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## **1961 EUROPEAN SOCIAL CHARTER**

1st National Report on the implementation of  
the European Social Charter  
submitted by

**THE GOVERNMENT OF SAINT MARTIN**  
(Caribbean part of the Kingdom of the Netherlands)

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**CYCLE 2020**

# **EUROPEAN SOCIAL CHARTER**

## Article 1§1\*

*to accept as one of their primary aims and responsibilities the achievement and maintenance of as high and stable a level of employment as possible, with a view to the attainment of full employment;*

### **1. Question**

Please provide details of labour market policy measures specifically designed to support specific groups or communities, such as young people who have not yet entered the labour market, persons in geographical areas and communities with distinct levels of underemployment (quality) or unemployment (quantity) or experiencing severe or chronic unemployment as well as migrants and refugees.

#### 1.1.School-to-Work Transition Survey

This survey targets all exam students of all secondary/tertiary schools, which is conducted annually. The purpose of this survey is to highlight trends and allow for proper planning. The results of the survey has proven to be fundamental in identifying the various pathways chosen by the youth, as well as the probability of youthful labour participation.

#### 1.2.Labour Force Survey (LFS)

The Labour Force Survey (LFS) is a sample survey conducted amongst households with the broad aim to measure the recent developments of the labour market. The Labour Force Survey addresses principally the education and employment issues on St. Maarten. The sample for the Labour Force Survey was drawn from the population of private households. The sample was stratified based on the 8 official districts (zones) of St. Maarten and the population density.

### **2. Question**

Please include statistical information on the overall impact of employment policy during the reference period: economic growth indicators, unemployment rates broken down by gender, age and duration, public expenditure on passive and active labour market measures as a share of GDP, number of participants in active measures (training), activation rate (participants/unemployed ratio).

## Article 1§2\*

*to protect effectively the right of the worker to earn his living in an occupation freely entered upon*

### 3. Question

Please provide updated information on legislation prohibiting all forms of discrimination in employment in particular on grounds of gender (if not accepted Article 20/Article 1 AP), race, ethnic origin, sexual orientation, religion, age political opinion, disability (if not accepted Article 15§2), including information on remedies.

#### Answer

The prohibiting of all forms of discrimination in employment is stipulated in various laws.

#### 3.1. Constitution of Sint Maarten

In article 16 (Equality) of the Constitution of Sint Maarten it is stipulated that:

*All persons in Sint Maarten shall be treated equally in equal circumstances. Discrimination on the grounds of religion, belief, political opinion, race, skin color, sex, language, national or social origins, membership of a national minority, assets, birth or on any grounds whatsoever shall not be permitted.*

#### Elucidation

This text is a close match with article 1 of the Dutch Constitution and article 14 of the European Convention on Human Rights (ECHR). The principle applies for the courts, the administration and the legislature and requires equal administration of justice in many fields. An explicit prohibition of discrimination of discrimination is included. Unequal treatment on the grounds listed is not permitted, unless justified convictions can be presented for this. The grounds are broader than those currently named in the Dutch Constitution. Grounds drawn from Article 14 of the ECHR that have been added are: skin color, language, national or social origin, association with a national minority, assets and birth. Grounds that are not mentioned carry equal weight to those that are. According to jurisprudence, discrimination arises if there is no reasonable and objective justification.

Article 17 (Equality) states:

*All Dutch nationals shall be equally eligible for appointment to public service.*

#### Elucidation

This article concerns the provision of an assurance that discrimination is not permissible in appointments in government service. This article does not prejudice the government's authority to reserve civil service appointments partially or entirely for persons who hold Dutch nationality. At the same time, the restriction of the guarantee to persons of Dutch nationality does not rule out the eligibility of foreigners for civil service appointments.

### 3.2. Civil Code

During the year 2018, a new Title 10 of Book 7 of the Civil Code, to replace Book 7A of the Civil Code, in the area of labour agreements was pendent<sup>1</sup>. This new legislation also includes a prohibition of discrimination.

Article 646 of Section 4, Equal treatment, states

*1. The employer may not make a distinction between men and women when entering into a labour agreement, educating the employee, in the employment conditions, in the promotion and in the termination of the labour agreement.*

*2. The first paragraph may be deviated from, in so far as it concerns entering into a labour agreement, and educating if the distinction made is based on a characteristic that is related to gender and that characteristic because of the nature of the specific professional activities or the context in which they are carried out is an essential and determining professional requirement, provided that the objective is legitimate and the requirement is proportionate to that objective.*

*3. The first paragraph may be deviated from if it concerns clauses that relate to the protection of women, in particular in connection with pregnancy or maternity.*

*4. The first paragraph may be deviated from if it concerns clauses that are intended to place female employees in a privileged position in order to eliminate or reduce disadvantages and the distinction is in a reasonable proportion to the intended objective.*

*5. In this article, a distinction is understood to mean: direct and indirect discrimination and the assignment to make a distinction. Direct discrimination means: distinction between men and women. Direct discrimination also includes: discrimination based on pregnancy, childbirth and motherhood. Indirect discrimination means: discrimination based on qualities other than sex, such as marital status or family circumstances, which results in discrimination based on sex.*

*6. The prohibition of direct discrimination laid down in this article includes a prohibition on intimidation and a prohibition on sexual harassment.*

*7. Intimidation as referred to in the sixth paragraph is understood to mean: behavior that is related to the gender of a person and that has the purpose or effect that the dignity of the person is compromised and that a threatening, hostile, offensive, humiliating or offensive environment is created.*

*8. Sexual intimidation as referred to in the sixth paragraph means: any form of verbal, non-verbal or physical behavior with a sexual connotation that has the purpose or effect of*

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<sup>1</sup> This new legislation was approved by Parliament of Sint Maarten on August 26, 2019.

*compromising the dignity of the person, in particular when threatening hostile, abusive, degrading or offensive situation is created.*

*9. The employer may not disadvantage the employee who rejects or suffers the behavior referred to in the seventh and eighth paragraphs.*

*10. The prohibition of discrimination laid down in the first paragraph does not apply with regard to indirect discrimination if that distinction is objectively justified by a legitimate goal and the means for achieving that goal are appropriate and necessary.*

*11. A clause in violation of the first paragraph is null and void.*

*12. If the person who believes that his disadvantage is or is being made a distinction as referred to in this article, invokes facts that may lead to such a distinction, the other party must prove that no action has been taken in violation of this article.*

*13. The second and third paragraphs do not apply to the prohibition of intimidation and sexual harassment, referred to in the sixth paragraph.*

### Elucidation

In the first paragraph, it is stated that the employer may not make a distinguish between men and women, when entering into the labour agreement, for example because the woman is pregnant, providing education to the employee (training, education and training), in the employment conditions (including wages), in the working conditions (for example, with regard to childcare), at the promotion and termination of the labour agreement.

The following paragraphs provide exceptions to this prohibition.

If gender is an essential and determining professional requirement, a distinction can in principle be made (paragraph 2) such as actors and actresses.

The protection of women, in particular with regard to pregnancy and maternity, also justifies a departure from the main rule (paragraph 3).

A third exception is that of pursuing a preferential policy for women. A preference policy must meet certain requirements. A preference policy may not necessarily lead to a favor for a woman. The policy must in any case be proportionate to what is appropriate to achieve the objective pursued.

The fifth paragraph contains descriptions of the concepts of direct and indirect distinction. Discrimination on the grounds of pregnancy, childbirth and motherhood also falls under direct discrimination (as well as the intimidation and sexual harassment to be mentioned below). A distinction between working hours and temporary nature of the labour agreement (potential indirect distinctions of men and women) are separately covered by the articles 648 and 649 respectively.

The sixth to ninth paragraphs relate to intimidation and sexual harassment, concepts that are described in the seventh and eighth paragraphs.

In accordance with paragraph 10, an indirect distinction may be objectively justified. The requirements of proportionality, legitimacy and efficiency must be met.

The eleventh paragraph contains a nullity penalty. This means that in a particular case, the court must find the nullity of its own motion, that is, without the employee invoking it.

The burden of proof division of paragraph 12 facilitates the employee's position of proof

The thirteenth paragraph means that intimidation and sexual harassment can never be justified. They are therefore always (directly) discriminatory.

#### **4. Question**

Please indicate any specific measures taken to counteract discrimination in employment of migrants and refugees.

##### **Answer**

No specific measures have been taken to counteract discrimination in employment of migrants and refugees.

#### **5. Question**

Please indicate what measures have been taken to assess the prevalence of the problem of exploitation of vulnerability, forced labour, modern slavery? Does legislation exist to deal with the phenomenon of exploitation of vulnerability, forced labour, modern slavery and does it make provision for the identification and protection of victims, enable prosecution of exploiters, or otherwise provide reporting requirements for businesses to detail actions taken to investigate their supply chains for forced labour, due diligence in public procurement to guarantee funds are not inadvertently supporting modern slavery? Are there regular inspections of sectors such agriculture, construction, hospitality, manufacturing and domestic work, which are particularly affected by labour exploitation?

##### **Answer**

The Government of Sint Maarten informs that forced labour is solely cited in and strictly prohibited by the National Constitution of Sint Maarten. Article 4 of the Constitution states the following:

1. *No person shall be held in slavery or servitude.*
2. *No person shall perform forced labour or mandatory work, other than as community service.*

3. *Human trafficking is prohibited.* (The Government of Sint Maarten recognizes that the term “forced labour” is in essence different than the term “human trafficking”, however by also prohibiting the latter, the Government is making an extra effort to ensure the protection of **all** people by ensuring, that it is also unlawful to be (forcefully) brought to the shores of Sint Maarten (to work, or under other pretenses).

Moreover, the Constitution also stipulates in article 3 that: “*No person shall be subjected to torture or to cruel, inhumane or degrading treatment or punishment*”, which forced labour could categorically fall under.

The following (main) list of labour legislations and administrative regulations additionally exist, which consists of provisions to ensure that forced labour is prevented and combatted, whether directly, or indirectly:

**Arbeidsregeling (in English: Labour Regulation)**, which mandates certain working conditions, such as: the maximum working hours, rest-time, (lunch) breaks, overtime, and other stipulations. By ensuring that standard working conditions are set as benchmarks, employers must comply with stipulations of the legislations and, consequently can be penalized for non-compliance. Article 18 prohibits children fifteen years and younger to work, which means that anyone guilty of child labour will be prosecuted by law. Articles 19 to 21 further prohibits youngsters working under certain conditions.

**The Civil Code, Book 7A**, further gives the possibility for employers and workers to negotiate and agree on their own working conditions; however, these conditions cannot conflict with any labour legislations nor regulations<sup>2</sup>.

**Labour Decree for Youthful Persons**, It is against the law for children to work under the age of 16. However, the legislation makes an exemption to this stipulation for children, who have reached the age of 12, and have completed primary school, may perform certain work as long as these activities are:

- Necessary for the learning of a trade or profession (apprenticeship);
- Or, is not of a dangerous nature.

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<sup>2</sup> This means that the relationship between an employer and a worker is essentially “form-free”; allowing parties appropriate freedom for negotiations and mutual agreements, within the minimum constraints of the law.

The Labour Decree for Youthful Persons provides conditions under which children, above sixteen years of age, may perform work. Fundamentally indicating that children must at all times be in a protected, safe environment (and simultaneously fostering the notion that children should be attending school instead of work). The law also prohibits persons under the age of 18, from working overtime, at night, or in activities dangerous to their physical or mental health. This legislation therefore makes provisions to ensure protection at the workplace, which also indirectly prohibits (child) forced labour.

**Penal Code,** In the year 2016 some very significant changes were made to the Penal Code of Sint Maarten. One of these changes was the addition of “forced labour”, which qualifies as a crime with a subsequent punishment of a maximum of nine years imprisonment (for simple cases), or a fine, up to the fifth category. Article 2:239, second paragraph subsequently prohibits forced labour.

### **The Inspectorate of Labour,**

The Inspectorate of Labour is a very essential agency within the Ministry of Public Health, Social Development and Labour, as amongst others it regards the control, investigation of and handling of labour complaints (including cases of forced labour) and labour legislation. This agency effectively ensures that labour legislation is upheld by all and the (preventative) safety (against *threats* deriving from any labour relationship) of the general public is safeguarded, in the broadest sense, which also includes at the workplace.

This is done by executing labour inspections. These inspections are executed by labour inspectors. These inspectors are tasked with, amongst others, ensuring that workers have a safe work environment, raising awareness of labour compliance, advise the Ministry on national policy planning and the design of new legal regulations, carrying out labor control, labor and safety inspection, carrying out checks on compliance with recognized standards and regulations with regard to work, effectively checking for appropriate use of employment services and regulations, carrying out checks on compliance with recognized standards and regulations regarding working conditions and employment conditions.

Compliance of the following labour legislations are being inspected:

- Labour Regulation;
- Minimum Wage National Ordinance;

- Vacation Regulation;
- National Ordinance on Foreign Labour;
- National Ordinance on safety;
- Civil Code, Book 7A.

The Inspectorate performs – what is called “multidisciplinary inspections” – with other governmental inspectors, such as inspectors from the Fire Department, Public Works Department and the Permit and License Department. Therefore, during these inspections, the team is ensured of having the expertise of the formentioned disciplines. Currently the Inspectorate of Labour agency is comprised of 3 labour inspectors, and intends to recruit more inspectors, as the agency still has critical vacancies. The current labour inspectors have been appointed as ‘buitengewoon ambtenaar van politie’ (in English: extraordinary police officer), which authorizes them amongst others to issue fines for non-compliance of the legislations.

Though the Inspectorate issues reports to the Minister and Secretary General of the ministry, it performs its tasks as an independent entity within the Ministry, which limits the occurrence of favoritism and/or prejudices between the inspected businesses and the inspectors. The Inspectorate also has the authority or obligation to bring life threatening or otherwise precarious cases directly to the Public Prosecutor. The Inspectorate has the obligation to also report and or provide advice on any identified unsafe work environments.

**The National Reporting Bureau on Human Trafficking (hereafter: the Bureau).** The Bureau is responsible for registering, monitoring and investigating complaints with regard to human trafficking. More specifically, the Bureau investigates cases pertaining to human trafficking, and human smuggling, of any kind.

This Bureau was established in 2013 to prevent and combat human trafficking and raise awareness about anti-trafficking and human smuggling (of mainly adult entertainment) commercial sex workers. As the cooperation amongst stakeholders intensified, the National Reporting Bureau has been the core-executing agency for the prevention of human trafficking and protection of victims.

After the year 2015 Trafficking In Persons (TIP) report, an action plan for the Government was recommended and partially (if not in totality) executed. Said action plan involved the following steps:

1. Identify and assist potential trafficking victims by implementing formal, proactive measures to guide officials, including health workers, on how to identify and assist victims among vulnerable populations.
2. Proactively implement the anti-trafficking law by vigorously prosecuting, convicting, and sentencing traffickers, including government officials complicit in human trafficking.
3. Include a trained victim advocate in routine health inspections at the legal brothels to ensure the rights of women in these legal brothels are protected.
4. Conduct outreach with all incoming migrants, including domestic workers and foreign women on temporary entertainment visas, to ensure they are informed of their rights, the anti-trafficking hotline, and ways to seek help.
5. Consult with the Government of the Netherlands on proactive victim identification efforts.
6. Continue to educate the general public, public officials and victims about trafficking in St. Maarten and its distinctions from human smuggling.
7. Continue implementing the national anti-trafficking plan.

This bureau executed the Human Trafficking and Smuggling awareness campaign in 2016, which included press and social media articles, presentations to at risk groups and information sessions to representative organizations for non- nationals.

Subsequently, bi-monthly (joint) site visits are made by workers of the Bureau and labour inspectors, (and multiple disciplinary inspections may also be scheduled with members of the ‘Korps Politie Sint Maarten’ (in English: Sint Maarten Police Force) to adult entertainment clubs. The Bureau also utilizes a hotline and email for anonymous victims.

The Government of Sint Maarten continues to initiate various projects to identify other industry areas where human trafficking may be prominent, as well as identify vulnerable groups and victims of human trafficking and /or human/smuggling.

The Human Trafficking & Human smuggling department is responsible for the following task:

- Conducting criminal investigations based on information received or arrest(s) made regarding the violation of the Human Smuggling and Human Trafficking laws. All by all combating and preventing all forms of organized crimes about Human Trafficking and Human Smuggling.
- To combat human smuggling and human trafficking of at risk groups on the island through prevention and protection.

According to a past TIP Report: *“The Government of St. Maarten fully meets the minimum standards for the elimination of trafficking. The government continued to demonstrate serious and sustained efforts during the reporting period; therefore, St. Maarten remained on Tier 1.”*

### **The Public Prosecutor’s Office,**

The Office of the Public Prosecutor is tasked with safeguarding law and order by the detection and prosecution of criminal offenses on Sint Maarten and the subsequent execution of court rulings made by the Judge. As such, the Office of the Public Prosecutor has registered a number of cases, brought to Court for forced labour offenses.

Though the Minister of Justice is politically responsible for the Public Prosecutor’s Office, the Public Prosecutor’s Office does not receive instructions from the Minister, instead it derives its authority directly from the following legislations:

1. Kingdom Act Public Prosecution Service of Curacao, Sint Maarten, Bonaire, St. Eustatius and Saba;
2. The Penal Code;
3. The Code of Criminal Proceedings.

### **Procedures**

To register a forced labour complaint, a written complaint must be filed at the Office of the Public Prosecutor. This complaint must also be accompanied by the relevant personal information of the client and any other details or proof of complaint. Complaints relating to incidences older than one year, may not be processed immediately, due to the long time between the occurrence and the complaint.

Once a complaint is registered and deemed “adequate”, this complaint is investigated. Most investigations are done with the collaboration of the Labour Inspectorate. Upon completing the investigation, a report is made up, discussed and referred to Court, where the case can be heard by a judge and given a verdict.

During the reporting years, the Office officially investigated five cases of forced labour: four cases involved forced labour of “commercial sex workers” and one case that involved “non-sex workers”. All of these cases were prosecuted in court and in most of these cases the accuser

received a guilty verdict. All court cases from Sint Maarten can be found on the website of the Courts: <http://www.gemhofvanjustitie.org/uitspraken/rechtspraak-nl>.

### **The Court of First Instance**

The Court of First Instance hears all cases brought before the Judge. These cases include cases of forced labour as well as human trafficking/human smuggling. Human trafficking is commonly linked to forced labour on Sint Maarten, these cases predominantly occur within the prostitution industry.

In 2018, Sint Maarten reports two cases of human smuggling. In one of those cases the suspect was sentenced to 24 months imprisonment, of which 12 months conditional sentence and in the other case 36 months imprisonment, of which 12 conditional.

Punishments usually depend on the role the main suspect has, in each case; whether the suspect has prior convictions or if there is no prior criminal record. Normally (partially) unconditional imprisonment will be applied to suspects that play an important role in these types of cases.

Convicted offenders are sentenced by the Court of Law, according to the Penal Code/ Prosecution Code and other laws of Sint Maarten.

The Government of Sint Maarten has been making considerable strides to eradicate forced labour, via various (semi-) governmental entities. This is evident by the low number of cases registered and the fact that procedures and legislation are already in place to address this occurrence.

### **6. Question**

Please provide information on any measures taken to protect workers in the “gig economy” or “platform economy” whose employment is very often precarious, against exploitation.

#### Article 1§3

<i>to establish or maintain free employment services for all workers</i>
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No information requested, except where there was a conclusion of non-conformity or a deferral in the previous conclusion for your country.

#### Article 1§4

*to provide or promote appropriate vocational guidance, training and rehabilitation*

No information requested, except where there was a conclusion of non-conformity or a deferral in the previous conclusion for your country.

#### Article 20/Article 1 of the 1988 Additional Protocol\*

*Right to equal opportunities and equal treatment in matters of employment and occupation without discrimination on the grounds of sex*

#### **7. Question**

Please provide up-dated information on the statutory framework guaranteeing equal pay for equal work or work of equal value with particular emphasis on the following aspects:

- rules on shifting the burden of proof in cases where pay discrimination is alleged on grounds of sex
- rules on compensation in case of pay discrimination on grounds of sex (are ceilings applicable?)
- does national law and practice provide for pay comparisons outside the company directly concerned?

#### **Answer**

Please see the answer to question 3.

#### **8. Question**

Please describe the job classification and promotion systems in place as well as strategies adopted and the measures taken to ensure pay transparency in the labour market (notably the possibility for workers to receive information on pay levels of other workers), including the setting of concrete timelines and measurable criteria for progress.

#### **Answer**

Presently Sint Maarten does not have such classifications and promotion systems available but will consider such in the future.

#### **9. Question**

Please provide statistical data on the gender pay gap<sup>3</sup> (adjusted and unadjusted) for all years of the reference period.

**Answer**

The gender pay gap or gender wage gap is the average difference between the remuneration for men and women who are working. The most recent Labour Force Survey indicates an average monthly male and female income of respectively NAF 2.000 and NAF 2.500. The unadjusted average female's salary is therefore 25% of the average male salary

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<sup>3</sup> The gender pay gap or gender wage gap is the average difference between the remuneration for men and women who are working. Women are generally considered to be paid less than men. There are two distinct numbers regarding the pay gap: unadjusted versus adjusted pay gap. The latter typically takes into account differences in hours worked, occupations chosen, education and job experience. For example, someone who takes time off will likely not earn as much as someone who does not take time off from work. In the United States, for example, the unadjusted average female's annual salary has commonly been cited as being 78% of the average male salary, compared to 80–98% for the adjusted average salary. (Source: Wikipedia)