



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

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University Women of Europe v. France
Complaint No. 130/2016

**OBSERVATIONS BY THE EUROPEAN TRADE UNION
CONFEDERATION (ETUC)**

Registered at the Secretariat on 3 November 2017



Collective Complaint

University Women of Europe (UWE) v. France

Complaint No. 130/2016

**Observations
by the
European Trade Union Confederation
(ETUC)**

(03/11/2017)

Outline

INTRODUCTION.....	3
I. GENERAL FRAMEWORK	4
A. INTERNATIONAL LAW AND MATERIAL	4
1. <i>United Nations</i>	4
2. <i>International Labour Organisation</i>	9
3. <i>Council of Europe</i>	13
4. <i>European Union (EU)</i>	19
B. FURTHER PERTINENT MATERIAL	22
1. <i>Concerning the Gender pay gap</i>	22
2. <i>Concerning the (under-)representation in decision-making positions within private companies</i>	23
C. LEGAL PRINCIPLES	24
1. <i>General considerations</i>	24
2. <i>Gender pay gap</i>	24
3. <i>(Under-)representation in decision-making bodies within private companies</i>	27
II. SPECIFIC SITUATION	29
A. INTERNATIONAL CASE-LAW	30
1. <i>United Nations</i>	30
2. <i>International Labour Organisation</i>	33
3. <i>Council of Europe</i>	36
B. FURTHER PERTINENT MATERIAL ON THE SITUATION IN LAW AND PRACTICE	40
1. <i>Concerning the Gender pay gap</i>	40
2. <i>Concerning the (under-)representation in decision-making positions within private companies</i>	41
C. APPLICATION OF THE LEGAL PRINCIPLES	41
1. <i>Concerning the Gender pay gap</i>	41
2. <i>Concerning the (under-)representation in decision-making positions within private companies</i>	42
III. CONCLUSIONS	43
A. SUBSTANTIVE CONCLUSIONS	43
B. PROCEDURAL REQUEST	43
TABLE OF CONTENTS.....	44

- 1 In availing itself of the opportunity provided in the Collective Complaints Procedure Protocol (CCPP - Article 7§2) the European Trade Union Confederation (ETUC) would like to submit the following observations. The ETUC welcomes the fact that the respondent State has ratified not only the Revised European Social Charter (RESC)¹ but also the Collective Complaints Procedure Protocol (CCPP). However, the ETUC would invite the Government to take the appropriate steps to accept all provisions of the RESC.

Introduction

- 2 The main content of the complaint is described in the Decision on admissibility of 4 July 2017 and contains mainly two elements:
 - (1) the Gender wage gap,
 - (2) the (under-)representation in decision-making positions within private companies.
- 3 From the very outset, the ETUC would like to highlight that it is strongly committed to achieving equality between women and men. In its Constitution the ETUC clearly states that it
 - will work throughout Europe for [...]
 - the elimination of all forms of discrimination, based on sex, age, colour, race, sexual orientation, nationality, religious or philosophical beliefs or political opinions;
 - the promotion of equal opportunities and equal treatment between men and women; [...]²
- 4 The ETUC priorities are currently outlined in the Paris Action Programme (2015-2019) and the ETUC Action Programme on Gender Equality 2016 – 2019, and include in particular:
 - Mainstreaming gender into all ETUC policies;
 - Achieving equal pay between women and men;
 - Eliminating the gender gap in decision-making bodies.³
- 5 Against this background, these Observations aim at fulfilling these objectives by providing the European Committee of Social Rights (ECSR or Committee) with as much as possible consistent and comprehensive information on the problems at issue. The Observations will be divided into three parts the first of which will be attributed to the general framework (Part I) whereas the second will deal with the country-specific situation including the relevant international case law concerning the respondent State (Part II) before finally arriving at the Conclusions (Part III).
- 6 At an editorial level, it is indicated that all quotations will be governed by the following principles: they focus on the issues at stake (while still showing the relevant context) and will be ordered chronologically (beginning with the newest text). Emphases in **bold** are added by the ETUC;⁴ eventual footnotes are, in principle, omitted. Each time Article 20 of the Charter is mentioned it also includes Article 1§1 of the (First) Additional Protocol which has the same content for those countries which have ratified only the latter provision. Following the Committee's General Introduction to Conclusions 2012, the content of Article 4§3 of the Charter on the right of equal pay is now considered to be included in Article 20 of the Charter.

¹ Unless stated otherwise, Articles without further indication relate to the 1996 RESC.

² Extract of the Preamble of the [ETUC Constitution](#).

³ See for further information: <https://www.etuc.org/issue/gender-equality>.

⁴ Where the original text contains emphases they are highlighted in *italics*.

Therefore, each time these Observations refer to Article 20 of the Charter in relation to equal pay they include also Article 4§3 of the Charter unless otherwise specified.

I. General framework

- 7 As Part I, the description of the 'General framework' is setting the foundation for the country-specific assessment in Part II.

A. *International law and material*

- 8 The importance and legal significance of international standards and their interpretation and application⁵ is widely recognised. Accordingly, the collective complaint refers in several respects to international standards and the respective case law (in particular CEDAW). Nevertheless, the ETUC would like to add pertinent references to international law and material to the description provided in the complaints because all following International Organisations attribute a great importance to the principle of equality between men and women be it in their standard-setting, the respective case law or in other fields like research, projects, studies etc.
- 9 Unless stated otherwise the respondent State has ratified all the following instruments referred to below.⁶

1. United Nations

- 10 The United Nations (UN) provide for a wide-ranging set of standards (see below a) to d)) and further pertinent material (see below e)).

a) *Universal Declaration of Human Rights*

- 11 The main provisions of the Universal Declaration of Human Rights (UDHR) relating to equality between men and women may be quoted as follows:

Article 1

All human beings are born **free and equal in dignity and rights**. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood. [...]

Article 23

[...] (2) Everyone, without any discrimination, has the right to **equal pay for equal work**.

b) *International Covenant on Civil and Political Rights*

(1) Text

- 12 The main provisions of the International Covenant on Civil and Political Rights (ICCPR)⁷ relating to equality between men and women might be quoted as follows:

Article 2

⁵ As to legal impact of the 'Interpretation in harmony with other rules of international law' see the ETUC Observations in No. 85/2012 Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) v. Sweden - Case Document no. 4, Observations by the European Trade Union Confederation (ETUC), paras. 32 and 33.

⁶ As legally non-binding instruments, this list does obviously not include the UDHR nor Recommendations nor any 'Further pertinent material'.

⁷ Adopted by General Assembly resolution 2200A (XXI) of 16 December 1966; entry into force 23 March 1976.

1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, **sex**, language, religion, political or other opinion, national or social origin, property, birth or other status. [...]

Article 3

The States Parties to the present Covenant undertake to ensure the **equal right of men and women** to the enjoyment of all civil and political rights set forth in the present Covenant. [...]

Article 26

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, **sex**, language, religion, political or other opinion, national or social origin, property, birth or other status. [...]

(2) General interpretation

13 In its General Comment No. 28 on Article 3 ICCPR⁸, the competent organ to interpret the ICCPR, the Human Rights Committee (CCPR), stated i.a.

31. [...] The Committee has also often observed in reviewing States parties' reports that a large proportion of women are employed in areas which are not protected by labour laws and that prevailing customs and traditions discriminate against women, particularly with regard to access to better paid employment and to **equal pay for work of equal value**. States parties should **review their legislation and practices** and take the lead in implementing all measures necessary to eliminate discrimination against women in all fields, for example by **prohibiting discrimination by private actors in areas such as employment**, education, political activities and the provision of accommodation, goods and services. States parties should report on all these measures and provide information on the remedies available to victims of such discrimination.

c) International Covenant on Economic, Social and Cultural Rights

14 As complementary to the ICCPR the International Covenant on Economic, Social and Cultural Rights (ICESCR)⁹ provides in particular for the protection against discrimination (see below (1)) and for social rights. Its competent organ, the Committee on Economic, Social and Cultural Rights (CESCR) to interpret this instrument has developed a case law in this respect (see below (2)).

(1) Text

Article 2

[...] 2. The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, **sex**, language, religion, political or other opinion, national or social origin, property, birth or other status [...]

Article 3

The States Parties to the present Covenant undertake to ensure the **equal right of men and women** to the enjoyment of all economic, social and cultural rights set forth in the present Covenant.

Article 7

The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular:

(a) Remuneration which provides all workers, as a minimum, with:

⁸ Adopted: 29.03.2000 (replacing general comment No. 4).

⁹ Adopted by resolution 2200A (XXI) of 16.12.1966; entry into force 03.01.1976.

- (i) Fair wages and **equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men**, with equal pay for equal work; [...]
- (c) Equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence; [...]

(2) General interpretation

15 Recently, in its General Comment No. 23 concerning Article 7 ICESCR¹⁰ CESCR 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. It should cover a broad selection of functions. Since the focus should be on the “value” of the work, evaluation factors should include **skills, responsibilities and effort required by the worker, as well as working conditions**. It could be based on a comparison of rates of remuneration across organizations, enterprises and **professions**.

13. Objective job evaluation is important to **avoid indirect discrimination** when determining rates of remuneration and comparing the relative value of different jobs. For example, a distinction between full-time and part-time work — such as the payment of bonuses only to full-time employees — might indirectly discriminate against women employees if a higher percentage of women are part-time workers. Similarly, the objective evaluation of the work must be free from gender bias. [...]

d) Convention on the Elimination of All Forms of Discrimination against Women

16 The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)¹¹ can be considered as the universal core convention on equality between men and women. It provides also for specific protection in employment (see below (1)) and for social rights. Its competent organ, the Committee on the Elimination of Discrimination against Women (CEDAW) to interpret this instrument has developed a case law in this respect (see below (2) and (2)(b)).

(1) Text

Article 1

For the purposes of the present Convention, the term "**discrimination against women**" shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

Article 2

States Parties condemn discrimination against women in all its forms, agree to pursue by **all appropriate means** and without delay a policy of eliminating discrimination against women and, to this end, undertake:

¹⁰ [General Comment No. 23](#) (2016) on the right to just and favourable conditions of work (article 7 ICESCR); see General comment No. 20 (2009) on non-discrimination in economic, social and cultural rights.

¹¹ [Convention on the Elimination of All Forms of Discrimination against Women](#), 18.12.1979.

- (a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle;
- (b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women;
- (c) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination;
- (d) To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation;
- (e) To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise;**
- (f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women;
- (g) To repeal all national penal provisions which constitute discrimination against women.

Article 3

States Parties shall take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the **full development and advancement of women**, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men. [...]

Article 11

1. States Parties shall take all appropriate measures to eliminate discrimination against women in the **field of employment** in order to ensure, on a basis of equality of men and women, the same rights, in particular:

- (a) The right to work as an inalienable right of all human beings;
- (b) The right to the same employment opportunities, including the application of the same criteria for selection in matters of employment;
- (c) The right to free choice of profession and employment, the right to promotion, job security and all benefits and conditions of service and the right to receive vocational training and retraining, including apprenticeships, advanced vocational training and recurrent training;
- (d) The right to **equal remuneration**, including benefits, and to equal treatment in respect of work of **equal value**, as well as equality of treatment in the evaluation of the quality of work; [...]

(2) General interpretation

(a) *Concerning the Gender pay gap*

17 As early as 1989 in its General Recommendation No. 13¹² the CEDAW defined in more detail the content of 'Equal remuneration for work of equal value' by recommending to the States Parties i.a. 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.

¹² [General recommendation No. 13: Equal remuneration for work of equal value](#), CEDAW, Eighth session (1989)), contained in document A/44/38. Further General Recommendations might be relevant, such as

- No. 16 (1991) unpaid women workers in rural and urban family enterprises,
- No. 28 (2010) The Core Obligations of States Parties under Article 2 of the CEDAW,
- No. 33 (2015) on women's access to justice.

(b) *Concerning the (under-)representation of women in decision-making bodies in enterprises*

18 In more recent times 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 appears important to highlight the following extracts of 'Concluding Observations' on certain countries which have not ratified the CCPP, whereas extracts of similar CEDAW conclusions on countries which have ratified the CCPP are quoted in Part II.A. of the respective ETUC Observations.

(i) Estonia (2016)¹³

28. [...] The Committee is also concerned about: [...]

(d) The **significant underrepresentation of women in management positions in private companies**; [...]

29. *The Committee recommends that the State party: [...]*

(d) *Increase the representation of women in **management positions in private companies**, including through temporary special measures; [...]*

(ii) Slovakia (2015)¹⁴

28. The Committee notes the amendment to the Labour Code in 2011 to provide for the equal treatment of women and men in employment and an increase in the representation of women on corporate boards, but is concerned:

(a) That significant horizontal and vertical gender segregation exists in the labour market, including the **persistently low representation of women compared with men in economic decision-making positions**, such as on the supervisory board of companies and in executive positions, and that the size of the gender pay gap remains large, women's high levels of education notwithstanding; [...]

29. *The Committee recommends that the State party: [...]*

(b) *Enhance measures to achieve the **equal and full participation of women in decision-making in the economic sphere, in particular on the management and supervisory boards of public and private companies**; [...]*

(iii) Spain (2015)¹⁵

28. The Committee [...] is particularly concerned about the following issues: [...]

(b) The **low representation of women in managerial and decision-making positions and on boards of directors** (18.2 per cent) and that neither Organic Law No. 3/2007 on effective equality for men and women nor Law No. 31/2014 amending the Corporations Act provides sanctions for the non-enforcement of the required gender balance on the boards of directors of large companies; [...]

29. *The Committee recommends that the State party: [...]*

(d) *Take measures to achieve the equal and full participation of women **in decision-making in the economic sphere, in particular on the boards of directors of large companies, by introducing mandatory quotas***;

(iv) Denmark (2015)¹⁶

29. The Committee welcomes the establishment in 2011 of a tribunal for equal pay, but remains concerned at: [...]

¹³ [Concluding observations on the combined fifth and sixth periodic reports of Estonia](#), CEDAW/C/EST/CO/5-6 – 18.11.2016.

¹⁴ [Concluding observations on the combined fifth and sixth periodic reports of Slovakia](#), CEDAW/C/SVK/CO/5-6 – 25.11.2015.

¹⁵ [Concluding observations on the eighth periodic report of Spain](#), CEDAW/C/ESP/CO/7-8, 29.7.2015.

¹⁶ [Concluding observations on the eighth periodic report of Denmark](#), CEDAW/C/DNK/CO/8, 11.03.2015.

(c) The absence of clearly defined sanctions for companies that fail to meet **targets for equal gender representation**; [...]

30. *The Committee recommends that the State party: [...]*

(c) *Provide for adequate and **clearly defined sanctions for companies that fail to meet targets for equal gender representation and provide specific mechanisms for the prompt enforcement of such sanctions**; [...]*

e) *Further pertinent material*

The importance of the principle of equality between men and women is furthermore underlined by the inclusion in the [UN 2030 agenda](#). In its Sustainable Development Goals (SDG) Goal 5. ('Achieve gender equality and empower all women and girls') contains i.a. the following elements:

5.1 **End all forms of discrimination against all women** and girls everywhere [...]

5.5 **Ensure women's full and effective participation** and equal opportunities for leadership at **all levels of decision- making** in political, **economic** and public life [...]

5.c Adopt and strengthen **sound policies and enforceable legislation** for the promotion of gender equality and the empowerment of all women and girls at all levels [...]

2. International Labour Organisation

19 Out of the eight core Conventions of the International Labour Organisation (ILO), the two anti-discrimination Conventions No. 100 and 111 are of specific relevance for this collective complaint.

a) *Convention No. 100¹⁷*

(1) Text

Article 1

For the purpose of this Convention

(a) the term *remuneration* includes the ordinary, basic or minimum wage or salary and any additional emoluments whatsoever payable directly or indirectly, whether in cash or in kind, by the employer to the worker and arising out of the worker's employment;

(b) the term *equal remuneration for men and women workers for work of equal value* refers to rates of remuneration established without discrimination based on sex.

Article 2

1. Each Member shall, by means appropriate to the methods in operation for determining rates of remuneration, promote and, in so far as is consistent with such methods, ensure the application to all workers of the principle of equal remuneration for men and women workers for work of equal value.

2. This principle may be applied by means of

(a) national laws or regulations;

(b) legally established or recognised machinery for wage determination;

(c) collective agreements between employers and workers; or

(d) a combination of these various means.

Article 3

1. Where such action will assist in giving effect to the provisions of this Convention measures shall be taken to promote objective appraisal of jobs on the basis of the work to be performed.

2. The methods to be followed in this appraisal may be decided upon by the authorities responsible for the determination of rates of remuneration, or, where such rates are determined by collective agreements, by the parties thereto.

¹⁷ [Equal Remuneration Convention](#), 1951 (No. 100). Adoption: 29.06.1951, entry into force: 23.05.1953 - Status: Up-to-date instrument (Fundamental Convention).

3. Differential rates between workers which correspond, without regard to sex, to differences, as determined by such objective appraisal, in the work to be performed shall not be considered as being contrary to the principle of equal remuneration for men and women workers for work of equal value.

Article 4

Each Member shall co-operate as appropriate with the employers' and workers' organisations concerned for the purpose of giving effect to the provisions of this Convention.

(2) General interpretation

(a) *General Survey 2012*

20 In its General Survey 2012,¹⁸ the 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:

Gender pay gap

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**. The gender pay gap varies from country to country, and between different sectors within a country. Globally, women earn approximately 77.1 per cent of what men earn (a pay gap of 22.9 per cent) though in some countries women earn considerably less. If wages of part-time workers are included in the calculation, the gap can increase to much higher levels.

669. Many countries have made progress in reducing the pay gap, though in others it has stagnated for many years, or even increased. Even where gender pay differences are **narrowing**, they are doing so **extremely slowly**: at the current rate it is estimated that another 75 years will be needed to bridge the gap. *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: The cornerstone of the Convention

[...] 673. *The concept of "work of equal value" lies at the heart of the fundamental right of equal remuneration for men and women for work of equal value, and the promotion of equality. Due to historical attitudes and stereotypes regarding women's aspirations, preferences and capabilities, certain jobs are held predominantly or exclusively by women (such as in caring professions) and others by men (such as in construction). **Often "female jobs" are undervalued in comparison with work of equal value performed by men when determining wage rates. 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.***

674. "Value" while not defined in the Convention, refers to the worth of a job for the purpose of computing remuneration. "**Value**" in the context of the Convention indicates that **something other than market forces** should be used to ensure the application of the principle, as market forces may be inherently gender-biased. [...]

675. While *Article 1* indicates what cannot be considered in determining rates of remuneration, *Article 3* presupposes the use of appropriate techniques for **objective job evaluation** to determine value, comparing factors such as skill, effort, responsibilities and working conditions.

¹⁸ Report III(1B): [Giving globalization a human face](#), General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization, 2008, 2012.

Comparing the relative value of jobs in occupations which may involve different types of skills, responsibilities or working conditions, but which are nevertheless of equal value overall, is essential in order to eliminate pay discrimination resulting from the failure to recognize the value of work performed by women and men free from gender bias. The Committee recalls that the principle has been applied to compare the remuneration received by men and women **engaged in different occupations**, such as wardens in sheltered accommodation for the elderly (predominantly women) and security guards in office premises (predominantly men); or school meal supervisors (predominantly women) and garden and park supervisors (predominantly men). [...]

679. *Noting that many countries still retain legal provisions that are narrower than the principle laid down in the Convention, as they do not give expression to the concept of “work of equal value”, and that such provisions hinder progress in eradicating gender-based pay discrimination, the Committee again urges the governments of those countries to take the necessary steps to amend their legislation. Such **legislation should** not only provide for equal remuneration for equal, the same or similar work, but also **address situations where men and women perform different work that 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. Article 3 also makes it clear that differential rates between workers are compatible with the principle of the Convention if they correspond, without regard to sex, to differences determined by such evaluation.* [...]

Scope of comparison

697. Application of the Convention's principle is not limited to comparisons between men and women in the same establishment or enterprise. It allows for a much broader comparison to be made between jobs performed by men and women in different places or enterprises, or between different employers. **Ensuring a broad scope of comparison is essential for the application of the principle of equal remuneration** given the continued prevalence of occupational sex segregation. [...]

698. The reach of **comparison** between jobs performed by women and men **should be as wide as possible**, in the context of the level at which wage policies, systems and structures are coordinated. As effective application of the principle of the Convention is needed, where women are more heavily concentrated in certain sectors or occupations, there is a risk that the possibilities for comparison at the enterprise or establishment level will be insufficient. In certain countries the scope of comparison is limited to the same employer in legislation. **The European Committee of Social Rights has also considered under the European Social Charter that “[a]s comparisons need to be made in order to determine whether women and men really do receive equal pay, the Committee has consistently found that „the possibility to look outside an enterprise for an appropriate comparison should exist where necessary” (Conclusions XIII-1, p. 121)**”. Similarly, the Committee of Experts has also asked certain governments to extend the scope of comparison beyond the enterprise. [...]

Objective job evaluation methods

[...] 701. *Whatever **methods** are used for the objective evaluation of jobs, particular care **must be taken to ensure that they are free from gender bias**: it is important to ensure that the selection of factors for comparison, the weighting of such factors and the actual comparison carried out are not discriminatory, either directly or indirectly.* Often skills considered to be “female”, such as manual dexterity and those required in the caring professions, are undervalued or even overlooked, in comparison with traditionally “male” skills, such as heavy lifting. In addition, if job evaluation is to make a positive contribution to resolving wage discrimination and promoting equality, there must be a legal and administrative framework enabling workers to claim equal remuneration on the basis of the assessed value of their

jobs, together with a right to claim redress when job evaluation systems have been found to be discriminatory.

702. A number of analytical job evaluation methods have been developed, for example: in *Sweden*, "Steps to Pay Equity"; in *Switzerland*, the ABAKABA and EVALFRI methods; and in *Spain* the ISOS methods. With respect to the ABAKABA method, the Committee has noted that it takes into consideration characteristics considered to be masculine and feminine, and includes criteria such as repetitiveness and precision of movement, responsibility for the life of others, responsibility for the environment, the number of work interruptions (for example in secretarial and clerical work), empathy and the ability to organize, which are often linked to occupations in which women are predominantly employed. [...]

b) *Convention No. 111*¹⁹

(1) Text

Article 1

1. For the purpose of this Convention the term *discrimination* includes

(a) **any distinction**, exclusion or preference made on the basis of race, colour, **sex**, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation; [...]

3. For the purpose of this Convention the terms *employment* and *occupation* include access to vocational training, access to employment and to particular occupations, and terms and conditions of employment. [...]

Article 3

Each Member for which this Convention is in force undertakes, by methods appropriate to national conditions and practice [...]

(b) to enact such legislation [...];

(c) to repeal any statutory provisions and modify any administrative instructions or practices which are inconsistent with the policy; [...]

(2) General Interpretation

21 In its General Survey 2012,²⁰ the CEACR described the requirements which derive from Convention No. 100 in relation equality between men and women as follows:

(a) *General Survey 2012*

Chapter 3 - Equality of opportunity and treatment in employment and occupation (Convention No. 111)

Introduction

731. [...] *As a first step, it is essential to acknowledge that no society is free from discrimination and that **continuous action is required** to address it.*

732. [...] *The implementation of the national equality policy presupposes the adoption of a range of specific and concrete measures, including in **most cases the need for a clear and comprehensive legislative framework**, and ensuring that the right to equality and non-discrimination **is effective in practice**. Proactive measures are required to address the underlying causes of discrimination and de facto inequalities resulting from deeply entrenched discrimination.* [...]

¹⁹ [Discrimination \(Employment and Occupation\) Convention](#), 1958 (No. 111), Convention concerning Discrimination in Respect of Employment and Occupation. Adoption: 25.06.1958, entry into force: 15.06.1960 - Status: Up-to-date instrument (Fundamental Convention).

²⁰ See note 18.

Thematic issues

Defining discrimination

743. *Clear and comprehensive definitions of what constitutes discrimination in employment and occupation are instrumental in identifying and addressing the many manifestations in which it may occur. [...] Any discrimination – in law or in practice, direct or indirect – falls within the scope of the Convention.*

Direct and indirect discrimination

744. Direct discrimination occurs when less favourable treatment is explicitly or implicitly based on one or more prohibited grounds. [...]

745. **Indirect discrimination** refers to apparently neutral situations, regulations or practices which in fact result in unequal treatment of persons with certain characteristics. It occurs when the same condition, treatment or criterion is applied to everyone, but results in a disproportionately harsh impact on some persons on the basis of characteristics such as race, colour, sex or religion, and is not closely related to the inherent requirements of the job. In referring to the “effect” of a distinction, exclusion or preference, it is clear that intention to discriminate is not an element of the definition in the Convention, which covers all discrimination **irrespective of the intention of the author** of a discriminatory act. The Convention also covers situations in which inequality is observed in the **absence of a clearly identifiable author**, as in some cases of indirect discrimination or occupational segregation based on sex. Challenges related to structural discrimination therefore need to be addressed under the Convention. [...]

Grounds of discrimination: An evolving area

[...]

Sex discrimination and gender equality

782. Under the Convention, sex discrimination includes distinctions based on the biological characteristics, as well as **unequal treatment arising from socially constructed roles** and responsibilities assigned to a particular sex (gender). Gender roles and responsibilities are affected by age, race, class, ethnicity and religion, and by the geographical, economic and political environment. [...]

783. *The protection against discrimination applies to both men and women, although considerable inequalities, in law and in practice, exist to the detriment of women. Despite the requirement under the Convention to repeal discriminatory legal provisions, laws discriminating directly or indirectly against women have not yet been relegated to the past. Women are also over-represented in informal and atypical jobs, including part-time jobs, face greater barriers in gaining access to posts of responsibility, and continue to bear the unequal burden of family responsibilities. Stereotyped assumptions regarding women’s aspirations and capabilities, their suitability for certain jobs or their interest or availability for full-time jobs, continue to lead to the segregation of men and women in education and training, and consequently in the labour market.*

3. Council of Europe

22 The Council of Europe (CoE) is characterised by two main human rights instruments, the European Convention on Human Rights (ECHR, see below a)) and the European Social Charter (ESC, see below b)) which is at the very core of this complaint. However, there are also other relevant documents (see below c)).

a) *European Convention on Human Rights*

23 In its fundamental Article 14, the ECHR²¹ prohibits discrimination²² in the following terms:

²¹ http://www.echr.coe.int/Documents/Convention_ENG.pdf

²² See as joint publication by the ECtHR and the Fundamental Rights Agency of the EU (FRA) the ‘[Handbook](#) on European non-discrimination law’ developing the related ECHR/EU case-law and

Article 14 - Prohibition of discrimination

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.

However, this protection requires that the right referred to falls in the ambit of one of the rights enshrined in the Convention or its Protocols. As far as equal pay is concerned the sole Convention right could possibly be Article 1 of Protocol No. 1 (Protection of Property).

- 24 This lack of protection against discrimination in general has been closed by the adoption of Protocol No. 12,²³ but it still lacks ratification to a large degree.²⁴

Article 1 - General prohibition of discrimination

1. The enjoyment of any right set forth by law 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.

2. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.

- 25 So far, no cases or ECtHR's rulings on equal pay are known.

b) European Social Charter (ESC)²⁵

(1) Text

Article 4 – The right to a fair remuneration

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 – The right to equal opportunities and equal treatment in matters of employment and occupation without discrimination on the grounds of sex

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:

- a access to employment, protection against dismissal and occupational reintegration;
- b vocational guidance, training, retraining and rehabilitation;
- c **terms of employment and working conditions, including remuneration;**
- d **career development, including promotion.**

Article E – Non-discrimination

The enjoyment of the rights set forth in this Charter shall be secured without discrimination on any ground such as race, colour, **sex**, language, religion, political or other opinion, national extraction or social origin, health, association with a national minority, birth or other status.

covering the context and background to discrimination categories and defences, the scope of the law and the grounds protected ([update](#), July 2010 – December 2011).

²³ Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, ETS No.177, 04/11/2000.

²⁴ Up to date 18 CoE Member States have ratified and 20 further Member States have signed Protocol No. 12. Out of the 15 CoE Member States having ratified the CCPP six have either ratified (i.e. Croatia, Cyprus, Finland, Netherlands, Portugal and Slovenia) or signed this Protocol (i.e. Belgium, Czech Republic, Greece, Ireland, Italy and Norway) whereas three Member States (i.e. Bulgaria, France and Sweden) have refrained from opting for one of the two alternatives.

²⁵ [European Social Charter \(Revised\)](#), 03.05.1996, European Treaty Series - No. 163.

(2) Compilation of case law (Digest 2008)

26 The 'Digest of the Case Law of the European Committee of Social Rights' (Digest 2008) compiles the main principles deriving from the ECSR's case law based on Statements of Interpretation, Conclusions or Decisions.

27 Concerning the principle of equal pay for work of equal value as enshrined in Article 4§3 of the Charter, the Digest 2008 states the following:

(a) *Article 4§3*

Article 4§3 guarantees the right to equal pay without discrimination on grounds of sex. This is one aspect of the right to equal opportunities in matters of employment guaranteed by Article 20. As a result, the case-law under Article 20 (see *infra*) applies *mutatis mutandis* to Article 4§3. Only aspects specifically linked to equal pay are dealt with hereinafter.

The situation as regards equal pay in countries which have accepted both Article 20 and Article 4§3 is examined exclusively under Article 20 and these countries are no longer required to submit a report on the application of Article 4§3.

The principle of equal pay

Women and men are entitled to "equal pay for work of equal value". This means that the equal pay principle applies to the same work and to "mixed jobs", that is ones performed by both women and men, but also to work of the same value.

The principle of equality should cover **all the elements of pay**, that is basic or minimum wages or salary plus all other benefits paid directly or indirectly in cash or kind by the employer to the worker by reason of the latter's employment.

It must also apply between full-time and part-time employees, covering the calculation of **hourly wages**, pay increases and the components of pay.

Guarantees of enforcement

Legislative means

The right of women and men to "equal pay for work of equal value" must be expressly provided for in legislation.

As far as setting wage levels is concerned, states are free to choose their own methods and can treat this as a matter to be decided by collective bargaining. Domestic law must however **ensure that violations of the principle of equal pay will be sanctioned** and lay down the general rules applying to labour and management when they are negotiating wages (for example, differential pay scales and discriminatory clauses must be ruled out). If full equal pay cannot be achieved through collective bargaining, the **state must intervene** using legal wage-fixing methods or any other appropriate means.

Judicial safeguards

Domestic law must provide for appropriate and effective remedies in the event of alleged wage discrimination. Employees who claim that they have suffered discrimination must be able to take their case to court.

Domestic law should provide for an alleviation of the burden of proof in favour of the plaintiff in discrimination cases.

Anyone who suffers wage 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 act as a deterrent to the offender. In cases of unequal pay, any compensation must, as a minimum, cover the difference in pay.

Methods of classification and comparison and other measures

Appropriate classification methods must be devised enabling to compare the respective values of different jobs and carry out objective job appraisals in the various sectors of the economy, including those with a predominantly female labour force.

Domestic law must make provision for comparisons of pay and jobs to extend outside the company directly concerned where this is necessary for an appropriate comparison. The Committee views this as a crucial means of ensuring that job appraisal systems are effective under certain circumstances, particularly in companies where the workforce is largely, or even exclusively, female.

States must promote positive measures to narrow the pay gap, including:

- measures to improve the quality and coverage of wage statistics;
- steps to ensure that more attention is paid to equal pay for women and men in national action plans for employment.

28 As regards more generally the principle of equality between men and women provided for in Article 20 of the Charter, the Digest 2008 states the following:

(b) *Article 20*

Definitions and scope

Article 20 guarantees the right to equality at **all stages of working life** – access to employment, remuneration and other working conditions, including dismissal and other forms of detriment, vocational training and guidance and promotion. These words give Article 20 the status of *lex specialis* in relation to Article 1§2 of the Charter, which prohibits all discrimination at work on whatever ground.

The **right to equal pay** without discrimination on the grounds of sex is guaranteed by Article 4§3 and the relevant specific case-law is presented under this article (see above): The situation as to equal pay in States party which have accepted Articles 4§3 and 20 is examined under Article 20 only. Consequently, these States are no longer required to submit a report on the application of Article 4§3. [...]

Discrimination in breach of the Charter is constituted by a difference in treatment between **people in comparable situations** which does not pursue a legitimate aim and is not based on objective and reasonable grounds. In determining whether a legitimate aim is being pursued and the measures taken are reasonably proportionate, the Committee applies Article G.

Indirect discrimination occurs where a rule, identical for everyone, disproportionately affects men or women without a legitimate aim. Equal treatment of full-time and part-time employees is considered from this angle in particular in respect of social security issues. [...]

The principle of equality applies to all employees, in both the **private and public sectors**.

Means of enforcement

Legal framework

The right of women and men to equality **must be guaranteed by a law**. The Charter requires “states not only to provide for equal treatment but also to protect women and men from discrimination in employment and training. This means that they are obliged to enact a sufficiently detailed legislation explicitly imposing equal treatment in all aspects.” It is not sufficient merely to state the principle in the Constitution. [...]

It must be possible to set aside, withdraw, repeal or amend any provision in collective agreements, employment contracts or firms' internal regulations that is incompatible with the principle of equal treatment.

Right of appeal

National legislation must provide for appropriate and **effective remedies** in the event of alleged discrimination. Employees who consider that they have suffered discrimination must be able to take their case to an independent body.

The **burden of proof must be shifted**. The shift in the burden of proof consists in ensuring that where a person believes he or she has suffered as the result of non-compliance with the principle of equal treatment 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 equal treatment. The purpose of this rule is to enable courts to deal with discrimination in the light of the effects produced by a rule, act, or practice and hence that the shift in the burden of proof is a key factor in the effective application of rules on protection against discrimination.

By analogy with the case-law in relation to Article 1§2, a number of **other legal steps should be taken** to make the right of appeal fully effective, such as authorising trade unions and other bodies to take action in employment discrimination cases, including action on behalf of individuals or setting up an independent body to promote equal treatment and provide legal assistance to victims.

Adequate compensation

Anyone who suffers 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 act as a deterrent to the offender**.

Adequate compensation means:

- **reinstatement** or retention of employment and compensation for any pecuniary damage suffered in the event of unlawful or unfair dismissal;
- **compensation** proportionate to the damage suffered, i.e. to cover **pecuniary and non-pecuniary damage**, where the dismissed employee does not wish to be reinstated or continuation of the employment relationship is impossible;
- in all other cases, bringing the discrimination to an end and awarding compensation proportionate to the pecuniary and non-pecuniary damage suffered.

In accordance with these principles, the Committee considers that compensation should **not** be subject to an **upper limit** as this prevents it from being proportionate to the damage suffered and hence adequate.

When assessing the level of compensation, the Committee takes account of **whether it is high enough to prevent employers from re-offending**. For this purpose, it also considers any other administrative, civil or criminal penalties imposed on employers.

Protection against reprisals

Employees who try to enforce their right to equality must be **legally protected against any form of reprisals from their employers**, including not only dismissal, but also downgrading, changes to working conditions and so on. National legislation must provide for the same consequences where an employee is a victim of reprisal measures as those described above in the sections on appeal procedures and compensation. [...]

Particular rights of women

[...]

Equal opportunities and positive measures

Since "the aim and purpose of the Charter, being a human rights protection instrument, is to **protect rights not merely theoretically, but also in fact**" and conformity with the Charter cannot be ensured solely by the operation of legislation, states must take practical steps to promote equal opportunities.

Appropriate measures include:

- adopting and implementing **national equal opportunities action plans**;
- requiring individual undertakings to draw up enterprise or **company plans** to secure greater equality between women and men; [...]

There is no case-law on discrimination by results, such as the systematic granting of priority to women in sectors of activity in which they are under- represented.

(3) Statement of interpretation

29 Following the Digest 2008 the ECSR has adopted a specific Statement of Interpretation on 'equal pay comparisons' in the framework of Conclusions 2012:²⁶

Under Article 20, equal treatment between women and men includes the issue of equal pay for work of equal value. Usually, pay comparisons are made between persons within the same undertaking/company. However, there may be situations where, in order to be meaningful this comparison can only be made across companies/undertakings. Therefore, the Committee requires that it be possible to **make pay comparisons across companies**. It notes that **at the very least**, legislation should require pay comparisons across companies in one or more of the following situations:

- cases in which **statutory rules** apply to the working and pay conditions in more than one company;
- cases in which several companies are covered by a **collective works agreement** or regulations governing the terms and conditions of employment;
- cases in which the terms and conditions of employment are laid down **centrally** for more than one company within a **holding** (company) or conglomerate.

(4) Conclusions (2016) on (under-)representation of women in decision-making functions within the private sector

30 In more recent times the Committee has shown an increasing interest in the representation of women in decision-making functions. Indeed, it asked for example [Armenia](#), [Romania](#), [Turkey](#) and [Ukraine](#) as well as [Belgium](#) to provide information i.a. on (increasing) women's participation decision-making positions or posts or noted progress in relation to women's participation in decision making in [Ireland](#).

c) Further pertinent material

31 The Committee of Ministers has adopted several Recommendations²⁷ which are in part relevant for the issues at stake.

- *Recommendation No. R(85)2 on legal protection against sex discrimination* 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. The Appendix to the Recommendation refers to the need to give consideration to the adoption of special temporary measures designed to accelerate the realisation of *de facto* equality between men and women in those areas where inequalities exist. In addition, member states are encouraged to adopt suitable machineries and legislation containing effective remedies and sanctions in order to discourage discrimination.
- [Recommendation No. R \(98\)14 on gender mainstreaming](#) calls on member states to create an enabling environment and facilitate conditions for the implementation of gender mainstreaming in the public sector on the basis of the Council of Europe Report on Gender Mainstreaming. The report sets out the conceptual framework for gender mainstreaming and a methodology for its implementation, accompanied by examples of good practices.
- [Recommendation Rec\(2007\)17 on gender equality standards and mechanisms](#) provides an extensive list of measures to achieve gender equality in practice, taking into account human rights and the integration of a gender perspective in legislation in all sectors. It recommends specific gender equality standards in private and family life, education, science and culture, economic life, social protection, health, including sexual and reproductive matters, violence against women, trafficking in human beings, conflict and post-conflict situations and specific situation of vulnerable groups exposed to multiple discrimination. The Recommendation also puts forward strategies, mechanisms and tools to achieve gender equality, such as the

²⁶ The same applies for Conclusions XX-1 - Statement of interpretation - Article 1 Additional Protocol.

²⁷ For the compilation see <https://rm.coe.int/168058feef>.

implementation of complementary strategies; strong institutional mechanisms/national machinery for gender equality; studies and instruments to measure and evaluate progress on the situation of women and men, and the establishment of co-operation and partnerships.

4. European Union (EU)

32 Equality between women and men is one of the European Union's founding values. It goes back to 1957 when the principle of equal pay for equal work became part of the Treaty of Rome²⁸ as primary law²⁹ and later further developed also in secondary law (see below a)). The Court of Justice of the European Union (CJEU) has developed a very rich jurisprudence so far (see below b)). There is also further pertinent material for the purpose of dealing with this complaint (see below c)).

a) *Legislative framework*

(1) Primary Law

33 With the entry into force of the Treaty of Lisbon in 2009 several sources are relevant:

34 The Charter of Fundamental Rights of the European Union (CFREU), legally binding on all EU Member States by virtue of Article 6(1)(3) of the Treaty on the European Union (TEU), provides i.a.:

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.

35 Moreover, the principle is enshrined in the founding values of the EU:

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.

36 The Treaty on the Functioning of the European Union (TFEU) lays down the 'gender mainstreaming principle:

Article 8³⁰

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

37 In the Title on 'Social Policy' a specific article is devoted to the principle of equality between men and women, in particular in relation to 'equal pay'.

²⁸ See for further details <http://ec.europa.eu/justice/gender-equality/>.

²⁹ Art. 119 EC-Treaty.

³⁰ (ex Article 3(2) TEC).

*Article 157*³¹

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. [...]

(2) Secondary law

- 38 After several directives starting in 1975 the actual secondary legislative framework is defined by Directive 2006/54. In 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**.

Concerning the Horizontal Provisions in Title III, Chapter 1 on 'Remedies and enforcement' is of particular importance.

- 39 At least in one specific sector [the Capital Requirements Directive \(2013/36/EU\)](#)³² secondary 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.

b) *General interpretation*

- 40 One of the longest-standing human rights issues the CJEU is dealing with is the principle of equal pay and later the principle of equality between men and women. It has developed an

³¹ (ex Article 141 TEC ; the first version being Article 119 EEC Treaty).

³² Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC.

important corpus of jurisprudence in this respect.³³ As very important cases one might refer to the leading case [Defrenne II](#) (1976) and, for example, also to the [Enderby](#) (1993) judgement.

c) Further pertinent material

(1) EU Institutions

41 In aiming at giving social rights a new impetus the *Commission* has adopted a [Recommendation on 'The European Pillar of Social Rights'](#) (April 2017). Its Principle No. 2 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.

42 In a more specific [Recommendation on strengthening the principle of equal pay between men and women through transparency](#) (2014)³⁴ the Commission had stated the respective principles.

43 In a [Communication](#) (2013)³⁵ on the application of Directive 2006/54 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**.

44 The *European Parliament* (EP) has a long-standing tradition to call for effective implementation of the principle of equality between men and women. Specifically, on the issue of equal pay the EP adopted a [Resolution](#) (2012)³⁶ with recommendations to the Commission on application of the principle of equal pay for male and female workers for equal work or work of equal value. Most recently, it has adopted [Resolution](#) (2017)³⁷ on women's economic empowerment in the private and public sectors in the EU.

45 The Commission offers additional information on specific websites on [Gender equality](#) in general and on the [Gender pay gap](#) and the [Gender balance in decision-making positions](#) including its proposed 40% objective for the representation of women on Boards.

(2) Other bodies

46 Without being exhaustive and besides the Fundamental Rights Agency of the EU (FRA) which generally deals with human rights issues, the importance the EU attributes to the question of equality between men and women is shown by the creation of the specific body called

³³ See, for example, a [Compilation of case law on the equality of treatment between women and men and on non-discrimination in the European Union](#) (3rd edition, completed in July 2009), complemented by a further '[Discrimination and Gender equality cases overview](#)' (until April 2011); relevant case law since 2011 might be found in the data-base of the CJEU: [list of cases under Article 157 TFEU](#).

³⁴ C(2014) 1405 final, 07.03.2014.

³⁵ COM(2013) 861 final, 06.12.2013, p. 7.

³⁶ [\(2011/2285\(INI\)\)](#), 24.05.2012.

³⁷ [\(2017/2008\(INI\)\)](#), 03.10.2017.

European Institute of Gender Equality (EIGE). Although created as a network of national equality institutions the Equinet contributes to the promotion of equality at EU level.³⁸

(a) *Gender pay gap*

- 47 Specialised bodies or organisations also deal with these problems and try to contribute to overcome them. Recently, *Equinet* has published a report '[A comparative analysis of gender equality law in Europe 2016](#)' summarizing the situation i.a. as follows:

Unfortunately, despite this legal framework, the difference between the remuneration of male and female employees remains one of the great concerns in the area of gender equality: on average, women in the EU earn 16.3 % less than men, and progress has been slow in closing the gender pay gap. The differences can be partly explained by factors other than discrimination: e.g. traditions in the career choices of men and women; the fact that men, more often than women, are given overtime duties, with corresponding higher rates of pay; the gender imbalance in the sharing of family responsibilities; glass ceilings; part-time work, which is often highly feminised; job segregation etc. However, **another part of the discrepancies cannot be explained except by the fact that there is pay discrimination**, which the principle of equal pay aims to eradicate.

- 48 In the Conclusions of its [2017 Report on equality between women and men in the EU](#) Equinet states:

Over the last years, the gaps in pay, employment and working hours have been plateauing. At this rate of change, it will **take more than a century to close** the overall **gender gap** in earnings.

(b) *(Under-)representation in decision-making bodies within private companies*

- 49 The organisation [European Women on Boards](#) (EWoB) has published a report on [Gender Diversity on European Boards](#) (Realizing Europe's Potential: Progress and Challenges, April 2016)³⁹ containing i.a. statistics as well as legal and other frameworks.

B. Further pertinent material

- 50 As the Committee also refers to other pertinent (e.g. Eurostat) material it appears useful to provide additional information in this respect.

1. *Concerning the Gender pay gap*

- 51 To measure the extent of the Gender pay gap in relation to the countries concerned the main point is reliable statistical evidence. Thus, the most important statistical source (also referred to by the Committee) is Eurostat.⁴⁰ It provides - in a given period of time - the relevant data:

Gender pay gap in unadjusted form⁴¹

GEO/TIME	2010	2011	2012	2013	2014	2015
European Union (28 countries)	16,4	16,9	17,3	16,8	16,7	16,3
Belgium	10,2	9,4	8,3	7,5	6,6	6,5

³⁸ All those bodies offer websites comprising important additional information.

³⁹ Further information might be drawn from <http://european.ewob-network.eu/projects/ewob-studies/>.

⁴⁰ Its specific advantage for the examination of all 15 cases lies in the fact that Norway is also included.

⁴¹ by NACE Rev. 2 activity (Industry, construction and services (except public administration, defense, compulsory social security) - structure of earnings survey methodology [earn_gr_gpgr2] - Extract – in alphabetical order.

GEO/TIME	2010	2011	2012	2013	2014	2015
Bulgaria	13,0	13,2	15,1	14,1	14,2	15,4
Croatia	5,7	3,4	2,9	9,0	10,4	:
Cyprus	16,8	16,1	15,6	14,9	14,2	14,0
Czech Republic	21,6	22,6	22,5	22,3	22,5	22,5
Finland	20,3	19,1	19,2	18,8	18,4	17,3
France	15,6	15,7	15,6	15,5	15,5	15,8
Greece	15,0	:	:	:	:	:
Ireland	13,9	12,7	12,2	12,9	13,9	:
Italy	5,3	5,7	6,5	7,0	6,1	5,5
Netherlands	17,8	18,6	17,6	16,5	16,1	16,1
Norway	16,1	15,7	14,7	15,5	14,5	14,9
Portugal	12,8	12,9	15,0	13,3	14,9	17,8
Romania	8,8	9,6	6,9	4,9	4,5	5,8
Slovenia	0,9	3,3	4,5	6,3	7,0	8,1
Sweden	15,4	15,6	15,5	14,6	13,8	14,0

<http://appsso.eurostat.ec.europa.eu/nui/setupDownloads.do>

52 This statistic shows that for all countries concerned by the complaints for which information is available the minimum Gender pay gap still lies above 5.5 %. That means that for all countries the principle of equal pay for work of equal value is not ensured. This is even more true taking into account the lack of clarity in relation to the calculation (e.g. to which extent did they - or at least should they - imply other discriminatory elements like career differences leading to the increase of the pay gap) or in relation to the data basis (e.g. undocumented work or informal economy, both sectors in which the gender pay gap will most probably be even higher).

2. Concerning the (under-)representation in decision-making positions within private companies

53 In its updated 'Data table' the European Institute for Gender Equality (EIGE) provides the following information:⁴²

Largest listed companies: presidents, board members, (non-)executives and CEOs⁴³

Countries	Men (%)	Women (%)	Gap (points)
EU28	75.4	24.6	50.8
Belgium	70.6	29.4	41.2
Bulgaria	87.2	12.8	74.4
Croatia	77.4	22.6	54.8
Cyprus	89.3	10.7	78.6
Czech Republic	82.9	17.1	65.8
Finland	67.7	32.3	35.4
France	57.9	42.1	15.8
Greece	90.7	9.3	81.4
Ireland	82.7	17.3	65.4

⁴² Extract – in alphabetical order.

⁴³ [2017-B1; All countries; Men, Women; PC; Members; All sectors](#) [Extract]

Countries	Men (%)	Women (%)	Gap (points)
Italy	67.1	32.9	34.2
Netherlands	69.8	30.2	39.6
Norway	56.0	44.0	12
Portugal	84.5	15.5	69
Slovenia	79.0	21.0	58
Sweden	64.5	35.5	29

http://eige.europa.eu/gender-statistics/dgs/indicator/wm_idm_bus_bus_wmid_comp_compbm

54 This statistic illustrates that only two countries achieve the Commission's proposed objective (40%, see above, para. 45). However, this data only refers to 'largest listed companies' thus leaving out the quantitatively much more important part of the other 'listed companies' as well as non-listed companies. Therefore, it is to be assumed that all countries concerned do not reach this threshold.

C. Legal Principles

55 This section is aimed at setting the framework for Part II by analysing the fundamental legal questions which are at the core of this case.

1. General considerations

56 The two main elements raised in the complaint differ very much from a legal point of view. Whereas the first (equal pay) is very 'classic' in the sense of a long-standing tradition of States providing for (general) legislation in this respect but not sufficiently enforcing it the second problem is a fairly new element which is only slowly appearing at international and national level as a problem to be seriously dealt with.

57 Against this background being different in character both elements are governed by Article 20 of the Charter, 'The right to **equal opportunities and equal treatment** in matters of employment and occupation without discrimination on the grounds of sex'.⁴⁴ From the outset, it should therefore be noted that this Article belongs to the most relevant provisions as it is a so-called 'hard core' Article (see Article A§1(b) of the Charter). More generally, the Council of Europe attributes great importance to [Gender equality](#).

2. Gender pay gap

a) General considerations

58 In general terms, the principle of equal pay for work of equal value is of fundamental character. It is directly related to the human dignity of women who fail to be recognised as equal when it comes to their remuneration.⁴⁵ They are prevented from taking part in the normal societal life at the same footing as men.

59 The Gender pay gap is one longest-standing element of equality between men and women in employment. According to the CEACR: 'Pay differentials remain **one of the most persistent**

⁴⁴ Or Article 1 of the 1988 Protocol; see for the most recent commentary on this provision *C. Kollonay Lehoczky*, Article 20, in: N. Bruun, K. Lörcher, I. Schömann, S. Clauwaert (eds.), *The European Social Charter and the Employment Relation*, Hart Publishing Oxford, 2017, 358 - 380.

⁴⁵ See the reference to human dignity in relation to remuneration in Article 23(4) UDHR.

forms of inequality between women and men' and can be considered as '**one of the most obvious examples of structural gender discrimination** (see above para. 20 (para. 668)).

60 Legally speaking, it found recognition in international human rights and employment law starting in 1948 by Article 23(2) UDHR (see above A.1.a)) and continued to be transferred to a legally binding international instrument for the first time by ILO Convention No. 100 in 1951 (see above A.2.a). This fundamental rights Convention also formed the basis of Article 4§3 of the Charter.

61 However, despite of all international and national legal and other measures, the principle of equal pay has not at all been (fully) applied. Quite to the contrary, in describing the future developments two documents might be quoted, first the *ILO* assessing the situation at the global level as something like a three generation problem (75 years):

Even where gender pay differences are narrowing, they are doing so extremely slowly: at the current rate it is estimated that another **75 years** will be needed to bridge the gap (see above para. 20 (para. 669))

whereas *Equinet* - mainly concerning the EU level - sees a nearly four generation problem (100 years):

Over the last years, the gaps in pay, employment and working hours have been plateauing. At this rate of change, it will take more than **a century** to close the overall gender gap in earnings. (see above para. 48)

for attaining equal pay if nothing fundamentally different happens earlier.

62 Besides this tremendous challenge as such there is a further duplicating dimension. As old-age pensions are normally based on the contributions paid during the working life and these contributions are calculated in relation to the remuneration received the discriminating gender pay gap has an enormously important negative impact on the amount of the old-age pensions,⁴⁶ in short: the lower wages lead to lower amounts of old-age pensions. Thus, the gender pay gap extends the discrimination of women even over the retiring age. This is dramatic because many women (even having worked for a long time) will run the great risk of poverty as elderly persons.

63 At least from the point of view of the ETUC this situation requires a much stricter approach to assess the situation of (non-)conformity in both substantive and procedural dimensions.

b) Substantive requirements

64 At the substantive level, there is a *quantitative* and a *qualitative* dimension. The former is related to the statistical (evaluation of the) situation. In assessing the (non-)conformity of the situation in respondent States it would appear that the Committee only attributed a decisive importance if there was 'manifestly' high (unadjusted) gender pay gap.⁴⁷ However, from the point of view of the ETUC it would be necessary to change this approach.

⁴⁶ See, for example, the EU Council conclusions '[Equal income opportunities for women and men: Closing the gender gap in pensions](#)' (04.06.2015).

⁴⁷ See, for example, [Conclusions 2014 - Azerbaijan - Article 4§3](#): 'The Committee notes from the report that in 2009 the average wages of women amounted to 58,6% of that of men and 46,2% of that of men in 2012. The Committee notes the downward trend in wage equality and considers that the unadjusted pay gap is manifestly too high and therefore, finds that the situation is not in conformity with the Charter.'

- 65 Starting by the fundamental word 'equal', continuing with the great importance of this right (see above in particular para. 58 but also paras. 13, 15, 17 and 21) and taking into account the necessity that the rights recognised in the Social Charter must take a practical and effective, rather than purely theoretical, form.⁴⁸
- 66 According to the point of view of the ETUC, a different approach is required. This would mean that only a 'zero' difference is permitted. However, admitting even that 'equal' might not be interpreted in the strict sense it should nevertheless be evaluated at the threshold close to 'zero'. A reasonable threshold would therefore appear to permit only a difference of 5%.
- 67 According to relevant statistics (see above B.1) all countries concerned by the complaints for which information is available the minimum Gender pay gap still lies above 5.5 %. That means that for all countries concerned the principle of equal pay for work of equal value is not ensured.
- 68 In *qualitative* terms, the Committee has established certain requirements. As it obvious from the statistics referred to above (see above B.1) the timeline shows the persistent nature of the Gender pay gap. Against this background, it is not any more sufficient to say that the respondent States are (totally) free in their means how to ensure equal pay. In drafting a list of measures particular attention is paid to the Conclusions of the Committee. However, sometimes it appears necessary to go further by particular taking into account international case law. Accordingly, it would appear important to require a clear and comprehensive legislation (see above para. 21 (para. 732). In also taking into account also the international case law (see above A.) this legislation should at least ensure that
- the coverage of **all workers** (in a wide definition) is ensured (taking in particular into account that there is no limitation to the 'great majority' like in Article I§2 e.g. for Article 2),
 - the general legal concept includes also **indirect** discrimination (see above para. 21 (in particular para. 745),
 - the term 'pay' contains **all elements of remuneration** as well as supplementary pensions,
 - the **comparison** comprises as a minimum
 - *transparency* (see, for example, above para. 42) or at the very least an effective prohibition of any requirement of confidentiality imposed by employers on potential victims of discrimination or referred to as requirement in any impartial procedure aimed at examining potential discrimination in relation to remuneration,
 - the reach of *comparison* between jobs performed by women and men *being construed as wide as possible* (see above para. 20 (para. 698),
 - the wide definition of 'equal value' also *encompassing work that is of an entirely different nature*, which is nevertheless of equal value (see above para. 20 (para. 673); 'completely different', see above para. 15 (para. 11)),
 - the necessity to evaluate the respective job by a '*job evaluation*' with criteria excluding any kind of (also indirect) discrimination (see, for example, above 15 (paras. 12 and 13), para. 17 (para. 2), para. 20 (para. 701)),

⁴⁸ Decision on the merits, 09.09.1999 - No. 1/1998 - *International Commission of Jurists v. Portugal*, para. 32.

- the respective *assessment* followed by effective *consequences* in case that the result shows a discrimination.

c) *Procedural requirements*

69 Procedural requirements are aimed at additionally serving to ensure the effective exercise of the right to equal pay. Besides the substantive criteria mentioned above it is necessary to ensure them by **legislation**. However, it is not sufficient to enact legislation. In particular, a *review of legislation* is necessary if the threshold is not attained (see, for example para. 13). This would mean that a country which has not attained the threshold required and has not reviewed existing legislation in a given period of time (at least within a period of five years (see above B.1)) should be considered as violating Article 20 of the Charter,

70 Legislation must be **applied effectively**. The following elements are necessary to ensure this application. At a *general* level,

- the labour inspection must have the task of monitoring and possibly intervening coupled by the respective powers and the appropriate equipment in financial and personal terms,
- trade unions as well as human rights institutions or organisations must have the right to file (general) complaints (and be admitted as third parties in any individual complaints (see below).

71 At an *individual* level, the women concerned must have the right to effective access to court complemented by a fair and effective procedure including i.a. the shift of burden of proof to the employer. Moreover, any discrimination (victimisation) in relation of taking any procedural action must be effectively prevented.

72 In any event, it appears important that any possible shift from substantive to procedural requirements should not be continued. Conversely, both elements should be evaluated on their own merits (thus leading possibly to two violations).

d) *Interim conclusions*

73 This catalogue of measures appears necessary in order take a new, fresh an comprehensive step to achieve the elimination of the Gender pay gap at least to considerably shorten the enormous periods of time mentioned above (see para. 61). If they are not implemented the Committee should find a violation of Article 20 of the Charter.

74 This is particularly the case in relation to the substantive requirement of the 5 % threshold mentioned above (see para. 66). As all countries concerned do not attain this threshold the Committee should come to finding a violation already for this reason.

3. (Under-)representation in decision-making bodies within private companies

a) *General considerations*

75 As previously described, the problem of equal representation in decision-making bodies in private companies has only recently appeared at the stage of international and European level (see para. 56). In terms of the Charter and according to the Decision of admissibility, it relates

to Article 20 of the Charter RESC. Until now and in substance, the Committee has only timidly dealt with this question (see above para. 30).

- 76 That is why it appears necessary to interpret Article 20 according to the principles which have been referred to previously. As a starting point it might be helpful to understand that a position as member in a board is of course crucial for your general career in working life.
- 77 The *wording* of Article 20 of the Charter might be considered as not very clear in this respect. Two main questions might have to be addressed: Are the fields referred to in lit. a) – d) of exclusive character? In the affirmative: Does any of the fields enumerated in lit. a) – d) encompass the collective character of decision-making positions in general and decision-making bodies in particular?
- 78 Concerning the first question the wording as such does not exclude a non-exhaustive character because it does not contain any specific wording to this effect (such as 'only' or 'exclusively'). Nevertheless, one could base an exclusive understanding on a comparison with other provisions which contain specific wording as the exemplary character (e.g. 'such as'). In such as case it would be necessary to answer the second question.
- 79 To answer the second question the notion of 'positions' and 'bodies' has to be clarified. First, decision-making 'positions' could be understood as the more general term than the respective 'bodies'. As the former are closely related to an individual situation (such as promotion) this situation would fall under lit. d) ('career development, including promotion'). However, if 'bodies' was something separate, the situation might be more complicated. (If a member of a 'body' is chosen internally, there is no problem to consider this also as a 'promotion' because of their possibly different character.) In any event, it could be also considered as 'terms of employment' understood as being also meant in a collective dimension.
- 80 Examining the *context* as well as the *objective* of Article 20 of the Charter, based in particular on the wide formulation in Part I as well as in particular the introductory part of Article 20 ('effective exercise ...') there should be no doubt that these elements strive for including this issue in the said provision.
- 81 Taking into account also an emerging trend in national legislation complemented by recent *international case law* of CEDAW (see above para. 18) and first elements in EU legislation (see above para. 39) this trend should be considered as confirming such an interpretation. Concerning the developments in international law, mainly elaborated by the CEDAW, tend to go in a more collective dimension. In particular Articles 2 and 3 CEDAW read together with Article 11 CEDAW can be interpreted to cover a general obligation for the Contracting Parties to take effective measures in order to achieve equality regarding the female representation on boards in private companies.
- 82 Concluding this examination, the ETUC is of the view that the Committee should come to the conclusion that the (under-)representation of women in decision-making bodies is covered by Article 20 of the Charter.

b) Substantive requirements

- 83 In substantive terms, it would appear necessary to provide for a threshold which should be attained in order to secure equal representation in decision-making positions. If one would, however, not require an 'equal' representation (and thus oblige States to ensure 50%

representation of both sexes) it would nevertheless appear important to define a threshold close to this percentage (for example 40%).

c) *Procedural requirements*

84 In principle, and *mutatis mutandis* the same elements as described above (2.c) should apply here also.

d) *Interim conclusions*

85 Article 20 of the Charter should be understood as covering (under-)representation of women in decision-making bodies within private companies. This would of course apply all the more to State-owned enterprises or respective bodies in public administrations. In examining the question of (non-conformity the Committee should come to the conclusion to require a threshold to be attained which is close to or least not distant from 50%. It should require also respective legislation and all necessary procedural measures which are necessary to achieve this objective.

86 If one would take the basis of 40% and if one would further base the assessment in particular on the relevant statistics (see above B.2) it would appear that the States concerned do not sufficiently ensure the application of Article 20 of the Charter.

II. Specific situation

87 On the foundation of the 'General framework' (described in Part I) this Part II will provide the country-specific international case law (see below A)⁴⁹ as well as any further pertinent material (see below B) and thus form the basis for the legal assessment (see below C).

88 To recall, the main content of the complaint against France is described in the Decision on admissibility of 4 July 2017⁵⁰ as follows:

UWE invokes the following grounds:

a) The first concerns the wage gap between men and women in France, which still persists and is unfavourable to women. According to UWE, unequal pay is a reality, despite the international obligations entered into and the domestic legislation enacted. In this respect, UWE also alleges that, in practice, the bodies which are responsible for monitoring effective compliance with employment law in relation to equal pay for men and women, have failed to fulfil their task in fighting discrimination, thus rendering existing legislation ineffective. UWE cites the work in particular of the Rights Defender ("*le défenseur des droits*"), a national institution which can receive applications from any person having suffered discrimination, and the labour inspectorate;

b) Secondly, UWE alleges that a very small number of women occupy decision-making positions within private companies, in spite of national legislation, mainly Act No. 2011-103 of 27 January 2011, which established a threshold of 40% for each sex in administration boards of public and private enterprises. According to UWE, 95 % of administration boards members are men and, in practice, the same women have access to the maximum authorised seats.

⁴⁹As already indicated in paragraph 6 of Part I, the extracts of case law of international bodies highlighted below refer in principle to the latest recommendations/observations/concerns expressed by those bodies on the respondent country unless mentioned or considered relevant otherwise.

⁵⁰ [Decision on admissibility](#), 4 July 2017.

A. *International case-law*

1. *United Nations*

89 The situation in France has been examined in relation to the obligations deriving from two relevant instruments as follows:

a) *International Covenant on Civil, Political and Cultural Rights*

90 After considering the fifth periodic report submitted by France, the Human Rights Committee (CCPR) adopted the following 'Concluding Observations':⁵¹

C. Principal subjects of concern and recommendations

Equality between men and women

8. The Committee notes with concern the persistence of a **large wage gap between men and women** and the prevalence of discrimination in the world of work, including in the civil service (arts. 3 and 26). *The State party should continue implementing measures to ensure de facto equality between men and women in law and in general policy, in particular by ensuring that the provisions of the Act of 4 August 2014 are not affected by the bill on social dialogue and employment. It should also increase the means to ensure compliance with companies' obligations in respect of equality at the workplace and wage equality, including through the work of the labour inspection services.*

b) *International Covenant on Economic, Social and Cultural Rights*

91 Examining the fourth report of France, the Committee on Economic, Social and Cultural Rights (CESCR) has come to the following 'Concluding Observations':⁵²

C. Principal subjects of concern and recommendations

Equal rights of men and women

20. The Committee observes with concern that, although progress has been made, women are still at a disadvantage in society and, in view of the gender-based wage gap, particularly so in the labour market (art. 3).

21. *The Committee urges the State party to redouble its efforts to achieve the priority objectives set at the second meeting of the Interministerial Committee for Women's Rights and Equality between Women and Men in 2014 and calls upon it to: [...]*

(b) *Develop occupational assessment tools with a view to revising wage levels in occupational groups in which women have traditionally been overrepresented;*

(c) *Increase the **representation of women in decision-making posts in public bodies and promote greater gender balance in businesses, irrespective of their size;***

⁵¹ Adopted at its 3193rd meeting, held on 21 July 2015. See also http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fFRA%2fCO%2f5&Lang=en

⁵² Adopted at its 49th meeting, held on 24 June 2016. See also http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fFRA%2fCO%2f4&Lang=en.

c) *Convention on the Elimination of All Forms of Discrimination against Women*

92 In its 'Concluding observations' concerning the combined seventh and eight periodic reports of France, the Committee on the Elimination of Discrimination against Women (CEDAW) has expressed the following concerns and recommendations:⁵³

C. Principal areas of concern and recommendations

Legislative framework and access to justice

12. The Committee commends the State party on its exhaustive anti-discrimination legal framework, especially in the light of the adoption in 2014 of Act No. 2014-873 on substantive equality between women and men, and on the strong institutions involved in monitoring the framework. It also welcomes various draft laws proposing important improvements to the legal framework (on equality and citizenship and on the modernization of justice). The Committee is concerned, however, about:

- (a) The limited effectiveness of the State party's anti-discrimination legislation;
- (c) The difficulties faced by women claiming their rights owing to lack of knowledge thereof, including on the Convention and the Optional Protocol, the costs, the length of the procedures, insufficient legal aid, affecting disproportionately women in situations of vulnerability or poverty, and insufficient consideration of cases of intersecting forms of discrimination, thus preventing comprehensive reparation;
- (d) The unequal application of anti-discrimination law across the territory of the State party, in particular in non-metropolitan areas; (...)

13. *In line with its general recommendation No. 33 (2015) on women's access to justice, the Committee recommends that the State party:*

- (a) *Introduce group actions, as planned in the draft law on the modernization of justice in the twenty-first century, and open them to ad hoc groups of persons collectively concerned by sex discrimination, and establish a fund to support such claims in order to alleviate the financial burden on women;*
- (b) *Expedite the adoption of the draft law on the modernization of justice in the twenty-first century to simplify legal avenues for claimants, in particular women who are victims of intersecting forms of discrimination, harmonize sanctions and compensation schemes for violations of anti-discrimination laws and provide for the possibility of addressing multiple grounds of discrimination jointly; [...]*
- (f) *Ensure that, following the redistribution of competence provided for in the draft law on equality and citizenship, local governments, especially in the non-metropolitan areas, have the capacity to fully implement the gender equality legislation and other measures such as plans and programmes.*

National machinery for the advancement of women and gender mainstreaming

14. The Committee welcomes the creation in 2013 of the High Council for Gender Equality, devoted solely to the promotion of gender equality, as an advisory body under the Office of the Prime Minister. It appreciates the important roles played by the High Council, the Defender of Rights and the National Consultative Commission for Human Rights. It also notes the complex architecture of the interministerial committees and senior gender advisers, including in the regions and non-metropolitan areas. The Committee is, nevertheless, concerned about:

- (a) The changes in the status and focus of the national machinery for gender equality, which changed from a full-fledged ministry to the lesser level of a State secretariat and then regained the ministerial level as a component under the new Ministry of Families, Children

⁵³ Considered at its 1409th and 1410th meetings, on 8 July 2016 See also: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CEDAW%2fC%2fFRA%2fCO%2f7-8&Lang=en.

and Women's Rights; those changes have created uncertainty and could be interpreted as a regression in respect of the centrality of women's human rights;

(b) The complexity of the structure compared with the need for clear and coherent coordination and management of gender mainstreaming efforts and the lack of comprehensive monitoring and impact evaluation measures;

(c) The insufficient human, technical and financial resources allocated to the national machinery for the advancement of women to effectively coordinate gender equality plans, policies and programmes in all areas and at all levels of government throughout the territory;

(d) The lack of a clear delineation of statutory functions and powers among the High Council for Gender Equality, the Defender of Rights and the National Consultative Commission for Human Rights, and the very limited human, technical and financial resources allocated to the High Council compared with the Defender of Rights and the National Consultative Commission.

15. *The Committee recommends that the State party:*

(a) *Ensure that gender equality issues continue to be dealt with by a full-fledged ministry, with a strong mandate and the human, technical and financial resources necessary to effectively coordinate gender equality plans, policies and programmes in all areas and at all levels of government;*

(b) *Reinforce monitoring mechanisms to comprehensively and regularly assess progress in the implementation of its gender equality policies, plans and programmes and evaluate the impact of such efforts, with a view to taking remedial action;*

(c) *Strengthen the implementation of the gender equality policies at the municipal and regional levels and ensure that all government bodies involved receive sustained guidance and support in their implementation efforts, including sufficient human, technical and financial resources;*

(d) *Allocate sufficient human, technical and financial resources to the High Council for Gender Equality to allow it to fulfil its mandate, expedite the adoption of the draft law on equality and citizenship, which will institute and ensure the sustainability of the High Council in the institutional landscape, and ensure that the other two institutions also receive the necessary means, in particular to allow the National Consultative Commission for Human Rights to fully play its role in view of the new functions that it has received (rapporteur for the trafficking and exploitation of human beings).*

Temporary special measures

16. The Committee welcomes the fact that the exhaustive and **detailed legal framework promoting gender parity** in the electoral system for all assemblies, **high-level jobs in the civil service and in the private sector and the participation of women on boards of directors for companies listed on the stock exchange** is not a temporary special measure. The Committee remains concerned about the vulnerable situation of women and girls belonging to disadvantaged groups in political life, education, employment and health. [...]

Participation in political and public life

28. The Committee commends the State party on the numerous legislative and constitutional measures taken to ensure gender parity in political and public life. It notes that parity has been achieved in the Cabinet and in regional and departmental councils. It welcomes the sharp increase in the representation of women in the regional and municipal councils following the local elections held in 2014. The Committee notes that the legislation promoting gender parity was completed in 2014 for all levels of the State (central, regional, departmental and local). It remains concerned, however, about the low representation of women in the National Assembly and the Senate, given that some political parties appear to prefer to be fined rather than to nominate women candidates for elections, and in the presidencies of subnational councils, such as mayors (16 per cent) or presidents of departments (approximately 10 per cent), or of regions (17.6 per cent). The Committee also notes the progress made in the **representation of women on boards of directors**.

29. *The Committee recommends that the State party: [...]*

(c) Pursue its efforts to ensure equal representation in decision-making positions on boards of directors and in various areas of public administration; [...]

Employment

34. The Committee welcomes the generally high rate of participation by women in the labour force in the State party and the numerous steps taken to promote gender equality in the labour market, including measures to facilitate the reconciliation of family and work life, strengthen the social entitlements of part-time workers and reduce the share of women in this category, and improve the pensions of older women and overcome the glass ceiling. It also welcomes the extension of the regulation on sexual harassment and sexist behaviour to the public sector, as provided for in the recently adopted law on new freedoms and new protections for enterprises and employed persons (El Khomri Law). The Committee is, however, concerned about:

(a) The continuing horizontal and vertical occupational segregation and the concentration of women in part-time and low-paid jobs, measures taken in the public service regarding managerial positions obviously not having achieved their aim;

(b) The **lack of implementation of the principle of equal pay for work of equal value and the persistent gender wage gap**, in both the public and private sectors, which adversely affects women's career development and pension benefits; [...]

35. *The Committee recommends that the State party:*

(a) *Adopt effective measures, including skills training, incentives for and encouragement of women to work in non-traditional fields and temporary special measures, to achieve de facto equal opportunities for women and men in the labour market and eliminate occupational segregation, both horizontal and vertical, in the public and private sectors, and ensure that the quotas for female managerial positions are not undermined by inefficient sanctions;*

(b) *Adopt measures to effectively implement the principle of equal pay for work of equal value and to narrow and close the gender wage gap, including by applying gender-neutral analytical job classification, evaluation methods and regular pay surveys, notably in the civil service, and by ensuring that businesses comply with their legal obligations to develop measures aimed at fostering collective bargaining; [...]*

(e) *Conduct a comprehensive review of the gendered impact of the new El Khomri Law, with a view to amending all provisions that may discriminate indirectly against women, in particular the provision relating to the principle of neutrality, in order to protect their rights and maintain coherence with previous gender equality legislation;*

2. International Labour Organisation

93 The CEACR has made the following statements concerning France in relation to the following Conventions:

a) Convention No. 100

Direct Request (2013)⁵⁴

Remuneration gap. The Committee notes that, according to the *Key statistics on equality between men and women (2011)*, in 2009 the average annual net wages of women working full-time were 20.1 per cent lower than those of men in the private or semi-public sector (19.2 per cent in 2008); 14.55 per cent lower in the State civil service (14.6 per cent in 2008); 9.3 per cent lower in the territorial civil service (11.55 per cent in 2008); and 21.2 per cent lower in the hospital civil service (22.3 per cent in 2008). The analysis published in March 2012 by the Research, Study and Statistics Directorate (DARES) shows that the less favourable position of women in terms of wages is due to the fact that there are fewer women in managerial positions, that women are often employed in less skilled jobs and that generally they have less seniority; and, that where characteristics are similar, women's average hourly wage is 9 per cent lower than men's (a gap

⁵⁴ Adopted 2012, published 102nd ILC session.

not explained by the characteristics pertaining to the workers, the enterprises or the jobs concerned). Furthermore, according to this study, the average amount of women's bonuses is 25 per cent less than men's (the ratio of total bonuses to total paid hours).

The Committee notes that according to the Government, by 31 December 2010, the deadline fixed by the Equal Pay Act, No. 2006-340 of 23 March 2006, the objective of eliminating the wage differential had not been achieved. It notes that section 99 of Act No. 2010-1330 of 9 November 2010 provides for a financial penalty to be applied from 1 January 2012, to enterprises with 50 or more employees which are not covered by a collective agreement or, failing that, an action plan on equality in employment. Decree No. 2011-822 of 7 July 2011 on the implementation of employers' obligations regarding equality in employment between men and women sets out the ways and means of implementation and establishes grounds on which an enterprise may be exempted from this obligation (economic difficulties, restructuring, etc.). The Committee notes further that the framework for the application of sanctions is currently under review, in collaboration with the social partners, and that the Higher Council on Equality in Employment will be asked for an opinion on the matter. *The Committee asks the Government to continue to provide information on the gender pay gap in the various sectors of the economy and on the analysis and the causes of the pay gap. It also asks the Government to provide information on any changes in the framework for the application of sanctions to enterprises that are in breach of the provisions on wage equality, including information on the Higher Council's opinion and the follow-up measures adopted.*

Enforcement of the principle of the Convention through sectoral and enterprise agreements. The Committee notes the Government's indication that the General Labour Directorate supports and raises awareness among negotiators at sectoral and enterprise level. Referring to its comments on the application of the Discrimination (Employment and Occupation) Convention, 1958 (No. 111), the Committee notes that the Government also indicated that **collective bargaining at sectoral level on equality in employment and wage equality remains quantitatively inadequate** notwithstanding some improvement in the content of the agreements, whereas the number of enterprise agreements addressing equality rose significantly between 2010 and 2011. The Committee welcomes the fact that, thanks to an analysis of sectoral agreements addressing the issue of equality in employment carried out in 2011 by the Ministry of Labour, Employment and Health, a number of good practices have been identified for reducing the gender pay gap which focus in particular on recruitment policies and internal mobility, vocational training, the implementation of a targeted wage policy, work organization and the balancing of work and family life (see *Bilans & rapports, La négociation collective en 2011*, May 2012). The Committee notes that these good practices have been published on the Ministry's website to assist enterprises in implementing arrangements for equality in employment. *The Committee asks the Government to continue to provide information on the contents of sectoral and enterprise agreements relating to wage equality between men and women and on the specific measures taken in this respect to reduce the gender pay gap. Furthermore, it encourages the Government to continue its efforts to disseminate the good practices identified at sectoral and enterprise levels with a view to reducing and eliminating pay gaps, and to pursue its action to raise awareness among the social partners about the principle of the Convention and, in particular, the concept of "work of equal value".*

Equal remuneration in the public service. In its previous comments, the Committee noted the adoption of the framework mechanism for the function and performance bonus (PFR) aimed at revising the policy on allowances in the public service, the implementation of which involves the drawing up of a typology of jobs in each ministry. It also notes the publication, in January 2011, of a report on gender equality in the public service containing proposals for equality, related in particular to the improvement of women's career development; strengthening statistical information so as to better identify the obstacles to women's career development; fixing clear and mandatory objectives regarding the proportion of women in management posts; measures related to human resources management (career breaks); encouragement for balancing work and family life; establishment of a national plan on training and communication regarding equality in employment; sharing of these objectives with the trade unions, with the aim of reaching a national agreement in the public service. Referring in this connection to its observation on the application of Convention No. 111, the Committee notes that Act No. 2012-347 of 12 March 2012 on access to permanent employment and improvement of the working conditions of contractual agents in the public service and on combating discrimination, which contains a number of provisions on the public service, **sets out progressive and quantified objectives for appointing women to senior management posts.** *The Committee asks the Government to continue to take measures*

to combat the underlying causes of pay differentials in the public service, particularly occupational segregation, both vertical and horizontal, and to provide information on the specific follow up measures, based on the report on equality in employment in the public service, to eliminate inequalities in remuneration, and to report on the impact of such measures. The Committee also asks the Government to take the necessary measures to ensure that the principle of equal remuneration for men and women for work of equal value is fully taken into account in the job evaluation process carried out during the implementation of the PFR and to provide information in this regard.

Objective job evaluation. The Committee recalls that the interoccupational agreement of 1 March 2004 regarding gender diversity and equality in employment provides that specific time-bound measures may also be carried out to **reduce wage differentials in phases** and that, at the sectoral level, this objective is achieved by means of an analysis, during the five-yearly review of classification, of the evaluation criteria used in defining the different posts with a view to identifying and correcting those which may lead to discrimination between men and women and to take into account all skills used (section 13). According to information available to the Committee, such a review of classifications and of evaluation criteria has not been carried out. The Committee also notes the Government's indication that the work of the working group to "evaluate jobs in order to reduce inequalities between women and men" established by the High Authority Against Discrimination and for Equality (HALDE) has not yet been published. *The Committee asks the Government to provide information on the implementation of the 2004 interoccupational agreement as it concerns the review of occupational classifications and the analysis of job evaluation criteria. The Committee once again asks the Government to provide information on the impact of the comparative situation reports which enterprises are required to draw up, and on the implementation of objective job evaluation at enterprise level indicating if and to what extent these analyses of the status of equal pay for men and women have allowed for a re-evaluation of tasks performed predominantly by women and have narrowed the pay gap. The Committee asks the Government to provide information on the work of the working group established by HALDE to evaluate jobs.*

Part-time employment. *Considering the possible effects of part-time work on the gender pay gap, the Committee asks the Government to provide information on measures taken to reduce "involuntary" part-time work, and to ensure that provisions on part-time work aimed at the reconciliation of work and family responsibilities are applied in practice to both men and women.*

Application in practice. Court decisions. *The Committee asks the Government to continue to provide information on any court decisions relating to equal remuneration for men and women for work of equal value.*

Labour inspection. The Committee understands from the information supplied to the Government that the mechanism for applying sanctions, which came into force in January 2012, has not led to the imposition of any fines, the labour inspectorate having issued approximately 70 observations and ten official warnings to enterprises to enable them to regularize their situation in terms of their obligations regarding equality in employment between men and women. *While noting that this mechanism is currently under review, the Committee asks the Government to provide information on the results of the activities to monitor the application of the principle of equal remuneration for men and women for work of equal value by the labour inspectorate and the regional directorates of enterprises of competition, labour and employment, as well as on any exemptions granted to employers in default, including in the overseas departments.*

b) *Convention No. 111*

Direct Request (2013)⁵⁵

[...]

Promotion of equality of opportunity and treatment for men and women in employment and occupation. The Committee notes the data on the employment of men and women provided by

⁵⁵ Adopted 2012, published 102nd ILC session.

the Government, showing the persistence of inequality in employment and occupation. The Committee welcomes the adoption of Act No. 2011-103 of 27 January 2011 on the **balanced representation of women and men on executive boards** and occupational equality, which provides for the progressive introduction of quotas for the representation of each gender on these bodies (40 per cent by 2017). The Act also provides that such boards shall discuss each year the enterprise policy on vocational and wage equality based on a report of the comparative situation of the general conditions of employment of women and men in the enterprise. However, the Committee notes that, according to a study conducted in February 2011, only half of enterprises had prepared the comparative report. The Committee notes the adoption of Act No. 2010-1330 of 9 November 2010, section 99 of which establishes a financial penalty, which may be as high as 1 per cent of the payroll, in the absence of a negotiated agreement or plan of action for occupational equality, which has to be adopted on the basis of the comparative report. It nevertheless notes that Decree No. 2011-822 of 7 July 2011, issued under section 99 of the Act of 2010, provides that, in certain cases, including economic difficulty, the penalty applicable to an enterprise which has not fulfilled its obligations in this respect may not be applied or may be reduced. In this regard, the Committee notes that a draft text to revise the provisions on the application of sanctions to enterprises which are not in compliance with the Act on occupational equality is currently being prepared in collaboration with the social partners. The Committee further notes the information on collective bargaining on occupational equality provided by the Government in its report under the Equal Remuneration Convention, 1951 (No. 100). According to this information, collective bargaining at the branch and enterprise levels is progressing, even though it remains inadequate, and the content of the agreements concluded is constantly improving. The Committee notes in this respect that an analysis of the branch agreements found good practices which have been published on the website of the Ministry of Labour, Employment, Vocational Training and Social Dialogue with a view to helping enterprises give effect to the legislative provisions. The Committee also notes that equality for men and women in employment and occupation is one of the principal themes addressed by the Major Social Conference which brought together the Government and the social partners in July 2012. It observes that on this occasion the Government and workers' and employers' organizations determined "the conditions for tripartite commitment to real equality for women and men" and agreed on the establishment of a steering committee and on experiments at the regional level. The Committee notes that workers' and employers' organizations engaged in inter-occupational bargaining in September 2012 on occupational equality for men and women and the quality of working life. *Welcoming the commitment demonstrated by the Government to address inequalities between men and women, in collaboration with the social partners, and the resources allocated to this purpose, the Committee requests the Government to provide information on the measures adopted and the action taken to this end, including any measures relating to education and vocational guidance and training, and the results achieved. It also requests the Government to provide information on the implementation of Act No. 2011-103 of 27 January 2011 on quotas and on the effect given to the system of penalties established by Act No. 2010-1330 of 9 November 2010, including information on any further measures in this respect. Please continue to provide information on the outcome of collective bargaining on occupational equality at all levels.*

3. Council of Europe

94 In examining the situation in France, the ECSR has come to the following 'Conclusions':

a) *Article 4§3*

Conclusions 2014

The Committee takes note of the information contained in the report submitted by France.

Legal basis of equal pay

The regulatory changes in the reference period are mainly the result of Law No. 2010-1330 of 9 November 2010 on pension reform and Law No. 2012-1189 of 26 October 2012 on job creation. According to the report, the employer is obliged to provide equal pay for women and men for equal work or work of equal value. This obligation prohibits differentiation in terms of salary and career progress based on gender.

Every year the employer must submit to the works council or staff representatives a written report on the comparative general employment conditions. The objective is to assess, for each

professional category in the company, the situation of women and men in hiring, training, promotion, qualification, classification, conditions work and compensation.

Article L. 2242-5-1 of the Labour Code (the Law of 9 November 2010) establishes a financial penalty for the employer of up to 1% of the gross payroll, if the company is not covered by an agreement on professional equality or if there is no unilateral action plan. This arrangement came into force on 1 January 2012.

Guarantees of enforcement and judicial safeguards

The Committee notes that there have been no new developments as regards guarantees of enforcement and judicial safeguards. It asks whether compensation for victims of wage discrimination on the ground of gender is subject to a ceiling.

Methods of comparison and other measures

In its Conclusion on Article 20 (Conclusions 2012) the Committee noted that under French law, in order to make a pay comparison, the employees must belong to the same enterprise or undertaking. Therefore the principle of **equal pay for work of equal value** could not be invoked in respect of persons working for different enterprises, even if they are covered by the same collective agreement. The Committee referred to its Interpretative Statement in the General Introduction (2012) and found that the situation was not in conformity with the Charter.

The Committee also noted (Conclusions 2012, Article 20) that the decision of the Court of Cassation of 20 June 2008 (case No. 06.46.204) which held that employees exercising different functions could not be held to be doing work of equal value was overturned in 2010 (judgment of 6 July 2010, Case No. 09.40.400210).

The Committee notes from the information provided by the representative of France to the Governmental Committee (Report concerning Conclusions 2012, §380) that the principle of equal pay requires the employer to ensure equal pay between women and men for the same work or for work of equal value in his/her company. If the application of this principle in an enterprise entails respect by the employer for all provisions of the collective agreement for all employees, whether men or women, no justification can exist that within the same occupational branch, employees of different companies – men or women – receive identical salaries for the same activity. Such a requirement would ignore the principle that allows the employer to pay above the minimum set by sectoral or enterprise level collective agreement.

According to the representative of France, the principle of equal pay for equal work or work of equal value as laid down by the Charter does not apply to employees belonging to different companies, who are in different situations, regardless of whether some elements of remuneration are common between all or parts of the business (whether legislative, regulatory or set by collective agreements).

The representative of France recalled the judgments of the Court of Cassation (Cass. soc. 29 October 1996), in which it held that the principle of equal treatment between men and women engaged in equal work or work of equal value is a more general application of the principle of 'equal work, equal pay'. The employer is required to provide equal pay for all employees, provided that the employees concerned are placed in the same situation.

In this jurisprudential construction it appears, according to the representative of France, that the difference in treatment between employees placed in the same situation should be based on objective reasons for which the judge must control concretely the reality and relevance (Cass. soc. 15 May 1997; Cass. soc. 15 May 2007).

To assess whether employees are in a situation of work of equal value, the jurisprudence refers first to the post in question and takes into account the coefficient, qualifications and seniority of the employees (Cass. soc. 15 December 1998; Cass. soc. 23 October 2001).

The jurisprudence requires that for the comparison to be made, employees should perform the same duties (employees who perform different functions do not perform the work of equal value, Cass. soc. 26 June 2008).

However, according to the representative of France, this restrictive approach has been questioned later on. The Court has later recognised that different functions may include work of equal value (Cass. Soc. 6 July 2010).

This approach to the concept of equal work or work of equal value in the case law requires the judge to engage in a comparative analysis of the functions, tasks and responsibilities of the employees concerned (Cass. soc. 1 July 2009; Cass. soc. 28 September 2010).

Concerning the Economic and Social Unit (ESU), the Court stated that in an economic and social unit that is composed of persons who are in legally different situations, in order to determine the

level of remuneration of an employee, there can be no comparison between the conditions of remuneration of this employee and other employees in the economic and social unit, unless these conditions are established by law or collective agreement, as well as where work of these employees is accomplished in the same establishment (Cass soc, 1 June 2005; Cass soc, 2 June 2010) .

The Court thus favours the framework of the legal entity, allowing however, and by exception, that if the remuneration is fixed by a collective agreement applicable to all entities of the ESU, the principle of equality applies. The also seems to suggest that for employees working in the same establishment of the ESU, the principle of equal remuneration applies even if these employees belong to legally separate entities within the ESU.

The differences in the pay of employees within different establishments of the same enterprise can therefore only be the result of objective reasons, of which the reality and relevance should be controlled by the judge.

In its Statement of Interpretation (2012) the Committee held that equal pay comparisons should be allowed outside the company in at least one or more of the following situations:

- cases in which statutory rules apply to the working and pay conditions in more than one company;
- cases in which several companies are covered by a collective works agreement or regulations governing the terms and conditions of employment;
- cases in which the terms and conditions of employment are laid down centrally for more than one company within a holding (company) or conglomerate.

The Committee considers that the case law of the Court of Cassation corresponds to this interpretation. In this respect, the Committee wishes to be informed of any litigation cases involving equal pay.

According to the report, the Government has set up a website which provides support tools for enterprises for the preparation of their comparative situation report (CSR) regarding general employment conditions of women and men in the company. Two models of CSR are available, one for companies with fewer than 300 employees and one for companies with 300 or more employees, as well as a guide to implementation.

The Committee also takes note of other measures taken with a view to promoting equality between men and women at the workplace, including the reactivation of the Interdepartmental Committee on Women's Rights by the Decree 2012-1097 of 28 September 2012. The Committee also takes note of the decree of 18 December 2012 which strengthens social dialogue on these issues.

The Committee notes from another source quoted by the report (Dares Analyses No. 16, March 2012) that in 2009 the average gross salary for male employees was €33 251 and for females €24 359, thus resulting in an unadjusted pay gap of 27%. The Committee also notes from EUROSTAT data that the unadjusted pay gap in 2011 was 14.8%.

Conclusion

Pending receipt of the information requested, the Committee concludes that the situation in France is in conformity with Article 4§3 of the Charter.

b) Article 20

Conclusions 2016

The Committee notes that, according to the report submitted by the government to the Higher Council for Occupational Equality on the results of activities to promote occupational equality between women and men over the period 2012-2015, considerable use has been made of this penalty, which in more than half the cases concerned led to the regularisation of the situation. The report adds that the number of branch agreements on equality rose from 122 in 2013 to 140 in 2014, of which six were specifically concerned with occupational equality and equal pay (9 in 2013, 19 in 2012 and 27 in 2011) and at least 134 others dealt with this subject (compared with 113 in 2013, 164 in 2012 and 140 in 2011). **Occupational equality and equal pay** are also the subject of more wide-ranging negotiations.

With more specific regard to the measures concerning collective bargaining in equality matters taken since the passing of Act 2010-1330 of 9 November 2010:

- Act 2014-873 of 4 August 2014 on real equality between women and men introduced an additional penalty for failure to reach an agreement or produce an action plan, namely a ban on tendering for public procurement contracts (Article L. 2242-5 of the Labour Code);
- the Act also strengthened and simplified undertakings' negotiation obligations with regard to equality as follows:
- negotiations on the objectives of occupational equality between women and men (Article L. 2242-5) and on salaries and wages (L. 2242-7) are now the subject of a single annual negotiating process;
- in the absence of an agreement, the compulsory annual negotiations on salaries and wages will also be concerned with identifying and programming measures to remove inequalities in pay between women and men;
- the content of reports on undertakings' financial situation or of single undertaking reports (on which the triennial negotiations on occupational equality are based) has been extended: they must now provide information on the respective situations of men and women with regard to occupational safety and health, differences in pay and career progression in terms of age, qualifications and seniority, and changes in the respective promotion rates of women and men within the undertaking by occupation;
- in the event of a generalised difference in the pay of women and men within a particular branch, the social partners must make it a priority to reduce the gap. They must also consider the criteria used to define the various posts/jobs concerned with a view to identifying and modifying those that are likely to lead to discrimination between women and men (Article L. 2241-7 as amended by Section 2 of Act 2014-873).

In the case of pay comparisons between undertakings, the Committee refers to its conclusion 2014 on Article 4§3, where it found that the situation in this regard was in conformity with the Charter. It recalls that it considers the right to equal pay from the standpoint of Articles 20 and 4§3 of the Charter every two years, under the auspices of thematic groups 1, "Employment, training and equal opportunities", and 3, "Labour rights". The Committee had previously noted that, in connection with the labour law concept of an economic and social unit, the Court of Cassation stated that, when determining the remuneration of an employee in a unit composed of persons in different legal situations, the remuneration conditions of this employee cannot be compared with those of other employees in the unit unless those conditions have been established by law or in a collective agreement, and in the case where the work of these employees is carried out in the same establishment (Cass soc, 1 June 2005; Cass soc, 2 June 2010).

The Court of Cassation therefore gives precedence to the situation of the legal entity, although recognising, as an exception, that if the remuneration is fixed by a collective agreement applicable to all the economic and social unit's entities the equality principle applies. The Court also seems to suggest that, in the case of employees working in the same establishment of the economic and social unit, the principle of equal pay applies even if those employees belong to legally separate entities within the unit. Differences in the pay of employees within different establishments of the same enterprise can therefore only be justified by objective factors, whose reality and relevance must be subject to judicial oversight (Conclusions 2014, article 4§3).

Equal opportunities

The Committee notes from Eurostat data that the **pay gap** between women and men was 15.6% in 2011, 15.4% in 2012 and 15.3% in 2013 and 2014. The male employment rate fell slightly, from 68.3% in 2009 to 67.7% in 2014. This is below the average of the 28 EU countries, which was 70.1% in 2014. The female employment rate rose slightly, from 59.8% in 2009 to 60.9% in 2014, which is above the average for the 28 EU countries of 59.6% in 2014.

The Committee notes the measures taken since 2012 by the Government to encourage public employers to set a good example with regard to equality between women and men in their sector of activity. The report states that, on 8 March 2013, under the aegis of the Prime Minister and the minister responsible for the public service, all the public employers and representative trade unions signed a protocol of agreement on occupational equality between women and men in the public sector. The agreement applies to 5.4 million public officials and specifies fifteen measures under four main headings: social dialogue as a key element for securing occupational equality, equal career prospects and remuneration, a better balance between occupational and private lives and preventing violence and harassment in the work place. The report then describes the

measures that have already been implemented. In addition, each autumn equality conferences are held, at which ministers report on progress made on their equality action plans, while objectives and achievements in this field are also discussed each spring at human resources planning conferences. The new human resources objective in 2015 was to reduce pay gaps between women and men. According to the report, econometric studies on such differentials show that there is still a difference of 12% between the average salaries of men and of women in the public sector, compared with 19% in the private sector.

The report also provides information on the outcome of the 2013 regulations on a balanced appointment system. Since 1 January 2013, there has been a statutory requirement for each sex to benefit from at least 20% of appointments of new staff to senior administrative and management posts in the state, local and regional government and hospital branches of the public service. This figure was raised to 30% on 1 January 2015 and will be 40% from 2017. The first results available for 2014, relating to senior posts in the state public service, show that the rate of female appointments was almost the same as in 2013, with 33% of new appointments to posts of deputy director, head of department, project director and senior expert in the central administration going to women (61 women out of the 183 appointments concerned). Of the 120 first **appointments to senior management posts** in 2014, 29% concerned women.

The Committee asks for up-to-date information in the next report on practical measures introduced and action taken during the reference period to promote gender equality, particularly equal pay for work of equal value, and to reduce the gender pay differential, and information on the results obtained in the public and private sectors.

It also asks for information on the activities of the labour inspectorate to monitor compliance with the legislation on equality between women and men in practice.

Conclusion

Pending receipt of the information requested, the Committee concludes that the situation in France is in conformity with Article 20 of the Charter.

B. Further pertinent material on the situation in law and practice

1. Concerning the Gender pay gap

95 From different sources, including all the conclusions and/or observations of the above-mentioned bodies, the main regulatory instruments in relation to discrimination on the grounds of sex in general and equal pay for equal work in particular -and without being exhaustive- the following:

- Act No. 2014-873 of 4 August 2014,
- Act No. 2010-1330 of 9 November 2010,
- Decree No. 2011-822 of 7 July 2011,
- Equal Pay Act, No. 2006-340 of 23 March 2006,
- Labour Code (different articles e.g. L 2242) ,
- Protocol of Agreement of 8 March 2013 (public sector).

96 However, despite this existing regulatory framework, (recent) statistic show that there still exists a gender wage gap in France:

- According to the Commission, based on Eurostat 2014 figures, in France the gender pay gap stands at 15.5%⁵⁶ (the average gender pay gap in the EU is

⁵⁶ According to the Eurostat figures for 2015, this stands now at 15.8%. (See also table in Part I.B.1)

16.7%) and the gender overall earnings gap in France stands at 31.2% (the average gender overall earnings gap in the EU is 39.8%).⁵⁷

2. Concerning the (under-)representation in decision-making positions within private companies

97 From different sources, including all the conclusions and/or observations of the above-mentioned bodies, the main regulatory instruments in relation to representation of women in decision-making positions in private and public enterprises/administrations - and without being exhaustive - are the following:

- Act No. 2011-103 of 27 January 2011 on the balanced representation of women and men on boards of directors and supervisory boards of listed and large joint stock companies (whereas the initial quota where set at 20%, as from 1 January this was to be increased to 40%; the regulation also provides for sanctions in case of non-compliance.
- Act No. 2012-347 of 12 March 2012 on access to permanent employment and improvement of the working conditions of contractual agents in the public service and on combating discrimination, which contains a number of provisions on the public service, sets out progressive and quantified objectives for appointing women to senior management posts

98 However, and despite France is one of the few European countries providing a regulatory framework, the following figures show that there is still a considerable under-representation of women existing in practice.

99 In April 2016, the average share of women on the boards of the largest publicly listed companies registered in the EU-28 Member States reached 23.3 %. For France, the figure is 31,7%.⁵⁸

C. *Application of the legal principles*

100 In Part I the relevant 'International law and material' as well as 'Further pertinent material' has been described in detail. On this basis, the (legal) 'Principles' which govern the framework for the assessment of this complaint have been developed. Against this background, the ETUC assesses situation in France as follows.

101 From the outset, it is noted that the ECSR has not found a violation in its Conclusions concerning the relevant Articles but, nevertheless, asked certain questions (as quoted above). However, this situation does not exclude that - after a more detailed examination - the ECSR might come to a different assessment. In the view of the ETUC this would be necessary.

1. Concerning the Gender pay gap

102 In general terms, it is clear that the Gender pay gap remains above 0%. This is the case for decades. This situation is not at all compatible with the principle of equal pay for work

⁵⁷ European Commission factsheet gender way gap 2016 - France ; http://ec.europa.eu/justice/gender-equality/files/gender_pay_gap/2016/gpg_country_factsheet_fr_2016_en.pdf

⁵⁸ European Commission, [Factsheet July 2016. Gender balance on corporate boards - Europe is cracking the glass ceiling ; http://ec.europa.eu/justice/gender-equality/files/gender_balance_decision_making/1607_factsheet_final_wob_data_en.pdf](http://ec.europa.eu/justice/gender-equality/files/gender_balance_decision_making/1607_factsheet_final_wob_data_en.pdf)

of equal value, even less so when taking into account the requirement of 'effectiveness' enshrined in the introductory words of the relevant articles.

103 More specifically and according to the ECSR's case law, the Gender pay gap has both, a substantial and procedural dimension. This is confirmed by the international law approaches as developed in particular by the CESCR, CEDAW and CEACR (see quotations in Part I). Not fulfilling one of the requirements in respect of these two dimensions leads to a violation.

a) Substance

104 From a substantive perspective, there are at least the following elements which should (at least in combination) lead to a violation of Article 20 ESC:

- Statistical evidence (see above para. 96) shows that there is still a gender pay gap. Even if it might have been reduced during the last time **any** Gender pay **gap** does not fulfil the non-discrimination requirement based on sex.
- The official statistics are still excluding **small (micro) seized enterprises**. It is therefore most probable that the Gender pay gap is even higher in these enterprises.

105 From the point of view of the ETUC this illustrates that there is a violation of Article 20 of the Charter from the substantive perspective.

b) Procedure

106 Moreover, from a procedural perspective, it appears evident that there is also a violation as the result of eliminating the gender pay gap is not achieved. In particular, it is obvious that the general framework for the supervision of the satisfactory application of the principle of equal pay is insufficient:

- in principle, the **labour inspectorate** should (be able to) ensure the satisfactory application of this important principle; despite the fact that the respondent State has ratified ILO Convention No. 81 on labour inspection it is obvious that this is not the case (in particular taking into account the nearly total lack of supervision in the SMEs);
- all **other means** to ensure the satisfactory application of the principle of equal value haven proven insufficient.

107 From the point of view of the ETUC this illustrates that there is a violation of Article 20 of the Charter also from the procedural perspective.

2. Concerning the (under-)representation in decision-making positions within private companies

108 Concerning the (under-)representation in decision-making positions within private companies this problem has only been addressed in more recent years. As developed in Part I.B.2. this is covered by Article 20 of the Charter. If there is not sufficiently clear and wide-ranging legislation and/or if the practice shows that this equality principle is not implemented sufficiently this leads from the point of view of the ETUC to finding a violation of Article 20 of the Charter.

a) Substance

109 Statistical evidence (see above para. 99) shows that there is still an under-representation of women in decision-making bodies within private companies (and that even

the 40% quota fixed by the national legislation is not reached). Even if there might be relevant legislation and even if the degree of representation of women would have increased it is not to be disputed that women are not sufficiently represented within these bodies.

110 From the point of view of the ETUC this illustrates that there is a violation of Article 20 of the Charter from the substantive perspective.

b) Procedure

111 It would appear that there are no effective legislative measures in order to ensure the sufficient representation of women in decisions-making bodies within private enterprises. In practice, there is even less supervision and enforcement.

112 From the point of view of the ETUC this illustrates that there is a violation of Article 20 of the Charter also from the procedural perspective.

III. Conclusions

A. Substantive conclusions

113 This collective complaint - as all the other 14 complaints concerning the same issues - is of great importance for the full realisation of the very fundamental right of women to non-discrimination. In particular, the continuous denial of equal pay for work of equal value is one of the fundamental problems which still remain in European societies.

114 From the ETUC's point of view it is necessary to come to the following conclusions of a violation of Article 20 of the Charter in relation to

- the Gender pay gap in its substantive (see above II.C.1.a)) and procedural dimensions (see above II.C.1.b)) as well as in relation to
- the under-representation of women in decision-making bodies also in its substantive (see above II.C.2.a)) and procedural (see above II.C.2.b)) dimensions.

115 The Committee might thereby also in particular consider to take account of the recommendations/observations/concerns expressed by the international bodies referred to in II.A. addressed to the respondent state.

B. Procedural request

116 Given the high complexity of this case, in particular in relation to possible justifications which might be provided during the further procedure by Governments or others, there will most probably be specific issues which are not yet dealt with in these ETUC Observations.

117 Accordingly, and referring to the example in the case of *MATICA v. Croatia*, the ETUC would be very grateful if it were granted the opportunity to submit additional information following in particular the observations by the Government concerned but also any other relevant observations in this respect.

Table of contents

INTRODUCTION.....	3
I. GENERAL FRAMEWORK.....	4
A. INTERNATIONAL LAW AND MATERIAL.....	4
1. <i>United Nations</i>	4
a) Universal Declaration of Human Rights.....	4
b) International Covenant on Civil and Political Rights.....	4
(1) Text.....	4
(2) General interpretation.....	5
c) International Covenant on Economic, Social and Cultural Rights.....	5
(1) Text.....	5
(2) General interpretation.....	6
d) Convention on the Elimination of All Forms of Discrimination against Women.....	6
(1) Text.....	6
(2) General interpretation.....	7
(a) Concerning the Gender pay gap.....	7
(b) Concerning the (under-)representation of women in decision-making bodies in enterprises.....	8
(i) Estonia (2016).....	8
(ii) Slovakia (2015).....	8
(iii) Spain (2015).....	8
(iv) Denmark (2015).....	8
e) Further pertinent material.....	9
2. <i>International Labour Organisation</i>	9
a) Convention No. 100.....	9
(1) Text.....	9
(2) General interpretation.....	10
(a) General Survey 2012.....	10
Gender pay gap.....	10
Equal value: The cornerstone of the Convention.....	10
Comparing jobs, determining value.....	11
Scope of comparison.....	11
Objective job evaluation methods.....	11
b) Convention No. 111.....	12
(1) Text.....	12
(2) General Interpretation.....	12
(a) General Survey 2012.....	12
Introduction.....	12
Thematic issues.....	13
Defining discrimination.....	13
Direct and indirect discrimination.....	13
Grounds of discrimination: An evolving area.....	13
Sex discrimination and gender equality.....	13
3. <i>Council of Europe</i>	13
a) European Convention on Human Rights.....	13
b) European Social Charter (ESC).....	14
(1) Text.....	14
(2) Compilation of case law (Digest 2008).....	15
(a) Article 4§3.....	15
The principle of equal pay.....	15
Guarantees of enforcement.....	15
Legislative means.....	15
Judicial safeguards.....	15
Methods of classification and comparison and other measures.....	16

(b)	Article 20	16
	Definitions and scope	16
	Means of enforcement	16
	Legal framework.....	16
	Right of appeal	16
	Adequate compensation.....	17
	Protection against reprisals.....	17
	Particular rights of women.....	17
	Equal opportunities and positive measures	17
	(3) Statement of interpretation.....	18
	(4) Conclusions (2016) on (under-)representation of women in decision-making functions within the private sector	18
c)	Further pertinent material.....	18
4.	<i>European Union (EU)</i>	19
a)	Legislative framework	19
	(1) Primary Law	19
	(2) Secondary law	20
b)	General interpretation	20
c)	Further pertinent material.....	21
	(1) EU Institutions.....	21
	(2) Other bodies.....	21
	(a) Gender pay gap.....	22
	(b) (Under-)representation in decision-making bodies within private companies.....	22
B.	FURTHER PERTINENT MATERIAL	22
1.	<i>Concerning the Gender pay gap</i>	22
2.	<i>Concerning the (under-)representation in decision-making positions within private companies</i>	23
C.	LEGAL PRINCIPLES.....	24
1.	<i>General considerations</i>	24
2.	<i>Gender pay gap</i>	24
	a) General considerations	24
	b) Substantive requirements.....	25
	c) Procedural requirements	27
	d) Interim conclusions	27
3.	<i>(Under-)representation in decision-making bodies within private companies</i>	27
	a) General considerations	27
	b) Substantive requirements.....	28
	c) Procedural requirements	29
	d) Interim conclusions	29
II.	SPECIFIC SITUATION	29
A.	INTERNATIONAL CASE-LAW	30
1.	<i>United Nations</i>	30
a)	International Covenant on Civil, Political and Cultural Rights	30
	C. Principal subjects of concern and recommendations.....	30
	Equality between men and women.....	30
b)	International Covenant on Economic, Social and Cultural Rights	30
	C. Principal subjects of concern and recommendations.....	30
	Equal rights of men and women.....	30
c)	Convention on the Elimination of All Forms of Discrimination against Women	31
	C. Principal areas of concern and recommendations	31
	Legislative framework and access to justice.....	31
	National machinery for the advancement of women and gender mainstreaming	31
	Temporary special measures	32
	Participation in political and public life.....	32
	Employment	33

2.	<i>International Labour Organisation</i>	33
a)	Convention No. 100	33
	Direct Request (2013)	33
b)	Convention No. 111	35
	Direct Request (2013)	35
3.	<i>Council of Europe</i>	36
a)	Article 4§3	36
	Conclusions 2014	36
	Legal basis of equal pay	36
	Guarantees of enforcement and judicial safeguards	37
	Methods of comparison and other measures	37
b)	Article 20	38
	Conclusions 2016	38
	Equal opportunities	39
	Conclusion	40
B.	FURTHER PERTINENT MATERIAL ON THE SITUATION IN LAW AND PRACTICE	40
1.	<i>Concerning the Gender pay gap</i>	40
2.	<i>Concerning the (under-)representation in decision-making positions within private companies</i>	41
C.	APPLICATION OF THE LEGAL PRINCIPLES	41
1.	<i>Concerning the Gender pay gap</i>	41
a)	Substance	42
b)	Procedure	42
2.	<i>Concerning the (under-)representation in decision-making positions within private companies</i>	42
a)	Substance	42
b)	Procedure	43
III.	CONCLUSIONS	43
A.	SUBSTANTIVE CONCLUSIONS	43
B.	PROCEDURAL REQUEST	43
	TABLE OF CONTENTS	44