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*Project “Elimination of Gender and Age Discrimination
in the Labour Market in Ukraine: Education and Action Programme”*

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**Gender and Age Discrimination
in the Labour Market in Ukraine:**

**Legislative Analysis,
Research and Monitoring,
Advocacy Experience**

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The West Ukrainian Centre “Women’s Perspectives” is a regional women’s NGO that during its nine years of existence has become one of the leading third sector organizations in Lviv and the Western Ukraine.

The organization’s aims: legal, social and psychological adaptation of women in modern circumstances; human rights protection and education; promotion of gender equality in society and to call community’s attention to existing problems and to join efforts in order to solve them.

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FOREWORD

Progress has been made in promoting gender equality in Ukraine in the past decade. Governments, business, trade unions and women's NGOs pay considerable attention to this issue and make efforts to overcome the discriminatory stereotypes that create obstacles for women to receive proper work and income.

Though the existence gender discrimination in the labour market in Ukraine is presently recognized by most experts and politicians, and is seriously discussed, many forms of discrimination are still unexposed and are not properly analyzed.

Women in Ukraine are still in a more vulnerable position than men are: women are discriminated in access to workplaces, in employment, in pay for equal value work; the percentage of women's involvement decreases in high-paying sectors, while the professional and industrial segregation grows. Women are still less well represented on a leading positions and among decision-makers. In Ukrainian society the traditional role distribution is still popular, based on the treatment of men as breadwinner even though the family has changed considerably, and more and more often the labour of women is the only income source for the family.

The important stage on the way of confirmation of gender equality principle in Ukraine, where the clear national policy and institutional structures necessary for its realization have not existed till now, is improvement of legislation directed towards the elimination of gender discrimination.

A major step by Ukraine towards the elimination of gender and age discrimination in the labour market, and towards the State obligations before the international society, has been the adoption by the Parliament of Ukraine of the Law "On Ensuring Equal Rights and Opportunities for Women and Men" (hereinafter referred to as "the Equality Act") on September, 8, 2005, that has entered into force on January 1, 2006. For the first time in Ukrainian history the Law contains the "discrimination based on sex" legislative definition and provides the right of judicial protection from it. The other important document concerning the gender equality is the Decree of President of Ukraine "About improvement of the work of the central and local authorities on ensuring the equal rights and opportunities of women and men", signed on July 26, 2005.

However, as developed democratic countries' experience shows, existence of special legislation is not enough to secure the right of citizens,

guaranteed by the state, for equal treatment and protection from discrimination in the field of employment and other spheres of social life. The development of simple procedures of implementation and effective mechanisms of this protection of rights is also needed.

That is why one of the basic tasks of state policy in relation to ensuring the equal rights to citizens, directed towards eliminating gender and age discrimination, should become the development of an active protection system that would correspond to international standards.

The expansion of discriminatory practices in Ukraine to a great extent is assisted by the low legal culture of society, by the lack of information of citizens about the right on the equal treatment without discrimination regardless of age and gender, by the ignorance of this right protection mechanisms and (or) mistrust to them, and also by non-awareness officials of their role in protection of citizens from discrimination. That is why it is extremely important to have education on the new Equality Act and to inform the citizens about existing possibilities of protection, to perform free consultations and helping prepare documents for courts and other state bodies, as well as to offer training courses for officials.

Women's and human rights organizations that perform monitoring and analysis of the implementation of anti-discriminatory legislation, provide consultations and legal aid in court processes to the persons who have suffered discrimination, already play an important role in this process. The active involvement of such organizations will promote the more effective protection from discrimination and will assist the state institutions (courts, Ombudsperson etc). However, it is necessary to provide the non-governmental organizations with additional possibilities for protection of citizens, in particular to give them the right to sue in a court (and make a claim against the state bodies) in the interest of persons who have suffered discrimination regardless whether they are the members of these organizations.

Taking all of this into consideration, the West Ukrainian Centre "Women Perspectives" implemented the "Elimination of Gender and Age Discrimination in the Labour Market in Ukraine: Education and Action Programme" project from November, 2004 to January, 2006. Within the project framework, the comparative analysis of legislation of Ukraine was conducted with the norms of international and European law; the research of court practice in Ukraine and the practice of European Court on human rights on this problem was performed; the recommendations to the Draft of Law on equal rights were introduced that have been partially taken into account and represented in the Equality Act; survey and focus groups to study

understanding and awareness of people in the problem of gender and age discrimination in the labour market were conducted; the monitoring of published media has been carried out concerning the highlighting the problem of discrimination at the labour market; training programs for the local government bodies representatives, state employment centres, employers, trade unions, NGOs, journalists, women and men were conducted. Roundtables were also held on the gender and age discrimination issues in the project target towns: Lviv, Radekhiv, Govkva, Stryj, Sambir and Rudky.

The main results of the project have been discussed at the "The elimination of gender and age discrimination in the labour market in Ukraine: reality and perspectives" final Ukrainian national scientific practical Conference that took place on January 20-21, 2006 in Lviv.

This publication summarizes basic achievements and results of the project. It is an invitation to a discussion between a wide circle of specialists. In fact, gender equality is a matter without a solution; it is very difficult to proceed and achieve significant social progress. That is why this task fulfilment requires maximum active participation from all sides, especially now, when a new Equality Act should become the effective mechanism in gender equality achievement in all spheres of social life in Ukraine. Only consequent and systematic steps in this direction will make our joint efforts noticeable and substantial.

MONITORING OF LABOUR MARKET CONDITIONS RELATED TO AGE AND GENDER DISCRIMINATION: BASIC APPROACHES AND METHODOLOGY

Researches on the labour market conditions in Ukraine have been conducted repeatedly. Annually the information is published by Main Statistic Administration and State Employment Centres. But, unfortunately, they do not fully highlight a situation in the labour market, especially on age and gender discrimination. Thus, for example, the Main Statistic Administration reports that although the considerable majority of women have higher education, still they earn an average 71.9 % from men's salary. In January-September, 2005, the nominal average monthly salaries of women in the economy of the region made 579.47 UAH which is less for 19.4% at the regional level and 26.0 % less than the average salaries of men. According to data of 2004, about 84.3% of women (2.5 times more than men) have been employed in the type of economic activity with the wages lower than the average in the region: hotels and restaurants, educational establishments, health protection and social help. In all types of economic activity men salaries are higher than that of women.

According to data of Employment Centres, on January 1, 2005 - 60,500 people have been registered as unemployed, including 59.4% women and 40.6% men. The necessity of enterprises, establishments and organizations in workers for work place substitution and vacancies has been 4.600 of persons, yet only 641 women have been needed, (or 13.9% in a general necessity in workers) and that is 5.3% less than in the previous year.

That is why, taking into account the unfavourable situation in the labour market, especially for women, the specialists of West Ukrainian Centre "Women's Perspectives" within the project "*Elimination of Gender and Age Discrimination in the Labour Market in Ukraine: Education and Action Programme*" have recognized the need to conduct the complex monitoring of the labour market condition concerning the age and gender discrimination, using accessible sociological and other instruments.

The basic approach that underlies research has become the information collection from working persons and managers/owners of enterprises, persons who have been already discriminated in the labour market and from other sources as well.

The main research directions have been the following:

I. **Public opinion study** is the questioning on respondents' experience of work search, employment, work conditions and dismissal, as well as the suffering from discrimination in the labour market.

II. *Persons' opinion study who have suffered from discrimination or whose rights were violated* is the questioning of West Ukrainian Centre "Women Perspectives" clients on the most frequent forms of discrimination on the labour market, experience on protection and renewal of their rights.

III. *Study of highlighting issue of age and gender discrimination in mass media* - which type of information on the labour market prevails, and in which form it is given.

IV. *Comparative analysis of the Ukrainian legislation and international experience* regarding protection from gender and age discrimination in the labour market.

To provide the analysis of gender and age discrimination in the labour market, the following measures have been taken:

1. *Questioning of workers* and West Ukrainian Centre "Women Perspectives" clients has been made in Lviv city and targeted towns of the Lviv region: Sambir, Rudky, Stryj, Govkva, Radekhiv. The random single stage sample has been applied and 683 persons have been polled in total.

2. *Focus group research* involved persons employed legally and illegally, or those that have been fired less than 3 months for various reasons, have different experience, educational and income level, etc. Totally 6 focus groups have been conducted, and 42 people participated.

3. *In-depth interviews* of persons who suffered age or gender discrimination in the labour market. 15 in-depth interview have been taken.

4. *The comparative analysis of Ukrainian and International legislation*, on gender and age discrimination in the labour market.

5. *Analysis of court practice – survey among judges* regarding the investigation and examination of discrimination cases, analysis of European Court practice.

During the project implementation informational campaign has been conducted to draw public attention to the problem of gender and age discrimination in the labour market.

Training programmes and round tables with the purpose of increasing knowledge and work effectiveness has been conducted for the governmental officials, representatives of trade unions, NGO, mass-media, employers, etc.

RECOMMENDATIONS on changes in the legislation of Ukraine

To Constitution of Ukraine:

- With reference to the principle of equal treatment and prohibition of discrimination based on gender, to bring a norm of the part 3 of the article 24 of Constitution in accordance with the norms of the parts 1 and 2 of this article, norms of international law on providing gender equality and other norms of Constitutions of Ukraine (in particular, written in the article 51);
- To bring a norm of part 3 the article 24 and the norm of part 5 of article 43 in accordance with the norm of part 1 of article 43 of Constitution;
- To bring in provision on the possibility of special positive measures application and margins of such application.

To Law of Ukraine “On Ensuring Equal Rights and Opportunities for Women and Men” and Draft of the Labour Code of Ukraine:

- To bring in definition of terms, such as direct and indirect discrimination, harassment, in accordance with international documents.
- To bring in definition of sexual harassment in accordance with international documents.
- To fasten the principle of equal pay for work of equal value and principle of transparency in the field of work payment.
- To bring in definition of types of the special positive measures, and list of the special positive measures that can be used in the labour field and mechanisms of their application.
- To provide the application of such special positive measures in the labour field, as preferential treatment of the persons of that gender represented by a less number, establishment of quotas for manager posts occupancy in state bodies and bodies of local self-government at all levels.
- To lay on an employer obligations to take measures to prevent discrimination on the work place, to assert the proper order of reacting on them, and to acquaint a worker with possibilities of protection in cases of discrimination.
- To strengthen legal responsibility for discrimination in hiring and during work activity, including the introduction of administrative penalties as fines for the discriminatory actions of employers (in particular, for harassment and sexual harassments).

RECOMMENDATIONS on improvement of rights protection for persons who have suffered from gender and age discrimination in the labour market

– To create alternative to judicial mechanism of protection, through the delegating to the Specially authorized central executive body on equal rights and opportunities of women and men the plenary powers on consideration of claims about discriminatory actions of private and official individuals, state bodies; conducting the investigations regarding such claims and making decisions obligatory to implementation (including those that provide imposition of sanctions, setting of compensations, etc).

– To simplify the process of proving the facts of discrimination in a court through providing in the Civil Procedural Code and Code of the Administrative Judiciary of Ukraine the possibility to put on the employer the duty to prove that principle of equal treatment has not been violated.

– To eliminate obstacles that complicate access of people to judicial procedures, in particular, to give free of charge consultations and help in preparation of documents for a court, paid from the state budget.

– To improve the informing of judges about possibilities of involvement of experts, practice of the European Court of Human Rights and courts in Ukraine to increase the efficiency of cases investigation.

– To inform citizens about the right of equal treatment provided by the legislation of Ukraine, in particular, by Equality Law, possibilities of protection from discrimination, including judicial.

– To give a right to an NGO to sue (and to apply claims to the state organs) in interests of persons who have experienced discrimination, regardless whether the persons are the members of these organizations.

I. PRINCIPLES OF EQUAL TREATMENT AND PROHIBITION OF DISCRIMINATION BASED ON SEX IN THE LABOUR MARKET

Principle of equal treatment is one of the most important in the international law and first of all flows from the general legal principle of equality of opportunities and prohibition of discrimination. The discrimination prohibition principle is asserted in the international legal acts - Universal Declaration of Human Rights in 1948, International Covenant on Economic, Social and Cultural rights in 1966, and several conventions of the International Labour Organization (ILO)¹, Convention on the Elimination of All Forms of Discrimination against Women (hereinafter referred to as “CEDAW”).

According to the definition of Article 1 CEDAW, “*discrimination against women*” means *any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.*

As a state party of the CEDAW, Ukraine is obligated to:

(a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle;

(b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women;

(c) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination;

(d) To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation;

(e) To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise;

¹ ILO Convention № 111 concerning discrimination in respect of employment and occupation, adopted on 1958.

(f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women;

(g) To repeal all national penal provisions which constitute discrimination against women.¹

The 1980-1990 of 20th century in the world are characterized by a new perception of ways of equality of sexes' problem solution. They shaped in practice in a new understanding of "*rights for equal opportunities and equal treatment*" which was reflected in the European international Acts. It is characterized, above all, by liquidation of guarantees for women in case of use of their labour at heavy and harmful works, and deviation from the principle of labour protection based on sex in favour of principle of labour protection of mothers, fathers and other workers with family responsibilities.

The discrimination prohibition principle in labour relations flows out from the European Social Charter as well, which is to "*secure that principle of discrimination concerning men and women was not only reflected in the valid law of each of Contractual Sides, but also would have been used in practice*"². The European social charter also requires States' care that the discriminatory provisions of collective agreements have no force, and in case of discrimination, "effective sanctions and measures of legal protection"³ were used. Parties also have as a purpose of the policy they implement by all proper means both national and international character, the achievement of conditions in which can be effectively carried out, in particular, the principle: "*All workers have the right to equal opportunities and equal treatment in matters of employment and occupation without discrimination based on sex.*"⁴

According to the Article 2 of the Equal Treatment Directive,⁵ the principle of equal treatment shall mean that there shall be no discrimination whatsoever on grounds of sex either directly or indirectly by reference, in particular, to marital or family status.

¹ Article 2, CEDAW.

² Article 1, European Social Charter, signed by Ukraine May 2, 1996, , European Social Charter (revised), signed by Ukraine May 7, 1999

³ Ibid.

⁴ Ibid, Part I, provision 20

⁵ Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (hereinafter – Equal Treatment Directive).

Initially, the equality principle in the labour field regardless of sex has been considered in the European Law in the equality context in payment for work of equal value. Thus the adoption of this principle has had economic value. However, afterwards the judicial practice acknowledged that the right for equal treatment is one of the fundamental human rights simultaneously underlining the social value of this principle as well.

The international legal norms and UN recommendations on the equality issues are an important instrument for transformations for regional and national legislation.

The discrimination prohibition principle has been reflected in legislation of European countries, in Constitutions and basic labour acts (such as the Labour Codes).

By analyzing the proper normative provisions, it is possible to distinguish the basic approaches to the discrimination concept, and also to ensure the equality of men and women in labour relations.

The general understanding of equality principle has been exposed through the thesis: the workers who are in an equal position must acquire an identical volume of rights and duties, thus not only in the field of labour legislation, but also in the field of social welfare.

After the general rule, the guaranties of non-discrimination in labour relations consist, on the one hand, in strengthening the discrimination prohibition (both direct and indirect), in particular, based on sex, on the other hand in development and legal regulation of measures directed on achievement of actual equality in the labour relations.

As mentioned above, the legislative discrimination prohibition is a general source for the legal systems of the EU countries. Exceptions are such activities, the specific of which assumes the requirement to fulfil the work, by person of definite sex (the special requirements to the performed work).

Ratifying CEDAW and other international documents, Ukraine made an obligation to implement the policy of elimination of discrimination based on sex and to ensure realization of principle of equality of women and men. On implementation of these obligations, Ukraine included this principle in the Constitution.

So, according to the article 24 of the Constitution of Ukraine, citizens have equal constitutional rights and freedoms, and are equal before a law. The provision which proclaims equality of all citizens (both men and women) is strengthened by constitutional provision, according to which can not be any privileges or limitations based on sex.

However, principle of gender equality is represented in the Constitution of Ukraine not quite consistent. So, in spite of the principle of equality of rights of men and women provided by part 1 of this article, that stipulate for no privileges, part 3 of this article specifies that “equality of rights of women and man is ensured by the special measures on protection of labour and health of women, by establishing of pension privileges; by the conditioning, which enable women to combine job with maternity; by legal protection, material and moral support of maternity and childhood, including providing paid vacations and other privileges to the pregnant women and mothers”. Thus providing the special protection to the women, Constitution narrows rights for men.

An inconsistency appears also in provision that equality of rights for a woman and a man is ensured by providing to women equal opportunities with men in such spheres of public life, as political and cultural activity, education and professional training labour. Beyond vision of the legislator, remained family and all other spheres of life to ensure equality in which is also necessary.

Except for a general provision about gender equality, the Constitution of Ukraine in article 43 (Right to Work) establishes that the state creates conditions for full realization by citizens’ right to work, guarantees equal opportunities in the choice of profession and kind of work activity. In spite of that, part 5 of this article adds the provision, according to which “using for work of women and minors at work that is dangerous for their health is prohibited”. This norm from one side, is discriminatory concerning men, and from the other side is contradictory to the right of woman to work, which she freely chooses and which she freely consents.

Existence of constitutional norms that establish special privileges and guarantees for the women with children is possible to consider only as temporary positive discrimination which must be removed in the future.

Constitution is only a legal basis for development of gender equality legislation. Equality Act that entered into force January 1, 2006 is called to secure practical implementation of principle of equality of sexes in all spheres of life. *“The purpose of this Law is achievement of parity status of women and men through the legal ensuring of equal rights and opportunities of women and men, elimination of discrimination based on sex and implementation of special temporary measures, aimed at the elimination of misbalance between the opportunities of women and men to exercise equal rights granted by the Constitution.”* - as noted in the Preamble to the Law.

The Law defines such notions, as “*equal rights of women and men*”, “*equal opportunities of women and men*”, “*discrimination based on sex*”, “*gender equality*”, “*gender and legal examination*” and others¹, outlines main directions of state policy concerning the ensuring of equal rights and opportunities of women and men, gives power in the field of ensuring equal rights and opportunities of women and men to some public authorities, institutions and organizations.

According to this Law, “*equal rights for women and men*” is the *absence of limitations or privileges based on sex*; and “*equal opportunities of women and men*” is *equal conditions for realization of equal rights of women and men*. The Law defines “*gender equality*” as *equal legal status of women and men and equal opportunities for its realization that allows the persons of both sexes to take an equal part in all spheres of society life*, and “*discrimination based on sex*”, as *actions or inactivity, which express any distinction, exclusion or privileges based on sex, if they are directed to limitation or do impossible recognition, use or exercising of human rights and freedoms for women and men on equal grounds*.

Prohibition of discrimination based on sex is defined in the article 6 of the Equality Act. The same article sets cases which are not discrimination based on sex, such as:

- special protection of women during pregnancy, delivery, and breastfeeding;
- obligatory military service for men, prescribed by law;
- difference in retirement age for women and men, prescribed by law;
- special requirements concerning working conditions of women and men related to protection of their reproductive health;
- positive measures.

Conducted survey has shown that the level of awareness and understanding of the discrimination issue among the workers of both sexes is quite low. Not always person can identify the discrimination actions taken by an employer. Only 22.5% of respondents have recognized that they have been discriminated on by sex or age in labour relations. However, 40.6% of respondents have reported that they were made to do the work not provided by their job description, and which on the opinion by management should be done by persons of certain sex.

¹ Article 1.

Regardless of the low level of identification discrimination towards themselves among respondents, answering the question “What do you consider discrimination in the work place?” that has contained the list of discrimination actions and employee rights violations, the majority of respondents (over 65%) have properly distinguished discrimination actions¹. This gives the possibility of hope that in case of citizens’ familiarity of the Equality Act, they will identify the discrimination cases and take measures to stop discrimination and protect their rights.

1. The Direct and Indirect Discrimination

The concepts of direct and indirect discrimination are defined in the Equal Treatment Directive. According to this Directive and other EU legislation the following definitions are used:

- direct discrimination: where one person is treated less favourably on grounds of sex than another is, has been or would be treated in a comparable situation,

- indirect discrimination: where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary.

UN bodies share the general approach concerning the direct and indirect discrimination. The Committee on Economic, Social and Cultural rights in its General Comment points out that the *direct discrimination occurs when a difference in treatment relies directly and explicitly on distinctions based exclusively on sex and characteristics of men or of women, which cannot be justified objectively*².

However, *indirect discrimination occurs when a law, policy or program does not appear to be discriminatory, but has a discriminatory effect when implemented. This can occur, for example, when women are disadvantaged compared to men with respect to the enjoyment of a particular opportunity or benefit due to pre-existing inequalities. Applying a gender-neutral law may*

¹ Gender and age discrimination in labour market in Lviv region in figures, I.Trokhym, O.Vorobets, Lviv, 2005.

² Committee on Economic, Social and Cultural Rights, General Comment №16 (2005) Article 3: the equal rights of men and women to the enjoyment of all economic, social and cultural rights, E/C 12/2005/3, 13 May 2005.

*leave the existing inequality in place, or exacerbate it*¹.

The International Covenant on Civil and Political Rights bans the measures that are *aimed at (direct discrimination) or result (indirect discrimination) in a rights violation*. The other UN bodies apply the same formula.

In Ukraine the Equality Act does not contain definitions of direct and indirect discriminations, though for ensuring the effective application in practice of international legislation and legislation of Ukraine, it would be reasonable to introduce such definitions into this Law.

2. Harassment as a form of discrimination based on sex

The employees, mainly women at work, are often persecuted from the employers or another person's side, more frequently of those ones they are subordinated to, because they belong to a certain sex. That is why in the International and European legislation the harassment notion is used.

According to the definition, given in the Equal Treatment Directive, harassment is "*where an unwanted conduct related to the sex of a person occurs with the purpose or effect of violating the dignity of a person, and of creating an intimidating, hostile, degrading, humiliating or offensive environment*".

Harassment in the workplace can lie in the undesirable commentaries concerning appearance, clothes or the personal characteristics of a person, the hostile behaviour aimed at one's isolation, ungrounded criticism, etc.

Such behaviour can be humiliating and threatening to the health and safety of the worker. It obtains a discriminative character in case a person has reasonable motives to consider that the objections from her/his side will lead to an unfavourable position at work, in particular in a situation where it concerns the hiring or a promotion or if it causes a hostile atmosphere in the work place.

The legislation of Ukraine does not contain the concept of "*harassment in the work place*".

During the focus group study, the women reported such treatment towards themselves from the side of colleagues or managers. As a rule, the

¹ Committee on Economic, Social and Cultural Rights, General Comment №16 (2005) Article 3: the equal rights of men and women to the enjoyment of all economic, social and cultural rights, E/C 12/2005/3, 13 May 2005.

notices and hints to managers that such treatment for them (women) is not acceptable, have no results and often victim have to quite the job due to the impossibility to find other solutions. According to the results, 24% of survey respondents experienced the brutal treatment and humiliation from management, of which 26.5% women and 20.8% men have reported.

An example of such harassment can be a situation when the treatment towards a female worker changes after the management finds out about her pregnancy. Compulsion to quit a job is quite widespread among those pregnant women who were harassed. The survey results, in particular, show that 3.8% of interviewed women have encountered this personally and 25.2% have reported that their acquaintances or colleagues have faced the compulsion to quit a job because of pregnancy. Moreover, during the project implementation, we have given 42 consultations on such situations that make up 13.9 % of the general amount of legal consultations, and we have given 41 consultations on the refusal of an employer to pay maternity leave (13.5 %).

Yet, as we have very often found out, owners and managers act in such a way because of legal illiteracy regarding payments for maternity leave, which is fully paid from the State Social Insurance Fund.

3. Sexual harassment as a form of discrimination based on sex

Sexual harassment is one of the forms of harassment.

Sexual harassments take place, *"where any form of unwanted verbal, non-verbal or physical conduct of a sexual nature occurs, with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment."*¹.

The sexual harassment can be carried out in verbal or non-verbal forms. They are, in particular, such types of undesirable sexual behaviour, as touching and other physical contacts, remarks with the sexual implication, jokes and hints of sexual nature, and also obtrusive compliments, showing of pornographic materials and other actions with a sexual nature.

The legal institute of "sexual harassments" has gained considerable development in the law of the USA. In 1980 the Commission on Equal Opportunities in Employment produced the guiding instructions where it declared the sexual harassments as a form of discrimination based on sex. According to this guidance, the undesirable flirting of a sexual nature, requirements of sexual services and other verbal or physical behaviour of

¹ Article 2, Equal Treatment Directive

sexual nature are harassment, if: 1) the submission to such behaviour becomes a condition of employment in a direct or an indirect form; 2) submission to such behaviour or its rejection by a person is used as a basis for decision-making concerning the job placement of the person; 3) such behaviour is intended or results from unjustified interference with employee performance or creation of a threatening, hostile or abusive environment at the work place¹. The behaviour that responds to the conditions, described in points 1 and 2, is considered sexual harassment of “favour for favour” (quid-pro-quo) type, and the one described in the point 3, the creation of a hostile (or abusive) work environment type. Thus, the sexual harassment of the creation of a hostile (or abusive) environment type can possess an unclear sexual character; the environment can possess negative direction against person of certain sex without signs of sexual nature in behaviour.

The Equal Treatment Directive prohibits not only harassment, i.e. sexual harassments at work as discrimination based on sex, but also obligates States to take the preventive measures including ones on a national legislation level.

The ILO position on this issue is highlighted in the resolution of 1985 year, in which the concept of sexual harassment means the undesirable sexual attention that arises in abusive remarks, rude jokes, inappropriate commentaries concerning clothes, outlook of the person, its family status, lenient or paternal treatment, ones that humiliate human dignity etc., if there are grounds for the person to consider, that job placement conditions depend on her or his proper behaviour.

Sexual harassment is a widespread problem in the labour field in Ukraine as confirmed by the results of conducted research. As the focus group study participants respond, the practice of sexual harassment has been developed in the Soviet period, and as a socially ill phenomenon, was passed to us. That is why it is a very complicated problem deeply rooted and is based far back to that time on the cultural peculiarities of previous decades.

The participant of the focus group study (28 years old):

“Here men think it is necessary to come, stroke and put a hand, but they think that they pay attention to us in such a way, it is uncomfortable to rebuke. At first I have made remarks and then they have laughed and have not understood me. Initially I was offended with them, now I get used to it. They cannot behave in a different way”.

¹ Pigenkp V. Sexual harassments: Valid legislation and present policy in the USA, <http://www.rada.kiev.ua/LIBRARY/catalog/law/usa077.txt>.

During the survey the 1.7 % of women and 1.2% of men have informed us that they have experienced “*compulsion to sexual relations, as payment for career promotion, salary increase, etc.*” 9.0% of women and 2.3% of men have faced “*the undesirable informal stroking and pats of a sexual nature from management*”. *Undesirable remarks of a sexual nature* from management were reported by 9.6% of women and 8.5% of the men.

Of major concern is the fact that among participants of focus group study, the cases of sexual harassment in work places have been discussed, however, nobody has heard about a judicial recourse. The position of the participants was that this would bring no satisfaction and moreover could compromise the woman. The mistrust of the judicial protection system does not allow victims to defend their rights to fight the discrimination at their workplace. Very often the participants have spoken about the shame of a victim concerning the appeal to the court in such cases.

The definition of sexual harassment is given for the first time in legislation of Ukraine in the Equality Act¹. Thus, according to it, sexual harassment are actions of sexual nature, expressed verbally (threats, intimidation, improper remarks) or physically (stroking, pats), that humiliate or will offend the people who are under the work, duty, material or other subordination.

The Equality Act and Draft of the Labour Code of Ukraine² consider sexual harassments as discriminatory actions. Thus, the Draft of the Labour Code, determining sexual harassments, repeats the proper definition of Equal Treatment Directive.

It is worthy to notice, that the European Law moves by establishing the responsibility for harassment of any worker, not only managers, and in certain cases, it is also the employer who has not taken the measures for prevention of rights violation or protection of the victim. In Ukraine the Equality Act obligates an employer to “*take measures to make impossible the cases of sexual harassment*”³. However, it does not determine what exact measures must be taken, and does not set the responsibility for the given norm violation.

¹ Article 1.

² Article 4, Draft of the Labour Code of Ukraine , №1038-1.

³ Article 17.

4. Victimisation

Some national and European discrimination legislations contain victimisation notion and protection norms.

Victimisation means *adverse actions taken by Employer as a reaction on efforts to apply legal principles of equality and discrimination prohibition*. The best example of victimisation is the situation where the employee has been dismissed or has not been promoted because the employee has brought forth claims on harassment or other discrimination forms. The Equal Treatment Directive obliges the States to undertake measures that prohibit victimisation.

The Legislation of Ukraine does not yet contain direct victimisation prohibition norms. However, the Criminal Code of Ukraine provides the responsibility for the illegal employee's dismissal for personal motives¹. This norm can be applied in the cases of victimisation.

The Draft of Law on the Equal rights and Possibilities² had stated that *"The behaviour of the Employer or any official is incompetent in case of persecution of the employee who has claimed the discrimination attitude towards him/herself"*. The Equality Act does not contain this or any other norm on employee's victimisation.

In order to achieve correspondence legislation of Ukraine with the European legislation norms on victimisation prohibition, the responsibility for the violation of the Equality Act, and, in particular, for the discrimination behaviour of the employer should be clearly defined.

5. Burden of proof in the discrimination cases

The general principle of claims consideration, according to which the burden of proof lies on claimant, often creates significant problems, concerning the proving for the claimant. For example, for the woman fired because of her pregnancy (or having very young children), it is practically impossible to prove this in court, while almost all evidence (documents, witnesses - former co-workers) mainly are under the employer influence. In addition, the employer has more possibilities to use the services of a professional defender, and the worker during such trials does not work and is in fact deprived of income sources.

One more argument, why the discrimination victims, as a rule, do not appeal to the court the focus groups participants identify as mistrust of the fair

¹ Article 172 „The gross violation of the labour contract”.

² Article 19.

case examination and the stereotype that the victim herself has provoked the offender.

The EU Council Directive on the burden of proof¹ in cases of discrimination based on sex requires from States to take measures, *as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.* Thus the directive delegates a duty of proof from worker on the employer, and substantially improves the worker position in the court process.

Although the new Procedural Codes of Ukraine, which recently entered into force,² contain quite a lot of progressive provisions intended to improve the effectiveness of the procedure of judicial defence, including protection from discrimination, the procedural still needs changes which would have taken into account specific legal investigation on gender discrimination in the labour sphere. In particular, it is necessary to include in the Civil Procedural Code and Code of Administrative Judiciary of Ukraine the possibility of shifting burden of proof and obligation of accused person to prove that the principle of equal treatment was not violated.

Similar provisions are needed to be brought in Equality Act for simplification of procedure of proving discrimination facts in case of their examination by other authorized bodies. It is an important task, because results of focus-groups show, that the most serious reason which restrains the women from appeal for protection from discrimination to the court or other bodies, is the fact of the victim's awareness of impossibility to prove the facts of the employer discriminatory actions.

¹ Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex

² Civil Procedural Code and Code of Administrative Judiciary of Ukraine entered into force September 1, 2005

6. The special legislation and special bodies to ensure gender equality

The ensuring by the State of assured to the citizens rights at legal level and protection from discrimination, ensuring the gender equality in the labour and other spheres of public life require the existence of special legislation and state institutions aiming at practical gender policy implementation.

The Committee on Economic, Social and Cultural rights considers that *national policies and strategies should provide for the establishment of effective mechanisms and institutions, where they do not exist, including the administrative authorities, ombudspersons and other national human rights institutions, courts and tribunals. These institutions should investigate and address alleged violations relating to article 3 and provide remedies for such violations. State parties, for their part, should ensure that such remedies are effectively implemented.*¹

The special laws on equality of rights and possibilities of men and women are accepted in many countries in the world, such as Norway, Iceland, Sweden, Denmark, Lithuania, Slovenia and others.

For example, the Act on the equal possibilities in Sweden dated January 1, 1992 provides sanctions against gender discrimination and the positive measures application for gender equality implementation as well. According to this Act, all employers which have less than ten hired workers must develop an annual plan, in particular, on equal pay after annual research has been performed on the difference in salaries. The Act on equal possibilities in Lithuania effective since March 1, 1999 was the first one for Central and Eastern Europe².

Except for organizations and bodies responsible for providing equal possibilities for men and women, the European Union institutes of each State of the European Union has created its own mechanisms, in particular, the special bodies. For example, Great Britain has a Committee for equal possibilities. Poland has a government appointed body on equal status for men and women. In the USA such body is the Committee on equal possibilities in the sphere of employment.

¹ Committee on Economic, Social and Cultural Rights, General Comment №16 (2005) Article 3: the equal right of men and women to the enjoyment of all economic, social and cultural rights, E/C.12/2005/3, 13 May 2005.

² Women in Europe. The Gender and Economic Justice in Admission and Integration into EU. – NEWW-Polska.

After summarizing the world experience, it is possible to point out such basic types of state structures that ensure gender equality implementation¹:

- *presidential structures*: adviser on gender issues; consulting, advisory body on gender issues, etc;
- *parliamentary structures*: adviser on gender issues by the Parliament Speaker; parliamentary committee (or sub-committee) in matters of gender equality; scientific-advisory body on gender issues; etc;
- *ombudsperson* in cases of gender equality or equal possibilities;
- *governmental structures*: adviser of the Prime Minister; management by the prime minister or other members of Ministry; management from gender matters; committee in gender equality matters in government; different committees and commissions.
- *Ministries, state committees*: state committee in gender equality matters; within the ministries – separate structures on gender equality issues.
- *structures on gender issues in the local bodies*.

Some of the main responsibilities given to such special bodies can be distinguished by the following:

- collection and distribution of information about gender issues;
- monitoring of the valid law on gender equality realization and its implementation;
- reports and measures preparation on the activity stimulation that assists the elimination of gender discrimination;
- positive measures directed to citizens, employers and trade unions program development;
- development of gender examination of normative acts, drafts and measures of state bodies in the sphere of gender equality provision;
- assistance in work and/or the activity of other state bodies in the coordination of gender issues;
- consideration of claims on discrimination on the basis of salaries, job placement or pursuit, investigation of cases of discrimination and sexual harassments;
- initiation of judicial trials of gender discrimination cases;
- victim interests presentation from discrimination in courts in certain conditions;

¹ The classification is given in Article by Melnyk T. M. “The international experience of gender equality ensuring”, Materials and handouts of the “International experience of state ensuring of equality women and men” international conference, Ukraine, Kyiv, June, 30–July 1, 2003.

- initiatives of nongovernmental organizations discussion, including international ones, for the purpose of gender equality assertion.

Special body establishing is provided by Equality Act as well. It is the specially authorized central body of executive power on issues of providing equal rights and possibilities for women and men (hereinafter known as the Special body).

Moreover, the Law obliges such Body to consider the claims of persons who experienced discrimination based on sex or sexual harassment. However for this duty execution of the Law, unfortunately, has not provided the authority necessary for the effective consideration of claims and reaction of discriminatory actions. The special body “*considers the appeals of citizens on discrimination based on sex*” and “*registers and summarizes the cases of discrimination based on sex*” and also “*makes suggestions concerning its elimination*”.¹

Thus the real threat of having one more state body established that will be insufficient to effectively protect persons from gender discrimination exist, and as follows, really affect a state policy concerning ensuring gender equality.

The state should care for the discrimination protection alternative mechanism creation, in particular, on the Special body activity basis. However, it is possible only on condition of authorizing such body with the authority not only concerning the consideration of claims on the discriminatory actions of private individuals and officials, state bodies, but also on carrying out the verifications after such claims and adopting the obligation to implement decisions (including ones that provide applying sanctions, defining compensation, etc).

7. Temporary special measures directed on ensuring gender equality

Many of international documents, including those ratified by Ukraine, provide possibilities of implementation of temporary special measures. It is being done for providing or accelerating the establishment of factual equality, including the equality between men and women. Such measures, according to international legislation, are not considered discriminatory.

Temporary special measures are measures which mean more than a simple prohibition of discrimination and aim at searching the protection from

¹ Article 11

discriminatory situations. National and international norm-forming bodies and courts accept that all forms of positive special measures should be grounded and justified and should work proportionally to the tasks. Therefore special measures are very often time and scope limited when taking into account particular inconveniences influencing a person or a group of people and necessary of overcoming the discrimination which occurred in the past.

Declaration on Equal Rights for Men and Women adopted by the Committee of Ministers of Council of Europe states, in particular, the necessity of providing of appropriate measures and in particular *temporary special measures, that are aimed at providing or accelerating the establishment of factual equality between men and women in different spheres, especially in the access to state positions of all levels, access to all professions, employment and salary.*

Committee on Economic, Social and Cultural Rights agreed on the need in special positive measures. In particular, in General Comment №16, Committee instructs that *temporary special measures may sometimes be needed in order to bring disadvantaged or marginalized persons or groups of persons to the same substantive level as others.*¹ For instance, if general conditions of certain parts of population do not allow the enjoyment of their rights or weaken such possibility, the state should take special measures to improve the situation. Such measures can provide temporary preferential treatment to certain parts of the population in comparison with the rest of the population. Such a preferential treatment is offered only for the time needed to change the discrimination in practice.

According to the same document, the States are encouraged to implement temporary special measures for accelerating the establishment of equality between men and women in using their rights in accordance with the Covenant. Such measures are not considered discriminatory if they are based on state obligations to eradicate disadvantages caused by past or existing discriminatory laws, traditions and practices. Since duration and implementation of such measures should correspond with the specific problem, the context should be adapted to circumstances. The results of such measures should be monitored for suspension in case of reaching the goal.

The Human Rights Committee accepted the quota usage in the reports

¹ Committee on Economic, Social and Cultural Rights, General Comment №16 (2005) Article 3: the equal rights of men and women to the enjoyment of all economic, social and cultural rights, E/C.12/2005/3, 13 May 2005.

of some countries. For instance, the Committee accepted the constitutional changes in India, which provided the reservation of one-third of places for women in elective local authorities.

CEDAW obliges a state with the duty to take special measures and indicates that they should primarily aim at overcoming the imbalance and past discriminatory practices. The Convention states that such measures are to be time limited, but does not suggest any special time limits. General Recommendations 23 of the Convention support giving the quotas for reaching gender balance in public and political institutions.

Article 14 of the European Convention¹ indicates that realization of right and freedom are to be guaranteed without any kind of discrimination. It emphasizes that the states, in their normative acts, can have positive obligations according to this article alongside with negative obligation not to discriminate. The preamble of Protocol 12 to European Convention stresses the importance of special measures. It states that the principle of prohibition of discrimination does not prohibit the state from taking measures to promote full and effective equality, under the condition that this will be done with objective and justified grounding of these measures.

The necessity of positive obligations of the states according to Article 14 of the European Convention for providing the equality alongside obligations not to discriminate or prevent discrimination is supported by the latest cases of European Court of Human Rights.

In the Recommendation² on the promotion of positive action for women, the Council of the EEC states that the equal possibilities for men and women demand more than just anti-discriminatory law. It puts the stress on negative and harmful influence that forms the basis of discrimination and arises from widely spread stereotypes based on the idea of traditional division of men's and women's role in society.

The most commonly used types of special positive measures that are used in national and international legislation are following:

Training and support. Several national human rights instruments explicitly mention training and support as one method of addressing problems of inequality. Training facilitates equality of opportunity but does not address discrimination that occurs in the final selection or promotion of candidates. Although members of different groups may have the same or similar

¹ Convention for the Protection of Human Rights and Fundamental Freedoms, ratified by Ukraine July 17, 1997

² Recommendation 84/635/EEC on the promotion of positive action for women, OJ 1984 L 331/34.

qualifications and capability, underlying prejudice may still prevent genuinely equal opportunity. Section 38 of the UK Race Relations Act 1976 and Section 48 of the UK Sex Discrimination Act 1975 provide that under specified conditions (including the under-representation of a relevant group) employers may provide training for employees of that particular group or encourage them to take advantage of opportunities for doing work at that establishment. However, employers are not permitted to discriminate in favour of a particular sex or people from under-represented racial groups at the point of recruitment unless a genuine occupational or other defence applies¹.

Preferential treatment. The granting of preferential treatment to members of disadvantaged groups is a form of positive action sometimes prohibited by international instruments. Automatic priority or special consideration, by which individuals or groups are selected or preferred for employment or training based on certain personal characteristics, is prohibited in some jurisdictions because of its discriminatory effect on individuals negatively affected. This may be the case even where the personal characteristic such as race or sex is used just as a ‘plus’ factor to distinguish between two equally qualified candidates. An alternative form of preferential treatment involves taking into consideration an individual’s membership of a disadvantaged group along with a whole range of other factors relevant to a recruitment decision. The European Court of Justice has looked at the issue of automatic priority primarily in cases of gender discrimination in the work place. EU law allows automatic priority but only where candidates after individual assessment are deemed to have equivalent merit. In such circumstances priority can be given to the equally qualified person from the disadvantaged class².

Quotas. Although quotas often have the legitimate aim of ensuring disadvantaged groups have access to opportunities and participation, their blanket application may result in discrimination against individuals who are competing for the same opportunities. Quotas are sometimes applied to educational institutions, political bodies, and even employment. In areas where participation itself is a central goal, such as in democratic politics, quotas are often used. Quotas are generally only permitted where they are temporary and limited in nature rather than where there is persisting disadvantage such as in the case of disability. Whether discrimination provisions permit quotas is also affected by the understanding that quotas may have negative effects in some circumstances. For example, a quota

¹ Non-Discrimination in International Law, A Handbook for Practitioners, Interights, 2005.

² Ibid.

requirement of disabled employees may suggest that such employees cannot compete for a job in a truly open labour market. This sometimes creates a ‘quota trap’ giving the message that such workers are less valuable economically and less productive¹.

There are also practices of implementation positive actions and measures in the elected bodies. The strategies of positive actions are implemented during potential candidates’ preparation, selection and appointment of the candidates and career promotions.

During potential candidates’ preparation, the following special positive measures can be implemented:

- Organization of special education for “underrepresented” sex in certain spheres aiming at equation of starting possibilities;
- Obligatory requirement for reservation lists formed by ministries and administrations, i.e. minimum representative of one sex is 30%;
- Forming of gender-balanced reserve of personnel, including education for promotion to leading positions;
- Practice of “open door” activities and voluntary practices in state institutions;
- Job announcements should not give the impression that one of the sexes is being discriminated against.

Special measures during the selection of the candidates and their appointment should follow some rules:

- The requirements for the candidates should not provide advantage for representative of one sex;
- Short lists should contain the names of people of both sexes;
- In the case of equal qualification, preference is given to the representative of a sex “underrepresented” in this field;

Special measures during the career promotion are the following:

- Provide the work conditions that allow a parent to combine paternal duties with their job (flexible schedule, rooms for mother and child, etc.)
- The candidates for career promotion should be optional and represent both sexes;

¹ Non-Discrimination in International Law, A Handbook for Practitioners, Interights, 2005.

- In the case of equal professional characteristics, the preference should be given to the representative of a sex “underrepresented” in this field;
- Provide equal possibilities of promotion for women and men.

For the first time in Ukraine, special positive measures were mentioned in Draft of Law about Equal Rights and Opportunities and were reflected in the Equality Act. According to the Equality Act,¹ positive actions – special temporary measures – aim at elimination of the imbalance between men’s and women’s opportunities of realization of equal rights given by the Ukrainian Constitution.

Legal recognition of the importance of positive measures for reaching gender equality is reflected in Preamble to this Law. It states that the goal of the Law is to reach equality between men and women in all spheres of social life by means of implementation of special temporary measures which lead to eliminate the imbalance between men’s and women’s opportunities of realization of equal rights given by the Ukrainian Constitution and law of Ukraine. The Equality Act also states that state policy providing equal rights and opportunities for men and women aims, in particular, to implementation of positive actions². A significant fact is that positive actions are not considered sex discrimination.³

The Equality Act indicates the institutions and people allowed to implement positive actions as follows:

- State and local bodies of power, enterprises, organizations, institutions and civic associations facilitate balance representation of both sexes in decision making. To reach this goal they can implement positive measures⁴;

- A special representative body of executive power (Special body) responsible for ensuring equality of rights for men and women offers the suggestion concerning the implementation of positive measures and their suspension⁵;

- Bodies of executive power and specially appointed central bodies implement positive measures within their competence.⁶

¹ Article 1

² Article 1

³ Article 6

⁴ Article 7

⁵ Article 11

⁶ Article 12

Moreover the employers can implement positive actions which aim at balancing correlation between men and women in different spheres of their activities and also among different categories of the employees.¹ Collective agreements should provide staffing and promotion of employees keeping to the principle of showing the preference for the persons of sex which is underrepresented.² It is fixed in the Equality Act that Special body is able to suggest implementation of positive actions and their suspension³. However, the Equality Act does not clearly define the conditions and reasons for positive actions implementation, the mechanisms of making a decision about positive actions implementation and suspension, and the control over their realization.

In such a way the main characteristics of International and European legislation, directed at elimination of gender discrimination and implementation of the principle of equal treatment are as follows:

- Prohibition of discrimination based on sex (direct and indirect);
- Special measures which help with actual achievement of equality between men and women and aim at prohibition of direct and indirect discrimination;
- Prohibition of victimisation, harassment, sexual harassment as discriminatory actions;
- Putting a burden of proof in discrimination cases on the employer;
- Awarding compensation for breaking the anti-discrimination law;
- Adopting of special law on gender equality;
- Establishing appropriate institutions/bodies for rights protection – ombudsperson or organizations that are empowered to control the implementation of fixed norms and study the cases on rights violation.

¹ Article 17

² Article 18

³ Article 11

II. ENSURING RIGHTS FOR FREE CHOICE OF OCCUPATION AND PROTECTION FROM UNEMPLOYMENT

State policy of Ukraine concerning employment is fixed in Ukrainian Law “On the Employment of the Population” (hereinafter referred to as “the Employment Act”). It is based on the principle of providing equal rights for every citizen regardless of sex and age¹. The protection from groundless refusal when applying for a job or wrongful dismissal² is also guaranteed by this Law. At the same time the common practice is that sex or age of person often is the reason for refusal of job position. Media monitoring shows that 30.1% of job advertisements include limitation in sex and age³.

Article 5 of the Employment Act provides additional guarantees during the employment procedure for some categories of population who require social protection and “*are not able to compete in labour market*”. Such categories consist of **women** having children under the age of 6, **single mothers** having children under the age of 14 or disabled children, **young people** who finished or stopped their studies, **orphans, children** who are left without paternal care, people of **pre-retirement age** (men reaching the age of 58, women reaching the age of 53.) The Draft of Labour Code of Ukraine⁴ provides reservation of workplaces and quota for taking on those categories of citizens. Such regulations of Ukrainian Law and the Draft of Labour Code correspond with requirements of International Labour Organization (ILO) Convention №156 on Equal Opportunities and Equal Treatment for Men and Women Workers: Workers with Family Responsibilities⁵, but limit the guarantees for other categories of citizens, particularly other categories of employees with family responsibilities. Such category is men that took parental leave till child become 3 years old⁶. So, if man applies to the State Employment Service after such leave, he is not entitled to recommencement of unemployed status, because only women are granted such right⁷. Law definition referring to women with children as people who “*are not able to compete in labour market*” influences negatively in the situation of women in

¹ Article 3, Law on Employment of the Population

² Article 4, Law on Employment of the Population

³ Gender and age discrimination in labour market in Lviv region: media monitoring, I.Trokhym, O.Vorobets, M.Chumalo, Lviv, 2005

⁴ Article 34, Draft of Labour Code

⁵ Convention was ratified by Ukraine in 1999

⁶ Article 179, Labour Code of Ukraine.

⁷ Provision 52, Procedure of registration and re-registration of persons which are seeking a job, and unemployed people, unemployment payments, and conditions of providing material support during the professional training, Decree of Cabinet of Ministers of Ukraine №578, 27.04.1998.

the labour market.

The guarantees of free access to professions and choice of work for all employees, which are provided in the International and Ukrainian legislation, have certain exceptions. According to the norms of International law,¹ limitation of job access or giving preference to certain sex when applying for certain type of jobs which are connected with peculiarities and condition of the work, are not considered discrimination.

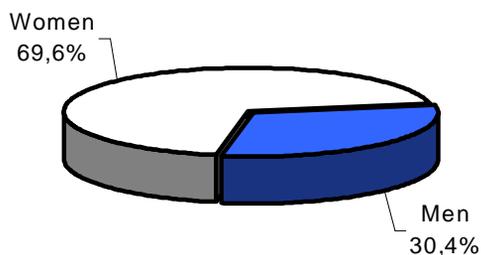
However, the difference in attitude to the employees of different sex is caused by specific work should be well grounded and justified. Such norm is stated in Articles 4 and 23 of Ukrainian Draft of Labour Code.

The Equality Act contains a norm which states: “*Special protection of women during pregnancy period, labour and breastfeeding are not considered to be discrimination on the grounds of sex*”, “*special requirements concerning work protection of men and women connected with the care of the reproductive health*” are not considered to be discrimination as well. But this norm doesn’t define what “*special requirements*” are, and in what cases they should be applied. Evidently in such aspect this norm can be used for supporting such discrimination as limiting the access of women to certain work because of “special requirements” connected with care of their reproductive health.

¹ ILO Convention № 111 concerning discrimination in respect of employment and occupation, adopted on 1958, Directive on Equal Treatment

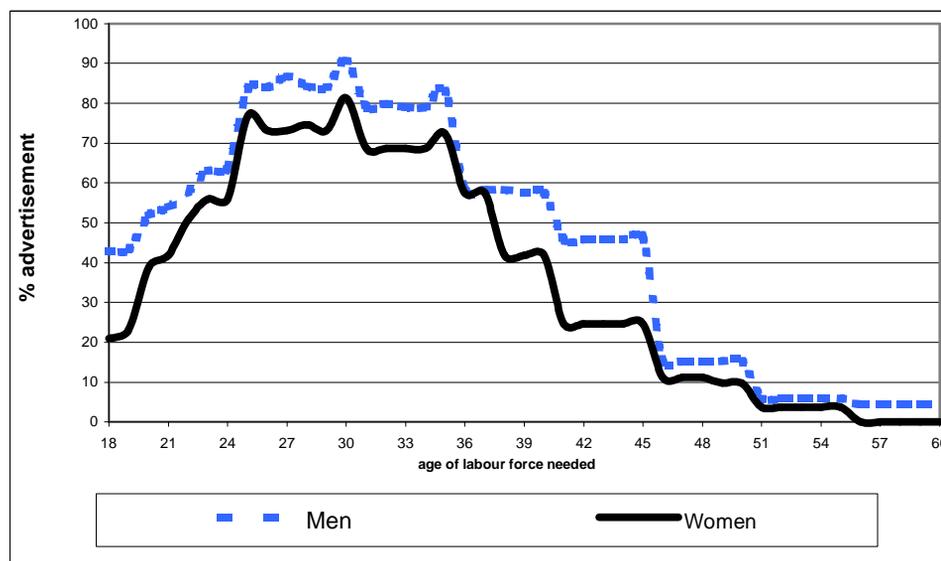
III. ENSURING THE RIGHT FOR EQUAL ACCESS TO WORK

One of the most widespread discrimination types in the labour market in Ukraine is the discrimination based on sex and age on the access to work. Particularly it can be shown by conducted monitoring of job advertisements.



The monitoring of informational advertisements publications (“Inviting to the Job” and “Lviv Advertisements”) has shown that among the advertisements with requirements on certain sex, more than two thirds (69.6%) of such announcements discriminate women, and a bit less than a third (30.4%) discriminate men.

The following figure graphically shows the relation of announcements which offer jobs to men and women of different age.



The data in the given table shows the percentage of discriminating advertisements based on sex depending on openings offered in the labour market.

Among such advertisements in **74.3%** of the cases of vacancies of secretaries, office managers and assistants (that are mostly low paid) women have been invited. For the rest of the categories of posts, the advantage has been given to men: workers, service personnel – **86.1%**; managers of all levels – **79.5%**; qualified specialists – **66%**; advertising managers, sales managers, etc – **54.3%**.

Labour force needed	% of advertisements containing requirement of persons of certain sex	
	Men	Women
Managers of all levels and administrative personnel	79.5%	20.5%
Workers, service personnel	86.1%	13.9%
Qualified specialists	66.0%	34.0%
Advertising managers, sales managers, etc.	54.3%	45.7%
Secretaries, office managers, assistants	25.7%	74.3%
Other	50.0%	50.0%

In the table are pointed percentages within the certain category of employees.

Among the job advertisements where the advantage for certain types of employees is given to men are ones for vacancies for workers and service personnel. Among the advertisements where women are preferred, are the ads about secretaries, office managers and assistants.

Not only do 30% of the announcements contain discrimination requirements for applicants based on gender and age, the discriminative treatment by the employer is continued in the interview. The participants of the focus group study have mentioned the existence of questions of personal character, and those that do not at all concern prospective employment during an interview.

All participants have noted that they almost always were questioned

about having small children, plans of marriage and giving birth, health condition of their children, etc.

The majority of respondents (**85.9%**) did not respond to job advertisements if they did not fit by gender or age. In the focus group study the participants have said that mismatch of gender or age specified in the announcements stopped them from applying for a vacancy.

Those who did respond to such advertisements (**14.1%**):

- Almost a third (**29.4%**) were refused on the basis of a mismatch to the requirements given, including **33.3%** who were women and **24.3%** who were men.

- After an interview, a fourth (**25.9%**) were refused because of an **age mismatch**, though **57.1%** were persons 18 to 24 years old, **40.9%** were 35 to 44, and only **4.0%** were 25 to 34.

- **15.3%** of the respondents received a refusal after the interview without specifying the reason

- **12.9%** of the respondents received a refusal because of **gender mismatch** (among women this percentage was twice as high than among men – **16.7%** vs. **8.1%**).

- **11.8%** got a job. Besides, this indicator among men is twice higher than among women -- **16.2%** vs. **8.3%**.

- **4.7%** received refusal after an interview on the basis of other reasons.

According to the survey data during the hiring process:

- **53.1%** of respondents were asked about their family life,

- **46.8%** were asked about the existence of children and their age (**incl. 55.7% of women while only 35.0% of men were asked**).

- **17.1%** of respondents were asked about their plans for maternity/paternity (**24.8% of women vs. 6.9% of men**).

14.4% of all respondents were rejected due to their age, and **5.6%** due to gender, whereas **79.4%** comprised of women and only **20.6%** men.

The percentage of women (**6.1%**), who, while being hired, faced the employer's undesirable remarks of a sexual nature, is significantly higher than that of men (**1.5%**) who encountered that.

The possibility of equal rights of women and men in hiring and application of the same selection criteria in the employment process is

provided by the international legislation, in particular Article 11 of the CEDAW. For the implementation of this Convention, Ukraine pledged to introduce the proper norms to the national legislation.

The positive innovations in the legislation of Ukraine are the anti-discriminatory norms of the Draft of Labour Code of Ukraine that prohibit the employer while selecting candidates “to set any requirements of discriminatory character in announcements (advertisements), and also to require from applicants for job information about their family status, personal life”¹, and prohibit “conducting testing, formulation of questions in interviews, accomplishing thus other actions, that are discriminatory after any sign, defined by this Code and other laws, or such, that touch honour and human dignity and do not concern the work or position”².

The Equality Act provision prohibits the employers “in announcements (advertisements) on vacancies to offer work only to the women or only to the men, unless the specific work, which can be executed exceptionally by persons of definite sex, to set the different requirements, giving an advantage to one of the sexes, to require from applicants for a job information about their personal life, plans on birth giving”³.

However, during several months after the Equality Act entered into force, nothing has changed, i.e. the quantity of announcements on vacancies that contain the limitations on age and gender, since January 2006 has not decreased. Only under the condition of the existence of effective mechanisms of practical application of these norms and bringing to responsibility for their violation will it become possible to decrease the level of discrimination based on gender and age at the hiring stage.

¹ Article 29, Draft of Labour Code of Ukraine.

² Article 60, Draft of Labour Code of Ukraine.

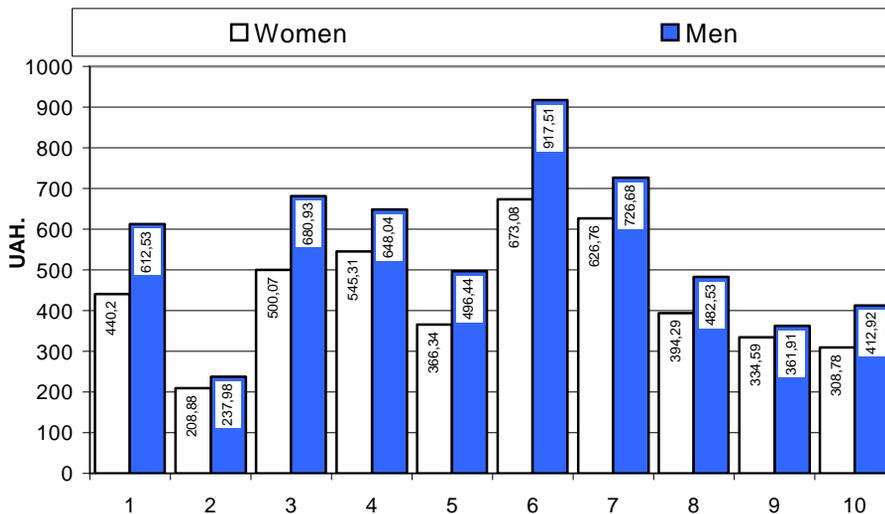
³ Article 17.

IV. ENSURING THE RIGHT ON EQUAL PAY FOR WORK OF EQUAL VALUE

Experience of other countries convinces that discrimination based on sex in the labour field most often turns up exactly in labour payment issues. In practice, the average salaries of women are lower than men's salaries.

This is caused by the gender segregation in the labour field that reflects different approaches to estimation of the work of women and men. This is why the settlement of this issue should be given special attention.

In all types of economic activity men's salaries are higher than those of women in Ukraine. The correlation of salaries between men and women in industry and transport comprises **73.4%**; in realty companies **85.3%**; in wholesale and retail trade companies **73.8%**; in companies offering collective, public and individual services **74.8%**; in educational institutions **81.7%**; in building companies **84.1%**; in agriculture **87.8%**; and in state administration bodies **86.2%**¹.

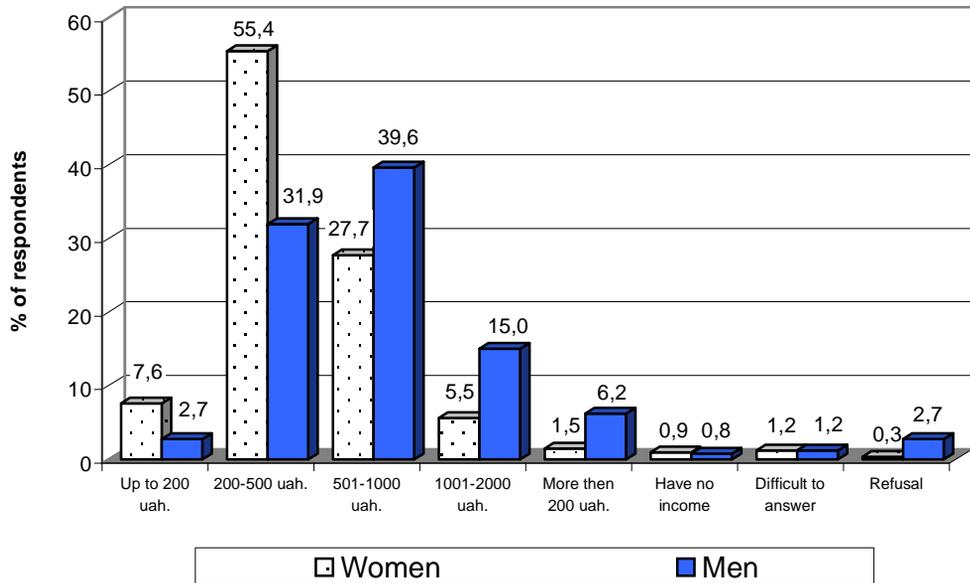


1. Total
2. Agriculture
3. Industry
4. Building
5. Retail and wholesale
6. Transport
7. State administration
8. Education
9. Health protection
10. Collective, public and individual services

¹ Economical report „The gender peculiarities at the labour market in Lviv region”, State committee of statistics of Ukraine, Main Administration of statistics in Lviv region, 2004.

Data of the Main Statistic Administration report the differences in salaries from 12.2% till 26.2% in Lviv region in 2004 in each type of economic activity¹.

Survey results have shown that **26.5%** of women and **17.3%** of men “*absolutely unsatisfied with the present workplace because of salary*”.



The State Pension Fund has published the average salary in Ukraine which is 751 UAH. At the same time among our survey respondents **55.4%** of women and **32.0%** of men earn from 200 to 500 UAH per month and **16%** of men and only **5.5%** of women earn from 1,001 to 2,000 UAH. This indicator shows that **6.2%** of men earn more than 2,000 UAH and that **1.5%** of women earn lower than men by four times.

During the focus group study, the participants gave the examples of the difference in the pay of men and women for the same job of equal value and especially showed the most widespread example to be that of the accountant job.

Principle of equal pay for the equal job has been already fixed in the Universal Declaration of Human Rights, in the article 23 of which is stated - that everybody has a right without any discrimination for equal pay for equal work.

¹ Report of Main Department of Statistic of Lviv region, 2004.

The International Covenant on Economic, Social and Cultural rights has defined the right for equal pay for work of equal value without any difference, the integral part of right of each person on the just and favourable labour conditions. Thus the article 7 is marked, in particular: *Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work.*

The right for the equal pay for work of equal value is ideology of International Labour Organization and adopted first of all by Convention (No.100) concerning Equal Remuneration for Men and Women Workers for Work of Equal Value¹. According to the article 2 of the Convention, each ILO State Party ensures the application to all workers of the principle of equal remuneration for men and women workers for work of equal value. This principle can be thus used at the national legislation level, at the level of collective agreements between employers and employees, or at both these levels. For Ukraine as for the ILO Member and the state that has ratified Convention № 100, it is obligatory.

The article 11 of CEDAW obligates the State Parties to take measures to ensure on the basis of equality of men and women *the right to equal remuneration, including benefits, and to equal treatment in respect of work of equal value, as well as equality of treatment in the evaluation of the quality of work.*

The thesis on the equality of sexes in work payment is reflected in the European Union legislation as well. In particular, according to the article 141 of the Treaty of Amsterdam, each State will introduce and will support the principle of equal pay for men and women for work of equal value. Equal pay of work, which is of identical value, without discrimination based on gender or family status, thus concerns all aspects of payment and reward conditions. It should be mentioned that this norm is a norm of "direct action", and it means that it is obligatory to be implemented by employers and applied by the state bodies (including judicial), regardless if it is reflected in the State legislation.

The European Union legislation obligates States as well:

- to abolish all discrimination between men and women arising from laws, regulations or administrative provisions which is contrary to the principle of equal pay.

- to take the necessary measures to ensure that provisions appearing in

¹ Convention ILO № 100, ratified by Ukraine on 10.08.1956.

collective agreements, wage scales, wage agreements or individual contracts of employment which are contrary to the principle of equal pay shall be, or may be declared, null and void or may be amended.

- to take the necessary measures to protect employees against dismissal by the employer as a reaction to a complaint within the undertaking or to any legal proceedings aimed at enforcing compliance with the principle of equal pay.

- to take the measures necessary to ensure that the principle of equal pay is applied. They shall see that effective means are available to take care that this principle is observed¹.

The legislation of Ukraine does not actually fix a right of employees to equal pay for work of equal value. On the one hand, the salary size depends only on the size and quality of work contribution of the worker. In particular, article 94 of the Labour Code of Ukraine indicates that the size of salaries depends on complication and conditions of executable work, professional and business characteristics of worker, results of his/her work and economic activity of enterprise, establishment, and organization and is not constrained to the maximum size. The same norm is contained in the article 1 of Law of Ukraine "On Labour Payment"². On the other hand, the article 21 of this Law indicates only that any decrease of payment of work based on gender is banned, and does not contain the clear provision that each worker regardless of sex has the right to equal pay for equal work.

In the Equality Act an attempt has been made to fasten this principle. So, it is set that an employer is obliged to carry out equal pay of work for women and men during the identical qualification and identical work conditions³. However, such formulation does not seem appropriate, since it only goes by identical qualification and work conditions, instead of work of equal value. That is why this norm can not be practically applied as the solution for the problem of differences of work payment of men and women for the equivalent work. Progressive provision, according to which "*if salaries of women and men who perform equivalent work are different for the enterprise, establishment and organization, the employer is to prove that it is not conditioned by the gender of the worker*" and which has been contained in Draft of the Equality Act, unfortunately, has not been included in adopted Law.

¹ Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women.

² The Law of Ukraine № 108 «On labour payment» from 24.03.1995.

³ Article 17.

The important accents that result from the European legislation and judicial practice and to which should be paid attention while improving the Ukrainian legislation, are the clear necessity of consolidation of the principle of equal pay for work of equal value. Thus, concept "*work of equal value*" is not limited only by the equal (identical) work or work performed simultaneously.

The important thing is the application of transparency principle in the field of work payment as well that will enable the workers to reveal the possible discrimination and protect in court their right for equal pay for work of equal value in the case of its violation.

V. ENSURING THE RIGHT ON SAFE WORK CONDITIONS

Problems connected with work protection in industry concerning all workers regardless of sex. At present 26.1% of all employed in industry (including women) work at laborious tasks or under influence of harmful or dangerous production factors¹. The most harm causes the influence of dangerous production factors to the health of women, especially in the pregnancy period, causing birth of children underdeveloped, that conditions child's morbidity and death rate, child's invalidity.

By ILO Conventions, the system of privileges and special limitations concerning the job character and types of labour activity has been developed. It is done for women labour protection in interests of saving their health and health of their future children, which conditions a health of all population and saving a gene pool.

However, the international legislation in part of regulation of the right to work at the end of the 1990th is characterized by the gradual liquidation of guarantees for women in usage of their work in heavy and harmful works. In the European Social Charter (revised), the principle of labour protection is changed by the principle of labour protection of mothers and parents and workers with family responsibilities. Under the influence of these tendencies the ILO revises its standards and privileges. Many European countries have already cancelled them and denounced some ILO Conventions.

The legislation of Ukraine provide the substantial limitation of types of works on which the labour of women can be used. In particular, the Labour Code of Ukraine² bans use of women labour at heavy work and at work with harmful or dangerous labour conditions, and also at underground works, except for some underground work (non-physical work or sanitary and consumer service). In addition, it is forbidden to use women to rise and move things with the exceeding set maximum norms mass. It is forbidden to use women at night-time work as well, except for the industries of national economy where it is caused by special necessity and settled as a temporal action³.

Such norms have been transformed in the Constitution of Ukraine and industry legislation of the Soviet times from the mentioned ILO conventions.

¹ Statistical collection „Labour of Ukraine 2003”, State committee on statistics of Ukraine.

² Article 174, Labour Code of Ukraine.

³ Article 175, Labour Code of Ukraine.

Simultaneously, the prohibition of using women labour at work with harmful and dangerous conditions, and also at underground work and ones in the night time, constrains the right of women to work, that, according to article 43 of the Constitution of Ukraine, violates the right of the possibility to earn money by work which can be freely chosen or of which one freely agrees.

Additionally, regardless of the indicated prohibitions and limitation, 16.7 % of women work in unfavourable conditions as well as under influence of exceedingly harmful chemical matters caused mainly by fibre gene action, vibration, noise, labour difficulty, intensity of work and other factors. But it is only formal statistics. In the conditions of mass work in the informal sector, frequent are violations of legislation regarding the pregnant women who are involved in night-time work and are illegally fired. Consequently, the task of strengthening women protection remains an actual one.

Thus, the existence of some prohibitions set as a guarantee for women, in practice develops an inferiority feeling and is not only limiting women in access to work and earning of income, but also deprives women working at harmful works of the provided by law guarantees, benefits and compensations. Such limitations of women labour use provided by legislation of Ukraine do not correspond to the requirements of time and have discriminatory nature.

This is confirmed by results of the survey that have shown that „*The possibility of heavy work in harmful conditions with high payment*” is recognized to be **“acceptable”** by **7.3% of women** respondents, and by **39.1% of women** respondents **“acceptable in certain conditions”**.

VI. RIGHT TO PROFESSIONAL EDUCATION

According to article 1 of the ILO Convention № 142¹, *each Member shall adopt and develop comprehensive and coordinated policies and programmes of vocational guidance and vocational training, closely linked with employment, in particular through public employment services. These policy and programs stimulate and enable all persons, on the basis of equality and without any discrimination, to develop and apply their skills for work in their own interests and according to their intentions taking into account the necessities of society.*

According to the Law of Ukraine “On Professional and Technical Education”², the citizens of Ukraine have equal rights to gain professional and technical education due to their capabilities and natural inclinations. The limitations are assumed due to medical and age characteristics, and also by indexes of professional fitness determined by the Cabinet of Ministers of Ukraine.

The Temporal State List of professions on preparation of skilled workers in the professional, technical educational institutions³ contains the professions according to which the state standards of professional and/or technical education are developed and adopted, i.e. the requirements to the professional and/or technical education content, qualification levels of graduates from professional and/or technical educational institutions, the main obligatory teaching means and educational level of entrants. The given list is a legal document, which determines the names of professions and specialization directions, planned levels of professional qualification of graduating students from professional and/or technical educational establishments, limitations for employment based on *age*, the medical indexes and *gender*.

The “teacher assistant” or “land lady” are professions that can be gained only by women rather than “security guard” can train only men.

Such legislative limitations on gaining professions based on sex are obvious discriminatory in nature and do not correspond to the time requirements.

¹ The ILO Convention № 142 concerning vocational guidance and vocational training in the development of human resources, ratified by Ukraine on 3.05.1979

² Article 5, Law of Ukraine “On Professional – Technical Education”.

³ The list is adopted by the Resolution of Cabinet of Ministers of Ukraine, dated 02.04.1998. №450.

VII. ENSURING EQUALITY OF RIGHTS AND OPPORTUNITIES OF WORKERS WITH FAMILY RESPONSIBILITIES

In Preamble of CEDAW it is stated that the Convention State Parties are “*aware that a change in the traditional role of men as well as the role of women in society and in the family is needed to achieve full equality between men and women*”.

A purpose of Convention is the prevention of discrimination concerning women based on marital or maternity reasons and guarantee of the effective right on work.

That is why CEDAW in order to prevent discrimination against women on the grounds of marriage or maternity and to ensure their effective right to work, oblige States Parties to take appropriate measures: *to prohibit, subject to the imposition of sanctions, dismissal on the grounds of pregnancy or of maternity leave and discrimination in dismissals on the basis of marital status; to introduce maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances; to encourage the provision of the necessary supporting social services to enable parents to combine family obligations with work responsibilities and participation in public life, in particular by promoting the establishment and development of a network of child-care facilities; to provide special protection to women during pregnancy in types of work proved to be harmful to them.*

The 92/85/EEC¹ Directive sets, that pregnant workers, workers who are breastfeeding, will not be obliged in any circumstances to perform the responsibilities, which contain the risk for safety or health connected with influence or work conditions, provided by the appropriate amendment; and also night time work during pregnancy and period after birth giving that should be defined by the national body responsible for safety and health.

According to the article 2 of Directive of 2002/73/EC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, *a woman on maternity leave shall be entitled, after the*

¹ 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.

end of her period of maternity leave, to return to her job or to an equivalent post on terms and conditions which are no less favourable to her and to benefit from any improvement in working conditions to which she would be entitled during her absence.

The directive 96/34/EU on the general agreement concerning the paternal vacation gives (to the men and women) an individual right to the workers on the paternal vacation in connection with birth or adoption of child, for the care of this child, at least 3 months long, until the moment the child will become of age 8 years. Thus *to promote equal opportunities and equal treatment between men and women, the parties consider that the right to parental leave provided should, in principle, be granted on a non-transferable basis*¹.

The one of purposes of national policy to provide the actual equality of treatment and opportunities for the working men and women consists in that the persons with the family responsibilities who performs or wishes to perform the paid work, could have fulfilled their right to it, not experiencing discrimination, and, as far as it is possible, harmoniously combine professional and family responsibilities.

According to article 1 of the ILO Convention №156 Convention concerning Equal Opportunities and Equal Treatment for Men and Women Workers: Workers with Family Responsibilities² “worker with the family responsibilities” are the workers with responsibilities in relation to their dependent children, where such responsibilities restrict their opportunities of preparing for, entering, participating in or advancing in economic activity, and also workers with responsibilities in relation to other members of their immediate family who clearly need their care or support, where such responsibilities restrict their opportunities of preparing for, entering, participating in or advancing in economic activity.

The labour legislation of Ukraine contains a wide range of guarantees for women who have children. In particular these are prohibition of night time work and overtime work, business trips, transformation for easier work, prohibition of firing and salary decreases, etc.

According to the article 186-1 of the Labour Code of Ukraine, these guarantees are spread on men-parents as well, but only on those “who raise the children without the mother (including the cases of long stay of mother in the medical establishment)”.

¹ Article 2, Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave.

² Convention ratified by Ukraine October 22, 1999.

In recent years in legislative acts introduced a range of provisions, which to a certain extent have equalled the rights of men and women, workers with family responsibilities. In particular, according to the Law of Ukraine "On Leave"¹ leave for baby-care to the age of 3 years can be given to the mother, and can be used fully or partially also by the child's father, grandmother, grandfather or other relatives, who actually take care of the child, or person, who has adopted or taken guardianship over the child.

Though article 10 of that Law contains the progressive provision that annual leave of complete duration until the 6 months of undisturbed continuous work in the first year of work in a certain company according to the desire of the worker is given to the men, wives of which are on maternity leaves, and also parents- educators of kindergarteners of family type, it provides such vacations only to the women who have two or more children under age of 15 years or an invalid child. The same is valid for the article 10 of Law on Leave, which indicates that annual leave on the desire of the worker in the suitable time are given to the women who have two and more children under the age of 15 years or invalid child, depriving the men of such right.

In connection with the changes, made in the article 17 of the Law on Leave in July, 2003, the right for leave in connection with pregnancy and births have received the men as well, who have adopted new-born children immediately from the maternity hospital. At the same time, according to the article 19 of the same Law, the right to additional leave has for some reason been given only to a woman who has adopted a child (and also a woman who works and has two or more children under the age of 15 or invalid child), however, the man does not possess such right.

According to the survey results, 1.5% men respondents and 8.5% women respondents have been refused sick leave to look after a child.

The criminal responsibility for the gross violation of legislation on labour (illegal dismissal of worker from work based on personal reasons, and also other gross violation of legislation on labour) is provided in the article 172 of Criminal Code of Ukraine and increases only if the victim is a mother with a child under age of 14 years or invalid child.

Thus the legislation of Ukraine still demonstrates such approach where only women with family responsibilities need the additional guarantees, depriving these guarantees of men and other persons with the family responsibilities. Besides, women are perceived as persons who can not fully compete in the labour market, and that is why they need the additional guarantees.

¹ Article 18, Law of Ukraine, November 15, 1996 №506 "On Leave".

All of these increase the existence in society stereotypes that child care is exceptional women duty. Besides, the question in interview on having the children is a key one, especially when it concerns the employment of woman as described above. The women in the focus group study reported that children are an obstacle in gaining a job because they can become sick and the woman would be made to take sick leave, and the employers think she would perform her job in an inappropriate way. Simultaneously, the absence of children is also the reason for refusal because the employers think that this would cause, in the near future, the absence of the worker because of maternity leave.

The participants of focus group study:

“When I have been hired I have been asked whether I am married and going to take maternity leave. I have been told that in case I will take maternity leave in a year or less, they will fire me. It has been said quite seriously...”

„ On one of the interviews I have had the requirement set not to marry for three years”.

“My daughter in the hiring process has passed all the tests, however when the employer found out about her child, she got refusal. They did not take into account that the baby is in kindergarten. The director is a woman. In case you have a child, you are instantly refused”.

Some norms of Equality Act show the legislator attempts to pay attention to the given problem. So, according to the Equality Act¹, the state policy on providing equal rights and opportunities for women and men is directed, in particular, on *“providing equal opportunities to women and men concerning the combining the professional and family responsibilities; family support, forming responsible maternity and paternities.”* Besides, the mentioned Act provides that the bodies of executive power and bodies of local self-government within their jurisdiction *“establish the conditions for combining by women and men the professional and family responsibilities”*, and obligates the employers to *“secure to the women and men the possibility to combine work activity with family responsibilities”*².

However, it is obvious that without specification of mentioned responsibilities, mechanisms of their implementation and control, and also responsibility for the violation, introduction of the necessary changes to the legislation of Ukraine, solution of a given problem will be set aside for an indefinite time.

¹ Article 3.

² Article 17.

VIII. PROHIBITION OF DISCRIMINATION BASED ON AGE

In the focus groups, the people provided examples on violation the rights of young employees while hiring. It concerns the situation when several young people are taken for the *unpaid* probation period with the condition that after the period one employee will stay. However, after finishing the probation period, each of them separately is informed that unfortunately he /she did not pass the probation period and they are fired. Then new workers are taken on under the same conditions. Thus the company always has a free work force. Youth agrees with these unfavourable conditions (unpaid probation period in this situation is prohibited by law) because the lack of experience does not allow one to gain a better position.

Among the respondents, the majorities of persons who have been offered the unpaid probation period are the ones in the age of 18-24 years old, and comprises 25.2%. In 12.2% of cases the refusal was based on age in this category.

The persons above 40 years old mentioned that at their age it is almost impossible to find a job.

The analysis of announcements in two advertising – informational newspapers “Inviting to Job” and “Lviv Advertisements” containing announcements on vacancies in the labour market has shown that **28.3% contain requirements to the age of prospective employees.**

The need in workers for a certain post at a certain age mostly has fallen in age ranges. Most often the following ranges have been encountered:

Age range	% advertisements
18-35 years old	12.5%
18-40 years old	11%
18-45 years old	8.3%
18-30 years old	7.7%

Analysis of the range of 18- 60 years old has been taken.



Announcements with specified age of workers

On the graph is shown the percentages of announcements on analyzed newspapers where the need of workers of a certain age has been specified. It is obvious that the distribution line increases from 18 to 25 years old achieving its peak then until 30 years old, and almost does not change gaining the maximum in this point at which time it begins to fall.

For example, the “Lviv Advertisements” advertising – informational newspaper also contains section on vacancies in the labour market. However, there were no registered ones seeking workers above the 35 years old.

The article 22 of Labour Code of Ukraine that bans the limitation of rights or establishment of advantages in the labour relations depending on the different reasons does not provide the prohibition of such actions based on the age; i.e. age is not defined as the one of the forbidden ground of discrimination. In the article 4 of Draft of the Labour Code, the age is already in the list of forbidden grounds of discrimination of workers. By this the labour legislation of Ukraine approaches to standards of European legislation which bans discrimination based on age in the field of employment¹. The general principle of discrimination prohibition contains in the European legislation certain exceptions in application. The difference in treatment based on age is not considered to be discrimination if according to the national legislation it is objectively and reasonably grounded by legal purpose, in particular by the legal policy of employment, aims and tasks the labour market and vocational training, and if the means for achieving this goal is

¹ Council Directive 2000/78/EU of 27 November 2000, establishing a general framework for equal treatment in employment and occupation.

necessary and proportional. Such difference in treatment can contain the specific conditions of employment access and vocational training for the young people and workers of older age, for providing their professional integration and protection; definition of the fixed requirements of minimum age, work experience for access to the certain positions; definition of the fixed maximal age in cases of the necessary further training or necessity in the reasonable work period before retiring.

The similar norms are reflected in Law of Ukraine "On Employment" that provide the additional guarantees in the job placement, in particular, for young people and persons of pre-retirement age¹.

However, as well as in the case of discrimination based on sex, to ensure the effectiveness declared by legislation, protection from discrimination based on age is needed to provide the mechanisms of application and bringing responsibility for discriminatory actions.

¹ Article 5 Law of Ukraine « On Employment» of 1. 03. 1991 № 803: Persons of the pre retirement age (men after the age of 58 years old, women at 53 years old), and also youth, that has graduated or stopped the study in general secondary schools, professional technical or higher educational institutions, has dismissed from the military service or alternative (non military) service and those who gain their first work place, children (orphans), who have been left without parent care, and also persons who achieve 15 years old and who after agreement or person that substitutes one of the parents, can, as exception, be employed, the state secures the granting of the additional guarantees on employment for the persons who require the social protection and are unable to compete at the labour market.

IX. PROBLEMS OF PROTECTION FROM GENDER AND AGE DISCRIMINATION IN UKRAINE

The Equality Act that prohibits the gender discrimination, inclusive in the labour relations, and guarantees protection from it by state, has entered into force since January 1, 2006.

However, and before that time, a right to non-discrimination based on gender and age has been provided by the article 24 of Constitution of Ukraine of 1996. Moreover, the Labour Code since its acceptance in 1971 has guaranteed equality of labour rights for citizens regardless of sex and bans any direct or indirect limitation of rights or introduction of direct or indirect advantages while conclusion, amendment and cancelling a labour contract depending on the worker's sex, and the Constitution - the right of judicial defence which guarantees to each the right of judicial protection of one's rights.

However, there are no traditions of protection from gender and age discrimination in Ukraine.

The courts of Ukraine have not examined such cases. At least there is no data on publication of court decisions in the press; the official statistics on such cases is not conducted.

The lack of cases, first of all, is connected with the lack of appeals from citizens for protection from gender and age discrimination. This, in particular, proves the data on survey among judges¹.

So, only 8% of the interviewed judges, who during three years have taken the cases on dismissal, have pointed out that in those cases were references of claimant on discriminatory behaviour of the owner (manager). Any of judges who have investigated such cases, did not hear remarks by claimant on the compulsion to enter in the sexual relations. The surveyed judges have not investigated the criminal cases according to the article 154 of Criminal Code of Ukraine "Compulsion to sexual relations" as well. Any of the asked judges did not consider the cases on the refusal to employ because of pregnancy, family status or age. The same negative result is about cases on lawsuits of women about any form of discrimination in the labour market on the basis of article 24 of Constitution of Ukraine, articles 22 of Labour Code of Ukraine or International treaties ratified by Ukraine.

Only 35% judges have considered cases on sanction by unpaid costs on maternity vacation and baby-care. Still there have been not many suits (more frequently respondents countered two cases, the maximum quantity 5, average – 1.6).

¹ Survey was completed by Women's Perspectives in cooperation with Ukrainian Academy of Judges in 2005. 56 judges of local courts in Lviv region were surveyed.

The advocates, workers of the public prosecutor office and labour inspectors confirm absence of appeals concerning the discrimination as well.

So, from the 193 claims from women on violation of their labour rights addressed to the Regional State Labour Inspection (hereinafter - Labour Inspection) in the 11 months period in 2005, no claims contained the report on discrimination at work, including those based on gender or age.

Presumably, that is why the State Supervision Department on Labour Legislation Implementation (hereinafter – State Labour Supervision) does not conduct statistics of observance of discrimination prohibition principle, including gender and age, in labour relations.

During the legislation implementation examination on women labour in enterprises, establishments, organizations of all form of properties which are conducted by the Labour Inspection on the order of instructions of State Labour Supervision, are studied the legislation requirements accordance in part of women labour application prohibition at work with the harmful and dangerous labour conditions and the works connected with raising and moving things, the mass of which exceeds the set for women maximum norms; prohibitions of women involvement to work in night-time, to overtime work and work on holidays and business trips of prospective mothers and women who have children under age of 3 years old; requirements of the Law of Ukraine "On Leave", etc.

The data received by Labour Inspection results of such verifications register the violation of women rights by employers. However, they do not reflect the presence and absence of difference in treatment by the employer the persons of different gender or age, for example, in relation to difference in pay for work of equal value between workers of different gender or age.

The authors of this publication could not get the information on criminal cases according to the 161 article of Criminal Code of Ukraine that provides criminal responsibility for the direct or indirect limitation of rights or establishment of direct or indirect privileges of citizens based on gender or other signs (including the age).

The absence of appeals of citizens to the courts and other state bodies for protection from discrimination, at first glance, can be reasoned by the absence of gender and age discrimination problem in Ukraine. However, years long help provided by women's and human rights organizations to the persons who have been refused to be employed or fired because of pregnancy (family responsibilities, age, gender), who experienced the sexual harassments at work and other discriminatory actions, convinces the seriousness of this problem in Ukraine. The researches conducted and study of experience of

other countries give the picture of its scales and enable ones to understand the causes that restrain a person having suffered discrimination from suing.

During the conducted focus groups in the answers on the question: "**Do you happen to know cases when the workers applied to court defending their rights or for protection from discriminatory actions?**" the majority of participants have answered that have heard about the cases when women claim to court the illegal dismissal, not pay of salary or funds on maternity leave. However, all have agreed, that such cases are not widespread because of delays in court, mistrust of the court, the judicial system corruptibility, lack of confidence in gaining a result. To the question whether they would personally sue, the answers were divided almost equally.

Among the respondents the **56.7%** have not reacted on discriminatory actions towards them at the work place. The respondents that have not reacted on mentioned violations have explained that mainly (**58.3%**) did not consider a violation as a problem. **22.2%** have pointed out that they did not believed in the possibility of solving the problem. **12.5%** of employees the rights of whom have been violated have not known how to solve the problem. **5.1%** explained their inactivity was caused by fear. **3.2%** of respondents did not know where to address.

From the **161** women who addressed the consultation during the project implementation, only **5** have decided to apply to court, all exceptionally in matters of unpaid funds on maternity leaves (1 person), and debts on salary payment in dismissal (4 persons). The majority of women that addressed the problems of compulsion to be fired because of pregnancy, firing because of personal motives, threats of not payment of funds on maternity leave, refused to apply to court because of distrust in possibility of positive result, and would like to solve the problem in another way.

Certainly, not the last place in the factors list that makes a person silently agree with the discriminatory treatment and unjust work conditions is the fear to lose the job in the conditions of insufficient jobs places in the modern labour market of Ukraine.

However, it is not the single and main reason. The absence of appeals to the state bodies on protection form of discrimination shows that the acceptance of anti discriminatory norms in law is not sufficient for overcoming of discrimination, and demonstrates the necessity of creating the effective system of protection that would allow to effectively eliminate the obstacles in the right on equal treatment enjoyment (and secure, if needed, its forced realization as well).

ADVOCACY EXPERIENCE

The component of Advocacy in the project consisted of the creation of Coalitions against discrimination in the labour market; conducting of training programmes and round tables , information campaign and the conduction of final conference.

- Training programmes:

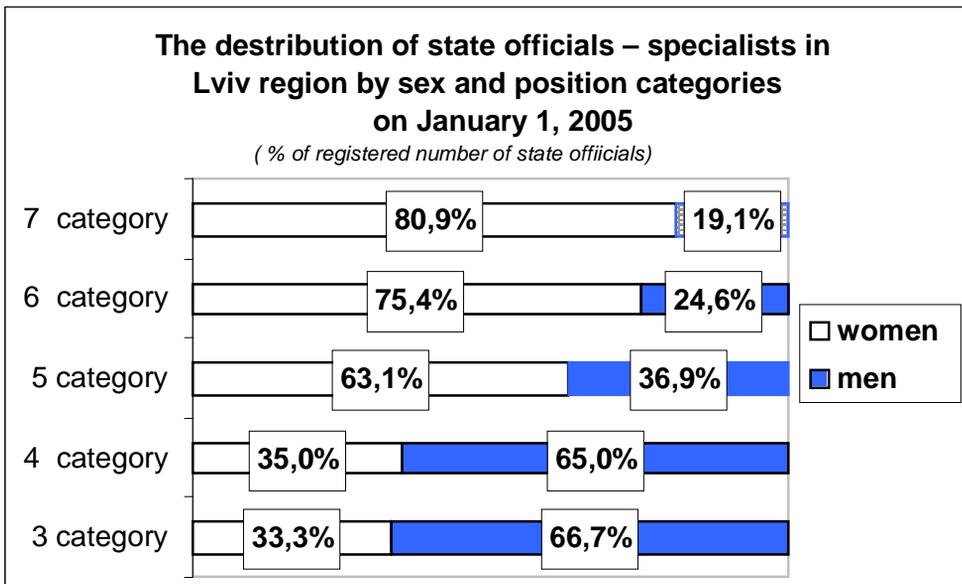
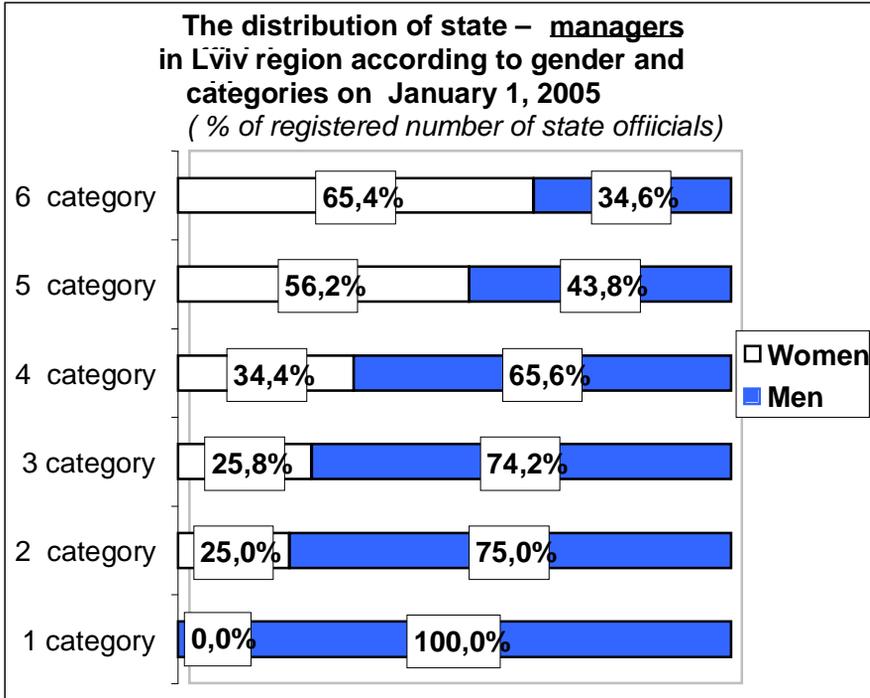
The 42 trainings for 538 participants were conducted, 9 in Lviv city and 33 in the districts of the Lviv region .

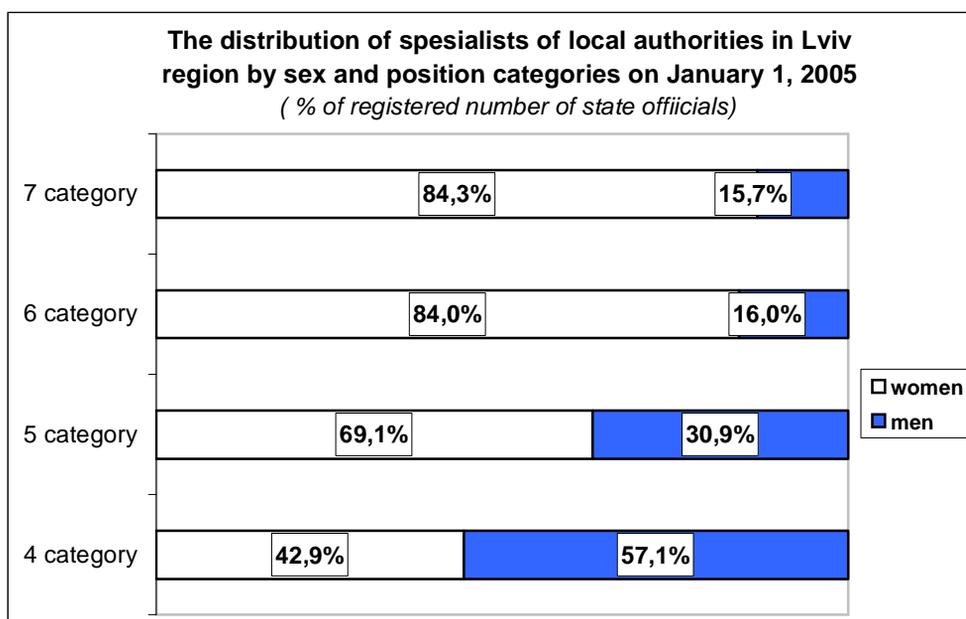
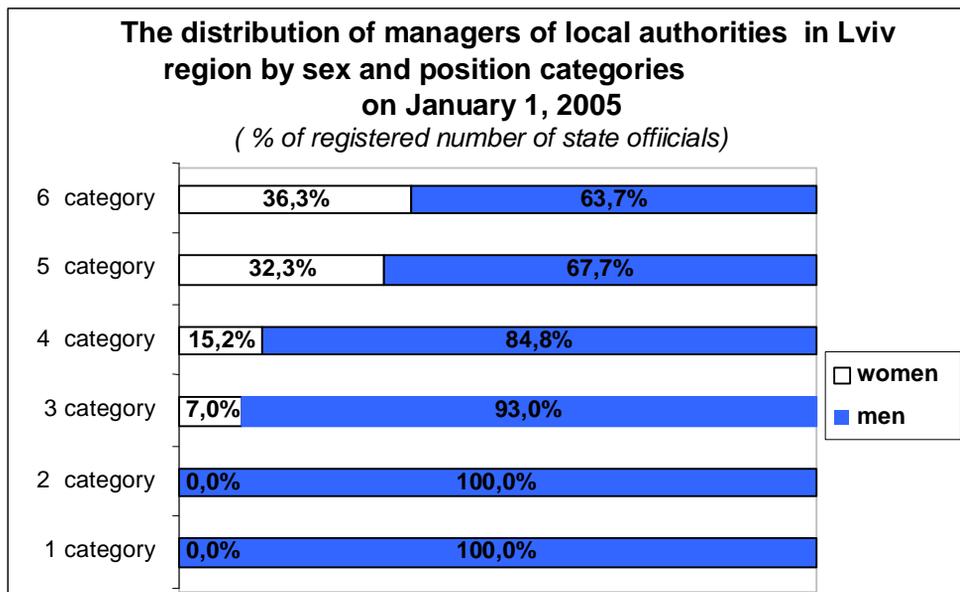
The main target groups were the local authorities, deputies, employment office and trade unions representatives, NGOs, journalists and other women and men.

Trainings were conducted within 1 to 2 days for 3 to 8 hours per day, depending on the group and place.

The structure of the trainings contained mainly of:

- The introductory block;
- “Model of discrimination” exercise: Here the situation was modelled by one sub-group which was discriminated by the colour of their eyes. . Thus the general mechanisms of the discrimination, group behaviour models that discriminated and were discriminated against, were analyzed:
 - Concept block: Practical exercise on basic terms;
 - Legal block: Legislation of Ukraine on protection of rights of women, improvement of women’s positions and the introduction of gender equality, legislation of European Union on equality of women and men in the employment field and social sphere;
 - The examination of the actual situation in the labour market of Lviv and Ukraine, in particular, the following data of the Lviv Statistics Administration:





- The important role during the trainings was placed on the "Gender stereotypes" block. After finishing the exercises, which made one think about stereotype perception of women and men, a group always brought to the discussion the negative influence of gender stereotypes on women perception, gender construction, fixing of gender roles from the side of the state and mass media, etc.

- During training, was examined the block of "domestic labour" as well (where during the "Scanning of time" exercise implementation, a group was described in hours of the day timetable of men and women of the "average family")

- Depending on a group, the "Role of mass media in elimination discrimination and providing of rights equality of women and men" block was added, or "Strategies of positive actions in the appointed bodies of power".

At the beginning of training, the group, as in other trainings, watchfully perceived the subject, denied the existence of the problem, etc. Already to the concept block, however, the group approach showed they were quite interested. During the basic concepts, categories and terms study, it was always interesting to put the question to the group: "What is gender?" The answers were very different and very rarely (only in 1%-5% of answers) were the answers close to the right ones. As a rule, the group demonstrates the whole spectrum of classic gender stereotypes. These stereotype carriers are even unaware that it could be different. The reference to official statistical data that reveal the real state of discrimination based on gender acts is convincing.

"Time scanning" exercise (when participants in small groups describe the timetables of employment of women and men) were conducted in male and in mixed groups. And, as a rule, participants agreed that women are considerably busier at work than men are. Even when a sub-group decides to show the equal tasks distribution, in presentation it states that a man "helps a wife to breed the children", "helps in housework". It means, a woman has certain duties, and a man can help her in the execution of these duties. The interesting thing is also that the participants agreed that male domestic labour is done outside a home (remove garbage, take a child to and from kindergarten, maintain a car, etc., while female domestic labour is almost concentrated within the limits of the home). The assertion that the lower the status of women in society is, the greater is the work they execute as compared to men. Agreeing with this thesis, the observation was that the less the settlement is, the larger the amount of work that is done by men, the higher is the estimation (at least moral) they give to women labour. It means that in rural areas where men are more involved in domestic labour, both men

and women acknowledge the importance of so called women labour.

During the discussion of the “glass ceiling”, “glass walls” (i.e. gender segregation), “sticky floor” concepts, i.e. stereotypes that keep a woman from professional advancement, “glass elevator”, i.e. that “carries a man into the women gender segregated employment sphere of high positions, i.e., directors of schools, main doctors, participants illustrated cases from their life or from the lives of their acquaintances.

Types of discrimination discussed in trainings:

- *Gender discrimination* - the advertisements of vacancies with indication of preferable gender of worker;

- *Gender discrimination based on marital status* - discrimination concerning single and recently married women; discrimination in relation to women with young children (greater consent is to hire women with older children); family status and women employment opportunities;

- *Age discrimination* - requirements of age in announcements of vacancies; age as a factor during interviews; access of older women to employment.

Conclusions and recommendations, as a result of conduction of the trainings:

§ To conduct similar trainings. This recommendation has always been given, no matter what group. It was interesting that participants almost always recommended conducting these trainings for more meaningful (from their point of view) audiences than they are. It means if they are the workers, then trainings should be done for their managers; if deputies of local councils, then trainings should be done for the deputies of the Parliament, journalists then for their editors; and significantly if women, then trainings should be done for men.

§ Conducting the gender trainings, already seven years, shows the growing necessity at all levels in similar programming activity, both at the level of power, employers, workers or the unemployed.

Cooperation with State Employment Service has resulted in the following recommendations:

§ In 2003, the international organization Human Rights Watch conducted research in Ukraine on gender discrimination in the labour market (our organization has assisted in this research conducting in Lviv). Attention of the government was drawn to the impermissibility of the division of

existent vacancies of male and female ones. Recommendation to abolish the form of the statistical reports of employers of the requirements to the sex of the needed workers was given. A few years have passed and these reports remain the same. By going to any employment centre, you will see that the lists of present vacancies of state employment centres regularly contain the requirements of the sex, and an official form for requesting the placement of vacancies requires the specification of the amount of vacancies for women. Possibly a new law will force the State statistics committee to change this form of reports.

- In any Employment Centre in noticeable places you will see the informative folders on different professions. Here it is possible to read about house-painters, seamstresses, office managers, cooks, etc. During visits to the Employment Centres and talking about these folders, the question was always asked provocatively: "Which of the folders do you first of all recommend to the women to get acquainted?" And almost always the answer is on professions from classic gender segregated spheres. The secretaries and seamstresses are women, whereas programmers are men. The Employment Service is our strategic, old and faithful partner. The Regional Employment Centre recognizes and understands the problem and does quite a bit for its solution. Very often in the small towns Employment Centres, consultants still recommend training of seamstresses to the women only. During trainings participants were explained that "masculine" and "feminine" professions do not exist and that the only unique "sexual professions" allegedly would be maternal milk wet nurses and sperm donors. All the other professions should be equally accessible for men and for women and the practice of subsequent segregation should be eliminated through the Employment Centres.

§ To place responsibility for placing the discriminatory announcements of employment on mass media.

§ It is necessary to apply and popularize strategies of positive actions in the appointed power bodies.

Within the advocacy activities in the framework of the project implementation, the Coalition for elimination of gender and age discrimination was created. The Coalition was formed by representatives of women's NGO, regional employment centres representatives, deputies, local authorities, media. The meetings of the Coalition took place once in 2 months. During those meetings the actual issues of the labour market of Lviv were examined including the plan of the project realization where efforts were coordinated and strategy of the elimination of discrimination was developed in the labour market.

The roundtables were conducted in all target district centres, two in every town and four in Lviv.

To participate in the work of the roundtable, the representatives of the authority bodies, i.e. mayors of the cities, deputies, civil servants, the representatives of the employment centres, public organizations, trade unions and mass media were invited. During the first roundtable held, the presentation of the Project, the plan of its realization, prospect of collaboration and suggestion of participants of the project realization were discussed.

During the final phase of the project, the final roundtables took place. The main results of the project were discussed. All parts of the project were carried out within the framework of the project and prospects of subsequent cooperation came into question.

In addition, in Lviv 2 additional roundtables (unforeseen in the project) were held. The first roundtable “State mechanisms of providing gender equality and protection from discrimination» was devoted to the review of the Draft of Equality Act. As a result of the roundtable meeting, the participants signed a Resolution that was directed to the Parliament Committee on the human rights, national minorities and international relations matters, in the Parliament Committee on science and education matters, in the Parliament Committee on social policy and labour matters, in the Parliament Committee on the budget, in the Parliament Committee on European integration matters, to Ombudsman, the Ministry of Family and Youth, and to political parties and NGO. In Resolution, the Draft was analyzed and it defined the main recommendation of changes, a total of 11 recommendations.

The roundtable was also conducted on the discussion of the already adopted Equality Act and Decree of President of Ukraine “About improvement of the work of the central and local authorities on ensuring the equal rights and opportunities of women and men”, signed on July 26, 2005.

During this roundtable, the discussion was on the existent legal base in Ukraine of securing gender equality in the labour market in Ukraine with the introduction of possible mechanisms of these normative acts.

On January 20-21, 2006, the *National Ukrainian Scientific-Practical Conference “Elimination of Gender and Age Discrimination in the Labour Market in Ukraine: Realities and Prospects”* was held. During that conference, on the first work day at the plenary meeting, acquaintance took place with the results of the research of age and gender discrimination in the labour market which was conducted by West Ukrainian Centre “Women’s Perspectives” in 2005 in the Lviv region. Discussion was held on the

international experience, legislation of Ukraine and mechanisms of protection from gender discrimination in the labour market; results of the training programmes and roundtables conducted within the framework of the project action plan; discussion of strategies of overcoming gender discrimination in the labour market. Lecturers also reported themes on the "Formation of a gender culture in society as a way to eliminate gender discrimination in Ukraine"; "Gender issues of youth employment in the labour market of Ukraine", "Role and determination of preventive ways of gender discrimination in steady development and self provision of rural communities", "Gender problems of the labour market in Ukraine", "Influence of the organizational culture on gender policy"; "Gender peculiarities of career young students (as a result of social psychological research)"; and "Government service: Gender misbalance".

Discussion was held during the sectional meetings on the second work day on the main strategies of overcoming gender discrimination in the labour market in Ukraine and basic principles and mechanisms of the organization of a national network on the prevention of age and gender discrimination in the labour market".

The network of counteraction to the gender and age discrimination in the labour market based on the conference results was created. http://groups.yahoo.com/group/against_discrimination/.

Total number of conference participants was 72. They were from 53 organizations from Lviv and the Lviv region, Kiev, Odessa, Ivano-Frankivsk, Ternopil, Dnipropetrovsk, Donetsk, Kharkiv region and Estonia.

All lectures and speeches on the final conference were published in the edition "Materials of National Ukrainian scientific practical conference on the "Elimination of Gender and Age Discrimination in the Labour Market in Ukraine: Realities and Prospects".

ANNEX

LAW OF UKRAINE

On Ensuring Equal Rights and Opportunities for Women and Men

*Not official translation**Related articles*

The purpose of this Law is achievement of parity status of women and men in all spheres of society life through the legal ensuring of equal rights and opportunities of women and men, elimination of discrimination based on sex and implementation of special temporary measures, aimed at the elimination of misbalance between the opportunities of women and men to exercise equal rights granted by the Constitution and Laws of Ukraine.

Article 1. Definition of terms

In this Law the stated terms below are used in following meanings:

Equal rights for women and men are the absence of limitations or privileges based on sex;

Equal opportunities of women and men are equal conditions for realization of equal rights of women and men;

Discrimination based on sex is an actions or inactivity, which express any distinction, exclusion or privileges based on sex, if they are directed to limitation or do impossible recognition, use or exercising of human rights and freedoms for women and men on equal grounds;

Positive actions are the special temporary measures that aimed at elimination of the imbalance between men's and women's opportunities of realization of equal rights given by the Ukrainian Constitution and Laws of Ukraine.

Sexual harassment are actions of sexual nature, expressed verbally (threats, intimidation, improper remarks) or physically (stroking, pats), that humiliate or will offend the people who are under the work, duty, material or other subordination.

Gender equality is the equal legal status of women and men and equal opportunities for its realization that allows the persons of both sexes to take an equal part in all spheres of society life;

Gender and legal examination is the analysis of current legislation, drafts of legislation, the result of which is the conclusion on their accordance with principle of equal rights and opportunities of women and men.

Article 2. *Legislation concerning ensuring of equal rights and opportunities for women and men*

The legislation on ensuring of equal rights and opportunities for women and men consists of Constitution of Ukraine, of this Law and other legal normative acts.

If by the international treaty of Ukraine, a consent for obligatory implementation of which is given by the Parliament of Ukraine, other rules are set, than those that is foreseen by this Law, the rules of international treaty apply.

Article 3. *General directions of state policy in relation to ensuring of equal rights and opportunities for women and men*

A state policy in relation to ensuring of equal rights and opportunities for women and men is directed on:

- strengthening of gender equality;
- non-admission of discrimination based on sex;
- application of positive actions;
- providing of equal participation of women and men in a decision making;
- providing of equal opportunities for women and men in relation to combination of professional and family duties;
- support of family, forming of responsible motherhood and fatherhood;
- education and propaganda among the population of Ukraine of gender equality culture, dissemination of educational activities in this field;
- protection of society from the information directed on discrimination based on sex.

Article 6. *Prohibition of discrimination based on sex*

Discrimination based on sex is prohibited.

The following actions are not considered discrimination based on sex:

- special protection of women during pregnancy, delivery, and breastfeeding;
- obligatory military service for men, prescribed by law;
- difference in retirement age for women and men, prescribed by law;
- special requirements concerning working conditions of women and men related to protection of their reproductive health;
- positive measures.

Article 17. *Providing equal rights and opportunities for women and men in work and pay for work*

Equal rights and opportunities in employment, promotion in work, training and retraining are provided to women and men.

An employer is under an obligation:

- to create the conditions of work, which would allow women and men to carry out work activity on equal basis;
- to provide possibility to combine work activity with family duties to women and men;
- to provide equal pay of work of women and men during identical qualification and identical terms of work;
- to take measures concerning creation of work conditions safe for life and health;
- to take measures concerning sexual harassment prevention.

Employers are forbidden in announcements (advertising) about vacancies to offer work only to women or only to men, except for specific work, which can be executed exceptionally by the persons of certain sex, to make different requirements, giving advantage to one of the sexes, to require from persons, applying for job, information about their personal life, plans in relation to birth of children.

Employers can carry out the positive actions directed on achievement of the balanced correlation of women and men in different spheres of work activity, and also among different categories of workers.

Article 18. *Providing of equal opportunities during the conclusion of collective agreements and contracts*

In the case of practice of collective regulation of labour relations (general agreement, agreements regional and of particular branch of industry, and collective agreements) the agreements are to include positions which provide equal rights and opportunities of women and men, with pointing of terms of realization of the provisions.

The collective agreements should foresee:

- Appointing one of the workers the responsible person in gender issues - adviser of leader of enterprise, of establishment and organization, their structural subdivisions (not paid);
- Completing the staff and promoting of workers in according to principle of giving preference to person of certain which is underrepresented;
- Elimination of inequality in payment of work of women and men both in different industries of economy and in the same industry, on the base of general social norm of payment of labour in budgetary and other spheres, and also on the basis of the professional personnel training (retraining).

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досвід громадянського представництва**

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