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**EUROPEAN COMMITTEE OF SOCIAL RIGHTS
COMITÉ EUROPÉEN DES DROITS SOCIAUX**

DECISION ON THE MERITS

Adoption: 5 December 2019

Notification: 28 February 2020

Publicity: 29 June 2020

University Women of Europe (UWE) v. France

Complaint No. 130/2016

The European Committee of Social Rights, committee of independent experts established under Article 25 of the European Social Charter (“the Committee”), during its 310th session in the following composition:

Giuseppe PALMISANO, President
Karin LUKAS, Vice-President
François VANDAMME, Vice-President
Eliane CHEMLA, General Rapporteur
Petros STANGOS
József HAJDU
Krassimira SREDKOVA
Raul CANOSA USERA
Barbara KRESAL
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Aoife NOLAN
Karin Møhl LARSEN
Yusuf BALCI
Ekaterina TORKUNOVA
Tatiana PUIU

Assisted by Henrik KRISTENSEN, Deputy Executive Secretary

Having deliberated on 20 March 2019, 12 September 2019, 16 and 17 October 2019, 2, 3 and 5 December 2019,

On the basis of the report presented by Petros STANGOS,

Delivers the following decision, adopted on the latter date:

PROCEDURE

1. The complaint lodged by University Women of Europe (UWE) was registered on 24 August 2016.
2. UWE alleges that the situation in France is in violation of Articles 1, 4§3, 20 and E of the Revised European Social Charter ("the Charter") having regard to the wage gap between men and women and the under-representation of women in decision-making positions within private companies in France.
3. On 4 July 2017, referring to Article 6 of the 1995 Protocol providing for a system of collective complaints ("the Protocol") the Committee declared the complaint admissible.
4. In its decision on admissibility, the Committee invited the Government to make written submissions on the merits of the complaint by 13 October 2017.
5. In application of Article 7§1 of the Protocol, the Committee invited the States Parties to the Protocol and the States that had made a declaration in accordance with Article D§2 of the Charter, to submit any observations they might wish to make on the merits of the complaint by 13 October 2017.
6. In application of Article 7§2 of the Protocol, the Committee invited the international organisations of employers or workers mentioned in Article 27§2 of the Charter to make observations by 13 October 2017.
7. On 24 July 2017, the Government asked for an extension to the deadline for presenting its submissions on the merits. The President of the Committee extended this deadline until 3 November 2017. The Government's submissions on the merits were registered on 3 November 2017.
8. On 14 September 2017, the European Confederation of Trade Unions (ETUC) ("the ETUC") asked for an extension to the deadline for presenting its observations on the complaint. The President of the Committee extended this deadline until 3 November 2017. ETUC's observations were registered on 3 November 2017.
9. The deadline set for UWE's response to the Government's submissions on the merits was 5 January 2018. UWE's response was registered on 5 January 2018.

10. Pursuant to Rule 31§3 of the Committee's Rules ("the Rules"), the Government was invited to submit a further response by 9 March 2018. On 9 March 2018, the Government indicated that it did not wish to submit a further response.

11. Pursuant to Rule 32A of the Rules, the President invited the European Network of Equality Bodies (EQUINET) to submit observations by 30 March 2018. On 30 March 2018, EQUINET asked for an extension to the deadline for presenting its observations on the complaint. The President of the Committee extended this deadline until 4 May 2018. EQUINET's observations were registered on 4 May 2018.

12. Pursuant to Rule 32A of the Rules, the President invited the European Union to submit observations by 15 April 2018. On 20 April 2018, the European Union asked for a new deadline for presenting its observations on the complaint. The President of the Committee set 25 May 2018 as a new deadline. The European Union's observations were registered on 28 May 2018.

SUBMISSIONS OF THE PARTIES

A – The complainant organisation

13. UWE asks the Committee to declare that the situation in France constitutes a violation of Articles 1, 4§3 and 20 as well as Article E of the Charter on the following grounds:

- Firstly, UWE alleges that the pay gap between women and men still persists and is unfavourable to women. Moreover, France has not achieved equal pay for equal, similar or comparable work in practice.
- Secondly, only a very small number of women occupy decision-making positions within private companies, despite legislation adopted in 2011 to ensure that 40% of women are represented in decision-making positions within private enterprises.

14. In addition, UWE asks for the payment of €10,000 for costs incurred during the proceedings.

B – The respondent Government

15. The Government asks the Committee to dismiss all allegations submitted by UWE and to declare the complaint unfounded. The Government further asks the Committee to reject UWE's request concerning the costs incurred during the proceedings.

OBSERVATIONS BY WORKERS' ORGANISATIONS

The European Trade Union Confederation (ETUC)

16. The ETUC, making reference to various instruments of International Law and Eurostat statistics, concludes that the minimum wage gap between men and women lies above 5.5% in all the countries concerned. The ETUC therefore observes that, as the statistics highlight, the principle of equal pay for work of equal value is not guaranteed in practice. It also indicates that this is even more true when the lack of clarity in relation to the calculation is taken into account (for example, to what extent do they reflect other discriminatory elements, such as career differences which can lead to an increase in the wage gap or issues related to the source of data (for instance, undocumented work or the informal economy, both of which are sectors in which the gender pay gap is probably even higher).

17. The ETUC further refers to data of the European Institute for Gender Equality (EIGE), with regard to the representation of women in decision-making positions in private companies, and concludes that only two countries achieved the European Commission's proposed 40% objective for the representation of women on Boards, namely France and Norway. The ETUC points out in its conclusion, however, that the data in question only refers to the 'largest listed companies', and not to other listed companies and non-listed companies which represent, quantitatively, a much higher share. The ETUC therefore assumes that none of the countries concerned reach the threshold of 40%.

18. The ETUC indicates that the two main elements raised in the complaint differ from a legal point of view. Equal pay is a classic fundamental principle, and despite States traditionally providing for it in legislation, they do not sufficiently enforce it. The second ground, which concerns the under-representation of women on decision-making boards in private companies, is a fairly new element appearing at international and national level as a problem to be seriously dealt with. Nevertheless, both elements are covered by Article 20 of the Charter which guarantees "the right to equal opportunities and equal treatment in matters of employment and occupation without discrimination on the grounds of sex".

19. With respect to the wage gap between men and women, the ETUC raises the point that, in order to assess the conformity or non-conformity of the situation in each country with regard to the Charter, it is necessary to examine both substantive and procedural dimensions.

20. At the substantive level, there is a quantitative and a qualitative dimension to be considered. According to the ETUC, only a 'zero' wage gap should be permitted. However, on the basis that the interpretation of 'equal' does not apply in the strict sense of the word, a reasonable threshold could be a maximum of 5%. With respect to the qualitative dimension, as the statistics show, the wage gap between men and women continues to exist. The ETUC considers that it is no longer sufficient that States are free to choose the means by which they ensure equal pay, and point to the need to go further by taking into account the evolution of international case law. Accordingly, it would appear important to require a clear and comprehensive legislation, which should at least ensure that:

- the coverage of all workers is guaranteed;
- the general legal concept also includes indirect discrimination;
- the term 'pay' contains all elements of remuneration as well as supplementary pension;
- the comparison comprises as a minimum:
 - transparency;
 - the reach of comparison between jobs performed by women and men being construed as wide as possible;
 - a wide definition of 'equal value', also encompassing work that is of an entirely different nature, which is nevertheless of equal value;
 - the necessity to evaluate the respective jobs with criteria excluding any kind of discrimination, even indirect;
 - the assessment concerned is followed by effective consequences in cases where the results show that there is discrimination.

21. With respect to the under-representation of women in decision-making positions in companies, as a consequence of the decision of admissibility of the Committee, it follows that this aspect falls within the scope of Article 20.

22. At the substantive level, the ETUC considers that it is necessary to provide for a minimum threshold for representation of both sexes in decision-making positions. Although perfect equality, that is to say 50% of representation of both sexes, would not be a requirement, the ETUC considers that a percentage close to this, for example 40%, would be appropriate, as proposed by the European Commission.

23. The same procedural elements invoked regarding gender pay gap are also applicable.

24. As regards substance, the ETUC considers that statistics show clearly that the gender pay gap exists. Statistics are still excluding small (micro) sized enterprises, which makes it most probable that the gender pay gap is even higher in these enterprises. As regards the procedural perspective, the ETUC concludes that gender pay gap persists and it points out that the Labour Inspectorate does not ensure adequately respect for the principle of equal wage in practice.

25. Despite the existing legislative framework, recent statistics show that the gender pay gap still exists in France. According to the Commission, and on the basis of the information produced by Eurostat in 2014, the gender pay gap on France was of 15,5% (the average in EU being of 16,7%) and the gender overall earnings gap was 31,2% (the average in the EU was of 39,85%).

26. Concerning the under-representation in decision-making positions within private companies, the ETUC considers this problem has only been addressed in more recent years. As regards substance, statistical evidence shows that there is still an underrepresentation of women in decision-making bodies within private companies, in spite of relevant legislation and even if the degree of representation of women has increased.

27. As regards procedure, it would appear that there are no effective legislative measures in order to ensure the sufficient representation of women in decision-making bodies within private enterprises. In practice, there is even less supervision and enforcement.

28. For these reasons, the ETUC considers that there is a violation of Article 20 of the Charter from both perspectives.

OTHER OBSERVATIONS

A – The European Union

29. In its observations regarding University Women of Europe (UWE) v. Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Finland, France, Greece, Ireland, Italy, the Netherlands, Norway, Portugal, Slovenia and Sweden (Complaints Nos. 124-138/2016), the European Union, through the European Commission, highlights the European Union's legal framework and policy action of relevance to the matters raised in the complaints.

30. As regards the legal framework, the European Commission recalls that the principle of equal pay between women and men has been enshrined in the Treaties since 1957. The principle of equal pay for men and women for equal work and work of equal value was laid down in the original European Economic Community Treaty of 1957, more precisely in its Article 119, which later became Article 141 of the European Community Treaty. Since the entry into force of the Treaty of Lisbon (2009)³, the principle is embodied in Article 157 of the Treaty on the Functioning of the European Union (TFEU).

31. As regards non-legislative policy initiatives, according to the European Commission, closing the gender pay gap remains a major objective to achieve gender equality and it is a political priority. The gender pay gap in the EU still averages around 16%. This is socially unfair as well economically inefficient, equal pay being an obvious prerequisite for equal participation in the labour market. Across the EU, women have better educational outcomes than men (44% of women aged 30-34 in the EU attained tertiary education, compared with 34% of men). This factor does not prevent, however, women in the EU from being overrepresented in industries with low pay levels. Sectoral segregation continues to be one of the most important contributing factors to the gender pay gap in the EU.

32. In November 2017, the Commission adopted a Communication: EU Action Plan 2017-2019¹⁰, tackling the gender pay gap. The Action Plan presents ongoing and upcoming measures taken by the Commission to combat the gender pay gap in 2018-2019. It identifies eight areas for action:

- Improving the application of the equal pay principle

- Combating segregation in occupations and sectors
- Breaking the ceiling: initiatives to combat vertical segregation
- Tackling the care penalty
- Better valorising women's skills, efforts and responsibilities
- Fighting the fog: unveiling inequalities and stereotypes
- Alerting and informing about the gender pay gap
- Enhancing partnerships to tackle the gender pay gap

33. Moreover, several other Commission actions relate directly to some of the elements of the complaints, such as combating segregation in occupation and sectors, by supporting transnational projects to tackle stereotypes and segregation in education, and patriarchal attitudes. Besides, the European Commission monitors the national legislation and policies of Member States regarding the gender pay gap and raises awareness about it. The Commission reports regularly about the evolution of the gender pay gap, the earnings and pensions gap in Europe. The Commission aims at combating vertical segregation, by working towards the adoption of a proposal for a Directive in this field.

34. The Commission considers that one way of determining work of equal value is by using gender-neutral job evaluation and classification systems. However, Directive 2006/54/EC does not oblige Member States to put such systems in place and their availability at national level varies significantly. To attain its purpose, Directive 2006/54/EC requires that Member States ensure that any laws, regulations and administrative provisions contrary to the principle of equal treatment are abolished.

35. The European Commission concludes by indicating that the complexity of the issues in question and the numerous elements that, in the end, lead to the gender pay gap can be seen from many different angles, from the sociological to economic and legal. Therefore, according to the European Commission, it is necessary to take all of these into account.

B – European Network of Equality Bodies (EQUINET)

36. The Defender of Rights submitted the following observations regarding the situation in France to EQUINET.

37. The Defender notes that Article 4.3 of the Charter sets out three requirements: the existence of a legal basis expressly and unambiguously providing for equal pay for women and men, the existence of safeguards to ensure that it will be enforced, and the introduction of pay comparison mechanisms. The Committee also takes account

of the pay gap. Under Article 20, the Committee examines the domestic legal framework, the remedies available and the penalties imposed, the effective implementation of measures regarding women's employment levels, the pay gap between men and women, the occupation by women of decision-making positions or management positions, and the concrete measures taken to ensure equal opportunities.

38. The Defender of Rights is an independent administrative authority established by Law No. 2011-333 of 29 March 2011. One of its five tasks is to combat direct and indirect discrimination and to promote equal treatment. The Defender of Rights took over from the High Authority against Discrimination and for Equality (HALDE). He/she therefore deals with complaints submitted to him/her and promotes studies on means of highlighting the employment situation of women and measures to foster equality in employment.

39. The Defender notes that discrimination against women in the employment sector persists in France. The International Labour Organisation (ILO) has shown that gender is one of the main grounds for discrimination at work alongside age. In 2018, the average salary for French women was 19% lower than that of men.

40. Pay gaps between women and men result from two factors, which are sometimes combined. The first one is "structural", deriving from the fact that men and women do not have the same jobs, which explains the different wage levels. This can be compounded by a second factor, linked to careers and salaries. According to INSEE statistics for 2017, when all categories of working time are combined, women earn 25.7% less than men.

41. In its Concluding observations for 2016, the CEDAW Committee expressed its concern about the situation in France, focusing in particular on the continuing horizontal and vertical occupational segregation and the concentration of women in part-time and low-paid jobs. The Committee recommended that the French authorities take several measures including eliminating occupational segregation in the public and private sectors and ensuring that the quotas for female management positions are not undermined by ineffective penalties.

42. Efforts have been made to reduce the pay gap, but the reasons behind wage inequalities are multiple and complex, including occupational segregation, direct discrimination, gender stereotypes, varying career paths and inequalities relating to part-time jobs. In the last few years, the Defender has worked to improve wage transparency and secure neutral job classifications without gender stereotypes.

43. There are also other types of employment discrimination, especially relating to or around pregnancy, such as being treated unfairly and/or being dismissed after returning from maternity leave, harassment, victimisation and breaks or slow-downs in the pace of career progression for women.

44. 55% of the complaints filed with the Defender of Rights concern employment discrimination. Approximately 10% of all the complaints allege discrimination on the ground of gender and/or pregnancy.

45. Access to the complaints procedure is facilitated, as complaints may be filed with the Defender by mail in an unstamped envelope or on an Internet form or, for people facing economic and social difficulties, through local contact persons. 450 local network delegates provide information, direct people to the right bodies, or assist persons who wish to file a complaint. Filing a complaint is free and uncomplicated.

46. The Defender of Rights has a broad range of means of investigation and action, which enables him/her to intervene both in individual cases of discrimination and on general issues. Contrary to UWE's allegations, the Defender's powers and scope of action have not been limited by the Law of 2011. Individual complaints are systematically, impartially and independently investigated, and the Defender can request any information and explanation to aid his/her investigation including summons and on-site verifications. Accused parties cannot refuse to provide information and if they do, the Defender may send a letter of formal notice then refer the matter to the urgent applications judge or state that they are perverting the course of justice, as he/she is entitled to do by law.

47. The Defender may also make use of situation testing to prove discriminatory conduct, comparing the attitudes of the person being tested towards a reference candidate on the one hand and a candidate who may be discriminated against on the other. The Defender of Rights can also intervene as *amicus curiae* before all courts to present his/her assessment of the case. This may be at his/her own initiative or at the parties' or judge's request, and he/she often intervenes in cases of gender discrimination in employment.

48. The Defender also has the right to follow-up on individual or general recommendations he/she has made in response to individual complaints. He/she has no authority to impose penalties, but the accused party is obliged to report on any action taken in response to complaints. In the absence of a response or if an unsatisfactory one is given, the Defender may issue an injunction requesting the implementation of the recommendation. If no action is taken, he/she may decide to publish a special report or divulge the name of the accused party. He/she may also request the authority concerned to take disciplinary measures against the professional who is at fault. In 2017, the Defender made submissions in 137 cases, issued 696 individual and general recommendations, and made 138 recommendations to the authorities. His submissions in court and the friendly settlements proposed were applied in over 76% of the cases.

49. Since the establishment of the HALDE in 2005, complaints concerning discrimination against women in the employment sector have steadily increased. Maternity is still today an obstacle to women's careers. The most common problem is that when new mothers return to work, they are not given a post equivalent to that held before.

50. Pursuant to the Law of 2011, the Defender of Rights was asked by the public prosecutor to look into a case where women were systematically refused a promotion in an industrial company. He noted that 25 female workers had been denied career development opportunities because of their gender and that the only woman in a management position earned less than her male colleagues. The prosecutor concluded that the company and its legal owner could be held liable for discrimination. The Defender also intervened on behalf of a woman appealing against the rejection of a complaint to the labour court for unfair pay and career development conditions. The appeal court, relying on the comparison panels produced by the Defender, found against the company in 2015.

51. In the public sector, one of the most striking cases in 2017 was one of insidious discrimination resulting from an apparently gender-neutral measure targeting civil servants only but penalising women on maternity leave more than anyone else. Following the Defender's recommendations, the ministry issued several notices warning the establishments concerned, which had imposed an illegal suspension on grade assessments, that they should comply with the law. The Defender has intervened in other cases in the last few years with positive results.

52. Regarding hiring and probationary periods, in many cases, when a woman announces her pregnancy during a job interview or while on a probationary period, the employer decides not to hire her or to terminate her contract. The Defender of Rights has intervened in such cases, and in cases of discrimination after women return from maternity leave, intersectoral discrimination, discriminatory and sexual harassment and reprisals after a victim has reported facts. Lastly, the Defender has also intervened in cases of employment discrimination affecting self-employed women, particularly lawyers. As of 1 January 2018, 54% of the lawyers at the Paris Bar were women. However, in 2015 in Paris, the average income for male lawyers was €137,925 whereas it was €64,902 for female lawyers.

53. The Defender notes that the difficulties encountered in bridging the pay gap between women and men and in eliminating other forms of gender-based discrimination are not related to the legislative framework, which appears to be satisfactory, but rather to the social partners' insufficient commitment. Less than one person out of ten takes steps to protect their rights and only one in four does so in the course of their career. The Defender has published practical information sheets to raise awareness of discrimination and harassment issues among elected representatives, human resources departments and civil servants. In 2015, he published a practical guide for large companies and in 2016, he issued a report on the employment of women with disabilities.

54. Other measures taken include a revision of occupational classifications, which resulted in legislative amendments in 2014 and 2017. However, the Defender of Rights considers that the obligation to organise collective bargaining is not sufficiently respected in practice. The assessment of these classifications is progressing slowly and sexist biases remain.

55. The Defender also made several recommendations in the course of the recent employment law reform for upper limits on compensation for discriminatory dismissal or dismissal resulting from harassment to be ruled out – recommendations which were included subsequently in the Labour Code. He contributed to civil service reforms by proposing, in 2017, that jobs dominated by women be upgraded and that more standardised appraisal of public servants be applied to combat prejudice. He also signed a partnership agreement with the High Council for Gender Equality, a consultative body chaired by the Minister for Families, Children and Women’s Rights, the intention being to encourage more complementary training, awareness-raising, support and expert advice activities.

RELEVANT DOMESTIC LAW AND PRACTICE

A – The Constitution

56. The Constitution of 4 October 1958 has been amended to make it possible to implement quotas. Under Constitutional Law No. 2008-724 of 23 July 2008 on the modernisation of the institutions of the 5th Republic, the following sentence was added to the first article of the Constitution:

“Statutes shall promote equal access by women and men to elective offices and posts as well as to professional and social positions”.

B – The Labour Code

57. Article L. 1132-1 of the Labour Code provides:

“Nobody may be excluded from a recruitment or access procedure for a placement or training course with a company, nor may any employee be penalised, dismissed or subject to a direct or indirect discriminatory measure, as defined in Article 1 of Law No. 2008-496 of 27 May 2008 on various provisions for adjustments to Community law in the sphere of discrimination, particularly with regard to remuneration, within the meaning of Article L. 3221-3, or profit-sharing or share allocation, training, redeployment, assignment, qualification, classification, promotion, transfer or contract renewal on the ground of origin, sex, morals, sexual orientation, gender identity, age, family situation or pregnancy, genetic characteristics, particular vulnerability on account of his or her economic situation whether apparent or known to the person committing the discrimination, real or supposed membership or non-membership of an ethnic group, nation or alleged race, political opinions, trade union or mutual society activities, religious beliefs, physical appearance, family name, place of residence or banking address, state of health, loss of autonomy, disability, or ability to speak in a language other than French”.

58. Secondly, besides this general principle of non-discrimination, the Labour Code more specifically protects gender equality at work. Article L. 1142-1 of the Code provides as follows:

“Subject to the particular provisions of this Code, nobody may:

1° mention or allow mention to be made of the sex or family situation of the candidate sought in a job advertisement. This prohibition shall apply to all forms of advertising relating to a vacancy irrespective of the features of the employment contract being considered;

2° refuse to take on a person, authorise a transfer or terminate or refuse to renew an employee's employment contract on the ground of sex, family situation or pregnancy or on the basis of different selection criteria according to sex, family situation or pregnancy;

3° take any measure on the basis of sex or pregnancy, particularly with regard to remuneration, training, assignment, qualification, classification, occupational advancement or transfer.”

59. The principle of equal pay for women and men for work of equal value is set out expressly in domestic legislation. It was asserted for the first time by Law No. 72-1143 of 22 December 1972 on equal pay for men and women, then incorporated into the Labour Code by Decree No. 73-1046 of 15 November 1973 on the Labour Code. It is found today in Article L. 3221-2 of the Labour Code, which provides as follows:

“All employers shall ensure equal pay for women and men for equal work or work of equal value”.

60. This equal pay principle applies to all employers and employees, including those bound by a public-law contract. Article L. 3221-1 of the Labour Code provides:

“The provisions of Articles L. 3221-2 to L. 3221-7 shall apply both to the employers and employees mentioned in Article L. 3211-1 and to those not governed by the Labour Code and, in particular, public-law employees.”

61. Domestic legislation includes obligations to negotiate on gender equality at work at company and occupational sector level. With regard to mandatory negotiation at company level, Article L. 2242-1 of the Labour Code, in the amended wording arising from Order No. 2017-1385, provides:

“In companies in which one or more representative trade union branches have been formed, employers shall organise, at least once every four years ... 2° a negotiation on gender equality at work, relating in particular to measures designed to remove wage gaps and improve quality of life at work.”

62. Article L. 3221-7 of the Labour Code provides:

“Any provision figuring in particular in an employment contract, a collective labour agreement, a wage agreement or a wage regulation or scale, resulting from a decision by an employer or a group of employers, which, in breach of Articles L. 3221-2 to L. 3221-6, establishes lower remuneration for one or more employees of one of the sexes than that of employees of the other sex for equal work or work of equal value shall be automatically null and void.

The highest remuneration paid to the latter employees shall be automatically substituted for that provided for in the invalidated provision.”

63. If there is no agreement, the legislation provides that employers are required to adopt unilateral measures. Article L. 2242-3 of the Labour Code, in the amended wording arising from Order No. 2017-1385, provides:

“If no agreement on gender equality at work is arrived at following the negotiation referred to in sub-paragraph 2° of Article L. 2242-1, the employer shall draw up an annual action plan designed to ensure gender equality at work. Having assessed the objectives set and the measures taken over the preceding year, this action plan, based on clear, detailed and workable criteria, shall determine the progress targets for the forthcoming year, establish what qualitative and quantitative measures will help to achieve them and assess their cost. The action plan shall be submitted to the administrative authorities. A summary thereof, including at least progress indicators and targets established by decree, shall be brought to the attention of employees by the employer by means of posters in the workplace and by any other means suited to the conditions in which the company carries out its activities. It shall also be made available to any person who requests to see it and published on the company’s Internet site if it has one.”

64. Domestic law also lays down the additional provisions that apply in the absence of an agreement with regard to the timetable, the periodicity, the themes and the procedures for negotiation. In this event, Article L. 2242-13 of the Labour Code, in the amended wording arising from Order No. 2017-1385, provides that employers must engage in negotiations every year on gender equality at work and quality of life in the workplace, relating to issues including aims and measures. This makes possible to achieve occupational equality between women and men, particularly with regard to the elimination of pay gaps.

65. As to the mandatory negotiation at occupational sector level, Article L. 2241-1 of the Labour Code, in the amended wording arising from Order No. 2017-1385, provides:

“Organisations bound by a sectoral agreement or by occupational agreements shall meet at least once every four years to discuss the themes referred to in sub-paragraphs 1° to 5° (...), and to negotiate:

(...) 2° Measures intended to secure gender equality at work, and remedial measures designed to rectify any inequalities identified”.

66. Where there is no agreement on the timetable, the periodicity, the themes or the procedures for negotiation, Article L. 2241-8 of the Labour Code, in the amended wording arising from Order No. 2017-1385, provides:

“Organisations bound by a sectoral agreement or by occupational agreements shall meet at least once every year to negotiate wages. These negotiations shall take account of the aim of gender equality at work and the measures making it possible to achieve this.”

67. Domestic legislation also makes it a requirement to consult works councils on occupational equality issues. Under Article L. 2323-15 works councils must be consulted annually on the company’s social policy, working and employment conditions and, in particular, gender equality at work (ultimately and at the earliest from 1 January 2018 in companies with 50 workers or more, consultation will be conducted with the “social and economic committees”, a new single staff representation body

established by Order No. 2017-1386 of 22 September 2017 on the new organisation of social and economic dialogue in companies, promoting the exercise and proper acknowledgment of trade union responsibilities).

68. With a view to this consultation, employers will provide works councils with information and figures on gender equality within the company contained in the economic and social database. This includes diagnoses and assessments of the comparative situation of women and men in each of the company's occupational categories in the areas of hiring, training, occupational advancement, qualification, classification, working conditions, occupational health and safety, effective remuneration and the reconciliation of work and private and family life, along with an analysis of wage gaps and differing career development patterns according to age, qualifications and length of service, changes in promotion rates among women and men according to type of job within the company and the representation of men and women on management boards (Articles L. 2323-8 and L. 2323-17 of the Labour Code). Employers are also required to provide works councils with access to agreements or, failing that, companies' action plans to promote gender equality at work.

69. Article L. 1142-5 of the Labour Code provides:

"It shall be for employers to take account of objectives with regard to gender equality in the company and measures making it possible to achieve these:

1° in companies without trade union delegates;

2° in companies not subject to the requirement to negotiate set out in Articles L. 2232-21 and L. 2232-24;

3° in companies not covered by an extended sectoral agreement on gender pay equality."

C – Law No. 2008-496 of 27 May 2008 on various provisions for adjustments to Community law in the sphere of anti-discrimination

70. The definition of discrimination under this law is given in Article 1, which provides as follows:

"Direct discrimination shall be constituted by situations in which a person is treated less favourably than another is, has been or will be treated in a comparable situation, on grounds of his or her origin, sex, family situation, pregnancy, physical appearance, particular vulnerability resulting from his or her financial situation, be it apparent or known, family name, place of residence or banking address, state of health, loss of autonomy, disability, genetic characteristics, morals, sexual orientation, gender identity, age, political opinions, trade union activities, ability to speak in a language other than French, affiliation or non-affiliation to an ethnic group, a nation, an alleged race or a particular religion, whether genuine or assumed.

Indirect discrimination shall be constituted by an apparently neutral provision, criterion or practice, which is liable, however, for one of the reasons referred to in the previous paragraph, to put persons at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

Discrimination shall be taken to include:

1° Any action linked to one of the grounds referred to in the first paragraph or any action with a sexual connotation, undergone by a person and having the purpose or the effect of undermining that person's dignity or of creating an intimidating, hostile, degrading, humiliating or offensive environment;

2° Enjoining any person to engage in behaviour prohibited by Article 2°.

D – Law No. 2011-103 of 27 January 2011 on balanced representation of women and men on management and supervisory boards and occupational equality.

71. This law provides that the proportion of members of management or supervisory boards of each sex must not be lower than 20% by the end of a period of 3 years following the enactment of the law, then 40% on the second renewal of the membership of the board following the enactment of the law, or otherwise within a period of 6 years.

RELEVANT INTERNATIONAL MATERIALS

A – Council of Europe

1. Committee of Ministers

72. The Committee of Ministers adopted several recommendations, such as Recommendation Rec(1985)2 on legal protection against sex discrimination, in which it exhorts member states to take or reinforce measures for the promotion of equality between women and men, including through legislation in the field of employment, social security and pensions, taxation, civil law, the acquisition and loss of nationality and political rights. In its Recommendation Rec(1996)51 on reconciling work and family life the Committee of Ministers further calls on member states to take action to enable women and men to better reconcile their working and family lives. In its Recommendation Rec(1998)14 on gender mainstreaming, the Committee sets out the conceptual framework for gender mainstreaming and a methodology for its implementation, accompanied by examples of good practices.

73. More recently, in its Recommendation Rec(2017)9 on gender equality in the audiovisual sector the Committee of Ministers invites the Member States to collect, monitor and publish data on gender equality. In particular, it asks the member States to adopt monitoring methods and performance indicators, highlight causal relationships using qualitative analysis of the data.

2. Parliamentary Assembly of the Council of Europe (PACE)

74. In its Resolution 1715(2010), the PACE observed that discrimination against women in the labour market has a long history. Several factors are put forward to explain the wage gap between women and men: horizontal and vertical segregation in

the labour market (commonly referred to as “glass walls” and “glass ceilings”), women’s supposedly lower qualifications and lesser experience, and their atypical working hours and career structures due to childbirth and care responsibilities.

75. The PACE recommends that Member States:

- ensure that the right to equal pay for work of equal value is enshrined in their domestic legislation, if this is not already the case; that employers are obliged to respect this right (and incur penalties if they do not) and that employees can have recourse to the judicial process to pursue their claims with regard to this right, without incurring risks to their employment;
- collect reliable and standardised statistics on women’s and men’s wages, not only on the basis of gross hourly earnings, but also over the lifecycle;
- promote fair job classification and remuneration systems, including in the private sector,
- aim to increase women’s labour market participation rate and work against the pitfall of part-time work by encouraging all measures seeking to improve the care of children and the elderly outside the home, and a more equal sharing of care and household responsibilities between women and men;
- follow the Norwegian and Icelandic models, and a recent French initiative, which require that a minimum of 40% of members of certain companies boards be female, as an enabling factor.

76. The PACE calls on the social partners, employers’ associations and trade unions, to respect and defend the right to equal pay for work of equal value, *inter alia* by promoting and adopting fair and transparent job classification systems and wage scales.

77. In its Resolution 1921(2013) Gender equality, reconciliation of private and working life and co-responsibility the PACE observed that although progress has been made along the path towards gender equality, a traditional division of roles between women and men remains widespread in Europe.

3. European Court of Human Rights (ECtHR)

78. Article 14 (prohibition of discrimination) of the European Convention on Human Rights of 4 November 1950 provides:

Article 14

“The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

79. In *Konstantin Markin v. Russia* - Application No. 30078/06, Grand Chamber, judgment of 22 March 2012, the Court has pointed out that:

“127... [T]he advancement of gender equality is today a major goal in the member States of the Council of Europe and very weighty reasons would have to be put forward before such a difference of treatment could be regarded as compatible with the Convention ... In particular, references to traditions, general assumptions or prevailing social attitudes in a particular country are insufficient justification for a difference in treatment on grounds of sex.”

4. Commissioner for Human Rights

80. In his end-of-the-year statement (December 2017) the Commissioner for Human Rights, Nils Muižnieks, noted that:

“Gender equality in employment is still a distant promise in Europe.” (...)

Women in Europe effectively worked without pay during the last two months in comparison to men. In addition, they continued to face underrepresentation in decision-making bodies and positions. This is a gross injustice and a human rights violation. European states must tackle it much more forcefully than has been the case so far.

Although the situation varies from country to country, it is clear that women suffer everywhere on our continent from unequal treatment and opportunities in the workplace. It would be wrong to believe that this situation is the result of employment dynamics only. In reality, discrimination against women, be it direct or indirect, in this sphere of life results from deep-rooted societal attitudes that keep women in a subordinate role. Tackling this problem therefore requires a comprehensive approach from Council of Europe member states, from laws to be changed to political, cultural and economic measures to be implemented.”

81. In his position on women’s rights (2011), the Commissioner underlined that there are widespread and serious violations of the rights of women across Europe. With respect to women’s equality in the employment sector, there is a strong need to take steps to ensure that women have equal opportunities in the labour market at all levels, including senior and managerial-level positions, and that the principle of “equal pay for equal work” becomes a reality.

82. Wages in the private sector are often governed by collective agreements between social partners, without much room for state intervention. However, governments should step in and define the frameworks within which negotiations are possible. In order to ensure gender neutral job evaluation and grading systems, they can, for instance, specify the rules for applying the principle of equal pay for equal work between different sectors of employment. Authorities could also make use of awareness raising measures in the private sector, such as providing information to employers, employees and the public about their rights and duties.

B – United Nations

1. UN Convention on the Elimination of all forms of Discrimination (CEDAW) and its Committee

Gender pay gap

83. In its General Recommendation No. 1312 1989, the CEDAW defined in more detail the content of 'Equal remuneration for work of equal value' by recommending to the States Parties that:

"2. They should consider the study, development and adoption of job evaluation systems based on gender-neutral criteria that would facilitate the comparison of the value of those jobs of a different nature, in which women presently predominate, with those jobs in which men presently predominate, and they should include the results achieved in their reports to the Committee on the Elimination of Discrimination against Women;

3. They should support, as far as practicable, the creation of implementation machinery and encourage the efforts of the parties to collective agreements, where they apply, to ensure the application of the principle of equal remuneration for work of equal value."

Women on decision-making boards in enterprises

84. The CEDAW has also criticised the (under-)representation of women in decision-making bodies in enterprises. Although it has not (yet) provided a 'General Recommendation' on this issue, it has assessed the issue in these 'Concluding Observations': Estonia (2016)²⁹; Slovakia (2015); Spain (2015); Denmark (2015)¹⁶.

2. International Covenant on Economic, Social and Cultural Rights (ICESCR) and the Committee on Economic, Social and Cultural Rights

85. In its General Comment No. 23 concerning Article 7, ICESCR defined in more detail the content of para. (a)(i) as follows:

"11. Not only should workers receive equal remuneration when they perform the same or similar jobs, but their remuneration should also be equal even when their work is completely different but nonetheless of equal value when assessed by objective criteria. This requirement goes beyond only wages or pay to include other payments or benefits paid directly or indirectly to workers. [...]

12. The extent to which equality is being achieved requires an ongoing objective evaluation of whether the work is of equal value and whether the remuneration received is equal.

13. Objective job evaluation is important to avoid indirect discrimination when determining rates of remuneration and comparing the relative value of different jobs."

3. Principles relating to the Status of National Institutions (The Paris principles)

86. Adopted by the General Assembly resolution 48/134 of 20 December 1983, the Paris principles set out six main criteria that National Human Rights Institutions should meet: a) Mandate and competence: a broad mandate, based on universal human rights norms and standards; b) Autonomy from Government; c) Independence guaranteed by statute or Constitution; d) Pluralism; e) Adequate resources; and f) Adequate powers of investigation

C – International Labour Organisation

ILO Equal Remuneration Convention 100:

87. In its General Survey 2012, the ILO Committee on the Application of Conventions and Recommendations (CEACR) described the requirements which derive from Convention No. 100 in relation to the gender pay gap as follows:

Pay differentials

“668. Pay differentials remain one of the most persistent forms of inequality between women and men. Although explicit policies of providing lower pay for women have for the most part been relegated to the past, the gender pay gap remains one of the most obvious examples of structural gender discrimination

669. The continued persistence of significant gender pay gaps requires that governments, along with employers’ and workers’ organizations, take more proactive measures to raise awareness, make assessments, and promote and enforce the application of the principle of equal remuneration for men and women for work of equal value. Collecting, analysing and disseminating this information is important in identifying and addressing inequality in remuneration. [...]“

Equal value

“673. The concept of “work of equal value” is fundamental to tackling occupational sex segregation in the labour market, which exists in almost every country, as it permits a broad scope of comparison, including, but going beyond equal remuneration for “equal”, “the same” or “similar” work, and also encompasses work that is of an entirely different nature, which is nevertheless of equal value.”

Comparing jobs, determining value

“695. The concept of “equal value” requires some method of measuring and comparing the relative value of different jobs. There needs to be an examination of the respective tasks involved, undertaken on the basis of entirely objective and non- discriminatory criteria to avoid the assessment being tainted by gender bias. While the Convention does not prescribe any specific method for such an examination, Article 3 presupposes the use of appropriate techniques for objective job evaluation, comparing factors such as skill, effort, responsibilities and working conditions.”

D – European Union

1. Primary Law

88. After the entry into force of the Treaty of Lisbon in 2009 several sources are relevant:

89. The Treaty on European Union itself:

Article 2

“The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.”

90. The Treaty on the Functioning of the European Union (TFEU):

Article 830

“In all its activities, the Union shall aim to eliminate inequalities, and to promote equality, between men and women.”

Article 157

“1. Each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied.

2. For the purpose of this Article, ‘pay’ means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his employment, from his employer.

Equal pay without discrimination based on sex means:

(a) that pay for the same work at piece rates shall be calculated on the basis of the same unit of measurement;

(b) that pay for work at time rates shall be the same for the same job. [...]”

91. The Charter of Fundamental Rights of the European Union (CFREU), legally binding on all EU Member States when they apply EU law, by virtue of Article 6(1)(3) of the Treaty on the European Union (TEU), provides:

Article 21 - Non-discrimination

“1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited. [...]”

Article 23 - Equality between women and men

“Equality between women and men must be ensured in all areas, including employment, work and pay.

The principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex.”

2. Secondary law

92. Directive 2006/54/EC (the Equal Pay directive) of 5 July 2006, Chapter 1 (‘Equal pay’) of Title II, Article 4 provides:

“Article 4 - Prohibition of discrimination

For the same work or for work to which equal value is attributed, direct and indirect discrimination on grounds of sex with regard to all aspects and conditions of remuneration shall be eliminated.

In particular, where a job classification system is used for determining pay, it shall be based on the same criteria for both men and women and so drawn up as to exclude any discrimination on grounds of sex.”

93. Also, the Directive requires that the Member States shall ensure that all employment-related arrangements, including provisions in individual or collective agreements and contracts, internal company rules, rules governing independent professions and rules governing employees’ and employers’ organisations contradicting the principle of equal pay shall be or may be declared null and void or may be amended (Article 23).

94. Directive 2008/104/EC on temporary agency work requires that the basic working and employment conditions, including pay, of temporary agency workers shall be, for the duration of their assignment at a user undertaking, at least those that would apply if they had been recruited directly by that undertaking to occupy the same job. In addition, the rules on equal treatment between men and women in force at a user undertaking must be applicable to temporary agency workers.

95. The Capital Requirements Directive (2013/36/EU) legislation addresses directly the female under-representation:

“[*Recital*] 60. [...] To facilitate independent opinions and critical challenge, management bodies of institutions should therefore be sufficiently diverse as regards age, gender, geographical provenance and educational and professional background to present a variety of views and experiences. Gender balance is of particular importance to ensure adequate representation of population. In particular, institutions not meeting a threshold for representation of the underrepresented gender should take appropriate action as a matter of priority. [...] Therefore, diversity should be one of the criteria for the composition of management bodies [...]”

Article 88

“[...] 2.(a) [...] Furthermore, the nomination committee shall decide on a target for the representation of the underrepresented gender in the management body and prepare a policy on how to increase the number of the underrepresented gender in the management body in order to meet that target. [...]”

Article 91 [...]

“10. Member States or competent authorities shall require institutions and their respective nomination committees to engage a broad set of qualities and competences when recruiting members to the management body and for that purpose to put in place a policy promoting diversity on the management body.”

3. European Pillar of Social Rights

96. The European Pillar of Social Rights was proclaimed and signed in November 2017 by the Council of the European Union, the European Parliament and the European Commission during the Göteborg Social Summit for fair jobs and growth.

97. Principle No. 2 of the Pillar refers to:

Gender equality

“a. Equality of treatment and opportunities between women and men must be ensured and fostered in all areas, including regarding participation in the labour market, terms and conditions of employment and career progression.

b. Women and men have the right to equal pay for work of equal value.”

98. The gender pay gap is one of the three indicators for gender equality included in the social scoreboard that the Commission uses to monitor the implementation of the Pillar.

4. Other institutions

a) European Commission

99. See Recommendation of the European Commission on strengthening the principle of equal pay between men and women through transparency (2014/124/EU). Also, in its report to the European Parliament and the Council (COM/2013/0861) on the application of Directive 2006/54/EC the Commission concluded:

“Although estimates vary as to how much of the total gender pay gap arises from pay discrimination as prohibited by Article 157 TFEU and Article 4 of the Directive, it appears to be consensual that a considerable part of it can be traced back to discriminatory practices.

Proposed 40% objective for the representation of women on Boards – under Gender balance in decision-making positions.”

b) Court of Justice of the European Union

100. The issue of equal pay raises complex legal questions, as demonstrated by the case law before the CJEU. The main findings of the CJEU in this regard are set out below.

101. Article 157(1) of the TFEU and Article 4 of Directive 2006/54/EC provide for the elimination of all discrimination on grounds of sex with regard to all aspects and conditions of remuneration for the same work or for work to which equal value is attributed (see cases C-96/80, EU:C:1981:80, Jenkins, paragraph 22); C-237/85, EU:C:1986:277, Rummler, paragraph 11; C-17/05, EU:C:2006:633, Cadman, paragraphs 27-29).

102. The scope of Article 157(1) TFEU and Directive 2006/54/EC covers not only direct but also indirect discrimination (see to that effect, cases Jenkins, op. cit. paragraphs 14 and 15; C-285/02, EU:C:2004:320, Elsner-Lakeberg, paragraph 12; Cadman, op. cit., paragraph 30).

103. The fundamental principle laid down in Article 157(1) of the Treaty and elaborated by the Directive precludes unequal pay between men and women for the same job or work of equal value, whatever the mechanism which produces such inequality (see, for example, C-381/99, EU:C:2001:358, Brunnhofer, paragraph 30).

The source of discriminatory pay may be: a contract of employment, the legislative provisions, collective agreement (C-400/93, EU:C:1995:155, Royal Copenhagen paragraph 45) or pay provided on a voluntary basis (4557/93, EU:C:1996:33, Lewark paragraph 21,). The source of unequal pay must be unique or single, because if the differences identified in the pay conditions of workers performing the same work or work of equal value cannot be attributed to a single source, there is nobody which is responsible for the inequality and which could restore equal treatment. Such a situation does not come within the scope of Article 157(1) TFEU (Lawrence, C-320/00, EU:C:2002:498, paragraph 18 ; Allonby, C-256/01, EU:C:2004:18, paragraph 46).

104. The concept of equal pay includes any consideration paid immediately or in the future (see, for example, Barber, C-262/88, EU:C:1990:209, point 12 ; Bilka-Kaufhaus, 170/84, EU:C:1986:204, paragraph 15 ; Seymour-Smith, C-167/97, EU:C:1999:60, paragraph 23 ; Garland, 12/81, EU:C:1982:44, paragraph 5 ; Brunnhofer, *op. cit.*, paragraph 34). The concept of pay also includes payments which a worker receives from an employer even not performing any work provided in their contracts of employment (Gillespie, C-324/93, EU:C:1996:46, paragraph 13 ; Bötzel, C-360/90, EU:C:1992:246, paragraph 15 ; Rinner-Kühn, 171/88, EU:C:1989:328, paragraph 7). The concept of pay does not include statutory social security benefits (Defrenne, 80/70, EU:C:1971:55, paragraph 7).

105. The terms 'the same work', 'the same job' and 'work of equal value' are entirely qualitative in character in that they are exclusively concerned with the nature of the work actually performed (see Macarthys, 129/79, EU:C:1980:103, paragraph 11 ; Rummler, *op. cit.* , paragraphs 13 et 23 ; Brunnhofer, *op. cit.*, paragraph 42). In order to determine whether the work being done by different persons is the same, it is necessary to ascertain whether, taking account of a number of factors such as the nature of the work, the training requirements and the working conditions, those persons can be considered to be in a comparable situation (see to that effect C-400/93 Royal Copenhagen, *op.cit.*, paragraphs 32 and 33).

106. As regards the method to be used for comparing the pay of the workers concerned in order to determine whether the principle of equal pay is being complied with genuine transparency permitting an effective review is assured only if that principle applies to each aspect of remuneration granted to men and women, excluding any general overall assessment of all the consideration paid to workers (C-285/02 Elsner-Lakenberg, *op. cit.*, paragraph 13).

107. Pay systems must be based on criteria which are of importance for the performance of specific tasks entrusted to the employee' (C-109/88 Danfoss, paragraph 22).

108. The EU Member States are obliged to take the necessary measures to enable all persons who consider themselves wronged by discrimination, to pursue their claims by judicial process. Such an obligation implies that the measures in question should be sufficiently effective to achieve the objective pursued by the directive and should be capable of being effectively relied upon by the persons concerned before national courts (see judgments in C-271/91 Marshall, C-271/91, UE:C:1993:335, paragraph 22 et Paquay, C-460/06, EU:C:2007:601, paragraph 43). EU law does not prescribe a specific measure to be taken by Member States, however, the measures appropriate

to restore genuine equality of opportunity must guarantee real and effective judicial protection and have a genuine deterrent effect on the employer (see judgments in, von Colson et Kamann, 14/83, UE:C:1984:153, paragraphs 23 et 24 ; Draehmpaehl, C-180/95, EU:C:1997:208, paragraph 25 ; Paquay, C-460/06, EU:C:2007:601, paragraph 45).

109. Whenever there is evidence *prima facie* of discrimination, it is for the employer to prove that the practice at issue is justified by objective factors unrelated to any discrimination based on sex (C-17/05 Cadman, paragraph 31). However, it is clear from the case law of the CJEU that the burden of proof must shift when this is necessary to avoid depriving workers who appear to be the victims of discrimination of any effective means of enforcing the principle of equal pay (C-381/99 Brunnhofer, *op. cit.*, paragraph 53).

110. According to CJEU case law, where financial compensation is the measure adopted in order to achieve the objective of restoring genuine equality of opportunity, it must be adequate in that it must enable the loss and damage actually sustained as a result of the discriminatory dismissal to be made good in full in accordance with the applicable national rules (see judgments in C-271/91 Marshall, *op. cit.*, paragraph 26 ; Paquay, *op. cit.*, paragraph 46 ; Camacho, C-407/14, EU:C:2015:831, paragraph 33).

111. National law may not limit the time-period for a claim on arrears of pay, if an employee did not have access to the information the level of pay for a colleague of an opposite sex performing the same work (Levez, C-326/96, EU:C:1998:577, paragraph 34). An employer who has not provided the information on the level of pay for work performed by a colleague of opposite sex cannot reasonably rely on the principle of legal certainty (C-326/97 Levez, *op. cit.*, paragraphs 31-33).

THE LAW

PRELIMINARY CONSIDERATIONS

112. The right of workers to a fair remuneration is at the heart of the Charter's guarantee of conditions of work that are reasonable and ensure a fair reward for labour performed. Inadequate pay creates poverty traps, which may affect not just individuals and their families, but whole communities. Inadequate pay is also an obstacle to full participation in society and thus a marker for social exclusion. More broadly, pay which lags significantly behind average earnings in the labour market are incompatible with social justice.

113. One of the constituent elements of fair remuneration is the right of women and men to equal pay for equal work or work of equal value. The right of women and men workers to equal pay has a long history in the Charter. Already in the 1961 Charter, under Article 4§3, the States Parties undertook to recognise the right to equal pay, thus going beyond mere promotion of the principle and conferring an absolute character on this provision (Conclusions II (1971)).

114. Article 20 of the Charter (and Article 1 of the 1988 Additional Protocol) guarantees the right to equal opportunities and equal treatment in matters of employment and occupation, without discrimination on the grounds of gender. It embodies the same guarantee of equal pay as Article 4§3, and further encompasses other aspects of the right to equal opportunities and equal treatment in matters of employment, such as access to employment, vocational guidance and career development.

115. All the States Parties to the Charter having accepted Articles 4§3 and/or 20 are aware that this right has to be practical and effective, and not merely theoretical or illusory (International Commission of Jurists (ICJ) against Portugal, Complaint No. 1/1998, decision on the merits of 9 September 1999, §32).

116. The Committee notes that UWE also invokes Article 1 of the Charter concerning the right to work. However, it considers that in accordance with its well-established case law the assessment in substance more appropriately belongs under Articles 4§3 and 20 of the Charter. As regards Article E, which is also invoked by UWE, it is clear from the very wording of Articles 4§3 and 20 of the Charter that their scope includes the prohibition of discrimination. The Committee therefore considers that it is not necessary to examine whether there has been a violation of Article E in conjunction with Articles 4§3 and 20 of the Charter.

117. Despite the obligations deriving from the Charter and other international and European instruments to recognise and ensure the right to equal opportunities and equal pay for women and men for equal work or work of equal value, the gender pay gap still persists today. The available statistics reveal both downward and upward trends in gender pay gap indicators in European States as well as insufficient results of States' efforts to ensure a balanced representation of women in decision-making positions.

118. In this respect, the Committee draws attention to the main statistical indicators which it will take into account in the examination of the instant complaint. Firstly, the unadjusted gender pay gap, which is defined as the difference between the average gross hourly earnings of men and women expressed as a percentage of the average gross hourly earnings of men (indicator published by Eurostat). Secondly the gender overall earnings gap measures the impact of three combined factors - the average hourly earnings, the monthly average of the number of hours paid before adjustment for part-time work and the employment rate - on the average earnings of all women of working age, whether employed or not, compared to men (also published by Eurostat). Finally, with respect to the representation of women in decision-making positions, the Committee will rely mainly on statistics on the share of women on supervisory boards of the largest publicly listed companies in a country (indicator published by the European Institute for Gender Equality).

119. The Committee wishes to emphasise that gender pay gap indicators do not measure discrimination as such, rather they reflect a combination of differences in the average pay of women and men. The unadjusted gender pay gap, for example, covers both possible discrimination between men and women (one component of the “unexplained” pay gap) and the differences in the average characteristics of male and female workers (the “explained” pay gap). Differences in the average characteristics result from many factors, such as the concentration of one sex in certain economic activities (sectoral gender segregation) or the concentration of one sex in certain occupations (occupational gender segregation), including the fact that too few women occupy the better paid decision-making positions (vertical segregation).

120. The situation concerning the gender pay gap as well as the diversity of the solutions that the States have proposed to promote women’s right to equal pay, together with a varying degree of success in achieving the ultimate goal – guaranteeing gender equality in practice - have prompted the Committee to take a fresh look at the provisions of the Charter with a view to analysing and clarifying the State obligations arising from in Articles 4§3 and 20 in the light of the current state of international and European law and practice in the area.

121. In this respect, the Committee wishes to recall its approach to the interpretation of the Charter. Thus, in interpreting the provisions of the Charter, it has to take into account not only current conditions and relevant international instruments, but also emerging new issues and situations. In other words, the Charter is a living instrument and therefore the Committee interprets the rights of the Charter in a dynamic manner having regard to present day requirements.

122. In the light of the above considerations and taking into account the allegations presented and the information submitted by the parties as well as the information received from other sources, the Committee will consider the issues at stake in the following order:

(a) First, the Committee will assess UWE’s allegations concerning the respect for the right of equal pay for equal work or work of equal value from two angles:

- The obligations of the State as regards the recognition and the enforcement of the right to equal pay under Articles 4§3 and 20.c of the Charter. These obligations include the following:
 - recognition in legislation of the right to equal pay for equal work or work of equal value;
 - ensuring access to effective remedies when the right to equal pay for equal work or work of equal value has not been guaranteed;
 - ensuring pay transparency and enabling job comparisons;

- maintaining effective equality bodies and other relevant institutions;
- The obligations of the State to adopt measures to promote the right to equal pay for equal work or work of equal value, under Article 20.c of the Charter. These obligations include the following:
 - collection of reliable and standardised data with a view to measuring the gender pay gap;
 - adoption of measures to promote equal opportunities through gender mainstreaming.

(b) Secondly, the Committee will assess the issues arising in relation to the representation of women in decision-making positions within private companies under Article 20.d of the Charter, according to which States Parties have undertaken to ensure and promote the right to equal opportunities and equal treatment in the field of career development, including promotion.

I. ALLEGED VIOLATION OF ARTICLES 4§3 AND 20.C OF THE CHARTER AS REGARDS RECOGNITION AND ENFORCEMENT OF THE RIGHT TO EQUAL PAY

123. Article 4§3 and 20 of the Charter read as follows:

Article 4 – Right to a fair remuneration

Part I: “All workers have the right to a fair remuneration sufficient for a decent standard of living for themselves and their families.”

Part II: “With a view to ensuring the effective exercise of the right to a fair remuneration, the Parties undertake:

...

3. to recognise the right of men and women workers to equal pay for work of equal value;

...

The exercise of these rights shall be achieved by freely concluded collective agreements, by statutory wage-fixing machinery, or by other means appropriate to national conditions.”

Article 20 – Right to equal opportunities and equal treatment in employment and occupation without sex discrimination

Part I: “All workers have the right to equal opportunities and equal treatment in matters of employment and occupation without discrimination on the grounds of sex.”

Part II: “With a view to ensuring the effective exercise of the right to equal opportunities and equal treatment in matters of employment and occupation without discrimination on the grounds

of sex, the Parties undertake to recognise that right and to take appropriate measures to ensure or promote its application in the following fields:

...

c. terms of employment and working conditions, including remuneration; ...”

A – Arguments of the parties

1. The complainant organisation

Recognition of the right to equal pay in legislation

124. UWE refers to all the adopted laws and in force in France, a selection of which has been reproduced in the domestic law selection of this decision. Although there are many provisions on gender equality, UWE alleges that they are not applied.

125. UWE considers that the Constitution and statutes prohibit all discrimination between the sexes and provides that equal treatment must be secured. However, it alleges that the information provided by France still merely takes the form of a description of the legal and institutional framework without further explanation on its applicability and the interpretation given by courts.

Effective remedies

126. According to UWE, the costs of legal proceedings for victims of discrimination and the limitation periods which apply in wage disputes make such proceedings uncertain and expensive.

127. UWE argues that the relevant labour court will require an employee to allege legal and above all substantive evidence in support of her arguments. Any request by the employee for an expert opinion or the production of documents by the opposing party will be refused, as the courts practically never make use of their power to order documents to be produced or even to appoint a court rapporteur to prepare the case for judgment, which is less costly than commissioning an expert report. Furthermore, the courts systematically point out that an investigative measure may not be ordered to make up for the failings of one of the parties.

128. The last obstacle is the prescription period in wage disputes, which is now only three years under Article L 3245-1 of the Labour Code.

Pay transparency and job comparisons

129. UWE alleges that although employers' decisions on wages may no longer be discretionary, premiums or specific bonuses which are not based on predetermined objective criteria may still be granted by employers as they choose (Cass. Soc., 10 October 2012, No. 11–15296). Basic wages and related payments are covered by the principle of equality (Cass. Soc., 5 January 2001, No. 99-42772). However, in practice, it is not that difficult to set up strategies to bypass the requirement.

130. UWE draws attention to a judgment of the Court of Cassation in 2009, in which it was held that for it to be established that discrimination exists, it was not always necessary to compare the situation with that of other workers, meaning that there was very broad scope for comparison including, where appropriate, the use of hypothetical comparators (Cass. Soc., 10 November 2009, No. 07-42849).

131. According to UWE the Court of Cassation has consistently held, with regard to comparisons, that application of the equal pay rule is confined to companies which are distinct legal persons (Cass. Soc., 12 July 2006 No. 04-46 104). The principle does not apply to comparisons:

- between employees working in separate establishments belonging to the same company (Cass. Soc., 7 April 2004 No. 01-42758);
- between employees working for the same group (Cass. Soc., 20 November 2012, No. 11-20.41);
- between employees working for the same economic and social unit (Cass. Soc., 30 May 2012, No. 11-11387);
- between employees seconded from another body (Cass. Soc. 6 July 2005 No. 03-43074).

132. This represents a large number of exceptions to the rule, seriously undermining its effectiveness. The case law has evolved, moving from identical functions to similar ones. Similarly, diplomas may now be comparable (Cass. Soc., 11 July 2007, No. 05-45324). Provided that the functions performed by each of the persons concerned are of equal value, the principle of “equal pay for equal work” applies even if, in practice, these functions are different (Cass. Soc., 10 July 2013 No. 12-13790, 25 March 2015, No. 14-10149; 4 March 2015, No. 13-20631). This is a promising step forward but none of it has addressed the problem when it comes to the Court of Cassation’s demands concerning the burden of proof, which still lies entirely with the worker.

Equality bodies and other institutions

133. UWE states that the Defender of Rights is a national institution for the protection and promotion of rights, set up in 2011, to which cases may be referred free of charge by anyone who feels that they have been discriminated against. His/her main task is to defend people whose rights have been infringed in the area of equality, particularly with regard to discrimination. However, there is little in common between the way in which the Defender of Rights is presented in the report and the opinion issued by EQUINET or the actual circumstances on the ground. The Defender of Rights will usually only take action if presented with a full case file, in which all the evidence has already been gathered.

134. Before the Defender of Rights, there was the High Authority against Discrimination and for Equality (HALDE), whose actions caused much discontent among businesses. UWE claims that it was decided politically to replace HALDE by the Defender to curb its impact.

135. The Labour Inspectorate supervises the activities of private companies. It is accountable to the General Delegation for Employment and Vocational Training (DGEPF) of the Ministry of Labour, which is arranged into decentralised departments at regional level as directorates for enterprise, competition, consumer affairs, labour and employment. Labour inspectors are authorised to report offences and issue official notices to comply.

2. The respondent Government

Recognition of the right to equal pay in legislation

136. The Government notes that the complainant organisation does not dispute the fact that France has equipped itself with an exhaustive body of legislation on non-discrimination and equal pay for women and men. UWE also recognises that the French state has adopted several laws on these issues. The French state has most certainly written the principle of non-discrimination and the right of women and men to equal pay for equal work into its domestic law.

137. However, the Government notes that while the complainant organisation does not question the existence of domestic legislation establishing the principle of equal pay for women and men, it does question whether it is being applied in practice and takes issue in particular with the French courts' interpretation of this legislation. It argues for example that this case law interpretation weakens the impact of the principle, firstly because employers are granted the possibility of awarding benefits to workers at their own discretion, and secondly because its scope is limited to workers working for the same company. The Government considers this argument to be flawed.

138. With regard to the forms of remuneration which are left to employers' discretion, the Government points out that these are covered by the domestic law provisions prohibiting discrimination, on the same basis as fixed remuneration. For instance, Article L. 3221-3 of the Labour Code provides that "Remuneration within the meaning of this chapter is formed by the ordinary, basic or minimum wage or salary and any other considerations or additional emoluments payable directly or indirectly, whether in cash or in kind, by the employer to the worker and arising out of the worker's employment". The Government also emphasises that the Court of Cassation has stated that while employers may grant particular advantages to some workers, this is on the condition that all workers of a company finding themselves in the same situation may enjoy the advantage granted in this manner, and that the rules on the granting of such advantages are predetermined and verifiable (Cass. Soc., 18 May 1999, Nos. 98-40.201 and 98-40.202; Cass. Soc. 18 January 2000, No. 98-44.745). Lastly, the Court of Cassation has held that while employment contracts may provide for the award of a bonus at the employer's discretion in addition to the employee's fixed pay, the discretionary nature of this bonus does not allow employers to treat workers in a comparable situation with regard to the advantage in question any differently (Cass. Soc., 10 October 2012, No. 11-15.296).

139. Therefore, the national courts' interpretation of the concept of remuneration satisfies the requirements of Articles 4§3 and 20 of the revised Charter.

Effective remedies

140. The Government recalls that the Committee considers that for the principle of equal pay to be effective, domestic law must provide for appropriate and effective remedies in the event of allegations of wage discrimination and a shift in the burden of proof away from the complainant. The Government points out that in French law, civil and criminal remedies and penalties are provided for in the event of breaches of the principle of equal pay for women and men for work of equal value.

141. With regard to civil remedies and penalties, the labour court has jurisdiction to hear the disputes which can arise from all employment contracts subject to the provisions of the Labour Code between employers or their representatives and their workers. Workers subject to discrimination may therefore bring proceedings before it.

142. With regard to criminal remedies and penalties, the Criminal Court may, after hearing the allegations of a victim or a trade union, impose a one-year prison sentence and/or a fine of €3,750 on employers who do not respect their obligation to award equal pay to women and men for the same work or work of equal value (Articles L. 1144-2 and L. 1146-1 of the Labour Code). By way of an additional penalty, the court may also order employers who are found guilty to display the judgment at their own cost and to have it published, in full or in the form of extracts, in newspapers chosen by the court.

143. Domestic law has also set up a penalty for companies with fifty workers or more which are not covered by an agreement on gender equality at work arising from labour negotiations or the annual action plan referred to in paragraph 16 of the Government's submissions on the merits. Under Article L. 2242-8 of the Labour Code, such companies must pay a fine of up to 1% of the remuneration and benefits paid to workers and persons treated as such during periods when they are not covered by such an agreement or action plan. Any such fines collected are paid into an old age solidarity fund.

144. The Government notes that as of 15 December 2016, 43.6% of companies subject to the obligation were covered by a company-level agreement. Broken down according to company size, the coverage figures were as follows:

- 92% of companies with 1,000 workers or more;
- 68% of companies with 299 to 999 workers;
- 38% of companies with 50 to 299 workers.

145. The Government notes that in 2016 the average penalty is 0.5% of these companies' payroll, amounting to total penalties of €613,500. Of the 116 companies that have been fined, 96 were fined for the lack of an agreement or action plan and 20 were fined for non-compliance.

146. Lastly, the Government points out that in 34% of the cases in which penalties were imposed, the situation in the companies concerned has been brought into line with the regulations.

147. With regard to the burden of proof, the Government notes that the Committee has asserted that Article 20 of the revised Charter implies a shift in the burden of proof away from workers who believe that they have been the victims of a discriminatory measure. The Government points out that in accordance with this interpretation, Article L. 3221- 8 of the Labour Code provides that the rules of evidence set out in Article L. 1144-1 must be applied in discrimination disputes. Under this article, it is for workers who allege an infringement of the principle of equal pay to present the court with evidence of facts which may constitute unequal pay and it is for employers to produce evidence of objective factors justifying this difference in treatment.

148. With regard to procedural measures (for establishing or preserving evidence), the Government points out that the national legislation includes many legal tools, applying to labour court proceedings, enabling plaintiffs to obtain key documents for the initiation and support of their discrimination proceedings. In addition, labour court proceedings were comprehensively reformed as a result of the adoption of Decree No. 2016-660 of 20 May 2016 on the labour court system and the judicial processing of labour disputes. Under Articles R. 1454-1 et seq. of the Labour Code, courts may require parties to provide any documents or justifications capable of clarifying the facts for the labour court and draw all the appropriate consequences from the abstention of parties or their refusal to communicate. They may also appoint a rapporteur with authority to hear any person, carry out all relevant investigative measures and order all measures necessary for the preservation of evidence or disputed objects.

149. The Government also notes that while UWE claims that Labour Courts do not make proper use of these legal tools, it fails to provide any concrete evidence or case law in support of its allegations. The Government argues that the case law of the Court of Cassation is actually in favour of procedural measures in labour disputes. For instance, in a judgment of 4 February 2009, it rejected an appeal by an employer who considered that the trial court had infringed Article 146 of the Code of Civil Procedure with regard to procedural measures ordered in the course of a trial, by ordering an interlocutory expert opinion without finding that the evidence submitted by the employee made it probable that there had been discrimination. In another case concerning a procedural measure ordering that, before the proceedings began, the employer should communicate the relevant employment contracts, pay slips, bonus calculations and tables of advancements and promotions, the Court of Cassation found that the argument put forward by the employer that there was a need to respect the employee's personal life and protect trade secrets did not in themselves constitute any obstacle to the application of this provision. It also considered that the preliminary discovery measures provided for in Article 145 of the Code of Civil Procedure were not confined to preserving evidence but could also be used to establish evidence (Cass. Soc., 19 December 2012, Nos. 10-20.526 and 10-20.528). For instance, workers could demand a procedural measure to establish evidence supporting a presumption of discrimination even before any proceedings on the merits had been brought, provided that they demonstrated that there was a legitimate reason for this, and the courts could not object on the basis of Article 146 of the Code of Civil Procedure on procedural

measures ordered in the course of a trial, which is not applicable when an application is made under Article 145 of the Code (Enlarged Court, 7 May 1982, No. 79-11.974).

150. It is clear therefore that domestic legislation provides legal tools capable of overcoming the difficulties of establishing evidence of discrimination and that the relevant case law interprets these tools in a manner that makes it possible to implement the principle of equality effectively.

151. Lastly, with regard to the cost of proceedings, the Government points out that Law No. 77-1468 of 30 December 1977 establishing free judicial proceedings before the civil and administrative courts asserts the principle that justice is free of charge. This principle applies to all proceedings, not just labour court proceedings. As a result, parties are required to cover the costs only of third parties to the proceedings, in other words persons who are neither judges nor members of the court registry. Furthermore, the Government notes that domestic legislation has set up legal tools designed to offset any financial difficulties for parties and prevent any financial burden that would be unfair for any of the parties. In this connection, labour court proceedings do not require legal representation at first instance, and this tends to reduce lawyers' fees (Article R. 1453-2 of the Labour Code). Under the relevant legislation, workers may be assisted or represented by another employee or a trade union representative (Article D. 1453-2-1 of the Labour Code). Any costs that are not covered cannot be considered to impede the proper protection of workers who are victims of discrimination.

Pay transparency and job comparisons

152. The Government notes that the Court of Cassation has built up a body of case law on appropriate comparison frameworks, making it possible to apply the principle of wage equality beyond the exclusive framework of companies as distinct legal entities. The Government points out that to assess the existence of differing treatment, it is necessary to compare the situation of persons who consider themselves the victims of discrimination with that of another group of persons and hence to establish an appropriate frame of comparison. This depends on the existence of a single source – and not necessarily a common employer – delimiting an entity responsible for the breach of the principle and capable of remedying it. Therefore, in accordance with this interpretation of the Court of Justice of the European Union, and contrary to what the complainant organisation claims in its complaint, the Court of Cassation has applied the principle of equal pay to workers working in different establishments belonging to the same company and workers working for the same economic and social unit.

153. With regard to establishments belonging to the same company, the Government points out that Article L. 3221-5 of the Labour Code provides that “pay differences between establishments of a single company for the same work or work of equal value cannot be founded on the sex of the workers of these establishments”. The judgment of the Court of Cassation of 7 April 2004 conceded that an establishment could apply specific pay arrangements provided that the establishment had distinctive features which justified this difference in treatment (Cass. Soc., 7 April 2004, No. 01-42.758; Cass. Soc., 24 November 2009, No. 08-41.097). Under this case law, employers therefore had to show what features distinguished the establishment in question from the company's other establishments, thus enabling the principle of equality to be reconciled with a principle of individualisation.

154. Subsequently, and in keeping with this decision, the Court of Cassation singled out two different situations: that in which the difference in treatment is the result of a unilateral decision by an employer and that in which it stems from an establishment-level agreement negotiated and signed by representative trade unions. If the difference in treatment stems from a unilateral decision by the employer, the employer must show that it is based on objective reasons, whose true nature and relevance will be assessed by the court. Therefore, in this situation, the principle of wage equality applies to different establishments belonging to the same company, and differences in treatment are only possible if the employer justifies them through materially verifiable and relevant reasons that are objective and hence external to the individual, as reviewed by the trial court. If the difference in treatment arises from an establishment-level agreement negotiated and signed by representative trade unions, the Court of Cassation will presume that it complies with the principle of equality, unless the person disputing it demonstrates that it is unconnected with any work-related consideration. Accordingly, in this situation, there is a presumption of compliance with the principle of wage equality, which is accounted for by the legitimacy of representative trade unions within establishments. It should be said that by applying a rule of simple presumption, the Court of Cassation recognises the discretion granted to the social partners when implementing the principle of equal treatment. However, the Court of Cassation does point out that this discretion has its limits. Workers can always overturn this presumption if they can demonstrate that the difference in treatment to which they object is unconnected with any work-related consideration. In such circumstances it is for the court to decide on the balance to be struck between the freedom of negotiation of the social partners and the respect for the principle of equality that they must show in the course of such negotiations.

155. Lastly, the Court of Cassation has established that, unlike establishments which belong to a single company and hence a single legal person, economic and social units are made up of separate legal persons. However, a comparison can be made between the pay conditions of an employee and that of other workers in the same economic and social unit if these conditions are laid down by the law or a common collective agreement or if the work of these workers is carried out within the same establishment (Cass. Soc., 1 June 2005, No. 04-42.143; Cass. Soc., 30 May 2012, No. 11-11.387; Cass. Soc., 27 November 2013, No. 12-18.814).

156. In this way, submitting companies to the same body of rules makes it possible to set up an appropriate framework for comparison. On the other hand, the Court of Cassation does not apply the principle of equal pay to workers working for the same group (Cass. Soc., 20 November 2012, Nos. 11-20.341, 11-20.342, 11-21.558 and 11-21.559; Cass. Soc., 9 October 2013, No. 12-16.664), or between workers seconded from another body (Cass. Soc., 6 July 2005, No. 03-43.074). This is because there cannot be an appropriate framework for comparison in such cases, as several companies are involved, whose activities may be quite different, and which may be organised differently and covered by separate collective agreements.

Equality bodies and other institutions

157. The Government submits that, contrary to the complainant organisation's allegations concerning the Labour Inspectorate and the Defender of Rights, which are non-judicial control mechanisms on the provisions covering equal pay for women and men, they do effectively combat wage discrimination.

158. These bodies have additional powers and means of action to judicial mechanisms, which make for more effective protection of victims of discrimination. For instance, under Article L. 3221-9 of the Labour Code, labour inspectors or any other equivalent supervisory officials are charged, within their respective areas of responsibility and in liaison with criminal investigation officers and staff, with reporting infringements of the rules on equal pay for women and men for work of equal value.

159. Under Article L. 8112-1 of the Labour Code, labour inspectors are tasked with ensuring that the provisions of the Labour Code and other labour law provisions are applied. They are also tasked with supervising implementation of the stipulations of collective labour agreements meeting the requirements laid down in Part II, Book 2, and, in liaison with criminal investigation officers and staff, reporting infringements of these rules and stipulations. They are covered by a guarantee of independence in the exercise of their duties within the meaning of international conventions on labour inspection and have wide-ranging powers and means of action. They may, in particular, under Article L. 8113-5 of the Labour Code, demand to see any document or item of information helping to confirm facts capable of determining compliance with the provisions of the Labour Code and the Criminal Code on discrimination and the provisions of Articles L. 1142-1 and L. 1142-2 of the Labour Code on gender equality at work.

160. Article L. 2323-18 of the Labour Code also provides that information from the economic and social database on the comparative situation of women and men in the company and the agreement or the action plan for gender equality at work should be made available to labour inspectors, along with the opinion of the works council, within fifteen days of the works council meeting.

161. As to the Defender of Rights, this is an independent constitutional authority tasked with overseeing the protection of rights and freedoms and promoting equality, in accordance with Organic Law No. 2011-333 of 29 March 2011 on the Defender of Rights, which determines his/her jurisdiction and governs his/her activities. The Defender of Rights' task is to combat discrimination prohibited by the law and to promote equality. Cases may be referred to him/her by all persons who consider themselves the victim of direct or indirect discrimination prohibited by the law or by an international commitment duly ratified or approved by France, or by any association officially registered for at least five years on the date of the facts and proposing in its statutes to combat discrimination or assist the victims of discrimination, either jointly with the person alleging discrimination, or with that person's consent.

162. If the Defender of Rights finds that there has been discrimination, he/she may make any recommendation he/she considers capable of guaranteeing respect for the rights and freedoms of the injured party and remedying the problems brought to his/her notice and ensuring that they will not be repeated. He/she may also arrange the friendly settlement of disputes through a mediation process. Lastly, he/she may provide legal assistance for persons considering themselves victims of discrimination in preparing their file and helping them to identify which proceedings are best suited to their case, including those with an international dimension. The Defender of Rights does not have any judicial authority but if facts brought to his/her attention seem to constitute an offence or a crime, he/she will notify the public prosecutor. He/she may also be invited by civil, criminal or administrative courts hearing facts relating to discrimination to make comments, either at their request or of that of the parties, or ask to be heard by these courts, which is his/her legal right. In the course of his/her work, the Defender of Rights has an investigating power allowing him/her to ask for explanations from any natural or legal person impugned before him/her, to hear anyone whose evidence may be useful, to call for the communication of all information or evidence which will help him/her in his/her task or to carry out on-site inspections.

B – Assessment of the Committee

Recognition of the right to equal pay in legislation

163. The Committee recalls that under Articles 4§3 and 20.c of the Charter (and Article 1.c of the 1988 Additional Protocol), the right of women and men to equal pay for work of equal value must be expressly provided for in legislation. The equal pay principle applies both to equal work and work of equal or comparable value. The concept of remuneration must cover all elements of pay, that is basic pay and all other benefits paid directly or indirectly in cash or kind by the employer to the worker by reason of the latter's employment.

164. The States Parties are obliged to enact legislation explicitly imposing equal pay. It is not sufficient to merely state the principle in the Constitution. States must ensure that there is no direct or indirect discrimination between men and women with regard to remuneration.

165. The principle of equal pay precludes unequal pay irrespective of the mechanism that produces such inequality. The source of discriminatory pay may be the law, collective agreements, individual employment contracts, internal acts of an employer.

166. Any legislation, regulation or other administrative measure that fails to comply with the principle of equal pay must be repealed or revoked. The non-application of discriminatory legislation is not sufficient for a situation to be considered in conformity with the Charter. It must be possible to set aside, withdraw, repeal or amend any provision in collective agreements, individual employment contracts or internal company regulations that is incompatible with the principle of equal pay (Conclusions XIII-5, Statement of Interpretation on Article 1 of the 1988 Additional Protocol).

167. The Committee notes that France has adopted a body of legislation enshrining the right to gender equality at work. The principle of equality is recognised in Article 1 of the Constitution and the Labour Code explicitly prohibits sex discrimination and provides for equal treatment between men and women (Article L1132-1 and Articles L1142-1 et seq.). The Law adopted on 23 March 2006 on equal pay for women and men aimed to eliminate all pay gaps within five years of its adoption. France has continued to develop its legislation in this field, and it adopted the Law of 1 August 2018 on everyone's freedom to "choose their future at work". This Law provides that companies would have three years to achieve equal pay, a budget for pay adjustments should be allocated, checks would be carried out and penalties applied if the measure was not respected by the end of the three-year period.

168. On this basis, the Committee considers that the obligation to recognise the right to equal pay for work of equal value is satisfied.

Effective remedies

169. The Committee recalls that domestic law must provide for appropriate and effective remedies in the event of alleged pay discrimination. Workers who claim that they have suffered discrimination must be able to take their case to court. Effective access to courts must be guaranteed for victims of pay discrimination. Therefore, proceedings should be affordable and timely.

170. Anyone who suffers pay discrimination on grounds of sex must be entitled to adequate compensation, i.e. compensation that is sufficient to make good the damage suffered by the victim and to act as a deterrent. Any ceiling on compensation that may preclude damages from being commensurate with the loss suffered and from being sufficiently dissuasive is contrary to the Charter.

171. The burden of proof must be shifted. The shift in the burden of proof consists in ensuring that where a person believes she or he has suffered discrimination on grounds of sex and establishes facts which make it reasonable to suppose that discrimination has occurred, the onus is on the defendant to prove that there has been no infringement of the principle of non-discrimination (Conclusions XIII-5, Statement of interpretation on Article 1 of the 1988 Additional Protocol).

172. Retaliatory dismissal in cases of pay discrimination must be forbidden. Where a worker is dismissed on grounds of having made a claim for equal pay, the worker should be able to file a complaint for dismissal without valid reason. In this case, the

employer must reinstate her/him in the same or a similar post. If reinstatement is not possible, the employer must pay compensation, which must be sufficient to compensate the worker (i.e. cover pecuniary and non-pecuniary damage) and to deter the employer.

173. The Committee notes that according to UWE there are a few cases on equal pay in France, the remedies available are not effective and women who wish to appeal are held back, either by a fear of reprisals or because of excessive costs or a lack of access to the information they need.

174. The Committee further notes that both the Government and the Defender of Rights have contested these allegations and have drawn attention to the growing number of appeals and assistance provided for victims in the context of allegations of pay discrimination. The Defender of Rights has presented figures showing a significant number of cases of pay discrimination, prompting the office of the Defender to make individual or general recommendations or recommendations to the authorities. The Defender of Rights states that his advice before courts on pay equality disputes was followed in over 76% of cases and that almost 78% of amicable settlements in which he has been involved have yielded a result in favour of equal pay.

175. The Committee also acknowledges that, according to the European Network of Legal Experts in Gender Equality and Non-Discrimination, Country Report on gender equality: France 2018, there is a quite limited number of persons who actually lodge complaints before courts in France and, when litigation on equality issues happen, it has concerned in many cases men claiming the same rights as women. However, there is a certain evolution and the number of cases on discrimination against women brought before the courts is increasing. The trend has continued in 2019 according to the Country Report on non-discrimination: France 2019. However, there are no available specific statistics on the number of cases on gender pay discrimination lodged before the courts.

176. Concerning judicial proceedings, the above-mentioned Country Report on gender equality highlights that representation by a lawyer is not mandatory before employment tribunals, the district courts and the criminal courts. It is, however, usual to be represented before such jurisdictions. Representation by a lawyer is mandatory before the regional courts, the commercial courts, the administrative courts, the Court of Appeal and the Court of Cassation. Legal aid is available to individuals on low incomes (Law No. 91-647 of July 1991 on legal aid). Since the Defender of Rights cannot initiate judicial proceedings, victims have the burden of instituting action and finding financing for their own litigation costs.

177. The Committee notes that domestic legislation provides for a shift of the burden of proof in sex discrimination cases and there are no ceilings on compensations. Moreover, sanctions are available in discrimination cases. Since the adoption of Decree No. 2012-1408 on 18 December 2012, sanctions are also possible if companies do not respect their obligation to negotiate and to conclude agreements on gender equality. As a consequence, gender equality has become an issue of negotiation at enterprise and at sectoral level.

178. Despite the remaining obstacles, the Committee considers that, in the light of the work of the Defender of Rights, the recent legislative measures adopted, the system of sanctions in place and the evolution in the case law, the obligation to ensure access to effective remedies in the meaning of the Charter is satisfied.

Pay transparency and job comparisons

179. The Committee considers that pay transparency is instrumental in the effective application of the principle of equal pay for work of equal value. Transparency contributes to identifying gender bias and discrimination and it facilitates the taking of corrective action by workers and employers and their organisations as well as by the relevant authorities.

180. States should take measures in accordance with national conditions and traditions with a view to ensuring adequate pay transparency in practice, including measures such as those highlighted in the European Commission Recommendation of 7 March 2014 on strengthening the principle of equal pay between men and women through transparency, notably an obligation for employers to regularly report on wages and produce disaggregated data by gender. The Committee regards such measures as indicators of compliance with the Charter in this respect.

181. In order to establish whether work performed is equal or of equal value, factors such as the nature of tasks, skills, educational and training requirements must be taken into account. The Committee further observes that the notion of equal work or work of equal value has a qualitative dimension and may not always be satisfactorily defined, thus undermining legal certainty. States should therefore seek to clarify this notion in domestic law as necessary, either through legislation or case law. In this respect, job classification and evaluation systems should be promoted and where they are used, they must rely on criteria that are gender-neutral and do not result in indirect discrimination. Moreover, such systems must consider the features of the posts in question rather than the personal characteristics of the workers (Conclusions XV-2, Article 4§3, Poland).

182. The Committee considers that the possibility of making job comparisons is essential to ensuring equal pay. Lack of information on comparable jobs and pay levels could render it extremely difficult for a potential victim of pay discrimination to bring a case to court. Workers should be entitled to request and receive information on pay levels broken down by gender, including on complementary and/or variable components of the pay package. However, general statistical data on pay levels may not be sufficient to prove discrimination. Therefore, in the context of judicial proceedings it should be possible to request and obtain information on the pay of a

fellow worker while duly respecting applicable rules on personal data protection and commercial and industrial secrecy.

183. Moreover, national law should not unduly restrict the scope of job comparisons, e.g. by limiting them strictly to the same company. Domestic law must make provision for comparisons of jobs and pay to extend outside the company concerned where necessary for an appropriate comparison. The Committee views this as an important means of ensuring that the equal pay principle is effective under certain circumstances, particularly in larger companies or specific sectors where the workforce is predominantly, or even exclusively, of one sex (see Statement of interpretation on Article 20, Conclusions 2012). The Committee considers notably that job comparisons should be possible across companies, where they form part of a group of companies owned by the same person or controlled by a holding or a conglomerate.

184. The Committee observes that French law recognises the principle of pay transparency. Employers must provide information to workers' representatives (works councils and trade union representatives) on equal pay. Companies employing 50 or more workers must produce an annual report for the work council, comparing the situation of women and men in the company. This must comprise a comparative analysis in respect of recruitment, training, qualifications, pay, working conditions and a balance between professional and private life, supported with relevant statistically-based indicators. The publication of relevant indicators in the workplace is mandatory according to the law, notably Law of 29 March 2018.

185. The Committee further observes that, according to the European Network of Legal Experts in Gender Equality and Non-Discrimination, Country Report on gender equality: France 2018, France has taken the necessary measures to ensure application of Recommendation of 7 March 2014 on strengthening the principle of equal pay between men and women through transparency.

186. The Committee acknowledges that domestic law lays down the parameters for establishing the equal value of the work performed. According to Article L3221-4 of the Labour Code they are the following: title, diploma, professional experience, responsibilities and physical or mental stress, although the list is not exhaustive. The Committee further notes from the above-mentioned Country Report that if a judge finds that a case might amount to gender discrimination, and there are no men in the company which can serve as comparators, it does not represent an obstacle to a finding of discrimination.

187. The Committee notes from the allegations of UWE that the legislation does not refer to the possibility of making job comparisons across companies and that the case

law of the Court of Cassation is outdated and inconsistent, and does not clearly establish this possibility. However, the Committee recalls that, in its conclusions on Article 20 and on Article 4§3, it already found that France was in conformity with the Charter on this issue. The Committee examined the specific case law of the Court of Cassation and its definition of the notion of legal entity. The Court has established that the principle of equal pay applies and job comparisons are possible even if workers belong to legally separate entities within a bigger structure and under a single source. Differences in the pay of workers within these different legal entities could therefore only be justified by objective factors, whose reality and relevance had to be subject to judicial review. On this basis, the Committee has previously considered the situation in France to be in conformity with the Charter (Conclusions 2014, France, Article 4§3; Conclusions 2016, France, Article 20).

188. In view of the above, the Committee considers that the obligation to ensure the principle of pay transparency and to enable job comparisons is satisfied.

Equality bodies and other institutions

189. The Committee considers that the satisfactory application of the Charter cannot be ensured solely by the operation of legislation if this is not effectively applied and rigorously supervised (ICJ v. Portugal, Complaint No. 1/1998, op.cit., §32). The Committee has considered that measures to foster the full effectiveness of the efforts to combat discrimination include setting up of a specialised body to monitor and promote, independently, equal treatment, especially by providing discrimination victims with the support they need to take proceedings (Conclusions XVI-1, Article 1§2, Iceland). The status of such equality bodies in terms of their mandate, their independence and resources must be clearly defined. In this context, the Committee also has regard to the criteria for national human rights institutions set out in the so-called Paris Principles adopted in 1993 by the United Nations General Assembly.

190. As regards the mandate of equality bodies, the Committee considers that it should include provision for functions such as the following:

- monitoring and promotion: in cooperation with Labour Inspectorates or other relevant bodies, monitor the situation regarding gender discrimination, including in respect of pay, and produce regular reports; conduct inquiries at their own initiative and make recommendations; raise awareness of the equal pay principle across society.
- decision-making: receive, examine, hear cases of discrimination; issue binding or authoritative decisions on complaints concerning alleged discrimination and ensure the implementation of such decisions.
- assistance to victims: provide personal and legal support to complainants; mediate settlements in cases of discrimination; represent victims in cases of discrimination; and monitor the implementation of decisions in such cases.

191. The Committee further considers that in addition to having a clear and comprehensive mandate, these specialised equality bodies must be equipped with the necessary human and financial resources as well as infrastructure to ensure that they can effectively combat and eliminate pay discrimination.

192. The Committee wishes to emphasise that it is not within the scope of the examination of this complaint to conduct an exhaustive analysis of the conformity of the situation with the above criteria. The Committee will restrict its examination to assessing in light of the information available to it the effectiveness of equality bodies and other relevant institutions in ensuring equal pay for equal work or work of equal value.

193. The Committee takes note of the role of the Defender of Rights, which is as an independent administrative authority, created by Law No. 2011-333 of 29 March 2011. The Defender of Rights is a body resulting from the merger of pre-existing bodies in May 2011. According to the European Network of Legal Experts in Gender Equality and Non-Discrimination, Country Report on non-discrimination: France 2019 as well as Country Report on gender equality: France 2018, the Defender of Rights has been recognised for its activism and independence, taking due care to explain its mandate as an independent advocate of rights within its domain of competence, which includes equal pay. Statistics on the activity of the Defender of Rights show that its implication in anti-discrimination issues and the investigation of cases has not been affected by the merger of several bodies into a larger unified body. The Reports further state that if the mandate of the former equality body (HALDE, *Haute Autorité de Lutte contre les Discriminations et pour l'Égalité*) was exclusively dedicated to the application of anti-discrimination law, the visibility of the Defender of Rights and the attention given to its positions draw significant attention to anti-discrimination issues. The French Defender has a broad mandate, which combines functions of promotion and prevention, monitoring functions, assistance to victims in litigation, as well as decision-making functions, issuing recommendations and decisions on gender pay discrimination cases.

194. The Committee further observes that the Defender of Rights in its observations disputes UWE's allegations stating that its powers have not been reduced or its sphere of action limited by legislative amendments. Individual complaints lodged before the Defender of Rights systematically undergo an impartial and independent investigation, and the Defender of Rights may gather any information and explanations which may be of use to its inquiry, through various means, including summons for people to appear in person and on-site investigations. 55% of the cases submitted to the Defender of Rights alleging discrimination relate to the employment field and about 10% of these cases relate to allegations of discrimination on the ground of sex and/or pregnancy.

195. The Committee notes that the Defender of Rights may also make use of "situation testing" to prove discriminatory behaviour and intervene as *amicus curiae* before the courts. In 2017, the Defender made submissions in 137 cases, issued 696 individual and general recommendations, and made 138 recommendations to the authorities. Its submissions in court and the friendly settlements proposed were applied

in over 76% of cases. There has not been any decrease in the number of cases since the Defender of Rights replaced the HALDE in 2005.

196. With regard to the Labour Inspectorate, the Committee notes that UWE alleges that labour inspectors play an insufficient role and their functions have not evolved. The Government disputes this, pointing out that labour inspectors' functions include reporting infringements of the rules on equal pay for women and men for work of equal value. The Committee further notes the measures adopted by the Government in May 2018, which intended to increase the inspections and operations of the Labour Inspectorate in this field, and raised the number of inspections relating solely to equality at work and wage equality from 1,730 to 7,000 per year.

197. The Committee further notes according to the 2019 Report from the European Network of Legal Experts in Gender Equality and Non-Discrimination that in 2018, the Defender of Rights spent a budget of €21,618,096, increased by 1.7% compared to 2017. Its budget is structured without reference to allocation for each area of competence. More than 50% of this budget is dedicated to its equality/antidiscrimination mandate.

198. In view of the above, the Committee considers that the Defender of Rights has a broad mandate and plays an important role in the field of discrimination, including in gender pay discrimination cases. The Committee therefore considers that the obligation to maintain an effective equality body with a view to guaranteeing the right to equal pay is satisfied.

Concluding assessment

199. Firstly, with regard to the recognition of the right to equal pay, the Committee notes that France has adopted a large number of laws on the subject, and equality and non-discrimination are principles that are enshrined in the Constitution. The Labour Code has been reformed several times to incorporate further guarantees of equal pay for women and men. The Committee considers that the legislation satisfies the obligation to recognise the right to equal pay.

200. Secondly, despite the remaining obstacles, the Committee considers that, in the light of the work of the Defender of Rights, the recent legislative measures adopted, the system of sanctions in place and the evolution in the case law, the obligation to ensure access to effective remedies in the meaning of the Charter is satisfied.

201. Thirdly, the Committee notes that the principle of transparency has been taken into account in the French legislation and that it is possible to compare jobs, consult information on the wages of other workers and companies must produce data broken down according to gender. The Committee considers that the obligation to ensure pay transparency and to enable job comparisons in practice is satisfied.

202. Lastly, with regard to the role of the Defender of Rights, the Committee notes that it has a broad mandate, which includes specific functions in the fight against pay discrimination in France and contribute actively to the establishment of equal pay. The

Committee also notes the role that the Defender plays in processing complaints and helping victims of pay discrimination to bring their cases to justice. The Committee considers that the obligation to maintain an effective equality body with a view to guaranteeing the right to equal pay is satisfied.

203. Consequently, the Committee holds that there is no violation of Articles 4§3 and 20.c of the Charter.

II. ALLEGED VIOLATION OF ARTICLE 20.C OF THE CHARTER AS REGARDS MEASURES TO PROMOTE EQUAL OPPORTUNITIES BETWEEN WOMEN AND MEN IN RESPECT OF EQUAL PAY

204. Article 20.c of the Charter reads as follows:

Article 20 – Right to equal opportunities and equal treatment in employment and occupation without sex discrimination

Part I: “All workers have the right to equal opportunities and equal treatment in matters of employment and occupation without discrimination on the grounds of sex.”

Part II: “With a view to ensuring the effective exercise of the right to equal opportunities and equal treatment in matters of employment and occupation without discrimination on the grounds of sex, the Parties undertake to recognise that right and to take appropriate measures to ensure or promote its application in the following fields: (...)

...

c terms of employment and working conditions, including remuneration;

A – Arguments of the Parties

1. The complainant organisation

205. UWE states that the respondent state’s submissions include only very few relevant and reliable figures. It argues that it is difficult or impossible for women who may wish to make complaints to obtain comparative data on wages paid.

206. Furthermore, most obligations concerning the production of statistical documents apply, for the purpose of establishing staff representative bodies, to companies with 50 workers or more and hence have works councils, or to economic and social units bringing together various legally distinct companies. UWE adds that in 2011 according to the French National Institute of Statistics and Economic Studies (INSEE), French companies could be divided into the following categories: “243 major companies which, on their own, employ 30% of all workers; 5,000 intermediate-sized companies; 138,000 small and medium-sized enterprises (SMEs) not including micro-enterprises, and 3 million micro-enterprises”. In 2010, in the private sector, women’s wage income was 28% lower than that of men. Since 1995, the gap between men’s and women’s wage income had slightly decreased as a result in particular of the fact that the share of managerial posts occupied by women had increased. Nonetheless, they still occupied over 70% of non-managerial posts, in which wages are lowest. In 2010, in the public sector, the pay gap between men and women was 18%, or ten points less than in the private sector. This gap has remained stable, however, over the

last ten years. Very few workers are actually covered by systems which require reports to be submitted to staff representative bodies on the detailed nature of their work. And in practice, few trade unions or elected representatives take up the issue.

207. UWE states that according to the analysis conducted by the inequality monitoring body, the *Observatoire des inégalités*, on 27 May 2016, when all categories of working time are combined, men earn 23.5% more than women. Nearly 11% of the pay gaps between the genders are unexplained and constitute “pure” discrimination. The average net monthly wage earned by men for full-time work was €2,389 in 2013, and the average net monthly wage earned by women was €1,934 – a gap of €455, which was almost equal to half of the guaranteed minimum wage. This means that men earned, on average and on a full-time equivalent basis, a wage which was 23.5% higher than that of women. Or, in other words, women were paid on average 81% of the pay earned by men (€1,934 compared to €2,389), or 19% less. The higher up the pay ladder one goes, the greater the gap between women and men becomes, partly because there are far fewer women at the top of the ladder. Using FTE pay as the basis for comparison once again, the highest pay level among the lowest-paid 10% of women was 8% lower than the figure for men (€1,154 for women versus €1,254 for men). The minimum salary of the highest-paid 10% of women was 22% lower than the figure for men (€3,036 for women as compared with €3,892 for men). At the median salary level, women’s wages were 14% lower, or €263 per month less than their male counterparts.

208. UWE alleges that when all categories of working time are combined (part-time and full-time), women’s wages are on average equivalent to 74.3% of men’s wages, according to the 2012 figures from the Ministry of Labour.

209. The first factor that explains the pay inequality stems from the differences in working time. The number of women in part-time work is four times greater than the number of men, so it is logical that their income – when all categories of working time are combined – is lower than that of men. In addition, the working time of men is also increased by overtime, which they do more often than women. However, even when the comparison is narrowed down to full-time pay, women still earn 16.3% less. If differences in terms of age bracket, type of contract, working time, sector of activity and company size are taken into account, there is an unexplained pay gap of approximately 10.5% according to the data from the Ministry of Labour.

210. UWE also notes that, in the public service sector, the pay gap still exists. The report of 10 March 2015 by the Ministry of Decentralisation and the Civil Service concerns “the pay gap between women and men through the prism of gender inequalities”. The average pay gap between women and men is 12% in the public service sector, as compared with 19% in the private sector. The ministries in which the greatest discrimination exists, with gaps of 15%, are the Ministries of Foreign Affairs and the Interior, to which the departments coming under the Prime Minister must be added.

211. With regard to equal pay for work of equal or comparable value, UWE regrets that not enough appropriate measures are taken. There is a general lack of clarification which could serve to determine the conformity of the policies followed with the requirements of the Charter.

212. According to UWE, measures for companies with 49 workers or less are clearly inadequate if not totally non-existent.

2. The respondent Government

213. The Government points out that while there are still gender pay gaps in practice, it is committed to gender equality at work and pursues its efforts to promote it. It notes that several plans and incentive measures have been set up to promote equality in the workplace.

214. The Government states that, on 5 October 2016, during the 4th Equality at Work Week, the Government launched the first interministerial plan to promote gender equality at work, with the aim of developing a culture of genuine equality between women and men in the workplace. In tackling the structural inequalities which persist between women and men, this plan aims to consolidate, disseminate, assess and modernise public policies to promote equality at work. All of the ministries and authorities involved are fully committed to the plan and have undertaken to implement it across the board, and to assess and plan the changes needed between 2016 and 2020. One of the plan's focuses is the gender pay gap. As a result, the Government has set itself the tasks of measuring and correcting gaps in the pay of all public employers, increasing the number and improving the quality of agreements on gender equality at work and quality of life in the workplace, enhancing measures to supervise these agreements and highlighting examples of companies which have set up tools to evaluate and bridge gender pay gaps.

215. As the national plan was finalised, other measures to promote equality were adopted. In 2012 so-called Regions of Excellence trials were launched in nine regions (Aquitaine, Brittany, Centre, Ile-de-France, Midi-Pyrénées, Nord-Pas-de-Calais, Poitou-Charentes, La Réunion and Rhône-Alpes). Nine further regions joined the project in 2015, namely Alsace, Lower Normandy, Champagne-Ardenne, Franche-Comté, Limousin, Lorraine, Pays de la Loire, Picardy and Provence-Alpes-Côte d'Azur. The final assessment highlighted the benefits of the trial in terms of innovation, the development of new partnerships and obtaining new funding.

216. In addition, in 2004 the State set up a Gender Equality at Work label, to which it has exclusive rights. This is a means of highlighting private and public bodies' commitment to equality and gender balance in the workplace. The label, which is the result of co-operation with the social partners, proposes a methodology which enables economic players to organise and promote equality and gender balance at work in all public and private bodies. The 2016 activity report identified 75 bodies which had been granted the Equality label. This figure was five times the average over the last ten years. Lastly, a network of companies and public bodies fostering equality was launched on 24 June 2015. It brings together the top 120 listed companies in France, the companies that have been awarded the Gender Equality at Work label – and, since 2016, public bodies – at a plenary meeting chaired by the minister responsible for gender equality. The network is an opportunity for companies to share good practices and assess their results, with the support of the Women's Rights and Equality Department of the Directorate General of Social Cohesion and Public Bodies.

B – Assessment of the Committee

a) Key figures as regards equal pay in France

217. According to Eurostat, in 2017, women's gross hourly earnings in France were on average 15.4% lower than those of men. In the European Union, they were 16% lower than those of men (EU28). According to the same source, the hourly gender pay gap in France stood at 15.6% in 2010, 15.4% in 2012, 15.3% in 2013 and in 2014. The gender overall earnings gap in France stood at 31% in 2014 (the average gender overall earnings gap in the EU is 39.6 %). The adjusted or "unexplained" gender pay gap was 10.7% compared to an EU-28 average of 11.5% (2014 data, see the Eurostat study "A decomposition of the unadjusted gender pay gap using Structure of Earnings Survey data", 2018).

b) Collection of data on equal pay and measures to promote equal opportunities

218. The Committee considers that in order to ensure and promote equal pay, the collection of high-quality pay statistics broken down by gender as well as statistics on the number and type of pay discrimination cases are crucial. The collection of such data increases pay transparency at aggregate levels and ultimately uncovers the cases of unequal pay and therefore the gender pay gap. The gender pay gap is one of the most widely accepted indicators of the differences in pay that persist for men and women doing jobs that are either equal or of equal value. In addition, to the overall pay gap (unadjusted and adjusted, the Committee will also, where appropriate, have regard to more specific data on the gender pay gap by sectors, by occupations, by age, by educational level, etc.

219. The Committee considers that States are under an obligation to analyse the causes of the gender pay gap with a view to designing effective policies aimed at reducing it. The Committee here recalls its previous holding that the collection of data with a view to adopting adequate measures is essential to promote equal opportunities. Indeed, it has held that where it is known that a certain category of persons is, or might be, discriminated against, it is the duty of the national authorities to collect data to assess the extent of the problem (European Roma Rights Centre v. Greece, Complaint

No. 15/2003, decision on the merits of 8 December 2004, §27). The gathering and analysis of such data (with due safeguards for privacy and to avoid abuse) is indispensable to the formulation of rational policy (European Roma Rights Centre v. Italy, Complaint No. 27/2004, decision on the merits of 7 December 2005, §23).

220. The Committee further recalls that the aim and purpose of the Charter, being a human rights protection instrument, is to protect rights not merely theoretically, but also in fact (ICJ v. Portugal, Complaint No. 1/1998, *op.cit.*, §32). Conformity with the Charter cannot be ensured solely by legislation and States Parties must take measures to actively promote equal opportunities. Besides the fact that legislation must not prevent the adoption of positive measures or positive action, the States are required to take specific steps aimed at removing *de facto* inequalities that affect women's and men's chances with regard to equal pay.

221. While the Committee acknowledges that the realisation of the obligation to take adequate measures to promote equal opportunities is complex, the States Parties must take measures that enable the achievement of the objectives of the Charter within a reasonable time, with measurable progress and to an extent consistent with the maximum use of available resources (International Association Autism-Europe (IAAE) v. France, Complaint No. 13/2002, *op.cit.*, §53).

222. Under Article 20.c of the Charter the obligation to take appropriate measures to promote equal opportunities entails gender mainstreaming which is the internationally recognised strategy towards realising gender equality. It involves the integration of a gender perspective into the preparation, design, implementation, monitoring and evaluation of policies, regulatory measures and spending programmes, with a view to promoting equality between women and men, and combating discrimination. The Committee considers that gender mainstreaming, as recommended in particular by the Committee of Ministers of the Council of Europe (Recommendation Rec(98)14), should cover all aspects of the labour market, including pay, career development and occupational recognition, and extending to the education system (Conclusions XVII-2, Article 1 of the 1988 Additional Protocol, Greece).

223. States should assess the impact of the policy measures adopted in tackling vertical or horizontal occupational gender segregation in employment, improving women's participation in a wider range of jobs and occupations.

224. Among other measures that States could adopt to reduce the gender pay gap and which the Committee regards as relevant indicators for assessing compliance with the obligations laid down by the Charter the following are highlighted:

- adoption and implementation of national action plans for employment which effectively ensure equality between women and men, including pay;
- requiring individual undertakings to draw up enterprise or company plans to secure equal pay;
- encouraging employers and workers to deal with equality issues in collective agreements;
- raising awareness of the equal pay principle among employers, organisations and the public at large, including through the activities of equality bodies.

225. The Committee notes that the gender pay gap in France is persistent, having remained almost unchanged over the last ten years despite the measures taken by the Government. The European Commission factsheet on gender pay gap from 2016 refers to some of the factors that contribute to the pay gap in France: the fact that women take charge of important unpaid tasks, such as household work and caring for children or relatives on a far larger scale than men do; women also tend to spend periods off the labour market more often than men and these career interruptions not only influence hourly pay, but also impact future earnings and pensions; there is segregation in education and in the labour market and this means that, in some sectors and occupations, women tend to be overrepresented while, in others, men are overrepresented; and finally, pay discrimination, while illegal, continues to contribute to the gender pay gap.

226. The Committee further notes that the Government has adopted a wide array of measures in order to remedy this persistence of the gender pay gap. One example is the law called the “Pact Law”, adopted in October 2018 and which requires listed companies to publish average and median salaries so as to reduce pay gaps and afford greater transparency.

227. The Committee also observes that in November 2018 the Minister of Labour introduced an equal pay index, introducing an obligation from 2019 onwards to measure and correct pay gaps. The targets for companies with more than 250 workers relate to five aspects, graded on a scale totalling 100 points: differences in remuneration for persons of comparable ages with comparable posts (40 points); the distribution between women and men of individual wage rises (20 points); the distribution of promotions (15 points); wage rises on returning from maternity leave (15 points); and the number of women in the highest paid jobs (10 points). For companies with 50 to 250 workers, individual wage rises and promotions are grouped under a single indicator worth 35 points. Companies that fail to reach 75 points out of 100 may be fined up to 1% of their payroll. Companies will be given three years to meet their obligations in this respect. The new measures adopted seem to be a positive step, although they are too recent to assess properly their impact in the present decision.

228. In the light of the above elements, the Committee considers that France has collected data regarding the gender pay gap and has produced analysis of the data, complying with the obligations of the Charter on this point.

229. The Committee further notes that the Government has adopted measures to tackle the gender pay gap. However, the gender pay gap is a persistent problem and the plans adopted have not succeeded in narrowing it and it has become entrenched. Market segregation, the use of part-time work and other obstacles to women's development account for the gap. The Committee considers that the measures adopted to promote equal opportunities for women in the labour market have been inadequate and have not achieved measurable progress.

230. In view of the above, the Committee holds that there is a violation of Article 20.c of the Charter on the ground that there has been insufficient measurable progress in promoting equal opportunities between women and men in respect of equal pay.

III. ALLEGED VIOLATION OF ARTICLE 20.D OF THE CHARTER AS REGARDS ENSURING BALANCED REPRESENTATION OF WOMEN IN DECISION-MAKING POSITIONS WITHIN PRIVATE COMPANIES

231. Article 20.d of the Charter reads as follows:

Article 20 – Right to equal opportunities and equal treatment in employment and occupation without sex discrimination

Part I: "All workers have the right to equal opportunities and equal treatment in matters of employment and occupation without discrimination on the grounds of sex."

Part II: "With a view to ensuring the effective exercise of the right to equal opportunities and equal treatment in matters of employment and occupation without discrimination on the grounds of sex, the Parties undertake to recognise that right and to take appropriate measures to ensure or promote its application in the following fields:

[...]

d. career development, including promotion."

A – Arguments of the parties

1. The complainant organisation

232. UWE points out that Law No. 2011-103 of 27 January 2011 set a quota of 40% of each sex on management and supervisory boards of major private and public enterprises. While the number of women on boards has tripled in listed companies, in the 400 non-listed companies concerned, with over 500 workers and a turnover of over €50 million, the results have fallen short of the objectives set.

233. UWE states that 95% of the seats on management and supervisory boards are occupied by men and there is not a single woman in charge of any of the top 40 companies on the French stock exchange, the CAC 40. In practice, it has been noted that it is always the same women who occupy the maximum permitted number of seats

on boards. As to executive boards not covered by the law, these are still just as closed off to women. According to a report by the *Conseil Supérieur à l'Égalité Professionnelle* (High Council for Occupational Equality) barely 28% of companies covered by the Law on the representation of women on management boards, not 40%, meet their legal obligations. Large companies with a high market capitalisation do manage to comply with the law. In those with more than 500 workers and a turnover of more than €50 million, this figure is reported to be around 25%. The extent to which the 40% quota must be reached depends on the number of administrators and UWE alleges that it can be reduced to 20% where the board has only eight administrators. Companies reduce the size of their boards so that the proportion of women administrators need only amount to 20%. UWE asserts that the penalties can hardly be used because they are civil penalties, which can only be applied to persons who have acted deliberately. It would seem that no legal proceedings on these matters have been brought to date.

234. UWE finally points out that the proportion of women on supervisory boards is even lower than that on management boards.

2. The respondent Government

235. According to the Government, UWE's allegations regarding women on management boards are unfounded. The Government points out that the Constitution of 4 October 1958 was amended to make it possible to apply quotas. As a result, it has been possible to adopt legislation setting targets for the balanced representation of women and men in decision-making positions in both the private and the public sector and provide for penalties in the event of a failure to comply with these obligations.

236. With regard to the private sector, Law No. 2011-103 of 27 January 2011 on the balanced representation of women and men on management and supervisory boards and occupational equality set a mandatory quota of 40% of the under-represented sex on management boards as of 1 January 2017 in listed companies and companies with over 500 permanent workers and a turnover of more than €50 million. The penalties provided for in the event of non-compliance with the law are firstly, the annulment of appointments which breach the parity requirement and secondly, suspension of the payment of attendance fees.

237. With regard to the public sector, Law No. 2012-347 of 12 March 2012 on access to permanent employment and improvements to employment conditions for contractual workers in the civil service, anti-discrimination measures and various other measures relating to the civil service, established that the proportion of qualified persons of each sex appointed to the management boards, supervisory boards or equivalent bodies of public establishments must be 40% or more.

238. Law No. 2014-873 of 4 August 2014 on genuine equality between women and men established a requirement to arrive at parity in the governing bodies of sports federations, public industrial and commercial establishments, chambers of commerce and industry, and chambers of agriculture.

239. The Government also notes that the statistics concerning the representation of women in decision-making positions show a broadly positive trend. The proportion of women on management or supervisory boards of the major French companies listed on the stock exchange rose from 9% in 2008 to 27% in 2013. In 2015, the proportion of women on management boards of companies on the SBF120 French stock market index was 33%, while the equivalent figure was 21.5% for the top 100 companies and 14.1% for executive boards.

240. In 2016, the proportion of women represented was 38% on management and supervisory boards, 22% on the boards of the top 100 companies and 14.9% on executive boards.

B – Assessment of the Committee

241. The Committee considers that Article 20.d of the Charter imposes positive obligations on States to tackle vertical segregation in the labour market, by means of, inter alia, promoting the advancement of women in decision-making positions in private companies. This obligation may entail introduction of binding legislative measures to ensure equal access to management boards of companies. Measures designed to promote equal opportunities for women and men in the labour market must include promoting an effective parity in the representation of women and men in decision-making positions in both the public and private sectors (Conclusions 2016, Article 20, Portugal).

242. The Committee observes that according to the European Commission's 2019 Report on equality between women and men, the proportion of women on management boards of the largest publicly listed companies in countries with binding legislative measures has risen from an average of 9.8% in 2010 to 37.5% in 2018. In countries with non-binding measures, including positive action to promote gender balance, the corresponding percentages were 12.8% in 2010 and 25.6% in 2018, whereas in countries where no particular action (apart from self-regulation by companies) has been taken, the situation remained almost stagnant with 12.8% on average in 2010 and 14.3% in 2018. The overall EU-28 average was 26.7% in 2018. The Committee further observes that PACE Resolution 1715(2010) recommends that the proportion of women on management boards of companies should be at least 40%.

243. Finally, the Committee recalls that in respect of Article 20.d, as for Article 20.c, States must take measures that enable the achievement of the objectives of the Charter within a reasonable time, with measurable progress and to an extent consistent with the maximum use of available resources.

244. The Committee notes that France has legislation on the representation of women in decision-making positions, which has yielded positive results in the specific area of France's largest listed companies. Law No. 2011-822 of 7 July 2011 imposed a mandatory quota of 40% of the under-represented sex on management boards from 1 January 2017 in listed companies and provides for penalties for failure to observe the quota, although only in companies with 500 permanent workers or more and a turnover of over €50 million. Under the 2011 Law, where a company that breaks the rules is in a difficult economic situation, the penalty may be reduced or waived.

245. The Committee notes that the 2011 Law has contributed to an increase in the number of women in decision-making positions of the largest listed companies. Indeed, according to data provided by EIGE (the European Institute for Gender Equality) by April 2019, the proportion of women on management boards of France's largest listed companies was 44%. It was 42.1% in 2017. In 2010, women represented 12.3% of management boards in the largest listed companies.

246. The Committee notes that the aim of meeting the 40% quota of women in company management bodies has been achieved in the largest listed companies. France is at present one of the European countries with the highest proportion of women as board members of the largest listed companies. In the light of this and even though smaller companies have not achieved the same results, the Committee considers that the Government has taken effective measures to meet its positive obligation to ensure a balanced representation of women in decision-making positions within private companies.

247. Consequently, the Committee holds that there is no violation of Article 20.d of the Charter.

IV. REQUEST FOR COMPENSATION

248. The Committee decides not to make a recommendation to the Committee of Ministers as regards the complainant's request for a payment of €10,000 in compensation for legal costs incurred in connection with the proceedings. It refers in this respect to the stance taken by the Committee of Ministers in the past (see Resolution CM/ResChS(2016)4 in *European Roma Rights Centre (ERRC) v. Ireland*, Complaint No. 100/2013) and to the letter of the President of the Committee addressed to the Committee of Ministers dated 3 February 2017 in which the President announced that the Committee would for the time being refrain from making recommendations to the Committee of Ministers concerning the reimbursement of costs.

249. The Committee nevertheless maintains its view that reimbursement of costs is in principle justified and appropriate under certain circumstances and an important factor in enabling the complaints procedure to attain the objectives and the impact that led the member States of the Council of Europe to adopt it in the first place.

CONCLUSION

For these reasons, the Committee concludes:

- as regards recognition and enforcement of the right to equal pay for work of equal value,
 - by 14 votes to 1, that there is no violation of Articles 4§3 and 20.c of the Charter as regards recognition of the right to equal pay in the legislation;
 - by 14 votes to 1, that there is no violation of Articles 4§3 and 20.c of the Charter as regards access to effective remedies;
 - by 14 votes to 1, that there is no violation of Articles 4§3 and 20.c of the Charter as regards pay transparency and job comparisons;
 - unanimously, that there is no violation of Articles 4§3 and 20.c of the Charter as regards equality bodies;
- by 14 votes to 1, that there is a violation of Article 20.c of the Charter on the ground that there has been insufficient measurable progress in promoting equal opportunities between women and men in respect of equal pay;
- by 14 votes to 1, that there is no violation of Article 20.d of the Charter as regards measures to ensure a balanced representation of women in decision-making bodies within private companies.



Petros STANGOS
Rapporteur



Giuseppe PALMISANO
Président



Henrik KRISTENSEN
Secrétaire exécutif adjoint

In accordance with Rule 35§1 of the Rules a partly dissenting separate opinion of Petros STANGOS is appended to this decision.

**PARTLY DISSENTING SEPARATE OPINION OF
PETROS STANGOS**

I disagreed, on the following grounds, with the findings reached by most of the Committee members that there was no violation by France either of Articles 4§3 and 20.c of the Charter with regard to recognition of the right to equal pay or of Article 20.d of the Charter with regard to the balanced representation of women in the decision-making bodies of private companies, on the following grounds.

Firstly, I consider that although it cannot be denied that French legislation (both constitutional and ordinary law) establishes the right of men and women to equal pay, one of the characteristic traits of the ordinary law in this sphere is that the legal arsenal that has been set up is constantly evolving. This is recognised, albeit somewhat indirectly, in the current decision (see §167). However, it cannot be said that this legislation was consistent with regard to the requirement – which is inherent in this type of legislation because of its constant “evolution” – that the state should achieve the expected results within specific deadlines. In my opinion, the obligation (which is also inherent in the law) to achieve the goals set out on each occasion could only have been met in practice through a declaration that these aims had to be reached within reasonable times. However, this was not always the case during the period under consideration.

No time limit was set vis-à-vis the requirement to promote equal rights and equal opportunities for women and men in the first law of this type, the “Roudy Law” of 13 July 1983, which transposed European Directive 76/207/EC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions into domestic law. By contrast, the following law on the subject, dating from 10 July 1989, required organisations bound by a sectoral collective agreement to conduct negotiations on gender equality at work, and on remedial measures where inequalities were detected, within a period of two years. The “Genisson Law” of 9 May 2001, which consolidated the Roudy Law, established a requirement to conduct negotiations on pay equality at company and sectoral level without setting any specific deadlines, but this was certainly not the case with the Law of 23 March 2006 on equal pay for women and men, whose aim was, among other things, to eliminate all wage gaps within five years of its adoption. This ambiguous position concerning the setting of time limits for gender equality goals was reflected in the very recent Law of 1 August 2018 on everyone’s freedom to “choose their future at work” – as referred to in the paragraph of the decision cited above. On the one hand it was provided, as noted in the decision, that companies would have three years to achieve equal pay, that they should allocate a budget for wage adjustments and that checks would be carried out and penalties applied if the measure was not respected by the end of the three-year period. On the other hand, no provision was made with regard to the time span for the achievement of goals such as the acquisition by part-time employees (80% of whom are women) of the same rights to training as full-time employees, the election by the staff of all companies of a liaison officer responsible for measures to combat sexist and sexual violence, and systematic training for labour inspectors and occupational health professionals on preventing violence, offering an appropriate response and supporting victims.

In my opinion, France would have been brought entirely into conformity with the obligations arising from Articles 4§3 and 20.c of the Charter with regard to recognition of the right to equal pay if the successive laws in question had been made more effective and binding through the establishment in every case of detailed and reasonable deadlines by which it was expected that the objectives set would be achieved.

Secondly, the situation in France where it comes to the balanced representation of women on the decision-making bodies of private companies is not yet anywhere near to fulfilling the obligations arising from Article 20.d of the Charter. No official assessment is made in France of the average rate of occupation by women of senior management posts in all the companies operating in the country. UWE believes that the percentage is in the region of 28% whereas Equinet puts it at 33% based on data provided by the authorities. The uncertainty that reigns in this area is symptomatic of France's hesitant approach.

However, as is conceded in the decision itself, France has legislation on the representation of women on key management posts and, according to certain calculations, it has yielded positive results in the specific area of France's major companies. For instance, whereas in 2009, the percentage of women managing such companies was 10.7%, in 2016, according to the calculations of the High Council for Gender Equality, this percentage had risen to 34% with regard specifically to the management boards of the top 40 listed companies known as the "CAC40". Yet, other equally reliable calculations (not provided by the parties to the dispute) show that in the 120 top companies of the "SBF120", 82.88% of the seats on executive boards (which wield the real power in such companies) were occupied by men in 2018 and only ten of the chairs of executive boards were women. In point of fact, the aim set by the law of 2011 of meeting the 40% quota of women in company management bodies (see §244 of the decision) is far from having been reached because unlisted companies and small companies have far fewer women on their management boards. Most certainly, it cannot be ruled out that factors other than the Government's inertia in promoting increased participation by women in companies' management tiers has contributed to France's backwardness in this area. These could include, for example, the persistence of conscious or subconscious social representations, in other words the fact that people still more easily and readily picture a man than a woman occupying a position of responsibility in a company. This possible "mitigating circumstance" cannot, however, extricate France from the state of non-conformity with regard to Article 20.d of the Charter in which it finds itself, which, moreover, is what prompted me to vote against the finding by the majority of the Committee members that there was no violation of that provision.