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***The right of men and women workers
to equal pay for work of equal value
in Article 4§3 of the (Revised) European Social Charter***

*The difference with gender pay gap
and the comparison between Portugal and Italy*

Seminar “The Multilevel Protection of Fundamental Social Rights” –
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1. INTRODUCTION

The principle of equal pay has a long lasting existence since it appeared for the first time on an International level in the Equal Remuneration Convention of 1951 (No. 100) written by the International Labour Organization and on a EU level in the 1957 Treaty of Rome. Since then the supranational and national approaches to economic independence and gender equality in the labour market have expanded in scope, both in soft and hard law, but there are two main comments to make and that will be clearer in the continuation of the essay. First of all, ensuring the principle *de jure* and then implementing it *de facto* is just a drop in the ocean because the wider problems of discrimination in the workplace and gender pay gap have multiple causes and factors and require several measures in different fields and the implementation of more than one human and social right. Secondly, the main challenge that EU and States have to face is the application in practice of the principle. It is one thing to make the equal pay right enter the Constitutional Charter and even to provide for measures and projects on a legal level with acts and legislative decrees, another is to make them come true, functional and effective and to remove the unequal pay between men and women in order to decrease the gender pay gap. Therefore it is clear that the principle in question has a strong and fundamental potential but irregular and ineffective application.¹

For the purpose of introducing the topic, should be given some preliminary definitions that are at the basis of the equal pay principle. It is logic to start with equal pay itself: it is when a person of one sex (more commonly a woman) receives less pay than a man carrying out the same or similar job. Equal work can be like work which is the same or broadly similar work, work rated as equivalent under valid job classifications schemes or work of equal value which is not similar but of equal value in terms of demands such as effort, skill and decision-making.² In addition, when the legislation speaks about “pay” it uses a term that can be mentioned alongside “remuneration”: they are both generic terms that do not include only salaries or wages. Article 1(a) of the ILO Convention presents its broad definition which includes “*ordinary, basic or minimum wages or salaries and any additional emoluments whatsoever payable directly or indirectly, whether in cash or in kind, by the employer to the worker and arising out of the worker’s employment*”.³

¹ WHITEHOUSE, Gillian – SMITH, Meg. *Equal pay for work of equal value, wage-setting and the gender pay gap*. In: SAGE journals - August 4, 2020. Available at <https://journals.sagepub.com/doi/10.1177/002>.

² Equality Human Rights Commission. *What is Equal Pay?*. Available at: <https://www.equalityhumanrights.com/en/advice-and-guidance/what-equal-pay>

³ ILO. *Equal Remuneration Convention*, 1951 (No. 100). Available at: https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312245

2. EQUAL PAY AND GENDER PAY GAP: SOME PRELIMINARY CONSIDERATIONS

I. Difference between equal pay and gender pay gap

Every year the European Commission marks 10 November as the Equal Pay Day, symbolizing the day of the year on which women effectively stop earning money relative to men.⁴

Since it depends on how much is the gender pay gap, it's important that everyone knows that gender pay gap and equal pay are two distinct concepts, even if people frequently overlap them, creating some confusion in the reading of statistics and articles. Gender pay gap is the difference between what men typically earn in an organization compared to what women earn over a period of time, irrespective of their role or seniority. With it the pay differences between sexes are shown on a broader level. For example, an organization that is over-populated by men in senior roles and women in junior roles will have a gender pay gap. Equal pay is something more precise because represents the legal requirement for men and women to be paid the same for performing the same or like work that has been rated of equal value.⁵

Another important distinction that is to be made regarding the concept of gender pay gap is between unadjusted and adjusted pay gap because data and statistics can be related to both. The first one is a row figure in the average differences in payment that makes only an adjustment for time worked by adopting an hourly comparison figure; on the contrary the second one takes into account some elements such as type of occupation, education, experience that might influence pay gap.⁶

II. The relationship between equal pay and gender pay gap

The question to be answered is: if men and women receive equal pay, will the gender pay gap be wiped out? Not necessary is the answer. On one hand there is the compliance of a business with the rules and regulations about the equal pay when it ensures an equal remuneration at every level for men and women that do a comparable job. On the other hand the gender pay gap considers other relevant factors: it's clear that even if a male and female senior manager of the same company receive

⁴ European Commission. *Equal Pay Day*. Available at: https://ec.europa.eu/info/policies/justice-and-fundamental-rights/gender-equality/equal-pay/equal-pay-day_pt

⁵ Everywoman. *Equal Pay vs. the Gender Pay Gap: how to explain the difference to stakeholders*. Available at: <https://www.everywoman.com/news-insight/equal-pay-vs-gender-pay-gap>

⁶ EUROSTAT Statistics explained. *Gender Pay Gap Statistics*. Available at: https://ec.europa.eu/eurostat/statistics-explained/index.php/Gender_pay_gap_statistics#Gender_pay_gap_levels_vary_significantly_across_EU

an equal pay and benefits, a gender pay gap still exists when in the same organization senior management and leadership teams are predominated by men while junior positions are mostly held by females.

III. Causes of unequal pay and gender pay gap

From a formal point of view, the cause of unequal remuneration is the violation of national and supranational provisions on equal pay for equal work or work of equal value by private and public bodies. The causes of the gender pay gap are substantial and more varied and complex, e.g.:

- concentration of girls in sectors that offer narrower scope for financial reward and boys in higher paying ones such as banking, finance and technology industries (occupational segregation);
- vertical segregation;
- women's career breaks and returns to work on part-time wages (the gender pay gap is usually lower for young employees and tends to widen with the age due to maternity and a higher female single-parental rate);
- female lower education level representing an obstacle in order to enter the labor market.

3. NON-DISCRIMINATION BETWEEN MEN AND WOMEN WITH RESPECT TO REMUNERATION IN INTERNAL SOURCES

I. Portuguese provisions on equal pay

First point of reference is the Constitution since Article 59§1(a) indexed "Workers' rights" states that *«regardless of age, sex, race, citizenship, place of origin, religion and political and ideological convictions, every worker has the right to the remuneration of his work in accordance with its volume, nature and quality, with respect for the principle of equal pay for equal work and in such a way as to guarantee a proper living»*.⁷

The Portuguese Labor Code (Law No. 7/2009) in Article 23 provides some important definitions for the following provisions: equal work is when *«the functions performed at the service of the same employer are equal or objectively similar in nature, quality and quantity»* and work of equal value in when the functions *«are equivalent, considering in particular the qualification or experience*

⁷ DRE, Diário da República Eletrónico. *Constitution of the Portuguese Republic*. Available at: <https://dre.pt/constitution-of-the-portuguese-republic>

*required, the responsibilities attributed, the physical and psychological effort and the conditions under which the work is performed».*⁸

Art. 26§2 ensures the principle of equal pay providing that, if a collective labor regulation or an internal company one establishes equal remuneration for equal work applicable only to workers of one of the sexes, the most favorable provision valid for both sexes substitutes the discriminating one.⁹ Also Art. 31 provides for a lot of indications on equal working conditions, in particular regarding remuneration.¹⁰

Lastly, the main formal reference into the Portuguese legal system is art. 270 of the same Code: it expresses the right of men and women workers to equal pay for work of equal value.¹¹

Before the previous source, Law No. 34/2004 has granted legal protection in the figure of free legal representative in court and legal advisor, to national and EU citizens, stateless persons resident in EU and with insufficient means.¹²

Law No. 60/2018 published on 21 August and come into effect six months after has introduced new measures to promote equal remuneration between sexes for equal work or equal value. More specifically the law includes these rules and requests:

- in the first semester of each year, the Labor Ministry publishes gender pay gap data at a national and sectoral level but also by company, by profession and employee's qualification level, thanks to the data that companies must annually report as required by the Labor Code;
- as a consequence, the Labor Authorities (ACT) should notify specific companies to provide an assessment of the detected salary differences and a plan of action in order to demonstrate justified and non-discriminatory causes or to correct the gap in unjustified cases. If some unjustified differences remain, they would be considered discriminatory;
- all companies have to keep the documentation and make salary policies transparent, also basing the elements of evaluation e.g. merit, productivity, absenteeism, seniority on criteria that are objective and the same of every sex;
- from 2019 there is the possibility for employee and union representatives to ask to the CITE (Portuguese Commission for Employment Equality) for an opinion on a claim of gender

⁸ DRE, Diário da República Eletrónico. *Labour Code, Law no. 7/2009 - Official Gazette no. 30/2009, Series I of 2009-02-12*. Available at: <https://dre.pt/application/conteudo/123169278>

⁹ *Ibid*

¹⁰ *Ibid*

¹¹ *Ibid*

¹² European e-Justice Portal. *Costs of proceedings – Portugal*. Available at: https://e-justice.europa.eu/content_costs_of_proceedings-37-pt-maximizeMS-en.do?member=1

remuneration discrimination. If the employer fails to prove a non-discriminating and transparent policy, it has 180 days to communicate the measures implemented to eliminate the problem.¹³

II. Italian provisions on equal pay

The starting point of this topic for the Italian legal system is the Constitution: Article 3 states the principle of equality and Article 37 affirms that «*Working women are entitled to equal rights and, for comparable jobs, equal pay as men*».¹⁴

Going into the more specific labor legislation, Law No. 300/1970 published on 20 May and representing the Workers' Statute (indexed "Provisions on the protection of workers' freedom and dignity, of freedom of association in workplace and provisions on employment") deals with the discriminatory behaviors in Article 16. Economic treatments more favorable for one person or a group of persons are prohibited on ground of art. 15: any pact or act seeking to cause injury due to discrimination by gender is null.¹⁵

Another legal reference for an Italian worker is Legislative Decree No. 198/2006 indexed "Code of Equal Opportunities between Men and Women" and amended especially by Legislative Decree 5/2010 which transposed Directive 2006/54/EC.

Articles 12 *et seq.* impose equality advisors as public officials at national, regional and supra-municipal that are expert on women's work, law on equality and equal opportunities and labor market since they have to promote and control the implementation of the principle. Their positive actions can be detecting discrimination's situations, promoting projects and equal opportunities policies, disseminating information and cultural education activities on the forms of discrimination and collaborating with the local authorities and equality bodies.

Article 25 defines what is considered "direct discrimination" and instead what is "indirect discrimination".

Article 28 ensures women's right to be paid equally to men for an equal work or work of equal value and the use of common criteria between sexes by job classification's systems that determine remunerations.

¹³ DRE, Diário da República Eletrónico. Law No. 60/2018 – Official Gazette no. 160/2018, Series I of 2018-08-21. Available at: <https://data.dre.pt/web/guest/pesquisa/-/search/116130014/details/maximized>

¹⁴ Senato della Repubblica. *Constitution of the Italian Republic*. Available at: https://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf

¹⁵ Gazzetta Ufficiale della repubblica Italiana. Legge 20 maggio 1970, n. 300 . GU Serie generale n.131 del 27/05/1970. Available at: <https://www.gazzettaufficiale.it/eli/id/1970/05/27/070U0300/sg>

As for the judicial moment, Article 36 states that the person who wants to take legal action for discriminating behavior instead of the conciliation procedure provided by collective agreements can turn to the competent local Councilor for Equal Opportunities. This latter can resort to the Labor Court Judge or TAR (Regional Administrative Court) or intervene to the lawsuit filed by the discriminated worker.

Also the burden of proof is put in favor of the worker by Art. 40: when the claimant provides factual elements related among others to pay schemes that are sufficient grounds for the presumption of the existence of acts, pacts or discriminatory behaviors by reason of sex, it is up to the respondent to prove the non-existence of a discrimination.

A control similar to the one in Portugal is designed also by Article 46 of this Italian Decree:

- Public and private bodies with more than 100 employees every other year must draw up a report on the situation of men and female workers for each profession and in relation to recruitment, training, promotions, intervention of the Wages Guarantee Fund, firing, retirements, remuneration.
- If these bodies don't provide the report, they must do it within 60 days, under penalty of a sanction.¹⁶

Another more recent Legislative Decree, numbered 150/2011, in Art. 28 regulates litigations concerning discrimination by imposing to them an accelerated procedure, repeating the inversion of the burden of proof in case of presumption of discriminatory acts, agreements or behavior bases also on statistical data and providing for the defendant's payment of damages also for non-pecuniary loss, a plan to rectify the discrimination and more severe damages in case of retaliatory behavior.¹⁷

4. ARTICLE 4§3 OF THE (REVISED) EUROPEAN SOCIAL CHARTER AND THE ECSR INTERPRETATION

Article 4 – The right to a fair remuneration

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

1. to recognize the right of workers to a remuneration such as will give them and their families a decent standard of living;

¹⁶ Gazzetta ufficiale della Repubblica Italiana. *Codice delle pari opportunità tra uomo e donna, Decreto Legislativo 11 aprile 2006, n. 198 – GU Serie generale n. 125 del 31-05-2006 – Suppl. Ordinario n- 133*. Available at:

<https://www.gazzettaufficiale.it/dettaglio/codici/pariOpportunita>

¹⁷ Gazzetta ufficiale della Repubblica Italiana. *Decreto Legislativo 1 settembre 2011, n. 150 – GU Serie generale n. 220 del 21-09-2011*. Available at: <https://www.gazzettaufficiale.it/eli/id/2011/09/21/011G0192/sg>

2. to recognize the right of workers to an increased rate of remuneration for overtime work, subject to exceptions in particular cases;
- 3. to recognize the right of men and women workers to equal pay for work of equal value;**
4. to recognize the right of all workers to a reasonable period of notice for termination of employment;
5. to permit deductions from wages only under conditions and to the extent prescribed by national laws or regulations or fixed by collective agreements or arbitration awards.

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.¹⁸

I. The principle of equal pay

Paragraph 3 deals with the right to equal pay without discrimination on grounds of sex and is part of the wider Article 4 on the rights to a fair remuneration for workers; it, in turn, is clearly one aspect of the right to equal opportunities in matters of employment guaranteed by Article 20. As a consequence, the case-law and decision and conclusions of the ECSR usually involve both Art. 20 and Art. 4§3.

Both men and women have the right to be paid in an equal way for work of equal value. This last expression means that this principle must apply not only to the same work but also to different works of the same value. Reconnecting with the formal meaning of remuneration, the principle of equal pay covers all the types and elements of pay, such as wages or salaries, benefits in cash or kind paid by the employer to the worker as a consequence of the employment relationship.¹⁹

According to the Conclusions XVI-2, Portugal, Art. 4§3, it also has to take into consideration the difference between full-time and part-time employees and to apply to both of them.²⁰

II. Guarantees of enforcement

On one hand the national legislations can provide for the wage level with the method or type of rules they consider more appropriate, legislation, regulations but also collective agreements, but the States must provide that equality is achieved not only in law but also in practice, otherwise it must intervene with sanctions in case of violation and legal wage-fixing.²¹

On the other hand also judicial safeguards are essential: states law must protect discriminated workers

¹⁸ Council of Europe. *European Social Charter (Revised)*, *European Treaty Series - No. 163*. Available at: <https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/090000168007cf93>

¹⁹ Council of Europe. *Digest of the Case Law of the European Committee of Social Rights (2018)*. Available at: <https://rm.coe.int/digest-2018-parts-i-ii-iii-iv-en/1680939f80>

²⁰ Council of Europe. *Digest of the Case Law of the European Committee of Social Rights – Appendix (2018)*. Available at: <https://rm.coe.int/digest-2018-appendix-en/1680939f7e>

²¹ Council of Europe. *Digest of the Case Law of the European Committee of Social Rights (2018)*. Available at: <https://rm.coe.int/digest-2018-parts-i-ii-iii-iv-en/1680939f80>

thanks to appropriate and effective judicial remedies. Additionally to the ECSR domestic legislations should ensure the burden of proof in favour of the discriminated plaintiff in this type of litigations. As a result of the judicial process, an adequate compensation should be ensured to the discriminated worker. In other words he/she should receive a compensation balanced with the damage suffered and that represents a deterrent to the offender, at least the difference in pay. Another chance that an employee must have is to sue the employer for retaliatory dismissal when he is fired due to his claim about unequal pay. The conclusion of the dispute are two: the employee is reintegrated in the same or similar position or, if not possible anymore or not desired by the worker, he is compensated through a sufficient amount of money fixed by the Court.²²

III. Methods of comparison

The role of domestic law is also to offer provisions for the comparisons of pay and jobs outside each individual company; there is this need particularly in companies where the workforce is largely or exclusively, female. These kind of comparisons are essential when the pay differences for a work of equal value between the two sexes are caused by a single specific source, for example employees that work in different establishments of the same company and covered by the same collective works agreement. In addition, the evaluation of ECSR takes into consideration the national information about the unadjusted pay gap (the difference between average earnings of female and male employees in all occupations) and adjusted pay gap (corrected gender pay differential for work of equal value).²³

5. THE ECSR CONCLUSIONS AND DECISIONS ON ARTICLE 4§3

What follows is a backward analysis, starting from the conclusions related to the first years of Portugal and Italy's presence into the CEE and ending with the 2019 Decision which concerned 15 EU States.

At this point some preliminary distinctions are essential. The conclusions are the result of the periodic reports on implementation of the Charter in law and in practice that States Parties have to submit: the ECSR evaluates the reports and the findings are explained in the conclusions with the final indication of national compliance or non-compliance. Nowadays the States must submit every year a report on the provisions contained in one of the four thematic groups, so each group is analyzed by the Committee every four years. Instead the decisions are the final step of the collective complaints

²² Council of Europe. *Digest of the Case Law of the European Committee of Social Rights (2018)*. Available at: <https://rm.coe.int/digest-2018-parts-i-ii-iii-iv-en/1680939f80>

²³ *Ibid*

procedure in which trade unions, employers' representatives and NGO claim a violation of the Charter by one or more States Parties. After that the ECSR decides both on the admissibility and the merits and the violating State must respect the decision even if it is not enforceable on a national level.

I. Portugal

Portugal joined EEC from 1 January 1986. For this State the Committee has made available some Conclusions at the end of the reporting system's application on Art. 4§3 and one Decision in 2019.

a. Conclusions XIII-3 ²⁴/ XIII-5 ²⁵

The Portuguese report evaluating the period 1991-1993 demonstrated that the legislation in force in those years (Legislative Decree 392/1979) embodied the principle of equal pay, the need of common and objective criteria for the assessment of tasks, the nullity of discriminatory clauses in collective bargaining, the burden of proof for the employer in legal action for discriminatory remuneration on grounds of sex.

Thanks also to the analysis of the role of general Labor Inspectorate and the CITE made through the report and the requests of the ILO Committee of Experts on Convention No. 100/1951, in the conclusion XIII-3 the ECSR established that the situation *de jure* was in line with the respect of Art. 4§3 (for this reason the State was considered in compliance with this provision) but an adequate *de facto* situation was not demonstrated in the report. Actually Portugal did not provided information about the 28% difference in pay between sexes found out by ILO in practice and the impact of the CITE.

With the second report at issue (1994-1995) Portugal answers to the ECSR's request in the previous conclusion affirming that in case of retaliatory measures against the worker who demanded equal pay he can sue the employer before the Labour Court or with the General Labour Inspectorate. The usual procedure in those cases is the reintegration of the employee in the workplace and the payment by the employer of the wages lost from the dismissal to the date of the judgement. Only if it is impossible or if the employee doesn't want, the solution would be a compensation that should be one month's pay per year of service, even partial, and under no circumstances less than three months' pay.

The Committee at the end defers its XIII-5 conclusion because of some deficiencies: how these rules are applied in practice? What are the updated data in the 1993's most discriminatory categories, i.e.

²⁴ ECSR. *Conclusions XIII-3 - Portugal - Article 4§3*. Available at: <http://hudoc.esc.coe.int/eng?i=XIII-3/def/PRT/4/3/EN>

²⁵ ECSR. *Conclusions XIII-5 - Portugal - Article 4§3*. Available at: <http://hudoc.esc.coe.int/eng?i=XIII-5/def/PRT/4/3/EN>

semi-skilled workers and senior executives?

b. Conclusions XIV-2 ²⁶

In 1996 the missing information about the application of compensation in practice were not filled by the State: with this 1998 conclusion the Committee asked again about the iter for reinstatement or compensation. The national reference provisions are Section 11 of Legislative Decree 392/1979 on the ban of firing or sanctioning the worker after his/her claim for discrimination and Sections 12-13 of Legislative Decree No. 64-A/1989 that establish the method to calculate the compensation. But is this the maximum compensation or just a minimum point of reference for the judge? The ECSR wants to know. Furthermore the main problem emerging from the report is that the gender pay gap hasn't decreased in 10 years, the different being still at 28% in 1996. One of the causes of the gap is the insufficient measures to give effect to the equal pay principle.

c. Conclusions XVI-2 ²⁷

Here to the Committee one of the main point is the equal pay to be guaranteed also outside the corporate entity. In other words, it's vital that a comparison between equal works or works of equal value of different enterprises in order to have actual objective criteria and to deter unequal payments especially in majority-female bodies. Unfortunately the Legislative Decree of 1979 is not in conformity with the article of the topic because it assures equal pay for equal work or work of equal value only on a corporate entity level.

Thereafter the conclusion focuses on the too restrictive clauses contained in the Portuguese collective bargaining, especially metal sector agreements, because they consider to apply the equal pay principle and doing the comparison between works on the merely basis of the qualifications of employees.

Lastly, it is noted that there is a new legal sources entered into force in the period 1997-2000. It is the Act No. 118/1999 that stresses the gravity of labor-related offences and violations by imposing heavy fines but that is not clear on the amount of compensation of discriminated victims on the possibility to ask for the nullity of the discriminating contract.

At the end of the evaluation of the report, the Committee has still some unanswered questions on the part-time work: is the hourly pay of part-time employees that do the same or similar job of a full-time employee identical to the latter's one? Or the hourly wage depends on the number of hours of service?

²⁶ ECSR. *Conclusions XIV-2 - Portugal - Article 4§3*. Available at: <http://hudoc.esc.coe.int/eng?i=XIV-2/def/PRT/4/3/EN>

²⁷ ECSR. *Conclusions XVI-2 - Portugal – Article 4§3*. Available at: <http://hudoc.esc.coe.int/eng?i=XVI-2/def/PRT/4/3/EN>

Are there some benefits and bonuses only intended for full-time workers?

d. Conclusions 2014²⁸

After the Committee's decision to ask to the Member States a two-year report on equal pay both under Article 4§3 and Article 20 (the Articles of the Charter are now set up in 4 thematic groups) and the previous Portugal's conformity as regards the legal basis of the principle in conclusions 2012, here the ECSR starts with an analysis of the role of CITE. People who feel there was a violation of labor legislation can send a complaint to the Commission for Equality at work and in Employment that must formulate an opinion. In the era 2009-2012 it received three claims and answered with the respective non-binding administrative opinions but it did not illustrate if the Courts had aligned to them or not.

Therefore the Committee also underlined that the Portuguese report did not contain specific information about the national methods to comply to the EU standards of enforcement and judicial safeguards. Reference is made to the right to sue the employer by who suffered a working discrimination and the burden of proof transferred to the defendant, the right to a correct compensation in order to fix the employee's damages and deter the employer and the worker's right to be reintegrated in his workplace or to receive a compensation decided by the court after when he takes an action after a retaliatory dismissal.

As for the comparison between man and women wages, the report gives to the Committee some statistics: in 2011 the difference between men and women was 18% for basic pay and 20,9% for earnings and the gap increases with the increase of qualification and school education, in 2012 the unadjusted gender pay gap raised compared to 2011.

Moreover, the problem of equal pay comparisons outside the enterprise directly analyzed is also faced: in previous reports Portuguese Government stated that the comparison is impossible because the remuneration's differences among companies can be caused by different investments, type of business, organization of work while in 2012 the Committee stated that equal pay comparisons must be carried out in certain circumstances. These are when some provisions are valid for more than one company, when a collective agreement or regulation applies to many enterprises and when a holding establishes T&C identical for more than one subsidiary. The consideration arose from the case *A.G. Lawrence and Others v. Regent office Care Ltd*, No. 320/00, in which the European Court of Justice affirms that Article 141§1 EC does not limit the equal pay principle to the remuneration of men and women in the same company but that when the pay differences have not origin from a single source,

²⁸ ECSR. *Conclusions 2014 - Portugal – Article 4§3*. Available at: <http://hudoc.esc.coe.int/eng?i=2014/def/PRT/4/3/EN>

there is no responsibility and way to restore equal treatment. According to the Opinion of the Advocate General regarding this litigation, in cases such as employees working for the same legal person, workers of different establishments under the same collective works agreement there is only one source.

In summary, even if there are elements like the economic and development differences between areas and companies, an employee must have the possibility to compare his remuneration to the one of another typical worker if the legal source for pay calculation is the same.

II. Italy

Italy entered EEC in 1958 and from that moment has collected a lot of reports on Article 4§5 and consequent ECSR conclusion but only one decision, result of the same collective complaint that has involved also Portugal.

a. Conclusions I ²⁹ / II ³⁰ / III ³¹

The first known conclusion about Italian situation is not encouraging: it was the '60s and in many collective agreements the Committee found discriminations against workers, especially female ones, both as regards the remuneration and the job classification.

The result of the second report of the biennium 1968-1969 was similar because from a legal point of view the principle of equal pay was guaranteed but in practice the statistics showed a persistent discrimination, especially in predominantly female sectors, i.e. textile, clothing, teaching, office work.

Once again in the Conclusions III from the following biennium, the ECSR stated that Italy was not in compliance with Art. 4§3 because of the missing data on the application of the principle in job classification in the sectors mentioned above and also asked which were the objective criteria in order to determine the “work of equal value”.

b. Conclusions IV ³² / V ³³ / VI ³⁴ / VII ³⁵ / VIII ³⁶

In 1972-1973 Italian Courts started to really apply the principle of equal pay for equal work in case of recourse by the discriminated worker but the problem of having common criteria to compare the value of different jobs remained.

²⁹ ECSR. *Conclusions I - Italy – Article 4§3*. Available at: <http://hudoc.esc.coe.int/eng?i=I/def/ITA/4/3/EN>

³⁰ ECSR. *Conclusions II - Italy – Article 4§3*. Available at: <http://hudoc.esc.coe.int/eng?i=II/def/ITA/4/3/EN>

³¹ ECSR. *Conclusions III - Italy – Article 4§3*. Available at: <http://hudoc.esc.coe.int/eng?i=III/def/ITA/4/3/EN>

³² ECSR. *Conclusions IV - Italy – Article 4§3*. Available at: <http://hudoc.esc.coe.int/eng?i=IV/def/ITA/4/3/EN>

³³ ECSR. *Conclusions V - Italy – Article 4§3*. Available at: <http://hudoc.esc.coe.int/eng?i=V/def/ITA/4/3/EN>

³⁴ ECSR. *Conclusions VI - Italy – Article 4§3*. Available at: <http://hudoc.esc.coe.int/eng?i=VI/def/ITA/4/3/EN>

³⁵ ECSR. *Conclusions VII - Italy – Article 4§3*. Available at: <http://hudoc.esc.coe.int/eng?i=VII/def/ITA/4/3/EN>

³⁶ ECSR. *Conclusions VIII - Italy – Article 4§3*. Available at: <http://hudoc.esc.coe.int/eng?i=VIII/def/ITA/4/3/EN>

For the following report, the Committee asked to prove the absence of different remuneration between sexes into the agricultural sector and the objective criteria for job evaluation where they are still absent such as semi-public companies.

A big step forward was made thanks to the Act No. 903/1977 regarding equal treatment in employment and social insurance because in the equal pay field some of these new provisions deal with clauses contrary to the principle of Art. 4§3 and affirmed the invalidity of such clauses.

The last two Conclusions of this group relate to the period 1978-1981 and are not satisfying: if on one side Italian legislation was scrupulous with the recognition of the principle, on the other hand persisted a difficult and unproven application *de facto*.

c. Conclusions IX-2 ³⁷/ X-2 ³⁸/ XI-2 ³⁹/ XII-2 ⁴⁰

The years from 1982 to 1990 were characterized by an evolution both in *de jure* and *the facto* level. As for the first one in 1983 a new decree created the Equal Opportunities Commission with a transversal competence on the vast field of equal treatments between sexes. From a practical point of view, both the central state and the Regions kept on reaching the equalization of men and women working conditions through some new instruments, e.g. the appointment of advisers on the application of the principle of equality between men and women with regard to work, who are to be members of the various regional employment committees, the National Commission for the Achievement of Equality between Men and Women and regional committees on equality, It further noted the provision in a Bill for affirmative action on behalf of women.

d. Conclusions XIII-1 ⁴¹/ XIV-2 ⁴²

The Act No. 125/1991 was definitely the protagonist of the 1990-1991 Italian report, with incisive practical measures in favor of female workers. First of all it provided a financial assistance for actions of equalization and a greater protection of women due to the expansion of the meaning of “discrimination”: from that point on, also indirect discriminations were taken into account. Other important novelties were the reversed burden of proof in favor of plaintiff and the arising of a National Committee for implementation of the principles of equal treatment and equal opportunities for male and female workers and the nominee of Equal Councilors.

In Conclusions XIII the Committee requested for the next report some information and data on the

³⁷ ECSR. *Conclusions IX-2 - Italy – Article 4§3*. Available at: <http://hudoc.esc.coe.int/eng?i=IX-2/def/ITA/4/3/EN>

³⁸ ECSR. *Conclusions X-2 - Italy – Article 4§3*. Available at: <http://hudoc.esc.coe.int/eng?i=X-2/def/ITA/4/3/EN>

³⁹ ECSR. *Conclusions XI-2 - Italy – Article 4§3*. Available at: <http://hudoc.esc.coe.int/eng?i=XI-2/def/ITA/4/3/EN>

⁴⁰ ECSR. *Conclusions XII-2 - Italy – Article 4§3*. Available at: <http://hudoc.esc.coe.int/eng?i=XII-2/def/ITA/4/3/EN>

⁴¹ ECSR. *Conclusions XIII-1 - Italy – Article 4§3*. Available at: <http://hudoc.esc.coe.int/eng?i=XIII-1/def/ITA/4/3/EN>

⁴² ECSR. *Conclusions XIV-2 - Italy – Article 4§3*. Available at: <http://hudoc.esc.coe.int/eng?i=XIV-2/def/ITA/4/3/EN>

application of these new groups of provisions since according to the 1991 act the Italian Labour Minister had to present to the Parliament a report in 1993, two years after the coming into force. It also wanted to have news on the procedure in case of retaliatory dismissal or other measures: reinstatement or compensation? On the basis of which criterion? And finally, how does Italian government ensure the equality of the wage elements that go beyond the basic wage?

The following five-year report describes the impartial implementation of the 1991 Act and the absence of an observatory for data on the equal pay litigations, except for the Information Board linked with the National Committee that analyses collective agreement to avoid indirect discriminations. Especially the missing appointment of the Councillors is serious since they have the task of monitoring the women's situation in the working sector and also taking legal actions.

Due to these reasons and the lack of certain data directly coming from Italian State but only from Eurostat and ILO (according to Eurostat data for 1995, female manual workers earned on average 77 % of male manual workers' pay), in 1998 the Committee deferred its conclusion.

e. Conclusions 2014 ⁴³

After a period of analysis of the equal pay principle only under the wide Article 20 of the Charter (in the early 2000s Italy was found in conformity with the article), the Committee went back to evaluate the compliance both with Art. 4§3 and 20.

In the examines period 2009-2012 the main novelty was the Legislative Decree 5/2010, the national transposition of Directive 2006/54/EC, which led to some modifications on the original version of the Code for Equal Opportunities of 2006, e.g. the affirmation of the prohibition of direct and indirect pay discriminations and of specific preventing measures in collective agreements.

The new versions of Articles 36 and 37 of the Code also distinguished individual discrimination and collective one: the first one allows the discriminated worker to personally sue the employer, in the second situation it is up to the regional Equal Councilor taking action. As for the legal action, still exists the burden of proof imposed on the respondent and more severe sanctions were introduced (from € 250 to €1,500).

For the comparison between company's realities, Art. 46 of the Code started to impose to public and private bodies with more than 100 workers a two-year report about equality in remuneration, training, promotion and recruitment. Equally to the Conclusions 2014 about Portugal, the ECSR stated that in specific three situations the comparison between remuneration for equal work or work

⁴³ ECSR. *Conclusions 2014 - Italy – Article 4§3*. Available at: <http://hudoc.esc.coe.int/eng?i=2014/def/ITA/4/3/EN>

of equal value must be made with regard to more than one company in order to be accurate and truthful.

III. Decisions on Complaints No. 133/2016 and 136/2016: University Women of Europe (UWE) v. Italy/Portugal

a. Content

Only one ECSR decision relates to the compliance with the equal pay principle and the right to equal opportunities in the workplace, both under Article 4§3 and Article 20. The decisions, in fact, are multiple because they are the result of a collective complaint triggered by University Women of Europe against 15 States which have accepted the procedure and they were adopted on 5 and 6 December 2019. The States involved were: Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Finland, France, Greece, Ireland, Italy, Netherlands, Norway, Portugal, Slovenia and Sweden.⁴⁴

University Women of Europe (UWE) is an international non-governmental organization with participatory statute with the Council of Europe and it is in the list of NGO produced by the Governmental Committee of international NGO entitled to submit complaints before the ECSR. Its complaint fell into the scope of the organization itself, that is mainly to contribute to the development of programs of the Council of Europe and the European Women's Lobby and other European governmental and non-governmental organizations in the field of equality of women's rights and non-discrimination and to promote lifelong education especially for women and girls.

This decision is very significant for many reasons: firstly, the principle of equal pay is treated as a human right and not only as a social right that must be kept apart from other apparently more important principles. The idea of indivisibility between human and social field is here visible. Secondly, the topic of the decisions is an essential one: as it will be explained further on in the conclusion, an inadequate pay and differences between workers, especially between sexes, create many more problems both for the sociability of the individuals and the efficiency of the companies. At the end, the fact that the analysis of the ECSR is transversal through 15 States and that 14 of them have not compliant legal and/or policy measures is an clear alarm bell for all the States parties

⁴⁴ Council of Europe. *Gender pay gap is still persistent in Europe – Event*. Available at: https://www.coe.int/en/web/european-social-charter/european-committee-of-social-rights/-/asset_publisher/t5SoWyFqMYBR/content/the-decisions-on-the-merits-in-university-women-of-europe-uwe-v-belgium-bulgaria-croatia-cyprus-czech-republic-finland-france-greece-ireland-italy-the?_101_INSTANCE_t5SoWyFqMYBR_viewMode=view/

to the Charter which have not accepted the complaint and for the other States members of the Council of Europe which have not ratified the Charter.⁴⁵

The content of the decisions are the clear and precise obligations that the ECSR has already suggested during the last years' conclusions: to recognize the equal pay right from a legislative point of view, to ensure effective remedies in case of occurred pay discrimination, to make payments transparent and pay comparison and its criteria viable, to create or maintain efficient bodies tasked with monitoring the application of the principle and the remedies for the victim, to implement new measures to secure this right more and more.

The latter target must be based on periodic measurements and precise statistics collection on gender pay gap: only knowing which are the annual data and comparing them with the previous ones, a government is capable to analyze the reasons of the gender wage gap, that could also include an inefficient application of the principle of equal pay for equal work or work of equal value.

b. Decision 136/2016: Italy⁴⁶

Focusing only on the right equal pay, the UWE argues that the Italian situation was not in conformity with Articles 1, 4, 20 and E of the Charter and with Article 1 of the 1988 Additional Protocol because the unequal pay in female disfavor still existed and the national bodies with the task to control the effective respect of the employment dispositions are inefficient: the major reference is to the 2015 National Equality Committee, the councilors on a regional and provincial level and the labor inspectorate.

After presenting the observations of the European Trade Union Confederation (ETUC), the national legal context and the supranational one, the decision deals with the alleged violation of Article 4§3 and Article 20.C.

First of all, UWE states that ensuring the equal pay rights also means ensuring the access to affordable and direct judicial remedies, especially in case of retaliatory measures and that Italy has not proved with reliable data costs, ease of access and numbers of the judicial procedures. The government answers that after the Legislative Decree 8/2017 the violation of Article 28 of Legislative Decree 198/2006 on Prohibition of pay discrimination provides for an administrative fine from €5,000 to €10,000 and that the decriminalization leads to effective and high sanctions that

⁴⁵ Council of Europe. *UWE Decisions – Factsheet*. Available at: <https://rm.coe.int/uwe-decisions-factsheet-en/16809ede22>

⁴⁶ ECSR. *Decision on the merits: University of Europe (UWE) v. Italy, Complaint No. 133/2016*. Available at: <http://hudoc.esc.coe.int/eng?i=cc-133-2016-dmerits-en>

have to be paid and to eliminate the delays of the criminal law ensuring immediate application of the fine in case of discrimination.

Secondly, to UWE the lack of transparent information about collective agreements (CCNL) which fix minimum wages by economic sectors and qualifications and Second-Level Enterprise Contracts which should permit workers to have higher wages in case of increased productivity is connected to the problem of job classification: there are no clear criteria presented by the governments and no encouragement to make external bodies to define them. Italy argues that if public and private companies with more than 100 do not submit the report under Art. 46 of the Decree mentioned above, the Regional Labour Directorate can apply a sanction and suspend the social security benefits for one year in case of non-compliance.

Finally, according to UWE the Italian Equality Advisors are not independent because linked to the Department of Equal Opportunities of the Presidency of the Council of Ministers and there are no information about their concrete work in the field of non-discrimination. Also the Office for the promotion of Equal treatment and the Prevention of Discrimination on Race and Ethnicity (UNAR) was partially set aside and the Governments does not provide for reports of the monitoring by the Labour Inspectorate. The Italian legal reference is the Legislative Decree 196/2006 amended by the Legislative Decree 15/2015. The Government specifies that the Equality advisors are public officers on a national and local level that also have the competence in ensuring compliance for the remuneration aspect: they intervene freely when asked by the worker, they can manage preventive conciliations between employer and employee and intervene in a legal action before courts. They also have to submit a report annually, which is viewed by the National Gender Advisor. This latter and the local equality Advisers are strongly connected with the National Labour Inspectorate and the Labour Inspectors in order to create measures to facilitate the implementation of equality between men and women. The Inspectors also have to evaluate, to be effective, if the resignation or the cessation of employment is voluntary of cause by a discriminatory behavior of the employer.

The conclusion of the Committee is not totally positive because it voted:

- unanimously for the absence of violation of Art. 4§3 and Art. 20.c as regards recognition of the right to equal pay for work of equal value on a legal level;
- by 11 votes to 4 that Italy was compliant with these articles as regards access to effective remedies, also judicial;
- unanimously for the violation of the articles in the context of pay transparency;
- unanimously for the absence of violation for the aspect of equality bodies and entities.

c. Decision 133/2016: Portugal ⁴⁷

As for the Portugal applicative situation of equal pay principle, UWE alleges that also this State was in violation of the articles: despite the supranational provisions, equal pay is not yet a reality also due to the failure of the bodies used as a monitor to control pay discrimination, such as the Labour Equality Commission and the labor inspectorate.

In this case there are observations by ETUC and also by the European Network of Equality Bodies (EQUINET), the list of relevant domestic law and international legal materials.

UWE starts its arguments by saying that the right of equal pay is present in the Constitution but that all the Portuguese laws on this topic are not renovated and effective. To the Government, there are lot of appropriate laws and decrees that have implemented the constitutional basis.

Additionally the Organization claims that the low number of pay discrimination episodes in Portugal are due to some problems: no resources in the hands of the worker, no criteria for comparing jobs, time limits to stand up for themselves, high costs for judicial procedures and complexity in obtaining evidences, inadequate compensations and sanctions and risk of retaliatory dismissal, especially for women. In addition to this, information are missing about the efficiency of juridical supervision, proceedings, costs: as for the remedies in favor of a discriminate employee, EQUINET states that in Portugal the idea of sue the employer before the court for discriminatory acts barely exists. Portugal points out that data are meaningful: in 2016 the number of pending administrative proceedings has decreased by 58% compared to 2013 and the condemnations has increased by 63% compared to 2015. A specific legal framework that aims to make justice more accessible in case of discrimination (for national and EU citizens, for stateless people with a EU residence permit and for who lacks financial means) is present especially in the Law 34/2004. Art. 25 of the Labour Code provides for the inversion of the burden of proof.

As for pay transparency, UWE notices many non-neutral job classifications and a lot of bias: for example, who works in the municipal parks department is predominantly male and receives a bonus while workers of a municipal kindergartens and nurseries don't and the same can go for the private sector. If the classification is made accessible and neutral and a comparison between companies is made possible as the Charter requires, an employee is able to take action to obtain equality. The Government defends itself by mentioning an important project arose in 2016 by a trade union

⁴⁷ECSR. *Decision on the merits: University of Europe (UWE) v. Portugal*, Complaint No. 136/2016. Available at: <http://hudoc.esc.coe.int/eng?i=cc-136-2016-dmerits-en>

confederation and other organizations such as ILO Lisbon office and CITE: it aimed to formulate a job evaluation method free from gender bias and focused on the value of work. This evaluation was tried in many small and medium-sized enterprises in the sector of food and beverage, realizing that the female-dominant occupations were less valued and had worse working conditions. After the experiment, the evaluating method was applied in textile, footwear and wool in order to identify which occupational categories were gender segregated and to obtain the same improvements of the first project's application. Moreover, in 2014 CITE made available two web tools for companies that allow them to evaluate their pay methods and if the cause of a possible difference is gender-based. The first one is a questionnaire about job evaluation methods and pay methods in order to find out possible situations of discriminating treatment between sexes: it is the Self-Assessment Survey on Equal Pay between Men and Women in Companies. The second one, the Gender Pay Gap Calculator, is a software through which the companies are able to measure their gaps, to find the cause (gender-based or based on objective and different factors).

At the end UWE takes into account the Portuguese Equality bodies: the Commission for Equality in Labour and Employment (CITE) that examines complaints of violation of labor legislation and the Citizenship and gender Equality Commission on a local level. Both of them are too dependent to the Government, they haven't enough funds and they are not efficient since few complaints come to the Commission. Another point is the duty for employers to send an annual report, especially on payments, to the Working Conditions Authority (ACT) representing the labour inspection authority, to trade unions committees and employer representatives. On this UWE sustains that the monitoring of the ACT are insufficient as well as the activity of labor inspectorate: there are no information about the funds and the workforce for these two bodies. The Government lists in response the positive action made by the CITE, e.g. receiving complaints on violation of laws about non-discrimination between sexes and generating mandatory legal opinion during procedures (more than 90% of complaints and legal opinions were on cases of female discrimination). Also the ACT proposed a specific annual programme of visits, requestable by anyone, with the scope of creating an equal internal labor market and protecting vulnerable groups of workers and others were in progress (the most relevant is the National Strategy for Safety and Health at Work 2015-2020). Additionally, in 2014 it trained more than 100 inspectors on gender equality and nondiscrimination. Finally, in the website there are information that are intended to help employers and worker in applying the law and create awareness on duties and rights.

As for the Portugal's situation, the Committee has considered it more compliant that the Italian one establishing that:

- unanimously, there is no violation of Articles 4§3 and 20.c for the legal recognition of the equal pay principle;
- by 11 votes to 4, there is no violation in the access to effective remedies;
- by 14 votes to 1, Portugal is compliant as for the remuneration transparency and job comparison's methods;
- by 12 votes to 3, national equality bodies are compliant with the articles.

6. CONCLUSIONS

At this point is clear that the right of equal pay for equal work or work of equal value clearly is an essential social right since it is contained in the European Social Charter. However, it is not just that: it must be considered a fundamental right and a human right as much as civil and political rights. This claim derives both from the theoretical concept of universality, indivisibility and interrelation between liberty rights and social rights and from a practical analysis of the consequences of unequal pay, especially between men and women. In fact, the right of equal pay is a *facere* obligation that, among others causes as said in the introduction, has an impact on the gender pay gap. Consequently discriminations in remuneration and a wide gender pay gap create drop-down effects on labour market in general and on the individual companies but also on the social context.

Firstly, women struggle to achieve the higher paid positions and this is a loss of talent that must be prevented by attracting them with appropriate recruitment processes, flexible working practices and job design. Moreover, providing equal pay and targeting gender wage gap creates benefit for the business of the enterprises: it reduces the risk of claims, the employees feel more valued and trust more the body, the productivity becomes higher.

Secondly, the problem must be seen also on public policy perspective. There is an impact on the economic activity in terms of GDP (Gross Domestic Product) because a decrease of gender pay gap by 17% to 16% would increase the GDP per capita by \$260 more or less. There are effects also on the women's pensions due to the fact that the work less in terms of years, they earn less and they face more poverty in their seniority.

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