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gender equality and non-discrimination



## **The enforcement of the principle of equal pay for equal work or work of equal value**

A legal analysis of the situation  
in the EU Member States, Iceland,  
Liechtenstein and Norway

Including summaries in English,  
French and German

**EUROPEAN COMMISSION**

Directorate-General for Justice and Consumers  
Directorate D — Gender equality  
Unit JUST/D2

*European Commission  
B-1049 Brussels*

# **The enforcement of the principle of equal pay for equal work or work of equal value**

A legal analysis of the situation in the EU Member  
States, Iceland, Liechtenstein and Norway

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July 2017

The author wishes to thank Rafael Fortes Tomar Marques de Oliveira,  
Erasmus and trainee at Hasselt University, for his help with the preparation of this report.

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Luxembourg: Publications Office of the European Union, 2017

ISBN 978-92-79-71471-9

Doi:10.2838/672873

Catalogue number DS-01-17-816-EN-N

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# Executive summary

Sixty years after the principle of equal pay for men and women for equal work or work of equal value was first laid down in Article 119 of the EEC Treaty (currently Article 157 of the Treaty on the Functioning of the EU), the EU today faces a gender pay gap that has remained constant at a relatively high level for decades. The most recent Eurostat data show an average figure of 16.3 % (for the year 2015) for the 28 EU Member States.<sup>1</sup> Although there is a big difference between the countries with the lowest pay gap (**Italy** and **Luxembourg**, both with 5.5 % in 2015) and the country with the highest pay gap (**Estonia**, with 26.9 % in 2015), and although these figures represent the so-called ‘unadjusted’ gender pay gap (i.e. not adjusted according to individual characteristics that may explain part of the difference),<sup>2</sup> there are signs that all over Europe sex-based pay discrimination remains a problem that should not be underestimated.

All of this is in strong contrast with the attention that all EU institutions have given to the equal pay principle over the previous decades. The EU legislator has refined the above-mentioned Treaty provision in the Equal Pay Directive 75/117/EEC,<sup>3</sup> which has later on been replaced by Recast Directive 2006/54/EC.<sup>4</sup> From the 1970s onwards, the Court of Justice of the EU (CJEU) has given the principle a boost through its many and at times innovative interpretations in preliminary rulings, which have apparently constituted a powerful tool for the uniform enforcement of the principle in the Member States. Also the European Commission has devoted its attention to the gender pay gap and has undertaken, at intervals, policy actions aimed at the dispersion of the principle that men and women should receive the same pay for equal work or work of equal value. In its recent Strategic Engagement for Gender Equality (2016-2019),<sup>5</sup> the European Commission has again set the reduction of the gender pay gap as one of its five key actions.

Also on the Member State level the gender pay gap has been the target of quite some activity. Depending on the country in question, such activity has been less, or more at the instigation of EU incitement. However, no matter how active a Member State has been until today with respect to the fight against the gender pay gap, it is certain that the principle of equal pay is, generally speaking, fully reflected in the legislation of the current 28 EU Member States. The same is true for the other three countries of the European Economic Area (EEA): **Iceland**, **Liechtenstein** and **Norway**.<sup>6</sup> Also on the national policy level attention has been paid to sex-based pay discrimination, with actions like the ‘equal pay day’ for example. However, it had already become apparent in the past that only very few claims of sex-based pay discrimination reach the national courts.<sup>7</sup>

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1 See: <http://ec.europa.eu/eurostat/tgm/table.do?tab=table&init=1&language=en&pcode=tsdsc340&plugin=1>, accessed 4 March 2017.

2 The ‘unadjusted’ gender pay gap represents the difference between the average gross hourly earnings of male paid employees and of female paid employees as a percentage of average gross hourly earnings of male paid employees. This indicator has been defined as ‘unadjusted’, as it has not been adjusted according to individual characteristics that may explain part of the earnings difference (for example: traditions in the education and career choices of men and women and part-time work, which is often highly feminised). Consequently, the pay gap figure that has been ‘adjusted’ to such individual characteristics can only be explained by the fact that there is pay discrimination. See also: European Commission (2014). *Tackling the gender pay gap in the European Union*, available at: [http://ec.europa.eu/justice/gender-equality/files/gender\\_pay\\_gap/gpg\\_brochure\\_2013\\_final\\_en.pdf](http://ec.europa.eu/justice/gender-equality/files/gender_pay_gap/gpg_brochure_2013_final_en.pdf), accessed 1 March 2017.

3 Directive 75/117/EEC on the approximation of the laws of the Member States, relating to the application of the principle of equal pay for men and women, OJ L 45, of 19 February 1975, p. 19.

4 Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), OJ L 204, of 26 July 2006, p. 23.

5 Commission Staff Working Document, ‘Strategic engagement for gender equality 2016-2019’, SWD (2015) 278 final.

6 The EEA Agreement, which entered into force on 1 January 1994, enables Iceland, Liechtenstein and Norway to enjoy the benefits of the EU’s single market without the full privileges and responsibilities of EU membership.

7 European Network of Legal Experts in the Field of Gender Equality, Foubert, P. (2010), *The Gender Pay Gap in Europe from a Legal Perspective*, pp. 19-23, available at: <http://www.equalitylaw.eu/downloads/3857-the-gender-pay-gap-in-europe-from-a-legal-perspective-including-33-country-reports-pdf-4-246-kb>, accessed 1 March 2017.

Against the background of this low amount of national case law, and given the persisting gender pay gap on the one hand, and the many actions already undertaken by the EU and its Member States on the other, the European Commission requested its European network of legal experts in gender equality and non-discrimination<sup>8</sup> to prepare a report on the *enforcement* of the equal pay principle in particular. The Network has distributed a detailed questionnaire amongst 31 national legal experts from the current 28 EU Member States and the other three EEA countries.<sup>9</sup> Questions related to the national legislative framework with respect to judicial enforcement (for example, which judicial bodies are competent, who can bring a claim, which procedural rules are applicable, etc.), to the possibilities of non-judicial enforcement (internal and external procedures, ADR, reporting duties, etc.), to the available remedies (compensation and reparation) and penalties (for example, fines and imprisonment), to protection against victimisation and to the role of the national equality bodies. Finally, the questionnaire enquired about national ‘good practices’, that could serve as an example for other states and potentially also for future EU legislative measures. The 31 country reports that resulted from the questionnaire provided the information on which this report is based.

After sketching an overview of the general situation in Europe with respect to the principle of equal pay for men and women (chapter 1), this report continues with a brief overview of the ways in which the EU Member States and the EEA countries have implemented the equal pay principle on the national legislative level (chapter 2).

Although it was not the main aim of this report to provide a general overview of the national equal pay legislation in place,<sup>10</sup> it has been deduced from the 31 country reports that the material scope given to the equal pay principle in the national implementation measures has a strong link with how easy, or how difficult it is in a given country to actually enforce equal pay provisions. National legislation may vary as to the extent to which the key concepts of the principle of equal pay for equal work or work of equal value for men and women have been defined. Some countries largely rely on the fact that victims of pay discrimination will invoke EU law before the national courts, while other countries have made an effort to provide detailed definitions in their own national law. As a consequence, not all citizens of the EU and EEA are equally clear on what is to be understood by ‘pay’, ‘equal work’, ‘work of equal value’, ‘indirect discrimination’, ‘justification’, etc. That may highly impact on enforcement. In **the Netherlands**, for example, ‘pay’ is defined by just referring to ‘any remuneration owed by the employer to the employee in return for the labour of the latter’. In **Iceland**, by contrast, a very detailed definition is provided by law (‘ordinary remuneration for work and further payments of all types, direct and indirect, whether they take the form of perquisites or other forms, paid by the employer to the employee for his or her work’). **Lithuanian** law states that ‘equal work’ shall mean ‘the performance of work activities which, according to objective criteria, are equal or similar to other work activities to the extent that both employees may be interchanged without significant costs for the employer.’ ‘Equivalent work’ shall mean that, according to objective criteria, it is not lower skilled and less significant for the employer in the achievement of his operational objectives than any other comparable work. In countries like **Finland**, **Greece** and **Latvia**, national law does not elaborate on what is ‘equal work’ or ‘work of equal value.’ When it comes to justifications, there are countries like **Cyprus**, **Slovakia** and **Slovenia** that do not accept any justification at all, whilst others do accept that pay differences are justified on the basis of objective reasons that should have no connection with discrimination (for example, **France**, **Poland**, **Hungary**, and **the Netherlands**). The **Swedish** expert has pointed at the risk that in such a case judges may be all too ready to accept employers’ justifications for pay differentials, thereby making it difficult

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8 The European Commission has set up this network in order for it to support its work by providing independent information and advice on relevant developments in the Member States. See: <http://www.equalitylaw.eu/>, accessed 4 March 2017.

9 The questionnaire is attached to this report.

10 That has already been done in other reports. See, for example, European network of legal experts in gender equality and non-discrimination, Senden, L., Timmer, A. (2016), *A comparative analysis of the implementation of EU gender equality law in the EU Member States, the former Yugoslav Republic of Macedonia, Iceland, Liechtenstein, Montenegro, Norway, Serbia and Turkey*, European Commission, available at: <http://www.equalitylaw.eu/downloads/3967-a-comparative-analysis-of-gender-equality-law-in-europe-2016-pdf-867-kb>, accessed 31 March 2017.

in practice for the claimant to show that discrimination has actually taken place. In this chapter of the report some attention is also paid to the question whether national law requires a comparator in order to establish an equal pay claim in the courts. The **French** Court of Cassation, for example, has held that ‘the existence of discrimination does not necessarily imply a comparison with other workers.’ By contrast, the law of many other states still stipulates that an actual (and not a hypothetical) comparator needs to be identified. Such an actual comparator is sometimes very narrowly described in terms of time, sex, work, etc. The **Dutch** and **Irish** acts, for example, require that there should be a comparator of the opposite sex. In **Iceland**, the assumption underlying the law is that the comparator is working for the same employer. It goes without saying that the more conditions the comparator needs to fulfil, the harder it is for a victim to actually prove that there is sex-based pay discrimination.

Chapter 3 focuses on the actual enforcement of the principle of equal pay in the 31 states covered. It addresses judicial and non-judicial enforcement (Sections 3.1 and 3.2, respectively), typical remedies allowed in both judicial and non-judicial enforcement, including compensation and reparation (Section 3.3), the measures aimed at protecting employees against victimisation (Section 3.4), the penalties involved (Section 3.5) and the role and competences of the equality bodies with regard to sex-based pay discrimination (Section 3.6).

Section 3.1 is based on Article 17(1) of Recast Directive 2006/54/EC requiring Member States to ensure that judicial procedures are available for the enforcement of all obligations under this Directive. The responses to the questionnaires have indicated that all of the 31 countries studied do indeed have legislation guaranteeing victims of sex-based pay discrimination access to justice in order to judicially enforce their rights. Sometimes such legislative provisions relate directly to the enforcement of equal pay for equal work or work of equal value (for example, **Ireland** and **Malta**), sometimes such enforcement measures are to be found in more general equality legislation (for example, **Austria, Belgium, Croatia, Finland** and the **United Kingdom**), and in still other cases one needs to resort to general rules regarding the enforcement of rights (for example, **Bulgaria, Greece, France** and **Hungary**). Generally speaking, nearly all experts have pointed out that, from a mere legislative point of view, judicial protection and the access thereto are satisfactorily regulated in their countries. However, it has turned out that the way in which judicial enforcement is organised may negatively affect a victim’s chances to actually obtain judicial redress. A first issue concerns the question of which judicial body is competent to hear a pay discrimination claim. Whilst in the majority of countries pay discrimination claims must be brought before the civil courts (including labour/ employment/ industrial tribunals and courts), in an exceptional case there is a body that is competent to hear discrimination cases only (for example, the Gender Equality Complaints Committee in **Iceland**). A second issue relates to the applicable procedural rules. Those rules determine an important number of procedural aspects and may consequently have a big impact on enforcement. Relevant questions relate to who can bring the claim (only the victim, or are class actions allowed?), which evidence can be produced (statistics, expert witnesses?) and whether the burden of proof shifts from the victim to the employer according to Article 19 of Recast Directive 2006/54/EC. Also limitation periods have an influence on how easy it is for a victim to have his/her right to equal pay enforced. Limitation periods differ widely across the European countries, ranging from, for example, three months in **Lithuania**, to five years in **Croatia**<sup>11</sup> and six years in the **United Kingdom**. Apart from the above-mentioned difficulties that are directly related to the substance of the judicial enforcement rules, the 31 national experts described a number of other barriers that hinder the effective enforcement of the principle of equal pay for men and women. Many of those barriers had already been hinted at before:<sup>12</sup> costly proceedings, the lack of pay transparency, the lack of sensitivity for or even limited knowledge of sex-based pay discrimination (for example, on the part of employees, employers, trade unions, judges, etc.), the fear of victimisation (especially in small countries like **Estonia, Liechtenstein, Luxembourg** and **Malta**) and the lack of trust in the national judicial system. One relatively new enforcement obstacle

11 Croatia, article 139 Labour Code, <http://www.mrms.hr/wp-content/uploads/2015/03/labour-act.pdf>, accessed 24 August 2017.

12 European Network of Legal Experts in the Field of Gender Equality, Foubert, P. (2010), *The Gender Pay Gap in Europe from a Legal Perspective*, pp. 19-23, available at: <http://www.equalitylaw.eu/downloads/3857-the-gender-pay-gap-in-europe-from-a-legal-perspective-including-33-country-reports-pdf-4-246-kb>, accessed 1 March 2017.

that surfaced in a number of country reports is related to the changed political and economic situation in a number of EU Member States, namely **Greece, Hungary, Italy** and **Poland**. **Greece**, for example, faces economic difficulties which makes people who are still lucky enough to have a job less critical of their employment conditions. **Hungary's** current political climate would require a fair degree of bravery to stand up against sex-based pay discrimination.

Section 3.2 deals with non-judicial enforcement measures, as also allowed by Article 17(1) of Recast Directive 2006/54/EC. The country reports have indicated that out-of-court solutions have gained popularity in the field of discrimination disputes. According to the **Dutch** expert, the evolution towards more out-of-court settlements may also have been intensified by the fact that an increasing number of people take out insurance for judicial assistance. Insurance companies are allegedly not very eager to commence difficult and expensive procedures concerning matters like pay discrimination based on sex, but often prefer a settlement instead. The out-of-court settlements described in the national reports are very diverse, and may either be provided by law, based on policies or even be voluntary initiatives set up by companies, institutions, organizations, etc.

There are internal (within the company) (i) and external (outside the company) procedures (ii). Internal procedures can be more or less formalised, but are almost never compulsory. From the latter perspective, the **Romanian** situation is quite particular. **Romanian** law does not provide for a legal obligation to establish internal procedures within the company in order to hear pay discrimination claims on the ground of sex. However, if companies do decide to establish internal procedures, **Romanian** law forces the alleged victim to first try this avenue before taking advantage of external procedures. In so doing, **Romania** has also created a legal link between the internal enforcement procedure, on the one hand, and the potential later judicial enforcement procedure before the court. As far as the external procedures are concerned, it is clear that in many countries the national equality bodies are involved in those procedures. Also labour inspectorates may play a role (for example, **France**, the **Czech Republic**, **Greece** and **Slovenia**), as well as trade unions (for example **Italy** and **Sweden**). Apart from internal and external procedures as described above, there is also alternative dispute resolution (ADR), which is probably the most well-known example of non-judicial enforcement (iii). In this report ADR is understood in a narrow sense, i.e. as the potential use of mediation, conciliation and arbitration prior to a court hearing.<sup>13</sup> These are also referred to as 'judicial ADR', as there is always a link with judicial enforcement, be it as an option preceding the actual hearing of a case in court, or as a genuine alternative for court proceedings. Given the popularity of ADR, it is surprising that quite a number of experts have mentioned that the law of their states does not refer to ADR, be it in a compulsory or a non-compulsory way (**Austria, Bulgaria, Cyprus, Estonia** and **the Netherlands**). In many other countries, however, there are laws that make mediation (for example, in the **Czech Republic** and in **Latvia**), conciliation (for example, in **Greece, France** and **Poland**) and arbitration (for example, in **Croatia** and, if established by collective agreement, in **Portugal**) available for sex-based pay discrimination cases.

It is hard to draw conclusions about the numerical importance of the above-mentioned out-of-court solutions. Generally speaking, national experts have mentioned that there are few to no figures available. Only when equality institutions are involved may some data be available. **Iceland** seems to be the only country that has gathered reliable statistical data. On top of the limited availability of statistical data, the conditions of the actual settlement are almost always confidential. Many experts have called such confidentiality problematic. However, the **Irish** expert has indicated that it is precisely confidentiality that constitutes the attractiveness of the out-of-court solutions.

The last paragraphs of section 3.2 (iv) deal with different national efforts that are being made in Europe to *prevent* pay discrimination on the ground of sex. National experts have been asked in the questionnaire whether they are aware of initiatives, other than the out-of-court solutions mentioned above, that could

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13 Eurofound (2010), *Individual Disputes at the Workplace: Alternative Disputes Resolution*, Dublin, p. 1, available at: [https://www.eurofound.europa.eu/sites/default/files/ef\\_files/docs/eiro/tn0910039s/tn0910039s.pdf](https://www.eurofound.europa.eu/sites/default/files/ef_files/docs/eiro/tn0910039s/tn0910039s.pdf), accessed 27 February 2017.

also be classified under non-judicial enforcement. The most popular initiative seems to be the national 'equal pay days.' Also certificates, labels and prizes have been mentioned, as well as check-lists for job evaluation and classification systems, media campaigns and the like. The **Hungarian, Italian and Polish** experts have however indicated that very few initiatives have been taken recently in their countries. This is probably caused by the already mentioned political or economic situation in these countries.

Section 3.3 of chapter 3 deals with the remedies, and more precisely compensation and reparation, available in both judicial and non-judicial enforcement systems. Article 18 of Recast Directive 2006/54/EC provides that such remedies must be real and effective, in a way that is dissuasive and proportionate to the damage suffered. Usually embedded in their (sex) equality legislation, a number of countries provide for specific implementing legislation, while in other countries there are legislative provisions referring specifically to remedies for sex-based *pay* discrimination. In some other countries, the general rules that apply in case of breaches of legal measures laid down in civil (procedure) codes or labour (procedure) codes are to be relied on.

Section 3.3 gives an overview of the different types of compensation, and reparation more generally, that have been listed by the national experts. In this report compensation is defined as a way of redressing quantifiable damage or harm. Reparation refers to compensation but also encompasses other ways of redressing the consequences of sex-based pay discrimination. Attention is paid to compensation and reparation in judicial enforcement procedures, as well as in out-of-court solutions. In most of the countries victims are able to claim financial compensation in the courts for the actual loss suffered. Financial compensation typically includes the pay difference between the victim's wage and the (higher) wage of the comparator. Sometimes this so-called 'levelling up' of pay is required by legislation (for example, **Austria** and **Denmark**). Sometimes it is the consistent case law of the courts that orders the levelling up (for example, the **Czech Republic, Greece** and **Spain**). As far as non-material damages are concerned, the situation is quite diverse. Generally, non-material damages are rarely awarded and, in the event of this actually occurring, it is usually at a very low amount. Other types of reparation that can be awarded in case of judicial enforcement include the publication of the judgment or the possibility for the judge to declare the unlawful provisions null or void, employers are warned by the courts to refrain from discrimination in the future, etc. With respect to remedies in non-judicial enforcement, a large amount of national experts mentioned that no relevant data are available. A few experts referred to pecuniary remedies (the **Czech Republic, Hungary** and **France**), the publication of the ruling (**Iceland and Hungary**), public apologies (the **Czech Republic**) and reinstatement or restoration (**the Netherlands**).

Section 3.4 of chapter 3 discusses national measures aimed at protecting employees against dismissal or any other adverse treatment by way of retaliation due to an equal pay complaint. Article 24 of Recast Directive 2006/54/EC provides that Member States should provide such measures, and all states included in this report seem to be compliant. The vast majority of countries offer protection against victimisation on the basis of general (sex) equality legislation. In a very small number of countries, victims need to revert to general principles of labour law to find protection against victimisation (**Estonia, Latvia** and **Portugal**). The way in which the protection is attained, differs, however, and case law appears to be relatively scarce. The report further discusses who is protected against victimisation (the alleged victim, or also persons who knew about the discrimination, or who served as a comparator?), from which disadvantageous treatment, during which period and, finally, which are the applicable sanctions.

Section 3.5 concerns potential penalties. Article 25 of Recast Directive 2006/54/EC provides that such penalties, which may comprise the payment of compensation to the victim, must be effective, proportionate and dissuasive. This provision consequently allows, but does not require, Member States to take measures providing for the payment of punitive damages to the person who has suffered discrimination on grounds of sex.<sup>14</sup> Such punitive damages are not related to the financial compensation aimed at in Article 18 of the Recast Directive as mentioned above. While in some countries the law does not provide any

14 Case C-407/14 *Arjona Camacho* ECLI:EU:C:2015:831, paras. 38 and following.



possibility to penalise the perpetrator of the equal pay principle other than compensation or reparation (for example, **Austria, Denmark and Sweden**), other countries have to turn to the generally applicable sanctions to cover for the violations of the principle of equal pay (for example, **Greece, Malta, Poland and Spain**). A large number of countries, however, have adopted specific legislation in response to Article 25 (for example, **Belgium, Bulgaria and Croatia**). In those cases the infringement of the (sex) equality provision is criminalised in a separate legal provision. The typical penalties that the national experts referred to are criminal sanctions (fines, imprisonment or a combination of both) and administrative sanctions (administrative fines in particular), among other types (e.g. the publication of decisions, the loss of public benefits, etc.). Several countries have also introduced alternative penalties, like the publication of the decision. Although publication may, at first sight, be a penalty with a highly dissuasive impact, the **Danish, German and Portuguese** experts have warned that in their countries the names of the parties are never mentioned in the published versions of the decisions, making such publication less of an accessory sanction. In **Hungary**, the condemning decision including the name of the violator is published occasionally on the website of both the equality body and the employer. Another interesting alternative penalty, which has been adopted in both **Italy and Spain**, is the removal of an advantage from the discriminator that he would otherwise have qualified for, like subsidies or other public benefits. Similarly, a number of national legal systems (for example, **Belgium, Italy, Hungary and the Netherlands**) allow the exclusion from public procurement of employers who have been found guilty of pay discrimination.

Finally, in section 3.6 the report takes a closer look at the national equality bodies that each Member State must establish 'for the promotion, analysis, monitoring and support of equal treatment of all persons without discrimination on grounds of sex' (Article 20 of Recast Directive 2006/54/EC). All national experts have reported the existence of at least one such equality body competent to deal with problems and/or claims with regard to the principle of equal pay for equal work or work of equal value for men and women.

There appears to be a wide variety of national equality bodies displaying differences in many aspects. In the first place, there are considerable variations as to the equality bodies' material scope. In a limited number of states there is an equality body that is only competent for sex equality. Such countries include **Belgium, Croatia, Cyprus, Finland, Iceland, Italy and Portugal**. The majority of states, however, have national equality bodies that deal with a large number of discrimination grounds like race, disability, age, belief, etc. **Lithuania, Spain and Liechtenstein** have recently moved from an equality body which is competent for just sex discrimination to an equality body targeting a broader range of discrimination grounds. The fields within which the equality bodies can act may also vary, and regularly go beyond the employment sphere, covering, for example, education and the supply of goods and services. Finally, also from a territorial perspective, equality bodies demonstrate differences. National equality bodies may be competent on the national level and/or on the regional and local levels. In the second place, national equality bodies take up different positions within the national state apparatus. All of them have a connection with the national civil service, but the strength of the link is not the same in all countries. In some states, the equality body's independence seems to be quite high. The newly established **Irish** Human Rights and Equality Commission, for example, is an entirely independent body. The commissioners are appointed by the President of **Ireland** so that there can be no perception of any political interference whatsoever. By contrast, the link between the equality body and the public service seems to be somewhat tighter in **Belgium**. The Institute for the Equality of Men and Women has a more hybrid purpose, serving, on the one, hand as an administrative body to implement federal policy on sex equality, and being in charge of promoting gender equality through all useful means, on the other hand. Particularly in countries that have opted for an ombudsperson to take up the tasks of a national equality body, the independence of this function is one of the most important elements pointed out by the national experts (for example, **Cyprus, Croatia, Finland, Greece, Latvia, Lithuania, Norway and Sweden**).

The competences of the national equality bodies appear to be numerous and diverse, and many of them relate to the enforcement of the principle of equal pay for men and women. Many equality bodies have competences regarding the non-judicial enforcement of the equal pay principle. Most of the national equality bodies are involved in awareness-raising campaigns and the promotion of sex equality by all

useful means, including public events and conferences, training sessions for lawyers, civil servants, NGOs, public authorities and companies, the development of prevention tools and e-learning courses, information and consultation days, etc. Advising stakeholders, in the form of statements, opinions or decisions in particular cases, and/or conducting research more generally is also a task that must be taken up by many national equality bodies. For some of them it is even their only task. Stimulating social dialogue and working with social partners is another example. Finally, some national equality bodies also play a role, which can take on many different forms, in ADR. Apart from their non-judicial enforcement competences, a number of equality bodies are also involved in the judicial enforcement of the equal pay principle. Such a role may range from assisting alleged victims to bring their claims (for example, **Germany, Malta, Slovenia** and the **United Kingdom**), bringing a claim on behalf of the victim (for example, in **Ireland, Poland, Slovakia** and **Slovenia**), initiating discrimination cases themselves (for example, in **Belgium** and **Spain**) or acting as an *amicus curiae* (for example, **France** and **Romania**), to acting as a (quasi-) judicial body with the ability to remedy (compensation and/or reparation) (for example, **Denmark** and **Finland**) and potentially also with sanctioning powers (for example, **Bulgaria** and **Hungary**). Remedies that national equality bodies aim at are, generally speaking, quite diverse, and are of both a judicial and non-judicial nature. There currently seems to be a slight preference for amicable solutions with a focus on the avoidance of future discrimination.

Most of the country reports have mentioned that national equality bodies collect data in only a limited and fragmentary way (for example, **Cyprus, Estonia, Germany, Hungary** and **Malta**). Some equality bodies do not even (or hardly) gather or publish anything at all (for example, **Bulgaria** and **Luxembourg**). There are some noteworthy exceptions like **Denmark**, which has an equality body that publishes all of its decisions on its website, albeit in an anonymized way.

The last chapter of this report (chapter 4) presents conclusions, good practices and recommendations.

The 31 country reports have provided indications that a major part of the judicial enforcement problem is connected with the judicial procedures themselves as they are still very heterogeneous. Depending on a number of characteristics, a national judicial enforcement system is less or more efficient with respect to the enforcement of the principle of equal pay for men and women for equal work or work of equal value. This report highlights five key characteristics that, depending on how they have been filled in on a national level, may impact substantively on the successful judicial enforcement of the equal pay principle. A first key element relates to the judicial body that can hear a case concerning sex-based pay discrimination. One may suggest here that more specialised courts have a more in-depth knowledge of sex-based pay discrimination and are therefore better equipped to judge such cases. A second element is connected with the actual bringing of a sex-based pay discrimination case. In this respect, it is to be expected that the possibility for a victim of sex-based pay discrimination to join a class action (in addition to the possibility to bring an individual claim) has a substantial and positive impact on the national enforcement of the equal pay principle. A third key characteristic is related to the shifting of the burden of proof. In nearly all states studied it is unclear when exactly there is a sufficiently serious indication of discrimination for the burden of proof to shift onto the employer. States with more detailed legislation in this respect seem to be better armed. Limitation periods are the fourth key characteristic. In many states limitation periods are very short and often it is difficult to find out which limitation period is applicable. That also seriously limits the possibilities to enforce the principle of equal pay for men and women. Finally, in the fifth place, available remedies (compensation and reparation) and the possibility to impose criminal sanctions impact on the effectiveness of a judicial enforcement mechanism. The low amounts set and awarded for both material and non-material damages do not particularly deter future pay discriminators. With respect to criminal sanctions (fines and/or imprisonment) a similar finding is to be reported, leading to a similar lack of deterrence.

Notwithstanding the above-mentioned difficulties related to judicial enforcement, a number of national 'good practices' are certainly worth highlighting. Those concern both hard law and soft law measures that can serve as examples on a national or a European level. Interesting hard law measures include legal

initiatives that focus on pay transparency. There is, for example, the **Finnish** measure of pay mapping, and the provisions of the new **Lithuanian** Labour Code of 2017, which make a significant move in the direction of more transparency in wage systems by introducing several obligations for employers to make available wage-related information to the employees, the works council and the trade unions. Also a few procedural law provisions can be labelled as good practices. The **Portuguese** expert referred to a reasonably far-reaching rule in the **Portuguese** Labour Code, regarding the automatic replacement system of sex discriminatory collective agreements or company regulation provisions by the more favourable provision which then becomes applicable to all male and female workers, in the case of a successful pay discrimination claim. Also the sanction of the revocation of public benefits or even exclusion, for a certain period of time, from any further award of financial or credit inducements or from any public tender (**Italy** and **Spain**), the works mediator (**Belgium**) and the duty to publish decisions (**Ireland**), preferably not anonymized, constitute good hard law practices. Good soft law practices are more numerous. They include the award of labels, certificates and prizes (for example, **Cyprus**, **Malta** and **Norway**), awareness-raising initiatives like the ‘future day’ in **Liechtenstein** and the ‘equal pay day’ in many European states. Also the development of assessment tools and procedures – for employers, employees and social partners – can be seen as a good soft law practice. Reference can be made here to the equal wage monitoring provided by the **Swedish** National Mediation Office. In some countries quite some expertise seems to be possessed by, for example, equality bodies in having the national media cover the (soft law) initiatives that are taken to fight sex-based pay discrimination (for example, **Malta**, **Norway**, **Portugal** and the **United Kingdom**).

This report concludes that from the several country reports indications may be gathered that specialisation in its many different meanings is to be recommended. Firstly, with respect to the applicable legal rules such specialisation implies that clear definitions of legal concepts like, for example, ‘equal work’, ‘work of equal value’ and ‘indirect discrimination’, as well as clarity with respect to the question of whether a comparator is required or whether unequal treatment can be justified substantially enhance the possibilities to judicially enforce the equal pay principle for men and women. Secondly, the more specialised the involved judicial or non-judicial body is, the more satisfactory its activities seem to be. Special attention should be given to the social partners that have been accused by a number of experts of perpetuating the gender pay gap through collective negotiations leading to gender discriminatory function classifications and wage systems. Thirdly, the specialisation of claimants might also enhance judicial enforcement. Whilst most of the victims of pay discrimination are only confronted once with pay discrimination – and will consequently never be specialists – the possibility of a class action suit allows certain organisations to obtain a specialist position at the service of discriminated workers. Fourthly, procedural rules that are specifically ‘geared’ towards discrimination cases (taking into account the vulnerable position of the alleged victim of the discrimination) also have a positive impact on judicial enforcement. That should not only involve the mere mentioning of the shifting of the burden of proof as requested by Recast Directive 2006/54/EC. It should also encompass a description of which and how much information is needed for the actual shifting of the burden of proof. Finally, enforcement is undoubtedly also served by legal rules that protect employees who claim their rights against victimisation, specifically in discrimination cases. It is to be expected that a prohibition of retaliation that is based on general principles of labour law offers less protection as it is less visible. Apart from specialisation, this report also suggests that the Member States pay sufficient attention to both judicial and non-judicial enforcement initiatives and have them widely covered by national media.<sup>15</sup> After all, there still appears to be insufficient knowledge about the gender pay gap and the different ways to enforce the principle of equal pay for equal work or work of equal value for men and women, notwithstanding the fact that the EU and the majority of its Member States have already been taking action for so long.

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15 Fuchs, G. (2013), ‘Strategic Litigation for Gender Equality in the Workplace and Legal Opportunity Structures in Four European Countries,’ *Canadian Journal of Law and Society*, Vol. 28, no. 2, pp. 206-207.



# Résumé

Soixante ans après que le principe de l'égalité des rémunérations entre hommes et femmes pour un même travail ou travail de même valeur ait été consacré pour la première fois par l'article 119 du traité CEE (aujourd'hui article 157 du traité sur le fonctionnement de l'UE), l'Union connaît encore un écart de rémunération entre travailleurs masculins et féminins dont le niveau relativement élevé est constant depuis plusieurs dizaines d'années. Les données Eurostat les plus récentes font état d'un chiffre moyen de 16,3 % (année 2015) pour les 28 États membres de l'UE.<sup>1</sup> En dépit d'une importante disparité entre les pays affichant l'écart de rémunération le plus faible (**Italie** et **Luxembourg** avec un écart de 5,5 % en 2015 dans les deux cas) et le pays où il est le plus élevé (**Estonie** avec 26,9 % en 2015), et même si ces chiffres représentent l'écart des rémunérations «non corrigé» entre hommes et femmes (à savoir l'écart non ajusté pour tenir compte des caractéristiques individuelles susceptibles d'expliquer partiellement la différence),<sup>2</sup> il existe des signes montrant que, partout en Europe, la discrimination salariale fondée sur le sexe demeure un problème qu'il convient de ne pas sous-estimer.

Ce constat contraste fortement avec l'attention soutenue que toutes les institutions de l'UE accordent au principe de l'égalité des rémunérations depuis plusieurs dizaines d'années. Le législateur européen a affiné la disposition du traité susmentionnée dans la directive 75/117/CEE relative à l'égalité des rémunérations,<sup>3</sup> ultérieurement remplacée par la directive de refonte 2006/54/CE.<sup>4</sup> La Cour de justice de l'Union européenne (CJUE) a donné une impulsion à ce principe à partir des années 1970 en formulant à de nombreuses reprises, et de façon parfois innovante, des interprétations à son égard dans ses décisions préjudicielles – lesquelles se sont apparemment avérées un puissant outil d'harmonisation de l'application du principe dans les États membres. La Commission européenne a porté elle aussi son attention sur l'écart des rémunérations entre hommes et femmes, et entrepris à intervalles réguliers des actions visant à diffuser le principe selon lequel travailleurs masculins et féminins devraient bénéficier de la même rémunération pour un travail égal ou un travail de même valeur. Dans son récent engagement stratégique pour l'égalité entre les femmes et les hommes (2016-2019),<sup>5</sup> la Commission européenne fait à nouveau de la réduction de l'écart de salaire entre les hommes et les femmes l'un de ses cinq domaines d'action prioritaires.

Au niveau des États membres également, l'écart des rémunérations entre travailleurs masculins et féminins a suscité une certaine activité – laquelle a été plus ou moins menée à l'instigation de l'UE selon le cas. Quoi qu'il en soit et quel qu'ait été à ce jour le dynamisme manifesté par les États membres dans la lutte contre l'écart salarial entre hommes et femmes, on peut affirmer aujourd'hui que le principe de l'égalité des rémunérations est, de manière générale, pleinement reflété dans la législation des 28 pays actuellement membres de l'UE. Il en va de même des trois autres pays de l'Espace économique européen

- 1 Voir: <http://ec.europa.eu/eurostat/tgm/table.do?tab=table&init=1&language=en&pcode=tsdsc340&plugin=1>, consulté le 4 mars 2017.
- 2 L'écart de rémunération non ajusté entre hommes et femmes représente la différence entre la rémunération horaire brute moyenne des hommes salariés et des femmes salariées en pourcentage de la rémunération horaire brute moyenne des hommes salariés. Cet indicateur a été défini comme «non corrigé» car il n'est pas ajusté pour tenir compte de caractéristiques individuelles susceptibles d'expliquer partiellement la différence de rémunération (par exemple: les traditions en matière d'éducation et de choix de carrière pour les hommes et les femmes, ou le travail à temps partiel, qui est souvent très féminisé). En conséquence, le chiffre de l'écart des rémunérations qui est «ajusté» pour tenir compte de ces caractéristiques individuelles ne peut s'expliquer que par l'existence d'une discrimination salariale. Voir également: Commission européenne (2014). *Tackling the gender pay gap in the European Union*, disponible sur: [http://ec.europa.eu/justice/gender-equality/files/gender\\_pay\\_gap/gpg\\_brochure\\_2013\\_final\\_en.pdf](http://ec.europa.eu/justice/gender-equality/files/gender_pay_gap/gpg_brochure_2013_final_en.pdf), consulté le 1<sup>er</sup> mars 2017.
- 3 Directive 75/117/CEE concernant le rapprochement des législations des États membres relatives à l'application du principe de l'égalité des rémunérations entre les travailleurs masculins et les travailleurs féminins, JO L 45 du 19 février 1975, p. 19.
- 4 Directive 2006/54/CE relative à la mise en œuvre du principe de l'égalité des chances et de l'égalité de traitement entre hommes et femmes en matière d'emploi et de travail (refonte), JO L 204 du 26 juillet 2006, p. 23.
- 5 Document de travail des services de la Commission, «Engagement stratégique pour l'égalité entre les hommes et les femmes 2016-2019», SWD (2015) 278 final.

(EEE): l'Islande, le Liechtenstein et la Norvège.<sup>6</sup> Les politiques nationales ont accordé elles aussi une attention à la discrimination salariale fondée sur le sexe avec des actions telles que la Journée de l'égalité salariale par exemple; l'expérience montre néanmoins que rares sont les recours invoquant une discrimination salariale fondée sur le sexe qui parviennent aux juridictions nationales.<sup>7</sup>

Face à la rareté des contentieux nationaux, et compte tenu de la persistance de l'écart salarial entre hommes et femmes, d'une part, et des multiples actions déjà entreprises par l'UE et ses États membres, d'autre part, la Commission européenne a demandé à son réseau d'experts juridiques dans le domaine de l'égalité des genres et de la non-discrimination<sup>8</sup> de préparer un rapport sur l'application du principe de l'égalité des rémunérations en particulier. Le Réseau a adressé un questionnaire détaillé aux 31 experts juridiques nationaux appartenant aux 28 États membres actuels de l'UE et aux trois autres pays de l'EEE.<sup>9</sup> Les questions portaient sur le cadre législatif national en matière d'application judiciaire (quelles sont les instances judiciaires compétentes, qui peut introduire un recours, quelles sont les règles de procédure applicables, etc.); sur les possibilités de mise en application extrajudiciaire (procédures internes et externes, mécanismes alternatifs de résolution des conflits, obligations en matière de rapport, etc.); sur les voies de recours (indemnisation et réparation) et sanctions (amendes et emprisonnement par exemple) disponibles; sur la protection contre les rétorsions; et sur le rôle des organismes nationaux pour l'égalité de traitement. Enfin, le questionnaire s'intéresse aux «bonnes pratiques» nationales susceptibles d'inspirer d'autres pays, voire peut-être de futures mesures législatives au niveau de l'UE. Les 31 rapports nationaux tirés du questionnaire ont constitué la base d'information sur laquelle se fonde le présent rapport.

Après avoir donné un aperçu général de la situation en Europe en termes de respect du principe de l'égalité des rémunérations entre hommes et femmes (chapitre 1), le rapport décrit brièvement la manière dont les États membres de l'UE et les pays de l'EEE ont mis ce principe en œuvre dans leur législation nationale (chapitre 2).

L'objectif principal du présent rapport n'était pas de dresser un bilan général des législations nationales en vigueur en matière d'égalité salariale,<sup>10</sup> mais il ressort des 31 rapports nationaux que le champ d'application matériel conféré au principe de l'égalité de rémunération dans les mesures nationales de mise en œuvre détermine largement la facilité – ou la difficulté – de faire effectivement appliquer les dispositions en la matière dans un pays déterminé. Les législations nationales peuvent varier quant à la mesure dans laquelle elles définissent les concepts clés du principe de l'égalité des rémunérations des hommes et des femmes pour un travail égal ou un travail de même valeur. Certains pays comptent largement sur le fait que les victimes de discrimination salariale vont invoquer le droit européen devant les juridictions nationales, tandis que d'autres se sont donné la peine de prévoir des définitions précises dans leur propre droit national. Il en résulte que tous les citoyens de l'UE et de l'EEE n'ont pas une vision aussi claire de ce qu'il faut entendre par «rémunération», «même travail», «travail de même valeur», «discrimination indirecte», «justification», etc. – et que cette situation peut avoir une forte incidence sur la mise en application. Aux Pays-Bas, par exemple, la «rémunération» est définie par une simple référence à «toute rémunération due par l'employeur au salarié en échange du travail de ce dernier». En Islande, en revanche, la loi fournit une définition très détaillée («rémunération ordinaire d'un travail et versements

6 L'accord EEE, entré en vigueur le 1<sup>er</sup> janvier 1994, permet à l'Islande, au Liechtenstein et à la Norvège de bénéficier des avantages du marché unique de l'UE sans avoir tous les privilèges et toutes les responsabilités d'une adhésion à l'UE.

7 Réseau européen d'experts juridiques dans le domaine de l'égalité des genres, Foubert, P. (2010), *L'écart de rémunération entre femmes et hommes en Europe d'un point de vue juridique*, p. 19-23, disponible sur: <http://ec.europa.eu/social/BlobServlet?docId=6138&langId=fr>, consulté le 1<sup>er</sup> mars 2017.

8 La Commission européenne a institué ce réseau pour qu'il étaye son action par l'apport d'informations et de conseils indépendants sur les évolutions pertinentes intervenant dans les États membres. Voir: <http://www.equalitylaw.eu/>, consulté le 4 mars 2017.

9 Le questionnaire est joint au présent rapport.

10 Ce qui avait déjà été fait par d'autres rapports. Voir notamment, Réseau européen des experts juridiques dans le domaine de l'égalité des genres et de la non-discrimination, Senden, L., Timmer, A. (2016), *A comparative analysis of the implementation of EU gender equality law in the EU Member States, the former Yugoslav Republic of Macedonia, Iceland, Liechtenstein, Montenegro, Norway, Serbia and Turkey*, Commission européenne, disponible sur: <http://www.equalitylaw.eu/downloads/3967-a-comparative-analysis-of-gender-equality-law-in-europe-2016-pdf-867-kb>, consulté le 31 mars 2017.

supplémentaires de tous types, directs ou indirects, que ce soit sous la forme d'avantages indirects ou sous d'autres formes, payés par l'employeur au salarié/à la salariée pour son travail»). En **Lituanie**, la loi dispose que «même travail» signifie «l'exécution d'activités professionnelles qui, selon des critères objectifs, sont équivalentes ou similaires à d'autres activités professionnelles dans la mesure où les deux salariés sont interchangeables sans frais significatifs pour l'employeur». «Travail équivalent» signifie que, selon des critères objectifs, il ne s'agit pas pour l'employeur d'un poste moins qualifié et moins important que tout autre poste comparable pour atteindre ses objectifs opérationnels. Dans des pays tels que la **Finlande**, la **Grèce** et la **Lettonie**, le droit national ne précise pas ce qu'est un «même travail» ou un «travail de même valeur». S'agissant des justifications, des pays tels que **Chypre**, la **Slovaquie** et la **Slovénie** n'admettent absolument aucune justification, alors que d'autres (**France**, **Pologne**, **Hongrie** et **Pays-Bas** notamment) admettent que des différences de rémunération puissent se justifier pour des raisons objectives sans aucun rapport avec une discrimination. L'expert **suédois** a attiré l'attention sur le risque que, dans ce type de situation, les juges se montrent particulièrement empressés d'accepter les arguments avancés par les employeurs pour justifier des différences salariales, et que la partie requérante éprouve les plus vives difficultés pratiques à démontrer qu'il y a réellement eu discrimination. Ce chapitre du rapport s'intéresse également à la question de savoir si la législation nationale exige un comparateur pour faire valoir un recours visant à obtenir une égalité salariale. La Cour de cassation **française**, par exemple, a considéré que «l'existence d'une discrimination n'implique pas nécessairement une comparaison avec d'autres travailleurs». La législation de beaucoup d'autres États membres continue par contre de stipuler qu'un comparateur réel (et non hypothétique) doit être identifié – lequel comparateur réel est parfois décrit de façon très étroite en termes de temps, de sexe, de travail, etc. Les législations **allemande** et **irlandaise**, par exemple, exigent un comparateur du sexe opposé. En **Islande**, la loi prend pour hypothèse sous-jacente que le comparateur travaille pour le même employeur. Il va de soi que plus le comparateur doit remplir de conditions, plus il est difficile pour la victime de prouver effectivement une discrimination salariale fondée sur le sexe.

Le chapitre 3 se concentre sur l'application réelle du principe de l'égalité de rémunération dans les 31 pays couverts par l'analyse. Il aborde l'application judiciaire et extrajudiciaire (sections 3.1 et 3.2 respectivement), les voies de recours classiques dans les deux cas, y compris la compensation et la réparation (section 3.3), les mesures destinées à protéger les salariés contre les rétorsions (section 3.4), les sanctions possibles (section 3.5) et le rôle et les compétences des organismes de promotion de l'égalité en ce qui concerne la discrimination salariale fondée sur le sexe (section 3.6).

La section 3.1 se fonde sur l'article 17, paragraphe 1, de la directive de refonte 2006/54/CE qui exige des États membres qu'ils veillent à ce que soient accessibles des procédures judiciaires visant à faire respecter les obligations découlant de la directive. Il ressort des réponses au questionnaire que les 31 pays étudiés sont effectivement dotés d'une législation qui garantit un accès à la justice aux victimes de discrimination salariale fondée sur le sexe afin qu'elles puissent y faire valoir leurs droits. Dans certains cas, ces dispositions législatives concernent directement l'application du principe de l'égalité de rémunération pour un même travail ou un travail de même valeur (**Irlande** et **Malte** notamment); dans d'autres, ces mesures exécutoires figurent dans une législation sur l'égalité à caractère plus général (**Autriche**, **Belgique**, **Croatie**, **Finlande** et **Royaume-Uni** par exemple); dans d'autres cas encore, ce sont les règles générales en matière d'exercice des droits qui doivent être invoquées (**Bulgarie**, **Grèce**, **France** et **Hongrie** notamment). La quasi-totalité des experts ont indiqué que, de façon générale et d'un simple point de vue juridique, la réglementation relative à la protection judiciaire et l'accès à celle-ci est satisfaisante dans leurs pays respectifs. Il est néanmoins apparu que le mode d'organisation de la mise en application judiciaire pouvait avoir un impact négatif sur les chances de la victime d'obtenir effectivement réparation en justice. Un premier point concerne la question de savoir quelle est l'instance judiciaire compétente pour statuer sur un recours en matière de discrimination salariale. Si, dans la majorité des pays, ce type de recours doit être introduit devant une juridiction civile (y compris les cours et tribunaux du travail), il existe exceptionnellement une instance pouvant être exclusivement saisie en cas de discrimination (tel est notamment le cas de la Commission des plaintes sur l'égalité des sexes en **Islande**). Un second point concerne les règles de procédure applicables, lesquelles déterminent un nombre important d'aspects

procéduraux et peuvent, en conséquence, avoir un impact considérable sur la mise en application. Les questions pertinentes sont de savoir qui peut introduire le recours (uniquement la victime, ou des actions collectives sont-elles autorisées?), quels éléments de preuve peuvent être produits (des statistiques, des témoins experts?) et si la charge de la preuve passe de la victime à l'employeur conformément à l'article 19 de la directive de refonte 2006/54/CE. Les délais de prescription ont eux aussi une influence sur la facilité ou la difficulté avec laquelle une victime peut faire respecter son droit à l'égalité de rémunération. Ces délais varient considérablement d'un pays européen à l'autre puisqu'ils vont, par exemple, de trois mois en **Lituanie** à cinq ans en **Croatie**<sup>11</sup> et six ans au **Royaume-Uni**. En dehors des difficultés susmentionnées, qui sont directement liées au contenu des règles d'exécution judiciaire, les 31 experts nationaux décrivent une série d'autres obstacles qui freinent l'application effective du principe de l'égalité des rémunérations entre les hommes et les femmes. Bon nombre de ces obstacles ont déjà été évoqués:<sup>12</sup> coût élevé des procédures; manque de transparence salariale; absence de sensibilisation, voire même méconnaissance de la discrimination salariale fondée sur le sexe (de la part des salariés, des employeurs, des syndicats, des juges, etc.); crainte de représailles (en particulier dans de petits pays tels que l'**Estonie**, le **Liechtenstein**, le **Luxembourg** et **Malte**); et manque de confiance dans le système judiciaire national. Une entrave relativement nouvelle est mentionnée dans un certain nombre de rapports nationaux en lien avec l'évolution de la situation politique et économique de plusieurs États membres (en l'occurrence la **Grèce**, la **Hongrie**, l'**Italie** et la **Pologne**). La **Grèce**, par exemple, se trouve confrontée à des difficultés économiques telles que les personnes qui ont encore la chance d'avoir un emploi se montrent moins critiques à l'égard de leurs conditions de travail. Il faudrait, étant donné le climat politique actuel en **Hongrie**, une bonne dose de courage pour s'élever contre une discrimination salariale fondée sur le sexe.

La section 3.2 est consacrée aux mesures d'application extrajudiciaire telles qu'également autorisées par l'article 17, paragraphe 1, de la directive de refonte 2006/54/CE. Les rapports nationaux montrent que les solutions hors tribunaux gagnent en popularité lorsqu'il s'agit de différends relatifs à des discriminations. Selon l'experte des **Pays-Bas**, l'évolution vers davantage de règlements à l'amiable pourrait notamment s'expliquer par le nombre croissant de personnes souscrivant une assurance «protection juridique». Les compagnies d'assurance seraient en effet peu tentées d'engager des procédures complexes et onéreuses lorsqu'il s'agit par exemple de discrimination salariale fondée sur le sexe, et préfèrent souvent un règlement à l'amiable. Les accords hors tribunaux décrits dans les rapports nationaux revêtent des formes très diverses et peuvent être prévus par la loi ou se fonder sur des politiques, voire même relever d'initiatives volontaires émanant d'entreprises, d'institutions, d'organisations, etc.

Il existe des procédures internes (au sein de l'entreprise) (i) et externes (hors de l'entreprise) (ii). Les premières peuvent être plus ou moins formalisées, mais ne sont pratiquement jamais obligatoires. La situation de la **Roumanie** est assez particulière à cet égard: le droit roumain ne prévoit pas l'obligation légale d'instaurer des procédures internes au sein de l'entreprise pour le traitement de plaintes alléguant une discrimination salariale fondée sur le sexe, mais lorsqu'une entreprise décide d'instaurer des procédures internes à cette fin, le droit roumain oblige la victime présumée à utiliser cette voie de recours avant de faire appel à des procédures externes. Ce faisant, la **Roumanie** a également créé un lien juridique entre la procédure d'application interne, d'une part, et une éventuelle procédure d'application judiciaire ultérieure devant les tribunaux. En ce qui concerne les procédures externes, il apparaît clairement que les organismes nationaux pour l'égalité de traitement y participent dans de nombreux pays. Les inspections du travail peuvent également jouer un rôle (**France**, **République tchèque**, **Grèce** et **Slovénie** notamment), de même que les syndicats (**Italie** et **Suède**, par exemple). Il existe, outre les procédures internes et externes décrites ci-dessus, des modes alternatifs de résolution des conflits (MARC) – lesquels offrent probablement l'exemple le mieux connu d'application non judiciaire (iii). Le mode alternatif de règlement des litiges s'entend ici dans un sens étroit, à savoir le recours potentiel à

11 Croatie, article 139 du code du travail, <http://www.mrms.hr/wp-content/uploads/2015/03/labour-act.pdf>, consulté le 24 Août 2017.

12 Réseau européen des experts juridiques dans le domaine de l'égalité des genres, Foubert, P. (2010), *L'écart de rémunération entre femmes et hommes en Europe d'un point de vue juridique*, p. 19-23, disponible sur: <http://ec.europa.eu/social/BlobServlet?docId=61338&langId=fr>, consulté le 1<sup>er</sup> mars 2017.

la médiation, à la conciliation ou à l'arbitrage avant une audience au tribunal.<sup>13</sup> On parle également de «MARC judiciaire» car il existe toujours un lien avec une application judiciaire, qu'il s'agisse d'une option précédant l'audience réelle d'une affaire en justice ou qu'il s'agisse d'une véritable alternative à des poursuites judiciaires. Étant donné la popularité des MARC, il est surprenant que de nombreux experts signalent que leur législation nationale n'y fait pas référence, que ce soit en termes obligatoires ou non obligatoires (**Autriche, Bulgarie, Chypre, Estonie et Pays-Bas**). Beaucoup d'autres pays cependant se sont dotés de lois prévoyant la médiation (**République tchèque et Lettonie**, par exemple), la conciliation (**Grèce, France et Pologne** notamment) et l'arbitrage (entre autres la **Croatie** et, lorsque les conventions collectives le stipulent, le **Portugal**) pour les cas de discrimination salariale fondée sur le sexe.

Il est difficile de tirer des conclusions quant à l'importance numérique des solutions extrajudiciaires décrites ci-dessus – les experts ayant fait savoir, de manière générale, que les chiffres disponibles en la matière étaient rares, voire inexistants. Quelques données sont éventuellement disponibles lorsque des organismes pour l'égalité de traitement sont impliqués. L'**Islande** apparaît comme le seul pays ayant rassemblé des données statistiques fiables. À cette disponibilité limitée de données statistiques vient s'ajouter le fait que les conditions du règlement proprement dit sont pratiquement toujours confidentielles. Beaucoup d'experts estiment cette confidentialité problématique, mais l'experte d'**Irlande** indique que c'est précisément cette confidentialité qui fait l'attrait des solutions extrajudiciaires.

Les derniers paragraphes de la section 3.2 (iv) s'intéressent aux divers efforts nationaux déployés en Europe pour prévenir la discrimination salariale fondée sur le sexe. Le questionnaire demandait aux experts nationaux s'ils avaient connaissance, en dehors des solutions extrajudiciaires susmentionnées, d'initiatives pouvant également être répertoriées à la rubrique de l'application extrajudiciaire. L'initiative la plus répandue semble être la «Journée nationale de l'égalité salariale». Des certificats, labels et prix ont également été cités, de même que des check-lists pour les systèmes d'évaluation et de classification des emplois, des campagnes médiatiques, etc. Les experts de **Hongrie, d'Italie** et de **Pologne** ont toutefois signalé que très peu d'initiatives ont été récemment prises dans leurs pays respectifs – ce que leur situation politique ou économique explique probablement.

La section 3.3 du chapitre 3 porte sur les voies de recours, et plus précisément sur la l'indemnisation et la réparation, mises à disposition à la fois dans le cadre de l'application judiciaire et dans celui de l'application extrajudiciaire. L'article 18 de la directive de refonte 2006/54/CE prévoit que ces voies de recours doivent être effectives, et leurs modalités dissuasives et proportionnées par rapport au dommage subi. Plusieurs pays ont une législation d'exécution spécifique s'inscrivant le plus souvent dans leur législation relative à l'égalité entre les hommes et les femmes; d'autres pays ont adopté des dispositions législatives portant spécifiquement sur les voies de recours en cas de discrimination *salariale* fondée sur le sexe; ailleurs encore, il convient d'invoquer les règles générales applicables en cas de violation des dispositions juridiques énoncées dans le code (de procédure) civil ou dans le code (de procédure) du travail.

La section 3.3 donne un aperçu des différents types d'indemnisation, et de réparation de façon plus générale, énumérés par les experts nationaux. L'indemnisation est entendue dans le présent rapport comme une manière de réparer un dommage ou un préjudice quantifiable. La réparation couvre pour sa part, outre l'indemnisation, d'autres moyens de réparer les conséquences d'une discrimination salariale fondée sur le sexe. Le rapport s'intéresse à l'indemnisation et à la réparation dans le cadre de procédures d'application à la fois judiciaires et extrajudiciaires. Dans la plupart des pays, les victimes sont en mesure de réclamer en justice une indemnisation financière pour la perte réellement subie. L'indemnisation financière comprend généralement la différence de rémunération entre le salaire de la victime et le salaire (plus élevé) du comparateur. Ce «nivellement par le haut» de la rémunération est parfois exigé par la loi (**Autriche et Danemark** notamment) mais il peut aussi découler d'une jurisprudence constante des juridictions qui l'ordonnent (**République tchèque, Grèce et Espagne**, par exemple). La situation

13 Eurofound (2010), *Individual Disputes at the Workplace: Alternative Disputes Resolution*, Dublin, p. 1, disponible sur: [https://www.eurofound.europa.eu/sites/default/files/ef\\_files/docs/eiro/tn0910039s/tn0910039s.pdf](https://www.eurofound.europa.eu/sites/default/files/ef_files/docs/eiro/tn0910039s/tn0910039s.pdf), consulté le 27 février 2017.



se présente de façon assez diversifiée en ce qui concerne le dommage moral. De manière générale, des dommages-intérêts pour préjudice moral sont rarement attribués et, lorsque tel est le cas, leur montant est habituellement très peu élevé. On peut encore citer parmi les types de réparation susceptibles d'être accordés dans le cadre d'une application judiciaire la publication de l'arrêt ou la possibilité pour les juges de déclarer les dispositions en cause nulles et sans effet, un avertissement adressé par le tribunal aux employeurs pour qu'ils s'abstiennent de pratiquer une discrimination à l'avenir, etc. S'agissant des réparations dans le cadre de l'application extrajudiciaire, de nombreux experts nationaux signalent qu'aucune donnée pertinente n'est disponible. Quelques experts évoquent des compensations pécuniaires (**République tchèque, Hongrie et France**), la publication de l'arrêt (**Islande et Hongrie**), des excuses publiques (**République tchèque**) et la réintégration ou le rétablissement (**Pays-Bas**).

La section 3.4 du troisième chapitre analyse les mesures nationales destinées à protéger les salariés contre un licenciement ou tout autre traitement défavorable en représailles d'une plainte en matière d'égalité de rémunération. L'article 24 de la directive de refonte 2006/54/CE prévoit l'obligation pour les États membres d'introduire des mesures de ce type, et tous les pays couverts par le rapport semblent la respecter. La grande majorité d'entre eux offrent une protection contre les rétorsions basée sur la législation générale relative à l'égalité (des sexes). Dans un très petit nombre de pays, les victimes doivent invoquer les principes généraux du droit du travail pour bénéficier d'une protection contre les rétorsions (**Estonie, Lettonie et Portugal**). La manière dont la protection est assurée diffère cependant, et la jurisprudence semble relativement peu abondante. Le rapport aborde aussi d'autres questions: qui est protégé à l'encontre des rétorsions (la victime présumée, ou également des personnes qui avaient connaissance de la discrimination, ou qui ont servi de comparateur?); quels sont les traitements défavorables visés?; et, en définitive, quelles sont les sanctions applicables?

La section 3.5 concerne les sanctions potentielles. L'article 25 de la directive de refonte 2006/54/CE prévoit que ces sanctions, qui peuvent comprendre le versement d'indemnités à la victime, doivent être effectives, proportionnées et dissuasives. Cette disposition autorise donc les États membres, mais sans les y obliger, à prendre des mesures prévoyant le versement de dommages et intérêts punitifs à la personne ayant subi une discrimination fondée sur le sexe.<sup>14</sup> Ces dommages et intérêts punitifs ne sont pas liés à l'indemnisation financière visée à l'article 18 de la directive de refonte, telle que mentionnée ci-dessus. Si certains pays n'ont pas prévu dans leurs lois la possibilité de sanctionner l'auteur d'un non-respect du principe de l'égalité de rémunération par d'autres moyens que l'indemnisation ou la réparation (**Autriche, Danemark et Suède** notamment), d'autres doivent se tourner vers des mesures générales de sanction pour couvrir les violations du principe de l'égalité de rémunération (**Grèce, Malte, Pologne et Espagne**, par exemple.). Nombreux sont toutefois les pays qui ont adopté une législation spécifique en réponse à l'article 25 (**Belgique, Bulgarie et Croatie** entre autres). La violation de la disposition relative à l'égalité (entre hommes et femmes) est alors incriminée dans une disposition juridique distincte. Les sanctions généralement mentionnées par les experts nationaux sont de nature pénale (amendes, emprisonnement ou combinaison des deux) et administrative (amendes administratives en particulier), mais aussi d'autres types (publication des décisions, perte d'avantages publics, etc.). Plusieurs pays ont également introduit des sanctions alternatives, telle la publication de la décision. Bien que celle-ci puisse paraître à première vue une sanction sans grand effet dissuasif, les experts du **Danemark**, d'**Allemagne** et du **Portugal** tiennent à préciser que, dans leurs pays, les noms des parties ne figurent jamais dans la version publiée des décisions de justice, de sorte que leur publication relève d'une sanction ayant un caractère moins accessoire. En **Hongrie**, la condamnation incluant le nom du contrevenant est occasionnellement publiée sur le site web de l'organisme pour l'égalité et de l'employeur. Une autre sanction alternative intéressante, adoptée à la fois par l'**Italie** et par l'**Espagne**, est la suppression d'un avantage auquel l'auteur de la discrimination aurait été autrement éligible (subventions ou autres avantages publics). De même, toute une série de systèmes juridiques nationaux (parmi lesquels la **Belgique**, l'**Italie**, la **Hongrie** et les **Pays-Bas**) autorisent que des employeurs déclarés coupables de discrimination salariale soient exclus des marchés publics.

14 Affaire C-407/14 *Arjona Camacho* [2015], ECLI:EU:C:2015:831, point 38 et suivants.

Enfin, la section 3.6 du rapport examine plus attentivement les organismes pour l'égalité de traitement que tout État membre doit mettre en place afin «de promouvoir, d'analyser, de surveiller et de soutenir l'égalité de traitement entre toutes les personnes sans discrimination fondée sur le sexe» (article 20 de la directive de refonte 2006/54/CE). Tous les experts nationaux ont fait part de l'existence d'un organisme au moins de ce type habilité à traiter les problèmes et/ou les plaintes en rapport avec le principe de l'égalité des rémunérations entre hommes et femmes pour un même travail ou un travail de même valeur.

Il existe apparemment une grande diversité entre organismes pour l'égalité de traitement – leurs différences portant sur de multiples aspects. Premièrement, on observe de fortes variations au niveau de leur champ d'application matériel. Un nombre restreint de pays ont mis en place un organisme pour l'égalité exclusivement compétent pour les questions d'égalité entre hommes et femmes : il s'agit de la **Belgique**, de la **Croatie**, de **Chypre**, de la **Finlande**, de l'**Islande**, de l'**Italie** et du **Portugal**. La majorité des États se sont toutefois dotés d'organismes pour l'égalité de traitement qui traitent toute une série de motifs de discrimination tels que la race, le handicap, l'âge, les convictions, etc. La **Lituanie**, l'**Espagne** et le **Liechtenstein** sont récemment passés d'un organisme pour l'égalité uniquement compétent en matière de discrimination fondée sur le sexe à un organisme pour l'égalité ciblant un éventail plus large de motifs de discrimination. Les domaines dans lesquels les organismes pour l'égalité peuvent agir varient également et dépassent régulièrement la sphère de l'emploi pour couvrir, par exemple, l'éducation et la fourniture de biens et de services. Enfin, ces organismes nationaux affichent également certaines disparités sur le plan territorial puisqu'ils peuvent être compétents au niveau national et/ou au niveau régional et local. Deuxièmement, ils occupent des places différentes au sein de l'appareil étatique national. Tous ont un lien avec la fonction publique, mais ce lien est plus ou moins étroit selon le pays. Dans certains cas, l'indépendance de l'organisme pour l'égalité de traitement semble assez grande. La Commission pour les droits de l'homme et l'égalité récemment instituée en **Irlande**, par exemple, est un organisme totalement indépendant. Les commissaires sont nommés par le Président de l'Irlande de sorte qu'il ne peut y avoir le moindre sentiment d'interférence politique. Par contre, le lien entre l'organisme pour l'égalité et le service public semble un peu plus étroit en **Belgique**. L'Institut pour l'égalité des femmes et des hommes y a une finalité davantage hybride puisqu'il s'agit, d'une part, de l'organe administratif chargé de mettre en œuvre la politique fédérale en matière d'égalité des sexes et, d'autre part, de l'organe compétent pour promouvoir l'égalité des genres par tous moyens utiles. Dans les pays ayant pris pour option qu'un médiateur assumerait les tâches de l'organisme pour l'égalité de traitement, l'indépendance est l'un des principaux aspects soulignés par les experts nationaux à propos de cette fonction (**Chypre**, **Croatie**, **Finlande**, **Grèce**, **Lettonie**, **Lituanie**, **Norvège** et **Suède** notamment).

Les compétences des organismes nationaux pour l'égalité apparaissent multiples et variées, et bon nombre d'entre elles concernent la mise en application du principe de l'égalité des rémunérations entre les hommes et les femmes. Beaucoup d'organismes pour l'égalité sont compétents pour l'application extrajudiciaire de ce principe. La plupart des organismes nationaux pour l'égalité participent à des campagnes de sensibilisation et à la promotion de l'égalité entre hommes et femmes par tous moyens utiles, y compris des événements publics et des conférences; des séances d'information à l'intention des juristes, des fonctionnaires, des ONG, des autorités publiques et des entreprises; le développement d'outils de prévention et de cours en ligne; des journées d'information et de consultation, etc. Nombreux sont également les organismes nationaux pour l'égalité de traitement qui doivent conseiller les parties prenantes (sous la forme de déclarations, d'avis ou de décisions dans des cas particuliers) et/ou effectuer des recherches dans un cadre plus général. Il s'agit d'ailleurs, pour certains d'entre eux, de leur unique tâche. La stimulation du dialogue social et le travail avec les partenaires sociaux sont d'autres exemples de leur mission. Enfin, plusieurs organismes nationaux pour l'égalité jouent également un rôle, dont la forme peut varier, dans les mécanismes alternatifs de résolution des conflits. Outre leurs compétences en matière de mise en application extrajudiciaire, un certain nombre d'entre eux participent également à l'application judiciaire du principe de l'égalité de rémunération: il peut s'agir d'aider des victimes présumées à introduire leurs plaintes (**Allemagne**, **Malte**, **Slovénie** et **Royaume-Uni** par exemple); d'introduire une plainte au nom de la victime (**Irlande**, **Pologne**, **Slovaquie** et **Slovénie** notamment); d'engager eux-mêmes des poursuites pour discrimination (**Belgique** et **Espagne** entre autres) ou d'agir en

qualité d'*amicus curiae* (**France** et **Roumanie** notamment); et même d'agir en qualité d'instance (quasi-) judiciaire habilitée à réparer (indemnisation et/ou réparation) (**Danemark** et **Finlande** par exemple) et éventuellement dotée de pouvoirs de sanction (**Bulgarie** et **Hongrie** par exemple). Les réparations recherchées par les organismes nationaux sont, dans l'ensemble, assez diversifiées et de nature à la fois judiciaire et extrajudiciaire. Il semble y avoir aujourd'hui une légère préférence pour les solutions à l'amiable mettant l'accent sur la prévention de discrimination future.

La plupart des rapports nationaux indiquent que les organismes nationaux pour l'égalité ne procèdent qu'à une collecte limitée et fragmentaire de données (**Chypre**, **Estonie**, **Allemagne**, **Hongrie** et **Malte** entre autres). Certains de ces organismes ne rassemblent ou ne publient pratiquement, voire absolument, rien (**Bulgarie** et **Luxembourg** par exemple). Certaines exceptions méritent d'être signalées, tel le **Danemark** où l'organisme pour l'égalité publie toutes ses décisions sur son site web après les avoir rendues anonymes.

Le quatrième et dernier chapitre du présent rapport contient les conclusions, les bonnes pratiques et les recommandations.

Il ressort des 31 rapports nationaux que le problème de la mise en application judiciaire est largement lié aux procédures judiciaires elles-mêmes, qui restent très hétérogènes. Une série de caractéristiques font qu'un système national d'application judiciaire est plus ou moins efficace en termes de mise en œuvre du principe de l'égalité des rémunérations entre hommes et femmes pour un même travail ou un travail de même valeur. Le présent rapport met en évidence cinq caractéristiques clés qui, selon la manière dont elles se présentent au plan national, peuvent avoir une incidence majeure sur le bon aboutissement de l'application judiciaire du principe de l'égalité de rémunération. Le premier de ces éléments concerne l'instance judiciaire habilitée à être saisie d'une affaire de discrimination salariale fondée sur le sexe – aspect à propos duquel on pourrait considérer que des juridictions plus spécialisées ont une meilleure connaissance de cette forme de discrimination et sont dès lors plus aptes à statuer dans ce type d'affaires. Un deuxième élément concerne l'engagement effectif de poursuites pour discrimination salariale fondée sur le sexe – la possibilité pour une victime de ce type de discrimination de s'associer à une action collective (outre la possibilité de déposer une plainte individuelle) apparaissant comme susceptible d'avoir une incidence majeure et positive sur l'application nationale du principe de l'égalité de rémunération. Une troisième caractéristique clé concerne le renversement de la charge de la preuve. On constate dans la quasi-totalité des pays couverts par l'étude un manque de clarté quant à ce qui constitue exactement un indice suffisamment sérieux de discrimination pour que la charge de la preuve incombe à l'employeur. Les pays dotés d'une législation détaillée à cet égard semblent mieux armés. Les délais de prescription constituent la quatrième caractéristique clé. Ils sont souvent très courts – sans compter qu'il s'avère difficile dans de nombreux cas d'établir le délai applicable – ce qui limite considérablement aussi les possibilités de mise en application du principe de l'égalité des rémunérations entre hommes et femmes. Enfin, on trouve en cinquième place les voies de recours disponibles (indemnisation et réparation) et la possibilité d'imposer des sanctions pénales, qui ont un impact sur l'efficacité du mécanisme de mise en application judiciaire. Les faibles montants fixés et attribués pour préjudice matériel comme pour préjudice moral ne dissuadent pas particulièrement de futurs actes discriminatoires en matière salariale. Un constat analogue doit être fait en ce qui concerne les sanctions pénales (amendes et/ou emprisonnement) avec une même absence d'effet dissuasif.

Nonobstant les difficultés évoquées ci-dessus en rapport avec l'application judiciaire, plusieurs «bonnes pratiques» nationales méritent assurément d'être soulignées. Elles concernent des mesures juridiques à la fois contraignantes (*hard law*) et non contraignantes (*soft law*) pouvant servir d'exemples au niveau national ou européen. Au nombre des mesures contraignantes figurent des initiatives juridiques axées sur la transparence salariale. On peut citer à ce titre la mesure **finlandaise** relative à la cartographie des rémunérations, et les dispositions du nouveau code du travail **lituanien** (2017), qui constituent une avancée majeure sur la voie d'une transparence accrue des systèmes de rémunération en instaurant plusieurs obligations pour les employeurs de mettre des informations concernant les rémunérations à la disposition des salariés, du comité d'entreprise et des syndicats. Quelques dispositions du droit procédural peuvent également d'être désignées comme bonnes pratiques. L'experte du **Portugal** évoque une règle de



portée raisonnablement large du code national du travail, laquelle prévoit le remplacement automatique de clauses de conventions collectives ou de dispositions de règlements intérieurs des entreprises ayant un caractère discriminatoire en termes d'égalité entre les sexes par la disposition plus favorable découlant de l'aboutissement positif d'un recours pour discrimination et devenant dès lors applicable à tous les travailleurs masculins et féminins. On peut citer encore au titre de mesures juridiques contraignantes constitutives de bonnes pratiques la sanction consistant en une suppression d'avantages publics, voire une exclusion pendant une période déterminée de l'attribution d'incitations financières ou de crédits ou de tout appel d'offres public (**Italie** et **Espagne**); le médiateur d'entreprise (**Belgique**); et l'obligation de publier les décisions (**Irlande**), de préférence non anonymisées. Les exemples de bonnes pratiques relevant de mesures juridiques non contraignantes sont plus nombreux. On peut notamment citer l'attribution de labels, de certificats et de prix (**Chypre, Malte et Norvège** notamment), des initiatives de sensibilisation telles que la «Journée du futur» au **Liechtenstein** et la «Journée de l'égalité salariale» dans beaucoup de pays européens. La mise au point d'outils et de procédures d'évaluation – à l'intention des employeurs, des salariés et des partenaires sociaux – peut également être considérée comme une bonne pratique. On peut citer ici le système de suivi de l'égalité des salaires proposé par l'Office national **suédois** de médiation. Il semble que les organismes pour l'égalité, entre autres, possèdent dans plusieurs pays une incontestable expertise leur permettant de faire couvrir par les médias nationaux les initiatives (juridiquement non contraignantes) de lutte contre la discrimination salariale basée sur le sexe (**Malte, Norvège, Portugal et Royaume-Uni** par exemple).

Le rapport ci-après conclut sur la base d'indications tirées de plusieurs rapports nationaux qu'une spécialisation, aux différents sens du terme, doit être recommandée. Premièrement, en ce qui concerne les règles juridiques applicables, une spécialisation aurait pour effet que des définitions claires de concepts juridiques tels que «même travail», «travail de même valeur» et «discrimination indirecte», ainsi qu'une clarté sur le point de savoir si un comparateur est exigé ou si une inégalité de traitement peut être justifiée, renforceraient considérablement les possibilités d'application judiciaire du principe de l'égalité des rémunérations entre hommes et femmes. Deuxièmement, plus l'instance judiciaire ou non judiciaire concernée est spécialisée, plus les activités semblent satisfaisantes. Il convient de réserver une attention particulière aux partenaires sociaux, accusés par un certain nombre d'experts de perpétuer l'écart salarial hommes-femmes par le biais de négociations collectives débouchant sur des classifications de fonctions et des systèmes de rémunération discriminatoires en termes de genre. Troisièmement, la spécialisation des plaignants pourrait également renforcer l'application judiciaire. Si la plupart des victimes de discrimination salariale ne sont confrontés à cette situation qu'une fois dans leur vie – et ne deviendront donc jamais des spécialistes – la possibilité d'une action collective permet à certaines organisations de se positionner en tant que spécialistes au service de travailleurs visés par une discrimination. Quatrièmement, les règles de procédure spécifiquement «axées» sur les affaires de discrimination (tenant compte de la position vulnérable de la victime présumée des faits discriminatoires) ont également une incidence positive sur l'application judiciaire. Cette approche ne devrait pas seulement consister en une simple mention du renversement de la charge de la preuve comme le demande la directive de refonte 2006/54/CE: elle devrait inclure une description du type et du volume d'informations requises pour que ce renversement ait effectivement lieu. Enfin, la mise en application a également tout à gagner de règles juridiques qui protègent les salariés invoquant leurs droits à l'encontre de rétorsions, en cas de discrimination tout particulièrement. Il n'est guère surprenant qu'une interdiction de représailles fondée sur des principes généraux du droit du travail offre moins de protection, étant donné sa moindre visibilité. Outre la spécialisation, le présent rapport suggère que les États membres accordent une attention suffisante aux initiatives de mise en application, tant judiciaire qu'extrajudiciaire, et à ce qu'ils veillent à ce que les médias nationaux en fassent largement écho.<sup>15</sup> Car il semble en définitive qu'en dépit du fait que l'UE et la majorité de ses États membres agissent dans ce domaine depuis très longtemps, l'écart salarial entre hommes et femmes, et les différentes manières de faire appliquer le principe de l'égalité de rémunération entre les hommes et les femmes pour un même travail ou un travail de même valeur, restent largement méconnus.

15 Fuchs, G. (2013), «Strategic Litigation for Gender Equality in the Workplace and Legal Opportunity Structures in Four European Countries», *La Revue canadienne Droit et Société*, vol. 28, n° 2, p. 206-207.

# Zusammenfassung

Sechzig Jahre, nachdem der Grundsatz der Entgeltgleichheit für Frauen und Männer bei gleicher oder gleichwertiger Arbeit erstmals in Artikel 119 EWG-Vertrag (jetzt Art. 157 des Vertrags über die Arbeitsweise der EU) verankert wurde, sieht sich die EU heute mit einer geschlechtsspezifischen Entgeltlücke konfrontiert, die seit Jahrzehnten auf relativ hohem Niveau konstant geblieben ist. Die neuesten Eurostat-Daten weisen für die 28 EU-Mitgliedstaaten einen durchschnittlichen Wert von 16,3 % aus (für 2015).<sup>1</sup> Auch wenn der Unterschied zwischen den Ländern mit der niedrigsten Entgeltlücke (**Italien** und **Luxemburg** mit jeweils 5,5 % im Jahr 2015) und dem Land mit der höchsten Entgeltlücke (**Estland** mit 26,9 % im Jahr 2015) groß ist und auch wenn diese Zahlen die sogenannte „unbereinigte“ (d. h. nicht anhand individueller Merkmale, die einen Teil der Differenz erklären können, bereinigte) Entgeltlücke zwischen Frauen und Männern widerspiegeln,<sup>2</sup> gibt es Anzeichen dafür, dass geschlechtsbezogene Entgeltdiskriminierung überall in Europa nach wie vor ein Problem darstellt, das nicht unterschätzt werden darf.

All dies steht in starkem Gegensatz zu der Aufmerksamkeit, die sämtliche EU-Institutionen dem Grundsatz der Entgeltgleichheit in den vergangenen Jahrzehnten gewidmet haben. Der EU-Gesetzgeber hat die oben genannte Vertragsbestimmung in der Entgeltgleichheitsrichtlinie 75/117/EWG weiterentwickelt,<sup>3</sup> die später durch die Richtlinie 2006/54/EG ersetzt wurde.<sup>4</sup> Ab den 1970er Jahren hat der Gerichtshof der EU (EuGH) mit seinen zahlreichen und bisweilen innovativen Vorabentscheidungen, die allem Anschein nach ein wirkungsvolles Instrument zur einheitlichen Durchsetzung des Entgeltgleichheitsgrundsatzes in den Mitgliedsstaaten gewesen sind, diesem Grundsatz Auftrieb verliehen. Auch die Europäische Kommission hat der geschlechtsspezifischen Entgeltlücke Aufmerksamkeit geschenkt und in regelmäßigen Abständen politische Maßnahmen ergriffen, deren Ziel es war, den Grundsatz, dass Frauen und Männer für gleiche oder gleichwertige Arbeit das gleiche Entgelt erhalten sollten, zu verbreiten. In ihrem kürzlich beschlossenen „Strategischen Engagement für die Gleichstellung der Geschlechter (2016-2019)“<sup>5</sup> hat die Europäische Kommission die Verringerung der geschlechtsspezifischen Entgeltlücke erneut zu einem ihrer fünf vorrangigen Themenbereiche erklärt.

Auch auf der Ebene der Mitgliedstaaten waren die Entgeltunterschiede zwischen Frauen und Männern Gegenstand diverser Aktivitäten. Je nach Land kamen diese Aktivitäten weniger, oder auch mehr, auf Betreiben der EU zustande. Egal wie aktiv ein Mitgliedstaat bis heute bei der Bekämpfung der geschlechtsspezifischen Entgeltlücke gewesen ist, fest steht, dass sich der Grundsatz des gleichen Entgelts in den Rechtsvorschriften der gegenwärtig 28 EU-Mitgliedstaaten in aller Regel in vollem Umfang widerspiegelt. Gleiches gilt für die anderen drei Länder des Europäischen Wirtschaftsraums (EWR) **Island**,

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1 Vgl.: <http://ec.europa.eu/eurostat/tgm/table.do?tab=table&init=1&language=de&pcode=tsdsc340&plugin=1>, letzter Zugriff am 4. März 2017.

2 Die „unbereinigte“ Entgeltlücke ist die Differenz zwischen dem durchschnittlichen Bruttostundenverdienst von männlichen Beschäftigten und dem von weiblichen Beschäftigten, ausgedrückt in Prozent des durchschnittlichen Bruttostundenverdienstes von männlichen Beschäftigten. Dieser Indikator wurde als „unbereinigt“ definiert, da er nicht anhand individueller Merkmale bereinigt wurde, die einen Teil des Entgeltunterschieds erklären können (z. B. Traditionen in der Ausbildungs- und Berufsauswahl von Frauen und Männern oder Teilzeitarbeit, die häufig stark feminisiert ist). Die Entgeltlücke, die anhand solcher Faktoren „bereinigt“ wurde, ist folglich nur damit zu erklären, dass eine Entgeltdiskriminierung vorliegt. Vgl. auch: Europäische Kommission (2014), *Tackling the gender pay gap in the European Union*, abrufbar unter: [http://ec.europa.eu/justice/gender-equality/files/gender\\_pay\\_gap/gpg\\_brochure\\_2013\\_final\\_en.pdf](http://ec.europa.eu/justice/gender-equality/files/gender_pay_gap/gpg_brochure_2013_final_en.pdf), letzter Zugriff am 1. März 2017.

3 Richtlinie 75/117/EWG zur Angleichung der Rechtsvorschriften der Mitgliedstaaten über die Anwendung des Grundsatzes des gleichen Entgelts für Männer und Frauen, ABl. L 45 vom 19. Februar 1975, S. 19.

4 Richtlinie 2006/54/EG zur Verwirklichung des Grundsatzes der Chancengleichheit und Gleichbehandlung von Männern und Frauen in Arbeits- und Beschäftigungsfragen (Neufassung), ABl. L 204 vom 26. Juli 2006, S. 23.

5 Arbeitsdokument der Kommissionsdienststellen, „Strategic engagement for gender equality 2016-2019“, SWD(2015) 278 final.

**Liechtenstein** und **Norwegen**.<sup>6</sup> Auch auf nationaler Ebene wurde dem Thema geschlechtsbezogene Entgeltdiskriminierung Beachtung geschenkt, zum Beispiel mit Initiativen wie dem „Equal Pay Day“. Allerdings hatte sich bereits in der Vergangenheit gezeigt, dass nur sehr wenige Rechtsstreite wegen geschlechtsbezogener Entgeltdiskriminierung vor die nationalen Gerichte gelangen.<sup>7</sup>

Vor dem Hintergrund dieser geringen Zahl nationaler Gerichtsurteile und angesichts der anhaltenden Entgeltlücke einerseits und der zahlreichen Maßnahmen, die die EU und ihre Mitgliedstaaten bereits ergriffen hatten, andererseits ersuchte die Europäische Kommission ihr Europäisches Netzwerk von Rechtsexpertinnen und Rechtsexperten für Geschlechtergleichstellung und Nichtdiskriminierung darum,<sup>8</sup> einen Bericht speziell zum Thema *Durchsetzung* des Grundsatzes der Entgeltgleichheit zu erstellen. Das Netzwerk legte 31 nationalen Rechtsexpertinnen und -experten aus den derzeit 28 EU-Mitgliedstaaten und den anderen drei EWR-Ländern einen detaillierten Fragebogen vor.<sup>9</sup> Die Fragen bezogen sich auf den innerstaatlichen Rechtsrahmen für die gerichtliche Durchsetzung (welche Justizbehörden sind zuständig, wer kann ein Gericht anrufen, welche Verfahrensvorschriften kommen zur Anwendung usw.), auf die Möglichkeiten einer nichtgerichtlichen Durchsetzung (interne und externe Verfahren, ADR, Berichterstattungspflichten usw.), auf die zur Verfügung stehenden Möglichkeiten des Schadensausgleichs (Schadenersatz und Entschädigung) und Sanktionen (z. B. Geld- und Freiheitsstrafen), auf den Schutz vor Viktimisierung und die Rolle der nationalen Gleichbehandlungsstellen. Schließlich wurden in dem Fragebogen auch nationale „bewährte Verfahren“ abgefragt, die als Anregung für andere Länder und gegebenenfalls auch für künftige Gesetzgebungsmaßnahmen der EU dienen könnten. Die 31 Länderberichte, die aus dem Fragebogen hervorgingen, lieferten die Informationen, auf denen der Bericht basiert.

Der Bericht skizziert zunächst die allgemeine Situation in Europa bezüglich des Grundsatzes der Entgeltgleichheit für Frauen und Männer (Kapitel 1) und liefert danach einen kurzen Überblick darüber, wie die EU-Mitgliedstaaten und EWR-Länder den Entgeltgleichheitsgrundsatz auf nationaler Gesetzgebungsebene umgesetzt haben (Kapitel 2).

Auch wenn das vorrangige Ziel des Berichts nicht darin bestand, einen allgemeinen Überblick über die nationalen Entgeltgleichheitsvorschriften zu liefern,<sup>10</sup> ergab sich aus den 31 Länderberichten, dass der in den nationalen Umsetzungsvorschriften für den Entgeltgleichheitsgrundsatz festgelegte sachliche Geltungsbereich eng damit zusammenhängt, wie einfach oder schwierig es in einem bestimmten Land ist, die Entgeltgleichheitsvorschriften tatsächlich durchzusetzen. Die nationale Gesetzgebung kann sich, was die Definition der Schlüsselbegriffe des Grundsatzes der Entgeltgleichheit für Frauen und Männer bei gleicher oder gleichwertiger Arbeit betrifft, unterscheiden. Einige Länder vertrauen weitgehend darauf, dass Opfer von Entgeltdiskriminierung sich vor den nationalen Gerichten auf das EU-Recht berufen; andere Länder hingegen haben Anstrengungen unternommen, um in ihrem nationalen Recht detaillierte Definitionen zu liefern. Demzufolge sind sich nicht alle Bürgerinnen und Bürger der EU und des EWR gleichermaßen darüber im Klaren, was unter „Entgelt“, „gleiche Arbeit“, „gleichwertige Arbeit“, „mittelbare Diskriminierung“, „Rechtfertigung“ usw. zu verstehen ist. Dies kann beträchtliche Auswirkungen auf die Durchsetzung haben. Der Begriff „Entgelt“ ist in **den Niederlanden** zum Beispiel schlicht definiert als

6 Das EWR-Abkommen, das am 1. Januar 1994 in Kraft trat, ermöglicht es Island, Liechtenstein und Norwegen, die Vorteile des EU-Binnenmarktes ohne die vollen Rechte und Pflichten einer EU-Mitgliedschaft zu nutzen.

7 Europäisches Netzwerk von Rechtsexpertinnen und Rechtsexperten auf dem Gebiet der Gleichstellung von Frauen und Männern, Foubert, P. (2010), *The Gender Pay Gap in Europe from a Legal Perspective*, S. 1923, abrufbar unter: [http://ec.europa.eu/justice/gender-equality/files/gpg\\_legal\\_perspective\\_2010\\_en.pdf](http://ec.europa.eu/justice/gender-equality/files/gpg_legal_perspective_2010_en.pdf), letzter Zugriff am 1. März 2017.

8 Dieses Netzwerk wurde von der Europäischen Kommission eingerichtet, um die Kommission in ihrer Arbeit zu unterstützen, indem es sie mit unabhängigen Informationen und Empfehlungen zu relevanten Entwicklungen in den Mitgliedstaaten versorgt. Vgl. <http://www.equalitylaw.eu/>, letzter Zugriff am 4. März 2017.

9 Der Fragebogen ist dem Bericht beigelegt.

10 Dies haben bereits andere Berichte getan. Vgl. zum Beispiel: Europäisches Netzwerk von Rechtsexpertinnen und Rechtsexperten für Geschlechtergleichstellung und Nichtdiskriminierung, Senden, L., Timmer, A. (2016), *A comparative analysis of the implementation of EU gender equality law in the EU Member States, the former Yugoslav Republic of Macedonia, Iceland, Liechtenstein, Montenegro, Norway, Serbia and Turkey*, Europäische Kommission, abrufbar unter: <http://www.equalitylaw.eu/downloads/3967-a-comparative-analysis-of-gender-equality-law-in-europe-2016-pdf-867-kb>, letzter Zugriff am 31. März 2017.

„jegliche Vergütung, die der/die Arbeitgeber/in dem/der Arbeitnehmer/in als Gegenleistung für dessen/deren Arbeit schuldet“. Das **isländische** Recht hingegen enthält eine sehr detaillierte Begriffsbestimmung („ordentliche Vergütung für Arbeit sowie sonstige unmittelbare und mittelbare Zahlungen aller Art, sowohl in Form von Vergünstigungen als auch in anderer Form, die der/die Arbeitgeber/in dem/der Arbeitnehmer/in für seine/ihre Arbeit entrichtet“). Im **litauischen** Recht ist „gleiche Arbeit“ definiert als „die Verrichtung von Arbeitstätigkeiten, die nach objektiven Kriterien insofern gleich oder ähnlich wie andere Arbeitstätigkeiten sind, als beide Arbeitnehmer/innen ohne größere Kosten für den/die Arbeitgeber/in ausgetauscht werden können.“ „Gleichwertige Arbeit“ bedeutet, dass diese Arbeit nach objektiven Kriterien für den/die Arbeitgeber/in bei der Erreichung seiner/ihrer operativen Ziele nicht weniger qualifiziert und weniger wichtig ist als jede andere vergleichbare Arbeit. In Ländern wie **Finnland, Griechenland** und **Lettland** geht das nationale Recht nicht darauf ein, was unter „gleicher Arbeit“ oder „gleichwertiger Arbeit“ zu verstehen ist. Was Rechtfertigungen betrifft, so gibt es Länder wie **Zypern, die Slowakei** und **Slowenien**, die keinerlei Rechtfertigung zulassen, und andererseits solche, die akzeptieren, dass Entgeltunterschiede aus objektiven Gründen, die nichts mit Diskriminierung zu tun haben, gerechtfertigt sind (z. B. **Frankreich, Polen, die Niederlande** und **Ungarn**). Der **schwedische** Experte wies auf die Gefahr hin, dass Gerichte in einem solchen Fall allzu bereit sein könnten, die Begründungen der Arbeitgeber/innen für Entgeltunterschiede zu akzeptieren, und es dem/der Kläger/in in der Praxis damit schwer gemacht würde nachzuweisen, dass eine Diskriminierung tatsächlich stattgefunden hat. In diesem Kapitel des Berichts wird auch auf die Frage eingegangen, ob das nationale Recht eine Vergleichsperson vorschreibt, um Klage wegen Entgeltdiskriminierung zu erheben. Der **französische** Kassationshof hat zum Beispiel festgestellt, dass „das Vorliegen einer Benachteiligung nicht zwangsläufig einen Vergleich mit anderen Arbeitnehmern voraussetzt“. Im Gegensatz dazu sehen die Rechtsvorschriften vieler anderer Staaten immer noch vor, dass eine reale (also keine hypothetische) Vergleichsperson benannt werden muss. Eine solche reale Vergleichsperson ist in Bezug auf Zeit, Geschlecht, Arbeit usw. manchmal sehr eng gefasst. Nach **niederländischem** und **irischem** Recht ist zum Beispiel eine Vergleichsperson des anderen Geschlechts erforderlich. In **Island** basieren die Rechtsvorschriften auf der Annahme, dass die Vergleichsperson für denselben/dieselbe Arbeitgeber/in tätig ist. Je mehr Voraussetzungen die Vergleichsperson erfüllen muss, desto schwieriger ist es natürlich für das Opfer nachzuweisen, dass eine geschlechtsbezogene Entgeltdiskriminierung vorliegt.

Kapitel 3 widmet sich der eigentlichen Durchsetzung des Entgeltgleichheitsgrundsatzes in den untersuchten 31 Ländern. Es geht um gerichtliche und nichtgerichtliche Durchsetzung (Abschnitte 3.1 und 3.2), typische Formen der Wiedergutmachung, die sowohl in gerichtlichen als auch in nichtgerichtlichen Durchsetzungsverfahren zulässig sind, einschließlich Schadenersatz und Entschädigung (Abschnitt 3.3), Maßnahmen zum Schutz von Arbeitnehmerinnen und Arbeitnehmern vor Viktimisierung (Abschnitt 3.4), Sanktionen (Abschnitt 3.5) sowie die Rolle und Zuständigkeiten der Gleichbehandlungsstellen in Bezug auf geschlechtsbezogene Entgeltdiskriminierung (Abschnitt 3.6).

Abschnitt 3.1 basiert auf Artikel 17 Absatz 1 der Richtlinie 2006/54/EG, dem zufolge die Mitgliedstaaten sicherstellen müssen, dass für die Durchsetzung sämtlicher Verpflichtungen aus der genannten Richtlinie gerichtliche Verfahren zur Verfügung stehen. Die Antworten aus den Fragebögen ergaben, dass alle 31 untersuchten Länder in der Tat über Rechtsvorschriften verfügen, die Opfern geschlechtsbezogener Entgeltdiskriminierung Zugang zur Justiz gewährleisten, um ihre Ansprüche gerichtlich geltend zu machen. Manchmal beziehen sich solche Rechtsvorschriften direkt auf die Durchsetzung von gleichem Entgelt für gleiche oder gleichwertige Arbeit (z. B. **Irland** und **Malta**), manchmal finden sich solche Durchsetzungsbestimmungen in allgemeineren Gleichstellungsvorschriften (z. B. **Belgien, Finnland, Kroatien, Österreich** und **Vereinigtes Königreich**) und in wieder anderen Fällen muss auf allgemeine Vorschriften zur Rechtsdurchsetzung zurückgegriffen werden (z. B. **Bulgarien, Frankreich, Griechenland** und **Ungarn**). Im Großen und Ganzen haben fast alle Expertinnen und Experten betont, dass – unter rein gesetzgeberischen Gesichtspunkten – der rechtliche Schutz und der Zugang zu diesem Schutz in ihren jeweiligen Ländern zufriedenstellend geregelt sind. Es hat sich jedoch gezeigt, dass die Art und Weise, wie die gerichtliche Durchsetzung organisiert ist, die Chancen eines Opfers, vor Gericht Schadensausgleich zu erhalten, negativ beeinflussen kann. Das betrifft zunächst die Frage, welche

Justizbehörde dafür zuständig ist, eine Klage wegen Entgeltdiskriminierung zu verhandeln. Während Klagen wegen Entgeltdiskriminierung in den meisten Ländern vor den Zivilgerichten (einschließlich den Arbeits- und Gewerbeberichten) verhandelt werden, existiert im Ausnahmefall eine Stelle, die nur für Diskriminierungsfälle zuständig ist (z. B. der Beschwerdeausschuss für Gleichstellungsfragen in **Island**). Ein zweiter Punkt betrifft die Verfahrensvorschriften, die zur Anwendung kommen. Diese regeln zahlreiche Verfahrensaspekte und können entsprechend große Auswirkungen auf die Durchsetzung haben. Wichtige Fragen in diesem Zusammenhang sind zum Beispiel, wer klagen darf (nur das Opfer oder sind Sammelklagen möglich?), welche Beweismittel zulässig sind (Statistiken, Sachverständige?) und ob die Beweislast im Einklang mit Artikel 19 der Richtlinie 2006/54/EG vom Opfer auf den/die Arbeitgeber/in übergeht. Auch Fristen haben Einfluss darauf, wie einfach es für ein Opfer ist, seinen/ihren Anspruch auf gleiches Entgelt durchzusetzen. Die Fristen sind in den europäischen Ländern sehr unterschiedlich und reichen zum Beispiel von drei Monaten in **Litauen** bis zu fünf Jahren in **Kroatien**<sup>11</sup> und sechs Jahren im **Vereinigten Königreich**. Abgesehen von den oben erwähnten Schwierigkeiten, die direkt mit dem Inhalt der Vorschriften zur gerichtlichen Durchsetzung zusammenhängen, haben die 31 Länderexpertinnen und -experten eine Reihe weiterer Hindernisse beschrieben, die einer wirksamen Durchsetzung des Grundsatzes der Entgeltgleichheit für Frauen und Männer im Wege stehen. Auf viele dieser Hindernisse wurde bereits früher hingewiesen:<sup>12</sup> kostspielige Verfahren, mangelnde Entgelttransparenz, mangelnde Sensibilität für oder geringe Kenntnisse über geschlechtsbezogene Entgeltdiskriminierung (seitens der Arbeitnehmer/innen, Arbeitgeber/innen, Gewerkschaften, Richter/innen usw.), Angst vor Viktimisierung (vor allem in kleinen Ländern wie **Estland, Liechtenstein, Luxemburg** und **Malta**) sowie mangelndes Vertrauen in das Justizsystem des jeweiligen Landes. Ein relativ neues Hindernis für die Durchsetzung, das in einer Reihe von Länderberichten zum Vorschein kam, hängt mit der veränderten politischen und wirtschaftlichen Situation in einer Reihe von EU-Mitgliedstaaten zusammen, als da wären **Griechenland, Italien, Polen** und **Ungarn**. **Griechenland** zum Beispiel hat mit wirtschaftlichen Schwierigkeiten zu kämpfen, was dazu führt, dass Menschen, die in der glücklichen Lage sind, noch einen Arbeitsplatz zu haben, weniger kritisch gegenüber ihren Arbeitsbedingungen sind. In **Ungarn** würde es in dem derzeit herrschenden politischen Klima ziemlich viel Mut erfordern, sich gegen geschlechtsbezogene Entgeltdiskriminierung zu wehren.

In Abschnitt 3.2 geht es um nichtgerichtliche Verfahren der Rechtsdurchsetzung, wie sie nach Artikel 17 Absatz 1 der Richtlinie 2006/54/EG ebenfalls zulässig sind. Aus den Länderberichten ging hervor, dass sich außergerichtliche Beilegungen im Bereich von Diskriminierungsstreitigkeiten wachsender Beliebtheit erfreuen. Nach Ansicht der **niederländischen** Expertin wurde die Entwicklung hin zu mehr außergerichtlichen Streitbeilegungen möglicherweise auch dadurch verstärkt, dass immer mehr Menschen eine Rechtsschutzversicherung abschließen. Versicherungsgesellschaften haben offensichtlich kein großes Interesse daran, schwierige und kostspielige Verfahren über Fragen wie geschlechtsbezogene Entgeltdiskriminierung zu führen, sondern ziehen stattdessen häufig eine Einigung vor. Die in den Länderberichten beschriebenen Möglichkeiten der außergerichtlichen Streitbeilegung sind sehr vielfältig und können entweder gesetzlich vorgesehen sein, auf Policen beruhen oder sogar freiwillige Initiativen von Unternehmen, Institutionen, Organisationen usw. sein.

Es existieren (i) interne (innerbetriebliche) und (ii) externe (außerbetriebliche) Verfahren. Interne Verfahren können mehr oder weniger formalisiert sein, sind aber fast nie zwingend vorgeschrieben. Unter letzterem Gesichtspunkt ist die **rumänische** Situation ziemlich speziell. Nach dem **rumänischen** Recht sind Unternehmen gesetzlich nicht verpflichtet, interne Verfahren einzurichten, um Beschwerden wegen geschlechtsbezogener Entgeltdiskriminierung zu behandeln. Wenn sich Unternehmen jedoch dafür entscheiden, interne Verfahren einzurichten, ist das mutmaßliche Opfer nach **rumänischem** Recht gezwungen, zuerst diesen Weg einzuschlagen, bevor er/sie auf externe Verfahren zurückgreift. Damit hat **Rumänien** auch eine rechtliche Verbindung zwischen dem internen Durchsetzungsverfahren einerseits und

11 Kroatien, Art. 139 Arbeitsgesetzbuch, <http://www.mrms.hr/wp-content/uploads/2015/03/labour-act.pdf>, letzter Zugriff am 24. August 2017.

12 Europäisches Netzwerk von Rechtsexpertinnen und Rechtsexperten auf dem Gebiet der Gleichstellung von Frauen und Männern, Foubert, P. (2010), *The Gender Pay Gap in Europe from a Legal Perspective*, S. 19-23, abrufbar unter: [http://ec.europa.eu/justice/gender-equality/files/gpg\\_legal\\_perspective\\_2010\\_en.pdf](http://ec.europa.eu/justice/gender-equality/files/gpg_legal_perspective_2010_en.pdf), letzter Zugriff am 1. März 2017.



dem eventuell später stattfindenden gerichtlichen Durchsetzungsverfahren andererseits geschaffen. Was die externen Verfahren betrifft, so ist klar, dass in vielen Ländern die nationalen Gleichbehandlungsstellen an diesen Verfahren beteiligt sind. Auch Arbeitsaufsichtsbehörden können eine Rolle spielen (z. B. **Frankreich, Griechenland, Slowenien** und **Tschechische Republik**), ebenso Gewerkschaften (z. B. **Italien** und **Schweden**). Abgesehen von den oben beschriebenen internen und externen Verfahren gibt es auch die alternative Streitbeilegung (ADR), die wohl das bekannteste Beispiel für (iii) nichtgerichtliche Durchsetzung ist. In dem Bericht wird ADR im engeren Sinne verstanden, d. h. als der mögliche Einsatz von Vermittlungs-, Schlichtungs- und Schiedsverfahren im Vorfeld einer Gerichtsverhandlung.<sup>13</sup> Diese Verfahren werden auch als „gerichtliche ADR-Formen“ bezeichnet, da immer ein Zusammenhang zur gerichtlichen Durchsetzung besteht, sei es als eine Option, die der eigentlichen Verhandlung eines Falls vor Gericht vorausgeht, oder als echte Alternative zu einem Gerichtsverfahren. Angesichts der Popularität von ADR überrascht es, dass eine ganze Reihe von Länderexpertinnen und -experten erwähnt haben, dass die Rechtsvorschriften ihrer Länder nicht auf ADR eingehen, weder als obligatorisches noch als freiwilliges Verfahren (**Bulgarien, Estland, die Niederlande, Österreich** und **Zypern**). In vielen anderen Ländern existieren jedoch Gesetze, die in Fällen geschlechtsbezogener Entgeltdiskriminierung Vermittlung (z. B. **Lettland** und **Tschechische Republik**), Schlichtung (z. B. **Frankreich, Griechenland** und **Polen**) und Schiedsverfahren (z. B. **Kroatien** und, soweit tarifvertraglich vereinbart, **Portugal**) ermöglichen.

Es ist schwierig, Rückschlüsse auf die zahlenmäßige Bedeutung der oben erwähnten außergerichtlichen Beilegungen zu ziehen. In der Regel haben die Länderexpertinnen und -experten erwähnt, dass wenige bis gar keine Zahlen vorliegen. Nur wenn Gleichstellungseinrichtungen beteiligt sind, kann es sein, dass gewisse Daten zur Verfügung stehen. **Island** scheint das einzige Land zu sein, das zuverlässige statistische Daten erhoben hat. Zusätzlich zur begrenzten Verfügbarkeit statistischer Daten sind die Bedingungen des letztlich getroffenen Vergleichs fast immer vertraulich. Viele Expertinnen und Experten haben diese Vertraulichkeit als problematisch bezeichnet. Nach Ansicht der **irischen** Expertin ist es jedoch gerade die Vertraulichkeit, die außergerichtliche Beilegungen so attraktiv macht.

Die letzten Absätze von Abschnitt 3.2 (iv) befassen sich mit verschiedenen innerstaatlichen Bemühungen, die in Europa unternommen werden, um geschlechtsbezogene Entgeltdiskriminierung zu *verhindern*. In dem Fragebogen wurden die Länderexpertinnen und -experten gefragt, ob ihnen neben den oben erwähnten außergerichtlichen Beilegungsverfahren, Initiativen bekannt sind, die ebenfalls als nichtgerichtliche Durchsetzung eingestuft werden könnten. Die am weitesten verbreitete Initiative scheinen die nationalen „Equal Pay Days“ zu sein. Auch Zertifikate, Labels und Preise wurden erwähnt, des Weiteren Checklisten für Arbeitsbewertungssysteme und Systeme der beruflichen Einstufung, Medienkampagnen und dergleichen mehr. Die Expertin aus **Italien** und die Experten aus **Polen** und **Ungarn** gaben jedoch an, dass in ihren Ländern in letzter Zeit nur sehr wenige Initiativen auf den Weg gebracht wurden. Vermutlich ist dies auf die bereits erwähnte politische bzw. wirtschaftliche Situation in diesen Ländern zurückzuführen.

Abschnitt 3.3 des Kapitels 3 beschäftigt sich mit den Möglichkeiten des Schadensausgleichs, genauer gesagt mit Schadenersatz und Entschädigung, die sowohl in gerichtlichen als auch in nichtgerichtlichen Durchsetzungssystemen zur Verfügung stehen. Artikel 18 der Richtlinie 2006/54/EG sieht vor, dass dieser Schadensausgleich tatsächlich und wirksam sein muss, sodass er abschreckend und dem erlittenen Schaden angemessen ist. In einer Reihe von Ländern existieren spezielle Durchführungsbestimmungen, die in der Regel in die Gleichbehandlungs- bzw. Gleichstellungsvorschriften eingebettet sind; andere Länder wiederum verfügen über gesetzliche Regelungen, die sich speziell auf den Schadensausgleich im Fall geschlechtsbezogener Diskriminierung beim *Entgelt* beziehen. In einigen anderen Ländern kommen die allgemeinen Vorschriften zur Anwendung, die bei Verstößen gegen Bestimmungen des Zivilgesetzbuchs oder der Zivilprozessordnung bzw. des Arbeitsgesetzbuchs oder der Arbeitsprozessordnung gelten.

13 Eurofound (2010), *Individual Disputes at the Workplace: Alternative Disputes Resolution*, Dublin, S. 1, abrufbar unter: [https://www.eurofound.europa.eu/sites/default/files/ef\\_files/docs/eiro/tn0910039s/tn0910039s.pdf](https://www.eurofound.europa.eu/sites/default/files/ef_files/docs/eiro/tn0910039s/tn0910039s.pdf), letzter Zugriff am 27. Februar 2017.

Abschnitt 3.3 liefert einen Überblick über die verschiedenen Arten von Schadenersatz, und generell Schadensausgleich, die von den Länderexpertinnen und -experten identifiziert wurden. In dem Bericht wird Schadenersatz als Mittel zur Wiedergutmachung eines quantifizierbaren Schadens definiert. Schadensausgleich bezieht sich auf Schadenersatz, umfasst aber auch andere Mittel zur Wiedergutmachung der Folgen geschlechtsbezogener Entgeltdiskriminierung. Untersucht werden Schadenersatz und Schadensausgleich in gerichtlichen Durchsetzungsverfahren sowie in außergerichtlichen Beilegungsverfahren. In den meisten Ländern können Betroffene einen finanziellen Ausgleich für die tatsächlich erlittenen Einbußen gerichtlich geltend machen. Der finanzielle Ausgleich umfasst in der Regel die Differenz zwischen dem Arbeitsentgelt der betroffenen Person und dem (höheren) Arbeitsentgelt der Vergleichsperson. Manchmal ist dieses sogenannte „Levelling up“ des Entgelts gesetzlich vorgeschrieben (z. B. **Dänemark** und **Österreich**). Manchmal ist es die ständige Rechtsprechung der Gerichte, die das „Levelling up“ anordnet (z. B. **Griechenland**, **Spanien** und **Tschechische Republik**). Was immaterielle Schäden betrifft, so ist die Situation sehr unterschiedlich. Ersatz für immaterielle Schäden wird im Allgemeinen selten zugesprochen und ist, falls dies doch geschieht, in der Regel ein sehr geringer Betrag. Andere Arten der Wiedergutmachung, die im Falle einer gerichtlichen Durchsetzung zugesprochen werden können, sind die Veröffentlichung des Urteils, die Nichtigerklärung der rechtswidrigen Bestimmungen durch das Gericht, die Ermahnung des Arbeitgebers/der Arbeitgeberin durch das Gericht, Diskriminierung künftig zu unterlassen, usw. Was Maßnahmen der Wiedergutmachung in nichtgerichtlichen Durchsetzungsverfahren betrifft, so haben zahlreiche Länderexpertinnen und -experten festgestellt, dass keine aussagekräftigen Daten vorliegen. Einige Expertinnen und Experten erwähnten finanziellen Schadensausgleich (**Frankreich**, **Tschechische Republik** und **Ungarn**), die Veröffentlichung des Urteils (**Island** und **Ungarn**), öffentliche Entschuldigungen (**Tschechische Republik**) und Wiedereinstellung bzw. Wiedereinsetzung (**die Niederlande**).

In Abschnitt 3.4 des Kapitels 3 geht es um nationale Maßnahmen zum Schutz der Arbeitnehmer/innen vor Entlassung oder einer anderen nachteiligen Behandlung durch Vergeltungsmaßnahmen infolge einer Beschwerde wegen ungleicher Bezahlung. Gemäß Artikel 24 der Richtlinie 2006/54/EG sind die Mitgliedstaaten verpflichtet, solche Maßnahmen zu treffen, und alle in dem Bericht erfassten Länder scheinen diese Anforderung zu erfüllen. Die überwiegende Mehrzahl der Länder bietet Schutz vor Viktimisierung im Rahmen der allgemeinen Gleichbehandlungs- bzw. Gleichstellungsvorschriften. In sehr wenigen Ländern müssen Betroffene auf allgemeine Grundsätze des Arbeitsrechts zurückgreifen, um Schutz vor Viktimisierung zu finden (**Estland**, **Lettland** und **Portugal**). Die Art und Weise, wie der Schutz erreicht wird, unterscheidet sich jedoch, und Rechtsprechungsfälle scheinen ziemlich rar zu sein. Weiter wird in dem Bericht untersucht, wer vor Viktimisierung geschützt wird (das mutmaßliche Opfer oder auch Personen, die von der Diskriminierung wussten oder als Vergleichsperson dienen?), vor welcher nachteiligen Behandlung, innerhalb welchen Zeitraums und schließlich welche Sanktionen zur Anwendung kommen.

Abschnitt 3.5 geht auf mögliche Sanktionen ein. Nach Artikel 25 der Richtlinie 2006/54/EG müssen die Sanktionen, die auch Schadenersatzleistungen an die Opfer umfassen können, wirksam, verhältnismäßig und abschreckend sein. Diese Vorschrift erlaubt es den Mitgliedstaaten also, zwingt sie aber nicht, Maßnahmen zu ergreifen, die die Zahlung von Strafschadenersatz an die Person vorsehen, die wegen ihres Geschlechts diskriminiert wurde.<sup>14</sup> Ein solcher Strafschadenersatz hat nichts mit dem oben erwähnten finanziellen Ausgleich zu tun, auf den Artikel 18 der Richtlinie 2006/54/EG abzielt. In einigen Ländern sieht das Gesetz keine andere Möglichkeit als Schadenersatz oder Entschädigung vor, um Verstöße gegen den Grundsatz der Entgeltgleichheit zu ahnden (z. B. **Dänemark**, **Österreich** und **Schweden**), andere Länder müssen bei der Bestrafung solcher Verstöße auf die allgemeinen Sanktionen zurückgreifen (z. B. **Griechenland**, **Malta**, **Polen** und **Spanien**). Viele Länder haben als Reaktion auf Artikel 25 jedoch spezielle gesetzliche Regelungen geschaffen (z. B. **Belgien**, **Bulgarien** und **Kroatien**). In diesen Fällen werden Verstöße gegen die Gleichbehandlungs- bzw. Gleichstellungsvorschriften in einer separaten Rechtsvorschrift unter Strafe gestellt. Typische Strafen, die von den Länderexpertinnen und -experten

14 Rechtssache C-407/14, *Arjona Camacho*, ECLI:EU:C:2015:831, Rn. 38 ff.

genannt wurden, sind strafrechtliche Sanktionen (Geldbußen, Freiheitsstrafen oder eine Kombination aus beiden) und verwaltungsrechtliche Sanktionen (speziell Bußgelder) sowie andere Arten von Sanktionen (Veröffentlichung von Entscheidungen, Verlust öffentlicher Zuwendungen usw.). Mehrere Länder haben auch alternative Strafen eingeführt, etwa die Veröffentlichung der Entscheidung. Veröffentlichungen mögen auf den ersten Blick eine Strafe mit äußerst abschreckender Wirkung sein; die Expertinnen aus **Dänemark** und **Portugal** sowie der Experte aus **Deutschland** haben jedoch darauf hingewiesen, dass in ihren Ländern die Namen der Parteien in den veröffentlichten Fassungen der Entscheidungen nie erwähnt werden, wodurch die Funktion solcher Veröffentlichungen als akzessorische Sanktion eingeschränkt wird. In **Ungarn** wird die verurteilende Entscheidung einschließlich des Namens des/der diskriminierenden Person mitunter auf der Webseite sowohl der Gleichbehandlungsstelle als auch des Arbeitgebers/der Arbeitgeberin veröffentlicht. Eine weitere interessante Strafvariante, die sowohl in **Italien** als auch in **Spanien** eingeführt wurde, ist der Entzug eines Vorteils (Subventionen oder andere staatliche Zuwendungen), auf den die diskriminierende Person andernfalls Anspruch gehabt hätte. In einigen nationalen Rechtsordnungen (z. B. **Belgien, Italien, die Niederlande** und **Ungarn**) ist es außerdem möglich, Arbeitgeber/innen, die einer Entgeltdiskriminierung für schuldig befunden wurden, von der Vergabe öffentlicher Aufträge auszuschließen.

In Abschnitt 3.6 beschäftigt sich der Bericht schließlich mit den nationalen Gleichbehandlungsstellen, die jeder Mitgliedstaat einrichten muss und „deren Aufgabe darin besteht, die Verwirklichung der Gleichbehandlung aller Personen ohne Diskriminierung aufgrund des Geschlechts zu fördern, zu analysieren, zu beobachten und zu unterstützen“ (Artikel 20 der Richtlinie 2006/54/EG). Alle Länderexpertinnen und -experten haben berichtet, dass mindestens eine solche Stelle zur Förderung der Gleichbehandlung existiert, die befugt ist, Probleme und/oder Ansprüche bezüglich des Grundsatzes der Entgeltgleichheit für Frauen und Männer bei gleicher oder gleichwertiger Arbeit zu behandeln.

Es scheint ein breites Spektrum an nationalen Gleichbehandlungsstellen zu geben, die sich in vielen Aspekten unterscheiden. Erstens existieren erhebliche Unterschiede, was den sachlichen Geltungsbereich der Gleichbehandlungsstellen angeht. Eine begrenzte Anzahl von Ländern verfügt über eine Gleichbehandlungsstelle, die ausschließlich für Geschlechtergleichstellung zuständig ist. Zu diesen Ländern gehören **Belgien, Finnland, Island, Italien, Kroatien, Portugal** und **Zypern**. Die meisten Länder haben jedoch nationale Gleichbehandlungsstellen, die sich mit einer Vielzahl von Diskriminierungsgründen – rassistische Zugehörigkeit, Behinderung, Alter, Weltanschauung usw. – beschäftigen. **Liechtenstein, Litauen** und **Spanien** haben vor kurzem von einer Gleichbehandlungsstelle, die nur für Geschlechterdiskriminierung zuständig war, auf eine Gleichbehandlungsstelle umgestellt, die eine größere Bandbreite von Diskriminierungsgründen abdeckt. Was die Bereiche betrifft, in denen die Gleichbehandlungsstellen tätig werden können, kann es ebenfalls Unterschiede geben. Regelmäßig gehen diese über den Beschäftigungsbereich hinaus und beziehen zum Beispiel Bildung und die Versorgung mit Gütern und Dienstleistungen mit ein. Schließlich unterscheiden sich die Gleichbehandlungsstellen auch unter territorialen Gesichtspunkten. Nationale Gleichbehandlungsstellen können auf nationaler Ebene und/oder auf regionaler und lokaler Ebene zuständig sein. Zweitens haben nationale Gleichbehandlungsstellen innerhalb des jeweiligen Staatsapparats unterschiedliche Positionen. Alle stehen in Verbindung mit der öffentlichen Verwaltung, die Verbindung ist jedoch nicht in allen Ländern gleich stark. In einigen Ländern scheint die Unabhängigkeit der Gleichbehandlungsstelle sehr ausgeprägt zu sein. Die neu geschaffene **irische** Kommission für Menschenrechte und Gleichstellung ist zum Beispiel eine völlig unabhängige Stelle. Die Kommissar/innen werden vom **irischen** Präsidenten ernannt, sodass keinerlei Eindruck einer politischen Einmischung entstehen kann. Im Gegensatz dazu scheint in **Belgien** die Verbindung zwischen der Gleichbehandlungsstelle und der öffentlichen Verwaltung etwas enger zu sein. Das Institut für die Gleichstellung von Frauen und Männern hat eine mehr gemischte Funktion, da es einerseits als Verwaltungsorgan zur Umsetzung der föderalen Gleichstellungspolitik dient und andererseits dafür verantwortlich ist, die Gleichstellung von Männern und Frauen mit allen geeigneten Mitteln zu fördern. Vor allem in Ländern, die sich dafür entschieden haben, die Aufgaben der nationalen Gleichbehandlungsstelle einer Ombudsperson zu übertragen, ist die Unabhängigkeit dieses Amtes einer der wichtigsten Aspekte,



die von den Länderexpertinnen und -experten hervorgehoben wurden (z. B. **Finnland, Griechenland, Kroatien, Lettland, Litauen, Norwegen, Schweden** und **Zypern**).

Die Zuständigkeiten der nationalen Gleichbehandlungsstellen scheinen zahlreich und vielfältig zu sein, und viele dieser Zuständigkeiten beziehen sich auf die Durchsetzung des Grundsatzes der Entgeltgleichheit für Frauen und Männer. Zahlreiche Gleichbehandlungsstellen haben Zuständigkeiten im Rahmen der nichtgerichtlichen Durchsetzung des Entgeltgleichheitsgrundsatzes. Die meisten nationalen Gleichbehandlungsstellen engagieren sich in Sensibilisierungskampagnen und darin, die Geschlechtergleichstellung mit allen geeigneten Mitteln zu fördern, u. a. durch öffentliche Veranstaltungen und Konferenzen, Schulungen für Jurist/innen, Beamt/innen, NROs, Behörden und Unternehmen, Entwicklung von Präventionsinstrumenten und E-Learning-Kursen, Informations- und Beratungstage usw. Die Beratung von Interessenträgern, in Form von Stellungnahmen, Gutachten oder Entscheidungen in Einzelfällen, und/oder generell die Durchführung von Forschungsarbeiten ist eine weitere Aufgabe, für die viele nationale Gleichbehandlungsstellen zuständig sind. Für einige von ihnen ist es sogar die einzige Aufgabe. Die Förderung des sozialen Dialogs und die Zusammenarbeit mit den sozialpartnerschaftlichen Organisationen ist ein weiteres Beispiel. Schließlich spielen einige nationale Gleichbehandlungsstellen auch in der alternativen Streitbeilegung (ADR) eine Rolle, die viele verschiedene Formen annehmen kann. Abgesehen von ihren nichtgerichtlichen Durchsetzungsbefugnissen sind einige Gleichbehandlungsstellen auch an der gerichtlichen Durchsetzung des Entgeltgleichheitsgrundsatzes beteiligt. Dabei reicht ihre Funktion von der Unterstützung mutmaßlicher Opfer bei der Geltendmachung ihrer Ansprüche (z. B. **Deutschland, Malta, Slowenien** und **Vereinigtes Königreich**), der Geltendmachung von Ansprüchen im Namen des Opfers (z. B. **Irland, Polen, die Slowakei** und **Slowenien**), der Anstrengung von Diskriminierungsverfahren auf eigene Initiative (z. B. **Belgien** und **Spanien**) oder der Beteiligung als *Amicus Curiae* (z. B. **Frankreich** und **Rumänien**) bis hin zur Tätigkeit einer (quasi-)gerichtlichen Stelle mit der Befugnis des Schadensausgleichs (Schadenersatz und/oder Entschädigung) (z. B. **Dänemark** und **Finnland**) und potenziell auch mit Sanktionsbefugnissen (z. B. **Bulgarien** und **Ungarn**). Die Wiedergutmachungen, die nationale Gleichbehandlungsstellen anvisieren, sind generell recht unterschiedlich und sowohl gerichtlicher als auch außergerichtlicher Art. Derzeit scheint es eine leichte Präferenz für gütliche Streitbelegungen mit Schwerpunkt auf der Vermeidung künftiger Diskriminierung zu geben.

In den meisten Länderberichten wurde erwähnt, dass die nationalen Gleichbehandlungsstellen nur begrenzt und bruchstückhaft Daten erheben (z. B. **Deutschland, Estland, Malta, Ungarn** und **Zypern**). Einige Gleichbehandlungsstellen erheben oder veröffentlichen gar nichts (oder kaum etwas) (z. B. **Bulgarien** und **Luxemburg**). Es gibt ein paar bemerkenswerte Ausnahmen wie zum Beispiel **Dänemark**, das eine Gleichbehandlungsstelle hat, die alle ihre Entscheidungen auf ihrer Webseite veröffentlicht, wenn auch in anonymisierter Form.

Das letzte Kapitel des Berichts (Kapitel 4) enthält Schlussfolgerungen, bewährte Verfahren und Empfehlungen.

Die 31 Länderberichte haben Anhaltspunkte dafür geliefert, dass ein Großteil des Problems der gerichtlichen Durchsetzung mit den gerichtlichen Verfahren selbst zusammenhängt, da diese nach wie vor sehr heterogen sind. Abhängig von einer Reihe von Merkmalen ist ein nationales System der gerichtlichen Durchsetzung mehr oder weniger effizient, was die Durchsetzung des Grundsatzes der Entgeltgleichheit für Frauen und Männer bei gleicher oder gleichwertiger Arbeit betrifft. Der Bericht zeigt fünf wesentliche Elemente auf, die – je nachdem, wie sie auf nationaler Ebene ausgestaltet sind – Auswirkungen auf die erfolgreiche gerichtliche Durchsetzung des Entgeltgleichheitsgrundsatzes haben können. Ein erstes Schlüsselement betrifft die Justizbehörde, die einen Rechtsstreit wegen geschlechtsbezogener Entgeltdiskriminierung verhandeln kann. Man könnte hier anregen, dass stärker spezialisierte Gerichte fundiertere Kenntnisse über geschlechtsbezogene Entgeltdiskriminierung haben und daher besser dafür gerüstet sind, über solche Rechtsstreite zu entscheiden. Ein zweites Element bezieht sich auf die eigentliche Anstrengung eines Verfahrens wegen geschlechtsbezogener Entgeltdiskriminierung. Hier ist davon auszugehen, dass die

Möglichkeit für Opfer geschlechtsbezogener Entgeltdiskriminierung, sich an Sammelklagen zu beteiligen (zusätzlich zu der Möglichkeit, Einzelklage einzureichen), erhebliche und positive Auswirkungen auf die innerstaatliche Durchsetzung des Entgeltgleichheitsgrundsatzes hat. Ein drittes Schlüsselement steht mit der Verlagerung der Beweislast in Verbindung. In fast allen untersuchten Ländern ist unklar, wann genau hinreichend schwerwiegende Anhaltspunkte für eine Diskriminierung vorliegen, damit die Beweislast auf den Arbeitgeber bzw. die Arbeitgeberin übergeht. Länder mit detaillierteren Rechtsvorschriften zu diesem Thema scheinen besser gewappnet zu sein. Fristen sind das vierte Schlüsselement. In vielen Ländern sind die Fristen sehr kurz, und häufig ist es schwierig herauszufinden, welche Frist gilt. Dadurch werden die Möglichkeiten, den Grundsatz der Entgeltgleichheit für Frauen und Männer durchzusetzen, ebenfalls stark eingeschränkt. Das fünfte Element schließlich, von dem der Wirkungsgrad eines gerichtlichen Durchsetzungsmechanismus abhängt, sind die verfügbaren Möglichkeiten des Schadensausgleichs (Schadenersatz und Entschädigung) und die Möglichkeit, strafrechtliche Sanktionen zu verhängen. Die geringen Beträge, die sowohl für materielle als auch für immaterielle Schäden festgesetzt und gewährt werden, wirken auf künftige Entgeltdiskriminierer/innen nicht besonders abschreckend. In Bezug auf strafrechtliche Sanktionen (Geldstrafen und/oder Freiheitsstrafen) ist Ähnliches festzustellen, was zu einem ähnlichen Mangel an Abschreckung führt.

Ungeachtet der oben erwähnten Schwierigkeiten im Zusammenhang mit der gerichtlichen Durchsetzung gibt es eine Reihe nationaler „bewährter Verfahren“, die es wert sind, hervorgehoben zu werden. Es handelt sich dabei sowohl um zwingende Vorschriften (Hard Law) als auch um unverbindliche Maßnahmen (Soft Law), die auf nationaler oder europäischer Ebene als Beispiele dienen können. Interessante Hard-Law-Maßnahmen sind unter anderem gesetzgeberische Initiativen, die auf Entgelttransparenz abzielen. Beispiele dafür sind das **finnische** „Entgelt-Mapping“ und die Bestimmungen des neuen **litauischen** Arbeitsgesetzbuches von 2017: Sie machen einen wichtigen Schritt in Richtung auf mehr Transparenz in den Lohn- und Gehaltssystemen, indem sie die Arbeitgeber/innen verpflichten, den Beschäftigten, dem Betriebsrat und den Gewerkschaften entgeltbezogene Informationen zur Verfügung zu stellen. Auch einige verfahrensrechtliche Bestimmungen können als bewährte Verfahren angesehen werden. Die **portugiesische** Expertin verwies auf eine ziemlich weitreichende Bestimmung im **portugiesischen** Arbeitsgesetzbuch, der zufolge geschlechtsdiskriminierende Kollektivvereinbarungen oder Betriebsregelungen im Fall einer erfolgreichen Klage wegen Entgeltdiskriminierung automatisch durch die günstigere Bestimmung ersetzt werden, die dann für alle Beschäftigten – Männer wie Frauen – gilt. Gute Hard-Law-Verfahren sind auch Sanktionen in Form des Widerrufs staatlicher Zuwendungen oder sogar des Ausschlusses von Zuschüssen und Förderkrediten bzw. von öffentlichen Ausschreibungen für einen bestimmten Zeitraum (**Italien** und **Spanien**), außerdem der „Arbeitsschlichter“ (**Belgien**) und die Pflicht, Entscheidungen – vorzugsweise nicht anonymisiert – zu veröffentlichen (**Irland**). Gute Soft-Law-Verfahren sind zahlreicher. Dazu gehören die Vergabe von Labels, Zertifikaten und Preisen (z. B. **Malta**, **Norwegen** und **Zypern**), Sensibilisierungsmaßnahmen wie der „Zukunftstag“ in **Liechtenstein** und der in vielen europäischen Ländern stattfindende „Equal Pay Day“. Auch die Entwicklung von Bewertungsinstrumenten und -verfahren für Arbeitgeber/innen, Arbeitnehmer/innen und sozialpartnerschaftliche Organisationen kann als gutes Soft-Law-Verfahren gelten. Genannt sei an dieser Stelle auch die Überwachung der Entgeltgleichheit durch das **schwedische** Schlichtungsinstitut. In einigen Ländern scheinen zum Beispiel die Gleichbehandlungsstellen über einiges Know-how zu verfügen, um zu erreichen, dass die nationalen Medien über die (Soft-Law-)Initiativen berichten, die zur Bekämpfung geschlechtsbezogener Entgeltdiskriminierung ergriffen werden (z. B. **Malta**, **Norwegen**, **Portugal** und **Vereinigtes Königreich**).

Der Bericht kommt zu dem Ergebnis, dass sich aus den diversen Länderberichten Anhaltspunkte dafür ergeben, dass Spezialisierung in ihren vielen verschiedenen Formen empfehlenswert ist. Erstens: In Bezug auf die einschlägigen Rechtsvorschriften bedeutet eine solche Spezialisierung, dass klare Definitionen von Rechtsbegriffen wie „gleiche Arbeit“, „gleichwertige Arbeit“ und „mittelbare Diskriminierung“ sowie Klarheit bezüglich der Frage, ob eine Vergleichsperson erforderlich ist oder ob eine Ungleichbehandlung gerechtfertigt sein kann, die Möglichkeiten einer gerichtlichen Durchsetzung des Grundsatzes der Entgeltgleichheit für Frauen und Männer wesentlich verbessern. Zweitens: Je spezialisierter die beteiligte gerichtliche oder nichtgerichtliche Stelle ist, desto zufriedenstellender

scheint ihre Tätigkeit zu sein. Besondere Aufmerksamkeit sollte den sozialpartnerschaftlichen Organisationen gewidmet werden, denen von einigen Expertinnen und Experten vorgeworfen wurde, dass sie durch Kollektivverhandlungen, die zu geschlechtsdiskriminierenden Tätigkeitseinstufungs- und Entgeltsystemen führen, die geschlechtsspezifische Entgeltlücke aufrechterhalten. Drittens: Auch eine Spezialisierung der Klägerseite könnte die gerichtliche Durchsetzung verbessern. Während die meisten Opfer von Entgeltdiskriminierung nur einmal mit dieser Art von Diskriminierung konfrontiert sind – und daher niemals Spezialist/innen sein werden –, erlaubt die Möglichkeit, Sammelklagen einzureichen, es bestimmten Organisationen, sich eine Spezialistenfunktion im Dienste diskriminierter Arbeitnehmer/innen anzueignen. Viertens: Verfahrensvorschriften, die speziell auf Diskriminierungsfälle ausgerichtet sind (indem sie die schwache Position des mutmaßlichen Diskriminierungsopfers berücksichtigen), haben ebenfalls positive Auswirkungen auf die gerichtliche Durchsetzung. Dies sollte sich nicht auf die bloße Erwähnung der in der Richtlinie 2006/54/EG vorgeschriebenen Beweislastverlagerung beschränken. Es sollte auch eine Beschreibung beinhalten, welche und wie viel Informationen für die tatsächliche Verlagerung der Beweislast erforderlich sind. Schließlich wird die Durchsetzung zweifellos auch durch gesetzliche Vorschriften unterstützt, die Arbeitnehmer/innen, die ihre Rechte geltend machen, vor Viktimisierung schützen, speziell in Diskriminierungsfällen. Es ist davon auszugehen, dass ein Verbot von Vergeltungsmaßnahmen, das auf allgemeinen Grundsätzen des Arbeitsrechts beruht, weniger Schutz bietet, da es weniger stark wahrgenommen wird. Abgesehen von Spezialisierung empfiehlt der Bericht auch, dass die Mitgliedstaaten sowohl gerichtlichen als auch nichtgerichtlichen Durchsetzungsinitiativen genügend Aufmerksamkeit schenken und für eine breite Berichterstattung in den nationalen Medien sorgen sollten.<sup>15</sup> Letzten Endes scheint das Wissen über die geschlechtsspezifische Entgeltlücke und die verschiedenen Möglichkeiten, den Grundsatz der Entgeltgleichheit für Frauen und Männer bei gleicher oder gleichwertiger Arbeit durchzusetzen, immer noch ungenügend zu sein, ungeachtet der Tatsache, dass die EU und die Mehrzahl ihrer Mitgliedstaaten sich schon so lange auf diesem Gebiet engagieren.

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15 Fuchs, G. (2013), „Strategic Litigation for Gender Equality in the Workplace and Legal Opportunity Structures in Four European Countries“, *Canadian Journal of Law and Society*, Bd. 28, Nr. 2, S. 206-207.

# 1 Introduction: an overview of the general situation in Europe and the approach and specific focus of this report

Equal pay for men and women for equal work or work of equal value has been a concern of the European Union (EU) from its very beginning, resulting in several legal provisions and relevant case law by the Court of Justice of the EU (CJEU), formerly the European Court of Justice (ECJ). Also the EU Member States have undertaken legislative action in various ways to make sure that the equal pay principle is put into practice. However, the EU still finds itself confronted with a persisting gender pay gap of 16.3 % on average for the 28 Member States in 2015.<sup>1</sup> This gap persuaded the European Commission to examine the enforcement of the equal pay principle, inspiring a request to its European network of legal experts in gender equality and non-discrimination ('Network')<sup>2</sup> to write a report on the enforcement of the principle of equal pay for men and women for equal work and work of equal value.

## 1.1 The principle of equal pay for men and women for equal work or work of equal value in the EU

The principle of equal pay for men and women for equal work and work of equal value was laid down in the original EEC Treaty of 1957, more precisely in its Article 119, which later became Article 141 EC Treaty. Since the entry into force of the Treaty of Lisbon (2009), the principle is embodied in Article 157 of the Treaty on the Functioning of the European Union (TFEU). According to the current Article 157 TFEU, 'pay' refers to '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.'

An important impetus for bringing the equal pay principle into practice was provided by Equal Pay Directive 75/117/EEC,<sup>3</sup> which has in the meantime been replaced by Recast Directive 2006/54/EC.<sup>4</sup> This Directive prohibits both direct and indirect pay discrimination. Where job classification schemes are used in order to determine pay, these must be based on the same criteria for both men and women and should be drawn up to exclude discrimination on grounds of sex<sup>5</sup> (Article 4). Also, the Recast Directive requires that the Member States shall ensure that all employment-related arrangements, including provisions in individual or collective agreements and contracts, internal company rules, rules governing independent professions and rules governing employees' and employers' organisations contradicting the principle of equal pay shall be or may be declared null and void or may be amended (Article 23).

Apart from the above-mentioned EU legal framework, also the case law of the CJEU, often induced by requests for preliminary rulings by national judges, has been of major importance for the introduction of the equal pay principle in the daily lives of EU citizens. In particular, the Court's findings in the 1970s

- 1 Unadjusted gender pay gap figure for 2015 for the 28 EU Member States, see: <http://ec.europa.eu/eurostat/tgm/table.do?tab=table&init=1&language=en&pcode=tsdsc340&plugin=1>, accessed 5 March, 2017. Since 2007, computations are based on a harmonized source across the EU, the Structure of Earnings Survey (SES), a rich employer-employee matched data set. See Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions, entitled 'Tackling the pay gap between women and men', COM (2007) 424 final.
- 2 The 'European network of legal experts in gender equality and non-discrimination', or 'European Equality Law Network' (EELN) established in December 2014, combines two previously existing networks: the 'European Network of Legal Experts in the Non-discrimination Field' and the 'European Network of Legal Experts in the field of Gender Equality'. For more information on the Network, see <http://www.equalitylaw.eu/>, accessed on 11 January 2017.
- 3 Directive 75/117/EEC on the approximation of the laws of the Member States, relating to the application of the principle of equal pay for men and women, OJ L 45, of 19 February 1975, p. 19.
- 4 Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), OJ L 204, of 26 July 2006, p. 23.
- 5 In this report the word 'sex' is used, rather than 'gender', except where reference is made to the 'gender' pay gap. A discussion of the differences between 'sex' and 'gender' is not an aim of this report, although this certainly deserves discussion. For an example, see Lembke U. (2016), 'Tackling sex discrimination to achieve gender equality? Conceptions of sex and gender in EU non-discrimination law and policies', *European Equality Law Review*, no. 2, p. 49, available at: <http://www.equalitylaw.eu/downloads/3938-european-equality-law-review-2-2016>, accessed 1 March 2017.

that Article 119 is directly effective in both vertical (private person versus public authority) and horizontal (private person versus private person) relations<sup>6</sup> proved to be a powerful tool for enforcing the principle in the national courts, doubtless also with considerable preventive effects. Subsequent cases, in particular during the 1990s, concerned the scope of the notion of ‘pay’, which the Court has interpreted broadly. Pay includes not only basic pay, but also, for example, overtime supplements,<sup>7</sup> special bonuses paid by the employer,<sup>8</sup> travel allowances,<sup>9</sup> compensation for attending training courses and training facilities,<sup>10</sup> termination payments in the case of dismissal<sup>11</sup> and occupational pensions.<sup>12</sup> Another batch of cases delves into the concepts of ‘equal work’ and ‘work of equal value.’ In those cases the potential comparison of jobs is the central problem and judgments focus on finding an accurate comparator. Questions that have arisen in that perspective concern, for example, the possibility to compare with a similar<sup>13</sup> or even the same<sup>14</sup> job with another employer, with previous employees doing the same job<sup>15</sup> and with employees doing a job of lower value.<sup>16</sup> Also the use of statistics is an issue that has come to the surface in a number of CJEU cases.<sup>17</sup>

## 1.2 The equal pay principle at the national level

At the national level, the principle of equal pay is, generally speaking, also fully reflected in the legislation of the current 28 EU Member States and the three countries of the European Economic Area (EEA): **Iceland**, **Liechtenstein** and **Norway**.<sup>18</sup> The equal pay principle may be implemented both at the constitutional and/or legislative level, the latter either as a part of general labour law or as provided for in specific anti-discrimination or equality legislation. Furthermore, in some states equal pay is also (partly) guaranteed by collective agreement (for example, **Belgium**). Yet, the scope given to the principle in the different states varies in a number of respects. Those differences relate, for example, to the extent to and the way in which the concept of ‘pay’ has been defined in national law, to the extent to which a comparator is required, to the extent to which national law lays down parameters for establishing the ‘equal value’ of the work performed, to the extent to which national law addresses wage transparency, or to the extent to which it allows justifications for pay differences. The implementation of the equal pay principle in national law will be dealt with in more detail in the following chapter of this report.

## 1.3 A persisting gender pay gap

As already highlighted above, the major achievements on both the EU and the national levels have not been able to prevent Eurostat data from showing a persisting gender pay gap, reportedly of 16.3 % on average for the 28 EU Member States in 2015. Eurostat data on the gender pay gap always concern the so-called ‘unadjusted’ gender pay gap, representing the difference between the average gross hourly earnings of male paid employees and of female paid employees as a percentage of the average gross hourly earnings of male paid employees. This indicator has been defined as ‘unadjusted’ as it has not been adjusted according to individual characteristics that may explain part of the earnings difference. Such individual characteristics relate, amongst other things, to traditions in the education and career choices of men and women; to a gender imbalance in the sharing of family responsibilities; to the fact that men and women still tend to work in different sectors; to part-time work, which is often highly

6 Case 43/75 *Defrenne II* [1976] ECR 455.

7 See, for example, Case C-300/06 *Voß* [2007] ECR I-10573.

8 See, for example, Case C-333/97 *Lewen* [1999] ECR I-7243.

9 See, for example, Case C-12/81 *Garland* [1982] ECR 359.

10 See, for example, Case C-360/90 *Bötel* [1992] ECR I-3589.

11 See, for example, Case C-33/89 *Kowalska* [1990] ECR I-2591.

12 See, for example, Case C-262/88 *Barber* [1990] ECR I-1889.

13 See, for example, Case C-320/00 *Lawrence* [2002] ECR I-07325.

14 See, for example, Case C-256/01 *Allonby* [2004] ECR I-903.

15 See, for example, Case C-129/79 *Macarthy* [1980] ECR 1276.

16 See, for example, Case C-157/86 *Murphy* [1988] ECR 686.

17 See, for example, Case C-167/97 *Seymour-Smith* [1997] ECR I-623.

18 The EEA Agreement, which entered into force on 1 January 1994, enables Iceland, Liechtenstein and Norway to enjoy the benefits of the EU’s single market without the full privileges and responsibilities of EU membership.

feminised, etc.<sup>19</sup> However, an important part of the discrepancies can only be explained by the fact that there is pay discrimination (i.e. the 'adjusted wage gap').

Progress in closing the gender pay gap appears to be very slow in general: with an average of 16.3 % in 2015, the gender pay gap had decreased by only about one and a half percent as compared to the gender pay value in 2006 (17.7 %, i.e. the figure for – at the time – 27 Member States). This clearly shows the very moderate pace of improvement. Also, the differences between countries remain very substantive, and some trends are simply worrying, as is shown below.

In a very limited number of EU Member States, whose gender pay gap belonged from the beginning to the lower national pay gaps within the EU (under 10 %), there is a further clear and positive trend. In **Belgium** (from 10.2 % to 6.5 %), **Luxembourg** (from 8.7 % to 5.5 %) and **Romania** (8.8 % to 5.8 % provisionally) the gender pay gap has been further reduced. A number of states that in the past also belonged to the group with a relatively low gender pay gap have experienced, however, a remarkable relapse over the period from 2010 to 2015. In **Poland**, for example, the pay gap has again risen from 4.5 % in 2010 to 7.7 % in 2015 (provisional figure). **Croatia** shows a similar picture, with a gender pay gap rise from 5.7 % (in 2010) to 10.4 % (the provisional figure for 2014), just like **Malta** (7.2 % in 2010 to 10.6 % in 2014). **Slovenia** is a special case, with a rise from 0.9 % in 2010 to 8.1 % in 2015, the low figure for 2010 potentially being due to the measurement method used. In **Italy** the situation is relatively stable (from 5.3 % to 5.5 %).

From the (largest) group of Member States with average gender pay gaps (between 10 % and 20 %), only one features a slow, though unremarkably positive trend: **Cyprus** (from 16.8 % in 2010 to 14 % in 2015). For **Finland** (19.1 % in 2010 to 17.3 % as a provisional figure for 2015) and **Sweden** (15.6 % in 2010 to 14 % in 2015), the situation seems to be improving but it may still be too early to talk about a clear downward trend. Many of the Member States with average pay gaps, however, have remained more or less stable at those average levels (**Denmark** and **France**) or have shown a fluctuating trend (**Bulgaria, Hungary, Ireland, Latvia, Lithuania, the Netherlands, Portugal, Slovakia** and **Spain**). The EEA states of **Iceland** and **Norway** belong to the same category of states that feature fluctuations around average gender pay gaps.<sup>20</sup> **Greece** is a very particular case. The last available data are from 2010. With a gender pay gap of 15 %, the country showed in that year a further step in a declining trend since 2002 (25.5 % in 2002; 20.7 % in 2006; 21.5 % in 2007; 22 % in 2008 and 15 % in 2010). Since 2010, however, the relevant Eurostat table no longer features any **Greek** data.<sup>21</sup>

A number of states have stayed more or less constant at very high gender pay gap rates (around, or well over 20 %). The **United Kingdom** shows worrying fluctuations (19.5 % in 2010, 19.7 % in 2011, 21.2 % in 2012, 20.5 % in 2013, 20.9 % in 2014 and 20.8 % provisionally in 2015). The pay gap reductions in the other high pay gap states are deplorably low, taking into account the size of those pay gaps. These countries (data for 2010, 2011, 2012, 2013, 2014 and 2015 between brackets) include **Austria** (24 %; 23.5 %; 22.9 %; 22.3 %; 22.1 %; 21.7 %), the **Czech Republic** (21.6 %; 22.6 %; 22.5 %; 22.3 %; 22.5 % and 22.5 %), **Estonia** (27.7 %; 27.3 %; 29.9 %; 29.8 %, 28.1 % and 26.9 %) and **Germany** (22.3 %; 22.4 %; 22.7 %; 22.1 %; 22.3 % and 22 % provisionally).

Given the fact that the EU legislative and judicial institutions, together with the Member States, have now been taking action for more than 55 years to defend the principle of equal pay for equal work or work of

19 Scholars have warned that the 'unadjusted' gender pay gap indicator shows considerable shortcomings. See, for example, M. Peruzzi who claimed that 'an assessment that neglects any consideration of the personal professional characteristics of the employee inevitably leads to misleading results and it is not just a question of conformity with the antidiscrimination legal discourse'. Peruzzi M. (2015), 'Contradictions and misalignments in the EU approach towards the gender pay gap,' *Cambridge Journal of Economics*, Vol. 39, p. 449. Also Lips has warned that it can be tempting 'to justify paying women less, particularly when the justifications are worded in an apparently gender-neutral way'. Lips, H.M. (2013), 'Acknowledging Discrimination as a Key to the Gender Pay Gap,' *Sex Roles*, Vol. 68, No. 3, p. 225.

20 The Eurostat statistics do not provide any data for Liechtenstein.

21 The Eurostat gender pay gap table does not contain any data on Liechtenstein either.



equal value for men and women, this is a disappointing result. This explains why the gender pay gap has, in the past decade, encouraged several initiatives by the European Commission and continues to be one of the Commission's key concerns in the area of gender equality.

#### 1.4 Actions undertaken by the European Commission over the last ten years

Equal pay was already a priority mentioned in the 'Roadmap for equality between women and men 2006-2010'.<sup>22</sup> In 2007, the European Commission adopted a Communication examining the causes of the gender pay gap. It put forward a series of actions to tackle the problem, including, for example, an increase in care services for children and the elderly and the elimination of gender stereotypes in education, training and culture.<sup>23</sup> Also in 2007, the European Network of Legal Experts in the field of Gender Equality<sup>24</sup> already published a report on the 'Legal Aspects of the Gender Pay Gap'.<sup>25</sup> The aim of this report was not so much to provide a detailed overview of the national equal pay legislation, but rather to help reduce the often blurred discussion about the gender pay gap by, for example, clearly differentiating between pay discrimination, on the one hand, and pay discrepancies based on factors that have nothing to do with discrimination, on the other. In 2010, a new report followed to update the information provided in the 2007 report, but also to further develop it in two specific directions.<sup>26</sup> In the first place, the Commission was interested in obtaining better data on the national policies, initiatives and legal instruments aimed at tackling the gender pay gap in practice. In the second place, the Commission envisaged an exploration of the potential links between equal pay and other national labour law provisions.

In its 2013 Report on the implementation of Recast Directive 2006/54/EC, the European Commission highlighted that the practical application of the equal pay provisions seemed to be one of the Directive's most problematic areas.<sup>27</sup> In this respect, it considered that obscure pay structures and a lack of available information about pay levels of employees performing the same work or work of equal value were major contributing factors to the persistent gender pay gap. It therefore adopted, in 2014, the Pay Transparency Recommendation, requesting Member states to put in place specific measures to promote wage transparency.<sup>28</sup>

In its Strategic Engagement for Gender Equality (2016-2019),<sup>29</sup> the European Commission has again set the reduction of the gender pay gap as one of its five key actions, given the persisting gender pay gap. The current report on the enforcement of the equal pay principle must be seen against that background.

Recast Directive 2006/54/EC provides that Member States should ensure that 'judicial procedures for the enforcement of obligations under this Directive are available to all persons who consider themselves

- 22 Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions, entitled 'Roadmap for equality between women and men 2006-2010', COM (2006) 92 final.
- 23 Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions, entitled 'Tackling the pay gap between women and men', COM (2007) 424 final.
- 24 The 'European network of legal experts in gender equality and non-discrimination', or the 'European Equality Law Network' (EELN) established in December 2014, combines two previously existing networks: the 'European Network of Legal Experts in the Non-discrimination Field' and the 'European Network of Legal Experts in the field of Gender Equality'. For more information on the Network, see <http://www.equalitylaw.eu/>, accessed on 11 January 2017.
- 25 European Commission's Network of legal experts in the fields of employment, social affairs and equality between men and women, Prechal, S., Burri, S., van Seggelen, I., de Graaff, G. (2007), *Legal Aspects of the Gender Pay Gap*, European Commission, available at: [http://ec.europa.eu/justice/gender-equality/files/2007report\\_on\\_equal\\_pay\\_for\\_pub\\_final\\_en.pdf](http://ec.europa.eu/justice/gender-equality/files/2007report_on_equal_pay_for_pub_final_en.pdf), accessed 11 January, 2017.
- 26 See European Network of Legal Experts in the Field of Gender Equality, Foubert, P., Burri, S., Numhauser-Henning, A. (2010), *The Gender Pay Gap from a Legal Perspective (including 33 country reports)*, European Commission, available at: <http://www.equalitylaw.eu/downloads/3857-the-gender-pay-gap-in-europe-from-a-legal-perspective-including-33-country-reports-pdf-4-246-kb>, accessed 11 January 2017.
- 27 Report from the Commission to the European parliament and the Council 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), SWD(2013) 512 final.
- 28 Commission Recommendation on strengthening the principle of equal pay between men and women through transparency, C(2014) 1405 final.
- 29 Commission Staff Working Document, 'Strategic engagement for gender equality 2016-2019', SWD (2015) 278 final.

wronged.<sup>30</sup> It continues to state that Member States shall introduce into their national legal systems ‘such measures as are necessary to ensure real and effective compensation or reparation.’<sup>31</sup> When it comes to remedies, relevant case law of the CJEU has already discussed several aspects thereof, for example, the treatment that should be given to the class of persons put at a disadvantage, once an instance of discrimination has been discovered,<sup>32</sup> or the *a priori* fixing of an upper limit of the reparation of the loss and damage sustained by a person injured as a result of discriminatory behaviour.<sup>33</sup> This report intends to focus on enforcement in general, including issues of compensation, reparation and sanctions, as well as the role of national equality bodies. Measures of pay transparency are not dealt with, or only very marginally so, as the Commission ordered the European Equality Law Network (‘the Network’) to produce a separate report that focuses on that very particular aspect of enforcement.<sup>34</sup> Also, this report will not focus either on the links that the gender pay gap certainly has with the prevalence amongst female workers of part-time work, atypical jobs, temporary work, etc.<sup>35</sup> Those factors, which are ‘filtered’ from the unadjusted gender pay gap formula by the use of an average hourly wage instead of, for example, a monthly wage, are less innocent than they may seem at first sight. The reason for not elaborating upon those factors here has been inspired by the fact that the focus of this report is on the enforcement of existing equal pay provisions, which as such is not influenced by such factors.

## 1.5 The preparations for and the content of this report

The Network prepared this report on enforcement by sending out detailed questionnaires to legal experts in 31 states, including the current 28 EU Member States and the three EEA countries of **Iceland**, **Liechtenstein** and **Norway**.<sup>36</sup> The questions were related to the national legislative framework with respect to judicial enforcement (for example, which judicial bodies are competent, who can bring a claim, which procedural rules are applicable, etc.), to the possibilities of non-judicial enforcement (internal and external procedures, ADR, reporting duties, etc.), to available remedies (compensation and reparation) and penalties (for example, fines and imprisonment), to protection against victimisation and to the role of the national equality bodies. With its final question, the questionnaire searched for information on national ‘good practices’ that could serve as an example for other states and potentially also for future EU legislative measures. The country reports that resulted from this questionnaire round are the ‘raw material’ that has been used as a basis for the current report.

The 31 national reports clearly show that in a number of countries the gender pay gap, including the weak enforcement of the principle of equal pay for men and women, is on the political agenda. Such countries include, for example, **Belgium**, **Croatia** and **France**, three countries which (coincidentally?) also happen to have a fairly active national equality body. In other countries, however, the gender pay gap seems much less of an issue, as is the problematic enforcement of the principle of equal pay. This is reportedly the case in countries like, for example, **Hungary**, **Italy**, **Greece** and **Poland**. The experts from those countries have in so many words linked this problem to the political and/or economic changes that have relatively recently occurred in their countries. Those changes, because of a lack of financial means or because of a return to a more conservative view of the roles of men and women, have reduced the equal pay principle and its enforcement to rather marginal phenomena.

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30 Article 17(1) Directive 2006/54/EC. For an early case, see, for example, Case 14/83 *Von Colson and Kamann* [1984] ECR 1891.

31 Article 18 Directive 2006/54/EC.

32 Case C-33/89 *Kowalska* [1990] ECR I-2591. In this case the Court decided that the disadvantaged group should be given the same treatment as the group that had been given more favourable treatment (levelling up).

33 Case C-271/91 *Marshall* [1993] ECR I-4367. The Court observed that fixing such an upper limit cannot constitute a proper implementation of the Directive, since it limits the amount of compensation a priori to a level which is not necessarily consistent with the requirement of ensuring real equality of opportunity.

34 See European Network of Legal Experts in the Field of Gender Equality, Veldman, A., Timmer, A., *Pay transparency in the EU. A legal analysis of the situation in the EU Member States, Iceland, Liechtenstein and Norway* (2017), European Commission, available at: <http://www.equalitylaw.eu/downloads/4073-pay-transparency-in-the-eu-pdf-693-kb>, accessed 27 June 2017.

35 See, for example, Peruzzi, M. (2015), ‘Contradictions and misalignments in the EU approach towards the gender pay gap,’ *Cambridge Journal of Economics*, Vol. 39, p. 450.

36 The questionnaire is attached to the report.



## 2 The legislative framework (constitution, acts of parliament, collective labour agreements, soft law measures)

Notwithstanding the persistence of a gender pay gap throughout Europe, most EU Member States and EEA countries have adopted a substantive number of legislative provisions aimed at tackling it, often incited by EU legislation in the field (see supra). The majority of those provisions seem to be in full conformity with EU law, at least from a purely legalistic point of view. That has also been stressed by many of the national experts who filled out the questionnaire, although some of them (for example, **Bulgaria**) have immediately pointed at the large discrepancy between the formal legal recognition of the equal pay principle and its implementation in practice.

As already referred to above, the implementation of the equal pay principle on the national level can be carried out at different levels. Some states have referred to it in their constitutions. Other states have implemented the principle on the legislative level, either as a part of general labour law (labour codes, employments acts, etc.) or as provided for in specific anti-discrimination or equality legislation (sex-related or more general). Furthermore, in some states equal pay may also be (partly) guaranteed by collective agreements.

The following paragraphs present a brief overview of the way in which states have moulded the equal pay principle on the national level. Also, some attention is paid to the scope given to the equal pay principle in the national implementation measures. After all, it goes without saying that this scope has a very strong link with how easy or difficult it is in a certain country to actually enforce the existing equal pay law.

### 2.1 Constitutional provisions

Several national experts have referred to the existence of a general constitutional principle of non-discrimination or equality. Such a constitutional principle is usually linked to one or more forbidden grounds, like for example race, sex and religion. This is, for example, the case in **Cyprus**, and also in **Spain**. The **Spanish** expert has referred to Constitutional Court judgments in which the general principle of non-discrimination is used in a labour law context, in particular with regard to systems of professional classification and promotion that were allegedly discriminatory. In **Lithuania**, too, the principle of non-discrimination is laid down in the Constitution. In addition to that, the **Lithuanian** expert has made reference to the constitutional guarantee of just working conditions for *all* employees which, combined with the constitutional non-discrimination principle, would certainly guarantee equal pay for men and women for equal work or work of equal value. Also the **Slovak** Constitution contains a guarantee of just working conditions for *all* employees.

In some national constitutions a separate provision has been devoted to the equal treatment of men and women. In **France**, for example, the principle of equality between men and women was first recognised in 1946, in the Preamble to the **French** Constitution. Also the **German, Greek, Luxembourg** and **Slovenian** Constitutions contain a specific sex equality clause, often on top of a more general non-discrimination article. The **German** expert has explicitly referred to case law confirming that the sex equality principle as laid down in the Constitution binds the state as an employer as well as (theoretically) the parties to collective labour agreements.

Even the very precise idea of equal pay for men and women for equal work or work of equal value is worded in a number of national constitutions. That has been mentioned, for example, by the experts from **Finland, Italy, Malta, Poland** and **Romania**. In **Greece** and **Portugal**, equal pay is a constitutional right for *all* employees, irrespective of sex, but also irrespective of other protected grounds. Quite contrarily, in the latest **Hungarian** Constitution ('Fundamental Law') the provision on gender pay equality has been omitted with the reference to the general non-discrimination article.

## 2.2 Acts of parliament

In a number of countries the principle of equal pay for men and women for equal work or work of equal value is only to be found on the level of an act of parliament, and not in the constitution. This is inevitably the case in common law countries with no written constitution, like the **United Kingdom**. But also states that do have a constitution, possibly containing a clause relating to the principle of equal pay for men and women or to equality and non-discrimination more generally, have adopted legislation that further implements the equal pay principle for men and women. Below is a brief overview of where to find such parliamentary acts, as well as a few words on the personal scope of such acts. It should be highlighted that a significant number of states combine several parliamentary acts to translate the equal pay principle into their internal legal order.

### 2.2.1 Employment legislation

An obvious place to host a provision implementing the principle of equal pay for male and female workers is general national employment legislation, often entitled as 'labour code', 'employment act', 'workers' statute', 'working environment act', 'employment relationship act', etc. That is the case, for example, in the following countries: **Bulgaria, Croatia, the Czech Republic, France, Hungary, Latvia, Lithuania, Luxembourg, Malta, Norway, Poland, Portugal, Romania, Slovakia, Slovenia** and **Spain**. By analogy with the constitutional provisions mentioned above, such provisions either concern equal pay specifically for men and women, or equal pay for *all* employees (mentioning several forbidden grounds, sex being one of them).

In **Liechtenstein** and **the Netherlands** the principle of equal pay for men and women for equal work or work of equal value has (also) been incorporated in the Civil Code. That is not surprising, since in those states the rules governing the employment relationship make up a specific subdivision of the Civil Code's chapter on 'special contracts'.

### 2.2.2 Equality legislation

Very often the equal pay principle for men and women is (also) to be found in special equal treatment or non-discrimination legislation, directly aimed at implementing EU equality directives.

In the first place, such acts may relate to equal treatment on the grounds of sex alone, often referred to as 'gender act', 'sex equality act' and the like. Those acts may sometimes have a very narrow employment-related scope. In **Denmark**, for example, there even exists an act that specifically targets equal pay for male and female workers. Very often, however, national laws on sex equality including the equal pay principle have a more general scope, covering also other fields than just employment (for example, **Belgium, Estonia, Finland, Iceland, Italy, Liechtenstein, the Netherlands** and **Norway**). Typically, the other fields also have a social connection. By way of an example: in **Belgium**, the Gender Act targets sex discrimination in employment, social security, access to goods and services, social advantages, etc. Also **Estonia** has a Gender Equality Act that covers all aspects of social life, including employment, education, goods and services, social protection, etc.

Secondly, some national experts have signalled the existence of an Act specifically focussing on non-discrimination and equal treatment in employment. Such employment-related non-discrimination acts may be linked to only the criterion of sex (for example, **Cyprus**). More often, however, such acts on equal treatment in the employment sphere cover more grounds than just sex, and may consequently target pay discrimination based on a wide number of discrimination grounds. That is the case in, for example, **Austria, the Czech Republic, Ireland** and **Sweden**.

In still other countries, like **Bulgaria, Germany, Hungary, Slovakia** and the **United Kingdom**, equality and non-discrimination legislation is as general as it can possibly be, targeting discrimination based on different grounds including sex and covering different fields of life including employment. In so doing, those acts combine some of the characteristics of the first and second groups mentioned above, leading up to a national law that has a very broad scope.

### 2.2.3 Personal scope of acts of parliament

On top of what has already been mentioned regarding the scope of national acts (see under (i) and (ii) with regard to discrimination grounds and the fields of society covered), national acts also seem to vary substantially from other perspectives, which may also have an impact on their scope.

It is, for example, interesting to have a look at the personal ambit of the relevant national laws. Employees are usually covered. The **Slovakian** law refers explicitly to part-time workers (including job sharing), and workers who perform home work or telework. Sometimes also service providers are included, as well as the liberal professions, independent workers etc. Civil servants make up a special group. In **Belgium**, for example, the above-mentioned Gender Act covers both the private and the public sectors. In **Lithuania**, there is no separate administrative provision guaranteeing equal pay for equal work for men and women, but according to the national expert the equal pay principle is applied by way of a constitutional principle and an analogy with the equality legislation applicable in private law relationships. By contrast, in some countries (for example, **Austria, Latvia** and **Slovenia**) different acts for the public and the private sectors exist.

## 2.3 Collective agreements

Sometimes also collective agreements may guarantee the principle of equal pay for equal work for male and female workers. The legal status of such collective agreements varies widely from country to country. In some countries national level agreements set a framework for negotiators at lower levels to follow. That is the case, for example in **Belgium**, where a national agreement sets the principles, which are then applied in agreements at both industry and company levels. In countries like **France** it is industry-level agreements that set the boundaries. In principle, collective agreements are only legally enforceable against contracting parties. National and industry-level collective agreements can, however, be extended for them to apply as well to employees and employers who were not represented by the social partners signing the agreement.<sup>37</sup> The relationship between collective agreements and other national legal rules (statutory law, individual employment contracts, etc.) is dependent on the national legal order and concerns the national hierarchy of labour law.

In **Belgium**, a 1975 collective labour agreement by the National Labour Council relates to equal pay for male and female workers in particular, and contains quite detailed rules defining the scope of the principle. In **Sweden**, pay regulation as such is an issue that rests entirely with the social partners and collective bargaining. Although there are no explicit rules on equal pay except for the general ban on discrimination, there is an implicit duty for the social partners to consider equal pay practices when bargaining, etc. **Luxembourg** law, by contrast, does include a provision requiring the social partners to apply the principle of equal pay between women and men in any collective agreements. In **Denmark**, the equality legislation shall not apply to the extent that a corresponding obligation applies to provide equal pay under a collective agreement.

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37 Eurofound (2011), *Extension of collective bargaining agreements in the EU. Background paper*, Dublin, p. 1, available at: [https://www.eurofound.europa.eu/sites/default/files/ef\\_publication/field\\_ef\\_document/ef1154en.pdf](https://www.eurofound.europa.eu/sites/default/files/ef_publication/field_ef_document/ef1154en.pdf), accessed 27 June 2017.

## 2.4 The material scope of the equal pay principle in national law

Although the states studied in this report have all effectively implemented the equal pay principle into national law, it has already been highlighted in other reports that the material scope of the principle of equal pay differs across the European countries.<sup>38</sup> Legislation in some Member States defines what should be understood to constitute 'equal work' or 'work of equal value' (**Ireland, Lithuania and Sweden**), but very often such a definition is lacking, thus leaving it all up to the national courts (for example, **Finland and Latvia**). For some acts, for example, occupational pensions are seen as part of the 'pay' and sometimes not.

Such a difference in the material scope may appear with respect to different aspects of the national translation of the equal pay principle and may have (a great) impact on how successful the enforcement of equal pay for equal work for men and women may be in those countries.

Below is a brief overview of the most important differences in the material scope of the principle of equal pay for equal work or work of equal value. This overview is based on the report 'A comparative analysis of gender equality law in Europe 2016'<sup>39</sup> and on the country reports submitted for the present report. More detailed information is available in the 2016 comparative analysis.

### 2.4.1 *The extent to and the ways in which the concept of pay has been defined*

**Belgium and Liechtenstein** define the concept of pay as contained in Recast Directive 2006/54/EC and as it ensues from the CJEU's interpretation of Article 157 TFEU. In other countries either case law shows compliance with EU law (**Latvia**) or compliance is shown by a plethora of different laws (**Malta**) or collective agreements (**Belgium**). The definition contained in national law may be less elaborate than in EU legislation, yet the meaning is the same. In **the Netherlands**, for example, the Act on Equal Treatment of Men and Women merely refers to 'any remuneration owed by the employer to the employee in return for the labour of the latter.' In **Iceland**, by contrast, very detailed definitions are provided by law for 'wages' ('ordinary remuneration for work and further payments of all types, direct and indirect, whether they take the form of perquisites or other forms, paid by the employer or the employee for his or her work') and 'terms' ('wages together with pension rights, holiday rights and entitlement to wages in the event of illness and all other terms of employment or entitlements that can be evaluated in monetary terms').

In the following countries, the concept does not (seem to) fully comply with the definition and scope of Article 157(2) TFEU, which may have an impact on the possibilities to have the equal pay principle enforced. In **Romania**, the Labour Code fully transposes the equal pay principle and the concept of pay, whilst the Romanian Constitution uses a more limited formulation, i.e. it does not cover work of equal value, only equal work, and it only applies to salaries, not to other types of remuneration or benefits for work. The relevance of this limitation has not yet been clarified by the Constitutional Court. Another example is **Lithuania**. Until 2017, indirect payments were not mentioned in the law, and therefore different benefits or services provided by third parties (including insurance or pension benefits) did not fall under the domestic notion of pay. However, the 2017 Labour Code has now introduced a new definition, specifically for the implementation of the principles of equality and non-discrimination of employees. The employee's wage without discrimination shall now mean: a non-discriminatory base (rate) wage and all

38 European network of legal experts in gender equality and non-discrimination, Senden, L., Timmer, A. (2016), *A comparative analysis of the implementation of EU gender equality law in the EU Member States, the former Yugoslav Republic of Macedonia, Iceland, Liechtenstein, Montenegro, Norway, Serbia and Turkey*, European Commission, available at: <http://www.equalitylaw.eu/downloads/3967-a-comparative-analysis-of-gender-equality-law-in-europe-2016-pdf-867-kb>, accessed 31 March 2017.

39 European network of legal experts in gender equality and non-discrimination, Senden, L., Timmer, A. (2016), *A comparative analysis of the implementation of EU gender equality law in the EU Member States, the former Yugoslav Republic of Macedonia, Iceland, Liechtenstein, Montenegro, Norway, Serbia and Turkey*, European Commission, available at: <http://www.equalitylaw.eu/downloads/3967-a-comparative-analysis-of-gender-equality-law-in-europe-2016-pdf-867-kb>, accessed 31 March 2017.

the additional payments in cash or in kind which the employee receives directly or indirectly from the employer for his work.

#### *2.4.2 The extent to which (in)direct sex-based pay discrimination is prohibited*

Article 4 of Recast Directive 2006/54/EC explicitly requires Member States to ensure that both direct and indirect discrimination are prohibited on grounds of sex with regard to all aspects and conditions of remuneration. In **Spain**, for example, the Workers' Statute explicitly states that 'the employer is obliged to pay for work of equal value the same remuneration, paid directly or indirectly, and whatever the nature of the work including the remuneration that is not considered salary by Spanish legislation, without discrimination on the basis of sex in any of its items or conditions.' The Spanish Constitutional Court has issued several rulings, pointing out that systems of professional classification and promotion must rely on criteria that are neutral and do not result in indirect discrimination, for example by using 'physical effort' or 'arduous work' as a reason to give a higher value to men's activities.

Still, not all national legal systems provide for such an explicit stipulation. **Germany** can serve as an example in this respect. German equality legislation does not include a positive principle of equal pay, but only a negative principle of prohibition of pay discrimination, which is not further implemented. Also, the German expert has referred to an unwritten principle of equal treatment in labour law. Furthermore, the principle of equal pay is reportedly part of the gender equality principle in the German Constitution, which binds the state as an employer as well as the parties to collective labour agreements. Yet, while most wages and job classification systems in Germany are determined by collective agreements under the Act on Collective Bargaining, this Act does not contain any provisions on equal pay. Even collective agreements with public services and social institutions still contain gender-discriminatory job classification systems today.

#### *2.4.3 The extent to which a comparator is required as regards equal pay claims*

In a number of states a comparator is not required, which opens up opportunities for easier enforcement. The **French** Court of Cassation, for example, has held that 'the existence of discrimination does not necessarily imply a comparison with other workers.' **Spanish** courts resolve equal pay cases by analysing the identity of functions or their equal value, without considering the possibility of introducing the concept of (a hypothetical) comparator, even if the law does not seem to exclude this possibility. Also the **Norwegian** expert indicated that a comparator is not required in national equal pay law. However, a comparator is allegedly very often referred to, although this may be a hypothetical comparator. The expert explicitly stated that this may be regarded as a necessity since the **Norwegian** employment market is highly gender segregated. If it were a requirement that there should always be a comparator of the opposite sex, it would be almost impossible to bring an equal pay claim.

In many other countries, however, the law still stipulates that an actual (and not a hypothetical) comparator needs to be identified. Such an actual comparator is sometimes very narrowly described in terms of time, sex, work, etc. The **Dutch** and **Irish** acts, for example, require that there should be a comparator of the opposite sex. In highly segregated labour markets, that can be problematic. In **Iceland**, the assumption underlying the law is that the comparator is working for the same employer. Also in **Ireland**, the law provides that the comparator must be employed to do like work by the same or an associated employer, at that time or any 'relevant time.' When it comes to the question whether the comparator must be employed simultaneously with the claimant, the **Maltese** Employment and Industrial Relations Act provides an interesting illustration. The act states that employees in the same class of employment are entitled to the same rate of remuneration for work of equal value. However, an employer and a worker or a union of workers may agree, following negotiations on a collective agreement, on different salary scales, annual increments and other conditions of employment that are different for those workers who are employed at different times, where such salary scales have a maximum that is achieved within a

specified period of time. In contrast to the states of **Iceland, Ireland, the Netherlands** and **Malta**, where the law requires an actual comparator, in some states it is the case law that stipulates that requirement, without there necessarily being a legal basis for this. That is the case, for example, in **Greece**. Similarly, in **Poland**, jurisprudence does not provide for the possibility to compare remuneration rates for similar positions provided by other employers (and/or located in the same geographical area). As a consequence, the **Polish** Supreme Court has argued that pay discrimination cannot be shown if the employee occupies a position with a unique character within the enterprise.

#### *2.4.4 The extent to which parameters have been laid down for establishing the equal value of the work performed*

In some countries, national law specifies (to some extent) how and by what criteria the equal value of work performed is to be established. These may include criteria of a personal, job-related (for example, working conditions, responsibility, etc.) and labour market nature. That is the case, for example, in **Croatia, Hungary, Iceland, Lithuania, Norway, Slovakia, Sweden**. **Lithuanian** law states that 'equal work' shall mean the performance of work activities which, according to objective criteria, are equal or similar to other work activities to the extent that both employees may be interchanged without significant costs for the employer.' 'Equivalent work' shall mean that, according to objective criteria, it is not lower skilled and less significant for the employer in the achievement of his operational objectives than any other comparable work. In **Hungary**, an extra criterion for judging equal value has been added to the Labour Code in 2012: labour market conditions and market value can now also be taken into account. The result is that different wages in different parts of the country are now perfectly legal. Also the **Hungarian** Act on Public Servants similarly refers to labour market conditions. The equal pay rule is even further undermined by a provision entitling the director of an administrative body to increase the basic wage of a public servant by 50 %, or to reduce it by 20 %, depending on the result of an evaluation of the performance or the quality of the work done in the previous year. So, although equal pay rules are applicable to public servants, the possibility of a severe wage adjustment opens a side door to sex-based pay discrimination. Also in **Norway**, the discussion regarding the degree to which the argument of market value may be taken into account is recurrent. The **Norwegian** expert also reported a landmark case where a municipality was ordered to remedy the error of not paying equal pay to women working in afterschool care compared to men in equivalent positions as 'work leaders'. The tribunal called upon to decide the case undertook a specific evaluation of the job tasks at the two workplaces.

In many countries (for example, **Finland, Greece** and **Latvia**), however, national law does not elaborate on what is 'equal work' or 'work of equal value.' Assessing which jobs are of equal value is consequently problematic, thus impacting on the enforcement of the equal pay principle for men and women. According to the **Finnish** preparatory works of the relevant legislation, the equal pay principle concerns work of equal value even if the jobs in question are very dissimilar but can be considered equally demanding. That is particularly important in Finland, where the labour market is deeply sex segregated. Still, the **Finnish** expert has highlighted that assessing which jobs are comparable remains difficult. The **Greek** expert doubts whether the **Greek** legislator has been fully aware of the meaning of 'work of equal value,' since the equality legislation refers to 'professional' instead of 'job' classification. The expert suspects that this may imply that the evaluation and classification concern the worker rather than 'the nature of the services in question,' as required by EU law and as interpreted by long-standing CJEU case law.<sup>40</sup> This is all the more so as the relevant **Greek** legislation does not provide for any criteria for job evaluation and classification.

In some countries, specific parameters ensue from the case law, and not from legislation. As has already been highlighted above, the **Spanish** Constitutional Court has referred to criteria like 'physical effort' or 'arduous work' as a reason to give higher value to men's activities. The **German** Federal Labour Court has deplored the fundamental lack of objective criteria, and has itself focused on the requirements for work

40 See, for example, Case C-129/79 *Macarthy* [1980] ECR 1276, para. 11.



performance such as the necessary knowledge, skills and abilities, the variety of professional duties and educational qualifications.

In still other countries, it is left first and foremost to the social partners to deal with this in collective agreements (for example, **Bulgaria**), or to equality bodies to provide guidance in this respect (for example, **Belgium**). The **Belgian** equality body thus issued a methodological instrument, a 'Gender-neutral checklist for job assessment and classification,' which was given legal recognition in the sense that when a joint sector committee adopts a job classification system, the latter must now be submitted to a department of the federal Ministry of Employment for an assessment of its gender neutrality, the mentioned checklist being one element to be taken into consideration for that purpose.

#### *2.4.5 The extent to which justifications for pay differences are allowed*

While EU law only accepts justifications for direct sex discrimination in a very limited number of narrowly described cases defined by law,<sup>41</sup> indirect sex discrimination can be justified provided that such justification is objective, serves a legitimate aim and that the means of reaching that aim are appropriate and necessary.<sup>42</sup> In some countries, however, national law does not accept that pay differences are justified. That is the case in, for example, the **Czech Republic, Cyprus, Slovakia and Slovenia**. In other countries it is left to the courts to decide on the potential justification for pay differentials (for example, **Sweden** and the **United Kingdom**). The **Swedish** expert has noted that the main problem in **Sweden** is the Labour Court, which is too ready to accept employers' justifications for pay differentials, thereby making it hard for the claimant to show that discrimination has actually taken place.

In other countries, the national law accepts that pay differences are justified on the basis of objective reasons that, self-evidently, must have no connection whatsoever with discrimination. That has been reported by the experts from, for example, **France, Poland and the Netherlands**. In the same respect, the **Italian** expert has interestingly warned that many criteria that are only at first sight gender-neutral (and thus in fact discriminatory) can easily be explained by the employer as being objectively necessary and proportionate, responding to a real need of the business. A typical example of a justification that should not be acceptable as it has too strong a connection with discriminatory practices is the reference to freedom of negotiations or freedom of contract and the fact that a woman worker would have consented to work for a lower wage. After all, one may wonder why women would agree, after having 'freely negotiated' their wage, to work for less than their male colleagues.

Justifications often embody the danger of again bringing the discrimination in through the back door. Allowing a broad interpretation of justificatory elements may reduce the equality concept to an empty box, which would undoubtedly be contrary to EU law. That is precisely why justification should be carefully scrutinised: it has a direct impact on the enforcement of the principle of equal pay for equal work for men and women. Also, the line between justifications for pay differences, on the one hand, and criteria that define the comparator (for example, being employed at different times or the labour market value of a job), the equal value of jobs (for example, responsibility) etc., on the other hand, is often quite thin. Many elements that come into play when the claimant contends that there is a sex-based pay difference potentially amounting to discrimination, may be used again when justification for such a pay difference is discussed. That could be illustrated by the fact, for example, that the **Hungarian** expert mentioned the market value of the job as an element to be taken into account to decide on the comparability of jobs, whilst the **Norwegian** expert mentioned it when discussing potential justifications for differential treatment.

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41 Reference ought to be made here to Article 157(4) TFEU that concerns the possibility to introduce positive actions, 'with a view to ensuring full equality in practice between men and women in working life.'

42 Article 2(1)(b) Recast Directive 2006/54/EC.

## 3 Enforcement

### 3.1 Judicial enforcement

Article 17(1) of Recast Directive 2006/54/EC explicitly provides that Member States shall ensure that judicial procedures are available for the enforcement of all obligations under this Directive. As a consequence, all persons should be given the right to obtain an effective remedy in a competent court against measures which they consider to be contrary to the principle of equal treatment for men and women as laid down in the directive.<sup>43</sup> It is for the Member States to ensure sufficiently effective judicial control as regards compliance with the applicable provisions,<sup>44</sup> including the principle of equal pay for equal work or work of equal value.

The responses to the questionnaires have shown that all 31 countries studied have some legislation in place guaranteeing that victims of pay discrimination based on sex can turn to a certain body in order to judicially enforce their rights.

A few countries have adopted legislative provisions that relate *expressis verbis* to the judicial enforcement of equal pay for equal work or work of equal value. This is the case in **Ireland, Malta** and the **United Kingdom**. It should be highlighted, however, that all of these legal provisions relate to the principle of equal pay generally, and not just to equal pay for men and women workers. As a consequence, these provisions also protect other vulnerable groups, like part-time workers, workers with a disability, old-age workers, etc.

Another group of countries have adopted provisions that generally guarantee the judicial enforcement of equality legislation, which frequently applies to more areas of society than just employment. Those laws tend to have names like, for example, 'Equality Act', 'Anti-Discrimination Act' or, with a more limited scope, 'Employment Equality Act' or 'Gender Equality Act'. That is the case in, for example, **Austria, Belgium, Croatia, Cyprus, the Czech Republic, Denmark, Estonia, Finland, Germany, Greece, Liechtenstein, the Netherlands, Norway, Romania, Slovenia** and **Slovakia**. It should be added, however, that with a view to good enforcement, a combined use of equality legislation provisions (*lex specialis*) and more general provisions (*lex generalis*) is often required (mentioned explicitly, for example, by the experts from **Croatia** and **Slovakia**).

A last group of countries have no specific legislation in place for the judicial enforcement of the principle of equal pay for equal work or work of equal value for women and men. In those countries reference is made to the general rules regarding the judicial enforcement of rights, as mostly laid down in labour (procedure) codes, civil (procedure) codes and/or administrative (procedure) codes. Such countries include **Bulgaria, France, Hungary, Iceland, Italy, Latvia, Lithuania, Luxembourg, Poland, Portugal, Spain** and **Sweden**. Within its labour procedure code, however, **Portugal** does have a special procedure for discrimination claims. Similarly, in **Sweden**, the Labour Court has a particular composition when it hears discrimination cases.

Notwithstanding the fact that nearly all experts have observed that, generally speaking and from a mere legislative perspective, judicial protection is fine in their countries, it has turned out that there exist major differences in the overall effectiveness of such judicial procedures. Below, a number of aspects related to the national judicial procedures are discussed in more detail. Quite often the way in which judicial enforcement is organized on the national level negatively affects a victim's chances to actually obtain judicial redress.

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43 See, for example, Case C-222/84 *Johnston* [1986] ECR 1663, para. 19.

44 See, for example, Case C-271/91 *Marshall* [1993] ECR I-4400, para. 22.

### 3.1.1 Which judicial bodies can hear pay discrimination claims?

In a large number of countries a distinction is made between private and public sector workers. Employees in the private sector have to turn to the ordinary civil courts in order to bring a sex-based pay discrimination claim. Public servants, on the other hand, must apply to the administrative courts. That is the case in **Austria, Estonia, Greece, France, Italy, Latvia, Lithuania** and **the Netherlands**. In some countries pay discrimination claims by private sector employees are heard by labour, employment or industrial tribunals or courts, which are a subdivision of the civil court system. That is the case in **Belgium, Germany, Hungary, Portugal** and **Spain**. In **Lithuania**, before going to the court of general jurisdiction, employee should first bring his claim to the Labour Disputes Commission under the State Labour Inspectorate.

In a number of countries all pay discrimination claims, both by private and public sector workers, ought to be brought before the civil courts (including labour/employment/industrial tribunals and courts). This has been reported for **Bulgaria, Croatia, Cyprus**, the **Czech Republic, Denmark, Finland, Iceland, Ireland, Luxembourg, Malta, Norway, Poland, Romania, Slovakia, Slovenia, Sweden** and the **United Kingdom**. In **Finland**, only disagreements concerning the interpretation of a collective agreement can be brought before the Labour Court. In **Ireland**, as an alternative to bringing the equal pay claim before the Circuit Court, the victim can apply to the Director General of the Workplace Relations Commission, who appoints an adjudicating officer. That adjudicator's decision can then be appealed to the labour courts. In **Sweden**, a trade union or the Equality Ombudsman can bring a claim to the Labour Court directly. If the victim wants to bring the claim him/herself, then he/she has to go to the local district court first, whose decision can then be appealed to the Labour Court.

Exceptionally, a number of countries have established (quasi-)judicial bodies that merely deal with discrimination cases. These judicial bodies' competences are often additional to the ordinary civil courts' competences in discrimination cases. In **Finland**, a National Non-Discrimination and Equality Tribunal only hears cases brought by a central labour market organisation or by the Gender Equality Ombudsman (and not by an individual claimant). **Iceland** has its Gender Equality Complaints Committee, a semi-judicial body set up on the basis of equality legislation. Its task is to examine cases and to deliver a ruling in writing. If the case may be expected to influence policy on the labour market as a whole, the Committee shall seek comments from the national federation of workers and employers before delivering a ruling. Most cases regarding sex-based wage discrimination go to the Complaints Committee whose rulings are binding for the parties to the case. If a ruling of the Complaints Committee is in the claimant's favour but the respondent does not accept the ruling and brings an action to have it annulled by the courts, the claimant's legal costs, both at the District and the Supreme Court level, shall be paid by the treasury. If the Gender Equality Complaints Committee deems a complaint evidently unfounded, the Committee may order the claimant to pay the defendant's legal costs. An attachment may be made, without a prior court judgment, to secure the payment of legal costs. In a few countries the equality bodies have been given jurisdictional competences. That is the case, for example, in **Denmark** and in **Hungary**, and will be discussed under the heading concerning equality bodies.

Sometimes, pay discrimination on the ground of sex is a misdemeanour/criminal offence and is therefore subject to criminal sanctions. That is the case in, for example, **Belgium, Croatia, Finland, Portugal** and **Slovenia**. If that is the case, the public prosecutor, or the labour inspectorate (in **Croatia**), can bring a claim before the criminal courts. In **Finland** the victim has an independent right to bring charges under the Criminal Code and is, as a consequence, not dependent on the public prosecutor's decision whether or not to prosecute.

A few experts have also referred to the possibility of bringing a claim against a legal rule that infringes the principle of equal pay for equal work or work of equal value for men and women. Such legal proceedings are typically brought before a constitutional court, as is the case, for example, in **Belgium, Malta** and

**Spain.** In **Greece**, discriminatory administrative acts can be brought before the administrative courts. As far as the potential illegality of collective agreements is concerned, a number of experts have warned that, in their countries, there is very little opportunity to undertake anything against collective agreements that breach the principle of equal pay for equal work or work of equal value (for example, **Spain**). In **Portugal**, however, the situation is different. Since 2009, the **Portuguese** Labour Code contains a provision that obliges the equality body (CITE) to analyse collective agreements within 30 days of their publication, to check whether they include discriminatory clauses. If that is the case, the equality body can present the case to the public prosecutor, who can take it before the competent court (Labour Court or Administrative Court) in order to have these clauses declared null and void. In previous years, the equality body has allegedly made considerable use of this competence.

### *3.1.2 Which procedural rules are applicable?*

What procedural rules are applicable depends on the type of judicial body that is competent to hear pay discrimination claims based on sex.

The civil courts follow their respective national civil procedure rules. In labour/employment/industrial tribunals and courts specific labour procedure rules often apply. A few experts have given examples showing that labour procedure is often more protective of a victim's position than ordinary civil procedure. In **Poland**, for example, the labour judge can adopt an active position in the proceedings. He/she may 'ex officio' perform an investigation procedure aimed, among other things, at correcting formal defects in pleadings. In **Germany**, fees for a procedure before the labour courts are comparably low. Until 31 December 2015, the **Greek** Code of Civil Procedure also included a chapter which provided for a special 'labour disputes' procedure that was quicker, more flexible and less expensive than the ordinary civil procedure. However, as of 1 January 2016 the labour disputes procedure has been absorbed by a more general procedure for 'disputes related to possessions.' That new procedure appears to be less favourable to workers than the old labour disputes procedure used to be, as it is longer, more complex and more expensive. In this respect, the Greek expert warned against a serious regression in judicial protection.

The administrative courts are subject to administrative procedure codes. The **Greek** expert highlighted that the Greek administrative procedure is inquisitorial. In **Spain**, the administrative procedure, like the Spanish social (labour) procedure, has special rules for claims related to human rights, including equal pay. Here as well the victim is given special protection. Procedural rules for human rights claims include, for example, the mandatory intervention of the public prosecutor and summary proceedings.

The criminal courts are subject to criminal procedure rules, implying in most cases the involvement of the public prosecutor.

The procedural rules that are applicable to the hearing of a discrimination claim determine an important number of aspects of the procedure and, therefore, potentially have a tremendous impact on the enforcement of the principle of equal pay for men and women. Procedural rules describe who can bring a claim, which are the limitation periods and they contain rules regarding evidence.

### *3.1.3 Who can bring a pay discrimination claim based on sex?*

In all countries involved in this study claims can be brought individually by the victim of the discriminatory practice, irrespective of whether the claim needs to be brought before a civil court (including labour courts) or an administrative court. For bringing a claim to a criminal court, however, the victim is most often dependent on the public prosecutor to take action. In **Finland**, however, the victim has an independent right to bring charges under the Criminal Code. In **Greece**, for example, also the labour inspectorate can bring criminal charges.

In a number of countries victims who have suffered comparable damage may decide to join their claims and go to court together, as a group. That is the case, for example, in the **Czech Republic, Greece, Hungary, Malta, the Netherlands, Portugal, Romania, Slovenia** and the **United Kingdom**. In **Estonia**, joining claims is only possible before the administrative courts. It is important to highlight that in all these cases the employees involved are still considered as individuals and are formally a party to the proceedings.

In ‘class actions’, by contrast, victims of the same instance of discrimination are given the opportunity to have their claims taken care of without having to be involved individually in court proceedings. Class actions, which are a translation of the Roman *actio popularis*, are legal proceedings in which persons or organizations representing interests common to a large group participate as representatives of the group or class. The eventual judgment resolves the problem for the entire group. A few experts have indicated that their national legal system allows for class-like actions in cases of pay discrimination. For example, in **Hungary**, interest groups (including trade unions and NGOs) may initiate proceedings to the advantage of a large group with a protected characteristic, in case of an infringement or the imminent danger thereof. A similar possibility exists in **the Netherlands**. In **Italy**, national and regional equality advisers can act directly in their own name in cases of collective discrimination, even where the employees affected by the discrimination are not immediately identifiable. In **Poland**, a 2009 law allows for the possibility to bring a collective claim in certain matters resulting from employment relations. In practice this option is limited to situations in which the employer has committed a prohibited act (tort), for example a refusal to pay, or the unlawful limitation of remuneration. In the **Polish** expert’s opinion, however, it should be possible for a group of employees (at least 10) to bring a collective claim when they receive lower pay for the same work or work of the same value than employees of the opposite sex. In **France**, finally, a legal bill that makes class actions possible in matters of discrimination has been adopted as recently as 18 November 2016.

In nearly all countries victims are allowed to bring the discrimination claim to court in person (i.e. without professional representation), in procedures before both the civil and the administrative courts. In a number of countries personal representation is only possible in specific courts (for example, **the Netherlands**). Some experts have highlighted, however, that personal representation is in fact unusual or merely theoretical (for example, the **Czech Republic, Iceland** and **Norway**). There are notable exceptions, where claimants cannot represent themselves, like **Greece** and **Italy**. In **Greece**, a recent amendment to the Code of Civil Procedure has reintroduced the requirement of professional representation in all ‘disputes related to possessions’ whilst, previously, in ‘labour disputes’ personal representation was allowed. The **Slovakian** civil procedure rules provide that the judge shall instruct the claimant in a suitable manner on the possibility of representation.

Some experts (for example, **Estonia** and **Italy**) have signalled that, generally speaking, the knowledge of the right to equal pay for men and women is still fairly limited. Consequently, many victims will in practice need the assistance of someone else to bring a court claim. An obvious choice is then to solicit representation by a lawyer. However, not in all countries is free legal aid easily accessible, which de facto diminishes the opportunity for many victims to actually obtain assistance from a specialised lawyer (for example, **Greece, Ireland, Norway** and the **United Kingdom**). The **Greek** expert, for example, observed that free legal aid is only granted to persons with no resources at all.

In the vast majority of countries, representation of a victim of pay discrimination based on sex can also be taken on by a trade union representative. The union representative then acts ‘on behalf of’ the claimant. However, in some countries trade unions can only assist (but not represent) victims of pay discrimination when preparing their court claims (for example, **Finland**). In **Romania**, trade unions can only represent victims of sex discrimination in administrative procedures, while they do have wider representative powers in judicial procedures for instances of discrimination based on other grounds. The **Romanian** expert observed that this is clearly a case of unjustified discrimination between, on the one hand, alleged victims of sex discrimination and, on the other, alleged victims of discrimination based on all the other

forbidden grounds. In **Germany**, trade unions represented in the company can act against employers in case of serious breaches of their non-discrimination duties. Such claims should not encompass individual workers' claims. However, for several reasons (a lack of knowledge, a lack of awareness, other problems being assessed as more important, seeking internal solutions etc.), this possibility of taking legal action is hardly ever used. In **Estonia**, the unions cannot bring claims in civil courts.

When a trade union acts on behalf of one of its members in a pay discrimination claim, most countries require that this member explicitly authorizes such judicial action beforehand (for example, **Belgium, Latvia, Lithuania, Luxembourg, Malta, Poland** and **Spain**). In **France**, by contrast, trade union representatives may bring claims on behalf of their members as long as those members do not oppose this within 15 days of bringing the claim. Also in **Spain**, the unions have the implicit authorization of their members.

While representation by a lawyer or a trade union representative are the most common examples of representation, some national legal systems also allow representation by other persons, institutions or organizations. That is fully in line with Article 17(2) of Recast Directive 2006/54/EC which provides for engagement in judicial and/or administrative procedures by 'associations, organizations or other legal entities which have a legitimate interest in ensuring that the provisions of this Directive are complied with,' subject to the approval of the complainant. Such associations/organizations/entities include equality bodies (for example, **Belgium, Iceland, Slovakia** and **Slovenia**), associations that promote equality (for example, **France, Hungary, Italy, Liechtenstein, Malta, Poland, Slovakia, Slovenia** and **Spain**), ombudspersons (for example, **Norway** and **Sweden**) and exceptionally also the labour inspectorate (for example, **Italy**). In **Norway**, the ombud has in theory the competence to bring a claim on behalf of the employee, but has in practice never used this authority because he wants to remain impartial. In most cases these other representatives also need the victim's preceding approval to bring the claim. Sometimes third parties can also intervene in ongoing proceedings, when they can show a personal interest (for example, **Greece**).

Only very few countries seem to allow trade unions, or other organizations, to bring discrimination claims in their own name (so: not 'on behalf of'). A noteworthy example has been advanced by the **Irish** expert. Where the **Irish** equality body considers that there is a failure to comply with an equal remuneration term generally in a business or in relation to a person who has not made a reference to a claim and it is not reasonable for the person to make such a reference, then the equality body may refer the matter to the competent judicial body and the reference shall be in the name of the equality body. In **Belgium**, trade unions have their own *locus standi*, conditional on the victim's agreement, if there is a known victim. Also in **Liechtenstein**, organizations can take legal action, on the condition that the victim agrees beforehand.

### 3.1.4 Rules regarding evidence

Article 19 of Recast Directive 2006/54/EC prescribes a shift of the burden of proof to the employer as soon as an employee has established facts from which it may be presumed that there has been direct or indirect discrimination. This requirement applies to procedures before the civil and administrative courts, but does not apply to criminal procedures, nor to proceedings where it is for the competent judicial body to investigate the facts of the case (an inquisitorial procedure). Member States are self-evidently allowed to introduce rules of evidence which are more favourable to claimants.

All the national experts have reported that their national legislation contains the required shifting of the burden of proof. Those legal provisions typically figure in civil (procedure) codes (the **Czech Republic**), labour (procedure) codes (**Cyprus, France, Latvia, Lithuania, Luxembourg, Poland, Portugal** and **Spain**) and/or equality legislation (**Austria, Belgium, Bulgaria, Croatia, Cyprus, Denmark, Estonia, Finland, Germany, Greece, Hungary, Iceland, Ireland, Italy, Liechtenstein, Malta, the Netherlands, Norway, Romania, Slovenia, Slovakia, Sweden** and the **United Kingdom**). In **Estonia** the shifting of



the burden of proof does not apply to administrative procedures, but these proceedings are allegedly inquisitorial.

While, generally speaking, the law in the books seems to be fine when it comes to the division of the burden of proof, many national experts have pointed at difficulties that accompany the application of the division of the burden of proof between employee and employer.

To begin with, the **Greek** expert has noted that, in spite of a relevant CJEU preliminary judgment in a Greek case,<sup>45</sup> the reversal of the burden of proof is not applied in practice. The expert suspects that this is due to the fact that it is not the procedural code, but equality legislation that imposes the shift of the burden of proof onto the employer. Judges do not seem to be aware of this and still apply the general rules of evidence laying the burden of proof on the claimant.

Another difficulty relates to the uncertainty as to when, exactly, there is a sufficiently serious indication of discrimination for the burden of proof to shift to the employer. National legislation seems to use different terms to indicate the level of certainty that is required for the burden of proof to shift to the employer. Some experts have mentioned that facts should be presented which make it 'probable' that discrimination has occurred (for example, **Croatia, Hungary and Poland**). Others have referred to 'raising a presumption of discrimination' (for example, **Ireland, Lithuania, Malta, Slovenia and Sweden**), 'adducing a likelihood' (for example, **Iceland**) or 'giving reasons to believe that there has been discrimination' (for example, **Norway**). **Hungarian** evidentiary rules contain a specific reference to class actions (*actio popularis*): if the disadvantage has not yet occurred, the direct danger of its occurrence has to be demonstrated. In **Bulgaria**, evidentiary rules have only recently been brought into line with the requirements of Recast Directive 2006/54/EC. Until March 2015, alleged victims of discrimination had to 'prove' (instead of just 'establish') facts from which it may be presumed that there has been discrimination.

Some experts have described that the conditions for the burden of proof to shift are being interpreted so strictly that, in reality, there is no division of the burden of proof between employee and employer. **Polish** case law, for example, requests that the alleged victim of discrimination indicates the grounds that form the basis for the discrimination.<sup>46</sup> The Polish expert highlighted that employees cannot be expected to always know the motives which served as the ground for their employer's behaviour. Polish case law would therefore infringe the Polish Labour Code and Recast Directive 2006/54/EC, as it adds an extra condition for the burden of proof to shift to the employer.

The type of information that should be presented to the judicial bodies in order to establish a presumption of discrimination also differs from one country to another. Many systems allow that all legitimately obtained evidence may be produced, and often it is for the court to decide whether or not to accept a certain piece of evidence.

In a number of countries the use of statistics is allowed, either by law or by case law (for example, the **Czech Republic, Finland, France, Ireland, Italy, Latvia, Norway, Portugal, Slovakia, Spain** and the **United Kingdom**). In **Germany**, the Federal Labour Court has stated that statistics can be used as evidence in anti-discrimination cases to the extent that they relate directly to the employer concerned and are 'significant'. The case at hand concerned the promotion of women. 70% of the defendant company's workforce were female while there was no woman in a higher leading position. Statistical data on the workforce and leading positions in general could not prove the existence of a 'glass ceiling' which would require much more detailed information about women on every hierarchy level. Moreover, the court

45 Case C-196/02 *Nikoloudi* [2005] ECR I-1789.

46 Supreme Court (Poland), judgment of 9 January 2007, II PK 180/06, OSNP 2008, No 3-4, item 36. Later Supreme Court judgments have repeated this position.

stated that, generally, statistics alone would not suffice to prove sex discrimination in cases concerning promotion of women.<sup>47</sup>

Many countries also allow expert witnesses (for example, **Cyprus**, the **Czech Republic**, **France**, **Ireland**, **the Netherlands**, **Norway**, **Portugal**, **Slovakia**, **Spain** and the **United Kingdom**). In other countries it is not regulated (**Hungary**, **Italy** and **Luxembourg**). In **Iceland** an expert witness is at the cost of the party requesting to hear that expert, but this is reimbursed by the other party if the requesting party wins the case.

### 3.1.5 Rules regarding limitation periods

From the reports of the national experts it appears that there is a wide variety among countries in limitation periods that apply to claims based on the infringement of the principle of equal pay for equal work for men and women. That is not entirely surprising given the fact that the requirements of Recast Directive 2006/54/EC in this respect are only twofold. In the first place, Article 17(3) of the directive states that it is without any prejudice to national rules relating to time limits for bringing actions as regards the principle of equal treatment. No particular length of prescription periods is mentioned here. Secondly, Article 17(1) states that judicial recourse should remain possible after the relationship in which the discrimination is alleged to have occurred has come to an end. No indication is given as to how long after the end of the contract such recourse to judicial enforcement should remain open. Yet it is clear that EU law precludes the application of national procedural rules or other conditions which are less favourable than those applicable to similar domestic actions.<sup>48</sup>

A number of experts have highlighted that limitation periods do constitute a problem in their countries. Mostly, limitation periods are connected with the procedural rules that apply (civil procedure, administrative procedure, criminal procedure, ...). Sometimes, however, equality legislation also provides for separate limitation periods, which tend to be very short and often create confusing situations. In **Germany**, for example, section 15(4) of the General Equal Treatment Act states that any claim must be asserted in writing within a period of two months from the date on which the employee learns of the pay discrimination. Under section 61b of the Labour Court Act, a claim for compensation based on that same General Equal Treatment Act has to be brought before the court within three months. Both these prescription periods are very short, which is to the disadvantage of the alleged victims. Fortunately, in 2014 the State Labour Court of Rhineland-Palatinate has provided an alternative route. It decided that a claim for equal pay is not a request for compensation, but a claim for the fulfilment of contractual duties concerning lawful remuneration. As a consequence, the claim neither fell within the scope of section 15(4) of the General Equal Treatment Act nor within the scope of section 61b of the Labour Court Act.<sup>49</sup> The court decided that the general time limit in the **German** Civil Code was to be applied, which is three years. It is self-evident that such an interpretation favours a better enforcement of the equal pay principle for men and women. The **Croatian** expert also described a complex situation. As far as limitation periods are concerned, a combined reading of several legal provisions of the Croatian Labour Act is required. A claim regarding pay discrimination as such needs to be brought within 15 days following the receipt of a decision violating the right to equal pay, or following the day when the victim came to know about such a violation. However, a claim for financial compensation can be brought within five years, which is the general statute of limitation for all claims arising from employment relations. It is the opinion of the **Croatian** expert that a pay discrimination case can be considered to come within the ambit of the latter category of financial claims pertaining to employment. In **Lithuania**, the limitation period to bring a claim based on labour rights, including equal pay for equal work, to the Labour Disputes Commission (first instance) is only three months. Only afterwards, when the case is potentially brought before the court of general jurisdiction,

47 Federal Labour Court (Germany), judgment of 22 July 2010, 8 AZR 1012/08, overruling the State Labour Court of Berlin and Brandenburg, judgment of 26 November 2008, 15 Sa 517/08.

48 Case C-326/96 *Levez* [1998] ECR I-7857, para. 53.

49 State Labour Court of Rhineland-Paladine (Germany), judgment of 14 August 2014, 5 Sa 509/13.

does the ordinary prescription period of three years apply, as laid down in the Labour Code. In **Slovenia**, victims of pay discrimination may request judicial protection before the labour court only within 30 days from the expiry of the time limit stipulated for the fulfilment of obligations and/or the abolition of a violation by the employer and a claim for compensation under the general rules of civil law.

### 3.1.6 Evaluation of judicial enforcement

A major proportion of the national experts have mentioned that, from a merely legislative point of view, access to judicial bodies is regulated in a satisfactory way in their countries. Still, the experts described a fair number of barriers and obstacles that *de facto* hinder the judicial enforcement of the principle of equal pay for equal work. An overview of the most important barriers is given below. Such barriers have resulted in very low amounts of case law in all the countries studied. The vast majority of experts admitted that no official data were available (for example, **Austria, Belgium, Bulgaria, the Czech Republic, France, Hungary, Italy, Liechtenstein, Lithuania, Portugal, Romania, Slovakia and Spain**). Many of them suspected that just a few court cases per year concern pay discrimination on the ground of sex. Those national experts who could trace relevant data reported difficulties in discerning the number of cases that related to pay discrimination based on sex in particular. The data often concerned pay discrimination cases in general, i.e. based on different grounds, including sex (for example **Greece, Malta, the Netherlands, Norway, Poland** and the **United Kingdom**). Notwithstanding those difficulties, these experts discovered that the number of claims concerning sex-based pay discrimination varied from zero to a few (for example, **Norway**). Sometimes the most detailed national data concerned 'claims regarding sex-based discrimination' (going beyond just pay discrimination). That was the case, for example, in **Ireland**.

#### Costly proceedings

A first barrier that still seems to be a major disincentive for many victims of pay discrimination to actually bring a claim is the high cost of legal proceedings. That drawback was highlighted by the experts from **Austria, Belgium, Croatia, Estonia, Finland, Hungary, Iceland, Latvia, the Netherlands, Norway, Poland** and the **United Kingdom**. High costs relate to both court fees as well as to the costs of legal representation, for which in several countries no legal aid is available (*see supra*). In **Austria**, for example, the losing party bears all the costs, i.e. the court fees as well as the legal representation costs of the winning party.

#### Lack of pay transparency

A second barrier that was mentioned several times is the practical difficulty of actually obtaining the information that is necessary to establish facts from which it may be presumed that there has been discrimination. In this respect, reference was made to a general lack of pay transparency (for example, the **Czech Republic, Germany, Latvia and Spain**). Particularly in Central European countries, the worrisome phenomenon of confidentiality clauses in employment contracts, underpinned by a liberal approach to wage setting, adds to the absence of pay transparency (mentioned, for example, by the experts from **Croatia, Germany, Latvia, Lithuania and Poland**). With respect to those confidentiality clauses, it is interesting to note, however, that the **Polish** Supreme Court decided in 2011 that employers cannot abuse such confidentiality clauses in order to gain protection from claims resulting from violations of the equal treatment rule or in order to justify the termination of an employee's contract who disclosed his/her wage to a colleague in the framework of an action against pay discrimination.<sup>50</sup> In a number of countries social norms multiply the above difficulties in obtaining information on other employees' wages. In those countries it is a taboo to talk about salaries. People feel reluctant to inform their friends and family members when it comes to how much they earn (for example, **Belgium** and the **Czech Republic**).

50 Supreme Court (Poland), judgment of 15 July 2011, I PK 12/11.

In connection with this second barrier, the questionnaire also inquired about potential legal obligations for employers to report on equal pay, so as to obtain comparable statistics disaggregated by sex.<sup>51</sup> It matches the above findings that, in particular, most of the Central European countries do not seem to have any legislation in place that envisages pay transparency. The experts from **Bulgaria**, the **Czech Republic**, **Estonia**, **Latvia**, **Poland**, **Romania**, **Slovakia** and **Slovenia** have all declared that their legal systems do not oblige employers to report sex-disaggregated wage information, be it internally (within the company) or externally (to any state authority). The **Romanian** expert gave an interesting example of the strong aversion towards pay transparency in those countries. The Romanian authorities allegedly do not even use the instruments they currently have at their disposal to uncover sex-based pay discrimination. The **Romanian** labour inspectorate supervises the General Registry of Employees, which collects information about the content of each individual employment contract, including individual wages. The labour inspectorate could, as a consequence, easily generate sex-disaggregated statistical data on wages, but has decided not to do so. Moreover, the **Romanian** National Agency for Equal Opportunities between Women and Men, which has the mandate to promote equal opportunities between women and men, merely informed the **Romanian** expert that they do not work with such data. Quite similarly, the **Hungarian** expert has highlighted that wage data gathered by the Employment Office from companies that have a certain number of employees have revealed the existence of wage discrimination. The Office, however, would have no scope to address the issue of discrimination at the workplace. In **Estonia**, there is a political intention to have the Labour Inspectorate ask employers to disclose wages and salary rules. The employer should then prove that there has been no breach of the principle of equal treatment.

Apart from the Central European countries mentioned in the preceding paragraph, also the experts from **Ireland**, **Liechtenstein**, **Malta** and **Spain** have reported that their national legal systems contain no legal obligation related to pay transparency. In **Cyprus**, there is no legal obligation (as yet), but there is legal encouragement to report upon request by employees or their representatives. **Iceland** similarly has a voluntary equal pay standard. In **Germany** and the **United Kingdom** a law on pay transparency is reportedly underway. In the rest of the countries studied, laws already exist that force employers to communicate sex-disaggregated wage data. Still, attention should be drawn to the fact that not all of these laws oblige employers to *actively* communicate sex-disaggregated wage information. Sometimes these laws merely make it compulsory for employers to respond to requests formulated by either employees or their representatives.

In a number of countries, employers have to report wage data internally, to bodies like the works council (for example, **Austria**, **Belgium**, **France**, **Lithuania** and **the Netherlands**) or to union representatives (for example, **Italy** and **Luxembourg**). With respect to the judicial enforcement of the equal pay principle, an important question then is who has access to these data. Sometimes the data are accessible to all employees, and can potentially be used as evidence in a court case (for example, **Austria** and **France**). Sometimes data remain confidential, which implies that they are accessible only to the internal body they have been communicated to (for example, **Belgium** and **the Netherlands**). When there is a legal obligation to report to an external authority, that often concerns a reporting duty to a national office of statistics (for example, **Croatia** and **Denmark**), to an equality body or ombudsperson (for example, **Italy**) or yet another national authority (for example, **Portugal**). A number of countries combine both internal and external reporting (for example, **Italy**). To conclude, the experts from **Portugal** and **Sweden** have indicated that also collective labour agreements may contain provisions that oblige employers to communicate sex-disaggregated wage information.

An interesting example of compulsory internal wage transparency is the **Finnish** 'pay-mapping' requirement, as laid down in equality legislation. The aim of such mapping is to make sure there are no illegitimate pay differentials between women and men who do equal work, or work of equal value. If pay differentials show up when women and men are grouped by job classification, the employer must inquire into the reasons underlying those differentials. Where pay structures consist of different pay components,

51 See the 37<sup>th</sup> recital of Recast Directive 2006/54/EC.

the most significant of these must also be studied in order to find the reason for potential differences. Equality planning, including pay mapping, is to be done in cooperation with a representative nominated by the personnel. The representative thus receives information on the pay differentials within the workplace.

More detailed information on the difficulties in obtaining information on wages and the national initiatives taken in that respect (legislative and others) is to be found in the separate report on pay transparency measures, written for the Network by Albertine Veldman.<sup>52</sup>

#### Lack of sensitivity/knowledge re sex-based pay discrimination

A third barrier mentioned is a general lack of sensitivity for the issue of pay discrimination on the basis of sex (for example, **Bulgaria** and **Italy**), or even a very limited knowledge of rights and available avenues for enforcement on the part of employees, lawyers and even judges (for example, **Bulgaria**, **Estonia**, **Italy** and **Slovakia**). The **Slovakian** expert referred to the courts' bias with respect to Roma women in particular. An interesting feature closely linked to the lack of sensitivity is that many experts explicitly point at trade unions as being not interested in the issue of pay discrimination on the ground of sex. Unions are being described as 'part of the problem,' as they are regularly involved in the establishment of pay scales or at least approve them. Consequently, trade union representatives seldom feel pressed to stand up against the discriminatory effects of pay scales. On top of that, pay scales that originate from bilateral negotiations are often covered up by the so-called 'autonomy of collective bargaining.' That has been reported, for example, by the experts from **Belgium**, **Finland**, **Germany**, **Portugal** and **Spain**. Along the same lines, the **Slovakian** expert has mentioned that if remuneration (including the number of tariff groups, the amount of wage tariffs and the form of wages) is laid down in a collective agreement, it is sufficient to include in the employment contract references to the relevant provisions of that collective agreement. However, none of these collective agreements (which are available on the relevant websites) specifies the equal pay control mechanism. Similarly, also in **Sweden** pay regulation is an issue that rests entirely with the social partners and collective bargaining. There certainly is an implicit duty for the Swedish social partners to consider equal pay practices when bargaining, but there appears to be no explicit rules in this respect, except for the general ban on discrimination.

#### Fear of victimisation

In the fourth place, several experts have found that, very often, victims of pay discrimination fear 'victimisation' (for example, **Croatia**, **France**, **Greece**, **Hungary** and **Portugal**). Starting a legal procedure against their employer might give claimants a 'bad name', both within the company and outside, with a potential impact on their chances of finding future employment should the employment relationship be terminated. In **Greece**, the context of the socio-economic crisis and the resulting very high unemployment rate even adds to this danger. In particular in small countries the fear to be marginalized as a 'troublemaker' is said to be a very strong trigger not to speak up against pay discrimination based on sex. That has been explicitly reported by the experts from the following small European countries: **Estonia**, **Iceland**, **Liechtenstein**, **Luxembourg** and **Malta**.

#### Lack of trust in the national judicial system

A fifth obstacle is connected with the national judicial systems. In some countries, victims of pay discrimination hold themselves back from legal procedures because of their general lack of trust in the judicial system or dissatisfaction with the adjudication system. This has been reported, for example, for **Ireland**, **Italy** and **Romania**. Also, the courts often have a serious backlog, causing very lengthy procedures (for example, **Croatia**, the **Czech Republic**, **Greece**, **Slovakia** and **Slovenia**). When adding this to the

52 European Network of Legal Experts in the Field of Gender Equality, Veldman, A., Timmer, A., *Pay transparency in the EU. A legal analysis of the situation in the EU Member States, Iceland, Liechtenstein and Norway* (2017), European Commission, available at: <http://www.equalitylaw.eu/downloads/4073-pay-transparency-in-the-eu-pdf-693-kb>, accessed 27 June 2017.

finding that, across the board, judicial bodies tend to only award very modest financial compensation (*see infra*), it is not surprising that in a number of countries victims are reluctant to bring their claims to court.

### Changes in the national political and economic situation

A sixth obstacle for the judicial enforcement of the principle of equal pay for equal work for men and women is connected with recent changes in the political and economic situation of some countries. The **Greek** expert referred to the deteriorating position of women in the **Greek** labour market and their very high unemployment rate, following the economic problems of the country and the concomitant deregulation of the employment relationship. This situation has led many **Greek** employees to merely hope that they can keep the job that they currently have, and not to be too critical of the employment conditions. The **Hungarian** expert has highlighted that the current political climate in the country is one of ultra-conservative views on the role of women in society. That undermines the bravery required to stand up against any kind of authority including that of the employer. A noteworthy example thereof is the reserved way in which the **Hungarian** equality body (the Equal Treatment Authority) has filled in its jurisdictional competences in recent years. Similar events and movements in other European countries have also had their consequences for the relevant national equality bodies. The **Italian** expert, for example, has mentioned that funding for the Equality Advisors, who can bring claims to court on behalf of victims of pay discrimination, has been progressively cut in recent years, thereby reducing their impact to almost zero. Also in **Poland** the expectation is that the budget of the Commissioner for Human Rights, who can also go to court on behalf of an employee, will only be reduced.

### National procedural law

A seventh and final problem that surfaces in the national reports is related to the procedural rules that apply to pay discrimination claims. The short limitation periods (*supra*, (V)), combined with the uncertainty in several countries as to which limitation periods apply to pay discrimination claims, seem to result *de facto* in lower numbers of court claims. The **Greek** expert, for example, has pointed at the fact that potential claims might already be time-barred by the time a trade union representative receives the victim's preliminary approval for bringing a judicial procedure, as required by equality legislation. Similarly, given many employees' limited knowledge of rights and methods of enforcement (*supra*, (VI)), one could easily imagine that claims are time-barred by the time victims have found their way to someone who can inform them regarding their rights.

## 3.2 Non-judicial enforcement

Article 17(1) of Recast Directive 2006/54/EC allows the Member States to establish non-judiciary procedures (for example, conciliation) preceding judicial enforcement.

From the national experts' reports it has appeared that in many countries non-judicial procedures are indeed available to alleged victims of discrimination. The strong societal current that nowadays favours out-of-court solutions (also referred to as alternative dispute resolution, or ADR in the wide sense) for legal disputes has obviously also reached the field of discrimination disputes, although not all scholars are convinced of the sole advantages of using ADR to resolve discrimination complaints.<sup>53</sup> Also, the **Dutch** expert has interestingly highlighted in her report that the evolution towards more out-of-court settlements may have been intensified by the fact that an increasing number of people take out insurance for judicial assistance. Insurance companies are allegedly not very eager to start difficult and expensive procedures on matters like pay discrimination based on sex, but often prefer a settlement instead.

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53 See, for example, Allen, D. (2009), 'Against settlement? Owen Fiss, ADR and Australian discrimination law' *International Journal of Discrimination and the Law*, Vol. 10, pp. 191-217; MacDermott, T. (2015), 'The Role of Mandatory ADR and Agency Engagement in Resolving Employment Discrimination Complaints: An Australian Perspective' *International Journal of Comparative Labour Law and Industrial Relations*, Vol. 31, No. 1, pp. 27-46.



The out-of-court settlements described in the national reports are very diverse. Non-judicial enforcement procedures may either be provided by law, based on policies or even be voluntary initiatives set up by companies, institutions, organizations, etc. When non-judicial enforcement is provided by law it can be either compulsory or non-compulsory.

Below is an overview of the different avenues that have been mentioned in the national reports. First, under subheadings (i) and (ii), internal (within the company) and external (outside the company) procedures are described. After that, under (iii), ADR in the narrow sense is discussed, i.e. the potential use of conciliation, mediation and arbitration prior to a court hearing. The latter procedures are usually facilitated by legislation and there is always a link with judicial enforcement, be it as an option preceding the actual hearing of a case in court, or as a genuine alternative to court proceedings.

It is difficult to say anything about the numerical importance of the above-mentioned out-of-court solutions. Generally speaking, national experts have mentioned that there are few to no figures available regarding the number of complaints that are dealt with in a non-judicial way. Institutions or bodies that are involved do not seem to have the habit of gathering data and publishing official statistics. Only when equality institutions (including ombudsmen) are involved may some data be available, but even there it is often hard to distil the pay discrimination cases from more general data, for example data that concern equal treatment cases (mentioned by the experts from **Croatia, Cyprus, Estonia, Greece** and the **United Kingdom**). **Iceland** seems to be the only country that has gathered reliable statistical data. That is without any doubt connected with the existence of the Gender Equality Complaints Committee, a semi-judicial administrative ruling body, seated in the Ministry of Welfare. Its mere task is to examine cases and to deliver a ruling in writing on whether provisions of the **Icelandic** Gender Equality Act have been violated. The Committee's rulings may not be referred to a higher authority but are binding for the parties to each case. Since its establishment in 2008 the Committee has issued a ruling in nine cases concerning wage discrimination. In five of these cases the Complaints Committee ruled against the employer and decided that the respondent must pay the claimant's cost of bringing the complaint before the Committee.<sup>54</sup> In the most recent case<sup>55</sup> the defendant argued that the jobs were not the same or of equal value as they related to two separate divisions. The Complaints Committee held that the defendant had shown that objective reasons were behind paying the woman less on the contractual basis at the time. On the other hand, however, the Committee ruled that the defendant had still discriminated against the woman as he could not explain the difference in extra hours afforded to the job the man was holding as opposed to the woman during the period under scrutiny.

On top of the limited availability of statistical data, the conditions of the actual settlement – which may sometimes include the existence of the settlement itself – are almost always confidential. Along these lines, the **Irish** expert has indicated that it is precisely confidentiality that makes mediation so attractive.

To conclude, under (iv), this heading also deals with efforts that are being made in Europe to *prevent* pay discrimination on the ground of sex. National experts have been asked in the questionnaire whether they are aware of initiatives, other than the out-of-court solutions mentioned above, that could also be classified under non-judicial enforcement, for example media campaigns or campaigns in schools.

### 3.2.1 Internal procedures (within the company)

The experts from **Croatia, Cyprus, Denmark, Finland, Hungary, Iceland, Italy, Liechtenstein, Lithuania, the Netherlands** and **Poland** have not mentioned any possibility for employees to claim their rights on the (internal) company level. Multiple experts, however, did mention that victims of pay discrimination based on sex have procedures available within the company to enforce their right to equal pay for equal work or work of equal value for men and women. Still, in those countries the situation is

<sup>54</sup> Gender Equality Complaints Committee (Iceland), cases 1/2014, 5/2015 and 4/2015.

<sup>55</sup> Gender Equality Complaints Committee (Iceland), case 3/2016.

not necessarily very different from the first group of countries with no internal procedures. Very often it is only non-formalized and non-compulsory ways that employees have at their disposal to try and enforce their rights. In the reports regarding **Austria**, the **Czech Republic**, **Estonia**, **France**, **Germany**, **Greece**, **Hungary**, **Ireland**, **Latvia**, **Luxembourg**, **Malta**, **Norway** and **Portugal**, reference has been made in particular to the following: an informal discussion with the employer, contacts with works councils or trade union representatives, lodging a complaint with the competent department of the company, and getting in touch with the employees' confidentiality representative.

A number of countries (**Slovakia**, **Slovenia**, **Romania** and the **United Kingdom**) seem to have a more formalized, though still not compulsory way of internally dealing with pay discrimination based on sex.

In **Slovakia**, the Labour Code gives the right to each employee to submit a complaint to his/her employer against an infringement of the principle of equal treatment. The employer is then obliged to respond to such a complaint without undue delay, to examine it, to abstain from such conduct in the future and to eliminate the consequences thereof. Unfortunately, no procedural rules have been specified for the investigation of such complaints. The effect of this remedy is consequently said to be questionable and the remedy seems to be hardly ever used in practice. Just like in **Slovakian** law, **Slovenian** equality legislation provides that an employee can submit a written request to the employer to abolish the violation of his/her rights. However, should the employer not fulfil his/her obligations arising from the employment relationship and/or not abolish the violation within eight working days upon the receipt of the worker's written request, the worker may request judicial protection before the competent labour court. As a consequence, **Slovenian** law seems to have more 'bite' than its **Slovakian** counterpart.

The **Romanian** situation is quite particular. **Romanian** law does not provide for a legal obligation to establish internal procedures within the company in order to hear pay discrimination claims on the ground of sex. However, if companies do decide to establish internal procedures, **Romanian** law compels the alleged victim to first try this avenue before taking advantage of external procedures (be they judicial or non-judicial). It is remarkable that this preliminary condition is only imposed in cases of sex discrimination and not in cases of discrimination on other grounds.

In the **United Kingdom**, it is the equality body's (Equality and Human Rights Commission) Code of Practice on Equal Pay that encourages parties to settle the dispute internally by means of a grievance procedure. The ACAS (Advisory, Conciliation and Arbitration Service) Code of Practice on disciplinary and grievance procedures sets out guidance for both parties in dealing with grievances. If an employment tribunal subsequently finds that one or both parties unreasonably failed to comply with relevant guidance in the ACAS Code, it has the power to increase or reduce compensation accordingly.

It is remarkable that in **Romania**, **Slovenia** and the **United Kingdom** a legal link has been created between the internal procedure, on the one hand, and the potential (later) procedure before a court (judicial enforcement). Because of this link, these examples of internal procedures are closely related to the examples of ADR that are discussed below, under (iii).

### *3.2.2 External procedures (outside the company)*

Also procedures that involve an external actor, situated outside the company, are well known across Europe. In several countries the equality bodies (including ombudsmen) are involved in the non-judicial enforcement of the right to equal pay for equal work for men and women (see below, under the heading regarding equality bodies). Apart from the equality bodies, there are a number of other actors that play a role in national non-judicial enforcement procedures.

Whilst labour inspectorates do not necessarily have competences that relate to pay discrimination, in a number of countries they do play a certain role in out-of-court solutions for pay discrimination. In this

respect, several national experts have referred to the labour inspectorates' task to monitor compliance with discrimination law (for example, **Belgium, France** and **Romania**). In those countries, labour inspectors appear to function as some sort of 'early warning' system that is close to the employers and is armed with a number of tools that can pressurize employers to change their behaviour even before an employee thinks of bringing a lawsuit. In order to encourage employers to adapt their discriminatory behaviour, labour inspectors may possess several 'sticks behind the door'. Often labour inspectors can report infringements, which they happen to discover 'on duty', to the public prosecutor (for example, **Belgium** and **France**). In **France**, the labour inspectorate also has very specific competences regarding equal pay. The French labour inspector can request the communication of all the necessary information used in the company to determine pay. The inspectorate can even proceed to an adversarial inquiry where both the employer and the worker can be assisted by a person of their choice. In some countries labour inspectors can impose a fine themselves (for example, the **Czech Republic, Greece** and **Slovenia**). In **Lithuania**, the new Labour Code (2017) has increased the labour inspectorate's competences regarding pay discrimination. Before 2017, the **Lithuanian** labour inspectorate was very reluctant to use its own competences in cases of possible discrimination. As the new Labour Code expressly prohibits discrimination on various grounds, the labour inspectorate is now obliged to consider a violation of equality rights as a violation of labour rights, and should act accordingly. Unlike its **Czech, Greek** and **Slovenian** counterparts, however, the **Lithuanian** labour inspectorate does not have the competence to impose fines but can only initiate the procedure of administrative offences. In **Poland**, the labour inspectorate's role is pretty limited, but still there is a possibility for the inspectors to react against pay discrimination. While the **Polish** labour inspector cannot take administrative decisions, it can direct recommendations to the employer. The employer must then notify the implementation method and time. There are, however, no sanctions for non-compliance. In **Estonia**, the labour dispute committees at the labour inspectorate can resolve disputes up to the amount of EUR 10 000. Disputes on unequal treatment are allegedly scarce.

Also trade unions may play a role in external procedures. Their position varies from country to country. In **Italy**, for example, there is a non-judicial procedure before the trade unions that is regulated by collective labour agreements. That procedure is voluntary and is started by the worker, or by the trade unions or the local equality body on behalf of the worker. Similarly, in **Sweden**, an alleged victim can report discrimination to the trade union, although there is no legislation that legally regulates this procedure. However, once the trade union takes an interest in the allegation there are rules on negotiations which need to be followed. Such negotiations must have taken place before a case can be brought before the labour court. In **Greece**, trade unions take on the responsibility to refer victims of pay discrimination to the competent labour inspectorate and may even accompany them. By contrast, a number of experts have also explicitly mentioned that trade unions are weak in their countries when it comes to non-judicial enforcement outside the companies (for example, **Estonia**). Also in **Spain**, there is little information available on how trade unions might be involved in the non-judicial enforcement of rules related to equal pay for equal work.

Two experts have described external procedures that do not appear to be very widespread. In the **Czech Republic**, the Public Defender of Rights (the Czech equality body) plays a role in external non-judiciary enforcement. He/she can apply the high moral authority of his/her office to publish opinions and raise awareness on pay discrimination in the country. In **Belgium**, an employer who usually has a workforce of at least 50 employees may appoint a 'works mediator', following a proposal from the works council or the trade union delegation. One of the tasks of that works mediator is to help employees who report pay discrimination on grounds of sex to seek an informal solution with the hierarchy. Finally, **Iceland** has its Gender Equality Complaints Committee, set up under sex equality legislation. The Committee's task is to examine cases and to deliver a ruling in writing on whether provisions of the Act on Equal Status and Equal Rights of Women and Men have been violated. The Committee's rulings may not be referred to a higher authority. Most cases regarding sex-based wage discrimination go before the Complaints Committee whose rulings are binding for the parties to each case. If a ruling of the Complaints Committee is in the claimant's favour but the respondent does not accept the ruling and brings an action to have it

annulled by the courts, the claimant's legal costs, both at the district and the Supreme Court level, shall be paid by the Treasury.

### 3.2.3 The role of ADR

As previously indicated, ADR is given a narrow definition here, as it has also been described by Eurofound in its 2010 study on the use of ADR in individual disputes at the workplace.<sup>56</sup> ADR in the narrow sense is defined as the potential use of mediation, conciliation and arbitration prior to a court hearing.

Mediation, conciliation and arbitration are ADR tools that share certain characteristics, but also feature differences. As it is not the intention of this report to go into detail with respect to each of these three ADR methods, the following definitions, featuring the increasing involvement of the third party called upon, will suffice:<sup>57</sup>

- Mediation involves a neutral and impartial third party, the mediator, who helps the parties in a dispute to reach an agreement that is satisfactory to them, without actively proposing solutions.
- Conciliation involves a third party, the conciliator, who maintains the information flow between the conflicting parties and encourages a reconciliation between their antagonistic positions. The conciliator listens to each side and actively seeks to find an acceptable solution.<sup>58</sup>
- Arbitration involves a third party, the arbitrator, who hears the case presented by each party and makes a binding ruling on the outcome.

The above-mentioned narrow approach to ADR implies that these three methods are linked, in one way or another, to the judicial process. That is why they are also referred to as 'judicial ADR' (although it still concerns non-judiciary enforcement).<sup>59</sup> The links with judicial enforcement can be very diverse: for example, the action by a legal authority, often a court judge, immediately prior to a hearing in an ultimate effort to resolve the dispute, or the appointment of a third party (a publicly-funded specialist, a private expert, ...) as an alternative to a procedure in court or additional thereto.

Given the popularity of non-judicial enforcement, and ADR in the strict sense in particular, it is surprising that quite a number of experts have mentioned that, in their national legal systems, ADR plays no role when it comes to the enforcement of the principle of equal pay for equal work for men and women. That is to say: the law of those states does not refer to ADR, be it in a compulsory or a non-compulsory way. That seems to be the case for **Austria, Bulgaria, Cyprus, Denmark, Estonia and the Netherlands**. The **Dutch** expert highlighted, however, that although **Dutch** law does not contain any reference to ADR, the employer and employee may still resort to mediation if they want to. Particularly with regard to conflicts at a personal level, for example an employee who has reported sick because of a conflict with his/her superior or with other colleagues at work, mediation is allegedly a plausible avenue in order to have the conflict resolved. Almost every trained **Dutch** advocate or other provider of legal assistance would reportedly try to come to a settlement before starting a court procedure. So informally negotiations would often take place in **the Netherlands**, too.

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56 Eurofound (2010), *Individual Disputes at the Workplace: Alternative Disputes Resolution*, Dublin, p. 1, available at: [https://www.eurofound.europa.eu/sites/default/files/ef\\_files/docs/eiro/tn0910039s/tn0910039s.pdf](https://www.eurofound.europa.eu/sites/default/files/ef_files/docs/eiro/tn0910039s/tn0910039s.pdf), accessed 27 February 2017.

57 These definitions draw on Eurofound's definitions: Eurofound (2010), *Individual Disputes at the Workplace: Alternative Disputes Resolution*, Dublin, p. 1.

58 Eurofound discerns a second sub-type of conciliation, called 'remedial conciliation', which focuses on the future and rebuilding relationships, rather than on apportioning blame. Eurofound (2010), *Individual Disputes at the Workplace: Alternative Disputes Resolution*, Dublin, p. 1.

59 By contrast, 'non-judicial ADR' refers to avenues for a worker to have a dispute resolved at the level of the works council or similar institutions aligned to collective bargaining. Eurofound (2010), *Individual Disputes at the Workplace: Alternative Disputes Resolution*, Dublin, p. 1.

In the following paragraphs attention will be paid to, consecutively, the methods of mediation, conciliation and arbitration, as made available for resolving disputes on sex-based pay discrimination by diverse national legal provisions.

## Mediation

In the first place, several experts have mentioned that their legal system contains a law on mediation that can be applied to solve conflicts relating to pay discrimination based on sex. Very often these acts are quite recent and aim to regulate an alternative to ordinary court procedures. In the **Czech Republic**, for example, a Mediation Act was adopted in 2012. It can be used in private disputes, including labour disputes. The Czech expert has warned, however, that people are not inclined to use this instrument very often as there is no real possibility to enforce the results of the mediation. **Slovenia** reportedly has a similar act, called the Law on Mediation in Civil and Commercial Matters. **Latvia** also has a Mediation Law that could, in theory, apply to cases concerning equal pay. Still, the **Latvian** expert has found that there is no evidence that this law has ever been applied to individual labour disputes. The use of mediation is not a prerequisite for bringing the case to a **Latvian** court; it is just an alternative offered to the victim. **Malta** seems to have a more stringent Mediation Act. It sets out the possibility for a mediation process in which a mediator facilitates negotiations between the parties to assist them in reaching a voluntary agreement regarding their dispute in civil and industrial cases among others. The process may be resorted to voluntarily but a White Paper on Mediation that was published on 5 September 2016 stipulates that mediation shall be compulsory in cases stipulated by the Minister for Justice. Moreover, on the first day of a hearing, the Court would examine *prima facie* whether, due to the circumstances of the particular case, there are grounds to refer the issue to mediation. In **Slovakia**, the Antidiscrimination Act explicitly provides that everyone is entitled to the protection of his/her rights out of court through mediation. For the actual process of mediation reference is made to the special Act on Mediation, which does not provide specific rules for antidiscrimination mediation. The mediation agreement is binding on both parties to the mediation. If the mediation agreement is written in the form of notary minutes or is approved by the court, it is also legally enforceable. Also in **Hungary**, mediation has been made available as a complete alternative to litigation in all employment law cases, including equal pay cases. Mediation procedures are regulated by an Act of 2002. Mediation can take place within and outside the court system. Both options are regulated by this Act. Mediation may start by a claim or by a court order.

In a few countries, mediation has not been provided for in a separate act, but is laid down in a general code, like the labour code or the code of civil procedure. In **Poland**, for example, there exists a general mediation procedure, provided for in the Code of Civil Procedure. This voluntary mediation procedure can also be applied in pay discrimination cases and should result in a settlement. If, however, the parties do not come to an agreement, the code provides that any request made before a common court or an arbitration court, based on settlement proposals, proposals of mutual concessions, or declarations made during the mediation procedure are null and void. A court decision based on a mediation settlement can become an enforceable title.

Three national reports referred to the importance of collective labour agreements when it comes to the possible enforcement of the principle of equal pay for equal work for men and women through mediation. In **Croatia**, for example, the parties can agree to use mediation. The procedure and other issues relevant for the arbitration or mediation may be laid down in a collective agreement. The result of mediation is not obligatory for the parties, as opposed to a decision rendered in arbitration proceedings. Also the **Portuguese** report has indicated that ADR instruments, including mediation, may be a way to solve equal pay disputes, subject to the condition that they are established in collective labour agreements. After all, the Portuguese Labour Code indicates that such provisions can form the content of collective labour agreements. However, as these legal provisions are not binding in practice, these types of clauses in collective agreements are seldom established.

The third party which can act as a mediator in pay discrimination cases based on sex takes many different forms, varying from an already existing body or institution (that potentially also has other tasks) to a committee or commission that has been set up to mediate in a particular case. In **Ireland**, for example, the Director General of the Workplace Relations Commission (*supra*, 3.1.(i)) may consider that a complaint is appropriate for mediation. If both parties agree to this, a mediation officer shall convene a mediation conference for the purpose of resolving the complaint or use whatever means the mediation officer considers appropriate to resolve the matter. The mediation conference shall be conducted in private. The agreement shall be binding on the parties and if either party contravenes a term of the agreement then the contravention shall be actionable in a court of competent jurisdiction. The terms of the settlement are confidential and shall not be disclosed in court except where there is a contravention of the terms of the agreement. In some countries, labour inspectorates also play a role in 'judicial ADR', potentially in addition to their role in other external procedures involving non-judiciary problem-solving (see above, under (ii)). In some countries the labour inspectorate can offer mediation. That is allegedly the case in, for example, **Luxembourg**. Also in **Slovenia**, labour inspectors can be mediators in a dispute between an employer and an employee as long as that employee has first notified his/her employer about the violation and, despite this, the employer has not remedied the violation or fulfilled his/her obligations (see also *supra*, under internal procedures). Mediation must be suggested by one of the parties to the dispute, and the opposing party must agree thereto. This mediation procedure is informal and free of charge.

### Conciliation

The most widespread instance of conciliation is without any doubt the task of the national judge to offer his/ her services as a conciliator prior to the actual start of the court proceedings. Such a task can be made either compulsory or non-compulsory and mainly exists for civil judges (including judges of the labour and social courts). This typical example of 'judicial ADR' has been mentioned by the experts from, for example, **Germany, Greece and France**. The **Greek** expert has indicated that, before 2016, the Code of Civil Procedure required that the judge first try and reconcile the parties to labour disputes, no additional costs being involved. In practice, this was a mere formality and the failure of the judge to discharge this duty had no legal consequences. This requirement disappeared from the new Code of Civil Procedure, which provides for an out-of-court settlement of private disputes in general, therefore also labour disputes, based on an agreement between the parties. It also provides for 'judicial mediation' (and no longer conciliation) in private disputes, including labour disputes, to be carried out by judges serving in the first instance courts or the court of appeal with which the case can be lodged or in which it is already pending. Both of these new procedures are voluntary, but, they do not seem to be used in labour cases, which may be due to the fact that they involve additional costs.

In **Poland**, the law provides that victims of pay discrimination can, at their own initiative, follow the path of conciliation before reverting to a court claim. After all, the **Polish** Labour Code has introduced the rule that both the employee and the employer shall make every effort to settle a dispute arising from an employment relationship out of court. In this case, conciliation is not undertaken by the court, but by another third party. The code provides that, before submitting a case to the courts, an employee may demand the initiation of conciliation proceedings before a conciliation commission, which shall be appointed jointly by the employer and the trade union or, if no trade union is active in the employer's establishment, by the employer with the consent of the employees. Where proceedings before such a conciliation commission have not resulted in a settlement, the commission, on an application from the employee within 14 days of the termination of the conciliation proceedings, shall transfer the case to a labour court without delay. The application of the employee for a conciliatory settlement of the case by the conciliation commission shall then be substituted by a court claim. Similarly, in the **United Kingdom**, individuals intending to make a complaint to an employment tribunal are, since April 2014, required to first notify a conciliation officer at ACAS (the Advisory, Conciliation and Arbitration Service, see *supra*) of their intention to do so. An ACAS conciliation officer will then attempt, within a set time frame (normally one month), to promote the settlement of the dispute. During this 'early conciliation' period the time limit for making a claim to the employment tribunal is stayed. Although the initial notification is mandatory for



those wishing to make a claim to the employment tribunal there is no legal obligation for either party to actually participate in the early conciliation. Once the time period expires, or if a settlement is not possible, the claimant will be issued with a certificate which will enable her/him to initiate tribunal proceedings.

## Arbitration

Examples of countries where arbitration is offered to solve sex-based pay discrimination cases are less numerous. In **Croatia**, parties can agree to use arbitration, just like they can decide to use mediation. Here as well, the procedure and other issues relevant for the arbitration may be laid down by collective agreement. As opposed to mediation, the decision rendered in arbitration proceedings is binding on the parties. Also the **Portuguese** report has indicated that ADR instruments, including arbitration, may be a way to solve equal pay disputes, subject to the condition that they are established in collective labour agreements. As has already been mentioned, the **Portuguese** Labour Code indicates that such provisions may be a possible feature of collective labour agreements. The **Slovenian** report also states that arbitration is only possible where a collective agreement which is binding on the employer envisages the settling of individual labour disputes by arbitration, and the worker and the employer agree on the settlement of a dispute by arbitration. In such a case, the collective agreement shall lay down the composition, the procedure and other issues relevant to the work of the arbitrators. The worker and the employer may agree on the settlement of a dispute by arbitration not later than within 30 days of the expiry of the time limit for the fulfilment of obligations or the elimination of the violation by the employer. However, if the arbitration does not result in a decision within the time limit stipulated in the collective agreement, which cannot be later than within 90 days, then within the following 30 days the worker may request judicial protection before the labour court. In **Liechtenstein**, sex equality legislation has established the obligation for victims of pay discrimination in private employment contracts to appeal to an arbitration board before bringing the claim to court. The arbitration board is established at the court, with one of the judges being appointed to serve in the capacity of an arbitrator. If the parties to the dispute do not reach an agreement, the claim should be brought before the court within three months of the end of the arbitration procedure. To date, according to the expert, no experiences with such arbitration boards can be reported.

**Iceland** is a noteworthy case. One could refer again (see already under the heading regarding bodies that play a role in judicial enforcement) to the Gender Equality Complaints Committee. Most cases concerning sex-based wage discrimination go before the Complaints Committee whose rulings are binding on the parties to each case. As highlighted before, this Complaints Committee could also be considered to be some sort of arbitration committee.

### 3.2.4 Other efforts to prevent pay discrimination

In many countries efforts are being made to also prevent sex-based wage discrimination (*ex ante*) instead of only focusing on the (*ex post*) enforcement of the principle of equal pay for equal work.

The most popular national initiatives are without doubt the 'equal pay days,' which focus the attention of the public and of policymakers on the pay gap between women and men. Typically, equal pay days are celebrated on the day on which women start to earn, whereas men start to earn their wage on January 1 (supposing that both women and men start to work on January 1 of a given year). As the gender pay gap varies from country to country, the 'equal pay day' dates vary from country to country as well and, within one country, may vary from one year to another. Most often they are celebrated at the end of February or on some day in March. Alternatively, a day is chosen that marks the point at which women working full time effectively stop earning compared to what men earn (mostly at the end of October or November). 'Equal pay day' campaigns have been established in, for example, **Austria, Croatia, Cyprus, Estonia, Liechtenstein, Poland, Portugal, Slovakia** and the **United Kingdom**.

In a number of countries (for example, **Germany, Malta, Norway** and **Slovakia**) certificates, labels and/or prizes are awarded to companies and other employers, like administrations, which make a substantial effort to reduce sex-based pay discrimination.

Some national authorities and institutions have made available (online) check-lists for job evaluation and classification that can be used by employers. That is the case, for example, in **Belgium, Germany** and **Luxembourg**. Also websites have been developed for citizens to calculate standard wages for certain job positions (for example, the **Czech Republic**) or to encourage them to openly discuss wages with friends and relatives (for example, **Finland**).

Also research projects are being conducted to assess collective bargaining processes with regard to mapping their influence on the gender pay gap and to develop instruments to reduce discriminating effects. That has been reported, for example, for **Germany**. A similar initiative has been launched in **France**. In March 2013, the French equality body (the Defender of Rights) published a guide reflecting the work of a multidisciplinary group of experts to promote the principle of equal pay for work of equal value in collective agreements and to propose a methodology to social partners to ensure its effectiveness.

Several experts have also mentioned more general national awareness-raising campaigns (for example, the **Czech Republic, Liechtenstein, Portugal** and **Slovakia**) and general interest and attention from the media for news that relates to sex-based pay discrimination and the pay gap (for example, **Estonia, Malta, the Netherlands, Portugal** and the **United Kingdom**). In a few countries these big awareness-raising campaigns are mainly inspired by EU initiatives and funding (for example, **Bulgaria** and **Latvia**).

Contrary to what happened in all the above-mentioned countries, the **Hungarian, Italian** and **Polish** experts have indicated that very few initiatives have recently been taken in their countries. This is probably – again – symptomatic of the already mentioned political situation in these countries. In **Hungary**, opposition members in Parliament have repeatedly proposed to establish an Equal Pay Programme during 2015 and 2016. All proposals were already voted down at the level of the Business Development Committee. Therefore, the Plenary Session of Parliament did not even discuss any of those proposals. The **Polish** expert referred to the information he received from the competent Polish authority, by way of an answer to the public access information request he had made with regard to answering the questionnaire. The information received contained links to webpages where the respective information was supposed to be found. After accessing those pages, however, the Polish expert found out that the most recent data were from the year 2014 or earlier. The **Italian** expert again deplored the fact that the equal pay principle has only a minor profile both in the public debate and on the policy agenda.

### 3.3 Remedies: compensation and reparation

Article 18 of Recast Directive 2006/54/EC wants the Member States to make sure that real and effective compensation or reparation is made available to the victims of sex discrimination in general, in a way that is dissuasive and proportionate to the damage suffered. Such compensation or reparation should, according to the directive, not be restricted by the fixing of a prior upper limit.<sup>60</sup> The CJEU has clarified that measures appropriate to restore genuine equality of opportunity must guarantee real and effective judicial protection and have a genuine deterrent effect on the employer. Member States remain free, however, to choose between the different solutions which are suitable for achieving the objective of Recast Directive 2006/54/EC, depending on the different situations which may arise.<sup>61</sup> All of this self-evidently also applies to sex-based pay discrimination.

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60 An upper limit is possible, however, in cases where the employer can prove that the only damage suffered by an applicant as a result of discrimination within the meaning of the Recast Directive is the refusal to take his/her job application into consideration.

61 See Case C-407/14 *Arjona Camacho* ECLI:EU:C:2015:831, paras. 28 and following, for a summary of the CJEU's relevant case law regarding remedies.

Some countries have adopted specific legislation to implement Article 18 of Recast Directive 2006/54/EC into national legislation, most often (sex) equality legislation. That has happened in **Belgium, Bulgaria, Croatia, the Czech Republic, Denmark, Estonia, Finland, Germany, Greece, Iceland, Italy, Liechtenstein, Lithuania, the Netherlands, Norway, Poland, Slovakia, Slovenia, Spain and Sweden.**

A number of countries have gone even further, in the sense that they have adopted legal provisions that relate in particular to remedies for sex-based *pay* discrimination. In **Austria**, for example, the Equal Treatment Act for the Private Sector states that employees can sue for the difference between the discriminatory pay and the correct pay level retroactively for three years and additionally for compensation covering the ‘personal impairment by being subjected to sex-based discrimination.’ The **Irish** Employment Equality Act contains comparable provisions. In **France**, the Labour Code states that any provision of a collective agreement or a contract of employment providing for unequal pay between men and women is null and void. Also in the following countries legislation exists that focuses on remedies for pay discrimination on the ground of sex in particular: **Hungary, Luxembourg, Latvia** and the **United Kingdom.**

Just a few experts have referred to the general rules that are applicable in case of breaches of legal measures, as typically laid down in civil (procedure) codes or labour (procedure) codes. That is the case in **Cyprus, Malta** and **Romania.**

What follows is a discussion of the different types of compensation, and reparation more generally, that have been listed by the national experts. For the purposes of this report, compensation is understood to be a way of redressing quantifiable damage or harm. Reparation includes compensation but also encompasses other ways of wiping out the consequences of an illegal act, in this case sex-based pay discrimination. Attention will first be paid to compensation and reparation in judicial enforcement procedures. After that, an overview will be given of potential compensation and reparation outside the courts and tribunals. As has been the case in the preceding chapters, the role of the national equality bodies with respect to reparation and compensation is dealt with below in the chapter that focuses on the equality bodies in particular.

### *3.3.1 Compensation and reparation in case of judicial enforcement*

All countries seem to have legislation in place that allows employees to receive compensation and/or to obtain some other form of reparation when they find themselves confronted with sex-based pay discrimination and take judicial action in that respect. That reparation is awarded by a wide range of national judicial bodies, including the general civil courts (including labour or social courts and tribunals) and administrative courts, all depending on the question whether the claim for reparation has been brought by an employee in a privately owned company or a civil servant working in the public sector.

#### Different types of compensation

In the majority of countries victims of sex-based pay discrimination can claim financial compensation for the actual loss they have suffered. The CJEU has observed that, where financial compensation is the measure adopted in order to achieve the objective of restoring genuine equality of opportunity, it must be adequate, in that it must enable the loss and damage actually sustained to be made good in full in accordance with the applicable national rules.<sup>62</sup>

Financial compensation typically includes the pay difference between the victim’s wage and the (higher) wage of the comparator, which is usually easily quantifiable. Sometimes this so-called ‘levelling up’ of pay is required by legislation (for example, **Austria, Denmark, Luxembourg, Latvia, Liechtenstein** and **Romania**). Sometimes it is the courts which order this levelling up (for example, the **Czech Republic,**

<sup>62</sup> See, for example, Case C-407/14 *Arjona Camacho* ECLI:EU:C:2015:831, para. 33.

**Germany, Greece, Italy, the Netherlands, Slovakia, Spain and the United Kingdom**). Often that is established case law. The payment of interest may be included in the damages to be awarded (for example, **Cyprus and Ireland**). Many experts have reported that, in accordance with the Recast Directive, no upper limit applies for such financial compensation. However, limitation periods do apply, thereby in practice limiting the arrears/back pay that can be awarded. The typical limitation period for claiming arrears seems to be three years (for example, **Austria, Hungary, Ireland and Lithuania**), although there are exceptions. In **Ireland**, for example, the limitation period becomes six years if the claim is referred to the Circuit Court. Also in the **United Kingdom**, it is six years (five years in Scotland). In **Liechtenstein**, it is five years. In **Estonia**, a limitation period of only one year is applicable.

An interesting case is **Germany**. The **German** General Equal Treatment Act provides that the employer is obliged to pay material damages only when he/she can be held responsible for the discrimination by breach of duty (*Pflichtverletzung*). Moreover, in the case of discrimination caused by collective agreements, the employer is only responsible if he/she has acted with gross negligence or intentionally under the Act. Gross negligence requires the established case law of the federal courts or an overwhelming opinion in the literature placing the problem of discrimination on the employer, thus offering easy ways out of responsibility. The **Norwegian** expert, by contrast, has mentioned that in **Norway** the right to compensation is objective, i.e. regardless of the employer's intent to discriminate. Similarly, in **Iceland**, both those who deliberately violate equal pay legislation and those who do so through negligence are liable to pay financial compensation.

When it comes to financial compensation for non-material damage in the case of sex-based pay discrimination, the situation differs a great deal amongst the countries studied. In **Austria**, for example, compensation for non-material damage can be claimed covering the 'personal impairment by being subjected to sex-based discrimination.' Courts have to calculate such compensation according to the circumstances of the individual case (for example, factoring in the duration of the impairment and its impact on the working environment). **Croatian, Czech, Estonian, Hungarian, Slovakian and Slovenian** law contain similar provisions. Also in **Belgium and Denmark** the equality legislation provides for specific compensation for the prejudice suffered by victims of discrimination. In the **United Kingdom**, however, damages for injury to feelings are allegedly not available in equal pay cases, unlike sex discrimination claims not relating to pay.

Generally speaking, the national experts have all indicated that compensation for non-material damage is rarely awarded, and if so, it is usually a very low amount (for example, **Austria, Bulgaria, the Czech Republic, Denmark, Estonia, Hungary, Latvia, the Netherlands, Romania and Slovakia**). At the same time they also reported a very small amount of case law. The **Spanish** Higher Courts, for example, have never recognized specific compensation for damages to the victim of pay discrimination besides the pay difference to be awarded. However, according to the **Spanish** expert, it would be unfair to exclusively blame the courts for that, since claimants usually only request the differences in pay, and rarely request any other kind of compensation. The **Bulgarian** expert added that, generally speaking, compensation is greater in cases of pay discrimination against disabled persons than in cases of pay discrimination based on sex. There are exceptions, though. The State Labour Court of Rhineland-Palatinate (**Germany**) awarded compensation to the (unusually high) amount of EUR 6 000 for each claimant in a case of direct and deliberate pay discrimination against a large group of female employees that had lasted for years.<sup>63</sup> The court stated that sex discrimination generally involves a violation of a fundamental right and that the amount of compensation for pay discrimination should not depend upon the monthly income of the claimant. Interestingly, the **Slovenian** expert has indicated that compensation awarded for non-material damage should not only be effective and proportional to the damage suffered by the worker, but should also discourage the employer from repeating the violation. Also in **Hungary**, the amount of compensation must be sufficient to compensate the non-material damage suffered, but also to prevent similar occurrences in the future. Recently enacted rules on compensation for pain and suffering might,

63 State Labour Court of Rhineland-Palatinate (Germany), judgment of 13 May 2015, 5 Sa 436/13.

however, lead to stricter case law in the future. The **Lithuanian** expert, by contrast, has reported that **Lithuanian** law contains no provision on the dissuasive and proportionate character of the compensation to be awarded for the loss and damage of the victim.

Like the above-mentioned courts, generally speaking, also **Swedish** courts are known to set damages quite low. This is one of the reasons why special 'discrimination compensation' was introduced in the 2008 Discrimination Act. The new compensation was to fulfil both reparatory and preventive purposes. Those new preventive function rules were supposed to lead to somewhat higher compensation levels. The **Swedish** expert has reported that, in practice, only slightly higher compensation has been paid out following the entry into force of the 2008 Discrimination Act.

Sometimes, victims of pay discrimination have the possibility to claim compensation under different sets of legislation. In **Finland**, for example, compensation on the basis of the Equality Act does not reduce the compensation to which the victim may be entitled on the basis of other legislation. Such other legislation could include, for example, tort law or labour law. However, as the **Finnish** expert highlighted, it requires a good lawyer to note this. Also in **Latvia**, labour law provides for the right to compensation in case of discrimination along with other rights which an employee may claim. In **Poland**, there are diverging opinions on the question as to whether or not a claim for compensation based on the Labour Code excludes the possibility of also referring to the provisions of the Civil Code. There are two possible views. The first refers to the fact that compensation for discrimination has been included in the Labour Code, which would imply that the matter of compensation of damages in such a case has been completely regulated by provisions of labour law (the unitary approach). The second view, however, considers the relevant provision of the Labour Code to be a partial regulation, only providing for punishment (punitive damage) for the fact of committing discrimination, thus requiring a supplementary reference to the Civil Code in matters regarding compensation of damages caused by pay discrimination (the dual approach).

#### Other types of reparation

Many national experts have also described the power of the courts to declare the unlawful provision null and void (for example, **Belgium, Denmark, France, Luxembourg, Malta, the Netherlands, Norway** and **Spain**). The **Belgian** expert referred in this respect to the powers of the Constitutional Court and the Council of State. Both the **Danish** and **French** experts stated that provisions of both agreements and company regulations violating the principle of non-discrimination are void. The **Norwegian** expert explicitly reported a landmark case from the Labour Court regarding an equal pay claim made by female bio-engineers as compared to other types of engineers who were all male.<sup>64</sup> The bio-engineers were paid less per hour than the other engineers were. The Court found that the collectively negotiated clause regarding pay was invalid as such while the remaining part of the collective agreement remained valid.

Often the courts can also declare that discrimination should be refrained from in the future (for example, **Belgium, Bulgaria, Cyprus, the Czech Republic, Estonia, Liechtenstein** and **Slovakia**).

**Portuguese** law features a type of reparation that allegedly goes further than what is requested by EU law. If the breach concerns a specific category of workers and stems from a collective labour agreement or an internal regulation of the company, the result of a successful pay discrimination claim would be the automatic replacement of such clauses in the collective agreement or in the company regulation by the more favourable ones, alongside the duty imposed upon the employer to immediately level the remuneration rate to the standard of the category that is better paid for the future, together with damage compensation for the discriminatory treatment accorded in the past. In **Norway**, however, in one exceptional case, the clause of a collective labour agreement resulting in pay discrimination was declared null and void, but the Court instructed the parties involved to rectify the situation as the problem otherwise would have remained unsolved.

64 Labour Court (Norway), judgment of 28 September 1990, ARD-1990-148.

Another instance of reparation that has been reported by the national experts is the publication of the judgment. Since this is a measure that is also referred to within the framework of penalties, it is discussed below in the chapter concerning penalties (3.5.(iii)).

### 3.3.2 Compensation and reparation in case of non-judicial enforcement

As discussed above, most of the states also support the non-judicial enforcement of the principle of equal pay for equal work for men and women. When asked about the types of reparation, including compensation, that are available to the victim of sex-based pay discrimination in case of non-judicial enforcement, a large proportion of the experts answered that no relevant data are available in their respective countries. That is the case, for example, for: **Belgium, Bulgaria, Germany, Latvia, Luxembourg, Malta, Norway, Romania, Slovakia, Slovenia, Spain** and the **United Kingdom**. Several experts have again related this to the regular presence of confidentiality clauses in settlement agreements (for example, **Germany, Ireland** and **Latvia**). Others have also mentioned that non-judicial enforcement is hardly ever used in cases of sex-based pay discrimination (for example, **Greece, Latvia** and **Romania**).

The experts who could provide some information regarding compensation and reparation in the case of non-judicial enforcement all referred to ADR in the strict sense, i.e. mediation, conciliation and arbitration, prior to a hearing in court.

The **Czech** and **French** experts have referred to pecuniary remedies, like the economic compensation of the wages lost by the worker (**France**). In **Hungary**, allegedly any agreement that the parties believe to be proper and just is feasible, but mostly nothing higher than lost wages are agreed upon, according to the **Hungarian** expert. The **Italian** expert has referred to the potential 'levelling up' of wages, whilst the **Romanian** expert has stressed that there is no specific **Romanian** legal provision forbidding the 'levelling down' of pay as a result of a pay discrimination assessment. However, also in **Romania**, the content of the working contract cannot be changed unilaterally and the agreement of the employee is required. In **Poland**, remedies available to the victims of pay discrimination in case of non-judicial enforcement are the same as in the case of judicial enforcement, i.e. compensation for material and non-material damage. Also the **Estonian** expert has referred to compensation to be paid by the employer to the victim according to the decision of the labour dispute committee at the labour inspectorate.

In **Iceland**, the rulings of the Gender Equality Complaints Committee are published. In the same vein, the **Czech** expert referred to public apologies that are sometimes agreed upon by way of reparation.

The **Dutch** expert mentioned potential reinstatement or restoration. However, mediation would hardly ever be fruitful in this type of case as, once someone has filed a complaint about discrimination, the relationship between the employer and employee has often deteriorated to such an extent that mediation can no longer be of assistance.

## 3.4 Victimisation

All the consulted experts have indicated that their national legal systems include measures that protect employees against dismissal/any other adverse treatment as a reaction to a complaint aimed at enforcing the principle of equal pay for equal work. In doing so, they are all compliant with the requirements of Article 24 of Recast Directive 2006/54/EC that refers to the protection of 'employees, including those who are employees' representatives provided for by national laws and/or practices'. Indeed, already decades ago the CJEU decided that the principle of effective judicial remedies would be deprived of an essential part of its effectiveness if an employer were allowed to take measures against an employee as a reaction to legal proceedings with the aim of enforcing compliance with the principle of equal treatment. The fear



of such measures, where no legal remedy is available against them, might deter workers from pursuing their claims by judicial process.<sup>65</sup>

The way in which states attain that protection against victimisation differs, however. There are no countries which have adopted legal rules that specifically concern victimisation on the basis of an act or claim relating to equal pay for equal work for men and women. In the vast majority of the countries studied in this report protection against victimisation in case of sex-based pay discrimination is guaranteed under more general (employment) (sex) equality legislation (which can either be a separate act or statute, or a part of a (civil or labour) code). As a consequence, those rules apply to victimisation on the basis of a wide number of instances of discrimination. That is reportedly the case in **Belgium, Bulgaria, Croatia, Cyprus, the Czech Republic, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Liechtenstein, Lithuania, Luxembourg, Malta, the Netherlands, Norway, Poland, Romania, Slovakia, Slovenia, Spain, Sweden** and the **United Kingdom**.

Only in a very small number of countries is the prohibition of the victimisation of employees who have become involved in an attempt to enforce the principle of equal pay for equal work based only on general principles of labour law that are not necessarily connected with any equality legislation (**Estonia, Latvia** and **Portugal**). For **Latvia**, reference was only made to a generally applicable labour law norm protecting any employee against victimisation if he/she has claimed his/her employment rights as provided by law, an employment agreement or a collective agreement. The **Portuguese** expert has similarly indicated that, according to the **Portuguese** Labour Code, it is strictly forbidden for the employer to oppose in any way the exercise of an employee's rights and to react to such an exercise of rights with any sanction, dismissal or less favourable treatment of the worker. Finally, the **Estonian** expert could only refer to the provision in the **Estonian** Employment Contracts Act stipulating that upon the cancellation of an employment contract due to a lay-off, only an employees' representative, a pregnant employee and an employee who is raising a child under three years of age have the preferential right to keep their job. Employer's duty is to protect employees against discrimination, to provide explanations and to cancel employment contract due to employee's gender, pregnancy and connected health conditions, family obligations is prohibited, but due to other reasons cancellation is possible. Discriminatory is an act of less favourable treatment of employee who has filed a complaint regarding discrimination or has supported a person who has filed such complaint.

Interestingly, **Lithuanian** law seems to take the protection against victimisation, as required by Recast Directive 2006/54/EC, one step further. The **Lithuanian** Labour Code reportedly contains a provision that, *expressis verbis*, obliges the employer to take measures to make sure that the employee, who has submitted a claim concerning discrimination or has participated in proceedings related to discrimination, is protected from insulting behaviour or any other negative consequence. That seems to enhance an active/positive duty for the employer, rather than just (negatively/ passively) refraining from adverse treatment.

Notwithstanding the fact that in most countries the required legislation is in place, case law relating to victimisation connected with actions against sex-based pay discrimination is very scarce, as was mentioned by the experts from, for example, **Belgium, Bulgaria, Estonia, Italy, Latvia, Liechtenstein, the Netherlands, Norway, Slovenia** and **Sweden**.

The **Irish** expert has referred to one case<sup>66</sup> in which the **Irish** Labour Court clearly set out the three components which must be present for a claim of victimisation. It stated that (1) the claimant must have

65 See, for example, Case C-185/97 Coote [1998] ECR I-5211, para. 24.

66 Labour Court (Ireland) Barrett v Department of Defence (Equality Tribunal, 29 June 2009) (DEC-E2009-053) <http://www.lrc.ie/en/Cases/2009/June/DEC-E2009-053-Full-Case-Report.html>, accessed 9 March 2017; EDA1017 (Labour Court, 30 September 2010). <http://www.lrc.ie/en/Cases/2010/October/EDA1017.html>, accessed 9 March 2017. See also Equality Tribunal (Ireland) Matthews v ESB t/a ESB Networks DEC- E 2015-068 (Equality Tribunal 13 August 2015) <http://www.lrc.ie/en/Cases/2015/August/DEC-E2015-068.html>, accessed 9 March 2017; EDA1610 (Labour Court, 19 May 2016) <http://www.lrc.ie/en/Cases/2016/May/EDA1610.html>, accessed 9 March 2017.

taken action of a type referred to in the law as a protected act, and (2) the claimant must be subjected to adverse treatment by his or her employer; and (3) the adverse treatment must be in reaction to the protected act.

#### *3.4.1 Who is protected against victimisation?*

It is self-evident that, in the first place, the alleged victim of the discrimination undertaking an action or bringing a claim against presumed sex-based pay discrimination is protected against any disadvantageous act by the employer. However, it is not only the victim who is protected. Under **Irish, Norwegian** and **Slovakian** law, also the employee who announces his/her plan or intention to bring a claim based on pay discrimination is worthy of protection against victimisation.

Many experts have indicated that, apart from the victim him/herself, their national law also protects other employees who, in one way or another, were involved in any action against their employer with respect to the enforcement of the principle of equal pay for equal work for men and women. That can either be as a witness who has testified in a certain case (for example, **Croatia, France, Greece, Ireland, Lithuania, Luxembourg, Norway** and **Slovakia**), as an employee who has refused to comply with a discriminatory order (for example, **Croatia**), as an employee who has merely talked about such discrimination (for example, **France**) or has alleged that there had been such a contravention (for example, the **United Kingdom**), as an employee whose work has been compared with the victim's work (for example, **Ireland**) or as an employee who has provided information in connection with proceedings (for example, **Finland, Lithuania** and the **United Kingdom**). In **Liechtenstein**, legislation generally mentions protection 'for the employee him/herself and any other employees involved in the case.' Similarly, **Hungarian, Polish** and **Slovenian** law also mention employees 'supporting' or 'assisting' a victim of discrimination. **Greek** law protects the employee or trainee or his/her representative who took any action relating to the application of gender equality law.

In **Croatia**, a proposal is currently pending to broaden the personal scope of sex equality legislation to include not only victims or witnesses of sex discrimination, but all persons who become aware of such discrimination, as well as all related complaint procedures, be they formal or informal.

A final remark to be made here is that under **Norwegian** law the protection against retaliation does not apply if the protected person has been grossly negligent. It is questionable, however, whether this additional condition is in line with Recast Directive 2006/54/EC.

#### *3.4.2 Which disadvantageous treatment?*

Recast Directive 2006/54/EC mentions 'dismissal or other adverse treatment' that gives rise to the protection against victimisation. With respect to 'other adverse treatment' in particular national experts have referred to different national ways of implementation. In **Liechtenstein**, for example, the gender equality law includes a provision concerning the prohibition of any reprisals. **Slovenian** law talks about unfavorable consequences. In Iceland, a legal provision refers to injustice in the employee's work, for example as regards job security, the terms of employment or performance assessment. **Icelandic** law also prohibits in so many words that employees waive the rights that they have on the basis of the law that guarantees equal rights for men and women. The **French** Labour Code mentions, among other things, disciplinary action. **Lithuanian** law mentions 'insulting behaviour and negative consequences.' In **Hungarian** law retaliation is also defined as behaviour that is threatened with an infringement. The **Slovakian** expert has highlighted that under Slovakian law also an omission by the employer may be qualified as adverse treatment amounting to victimisation.

### 3.4.3 Period during which employees are protected against victimisation

Only a few experts have reported explicitly on the period during which employees are protected after the complaint is brought. In **Belgium**, protection against victimisation is applicable during twelve months after the complaint was filed, or until the end of a three-month period following the delivery of a final judgment in the case. **Icelandic** law contains a similar prescription period of one year.

### 3.4.4 Sanctions for victimisation in particular

National legislation often states that victimisation amounts to discrimination (for example, the **Czech Republic, Finland, Hungary** and **Spain**), leading to the assumption that the ordinary remedies for sex-based pay discrimination apply.

When an employee has been dismissed by way of retaliation, the sanction is often that the dismissal, or any other disadvantageous treatment by the employer, is considered to be null and void. Consequently, the employee concerned is reinstated in his/her job and/or all other disadvantageous treatment is eliminated. That has been reported with regard to, for example, **Belgium, Greece** and **Spain**. In **Danish** law, however, such reinstatement is only acceptable if it is not considered to be obviously unfair to uphold the employment agreement. In **Belgium**, if reinstatement is not possible, fixed damages equal to six months' gross remuneration are due.

In some countries, victimisation is also a criminal offence (for example, **Croatia, Cyprus** and **Malta**). In **Cyprus**, for example, the violating employer is liable to a fine of up to EUR 1 700. Also in **Malta**, any person contravening the law on victimisation shall be guilty of an offence and shall be liable on conviction to a fine not exceeding EUR 2 329.37 or to imprisonment for a period not exceeding six months or to both the fine and imprisonment.

**Lithuanian** law defines the harassment of a victim who has submitted a complaint as an administrative offence which may lead to an administrative fine being imposed on the employer. Also in **Romanian** law victimisation is sanctioned as an administrative offence.

## 3.5 Penalties

Apart from compensation and reparation (*see supra*) the judicial enforcement of the principle of equal pay for equal work for men and women may also be accompanied by penalties. Article 25 of Recast Directive 2006/54/EC provides that such penalties, which may comprise the payment of compensation to the victim, must be effective, proportionate and dissuasive. This article grants Member States the option of adopting measures which seek to penalise discrimination on grounds of sex in the form of compensation paid to the victim. Thus, Article 25 of Recast Directive 2006/54/EC allows, but does not require, Member States to take measures providing for the payment of punitive damages to the person who has suffered discrimination on the grounds of sex.<sup>67</sup> Such punitive damages may thus come on top of the financial compensation aimed at in Article 18 of the Recast Directive.

Notwithstanding this explicitly mentioned opportunity to introduce penalties, a number of national experts have indicated that their national legal systems provide little to no possibility to penalise the person who discriminates pay-wise against workers on the basis of their sex, other than compensation and reparation as already described above. These countries include: **Austria, Denmark** and **Sweden**. **Austria** only has punitive compensation for the victim, which cannot be classified as a genuine penalty. Similarly, in **Sweden**, the rules merely consider the already mentioned compensation for the offence resulting from the infringement and also for the loss that arises. The **Danish** expert only referred to

<sup>67</sup> Case C-407/14 *Arjona Camacho* ECLI:EU:C:2015:831, paras. 38 and following.

the possibility of imposing a fine for a discriminatory job advertisement, which is of limited use when it comes to combating sex-based pay discrimination. Also the experts from **Estonia, Germany, Ireland, Liechtenstein** and **Norway** could not refer to any penalties that would be applicable to sex-based pay discrimination.

Apart from the experts from the above-mentioned countries, a number of national experts have highlighted that some generally applicable sanctions are available as sanctions for infringements of the principle of equal pay for men and women (and the unequal treatment of male and female workers more generally). Such countries include **Greece, Malta, Poland** and **Spain**.

Quite a high number of countries, however, have more specific legislative measures at their disposal, which can be seen as an implementation of the above-mentioned Article 25 of Recast Directive 2006/54/EC. That is the case, for example, for **Belgium, Bulgaria, Croatia, the Czech Republic, Finland, France, Hungary, Italy, Latvia, Lithuania, Luxembourg, the Netherlands, Portugal, Romania** and **Slovenia**. In these cases, the infringement of (sex) equality provisions is criminalised. Very exceptionally, there is a national provision that merely sanctions unequal pay for men and women workers, and not just sex-based discrimination in general. That is the case in **Cyprus**.

The specific penalties that national experts have typically referred to comprise both criminal and administrative sanctions. Those two types of sanctions are dealt with below under two separate headings.

### 3.5.1 Criminal sanctions

Criminal sanctions typically include fines, imprisonment or a combination of both of those measures. A relatively high number of countries have provided for such criminal sanctions in either equality legislation, in employment legislation (for example, labour codes), in criminal codes, or a combination thereof. Those countries include **Belgium, Cyprus, the Czech Republic, Croatia, Finland, France, Greece, Iceland, Luxembourg, Malta, the Netherlands, Poland, Portugal** and **Slovenia**.

One of the most striking findings is that the amount of the fines varies enormously across the states studied, which may well influence their dissuasive effect. In practice, amounts appear to be relatively low, as has been reported for a few countries like the **Czech Republic**. The number of countries where discriminators may also be subject to imprisonment is relatively low (for example, **Belgium, Cyprus, Finland, France, Luxembourg, Malta, the Netherlands** and **Slovenia**). Imprisonment is mostly not found in equality legislation but rather in more general codes or acts, like labour codes or penal codes.

Although many states do have the legal tools to penalise employers who commit pay discrimination based on sex, several national experts have mentioned that, in practice, there are very few cases in which those legal tools have actually been used. One example is **the Netherlands**, where criminal law is allegedly hardly ever applied in equal pay cases. Such cases would be treated most often on the basis of civil or administrative law (relating to civil servants). The experts from, for example, **Finland, Iceland, Poland** and **Slovakia** have reported in a similar way.

### Sanctions related to (sex) discriminatory treatment in particular

In a reasonably high number of countries, criminal sanctions have been introduced for the infringement of provisions on equality (in employment) in particular. In **Belgium**, for example, practices of discrimination in employment relations are considered to be penal offences under the **Belgian** Gender Act. The perpetrator of various breaches of that Act is liable to a term of imprisonment of between one month up to one year and/or a fine of EUR 300 up to EUR 6 000. In **France**, it is the Labour Code that sanctions the discriminator with one year imprisonment and a fine of EUR 3 750. Also in **the Netherlands**, for example, criminal sanctions are possible. The Penal Code stipulates that discrimination by employers can be punished with

(a maximum of) two months' imprisonment or a fine. The **Icelandic** expert has, likewise, referred to the fact that the equality legislation allows fines to be imposed in cases of sex-based pay discrimination, but that this has not yet occurred in practice.

**Cyprus** is a specific case. In this country legal provisions have been adopted to criminalize pay discrimination on grounds of sex specifically. However, that does not imply that it would *de facto* be easier in this country to criminally sanction sex-based pay discrimination. Only persons who *intentionally* contravene the law that provides for equal pay for men and women for the same work shall be guilty of an offence and be punished with a fine not exceeding EUR 6 719, imprisonment not exceeding six months or with both such penalties. If the offence concerned has been committed due to *severe negligence*, a fine not exceeding EUR 3 359 shall be imposed. Furthermore, the same law also states that if the offence is committed by a legal person or organisation, the managing director, chairman, secretary or other similar official of the legal person shall only be guilty if it is proved that the offence has been committed with the consent, co-action or tolerance thereof. The legal person or organisation shall only be punished with a fine not exceeding EUR 11 757.

The requirement of an intentional contravention of the law can also be found in **Finnish** law. The **Finnish** Criminal Code provides for a fine or imprisonment for an employer who disadvantages an employee without a grave, acceptable ground on the basis of sex (among other discrimination grounds). The Code also criminalises an aggravated form of discrimination in work, i.e. when the employer takes advantage of the employee's vulnerability, dependent position, thoughtlessness or lack of information. However, the act always has to be *intentional* in order to be punishable under the Criminal Code. This, together with the fact that the procedure in criminal matters does not allow the reversal of the burden of proof, result in the fact that these **Finnish** Criminal Code provisions can only cover more or less evident cases of discrimination. Also in **Croatia**, pay discrimination will often be very difficult to prove. The **Croatian** Gender Equality Act provides that pay discrimination can only be sanctioned as a misdemeanour if it aims to cause fear or to create a hostile, degrading or offensive environment violating the dignity of another person. That will be difficult to prove in many cases.

In **Slovenia**, criminal sanctions may be imposed according to the Criminal Code for unequal treatment based on gender. The discriminator may be punished by a fine or sentenced to imprisonment for not more than one year. The fact that the offence is committed by an official through the abuse of his/her office or official authority is, under **Slovenian** law, an aggravating factor. Under those circumstances, the discriminator may be sentenced to a maximum of three years' imprisonment.

#### Sanctions not specifically related to (sex) discriminatory treatment

A number of experts have highlighted that only general rules comprising criminal sanctions might well be applicable to a breach of national legal provisions guaranteeing equal pay for equal work for men and women. In **Greece**, for example, criminal sanctions are provided for the non-timely payment of wages fixed by an individual contract of employment, a collective agreement, the law or a custom. Complaints are lodged against employers by wronged workers or by the labour inspectorate, upon a complaint by the worker concerned or by the labour inspectorate. The penalty is imprisonment for up to six months and a fine amounting to no less than 25 % or no more than 50 % of the amount due. The **Greek** expert is convinced that this provision may also apply in cases of the non-payment of wages in violation of the rule of equal pay for men and women. Unfortunately, there is still no case law on this specific matter. The **Polish** expert has clarified that only in exceptional cases, i.e. when the employer's violation of employees' rights features a *malicious* and *enduring* character, is there a possibility to charge the employer with liability for a misdemeanour, according to the **Polish** Penal Code. Likewise, in **Portugal**, when a breach of the law on equal pay provisions involves a crime, a criminal sanction is applicable under the Criminal Code. In **Norway**, criminal sanctions must be warranted either in the Working Environment Act, providing fines for a violation of its provisions, or in the Criminal Code, providing fines for actions of hate crime. It is

doubtful, however, whether these provisions could be applied to a violation of the equal pay rule as laid down in equality legislation.

### 3.5.2 Administrative sanctions

In a number of countries (**Bulgaria**, the **Czech Republic**, **Hungary**, **Italy**, **Latvia**, **Lithuania**, **Romania**, **Slovakia**, **Slovenia**, **Spain** and the **United Kingdom**) the infringement of the equal pay principle is subject to administrative sanctions, administrative fines in particular.

Such a possibility to sanction administratively may be established in a rather general way. An example is **Spain**, where the Law on Offences and Penalties in the Social Order provides that an employer can be found guilty of serious misconduct, in which case he/she can be ordered to pay an administrative fine of up to EUR 178 515.

In many other countries, administrative sanctions are more precisely geared towards the equal treatment of men and women in employment. This is the case, for example, in **Hungary**, where it is the national equality body that issues administrative fines. Even though such administrative fines are provided in tailor-made equality legislation, rather than in general administrative law, that does not seem to have had a harmonizing impact on the amounts that can be demanded from the perpetrators. In **Latvia**, for example, the labour inspectorate has an obligation to supervise and control the application of legal acts regulating employment conditions and health and safety. In that respect, the **Latvian** Administrative Violation Code provides for an administrative penalty of EUR 400 to EUR 700 if a person has breached the principle of non-discrimination as laid down in specific laws. In **Slovakia**, the labour inspectorate is also authorised to impose administrative penalties of up to EUR 100 000 for a violation by employers of their obligations concerning pay conditions. In the **Czech Republic**, for an offence in the area of equal treatment, the labour inspectorate can impose a fine of up to EUR 37 040. According to the **Romanian** gender equality law, administrative sanctions vary from EUR 680 to EUR 22 720. The **Bulgarian** expert has referred to fines and pecuniary sanctions for identified acts of discrimination and breaches of the anti-discrimination law to the amount of EUR 130 to around EUR 1 000. Increased sanctions are provided for repeated acts of discrimination, and also for non-compliance with the decisions of the **Bulgarian** equality body. The **Italian** expert mentioned administrative fines varying between EUR 5 000 and EUR 10 000 provided for all cases of discrimination covered by **Italian** equality legislation. In **Lithuania**, administrative fines vary from EUR 40 to EUR 1 200 for a violation of equality legislation. An interesting element of the **Slovenian** legislation is that administrative fines differ depending on the question of whether the infringement is committed by a legal person or a sole entrepreneur on the one hand, or an individual on the other. In the former case the amounts are substantially higher (EUR 3 000 to EUR 20 000, sometimes even EUR 30 000) than in the latter case (all between EUR 250 and EUR 8 000, depending on the legal basis used).

In the **United Kingdom** administrative fines are inflicted only in secondary order. Where an employment tribunal finds an employer liable for pay discrimination, the tribunal is required to first order the employer to carry out an equal pay audit unless a specified exception applies. Where the employer does not comply with the order (including in relation to the contents of the audit) the tribunal may order the employer to pay a penalty of no more than GBP 5 000 (around EUR 5 855).

### 3.5.3 Other types of penalties

In addition to the above-mentioned criminal sanctions (fines and potentially also imprisonment), several countries have introduced alternative penalties, which are discussed more at length below. Generally, such additional penalties come on top of fines and/ or imprisonment.

Still, a relatively high number of national experts (including **Austria**, **Bulgaria**, **Greece**, **Italy**, **Latvia**, **Liechtenstein**, **Lithuania**, **Luxembourg**, **Malta**, **Norway**, **Poland**, **Slovenia**, **Sweden** and the **United**



**Kingdom**) have also clearly indicated that their legal system does not provide for any alternative means of sanctioning.

### Publication of decisions

A first example, which is relatively widespread, is a decision ordering the publication of the judgment. Such an option exists in, for example, **Belgium, Croatia, Denmark, France, Germany, Hungary, Iceland, Ireland, the Netherlands, Portugal** and **Romania**. **Portuguese** and **Icelandic** judgements are reportedly often published on or made accessible via the court's website, and in the case of **Iceland's** Gender Equality Complaints Committee on the Ministry of Welfare's website. In **Hungary**, the equality body may decide to publish its decisions on both its own website and the website of the perpetrator. In **Belgium, Croatia, France** and **Romania**, the publication of judgments in newspapers is still the most obvious publication channel. In **Croatia**, publication in the newspapers is at the choice of the victim of the discrimination. **Belgian** judges can also order the discriminator to display the court's decision within or outside the enterprise's premises.

Although publication may, at first sight, be a penalty with a highly dissuasive impact, the **Danish, German** and **Portuguese** experts have all warned that the names of the parties are never mentioned in the published versions of the decisions, making publication less of an accessory sanction. In **Ireland**, by contrast, the decisions of both the Equality Tribunal and the Labour Court are published with the parties' names. However, in cases concerning personal matters, like sexual harassment, the names of the parties are not published. Under the new regime of the **Irish** Workplace Relations Commission, the names of the parties will no longer be published. The Labour Court will still publish its determinations with the names of the parties, except in cases concerning personal matters. In **the Netherlands**, court decisions are anonymized when published, whilst the equality body's decisions are published online, mentioning the name of the employer when equality legislation has been violated.

### Loss of public benefits, subsidies and public procurement

Some national legal systems prevent discriminators from obtaining an advantage that they would otherwise have qualified for, like subsidies or other public benefits. Such a penalty may be retroactive as well as having effect in the future.

In **Spain**, for example, the employer considered guilty of discrimination will lose public benefits and subsidies for the promotion of employment that he/she had possibly obtained, and this from the moment that the gender pay discrimination has started. Moreover, the offending employer can be temporarily disqualified from any future public benefit or subsidy for the promotion of employment (from six months to as much as two years). However, these two additional penalties can be replaced by the obligation for the employer to elaborate an equality plan that identifies and rectifies the cause of the discrimination. Similarly, **Italian** law stipulates the revocation of public benefits or even exclusion, for a certain period, from any further award of such benefits in the case of direct or indirect discrimination.

As far as public procurement is concerned, a number of national legal systems allow exclusion from public procurement for employers who have been found guilty of (wage) discrimination. This has been reported by the experts from **Belgium, Italy** and **the Netherlands**. Also the **Irish** expert suspected that discriminating employers would experience difficulties in respect of public procurement contracts.

**Belgium**, in particular, is an interesting case. The **Belgian** Gender Institute has published a brochure<sup>68</sup> to illustrate how national legislation allows for conditions related to 'social objectives', a notion which can apply to equal treatment, although the booklet does not mention the elimination of the pay gap

68 Gender Institute (Belgium) (2008), *Égalité entre femmes et hommes dans les marchés publics / Gelijke kansen voor vrouwen en mannen in overheidsopdrachten*, available in French and Dutch at <http://igvm-iefh.belgium.be>, accessed on 28 February 2017.

specifically. In its recent update, the brochure refers to a declaration on oath that is requested from all applicants for public procurement stating that the applicant organization 'has not been found guilty of sex discrimination in the past five years.' Also the 2007 Belgian Gender Mainstreaming Act is worth mentioning as it states that within the scope of procedures for the assignment of public spending contracts and the granting of subsidies, consideration should be given to the equality of men and women and to the integration of the gender dimension. Obviously, the **Belgian** Gender Institute applies its own guidelines in its own operations of public procurement, but no information is available on similar practices with other public bodies.

Also in **the Netherlands**, the State may insert provisions into contracts stating that the contract will be terminated in the event that the company/organisation involved has been found guilty of discrimination. Such provisions are included, for example, in contracts for the hiring of temporary workers. It should be clear, however, that there is no legal provision that forces the **Dutch** State to include this type of provision in public procurement contracts.

A few experts have indicated, in so many words, that sanctions like disqualification from public benefits, subsidies and public procurement procedures do *not* apply in their countries (for example, **Croatia, Cyprus, Germany** and **Romania**), and some of them have even pointed to situations that run counter to that very idea. The **Romanian** expert, for example, has referred to the painful situation of a regional authority in charge of the implementation of EU structural funds which was found guilty of sex discrimination in 2015. That led the national equality body to order the publication of its decision on that regional authority's website.<sup>69</sup> In **Germany**, lawyers allegedly explicitly reject the idea of taking more 'social criteria' into account in public procurement procedures, sometimes by stressing that equal pay has already been implemented in **German** labour law.

### 3.6 Equality bodies

All national experts have reported the existence of a national equality body (or several bodies) that is/are competent to deal with problems and/or claims relating to the principle of equal pay for equal work or work of equal value for men and women. It has turned out, however, that such equality bodies may take many different forms and that their competences may vary enormously from country to country. That is not surprising, since Article 20 of Recast Directive 2006/54/EC indeed offers the Member States some freedom, requiring to establish 'a body or bodies for the promotion, analysis, monitoring and support of equal treatment of all persons without discrimination on grounds of sex. These bodies may form part of agencies with responsibility at national level for the defence of human rights or the safeguarding of individual rights.' The 31 states discussed in this report seem to have taken full advantage of their freedom to shape the national equality body/bodies.

#### 3.6.1 *A wide variety of national equality bodies*

Differences as regards the equality body's material scope (discrimination grounds, field and territory)

In a rather limited number of states the body that is competent concerning equal pay for men and women (or: one of those bodies) is a body that merely focuses on sex equality, and as such is competent in all fields that are covered by Recast Directive 2006/54/EC (and potentially also by other EU directives on sex equality). Such countries include **Belgium** (the Institute for the Equality of Men and Women), **Croatia** (the Ombudsperson for Gender Equality), **Cyprus** (the Gender Equality Committee for Employment and Vocational Training), **Finland** (the Equality Ombudsman), **Iceland** (the Centre for Gender Equality), **Italy** (the Equal Opportunities National Committee) and **Portugal** (the Gender Equality Agency in the Field

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69 CNCD (Romanian Equality Body), Decision No. 189, 15 April 2015.

of Employment, as well as the Agency for Gender Equality and Citizenship). Although the names of the **Italian** Equal Opportunities National Committee and the **Finnish** Equality Ombudsman might suggest that these are equality bodies that are competent to deal with discrimination based on a wide variety of grounds, they also merely focus on sex equality. Many of the national equality bodies that merely focus on sex inequality also pay particular attention to other sex-related grounds, like gender reassignment, sexual orientation, marital or family status, etc. That is, for example, the case for the **Belgian** Institute for the Equality of Men and Women, for the **Croatian** Ombudsperson for Gender Equality and for the **Finnish** Equality Ombudsman.

A few experts have indicated that, originally, their country had an equality body that was competent concerning sex equality only. However, those national sex equality bodies have reportedly more or less recently been replaced by an equality body that can also act in defence of non-discrimination on the basis of other grounds, like race, disability, age, etc. The **Lithuanian** equality body (the Office of the Equal Opportunities Ombudsperson), for example, was primarily established to fight sex discrimination. Since 2008, however, the competences of the Office have been extended to also cover race, nationality, language, origin, social status, belief, convictions or views, age, sexual orientation, disability, ethnic origin or religion. In **Spain**, a law of 2014 has transformed the old Women's Institute (initially established in 1983) into the Institute for Women and for the Equality of Opportunities, aiming at combating discrimination on the grounds of birth, sex, racial or ethnic origin, religion or ideology, sexual identity, sexual orientation, age, disability or any other personal or social condition or circumstance. Similarly, in **Liechtenstein**, the Office for Equal Opportunities took over the activities of the Gender Equality Commission in 2013.

With the above-mentioned changes, **Liechtenstein**, **Lithuania** and **Spain** have changed to the path that many countries have always followed. The majority of the 31 countries studied here indeed have national equality bodies that are competent to deal with a wide range of discrimination grounds (often going beyond the EU *acquis*) like birth, race or ethnic origin, nationality, language, sex, age, disability, religion, belief or opinions, ideology, genetic characteristics, physical appearance, one's surname, state of health or disability, particular economic vulnerability, civil and/ or marital status, etc. Such general competence concerning many different discrimination grounds can often be derived from the equality body's name. In **Austria**, for example, the two competent equality bodies are: the Commission for Equal Treatment and the Federal Commission for Equal Treatment. In each of these Commissions there are a number of subdivisions, called 'Senats', that are competent to deal with a number of specific discrimination grounds. There are separate Senats for sex equality in each of the Austrian Commissions. Also the following countries have national equality bodies that cover a wide array of discrimination grounds: **Bulgaria** (the Commission for Protection against Discrimination), the **Czech Republic** (the Public Defender of Rights), **Germany** (the Federal Anti-Discrimination Agency), **Denmark** (the Board of Equal Treatment), **France** (the Defender of Rights), **Greece** (the Ombudsman), **Hungary** (the Equal Treatment Authority), **Ireland** (the Irish Human Rights and Equality Commission), **Luxembourg** (the Centre for Equal Treatment), **Latvia** (the Ombudsman of the Republic of Latvia), **Malta** (the National Commission for the Promotion of Equality), **the Netherlands** (the Netherlands Institute for Human Rights), **Norway** (the Anti-discrimination Ombud), **Poland** (the Commissioner for Human Rights), **Romania** (the National Council for Combating Discrimination), **Sweden** (the Equality Ombudsman), **Slovakia** (the Slovak National Centre for Human Rights), **Slovenia** (the Advocate), the **United Kingdom** (the Equality and Human Rights Commission in **Great Britain** and, in **Northern Ireland**, the Equality Commission for Northern Ireland). **Estonia** is a case worth mentioning. According to the national expert, three bodies qualify for the role of the **Estonian** equality body, and all three of them are competent to deal with more discrimination grounds than just sex. There are the Chancellor of Justice and the Estonian Human Rights Centre, but also the Gender Equality and Equal Treatment Commissioner. Contrary to what the latter body's name suggests, the Gender Equality and Equal Treatment Commissioner covers discrimination cases on grounds of sex, nationality (ethnic origin), race or skin colour, religion, views, age, disability and sexual orientation.

**Cyprus** has the generally competent Office of the Commissioner for Administration (Ombudsman), whose powers are separate from those of the already mentioned Gender Equality Committee for Employment

and Vocational Training. Also **Finland** features the double approach of working with equality bodies targeting sex equality in particular, as well as rather generally competent bodies. Apart from its Equality Ombudsman (see supra), who is competent concerning sex equality, **Finland** also has its National Non-Discrimination and Equality Tribunal, with a mandate concerning all discrimination grounds, except in matters of work, where the mandate only covers sex discrimination.

The fields within which national equality bodies can act vary as well, and regularly go beyond the employment sphere. The **Icelandic** Centre for Gender Equality, for example, is competent to promote sex equality in all spheres of society, including education, advertising, the supply of goods and services, etc. Sometimes the national equality body is competent concerning both the private and the public sectors, as is the case, for example, in **Liechtenstein** and **Portugal**. In **Austria**, by contrast, there exist two different equality bodies, one for the private sector, and one for the public sector. The Commission for Equal Treatment has been set up by the Equal Treatment Act for the Private Sector. The scope of this national equality body is very broad, covering equal treatment of men and women in the workplace, equal treatment on the grounds of ethnicity, religion, ideology, sexual orientation and age in the workplace and also non-discrimination on the grounds of sex or ethnicity in other areas (goods and services and in cases concerning discrimination on the grounds of ethnicity also social protection and health services and education). **Austria's** Federal Commission for Equal Treatment is competent to deal with cases of discrimination on the grounds of sex or religion, ideology, ethnicity, sexual orientation, or age in the workplace of federal civil servants and contractual federal employees.

Finally, also from a territorial perspective, national equality bodies feature differences. In some countries there are equality bodies that are competent on the national level, as well as other bodies which are competent at the regional and local levels. In **Italy**, for example, the National Equality Advisor is a member of the already mentioned Equal Opportunities National Committee and coordinates the Conference of Equality Advisors, which gathers all local Equality Advisors. In **the Netherlands**, all municipalities are obliged to establish and subsidize a Local Anti-Discrimination Bureau. Also **Croatia** has sex equality bodies at the regional and local levels. By contrast, the **German** expert has explicitly mentioned that on the state level (*Länder*), only very few equality bodies exist.

#### Differences as regards the position within the national state apparatus

National equality bodies can be established with names like institute, agency, board, centre, commission, committee, council, authority, etc., all operating in a relatively independent manner. That has occurred in: **Austria, Belgium, Bulgaria, Cyprus, Denmark, Germany, Hungary, Iceland, Ireland, Italy, Liechtenstein, Malta, the Netherlands, Portugal, Romania, Slovakia, Spain** and the **United Kingdom** (including **Northern Ireland**). Notwithstanding this independence, there is usually – in one way or another – a connection with the national civil service. National experts have mentioned, for example, the establishment of an equality body ‘under the control of,’ ‘under the supervision of’ or ‘financed by’ the minister competent for welfare, employment, justice, etc. That is not surprising given the fact that Article 20 of Recast Directive 2006/54/EC has given the Member States the instruction to make sure that a national equality body is operational. However, the extent to which the national equality body/bodies is/are linked to the public service differs substantially from country to country.

In some states, the equality body's independence seems to be quite high. For example, the **Irish** expert has mentioned explicitly that the newly established **Irish** Human Rights and Equality Commission is an independent body. The commissioners are appointed by the President of **Ireland** so that there can be no perception of any political interference whatsoever. Also the **Norwegian** expert has explicitly referred to the high independence of the Anti-discrimination Ombud. The **Luxembourg** Centre for Equal Treatment is overseen by a board of five members who are appointed by Parliament. Similarly, the expert from **Liechtenstein** has referred to legislative modifications with regard to the competences of the Office for Equal Opportunities, in order to better guarantee the Office's independence with respect to its various tasks. Also in **Austria**, the equality bodies seem to be quite independent. Both the **Austrian** Commission

for Equal Treatment (private sector) and the **Austrian** Federal Commission for Equal Treatment (public sector) have been set up as panels of equal treatment experts, amounting to special establishments within the relevant ministries. Those Commissions are further characterized by a tripartite composition, which further adds to their independence. Such a tripartite structure is also a characteristic of the **Portuguese** Gender Equality Agency in the Field of Employment, which is a public body that depends directly on the **Portuguese** Government and is financed by a public institution (the Institute for Employment and Professional Training).

Contrary to the relatively high independence of the national equality bodies, as just mentioned for **Austria, Ireland, Liechtenstein, Luxembourg** and **Portugal**, the link between the equality body and the public service seems to be somewhat tighter in **Belgium**. The **Belgian** expert mentioned that the Institute for the Equality of Men and Women has a more hybrid purpose. On the one hand, it serves as an administrative body to implement federal policy on sex equality. On the other hand, it is in charge of promoting gender equality through all useful means. Another interesting qualification of the national equality bodies' independence has been mentioned by the **British** expert. She stressed, with respect to the **British** Equality and Human Rights Commission in particular, that although this Commission's competences are – in theory – exercised in an independent manner, in practice constraints on the funding of the Commission have resulted in increasing limitations on its functioning.

In other countries the equality body is also acting independently but still connected to public service. Often those persons have a team of civil servants at their disposal to collaborate with them in order to fulfil their tasks. In the **Czech Republic**, and also in **France**, equality bodies have been established by way of so-called 'defenders of rights.' In **Estonia**, two persons (and their offices) act as competent equality bodies under EU law: the Gender Equality and Equal Treatment Commissioner and the Chancellor of Justice. **Poland** has its Commissioner for Human Rights, who undertakes, as an independent organ, actions aimed generally at the implementation of the equal treatment rule in employment, including the principle of equal pay for equal work or work of equal value. **Slovenia** has an 'Advocate', set up as an autonomous state body that may not receive binding instructions related to its work. In order to still enhance the Advocate's autonomy, a new nomination procedure has recently been introduced into the relevant legislation. As soon as this new procedure will have entered into force, the Advocate will be nominated by the National Assembly upon a proposal by the President of the Republic (as opposed to a proposal by the competent Minister previously). Under the new national law the function of the Advocate has become a public state function (as opposed to a civil service function previously).

A considerable number of countries have opted for an ombudsperson, thereby at first sight potentially giving the impression of a focus on an informal rather than formal approach to the equal treatment of men and women. Ombudspersons generally investigate complaints and try to find a solution, usually through ADR. All national experts who have referred to an ombudsperson stressed this person's independence. **Cyprus**, for example, as already mentioned, has an Ombudsman, which stands apart from the Gender Equality Committee for Employment and Vocational Training. Also the **Croatian, Finnish, Greek, Latvian, Lithuanian, Norwegian** and **Swedish** experts have referred to the existence of an ombudsperson with competences regarding sex equality or non-discrimination more generally.

In two states the role of the national equality body is also given to an organ that has 'judicial' connotations. **Finland** has its National Non-Discrimination and Equality Tribunal, in addition to the above-mentioned Equality Ombudsman. This Tribunal is an impartial and independent judicial body appointed by the **Finnish** government. Parties to a case of discrimination that have by themselves, or with the assistance of the Equality Ombudsman, reached a conciliation agreement, may seek confirmation of the agreement from the Non-Discrimination and Equality Tribunal, under Section 20, 3 of the **Finnish** Act on Equality. In **Norway**, the Anti-discrimination Ombud provides a statement as to whether or not anti-discrimination provisions have been breached. Those who want to dispute the Ombud's statement may bring the complaint to the Discrimination Tribunal, which will then provide either a statement or a legally binding decision. The Ombud/Tribunal is a low threshold complaint system where the parties do not need the

assistance of lawyers. It is not a precondition for filing a discrimination case with the courts that the issue at stake has already been through the Ombud/Tribunal system.

In the following paragraphs attention will be paid to the question of which competences do the national equality bodies have with respect to the enforcement of the principle of equal pay for equal work or work of equal value for male and female workers. Those competences show a very diverse picture. Enforcement competences can be placed on a continuum ranging from no enforcement tasks at all on the one side, to soft-law measures like awareness raising, counselling and assisting victims of discrimination, to – finally – even (a limited number of) hard-law judicial enforcement tasks. In the paragraphs below an overview is given of the most important non-judicial and judicial enforcement-related tasks that are attributed to national equality bodies.

Although it is hard to generalize on the basis of the all in all limited information provided in the national reports, there appear to be indications that the particular composition of the national equality bodies, and in particular their material scope and level of independence (see above), together with their competences (see below), do have an influence on the relevant country's policies and legislative activity with respect to the enforcement of the principle of equal pay for men and women for equal work or work of equal value. Countries with an equality body that focuses on sex equality and non-discrimination alone, rather than the whole panoply of discrimination grounds (including race, religion, age, disability, etc.), combined with sufficient (financial) independence and competences (not necessarily judicial), appear to have more satisfied national experts. It is, indeed, remarkable that the national reports regarding **Belgium, Croatia, Cyprus, Finland, Iceland, Italy** and **Portugal**, all countries with an equality body just for sex equality, breathe a rather positive atmosphere. They all mention some good practices (which is not the case in many of the other national reports, see below) and refer to a number of court cases, and/or scholarly writings and other publications on the gender pay gap, written in the national language. Another interesting element is that the countries mentioned here either belong to the group of states that have always featured a low gender pay gap, i.e. under 10 % (**Belgium, Croatia** and **Italy**), or to the group of states with average gender pay gaps, i.e. between 10 % and 20 % (**Cyprus, Finland, Iceland** and **Portugal**).

### *3.6.2 Competences re the non-judicial enforcement of equal pay*

Most of the national equality bodies have a substantial number of non-judicial enforcement tasks. Below is an overview of the most important ones, which were referred to by several national experts.

#### Awareness raising

The majority of the national equality bodies are involved in awareness raising campaigns and the promotion of sex equality by all useful means, including public events and conferences, training sessions for lawyers, civil servants, NGOs, public authorities and companies, the development of prevention tools and e-learning courses, information and consultation days, etc. Those tasks of the equality bodies have been highlighted by the experts from **Belgium, Bulgaria, Croatia, Estonia, Finland, France, Greece, Hungary, Iceland, Ireland, Liechtenstein, the Netherlands, Norway, Poland, Portugal, Slovenia, Sweden** and the **United Kingdom**.

The **Belgian** expert has qualified the **Belgian** equality body's task of awareness raising by referring to the fact that funds for campaigns are severely curtailed by the federal government's present policy of budgetary austerity. Also the **Estonian, Finnish, Lithuanian, Luxembourg** and **British** experts have mentioned that, today, there are very little to even no financial resources available for project-based awareness raising initiatives.

In some national reports attention has also been drawn to the importance of media attention in order to raise awareness for cases of sex-based pay discrimination. The **Estonian** Gender Equality and



Equal Treatment Commissioner, for example, has reportedly given some interviews in the media about some cases regarding women who were not paid or paid less. Employers' names were made public and sometimes such naming and shaming had a positive impact. One particular case that received the attention of the public was the so-called PRIA case in 2012. The applicants who had turned to the Commissioner suspected that they were being discriminated against because they were parents. The claimants argued that the state authority PRIA had established a practice whereby the wages of all the employees returning from parental leave were decreased by 10 % for a period of four months. PRIA was sent a memorandum by the Gender Equality and Equal Treatment Commissioner calling on them to change this illegal practice. PRIA eventually decided to increase the wages of the 40 victims, but were then told they had no right to this wage due to their incompetence.

#### Advising stakeholders: statements/opinions and research

Some national equality bodies have the (mere) task of advising stakeholders, in the form of statements, opinions or decisions in particular cases, and/or conducting research more generally.

Both the already mentioned **Austrian** equality bodies, the Commission for Equal Treatment (private sector) and the Federal Commission for Equal Treatment (public sector), have been set up as panels of equal treatment experts that give expert opinions. They have no other enforcement tasks, be they non-judicial or judicial. The Equal Treatment Commission (private sector) can give opinions both generally and in individual cases. In the latter respect, it has the legal competence to conduct inquiries into the implementation of equal treatment measures on sectoral levels or in individual cases that come to its notice (for example, by an application from the ombudsperson or by individual applications). The written statements of the Commission are non-enforceable, but can be used as corroborating evidence in discrimination court cases. As far as the Federal Equal Treatment Commission is concerned, this equality body is embedded into the system of civil service duties. If its findings show a breach of the equal treatment principle the responsible person may be subject to disciplinary measures according to federal civil service rules. In **Cyprus**, the Gender Equality Committee investigates complaints concerning allegations of discrimination at the workplace on grounds of sex. The decision of the Gender Equality Committee can be submitted as evidence before the Industrial Disputes Tribunal. The equality bodies of the following countries also give opinions in individual cases, which may have high moral authority and, in some countries, may subsequently be used in court proceedings or can even be challenged in the courts: **Bulgaria**, the **Czech Republic**, **Estonia**, **Hungary**, **Lithuania**, the **Netherlands**, **Norway**, **Portugal**, **Romania**, **Slovakia** and the **United Kingdom**.

A specific instance of advising stakeholders is the **Swedish** Equality Ombudsman's task to monitor the active measures obligation on behalf of employers. The employer is obliged to provide the information requested for this monitoring task and if the employer does not comply with these obligations the case can be presented to the special Board against Discrimination, which can impose financial penalties.

Many national equality bodies (merely) conduct independent research, which is often made available to the public in reports, explanations of legal texts, digests of case law, handbooks on legal protection against discrimination, guidelines for counselling centres, authorities and companies, recommendations regarding national legislation, etc. This is so in countries like **Bulgaria**, the **Czech Republic**, **France**, **Germany**, **Hungary**, **Liechtenstein**, **Luxembourg**, **Malta**, the **Netherlands**, **Poland**, **Portugal**, **Slovenia**, **Spain** and the **United Kingdom**. According to the **German** expert, the importance of such publications should not be underestimated.

#### Stimulating social dialogue and working with social partners

The **Italian** Equal Opportunities National Committee can propose solutions for collective disputes, and is also entrusted with the task of stimulating social dialogue on equality issues. Also in **Liechtenstein**, where the national equality bodies only have preventive functions, the Office for Equal Opportunities

should cooperate with the social partners, with a view to fighting sex discrimination, also with regard to pay. The **Portuguese** Gender Equality Agency in the Field of Employment analyses all collective agreements after their publication to check whether they include discriminatory clauses. If that is the case, the Agency can present the case to the public attorney, who can then take it to court in order to have those discriminatory clauses declared null and void

### Playing a role in ADR

The procedure before the **Bulgarian** Commission for Protection from Discrimination includes the possibility of an agreement between the parties. If such an agreement is reached, the Commission can approve it and discontinue the case. The Commission supervises the implementation of the agreement and its enforcement in case of non-implementation. In **Estonia**, the Chancellor of Justice can initiate conciliation proceedings on the basis of an application, provided that the other party also consents. This avenue of having the equal treatment principle enforced does not seem to be very popular, though: between 1999 and 2016, not a single application for conciliatory proceedings was brought. In **France**, the Defender of Rights can carry out an investigation and demand explanations from defendants, by conducting hearings and collecting other evidence, including the gathering of information on site. He may propose a settlement with a fine and compensation for the injury suffered by the victim as well as disclosure measures. This settlement is submitted to the public prosecutor for approval. A similar situation exists in **Croatia**, where the Ombudsperson for Gender Equality has the competence to investigate individual complaints prior to legal proceedings and to conduct mediation processes with the consent of the parties. The duty to cooperate with the Ombudsperson is assured, at least with respect to public bodies, by means of criminal sanctions. Upon the request of the Ombudsperson, public bodies should provide statements, information and documents relating to potential discrimination and make them accessible for inspection, failing which a fine of EUR 133 to EUR 665 will be due. Also the **Hungarian** Equal Treatment Authority engages in ADR. Prior to taking a decision (see infra, under own judiciary competences) the Authority shall, in all cases, try to reach a settlement between the parties. If such a settlement can be reached, the Authority shall approve it in a decision. The implementation of the settlement may be enforced in the same way as decisions establishing a breach of the law (see infra). In **Italy**, the National and Regional Equality Advisers can propose a conciliation agreement before going to court, requesting the person responsible for collective discrimination to present a plan to remove the discrimination within 120 days. If the plan is considered to be suitable for removing the discrimination, the parties sign an agreement which becomes a writ of execution through a decree of the judge.

Also in the following states national equality bodies have been given the competence to engage in ADR: **Iceland, Latvia, Malta, the Netherlands, Norway, Portugal, Romania** and **Sweden**. The **Maltese** expert reported an interesting 2015 case in which the National Commission for the Promotion of Equality conducted an investigation which determined the occurrence of sex discrimination in the wage of a female employee. The claimant alleged that she was receiving a lower wage than the male employees who were of a similar rank and with similar responsibilities. The National Commission noted that while all of the managers' wages differed in their amount, the gap between the male managers' wages was smaller than the one between the average male manager wage and the claimant's wage. Moreover, the Commissioner deemed that the company's arguments that there was no set salary scale for managers should not act to the detriment of the company's employees, and that the company should strive for more transparency in the manner in which wages are set for managers. Following its opinion issued in relation to this complaint, the National Commission was informed that negotiations between the employer and the claimant had resulted in a substantial salary increase when compared to her male counterparts.<sup>70</sup>

In **Finland**, the Ombudsman has no official mandate for settling cases, but in practice a settlement may be aimed at and where such settlement has been reached, it may be taken to the Non-Discrimination and

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70 National Commission for the Promotion of Equality (Malta) [https://ncpe.gov.mt/en/Documents/Our\\_Publications\\_and\\_Resources/Annual\\_Reports/NCPE%20AR%202015.pdf](https://ncpe.gov.mt/en/Documents/Our_Publications_and_Resources/Annual_Reports/NCPE%20AR%202015.pdf), accessed 24 March 2017.

Equality Tribunal to be confirmed. To the same extent, the **Irish** Human Rights and Equality Commission does not have a statutory function in relation to ADR, but if the body is providing assistance to a person, it may intervene by acting for that person and try and resolve the issues prior to the initiation of proceedings in court. By the same token, the **Polish** expert has highlighted that the rules regarding the functioning of the **Polish** Commissioner for Human Rights theoretically do not exclude the possibility of his involvement in non-judicial enforcement, including ADR. However, the expert is not aware of any such case.

### 3.6.3 Competences regarding the judicial enforcement of equal pay

In some countries the national equality bodies play a role in the judicial enforcement of the equal pay principle. Such a role may range from assisting alleged victims to bring their claims, to initiating discrimination cases themselves, to acting as a (quasi-)judicial body with the ability to remedy the situation (by compensation and/or reparation) and potentially also with sanctioning powers. In the following countries, the equality bodies are, to a small or large extent, involved in judicial enforcement: **Belgium, Bulgaria, Croatia, Cyprus, Denmark, Estonia, Hungary, Iceland, Italy, Latvia, Lithuania, Spain** and **Poland**. The **Czech** expert has highlighted that the Public Defender of Rights is currently not dealing with any judicial enforcement. A proposal aimed at giving the Public Defender of Rights more powers in that respect was withdrawn in February 2017.

#### Assisting victims of pay discrimination and bringing claims on their behalf

A number of national equality bodies are available for assisting victims of pay discrimination when bringing their case to court. That is the case for the equality bodies from, for example, **Belgium, Bulgaria, Croatia, Finland, Germany, Ireland, Italy, Malta, Portugal, Slovenia, Slovakia, Spain** and the **United Kingdom**. For the **Finnish** Ombudsman this possibility to assist victims of discrimination allegedly amounts to mere theory.

In some countries the national equality body can also bring a claim on behalf of the victim. That is reportedly the case in **Ireland**, in cases where it is unreasonable for the employee to do so, and also in other countries like **Iceland, Italy, Latvia, Poland, Slovakia, Slovenia** and **Sweden**. The **Latvian** Ombudsperson reportedly hardly ever uses this power. The **Slovenian** Advocate has only recently been given the competence to represent discriminated persons in judicial proceedings. The Advocate or one of the members of his team can only carry out such procedural acts if he or she has passed the state legal examination. In **Iceland**, the possibility for the Centre for Gender Equality to bring a claim on behalf of the victim is now laid down in the new regulation on 'Legal proceedings before the Gender Equality Complaints Committee' of 1 March 2017 instead of the **Icelandic** Gender Equality Act previously.

#### Own *locus standi* in court

The **Belgian** Institute for the Equality of Men and Women has *locus standi* for actions before the Council of State, if the source of the alleged discrimination lies in a decision by an administrative authority. If the source of the discrimination lies in a legislative instrument, the claim must be brought before the Constitutional Court. In criminal proceedings related to labour law, the Institute can intervene in order to claim damages.

The **Croatian** Ombudsperson for Gender Equality may become involved in court proceedings as an intervenor on the part of the claimant. The **Italian** Equality Advisors have a similar competence. The **Polish** Commissioner for Human Rights can only join ongoing proceedings if the violation of the equality principle has been caused by a public authority. In cases where an infringement of a citizen's rights occurs as a result of the actions of individual persons or private entities, the competences of the **Polish** Commissioner are limited to indicating the proper way of proceeding and examining whether

the authorities responded properly to the citizen's claims. Also the **British** Equality and Human Rights Commission has the power to intervene in discrimination cases by offering expert opinion or guidance.

Also the **Spanish** Institute for Women and for the Equality of Opportunities has standing before the courts. The **Spanish** expert has highlighted that the country's Law of Civil Procedure enables the Institute to act in a judicial capacity when the victims are a group of unspecified persons or if they are difficult to identify. That would, theoretically, give the Institute the judicial capacity to bring a claim in some cases of indirect pay discrimination. However, so far this has never happened. A similar rule exists in **Italy**, where the National and Regional Equality Advisers can act directly in their name in cases of collective discrimination, even where the employees affected by the discrimination are not immediately identifiable. Likewise, the **Hungarian** Equal Treatment Authority may initiate lawsuits, but this hardly ever occurs.

In some countries, the national equality bodies have *locus standi* as so-called *amicus curiae*, which can deliver independent advice to the courts. That has been reported, for example, by the experts from **France, Ireland, Lithuania** and **Romania**. In **France**, the *locus standi* of the Defender of Rights as an *amicus curiae* is even a double one. Civil, criminal and administrative courts may ask the Defender of Rights to present observations on a discrimination case brought before them. But the Defender of Rights may also ask to be heard *ex officio* by such courts. Also, if a settlement that is proposed by the Defender of Rights (see supra) is refused or fails to be implemented, he may register a direct summons at a criminal court. The **Romanian** National Council for Combating Discrimination is mandatorily subpoenaed in all civil cases regarding discrimination, where it can act as an *amicus curiae*. However, the Council has informed the **Romanian** expert that it has not yet been subpoenaed in any case concerning equal pay between women and men. Sometimes national equality bodies can *de facto* act as an *amicus curiae*. That has been reported, for example, with respect to **Latvia**. Although the Ombudsman of the Republic of **Latvia** is not given express competence to provide its opinion before a court and although such an opinion of the Ombudsman is not legally binding, persons submit such opinions in court as additional evidence on the application of the law. Also, the Supreme Court of **Latvia** has already invited the Ombudsman to give an opinion in cases relating to human rights.

#### Own judiciary competences of the national equality body (quasi-adjudicative functions)

The **Bulgarian** Commission for Protection from Discrimination, upon the identification of a discriminatory act, has the power to impose coercive administrative measures and penal administrative sanctions. Coercive administrative measures include: obligatory prescriptions to employers or other staff ordering the breaches of the law and discriminatory practices to be discontinued, as well as impeding the enforcement of unlawful decisions and orders. Penal administrative sanctions encompass fines and pecuniary sanctions ranging from EUR 130 to about EUR 1 000. Increased sanctions are provided for repeated acts of discrimination, and also for non-compliance with the decisions of the Commission for Protection from Discrimination. Also the **Hungarian** Equal Treatment Authority has decision-making capacity as an administrative organ. The Authority can only establish an infringement of the law, prohibit any further infringement of the law in the future, issue fines (ranging from EUR 165 to EUR 20 000) and order the publication of its decision on its own website and that of the violator. Fines are, however, only rarely imposed. For remedies aimed at repairing the harm suffered (for example, the payment of compensation or job reinstatement), the claimant must submit the case to a court, instead of or after the procedure at the Equal Treatment Authority. The **Romanian** National Council for Combating Discrimination investigates the complaint, assesses the facts and issues a decision as to whether the discrimination has occurred or not. It can order an administrative sanction consisting of an administrative fine or a warning.

The **Danish** Board of Equal Treatment decides on individual complaints and can award compensation to a claimant who has been unlawfully discriminated against. If the Board's decision is not complied with, the Board is obliged to bring the case before the courts on behalf of the claimant. Also in **Iceland**, the national equality body has a quasi-adjudicative enforcement role. If the **Icelandic** Centre for Gender Equality has a reason to suspect that an institution, enterprise or non-governmental organization has discriminated on the basis of sex, it shall investigate whether there is a reason to request the Gender

Equality Complaints Committee to examine the matter. The alleged discriminator shall be obliged to provide the Centre with the information and material it considers necessary to reveal the facts of the case. If the parties concerned do not comply with this request within a reasonable time limit, the Centre may decide that they are to pay per diem fines until such information and material have been disclosed.

The **Estonian** Chancellor of Justice is competent to resolve discrimination disputes between natural and legal persons under private law. The **Finnish** Non-Discrimination and Equality Tribunal may prohibit the continuation of a discriminatory measure. Where sex discrimination is in question, the Tribunal may even prohibit the continuation of the pay discrimination. However, the decision of the Non-Discrimination and Equality Tribunal may be taken to court for a review. In **Cyprus**, the recommendations of the Ombudsman are binding on the employer. In the case of non-compliance with the Ombudsman's recommendations and decision, the Ombudsman is authorized to issue an order for compliance or to impose a fine.

#### *3.6.4 Equality bodies' remedies in judicial and non-judicial enforcement*

Most of the national equality bodies have no authority to impose penalties themselves. The exceptions to this rule have been mentioned above and include, among other countries, **Bulgaria, Cyprus, Hungary, Iceland, and Romania**. For the rest, the remedies that national equality bodies aim at are quite diverse and are of both a judicial and non-judicial nature, as illustrated in the following paragraph. Yet there currently seems to be a slight preference for amicable solutions with a focus on the avoidance of future discrimination.

In employment matters, the **Belgian** Institute for Equal Treatment of Men and Women usually takes judicial action alongside the victim in order to strengthen the latter's claim for compensation, and it claims only symbolic damages for itself (which the courts decline to grant). In **Germany**, the Federal Anti-Discrimination Agency tries to achieve an out-of-court settlement between the parties. For the latter, other public authorities are obliged to assist the Agency, especially with supplying the necessary information. The **British** Equality and Human Rights Commission mainly wants to ensure that the immediate risk of discrimination is eliminated or reduced in order to change the behaviour of the organisation or sector in question to promote and achieve sustained compliance with equality law. The **German** expert has noted that it is hard to find any information on the (mostly non-judicial) remedies aimed at by the Agency, as these are not published. The **French** Defender of Rights can recommend compensation or reparation if it finds evidence of unequal pay. He can also suggest disclosure measures. The **Croatian** Ombudsperson will generally try to reach an amicable solution, if the circumstances allow for this. The **Italian** equality bodies mainly aim at compensation and reparation for the victim, as is also the case for the **Portuguese** Gender Equality Agency in the Field of Employment and the **Swedish** Equality Ombudsman. The **Netherlands** Institute for Human Rights sometimes gives recommendations in its opinions about the measures an organization can take to avoid discrimination in the future. These recommendations are usually not directed at compensation or reparation, but rather at measures to improve the organization's policy. The Institute has no powers in the field of compensation or reparation. The **Norwegian** Anti-discrimination Ombud and the Discrimination Tribunal have no authority under the current legislation to award damages of any kind. The Government has suggested that the Tribunal should be granted the right to award damages in simple cases as well as a right to award non-pecuniary damages. This proposal went to a public hearing on 19 October 2016 and the deadline for remarks was 30 November 2016.

#### *3.6.5 Data collection and publication*

Many experts (for example, **Bulgaria, Iceland, Ireland, Italy, Liechtenstein, Lithuania, Luxembourg, Norway, Slovakia, Spain** and the **United Kingdom**) have mentioned that their national equality bodies do not or hardly gather and publish any data.

A fairly high number of national equality bodies, however, does make an effort to compile some information, although sometimes in a limited and fragmentary way. Those countries include **Belgium, Croatia, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Latvia, Malta, the Netherlands, Norway, Poland, Portugal, Romania, Slovenia** and **Sweden**. The type of information that is made available is very diverse. **Denmark** and **Norway**, for example, have equality bodies that publish all their decisions in individual cases on their website, albeit in an anonymized way. The same goes for the opinions of the **Czech** Public Defender of Rights. **Belgium**, for example, has no systematic way of making case law available, except for the cases of the Constitutional Court, the Council of State and the Court of Cassation. The Institute for Equal Treatment of Men and Women does make an effort, however, to annually compile, in the form of a booklet, all 'known' case law that relates to sex equality, i.e. the relevant case law from the European and national levels that has come to the Institute's knowledge. A similar absence of an obligation for the national courts to inform the national equality body regarding decisions that fall within their ambit has been signalled by the **Finnish** expert. The **Finnish** Equality Ombudsman publishes his opinions on the official website. So far, however, he/she has not been able to follow or publish data on equal pay claims presented before the courts, as the courts are not liable to inform the Ombudsman regarding their decisions. Also the **Croatian** expert has pointed at the lack of a systematic publication of data regarding equal pay claims and their outcome. The opinions of the **Estonian** Gender Equality and Equal Treatment Commissioner are in principle not public, but some of them are published on the Commissioner's website. The second **Estonian** equality body, the Chancellor of Justice, collects raw data regarding the petitions addressed to him, and produces annual reports. Generally speaking, many national experts (**Croatia, France, Greece, Hungary, Malta, Slovenia** and **Sweden**) have mentioned that their equality bodies produce an annual report containing various data and information. The **Latvian** expert regrets that the **Latvian** Ombudsman's office no longer breaks down its data on complaints and investigation cases according to different discrimination grounds. **The Netherlands** Institute for Human Rights gathers data on discrimination cases and does indicate the ground of discrimination involved (age, sex, religion, etc.). A further specification does not take place, however. Also the office of the **Polish** Commissioner for Human Rights collects data on the amount of complaints involving sex discrimination in general. Additionally, and quite uniquely, the **Polish** Commissioner receives from the Ministry of Justice statistical data involving cases registered in the common courts regarding damages claimed for various forms of discrimination in employment. These data, however, do not include detailed information regarding pay discrimination on the ground of sex.

This limited amount of available information shows that very few cases on equal pay for men and women are being brought. In **Cyprus**, for example, data for 2015 show that 24 claims were submitted to the Ombudsman regarding discrimination on grounds of sex, employment and occupational treatment. However, none of these claims concerned equal pay. As regards **Hungary**, it is to be suspected that the number of equal pay claims is also extremely limited. The **Hungarian** expert has noted that, in previous years, the Equal Treatment Authority's yearly overviews, covering all 20 grounds of discrimination and all activities of the Authority, have not mentioned any data with respect to equal pay cases. Similarly, the **Latvian** Ombudsman's office has communicated to the **Latvian** expert that there have been no complaints or investigation cases on unequal pay for men and women in recent years. Also the **Polish** Commissioner for Human Rights has informed the **Polish** expert that he receives only a small amount of motions involving equal treatment. He suspects that the matter is under-reported, meaning that the amount of filed complaints is significantly lower than the actual scale of the problem. The **Romanian** National Council for Combating Discrimination has examined 24 cases on sex discrimination in the last five years. It found discrimination in eight cases. In the only case on pay discrimination, the Council did not find a breach of the principle of equal pay. That case concerned a refusal by an employer to pay to a male employee a supplement for children during the Christmas holiday in 2013, as stipulated in a collective agreement. The employee's wife, who was working for the same employer, did receive the supplement for their children. The Council justified its decision by stating that this was not a right for the



employee in question, because it was the child who was entitled to the payment of the supplement, not the employee.<sup>71</sup>

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71 CNCD (Romanian Equality Body), Decision No. 254, 30 April 2014.

## 4 Conclusions, good practices and recommendations

As has been highlighted in the introduction to this report, it is the persistence of the gender pay gap in all of the EU Member States and the EEA countries that has made the European Commission assume that the enforcement of the equal pay principle is potentially deficient. After all, it has already been known for a while that the principle of equal pay is, generally speaking, fully reflected in the legislation of the current 28 EU Member States and the additional three EEA countries. Still, the year 2015 featured an 'unadjusted' gender pay gap of 16.3 % on average for the 28 EU Member States. The preceding sections have shown that the enforcement of the equal pay principle indeed varies quite substantially across the countries studied.

A part of those enforcement problems can be linked to the scope that is given to the principle of equal pay across the different European countries. Some national laws, for example, define precisely what should be understood to constitute 'pay', 'equal work' or 'work of equal value,' or lay down parameters for establishing the equal value of the work performed. Similarly, national legislation may precisely describe the extent to which indirect pay discrimination is prohibited, the extent to which justifications are allowed, the extent to which a comparator is required, etc. Suffice it to indicate here that the national reports that have provided the input for this report contain some obvious signs that the more precise the legal definitions of the relevant concepts of a non-discrimination clause are, the easier it is for victims of sex-based pay discrimination to have the equal pay principle enforced. One example is the way in which courts interpret national legislation regarding the necessity to have a comparator in order to bring a successful discrimination claim. As highlighted above (2.4.(iii)), the courts in **France**, **Spain** and **Norway** have decided that a hypothetical comparator is acceptable, thus opening the door for victims of pay discrimination in highly sex-segregated labour markets, as is the case, for example, in **Norway**. Another example is **Icelandic** legislation which contains very detailed definitions of terms like 'wages' and 'work of equal value' (see 2.4.(i)). Those definitions have already given rise to interesting case law by the **Icelandic** Supreme Court. A first case (31 May 2000)<sup>72</sup> was initiated by the Centre for Gender Equality (the **Icelandic** equality body) after the Gender Complaints Committee had ruled in favour of the claimant, a woman working for a municipality. She claimed to have been discriminated against in the wages which she received. Her salary had been determined on the basis of a trade union agreement and subsequently a job evaluation system. A man, with the same rank but with a different trade union agreement, was paid more on the basis of the job evaluation system that was applicable to him. The Supreme Court held that when assessing whether jobs were of equal value in light of the applicable national equality legislation a contextual assessment was needed where jobs could be of equal value albeit different in many respects. It stated that the objective of the law would not be attained if equal pay was only confined to those in the same job category, and inevitably freedom of contract would be restricted. Also, the claimant had shown that the two jobs were of equal value, the municipality had allegedly not been able to prove that objective and reasonable causes were behind the wage difference and the different trade union agreements could not solely justify the wage difference. Furthermore, the employer had not been able to prove that the man's job deserved different terms (more hours etc.). As a consequence, the **Icelandic** Supreme Court held that the difference in wages and terms constituted a violation of the relevant law. In another case (20 January 2005),<sup>73</sup> the **Icelandic** Supreme Court dealt with the claim of, again, a woman working for a municipality. This woman was the head of the department for welfare and found out that she earned less than the head of the department of technology, who happened to be a man. On the basis of the job evaluation system the two jobs were rated the same. The Supreme Court held that the employer had not been able to prove in a reasonable way that market demands justified the wage

72 Supreme Court (Iceland), *Akureyri municipality against the Centre for Gender Equality because of Ragnhildur Vigfúsdóttir*, case no. 11/2000, 31 May 2000, available at: <https://www.haestirettur.is/default.aspx?pageid=347c3bb1-8926-11e5-80c6-005056bc6a40&id=a39c378e-2786-4ec8-a84f-6c0c5aecb285>, accessed 27 March 2017.

73 Supreme Court (Iceland), *Akureyri municipality against Guðrún Sigurðardóttir*, case no. 258/2004, 20 January 2005, available at: <https://www.haestirettur.is/default.aspx?pageid=347c3bb1-8926-11e5-80c6-005056bc6a40&id=0c3becd9-3312-47b8-95f7-10f85630d9bd>, accessed 27 March 2017.

difference in the management sphere of the municipality and that the woman was to be compensated for the municipality's violation of the relevant non-discrimination legislation.

As the scope of the national equal pay legislation is discussed at length in the 2016 general report prepared by the European Equality Law Network (EELN),<sup>74</sup> this report has mainly focused on the actual enforcement mechanisms/regimes of national equal pay legislation. As highlighted above, the national experts' answers to the questionnaires sent out by the EELN for the current report have shown that all the European countries studied here have invested, as requested by Recast Directive 2006/54/EC, in judicial mechanisms to enforce the principle of equal pay for equal work or work of equal value for men and women. Apart from those judicial mechanisms, a large number of countries have also set up very diverse non-judicial enforcement regimes, which in certain states appear to play a more important role than in other states.

What follows is an overview of the most important difficulties that national enforcement finds itself confronted with, followed by a list of good practices, which can be related to both national non-judicial and national judicial enforcement mechanisms. Finally, the report is wound up with a number of recommendations addressed to both national and EU authorities.

#### 4.1 Enforcement of equal pay for men and women: a problem with many faces

This report has studied the enforcement of equal pay for men and women from two angles (judicial and non-judicial), and based on – and also limited to – the reports of 31 European national legal experts. Without generalizing too much, indications have been found that judicial enforcement is problematic from different perspectives, and also that non-judicial enforcement features a number of defects.

Generally speaking, it has turned out that, from a mere legislative perspective, access to judicial bodies is regulated in a satisfactory way in most of the European countries studied here. Still the national experts have reported very low amounts of case law. A number of barriers are reportedly responsible for that, including costly proceedings, a lack of pay transparency, a lack of sensitivity for/knowledge of sex-based pay discrimination, the fear of victimisation and a lack of trust in the national judicial system. The national experts from **Greece, Hungary, Italy** and **Poland** have reported an additional and very specific obstacle to the judicial enforcement of the equal pay principle: the recent changes in the political and economic situation in their countries.

From the 31 national reports, however, it has become clear that the major part of the judicial enforcement problem is connected with the judicial procedures themselves that are – in addition to a number of problems that are common to all the countries studied – very heterogeneous. Depending on a number of characteristics, a national judicial enforcement system is less or more efficient with respect to the enforcement of the principle of equal pay for men and women for equal work or work of equal value.

Below is an overview of six characteristics of national judicial enforcement mechanisms that, taken into account in the 31 national reports, impact on the effectiveness of such judicial enforcement. Afterwards, the focus will shift to non-judicial enforcement mechanisms.

74 European network of legal experts in gender equality and non-discrimination, Senden, L., Timmer, A. (2016), *A comparative analysis of the implementation of EU gender equality law in the EU Member States, the former Yugoslav Republic of Macedonia, Iceland, Liechtenstein, Montenegro, Norway, Serbia and Turkey*, European Commission, available at: <http://www.equalitylaw.eu/downloads/3967-a-comparative-analysis-of-gender-equality-law-in-europe-2016-pdf-867-kb>, accessed 31 March 2017.

#### 4.1.1 Judicial enforcement mechanisms

The study of the reports handed in by the national experts has led to the detection of five key characteristics that, depending on how they have been filled in on a national level, may impact substantively on the successful judicial enforcement of the equal pay principle.

A first key characteristic relates to the judicial body that can hear a case regarding sex-based pay discrimination. Apart from the split that exists in a number of countries between the bodies that are competent for either the private or the public sector, it is clear that there is a substantial difference as to the extent to which national judicial bodies are 'armed' to deal with sex-based pay discrimination claims. Only a few countries have a highly specialised discrimination court (**Iceland** and **Finland**), while in most of the other states it is the labour courts or even the ordinary civil courts that are competent to hear pay discrimination cases. It is to be expected that more specialised courts have a more in-depth knowledge of sex-based discrimination, and are consequently better armed to judge sex-based pay discrimination cases. On the basis of the national experts' reports, however, it is difficult to draw any conclusions regarding the effect of such specialised courts on the amount of claims brought for adjudication. Completely in line with this, the **Finnish** expert observed that there is no reliable information on the number of pay discrimination cases which has encouraged the **Finnish** Ministry of Social Affairs and Health (which is responsible for gender equality policies) to consider a study on the issue.

The following three key characteristics all relate to the applicable procedural rules which self-evidently mirror the judicial bodies that are competent to hear sex-based pay discrimination claims. The national reports of the 31 countries studied here have shown that the labour procedure rules (applicable in the labour or employment courts and tribunals) are often more protective of a victim's position than ordinary civil procedure. In **Poland**, for example, the labour judge can take an active position in the proceedings, and in **Germany** the fees for a procedure before the labour courts are lower than the fees for other procedures. As procedural rules specify who can bring a claim, which are the limitation periods and which evidence can be used etc., they may have a considerable impact on the enforcement of the principle of equal pay for equal work or work of equal value for men and women.

The second key characteristic considers the actual bringing of the case. All states allow the individual victim to bring a pay discrimination claim, either personally or represented by a lawyer or a trade union representative. In a number of countries victims who have suffered comparable damage may decide to join their claims and go to court together as a group. However, the most important and most debated question nowadays relates to the potential bringing of class action suits, i.e. legal proceedings in which persons or organizations representing interests common to a large group participate as representatives of the group or class. The eventual judgment resolves the problem for the entire group. Such class actions, or related proceedings, are already possible in **Hungary, Italy, the Netherlands** and **Poland**. In **France** a bill is currently pending on this subject. It is to be expected that the possibility for a victim of sex-based pay discrimination to join a class action has a substantial and positive impact on the national enforcement of the equal pay principle.

The third key characteristic is related to the shifting of the burden of proof. The law in the books seems to be fine, yet many national experts have observed that the required division of the burden of proof between the employee and the employer comes with a number of difficulties. The judges may, for example, not be aware of the reversal of the burden of proof in sex-based discrimination cases, and hence not apply it in practice (for example, **Greece**). That may be connected with the fact that often the labour courts, or the ordinary civil courts, are competent to hear sex discrimination cases, and that they may not be fully aware of the fact that different procedural rules apply in those cases. Also, in many national legal systems it is unclear when, exactly, there is a sufficiently serious indication of discrimination for the burden of proof to shift onto the employer. Should there be a 'probability' that discrimination has occurred (for example, **Croatia, Hungary** and **Poland**), or a 'presumption of discrimination' (for example, **Ireland**,

**Lithuania, Malta, Slovenia and Sweden**), or rather ‘a likelihood’ (for example, **Iceland**), and how much information is needed in that respect? There seem to be nearly as many ways to establish a presumption of discrimination as there are countries in this study. Another issue is not the *amount* of information needed in order to establish a presumption of discrimination, but rather the *type* of information needed. Many systems allow all legitimately obtained evidence to be produced, and often it is for the court to decide whether or not to accept a certain piece of evidence. A fairly large number of states also (explicitly) allow statistics and expert witnesses. However, it is certain that the shifting of the burden of proof does not mean the same in the 28 EU Member States and the 3 EEA countries.

Limitation periods are the fourth key characteristic. From the reports of the national experts it has also appeared that the limitation periods that are applicable to claims based on the infringement of the principle of equal pay for equal work for men and women widely differ from one country to another. Limitation periods for sex-based pay discrimination claims may be as short as three months (for example, **Lithuania**) and are often much shorter than the limitation periods that are more generally applicable in national law. Several national experts have also mentioned that the detection of the correct limitation period for sex-based discrimination claims requires the combined application of several procedural rules. The fact that limitation periods tend to be very short and that it is often hard to find out which limitation period is applicable seriously limits the possibilities to enforce the principle of equal pay for men and women.

In the fifth place, also the available remedies (compensation and reparation) and the possibility to impose criminal sanctions impact on the effectiveness of a judicial enforcement mechanism. The payment of financial compensation for the pay difference is sometimes made dependent on a number of conditions, for example, intent or gross negligence on the part of the discriminator (for example, **Germany**). That all leads to usually modest financial compensation for victims of sex-based pay discrimination. As far as compensation for non-material damage is concerned, such a remedy is allegedly rarely awarded. Courts have to calculate this ‘punitive compensation’ according to the circumstances of the individual case (for example, factoring in the duration of the impairment and its impact on the work environment), and that usually leads to a very low amount. All those low amounts awarded for both material and non-material damage do not particularly deter future pay discriminators. With respect to criminal sanctions (fines and/or imprisonment) a similar finding is to be reported, leading to a similar lack of deterrence. The amount of the fines varies enormously, but even in countries where fines can potentially be higher, the actual amounts appear to be relatively low in practice (for example, the **Czech Republic** and **Hungary**). Also the number of countries where discriminators may be subjected to imprisonment is relatively low (for example, **Belgium** and **Cyprus**). Alternative reparatory remedies, like the publication of non-anonymized judgments (for example **Hungary** and **Ireland**) and the loss of public benefits or subsidies (for example, **Italy** and **Spain**) are still relatively scarce, although these remedies do have an interesting potential for the judicial enforcement of the equal pay principle and undoubtedly also have a deterrent effect.

#### 4.1.2 *Non-judicial enforcement mechanisms*

In many countries non-judicial procedures are available to alleged victims of sex-based pay discrimination. Such national out-of-court settlements tend to be very diverse and may either be provided by law, be based on policies or even be voluntary initiatives set up by companies themselves. In this report, a distinction has been made between non-judicial procedures that are internal to the company, non-judicial procedures that are external to the company, and finally, ADR in a narrow sense, i.e. the potential use of conciliation, mediation and arbitration, all prior to a court hearing. For all of them a number of difficulties and problems have been detected.

Internal non-judicial enforcement procedures are often non-formalized and non-compulsory, and consequently they are not very well known. In only a few countries (**Slovakia, Slovenia, Romania** and the **United Kingdom**) are such internal procedures more formalized (for example, through a link with

a judicial procedure), in the sense that they are referred to in national law, although this is still not compulsory. But even then, these more formalized procedures are allegedly seldom used in practice and their effects are questionable.

External procedures (involving an external actor, situated outside the company) are more well known. That could be so because quite often the national equality bodies tend to be involved in such external non-judicial enforcement procedures, implying that the success of such procedure is dependent on the equality body's activism and powers in the field. Things tend to be more problematic, however, when the trade unions play a substantial role in such external procedures, which is the case in countries like **Italy** and **Sweden**. Several experts have observed that, generally speaking, trade unions are not in the best position to act in any procedure regarding equal pay for men and women, as often it is them who create unjustifiable pay differences in collective agreements.

As far as ADR in the strict sense is concerned, it is surprising – at first sight and given the current popularity of ADR – that quite a number of experts (**Austria, Bulgaria, Cyprus, Denmark, Estonia** and **the Netherlands**) have mentioned that, in their national legal systems, ADR plays no role at all when it comes to the enforcement of the principle of equal pay for equal work for men and women. That is to say: the law of those states does not refer to ADR, be it in a compulsory or a non-compulsory way. On second thoughts, however, one could question whether ADR should play an important role in the enforcement of the equal pay principle. By solving pay discrimination issues through ADR, such issues as well as their potential solutions are being transferred from the public sphere to the more private sphere, which may impact on the publicity for such solutions, and consequently also on the deterrent effect of those remedies agreed upon.

There are few to no figures available with respect to the number of equal pay claims that are dealt with in a non-judicial way, neither could the experts disclose much information with respect to the types of reparation that tend to be awarded in cases of non-judicial enforcement. Several experts have referred in this respect to the regular presence of confidentiality clauses in all kinds of settlements, of both an internal and external nature (for example, **Germany, Ireland** and **Latvia**). Such clauses are certainly a serious problem that should be dealt with by law.<sup>75</sup> As a consequence of such a lack of information, the impact of non-judicial procedures on the enforcement of the equal pay principle is – to date – fairly unknown, and their preventive effect is uncertain. However, there are indications that such a preventive effect is not merely hypothetical. It might not be a coincidence, for example, that **Iceland**, which has been mentioned earlier in this conclusion as a leading country, appears to be the only country that has gathered reliable statistical data on non-judicial enforcement and which has a pretty active Gender Equality Complaints Committee, a semi-judicial body that seems to act on the boundary between judicial and non-judicial enforcement.

## 4.2 A (limited) number of good practices

When asked about good practices, quite a number of national experts were rather pessimistic and found that, in their countries, there was nothing to be reported (**Austria, Bulgaria, the Czech Republic, Denmark, Estonia, Hungary, Iceland, Latvia, Luxembourg, Poland, Romania, Slovenia** and **Slovakia**). It is surprising that those also include experts from countries which have been mentioned before in this conclusion as countries that do feature some elements that could prove advantageous to the genuine enforcement of the equal pay principle (e.g. **Iceland**). The **Icelandic** expert even observed that it would be strange to present good practices from her country, taking into account its constant gender pay gap (17.5 % in 2015). In the same vein, the **Czech** expert explicitly positioned the **Czech Republic** as a potential recipient for good practices from other Member States, rather than as an example for others.

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75 See also: European Network of Legal Experts in the Field of Gender Equality, Veldman, A., Timmer, A., *Pay transparency in the EU. A legal analysis of the situation in the EU Member States, Iceland, Liechtenstein and Norway* (2017), European Commission, available at: <http://www.equalitylaw.eu/downloads/4073-pay-transparency-in-the-eu-pdf-693-kb>, accessed 27 June 2017.



The **Croatian** expert was slightly more positive, stating that **Croatia** can be called a relatively decent follower and correct implementer of the required formal standards regarding equal pay for equal work or work of equal value for men and women, but nothing beyond that.

A number of experts, however, did earmark a number of national actions as good practices. Those concern both hard law and soft law measures that could serve as examples for other European states, and potentially also for the EU institutions. Below is a brief overview of the most important examples that the national experts listed, as well as a few examples of good practices that have been distilled from the comparison of the different national reports. A difference has been made between ‘hard law’ and ‘soft law’ good practices, based on the question of whether or not they are legally binding and consequently enforceable.

#### 4.2.1 ‘Hard law’ good practices

A number of national experts have referred to legal initiatives that focus on pay transparency. There is, for example, the already mentioned **Finnish** measure of pay mapping, and also the two-yearly **Italian** obligation for public and private companies from all sectors with more than 100 employees to draw up reports on the workers’ situation (including pay). Analogously, the **Lithuanian** expert has referred to the new Lithuanian Labour Code of 2017, which makes a significant move in the direction of more transparency in wage systems by introducing several obligations for employers to make available wage-related information to the employees, the works council and the trade unions. Also in **Germany** and the **United Kingdom**, an act on pay transparency is pending. The EELN’s report on pay transparency has confirmed that more publicly available information regarding wages is key in the fight against pay discrimination between men and women.

Also a few procedural law provisions can be labelled as good practices. The **Portuguese** expert referred to a reasonably far-reaching rule in the **Portuguese** Labour Code regarding the automatic replacement system of sex discriminatory collective agreements or company regulation provisions by the more favourable provision which then becomes applicable to all male and female workers in case of a successful pay discrimination claim. The **Spanish** expert labelled as good practices the legal rules that contain the possibility to impose administrative sanctions for unequal pay for equal work or work of equal value. Also in **Spain**, an employer who discriminates can be considered guilty of serious misconduct under the Law on Offences and Penalties in the Social Order (see supra), in which case he/she has to pay an administrative sanction varying from EUR 626 to EUR 187 515. Another interesting **Spanish** procedural measure involves the Institute for Women and for the Equality of Opportunities (i.e. the Spanish equality body) which can act in a judicial capacity when victims of sex discrimination are a group of unspecified persons or if they are difficult to identify. However, notwithstanding their theoretical attractiveness, the **Spanish** expert has observed that all the possibilities referred to are seldom used in practice. Penalties for pay discrimination are very rare, and the Institute has never brought a claim of pay discrimination of its own motion. The question thus remains whether these are genuine good practices.

A few national experts, including the **Italian** and the **Spanish** ones, have pointed at the sanction of the revocation of public benefits or even exclusion, for a certain period of time, from any further award of financial or credit inducements or from any public tender. Those measures can be seen as an interesting avenue to enhance equal pay for men and women in the case of an employer who has been guilty in the past of direct or indirect sex discrimination. The attractiveness of this type of measure is that employers who have been guilty of pay discrimination keep being ‘financially’ reminded of their discrimination for potentially a longer period of time than in the case of (merely) a procedure in court or a private bilateral settlement, the latter often being entirely confidential.

The **Belgian** expert referred to the works mediator (introduced by legislation in 2012) and a special commission composed of employees’ and employers’ representatives (instituted by a collective agreement

on equal pay for men and women). The latter commission, which is supposed to be well equipped to examine equal pay claims, can provide advice on equal pay disputes in answer to a labour court's request. The **Belgian** expert considered it to be unfortunate, however, that no works mediators have been appointed since the act came into force, and that the special commission has only been consulted twice, the last time being 30 years ago. So, here again, the question arises whether these constitute genuine good practices.

To conclude, the **Irish** expert has referred to the positive effects of publishing the decisions of the Workplace Relations Commission (although anonymized) and the Labour Court on the website of the Workplace Relations Commission. Whilst it is certainly true that more easily available data on pay discrimination cases would certainly enhance the chances of a good enforcement of the equal pay principle, it should at the same time be observed that the deterrent effect of anonymized decisions is limited. From that perspective, it is regrettable that **Ireland** now publishes decisions of the adjudication officers of the Workplace Relations Commission without identifying the parties to the said decision.<sup>76</sup>

#### 4.2.2 'Soft law' good practices

A soft law initiative that has been mentioned by a fair number of experts relates to the awarding of labels, certificates and prizes. In **Cyprus**, for example, there is a label for an 'Equality Employer', and one for implementing a 'Good Practice relating to equal treatment and/or equal pay.' Both labels are awarded by the Equality Certification Body. Thus far 19 employers have been given the 'Equality Employer' label, and 15 have received the 'Good Practice relating to equal treatment and/or equal pay' certification. The certification's duration is four years. The **Maltese** Equality Mark Certification is comparable. The number of conditions to be fulfilled include proof of equal pay and equality policies in place. This certification was launched in 2010 with a noteworthy campaign funded through ESF encouraging employers from all sectors to apply to be certified. Following certification, the logos of the certified organisations were widely publicised across the country, including on billboards. This has had the effect of enticing organisations, not only for the free publicity that the certification provides, but also to attract the best employees based on optimal work conditions. This has resulted in banks, insurance agencies and others competing to apply for certification. The Equality Mark Certification is still awarded today, but the publicity has stopped, together with the ESF funding. Another initiative in this category is the **Norwegian** Equality Prize, awarded yearly by the Confederation of Vocational Unions, a politically independent umbrella organization for employees. This prize intends to highlight the need for enterprises to constantly monitor their equality status. In 2016, it was the **Norwegian** DNB bank that won the prize for its systematic work in eradicating unequal pay amongst its staff where, amongst other measures, a large amount of money was put on the table to rectify inexplicable pay differences. At DNB, statistics showed that men and women were hired on equal pay, but as the years went by a pay gap arose. A once-only rectifying operation appeared to be a necessary measure. In order to ensure that no new pay gap would develop, careful routines for pay negotiations were set up along with monitoring routines. Finally, also within the framework of the **German** 'eg-check' project, administered by the Federal Anti-Discrimination Agency (i.e. the national equality body), certificates are awarded to honour the efforts of private companies and public administrative bodies to overcome pay discrimination.

Also a few specific awareness raising initiatives have been advanced as good practices. The expert from **Liechtenstein**, for example, stressed the importance of prevention and referred to the national 'future day' as a good practice in that respect. The last future day allegedly took place on 10 November 2016. It focused on stereotypical role models that consciously or unconsciously influence young people when choosing a future profession. Many youngsters appear to orient themselves towards either typically female or typically male abilities or activities, thereby unnecessarily and severely limiting their future opportunities. The national future day wants to countervail this development and set a number of good examples. A comparable, and very popular preventive campaign is the 'equal pay day' initiative that

76 Section 41(14) of the Workplace Relations Act 2015 (Ireland).

has already been set up in many countries (for example, **Austria, Belgium, Croatia, Cyprus, Estonia, Liechtenstein, Poland, Portugal, Slovakia** and the **United Kingdom**). The national ‘equal pay day’ often hosts a series of initiatives organised by different organisations that are active within the employment field. The expert from **Liechtenstein** mentioned one example. On 24 February 2016, the employee association LANV raised public awareness in cooperation with 31 restaurants. On that particular day, the menu cost 17.2 % less for all female guests, which corresponds to the pay difference between men and women in **Liechtenstein**.

Also the development of assessment tools and procedures – for employers, employees and not in the least the social partners – have been mentioned as good practices. The **German** Trade Unions Association has developed an online questionnaire for young women where they can answer questions regarding their future career choices, parenthood, work-life balance, care leave, taxes, etc. The users can obtain a general analysis of their answers informing them about the consequences of certain choices with special regard to remuneration, career choice and pensions. Also the already mentioned guide published by the **French** Defender of Rights (i.e. the national equality body), reflecting the work of a multidisciplinary expert team and focusing on the promotion of the principle of equal pay in collective bargaining and agreements, could be seen as an example of an assessment tool, on which the **French** expert was very positive. Given the already mentioned dubious role of the social partners when it comes to developing job classification and remuneration systems, such a tool seems to be particularly promising. The **Dutch** expert had a positive feeling with regard to the investigation which the job evaluation expert of the **Netherlands** Institute of Human Rights can carry out, free of charge, within an organisation following a complaint about potential unequal pay. That expert examines what kind of pay system an employer uses, how jobs are evaluated and whether the jobs are the same or of equal value. The **Swedish** expert stressed the importance of the equal wage monitoring provided by the **Swedish** National Mediation Office. According to its instructions, the Mediation Office does not only mediate in labour disputes in the **Swedish** labour market, but is also a part of the wage formation system, promoting an efficient wage formation process and meeting public objectives of various sorts.

It goes without saying that the effectiveness and strength of all the above-mentioned soft law good practices is highly dependent on the media attention given to them on a national level.<sup>77</sup> Some experts have mentioned that their national equality bodies have been quite successful in ensuring that the media cover the initiatives that are taken to fight sex-based pay discrimination (for example, **Estonia, Ireland, Malta, Norway, Portugal, Slovakia** and the **United Kingdom**). Such media campaigns may also be helpful to put the gender pay gap and the lacking enforcement of the equal pay principle on the political agenda. This link between media campaigns and public debate has also been explicitly mentioned by the expert from **Italy**.

### 4.3 Recommendations

The reports that have been prepared by the national experts from the 28 EU Member States and the 3 EEA countries demonstrate the importance of clear and unequivocal judicial enforcement procedures, and of well-informed, specialised and proactive institutions (like the courts and equality bodies) to deal with either judicial or non-judicial enforcement mechanisms.

From the study of the different national judicial enforcement systems, it has become apparent that specialisation in its many different meanings is without any doubt a major asset and is therefore to be recommended. Firstly, with respect to the applicable legal rules such specialisation implies that clear definitions of legal concepts like, for example, ‘equal work’, ‘work of equal value’ and ‘indirect discrimination’, as well as clarity with respect to the question of whether a comparator is required or whether unequal treatment can be justified substantially enhance the possibilities to judicially enforce the

77 See also Fuchs, G. (2013), ‘Strategic Litigation for Gender Equality in the Workplace and Legal Opportunity Structures in Four European Countries’, *Canadian Journal of Law and Society*, Vol. 28, no. 2, pp. 206-207.

equal pay principle for men and women (for example, **Iceland**). Secondly, the more specialised the involved judicial or non-judicial body is, the more satisfactory its activities seem to be. A good example is probably the **Icelandic** Gender Equality Complaints Committee, which has the task of examining sex-based (pay) discrimination cases and delivering a ruling in writing that is binding on the parties. In a few countries (for example, **Denmark**) the national equality body has also been given jurisdictional competences. Special attention needs to be given to the social partners that have been accused by a number of experts of perpetuating the gender pay gap through collective negotiations leading to gender discriminatory function classification and wage systems. In the third place, also the specialisation of claimants enhances judicial enforcement. Whilst most of the victims of pay discrimination are only confronted once with pay discrimination – and will consequently never be specialists – the possibility of a class action suit allows certain organizations to obtain a specialist position at the service of discriminated workers (for example, **Italy**). Fourthly, procedural rules that are specifically ‘geared’ towards discrimination cases (taking into account the vulnerable position of the alleged victim of the discrimination) also have a positive impact on judicial enforcement. That should not only involve the mere mentioning of the shifting of the burden of proof as requested by Recast Directive 2006/54/EC. It should also encompass a description of which and how much information is needed for the actual shifting of the burden of proof, instead of referring only to ‘making it probable that discrimination has occurred’ (for example, **Croatia, Hungary and Poland**), or ‘raising a presumption of discrimination’ (for example, **Ireland, Lithuania, Malta, Slovenia and Sweden**), or ‘adducing a likelihood’ (for example, **Iceland**), or ‘giving reasons to believe that there has been discrimination’ (for example, **Norway**). Finally, judicial enforcement is undoubtedly also served by legal rules that protect employees who claim their rights against victimisation, specifically in discrimination cases, as has already been arranged in quite a number of countries. It is to be expected that a prohibition on retaliation that is based on general principles of labour law, as is the case for example in **Portugal**, offers less protection as it is less visible.

Apart from specialisation, it is also recommended to pay sufficient attention to the fact that both judicial and non-judicial enforcement initiatives are widely covered by national mass media. That appears to be a good way to bring items onto the political agenda. After all, it has become clear that, although there are certainly differences amongst the countries studied, there is still insufficient knowledge about the gender pay gap and the different ways to enforce the principle of equal pay for equal work or work of equal value for men and women, notwithstanding the fact that the EU and the majority of its Member States have already been taking action for so long.

## Annex Questionnaire

### Questionnaire EELN thematic report 2016/2017:

#### Enforcement of the principle of equal pay for equal work or work of equal value between men and women

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### 1. Introduction

Both at the EU and national levels, the principle of equal pay for men and women for work of equal value seems, in general, well implemented in legislation.<sup>78</sup>

Nevertheless, Eurostat data shows a persisting gender pay gap, which was 16.1 % on average for the 28 EU Member States in 2014.<sup>79</sup> The pay differences can be partly explained by factors that are not directly related to discrimination such as traditional career choices of men and women and part-time work, which is often highly feminised. However, another part of the discrepancy can only be explained by the fact that there is pay discrimination. That latter finding is deeply troubling, given the fact that such pay discrimination has for a long time been legally forbidden. It suggests that, one way another, enforcement of the legislative measures in place is deficient.

This conclusion has inspired the European Commission to ask the gender stream of the European Equality Law Network (EELN) to prepare a report that pays particular attention to the enforcement of the equal pay principle, including issues of compensation, reparation and sanctions, as well as the role of equality bodies.

### 2. Important guidelines for answering the questionnaire

- Please, provide an answer to every question separately. Always add sources and references to (legislative) measures and case law.
- If the legislative measures referred to are an implementation of EU law (in casu most probably Recast Directive 2006/54/EC), please indicate whether you consider this implementation: (1) to exceed the requirements of EU law, (2) to be satisfactory, (3) to be partly deficient, or (4) to be incorrect.
- Please ensure that you highlight recent developments in the legislation and the case law.
- Do not summarize several questions into one answer and do not cross-reference other answers, even if this means that you are repeating yourself.
- There are some YES/NO questions. Please always make a choice, even if this is complex or difficult. Details and nuances can be provided later on.
- Provide short descriptions of and full references to the most relevant case law (including opinions of equality bodies), if any.
- Some questions indicate possible answers or aspects of answers. Please do not ignore them but take them into consideration and indicate whether they are relevant or not.

**Thank you for your collaboration!**

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78 For an overview, see chapter 4 of: <http://www.equalitylaw.eu/downloads/3823-a-comparative-analysis-of-gender-equality-law-in-europe-2015-pdf-1-03-mb>.

79 Unadjusted gender pay gap, provisional figure for 2014 for the 28 EU Member States. Between 2010 and 2014 the unadjusted gender pay gap for the 28 Member States varied between 16,1 and 16,6, with no clear declining trend. See: <http://ec.europa.eu/eurostat/tgm/table.do?tab=table&init=1&language=en&pcode=tsdsc340&plugin=1> <http://ec.europa.eu/eurostat/tgm/table.do?tab=table&init=1&language=en&pcode=tsdsc340&plugin=1>.

## Questionnaire

### Enforcement of the principle of equal pay for equal work or work of equal value between men and women

Country: .....

Author: .....

#### I. **General legislative framework re. enforcement of equal pay**

The following question enquires about the way in which the principle of equal pay for work of equal value has been implemented in national legislation. This question has already been asked in the questionnaire for the 2016 gender equality general reports. The answer can be used here, updated, and further developed.

1. Has the principle of equal pay for equal work or work of equal value between men and women been implemented in national legislation?

Yes/no

If yes:

- Specify in which legislation and Article(s).
- Please describe briefly the relevant Article(s).

#### II. **Enforcement of the equal pay principle**

2. Has specific national legislation been adopted to implement Article 17 (Defence of rights) of Recast Directive 2006/54/EC in national legislation, with a particular focus on equal pay?

Yes/no

If yes:

- Specify in which legislation and Article(s).
- Please describe briefly the relevant Article(s) and case law.

If no:

- Specify which other legislation ensures that judicial procedures are available for persons who consider that they have suffered pay discrimination.
- Please describe briefly the relevant Article(s) and case law.

##### a. **Judicial enforcement**

3. Which judicial body do victims of pay discrimination have to turn to in order to get redress: criminal/civil/administrative court...?

4. In order to know how the access to these judicial bodies is set up, please describe for each of the judicial bodies you mentioned above in question three:

- Who can bring the claim? Only the employee concerned? A group of employees? Can a trade union act on behalf of employee? Is the ombudsman competent to bring a claim on behalf of the employee? Competence of an equality body? Competence of the labour inspectorate?
- Which procedural rules do the judicial bodies mentioned above apply? E.g. can applicants defend themselves, are expert witnesses allowed, do courts accept statistics...? Please refer to the relevant legal instruments and Articles.
- How is the burden of proof divided? Has specific national legislation been adopted to implement Article 19 (Burden of proof) of Recast Directive 2006/54/EC in national legislation? Please refer to the relevant legal instruments and Articles.
- How would you evaluate in general the access to the judicial bodies you mentioned above? What are the obstacles and difficulties that applicants come across in equal pay cases?



5. If available, can you provide figures regarding claims that have been brought under the above mentioned procedures, and can you provide some information about which types of cases make it to judicial bodies (typical sectors, functions, direct/indirect discrimination...)? Are you aware of any cases that concern pay discrimination against men?

**b. Non-judicial enforcement**

6. Can employees report instances of pay discrimination to non-judicial bodies before they bring a court claim?

Yes/no

If yes:

- Does it concern an internal procedure (within the company)? Explain and refer to the relevant legislation and Article(s).
- Does it concern an external procedure (e.g. via trade unions, labour inspection, ombudsman...)? Explain who the relevant actors are and refer to relevant legislation and Article(s). Please note that equality bodies will be discussed separately below (in section II.F).
- What is the role of alternative dispute resolution ('ADR', such as negotiation, conciliation and mediation) to avoid proceedings regarding equal pay for equal work and to find a solution for an instance of pay discrimination? Has ADR been provided or obliged by law? If yes, please refer to the relevant legislation and Articles.
- Are you aware of any other initiatives to settle pay discrimination cases outside the courts?

7. Is there a legal obligation for employers to report on (equal) pay (e.g. reports regarding individual wages, salary scales...)? Do they have to report internally (self-enforcement) or to state authorities (public enforcement)? Please refer briefly to the relevant legal instruments and Article(s).

8. Are there any other efforts being made to prevent pay discrimination? Are you aware of any awareness raising campaigns (e.g. Equal Pay day, attention in the media or in schools, or other initiatives)?

9. If available, can you provide figures regarding claims that have been dealt with in a non-judicial way?

**c. Remedies: compensation and reparation**

10. Has specific national legislation been adopted to implement Article 18 (Compensation or reparation) of Recast Directive 2006/54/EC in national legislation, particularly with regard to equal pay?

Yes/no

If yes:

- Specify in which legislation and Article(s).
- Please describe briefly the relevant Article(s) and case law.

If no:

Specify which other legislation is applicable to ensure compensation or reparation is available in cases of equal pay discrimination.

Please describe briefly the relevant Article(s) and case law.

11. Please describe which remedies are available to the victim of pay discrimination (compensation, reparation...) in case of judicial enforcement. In so doing, please answer the following questions:

- Elaborate on the specific types of remedy and amounts of damages that can be awarded. What is the result of a successful discrimination claim? Is it levelling up of the pay of the employee discriminated against? Does legislation set a maximum amount of compensation? Please refer to the relevant legal instruments and Article(s).
- Which judicial bodies can award the above mentioned remedies?

- Do you consider judicial bodies generous when it comes to awarding damages (to the extent that they have a margin of appreciation)? If possible, please refer to case law.

**12.** Please describe the remedies available to the victim of pay discrimination (compensation, reparation...) in case of non-judicial enforcement. In so doing, please answer the following questions:

- In case of ADR: which are typical examples of remedies agreed on?
- Do non-judicial bodies have particular ways of settling cases?
- Are data being gathered regarding non-judiciary enforcement of the principle of equal pay for equal work? If yes, are these data being published or otherwise made publicly accessible?

#### **d. Victimisation**

**13.** Has specific national legislation been adopted to implement Article 24 (Victimisation) of Directive 2006/54/EC (recast) in national legislation, particularly with regard to equal pay?

Yes/no

If yes:

- Specify in which legislation and Article(s).
- Please describe briefly the relevant Article(s), and mention relevant case law on preventing victimisation/retaliation with regard to workers who lodge an equal pay claim.

If no:

Specify which other legislation is applicable to ensure that employees are protected against victimisation.

Please describe briefly the relevant Article(s), and mention relevant case law on preventing victimisation/retaliation with regard to workers who lodge an equal pay claim.

#### **e. Penalties**

**14.** Apart from compensation and/or reparation for the victim (see under c. Remedies), how is the discriminator sanctioned? For example: are criminal or administrative sanctions available? Can the discriminator be fined? Are sanctions like disqualification from public benefits, subsidies (including EU funding managed by Member States) and public procurement procedures applied?

**15.** Has specific national legislation been adopted to implement Article 25 (Penalties) of Recast Directive 2006/54/EC in national legislation, particularly with regard to equal pay?

Yes/no

If yes:

- Specify in which legislation and Article(s).
- Please describe briefly the relevant Article(s) and case law.

If no:

Specify which other legislation is applicable.

Please describe briefly the relevant Article(s) and case law.

**16.** Are you aware of any alternative sanctioning, e.g. publication of pay discrimination judgments, or naming and shaming of the discriminator?

## f. Equality bodies

**17.** Does your country have an equality body that seeks to implement the requirements of EU gender equality law (see Article 20 Recast Directive 2006/54/EC)?

N.B.: This question has already partly been asked in the questionnaire for the 2016 gender equality general reports. The answer can be used here, updated and further developed.

Yes/no

If yes:

- Specify the name of the body, its website and the legislative measure that established the body.
- Which discrimination grounds does the body cover?

**18.** Please describe what enforcement powers the equality body has regarding the equal pay principle, by answering the following questions (referring to the relevant legislative provisions and including relevant cases):

- Does the equality body play a role in judicial enforcement?

Yes/no

If yes: please describe this role. For example: can the equality body bring court claims on behalf of an employee, can it act as an 'amicus curiae', can it represent individuals in (pay) discrimination claims before the national courts, can the equality body act in a judicial capacity...?

- Does the equality body play a role in non-judicial enforcement?

Yes/no

If yes: please describe this role. For example: what is the equality body's role in ADR? Does the equality body practice ADR itself? Does the equality body act preventively (raising awareness, media campaigns...)?

**19.** What sort of remedies (compensation and reparation) does the equality body generally aim for, both in judicial and non-judicial enforcement? Please give examples, if possible. Does the equality body have penalty powers itself?

**20.** Do equality bodies gather data on equal pay claims and their outcomes in a systematic way? Do they publish these data? If yes: where?

## III. Good practices and general questions

**21.** Which element of the enforcement of the principle of equal pay for equal work would you call a 'good practice', which could serve as an example for other Member States? E.g. sanctions that are particularly deterrent and work preventively, specific attention in the media, etc. Please be precise and refer to the relevant cases, decisions, instruments etc.

**22.** Is there further information on the enforcement of the principle of equal pay for equal work or work of equal value between men and women, which has not been addressed by this questionnaire?

**23.** Please list relevant literature from your country related to the enforcement of the principle of equal pay for equal work or work of equal value between men and women.



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