Gender Pay Gap: The Protection of the Right to Equal Pay under the Pay Transparency Directive

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Abstract

The purpose of this article is to comprehend how and to which extent the EU Pay Transparency Directive ensures the protection of the right to equal pay for men and women and how effective it is in addressing the Gender Pay Gap. Firstly, the analysis focuses on the main provisions of the EU Treaties, to identify the legal framework at primary level establishing the right concerned, bearing in mind the case-law of the Court of Justice of the European Union and its guiding interpretation of the meanings arising from the principle of equal pay. Secondly, the article provides an analysis of the novelties introduced by the Pay Transparency Directive, to reduce the root causes of the Gender Pay Gap through transparency and enforcement mechanisms aimed at strengthening the exercise of employees' right to bring action before national authorities against pay discrimination. Concurrently, the article incorporates a comparison between the different standards of protection established within EU Law and those in the European Social Charter. The results reveal how market-related concerns and considerations prevail in EU social policy,

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concealing the risk of decreasing the effective implementation of the principle of equal pay.

Keywords: Gender Pay Gap, Transparency, EU Law, Standards, Discrimination

A. Introduction

The reduction of the Gender Pay Gap (GPG) is one of the most crucial and current social issues of the EU political agenda. This phenomenon refers to the differences between men's and women's wages for equal work or work of equal value, calculated as the ratio of women's average gross hourly wage to men's average gross hourly wage, or as the difference between men's and women's gross hourly wage as a percentage of men's average gross hourly wage.[1] Concurrently, the GPG is a specific indicator showing how the labour market includes differences between men and women, as well as an imbalance, so as to entail a higher risk of poverty for women.[2]

Several factors played an important role as root causes of the GPG, determining differences in the pay level of women and men and, in doing so, discrimination between workers on grounds of sex. Firstly, individual elements – such as age, level of education, and experience acquired – have been considered as objective differences in spreading the GPG within the economy as a whole, as well as the profession, the type of contract and working conditions, and the characteristics of the company concerned, namely its size or economic sector. Simultaneously, various economic, social and legal factors have contributed to increasing the GPG, such as the segregation of the labour market affecting women, traditions and stereotypes influencing the choice of education courses, the evaluation and classification of occupations and employment patterns, as well as the difficulties that women still experience in balancing work and private life.[3]

Another relevant element concerning the GPG is the lack of pay transparency. From a gender pay equality perspective, such expression is strictly linked to the accessibility of pay information. In particular, subordinate labour relations are marked by a substantial inequality between employers and workers, whereby the former group assumes a position of preeminence over the latter. As can be deduced, such information asymmetry concerning pay entails the possibility for employers to increase their wage setting power, so as to reduce workers' capability to identify and react against discriminatory practices.[4]

1 *EU expert group on Gender, Social Inclusion and Employment* (EGGSIE), The Gender Pay Gap. Origins and policy responses – A comparative review of thirty European Countries, 2006.

2 *Guerrero Padrón/Kovačević/Ribes Moreno*, in: Vujadinović/Fröhlich/Giegerich (eds.), p. 599.

3 *European Commission*, Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Tackling the pay gap between women and men, COM(2007) 424.

4 *Benedi Lahuerta*, IJEL 2022/11, pp. 3–4.

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Although the EU legal system provides for the policy of gender equality and the principle of equal pay for male and female workers for equal work or work of equal value through the horizontal clauses laid down in Article 8 and Article 157 TFEU, respectively, the GPG still remains a complex and persistent problem. For this reason, taking in due consideration the root causes of the GPG underlined above, the EU adopted the *Pay Transparency Directive*,[5] which entered into force on 6 June 2023. This secondary Union law instrument establishes a legal framework for the application of the concept of work of equal value – following the case law of the Court of Justice of the European Union (CJEU) – with criteria that include skills, effort, responsibility, and working conditions. Despite the significant steps taken by the EU in ensuring protection to the right to equal pay by adopting the Directive, some legal remarks on the effectiveness in strengthening the application of this right are required.

Firstly, Article 151 para. 2 TFEU lays down specific limits on the activity of the EU and its Member States in pursuing the objectives of social policy, emphasizing the need to uphold the competitiveness of the economy in the Union and the necessity to take into account the diversity of national practices, in compliance with the principle of subsidiarity stated in Article 5 para. 3 TFEU.[6] Secondly, the protection of the right to equal pay to tackle the GPG involves the interaction between the European Social Charter (ESC) and EU law. In particular, all EU Member States are parties to the ESC and, consequently, are obliged to comply with the relevant standards of protection. Considering that the ESC is the primary Council of Europe treaty in the field of social rights, such a double-standard system – ESC and EU law – entails a reflection on the effective protection of the right to equal pay ensured within EU Member States.

B. The Right to Equal Pay Under the EU Treaties

The right to equal pay for male and female workers is provided for by Article 157 TFEU. The EU Treaty concerned qualifies this right as a principle, demanding equal treatment for persons of different gender in their status as employees. This provision is closely connected to those that ensure gender equality, such as Articles 2 and 3 TEU and Article 8 TFEU, and to the CJEU case-law which qualifies the elimination of discrimination on the grounds of sex as a fundamental right.[7] As is well known, Article 2 TEU establishes the founding common values which identify the EU's self-conception, including equality between men and women as a principle

5 Directive (EU) 2023/970 of the European Parliament and of the Council of 10 May 2023 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, OJ L 132 of 17/5/2023, p. 21.

6 *Geiger/Khan/Kotzur* (eds.), p. 639.

7 CJEU, case C-149/77, *Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena*, ECLI:EU:C:1978:130, paras. 26–27.

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governing civil societies, as well as pluralism, non-discrimination, tolerance, justice, and solidarity.

These principles define a horizontal value system that is combined with the EU's ascending or descending multilevel governing structure.[8] On the other hand, Article 3 TEU lays down a framework of general objectives, underlining the direction and the perimeter of the EU's activities. This provision aims at ensuring social justice and protection by promoting equality between men and women to establish an internal market.

Simultaneously, the elimination of inequality and the promotion of equality between men and women are objectives that the EU must take into consideration in carrying out its activities, as stated in Article 8 TFEU. As a horizontal policy clause, this regulatory instrument establishes a prospective goal involving all EU policies and is binding for all EU Institutions. The aforementioned provision is the result of development through the evolution of the EU Treaties, introducing a general provision capable of adapting the Union's actions to the principle of gender equality, considered as a fundamental right recognized to individuals even before the Treaty of Amsterdam introduced Article 3 para. 2 TEC (now Article 8 TFEU). This sensitivity to the social dimension of the principle of gender equality, initially confined within a purely economic conception, led the European Commission to adopt the principle of *gender mainstreaming*, emphasizing the relevance of systematically considering the differences between the conditions, situations, and needs of women and men in all the then Community policies and actions.[9]

Nowadays, the promotion of the social dimension of the principle of gender equality, particularly in terms of equal pay, aims to address those problems affecting women in the labour market and their position in society, such as the GPG, job segregation, sexual division of labour, gender stereotypes and role, the possibilities of entering the labour market and retaining a job, the undervaluation of women's work and skills, as well as the reconciliation of work and family life.[10] Specifically, part-time work, occupational or horizontal segregation, and vertical segregation play a critical role in determining the GPG. The current scenario demonstrates the overrepresentation of women in care-related professions and relatively lower-paid sectors, such as education and health. Moreover, the upward mobility of women into positions of power and decision-making is severely restricted, resulting in the accumulation of women in labour positions corresponding to lower levels in the labour hierarchy,[11] mainly due to inequality regimes and the preeminence of a model based on hegemonic masculinity.

8 *Curti Gialdino* (ed.), p. 60.

9 *European Commission*, Communication from the Commission – Incorporating equal opportunities for women and men in all Community policies and actions, COM(96) 67 final.

10 *Bermúdez Figueroa / Dabetić / Pastor Yuste / Saeidzadeh*, in: Vujadinović / Fröhlich / Giegerich (eds.), pp. 115–121.

11 *Beghini/Cattaneo/Pozzan*, A quantum leap for gender equality: For a better future of work for all, 7/3/2019, available at: https://www.ilo.org/publications/major-publications/quantum-leap-gender-equality-better-future-work-all (14/7/2024).

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After analysing the EU Treaties that guarantee the promotion of gender equality, it is now possible to investigate the meaning of Article 157 TFEU. As stated at the beginning, this provision establishes the principle of equal pay for equal work for women and men, ensuring equal treatment for workers with regard to pay without any discrimination on grounds of sex. Although this principle has been a guiding legal instrument in EU social policy since its introduction with the 1957 Treaty of Rome (former Article 119 TEEC), its existence within the EU legal system derives from a political compromise sought by the insistence of Member States like France, whose legal orders already provided for such a principle. The reason behind this compromise was national self-interest in avoiding social dumping phenomena related to higher labour costs in certain productive sectors, thereby protecting domestic enterprises.[12]

The CJEU played a key role in amplifying and specifying the principle of equal pay with regard to its interpretation and scope. In particular, its case-law helped to develop the relevance of the social dimension of this principle, although initially Article 119 TEEC (now Article 157 TFEU) was introduced to pursue economic objectives, such as the elimination of distortions of competition between undertakings established in different Member States. The CJEU made this point clear in *Defrenne II*, ruling that Article 157 TFEU (previously Article 119 TEEC and Article 141 TEC) forms part of the social objectives of the EU, which is intended to achieve an economic union and, "by common action, to ensure social progress and seek the constant improvement of the living and working conditions of their peoples".[13]

In this landmark judgement, the CJEU highlighted the equivalence of the economic and social aims laid down in the aforementioned provision and the self-executing nature of the principle of equal pay. As a consequence, Article 157 is directly applicable, and individuals can rely on it against discriminations carried out by national public authorities in establishing discriminatory provisions or through private legal relationships, namely individual employment contracts or collective agreements.

In *Schröder*, the CJEU bolstered the social dimension of the principle of equal pay, pointing out its central role in the meaning of Article 119 TEEC. The CJEU declared that the economic aim pursued by this provision is secondary to its social objective, which constitutes the expression of a fundamental human right.[14] On this ground, the article in question is a specification of the principle of non-discrimination, which extends to employment.[15]

12 *Bell*, pp. 27–31; *Kadelbach*, in: Giegerich (ed.), p. 20; *Guerra Martins*, in: Giegerich (ed.), p. 39.

13 CJEU, case C-43/75, *Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena*, ECLI:EU:C:1976:56, para. 10.

14 CJEU, case C-50/96, *Deutsche Telekom AG v Lilli Schröder*, ECLI:EU:C:2000:72, para. 57.

15 *Barnand*, in: Alston/Bustelo/Heenan (eds.), pp. 231–233; *Rönnmar*, in: Barnand/Peers (eds.), pp. 630–661.

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From this perspective, the CJEU has developed its case law, moving from the provisions included in the EU founding Treaties and in the Charter of Fundamental Rights of the European Union (CFREU), increasing the protection of rights concerning equality law to be ensured in horizontal disputes.[16] In particular, the CFREU lays down two provisions relating to gender discrimination: on one hand, Article 21 provides for the prohibition of any discrimination on various grounds, such as sexual orientation and sex; on the other hand, Article 23 requires the guarantee of equality between men and women in all areas, including pay, work, and employment. The latter provision is closely connected with Article 157 (4) TFEU, insofar as both allow Member States to maintain or adopt positive actions to establish specific advantages for the underrepresented sex, determining justified derogations from the principle of equality on the grounds of sex.[17]

I. The Meaning of Pay Under Article 157 TFEU

Article 157(2) TFEU and Article 2(1) of Directive 2006/54/EC[18] provide for a definition of pay, identifying it as "the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his employment, from his employer".

Over the years, the CJEU dealt with the concept of pay and its scope on various occasions. In *Barber*, it ruled that this concept includes immediate and future considerations provided by the employer to the employee, taking into account their employment.[19] According to the CJEU, the legal nature of the pay and the concerned facilities is not relevant, and they can be granted under different instruments, such as legislative provisions, contracts of employment, and collective agreements.[20] The reason behind the CJEU ruling is that pay can be both legislative and voluntary.[21] As a consequence, remuneration does not need to be contractual in origin.[22]

In relation to payments additional to the minimum pay, the CJEU included several elements within the scope of Article 119 TEEC, such as individual pay

16 *Argren/Evola/Giegerich/Krstić*, in: Vujadinović/Fröhlich/Giegerich (eds.), p. 290.
17 *Millns*, in: Irving (ed.), p. 258.
18 Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, in OJ L 132 of 27/7/2006, p. 23.
19 CJEU, case C-262/88, *Douglas Harvey Barber v Guardian Royal Exchange Assurance Group*, ECLI:EU:C:1990:209, para. 12; CJEU, case C-12/81, *Eileen Garland v British Rail Engineering Limited*, ECLI:EU:C:1982:44, para. 5.
20 CJEU, case C-281/97, *Andrea Krüger v Kreiskrankenhaus Ebersberg*, ECLI:EU:C:1999:396, para. 17.
21 CJEU, case C-457/93, *Kuratorium für Dialyse und Nierentransplantation e.V. v Johanna Lewark*, ECLI:EU:C:1996:33, para. 21; CJEU, case C-360/90, *Arbeiterwohlfahrt der Stadt Berlin e.V. v Monika Bötel*, ECLI:EU:C:1992:246, para. 12.
22 *Barnard*, p. 228.

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supplements,[23] increments based on seniority,[24] and heads of household allowances granted to civil servants.[25] Simultaneously, in *Royal Copenhagen*, the CJEU declared that the gradual increase in the salary of a worker who remains in the same position for a certain period of time, provided for by a collective agreement and piece-work pay schemes, is embedded in the definition of pay under Article 119 TEEC.[26] This includes the monthly salary supplements stipulated in individual employment contracts,[27] and wages for additional hours (Article 141 TEC).[28]

In respect of benefits considered in monetary terms, the CJEU incorporated several situations within the meaning of pay, as follows: benefits paid to a woman on maternity leave under legislation or collective agreements;[29] the same benefits under an employment contract;[30] sick pay allowances;[31] lump-sum payments to female workers taking maternity leave to compensate for the professional disadvantages resulting from these employees' absence from work;[32] occupational social security schemes;[33] travel facilities obtainable on retirement;[34] severance schemes;[35] end-of-year bonuses;[36] compensation paid to a worker on termination of the employment relationship as a severance grant;[37] additional redundancy payments;[38] bridging pensions paid to workers who are compelled on grounds of ill health to

23 CJEU, case C-109/88, *Handels- og Kontorfunktionærernes Forbund I Danmark v Dansk Arbejdsgiverforening, acting on behalf of Danfoss*, ECLI:EU:C:1989:383, para. 13.
24 CJEU, case C-184/89, *Helga Nimz v Freie und Hansestadt Hamburg*, ECLI:EU:C:1991:50, para. 15.
25 CJEU, case C-58/81, *Commission of the European Communities v Grand Duchy of Luxembourg*, ECLI:EU:C:1982:215, para. 5.
26 CJEU, case C-400/93, *Specialarbejderforbundet i Danmark v Dansk Industri, formerly Industriens Arbejdsgivere, acting for Royal Copenhagen A/S*, ECLI:EU:C:1995:155, para. 15.
27 CJEU, case C-381/99, *Susanna Brunnhofer v Bank der österreichischen Postsparkasse AG*, ECLI:EU:C:2001:358, para. 34.
28 CJEU, case C-285/02, *Edeltraud Elsner-Lakeberg v Land Nordrhein-Westfalen*, ECLI:EU:C:2004:320, para. 19.
29 CJEU, case C-342/93, *Joan Gillespie and others v Northern Health and Social Services Boards, Department of Health and Social Services, Eastern Health and Social Services Board and Southern Health and Social Services Board*, ECLI:EU:C:1996:46, para. 14.
30 CJEU, case C-335/15, *Maria Cristina Elisabetta Ornano v Ministero della Giustizia, Direzione Generale dei Magistrati del Ministero*, ECLI:EU:C:2016:564, paras. 43–44.
31 CJEU, case C-171/88, *Ingrid Rinner-Kühn v. FWW Spezial-Gebäudereinigung GmbH & Co. KG*, ECLI:EU:C:1989:328, para. 7.
32 CJEU, case C-218/98, *Oumar Dabo Abdoulaye and Others v Régie nationale des usines Renault SA*, ECLI:EU:C:1999:424, para. 14.
33 CJEU, case C-170/84, *Bilka - Kaufhaus GmbH v Karin Weber von Hartz*, ECLI:EU:C:1986:204, para. 22.
34 CJEU, case C-249/96, *Lisa Jacqueline Grant v South-West Trains Ltd*, ECLI:EU:C:1998:63, paras. 13–15.
35 CJEU, case C-354/16, *Ute Kleinsteuber v Mars GmbH*, ECLI:EU:C:2017:539, paras. 40, 47.
36 CJEU, case C-333/97, *Susanne Lewen v Lothar Denda*, ECLI:EU:C:1999:512, para. 21.
37 CJEU, case C-33/89, *Maria Kowalska v Freie und Hansestadt Hamburg*, ECLI:EU:C:1990:265, para. 11.
38 CJEU, case C-173/91, *Commission of the European Communities v Kingdom of Belgium*, ECLI:EU:C:1993:64, para. 15.

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take early retirement;[39] wages for a bridging allowance established by a contract of employment;[40] compensation for unfair dismissal;[41] benefits stemming from the performance of military or compulsory civilian service;[42] benefits awarded under an occupational scheme which, partly or entirely, take the place of the benefits paid by a statutory social security scheme;[43] additional pre-retirement payments;[44] survivor's pension schemes for the civil partner;[45] schemes supplementary to the statutory occupational pension scheme.[46]

It must be pointed out that the large body of case law mentioned above helped to extend the scope of the concept of sex equality, which applies to the meaning of pay.[47]

II. Equal work and work of equal value

Pursuant to Article 157 TFEU, the application of the principle of equal pay for male and female workers must be ensured in relation to equal work and work of equal value. Firstly, it is clear that the concept of "equal work" under the meaning of Article 157 TFEU incorporates identical jobs performed by two employees for the same employer in a single establishment. On this point, the CJEU in *Macarthys* ruled that differences in pay between workers occupying the same post at different periods in time cannot be justified, and, consequently, the principle of equal pay "is not confined to situations in which men and women are contemporaneously doing equal work for the same employer".[48]

However, the CJEU identified in its rulings a limit relating to the term "same work" by declaring that its meaning does not cover the same activities which "are performed over a considerable length of time by persons the basis of whose qualification to exercise their profession is different".[49] The CJEU based its reasoning in *Wiener Gebietskrankenkasse* on the different knowledge and skills that professionals of various categories – in the case at issue doctors and psychologists – acquire in

39 CJEU, case C-132/92, *Birds Eye Walls Ltd. v Friedel M. Roberts*, ECLI:EU:C:1993:868, para. 12.
40 CJEU, case C-19/02, *Viktor Hlozek v Roche Austria Gesellschaft mbH*, ECLI:EU:C:2004:779, para. 40.
41 CJEU, case C-167/97, *Regina v Secretary of State for Employment, ex parte Nicole Seymour-Smith and Laura Perez*, ECLI:EU:C:1999:60, para. 35.
42 CJEU, case C-220/02, *Österreichischer Gewerkschaftsbund, Gewerkschaft der Privatangestellten v Wirtschaftskammer Österreich*, ECLI:EU:C:2004:334, para. 39.
43 CJEU, case C-7/93, *Bestuur van het Algemeen Burgerlijk Pensioenfonds v G. A. Beune*, ECLI:EU:C:1994:350, para. 37.
44 CJEU, case C-166/99, *Marthe Defreyn v Sabena SA*, ECLI:EU:C:2000:411, paras. 26, 30.
45 CJEU, case C-443/15, *David L. Parris v Trinity College Dublin and Others*, ECLI:EU:C:2016:897, para. 40.
46 CJEU, case C-110/91, *Michael Moroni v Collo GmbH*, ECLI:EU:C:1993:926, para. 15.
47 *Ellis/Watson*, pp. 181–182.
48 CJEU, case C-129/79, *Macarthys Ltd v Wendy Smith*, ECLI:EU:C:1980:103, para. 13.
49 CJEU, case C-309/97, *Angestelltenbetriebsrat der Wiener Gebietskrankenkasse v Wiener Gebietskrankenkasse*, ECLI:EU:C:1999:241, para. 23.

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their respective disciplines, even though they apparently perform the same activities. As a consequence, a different qualification constitutes an objective justification for providing differential pay levels.

In latter cases, the CJEU extended its interpretation of the concept of "equal work" by addressing the performance of identical jobs for the same employer in different establishments or for different employers. In *K and Others*, the CJEU found that a comparison between the pay conditions of workers of different sex performing equal work or work of equal value for the same employer in different establishments comes within the scope of Article 157 TFEU.[50] However, the application of the provision to the situation mentioned above is limited to cases where pay discrimination on the grounds of sex can be attributed to a single source. The CJEU justified this approach in *Lawrence and Others* by arguing that in cases where various sources determine differences in pay conditions of workers performing equal work or work of equal value, "there is no body which is responsible for the inequality and which could restore equal treatment".[51]

In recent years, the CJEU has established specific criteria, to determine whether different types of work are of equal value. Most notably, the CJEU envisaged the nature of the tasks assigned to each group of employees, the training requirements for performing those tasks, and the working conditions under which they are performed as factors to be taken into account in attributing equal value to compared jobs. For this purpose, workers are deemed to be in a comparable situation if they cover a large number of employees, ensuring that differences in pay are not due to purely fortuitous or short-term factors or related to the different individual output of the workers involved.[52]

According to the CJEU's case-law, the principle of equal pay forbids the application of provisions leading to direct or indirect sex discrimination, particularly where such provisions provide for different treatment between men and women based on criteria not linked to sex and where those differences in treatment are not attributable to objective factors unrelated to sex discrimination. On these grounds, the CJEU held that a difference in treatment between workers can comply with the principle of equal pay if the employer establishes an objective justification corresponding to its real needs and unconnected to any discrimination concerning sex.[53]

Additionally, the CJEU in *Enderby* clarified how the aforementioned justification can operate in the context of equal pay. Specifically, the CJEU considered the state of the employment market as "an objectively justified economic ground", in

50 CJEU, case C-624/19, *K and Others v Tesco Stores Ltd*, ECLI:EU:C:2021:429, para. 36.
51 CJEU, case C-320/00, *A. G. Lawrence and Others v Regent Office Care Ltd, Commercial Catering Group and Mitie Secure Services Ltd*, ECLI:EU:C:2002:498, para. 18.
52 CJEU, case C-427/11, *Margaret Kenny and Others v Minister for Justice, Equality and Law Reform and Others*, ECLI:EU:C:2013:122, paras. 27–28.
53 CJEU, case C-173/13, *Maurice Leone and Blandine Leone v Garde des Sceaux, ministre de la Justice and Caisse nationale de retraite des agents des collectivités locales*, ECLI:EU:C:2014:2090, para. 41.

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cases where such an element forces the employer to increase the remuneration for specific work in order to attract candidates. However, the objective justification must comply with the principle of proportionality, and it is for the national courts to assess if this condition applies, according to the circumstances of each case.[54]

As can be noted, in pay discrimination cases, as well as in discrimination cases in general, a two-phase mechanism determining the shifting of the burden of proof applies to ensure the implementation of the principle of equality in systems lacking in transparency. Firstly, the worker has to report the circumstances on which discrimination can be presumed; if this presumption is established, the respondent then has to show that no violation of the principle of non-discrimination occurred.[55] In this perspective, the shift of the burden of proof is one of the procedural elements enshrined in the EU *acquis* to bolster the application of the principle of equality on the grounds of sex. Additionally, it enhances access to judicial and/or administrative procedures, protects workers against retaliation, and provides rules on sanctions, penalties, compensation and reparation.[56]

As can be deduced from the topic at issue, making comparisons is an obstacle that victims of pay discrimination must face when bringing claims before national courts. From this perspective, the nature of the tasks to be performed, as well as the skill, effort and responsibility required, are significant factors in determining equal value of work. However, employees must be entitled to bring an action before appropriate national authorities, claiming that their work has the same value as other jobs, to have their rights under EU primary and secondary legislation acknowledged by a binding decision.[57]

In this respect, gender-neutral job classification or job evaluation systems can offer a method of assessing work of equal value, to avoid possible indirect discrimination. In particular, the identification of GPG discrimination is much less obvious in cases where schemes to differentiate between male and female-dominated jobs are used, due to their technicalities in establishing the value of work and pay. Job classification or job evaluation systems can obscure the risk of prejudices in valuing working skills and requirements, such as in comparisons between heavy manual work carried out by men and tasks entailing manual dexterity.[58] However, these schemes can serve as management tools to create an acceptable rank order of jobs, provided they are marked by a gender-neutral approach, based on the same criteria for men and women, and developed to exclude any discrimination on the grounds of sex.

54 CJEU, case C-127/92, *Dr. Pamela Mary Enderby v Frenchay Health Authority and Secretary of State for Health*, ECLI:EU:C:1993:859, paras. 26–28.
55 *Benoît-Rohmer*, in: Rossi/Casolari (eds.), p. 163.
56 *Muir/De Witte*, in: Rossi/Casolari (eds.), p. 137; *Wladasch*, in: Giegerich (ed.), pp. 238–242.
57 CJEU, case C-61/81, *Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland*, ECLI:EU:C:1982:258, para. 9.
58 *Ellis/Watson*, p. 224.

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Moving from these reasons, the CJEU in *Rummler* ruled on job classification and job evaluation, identifying the following guiding principles: the criteria governing pay-rate classification must ensure that work which is objectively the same attracts the same rate of pay, whether it is performed by a man or a woman; the use of values reflecting the average performance of workers of one sex as a basis for determining the extent to which work makes demands, requires effort, or is considered heavy constitutes a form of discrimination on grounds of sex; for a job classification system not to be discriminatory as a whole it must, insofar as the nature of the tasks carried out in the undertaking permits, take into account criteria for which workers of each sex may show a particular aptitude.[59]

C. The dialogue between the European Parliament and the European Commission on equal pay

The protection of gender equality is also implemented through EU secondary law by providing identical tools to tackle discriminations on the grounds of sex.[60]

To this end, different legislative instruments supplementing the legal framework of the aforementioned principle have been adopted over the years, regulating several working aspects, such as:

- Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions and Council Directive 79/7/EEC relating to the enforcement of the aforementioned principle in matters of social security;
- Council Directive 86/378/EEC on the implementation of the principle of equal treatment for men and women in occupational social security schemes, amended by Council Directive 96/97/EC and repealed by Directive 2006/54 concerning equal opportunities and treatment on the ground of sex in matters of employment and occupation;
- Council Directive 86/613/EEC on the application of the principle of equal treatment between men and women engaged in an activity, including agriculture, in a self-employed capacity, and on the protection of self-employed women during pregnancy and motherhood, repealed by Directive 2010/41/EU;
- Council Directive 92/85/EEC relating to the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding;
- Council Directive 96/34/EC on the framework agreement on parental leave, implemented by Council Directive 2010/18/EU and both no longer in force due

59 CJEU, case C-237/85, *Gisela Rummler v Dato-Druck GmbH*, ECLI:EU:C:1986:277, para. 25.

60 *Argren/Evola/Giegerich/Krstić*, in: Vujadinović/Fröhlich/Giegerich (eds.), p. 291; *Muir/De Witte*, in: Rossi/Casolari (eds.), pp. 136–139.

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to the more recent Directive (EU) 2019/1158 on work-life balance for parents and carers;[61]

- Directive 97/81/EC regulating the framework agreement on part-time work; Directive 2003/88/EC on certain aspects of the organisation of working time, such as weekly rest period and paid annual leave; Council Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services.

Despite the various legislative instruments provided at the EU level to strengthen the principle of equal pay, the GPG has continued to persist over the years, highlighting the inefficiency of the legal framework that existed prior to the adoption of the *Pay Transparency Directive*. In this perspective, the European Institutions – particularly the European Commission and the European Parliament – made this point clear on several occasions aimed at verifying the effective implementation of gender equality within the EU.

For instance, in 2006 the European Commission outlined an equality roadmap between men and women, pointing out the existence of a 15% GPG, attributed to direct discrimination against women and structural inequalities, such as stereotypes, segregation in different sectors, and disparities in access to education and training. Furthermore, the European Commission identified specific priority areas and objectives for EU action on gender equality, including: equal economic independence of women and men; reconciliation of work, private and family life; equal participation of women and men in decision-making processes; eradication of gender-based violence and trafficking; elimination of gender stereotypes in society; and promotion of gender equality outside the EU.[62]

Concerning the roadmap mentioned above, the European Parliament expressed its opinion in 2007, arguing the political failure of the strategy in specifying the responsibilities of the European Commission and the EU Member States as regards its implementation and the dissemination of information to citizens. In the view of the European Parliament, gender equality policy had to be seen as a prerequisite for the protection of individuals rights and not simply as a political priority related to a specific agenda or area.[63]

Over the years, the dialogue between the European Commission and the European Parliament played a significant role in determining the need to tackle the GPG through the contributions and efforts of EU Member States and social partners, as well as through the exchange of good practices at the EU level. In 2007, the European Commission suggested the inclusion of specific measures aimed at reducing

61 See *Waddington/Bell*, Common Mark Law Rev 2021/5, pp. 1401-1432; *Weldon-Johns*, Eur Labour Law J 2021/5, pp. 301–321.

62 *European Commission*, Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and Committee of Regions – A Roadmap for equality between women and men 2006-2010, COM(2006) 92 final.

63 *European Parliament*, Resolution of 13 March 2007 on a roadmap for equality between women and men (2006–2010), OJ C 301 E of 13/12/2017, p. 56.

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the GPG within the national reform programmes. Simultaneously, it underlined the employers' responsibility to respect the principle of equal pay between men and women under EU legislation, receiving possible support from national authorities in promoting labels for their gender equality company policies. According to the European Commission, the reasons behind the persistence of the GPG concerned the ineffectiveness of the existing EU legislation on the subject, the lack of proper enforcement, alongside with several factors that led to systematic differences in the composition of the male and female workforce and in productivity. These features included individual, job, firm and institutional characteristics,[64] social norms and traditions,[65] and gender segregation by sector or occupation.[66]

From a legal perspective, the EU legal framework for the protection of the right to equal pay until that period showed its effectiveness in ensuring workers against direct discrimination in terms of equal pay for the same job. On the other hand, this legislation failed to address discrimination concerning equal pay for work of equal value, leading to possible cases where equivalent jobs in the same company received different treatments. This was marked by the lack of awareness of potential victims and the difficulty in proving such cases before national judicial authorities.

For these reasons, the European Parliament requested the European Commission to submit a legislative proposal concerning the revision of the EU legal framework on the application of the principle of equal pay for men and women, as well as to foster a better and more prompt implementation of the provisions laid down in the Directive 2006/54, most notably those relating to compensation or reparation (Article 18), equality bodies (Article 20), social dialogue (Article 21), penalties (Article 25), prevention of discrimination (Article 26), and gender mainstreaming (Article 29). According to the European Parliament, the then pre-existing EU legislation did not adequately identify and, consequently, properly address the causes that led to the GPG in their entirety. Specifically, in 2008, the European Parliament clarified this point, arguing for the need to tackle the GPG by envisaging not only hourly wage differentials but additional factors such as job classification, productivity, and professional experience.

In such a context, the European Parliament pointed to the discrepancy between the remarkable legal framework on equal gender pay and the market reality due to specific reasons: on the one hand, women were subject to pay discrimination, despite achieving higher rates of educational success than men and accounted for the majority of college graduates; on the other hand, having to cope with needs

64 For instance, age, educational background, family background, presence of children, experience in the labour market, occupation, working time, contract type, job status, working conditions, sector, firm size, work organisation, recruitment behaviour, education and training systems, and wage bargaining.

65 The evaluation of male- and female-dominated occupations, career patterns, labour market participation, job choice, and education.

66 *European Commission*, Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Tackling the pay gap between women and men, COM(2007) 424.

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of a different nature that led to continuous career interruptions,[67] women suffered the unfavourable consequences of a pay regime based on the length of service to determine the level of remuneration.[68]

In 2012, the European Parliament renewed the call for regulatory action to improve the legal framework regarding the application of the principle of equal pay, stressing the importance of the EU's role in coordinating policy, promoting best practices, and involving various actors. This approach aimed to introduce a strategy at the EU level to face the GPG and its underlying causes.[69]

In this perspective, the European Commission published a report on the application of Directive 2006/54/EC in 2013,[70] with the purpose of analysing how EU Member States transposed the novelties[71] introduced by the legislative instrument concerned and to which extent equal pay provisions were applied in national practices. Specifically, the European Commission identified different national approaches in implementing new legal features concerning the definition of pay, the application of equal treatment to pension schemes related to particular categories of workers, and gender reassignment. However, the European Commission argued in its overall assessment that, in general, Member States failed to enhance and to modernise their legal orders. In addition, the analysis carried out by the European Commission highlighted three possible factors that could jeopardise the effective application of the EU legal framework on equal pay: the lack of clarity and legal certainty on the concept of work of equal value, the lack of transparency in pay systems, and procedural obstacles.

Concerning the first issue, the main limitation arose from the lack of a definition of work of equal value at the EU level and specific assessment criteria for comparing different jobs, although the CJEU – as stated above – has intervened on the matter on various occasions, identifying the need to consider workers in comparable situations based on several factors[72] to determine if they are performing the same work or work of equal value. As a consequence, the European Commission suggested the introduction of gender-neutral job evaluation and classification systems as a

67 In particular, the European Parliament mentioned specific factors, such as short working times, child-related employment breaks, and differing occupational choices.

68 *European Parliament*, Resolution of 18 November 2008 with recommendations to the Commission on the application of the principle of equal pay for men and women, OJ C 16 E of 22/1/2010, p. 21.

69 *European Parliament*, Resolution of 24 May 2012 with recommendations to the Commission on application of the principle of equal pay for male and female workers for equal work or work of equal value", OJ C 264 E of 13/9/2012, p. 75.

70 *European Commission*, Report on the application of Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), COM(2013) 861 final.

71 Such as the definition of pay, the express reference to discriminations resulting from gender reassignment, or the extension of the horizontal provisions concerning the defence of rights, compensation or reparation and the burden of proof to occupational social security schemes.

72 The nature of the work, as well as training and working conditions.

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solution to address the issue, noting that the Directive 2006/54/EC – which remains in force, along with the new *Pay Transparency Directive* – did not oblige EU Member States to adopt such schemes, and their implementation varied significantly at the national level.

As mentioned above, the European Commission deemed the lack of transparency in pay systems as a limiting factor for the application of the EU legal framework on equal pay. The European Commission observed that EU Member States provided specific wage transparency measures concerning the disclosure of pay information for both individual workers and categories of employees, implementing heterogeneous approaches.[73] Despite the adoption of such measures, the GPG persisted, prompting the European Commission to propose increased transparency, to enable social partners to identify and, consequently, address pay discrimination more effectively.

Simultaneously, in the European Commission's viewpoint, the effective application of the Directive 2006/54/EC faced specific procedural obstacles that jeopardised the proper implementation of the shifting of the burden of proof.[74] Although the EU legal framework on equal pay laid down the workers' right to bring discrimination cases before national courts, local practices showed that limited access to information on the remuneration of employees performing the same work or work of equal value – as well as lengthy and costly judicial proceedings, the lack of effective sanctions and sufficient compensation, the fear of retaliatory dismissals, and time limits – prevented workers from obtaining the necessary elements for a successful claim relating to pay discrimination.

Despite the European Parliament's several requests for a new legislative proposal from the European Commission concerning the revision of the EU legal framework on the principle of equal pay for men and women, the Commission did not meet these expectations. Instead, it adoped a non-binding initiative – a Recommendation – aiming to bolster the practical application of the principle and to support EU Member States in reducing the GPG.[75] In its Recommendation, the European Commission stressed the need to ensure wage transparency and tackle gender pay discrimination, by encouraging employers to implement specific measures to achieve this goal. In the view of the European Commission, various factors were required to decrease the GPG,[76] including the right of employees to obtain information on

73 E.g., the employer's obligation to provide the worker with the information on pay (Bulgaria or Slovakia); the obligation to indicate the legal minimum wage in advertising jobs (Austria); the right of national equality bodies to request information on pay (Sweden or Estonia).

74 *Muir/De Witte*, in: Rossi/Casolari (eds.), pp. 136–139.

75 *European Commission*, Recommendation of 7 March 2014 on strengthening the principle of equal pay between men and women through transparency, in OJ L 69 of 8/3/2014, p. 112.

76 Analysis of the proportion of women and men in each category of employee or position, as well as the job evaluation and classification system used and detailed information on pay and pay differentials on grounds of gender.

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pay levels, the introduction of pay audits that include specific analyses, as well as the development and use of gender-neutral job evaluation and classification systems.

As can be deduced from what has been said so far, the European Commission has embraced the suggestions included in the European Parliament's Resolutions by not reforming EU equal pay legislation, thus giving EU Member States more leeway than would be required by adopting a binding legislative instrument. As a consequence of this, along with the negative economic and social effects suffered by EU Member States from the 2008 Great Recession and the 2011 sovereign debts crisis, the GPG persisted during the following years, leading to renewed reflection on the effective application and implementation of the principle of equal pay for men and women.

In 2017, the European Commission published a report concerning the implementation of its recommendation on strengthening the principle of equal pay between men and women through transparency, assessing how EU Member States had put into effect the measures proposed in the recommendation. These measures included individuals' entitlement to request information on pay levels, company-level reporting, pay audits, and addressing equal pay in collective bargaining.[77] At that time, Sweden was the only country that had enshrined in its national legal framework all the specific measures contained in the toolbox proposed by the European Commission in 2014, and only eleven EU Member States had legislation on pay transparency.[78]

In its findings included in its two reports of 2013 and 2017, the European Commission assessed and summarised the following key issues concerning the GPG:

- The non-uniform definition and application of equal pay concepts[79] within the EU Member States' legislations;
- The possibility of justifying differences in pay, with the risk of unduly favouring employers and making access to justice difficult to workers;
- The varied implementation of the shift of the burden of proof among EU Member States affected by the lack of clear provisions concerning the evidence;
- The different limitation periods, which hampered workers' ability to have a reasonable amount of time to make a claim within the national legal systems;
- The lack of a deterrent effect of penalties and low compensation levels;
- The costs of proceedings, such as those required for legal representation and court fees, which discouraged victims of discrimination from bringing cases before national judicial authorities;
- The lack of clarity on the powers of national equality bodies, as well as its awareness;

77 *European Commission*, Report on the implementation of Commission Recommendation on strengthening the principle of equal pay between men and women through transparency, COM(2017) 671 final.

78 Austria, Belgium, Germany, Denmark, Finland, France, Ireland, Italy, Lithuania, Sweden, and the United Kingdom.

79 In particular, the concepts of pay, equal work and work of equal value.

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- The lack of promotion, development and use of gender-neutral job evaluation and classification systems;
- The barriers to pay transparency, as well as the absence of transparency in pay system.

D. The *Pay Transparency Directive*

Bearing in mind the findings resulting from the political dialogue with the European Parliament, the European Commission submitted a legislative proposal for a Directive in 2021, aimed at establishing pay transparency within organisations, as well as to enhancing enforcement mechanisms and to facilitating the application of the equal pay concepts.[80] As a result of the fulfilment of the EU ordinary legislative procedure under Article 294 TFEU, the *Pay Transparency Directive* entered into force in 2023.

I. An analysis of the *Pay Transparency Directive*

As pointed out in the previous sections, the EU equal pay legislation has failed to provide adequate protection for workers against pay discrimination and to permanently eliminate the GPG. This failure is due to the lack of transparency concerning pay levels within organizations, the lack of legal certainty on the concept of work of equal value, gender stereotypes, horizontal segregation, as well as the procedural obstacles that employees face in bringing a successful action relating to pay discrimination before national judicial authorities.

In this perspective, the provisions included in the *Pay Transparency Directive* lay down a legal framework aimed at improving the effectiveness of EU law in strengthening the application of the principle of equal pay for equal work or work of equal value between men and women established by Article 157 TFEU and Article 4 of the Directive 2006/54, to guarantee the rights of employees in case of discrimination on the grounds of sex. Given the above, an analysis of the main provisions of the *Pay Transparency Directive* is necessary to understand whether and to which extent this legislative instrument has improved the effectiveness of EU law against the GPG.

Firstly, concerning its scope, the *Pay Transparency Directive* applies to both private and public sectors, referring to employees with an employment contract or employment relationship, as well as applicants for employment (Article 2). Ensuring transparency prior to employment aims at eliminating the information asymmetry which influences the bargaining power of employees concerning the pay conditions and limits their ability to make decisions relating to the expected salary. For this

80 *European Commission*, Proposal for a Directive of the European Parliament and of the Council 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.

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reason, Article 5 requires employers to provide applicants with specific information, such as the initial pay or its range, based on objective, gender-neutral criteria, to be attributed to the position concerned, as well as the possible relevant provisions of the collective agreement applied by the employer in relation to the position. Furthermore, Article 5 prevents employers from asking applicants to disclose their pay history relating to current or previous employment relationships, to preserve their bargaining autonomy.

Secondly, Article 3 lays down definitions, terms and concepts applicable within the legal framework of the *Pay Transparency Directive*, to facilitate and clarify their interpretation upfront. Most notably, the provision includes existing definitions from Directive 2006/54, as well as concepts strictly linked to the right of equal pay, such as quartile pay levels, pay bands, and categories of workers. It must be pointed out that the scope of Article 3 involves intersectional discrimination, which occurs when discrimination is based on different grounds, in particular sex on one hand and racial or ethnic origin, religion or belief, disability, age or sexual orientation on the other. In this regard, the *Pay Transparency Directive* aims to ensure that national judicial authorities take into account disadvantages arising from such types of discrimination, particularly to identify the appropriate comparator and determine the level of due compensation and penalties to be imposed on a proportional basis.

As stated above, legal uncertainty on the concept of work of equal value is a key factor that contributed to increasing the GPG level. As for this definition, Article 4 of the *Pay Transparency Directive* incorporates gender-neutral criteria, such as skills, effort, responsibility and working conditions, for the purpose of assessing whether employees are in a comparable situation performing work of equal value. For this reason, the provision requires EU Member States to adopt measures, tools and methodologies aimed at achieving this objective through pay structures provided to employers. The wording of Article 4 also reflects the European Commission's intention to promote compliance with the principle of equal pay through systems capable of categorising job positions, thereby providing workers with a useful tool for identifying a valid comparator and determining the actual existence of pay discrimination.

In addition, the *Pay Transparency Directive* includes various provisions concerning information, in particular Article 7 and Article 9 (see *Section D.II.*). Article 7 establishes the right of employees to request and obtain information in writing from their employer relating to both individual and average pay levels. From this perspective, workers are entitled to receive the data necessary to assess whether the determination of their remuneration is carried out without discrimination compared to the other employees in the same organization, taking into account the equal work or work of equal value. Moreover, the provision ensures the protection of workers against possible retaliation or fear of reprisals by the employer, by providing for the right to demand the aforementioned information through their representatives or with the assistance of an equality body. To guarantee the right of employees to equal pay, the employer must provide the information on an annual basis and within a reasonable period not exceeding two months from the date of the request. However,

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Article 7 limits the disclosure of the data to the enforcement of the principle of equal pay.

Furthermore, the *Pay Transparency Directive* obliges EU Member States to adopt measures to ensure that employers carry out a joint pay assessment in cooperation with workers' representatives, to identify, remedy and prevent unjustified differences in pay between men and women for equal work or work of equal value. On this point, Article 10 lays down the conditions that must be satisfied to perform such an assessment: firstly, the pay reporting enshrined in Article 9 must highlight a difference in the average pay level between female and male workers of at least 5% in any category of workers; secondly, the assessment requires that the employer has not justified the aforementioned difference on the basis of objective and gender-neutral factors, such as those established by Article 4; lastly, the provision under examination states that the employer has not remedied the unjustified difference within six months of the date of submission of the pay reporting. As can be deduced from the wording of Article 10, the *Pay Transparency Directive* aims to force employers to closely monitor their pay setting practices, to avoid any possible gender discrimination and, in doing so, the infringement of the principle of equal pay, in cooperation with workers' representatives, the labour inspectorate, and the equality body.

As regards the legal remedies against pay discrimination, Article 15 states the obligation for EU Member States to take appropriate measures to entitle legal entities with an interest in ensuring the principle of equal pay between men and women to engage in judicial or administrative procedures for the enforcement of the rights enshrined in the *Pay Transparency Directive*. In addition, Article 16 provides for the right to compensation for workers who are victims of pay discrimination. On this point, the CJEU in *Arjona Camacho* argued that effective compensation or reparation in a way that is dissuasive and proportionate must cover in full the loss and damage sustained by employees as a result of discrimination on grounds of sex[81]. From this perspective, the provision includes full recovery of back pay and related bonuses or payments in kind, compensation for lost opportunities, non-material damage, any damage caused by other relevant factors which may include intersectional discrimination, as well as interest on arrears, without the fixing of any prior upper ceiling.

Moreover, as stated in Article 17, EU Member States are obliged to ensure that competent national judicial authorities have the power to issue injunction orders against any violation of the principle of equal pay, as well as to establish recurring penalty payment orders in case of non-compliance with the injunction orders. This is to provide an incentive for the employer to take appropriate measures to remedy the structural and organisational shortcomings of its management system.

In addition, the *Pay Transparency Directive* includes a provision concerning the shift of the burden of proof. Specifically, Article 18 establishes the obligation for

81 CJEU, case C-407/14, *María Auxiliadora Arjona Camacho v Securitas Seguridad España*, ECLI:EU:C:2015:831, para. 45.

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EU Member States to guarantee that, within proceedings, it is the employer who must prove that no violation of the principle of equal pay has occurred, in cases of prima facie discrimination. Moreover, where the employer does not comply with the pay transparency obligations set out in the Directive, the provision enables victims to bring an action before national judicial authorities without arguing even a prima facie case of discrimination, so as to enhance the position of the employee within the proceedings.

Furthermore, Article 19 on proof of equal work or work of equal value incorporates a couple of clarifications from the CJEU's case-law. On one hand, such clarifications involve the possibility of making comparisons between employees when they do not work for the same employer, whenever the pay conditions can be attributed to a single source setting those conditions.[82] On the other hand, the provision refers to situations where the comparison is not limited to workers employed at the same time.[83] Concurrently, Article 19 provides an open clause as a last resort, allowing employees to utilise any other evidence to prove alleged pay discrimination where no real comparator can be established.

As regards limitation periods, Article 21 lays down a minimum threshold of three years for bringing pay discrimination claims. In detail, it is the responsibility of EU Member States to ensure that national provisions on limitation periods on the subject matter determine when such periods begin to run, their duration and the circumstances under which they can be suspended or interrupted. Furthermore, Article 21 makes the effective date of the limitation period dependent on the claimant's awareness of an infringement, also bearing in mind the case where the employee can reasonably be expected to have knowledge of the violation. Given that, the introduction of the provision aims to eliminate barriers preventing victims of pay discrimination from enforcing their equal pay right, such as short limitation periods and related procedural hurdles.

As argued in *Section B.II.*, the protection of workers against retaliatory measures or any adverse treatments taken by employers is a procedural element through which the full application and correct implementation of the principle of equal pay must be guaranteed. For this reason, the *Pay Transparency Directive* includes a provision on victimisation and protection against less favourable treatment. In particular, Article 25 requires EU Member States to adopt appropriate measures to safeguard workers – even in cases where they have supported another person in the protection of that person's rights – and employees who are workers' representatives against dismissal or any other retaliatory behaviours by employers in reaction to a complaint within the employer's organisation. The CJEU made this point clear in *Hakelbracht and others*, by interpreting Article 24 of Directive 2006/54 as meaning that "the category of employees who are entitled to the protection provided by it must be interpreted broadly and include all employees who may be subject to retal-

82 CJEU, case C-320/00, *A. G. Lawrence and Others v Regent Office Care Ltd, Commercial Catering Group and Mitie Secure Services Ltd*, ECLI:EU:C:2002:498, para. 18.
83 CJEU, case C-129/79, *Macarthys Ltd v Wendy Smith*, ECLI:EU:C:1980:103, para. 13.

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iatory measures taken by an employer in response to a complaint of discrimination on grounds of sex, without that category being otherwise delineated" or limited by national legislations.[84]

Lastly, Article 28 entitles equality bodies to be competent on matters falling within the scope of the *Pay Transparency Directive*, by obliging EU Member States to enhance cooperation and coordination among labour inspectorates in protecting workers' right to equal pay. In this perspective, involving equality bodies in bringing actions on behalf or in support of employees is a key factor in boosting workers' chances to tackle procedural and financial obstacles in exercising their rights.

II. The discrepancies between the European Commission's proposal and the final *Pay Transparency Directive*

A comparison of the contents of the European Commission's proposal and the final text of the *Pay Transparency Directive* reveals some differences that need to be highlighted. Most notably, Article 6 on transparency of pay setting and pay progression policy requires employers to make accessible to workers a description of the gender-neutral criteria to determine employees' pay, pay levels, and career progression. Unlike the European Commission's proposal, the *Pay Transparency Directive* contains an additional paragraph, giving EU Member States the option to exempt employers with fewer than 50 workers from the obligation related to the pay progression. On this point, the European Commission simply suggested a more flexible approach for micro and small enterprises in complying with the obligation concerned. Although this additional paragraph may be justified on economic grounds, particularly to avoid costs and unreasonable burdens, such regulatory wording hides the risk of possible pay discrimination, due to the lack of transparency.

As regards reporting on pay gap between female and male workers laid down in Article 9 of the *Pay Transparency Directive* (Article 8 of the proposal), the final provision establishes a specific obligation for EU Member States concerning the information that employers must provide about their working organisations. In particular, the first paragraph of the provision sets a list of information as follows: the GPG (letter a); the GPG in complementary or variable components (letter b); the median GPG (letter c); the median GPG in complementary or variable components (letter d); the proportion of female and male workers receiving complementary or variable components (letter e); the proportion of female and male workers in each quartile pay band (letter f); the GPG between workers by categories of workers broken down by ordinary basic wage or salary and complementary or variable components (letter g).

84 CJEU, case C-404/18, *Jamina Hakelbracht and Others v WTG Retail BVBA*, ECLI:EU:C:2019:523, para. 27.

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In this regard, EU Member States are obliged to ensure that employers comply with the objective enshrined in Article 9, while having the option to compile the information themselves, using the administrative data provided by employers to the tax or social security authorities. Simultaneously, this provision lays down different timelines for supplying the aforementioned information based on the number of employees within the same organisation. In detail, the *Pay Transparency Directive* requires employers with 250 workers or more to provide the information listed above by 7 June 2027. For employers with 150 to 249 employees, the same deadline applied. For employers with 100 to 149 workers, Article 9 establishes a deadline of 7 June 2031.

However, the main issue concerns those organisations with fewer than 100 employees, as the *Pay Transparency Directive* gives EU Member States the option to decide whether to require employers to provide the information laid down in Article 9. Even with regard to this provision, the protection of economic interests seems to take precedence over the social fight against the GPG, although the final version of the *Pay Transparency Directive* has broadened the scope of the information obligation beyond what the European Commission proposed.

In addition, an important discrepancy between the European Commission's proposal and the Directive concerns the regulation of legal costs. According to the European Institution, EU Member States should not grant successful defendants in equal pay proceedings the right to recover legal costs from the plaintiff, except in cases of bad faith or clearly frivolous claims, or if non-recovery was manifestly unreasonable under the specific circumstances of the case. On the contrary, Article 22 of the *Pay Transparency Directive* (Article 19 of the proposal) offers more vague wording, enabling EU Member States to assess the suitability of not requiring the claimant to pay proceedings costs. A provision with such formulation could discourage victims of pay discrimination from taking legal action, due to the burdensome expenses of the claims, thus concealing a procedural hurdle.

A similar approach is also included in Article 23 of the *Pay Transparency Directive* (Article 20 of the proposal) regarding penalties for pay discrimination. In the wording submitted by the European Commission, EU Member States were required to set a minimum level for the fines applicable to infringements of the rights and obligations relating to equal pay for the same work or work of equal value, bearing in mind specific features, namely the gravity and duration of the violation, any intent or serious negligence on the part of the employer, and any other aggravating or mitigating factor applicable to the circumstances of the case. From the European Commission's perspective, the introduction of such a minimum level was a proper solution in order to ensure a two-fold effect: on one hand, a deterrent effect to avoid employers' illegal behaviours; on the other hand, a preventive effect aimed at encouraging employers to comply with their obligations. In this respect,

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the indication of such a minimum level is missing in Article 23, as is the definition of the aforementioned criteria by which the amount of fines is calculated.[85]

E. The interaction between EU law and the Conventions of the CoE in implementing equal pay

The effective implementation of the principle of equal pay from a gender-neutral perspective and the elimination of the GPG involve the interaction between EU law and the Conventions of the Council of Europe (CoE), namely the ESC and the Revised European Social Charter (RESC). The RESC includes the original 1961 ESC and the 1988 Additional Protocol incorporating new rights along with those enshrined in the earlier version of the ESC, such as the right to protection against poverty and social exclusion stated in Article 30.

As regards this aspect, the RESC played a significant role in widening the scope of the protection of fundamental economic and social rights at the European level, partly due to the case law of the European Committee of Social Rights (ECSR) as the ESC's interpretative body.[86] Simultaneously, it must be pointed out that all EU Member States are parties to the RESC, thus creating a binding double-standards system in ensuring the implementation of the social rights provided for by the two legal orders concerned. From a legal point of view, this means that EU Member States are obliged to comply with the provisions established by the RESC within the framework of the EU legislative procedures and in their national legal systems.

As far as the topic at issue concerned, Article 4 of the RESC lays down the right to a fair remuneration, specifically recognizing – among other things – the right of men and women workers to equal pay for work of equal value, as well as the access of workers and their families to a decent standard of living.[87] In addition, Article 20 of the RESC requires States Parties to take measures to guaranteeing and promoting the application of the right to equal opportunities and equal treatment in matters of employment and occupation without discrimination on the grounds of sex, particulary terms of employment and working conditions, including remuneration.

In *UWE v Belgium*, the ECSR developed its reasoning on the concept of equal pay by identifying the obligations resulting from the interpretation of the aforementioned provisions.[88] Specifically, the ECSR stressed the need to implement the right of equal pay through its recognition and enforcement within national legal systems,

85 *European Commission*, Proposal for a Directive of the European Parliament and of the Council 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.

86 *Arabadjieva/Kotsoni*, EP 2022/3, p. 1538; *Evola/Jungfleisch/Marinković*, in: Vujadinović/Fröhlich/Giegerich (eds.), p. 249.

87 *Adams/Deakin*, in: Bruun/Lörcher/Schömann/Clauwaert (eds.), p. 199.

88 ECSR, Collective Complaint No. 124/2016, *University Women of Europe (UWE) v. Belgium*, paras. 115, 139–140.

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as well as across its promotion by raising awareness of the principle as a suitable strategy aimed at reducing the impact of the GPG and pay disparities.[89]

From this perspective, a comparison between the standards provided by the two legal orders – the RESC and EU Law – is essential, for understanding what these instruments ensure and the level of protection they establish for the principle of equal pay for men and women in relation to equal work and work of equal value, bearing in mind – as stated before – that EU Member States are bound under both systems. Firstly, as legal scholars argued, EU Law and the RESC share common standards on certain elements linked to the implementation of transparency and enforcement mechanisms,[90] namely: the definition of legal concepts, such as pay;[91] effective remedies against pay discrimination on the grounds of sex;[92] employers' obligation on wages reporting;[93] the introduction of gender-neutral pay systems;[94] the shift of the burden of proof and workers' protection against dismissal;[95] provisions on equality bodies' mandate and functions;[96] and the role of monitoring bodies.[97]

However, differences in standards between EU law and the RESC in implementing the principles of equal pay can be detected with regard to the addressees of the obligations covering wage reporting and the transparency of pay setting and pay progression policies.

As noted in *Section D.II.*, Article 9 of the *Pay Transparency Directive* leaves EU Member States room for discretion in requiring employers with fewer than 100 workers to provide information on pay; concurrently, Article 6 incorporates the same approach by allowing EU Member States to assess whether to exempt employers from the obligation regarding pay progression policy information. Unlike the *Pay Transparency Directive*, in its interpretation of the equal pay provisions included in the RESC, the ECSR considers compliance with the pay information

89 *Kotsoni*, Placing Gender Equality in the Workplace at the Forefront of Social Rights in Europe: Equal Pay and Equal Opportunities under the Scrutiny of the European Committee of Social Rights, 5/10/2020, available at: https://strasbourgobservers.com/2020/10/05/placing-gender-equality-in-the-workplace-at-the-forefront-of-social-rights-in-europe-equal-pay-and-equal-opportunities-under-the-scrutiny-of-the-european-committee-of-social-rights/ (14/7/2024).

90 *Arabadjieva/Kotsoni*, EP 2022/3, p. 1557.

91 ECSR, Collective Complaint No. 125/2016, *University Women of Europe (UWE) v. Bulgaria*, para. 20.

92 ECSR, Collective Complaint No. 126/2016, *University Women of Europe (UWE) v. Croatia*, para. 105.

93 ECSR, Collective Complaint No. 127/2016, *University Women of Europe (UWE) v. Cyprus*, para. 149.

94 ECSR, Collective Complaint No. 129/2016, *University Women of Europe (UWE) v. Finland*, para. 162.

95 ECSR, Collective Complaint No. 128/2016, *University Women of Europe (UWE) v. Czech Republic*, paras. 87–88.

96 ECSR, Collective Complaint No. 130/2016, *University Women of Europe (UWE) v. France*, paras. 189–190.

97 ECSR, Collective Complaint No. 133/2016, *University Women of Europe (UWE) v. Italy*, paras. 153–154.

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obligations to be required of all employers, regardless of the number of workers within the enterprise. Put differently, the ECSR does not set any quantitative threshold for the application of pay reporting obligations, thus ensuring more effective transparency at all levels.

That said, the reason behind the different approaches in protecting the principle of equal pay within the two legal systems depends on their legal underpinnings.[98] In EU law, social and economic objectives often collide, creating contrasts where the former are economically oriented, thus increasing the risk of misleading the concept of social market economy enshrined in the Lisbon Treaty.[99] On this point, the arguments put forward by some scholars appear to be correct and worthy of support. Most notably, the *Pay Transparency Directive* is an example of such tension, because of provisions related to reporting and assessment obligations designed to safeguard a portion of employers from additional costs and administrative burdens, thus accommodating their financial concerns. On the other hand, the protection ensured to the principle of equal pay from a gender perspective by the RESC legal system appears more effective, due to the lack of those normative underpinnings regarding free-market economy, production, and business profits[100].

Simultaneously, Article 151 TFEU confirms the need to balance economic and social interests within EU law, by establishing limits on the activities to be carried out by the EU and its Member States in the field of social policy. Although the same provision includes a reference to the ESC as a benchmark for the achievement of EU social objectives, Article 151 TFEU also obliges its addressees to take into account the diversity of national practices and the necessity to maintain the competitiveness of the EU economy in ensuring such objectives, thus preserving the functioning of the internal market.

Since EU Member States are bound by both EU Law and the RESC, the asymmetry between these normative instruments in enshrining the principle of equal pay entails the risk of deviating standards, leading to a lowering of the level of social rights protection in national legal orders. However, the aforementioned binding double standards system raises questions as to how EU Member States act – or should act – in compliance with both legal orders, bearing in mind the different legal underpinnings described above. In particular, conflicts between the consequences stemming from EU membership and obligations laid down in the RESC may occur, despite the reference to the ESC in Article 151 TFEU and the role played by the RESC in shaping the wording of the CFREU, alongside the European Convention on Human Rights (ECHR). These conflicts refer to separate sets of cases involving the different requirements of EU law and the Charter, on the one hand, and the governance of the eurozone, on the other.[101]

Prior to getting to the heart of the matter, some preliminary legal remarks are required. Firstly, as is well known, Article 30(4) of the Vienna Convention on the Law

98 *Arabadjieva/Kotsoni*, EP 2022/3, pp. 1557–1562.
99 *Gerbrandy/Janssen/Thomsin*, Utrecht L Rev 2019/15, pp. 37–38.
100 *Arabadjieva/Kotsoni*, EP 2022/3, pp. 1559–1560.
101 *De Schutter*, in: Bruun/Lörcher/Schömann/Clauwaert (eds.), p. 25.

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of Treaties prevents States from escaping and circumventing their international obligations by subsequently concluding a separate agreement with other parties. From a legal perspective, this means – theoretically – that EU Member States could not invoke compliance with obligations under EU law as a justification for breaching the provisions of the RESC. As we shall see, practice has shown how the existence of external factors, such as financial crises, prevents the proper implementation of social rights under the RESC, undermining their protection in favour of primarily economic needs.

Secondly, within the EU legal system, the RESC is not recognised as having the same status as other international instruments, such as the ECHR. In this sense, the drafters of the CFREU sought to ensure consistency between the approaches of the CJEU and the European Court of Human Rights (ECtHR), to guarantee that the interpretation of the rights and freedoms established in the CFREU would be in accordance with those rights and freedoms included in the ECHR and the ECtHR's case law[102]. Moreover, the CJEU jurisprudence has shown such a privileged position of the ECHR and the CJEU's reluctance to consider interpretations provided by non-judicial bodies, in particular the ECSR, with reference to other international human rights instruments.[103]

Taking the above legal considerations as a starting point, it is now possible to analyse the sets of cases in which conflicts between the consequences stemming from EU membership and obligations laid down in the RESC may occur. As previously specified, these conflicts may concern the different requirements provided by EU Law and the RESC. As regards these cases, it must be pointed out that the ECSR refused to recognise a presumption of compatibility between EU law and the RESC, as the ECtHR did in the 2005 *Bosphorus* case.[104] In *Confédération Générale du Travail (CGT) v France*, the ECSR made this point clear, by arguing that neither the status of social rights within the EU law framework nor the process of elaboration of secondary legislation would justify such a presumption of conformity of EU legal texts with the RESC. Moreover, in the same case, the ECSR stressed the duty of EU Member States to take due consideration of the undertakings of the RESC, particularly when "they agree on binding measures in the form of directives which relate to matters within the remit of the European Social Charter".[105] In that case, France argued that the contested national measures were in accordance

102 Article 52 para. 3 CFREU states: "In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection".

103 CJEU, case C-249/96, *Lisa Jacqueline Grant v South-West Trains Ltd*, ECLI:EU:C:1998:63, para. 46; *De Schutter*, in: Bruun/Lörcher/Schömann/Clauwaert (eds.), p. 21.

104 ECtHR, Application no. 45036/98, *Bosphorus Hava Yollari Turïzm ve Tïcaret Anonïm Şïrketi v. Ireland*, paras. 155–156.

105 ECSR, Complaint No. 55/2009, *Confédération Générale du Travail (CGT) v. France*, paras. 33, 35.

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with the 2003 *Working Time Directive* and, consequently, they should be deemed in compliance with the RESC.

The second set of cases involves the governance of the eurozone. In particular, during past financial shocks, the imposition of macroeconomic policies on EU Member States in need of financial assistance created a remarkable tension with the RESC. This was the case of the austerity measures that Greece implemented because of the loan agreements concluded in 2010 and 2012[106]. The Greek government was forced to act in accordance with the loan agreements, due to the effects of the economic crisis it was facing at the time and the unsustainability of Greek public debt. From this perspective, the framework outlined in the loan agreements resulted in the intrusiveness of the austerity measures required on Greek sovereignty.[107]

These measures forced Greece to adopt reforms in its legal system that led to several violations of the RESC. For instance, in the two decisions *GENOP-DEI and ADEDY v Greece*, the ECSR declared that the Greek government had created situations of non-conformity with the right to fair remuneration enshrined in Article 4 of the RESC. In the first case, Greece had breached the right of workers to a reasonable period of termination because its revised labour legislation allowed the termination of a permanent contract without notice and with no severance pay.[108] In the second case, the ECSR held that the Greek government had violated the RESC due to the introduction of special apprenticeship contracts for individuals aged 15 to 18, marked by the lack of guarantees established by labour and social security law.[109]

The cases analysed so far clearly show the difficulty of coordination that lies in the binding double standard system linking EU law and the RESC in the protection of social rights, especially the right to equal pay between women and men. For this reason, a deeper and more dynamic interaction between the two systems could be the proper lens to avoid discrepancies among EU Member States with regard to the guarantee of social rights and their effective implementation. This approach takes into account the focus the EU has placed on dealing with this issue in recent years and the special expertise of the ECSR in the field of social rights.[110]

106 For an in-depth analysis, see *Papadopoulou*, in: Adams/Fabbrini/Larouche (eds.), pp. 223–247.

107 *Starita/De Sena*, Fra stato di necessità ed (illecito) intervento economico: il terzo "bail out" della Grecia, 4/8/2015, available at: http://www.sidiblog.org/2015/08/04/fra-stato-di-necessita-ed-illecito-intervento-economico-il-terzo-bail-out-della-grecia/ (14/7/2024).

108 See ECSR, Complaint No. 65/2011, *General Federation of Employees of the National Electric Power Corporation (GENOI-DEI) and Confederation of Greek Civil Servants' Trade Unions (ADEDY) v. Greece*.

109 See ECSR, Complaint No. 66/2011, *General Federation of Employees of the National Electric Power Corporation (GENOI-DEI) and Confederation of Greek Civil Servants' Trade Unions (ADEDY) v. Greece*.

110 *Aranguiz*, MJECL 2021/5, p. 623.

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F. Conclusions

The *Pay Transparency Directive* includes provisions that strengthened the protection of the principle of equal pay for male and female workers for equal work or work of equal value compared to previous legislative instruments, by reshaping the EU legal framework in this field.

As noted above, the wording of the *Pay Transparency Directive* reveals the EU's willingness to address the main causes of the GPG, such as those related to the definition of pay concepts, the lack of transparency in accessing information on the remuneration of employees, lengthy and costly judicial proceedings as procedural obstacles, the lack of effective sanctions and sufficient compensation, as well as the fear of retaliatory dismissals.

Although transparency and enforcement mechanisms – such as those incorporated within the Directive – are useful tools to ensure the effective implementation of the principle of equal pay, some legal concerns still remain. Market-related considerations in promoting gender equality in employment continue to play a significant role, thus concealing the risk of jeopardising the full achievement of the EU's social objectives. As argued in *Section B.*, the CJEU bolstered the social dimension of the principle of equal pay, pointing out its central role in the meaning of the current Article 157 TFEU and declaring that it prevails over the economic objective arising from the same provision, because of its nature as an expression of a fundamental right.

Concurrently, the asymmetry between EU law and the RESC in providing minimum standards concerning equal pay is a dangerous factor that determines a levelling down of its protection within EU Member States, due to the binding nature of both instruments. On this point, the *Pay Transparency Directive* leaves EU Member States free to adopt appropriate measures to ensure an higher level of protection; on the other hand, it is not difficult to assume that they will not go beyond the standards set out in Directive 2023/970/EU, due to the ongoing negative effects of the COVID-19 pandemic in their economies. However, it is undeniable that European Institutions – in the case of the *Pay Transparency Directive* – missed the opportunity to intensify a fruitful exchange and judicial dialogue between the two systems, despite the ECSR referring to the CJEU case law in several decisions[111].

Although the various EU legal sources enshrine the principle of equal pay as shown in the analysis above, effective gender equality in each EU policy still remains an objective to be properly implemented. The persistence of the GPG proves that women are still victims of direct and indirect discrimination in the labour market, undermining their working potential and increasing the risk of poverty compared to men.[112] It is still too early to assess the concrete impact that the *Pay Transparency Directive* will have in EU Member States and in tackling the GPG.

111 *Arabadjieva/Kotsoni*, EP 2022/3, p. 1564.
112 *European Institute for Gender Equality*, Gender Equality Index 2022 – The COVID-19 pandemic and care, 2022.

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Nevertheless, constant monitoring of the phenomenon will be essential to comprehend the effectiveness of its provisions in implementing the principle of equal pay.

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