



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

08 November 2017

**Case Document No. 3**

**University Women of Europe v. Portugal**  
Complaint No. 136/2016

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

**Registered at the Secretariat on 3 November 2017**





**Collective Complaint**

***University Women of Europe (UWE) v. Portugal***

**Complaint No. 136/2016**

**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 .....	29
1. <i>United Nations</i> .....	29
2. <i>International Labour Organisation</i> .....	32
3. <i>Council of Europe</i> .....	34
B. FURTHER PERTINENT MATERIAL ON THE SITUATION IN LAW AND PRACTICE .....	39
1. <i>Concerning the Gender pay gap</i> .....	39
2. <i>Concerning the (under-)representation in decision-making positions within private companies</i> .....	39
C. APPLICATION OF THE LEGAL PRINCIPLES .....	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
III. CONCLUSIONS .....	42
A. SUBSTANTIVE CONCLUSIONS .....	42
B. PROCEDURAL REQUEST .....	42
TABLE OF CONTENTS.....	42

- 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)<sup>1</sup> 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; [...]<sup>2</sup>
- 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.<sup>3</sup>
- 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;<sup>4</sup> 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.

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<sup>1</sup> Unless stated otherwise, Articles without further indication relate to the 1996 RESC.

<sup>2</sup> Extract of the Preamble of the [ETUC Constitution](#).

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

<sup>4</sup> 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 application<sup>5</sup> 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.<sup>6</sup>

#### 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)<sup>7</sup> relating to equality between men and women might be quoted as follows:

*Article 2*

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<sup>5</sup> 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.

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

<sup>7</sup> 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 ICCPR<sup>8</sup>, 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)<sup>9</sup> 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:

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<sup>8</sup> Adopted: 29.03.2000 (replacing general comment No. 4).

<sup>9</sup> 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 ICESCR<sup>10</sup> 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)<sup>11</sup> 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:

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<sup>10</sup> [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.

<sup>11</sup> [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. 13<sup>12</sup> 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.

<sup>12</sup> [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)<sup>13</sup>

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)<sup>14</sup>

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)<sup>15</sup>

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)<sup>16</sup>

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

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

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

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

<sup>16</sup> [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. 100<sup>17</sup>*

(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.

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<sup>17</sup> [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,<sup>18</sup> 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.

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<sup>18</sup> 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*<sup>19</sup>

(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,<sup>20</sup> 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.* [...]

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<sup>19</sup> [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).

<sup>20</sup> 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 ECHR<sup>21</sup> prohibits discrimination<sup>22</sup> in the following terms:

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<sup>21</sup> [http://www.echr.coe.int/Documents/Convention\\_ENG.pdf](http://www.echr.coe.int/Documents/Convention_ENG.pdf)

<sup>22</sup> 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,<sup>23</sup> but it still lacks ratification to a large degree.<sup>24</sup>

*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)<sup>25</sup>*

(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.

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

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

<sup>24</sup> 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.

<sup>25</sup> [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:<sup>26</sup>

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 Recommendations<sup>27</sup> 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

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

<sup>27</sup> 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 Rome<sup>28</sup> as primary law<sup>29</sup> 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 8<sup>30</sup>*

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'.

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

<sup>29</sup> Art. 119 EC-Treaty.

<sup>30</sup> (ex Article 3(2) TEC).

*Article 157*<sup>31</sup>

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 \(2013/36/EU\)](#)<sup>32</sup> 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

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

<sup>32</sup> 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.<sup>33</sup> 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)<sup>34</sup> the Commission had stated the respective principles.

43 In a [Communication](#) (2013)<sup>35</sup> 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)<sup>36</sup> 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)<sup>37</sup> 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

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<sup>33</sup> 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](#) (3<sup>rd</sup> 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](#).

<sup>34</sup> C(2014) 1405 final, 07.03.2014.

<sup>35</sup> COM(2013) 861 final, 06.12.2013, p. 7.

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

<sup>37</sup> [\(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.<sup>38</sup>

(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)<sup>39</sup> 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.<sup>40</sup> It provides - in a given period of time - the relevant data:

**Gender pay gap in unadjusted form<sup>41</sup>**

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

<sup>38</sup> All those bodies offer websites comprising important additional information.

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

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

<sup>41</sup> 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:<sup>42</sup>

### Largest listed companies: presidents, board members, (non-)executives and CEOs<sup>43</sup>

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
Italy	67.1	32.9	34.2
Netherlands	69.8	30.2	39.6

<sup>42</sup> Extract – in alphabetical order.

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

Countries	Men (%)	Women (%)	Gap (points)
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](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'.<sup>44</sup> 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.<sup>45</sup> 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 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)).

<sup>44</sup> 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.

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

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,<sup>46</sup> 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.<sup>47</sup> However, from the point of view of the ETUC it would be necessary to change this approach.

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

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

<sup>47</sup> 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.'

necessity that the rights recognised in the Social Charter must take a practical and effective, rather than purely theoretical, form.<sup>48</sup>

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

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

### 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)<sup>49</sup> 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 Portugal is described in the Decision on admissibility of 4 July 2017<sup>50</sup> as follows:

UWE invokes the following grounds:

a) The first concerns the wage gap between men and women in Portugal 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 Labour Equality Commission and the labour inspectorate;

b) Secondly, UWE alleges that a very small number of women occupy decision-making positions within private companies, the percentage of women being 6% within the administration boards of public listed enterprises.

### A. *International case-law*

#### 1. *United Nations*

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

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<sup>49</sup> As 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.

<sup>50</sup> [Decision on admissibility](#), 4 July 2017.

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

90 After considering the fourth periodic report submitted by Portugal, the Human Rights Committee (CCPR) adopted the following 'Concluding Observations':<sup>51</sup>

C. Principal matters of concern and recommendations

4. The Committee is concerned that **women are underrepresented in decision-making positions in the public sector**, including in the Foreign Service, as well as in the legislative assemblies of the autonomous regions of the Azores and Madeira. The Committee is also concerned about the **significant and increasing wage gap** between men and women (arts. 2, 3, 25 and 26).

*The State party should strengthen its efforts to increase the representation of women in decision-making positions in the public sector, including in the Foreign Service, as well as in the legislative assemblies of the autonomous regions of the Azores and Madeira, if necessary, through appropriate temporary special measures. The State party should continue to take steps to guarantee equal pay for women and men for work of equal value, in line with the 2009 Labour Code. It should also take steps to address the structural difficulties identified with regard to the implementation of gender-equality policies, including insufficient human and financial resources, limited conceptions of equality in public opinion and lack of political commitment, as mentioned in paragraph 47 of the State party's fourth periodic report.*

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

91 Examining the fourth periodic report of Portugal, the Committee on Economic, Social and Cultural Rights (CESCR) has come to the following 'Concluding Observations':<sup>52</sup>

C. Principal subjects of concern and recommendations

Obligations of the State party under the Covenant in the context of the economic crisis

1. The Committee notes with concern that, despite the measures taken by the State party to mitigate the economic and social impact of the **austerity measures** adopted in the framework of the Economic and Financial Adjustment Programme, the financial and economic crisis has had an adverse impact on the enjoyment of economic, social and cultural rights by the population at large, in particular with regard to the rights to work, social security, housing, health and education. Various measures, specifically those that target disadvantaged and marginalized individuals and groups, have not been sufficient to adequately protect them against the consequences of the crisis. The Committee also notes that, in the light of improvements in the economic and financial situation, the State party exited the Economic and Financial Assistance Programme in June 2014 (arts. 2, para 1; 2, para 2; 6; 7; 9 and 11–14). *The Committee reminds the State party of its obligation under the Covenant to respect, protect and fulfil economic, social and cultural rights progressively, to the maximum of its available resources. The Committee draws the State party's attention to the Committee's open letter of 16 May 2012 to States parties on economic, social and cultural rights in the context of the economic and financial crisis, in particular to the recommendations contained therein with regard to the requirements resulting from the Covenant regarding the applicability of austerity measures. Such measures can be applicable only if they are temporary, necessary and proportionate, not discriminatory and do not disproportionately affect the rights of disadvantaged and marginalized individuals and groups. In that context, the Committee recommends that the State party review the policies and programmes adopted in the framework of the Social Emergency Programme implemented since 2011, and any other subsequent post-crisis economic and financial reforms, with a view to ensuring that austerity*

<sup>51</sup> Adopted at its 2945th meeting, held on 31 October 2012. See also [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fPR T%2fCO%2f4&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fPR T%2fCO%2f4&Lang=en).

<sup>52</sup> Adopted at its 70th meeting, held on 28 November 2014. See also [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fPRT %2fCO%2f4&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fPRT %2fCO%2f4&Lang=en)



*measures are progressively waived and the effective protection of the rights under the Covenant is enhanced in line with the progress achieved in the post-crisis economic recovery.*

#### *Gender wage gap*

1. The Committee is concerned that the **gender wage gap**, which is discriminatory against women, although lower than the European average, **is still considerable** owing to occupational sex segregation (arts. 3 and 7). *The Committee recommends that the State party take measures to close the gender wage gap, including efforts to combat horizontal and vertical occupational sex segregation in the labour market, and to ensure the effective implementation of the principle of equal pay for work of equal value.*

#### *Minimum wage*

1. The Committee notes the increase in the proportion of employees who earn the minimum wage from 5.5 per cent in April 2007 to 12 per cent in October 2013 and, while it welcomes the decision of the State party to increase the minimum wage per month from €485 to €505 as of 10 October 2014, after it had been frozen since 2011, it remains concerned that the level of the minimum wage is still not sufficient to provide workers and their families with a decent living (arts. 7, 9 and 11). *The Committee recommends that the State party ensure that the minimum wage enables workers and their families to enjoy a decent living and that it is periodically reviewed and adjusted in line with the cost of living, in accordance with article 7, paragraph (a), of the Covenant.*

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

92 In its 'Concluding observations' concerning the combined eighth and ninth periodic report of Portugal, the Committee on the Elimination of Discrimination against Women (CEDAW) has expressed the following concerns and recommendations:<sup>53</sup>

#### *C. Principal areas of concern and recommendations*

##### *General context*

8. The Committee notes with concern that **austerity measures**, many of which have been taken by the State party under the bailout agreements with the European Union institutions and the International Monetary Fund, have had a detrimental and disproportionate impact on women in many spheres of life. The Committee also notes that few studies and evaluations have been conducted to monitor the gender-specific effects of such measures. The Committee wishes to emphasize that the concerns expressed below take into account the exceptional circumstances that the State party has faced in recent years and is still facing. However, the Committee reminds the State party that, even in times of fiscal constraints and economic crisis, special efforts must be made to respect women's human rights, sustain and expand social investment and social protection and employ a gender-sensitive approach, giving priority to women in vulnerable situations.

9. *The Committee recommends that the State party conduct a comprehensive study on the consequences of the austerity measures on women and design an action plan to mitigate the adverse effects of such measures, as well as seek assistance and support from the European Union and the International Monetary Fund for its implementation.*

##### *National machinery for the advancement of women*

14. The Committee notes the information provided by the State party indicating that there is effective coordination among the various bodies working on gender equality in the State party, such as the Commission for Citizenship and Gender Equality, the equality advisers functioning at the local level and the Commission for Equality in Labour and Employment. While acknowledging the State party's efforts to secure extrabudgetary resources for certain policies, the Committee is concerned about the **reported reduction in budget allocations**,

<sup>53</sup> Considered at its 1337th and 1338th meetings, on 28 October 2015. See also [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CEDAW%2fC%2fPRT%2fCO%2f8-9&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CEDAW%2fC%2fPRT%2fCO%2f8-9&Lang=en)

**especially to the Commission for Citizenship and Gender Equality**, and that the extra funding may not be sustainable or sufficient for the Commission's extended tasks.

*15. The Committee recommends that the State party take measures to provide the Commission for Citizenship and Gender Equality with sufficient and sustainable resources in order to enable it to carry out its functions effectively, and that it intensify its efforts to ensure effective coordination among the various government bodies working on gender equality.*

### *Employment*

34. The Committee welcomes **Council of Ministers resolutions No. 19/2012, aimed at increasing the representation of women in decision-making positions in State-owned companies**, and **No. 18/2014, on equal pay for work of equal value**. It also welcomes various measures taken to increase the representation of women in the private sector, including major companies traded on the stock market. However, the Committee is concerned:

(a) That, to date, the measures taken have had a limited impact on the employment situation of women, including their career advancement and salaries, which remain significantly lower than those of men; [...]

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

(a) *Take targeted measures, including temporary special measures, such as providing financial incentives for the employment of women;*

(b) *Enhance access to the employment market for women, especially young women, and apply the principle of equal pay for work of equal value in all sectors of the economy; [...]*

## 2. International Labour Organisation

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

### *a) Convention No. 100*

Direct Request (2017)<sup>54</sup>

The Committee notes the observations from the General Confederation of Portuguese Workers (CGTP) and from the General Union of Workers (UGT), communicated with the Government's report which refer to the issues already raised in the comments below.

Articles 1 and 2 of the Convention. **Gender pay gap** and occupational sex segregation. In its previous comments, the Committee requested the Government to take concrete measures to reduce the remuneration gap between men and women and to provide information on their impact. The Committee notes, in this respect, that the CGTP highlights the limited progress on differentials in the remuneration of men and women workers over recent years and indicates that the existing remuneration differential is due primarily to pay discrimination, occupational sex segregation in the labour market and part-time work. Furthermore, the Committee notes that the CGTP and the UGT indicate that pay bonuses and unilateral performance assessment regimes constitute a factor of discrimination against women workers because any absence, regardless of its cause, is recorded. This may include absences due to maternity leave and to family responsibilities. Concerning the adoption of measures to reduce the gender pay gap, the Committee notes the enactment of Resolution No. 13/2013 of 8 March of the Council of Ministers, establishing measures that promote and guarantee equality between men and women in the labour market, including the elimination of gender pay gaps and labour market segregation. Moreover, Resolution No. 18/2014 of 5 March of the Council of Ministers establishes a set of measures to reduce the gender pay gap, including the obligation for enterprises in the public sector and the recommendation for enterprises in the private sector with more than 25 employees, to draft a report on the remuneration received by women and men in order to identify and prevent unjustified differences in pay and to take measures to address these differentials. The Committee notes that the Government refers in this respect to the adoption of the V National Plan for Gender

<sup>54</sup> Adopted 2016, published 106th ILC session.

Equality, Citizenship and Non-Discrimination 2014–17, which includes strategic goals aimed at reducing gender inequalities in remuneration and provides for a periodic assessment of the evolution of remuneration differentials by gender.

The Government further refers to the report on remuneration disparities drafted by the Commission for Equality in Work and Employment (CITE) in 2013, according to which, in 2011 women received an average monthly basic wage that was 18 per cent lower than that received by men, and an average monthly remuneration that was 20.9 per cent lower than that of men. The higher the skill or education level, the greater the differential in favour of men. This was particularly notable in senior positions (72.2 per cent for average basic salary and 71.2 per cent for average remuneration). The gender pay gap was less marked for lower skilled categories, such as trainees and apprentices (5 per cent and 8.2 per cent for average basic wage and total remuneration, respectively). According to the same source, the gender pay gap declined slightly in 2013, to reach 17.9 per cent. The Government further indicates, in this respect, that the gender pay gap was larger in those sectors predominantly employing women and smaller in sectors predominantly employing men. *The Committee requests the Government to indicate how it is ensured that workers are not discriminated against with respect to pay bonuses or in their performance assessment, due to their family responsibilities. It also requests the Government to continue to adopt specific measures to reduce the gender pay gap and address its causes, both in senior and lower-skilled positions. The Committee requests the Government, in particular, to take measures to increase the representation of women in middle and higher income levels, as well as in those jobs predominantly occupied by men. The Committee requests the Government to continue to provide information on any developments in this respect including on the implementation of Resolutions Nos 13/2013 and 18/2014 of the Council of Ministers and the number of enterprises in the public and private sectors that have reported the existence of pay differentials and the measures they have taken to address them, as well as on any measures taken to ensure that wages set in sectors predominantly employing women are not based on a gender-biased undervaluation of the work performed as well as on any measures included in the equality plans adopted at the enterprise level.*

**Article 3. Objective job evaluation.** In its previous comments, the Committee requested the Government to continue to provide information on the results of the project “Revaluing work to promote equality” as well as the number of enterprises that have adopted the methodological guide in practice and the sectors covered. The Government indicates that a guide to applying job evaluation free from gender bias was produced, and that in 2011 and 2012, studies were published concerning the adaptation of the job evaluation method to different sectors, such as textile, clothing, and leather sectors. *The Committee requests the Government to continue to provide information on the measures taken to promote and implement objective job evaluation methods in the private and public sectors, including the sectors concerned, the results achieved and whether this has led to any adjustments in pay. It requests the Government, in particular, to provide information on the number of job evaluation exercises carried out in those public or private enterprises that had reported pay differentials between men and women in accordance with Resolution No. 18/2014.*

**Austerity measures.** In its previous comments, the Committee requested the Government to provide information concerning the impact of the **austerity measures** adopted to address the economic and financial crisis on equality and non-discrimination policies. The Committee notes that the Government indicates that, even though the gender pay gap has increased, this has been a consistent trend since 2002, and cannot be attributed to austerity policies. The Committee notes, however, that the Committee on the Elimination of Discrimination against Women, in its concluding observations of November 2015, expressed its concern at the detrimental and disproportionate impact on women in many spheres of life caused by the austerity measures, and at the fact that only a few studies and evaluations had been conducted to monitor the gender-specific effects of such measures (CEDAW/C/PRT/CO/8-9, 24 November 2015, paragraph 8). The Committee also notes that the CGTP refers to the wage cuts in the public sector, which employs primarily women (56 per cent), and to wage freezes, which mostly affect women (in 2013, 16.5 per cent of the employees earning the minimum wage were women and 8.7 per cent were men) *The Committee requests the Government to indicate if the austerity measures are still in place and, if this is the case, to take measures to ensure that they have no impact on equality and non-discrimination policies and measures either being implemented or to be applied in the future, in particular with respect to differentials in remuneration and occupational job segregation.*

Practical information. In its previous comments, the Committee requested the Government to continue to provide information on relevant opinions of the CITE and the activities carried out by both the CITE and the CIG for the promotion of the principle of equal remuneration for work of equal value. It also requested the Government to provide information on the enforcement activities of the labour inspection services relating to the application of the Convention. The Committee notes that the Government indicates that only four complaints of pay inequality were received during the period 2011–13, by the CITE and that it has not issued any opinions on this matter. The Government also indicates that awareness-raising activities on remuneration equality between men and women were carried out, such as the workshop “Wage Equality between Women and Men – An applied Experience” and information was disseminated in the media, in this regard. *The Committee requests the Government to continue to provide information on the opinions issued and the activities carried out by the CITE as well as on any violation detected by the labour inspection services relating to the application of the Convention, including on the remedies provided and sanctions imposed.*

b) *Convention No. 111*

Direct Request (2017)<sup>55</sup>

[...]

Equality plans. In its previous comments, the Committee requested the Government to provide information on the equality plans adopted. The Committee notes the Government’s indication that following the adoption of **Resolution No. 19/2012 of 8 March 2012, which obliges enterprises in the public sector and encourages enterprises in the private sector to adopt plans to achieve gender equality, including in management positions** and to evaluate their implementation, approximately 100 plans were evaluated in the private and the public sector in 2012. According to the results, in the public sector women represented 27.2 per cent of the members of the governing boards and women were at the head of the governing boards in only 16.7 per cent of the cases, in the private sector women represented only 9.5 per cent of the members of the governing boards and there were no women as heads of governing boards. *The Committee requests the Government to continue to provide information on the number and nature of the gender equality plans adopted in public and private enterprises, including information on their effectiveness and results obtained. [...]*

3. *Council of Europe*

94 In examining the situation in Portugal, 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 Portugal.

*Legal basis of equal pay*

The Committee refers to its conclusion under Article 20 (Conclusions 2012) where it considered that the situation was in conformity with the Charter as regards the legal basis of equal pay. It further notes from the report the principle of equal pay for equal work is enshrined in Article 59(1)(a) of the Constitution.

Furthermore, according to Article 270 of the Labour Code, when the amount of remuneration is determined, one must take account of the volume, nature and quality of the work, with respect for the principle of equal pay for equal work.

The Labour Code also stipulates that workers have a right to equal working conditions, in particular with regard to pay, and that the elements which determine the latter cannot entail any gender-based discrimination (Article 31(1), CT). Any form of variable remuneration – namely

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<sup>55</sup> Adopted 2016, published 106th ILC session.

task or output-based pay – must be established on the basis of the same unit of measurement. Remuneration calculated on the basis of working time must be the same.

### *Guarantees of enforcement and judicial safeguards*

According to the report, a breach of the right to equal pay for men and women constitutes a very serious administrative offence (Article 31(6), CT).

The Committee notes that in the area of salary discrimination, the Commission for Equality at Work and in Employment (CITE) plays an important role as the national mechanism for equality. Its competences include pursuing equality and non-discrimination between women and men at work, in employment and in vocational training, and in this respect it receives and analyses complaints linked to breaches of labour and employment legislation and issues formal opinions on the subject.

During the reference period CITE received three complaints regarding remuneration and supplements and issued the respective opinions. Such opinions are non-binding administrative decisions, but failure to comply with them is considered unlawful unless a court decides otherwise. The Committee asks how court decisions have dealt with CITE opinions.

The Committee recalls that under Article 4§3 of the Charter 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 a shift of the burden of proof in favour of the plaintiff in discrimination cases.

Anyone who suffers wage discrimination on grounds of gender must be entitled to adequate compensation, that is, compensation that is sufficient to make good the damage suffered by the victim and act as a deterrent to the offender (Conclusions XIII-5, Statement of Interpretation on Article 1 of the Additional Protocol). In cases of unequal pay, any compensation must, as a minimum, cover the difference in pay (Conclusions XVI-2, Malta).

The Committee further recalls that when the dismissal is the consequence of a worker's complaint concerning equal wages, the employee should be able to file a claim for unfair dismissal. In this case, the employer must reintegrate him in the same or a similar post. If reinstatement is not possible, the employer has to pay compensation, which must be sufficient to compensate the worker and to deter the employer. Courts should have the competence to fix the amount of this compensation, not the legislator (Conclusions XIX-3, Germany).

The Committee asks how the legislation complies with these standards.

### *Methods of comparison and other measures*

The report states that the principle of equality also entails the existence of national instruments, some of which are cross-cutting in nature, such as the 2007-2010 and 2011-2013 National Plans for Equality (PNIs).

The report provides information concerning the average earnings of men and women by occupation as well as monthly salary differential in basic pay and earnings, overall. The Committee notes that in 2011 women received 82% of men basic pay and 79,1% of earnings. According to the report, the gender pay gap is smaller in categories with lower levels of qualification. The differential rises as the level of qualification or the level of schooling increases. As senior managers women get 71.2% of men's earnings while as unskilled workers they get 91,7%. The Committee takes notes of the sectoral and by economic activity analysis of the gender pay gap.

The Committee notes from Eurostat that the **unadjusted pay gap stood** at 15,7% in 2012, in comparison to 12,5% in 2011. The Committee asks what measures are taken to narrow the gap. It also asks what is the adjusted pay gap, that is, the differential in pay for equal work.

As regards equal pay comparisons, the report states that there is no legislation permitting, in equal pay cases comparisons of pay and jobs to be made outside the company directly concerned.

The Committee refers to its conclusion on Article 20 (Conclusions 2008) where it took note of the argument of the Government that it did not seem possible to compare two or more enterprises

for wage purposes as the differences in wages could be attributable to the differences in organisation of work, investment, type of business, which are the key elements determining workers' remuneration.

In its conclusion on Article 20 (Conclusion 2012) the Committee noted that according to the report it was not possible to oblige an employer to pay his or her employees on the basis of comparisons with other employers' employees.

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, in this respect, that the approach of EU law allows a proper implementation of Article 4§3.

In this connection, the Committee has referred to the judgment of the European Court of Justice of 17 September 2002 on the A.G. Lawrence and Others v. Regent office Care Ltd (case C 320/00) where the Court held that there is nothing in the wording of Article 141(1) EC to suggest that the applicability of the provision of equal pay is limited to situations in which men and women work for the same employer. However, where the differences identified in the pay conditions of workers performing equal work or work of equal value cannot be attributed to a single source, there is no body which is responsible for the inequality and which could restore equal treatment. Such a situation does not come within the scope of Article 141(1) EC. The work and the pay of those workers cannot therefore be compared on the basis of that provision.

The Committee asks whether pay comparisons outside the company are possible in equal pay litigation, when difference identified in the pay conditions of female and male workers performing work of equal value is attributable to a single source. This could signify employees working for the same legal person or group of legal persons, employees of several undertakings or establishments covered by the same collective works agreement or regulations. In such cases, regulation of the terms and conditions of employment actually applied is traceable to one source, whether it be the legislature, the parties to a collective works agreement or the management of a corporate group (Opinion of Advocate General Geelhoed of 14 March 2002 regarding the ECJ Case C-320/00).

The Committee recalls that it has found that where, in equal pay cases, a comparison can be made with a typical worker (someone in a comparable job) in another company, provided the differences in pay can be attributed to a single source (ECJ, 17 September 2002, Case C-320/00 (Lawrence) and ECJ, 13 January 2004, C-256/01 (Allonby)), the situation was in conformity with the Charter (Conclusions on Article 20, Netherlands (2012)).

The Committee further considers that the pay gap may indeed be due to different levels of regional development as well as the differences in economic performance of companies, or to other similar reasons. However, these reasons should not preclude the workers from trying their equal pay case by comparing their pay with that of another worker performing the work of equal value in another company, based on the criteria outlined above.

The Committee asks the next report to provide information in the light of these clarifications.

### *Conclusion*

Pending receipt of the information requested, the Committee defers its conclusion.

b) *Article 20*

Conclusions 2016

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

*Equal rights*

The Committee recalls that it examines measures relating to maternity protection and family responsibilities under Articles 8 and 27 of the Charter (Conclusions 2015).

The Committee recalls that it examines the right to equal pay under Article 20 and Article 4§3 of the Charter, and does so therefore every two years (under thematic group 1 “Employment, training and equal opportunities”, and thematic group 3 “Labour rights”).

It therefore refers to its Conclusion 2014 on Article 4§3 and Conclusions 2012 on Article 20 where it examined the legal basis of equal pay and noted that the **right to equal pay for equal work is guaranteed** by the Constitution (Article 59 (1)(a)) and the Labour Code (Articles 270 and Article 31 in relation to gender equality in employment).

The Committee noted previously that the Commission for Equality at Work and in Employment (CITE) plays an important role as the national mechanism for equality. Its competences include pursuing equality and non-discrimination between women and men at work, in employment and in vocational training, and in this respect it receives and analyses complaints linked to breaches of labour and employment legislation and issues formal opinions on the subject. Such opinions are non-binding administrative decisions, but failure to comply with them is considered unlawful unless a court decides otherwise (Conclusions 2014 on Article 4§3). The Committee reiterates its question with regard to how court decisions have dealt with CITE opinions.

The Committee took note of the awareness-raising actions undertaken by the CITE to include gender-equality matters in collective agreements. It previously asked information on the impact of such steps on the content of collective agreements (Conclusions 2012). The report indicates that the Labour Code provides for a procedure of assessment of whether collective agreements comply with the law on equality and non-discrimination. The CITE has the competence to issue a substantiated assessment and in case it finds any discriminatory provisions in a collective agreement, it will notify the parties that they have 60 days to amend the respective provisions (Article 479 Labour Code). The report indicates that the effect of this procedure was that, in practice, the social partners – both employers’ associations and trade unions – became aware of CITE’s work and started correcting unlawful clauses/avoiding clauses that discriminate on the basis of gender on their own initiative. On this point, the report indicates that CITE held a number of awareness and training actions, with curricular plans that included the topic of the integration of gender equality into collective agreements and the “Informative Guide to Drawing Up Collective Labour Agreements Clauses from an Equality and Non-Discrimination Perspective” was issued.

As regards equal pay comparisons, the Committee previously concluded that the situation was not in conformity with the Charter on the ground that, in equal pay cases, legislation only permits comparisons of pay between employees working for the same company (Conclusions 2006, 2008, 2012). The Committee took note of the argument of the Government that it did not seem possible to compare two or more enterprises for wage purposes as the differences in wages could be attributable to the differences in organisation of work, investment, type of business, which are the key elements determining workers’ remuneration (Conclusions 2008, Article 20).

The Committee recalls that it examines the right to equal pay under Article 20 and Article 4§3 of the Charter, and does so therefore every two years (under thematic group 1 “Employment, training and equal opportunities”, and thematic group 3 “Labour rights”). Articles 20 and 4§3 of the Charter require the possibility to make pay comparisons across companies (Conclusions 2010, France). 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. (Statement of Interpretation on Article 20 (Conclusions 2012).

The Committee recalls that in **equal pay litigation cases** the legislation should allow pay comparisons across companies only where the differences in pay can be attributed to a single source. For example, the Committee has considered that the situation complied with this principle when in equal pay cases comparison can be made with a typical worker (someone in a comparable job) in another company, provided the differences in pay can be attributed to a single source (Conclusions 2012, Netherlands, Article 20) or when pay comparison is possible for employees working in a unit composed of persons who are in legally different situations if the remuneration is fixed by a collective agreement applicable to all entities of the unit (Conclusions 2014, France, Article 4§3).

The Committee further considers that the pay gap may indeed be due to different levels of regional development as well as the differences in economic performance of companies, or to other similar reasons. However, these reasons should not preclude the workers from trying their equal pay case by comparing their pay with that of another worker performing the work of equal value in another company, based on the criteria outlined above.

The current report indicates that under Portuguese law, collective labour agreements (IRCTs) are required to regulate other rights and duties pertaining to workers and employers (particularly the base pay for every occupation and professional category) (Article 492(2)(e) of the Labour Code) and to expressly state the amounts of the base pay for every occupation and professional category, if they have been agreed (Article 492(1)(f) of the Labour Code). In addition, application of all or part of a current collective agreement can be extended by ministerial order to employers or workers within the sector of activity and professional sector defined in the agreement (Article 514(1) of the Labour Code). The Committee therefore understands that it is possible to make pay comparisons between the companies belonging to the same sector/which are part of the same collective agreement and it asks that the next report confirm this understanding.

### *Equal opportunities*

The Committee notes from Eurostat that the wage gap between women and men (that is the difference between men and women in average gross hourly pay) was 12.8% in 2011 – lower than the average in the 27 countries of the European Union (16.5%) but increased by the end of the reference period to 14.5% in 2014.

The report mentions several plans and strategies to promote gender equality, in particular the Fourth National Plan for Equality, Gender, Citizenship and Non-Discrimination 2011-2013 and the Fifth National Plan for Equality, Gender, Citizenship and Non-Discrimination 2014-2017 as well as the Strategy for Equality between Women and Men 2010-2015. The report describes the various Resolutions of the Council of Ministers approving a range of measures designed to promote equal opportunities for women and men in the labour market; to fight the tendency towards a wage inequality between men and women; to **promote an effective plurality in the representation of women and men in decision-making positions in both the public and private sectors.**

The Committee takes note from the report of the activities and projects developed by CITE in order to promote equality and non-discrimination between men and women at work during the reference period such as: (i) the Gender Equality Instruments and Methodologies Project (PIMIG) which has as objectives to increase the prominence of the gender dimension in inspection actions Authority for Working Conditions (ACT) and to make the labour inspectors' work more effective when it comes to detecting and rectifying wage discrimination between women and men; (ii) a project entitled "Study and develop a tool for diagnosing gender pay gaps (GPGs) in enterprises which developed two electronic tools in order to analyse gender pay gaps: Self-reflection Questionnaire on Wage Equality between Men and Women in Enterprises, and the Gender Pay Gap Calculator; (iii) campaigns to raise public awareness of the persistence of wage inequality between women and men; and (iv) IGEN – Enterprises for Gender Equality Forum – a network of enterprises and organisations developed by CITE in order to promote gender equality at work and in employment.



The Committee asks the next report to continue to provide information on the concrete impact of all the positive measures and strategies on gender equality and the gender pay gap, and more generally, for updated information on the situation of women in employment and training as well as on all special measures and action plans taken to remove de facto gender inequalities.

### *Conclusion*

Pending receipt of the information requested, the Committee defers its conclusion.

## *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:

- Article 59(1)(a) of the Constitution
- Labour Code of 2009 (amongst others articles 31 and 270)
- Council of Ministers resolutions No. 19/2012, aimed at increasing the representation of women in decision-making positions in State-owned companies, and No. 18/2014, on equal pay for work of equal value
- Resolution No. 13/2013 of 8 March of the Council of Ministers, establishing measures that promote and guarantee equality between men and women in the labour market, including the elimination of gender pay gaps and labour market segregation.
- Council of Minister Resolution No. 18/2014 of 5 March establishes a set of measures to reduce the gender pay gap, including the obligation for enterprises in the public sector and the recommendation for enterprises in the private sector with more than 25 employees, to draft a report on the remuneration received by women and men in order to identify and prevent unjustified differences in pay and to take measures to address these differentials.

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

- According to the Commission, based on Eurostat 2014 figures, in Portugal, the gender pay gap stands at 14.9 %<sup>56</sup> (the average gender pay gap in the EU is 16.7 %) and the gender overall earnings gap in Portugal stands at 26.5 % (the average gender overall earnings gap in the EU is 39.8 %).<sup>57</sup>

### *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:

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<sup>56</sup> According to the Eurostat figures for 2015, this stands now at 17.8%. (See also table in Part I.B.1)

<sup>57</sup> European Commission factsheet gender way gap 2016 – Portugal; [http://ec.europa.eu/justice/gender-equality/files/gender\\_pay\\_gap/2016/gpg\\_country\\_factsheet\\_pt\\_2016\\_en.pdf](http://ec.europa.eu/justice/gender-equality/files/gender_pay_gap/2016/gpg_country_factsheet_pt_2016_en.pdf)

- Law 62/2017 of 1 August, on balanced representation between women and men in executive and supervisory boards of state-owned companies and listed companies<sup>58</sup>, which establishes a mandatory quota of 33%. Listed companies benefit from a transitory period of 20% mandatory quota between 2018 and 2020

98 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 Portugal, the figure is only 14.2%.<sup>59</sup>

### *C. Application of the legal principles*

99 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 Portugal as follows.

100 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*

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

102 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 CESC, 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*

103 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.

104 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.

<sup>58</sup> Available at: [http://cite.gov.pt/asstscite/downloads/legislacao/Lei\\_62\\_2017.pdf](http://cite.gov.pt/asstscite/downloads/legislacao/Lei_62_2017.pdf)

<sup>59</sup> 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](http://ec.europa.eu/justice/gender-equality/files/gender_balance_decision_making/1607_factsheet_final_wob_data_en.pdf)

*b) Procedure*

105 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.

106 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*

107 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*

108 Statistical evidence (see above para. 98) shows that there is still an under-representation of women in decision-making bodies within private companies. 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.

109 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*

110 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.

111 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

112 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.

113 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.

114 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

115 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.

116 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 .....	29
1.	<i>United Nations</i> .....	29
a)	International Covenant on Civil, Political and Cultural Rights .....	30
C.	Principal matters of concern and recommendations .....	30
b)	International Covenant on Economic, Social and Cultural Rights .....	30
C.	Principal subjects of concern and recommendations .....	30
Obligations of the State party under the Covenant in the context of the economic crisis .....	30	
Gender wage gap .....	31	
Minimum wage .....	31	
c)	Convention on the Elimination of All Forms of Discrimination against Women .....	31
C.	Principal areas of concern and recommendations .....	31
General context .....	31	
National machinery for the advancement of women .....	31	
Employment .....	32	
2.	<i>International Labour Organisation</i> .....	32
a)	Convention No. 100 .....	32
Direct Request (2017) .....	32	
b)	Convention No. 111 .....	34
Direct Request (2017) .....	34	
3.	<i>Council of Europe</i> .....	34
a)	Article 4§3 .....	34
Conclusions 2014 .....	34	
Legal basis of equal pay .....	34	
Guarantees of enforcement and judicial safeguards .....	35	
Methods of comparison and other measures .....	35	
Conclusion .....	36	
b)	Article 20 .....	37
Conclusions 2016 .....	37	
Equal rights .....	37	
Equal opportunities .....	38	
Conclusion .....	39	
B.	FURTHER PERTINENT MATERIAL ON THE SITUATION IN LAW AND PRACTICE .....	39

1.	<i>Concerning the Gender pay gap</i> .....	39
2.	<i>Concerning the (under-)representation in decision-making positions within private companies</i> .....	39
C.	APPLICATION OF THE LEGAL PRINCIPLES .....	40
1.	<i>Concerning the Gender pay gap</i> .....	40
a)	Substance .....	40
b)	Procedure.....	41
2.	<i>Concerning the (under-)representation in decision-making positions within private companies</i> .....	41
a)	Substance .....	41
b)	Procedure.....	41
III.	CONCLUSIONS .....	42
A.	SUBSTANTIVE CONCLUSIONS .....	42
B.	PROCEDURAL REQUEST .....	42
	TABLE OF CONTENTS .....	42