil service.

<sup>329</sup> Act No. 2018-771 of 5 September 2018 for the individual's freedom to choose their future professional life, <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000037367660&categorieLien=id>.

towards closing the structural gap preventively and constructively before financial sanctions occur.

However, the new decree on the publication of indicators for companies with more than 250 employees (Article D.1142-2 Labour Code) and for companies with between 50 and 250 employees (Article D.1142-2-1) reveals certain strengths and weaknesses in the legislative reform of equal pay monitoring. The main strength of the indicators is to calculate the average pay of women and men according to *age* cohorts because it reveals exactly when women and men have (dis)similar pay in equivalent jobs. The weaknesses of the new law of 2018 and the decree are first, the discretionary power of the employers who decide which jobs are equivalent. Secondly, employers must reveal the difference in the number of promotions for men and women (and only for companies over 250 employees) but do not have to reveal the nature of the promotions for men and women. The law requires the publication of the percentage of employees who benefited from a pay rise after their maternity leave which is already a provision in the law (Article 1225-26 Labour Code). Finally, the need to publish the number of workers of the under-represented sex among the ten best-paid employees is useful but symbolic.<sup>330</sup>

Under the new decree (Article D.1142-4), the results of the company in view of the indicators are published each year on the company's website, or in the absence of such a website, the indicators are circulated to employees by other means. This is too vague because it limits effective information for employees if it is somewhere on the website and not circulated personally and by default 'circulation by other means' has the effect that the employer can post the results of the indicators in a discrete or confidential location of the company and still abide by the law without any naming and shaming impact in and outside the firm.

#### 4.5 Remaining issues

A very interesting case arose in 2019<sup>331</sup> on a pending litigation in 2018 contesting a positive action measure which applied the parity rule to electoral colleges for employee representatives (Article L.2324-22-1).<sup>332</sup> A union contested both the constitutionality of the conditions of enforcement of the parity rule, subsequently confirmed through judicial review,<sup>333</sup> and the legality of the cancellation by the lower court of an election and a list presented by a union which did not respect the parity rule, seen as an infringement on freedom of association (*liberté syndicale*). The Court of Cassation confirmed the cancellation of the election and the union list 'which did not respect the balanced representation of the sexes, citing Article 21 of the EU Charter of Fundamental Rights on sex discrimination, Articles 8 and 14 of the ECHR applicable to sex discrimination in working conditions and ILO convention No. 111'. The Court recalled that the legitimate aim of the parity rule is to ensure a representation of employees which reflects the reality of the electoral pool and to promote effective equality between the sexes. Moreover, the Court confirmed that, 'the intent of the legislator was not to adopt a theoretical parity rule but a balanced proportion of female and male candidates of the relevant electoral college in the company'. 'The provisions are not a disproportionate infringement against freedom of association recognised by European and international texts but constitute a necessary and balanced reconciliation with the fundamental right to equality between the sexes.'

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<sup>330</sup> See Section 4.2 on equal pay for details.

<sup>331</sup> The decision is mentioned because of its importance, Court of Cassation, 13 February 2019, No. 18-17.042.

<sup>332</sup> Act No. 2015-994 of 17 August 2015 on social dialogue and employment (*Loi n° 2015-994 du 17 August 2015 relative au dialogue social et à l'emploi*), Article 7. However, labour law reform has since then transformed the works councils so abolished this particular article (not the principle of parity), Executive order No. 2017-1386 of 22 September 2017, Article 1.

<sup>333</sup> Constitutional Court Decision Nos. 2018-720/721/722/723/724/725/726 QPC of 13 July 2018.

## 5 Pregnancy, maternity, and leave related to work-life balance for workers (Directive 92/85, relevant provisions of Directives 2006/54, 2010/18 and 2019/1158)<sup>334</sup>

### 5.1 General (legal) context

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

The High Council on Equality in Employment presented a survey conducted in November and December 2018 on family responsibilities, parental rights and work-life balance.<sup>335</sup> It shows that 78 % of fathers took their whole paternity leave (63 % were high-level managers and 47 % CEOs). In couples, 55 % of women consider that they bear the essential childcare responsibilities, compared to 8 % of fathers who say they assume them. After a child is born, 69 % of mothers modify their work schedule (against 29 % of fathers) and 47 % even reduce their working time or stop working (against 6 % of fathers). In all, 84 % of women and 57 % of men consider that parenting is more of a barrier to career advancement for women compared to men. Among fathers, 18 % declared that they had the feeling that their paternity was a barrier to their career advancement and 50 % of mothers have the same opinion concerning their own careers. Half of parents consider that they do not spend enough time with their children compared to 6 % who feel that they spend as much time as they wish with their children. In terms of work-life balance, 73 % of mothers and 72 % of fathers are satisfied with their current job. Finally, 77 % of women and 68 % of men consider parenting is insufficiently taken into account in working time organisation and geographical considerations (business trips, transport).

The results of the survey reveal a paradox: a certain status quo of the challenges of work-life balance affecting particularly women but, at the same time, a form of acceptance or internalisation of this situation revealed by the shared satisfaction with work. Another survey was launched by the Observatory of Corporate Social Responsibility on the role of men as parents in companies.<sup>336</sup> Overall, 48.3 % were satisfied with the time they had for their families. In total, 85.4 % of male employees who are thinking of taking the paternity leave would like it to be extended. Among male employees, 91.8 % consider that flexible hours for shared custody is a good idea. Meanwhile, 49.7 % ignore the existence of support networks for male employees or mixed gendered support groups in their company.

There are private and public authorities which monitor issues of parenting and family, such as the public High Council on Families, Children and the Elderly<sup>337</sup> and the private Observatory on Parenting and Work-Life Balance in Companies,<sup>338</sup> part of the Observatory on Quality of Life at Work. These can inform the authorities about the challenges that need to be met in terms of the political agenda.

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<sup>334</sup> See Masselot, A. (2018) *Family leave: enforcement of the protection against dismissal and unfavourable treatment*, European network of legal experts in gender equality and non-discrimination, available at: <https://www.equalitylaw.eu/downloads/4808-family-leave-enforcement-of-the-protection-against-dismissal-and-unfavourable-treatment-pdf-962-kb> and McColgan, A. (2015) *Measures to address the challenges of work-life balance in the EU Member States, Iceland, Liechtenstein and Norway*, European network of legal experts in gender equality and non-discrimination, available at: <https://www.equalitylaw.eu/downloads/3631-reconciliation>.

<sup>335</sup> High Council on Equality in Employment (2019), *Prendre en compte la parentalité au travail* (Taking account of parenthood in the workplace) <https://www.egalite-femmes-hommes.gouv.fr/wp-content/uploads/2019/02/Prendre-en-compte-la-parentalite-au-travail-Presentation-des-resultats-du-22-fevrier-2019.pdf>.

<sup>336</sup> Raynaud, F., Fort, G., Daviere, L., Recorbet, L. (2018), *Les hommes en entreprises: regards croisés hommes-femmes: une vision partagée de l'égalité*, Report for ORSE (Observatory on corporate social responsibility) & Goods to Know: Diversity Differently), <https://www.orse.org/fichier/3293>.

<sup>337</sup> *Haut Conseil de la famille, de l'enfance et de l'âge* <http://www.hcfea.fr/>.

<sup>338</sup> *Observatoire sur la parentalité en entreprise et l'équilibre des temps en entreprise/OPE* (Observatory on parenting and work life balance in companies), available at: <https://www.observatoire-qvt.com/edito/4777/> and see its 2018 survey on work life balance measures in companies.

### 5.1.2 Other issues

A general characteristic of France is the strong emphasis on family policies since the turn of the century to boost birth rates (childcare, maternity leave and social security benefits for families regardless of income). However, recently policies have taken into account income-based needs and have reduced tax credits for home childcare, most probably influencing the recent decrease in birth rates, in the author's opinion. The rise in shared custody in divorce proceedings and the increase in single parent families, mostly headed by women, are current trends in France.

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

Generally, the 2017 labour law reform described below affects collective bargaining and working time, so it also affects work-life balance. The global labour law reform of 2017 safeguards the general provisions on equality:

- Act No. 2017-1385 of 22 September 2017 on collective bargaining;
- Act No. 2017-1386 of 22 September 2017 on the new organisation of social dialogue;
- Act No. 2017-1387 of 22 September 2017 on the predictability of and securing working relationships;
- Act No. 2017-1718 of 20 December 2017 modifying the previous acts.

All four acts were inserted into Act No. 2018-217 of 29 March 2018.<sup>339</sup>

In 2019, the following pieces of legislation were enacted:

Act No. 2019-828 of 6 August 2019 on the transformation of the civil service with provisions on equality between men and women in the public sector including the promotion of work-life balance with improvements to rights to parental leave.<sup>340</sup>

Act, No. 2019-1446 of 24 December 2019 on social security financing of benefits for persons caring for a parent or loved one: financial support and easier access to a family 'care' leave<sup>341</sup>

- Act No. 2018-771 of 5 September 2018, Article 68 on working remotely;
- Act No. 2018-17 of 29 March 2018, Article 11 on remote work;
- Act No. 2018-84 of 13 February 2018 on a mechanism to award rest days for carers of people in long-term care or with a disability;<sup>342</sup>
- Act No. 2016-1088 of 8 August 2016 on work;

<sup>339</sup> As explained below (11.6.1) the laws have modified the structure of representative bodies and negotiation and modified their competence in many regards.

<sup>340</sup> [Decree No. 2020-528 of 4 May 2020](#) defining the conditions to create and implement plans of action for professional equality in the civil service, (*Décret n° 2020-528 du 4 mai 2020 définissant les modalités d'élaboration et de mise en œuvre des plans d'action relatifs à l'égalité professionnelle dans la fonction publique*), Decree No. 2020-529 of 5 May 2020 amending the provisions on parental leave for civil servants and their time for childrearing (*Décret n° 2020-529 du 5 mai 2020 modifiant les dispositions relatives au congé parental des fonctionnaires et à la disponibilité pour élever un enfant*), Decree No. 2020-528 of 4 May 2020 defining the conditions to create and implement plans of action for professional equality in the civil service; the more specific decrees and acts on aspects of work-life balance are: Decree No. 2020-529 of 5 May 2020 amending the provisions on parental leave for civil servants and their time for childrearing (*Décret n° 2020-529 du 5 mai 2020 modifiant les dispositions relatives au congé parental des fonctionnaires et à la disponibilité pour élever un enfant*).

<sup>341</sup> Act, No. 2019-1446 24 December 2019 on social security financing of benefit for persons caring for a parent or loved one (*LOI n° 2019-1446 du 24 décembre 2019 de financement de la sécurité sociale pour 2020*), Article 68 et 69.

<sup>342</sup> *Loi créant un dispositif de don de jours de repos non pris au bénéfice des proches aidants de personnes en perte d'autonomie ou présentant un handicap*, <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000036596170&categorieLien=id>.

- Act No. 2014-873 of 4 August 2014, on real equality, encouraging fathers to take parental leave and supporting single mothers who claim child support;<sup>343</sup>
- Act No. 2012-347 of 22 March 2012, Article 46 on telework;
- Act No. 2006-396 on equal opportunities of 31 March 2006;
- Act No. 2005-706 of 27 June 2005 on childcare professionals and family care professionals;
- Act No. 89-488 of 10 July 1989 banning sex discrimination in collective bargaining agreements at the sectoral and company level.

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

The current political agenda is focused on promoting work-life balance to achieve equality and social cohesion,<sup>344</sup> following the impetus of the EU in its adoption of the Work-life Balance Directive. Before the EU Parliament, President Macron expressed opposition in March 2018 to an earlier version of the directive which would have increased the level of paid parental leave in France from the current EUR 396 a month to 50 % of pay (like sick leave) in order to encourage fathers to take it.<sup>345</sup> This led to a debate on whether to extend paid paternity leave, find other ways to encourage men to take the parental leave or increase support to employees needing leave for any type of care (terminally ill relatives, childcare or long-term care of a parent).

## 5.2 Pregnancy and maternity protection

### 5.2.1 Definition in national law

There is no definition of pregnancy in the law.

### 5.2.2 Obligation to inform employer

According to Article L.1225-2, there is no obligation to inform the employer (neither at the time of recruitment (even for short-term contracts), nor during employment, except just before leaving on maternity leave. However, employees must inform the employer in writing or verbally to benefit from the legal and collective rights linked to protection against dismissal, authorisation of absence for medical examinations without reduction of pay or to reduce working time.

The principles are the same as for night work. The protection granted by French law complies with the requirements of the Directive.

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

There is no case law on the definition of a pregnant worker, a worker who has recently given birth and/or a worker who is breastfeeding.

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

Article L.1225-7 of the Labour Code states that a pregnant woman can be temporarily assigned to another job if this is necessary. Article L.1225-9 of the Labour Code also provides that a pregnant woman can be asked to work during the day during her pregnancy and after her maternity leave. She has to be transferred to day work if the company doctor

<sup>343</sup> Awarding the other parent an incentive to take the parental leave in order to benefit from the entire duration of the leave.

<sup>344</sup> See Secretary for Equality's agenda: <https://www.egalite-femmes-hommes.gouv.fr/dossiers/egalite-professionnelle/partage-des-responsabilites-professionnelles-et-familiales/>.

<sup>345</sup> *Libération* (2018) 'Congé parental: Macron double par l'Europe' ('Parental leave: Macron overtaken by Europe'), 9 May 2018, available at: [https://www.liberation.fr/france/2018/05/09/conge-parental-macron-double-par-l-europe\\_1649012](https://www.liberation.fr/france/2018/05/09/conge-parental-macron-double-par-l-europe_1649012).

states that night work is incompatible with her pregnancy. This protection can be extended after her maternity leave when required and for a maximum of one month. This change cannot have any consequences for her pay. According to Article L.1225-6, if such a transfer is not possible, the employer must inform the woman and the company doctor of this and the reasons why it is not possible to transfer her. In this case, the contract of employment is suspended with no modification to her remuneration. Article L.1225-12 also provides for specific protection in case of exposure to specific risks.

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

The Court of Cassation specified that, when a job reassignment is required, the employer must pay the employee during the transition period between the regular job and the re-assigned position.<sup>346</sup>

#### 5.2.6 Prohibition of night work

When a pregnant employee or an employee having just given birth works at night under the conditions provided by Law No. 2016-1088 of 8 August 2016, the employee is reassigned at her request to a day job with no decrease in pay (Article 1225-9). A reassignment to a job in another undertaking requires her consent.

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

There is no case law on night work.

#### 5.2.8 Prohibition of dismissal

Article L.1225-4 of the Labour Code prohibits the dismissal of an employee when she has been medically certified as being pregnant. The dismissal will also be null and void if the employee sends a certificate indicating her pregnancy in the two weeks following the notification of her dismissal. The prohibition on dismissing a pregnant employee also applies during maternity leave and during the ten weeks after the birth (Article L.1225-4-1). A dismissal is only possible in the case of gross misconduct which is not connected to her condition or if the employer cannot maintain the contract of employment for a reason not connected to her condition. In any case, the dismissal cannot be notified during periods of suspension of the contract of employment. Thus an employee cannot be made redundant during maternity leave.

Article 81 of the new Act No. 2019-828 of 6 August 2019 on the transformation of the civil service, amending Article 6 of Act No. 83-634 of 13 July 1983 on the rights and obligations of civil servants, adds pregnancy as a specific ground of discrimination for public sector employees.

#### 5.2.9 Redundancy and payment during maternity leave

During her maternity leave, the worker is entitled to maternity benefits subject to the condition that she has been registered with the social security system for at least ten months on the estimated date of delivery (Article L331-3 of the Social Security Code). The amount of the maternity benefit is calculated on the basis of the average salary received over the last three months.

In the public sector, the one-day waiting period before payment during sick leave introduced by Act No. 2017-1837 on the 2018 budget<sup>347</sup> for public sector employees no longer applies to pregnant women if they have informed their employer.

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<sup>346</sup> Court of Cassation, No. 94-44833, 17 December 1997.

<sup>347</sup> [LOI n° 2017-1837 du 30 décembre 2017 de finances pour 2018](#).

Since a dismissal cannot take effect or be notified during periods of suspension of the contract of employment, an employee cannot be made redundant during maternity leave (Article L.1225-4).

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

According to the general and procedural rules on dismissal, the employer is obliged to indicate in writing the grounds for the dismissal in the letter notifying the employee of their dismissal (Article L.1232-2).

#### 5.2.11 Case law on the protection against dismissal

The Court of Cassation decided in 2017 that an undocumented employee of foreign origin does not benefit from the protection offered to pregnant women, which consists of forbidding dismissal during pregnancy, maternity leave and ten weeks upon return to employment, except in cases of gross misconduct by the employee not related to pregnancy or maternity (Articles L.1225-4 and L.1225-4-1, Labour Code).<sup>348</sup>

The Court of Cassation qualifies as gross misconduct by an employee justifying dismissal when the employee does not voluntarily follow instructions.<sup>349</sup> It does not count as adequate justification if the employer claims they cannot maintain the contract of employment for a reason not connected to her condition when that reason is given as economic reasons, according to the Court of Cassation.<sup>350</sup> However, if the company goes bankrupt, that is sufficient to prove the impossibility of maintaining the contract of employment.<sup>351</sup>

The Court of Cassation has considered that the modification of an employee's contract and her dismissal because of in vitro fertilisation treatment constitutes discrimination based on health status and not pregnancy discrimination.<sup>352</sup> This recalls the ECJ *Mayr* decision of 2008,<sup>353</sup> which was based on Articles 2(1) and 5(1) of Council Directive 76/207/EEC. These provisions preclude the dismissal of a female worker who is at an advanced stage of in vitro fertilisation treatment and the dismissal is based on the fact that the woman has undergone the treatment. However, the ECJ adds that the Pregnancy Directive 92/85/EEC and its protection against dismissal of pregnant workers in Article 10(1) does not extend to a woman who is dismissed where, on the date she was given notice of her dismissal, her egg had been fertilised in vitro, but not yet transferred to her uterus.

The permanent replacement of an employee during her maternity leave is considered by the Court of Cassation as a preparatory measure in view of her dismissal even when it is announced after her maternity leave. The dismissal is then null and void.<sup>354</sup> This case resembles the ECJ *Paquay* case applying Article 10(1) of Directive 92/82/EEC<sup>355</sup> which bans dismissal of pregnant workers. The provision covers a decision to dismiss a pregnant employee taken at different stages before the end of the period of protection against dismissal, as indicated in different job notices with information for candidates about their career prospects for a period extending after the maternity leave. This decision applied Article 10 of Directive 92/85/EEC.

The Court of Cassation has clarified that if, at the date of introduction of a claim for breach of contract because of a violation by the employer, the employee did not inform the

<sup>348</sup> Court of Cassation, No. 15-27928, 15 March 2017.

<sup>349</sup> Court of Cassation, No. 11-11193, 10 May 2012.

<sup>350</sup> Court of Cassation, No. 08-44626, 6 January 2010.

<sup>351</sup> Court of Cassation, No. 11-17420, 26 September 2012.

<sup>352</sup> Court of Cassation, No.16-28511, 27 July 2018.

<sup>353</sup> ECJ, 26 February 2008, *Mayr*, Case C-506/06, ECLI:EU:C:2008:119.

<sup>354</sup> Court of Cassation, No. 08-43299, 15 September 2010, see also Court of Cassation, No. 15-26250, 1 February 2017.

<sup>355</sup> ECJ, 11 October 2007, *Paquay*, C-460/06, ECLI:EU:C:2007:601.

employer of her pregnancy, the breach that is decided by the judge has the effect of an unjust dismissal and not the effect of a dismissal which is null and void. The difference is that the complainant cannot, in this case, request reinstatement, she will only be awarded damages.<sup>356</sup>

Finally, the Court of Cassation, citing Directive 92/85, considered that when an employer, during the maternity leave of an employee, simply collects evidence of dysfunction in the company that concern the employee, it is not in violation of Article 1225-4 of the Labour Code, which prohibits taking any measure in preparation for dismissal during the maternity leave.<sup>357</sup>

### **5.3 Maternity leave**

#### 5.3.1 Length

The period of maternity leave is six weeks before the estimated date of delivery and ten weeks thereafter (Article L.1225-17); the same provisions apply to civil servants (Article 34 of the 1984 Act, No. 84-16).

#### 5.3.2 Obligatory maternity leave

The obligatory period of maternity leave is eight weeks, with a minimum of six weeks after the birth (L1225-29 of the Labour Code).

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

According to Articles L.1225-7, L.1225-9, L.1225-10 and L.1225-13, in the case of the suspension of a contract of employment or a change of job during a woman's pregnancy, her pay should be maintained.

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

During pregnancy Articles L.1225-7, L.1225-9, L.1225-10 and L.1225-13 of the Labour Code ensure the employment rights of the pregnant woman. During her maternity leave, the worker is entitled to maternity benefits subject to the condition that she has been registered under the social security system for at least ten months on the estimated date of delivery (Article L.331-3 of the Social Security Code). The amount of the maternity benefit is calculated on the basis of the average salary received over the last three months. Many collective agreements nevertheless provide that the worker receives full pay during maternity leave. Her pay must be increased after her maternity leave in order to follow any general increases received by individual co-workers of the same category during the period of the employee's leave. In general, the worker is also entitled to all the advantages which have occurred during her leave to which she would have been entitled if she had not taken maternity leave. She is entitled to normal paid leave and to the normal rights to vocational training as if she had not been absent.

#### 5.3.5 Level of pay or allowance

The allowance during pregnancy is higher than the allowance in the case of sick leave, as the amount of the maternity benefit is based on the average salary (with a ceiling). Thus the maternity allowance leave is 100 % of the average pay of the woman concerned up to a ceiling of EUR 82.32 per day.

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<sup>356</sup> Court of Cassation No. 15-29330, 28 November 2018.

<sup>357</sup> Court of Cassation No. 18-20909, 16 November 2019.

### 5.3.6 Additional statutory maternity benefits

Many collective agreements provide that the worker receives full pay during maternity leave. In this case, pay is paid directly by the employer to the worker, and the social security system reimburses the employer. For example, an Air France agreement provides that the difference in pay between the amount of social security maternity benefit and the normal pay if the employee has one year of seniority in the firm and provides proof of the social security payment.<sup>358</sup>

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

In order to be eligible for benefits, pregnant women must be registered with the social security system for at least ten months on their estimated date of delivery and have worked for at least 150 hours during the last three months before the beginning of the pregnancy or have paid social contributions on pay of at least 120 times the minimum hourly wage (R.313-2 et seq. of the Social Security Code).

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

According to Article L.1225-25 of the Labour Code the employee has the right to return to the same or similar job after maternity leave with at least an equivalent remuneration. Pay must also be increased after the maternity leave in order to correspond to any general increases received by individual co-workers in the same category during the period of the employee's leave. In general, the worker is also entitled to all the advantages which have occurred during her leave that she would have been entitled to if she had not taken maternity leave. She is entitled to normal paid leave and to the normal rights to vocational training as if she had not been absent.

According to Article L.1225-26, in the absence of a collective bargaining agreement on guarantees in terms of pay increases during the maternity leave and after the leave, pay is increased according to the average general pay increases and the average increase of the individual rises paid to employees in the same professional category during the leave or just the average of individual rises. The Court of Cassation recently applied this rule in a 2018 case, rejecting the possibility for the employer to compensate for the difference in pay with an exceptional bonus.<sup>359</sup>

### 5.3.9 Legal right to share maternity leave

There is no legal right to share maternity leave.

### 5.3.10 Case law

During her maternity leave, the employee has the right to average pay equivalent to an earlier reference period, except e.g. for a bonus linked to a specific duty to collaborate with foreign employees to transfer French knowledge, according to the Court of Cassation in 2018 which cites Article 11, paragraph 2 of Directive 92/85/EEC.<sup>360</sup> This case recalls a similar limit to the right to equivalent pay in the case of an allowance for on-call duty, which was not given in the ECJ *Gassmayr* decision.<sup>361</sup>

The right to return to the same or a similar job as a manager can justify the termination of a contract which has the effect of an unfair dismissal.<sup>362</sup>

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<sup>358</sup> Article 3235, Air France Agreement for employees [https://www.sud-aerien.org/IMG/pdf/Convention\\_PS\\_Titre\\_4\\_Remuneration.pdf](https://www.sud-aerien.org/IMG/pdf/Convention_PS_Titre_4_Remuneration.pdf).

<sup>359</sup> Court of Cassation, No. 16-25323, 14 February 2018.

<sup>360</sup> Court of Cassation, No. 17-11618, 19 September 2018.

<sup>361</sup> ECJ 1 July 2010, *Gassmayr*, C-194/08, ECLI:EU:C:2010:386.

<sup>362</sup> Court of Cassation, No. 08-40338, 3 February 2010.

In 2019, the Court of Cassation mentioned that the refusal to return an employee to the equivalent job after maternity leave followed by a parental leave qualified as indirect sex discrimination.<sup>363</sup> The Court of Cassation struck down a decision of the Court of Appeal of Lyon that should have considered whether, since a considerably higher number of women than men take parental leave, the employer's decision in violation of the Labour Code to refuse to re-employ a female worker in her initial position after her parental leave, giving her administrative tasks, constituted indirect discrimination based on sex and if so, if it could be objectively justified. The Court's decision qualifies this as indirect discrimination since it is mostly women who choose to go on parental leave, often after maternity leave - without requiring specific statistics on the number of women affected.<sup>364</sup>

## 5.4 Adoption leave

### 5.4.1 Existence of adoption leave in national law

Adoption leave is 10 weeks, or 22 weeks for the adoption of more than one child (Article L.1225-37 of the Labour Code). The allowance is the same as in the case of maternity leave and the conditions are the same.

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

According to Article L.1225-38, the parents have the same protection against dismissal as women on maternity leave and they also have the same right to return to the same or a similar job (L.1225-43). The same rules also apply to pay. The parent shall benefit from any improvement in working conditions to which she or he would have been entitled during her or his absence.

### 5.4.3 Case law

The Court of Cassation considered the case of the wife of a male employee who adopted two children and was refused maternity benefits because she had renounced her right to social security. The Court ruled that it was not sex discrimination within the meaning of Article 9 of Directive 2006/54/EC, since the Directive applies to professional social security schemes and not statutory regimes.<sup>365</sup>

The Defender of Rights has also targeted several instances of freezes in performance ratings during maternity leave in the state healthcare sector<sup>366</sup> and challenges faced by workers in the entertainment sector in obtaining paid maternity leave because of the difficulty of calculating the number of hours of work in irregular work schedules.<sup>367</sup>

The Court of Cassation also recently rejected a claim of discrimination in a case where a financial bonus for cooperation with foreign teams of workers at another branch of the company was not awarded to a woman because of her absence due to maternity leave. The Court considered the employee did not participate in the activities required to benefit from the bonus.<sup>368</sup>

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<sup>363</sup> Court of Cassation, No. 18-15682 14 November 2019.

<sup>364</sup> Court of Cassation, Social chamber 14 November 2019 No. 18-15682, [https://www.courdecassation.fr/jurisprudence\\_2/arrets\\_publics\\_2986/chambre\\_sociale\\_3168/2019\\_9139/novembre\\_9548/1567\\_14\\_43913.html](https://www.courdecassation.fr/jurisprudence_2/arrets_publics_2986/chambre_sociale_3168/2019_9139/novembre_9548/1567_14_43913.html).

<sup>365</sup> Court of Cassation, No. 12-35005, 9 October 2014.

<sup>366</sup> Defender of Rights, [https://juridique.defenseurdesdroits.fr/doc\\_num.php?explnum\\_id=17640](https://juridique.defenseurdesdroits.fr/doc_num.php?explnum_id=17640).

<sup>367</sup> Defender of Rights, [https://juridique.defenseurdesdroits.fr/index.php?lvl=notice\\_display&id=25801](https://juridique.defenseurdesdroits.fr/index.php?lvl=notice_display&id=25801).

<sup>368</sup> Court of Cassation, 19 September 2018, No. 17-11.618.

## 5.5 Parental leave

### 5.5.1 Implementation of Directive 2010/18

The only measure implementing Directive 2010/18/EU is a Decree (No. 2012-1061) adopted on 18 September 2012, which modifies the rules for parental leave for public servants. The Decree recognises parental leave as an individual right. Before this, in the case of public servants, the mother and the father could take the parental leave or could share it but could not take it simultaneously. This is now possible.

Parental leave has also been a hot topic in recent years, with improvements to rights to parental leave in the public sector,<sup>369</sup> financial support and easier access to a family 'care' leave.<sup>370</sup> In 2019, a bill to provide for paid bereavement leave for families who have lost a child was introduced and was finally adopted by the Senate in 2020.<sup>371</sup>

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

The national legislation applies to both the public and the private sectors.

### 5.5.3 Scope of the transposing legislation

French legislation applies to part-time workers, fixed-term contracts and temporary workers (but since any worker is required to have worked at least one whole-year to request parental leave, this condition of seniority makes it more difficult for all these workers with short term work or reduced worktime to acquire this right.

### 5.5.4 Length of parental leave

The duration of parental leave is the same in the public and private sectors even though two different types of legislation are applicable. The initial period of parental leave is one year and it can be renewed twice until the child is three years old.

### 5.5.5 Age limits

The request for parental leave can be made at least two months before the beginning of the parental leave or one month before if it starts right after the maternity leave or adoption leave and until the child's third birthday. In the case of adoption, parental leave can also last for a maximum of three years after the child's arrival if the child was younger than three when adopted. In other cases, parental leave is for a maximum of one year (Article L.1225-47).

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<sup>369</sup> Decree No. 2020-528 of 4 May 2020 defining the conditions to create and implement plans of action for professional equality in the civil service, (*Décret n° 2020-528 du 4 mai 2020 définissant les modalités d'élaboration et de mise en œuvre des plans d'action relatifs à l'égalité professionnelle dans la fonction publique*), Decree No. 2020-529 of 5 May 2020 amending the provisions on parental leave for civil servants and their time for childrearing. (*Décret n° 2020-529 du 5 mai 2020 modifiant les dispositions relatives au congé parental des fonctionnaires et à la disponibilité pour élever un enfant*).

<sup>370</sup> Act No. 2019-1446 of 24 December 2019 on social security financing of benefit for persons caring for a parent or loved one (*LOI n° 2019-1446 du 24 décembre 2019 de financement de la sécurité sociale pour 2020*), Article 68 et 69.

<sup>371</sup> Amended Bill No. 2729 to improve the rights of workers and support to families after the loss of a child; the bill has been adopted by the Senate and the final version is being compiled, (*Proposition de loi, modifiée par le Sénat, visant à améliorer les droits des travailleurs et l'accompagnement des familles après le décès d'un enfant*, n° 2729 rectifié), 3 March 2020, [http://www.assemblee-nationale.fr/dyn/15/dossiers/conge\\_de\\_deuil\\_enfant\\_mineur](http://www.assemblee-nationale.fr/dyn/15/dossiers/conge_de_deuil_enfant_mineur).

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

The right to parental leave is an individual right and it can be taken by both parents. Parental leave is not available in the case of surrogacy, as surrogacy is not legal in France. The compensation granted to parents during parental leave may be shared between them.

#### 5.5.7 Transferability of the right to parental leave

The law of 2014 on real equality provided the possibility to extend the parental leave if the other parent takes six months.

#### 5.5.8 Form of parental leave

Parental leave can be granted on a full-time or part-time basis, although part-time leave must allow for at least 16 working hours per week.

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

The length of service requirement in order to benefit from parental leave is one year before the birth of the child (Article 1225-47). In the case of successive fixed-term contracts with the same employer, the sum of these contracts is taken into account for the purpose of calculating the qualifying period. For public servants, there is no length of service condition.

#### 5.5.10 Notice period

The employee must inform their employer of the starting date and the intended duration of the period during which they intend to benefit from the parental leave either on a full-time or part-time basis. When parental leave is taken immediately following the maternity or adoption leave, the employee must provide this information at least one month before the beginning of the leave (two months for public servants), otherwise this information must be given at least two months beforehand. When an employee wants to extend their parental leave or to take it full-time (if the parental leave was initially part-time) or part-time, they must inform the employer one month before the initial term. When the parental leave is on a part-time basis, the number of hours worked per week cannot be modified without the employer's approval unless this is explicitly provided by a collective agreement (Article L.1225-51 of the Labour Code). Determining the work schedule is a task for the employer which is a means of taking into account the needs of both employers and workers.

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

Parental leave cannot be refused or postponed on any grounds.

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

There are no special arrangement for small firms but the Court of Cassation confirms that, as long as the employee has acquired one year of seniority at work at the birth of the child or the arrival of the adopted child, they have the right to parental leave, regardless of the size of the enterprise and even if the employee is a domestic worker.<sup>372</sup>

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<sup>372</sup> Court of Cassation, No. 01-43456 19 November 2003.

#### 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)

If a child is seriously ill or disabled, parental leave can be extended by a year (Article L.1225-48 of the Labour Code).

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

If three children are adopted simultaneously, the parental leave can be extended five times to terminate at the sixth birthday of the youngest child (Article 1225-48).<sup>373</sup>

If the child is more than three years old at the time of the adoption but is still under compulsory school age, the parental leave taken full or part-time is granted but cannot exceed one year after the child's arrival (Article 1225-48).

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

During parental leave, the employment contract is suspended. The employer cannot dismiss a worker because they are on parental leave. Even if this right is not expressly recognised in the Labour Code, the Court of Cassation uses the articles of the Labour Code on parental leave to state that the reason to dismiss should not be linked to parental leave. It may also be considered that being on parental leave could not be viewed as a genuine and serious reason for dismissal.<sup>374</sup>

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

After parental leave, the worker has the right to return to the same job or, if this is not possible, to an equivalent or similar job, where the same advantages apply as before. They also have the right to training if working techniques or methods have changed. The employer should offer the possibility of a special interview after the period of leave in order to discuss the worker's career path.

In the public sector, Act No. 2019-828 6 August 2019 on the transformation of the civil service and Decree No. 2020-529 of 5 May 2020 amending the provisions on parental leave for civil servants and their time for childrearing, improve the situation of parents that take the leave by preserving their right to career advancement for the subsequent five years. This five-year period will be assimilated to effective work.

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

The rights acquired or in the process of being acquired by the worker on the date on which parental leave starts are maintained as they continue to apply until the end of the parental leave. During the leave, half of the seniority rights will accumulate. This measure intends to limit some of the consequences of the suspension of the contract of employment during parental leave.

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

The contract of employment is suspended during the period of the parental leave.

<sup>373</sup> Act No. 2014-873 of 4 August 2014 on real equality between women and men, Article 8 (*Loi n° 2014-873 du 4 août 2014 pour l'égalité réelle entre les femmes et les hommes*).

<sup>374</sup> Court of Cassation Soc., 18 October 1989, No. 87-45724, and Court of Cassation, Social chamber, 12 February 1997, No. 93-42510.

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

During parental leave, workers are still covered by the social security system for healthcare and maternity.

#### 5.5.20 Remuneration

Parental leave is not remunerated by the employer. However, there are some mechanisms that could help finance some of the leave. For example, some 'time-saving schemes' which are widely included in collective agreements allow for blocks of time off to be saved up which may be used as parental leave.<sup>375</sup>

#### 5.5.21 Social security allowance

The social security system provides for an allowance during some of the period of parental leave. A childcare allowance called the 'supplement for free choice of working time' (*Complément de libre choix d'activité*; here referred to as the 'CLCA'), paid by the National Family Allowance Fund, is available to parents who choose to take partial or full leave during these three years. The CLCA is paid for six months for a family's first child. This CLCA is paid for a further six months for a family's first child if the other parent takes this extension of the parental leave. Thus, a period of one year of paid parental leave is recognised for the first child if both parents share parental leave.

For subsequent children, the CLCA is now two and a half years and it will be paid for three years if the parental leave is shared. CLCA payments vary depending on how much a parent works during this time. Parents receive EUR 576.83 per month if they take full leave, EUR 438.62 per month if they work no more than 50 %, and EUR 331.35 per month if they work between 50 % and 80 % of a full work schedule (the allowance is less if parents receive the general family allowance paid for children under the age of three whether the parents are working or not, in this case: EUR 390.92, EUR 252.71 and EUR 145.78).

Finally, parents of at least three children who take full-time leave to care for them may opt to receive the 'optional supplement for free choice of working time' (*Complément optionnel de libre choix d'activité*; COLCA) instead of the CLCA. The COLCA pays a higher rate (EUR 819.14 per month) than the CLCA, but only lasts for one year. This is a way to encourage shorter parental leave (only one year but with higher payments). To receive CLCA or COLCA payments, parents must first meet a job tenure requirement: two years of continuous employment for a parent's first child, two years of employment over the previous four years for a parent's second child, or two years of employment over the previous five years for a parent's third child and beyond.

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

French parental leave is much longer than that provided for by the Directive, as it can last for three years. Moreover, this is an unconditional right (outside of the requirement of having acquired one year of seniority at work) and the social security systems provide for an allowance for parents to be able to take this parental leave. However, some of the detrimental effects of the parental leave scheme have been demonstrated. The argument is well known: an extended leave, especially for unskilled women, may have a negative impact on women's careers and earning profiles. For this reason, there is a growing debate in France as to whether parental leave should not be shorter and better paid.

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<sup>375</sup> Article 3151-2, Labour Code, available at: <https://www.legifrance.gouv.fr/affichCode.do?idSectionTA=LEGISCTA000033022636&cidTexte=LEGITEXT00006072050>.

### 5.5.23 Case law

The benefit of parental leave does not prevent the application of the protection against dismissal linked to pregnancy, according to the Court of Cassation,<sup>376</sup> and reflects the position of the ECJ.<sup>377</sup>

When the worker chooses to reduce their working time during their parental leave, setting the hours of work is at the employer's discretion but the employee's rejection of the proposal of certain hours of work<sup>378</sup> does not constitute a failing on the part of the employee if the proposal is not compatible with important family obligations, as explained by the Court of Cassation.<sup>379</sup> Even though there are no strict formalities for obtaining the right to prolong parental leave, absences are unjustified after the end of the initial parental leave if no request is made to extend the parental leave.

In 2019, the Court of Cassation qualified the refusal to return an employee to the equivalent job after maternity leave followed by parental leave as indirect sex discrimination.<sup>380</sup>

## 5.6 Paternity leave

### 5.6.1 Existence of paternity leave in national law

Since 2001, paternity leave has been recognised for all fathers who are employees and for civil servants. Since 2013, this leave can also be taken by the mother's spouse (even if he is not the father) or her partner. This leave is now called 'Paternity leave and settling-in leave' (Article L.1225-35 of the Labour Code). Paternity leave is 11 consecutive days for the birth of a single baby. Paternity leave is paid by the social security scheme up to a ceiling and could therefore be unattractive for executives. Some companies have adopted full pay for fathers in terms of a 'parent-friendly' measure. There is no condition as to the length of service.

In case of the child's hospitalisation in an intensive care unit immediately after the birth, the paternity leave is granted automatically and there is no need to request it, according to Act No 2018-1203 of 22 December 2018 (Article 72).

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

There is no specific provision against dismissal but the reason for dismissal should not be linked to the paternity leave because this would be considered discrimination based on family situation, a prohibited ground in France. After paternity leave, the worker has the right to return to the same job or, if this is not possible, to an equivalent or similar job, where the same advantages apply as before (Article L.1225-36 of the Labour Code).

### 5.6.3 Case law

The postponement of the paternity leave and its subsequent payment by the social security fund (CPAM) is only possible in two cases: the hospitalisation of the child or the death of the mother (and in no other circumstance).<sup>381</sup>

<sup>376</sup> Court of Cassation, No. 01-43574, 11 February 2004.

<sup>377</sup> ECJ 20 September 2007, *Sari Kiiski v Tampereen kaupunki*, C-116/06.

<sup>378</sup> Court of Cassation, No. 14-29190, 3 May 2016.

<sup>379</sup> Court of Cassation, No. 00-41873, 1 April 2003.

<sup>380</sup> Court of Cassation, Social chamber 14 November 2019 No. 18-15682, [https://www.courdecassation.fr/jurisprudence\\_2/arrets\\_publics\\_2986/chambre\\_sociale\\_3168/2019\\_9139/novembre\\_9548/1567\\_14\\_43913.html](https://www.courdecassation.fr/jurisprudence_2/arrets_publics_2986/chambre_sociale_3168/2019_9139/novembre_9548/1567_14_43913.html).

<sup>381</sup> Court of Cassation No. 08-19510, 10 November 2009.

## 5.7 Time off for *force majeure*

### 5.7.1 Time off for *force majeure*

*Force majeure* bereavement leave (if death is not linked to a terminal illness) is provided in Articles L.3142-2, L.3142-4, L.3314-5, and L.3324-6 of the Labour Code and Articles L.223-1 and L.623-1 of the Social Security Code. A bill was introduced in 2019 to improve paid bereavement leave for families who have lost a child, which was finally adopted by the Senate in 2020.<sup>382</sup> Beneficiaries can take 15 days' leave but the financial support has been reduced to 5 rather than 7 days in the event of the death of a child under 25 or for the death of a child regardless of his/her age who is herself/himself a parent.

### 5.7.2 Case law

There is no case law concerning time off for *force majeure* to the knowledge of the author.

## 5.8 Care leave

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

Parents are entitled to three days per year to care for sick children who are less than 16 years old. They are entitled to five days if the child is aged less than one year or if they have at least three children (Article L.1225-61 of the Labour Code).

In the case of a child under the age of 20 with a serious disability or illness, any employee with at least one year of employment with an employer is entitled to unpaid leave to care for their child or to work part-time for a period of up to three years (Article L.1225-61 of the Labour Code).

A period of leave for six months is possible for employees who need to care for a relative (either a child or a parent living in the same house) who is at the end of his or her life. In this case, the Labour Code explicitly provides that this leave can be taken in the form of part-time working, with the agreement of the employer (Article L.3142-16 of the Labour Code).<sup>383</sup> There has been added financial support and easier access to this family 'care' leave following the adoption of Act No. 2019-1446 of 24 December 2019 on social security financing of benefits for persons caring for a parent or loved one.<sup>384</sup> It eliminates any condition of seniority in the company for the employee to request the leave (previously, employees had to work for the company for at least one year). Article 68 of Act No. 2019-1446 of 24 December 2019 introduces an allowance for the carer (employee, civil servant, independent worker, unemployed person) for three months over their career.<sup>385</sup>

Since 2014, employees can also donate their day off to a parent of a seriously ill child (Article L.1225-65-1).

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<sup>382</sup> Amended Bill No. 2729 to improve the rights of workers and support to families after the loss of a child; the bill has been adopted by the Senate and the final version is being compiled, (*Proposition de loi, modifiée par le Sénat, visant à améliorer les droits des travailleurs et l'accompagnement des familles après le décès d'un enfant, n° 2729 rectifié*), 3 March 2020, [http://www.assemblee-nationale.fr/dyn/15/dossiers/conge\\_de\\_deuil\\_enfant\\_mineur](http://www.assemblee-nationale.fr/dyn/15/dossiers/conge_de_deuil_enfant_mineur).

<sup>383</sup> Act No. 2016-1088 of 8 August 2016 on social dialogue, Article 9 changed the name of the leave to carer leave (*congé de proche aidant*) instead of family support leave (*congé de soutien familial*).

<sup>384</sup> Act No. 2019-1446 of 24 December 2019 on social security financing of benefit for persons caring for a parent or loved one (*LOI n° 2019-1446 du 24 décembre 2019 de financement de la sécurité sociale pour 2020*), Articles 68 and 69.

<sup>385</sup> The allowance is given by the national family fund (social security, EUR 43 per day for a person in a couple and EUR 52 for a single person, 3 months maximum in a career) called *allocation journalière du proche aide*. A Decree should be adopted soon to detail the maximum allowance given in a month. See also Article 381-1 of the Social Security Code.

Act No. 2018-84 of 13 February 2018 provides for a mechanism to award rest days for carers of people in long-term care or with a disability.<sup>386</sup>

#### 5.8.2 Case law

The justification for leave from work to care for a seriously ill child is not covered by medical secrecy rules.<sup>387</sup> There has also been a case of an unjustified job transfer to another workplace, which was considered an abuse of power (not discrimination), considering the employee cared for her child with a disability at lunchtime.

### 5.9 Leave in relation to surrogacy

Surrogacy is not legal in France, so parental leave is not available.

### 5.10 Flexible working time arrangements

#### 5.10.1 Right to reduce or extend working time

The Labour Code recognises the right for a worker to work part-time (Article L.3123-2 of the Labour Code). The right should preferably be organised by a collective agreement (Article L.3123-17 of the Labour Code), but in the absence of any such agreement the law prescribes the procedure to be followed (Article L.3123-26 of the Labour Code and Article D.3123-3). This right is recognised for every worker without any specific condition being attached. The employee concerned initiates the procedure by informing the employer in writing of their wish to transfer to a part-time job, stating in that letter the desired working hours and the date envisaged for their introduction. The letter of request must be sent at least six months in advance. The employer is required to reply within three months and can refuse such a request on two grounds: either because no comparable job exists in the company, or because they can demonstrate that the transfer requested will have harmful consequences for production and the company's satisfactory operation. The decision of an employer to refuse the request can be challenged in court, but there have been no known decisions by the Court of Cassation on this issue. It is difficult to ascertain whether or not this right is actually being used by workers.

This right is also recognised for public servants and seems to be more effective. Public servants can ask to work part-time and the administration can only refuse if such a refusal is based on the needs of the service; a refusal can be challenged before a joint administrative committee (Article 24, Law No. 84-16).

Workers can also request annualised part-time hours (Article L.3123-2 of the Labour Code). On the basis of their family commitments, employees can request a reduction in their working hours in the form of a leave of absence for one or more weeks. This offers employees with dependent children, for example, the opportunity to reduce their working time to correspond with the dates of the school year.

#### 5.10.2 Right to adjust working time patterns

French law does not provide workers with a legal right to adjust working time patterns on request; however, collective agreements could provide some specific rights.

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<sup>386</sup> Act No. 2018-84 establishing a mechanism to award rest days for carers of people in long-term care or with disabilities (*Loi 2018-84 créant un dispositif de don de jours de repos non pris au bénéfice des proches aidants de personnes en perte d'autonomie ou présentant un handicap*), available at: <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000036596170&categorieLien=id>.

<sup>387</sup> Court of Cassation, No. 09-40997, 12 May 2010.

### 5.10.3 Right to work from home or remotely

French law does not provide workers with a legal right to work from home or remotely on request but organises its use by companies (Article L.1222-9). Since the Executive Order No. 2017-1387 of 22 September 2017 that reforms the Labour Code, employers do not have to incur the costs directly linked to remote work. However, with Act No. 2018-771 of 5 September 2018, Article 68, employers have to justify their refusal to grant the possibility of remote work to workers with disabilities. Moreover, Article 11 of Act No 2018-17 of 29 March 2018, ratifying the Macron labour law reform through executive orders,<sup>388</sup> extends the possibility of working remotely occasionally, from home for example. A 2019 national governmental study shows that increased remote working (at least three days a week) is more often chosen by women with young children.<sup>389</sup>

When the employer does not provide an office and the female employee must work remotely, compensation can be required – as confirmed by the Court of Cassation in 2019.<sup>390</sup>

### 5.10.4 Other legal rights to flexible working arrangements

There is a legal right to flexible working arrangements, such as arrangements by which workers can 'bank' hours to take time off in the future (*compte épargne temps*). According to Articles L.3151-1 to L.3151-4 and Articles L.3152-1 to L.3152-4 of the Labour Code, the time banking account allows employees to accumulate rights to paid leave (including parental leave) or benefit from a payment in exchange of leave not taken or sums due. The conditions to acquire these rights are established through collective bargaining agreement.

Collective bargaining agreements which have to be negotiated on issues of equality and quality of life at work can also take into account work-life balance linked to working time flexibility, also including increases in pay for paternity, maternity or adoption leave, increases in the duration of paternity leave, provisions developing flexible working time arrangements at the beginning or end of the working day, more options for voluntary part-time work and developing in-house daycare.<sup>391</sup>

### 5.10.5 Case law

There is no case law in light of Directive 92/85/EEC.

## 5.11 Evaluation of implementation

The different forms of leave have been implemented rather well by the legislator and the respect of rights before, during and after these leaves are essentially safeguarded by the Court of Cassation. There is a diversification of the existing types of leave and their protection, e.g. linked to the illness of a child, the long-term care of a relative or adoption. Paternity leave and parental leave are still not attractive to fathers because of the limited benefits awarded in France. Work-life balance negotiations linked to equality provisions might promote a more gender-neutral use of working time flexibility.

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<sup>388</sup> See Section 1.2 above: Act No. 2017-1385 of 22 September 2017 on collective bargaining (mentioned in the introduction to the national report)

- Act No. 2017-1386 of 22 September 2017 on the new organisation of social dialogue.
- Act No. 2017-1387 of 22 September 2017 on the predictability of and securing working relationships.
- Act No. 2017-1718 of 20 December 2017 modifying the previous acts.

All four acts were inserted into Law No. 2018-217 of 29 March 2018.

<sup>389</sup> DARES, Quels sont les salariés concernés par le télétravail?, p. 2 [https://dares.travail-emploi.gouv.fr/IMG/pdf/dares\\_analyses\\_salaries\\_teletravail.pdf](https://dares.travail-emploi.gouv.fr/IMG/pdf/dares_analyses_salaries_teletravail.pdf).

<sup>390</sup> Court of Cassation 27 March 2019 No. 17-21014.

<sup>391</sup> Executive Order 2017-1385, 22 September 2017, Articles 7, 2242-1, 2242-2 and 2242-3 of the Labour Code on collective bargaining.

## **5.12 Remaining issues**

Since the law of 4 August 2014, the employer must evaluate health and security measures according to the different impact of the exposure to risks, which can vary according to the sex of the worker.

Act No. 2016-1088 of 8 August 2016 allowed collective bargaining agreements to modify worktime over a period of three years, a provision which has been considered in violation of the European Social Charter by the European Committee on Social Rights.<sup>392</sup>

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<sup>392</sup> CEDS, 18.10.18, Complaint No. 154/2017 *CGT v. France*, published 15 March 2019.

## 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

Most reports target the inequalities in the levels of pensions awarded to women, often linked to interruptions in their careers for child rearing. The Pensions Advisory Council (*Conseil d'orientation des retraites*) recently highlighted the current inequalities between men and women in pay which affect the amount of pension awarded at the end of the career for women regardless of the pension scheme.<sup>393</sup>

The Defender of Rights has also exposed these difficulties and mentioned the need for measures which take into account lower pensions among women retiring after part-time work or caring for family members in all social security schemes.<sup>394</sup> The inequality in benefits between women and men can be accentuated by the residual differences in pensions between private pensions and civil service pensions.<sup>395</sup> A report on pensions in the civil service explains how reforms have progressively taken away gendered service credits for women after the *Griesmar* and *Leone* EU cases, with the *Quintanel* French case accepting compensation measures in the past.<sup>396</sup>

The issue of self-employment, social protection and sex segregation in the workplace has also been reported in studies by public authorities, explaining how more and more women who were traditionally employees are now self-employed in certain sectors like agriculture.<sup>397</sup>

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

Another issue concerns lawyers as independent workers who were the subject of pregnancy discrimination since they did not benefit from the protection against dismissal enjoyed by employees. The Act of 2014 on real equality, invoking the directive on equal treatment for independent workers, now protects them against dismissal.<sup>398</sup>

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

There are current debates on how the global reform of pensions which will be introduced by the government in 2019 after the EU elections will impact women who have an average pension which is 38 % lower than that of men. The reform will possibly modify survivors'

<sup>393</sup> Pensions Advisory Council (COR) (2019) *Les inégalités entre femmes et hommes pendant la vie active et la retraite* (The inequalities between women and men during employment and at retirement), <https://www.cor-retraites.fr/sites/default/files/2019-06/doc-4404.pdf>.

<sup>394</sup> Leconte V. (2016) 'L'intervention du Défenseur des droits en matière de protection sociale des femmes' ('Intervention by the Defender of Rights in relation to social security benefits for women') *Regards/2*, pp. 61-74, <https://www.cairn.info/revue-regards-2016-2-page-61.htm>.

<sup>395</sup> Duc, C., Solard, G., Treguier, J. (2017) *Les différences de retraite entre secteurs public et privé* (Differences in retirement in the private and public sector) Directorate of Research and Statistics, Dossiers May 2017/2 No. 16, available at: <https://drees.solidarites-sante.gouv.fr/IMG/pdf/dd16.pdf>.

<sup>396</sup> *Rapport sur les pensions de retraite de la service publique* (Report on pensions in the civil service), [https://www.performance-publique.budget.gouv.fr/sites/performance\\_publique/files/files/documents/jaunes-2019/Jaune2019\\_pensions.pdf](https://www.performance-publique.budget.gouv.fr/sites/performance_publique/files/files/documents/jaunes-2019/Jaune2019_pensions.pdf).

<sup>397</sup> Abdelnour S., Bernard S, Gros J. (2017) 'Introduction. Genre et travail indépendant. Divisions sexuées et places des femmes dans le non-salariat', *Travail et Emploi*, No. 150, p. 5 [https://dares.travail-emploi.gouv.fr/IMG/pdf/tete-150\\_introduction.pdf](https://dares.travail-emploi.gouv.fr/IMG/pdf/tete-150_introduction.pdf).

<sup>398</sup> Act No. 2014-873, of 4 August 2014, on real equality, Article 17 (*Loi n° 2014-873 du 4 août 2014 pour l'égalité réelle entre les femmes et les hommes*), available at: <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000029330832&categorieLien=id>.

pensions and develop a system of pension by points.<sup>399</sup> The new High Council on Retirement, which is the public authority in charge of leading the reform, has mentioned that gender-neutral compensation for interruptions in careers due to accidents and child rearing will be an essential element of the reform.<sup>400</sup> Different reports pinpoint the correlation between lower wages of women and lower retirement pensions.<sup>401</sup>

## **6.2 Direct and indirect discrimination**

Article L.913-1 of the Code of Social Security ensures the implementation of Recast Directive 2006/54/EC and states that any clauses in agreements, decisions and contracts which are in breach of the principle of non-discrimination are null and void.

## **6.3 Personal scope**

As provided by the Directive, the prohibition of discrimination in occupational social security schemes applies to the working population including the self-employed.

## **6.4 Material scope**

The material scope of French law is the same as Article 7 of the Directive.

## **6.5 Exclusions**

There are no exclusions to the application of the directive.

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

Two cases identify indirect sex discrimination. One is based on rights linked to classification of employment as managerial and non-managerial in collective bargaining agreements. In certain professions which are predominantly female, such as social work, employees are categorised as non-managers, whereas technicians, who are mostly male at the same grade, are categorised as managers. The Court of Cassation has argued that affiliation to a non-manager occupational pension fund for social workers may be justified but not proportionate. Indeed, the Court observes that the employer bases their analysis on the same discriminatory mode of categorisation in other agreements (circular reasoning) and that the application of the category of non-managers to social workers is not coherent. It does not reflect the leadership initiatives of social workers as compared to technicians at the same level who only execute supervisors' decisions.<sup>402</sup>

## **6.7 Actuarial factors**

Men and women pay the same contributions and receive the same benefits.

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<sup>399</sup> [https://www.lemonde.fr/politique/article/2019/01/15/la-reforme-des-retraites-corriger-t-elle-les-inegalites-femmes-hommes\\_5409320\\_823448.html](https://www.lemonde.fr/politique/article/2019/01/15/la-reforme-des-retraites-corriger-t-elle-les-inegalites-femmes-hommes_5409320_823448.html).

<sup>400</sup> Haut Commissaire pour la réforme des retraites, Information on rights of couples and family rights <https://www.reforme-retraite.gouv.fr/actualites/actualites-du-haut-commissaire/article/les-droits-conjugaux-et-familiaux-dans-un-systeme-universel-de-retraite>.

<sup>401</sup> Advisory Council on Pensions (COR) (2019) *The inequalities between women and men during employment and at retirement*, <https://www.cor-retraites.fr/sites/default/files/2019-06/doc-4404.pdf>, Report on pensions in the civil service, [https://www.performance-publique.budget.gouv.fr/sites/performance-publique/files/files/documents/jaunes-2019/Jaune2019\\_pensions.pdf](https://www.performance-publique.budget.gouv.fr/sites/performance-publique/files/files/documents/jaunes-2019/Jaune2019_pensions.pdf).

<sup>402</sup> On the incoherent means of justification of affiliation to AGIRC and ARRCO, see Court of Cassation Soc., 6 June 2012, No. 10-21.489, JCP G, 2012, 908, note M. Mercat-Bruns. Also, on the right to a supplementary retirement system being indirectly discriminatory against women, requiring a certain number of hours worked, Soc., 3 July 2012, No. 10-23.013, JCP S 2012, 1490, note J.-Ph. Tricoit.

## **6.8 Difficulties**

The *Griesmar* case (C-366/99) and now the *Leone* case (C-173/13) clearly highlight some of the French difficulties in implementing the Directive in occupational pension schemes.

## **6.9 Evaluation of implementation**

There have been indirect efforts to help women because of the type of activity they were in during their professional life. There have been efforts to award the right to retirement with full pension at 65 for carers<sup>403</sup> but the Defender of Rights regrets this possibility is not open to part-time carers.

## **6.10 Remaining issues**

There are no remaining issues.

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<sup>403</sup> Act No. 2010-1330, of 9 November 2010, on the reform of pensions (*Loi n° 2010-1330 du 9 novembre 2010 portant réforme des retraites*), Article 20, available at: <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000023022127&categorieLien=id>.

## **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)**

A report on pensions in the civil service explains how reforms have progressively removed gendered service credits for women after the *Griesmar* and *Leone* EU cases with the French *Quintanel* case accepting compensation measures in the past.<sup>404</sup> The Pensions Advisory Council (COR) monitors all pensions including statutory schemes and their evolution in an annual report.<sup>405</sup>

#### **7.1.2 Other relevant issues**

There are no other relevant issues

#### **7.1.3 Overview of national acts**

The principle of equal treatment in statutory schemes of social security derive generally from the law prohibiting discrimination and the law on the reform of pensions.

Act No. 2010-1330, 9 November 2010, on the Reform of Pensions, JO No. 261, 19 November 2010, p. 20034; Act No. 2008-496, 27 May 2008, implementing the various directives on discrimination, JO No. 123, 28 May 2008, p. 8801.

Article L.913-1 of the Social Security Code, amended by Order No. 2006-344 of 23 March 2006, Article 3, provides that collective bargaining or unilateral decisions linked to supplementary social protections cannot include sex discrimination. Any such provision is null and void. This does not prevent provisions on the protection of women linked to maternity.

#### **7.1.4 Political and societal debate and pending legislative proposals**

The High Council on Retirement Reform is evaluating the need for a global reform of all pensions in terms of compensating inequalities in pension levels with a more universal system which will be proposed in 2019.<sup>406</sup>

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

As such, the principle of equal treatment for men and women in matters of social security is not expressly mentioned. For example, there is no such principle in the Social Security Code. However, the general principle is recognised in the Constitution and it directly applies.

### **7.3 Personal scope**

The personal scope of national law is the same as in the directives.

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<sup>404</sup> *Rapport sur les pensions de retraite de la service publique* (Report on pensions in the civil service) (2019), p. 95, available at: [https://www.performance-publique.budget.gouv.fr/sites/performance-publique/files/files/documents/jaunes-2019/Jaune2019\\_pensions.pdf](https://www.performance-publique.budget.gouv.fr/sites/performance-publique/files/files/documents/jaunes-2019/Jaune2019_pensions.pdf).

<sup>405</sup> Pensions Advisory Council (COR) (2018) *Évolutions et perspective es des retraites en France. Rapport annuel 2018* (Retirement in France – developments and prospects. Annual Report 2018), available at: <https://www.cor-retraites.fr/sites/default/files/2019-06/doc-4647.pdf>.

<sup>406</sup> *Les enjeux de la reforme* (Challenges of the reform): <https://www.reforme-retraite.gouv.fr/la-reforme/article/les-enjeux-de-la-reforme>.

#### **7.4 Material scope**

The material scope is the same as in the directive.

#### **7.5 Exclusions**

For a long time the French legislator has chosen to implement the exception in Article 7(b) of Directive 79/7/EEC, according to which Member States can exclude from the scope of their legislation the advantages in respect of old-age pension schemes granted to people who have brought up children and also the exceptions in Article 7(c) (see Article L.351-4 of the Social Security Code before 2010).

However, a new provision included in the law to finance social security in 2010 was adopted in December 2009. As for civil servants, a specific right for women linked to maternity has been maintained: increased insurance coverage for pensions in the private sector for a maximum of one year for women who have given birth to one or more children. For the second year, the mother will continue to benefit from another increase in insurance coverage for children born before 1 January 2010, except if fathers can prove, in the year following the publication of the law, that they have raised their children on their own. For children born after 1 January 2010, the mother will continue to benefit from increased insurance coverage for a second year, if there is agreement between the father and the mother, expressed in the six months following the child's fourth birthday. If there is a disagreement between the parents, the advantage will be granted to the parent who can prove that he/she has contributed more and for a longer period to the upbringing of the child. If both parents have contributed equally to the child's upbringing, the benefit will be divided into two.

#### **7.6 Actuarial factors**

There are no actuarial factors distinguishing between men and women.

#### **7.7 Difficulties**

There are no current difficulties.

#### **7.8 Evaluation of implementation**

Statutory schemes respect the principle of equal treatment except for cases on past service credits for women (*Quintanel* 2015). There is no other case law and the real challenge will concern the global pension reform and its possible indirect effects on inequalities between women and men which the government would like to take into account in a gender-neutral way based on the impact of career interruptions.

There would be another way to indirectly foster promotion of equality of men and women in statutory schemes by further developing the optional use of enhanced contributions to pensions (contribution of employers at the same level as full-time work) for part-time workers, which already exists in Article L.241-3-1 of the Social Security Code and is recommended by the Defender of Rights.<sup>407</sup>

#### **7.9 Remaining issues**

There are no remaining issues.

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<sup>407</sup> The *Haute Autorité de lutte contre les discriminations et pour l'égalité (Halde)* (Equal Opportunities and Anti-Discrimination Commission) had already recommended this: Decision of 13 September 2010.

## 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 is a private Observatory on Self-Employment which covers academics, experts, lawyers, unions and private actors.<sup>408</sup> It drafts reports, for example on social protection for self-employed workers regardless of their sex.<sup>409</sup>

#### 8.1.2 Other issues

There are no other issues.

#### 8.1.3 Overview of national acts

- Act No. 2008-776 of 4 August 2008<sup>410</sup> on modernisation of the economy to promote entrepreneurship, simplify tax obligations for self-employed workers and extend to civil partners rights of married couples;
- Decree No. 2007-582 of 19 April 2007 on personal pension rights and affiliation of spouses of small businesses;<sup>411 412</sup>
- Law on research of 18 April 2006 improving access to leave for young people who want to start their own business;<sup>413</sup>
- Law No. 2005-882 of 2 August 2005 on small businesses, which protects the status of spouses, their limited liability, their right to training and recognition of their expertise to validate degrees;<sup>414</sup>
- Law on economic initiative of 1 August 2003 facilitating access to financial support and support for parity in female entrepreneurship 2003;<sup>415</sup>
- Decree No. 2008-1410 of 19 December 2008 extending maternity leave for the self-employed;<sup>416</sup>
- Decree No. 2008-536 and No. 2008-537 of 5 June 2008<sup>417</sup> on rights for employees in agriculture (extension of maternity leave and protection to exposure to certain risks of products/diethylstilbestrol (DES));

<sup>408</sup> *Observatoire du travail indépendant*: <https://www.travailindependant.org/>.

<sup>409</sup> *Observatoire du travail indépendant*, list of publications: <https://www.travailindependant.org/category/etudes-et-documents-de-reference/protection-sociale-des-independants/>.

<sup>410</sup> Act No. 2008-776 of 4 August 2008 on modernisation of the economy (*Loi n° 2008-776 du 4 août 2008 de modernisation de l'économie*), available at: <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000019283050>.

<sup>411</sup> Decree No. 2007-582 of 19 April 2007 on personal pension rights and affiliation of spouses of small businesses (*Décret n° 2007-582 du 19 avril 2007 relatif aux cotisations d'assurance vieillesse des conjoints collaborateurs des professionnels libéraux*), available at: <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000618397&categorieLien=id>.

<sup>413</sup> Law on research of 18 April 2006 improving access to leave for young people who want to start their own business (*Loi n° 2006-450 du 18 avril 2006 de programme pour la recherche*), available at: <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000426953>.

<sup>414</sup> Law No. 2005-882 of 2 August 2005 on small businesses (*Loi n° 2005-882 du 2 août 2005 en faveur des petites et moyennes entreprises*), available at: <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000452052&categorieLien=cid>.

<sup>415</sup> Law on economic initiative of 1 August 2003, (*Loi n° 2003-721 du 1 août 2003 pour l'initiative économique*), available at: <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=LEGITEXT000005634924>.

<sup>416</sup> Decree No. 2008-1410 of 19 December 2008 extending maternity (*Décret n° 2008-1410 du 19 décembre 2008 relatif à l'allongement du congé de maternité des assurées relevant à titre personnel du régime social des indépendants*), available at: <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000019992679&categorieLien=id>.

<sup>417</sup> Decree No. 2008-536 and No. 2008-537 of 5 June 2008 on maternity and adoption leave rights for employees in agriculture (*Décret n° 2008-536 du 5 juin 2008 relatif à l'allocation de remplacement pour congé de maternité ou d'adoption des personnes non salariées des professions agricoles*), available at: <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000018933875&dateTexte=>.

- Decree No. 2007-1491 of 17 October 2007 on maternity and paternity leave for non-salaried employees in agriculture;<sup>418</sup>
- Law on agriculture of 5 January 2006 facilitating rights to social protection of spouses and partners of farmers.<sup>419</sup>

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

The Secretary of State on equality has particularly emphasised and promoted policies to develop women's initiatives to establish their own companies: for example, loans for women starting businesses (*Le Fonds de garantie à l'initiative des femmes, FGIF*), networks to support women CEOs in different regions (*Le réseau EFOIR: 'Entreprendre au féminin, Océan indien – Réunion'*), continuing education for different professions, for example for architects (*Formation à la création d'entreprise de l'ARVHA*) and prizes for original initiatives (*Concours régional 'entreprendre au féminin' en Franche-Comté*).<sup>420</sup> The main objectives of these policies are to raise awareness about rights and support groups for women who set up their own companies and not to adopt more laws to promote their rights. The actions aim to create more awareness of rights for women who start companies, support them by improving their access to funds, explain current laws in their favour and link them up with networks of entrepreneurs.<sup>421</sup>

## 8.2 Implementation of Directive 2010/41/EU

France has requested an additional period as mentioned in Article 16(2) of the Directive to comply with Article 7. The transposition was made by Decree No. 2014-20 of 9 January 2014. It is not clear why France needed this additional period. The Decree is just about a very specific problem (health insurance of a specific regime of the collaborating partner of independent workers). Except for this Decree, France has not provided any explicit instruments formally implementing the Directive. The Act of 27 May 2008, No. 2008-496, implementing the various directives on discrimination, transposes both Directive 2006/54/EC and Directive 2004/113/EC. It states in its Article 5 that the law applies to any public and private person, including 'those carrying out an independent activity' (self-employed). It seems that this provision could also be analysed as implementing Directive 2010/41/EU. This could explain the absence of any formal transposition of this Directive.

## 8.3 Personal scope

### 8.3.1 Scope

There has been no explicit transposition of Article 2(a) in France. There is no legal definition of a self-employed person or self-employment in France. Similar to many labour laws in other countries, the French Labour Law is built around the 'binary divide' between employment and self-employment, between subordinated labour and independent or autonomous work, while a self-employed person can be defined as a person who is not a worker. The French Labour Code does not contain any definition of what is an employee or a definition of subordinate employment. However, certain criteria have been determined by the Court of Cassation, the French Supreme Court.<sup>422</sup> An employment contract exists when a person undertakes to work in the name and under the supervision of another in

<sup>418</sup> Decree No. 2007-1491 of 17 October 2007 on maternity and paternity leave for non-salaried employees in agriculture (*Décret n°2007-1491 du 17 octobre 2007 relatif à l'allocation de remplacement pour le congé de maternité des personnes non salariées des professions agricoles et modifiant le code rural (partie réglementaire)*), available at: <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000429029&dateTexte=>

<sup>419</sup> Law on agriculture of 5 January 2006, (*LOI n° 2006-11 du 5 janvier 2006 d'orientation Agricole*), available at: <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000264992&categorieLien=id>.

<sup>420</sup> <https://www.egalite-femmes-hommes.gouv.fr/dossiers/egalite-professionnelle/entrepreneuriat-des-femmes/des-actions-en-faveur-de-la-creation-dentreprise/>.

<sup>421</sup> <https://www.egalite-femmes-hommes.gouv.fr/dossiers/egalite-professionnelle/entrepreneuriat-des-femmes/les-acteurs-cles-de-la-creation-dentreprises/>.

<sup>422</sup> For instance see, Court of Cassation, Social Chamber, 13 November 1996, Dr. Soc. 1996. 1067.

return for remuneration. Three elements, which are required to prove the existence of an employment contract, emerge from this definition: the performance of an activity, in return for remuneration and the existence of a hierarchical relationship between the parties (a link of legal subordination). This last criterion is the most important one. According to the case law, the legal superior-subordinate relationship means that a job is performed under the authority of an employer, who has the power to give orders and instructions, to supervise the performance of the said work and to impose sanctions in case of a failure or breaches by its subordinate. A self-employed person can therefore be defined as a person who provides services to another party in an independent and non-subordinate manner.

### 8.3.2 Definitions

As regards the application of the principle of non-discrimination, the absence of a definition of self-employment does not seem to be a problem and it seems that there is no risk that people like 'small entrepreneurs' or 'businesspeople' will not be covered.

### 8.3.3 Categorisation and coverage

While self-employed workers can be considered part of the same category, the social protection of self-employed workers is subject to separate regulations.

For social protection issues, life partners are recognised. French law recognises persons engaged in a civil union (PACS) and people with a conjugal relationship living together as life partners.

### 8.3.4 Recognition of life partners

Spouses and life partners (registered by a *pacte civil de solidarité*: PACS, a type of civil union contract) can choose between three different statuses: a dependent worker, a partner or a collaborating spouse. Since 2005, there is an obligation to choose one of these three options. Spouses or life partners who have chosen the status of a collaborating spouse will benefit, on an obligatory basis, from social protection: old age, maternity and disability. Since 1 January 2014, the right to sickness benefits in cash has been improved in order to implement Directive 2010/41/EU. Collaborating spouses and life partners will now contribute and have the right to sickness benefits in cash in the case of sickness, which was not previously the case. However, this provision does not seem to apply to spouses and life partners in the 'liberal professions'.<sup>423</sup> Partners who are not married or registered by a PACS, if they participate in the activity of the business, can still voluntarily contribute to obtain benefits from the social security system.

## 8.4 Material scope

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

As such, Article 4 of the Directive has not been implemented. However, it seems that the same result is reached with Article 5 of the 2008 Act,<sup>424</sup> which states that the Act applies to any private and public entity, including 'those carrying out an independent activity' (self-employed).

Moreover, the Criminal Code prohibits discrimination in very general terms. Article 225-1 states the following:

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<sup>423</sup> In France, the 'liberal professions' refers to people who are not public servants and are not engaged in commercial activities. It includes professionals such as doctors, dentists and lawyers.

<sup>424</sup> Act No. 2008-496 of 27 May 2008 transposing EU law in the field of discrimination (*Loi No. 2008-496 du 27 mai 2008 portant diverses dispositions d'adaptation au droit communautaire dans le domaine de la lutte contre les discriminations*).

'Discrimination comprises any distinction applied between natural persons by reason of their origin, sex, family situation, pregnancy, physical appearance or family name, state of health, handicap, genetic characteristics, sexual morals or orientation, age, political opinions, union activities, or their membership or non-membership, real or supposed, of a given ethnic group, nation, race or religion.'

'Discrimination also comprises any distinction applied between legal persons by reason of the origin, sex, family situation, physical appearance or family name, state of health, handicap, genetic characteristics, sexual morals or orientation, age, political opinions, union activities, membership or non-membership, real or supposed, of a given ethnic group, nation, race or religion of one or more members of these legal persons.'

Article 225-2 adds:

'Discrimination defined by Article 225-1, committed against a natural or legal person, is punished by three years' imprisonment and a fine of EUR 45 000 where it consists:

1. of the refusal to supply goods or services;
2. of obstructing the normal exercise of any given economic activity;
3. of the refusal to hire, to sanction or to dismiss a person;
4. of subjecting the supply of goods or services to a condition based on one of the factors referred to under Article 225-1;
5. of subjecting an offer of employment, an application for a course or a training period to a condition based on one of the factors referred to under Article 225-1;
6. of refusing to accept a person onto one of the courses referred to under 2. of Article L.412-8 of the Social Security Code.'

Here, the protection against discrimination is largely defined and can include self-employment.

## 8.5 Positive action

Even if they are not specifically related to Directive 2010/41/EU, some policies regarding equal treatment for self-employed people exist in France. For example, a fund for women's initiatives was created in 1989 to support the setting up of businesses by women.<sup>425</sup> Today, this fund can guarantee loans for women for the establishment or development of their business and the Secretary of State for Equality fosters other initiatives to support female entrepreneurs through information on rights and support networks.<sup>426</sup>

## 8.6 Social protection

France has social protection for the self-employed. This social protection is subject to separate regulations (although they are very similar). Farmers come under the agricultural system. Craftspeople, retailers and manufacturers fall within the scope of the Social Protection Scheme for the Self-employed (RSI), while practitioners of the liberal professions are covered by separate schemes. However, liberal professionals also come under the RSI insofar as sickness insurance is concerned. The schemes are funded by social contributions and they cover benefits and pensions related to sickness, maternity, disability, survivors' benefits, accidents at work and occupational diseases. The schemes are mandatory and most of them are complemented by compulsory supplementary systems governed by the same funds.

<sup>425</sup> *Fonds de garantie à l'initiative des femmes*: <https://www.egalite-femmes-hommes.gouv.fr/dossiers/egalite-professionnelle/entrepreneuriat-des-femmes/fgif/>.

<sup>426</sup> *Secrétariat d'État chargé de l'Égalité entre les femmes et les hommes et de la lutte contre les discriminations*: <https://www.egalite-femmes-hommes.gouv.fr/dossiers/egalite-professionnelle/entrepreneuriat-des-femmes/accompagner-les-nouvelles-cheffes-dentreprises/>.

## **8.7 Maternity benefits**

There are some minor differences between the schemes and as a consequence the whole system is complex. For farmers, replacement benefits may be paid to compensate for the fees paid to ensure the replacement of the woman farmer in farm work (Articles L.732-10 et seq. of the Rural Code). The duration of the payment of the replacement benefits is the same as the period of maternity leave for employees (16 weeks).

For crafts, commerce and manufacturing, as well as the liberal professions, self-employed women have a right to a lump-sum payment for inactivity, which is aimed at compensating for the decrease in their activity (Articles L.611-1 et seq.; L.615-19 et seq.; and D.615-4 et seq. of the Social Security Code). The first half of this allowance is paid at the end of the seventh month of pregnancy and the second half after the birth of the child. The amount for 2018 is EUR 3 311. Furthermore, self-employed women have a right to daily maternity benefits for a period of 44 days, a period which can be extended on two occasions at most, for 15 days each. The maximum period for these benefits is therefore 74 days, which is less than the 14 weeks provided by Directive 2010/41/EU. The amount of these benefits for 2016 is EUR 2 237.60 for 44 days, EUR 3 121.10 for 59 days and EUR 3 914.60 for 74 days.

Spouses and life partners also have a right to a lump-sum payment for inactivity which is aimed at compensating for the decrease in their activity and the duration of the payment of these benefits is 16 weeks.

Some specific rules can also apply to various categories of self-employed workers. Lawyers and advocates have concluded an agreement in order to extend the right to maternity leave to 16 weeks (as opposed to 12 weeks previously). The extension of this period is a result of Directive 2010/41/EU.

Even though the French maternity allowances meet the requirement of sufficiency under the Directive (as it is at least equivalent to the allowance which the person concerned would receive in the event of a break in her activities or grounds connected with her state of health), in practice the main problem for self-employed women is the fact that the level of the benefits paid is low and they are only paid for a short period. Therefore, many self-employed women do not stop work for pregnancy or maternity-related reasons (the interruption is not mandatory) or do so only for a very short period of time, even if temporary replacements are available. For example, for women who are craftspeople, retailers or manufacturers, 90 % of the cost of hiring a person to replace the pregnant woman will be covered.

## **8.8 Occupational social security**

### **8.8.1 Implementation of provisions regarding occupational social security**

Special provisions are not necessary since general principles of equality apply.

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

There is no application of exceptions for self-employed people regarding matters of occupational social security (Article 11 of Recast Directive 2006/54)

## **8.9 Prohibition of discrimination**

Act No. 2008-496 of 27 May 2008, implementing the various directives on discrimination, provides a general prohibition of direct or indirect discrimination based on sex in access to and the supply of goods and services. Article 5 of the Act simply states that the Act applies

to any private and public entity, including 'those carrying out an independent activity' (self-employment). This Article therefore makes no distinction between self-employed persons and workers.

### **8.10 Evaluation of implementation**

There is limited case law on issues concerning equal treatment for the self-employed. The Defender of Rights delivered a decision on breach of contracts of self-employed workers in private partnership firms and their right to maternity and protection of their employment after maternity leave.<sup>427</sup> The majority of the legislation has been focused on helping partners of entrepreneurs obtain maternity leave and pensions or developing support for female entrepreneurs.

### **8.11 Remaining issues**

There are no remaining issues.

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<sup>427</sup> Defender of Rights, Decision MLD 2015-264 of 25 November 2015.

## 9 Goods and services (Directive 2004/113)<sup>428</sup>

### 9.1 General (legal) context

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

In its 2018 annual report, the Defender of Rights describes continued discrimination in the field of goods and services.<sup>429</sup> Previous reports had targeted difficult access to housing for single mothers, online sexual harassment and discrimination against people with disabilities, including women, in access to health services.

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

The Defender of Rights has published recommendations<sup>430</sup> and a report on how people feel abandoned due to the digital market and unequal access to services<sup>431</sup> that are apparently neutral but can disproportionately affect people under guardianship and with disabilities, including indirectly a majority of older women. Marketing techniques based on algorithms to establish consumer profiles can also perpetuate sex bias in the pricing of products for women. The Defender of Rights has raised the issue of human rights and risks in the use of algorithms.<sup>432</sup>

After a first report on women in the digital sector in 2015 by a member of Parliament,<sup>433</sup> the Council on Information and Freedom (CNIL) produced a report in December 2017 with specific recommendations about algorithms<sup>434</sup> based on two guiding principles, *loyalty* to citizens regardless of their consumer status and *reflexivity* to engage all involved in constant self-reflection on the use of algorithms by institutions and companies. Six operational recommendations were drafted: 1) train all those participating in the chain of people using algorithms; 2) make algorithmic systems more accessible by giving rights to users and providing mediation; 3) work on the design of algorithms to safeguard the freedom of users; 4) develop a platform of auditors of algorithms; 5) encourage ethical ideas about AI and make it a national cause; 6) reinforce the ethical dimension of companies.<sup>435</sup>

Then the Prime Minister commissioned a member of Parliament, Cédric Villani, who is a mathematician, to lead a study on the pros and cons of artificial intelligence (AI), including a chapter on inclusiveness, which came out in September 2018.<sup>436</sup> The study highlighted

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<sup>428</sup> See e.g. Caracciolo di Torella, E. and McLellan, B. (2018) *Gender equality and the collaborative economy*, European network of legal experts in gender equality and non-discrimination, available at: <https://www.equalitylaw.eu/downloads/4573-gender-equality-and-the-collaborative-economy-pdf-721-kb>.

<sup>429</sup> Defender of Rights (2018) *Rapport annuel d'activité 2018* (Annual Report 2018), p. 47, available at: [https://www.defenseurdesdroits.fr/sites/default/files/atoms/files/ddd\\_rapport\\_activite-2018\\_access\\_0.pdf](https://www.defenseurdesdroits.fr/sites/default/files/atoms/files/ddd_rapport_activite-2018_access_0.pdf).

<sup>430</sup> Defender of Rights, Framework decision, 2018-226, 3 September 2018, available at: [https://juridique.defenseurdesdroits.fr/index.php?lvl=notice\\_display&id=25921](https://juridique.defenseurdesdroits.fr/index.php?lvl=notice_display&id=25921).

<sup>431</sup> Defender of Rights (2019) *Dématérialisation et inégalités d'accès aux services publics* (Digitalisation and inequalities in access to public services), available at: <https://www.defenseurdesdroits.fr/sites/default/files/atoms/files/rapport-demat-num-21.12.18.pdf>.

<sup>432</sup> Defender of Rights, [https://juridique.defenseurdesdroits.fr/index.php?lvl=notice\\_display&id=25683](https://juridique.defenseurdesdroits.fr/index.php?lvl=notice_display&id=25683) referring to a study by the Council of Europe.

<sup>433</sup> Coutelle C. (2015) *Rapport d'information de l'Assemblée nationale no 3318, Femmes et numérique: dépasser les écueils, saisir les opportunités*, Délégation aux droits des femmes, par la députée Catherine Coutelle, December 2015 (General Assembly report: Women and the digital sector: overcoming barriers, seizing opportunities).

<sup>434</sup> CNIL (2017) *Report on algorithms and AI*, available at: <https://www.cnil.fr/fr/comment-permettre-lhomme-de-garder-la-main-rapport-sur-les-enjeux-ethiques-des-algorithmes-et-de>.

<sup>435</sup> CNIL (2017) *Report on algorithms and AI*, available at: <https://www.cnil.fr/fr/comment-permettre-lhomme-de-garder-la-main-rapport-sur-les-enjeux-ethiques-des-algorithmes-et-de>.

<sup>436</sup> Villani, C. (2018), *Donner un sens à l'intelligence artificielle : pour une stratégie nationale et européenne* (Giving meaning to artificial intelligence: for a national and European strategy), Report for the Prime

the risks of artificial intelligence both in terms of barriers to education for women in the tech industry, employment and career advancement and in marketing products for women.

An objective of 40 % female students was recommended to compensate for barriers in the tech industry.<sup>437</sup> The report recommends developing a database on inequalities between men and women at work<sup>438</sup> and promoting transparency in procedures for the recruitment and promotion of women.<sup>439</sup> Allocating a budget for AI impact on diversity<sup>440</sup> and developing mediation<sup>441</sup> to open AI to all by promoting fundamental rights, including in the public sector,<sup>442</sup> is another proposal of the report.

The High Council on Equality at Work has shown in its report on HR processes both in recruitment and promotions that the development of algorithms by companies can have a discriminatory effect on women.<sup>443</sup>

### 9.1.3 Political and societal debate

Macron first signed a Law for a Digital Republic in 2016<sup>444</sup> which is intended to support the digital transition of the collaborative economy and develop a more inclusive digital society, banning discrimination regardless of the ground, extending access to the internet and protecting citizens in terms of personal data.

President Macron promised to follow the proposals of the Villani Report in a speech at the Collège de France in 2018<sup>445</sup> where he reiterated the need for several initiatives outlined in the report: developing more inclusiveness of women in the tech industry because it is a male-dominated industry and developing more ethical AI through tools to 'track biases', develop 'transparency' in the use of algorithms and 'avoid decision-making exclusively on the basis of algorithms'. The idea is to promote interdisciplinary research in the field through the national research institute in the digital field (INRIA).<sup>446</sup> President Macron called for a specific commitment to non-discrimination and the development of a code of ethics linked to the digital world and its impact.<sup>447</sup>

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Minister, 8 September 2018, p. 163, available at:

[https://www.aiforhumanity.fr/pdfs/9782111457089\\_Rapport\\_Villani\\_accessible.pdf](https://www.aiforhumanity.fr/pdfs/9782111457089_Rapport_Villani_accessible.pdf).

<sup>437</sup> Villani Report, p. 163.

<sup>438</sup> Villani Report, p. 170.

<sup>439</sup> Villani Report, p. 171.

<sup>440</sup> Villani Report, p. 172.

<sup>441</sup> Villani Report, p. 172.

<sup>442</sup> Villani Report, pp. 173 and 177.

<sup>443</sup> Grésy, B. (2019), High Council on Women, *Égalité entre les femmes et les hommes dans les procédures RH* (Equality between women and men in HR procedures), p. 192, available at: <https://www.egalite-femmes-hommes.gouv.fr/wp-content/uploads/2019/03/Version-finale-RAPPORT-Egalite-dans-les-procedures-RH.pdf>.

<sup>444</sup> Act No. 2016-1321 for a Digital Republic, (*Loi n° 2016-1321 du 7 octobre 2016 pour une République numérique*).

<sup>445</sup> Élysée (2018) *Discours du Président de la République sur l'intelligence artificielle* (Speech by the President of France on artificial intelligence), available at: <https://www.elysee.fr/emmanuel-macron/2018/03/29/discours-du-president-de-la-republique-sur-lintelligence-artificielle>.

<sup>446</sup> INRIA, *Institut national de recherche sur les sciences du numérique* (French national institute for the digital sciences), <https://www.inria.fr/>.

<sup>447</sup> 'Et au cœur de cette réflexion, nous devons inscrire des engagements de non-discrimination sociale, ethnique, sexuelle et l'Etat, pour ce qui le concerne, rendra donc par défaut public le code de tous les algorithmes qu'il serait amené à utiliser' (We must make a commitment to working to avoid social, ethnic and sexual discrimination and the default position of the State will therefore be to make public the code for all the algorithms it uses), see: <https://www.elysee.fr/emmanuel-macron/2018/03/29/discours-du-president-de-la-republique-sur-lintelligence-artificielle>.

There is a debate on the risk of algorithmic sex discrimination in goods and services outside of employment.<sup>448</sup> In the private sector, algorithms have been used by private companies in recruitment tools (in matching mechanisms),<sup>449</sup> and have also been used by human resources management to develop biased model candidates, which are based on previous male candidates for employment.<sup>450</sup> Internet navigation can guide male and female consumers differently.<sup>451</sup> There is also the issue of profiling in enabling access to insurance and bank credits.<sup>452</sup> Other algorithms can also increase the risk of sex discrimination by raising prices for gendered products designed for menstruation (female consumers are easy targets for predatory prices).<sup>453</sup>

On the other hand, some personalised price setting for goods and services can limit the risk of economic discrimination for men and women from access to better individualised rates in airline transportation for everyone through to the technique of data mining (searching for the best deal drawn from big data).<sup>454</sup>

## 9.2 Prohibition of direct and indirect discrimination

Act No. 2008-496 of 27 May 2008<sup>455</sup> transposing EU law in the field of discrimination provides a general prohibition of direct and indirect discrimination based on sex in the access to, and the supply of, goods and services. Article 5 of the Act simply states that the Act applies to any private and public entity.

## 9.3 Material scope

The material scope of national law is broader than EU law as the exceptions have not been strictly implemented. Thus, the Act does not exclude, as the Directive does, the content of media or advertising from the non-discrimination principle. Concerning state and private education, the Act merely states that the non-discrimination principle does not prohibit the organisation of non-mixed schools.

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<sup>448</sup> Mercat-Bruns, M. (Ed.) (2020); *Nouveaux modes de detection et de prevention de la discrimination et accès au droit: action de groupe et discrimination systémique, algorithmes et préjugés, réseaux sociaux et harcèlement*, Société de législation comparée, Collection Trans Europe Experts, <https://www.lgdj.fr/nouveaux-modes-de-detection-et-de-prevention-de-la-discrimination-et-acces-au-droit-9782365170925.html>.

<sup>449</sup> See experiment which was quickly terminated with Vera, Robot HR at L'oréal selecting candidates for employment or Météojob and its matching algorithm, similar to a headhunter for companies, <https://www.lesechos.fr/2018/03/meteojob-optimise-le-recrutement-987260>.

<sup>450</sup> Coron, C. (2007), 'Le big data RH: vers une nouvelle convention de quantification?', *Annales des Mines-Gérer et comprendre* No. 3, 2007, p. 177.

<sup>451</sup> Attempts have been in France to avoid the traditional navigators, <https://www.ladn.eu/tech-a-suivre/data-big-et-smart/needle-extension-web-naviguer-sans-algorithme-google/>.

<sup>452</sup> Gadhoum Y., Gueyie J-P., Siala M.K. (2007), 'La décision de crédit: procédure et comparaison de la performance de quatre modèles de prévision d'insolvabilité', *Revue des Sciences de gestion* 2, p. 177.

<sup>453</sup> On the cost of products for menstruation: [https://www.allodocteurs.fr/maladies/gynecologie/pourquoi-les-regles-coutent-cher\\_26235.html](https://www.allodocteurs.fr/maladies/gynecologie/pourquoi-les-regles-coutent-cher_26235.html); on how competition law must also be analysed to understand how algorithms also reflect abuse of dominance, Chellet P. (2020), 'Prix personnalisé sur internet: la rencontre de la discrimination, de la concurrence et des données personnelles', p. 94 in Mercat-Bruns, M. (Ed.) (2020); *Nouveaux modes de detection et de prevention de la discrimination et accès au droit : action de groupe et discrimination systémique, algorithmes et préjugés, réseaux sociaux et harcèlement*, Société de législation comparée, Collection Trans Europe Experts, <https://www.lgdj.fr/nouveaux-modes-de-detection-et-de-prevention-de-la-discrimination-et-acces-au-droit-9782365170925.html>.

<sup>454</sup> Chellet P. (2020), 'Prix personnalisé sur internet: la rencontre de la discrimination, de la concurrence et des données personnelles', p. 93 in Mercat-Bruns, M. (Ed.) (2020); *Nouveaux modes de detection et de prevention de la discrimination et accès au droit: action de groupe et discrimination systémique, algorithmes et préjugés, réseaux sociaux et harcèlement*, Société de législation comparée, Collection Trans Europe Experts, <https://www.lgdj.fr/nouveaux-modes-de-detection-et-de-prevention-de-la-discrimination-et-acces-au-droit-9782365170925.html>; Marty F (2017), 'Algorithmes de prix, intelligence artificielle et équilibres collusifs', *Revue internationale de droit économique*, 2017 No. 2, p. 83.

<sup>455</sup> Act No. 2008-496 of 27 May 2008 transposing EU law in the field of discrimination (*LOI n° 2008-496 du 27 mai 2008 portant diverses dispositions d'adaptation au droit communautaire dans le domaine de la lutte contre les discriminations*), available at: <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000018877783>.

## **9.4 Exceptions**

The Act does not exclude, as the Directive does, the content of media or advertising from the application of the non-discrimination principle. Concerning state and private education, the Act merely states that the non-discrimination principle does not prohibit the organisation of non-mixed schools.

## **9.5 Justification of differences in treatment**

Article 4 (2) of the 2008 Act states that differences based on sex can be admitted when the provision of goods and services to one sex is justified by a legitimate aim and the means for achieving that aim are appropriate and proportionate. Apparently, there has been no case law on the interpretation of this article.

## **9.6 Actuarial factors**

French legislation has deleted references to gender differentiations in the Insurance Code.

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

French legislation has made use of the exemption from the principle of equal treatment allowed by Article 5 Paragraph 2 of Directive 2004/113/EC. The *Test-Achats* ruling was enforced in December 2012. A ministerial order adopted on 18 December 2012 states that gender differentiations can only apply to insurance contracts concluded before 20 December 2012 or those which are tacitly renewed (Order of 18 December 2012 on equality between men and women in insurances, JO 20 December 2012). The implementation of the *Test-Achats* ruling occurred at the last possible moment. Several months later, a Bill was adopted (Act No. 2013-672, July 2013, on the regulation of banking activities) thereby modifying Article L.111-7 of the Insurance Code, in order to delete any reference to gender differentiations. The implementation of Directive 2004/113/EC seems to be satisfactory and the *Test-Achats* ruling has been taken into account.

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

There are no positive action measures (Article 6 of Directive 2004/113/EC) in the field of non-discrimination in the consumption or supply of goods and services.

## **9.9 Specific problems related to pregnancy, maternity or parenthood**

There are no specific problems related to pregnancy, maternity or parenthood in this area.

## **9.10 Evaluation of implementation**

French legislation seems to conform with EU law.

## **9.11 Remaining issues**

The Defender of Rights has served as mediator in a case of a transgender person who could not get a bank to change the female identification to male on their bank accounts.<sup>456</sup>

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<sup>456</sup> Defender of Rights, Mediation RA-2018-098 of 8 June 2018  
[https://juridique.defenseurdesdroits.fr/index.php?lvl=notice\\_display&id=25266](https://juridique.defenseurdesdroits.fr/index.php?lvl=notice_display&id=25266).

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

### 10.1 General (legal) context

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

The High Council for Equality has conducted monitoring on the limited impact of the fight against continued sexual violence against women one year after the start of the #metoo movement in France.<sup>457</sup> The High Council also evaluated the inter-ministerial plan on violence against women (2017-2019).<sup>458</sup> The main result is an increase in proposals and commitments to fight violence against women as part of the 'national cause' for equality but a limited financial investment to enforce the policies adopted.<sup>459</sup>

The number of femicides each year is frightening: 122 deaths of women in 2019.<sup>460</sup> This triggered an initiative in October 2019 to attempt to prevent these acts and protect the victim's residence.<sup>461</sup> The lockdown of 2020 has increased the incidence of violence.<sup>462</sup> From 3 September to 25 November 2019, following public debates, the Prime Minister adopted new measures<sup>463</sup> to tackle domestic violence and femicide.<sup>464</sup> The financial support for violence prevention and a broad societal perspective on the structural causes of violence is reflected in a public policy brief in association with six comprehensive measures on gender equality for 2020:

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<sup>457</sup> Haut Conseil à l'Égalité entre les femmes et les hommes (2018), *Un an après #MeToo, la lutte contre les violences sexistes et sexuelles doit se poursuivre et s'intensifier*, Communiqué de Presse, available at: <http://www.haut-conseil-egalite.gouv.fr/violences-de-genre/actualites/article/cp-un-an-apres-metoo-la-lutte-contre-les-violences-sexistes-et-sexuelles-doit>.

<sup>458</sup> Haut Conseil à l'Égalité entre les femmes et les hommes (2018) *Évaluation intermédiaire du 5e plan interministériel (2017-2019) et de la politique contre les violences faites aux femmes*, Rapport [http://www.haut-conseil-egalite.gouv.fr/IMG/pdf/hce\\_evaluation-5eme-plan-tabl-word\\_vf-2.pdf](http://www.haut-conseil-egalite.gouv.fr/IMG/pdf/hce_evaluation-5eme-plan-tabl-word_vf-2.pdf).

<sup>459</sup> Haut Conseil à l'Égalité entre les femmes et les hommes (2018) *Évaluation intermédiaire du 5e plan interministériel (2017-2019) et de la politique contre les violences faites aux femmes*, Rapport [http://www.haut-conseil-egalite.gouv.fr/IMG/pdf/hce\\_evaluation-5eme-plan-tabl-word\\_vf-2.pdf](http://www.haut-conseil-egalite.gouv.fr/IMG/pdf/hce_evaluation-5eme-plan-tabl-word_vf-2.pdf), see especially p. 57.

<sup>460</sup> On average, a woman is killed by her husband or partner every three days in France, *L'express* 16/12/2019 [https://www.lexpress.fr/actualite/societe/au-moins-122-femicides-en-2019-un-chiffre-en-hausse-par-rapport-a-2018\\_2111451.html](https://www.lexpress.fr/actualite/societe/au-moins-122-femicides-en-2019-un-chiffre-en-hausse-par-rapport-a-2018_2111451.html).

<sup>461</sup> Act No. 2019-1480 of 28 December 2019 to combat violence in the family (*Loi n° 2019-1480 du 28 décembre 2019 visant à agir contre les violences au sein de la famille*); implemented by Decree 27 May 2020 on restraining orders which has been criticised because it only gives victims 24 hours to inform their spouse or ex-partner of the order, after which the request for the order expires, (*Décret n° 2020-636 du 27 mai 2020 portant application des articles 2 et 4 de la loi n° 2019-1480 du 28 décembre 2019 visant à agir contre les violences au sein de la famille*); [https://www.lemonde.fr/societe/article/2020/06/09/violences-conjugales-les-ordonnances-de-protection-menacees-par-un-decret\\_6042245\\_3224.html](https://www.lemonde.fr/societe/article/2020/06/09/violences-conjugales-les-ordonnances-de-protection-menacees-par-un-decret_6042245_3224.html).

<sup>462</sup> It seems appropriate to consider the scope of the measures adopted in 2019 in light of the subsequent amplifying effect of the Covid-19 pandemic on gender equality. The health crisis has taken its toll particularly on women during the period of mandatory confinement from March to May 2020. The Government has taken measures to curtail an increased amount of domestic violence. Some of the most essential jobs during the health crisis (healthcare workers, cashiers, cleaning services) are in sectors dominated by women which exposed them more to risks of contamination and finally the period of confinement has limited access to health care for pregnant women, women requiring abortions. Telework has been particularly hard on families with small children.

<sup>463</sup> This initiative is called the 'Grenelle des violences conjugales': it took the form of over 100 local and national meetings between stakeholders on the issue (healthcare workers, local politicians, lawyers, judges, NGOs, families' of victims to discuss future policies). New measures to protect women victims of violence adopted by the Assembly, [http://www.assemblee-nationale.fr/dyn/15/textes/l15t0390\\_texte-adoptee-seance](http://www.assemblee-nationale.fr/dyn/15/textes/l15t0390_texte-adoptee-seance) just adopted unanimously by the Senate, <https://www.senat.fr/petite-loi-ameli/2019-2020/483.html>; [https://www.lemonde.fr/societe/article/2020/06/10/une-proposition-de-loi-destinee-protger-les-victimes-de-violences-conjugales-adoptee-au-senat\\_6042318\\_3224.html](https://www.lemonde.fr/societe/article/2020/06/10/une-proposition-de-loi-destinee-protger-les-victimes-de-violences-conjugales-adoptee-au-senat_6042318_3224.html): provisions include a right given to doctors to inform authorities of an immediate danger to the victim 'under influence' prevailing over the confidentiality rule, increased sanctions for harassment if possible threat of victim's suicide, banning the geolocation of a victim without their consent and for cyberviolence through recurring messages to victims.

<sup>464</sup> [https://www.egalite-femmes-hommes.gouv.fr/wp-content/uploads/2019/11/veille\\_actualite\\_2019.10.30.pdf](https://www.egalite-femmes-hommes.gouv.fr/wp-content/uploads/2019/11/veille_actualite_2019.10.30.pdf).

'1) awareness raising against bias in schools (fighting the rape culture); 2) understanding the impact of poverty and exclusion of men and women as a factor which can exacerbate violence 3) implementing effective equality in employment to empower women and men 4) limiting inequalities in the health sector to fight physical and mental vulnerabilities; 5) combating violence against, women, protecting victims and preventing criminal recidivism;6) promoting women in diplomacy on the international level'.<sup>465</sup>

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

There are several relevant pieces of legislation in this regard:

- Act No. 2019-1480 of 28 December 2019 to combat violence in the family;<sup>466</sup>
- Decree 27 May 2020 against violence in the family on restraining orders has been criticised because it only gives victims 24 hours to inform their spouse or ex-partner of the order, after which the request for the order expires;<sup>467</sup>
- Act No. 2018-771 of 5 September 2018 on the individual's freedom to choose their professional future;<sup>468</sup>
- Act No. 2018-703 of 3 August 2018 reinforcing the fight against sexual and sexist violence;<sup>469</sup>
- Act No. 2017-242 of 27 February 2017 modifying the duration of the statute of limitation in criminal law (six years in case of sexual assault and sexual harassment and 20 years in case of rape);<sup>470</sup>
- Act No. 2016-444 of 13 April 2016 to reinforce the fight against the sex work system and giving support to prostitutes;<sup>471</sup>
- Act of 17 August 2015 adapting criminal procedure to EU law (personalised evaluation of victim's situation during criminal procedure);<sup>472</sup>
- Act No. 2012-954 of 6 August 2012, on sexual harassment, JO No. 182, 7 August 2012, p. 12921.<sup>473</sup>

Act No. 2019-1480 of 28 December 2019 to combat violence in the family and prevent femicides sets the maximum time given to the family judge to deliver the restraining order at six days. Created by the Act of 9 July 2010 on violence against women in couples and effects on children, the restraining order allows the judge to attest the violence, evict the violent partner, propose housing (with financial support for first few months and priority on low income housing), and forbid the partner to hold any weapon licence. The law provides that the victim can request to stay at home. An electronic bracelet can be placed on the violent partner, with their consent, and the law promotes the use of a special one-touch phone to alert the police if the woman is in serious danger (*téléphone grave danger* - TGD). Also a new phone application will allow victims to access all the information on

<sup>465</sup> [https://www.egalite-femmes-hommes.gouv.fr/wp-content/uploads/2019/11/veille\\_actualite\\_2019.10.30.pdf](https://www.egalite-femmes-hommes.gouv.fr/wp-content/uploads/2019/11/veille_actualite_2019.10.30.pdf).

<sup>466</sup> *Loi n° 2019-1480 du 28 décembre 2019 visant à agir contre les violences au sein de la famille.*

<sup>467</sup> *Décret n° 2020-636 du 27 mai 2020 portant application des articles 2 et 4 de la loi n° 2019-1480 du 28 décembre 2019 visant à agir contre les violences au sein de la famille.*

<sup>468</sup> Act No. 2018-771 of 5 September 2018 on the individual's freedom to choose their professional future (*LOI n° 2018-771 du 5 septembre 2018 pour la liberté de choisir son avenir professionnel*).

<sup>469</sup> Act No. 2018-703 of 3 August 2018 reinforcing the fight against sexual and sexist violence (*Loi n° 2018-703 du 3 août 2018 renforçant la lutte contre les violences sexuelles et sexistes*).

<sup>470</sup> Act No. 2017-242 of 27 February 2017 modifying the duration of the statute of limitation in criminal law (*LOI n° 2017-242 du 27 février 2017 portant réforme de la prescription en matière pénale*).

<sup>471</sup> Act No. 2016-444 of 13 April 2016 to reinforce the fight against the sex work system and giving support to prostitutes (*LOI n° 2016-444 du 13 avril 2016 visant à renforcer la lutte contre le système prostitutionnel et à accompagner les personnes prostituées*).

<sup>472</sup> Act of 17 August 2015 adapting criminal procedure to EU law (*LOI n° 2015-993 du 17 août 2015 portant adaptation de la procédure pénale au droit de l'Union européenne*).

<sup>473</sup> Act No. 2012-954 of 6 August 2012, on sexual harassment (*LOI n° 2012-954 du 6 août 2012 relative au harcèlement sexuel*).

professionals, healthcare workers close to their home, and support provided by organisations.

### 10.1.3 National provisions on online violence and online harassment

Act No. 2018-703 of 3 August 2018<sup>474</sup> reinforcing the fight against sexual and sexist violence has banned cyber harassment with a fine of up to EUR 45 000 and up to three years imprisonment (Article 222-33-2-2 of the Criminal Code).

Act No. 2016-1321 on the Digital Republic of 2016<sup>475</sup> provides for a sanction of two years imprisonment and a fine of up to EUR 60 000 in the case of any circulation without the consent of the individual of their voice or image in a public or private setting that is sexual in character (ban on revenge porn).

### 10.1.4 Political and societal debate

President Macron has labelled violence against women one of the top priorities of the 'national cause' on equality between women and men<sup>476</sup> by reinforcing the protection of victims and the sanctions against perpetrators. Policies include: sanctioning street harassment and cyber harassment in groups, training on sexual violence for professionals working with people with disabilities and their carers and the adoption of Act No. 2018-703 on combating sexual violence and sexism. Please note that in December 2019, other legislative reforms were passed addressing violence against women and the high level of femicide per year in France.<sup>477</sup>

## 10.2 Ratification of the Istanbul Convention

France has ratified the Istanbul Convention (IC), with Law No. 2014-476 of 14 May 2014<sup>478</sup> authorising the ratification of the Convention. The Convention was ratified on 4 July 2014 and entered into force on 1 November 2014. The coordination body is the Directorate General of Social Cohesion, Ministry of Social Affairs, Health and Women's Rights. The many legislative changes described above aim to ensure compliance with the Convention.

Before the adoption of the IC, two laws from 2006 (Law No. 2006-399)<sup>479</sup> and 2010 (Law No. 2010-769)<sup>480</sup> had been adopted to protect women against violence and this pre-existing legal framework was considered to be partly in compliance with the obligations under the Convention. Before the ratification, Law No. 2013-711 of 5 August 2013<sup>481</sup> was adopted notably to ensure compliance with the Convention. Just after the ratification, Law No. 2014-873 for Real Equality between Women and Men was adopted and it also contains some provisions dealing with violence against women in order to complete the transposition of the Convention. The Criminal Code was modified in order to implement Article 37(2) of the Convention (the criminalisation of the intentional conduct of luring an

<sup>474</sup> Act No. 2018-703 of 3 August 2018 reinforcing the fight against sexual and sexist violence, (*loi n° 2018-703 du 3 août 2018 renforçant la lutte contre les violences sexuelles et sexistes*).

<sup>475</sup> Act No. 2016-1321 of 7 October 2016 on the Digital Republic (*Loi n° 2016-1321 du 7 octobre 2016 pour une République numérique*).

<sup>476</sup> <https://www.egalite-femmes-hommes.gouv.fr/25948-2/>.

<sup>477</sup> See supra note 467.

<sup>478</sup> Act No. 2014-476 of 14 May 2014 authorising the ratification of the Convention (*loi n° 2014-476 du 14 mai 2014 autorisant la ratification de la convention du Conseil de l'Europe sur la prévention et la lutte contre les violences à l'égard des femmes et la violence domestique*).

<sup>479</sup> Act No. 2006-399 on prevention and repression of violence in couples and against minors, (*LOI n° 2006-399 du 4 avril 2006 renforçant la prévention et la répression des violences au sein du couple ou commises contre les mineurs*).

<sup>480</sup> Act No. 2010-769 on violence specifically against women, violence in couples and their incidence on children, (*LOI n° 2010-769 du 9 juillet 2010 relative aux violences faites spécifiquement aux femmes, aux violences au sein des couples et aux incidences de ces dernières sur les enfants*).

<sup>481</sup> Act No. 2013-711 of 5 August 2013 on adapting the justice system to EU and international law (*LOI n° 2013-711 du 5 août 2013 portant diverses dispositions d'adaptation dans le domaine de la justice en application du droit de l'Union européenne et des engagements internationaux de la France*).

adult or a child to the territory of a Party or State other than the one she or he resides in with the purpose of forcing this adult or child to enter into a marriage), Article 38 c (inciting, coercing or procuring a girl to undergo sexual mutilation), Article 39 (performing an abortion on a woman without her prior and informed consent) and Article 41(1). The legal framework is completed by an active state policy, expressed by the adoption of plans of action since 2004. The fourth inter-ministerial governmental plan to prevent and combat violence against women, 2014-2016, was adopted in 2013 and it doubles the budget for policies against gender-based violence.

## **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

The Defender of Rights has written several reports on the inequalities in access to justice which create increased barriers for citizens in precarious situations regardless of their gender and a personal refusal or discouragement to use legal recourse.<sup>482</sup> The Ministry of Justice has a series of Ministerial departments responsible for promoting access to justice<sup>483</sup> with local community legal services, and it monitors the recurring challenges for citizens in obtaining legal redress. Delegates of the Defender of Rights work in these local services to bring claims of discrimination.<sup>484</sup>

#### 11.1.2 Other issues related to the pursuit of a discrimination claim

An important report by the Defender of Rights about access to discrimination claims in terms of housing shows that single mothers are particularly affected by these practices and have difficulties in proving claims without investigations by the public authorities.<sup>485</sup>

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

A new reform of justice has just been adopted<sup>486</sup> which groups local district courts together (*Tribunal d'instance et de grande instance*) and has been criticised as limiting access to justice. The Defender of Rights has pointed out this risk.<sup>487</sup>

### **11.2 Victimisation**

Concerning victimisation, the Labour Code states that no employee can be the subject of disciplinary action, be dismissed or be subject to a discriminatory act for having testified to having witnessed discrimination or having talked about it (Article L.1132-3). The 2008 Act on the transposition of EU law in the field of anti-discrimination<sup>488</sup> has extended the scope of this provision to the public sector. The protection against victimisation complies with the Directives.

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<sup>482</sup> Defender of Rights (*Défenseur des droits*) (2017) *Enquête sur l'accès aux droits* (Survey on access to rights), p. 18, available at: <https://www.defenseurdesdroits.fr/sites/default/files/atoms/files/enquete-relations-usagers-servpublics-v6-29.03.17.pdf>.

<sup>483</sup> Ministry of Justice, access to justice: <http://www.justice.gouv.fr/organisation-de-la-justice-10031/les-fondements-et-principes-10032/laces-au-droit-et-a-la-justice-12043.html>.

<sup>484</sup> Report of activities by local councils on access to law (*Rapport CDAD 2016*), available at: [http://www.justice.gouv.fr/art\\_pix/Rapport\\_national\\_activite\\_2016\\_CDAD\\_anonyme.pdf](http://www.justice.gouv.fr/art_pix/Rapport_national_activite_2016_CDAD_anonyme.pdf).

<sup>485</sup> Defender of Rights, access to rights survey No. 5: discrimination and access to rented accommodation, available at: <https://www.defenseurdesdroits.fr/fr/communiqu-de-presse/2017/12/enquete-acces-aux-droits-ndeq5-discriminations-et-acces-au-logement>.

<sup>486</sup> Act No. 2019-222 of 23 March 2019 on programming 2018-2022 and reform of the justice system (*Loi n° 2019-222 du 23 mars 2019 de programmation 2018-2022 et de réforme pour la justice*).

<sup>487</sup> Defender of Rights, press release on justice system reform: <https://www.defenseurdesdroits.fr/fr/communiqu-de-presse/2018/11/reforme-de-la-justice-le-defenseur-des-droits-denonce-des-atteintes-a>.

<sup>488</sup> Act No. 2008-496 of 27 May 2008 transposing EU law in the field of discrimination (*Loi n° 2008-496 du 27 mai 2008 portant diverses dispositions d'adaptation au droit communautaire dans le domaine de la lutte contre les discriminations*).

## 11.3 Access to courts

### 11.3.1 Difficulties and barriers related to access to courts

Act No. 2016-1547, 18 November 2016, on Modernisation of Justice in the 21st Century was adopted to include a group action (type of class action) for discrimination cases in order to litigate collective discrimination, which can be systemic in employment,<sup>489</sup> covering all fields (housing, goods and services, access to health services etc.). In employment, only unions are entitled to the right to file a lawsuit, which can create a barrier for groups who are marginalised. This difficulty has been mentioned by the Defender of Rights.<sup>490</sup> The first group action was introduced (in March 2018),<sup>491</sup> for discrimination based on membership of a trade union, and the second one only recently<sup>492</sup> on sex based wage discrimination, rather than on the glass ceiling effect in a number of companies.

A new justice reform has been introduced,<sup>493</sup> which groups together local district courts (*Tribunal d'instance et de grande instance*) and has been criticised as limiting access to justice. The reform's goal is to simplify access to justice and will limit costs. However it might make routes to justice less accessible to vulnerable groups with the elimination of lower courts (*tribunal d'instance*) within communities (meaning that more travel is needed to go to court). The Defender of Rights has pointed out this risk.<sup>494</sup>

### 11.3.2 Availability of legal aid

Act No. 91-647 of 10 July 1991 and Decree No. 91-1266 of 19 December 1991 provide for legal aid that is needs-based.

## 11.4 Horizontal effect of the applicable law

### 11.4.1 Horizontal effect of relevant gender equality law

The horizontal effect of gender equality law does not pose a question of compliance. On the contrary, courts refer regularly to the fundamental principle of equal treatment linked to sex discrimination which allows them to disapply a norm which is not in conformity with EU law with regard to justification of categorisation linked to collective bargaining agreements, even when the question is not directly linked to questions of discrimination.<sup>495</sup>

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

The horizontal direct effect of the EU Charter seems to be enhanced after *Bauer*. There is no similar case in France at this time. However, on this point, the Court of Cassation in a decision of 3 April 2019 refers to the impact of the 'Charter in relation to the application of the general principle of equality (Article 51 §1)', indicating that 'the principle applies to

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<sup>489</sup> See report by Pecaut Rivolier, L. (2016), *Discrimination collective en entreprise* (Collective discrimination in companies), Report for the Ministry of Justice, cited.

<sup>490</sup> Defender of Rights, Opinion of 28 October 2015 (*Avis du Défenseur des droits n° 15-23*), available at: [https://www.defenseurdesdroits.fr/sites/default/files/atoms/files/ddd\\_avis\\_20151028\\_15-23.pdf](https://www.defenseurdesdroits.fr/sites/default/files/atoms/files/ddd_avis_20151028_15-23.pdf).

<sup>491</sup> Marjorie Caro, M., Champeaux F. (2018), 'La première action de groupe devant le TGI de Paris', 29/03/2018 *Semaine Sociale Lamy*, n°1809. <http://www.wk-rh.fr/actualites/detail/101925/la-premiere-action-de-groupe-devant-le-tgi-de-paris.html>.

<sup>492</sup> Aizicovici F., (2019) 'La CGT s'empare de l'action de groupe pour lutter contre les discriminations envers les femmes', *Le Monde*, 5 June 2019. [https://www.lemonde.fr/economie/article/2019/06/05/la-cgt-s-empare-de-l-action-de-groupe-pour-lutter-contre-les-discriminations-envers-les-femmes\\_5471660\\_3234.html](https://www.lemonde.fr/economie/article/2019/06/05/la-cgt-s-empare-de-l-action-de-groupe-pour-lutter-contre-les-discriminations-envers-les-femmes_5471660_3234.html).

<sup>493</sup> Act No. 2019-222 of 23 March 2019 on programming 2018-2022 and reform of the justice system (*Loi n° 2019-222 du 23 mars 2019 de programmation 2018-2022 et de réforme pour la justice*).

<sup>494</sup> Defender of Rights, press release on justice system reform: <https://www.defenseurdesdroits.fr/fr/communiqu-de-presse/2018/11/reforme-de-la-justice-le-defenseur-des-droits-denonce-des-atteintes-a>.

<sup>495</sup> See, recently, Court of Cassation, No. 17-11.970, 3 April 2019.

the actions of public authorities but also to all agreements which collectively regulate subordinate employment' and the Court directly cites EU case law (ECJ, 8 April 1976, *Defrenne*, 43-75, point 39, of 27 June 1990, *Kowlaska*, C-33/89, point 13, 17 July 2008, *Raccanelli*, C-94/07, point 45, of 17 April 2018, *Egenberger*, C-414/16, point 77). The Court of Cassation continues by recalling 'the need for Member state judges to render inapplicable any national provision if it is discriminatory and to apply the same regime to the disadvantaged group', citing (CJEU, *Milkova*, 9 March 2017, C-406/15, point 67).<sup>496</sup>

### 11.5 Burden of proof

Employees or job applicants who feel that they have been discriminated against must present the court with evidence 'that leads one to believe that direct or indirect discrimination has taken place'. In light of this evidence, it is up to the defendant to 'prove that the decision taken was justifiable according to objective facts that had no connection with any form of discrimination' (Article L.1132-3-3). Article 4 of the 2008 Act extends the application of this principle to civil and administrative procedures. Thus, the same rules apply in the administrative courts (see, for example, Council of State, 10 January 2011, No. 325268). Algorithms can be used to raise the presumption of discrimination in recruitment if the statistics are sufficient.<sup>497</sup>

The Court of Cassation has heard a case which is very similar to the ECJ *Meister*<sup>498</sup> case (Social chamber, 19 December 2012, No. 10-20526). Two employees asked the judges to oblige the employer to provide the information needed about the remuneration of other employees in order to establish a case of discrimination. The legal basis of their claim was Article 145 of the Code of Civil Procedure which states that, 'If there is a legitimate reason to preserve or to establish, before any legal process, the evidence of the facts upon which the resolution of the dispute depends, legally permissible preparatory inquiries may be ordered at the request of any interested party, by way of a petition or by way of a summary procedure'. In applying this article, the Court of Cassation stated that respecting an employee's personal life and respecting the employer's business secrets are not in themselves an obstacle to the application of this article when a national court finds that the requested measures are legitimate and are necessary for the protection of the rights of the party who has requested them. The Court of Appeal was right in deciding that the employees had a legitimate aim in demanding the communication of information necessary for the protection of their rights, information that only the employer had access to and had refused to communicate.

In the recent Court of Cassation case of 3 April 2019, the judges recall the evidentiary shift of the burden of proof in discrimination cases derived directly from EU law that prohibits a generalised presumption of justification of all categories laid out by collective bargaining agreements.<sup>499</sup>

### 11.6 Remedies and sanctions

#### 11.6.1 Types of remedies and sanctions

Any discriminatory actions by employers are regarded as null and void, and the employee retains all previously held rights. In the context of a dismissal, this means that any dismissal on discriminatory grounds could be annulled and a worker dismissed on a discriminatory ground can claim reinstatement and be regarded as never having left the job. This is a specific sanction for discriminatory acts. In a case where the employee does not want to continue the employment relationship, they have been eligible for a

<sup>496</sup> See, recently, Court of Cassation, No 17-11.970, 3 April 2019.

<sup>497</sup> See for a civil service candidate, Council of State (Conseil d'Etat) No. 383459 16 Oct. 2017.

<sup>498</sup> ECJ 19 April 2012, Case C-415/10 ECLI:EU:C:2012:217.

<sup>499</sup> See, recently, Court of Cassation, No 17-11.970, 3 April 2019 and the explanatory note by the Court, [https://www.courdecassation.fr/jurisprudence\\_2/notes\\_explicatives\\_7002/relative\\_arret\\_41944.html](https://www.courdecassation.fr/jurisprudence_2/notes_explicatives_7002/relative_arret_41944.html).

compensatory payment since 2012. Sanctions<sup>500</sup> are also possible if companies do not respect their obligation to negotiate and to conclude agreements on gender equality. As a consequence, gender equality has become an issue of negotiation at the enterprise and sectoral levels.

The new labour legislation<sup>501</sup> has modified the structure of representative bodies in private companies. The employer must still submit information to the new Social and Economic Council (CSE) as well as discuss equality issues and measures aiming at improving equality with the CSE. However, in light of the wide range of competences of the new CSE and its reduced number of members, this information risks being taken into account less frequently than previously.

#### 11.6.2 Effectiveness, proportionality and dissuasiveness

The French system of remedies might not always be very dissuasive because the damages do not go beyond reparation (they never represent more than the compensation of the harm itself)<sup>502</sup> even though the recent cap on damages<sup>503</sup> for unfair dismissal<sup>504</sup> does not apply to discrimination and harassment law (Article L.1132-4). The French system is also resistant to any inclusion of punitive damages in the law as reflected in the pending reform of tort liability, which excluded the introduction of punitive damages, preferring a civil fine.<sup>505</sup>

### 11.7 Equality body

The enforcement of gender equality law and the monitoring of access to justice are two of the missions of the Defender of Rights which produce cross fertilisation in the strategies to recommend better legal redress and mediation as well as more enforcement of anti-discrimination law. The issue of intersectional or multiple discrimination, to which the Defender of Rights is particularly sensitive through its actions and reports, reflects how gender disadvantage is particularly linked to the issue of access to justice.<sup>506</sup> The Defender of Rights also acts as a protector of whistle blowers in France.<sup>507</sup>

### 11.8 Social partners

In France, the social partners have been instrumental in developing a robust body of law on trade union discrimination and on the application of the shift of burden of proof, as well as on the right comparator in litigation on direct discrimination in promotion and pay.<sup>508</sup> Collective bargaining now includes negotiations on gender equality, work-life balance, prevention of sexual harassment and positive action.

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<sup>500</sup> The sanction is a financial penalty of up to 10 % of the remuneration (subject to social security contribution being paid).

<sup>501</sup> Acts of September 2017 mentioned above inserted into Law No. 2018-217 of 29 March 2018.

<sup>502</sup> There is a saying in French procedural law: 'the whole remedy, but just the remedy'.

<sup>503</sup> Executive Order No. 2017-1387 22 September 2017.

<sup>504</sup> Four labour courts resisted the application of a cap on unfair dismissal in the labour law reform: Labour Court of Troyes, 13 December 2018, Labour Court of Amiens, 19 December 2018, Labour Court of Lyon, 21 December 2018 and 7 January 2019.

<sup>505</sup> Javaux, B. (2019), 'L'amende civile: entre sanction pénale et punitive damages?', *Semaine Juridique* 11 February 2019, p. 276, available at: <http://www.tendancedroit.fr/wp-content/uploads/2019/02/En-questions-1.pdf>.

<sup>506</sup> See Defender of Rights (2019), *Symposium on the multiplication of grounds of discrimination: stakes, effects and perspectives*, available at: <https://www.defenseurdesdroits.fr/fr/actes-de-rencontre/2019/01/actes-du-colloque-multiplication-des-criteres-de-discrimination-enjeux>.

<sup>507</sup> *Loi organique n° 2016-1690 du 9 décembre 2016 relative à la compétence du Défenseur des droits pour l'orientation et la protection des lanceurs d'alerte*, <https://www.defenseurdesdroits.fr/fr/lanceurs-dalerte>.

<sup>508</sup> See the Clerc Method of panels of comparison and proof of damages for discrimination during a whole career, Chappe, V-A. (2011), 'La preuve par la comparaison: méthode des panels et droit de la non-discrimination', *Sociologies Pratiques* 2011/2, pp. 45-44, available at: <https://www.cairn.info/revue-sociologies-pratiques-2011-2-page-45.htm>.

### **11.9 Other relevant bodies**

The High Council on Equality, which looks at the plight of female migrants, and the High Council on Equality in Employment, which conducts in-depth studies of structural gender inequality in the workplace, are important authorities in influencing and monitoring the enforcement of gender equality and compliance with EU law.<sup>509</sup>

### **11.10 Evaluation of implementation**

The question of access to justice and effective enforcement in France is also linked to a political move to promote alternative dispute resolution mechanisms instead of legal recourse in courts. Apart from promoting the agency of victims of violence in the Presidential plan on equality, the emphasis of the government seems to be more on developing mechanisms of compliance, and prevention of gender discrimination and of violence against women and harassment. The reform of the Law on Justice of 2019 seems to confirm this trend.<sup>510</sup>

### **11.11 Remaining issues**

There are no remaining issues.

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<sup>509</sup> See their respective key roles: <http://www.haut-conseil-egalite.gouv.fr/enjeux-europeens-et-internationaux/>; <https://www.egalite-femmes-hommes.gouv.fr/le-secretariat-d-etat/instances/csep/>.

<sup>510</sup> Law No. 2019-222 of 23 March 2019 (*LOI n° 2019-222 du 23 mars 2019 de programmation 2018-2022 et de réforme pour la justice*).

## 12 Overall assessment

The following transposition problems were mentioned in this report:

- protection of women against recurring violence is still inadequate despite efforts for reform;
- parental and paternity leave are not attractive to men because of their duration and meagre financial support;
- monitoring and enforcement of prohibition of sex discrimination in job classifications can be reinforced in highly sex-segregated sectors;
- positive action through parity rules in executive boards is insufficient to prevent sex discrimination in promotions.

Nevertheless, French law seems to implement most areas of EU law correctly, not only through legislative change linked to worldwide trends in new technology and on digital law, sexual harassment law and work-life balance initiatives, but because of the impetus given through the investigations by the Defender of Rights in individual cases and the awareness-raising by the Court of Cassation and the Councils of State on the fundamental rights enshrined in EU equality law. The new enforcement of equal pay compliance through indicators and corrective measures still needs to be evaluated as well as the role of collective bargaining agreements on gender equality, which lack an effective means of monitoring. A class action of 2016 on sex discrimination in pay using the collective redress group action mechanism might help enforce the new law on gender wage gap indicators.<sup>511</sup> The French authorities seem to be attached to promoting positive action for real equality in parity rules and gender-neutral compensation in retirement for interruption of careers, recently extending the scope of these rules in the public sector. There are still some areas of resistance linked to parental leave, which is still less attractive to men, multiple discrimination (sex/disability, sex/religion and non-binary/transgender) and hostile environment sexual harassment violations in certain job sectors that are not yet effectively recognised in litigation. Considering the number of femicides per year and despite new measures to prevent and combat violence against women, this crucial issue continues to be a challenge in France.

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<sup>511</sup> <https://www.editions-legislatives.fr/actualite/la-cgt-lance-une-action-de-groupe-contre-les-inegalites-f-h-a-la-caisse-d-epargne>.

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