



# Gender pay gap and under-representation of women in decision-making positions: UWE decisions of the European Committee of Social Rights

Barbara Kresal<sup>1</sup>



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## Abstract

The aim of this article is to present the decisions of the European Committee of Social Rights concerning collective complaints, lodged by University Women of Europe (UWE) against 15 European states, in which the issues of the gender pay gap and gender imbalance in decision-making positions within private companies were raised. The Committee assessed compliance with the right to equal pay and the right to equal opportunities in the workplace and clarified the requirements stemming from the European Social Charter in this respect.

**Keywords** Equal pay · Gender pay gap · Under-representation of women in decision-making · European Committee of Social Rights · European Social Charter

## 1 Introduction

The article addresses the gender pay gap and under-representation of women in decision-making positions from a human rights perspective. Equal pay for equal work or work of equal value and gender balance in decision-making positions are human rights issues. They both fall within the broad scope of gender equality. The European

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✉ B. Kresal  
[barbara.kresal@fsd.uni-lj.si](mailto:barbara.kresal@fsd.uni-lj.si)

<sup>1</sup> Associate Professor of Labour Law and Social Security, University of Ljubljana, Ljubljana, Slovenia

Social Charter (ESC or ‘the Charter’),<sup>1</sup> the Council of Europe’s human rights treaty, often described as the counterpart of the European Convention on Human Rights (ECHR) or as the Social Constitution of Europe,<sup>2</sup> guarantees economic and social human rights and among them also the right to equal pay of women and men for work of equal value and the right to equal opportunities and equal treatment without discrimination on grounds of sex in matters of employment and occupation, *inter alia*, as regards remuneration and career development, including promotion.

In December 2019, the European Committee of Social Rights (ECSR) adopted 15 decisions within the framework of the collective complaints procedure under the European Social Charter which concern compliance with the right to equal pay and the right to equal opportunities in the workplace in Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Finland, France, Greece, Ireland, Italy, the Netherlands, Norway, Portugal, Slovenia and Sweden.

It is worth noting that 13 out of these 15 countries have already ratified and are bound by the revised Charter, except Croatia and Czech Republic which are still bound by the 1961 Charter. This has not caused any differentiation between the respective states in terms of the relevant procedural and material legal framework. The relevant provisions of the Charter under which the assessment has been done by the Committee are identical in the original Charter, as amended by the 1988 Additional Protocol, and in the revised Charter (Articles 4§3 and 20 of the revised Charter correspond entirely to Article 4§3 of the 1961 Charter and Article 1 of the 1988 Additional Protocol). Besides, the same rules on supervisory machinery apply to both, the 1961 Charter and the revised Charter.

These 15 states have accepted the collective complaints procedure, the supervisory mechanism under the ESC which was introduced – in addition to the regular reporting system – by the Collective Complaints Procedure Protocol (the 1995 Protocol).<sup>3</sup> The aim of the 1995 Protocol was to improve the effective enforcement of the rights guaranteed by the Charter, *inter alia*, by strengthening the role of the social partners and non-governmental organisations which can, under the prescribed con-

<sup>1</sup>The European Social Charter was signed in Turin in 1961 (Council of Europe, ETS No. 035, available at: <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/035>). In 1988, the Additional Protocol to the ESC was adopted (Council of Europe, ETS No. 128, available at: <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/128>), adding four new rights to the Charter. In 1996, the Revised European Social Charter was adopted (Council of Europe, ETS No. 163, available at: <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/163>) bringing together in a single treaty all rights enshrined in the 1961 Charter (some of them have been significantly upgraded and updated) and the 1988 Additional Protocol and adding eight new rights. The Charter, in its revised version, now guarantees 31 economic and social human rights, often referred to as fundamental social rights, and was intended to gradually replace the 1961 Charter. However, eight countries are still bound by the 1961 Charter, while 35 countries have already ratified and are bound by the 1996 Revised Charter. In 2020, German Bundestag approved the Government’s proposal to ratify the revised Charter, and on 29 March 2021, Germany ratified it. Ratifications and accepted provisions by the States Parties available at: <https://www.coe.int/en/web/european-social-charter/home>.

<sup>2</sup>De Schutter [7]; Salcedo Beltrán [15]; etc.

<sup>3</sup>Additional Protocol to the European Social Charter Providing for a System of Collective Complaints, Strasbourg, 9.11.1995 (Council of Europe, ETS No. 158, available at: <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/158>).

ditions, lodge a collective complaint.<sup>4</sup> University Women of Europe (UWE), one of the international NGOs holding the participatory status with the Council of Europe, made use of this possibility and lodged collective complaints concerning equal pay and gender balance in decision-making positions.

In the preliminary considerations in the UWE decisions, the ECSR pointed out that despite the obligations deriving from the Charter and other international and European instruments to recognise and ensure the right to equal opportunities and equal pay for women and men for equal work or work of equal value, the gender pay gap still persists today and that the available statistics reveal both downward and upward trends in gender pay gap indicators in European States as well as insufficient results of States' efforts to ensure a balanced representation of women in decision-making positions.<sup>5</sup> Numerous researches and studies confirm this.

Prohibition of discrimination is one of the cornerstones of the international human rights law and at the very heart of the Charter. It is the essential substance of all human rights, including the right to a fair remuneration. Equal pay for work of equal value without discrimination on grounds of sex is one of the essential aspects of gender equality. The same goes to equal opportunities and equal treatment of women and men in employment in general and as regards career development and promotion in particular, including access to decision-making positions. This article aims to shed light on important decisions of the ECSR addressing these issues from the perspective of the European Social Charter, i.e. from the human rights perspective. After shortly presenting the collective complaints lodged by UWE (Sect. 2) and the relevant provisions of the Charter (Sect. 3), this article focuses on the ECSR's assessment (Sect. 4). In Sect. 4.1, the relevant parts of the UWE decisions as regards equal pay are presented, followed by Sect. 4.2 on gender balance in decision-making positions. The Conclusion in Sect. 5 summarises the main findings.

## 2 Collective complaints

In 2016, UWE lodged 15 collective complaints against 15 European states, alleging that the existing gender pay gap and under-representation of women in decision-making positions within private companies amounted to a violation of the European Social Charter.

The issue of equal pay was raised for the first time within the framework of collective complaints procedure. Besides, for the first time, collective complaints concerning the same issue have been lodged against all 15 states that have accepted collective complaints procedure, a quasi-judicial procedure under the European Social Charter.

Each of these 15 collective complaints addressed, of course, a specific situation in a particular country. There are important differences between them in terms of legislative framework, institutional structure, organisation and competences as well as the resources of equality bodies and inspectorates, the access to courts and case

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<sup>4</sup>More on collective complaints procedure Cullen [6]; Clauwaert [4]; Churchill and Khaliq [3].

<sup>5</sup>*University Women of Europe (UWE) v. Belgium*, Complaint No. 124/2016, Decision on the merits of 6 December 2019, § 110.

law on equal pay, statistical data, various measures taken by the states in this area, etc., however, there are also important similarities. The problem raised by UWE in all of the collective complaints was the same: women are still paid less than men, women are under-represented in decision-making positions within private companies.

It is not possible to go into details of specific situations in each of these countries and to present their legal framework and practice with all relevant data as regards the issues at stake. The aim of this article is not a comparative analysis of the problem of gender discrimination, pay inequalities and gender imbalance in decision-making positions in these countries. Rather, the article seeks to identify human rights requirements with respect to equal pay and gender balance in decision-making positions that can be deduced from the UWE decisions. What are the obligations for the states stemming from the relevant provisions of the European Social Charter?

The ECSR decided that the collective complaints are admissible in July 2017 and adopted the decisions on the merits in December 2019.<sup>6</sup> Following the rules of the Collective Complaints Procedure Protocol (Art. 8), the decisions on the merits were made public in June 2020. Although UWE lodged these complaints “in a package”, that is at the same time, alleging the same violations and invoking the same provisions of the Charter, the ECSR did not decide to join the cases. The Committee adopted 15 decisions, each of them concerning a particular situation in a particular country.<sup>7</sup> There are, of course, important differences between them reflecting differences in the respective countries, however, there are also common parts in all of the UWE decisions.

In this article, I use the UWE decision concerning Belgium (No. 124) for reference purposes when discussing the common parts which appear in the same wording in all of the decisions (preliminary considerations, relevant international materials, introductory paragraphs of the assessment parts of the decisions on the merits).

<sup>6</sup> *UWE v. Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Finland, France, Greece, Ireland, Italy, the Netherlands, Norway, Portugal, Slovenia and Sweden*, Complaints Nos. 124-138/2016, Decisions on the merits of 5 and 6 December 2019. Available in the database HUDOC-ESC at: <https://hudoc.esc.coe.int/>.

<sup>7</sup> *UWE v. Belgium*, Complaint No. 124/2016, Decision on the merits of 6 Dec 2019 (<http://hudoc.esc.coe.int/eng?i=cc-124-2016-dmerits-en>); *UWE v. Bulgaria*, Complaint No. 125/2016, Decision on the merits of 6 Dec 2019 (<http://hudoc.esc.coe.int/eng?i=cc-125-2016-dmerits-en>); *UWE v. Croatia*, Complaint No. 126/2016, Decision on the merits of 5 Dec 2019 (<http://hudoc.esc.coe.int/eng?i=cc-126-2016-dmerits-en>); *UWE v. Cyprus*, Complaint No. 127/2016, Decision on the merits of 5 Dec 2019 (<http://hudoc.esc.coe.int/eng?i=cc-127-2016-dmerits-en>); *UWE v. Czech Republic*, Complaint No. 128/2016, Decision on the merits of 5 Dec 2019 (<http://hudoc.esc.coe.int/eng?i=cc-128-2016-dmerits-en>); *UWE v. Finland*, Complaint No. 129/2016, Decision on the merits of 5 Dec 2019 (<http://hudoc.esc.coe.int/eng?i=cc-129-2016-dmerits-en>); *UWE v. France*, Complaint No. 130/2016, Decision on the merits of 5 Dec 2019 (<http://hudoc.esc.coe.int/eng?i=cc-130-2016-dmerits-en>); *UWE v. Greece*, Complaint No. 131/2016, Decision on the merits of 5 Dec 2019 (<http://hudoc.esc.coe.int/eng?i=cc-131-2016-dmerits-en>); *UWE v. Ireland*, Complaint No. 132/2016, Decision on the merits of 5 Dec 2019 (<http://hudoc.esc.coe.int/eng?i=cc-132-2016-dmerits-en>); *UWE v. Italy*, Complaint No. 133/2016, Decision on the merits of 6 Dec 2019 (<http://hudoc.esc.coe.int/eng?i=cc-133-2016-dmerits-en>); *UWE v. Netherlands*, Complaint No. 134/2016, Decision on the merits of 6 Dec 2019 (<http://hudoc.esc.coe.int/eng?i=cc-134-2016-dmerits-en>); *UWE v. Norway*, Complaint No. 135/2016, Decision on the merits of 5 Dec 2019 (<http://hudoc.esc.coe.int/eng?i=cc-135-2016-dmerits-en>); *UWE v. Portugal*, Complaint No. 136/2016, Decision on the merits of 5 Dec 2019 (<http://hudoc.esc.coe.int/eng?i=cc-136-2016-dmerits-en>); *UWE v. Slovenia*, Complaint No. 137/2016, Decision on the merits of 5 Dec 2019 (<http://hudoc.esc.coe.int/eng?i=cc-137-2016-dmerits-en>); *UWE v. Sweden*, Complaint No. 138/2016, Decision on the merits of 6 Dec 2019 (<http://hudoc.esc.coe.int/eng?i=cc-138-2016-dmerits-en>).

### 3 Relevant provisions of the European Social Charter

UWE invoked Articles 1 (right to work), 4§3 (right to equal pay for work of equal value), 20 (right to equal opportunities and equal treatment in matters of employment and occupation without discrimination on the grounds of sex) and Article E (non-discrimination).

As already noted above, Croatia and Czech Republic have not ratified the revised Charter. Therefore, instead of referring to Article 20 of the revised Charter, the reference to Article 1 of the 1988 Additional Protocol was made, and as regards Article E which does not appear as such in the 1961 Charter,<sup>8</sup> UWE made reference to the Preamble of the 1961 Charter which contains the non-discrimination clause in its fourth recital.

Another remark has to be made: Croatia and Cyprus have not accepted and are not bound by Article 4§3. This has also not caused any differentiation between the states as regards the approach to the assessment. Since Croatia has accepted Article 1 of the 1988 Additional Protocol and Cyprus has accepted Article 20 of the revised Charter, the assessment was made under this provision, which fully absorbed Article 4§3 (see below).

Further on in this article, only the reference to the revised Charter will be used with no specific mention of the corresponding articles of the 1961 Charter and the 1988 Additional Protocol.

The collective complaints and the complainant's allegations are quite complex. In essence, UWE alleged that the situations in the respective states (that is, gender pay gap and under-representation of women in decision-making positions in the private companies) amounted to a violation of the above-mentioned provisions of the Charter, mainly due to the failure to ensure that the relevant legislation was effectively enforced in practice.

All the provisions of the Charter, invoked by UWE, are strongly interconnected, interrelated and they also overlap. Therefore, the ECSR considered, following its existing case law on the matter, that the assessment in substance belongs under Articles 4§3 and 20 of the Charter and based its assessment on these two provisions of the Charter. The very wording of Articles 4§3 and 20 of the Charter clearly indicate that their scope includes the prohibition of discrimination. The ECSR decided that it was not necessary to examine the situation under Article 1 and Article E in conjunction with the invoked Articles.<sup>9</sup>

Article 4 of the Charter stipulates that

“[w]ith a view to ensuring the effective exercise of the right to a fair remuneration, the Parties undertake:

...

<sup>8</sup>On non-discrimination in the 1961 Charter and in the revised Charter see Kollonay-Lehoczy [13], p. 491-492; De Schutter [8], p. 29, 33. The ECSR has already referred to and applied the non-discrimination clause of the 1961 Charter's Preamble, for example, in the Greek austerity cases (*Greek General Confederation of Labour (GSEE) v. Greece*, Complaint No. 111/2014, Decision on the merits of 23 March 2017, § 197; and others).

<sup>9</sup>*UWE v. Belgium*, op. cit. supra, § 109.

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

According to Article 20 of the Charter (Article 1 of the 1988 Additional Protocol),

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

...

- c. terms of employment and working conditions, including remuneration
- d. career development, including promotion”.

Csilla Kollonay-Lehoczky explains that Article 4§3 on equal pay is fully absorbed by Article 20 and that “there is no element of this provision that is not addressed by Article 20,” whereby the later builds on a more up-to-date approach, emphasising also the promotion through positive measures.<sup>10</sup> The interpretation of equal pay and the relevant case law under Article 20 applies also to Article 4§3. This is evident in the existing case law of the ECSR. The right to equal pay of women and men for work of equal value, explicitly guaranteed by Article 4§3 as a self-standing right and an essential element of the right to a fair remuneration, is at the same time also an aspect of the right to equal opportunities and equal treatment in matters of employment without discrimination on grounds of sex guaranteed by Article 20.

#### 4 The Committee’s Assessment

The ECSR had a challenging task before it. 15 collective complaints that are very complex and raise one of the fundamental human rights issues, not yet dealt with in the collective complaints procedure. 15 different situations in different states which must be assessed using the same standards and criteria. It was necessary to develop a clear structure of the assessment, to identify relevant legal aspects, to define legal requirements stemming from Articles 4§3 and 20 of the Charter. What is the content of these provisions? What is the content of the right to equal pay and the right to equal opportunities in the workplace without discrimination on grounds of sex?

In the preliminary considerations, the ECSR emphasised that the Charter is a living instrument and its provisions must be interpreted in a dynamic manner having regard to present day requirements.<sup>11</sup> Therefore, the ECSR decided to take a “fresh look” at the provisions of the Charter with a view to analysing and clarifying the obligations arising from Articles 4§3 and 20 and structured its assessment in the following way:<sup>12</sup>

<sup>10</sup>Kollonay-Lehoczky [12], p. 364. See also Mikkola [14], p. 182; Adams and Deakin [1], p. 213; and others.

<sup>11</sup>*UWE v. Belgium*, op. cit. supra, § 114.

<sup>12</sup>*Ibid.*, §§ 113, 115.

- (a) assessment of UWE's allegations concerning the respect for the right to equal pay for the right to equal pay for equal work or work of equal value from two angles:
- the obligations of the State as regards the recognition and the enforcement of the right to equal pay under Articles 4§3 and 20.c:
    - Recognition of the right to equal pay in legislation
    - Ensuring the access to effective remedies
    - Ensuring pay transparency and enabling job comparisons
    - Maintaining effective equality bodies and other relevant institutions
  - the obligations of the State to adopt measures to promote the right to equal pay under Article 20.c:
    - Collection of reliable and standardised data with a view to measuring gender pay gap
    - Adoption of measures to promote equal opportunities through gender mainstreaming
- (b) assessment of the issues in relation to the representation of women in decision-making positions within private companies under Art 20.d

As can be seen from the above scheme, the Committee's assessment was divided into two parts. First, it addressed the issue of equal pay under Articles 4§3 and 20.c and then gender-balanced representation under Article 20.d of the Charter. Equal pay was assessed from two angles: first, as regards "to recognise and enforce" and then as regards "to promote". The predominant part of the decisions deals with the right to equal pay, the Committee has conducted a comprehensive and in-depth assessment and the structure of the assessment as regards the right to equal pay is very detailed. Much shorter part of the decision is devoted to the gender-balanced representation in decision-making positions and the assessment in this respect is not as structured as in the first part. This is understandable, since it concerns a very specific, rather narrow aspect within the broader field of "career development and promotion" which is again part of a broad concept of right to equal opportunities and equal treatment in employment.

The essential elements of the right to equal pay can be deduced from the above structure of the assessment:

1. legislation prohibiting pay discrimination,
2. effective remedies,
3. pay transparency, objective job evaluation and job comparison,
4. institutional infrastructure,
5. promotion (appropriate measures).

In the preliminary considerations, the Committee emphasised that the right of workers to a fair remuneration is at the heart of the Charter and that the right of women and men to equal pay is one of the constituent elements of fair remuneration. The Committee pointed out that "(a)ll the States Parties to the Charter having accepted Articles 4§3 and/or 20 are aware that this right has to be practical and effective, and not merely theoretical or illusory" and that this right has a long history in the Charter. It referred to its previous case law and emphasised that already in the original Charter of 1961, under Article 4§3, the States Parties undertook to recognise the *right* to equal

pay, thus going beyond mere promotion of the principle and conferring an absolute character on this provision.<sup>13</sup> That means that it concerns the obligation of results and not just the obligation of an effort. It must be recognised and enforced here and now. Besides, the states must also adequately promote the right to equal pay with a view to ensure its effective realisation in practice.

It is also important to emphasise that the gender pay gap *per se* cannot be automatically considered as pay discrimination, rather, it is an indicator of differences in pay. It is important to address and analyse various pay gap indicators, such as unadjusted and adjusted, unexplained and explained gender pay gap, the sectoral, occupational and vertical gender segregation as sources of differences in pay, etc. In the preliminary considerations, the ECSR pointed out that gender pay indicators do not measure discrimination as such, rather they reflect a combination of differences in the average pay of women and men. It noted that the unadjusted gender pay gap, for example, covers both, possible discrimination between men and women (one component of the “unexplained” pay gap) and the differences in the average characteristics of male and female workers (the “explained” pay gap), and that these differences in the average characteristics result from many factors, such as the concentration of one sex in certain economic activities (sectoral gender segregation) or the concentration of one sex in certain occupations (occupational gender segregation), including the fact that too few women occupy the better paid decision-making positions (vertical segregation).<sup>14</sup>

Various studies on the determinants of gender pay gaps help to explain the persistence and the causes of this phenomenon, whereby the decomposition in explained and unexplained gender pay gaps is particularly interesting and instructive. As Boll and Lagemann point out, wage decomposition analyses reveal a tremendous degree of country heterogeneity concerning the roots of gender pay gap and policies aiming at tackling this problem should address both across-sector and within-sector differences in gendered pay.<sup>15</sup>

## 4.1 Equal pay (4§3 and 20.c)

### 4.1.1 Recognition and enforcement of the right to equal pay

**Recognition of the right to equal pay in legislation** First element and requirement that arises from the right to equal pay as guaranteed by the Charter is the recognition of the right to equal pay in legislation. What does it encompass?

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 must apply to both, 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.<sup>16</sup>

<sup>13</sup>*Ibid.*, §§ 105, 106, 108. An absolute character was already emphasised by the Committee in its Statement of interpretation from 1971 (Conclusions II (1971), Statement of Interpretation on Article 4§3).

<sup>14</sup>*UWE v. Belgium*, op. cit. supra, § 112.

<sup>15</sup>Boll and Lagemann [2], pp. 31.

<sup>16</sup>*UWE v. Belgium*, op. cit. supra, § 139.



The ECSR emphasised that 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 with regard to remuneration. The principle of equal pay precludes unequal pay irrespective of the mechanism that produces such inequality (the law, collective agreements, individual employment contracts, internal Laws of an employer).<sup>17</sup>

When the ECSR assessed the situation in 15 States from the perspective of these legal requirements, it found no violations. In all 15 States Parties that have accepted the Collective Complaints Procedure Protocol, there is an adequate legislation in force, complying with the requirements presented above. That is actually no surprise, since the main problem, also raised by UWE, is the effective enforcement of the existing legislation in practice.

**Ensuring the access to effective remedies** The second element of the right to equal pay is the access to effective remedies. The obligation to ensure the access to effective remedies when the right to equal pay for equal work or work of equal value has not been guaranteed comprise the following:

- appropriate and effective remedies in the event of alleged pay discrimination;
- adequate compensation;
- the shift in the burden of proof;
- retaliatory dismissal must be prohibited.

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 must be affordable and timely.<sup>18</sup>

The Committee also identified clear and strong standards as regards compensation in cases of pay discrimination. It emphasised that anyone who suffers pay discrimination must be entitled to adequate compensation. Compensation must be sufficient to make good the damage suffered by the victim and to act as a deterrent. It is important that 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.<sup>19</sup>

Besides, the burden of proof must be shifted,<sup>20</sup> and a retaliatory dismissal in cases of pay discrimination forbidden.<sup>21</sup>

<sup>17</sup>*Ibid.*, §§ 140-141.

<sup>18</sup>*Ibid.*, § 145.

<sup>19</sup>*Ibid.*, § 146.

<sup>20</sup>*Ibid.*, § 147. The ECSR already adopted the Statement of interpretation on this matter in 1995. According to the established case law of the Committee, 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).

<sup>21</sup>*UWE v. Belgium.*, op. cit. supra, § 148. The ECSR further specified the requirements in this respect: Where a worker is dismissed on this grounds, the worker should be able to file a complaint for dismissal

This element of the right to equal pay seems to be quite a problem in certain States. The ECSR found a violation in this respect in Bulgaria, Croatia, Finland, Greece and Slovenia. It is worth noting that most of the remaining decisions in which no violation was found were not reached unanimously, indicating that there were certain doubts and concerns raised also in respect of other countries.

**Ensuring pay transparency and enabling job comparison** The third element of the right to equal pay as guaranteed by the Charter is pay transparency. The following is of a particular importance:

- pay transparency is instrumental;
- job classification and objective job evaluation systems;
- evaluation criteria must be gender-neutral;
- possibility of making job comparisons is essential.

One of the most important messages of the UWE decisions is that pay transparency is instrumental for effective realisation of the right to equal pay. Transparency contributes to identifying gender bias and discrimination and it facilitates the taking of corrective action.<sup>22</sup>

Differences between countries in their approach to this sensitive, but crucial issue are significant, depending also on their traditions, industrial relations systems, etc. Taking into account these differences, the Committee nevertheless requires that the states take measures with a view to ensuring adequate pay transparency in practice, such as, for example, an obligation for employers to regularly report on wages and produce disaggregated data by gender.<sup>23</sup>

The central question is how to establish whether work performed is equal or of equal value. The ECSR points out that 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 must be adequately clarified in domestic law, either through legislation or case law.<sup>24</sup> 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.<sup>25</sup>

The Committee also emphasised that the possibility of making job comparisons is essential to ensuring equal pay. Lack of information on comparable jobs and pay levels could render it extremely difficult for a potential victim of pay discrimination to bring a case to court. Workers should be entitled to request and receive information on pay levels broken down by gender, including on complementary and/or variable

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without valid reason. In this case, the employer must reinstate the worker in the same or a similar post. If reinstatement is not possible, the employer must pay compensation, again according to the criteria for adequate compensation described above (must be sufficient to cover pecuniary and non-pecuniary damage and to deter the employer).

<sup>22</sup>*Ibid.*, § 154.

<sup>23</sup>*Ibid.*, § 155. Explicit reference is also made to the EU Recommendation on strengthening the principle of equal pay between men and women through transparency (2014/124/EU), OJ L 69, 8.3.2014, p. 112–116.

<sup>24</sup>This is particularly important, emphasised the Committee, because this notion has a qualitative dimension and may not always be satisfactorily defined, thus undermining legal certainty.

<sup>25</sup>*UWE v. Belgium*, op. cit. supra, § 156.

components of pay. As the ECSR noted, the general statistical data on pay levels may not be sufficient to prove discrimination. Therefore the ECSR explicitly pointed out that 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.<sup>26</sup>

It is obvious that the requirements with respect to pay transparency and job comparison are directly linked to and interconnected with the previous element of the right to equal pay, i.e. the access to court and the right to effective remedies. There could be no effective access to court without pay transparency and possibility of job comparison.

The ECSR further emphasised that 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 necessary for an appropriate comparison.<sup>27</sup>

Obligation to ensure pay transparency, objective and gender-neutral job evaluation as well as appropriate job comparison seems to be the most delicate aspect of the right to equal pay. Nearly all 15 States were found to be in violation of at least one or even more of these requirements, except Finland, France, Portugal and Sweden.

**Maintaining effective equality bodies and other relevant institutions** The last aspect within the first part of the assessment concerning the right to equal pay cover the specialised equality bodies and other institutions which monitor and promote the compliance with the equal pay principle and can have other functions as well, such as the assistance to victims of discrimination (provide personal and legal support to complainants, mediate settlements in cases of discrimination, represent victims in cases of discrimination etc.) and decision-making (receive, examine and hear cases of discrimination, issue binding or authoritative decisions on complaints concerning alleged discrimination etc).<sup>28</sup> By referring to its case law, the ECSR emphasised that measures to foster the full effectiveness of the efforts to combat discrimination include setting up of a specialised body to monitor and promote, independently, equal treatment, especially by providing discrimination victims with the support they need to take proceedings,<sup>29</sup> and that the satisfactory application of the Charter cannot be ensured solely by the operation of legislation if this is not effectively applied and rigorously supervised.<sup>30</sup>

The status of such equality bodies in terms of their mandate, their independence and resources must be clearly defined. The ECSR emphasised that in addition to having a clear and comprehensive mandate, these specialised equality bodies must be equipped with the necessary human and financial resources as well as infrastructure to ensure that they can effectively combat and eliminate pay discrimination.<sup>31</sup>

<sup>26</sup>*Ibid.*, § 157.

<sup>27</sup>*Ibid.*, § 158. As regards the scope of job comparison, the ECSR also refers to its previous Statement of interpretation on Article 20 (Conclusions 2012).

<sup>28</sup>*UWE v. Belgium*, op. cit. supra, §§ 167-168.

<sup>29</sup>ECSR, Conclusions XVI-1, Article 1§2, Iceland.

<sup>30</sup>*ICJ v. Portugal*, Complaint No. 1/1998, Decision on the merits of 9 September 1999, § 32.

<sup>31</sup>*UWE v. Belgium*, op. cit. supra, §§ 167, 169.

All 15 States but one, Bulgaria, were found to be in conformity with these requirements, however, not all decisions were unanimous.

#### 4.1.2 Obligation of the State to adopt measures to promote the right to equal pay

In addition to the obligation to recognise and enforce the right to equal pay, the States Parties have an obligation to promote this right which comprises of the following:

- collection of reliable, standardised data in order to enable measuring the gender pay gap;
- adoption of measures to promote equal opportunities through gender mainstreaming.

The Committee emphasised that the collection of high-quality pay statistics broken down by gender and the statistics on the number and type of pay discrimination cases are crucial; the collection of such data increases pay transparency at aggregate levels and uncovers the cases of unequal pay.<sup>32</sup> States are under an obligation to analyse the causes of pay inequalities in order to be able to design effective policies aimed at reducing the gender pay gap; the collection of data with a view to adopting adequate measures is essential to promote equal opportunities.<sup>33</sup> And the measures taken must 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.<sup>34</sup>

The right to equal pay is a very complex right with many concrete requirements stemming from it. In addition to the requirements that have to be fulfilled here and now, as an obligation of result (recognition of the right to equal pay in legislation, access to effective remedies etc.), the right to equal pay also has its dynamic element, i.e. an obligation for States to take measures with a view to promote effective realisation of equal pay in practice. In respect of this dynamic element, States must demonstrate sufficient measurable progress.

Perhaps one of the most important parts of the UWE decisions is a clear message in § 204 that 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.<sup>35</sup> As Kollonay-Lehoczky points out “while positive action under EU law is only

<sup>32</sup>*Ibid.*, § 202.

<sup>33</sup>*Ibid.*, § 203. The Committee extensively refers to its previous case law in this respect, for example, *European Roma Rights Centre v. Greece*, Complaint No. 15/2003, Decision on the merits of 8 December 2004, § 27 (the Committee emphasised that where it is known that a certain category of persons is, or might be, discriminated against, it is the duty of the national authorities to collect data to assess the extent of the problem) and *European Roma Rights Centre v. Italy*, Complaint No. 27/2004, Decision on the merits of 7 December 2005, § 23 (the Committee explained that the gathering and analysis of such data is indispensable to the formulation of rational policy).

<sup>34</sup>The Committee also refers to its long-standing case law in this respect (*International Association Autism-Europe (AIAE) v. France*, Complaint No. 13/2002, § 53).

<sup>35</sup>*UWE v. Belgium*, op. cit. supra, § 204.

permitted, under the Charter it is also an obligation” and therefore “[b]y this duality of the meaning of positive action, Article 20 of the Charter marks out the path for the future development of the concept of equality”.<sup>36</sup>

The ECSR also refers to the concept of gender mainstreaming stressing that this is internationally recognised strategy towards realising gender equality.<sup>37</sup>

A kind of the feedback loop is necessary: collect relevant high-quality data, analyse the causes of pay inequalities, adopt appropriate measures, monitor impact and evaluate measures by collecting and analysing relevant data, adjust the policies and measures etc. Sufficient measurable progress indicate that the approach taken by the State and the measures taken have been appropriate.

Only three states were found to be in conformity with the Charter in respect of their obligation to actively promote equal pay and actively reduce the existing gender pay gap, Belgium, Cyprus and Sweden. All other States under the assessment following the UWE collective complaints did not demonstrate sufficient measurable progress in reducing the gender pay gap.

## 4.2 Gender balance in decision-making positions (20.d)

The last part of the UWE decisions addresses the existing gender imbalance in decision-making positions which is quite a specific and rather narrow issue within the broad area of equal opportunities, however an important one. UWE limited this aspect even more, by limiting this question only to the private companies.

This issue is regarded as an integral part of career development and promotion, explicitly mentioned as one of the fields covered by Article 20.d on equal opportunities and equal treatment.

According to the Committee, Article 20.d of the Charter imposes positive obligations on States to tackle vertical segregation in the labour market. One aspect of this obligation is the promotion of the advancement of women in decision-making positions in private companies. Measures may be binding legislative measures or non-binding, promotional. However, in any case, States must take measures that enable the achievement of the objective, with measurable progress and with the maximum use of available resources.<sup>38</sup>

Nine States out of 15 were found to be in conformity (Belgium, Finland, France, Italy, the Netherlands, Norway, Portugal, Slovenia and Sweden) and the rest of them (Bulgaria, Croatia, Cyprus, Czech Republic, Greece, Ireland) were found not to be in conformity with the Charter on this point.

<sup>36</sup>Kollonay-Lehoczy [12], p. 371.

<sup>37</sup>*UWE v. Belgium*, op. cit. supra, § 206. 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 gender equality and combating discrimination.

<sup>38</sup>*Ibid.*, op.ct. supra, § 218-220. The ECSR explicitly refers to the PACE Resolution 1715(2010) which recommends that the proportion of women on management boards should be at least 40%.

## 5 Conclusion

The collective complaints lodged by UWE raised two fundamental issues in the broad area of gender equality, namely, equal pay of women and men for work of equal value and gender balance in decision-making positions.

All in all, only one state, Sweden “passed the exam” with the decision that there was no violation of Articles 4.3 and 20.c and d. with respect to the right to equal pay and the right to equal opportunities in the workplace as regards the issues raised in the complaints.

For the remaining 14 European states, the ECSR found a violation of at least one or more elements of the right to equal pay or the right to equal opportunities in the workplace.

As emphasised in the UWE decisions factsheet, the importance of these decisions extends far more broadly, to all countries that face similar gender pay gap problems, in particular the other 28 States Parties to the Charter (that have not accepted the complaints procedure) and, possibly, the other Council of Europe Member States that have yet to ratify the European Social Charter and embrace its monitoring mechanisms.<sup>39</sup> Mikkola rightly points out that “unfulfillment of equal pay in practice is a common European problem”.<sup>40</sup>

The UWE decisions of the European Committee of Social Rights bring an important message that equal pay is an essential element of a fair remuneration, that there are clear and detailed legal requirements arising from the right to equal pay and the right to equal opportunities and equal treatment in employment without discrimination on grounds of sex as guaranteed by Articles 4§3 and 20 of the European Social Charter, that problems in this respect still exist in practice and that states have to fulfil their obligations in this respect. The ECSR identified clear and strong standards with respect to equal pay and gender balance in decision-making.

The UWE decisions were adopted in December 2019, before the outbreak of Covid-19 pandemic and were made public just between the “waives” in June 2020. It can be expected (and first researches already show) that Covid-19 situation could have a negative impact on gender equality in general and within this on equal pay as well.<sup>41</sup>

In my view, the UWE decisions adopted by the ECSR could serve as a strong argument for keeping equal pay in the heart of political and legal debates,<sup>42</sup> already during the Covid-19 and also in the post-pandemic times, and for confirming that the right to equal pay is a human right and, therefore, it must be recognised as such, respected, enforced and promoted.

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<sup>39</sup>Council of Europe [5], p. 1.

<sup>40</sup>Mikkola [14], p. 182.

<sup>41</sup>See, for example, Hurley [10]; Wood [16]; EIGE [9]; ILO [11].

<sup>42</sup>In this respect, it is worth mentioning the new EU initiative: in March 2021, the European Commission proposed a new directive on pay transparency and enforcement mechanisms (Proposal for a Directive to strengthen the application of the principle of equal pay for equal work or work of equal value between men and women through pay transparency and enforcement mechanisms, COM(2021) 93 final, Brussels 4.3.2021, available at: [https://ec.europa.eu/info/sites/info/files/aid\\_development\\_cooperation\\_fundamental\\_rights/com-2021-93\\_en\\_0.pdf](https://ec.europa.eu/info/sites/info/files/aid_development_cooperation_fundamental_rights/com-2021-93_en_0.pdf)).

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