



European
Social
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Charte
sociale
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COUNCIL OF EUROPE



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

13 June 2018

Case Document No. 7

University Women of Europe (UWE) v. Portugal
Complaint No. 136/2016

OBSERVATIONS BY THE EUROPEAN COMMISSION

Registered at the Secretariat on 28 May 2018



EUROPEAN COMMISSION
DIRECTORATE-GENERAL JUSTICE and CONSUMERS

Directorate D: Equality and Union Citizenship
Unit D.2: Gender equality

Brussels, 25.05.2018

Subject: European Union observations regarding complaints nos. 124-138/2016, University Women of Europe (UWE) v. Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Finland, France, Greece, Ireland, Italy, the Netherlands, Norway, Portugal, Slovenia and Sweden

On 2 February 2018, the European Union, through the European Commission, was invited to give its views as regards the collective complaint concerning the violation of the revised European Social Charter lodged to the European Committee of Social Rights by the University Women of Europe (UWE), registered at the Secretariat of the European Social Charter on 24 August 2016.

The University Women of Europe lodged a complaint against fifteen countries that have accepted that the collective complaint is lodged against them. The collective complaint, consisting of fifteen individual complaints, refers to the following topics:

1. Lack of appropriate measures to achieve equal pay for equal work
 - absence of gender mainstreaming
 - ineffective employment equality policy
 - ineffective protection against discrimination
 - the measures implemented do not concern small enterprises
 - non-requirement to establish classification systems
2. Lack of effectiveness of Equality Ombudsman and Labour Inspectorates
 - which (public) authorities are competent to handle complaints?
 - which bodies/persons in companies are responsible to handle complaints?
3. Lack of evaluation of gender equality actions, including absence of reliable statistical data
4. Structural deficiencies
5. Gender biased norms and stereotypes
6. Lack of assessment of impact of uptake of parental leave on the pay gap
7. Under-representation of women in decision-making
8. Non-application of certain legislation to management boards.

The University Women of Europe finds the same problems invariably in relation to all countries under examination. Only some details differ, for example when it comes to the availability of statistics on gender pay gap for each particular State. Apart from such details, the University Women of Europe identified the problems of the same nature in all

the countries against which the complaint is lodged. The University of Europe concludes that the countries in question are in violation of certain articles of the Social Charter and the subsequent related texts¹.

The European Commission has no competence to give an opinion on possible violations of the Council of Europe's Social Charter. It will therefore limit itself to highlighting the European Union's legal framework and policy actions of relevance to the matters raised in the complaints.

I. Background

In the European Union, the principle of equal pay between women and men has been enshrined in the Treaties since 1957. The principle of equal pay for men and women for equal work and work of equal value was laid down in the original European Economic Community Treaty of 1957², more precisely in its Article 119, which later became Article 141 of the European Community Treaty. Since the entry into force of the Treaty of Lisbon (2009)³, the principle is embodied in Article 157 of the Treaty on the Functioning of the European Union (TFEU)⁴. According to the current Article 157 TFEU, "pay" refers to "*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*".

Article 157(1-2) TFEU enshrines the principle of equal pay for work of equal value and has horizontal direct effect.

The following EU legislation is, among others, related to the subject matter of the complaints in question:

- Directive 2006/54/EC of the European Parliament and the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation⁵ (Directive 2006/54/EC)

¹ For example: Article 1 of the Additional Protocol to the Social Charter of 1988, on the right to equal opportunities and equal treatment in matters of the employment and occupation without discrimination on the grounds of sex, Article 4(3) of the revised Social Charter ("With a view to ensuring effective exercise of the right to a fair remuneration, the Parties undertake (...) to recognise the right of men and women workers to equal pay for work of equal value"), Article 20 and Article E of Part V of the Social Charter

² Treaty establishing the European Economic Community (Treaty of Rome (EEC)), Document 11957E/TXT, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:11957E/TXT>

³ Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007, OJ C 306, 17.12.2007, p. 1–271; <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:12007L/TXT>

⁴ Consolidated version of the Treaty on the Functioning of the European Union, OJ C 326, 26.10.2012, p. 47–390; <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:12012E/TXT>

⁵ Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), OJ L 204, 26.7.2006, p. 23–36; <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32006L0054>

- Directive 2010/41/EU of the European Parliament and the Council of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity⁶ (Directive 2010/41/EU)

At EU level, the gender pay gap is tackled both through legislation and through policy initiatives.

II. Non-legislative policy initiatives

The gender pay gap is the difference between the average earnings of men and women as a percentage of the average earnings of men per working hour. It is calculated by comparing the combined earnings of all male employees with the combined earnings of all female employees. The term ‘gender pay gap’ must be distinguished from the term ‘pay discrimination’. Pay discrimination refers to women receiving less pay than men for work of equal value.

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

Within the European Union, the Council, the Commission and the European Parliament all acknowledge the need to address the problem. For example, one of the five main priorities of **the Strategic Engagement for Gender Equality 2016-2019**⁷ is to reduce gender pay, earnings and pension gaps, and thus fight poverty among women. Measures to close the gender pay gap are necessary also for the successful implementation of **the European Pillar of Social Rights (the Pillar)**⁸, as proclaimed by the European Parliament, the Council and the Commission on 17 November 2017. The gender pay gap is one of the three indicators for gender equality included in the social scoreboard that the Commission uses to monitor the implementation of the Pillar, including in the context of **the European Semester**. The European Semester was introduced in 2010 and it enables the EU member countries to coordinate their economic policies throughout the year and address the economic challenges facing the EU⁹. In the framework of the European Semester, the Commission assesses the governments` plans of the Member States and

⁶ Directive 2010/41/EU of the European Parliament and of the Council of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC, OJ L 180, 15.7.2010, p. 1–6; <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32010L0041>

⁷https://ec.europa.eu/antitrafficking/sites/antitrafficking/files/strategic_engagement_for_gender_equality_en.pdf

⁸ https://ec.europa.eu/commission/priorities/deeper-and-fairer-economic-and-monetary-union/european-pillar-social-rights/european-pillar-social-rights-20-principles_en

⁹ https://ec.europa.eu/info/business-economy-euro/economic-and-fiscal-policy-coordination/eu-economic-governance-monitoring-prevention-correction/european-semester/framework/european-semester-why-and-how_en

presents each country with a set of country-specific recommendations (CSRs). The CRS may address areas such as the state of public finances, measures to create jobs and fight unemployment, but also specifically the issue of inequality that the Commission observed in certain Member State.

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

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

As explained in the Commission's Action Plan, the causes of the gender pay gap are complex. They include a lack of sufficient work-life balance policies, gender stereotypes that consign women and men to pre-determined roles, restricting their freedom to choose the educational and occupational paths, insufficient enforcement of the equal pay principle, lack of pay transparency that has the effect of hiding pay inequality and gender bias, preventing women from demanding their rights.

Several other Commission's actions directly relate to some of the elements of the complaints:

- As for the stereotypes and patriarchal attitudes, the Commission is committed to combat segregation in occupation and sectors, by supporting transnational projects to tackle stereotypes and segregation in education, training and labour market and by organizing conferences on the basis of the results of projects on combating stereotypes and segregation and on funding grass-roots projects questioning stereotypes led by the education and training communities.
- The European Commission monitors the national legislation and policies of Member States regarding the gender pay gap. For example, the gender pay gap is one of the three indicators for gender equality included in the social scoreboard that the Commission uses to monitor the implementation of the Pillar, including in the context of the European Semester.

¹⁰ COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL AND THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE EU Action Plan 2017-2019 Tackling the gender pay gap, COM/2017/0678 final; <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52017DC0678>

- The Commission raises awareness about the gender pay gap, publishes the results of the projects funded under the EU's progress program, publishes and disseminates an updated Guide on the case law on the principle of equal pay, and prepares and disseminates an updated Guide on best practices. One of the awareness raising initiatives is celebration of European Equal Pay Day that marks the moment when women effectively stop getting paid compared to their male colleagues¹¹. The Commission reports regularly about the evolution of the gender pay gap, earnings and pensions gap in Europe. The Eurobarometer on the gender pay gap and pay transparency is rendered significant in this respect.
- With regards to unequal pay for equal or similar work and to the occupational social security schemes, the Commission supports data collection on teacher wages and encourages Member States to take action in eliminating under-remuneration in this sector.
- The problem of underrepresentation of women on senior and management positions, of the equal access of women to decision-making boards of private enterprises and the lack of employees' representatives for gender related matters attract additionally the attention of the collective complaints. The Commission aims at combating vertical segregation, by working towards the adoption of a proposal for a Directive in this field, monitoring the implementation of board gender diversity policies in the EU's largest listed companies, and funding projects aiming to improve the gender balance in economic positions at all management levels.
- As far as the adequate protection of pregnancy, maternity, paternity and family life is concerned, as well as the dismissal of pregnant workers and workers returning from family leaves, the Commission engages in initiatives to tackle the care penalty. It does so, in particular, by implementing the **Work-Life Balance initiative**¹², launching a study by the legal network to map the situation across Member States, and funding childcare or elderly care facilities in Member States through the European Structural and Investment Funds, to mention only some of the Commission's commitments
- Finally, yet importantly, the collective complaints challenge the existence of effective statutory and civil law remedies for the labour rights of women. They also address the issue of the burden of proof, which is presumed to lie with the weakest part. In 2018, the Commission **will evaluate the need to clarify the provisions on equal pay**, including those of the Directive 2006/54/EC. This includes an assessment of the effectiveness of sanctions and compensation to victims.

¹¹ In 2017, that was 3 November, which means that almost two months of the year remained that could be considered as “non-paid” for women

¹² The European Commission adopted an initiative on Work-Life Balance consisting of a Directive and a Communication TO SUPPORT WORK-LIFE BALANCE FOR WORKING PARENTS AND CARERS. The Communication foresees among other things, non-legislative actions in order to support and reinforce the legal measures of the Directive: A NEW START TO SUPPORT WORK-LIFE BALANCE FOR PARENTS AND CARERS; https://ec.europa.eu/info/law/better-regulation/initiatives/com-2017-253_en

III. EU legislation and case-law

An important impetus for bringing the equal pay principle into practice was provided by the Equal Pay Directive 75/117/EEC, which has in the meantime been replaced by the Directive 2006/54/EC. Directive 2006/54 defines the substance of the implementation of the principle of equal treatment as the elimination of discrimination on ground of sex in matters of employment and occupation. This Directive prohibits both direct and indirect pay discrimination.

Article 4 of the Directive establishes the principle of equal pay by providing that, for the same work or for work of equal value, direct and indirect discrimination on grounds of sex is prohibited in all aspects and conditions of remuneration. Where job classification schemes are used in order to determine pay, these must be based on the same criteria for both men and women and should be drawn up to exclude discrimination on grounds of sex (Article 4). Also, this Directive requires that the Member States shall ensure that all employment-related arrangements, including provisions in individual or collective agreements and contracts, internal company rules, rules governing independent professions and rules governing employees' and employers' organisations contradicting the principle of equal pay shall be or may be declared null and void or may be amended (Article 23).

One way of determining work of equal value is by using gender-neutral job evaluation and classification systems. However, Directive 2006/54/EC does not oblige Member States to put such systems in place and their availability at national level varies significantly.

To attain its purpose, Directive 2006/54/EC requires that Member States ensure that any laws, regulations and administrative provisions contrary to the principle of equal treatment are abolished.

Furthermore, Member States have to introduce measures to enable persons who consider themselves wronged by failure to apply the principle of equal treatment to pursue their claims by judicial process, possibly after recourse to other competent authorities. Member States should provide for effective, proportionate and dissuasive penalties for breaches of the obligations under Directive. Also, the Directive lays down prima facie and victimisation provisions, supporting an individual who was or is subject to discrimination, including pay discrimination.

Apart from the above-mentioned EU legal framework, the case law of the Court of Justice of European Union (CJEU), often induced by requests for preliminary rulings by national judges, has been of major importance for the introduction of the equal pay principle in the daily lives of EU citizens. In particular, the Court's findings in the 1970s that Article 119 of the Rome Treaty is directly effective in both vertical (private person versus public authority) and horizontal (private person versus private person) relations proved to be a powerful tool for enforcing the principle in the national courts, doubtless also with considerable preventive effects.

The equal pay issues may raise complex legal questions, as demonstrated by the rich case law before the ECJ on the notion of "pay", the concept of 'equal work' and 'work of equal value'¹³.

One of the elements important for assessing the complaints in question is to correctly assess the **notion of "pay"**¹⁴. The CJEU, in particular during the 1990s, has interpreted broadly the scope of the notion of 'pay'. Pay includes not only basic pay, but also, for example, overtime supplements, special bonuses paid by the employer, travel allowances, compensation for attending training courses and training facilities, termination payments in the case of dismissal and occupational pensions.

Another batch of cases delves into the concepts of **'equal work' and 'work of equal value'**.¹⁵ In those cases, the potential comparison of jobs is the central problem and judgments focus on finding an accurate comparator. Questions that have arisen in that perspective concern, for example, the possibility to compare with a similar or even the same job with another employer, with previous employees doing the same job and with employees doing a job of lower value. In addition, the use of statistics is an issue that has come to the surface in a number of CJEU cases.

It is also important to emphasize that the principle of equal pay for men and women for equal work and work of equal value enshrined in the EU legal provisions and the case law of the CJEU interpreting them, does not guarantee the absence of a gender pay gap. This is because the causes of the gender pay gap are multiple, as explained in the previously mentioned EU Gender Pay Gap Action Plan 2017-2019. These causes include of course pay discrimination, but also sectorial and vertical segregation, stereotypes about whether men and women should be on the labour market or at home and inadequate work-life balances policies.

¹³ On the "equal pay", see for example Judgment of the Court of 31 March 1981. - J.P. Jenkins v Kingsgate (Clothing Productions) Ltd. - Reference for a preliminary ruling: Employment Appeal Tribunal - United Kingdom. - Equal pay. - Case 96/80, ECLI identifier: ECLI:EU:C:1981:80; <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61980CJ0096>

- For more information, see the report "The enforcement of the principle of equal pay for equal work or work of equal value. A legal analysis of the situation in the EU Member States, Iceland, Liechtenstein and Norway" written by the European network of legal experts in gender equality and non-discrimination; <https://www.equalitylaw.eu/downloads/4466-the-enforcement-of-the-principle-of-equal-pay-for-equal-work-or-work-of-equal-value-pdf-840-kb>

¹⁴ On the notion of pay, see for example Judgment of the Court of 25 May 1971. - Gabrielle Defrenne v Belgian State. - Reference for a preliminary ruling: Conseil d'Etat - Belgium. - Equal pay. - Case 80-70, ECLI identifier: ECLI:EU:C:1971:55; <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61970CJ0080>;

¹⁵ As for the notion of "work of equal value", see for example Judgment of the Court (Fifth Chamber) of 1 July 1986. - Gisela Rummeler v Dato-Druck GmbH. - Reference for a preliminary ruling: Arbeitsgericht Oldenburg - Germany. - Equal pay for men and women - Classification system. - Case 237/85; <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61985CJ0237>

- Concerning assessment whether workers carry out work of equal value, see for example Judgment of the Court of 31 May 1995. - Specialarbejderforbundet i Danmark v Dansk Industri, formerly Industriens Arbejdsgivere, acting for Royal Copenhagen A/S. - Reference for a preliminary ruling: Faglige Voldgiftsret - Denmark. - Equal pay for men and women. - Case C-400/93; <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61993CJ0400>

The Commission believes that the information presented in this reply might shed more light on the current situation in the European Union and its Member States as regards different aspects of gender equality and, in particular, pay equality and gender pay gap. The complexity of the issues in question and the numerous elements that, in the end, lead to the gender pay gap can be seen from many different angles, from the sociological to economical and legal. Therefore, it is necessary to take all of these into account.

The Commission remains available for any further information the Council of Europe may need.

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