



European  
Social  
Charter

Charte  
sociale  
européenne



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

**DECISION ON THE MERITS**

**Adoption: 6 December 2019**

**Notification: 28 February 2020**

**Publicity: 29 June 2020**

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

Complaint No. 138/2016

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

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

Assisted by Henrik KRISTENSEN, Deputy Executive Secretary

Having deliberated on 19 mars 2019, 12 September 2019, 16 and 17 October 2019, 2,3 and 6 December 2019

On the basis of the report presented by Giuseppe PALMISANO,

Delivers the following decision, adopted on the latter date:

## **PROCEDURE**

1. The complaint lodged by University Women of Europe (UWE) was registered on 24 August 2016.
2. UWE alleges that the situation in Sweden is in violation of Articles 1, 4§3, 20 and E of the Revised European Social Charter ("the Charter") having regard to the pay gap between men and women and the under-representation of women in decision-making positions within private companies in Sweden.
3. On 4 July 2017, referring to Article 6 of the 1995 Protocol providing for a system of collective complaints ("the Protocol") the Committee declared the complaint admissible.
4. In its decision on admissibility, the Committee invited the Government to make written submissions on the merits of the complaint by 13 October 2017.
5. In application of Article 7§1 of the Protocol, the Committee invited the States Parties to the Protocol and the States that had made a declaration in accordance with Article D§2 of the Charter, to submit any observations they wished to make on the merits of the complaint by 13 October 2017.
6. In application of Article 7§2 of the Protocol, the Committee invited the international organisations of employers or workers mentioned in Article 27§2 of the Charter to make observations by 13 October 2017.
7. On 14 September 2017, the European Confederation of Trade Unions (ETUC) asked for an extension of the deadline for presenting its observations on the complaint. The President of the Committee extended this deadline until 3 November 2017. ETUC's observations were registered on 3 November 2017.
8. On 21 September 2017, the Government asked for an extension to the deadline for presenting its submissions on the merits. The President of the Committee extended this deadline until 3 November 2017. The Government's submissions on the merits were registered on 27 October 2017.
9. The deadline set for UWE's response to the Government's submissions on the merits was 9 February 2018. UWE's response was registered on 9 February 2018.

10. Pursuant to Rule 31§3 of the Committee's Rules ("the Rules"), the Government was invited to submit a further response by 5 April 2018. On 4 April 2018, the Government asked for an extension of the deadline for presenting its further response. The President of the Committee extended this deadline until 20 April 2018. The Government has not submitted any further information.

11. Pursuant to Rule 32A of the Rules, the President invited the European Network of Equality Bodies (EQUINET) to submit observations by 30 March 2018. EQUINET's observations were registered on 30 March 2018.

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

## **SUBMISSIONS OF THE PARTIES**

### **A – The complainant organisation**

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

- Firstly, UWE alleges that the pay gap between women and men still persists. Unequal pay is a reality, despite the international obligations entered into and the domestic legislation enacted.
- Secondly, only a very small number of women occupy decision-making positions within private companies, since there are no effective legislative measures to ensure the sufficient representation of women in decision-making bodies within private enterprises.

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

### **B – The respondent Government**

15. The Government maintains that Sweden does not violate any of the invoked articles of the Charter on the basis that the relevant laws and practices, together with the commitment to decrease pay differences between women and men show that Sweden respects and ensures effectively and efficiently the rights within the scope of Articles 1, 4§3 and 20, alone or in conjunction with Article E.

## **OBSERVATIONS BY WORKERS' ORGANISATIONS**

## **The European Trade Union Confederation (ETUC)**

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

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

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

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

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

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

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

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

23. As regards Sweden, according to the ETUC, in general terms, it is clear that the gender pay gap remains above 0%. 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.

24. As regards substance, in Sweden active measures have been in progress for many years aimed at evening out unfair pay differences between women and men. Pay discrimination is forbidden by law and an employer is obliged by law to actively survey and remedy discriminatory pay. No further legislative measures in the area are planned at present; it is a matter of ensuring compliance with the existing rules.

25. According to the ETUC, the fact that a phenomenon is prohibited does not, however, automatically mean that it ceases or disappears. Pay discrimination between women and men still exists despite the fact that it is prohibited and that there are a number of tools both in legislation and collective agreements that are intended to even out pay differences. However, progress is in the right direction. The trade union organisations in Sweden want to emphasise that further state intervention in this area is undesirable. The social partners must be given the space to agree on how their joint work should be conducted by means of sector-specific rules.

26. However, from a substantive perspective, the ETUC believes that there are elements which should (at least in combination) lead to a violation of Article 20 of the Charter, such as the existence of the pay gap (statistical evidence) and the fact that the official statistics are still excluding small (micro) sized enterprises, which makes it most probable that the Gender pay gap is even higher in these enterprises.

27. As regards a procedural perspective (i.e. a general framework to ensure a satisfactory application and enforcement/supervision of the principle of equal pay), despite a good functioning labour market model build on very active social partners and strong collective bargaining (complemented with supervisory/enforcement bodies such as the labour inspectorate), the result of eliminating the gender pay gap is not (yet fully) achieved. From the point of view of the ETUC this illustrates that there still is a violation of Article 20 of the Charter also from the procedural perspective.

28. Concerning the under-representation in decision-making positions within private companies this problem has only been addressed in more recent years. As regards substance, statistical evidence shows that there is still an underrepresentation of women in decision-making bodies within private companies. 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. 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.

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

## **OTHER OBSERVATIONS**

### **A – The European Union**

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

31. As regards the legal framework, the European Commission recalls that the principle of equal pay between women and men has been enshrined in the Treaties since 1957. The principle of equal pay for men and women for equal work and work

of equal value was laid down in the original European Economic Community Treaty of 1957, more precisely in its Article 119, which later became Article 141 of the European Community Treaty. Since the entry into force of the Treaty of Lisbon (2009)<sup>3</sup>, the principle is embodied in Article 157 of the Treaty on the Functioning of the European Union (TFEU).

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

33. In November 2017, the Commission adopted a Communication: EU Action Plan 2017-2019<sup>10</sup>, 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

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

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

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

## **B – European Network of Equality Bodies (EQUINET)**

37. In response to the request by the European Committee of Social Rights for the relevant members of EQUINET to submit information on the situation in law and in practice as regards equal pay in each of the countries concerned, focusing on the implementation of measures aimed at reducing and closing the gender pay gap, through the work of equality bodies or otherwise, EQUINET submits the following information as regards Sweden:

38. The existence of a gender pay gap remains a reality in Sweden. The so-called unweighted wage difference between men and women in 2016 stood at 12%. By the use of standard weighting it is possible to take into account factors such as differences inter alia in professions, sectors, education and age. Even when this is done, however, there remains an unexplained difference in pay between women and men of 4.5%. It should be noted, that whilst this pay differential is unexplained in a statistical sense, it does not exclude that it is the result of factors other than discrimination on the grounds of sex. Thus, the available data does not permit any firm conclusions to be drawn concerning the extent to which the existing Swedish gender pay gap is caused by pay discrimination in a legal sense.

39. In addition to the prohibition of discrimination on the grounds of sex in working life (covering, inter alia, discriminatory pay differentials between women and men) the Discrimination Act obliges employers to undertake prevention and promotion measures aimed at preventing discrimination and serving in other ways to promote equal rights and opportunities regardless of all the seven grounds of discrimination, including sex.

40. In the terminology of the Act this is referred to as an obligation to undertake “active measures”. This obligation includes the duty for employers to carry out annual pay surveys and, significantly, in this connection to assess whether existing pay differences are directly or indirectly associated with sex. Where such pay differences are found to exist, the employer is under an obligation to take the measures that are necessary to rectify the situation.



41. The Equality Ombudsman, as part of its mandate, is tasked with monitoring compliance with the Discrimination Act. This includes both the Act's provisions on the prohibition of discrimination and its provisions imposing an obligation on employers to take active measures. In the latter area the Ombudsman may, if it considers that an employer has failed to meet its obligations, apply to the Board against Discrimination for an order for fulfilment to be directed to the employer. Such an order by the Board shall be combined with a conditional financial penalty. With respect to violations of the prohibition of discrimination, the Ombudsman may bring a court action on behalf of a victim of discrimination for financial compensation to be paid to the individual concerned. No other sanctions are available to the Ombudsman in situations where discrimination has occurred.

42. As part of its activities in this area the Equality Ombudsman has, during the last five years, carried out several larger-scale coordinated efforts aimed at monitoring compliance with relevant aspects of the employers' duty to take active measures. It has conducted two larger supervisory schemes with a specific focus on pay surveys. In 2014 – 2015, the work of approximately 150 employers, both in the private and public sector, was monitored. The examination was aimed at sectors with significant differences in pay between women and men and focused on the employers' work on pay surveys.

43. The Ombudsman further maintains more routine monitoring activities in this field. This includes the examination of an individual employers' fulfillment of the duty to take active measures, including the obligation to carry out pay surveys, conducted as a result of information received e.g. through individual communications or media reports.

44. In addition to its supervisory function, the Equality Ombudsman also acts in a promotional capacity.

45. The Ombudsman has furthermore repeatedly engaged, inter alia, with trade unions and employers' organisations to provide information and support related to the new provisions on active measures in the Discrimination Act that entered into force on 1 January 2017, with a particular focus on equal pay and pay surveys. In 2016, the Ombudsman published a report focusing on employers' work on pay surveys, based on a qualitative analysis of documentation provided by some 100 employers on their activities to live up to their legal obligations in this area. The report has been widely disseminated and presented by the Ombudsman in different fora.

46. As is seen from the above, the Ombudsman institutions over the past five-year period has devoted a significant part of its resources on measures aimed at preventing and counteracting discriminatory pay differences between women and men. These efforts have, to the largest part, been related to the Discrimination Act's provision on active measures.

47. EQUINET further observes that in the Ombudsman's experience the litigation of individual cases of gender-based pay discrimination offers only limited possibilities to address the problems that exist in this area. Even disregarding the fact that individuals may often be unaware that they are subjected to this type of discrimination,

there are many reasons for the difficulties encountered in bringing such cases to a successful conclusion. These include, but are far from limited to, the problem of identifying the appropriate comparator in sectors where wages are individually set. In more general terms, the existence of unwarranted pay differentials between women and men in a workplace at the structural level does not necessarily translate into a successful legal course of action for gender based pay discrimination *in* an individual case.

48. The Equality Ombudsman further has expressed the view that the existing sanctions regime for violations of the prohibition of discrimination is insufficiently effective. For a sanction to be imposed upon an employer which maintains discriminatory pay differences between women and men, it is necessary to identify an individual employee which is not only aware of having been discriminated against but also prepared to engage in legal proceedings against the employer – a choice many persons may not feel comfortable to make. Unless such an individual can be identified, an employer may thus, in principle, engage in systematic gender based wage discrimination without any sanction being imposed. The situation is compounded by the fact that even if an individual claimant were to be identified and a legal action successfully brought, the amount of compensation awarded may be expected to be too low to have the requisite deterrent effect.

49. Based on these and additional related considerations, the Ombudsman has proposed that the possibility of introducing a different, more effective and truly dissuasive sanctions regime, better suited to addressing issues at a structural level should be considered. In this connection the Ombudsman has suggested that the existing legal framework in areas such as competition law and data protection law could serve as inspiration for such an inquiry.

50. While the Ombudsman's comments have been directed at the Swedish context, it is understood that similar considerations may apply in many other European countries. Thus, it may be noted that the European Commission in its recent action plan for tackling the gender pay gap has stated its commitment to taking action to improve sanctions in this field.

## **RELEVANT DOMESTIC LAW**

### **The Discrimination Act (2008:567)**

51. The Discrimination Act regulates the prohibition on discrimination on all grounds, including on the ground of gender. The Act includes the obligation for employers to work on active measures. It provides a framework for the work on active measures. The measures are to be decided by the employer in cooperation with the employees. The framework states that the work shall include the following:

- "investigating the existence of any risks of discrimination or reprisals or any other obstacles to individuals' equal rights and opportunities in the establishment in question;
- analysing the causes of any risks and obstacles discovered,
- taking the prevention and promotion measures that can reasonably be demanded; and
- monitoring and evaluating measures mentioned above."

52. The principle of equal pay is inherent in Chapter 3 of the Discrimination Act:

**Section 2**

“Employers and employees are in particular to endeavour to equalise and prevent differences in pay and other terms of employment between women and men who perform work which is to be regarded as equal or of equal value. They are also to promote equal pay growth opportunities for women and men.

Work is to be regarded as of equal value to other work if, on an overall assessment of the requirements and nature of the work, it can be deemed to be equal in value to the other work. The assessment of the requirements of the work is to take into account criteria such as knowledge and skills, responsibility and effort. In assessing the nature of the work, particular account is to be taken of working conditions.”

**Matters of pay**

**Section 10**

“In order to discover, remedy and prevent unfair gender differences in pay and other terms of employment, every three years the employer is to survey and analyse

- provisions and practices regarding pay and other terms of employment that are used at the employer’s establishment, and
- pay differences between women and men performing work that is to be regarded as equal or of equal value.

The employer is to assess whether existing pay differences are directly or indirectly associated with sex. The assessment is to refer in particular to differences between

- women and men performing work that is to be regarded as equal, and
- groups of employees performing work that is or is generally considered to be dominated by women and groups of employees performing work that is to be regarded as of equal value to such work but is not or is not generally considered to be dominated by women.”

**Section 11**

“Every three years employers are to draw up an action plan for equal pay in which they report the results of the survey and analysis described in Section 10. The plan is to indicate the pay adjustments and other measures that need to be taken to bring about equal pay for work that is to be regarded as equal or of equal value. The plan is to contain a cost estimate and a time 15 (27) plan based on the goal of implementing the necessary pay adjustments as soon as possible and within three years at the latest.

A report on and evaluation of how the planned measures were implemented is to be included in the next action plan.

The obligation to draw up an action plan for equal pay does not apply to employers who employed fewer than 25 employees at the start of the latest calendar year.”

**Section 12**

“Employers are to provide employees’ organisations with respect to which they are bound by a collective agreement with the information needed for the organisations to be able to cooperate in the survey, analysis and drawing up of an action plan for equal pay.

If the information concerns data on pay or other circumstances that relate to an individual employee, the rules on confidentiality and damages contained in Sections 21, 22 and 56 of the Employment (Co-determination in the Workplace) Act (1976:580) apply. In public sector activities, Chapter 10, Sections 11-14 and Chapter 12, Section 2 of the Secrecy Act (2009:400) apply instead.”

## **Gender equality plan**

### **Section 13**

“Every three years employers are to draw up a plan for their gender equality work. The plan is to contain an overview of the measures under Sections 4–9 that are needed at the place of work and an account of which of these measures the employer intends to begin or implement during the coming years.

The plan is also to contain a summary account of the action plan for equal pay that the employer is required to draw up under Section 11.

An account of how the planned measures under the first paragraph have been implemented is to be included in the next plan.

The obligation to draw up a gender equality plan does not apply to employers who employed fewer than 25 employees at the start of the latest calendar year.”

## **Chapter 4. Supervision**

### **The Equality Ombudsman**

#### **Duties of the Equality Ombudsman**

##### **Section 1**

“The Equality Ombudsman is to supervise compliance with this Act. The Ombudsman is to try in the first instance to induce those to whom the Act applies to comply with it voluntarily.

Provisions on the duties of the Ombudsman are also contained in the Act concerning the Equality Ombudsman (2008:568).”

## **Chapter 5. Compensation and invalidity**

### **Compensation**

#### **Section 1**

“A natural or legal person who violates the prohibitions of discrimination or reprisals or who fails to fulfill their obligations to investigate and take measures against harassment or sexual harassment under this Act shall pay compensation for discrimination for the offence resulting from the infringement. When compensation is decided, particular attention shall be given to the purpose of discouraging such infringements of the Act. The compensation shall be paid to the person who has been offended by the infringement.”

## **Chapter 6. Legal proceedings**

### **Right to bring an action**

#### **Section 2**

“The Equality Ombudsman, or a non-profit organisation whose statutes state that it is to look after the interests of its members and that is not an employees’ organisation referred to in the third paragraph, may bring an action, as a party, on behalf of an individual who consents to this. When the Ombudsman or the association brings such an action, the Ombudsman or association may also bring another action on behalf of the individual as part of the same proceedings, if he or she consents to this. In cases under Section 1, first paragraph the Ombudsman’s action is

brought before the Labour Court. For unmarried children under 18 years of age the consent of the custodian or custodians is required.

To be allowed to bring an action, the association must be suited to represent the individual in the case, taking account of its activities and its interest in the matter, its financial ability to bring an action and other circumstances.

When an employees' organisation has the right to bring an action on behalf of the individual under Chapter 4, Section 5 of the Labour Disputes (Judicial Procedure) Act (1974:371), the Ombudsman or association may only bring an action if the employees' organisation does not do so."

### **Burden of proof**

#### **Section 3**

"If a person who considers that he or she has been discriminated against or subjected to reprisals demonstrates circumstances that give reason to presume that he or she has been discriminated against or subjected to reprisals, the defendant is required to show that discrimination or reprisals have not occurred."

53. Swedish case law contains a few cases as regards the comparison of work claimed to be of equal value (Labour Court Case 1996 No. 41 and Labour Court Case 2001 No. 13). Both concerned the Örebro County 16 and the health sector. The issue at stake was whether the pay of a midwife was discriminatory as compared to that of a hospital technician. The Labour Court did not exclude the possibility that the work of a midwife and a hospital technician could be compared and found this to be of equal value, but in the case at stake it did not find the method used by the Equality Ombudsman (EO) to be sufficient to prove this. No discrimination was thus found to be at hand.

54. The second case, too, concerned the alleged pay discrimination of a midwife as compared to a hospital technician. In this case the midwife and the technician were indeed found to perform work of equal value following an assessment in terms of knowledge and skills, responsibility, effort and working conditions (now part of the definition of work of equal value according to the 2008 Discrimination Act). A prima facie case of pay discrimination was thus found to be at hand. The Labour Court, however, accepted the employer's 'excuse' that the higher wages of the technician were due to market arguments – there was an alternative labour market for technicians with significantly higher wages, an acceptable motive to adjust the wages of technicians at a somewhat higher level. There was thus no discrimination. Compare also the 'parallel' Labour Court Case 2001 No. 76 (a nurse and a hospital technician were compared and their work was found to be of equal value – it was finally found that, in this case also, there was no pay discrimination).

## **RELEVANT INTERNATIONAL MATERIALS**

### **A – Council of Europe**

#### **1. Committee of Ministers**

55. The Committee of Ministers adopted several recommendations, such as Recommendation Rec(1985)2 on legal protection against sex discrimination, in which it exhorts member states to take or reinforce measures for the promotion of equality between women and men, including through legislation in the field of employment, social security and pensions, taxation, civil law, the acquisition and loss of nationality and political rights. In its Recommendation Rec(1996)51 on reconciling work and family life the Committee of Ministers further calls on member states to take action to enable women and men to better reconcile their working and family lives. In its Recommendation Rec(98)14 on gender mainstreaming, the Committee sets out the conceptual framework for gender mainstreaming and a methodology for its implementation, accompanied by examples of good practices.

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

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

57. In its Resolution 1715 (2010), the PACE observed that discrimination against women in the labour market has a long history. Several factors are put forward to explain the pay gap between women and men: horizontal and vertical segregation in the labour market (commonly referred to as “glass walls” and “glass ceilings”), women’s supposedly lower qualifications and lesser experience, and their atypical working hours and career structures due to childbirth and care responsibilities.

58. The PACE recommends that Member States:

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

- follow the Norwegian and Icelandic models, and a recent French initiative, which require that a minimum of 40% of members of certain companies boards be female, as an enabling factor.

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

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

### **3. European Court of Human Rights (ECtHR)**

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

#### **Article 14**

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

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

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

### **4. Commissioner for Human Rights**

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

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

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

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

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

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

## **B – United Nations**

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

#### *Gender pay gap*

66. In its General Recommendation No. 13/12 1989, the CEDAW defined in more detail the content of 'Equal remuneration for work of equal value' by recommending to the States Parties that:

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

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

#### *Women on decision-making boards in enterprises*

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

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



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

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

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

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

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

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

## **C – International Labour Organisation**

### **1. ILO Equal Remuneration Convention 100:**

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

#### **Pay differentials**

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

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

#### **Equal value**

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

### **Comparing jobs, determining value**

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

## **D – European Union**

### **1. Primary Law**

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

72. The Treaty on European Union itself:

#### **Article 2**

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

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

#### **Article 8**

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

#### **Article 157**

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

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

Equal pay without discrimination based on sex means:

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

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

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

**Article 21 - Non-discrimination**

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

**Article 23 - Equality between women and men**

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

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

**2. Secondary law**

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

**"Article 4 - Prohibition of discrimination**

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

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

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

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

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

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

#### **Article 88**

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

#### **Article 91 [...]**

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

### **3. European Pillar of Social Rights**

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

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

#### **Gender equality**

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

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

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

### **4. Other institutions**

#### **a) European Commission**

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

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

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

## **b) Court of Justice of the European Union**

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

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

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

86. The fundamental principle laid down in Article 157(1) of the Treaty and elaborated by the Directive precludes unequal pay between men and women for the same job or work of equal value, whatever the mechanism which produces such inequality (see, for example, C-381/99, EU:C:2001:358, Brunnhofer, paragraph 30). The source of discriminatory pay may be: a contract of employment, the legislative provisions, collective agreement (C-400/93, EU:C:1995:155, Royal Copenhagen paragraph 45) or pay provided on a voluntary basis (4557/93, EU:C:1996:33, Lewark paragraph 21.). The source of unequal pay must be unique or single, because if the differences identified in the pay conditions of workers performing the same work or work of equal value cannot be attributed to a single source, there is nobody which is responsible for the inequality and which could restore equal treatment. Such a situation does not come within the scope of Article 157(1) TFEU (Lawrence, C-320/00, EU:C:2002:498, paragraph 18 ; Allonby, C-256/01, EU:C:2004:18, paragraph 46).

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

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

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

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

91. The EU Member States are obliged to take the necessary measures to enable all persons who consider themselves wronged by discrimination, to pursue their claims by judicial process. Such an obligation implies that the measures in question should be sufficiently effective to achieve the objective pursued by the directive and should be capable of being effectively relied upon by the persons concerned before national courts (see judgments in C-271/91 *Marshall*, C-271/91, UE:C:1993:335, paragraph 22 et *Paquay*, C-460/06, EU:C:2007:601, paragraph 43). EU law does not prescribe a specific measure to be taken by Member States, however, the measures appropriate to restore genuine equality of opportunity must guarantee real and effective judicial protection and have a genuine deterrent effect on the employer (see judgments in, *von Colson et Kamann*, 14/83, UE:C:1984:153, paragraphs 23 et 24 ; *Draehmpaehl*, C-180/95, EU:C:1997:208, paragraph 25 ; *Paquay*, C-460/06, EU:C:2007:601, paragraph 45).

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

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

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

## **THE LAW**

### **PRELIMINARY CONSIDERATIONS**

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

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

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

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

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

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

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

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

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



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

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

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

- The obligations of the State as regards the recognition and the enforcement of the right to equal pay under Articles 4§3 and 20.c of the Charter. These obligations include the following:
  - recognition in legislation of the right to equal pay for equal work or work of equal value;
  - ensuring access to effective remedies when the right to equal pay for equal work or work of equal value has not been guaranteed;
  - ensuring pay transparency and enabling job comparisons;
  - maintaining effective equality bodies and other relevant institutions;
- The obligations of the State to adopt measures to promote the right to equal pay for equal work or work of equal value, under Article 20.c of the Charter. These obligations include the following:
  - collection of reliable and standardised data with a view to measuring the gender pay gap;
  - adoption of measures to promote equal opportunities through gender mainstreaming.

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

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

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

### **Article 4 – Right to a fair remuneration**

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

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

...

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

...

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

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

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

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

...

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

## **A – Arguments of the parties**

### **1. The complainant organisation**

#### *Recognition of the right to equal pay in legislation*

107. UWE refers to the Discrimination Act which defines work of equal value. It underlines, however, that the fact that a set of relatively formal legal documents (constitution, laws, etc.) prohibit all gender discrimination and provide that equal treatment must be ensured in practice, does not mean that the relevant provisions are actually implemented. According to UWE, the information provided by the Government is mostly of a general nature and merely takes the form of a description of the legal and institutional framework, there being a general lack of clarifications which could serve to determine the conformity of the policies followed with the requirements of the Charter.

#### *Effective remedies*

108. According to UWE, the Discrimination Act authorises compensation for pecuniary and non-pecuniary damage to women employees and also establishes a new penalty, which entails specific compensation for discrimination. As well as compensating for discrimination suffered it is also intended to act as a deterrent. In the event of discrimination or stigmatisation by an employer, additional compensation for pecuniary damage is payable.

109. UWE, however, refers to the Direct Request (CEACR) concerning Convention No. 100, according to which difficulties are encountered in the investigation of complaints on pay discrimination between men and women. The Government has appointed a Commission of Inquiry (Dir. 2014:10) to submit proposals on how work against discrimination can be organised and made more efficient so that victims may assert their rights.

110. UWE finally states that the Equality Ombudsman received only 11 complaints regarding gender pay discrimination in 2013 and eight such complaints in 2012.

#### *Pay transparency and job comparisons*

111. UWE claims that the Government neither explains the component elements or characteristics of job classifications, nor provides the pay gap calculation method for firms. According to UWE, the Government refers to the encouragement to negotiate classifications, but not a requirement to establish them.

112. UWE alleges that examples of indirect discrimination bias have been identified in job assessment and classification methods, but nothing has been done to take account of them effectively in policies in terms of criteria employed to assess jobs and the application of these criteria in the weighting and ranking of jobs. According to UWE, there appears to be a lack of occupational categories with clearly defined classification criteria and the pitfalls have not yet been properly addressed. UWE considers that this issue should not just be dealt with through collective bargaining but clearly also by the State.

#### *Equality bodies and other institutions*

113. UWE refers to the Equality Ombudsman, which is an independent body responsible for promoting equality. However, according to UWE, the Government does not provide details of its achievements regarding equal pay. UWE further states that in terms of national machinery for the advancement of women at all levels, there is no public agency for gender equality. UWE also refers to the Labour Inspectorate (the Work Environment Authority) whose task is to secure compliance with the law and the requirement for safe and stimulating working conditions. However, given the continuing absence of equality, UWE claims that the Labour Inspectorate does not fulfil its function of improving working conditions and eradicating pay differences.

## **2. The respondent Government**

### *Recognition of the right to equal pay in legislation*

114. According to the Government, the Discrimination Act (2008:567) regulates the prohibition of discrimination on all grounds, including on the ground of gender. In Chapter 3, Section 2, it provides for equal pay for equal work or work of equal value.

115. On 1 January 2017 the rules on active measures in the Discrimination Act entered into force. The changes mean that an action plan for equal pay should be carried out annually instead of every third year. The obligation to provide documentation changed to include employers that have at least 10 employees, compared to 25 which was the level set out before the changes. The Government considers that identifying and correcting pay differentials associated with gender is an important part of successful gender equality work. In this work, action plans for equal pay are therefore a meaningful tool in order to ensure attention is given to the impact. Through continuous documentation, the supervisory authority will be able to follow the work on active measures.

### *Pay transparency and job comparisons*

116. The Government states that wage formation is not regulated by law but handled by the social partners without any interference from the State. However, the special Government Agency, the National Mediation Office, is responsible for not only mediating in labour disputes but also for promoting an efficient wage formation process and has responsibility for the official Swedish wage statistics. The National Mediation Office, which was established in 2000, also has the important task of analysing wage trends from a gender equality perspective and has done so annually since the first annual report was published for 2001.

117. According to the Government, in order to discover, remedy and prevent unfair gender differences in pay and other terms of employment, the employer must annually survey and analyse provisions and practices regarding pay and other terms of employment that are used by the employer, and pay differences between women and men performing work that is to be regarded as equal or of equal value.

118. The employer has to assess whether existing pay differences are directly or indirectly associated with gender. The analysis should refer in particular to differences between:

- women and men performing work that is to be regarded as equal;
- groups of employees performing work that is or is generally considered to be dominated by women and groups of employees performing work that is to be regarded as of equal value to such work but is not or is not generally considered to be dominated by women;

- groups of employees performing work that is or is generally considered to be dominated by women and groups of employees performing work that is not or is generally not considered to be dominated by women but that gives higher pay despite the requirements of the work being regarded as less.

119. The Government indicates that by definition, work is regarded as of equal value to other work if it can be deemed so based on an overall assessment of the requirements and nature of the work. The assessment of the requirements of the work should take into account criteria such as knowledge and skills, responsibility and effort. In assessing the nature of the work, particular account is to be taken of working conditions. Employers who employed more than 10 workers as of the beginning of the calendar year are to document in writing in the course of the year their work on pay surveys.

#### *Equality bodies and other institutions*

120. The Government indicates that the Equality Ombudsman supervises compliance with the Discrimination Act. The Ombudsman may bring a court action on behalf of an individual provided that he or she has consented to this. The Ombudsman also has the task to inform, educate, discuss, and have other contacts with authorities, companies, individuals and organisations; to follow international developments and have contacts with international organisations; to follow research and development work; to propose constitutional amendments or other anti-discrimination measures; and, to take other appropriate measures.

121. The Ombudsman in 2016 conducted a supervision of 190 authorities on their work on active measures with focus on their action plan for equal pay. Furthermore, the Ombudsman published a report with an analysis on how employers work to counteract ineffective pay differentials between women and men. The Ombudsman's work to promote equal rights and opportunities is important in order to identify and overcome problems.

122. Anti-discrimination offices, which are part of civil society, receive grants in order to prevent and combat discrimination on the ground of gender, for instance, at the local level. One of the requirements for the grant is that the office should give support to individuals and that they should be non-profit organisations.

123. The Government proposed in the Budget Bill for 2018 that the Ombudsman will receive an additional 10 million SEK (approximately €1 million) per year. This will strengthen the Ombudsman's work to supervise the compliance in general and in particular with the Act in the area of active measures. The Government also proposed to raise the grant to the Anti-discrimination offices from 14 million SEK (approximately €1.4 million) per year to 29 million SEK (approximately €2.9 million).

124. The Government further states that in January 2018, a gender equality agency (JaMy) would be established to achieve a strategic, cohesive and sustainable governance, and effective implementation of the gender equality policy.

## **B – Assessment of the Committee**

### *Recognition of the right to equal pay in legislation*

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

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

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

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

129. With regard to Sweden, the Committee observes that the under Section 2 of the Discrimination Act (2008:567), employers are required to equalise and prevent differences in pay for work that is regarded as equal or of equal value. Furthermore, according to Section 2, work is to be regarded as of equal value to other work if, on an overall assessment of the requirements and nature of the work, it can be deemed to be equal in value to the other work. The assessment of the work requirements takes into account criteria such as knowledge and skills, responsibility and effort.

130. The Committee considers that the obligation to recognise the right to equal pay for equal work in the legislation has been satisfied.

#### *Effective remedies*

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

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

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

134. Retaliatory dismissal in cases of pay discrimination must be forbidden. Where a worker is dismissed on grounds of having made a claim for equal pay, the worker should be able to file a complaint for dismissal without valid reason. In this case, the employer must reinstate her/him in the same or a similar post. If reinstatement is not possible, the employer must pay compensation, which must be sufficient to compensate the worker (i.e. cover pecuniary and non-pecuniary damage) and to deter the employer.

135. The Committee notes that in the area of discrimination in Sweden, there is now a unified Equality Ombudsman (*Diskrimineringsombudsmannen*, DO) that covers not only gender discrimination but also other protected grounds such as ethnicity, religion, sexual orientation, disability and age. The DO has competence to bring a case before the relevant court in any area covered by the Discrimination Act.

136. As regards access to courts for victims of gender discrimination, the Committee notes that it varies somewhat depending on the area at issue. In all contexts, they can be represented by the Equality Ombudsperson with no costs attached. The Ombudsperson has no obligation to represent an alleged victim but may choose to bring an action or not with reference to its relative importance from a more general perspective.

137. Legal assistance free of charge is provided by trade unions for their members and, more generally, by the DO. There is no obligation for the trade unions or for the DO to bring a case of alleged discrimination to the courts. The alleged victim of discrimination then has the possibility to address a relevant NGO if there is one.

Ultimately, they may bring the case on their own. Then there is the possibility of legal aid according to the Legal Aid Act (1996:1619). This right only applies to those earning less than SEK 260,000 (approximately €27,300) a year and is subsidiary to eventual rights to financial assistance in accordance with private insurance.

138. The Committee notes that UWE does not allege that judicial safeguards and other remedies are ineffective. The Committee recalls that it has previously considered that the situation was in conformity as regards the remedies and adequate compensation in equal pay claims (Conclusions 2012 on Article 20, Sweden).

139. The Committee notes from the European Network of Legal Experts in Gender Equality and Non-Discrimination, Country Report on gender equality: Sweden, 2018 that as regards the burden of proof, according to the Discrimination Act Chapter 6 Section 3, if a person who considers that he or she has been discriminated against or subjected to reprisals demonstrates circumstances that give reason to presume that he or she has been discriminated against or subject to reprisals, the defendant is required to show that discrimination or reprisals have not occurred.

140. In view of the above, the Committee considers that the obligation to ensure access to effective remedies has been satisfied.

#### *Pay transparency and job comparisons*

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

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

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



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

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

146. As regards pay transparency in Sweden and the application of the European Commission's Recommendation of 7 March 2014 on strengthening the principle of equal pay through transparency, the Committee notes from the European network of legal experts in gender equality and non-discrimination, Country Report on gender equality: Sweden, 2019 to some extent this is addressed through the rules on active measures in Chapter 3 of the Discrimination Act and its requirement of an Equal Pay Action Plan. This Plan shall include a survey of provisions and practices regarding pay and other terms of employment that are used at the employer's establishment and pay differences between women and men performing work that is to be regarded as equal or of equal value (Ch. 3 Sec. 10 of the Discrimination Act). This can also be done through the requirement for the Swedish Mediation Office – a public/state authority – to monitor pay developments on the Swedish labour market including equal pay developments. Furthermore, the Committee notes that employers who employed more than 10 workers as of the beginning of a calendar year are to document in writing in the course of the year their work on pay surveys. The Committee considers that the obligation to ensure pay transparency, notably an obligation for employers to regularly report on wages and produce disaggregated data by gender, is satisfied.

147. As regards job comparisons, the Committee has considered (Article 4§3, Conclusions 2014) that in equal pay litigation it was possible to make comparisons outside the company directly concerned.

148. The Committee notes from the the European Network of Legal Experts in Gender Equality and Non-Discrimination, Country Report on gender equality: Sweden, 2018 that the concept of pay is not defined in national legislation. However, the Swedish Labour Court's interpretation of the concept follows the interpretation of the CJEU, case C-236/98 *Jämställdhetsombudsmannen*. This case considers how pay is to be compared – as a lump sum or each element separately. According to the CJEU every share of wages (e.g. basic pay, inconvenient-hours supplement, etc.) must be compared separately. In principle a comparator is required since the definition of (direct) discrimination refers to a 'comparable situation.' According to the same definition, a hypothetical comparator is sufficient.

149. The Committee further notes from the aforementioned Country Report that there have been difficulties in proving prove that discrimination did take place in those cases once work has been found to be of equal value. The Labour Court has been too ready to accept employers' justifications for pay differentials. The rather limited amount of successful gender pay discrimination claims in domestic case law is, however, often understood as reflecting too broad a scope for justifications that may be invoked. Among the justifications found to legitimise pay differentials in the case law of the Swedish Labour Court are age (AD 2001 No. 13), capabilities (AD 2013 No. 64), collective bargaining outcomes (AD 2001 No. 13), and the market argument (AD 1995 No. 158, AD 201 No. 13, 2001 No. 51, and, 2001 No. 76).

150. The Committee notes that that Swedish law allows for a broad comparison of jobs outside the company concerned, on the basis of job assessment systems. The Committee considers that UWE provides no evidence to support its claim that there are no clear criteria for ranking or evaluating jobs or for finding a comparator.

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

#### *Equality bodies and other institutions*

152. The Committee considers that the satisfactory application of the Charter cannot be ensured solely by the operation of legislation if this is not effectively applied and rigorously supervised (ICJ v. Portugal, Complaint No. 1/1998, op.cit., §32). The Committee has considered that measures to foster the full effectiveness of the efforts to combat discrimination include setting up of a specialised body to monitor and promote, independently, equal treatment, especially by providing discrimination victims

with the support they need to take proceedings (Conclusions XVI-1, Article 1§2, Iceland). The status of such equality bodies in terms of their mandate, their independence and resources must be clearly defined. In this context, the Committee also has regard to the criteria for national human rights institutions set out in the so-called Paris Principles adopted in 1993 by the United Nations General Assembly.

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

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

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

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

156. The Committee notes that the Ombudsperson in Sweden is tasked with supervising the compliance of the employers with their obligations under the Discrimination Act to produce an annual pay survey. Furthermore, the Ombudsperson can engage to take legal action on behalf of an individual concerning pay discrimination. The Committee observes in particular that the Ombudsperson over the past five-year period has devoted a significant part of its resources to measures aimed at preventing and counteracting discriminatory pay differences between women and men. These efforts have, for the largest part, been related to the active measures provided for in the Discrimination Act. In this context, the Committee also considers that the mandate of the equality body in terms of its functions, its effectiveness and its competences is clearly defined. The Ombudsperson provides assistance to victims.

157. Moreover, Section 3 of the Discrimination Act exemplifies the broad mandate by specifying that, within the Ombudsperson's sphere of activities, it shall inform, educate, discuss and have other contacts with Government agencies, enterprises, individuals and organisations; follow international developments and have contacts with international organisations; follow research and development work; propose legislative amendments or other anti-discrimination measures to the Government; and initiate other appropriate measures.

158. The Committee further notes that the Swedish Gender Equality Agency was established on 1 January 2018 to contribute to effective implementation of gender equality policy. The main tasks of the agency are to coordinate, follow up and provide various forms of support in the area of gender equality.

159. The Committee notes from the Concluding observations on the combined eighth and ninth periodic reports of Sweden of the Committee on the Elimination of Discrimination against Women (CEDAW, 2016) that as regards access to justice, additional resources have been allocated to the Equality Ombudsman and to local anti-discrimination offices.

160. In view of the above, the Committee considers that the obligation to maintain an effective equality body with a view to guaranteeing the right to equal pay is satisfied.

#### *Concluding assessment*

161. Firstly, the Committee considers that the right to equal pay is recognised in the legislation.

162. Secondly, access to effective remedies is ensured for victims of pay discrimination.

163. Thirdly, the Committee notes in particular that employers have an obligation to regularly report on pay and produce disaggregated data by gender. Moreover, the law allows for a broad comparison of jobs outside the company concerned. Therefore, the obligation to ensure pay transparency and enable job comparisons is satisfied.

164. Finally, the Committee notes that equality bodies carry out several functions, such as monitoring and promotion and primarily assistance to victims. The obligation to maintain an effective equality body with a view to guaranteeing the right to equal pay is satisfied.

165. The Committee holds that there is no violation of Articles 4§3 and 20.c of the Charter.

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

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

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

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

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

...

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

## **A – Arguments of the Parties**

### **1. The complainant organisation**

167. According to UWE, the Government’s submissions include only very few relevant and reliable figures. UWE believes that where the respondent state makes choices to include one or other criterion in its statistics and exclude others, it is an attempt to conceal greater wage inequality than it admits. According to UWE, to assess the reality of the pay gap, which is less favourable than the Government maintains, it must be corrected or refined with other indicators and data. The Government’s indicators neither show the wage inequalities relating to the fact that women are much more likely to be confined to part-time work than men, nor the fact that women are under-represented in the most senior posts. Besides, UWE asserts that the data presented by the Government do not make a distinction between the public and private sectors.

168. UWE refers to a study conducted by the Swedish National Mediation Office (2016), which also shows that while the pay gap is becoming smaller, it still exists and is significant.

169. UWE believes that there is no sign of gender mainstreaming in the policies concerned, decision-making, access to resources, procedures and practices, methodology, implementation, monitoring or evaluation.

### **2. The respondent Government**

170. According to the Government, the overarching goal of the gender equality policy is for women and men to have the same power to influence and shape society and their own lives. The Government’s goals in this area include the following:

- Gender equal division of power and influence. Women and men are to have the same rights and opportunities to be active citizens and to shape the conditions for decision-making.
- Economic gender equality. Women and men must have the same opportunities and conditions as regards paid work which give them economic independence throughout their life.
- Gender equal education. Women and men, girls and boys must have the same opportunities and conditions with regard to education, study options and personal development.
- Equal distribution of unpaid housework and provision of care. Women and men must have the same responsibility for housework and have the opportunity to give and receive care on equal terms.

171. The Government states that gender equality policy is wide-ranging and relevant to many policy areas and agencies. Effective governance tailored to relevant agencies is essential in order to achieve gender equality goals. Sex disaggregated statistics, surveys and gender analyses are a basic prerequisite for making gender inequality in society visible and conducting an effective process of change. Access to such statistics needs to improve. The Government has therefore introduced a requirement that all agencies that present individual-based statistics in their annual reports should present data disaggregated by gender.

172. According to the Government, the wage difference between women and men has decreased in both the short and long term: between 2015 and 2016 the decrease was 0.5 percentage points, while between 2005 and 2016 it decreased by 4.3 percentage points.

173. The Government considers that differences in wages can be due to a number of different factors. If, with the aid of standard weighting, consideration is given to the explanatory factors that are available in the statistics, there is still an unexplained difference between the genders of 4.5% for the entire labour market in 2016. Blue-collar employees in the private sector have an unexplained wage difference of 3.5%. At state level, the unexplained wage difference is 4.0%. The largest unexplained wage difference, 7.2%, is found among private sector white-collar employees. There are various factors that affect this difference. According to the Government, it is clear that the most significant factor affecting pay differences is that men and women work in different sectors and professions to a large extent. Nevertheless, the Government contends that by active measures together with a strong commitment of all stakeholders, the gap is reduced continuously.

174. The Government further indicates that the "unexplained difference" means that the difference is unexplained from a statistical perspective. In this context an unfounded wage difference is defined as a difference in outcome that is due solely to

gender. The Government considers that it is difficult to determine whether differences in outcomes between men and women are due to relevant differences in characteristics - that cannot be observed in statistics but are apparent when the wage is set - or to discrimination.

175. According to the Government, in 2016 84% of all women in Sweden aged 20-64 years participated in the workforce and 89% of all men. A number of reforms were decisive for attaining such a high rate of participation, including individual taxation, a gender neutral paid system for parental leave i.e. parental leave designed for both parents, and an extensive public child and elderly care.

176. Women aged 20-64 years work part-time to a higher extent than men (28% of working women and 11% of working men in 2016) and use the main share of the parental leave (73% of the total number of days with compensation). The Government underlines in this respect that the single most important reason for women working part-time is that they cannot find full-time employment.

177. The Government also provides information about measures that have been taken to ensure that women and men have the same work opportunities and working conditions. The Government believes that a labour market where women and men can participate on the same terms is beneficial for society as a whole and contributes to a stronger economy. The Government has, on several occasions, underlined the importance of a less gender segregated labour market and also, of making full time work a norm for both women and men. As stated in the Budget Bill for 2018, the pay differences between women and men should further decrease. The Government states that it intends to present an action plan for equal pay.

178. In addition, social partners actively pursue issues on gender equality and equal treatment. The social partners actively work to eliminate pay differences between women and men. Collective agreements often contain special writings on how that work should be carried out and on measures how to help women enter into predominantly male occupations.

179. Moreover, the social partners have on several occasions in recent years reached collective agreements on specific pay increases for predominantly female occupational sectors.

## **B – Assessment of the Committee**

### **a) *Key figures as regards equal pay in Sweden***

180. As regards Sweden, the Committee notes from Eurostat that the unadjusted gender pay gap in 2017 was 12.6% having decreased from 13.3% in 2016 and 14% in 2015. By comparison the corresponding figure in 2010 was 15.4%. The EU-28 average was 16% in 2017 down from 17.1% in 2010. The overall earnings gap in 2014 stood at 26.2%. The adjusted or “unexplained” gender pay gap is relatively low at 7.1% compared to an EU-28 average of 11.5% (2014 data, see the Eurostat study “A decomposition of the unadjusted gender pay gap using Structure of Earnings Survey data, 2018).

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

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

182. The Committee considers that States are under an obligation to analyse the causes of the gender pay gap with a view to designing effective policies aimed at reducing it. The Committee here recalls its previous holding that the collection of data with a view to adopting adequate measures is essential to promote equal opportunities. Indeed, it has held that where it is known that a certain category of persons is, or might be, discriminated against, it is the duty of the national authorities to collect data to assess the extent of the problem (*European Roma Rights Centre v. Greece*, Complaint No. 15/2003, decision on the merits of 8 December 2004, §27). The gathering and analysis of such data (with due safeguards for privacy and to avoid abuse) is indispensable to the formulation of rational policy (*European Roma Rights Centre v. Italy*, Complaint No. 27/2004, decision on the merits of 7 December 2005, §23).

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



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

185. Under Article 20.c of the Charter the obligation to take appropriate measures to promote equal opportunities entails gender mainstreaming which is the internationally recognised strategy towards realising gender equality. It involves the integration of a gender perspective into the preparation, design, implementation, monitoring and evaluation of policies, regulatory measures and spending programmes, with a view to promoting equality between women and men, and combating discrimination. The Committee considers that gender mainstreaming, as recommended in particular by the Committee of Ministers of the Council of Europe (Recommendation Rec(1998)14), should cover all aspects of the labour market, including pay, career development and occupational recognition, and extending to the education system (Conclusions XVII-2, Article 1 of the 1988 Additional Protocol, Greece).

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

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

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

188. The Committee further notes that the Country factsheets on Sweden (European Commission, Magnitude and Impact Factors of the Gender Pay Gap in EU Countries) indicate that the major factors contributing to the pay gap are as follows:

- Distribution across industries: female workers in Sweden tend to be based in industries that offer comparatively low payment for the same level of qualification (especially education, health and social work activities). In contrast,

male workers are over-represented in industries that offer high rewards for the same level of qualification (particularly manufacturing).

- Ownership of firms: female workers in Sweden are over-represented in public owned firms, which on average offer lower pay than private firms to similarly qualified workers.
- Working time: female workers in Sweden work more often in part-time jobs than their male counterparts. Part-time jobs are associated with lower hourly pay.

189. The Committee also notes from the study conducted by the Swedish National Mediation Office (*Wagediff* study) that occupation is the most important explanation of pay differences. More specifically, of the various factors taken into account, it is occupation that makes the single largest contribution to explaining the pay differences between women and men.

190. The Committee notes that the Government collects regular and reliable statistics regarding the gender pay gap and it uses the indicators to develop its policy tools and measures. The Government and its agencies, including the Mediation Office, produce reliable analysis of different components of the pay gap as well as explained and unexplained differences in pay, with a view to identifying the part that is due to direct discrimination.

191. In view of information at its disposal, the Committee considers that the Government has taken measures to introduce a gender mainstreaming requirement in the activities of all agencies that present individual-based statistics. The Government has also promoted gender mainstreaming in areas such as economic gender equality, gender equal education and equal distribution of unpaid housework.

192. The Committee also notes from the 'Concluding observations' concerning the combined eighth and ninth report of Sweden, that the Committee on the Elimination of Discrimination against Women (CEDAW) has welcomed the generally high rate of labour force participation of women in Sweden. CEDAW has also welcomed the various measures taken to facilitate the reconciliation of family and work life, including the establishment of a parental insurance scheme, combined with an extensive system of public child and elderly care and improved rules on parental benefits.

193. The Committee observes that as regards its obligations to adopt measures to promote the right to equal opportunities, the Government has collected and analysed data and provided statistics regarding the situation of women in the labour market. The Committee considers that the downward trend in the gender pay gap (12.5% in 2017) since the year 2010 when the latter stood at 15.4% constitutes measurable progress.

194. On this basis, the Committee holds that there is no violation of Article 20.c of the Charter.

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

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

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

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

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

d. career development, including promotion.”

## **A – Arguments of the parties**

### **1. The complainant organisation**

196. According to UWE, in 2017 women represented 32.2% of the members of the boards of Sweden’s most important companies. The proportion of women board chairs was 6.2%, compared to 93.8% men. Among corporate CEOs, 4.9% were women and 95.1% men. However, according to UWE, the figure relates to the largest companies, so the number of women on the boards of smaller companies is even lower.

197. UWE states that the Swedish model is based on voluntary measures and the Swedish Corporate Governance Board administers guidelines to be followed by stock market listed companies. In 2014 the Board announced a number of changes to the Corporate Governance Code aimed at achieving a more equal gender balance in boardrooms. According to the Code, 40% of board members should be women by the year 2020. The Code is intended as a complement to other legislation and is not binding. However, companies are obliged to report any deviation from the Governance Code in their annual reports.

198. UWE quotes the Swedish CEDAW Network’s Shadow Report to the Swedish Government’s Eighth and Ninth Periodic Reports on the Implementation of the CEDAW Convention (2015), according to which private sector companies are far from achieving

gender balance. Even though there has been an increase in the total number of female board members of companies listed in the stock market over recent years, by 2014 women accounted for only 25% of the total. Also, in 2014, 95% of chairpersons in boards were men. At management level inequality is even more striking. Men make up 81% of management groups and 94% of CEOs and managing directors. According to the Shadow Report, these figures have hardly improved since 1999.

199. Finally, UWE agrees with the ETUC that no regulatory framework exists on the representation of women in decision-making positions within private enterprises.

## **2. The respondent Government**

200. According to the Government, when it comes to women in management positions in Sweden, in May 2017, the boards of companies, wholly or partially-owned by the State, consisted of 49% women and 51% men. The proportion of women and men among chairpersons of these boards was 45% women and 55% men. In January 2017, the proportion of CEOs was 36% women and 64% men.

201. The Government indicates that the distribution of women and men in management positions is more equal in the public sector, particularly within the state, than in the private sector. In 2016, the state sector comprised 48% women and 52% men in management positions, compared to 32% women and 68% men in the private sector.

202. In 2017, the proportion of women and men on company boards (private) was 32.2% women and 67.8 % men. The proportion of female chairpersons was 6.2 % compared to 93.8 % chairs among men. Among corporate CEOs, 4.9% were women, compared to 95.1% men.

203. According to the amended the Discrimination Act pertaining to active measures, which entered into force on 1 January 2017, employers are to promote an equal distribution of women and men in management positions. The proportion of women and men in management positions is monitored, evaluated and followed-up annually in the Budget Bill.

## **B – Assessment of the Committee**

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

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

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

207. The Committee notes from the European Network of Legal Experts in Gender Equality and Non-Discrimination, Country Report on gender equality: Sweden, 2018 that there is no legislation setting quotas for women's representation on company boards. In September 2016, a government ministry report suggested an amendment to the Companies Act to increase the share of women on company boards. The Government declared as its intention to present a legislative proposal, requiring at least a 40% representation of each gender on boards of companies listed on the stock exchange. Due to lack of support in Parliament, the Government later changed its plans and decided not to present any proposal on the matter.

208. The Committee further notes that in the 'Swedish Code on Corporate Governance,' which applies to listed private and public limited-liability companies and is monitored by the Swedish Corporate Governance Board, Rule 4.11 states that 'an equal distribution among the sexes shall be the goal.' This is a voluntary rule, but according to another rule (2.6), there is also an obligation to provide sufficient justification for the final proposal regarding the composition of a board.

209. According to the Government, certain progress can be noted during the last few years, even if the share of women on company boards is still far from the required 40%. In this respect, the Committee notes that in 2014 the Corporate Governance Board announced a number of changes to the Code on Corporate Governance aimed at achieving a more equal gender balance on company boards.

210. The Committee also notes that CEDAW (2016) commends Sweden on achieving gender parity in the cabinet and in management positions on the boards of

State-owned companies. Nevertheless, CEDAW remains concerned at the low number of women in management positions in academia, in top management positions and on the boards of private companies. It recommends that Sweden increase the use of temporary special measures, including statutory quotas in decision-making positions in high-level public administration, private and public companies and academia.

211. However, the Committee observes that according to data provided by the European Institute for Gender Equality (EIGE) up to April 2019, the representation of women and men on the boards of largest listed companies in Sweden in 2016 stood at 36.1% compared to an EU average of 23.3%. In 2018, the share of women stood at 36.1% and at 37.1% in 2019 (the EU average in 2019 was 27.8%). The Committee notes that the representation of women in the decision-making boards of the largest listed companies, is high in relative terms, despite the fact that no legislative measures have been adopted.

212. The Committee notes that the Government has taken measures to meet its positive obligations to tackle vertical segregation in the labour market. These measures have been accompanied by a clear and significant trend for improvement in such representation in recent years.

213. The Committee therefore holds that there is no violation of Article 20.d of the Charter.

#### **IV. REQUEST FOR COMPENSATION**

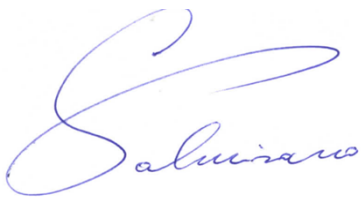
214. The Committee decides not to make a recommendation to the Committee of Ministers as regards the complainant's request for a payment of €10,000 in compensation for legal costs incurred in connection with the proceedings. It refers in this respect to the stance taken by the Committee of Ministers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

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

## CONCLUSION

For these reasons, the Committee concludes:

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



Giuseppe PALMISANO  
President and Rapporteur



Henrik KRISTENSEN  
Deputy Executive Secretary