

## EUROPEAN COMMITTEE OF SOCIAL RIGHTS COMITE EUROPEEN DES DROITS SOCIAUX

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### Realising equal pay and equal opportunities for women in employment

#### Criteria developed by the European Committee of Social Rights (ECSR)

*Compilation prepared by the Secretariat of the European Social Charter, Directorate General of Human Rights and Rule of Law (DGI), Council of Europe, based on the ECSR's decisions on the merits in the collective complaints lodged by the international NGO University Women Europe (UWE).*

*The decisions concern the 15 States which have accepted the complaints procedure (Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Finland, France, Greece, Ireland, Italy, the Netherlands, Norway, Portugal, Slovenia and Sweden). The decisions were adopted by the ECSR on 5 and 6 December 2019 and became public on 29 June 2020.*

#### I. RECOGNITION AND ENFORCEMENT OF THE RIGHT TO EQUAL PAY

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

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.

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.

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.

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legislation, regulation or other administrative measure that fails to comply with the principle of equal pay must be repealed or revoked.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).

##### *Effective remedies*

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.

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.

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).

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.

#### *Pay transparency and job comparisons*

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.

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.

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 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).

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.

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. This is 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). In particular, 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.

### *Equality bodies and other institutions*

The satisfactory application of the Charter cannot be ensured solely by the operation of legislation if this is not effectively applied and rigorously supervised (International Commission of Jurists (ICJ) v. Portugal, Complaint No. 1/1998, decision on the merits of 9 September 1999, §32). 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 criteria for national human rights institutions set out in the so-called Paris Principles adopted in 1993 by the United Nations General Assembly are also relevant.

As regards the mandate of equality bodies, 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;

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.

## **II. MEASURES TO PROMOTE EQUAL OPPORTUNITIES BETWEEN WOMEN AND MEN IN RESPECT OF EQUAL PAY**

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, more specific data on the gender pay gap by sectors, by occupations, by age, by educational level, etc. might also be considered, where appropriate.

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. Collection of data with a view to adopting adequate measures is essential to promote equal opportunities. Indeed, 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).

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.

While 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, decision on the merits of 4 November 2003, §53).

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. 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).

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.

Among other measures that States could adopt to reduce the gender pay gap and which may be regarded 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.

### **III. BALANCED REPRESENTATION OF WOMEN IN DECISION-MAKING POSITIONS WITHIN PRIVATE COMPANIES**

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).

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. In addition, PACE Resolution 1715(2010) recommends that the proportion of women on management boards of companies should be at least 40%.

Finally, 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.