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The Principle of Equal Pay for Work of Equal Value

Closing the Gender Pay Gap in Iceland

“So close, yet so far”

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Summary

The enunciation of the principle of equality and non-discrimination is of fundamental source in international human rights laws and EU-law and has a prominent place in the Icelandic constitution. The principles of equality and non-discrimination are based on various legal concepts that have evolved mainly in international and regional human rights or equality jurisprudence. International legal provisions guaranteeing the right to equality and non-discrimination are abundant and if discriminatory practices persist it is not for the lack of legal rules but perhaps rather for lack of implementation and effective enforcement of these rules on a domestic level. In recent years the focus seems to have shifted from the negative obligation not to discriminate, to the duty to recognize the difference between people and to take positive action to achieve substantive equality.

For the last decades, some comprehensive legal responses to the gender pay gap have been made at the international, EU and Icelandic forum, mainly through promoting the principle of equal pay for work of equal value and non-discrimination. In a global legal context, the most prominent human rights instruments promoting equal pay for work of equal value are the Equal Remuneration Convention, 1951 (No. 100), and the Convention on the Elimination of all Forms of Discrimination against Women. Together with the Discrimination (Employment and Occupation) Convention, 1958 (No. 111) they form the international legal and policy framework for promoting the principle of equal pay for work of equal value and non-discrimination in the world of work. However, while the principle of equal remuneration for men and women for work of equal value, often referred to as “equal pay”, has been widely endorsed, what it actually entails and how it is applied in practice has proved difficult to grasp.

In Europe, the principle of equal pay for men and women for work of equal value is embodied in Article 157 of the Treaty on the Functioning of the European Union (TFEU). 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), replaced a number of earlier legislative acts. Due to the slow improvement in closing the gender pay gap the focus is now on ineffective enforcement of the provision and the need for better implementations.

Although there has been more than fifty years of equal pay legislation in Iceland, the gender pay gap in the Icelandic labour market has remained resilient. Iceland has emphasised on improving the effectiveness of equal pay legislation aiming at tackling direct and indirect gender wage discrimination and recently made new amendments, the Equal Pay Standard, to the Gender Equality Act no. 10/2008. In this thesis the implementations of the principle of equal pay for work of equal value in Icelandic legislations and its effective enforcement will be analysed along with the Equal Pay Standard and its possibilities in closing the gender pay gap in Iceland. Also, how and why undervaluation of women’s work in the Icelandic labour market keeps the gender pay gap alive and if it is contrary to the principle of equal pay. Finally, it will be analysed if the principle of equal pay for work of equal value protects women discriminated against in pay on multiple grounds.

Acknowledgements

I should admit, I have a huge interest for gender equality in the world of work. Perhaps this interest is related to the fact that I have three daughters, all having their own dreams about professions and carriers. Gender equality implies that all men and women are free to develop their personal abilities and make life choices without the limitations set by stereotypes or prejudices about gender roles or the characteristics of men and women. This I wish for all the daughters of this world. I would therefore like to thank my daughters for aspiring me to do this work.

I also wish to express my warmest thanks and gratitude to my excellent supervisor Constance Thomas, for generously sharing her time and expertise and for providing invaluable encouragement throughout the process.

Finally, I wish to thank my family, especially my husband, and friends who have offered their support and endured me through this whole process.

1. Introduction

1.1 Background and context

The principle of equal pay for work of equal value is a recognised human right, subsequent to the principles of equality and non-discrimination. In international law, the most prominent human rights instruments promoting equal pay for work of equal value are the Equal Remuneration Convention, No. 100, and the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW). The principle of equality and the prohibition of discrimination are also considered a fundamental principle in Europe firmly constructed in the Treaties of the European Union, the Charter of Fundamental Rights of the European Union and secondary legislation. Due to the slow improvement in closing the gender pay gap the focus has been on ineffective enforcement of the provision and the need for better implementations.

The persistence of the gender pay gap, both globally and in a European context, doesn't harmonize with the longstanding international requirements of the International Labour Organization (ILO) and the institutions of the European Union for equal pay for work of equal value. It is also clear that the principle of equal pay for work of equal value is reflected in the Icelandic legislation. This raises questions about the implementation of the equal pay principle in international, European and Icelandic legal contexts and its practical application. While direct discrimination, when a woman is paid less than a man for the same work or work of equal value, is relatively rare due to strong laws prohibiting it, a more persistent problem is the undervaluation of women's work, with professions of women being paid less for work of equal value than other professions dominated by men. It is, for example, because of the systematic undervaluation of women's work, discriminations in pay for men and women came the focus of International Labour Organization (ILO).

Iceland has topped the World Economic Forum's Gender Gap Reports for the past 9 years. The main reasons for this high ranking are equal rights and equal opportunities in education, good health care, as well as women's success in increasing their political influence over the last three decades. The weakest side, however, is gender equality in the labour market and persistence of the gender pay gap for work of equal value continues to exist, despite legislation promoting equal pay for work of equal value. Therefore, it is important to analyse the laws on equal pay to determine if they play a role in the failure to close the gender pay gap.

Now, more than 40 years after the first gender equality act was adopted in Iceland promoting equal pay for work of equal value, a new legislation on equal pay came to force on 1st of January 2018, the Equal Pay Standard. This new amendment to the provision on equal pay, aims to eliminate the gender pay gap before the year 2022. The Equal Pay Standard has gained worldwide attention and brings high hope for closing the gender wage gap.

The Icelandic labour market is gender segregated with extreme feminisation in certain occupations and overall, pay is lower in female dominated sectors than in male dominated sectors. This aspect of the gender wage gap is worth focusing on in conjunction with other aspects which are believed to have implications for the gender pay gap such as collective bargaining, transparency in pay systems and job evaluation.

We live in a gendered world. People all over the world find that the basic conditions of their lives, for example their work conditions, are fundamentally shaped by their identification as belonging to particular sex or gender groups. This can explain the gender focus on equal pay provisions, but it also raises questions about possible limitations to the principle due to this gender explicit approach. Most people have, apart from gender, multiple identities, for example an age, a sexual orientation and an ethnicity. Many have or acquire a religion or a disability as well. Thus, discrimination can be multiple and experienced on a combination of more than one ground. Even though multiple discrimination happens in all spheres of social life, the labour market seems to be the sector where multiple discrimination occurs often. In this thesis the scope of the principle of equal pay for work of equal value will thus be addressed in the light of multiple discrimination in an international, European and Icelandic context, and the possible lack of protection to women facing multiple discrimination.

1.2 Purpose of the thesis

The purpose of this thesis is, firstly, to describe how the principle of equal pay for work of equal value is promoted in international human rights law, EU- law and Icelandic legislation as a legal response to the gender wage gap. In that context, a new amendment to the Icelandic Equality Act, the Equal Pay Standard, will be analysed, followed by some concluding remarks on its potentials of closing the gender wage gap in the Icelandic labour market. Thus, the implementation and enforcement of the principle of equal pay for work of equal value will be addressed. Furthermore, the Icelandic labour market will be analysed from a gender perspective to be able to assess how the principle of equal pay addresses gender segregated labour market and if the undervaluation of women's work is in contrast to the principle of equal pay.

Finally, the purpose of this thesis is to address the scope of the principle of equal pay for work of equal value, its possible limitations, and if those limitations hinder substantive equality to be reached in the labour market.

The overall aim of the thesis is to add to existing knowledge on the principle of equal pay for work of equal value and how to further narrow, and hopefully someday close, the gender wage gap in the Icelandic labour market.

1.3 Research questions

In this thesis four aspects will be analysed. Firstly, if the implementations of the principle of equal pay for work of equal value in Icelandic legislations is in compliance with the promotion of the principle in international and EU-law and if its enforcement is effective, especially in regard to legal certainty and transparency in pay systems. Secondly, how the Equal Pay Standard will address wage discrimination in the Icelandic labour market and its possibilities in closing the gender wage gap in Iceland. Thirdly, how and why undervaluation of women's work in the Icelandic labour market keeps the gender wage gap alive and if it is contrary to the principle of equal pay. Finally, if the principle of equal pay for work of equal value protects women discriminated in wages on multiple grounds.

1.4 Method

This thesis is based on the general accepted notion that the principle of equal pay for work of equal value needs to be correctly implemented and effectively enforced, if equality is to be promoted and pay discrimination is to be addressed efficiently. Thus, the implementation of the Icelandic provision promoting the principle of equal pay for work of equal value will be analysed with regards to international human rights law, ILO conventions 100 and 111 and EU-law on the subject. Then its effectiveness will be analysed regarding legal certainty of the concept work of equal value and transparency in pay determination and pay systems. Also, the limitations of the principle will be analysed by addressing its scope through various legal instruments.

Part of the thesis is descriptive, addressing how the principle of equality and non-discrimination and the principle of equal pay for work of equal value are promoted in international human rights law, EU-law and Icelandic law. Another part of the thesis is analytical where an attempt is made to analyse how the implementation and the enforcement of the principle of equal pay for work of equal value affects the gender wage gap.

This thesis therefore largely relies on legal dogmatic method and thus legal sources as international human rights instruments, EU-law and Icelandic legislation along with rulings and recommendation of various monitoring bodies and courts. Other sources eg. writings of scholars in the field of international human rights law, labour law and EU-law will also be used and reports and surveys from Icelandic, European and international institutions.

In chapter 2 the gender pay gap will be defined and its causes addressed, highlighting gender segregation, undervaluation of women's work, women's participation in the labour market in relations to family responsibilities and transparency in wage determinations. Also, multiple discrimination will be discussed in relations to other pay gaps than due to gender and furthermore the benefits of closing the gender pay gap or any other pay gaps for that matter. In chapter 3 the Icelandic labour market is discussed from a gender perspective; the resilient gender pay gap, high portion of women in part time jobs due to family responsibilities and the extreme feminisation in a gender segregated labour market. Furthermore, multiple discrimination will be addressed as well as wage determination and transparency. In chapter 4 the promotion of the principle of equal pay for work of equal value in international law will be addressed. The main focus will be on the International Covenant on Social, Economic and Cultural Rights (ICESCR), Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) and ILOs Equal Remuneration Convention, 1951 (No. 100) together with ILOs Discrimination (Employment and Occupation) Convention, 1958 (No. 111). In chapter 5 the promotion of the principle of equal pay for work of equal value in EU-law will be addressed highlighting Article 157 of the Treaty on the Functioning of the European Union (TFEU) and the 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). Apart from the above-mentioned EU legal framework, also the case law of the CJEU will be discussed because of its part in clarifying the concepts of the equal pay principle. In chapter 6 the promotion of the principle of equal pay for work of equal value in Icelandic

legislation will be addressed, focusing on article 19 of the Act on Equal Status and Equal Rights of Women and Men No. 10/2008 and the Equal Pay standard. In chapter 7 the research questions will be answered by analysing the previous chapters leading to conclusions and recommendation.

1.5 Limitations

Firstly, addressing undervaluation of women's work is complex and difficult to analyse. The reason is that the undervaluation of women's work can both be seen as structural problem and a pay discrimination. In this thesis the focus is on addressing pay differences between men and women (and potentially between women) due to pay discrimination contrary to the principle of equal pay for work of equal value. Therefore, the focus is on transparency in pay systems rather than changing the pay system as a whole. However, that does not mean that changing the pay system could not be efficient, but of course it is a difficult task. These two aspects are, however, very interrelated and the discussion at times touches on their link and thereby acknowledges that the fight for equal pay also requires efforts that goes beyond the implementation of the principle of equal pay for work of equal value.

Secondly, because of length limits the discussion of the complex causes of the gender pay gap was not addressed as deep as the author would have wanted.

Thirdly, this thesis focus is on gender segregated labour markets, horizontally opposed to vertically. Vertically segregated market can attribute to the gender pay gap, even though the horizontal factor weights more. Vertically segregation can partly be tackled with special measures such as gender quotas in companies. However, increasing women in management positions is more connected to attitudes and stereo-types and equal opportunities than actual pay discrimination.

Fourthly, due to length limits there is little discussion on the Icelandic Gender Equality Committee and other monitoring bodies as for the Centre for Gender Equality.

Finally, this thesis focuses, as mentioned, primarily on the implementation of the equal pay principle in Icelandic legislation and its effective enforcement. When discussing effective enforcement two key factors are hightailed eg. transparency and legal certainty. Other aspects are of course relevant. The author selected to focus on these two aspects, firstly because they are highly relevant in the Icelandic labour market and because of the European Union focus on transparency, but non-transparency in pay systems and wage determination are believed to be one of the most contributing factors to the gender pay gap.

1.6 Definitions

In this thesis, there are some concepts and terms used more frequently than others. The basic definitions of these concepts are presented here but will be further explained in more details in relevant chapters in the thesis.

Affirmative action/special measures/positive action

Measures targeted at a particular group and intended to eliminate and prevent discrimination or to offset disadvantages arising from existing attitudes, behaviours and structures. In this thesis affirmative action are referred to as special measures. The most common special measures are positive action, preferential treatment or quota systems. These special measures can be used to advance e.g. women's integration into e.g. employment.

Burden of proof

If a person files a legal complaint, it is in principle up to him or her to prove that he or she has been a victim of discrimination. However, in pay discrimination cases, the burden of proof shifts to the employer. This is primarily based on the fact that the employer has better access to statistics and pay information than the employee. Thus, the employer has to prove that the pay difference is justified and not because of gender.

Equal pay for work of equal value

Equal pay for work to which equal value is attributed (without discrimination on grounds of gender) with regard to all aspects of pay and aspects of remuneration.

Gender equality

The concept that all human beings are free to develop their personal abilities and make choices without the limitations set by strict gender roles; that the different behaviour, aspirations and needs of women and men are considered, valued and favoured equally.

Gender pay gap

The gap between the average earnings of men and women, across an organisation or the labour market, as a percentage of the male earnings.

Occupational segregation

The concentration of women and men in different types and levels of activity and employment, with women being confined to a narrower range of occupations (horizontal segregation) than men, and to the lower grades of work (vertical segregation).

Direct and indirect discrimination on the grounds of gender

Direct discrimination occurs when a person is treated less favourably because of his or her gender. Indirect discrimination occurs where a law, regulation, policy or practice, which is apparently neutral, has a disproportionate adverse impact on the members of one sex, unless the difference in treatment can be justified by objective factors.

Pay/Remuneration/Salary

In this thesis the concepts of pay/remuneration/salary are used in the same broad way, as ordinary basic pay plus any consideration, in cash or in kind, which worker receives in respect of his/her employment. Earnings are defined as "the remuneration in cash and in kind paid to employees, as a rule and at regular intervals, for time worked or work done, together with the

remuneration for time which was not worked.” The term pay/remuneration has been broadly interpreted both in international, EU and Icelandic law. Wages, however, is distinguished narrower, meaning the basic wage. However, in Icelandic legislation wages are interpreted broadly.

2. The Gender pay gap

2.1 Definition and measurements

The Gender pay gap (GPG) measures the difference between male and female average earnings, across an organisation or the labour market, as a percentage of the male earnings. For instance, if women's monthly average earnings are 75 % of men's monthly earnings, then the gender pay gap is 25%. These numbers are referred to as "unadjusted" pay gap. The longer period measured the larger the gender pay gap becomes. Thus, the gender pay gap can refer to differences in men's and women's hourly, weekly, monthly or yearly earnings. This shows how women's earnings can negatively be affected by difference in period, for example, because women are more likely to work part-time jobs and less likely to receive overtime pay because of family responsibilities.¹

Sometimes the measurements consider, for example, differences in hours worked, occupation chosen and education displaying what has been called "adjusted" pay gap. In Iceland, it is generally accepted that when comparing comparable groups of women and men, it is necessary to consider important explanatory variables such as the nature of the work, qualifications, length of employment and working hours.²

Organisations that measure the gender pay gap include the European Union (EU), OECD and the International Labour Organisation (ILO). Care should be taken in comparing measurements from different organisations as they do not all use the same definition. For example, within the OECD, the gender pay gap is defined as the difference between median earnings (i.e. not the average as used by the EU) of men and women relative to median earnings of men.³

Because the different methods used to measure the gender pay gap, and the premises on which each study is based, the outcome can be influenced. It is therefore important that, on national level, governments and the social partners agree on a means of measuring gender-based wage differentials. However, despite what methods used the measurements always show a considerable and persistence gender pay gap in women's disadvantage, provoking reaction in the international, EU and domestic forums.

2.2 Causes of the GPG

The Gender pay gap is both a simple and a complex term. It can be considered rather simple to simply measure the pay gap between men and women⁴ but capturing the complex aspects on the labour market that lead to women's disadvantage is more difficult.

¹ Oelez, Olney, Tomei (2013), p. 12.

² Icelandic Ministry of Welfare, (2013), p. 5.

³ World Economic Forum (2017) and European Commission (2011), p. 3.

⁴ Even if this seems simple there can be major problems in providing good data on the size of the gender pay gap, especially on a global level. This is because of a lack of gender disaggregated earnings data, a lack of associated information on working hours and disagreements about whether it is better to present the raw gender pay gaps, to compare median or average earnings between men and women, or to adjust raw gaps for differences in the characteristics. Source: Koukiadaki and Rubery, (2016), p. 2.

Sometimes, women and men are not paid the same wages although they perform the same work or work of equal value. This may be because of direct discrimination, where women are simply treated less favourably than men. However, more often, discrimination occurs indirectly, when a policy or practice that, although not intentionally designed to discriminate, results in unequal treatment between men and women. Both types of discrimination are prohibited by international, EU-law and Icelandic law. It is also important to deal with the persistent underlying causes of the GPG because there are multiple and complex links between the principle of equal pay for men and women, and the position and status of men and women more generally in employment and society.⁵

Other causes to the GPG than above mentioned discrimination, are for example different choice of work, workplace practises and pay systems, undervaluation of women's work, vertical and horizontal segregation of the labour market, gender roles and traditions and balancing work and family responsibilities. The scope of the present chapter does not permit an in-depth analysis of all these complex causes of the gender pay gap. However, some of the causes will be highlighted such as horizontal segregation that confine women and men to different parts of the labour market. In some cases, women (and men) in female dominated occupations are paid less than men (and women) in male dominated occupations. This often occurs in gender segregated labour markets where women's work is undervalued. Such gender segregated labour markets can therefore also lead to pay discrimination. Other causes of the gender pay gap will also be highlighted, such as the vertical segregation of women and men into different positions in organisational hierarchies where women constantly hit the "glass ceiling"⁶, difficulties for women balancing work and private life and non-transparent pay systems.⁷

2.2.1 Gender segregated labour market

Occupational segregation is the distribution of workers across and within occupations, based upon certain characteristics, most often gender. Gender segregated labour market refers to the unequal distribution of men and women in the occupational structure and can be either horizontally or vertically.⁸ Horizontal segregation refers to the concentration of women and men in different sectors and occupations and vertical segregation describes the clustering of men at the top of occupational hierarchies and of women at the bottom.⁹

The debate on the root causes of gender segregation in employment dates back to the 1970s and after decades of research, most scholars would agree that there can be no single-factor explanation for such gender segregation. The explanations are found in factors such as, working hours, comparative biological advantages, under-investment in human capital (schooling or training), differential income roles, preferences and prejudices, socialisation and stereotypes,

⁵ ILO (2012), Para:713

⁶ The invisible barrier arising from a complex set of structures in male-dominated organisations which prevents women from obtaining senior positions has been described as glass ceiling. Source: European Commission (1998), p. 33.

⁷ Foubert (2010), Foreword.

⁸ Underrepresentation at the top of occupation-specific ladders was subsumed under the heading of "vertical segregation", whereas it is now more commonly termed "hierarchical segregation".

⁹ Bettio and Verashchagina (2009), p. 30.

entry barriers and organisational practices. These factors, one or more combined, can lead to a gender segregated labour market which can lead to pay discrimination.¹⁰

In recent years the focus, in Europe, has been on four aspects as the main cause to gender segregated labour market: the demand for shorter or flexible hours of work because of family responsibilities, choice of study field, stereotypes and covert barriers and biases in organisational practices, including collective bargaining procedures. As mentioned, educational choices of women lead to occupational segregation. For example, since the majority of individuals who study to become nurses are women, this profession is over-represented among women. Similar findings can be observed in other sectors, especially those occupations related to care work and education.¹¹

Recent research confirms that sectoral gender segregation on the labour market accounts for a significant proportion of the gender pay gap in all EU countries: in other words, women are entering relatively low paid sectors.¹²

2.2.2 Undervaluation of women's work

Employment segregation matters if it submits unequal outcomes or interferes with an efficient functioning of the labour market. It is problematic that the more women found in a certain occupation, the lower the pay is for all workers in that type of job.¹³ Undervaluation of women's work is difficult to tackle directly. In Iceland, this has been of primary concern among low pay women workers and women working in sectors such as health-care and education. In general, care work is undervalued because it may be perceived as a natural female attribute rather than a skill to be acquired and cultivated.¹⁴

Undervaluation of women's work can be defined as "*higher quality of labour for a given wage*" and see it as „...*a thread which links together the three causes of the gender pay gap: occupational segregation, discrimination and women's unequal share of family responsibilities*". Two groups of factors may convert segregation into undervaluation: respectively, the social construction of value and payment systems.¹⁵ Firstly, segregation makes comparison difficult. It is much more difficult to compare the relative skills or contributions of women and men directly across sectors. Segregation can also disguise the influence of gender on wage differentials between sectors and organisations on pay and hierarchies within firms. Secondly, women's pay may be lower than men's if there is no job-grading system in place; if there are separate systems related to different kinds of jobs; and if the system does not reflect the kind of skills found in women's as well as in men's jobs. Also, pay systems are often based on rewarding the male model of continuity of employment and long hours of work.¹⁶

¹⁰ Bettio and Verashchagina (2009), p. 8, p. 38 and p. 45.

¹¹ ILO (2016), p. 31.

¹² Boll, Leppin, Rossen, and Wolf (2016), p. 12.

¹³ Oelez, Olney, Tomei (2013), p. 12.

¹⁴ ILO (2016), p.31.

¹⁵ Grimshaw and Rubery (2007), p. 10.

¹⁶ Ibid, p. 14–15. See also Bettio and Verashchagina (2009), p. 46-47.

Subsequently, the over-representation of women in sectors where their work is undervalued results in a gender pay gap.¹⁷ If undervaluation is defined as “higher quality of labour for a given wage”, it largely coincides with discrimination and thus to be contrary to the principle of equal pay for work of equal value. While direct discrimination, when a woman is paid less than a man for the same job, is relatively rare due to strong laws prohibiting it, a more persistent problem is the discrimination found in undervaluing women's work, with women being paid less for a job of equal value due to careers dominated by women being undervalued as a whole.¹⁸ In respect of the contributions of single characteristics, gender segregation along with women’s part time work, discussed in the next chapter, are predominantly widening the GPG.¹⁹

2.2.3 Women’s participation in the labour market

Overall, employment rates of women are lower than men, leading to gender employment gaps.²⁰ Recent research confirm that non-standard forms of employment eg. part-time and temporary contracts are associated with lower hourly wages which increases the gender pay gap.²¹ In Europe, this is the case despite the fact that, women are increasingly well qualified and even out-performing men in educational attainment.²² However, the trouble of balancing work and family life has a negative effect on women’s participation in the labour market and one of the factors accounting for the gender pay gap can be traced to the unequal division of unpaid labour in the home shaping patterns of segregation, working time schedules and access to promotion.²³

It’s a fact that women typically spend disproportionately more time on unpaid care work than men.²⁴ This is in addition to their paid activities, thus creating the “double burden” of work for women.²⁵ Although women generally work fewer hours in the paid labour market than men, when women’s paid and unpaid work is taken into account women work an average of 64 hours per week, compared to 53 hours worked by men, on average women spend 26 hours a week on care activities, compared to nine hours spent by men.²⁶ Thus, family responsibilities tend to lie on women and the difficulty to combine work with family responsibilities result in women in need for shorter and more flexible hours of work. When the search for shorter working hours becomes a choice of part-time work, it limits the choice of occupation, for example hindering entry into occupations featuring high or irregular work hours and workload.²⁷ Well-designed work-life balance policies can reduce the gender pay gap.²⁸

¹⁷ ILO (2016), p.31.

¹⁸ European commission (2011).

¹⁹ Boll, Leppin, Rossen, and Wolf (2016), p. 61.

²⁰ Bettio and Verashchagina (2009).

²¹ Boll, Leppin, Rossen, and Wolf (2016).

²² Bettio and Verashchagina (2009).

²³ O’Reilly, Smith, Deakin and Burchell (2015), p. 301. See also Rubery, J., Grimshaw, D., Figueiredo, H. (2005), p. 184–213.

²⁴ This has been referred to as division of labour of paid and unpaid work between women and men in private and public life. Source: European Commission (1998), p. 19.

²⁵ Bettio and Verashchagina (2009), p. 8.

²⁶ Eurofund (2013), p.9.

²⁷ Bettio and Verashchagina (2009), p. 8.

²⁸ European commission (2017), P.23.

In Europe, parenthood has a visible effect on the employment rate of women with children under the age of 6, with 38.9% of mothers working part-time as compared to 5.8% of fathers. The low employment rate of older women (aged 54-64) may also reflect the fact that women are more likely than men to take responsibilities for the care of the elderly with long-term care needs, reducing their working hours or exiting employment altogether.²⁹ It is of high concern that reduced labour market participation, for example because of family responsibilities, and overall gender pay gaps, can later contribute to high pension gaps for women.³⁰ This puts women at higher risk of poverty or social exclusion in old age.³¹

In Europe, increasing women's participation in the labour-force and raising their employment rate are necessary to meet the Europe 2020 headline target for 75% of the population aged 20-64 to be employed by 2020. Increasing the participation of women in the labour market are considered to provide a boost to economic growth based on the fact that GDP per capita losses attributable to gender gaps in the labour market have been estimated at up to 10% in Europe.³² Continuous efforts are also needed to tackle gender gaps and move towards a dual model where both men and woman can be earners and carers.³³

2.2.4 Wage-setting and transparent pay systems

Differences in wage structures play a large part in accounting for and perpetuating the gender pay gap. When wages are determined, the aim is to look closely at the value placed on skills, responsibilities, effort and other job components and to ensure that any pay differentials between women and men are justifiable and not based on gender.

The principle of equal pay for work of equal value addresses the occupational differences component of the gender pay gap at the point at which it occurs: when pay rates are set in an occupation. In a gender segregated labour market, a gender mainstreaming approach in wage setting is of great importance. This approach helps to move the focus of the debate about pay inequalities away from the personal characteristics or perceived deficiencies of women to addressing discrimination in institutional arrangements, social norms, market systems and pay policies.³⁴ Often the basic wages are the same but when adding other benefits to the basic wage discrimination often occurs. Additional benefits can sometimes make up increasingly more of the overall earnings package.

Wage transparency can enable employees and employers to reduce the gender pay gap and pay transparency is important in order to promote gender-neutral wage-setting structures. With a transparent pay system, it is also easier to compare pay and it is often where there is a range of additional payments, allowances and bonuses that discrimination takes place. Transparency in pay system means that everyone including managers, employees and trade unions should understand the pay systems. It's important that employees are able to understand how each

²⁹ European Commission (2017b), p.3.

³⁰ Further analysis of the drivers of the pension gap can be found in the European Semester thematic factsheet on pensions.

³¹ European Commission (2017b), p.5.

³² Cuberes and Teignier (2016), p. 22.

³³ European commission (2017b), p.1.

³⁴ Rubery, Grimshaw and Figueiredo (2002), p.4.

element of their pay packet contributes to their total earnings in any pay period. Transparent pay system based on gender neutral job evaluation that covers all employees might help eliminate unlawful pay gaps. Nonetheless, it is important to realise that the introduction of pay transparency targeting possible gender pay discrimination is a complex matter due to the fact that gender pay discrimination might flow from subtle and hidden mechanisms. Pay transparency, therefore, places high demands on the information to be provided in order to detect these mechanisms.³⁵ It can also enable employees, employers or social partners to take appropriate action. An awareness of different pay levels within a company can make it easier for individuals to challenge pay discrimination before national courts.³⁶

The European Commission considers that obscure pay structures and a lack of available information about pay levels of employees performing the same work or work of equal value are major contributing factors to the persistent gender pay gap. It therefore adopted, in 2014, the Pay Transparency Recommendation³⁷, requesting Member states to put in place specific measures to promote wage transparency.

In a report about Pay transparency in the EU, a legal analysis of the situation in the EU Member States and the EEA-countries³⁸ it is stated that while many countries have recently started to implement these measures, only a few countries already have some experience with at least one of the instruments. Norway was, in the report, considered to have the most progressive employee's information right and are mentioned as the country with the best practise supporting an employee's information right concerning gender pay levels for the same work or work of equal value. On the basis of the Norwegian Gender Equality Act employees have the right to request pay data of individual comparators at company level. The data received must be kept confidential and the comparators must be informed, but do not have to consent to disclosure. Trade unions' representatives may seek information in support of the individual according to the specifics laid down in the applicable collective agreement.³⁹ When the report was written the Equality Pay Standard had not come to force in Icelandic legislation.

2.2.5 Role of the Social partners and collective bargaining

The gender pay gap is lowest in countries where overall equality is higher and in countries where collective bargaining coverage is high and in companies that are bound to a collective agreement.⁴⁰ An effective method of achieving equal pay for work of equal value is through the collective bargaining process. Thus, collective agreements can play a significant role in promoting gender equality and in reducing pay inequalities between women and men. Examining collective agreements from the perspective of the principle of equal pay for work of equal value can be a useful towards addressing the issue through the collective bargaining

³⁵ Veldman (2017), p. 9.

³⁶ European Commission (2017c), p. 3.

³⁷ European Commission Recommendation on strengthening the principle of equal pay between men and women through transparency, C (2014) 1405 final.

³⁸ Iceland, Liechtenstein and Norway

³⁹ Veldman (2017), p. 26.

⁴⁰ Pillinger (2014), p. 9.

process. EU law requires member states to ensure that “provisions appearing in collective agreements, wage scales, wage agreements or individual contracts of employment which are contrary to the principle of equal pay shall be, or may be, declared null and void or may be amended”.⁴¹

Governments and the social partners can have a direct impact on wage levels, and therefore on the gender pay gap, by, for example, setting minimum wages or/and with wages in the public sector. As mentioned, in countries where collective bargaining is strong, inequality tends to be lower and this also translates into lower pay gaps. Generally, however, the presence of unions tends to be weaker in sectors where women are overrepresented. For this reason, minimum wages are also an effective policy to help reduce the gender wage gap between men and women at the bottom of the wage distribution.⁴² The public sector is a major employer of women, wages in key female-dominated professions in this sector (teachers and nurses, for instance) can greatly influence the overall gender pay gap.⁴³

Company level bargaining is also of an importance, setting equality objectives for companies particularly where these have been put forth in legislation. This can, for example, be in the form of negotiating workplace pay audits/surveys, flexible working time and reconciliation of work and family life. The best gender equality outcomes are found where sectoral and company bargaining co-exist.⁴⁴ However, there has been a general trend towards decentralised and individualised pay-setting at company level in Europe. This has happened on the expense of sectoral level bargaining, leading to greater fragmentation.⁴⁵

2.3. Multiple discrimination

Most people have, apart from gender, multiple identities: an age, a sexual orientation and an ethnicity. Many have or acquire a religion or a disability as well.

„Ethnic minority women, older women, black women and disabled women are among the most disadvantaged groups in many EU Member States. Similar multiple or intersectional discrimination is experienced by gay or lesbian members of ethnic minorities; disabled black people; younger ethnic minority members or older disabled people “⁴⁶

Thus, discrimination can be multiple and experienced on more than one ground. Even though multiple discrimination⁴⁷ happens in all spheres of social life, the labour market seems to be the sector where multiple discrimination occurs often.⁴⁸ For example, women with disability often

⁴¹ 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), Article 23(b).

⁴² ILO (2016), p.31.

⁴³ European Commission (2017), p. 22 and Boll, Leppin, Rossen, and Wolf (2016).

⁴⁴ Pillinger (2014), p. 10.

⁴⁵ Ibid, p. 6.

⁴⁶ Fredman, (2005), p.13-18.

⁴⁷ Multiple Discrimination has been given several definitions. However, it is generally accepted that the term describes the first of three situations where a person can be subjected to discrimination on more than one ground. The other two situations are compound discrimination and intersectional discrimination. Source: European Commission (2007), p. 16.

⁴⁸ European Commission (2007), p. 5.

experience unequal hiring and promotion conditions, unequal access to training and unequal pay for equal work.⁴⁹ Also women with disabilities face a higher risk than men with disabilities of poverty and social exclusion. The consequences of multiple discrimination can result in poverty, for example having a migrant background affects employment, education and living conditions and people with foreign-background are twice as likely to suffer from poverty or exclusion as EU-born people.⁵⁰

Multiple discrimination can be categorized as additive discrimination and intersectional discrimination. Additive discrimination occurs where a person suffers discrimination on multiple grounds, but each element making up this discrimination can be kept separate. Intersectionality, however, denies that identity can be dissected into “mutually exclusive categories of experience and analysis”, instead asserting that identity is a complex combination of different categories. Both examples of multiple discrimination are concerned with experiences of discrimination based on more than one ground, but only intersectional discrimination is able to offer a sufficient analysis of the lived experiences of intersectional identity.^{51 52} Also, analysing power relationships makes it possible to analyse which kinds of differentiation deserve attention. Thus, intersectionality is more than just a matter of identity. This does not mean that identities are not important, more that they should be seen both as a manifestation of the intersection of multiple hierarchies and a way of maintaining such hierarchies.^{53 54}

In Europe, equality law often does not adequately address the multiplicity of aspects that go to make up a person’s identity and equality legislations tends to treat people with a „single ground“ approach most often their gender or ethnicity.⁵⁵ This single ground approach have been criticised for not providing adequate protection⁵⁶ and intersectional analysis and approach considered more effective handling of multiple discrimination.⁵⁷ The more a person differs from the norm, the more likely she is to experience multiple discrimination, the less likely she is to gain protection.⁵⁸ Thus, multiple, but especially intersectional, discrimination is problematic because often its complex nature is focused to a single ground (gender or race) and consequently falls outside of equality protection.

Multiple discrimination can explain cumulative disadvantage leading to vulnerability of ethnic minority women, older women, black women and disabled women which are among the most disadvantaged groups in many EU Member States. Similar, cumulative disadvantage is experienced by gay or lesbian members of ethnic minorities, disabled black people, younger ethnic minority members or older disabled people. Thus a particular attention needs to be given

⁴⁹ Lodovici and Orlando (2017), p. 26.

⁵⁰ European commission (2017), p. 27

⁵¹ Smith (2016), p.76-80.

⁵² There are different ways to define multiple discrimination. See more in Fredman (2016), p. 27-29.

⁵³ MacKinnon, (2013), p. 1019-1023.

⁵⁴ Fredman (2016) p. 31. See also Cho, Crenshaw and McCall (2013), p.792 and Tomlinson (2013), p. 993-1012.

⁵⁵ European Commission (2007), p. 17.

⁵⁶ Crenshaw (1991), p. 1241- 1299.

⁵⁷ The intersectional methodological approach has mainly received attention in the jurisdictions of the USA, Canada, Ireland and the United Kingdom Source: European Commission (2007), p. 17.

⁵⁸ Fredman (2005), p. 14.

to the labour market participation of vulnerable categories of women, such as older women, single parents, women with a disability, women with a migrant background and women from ethnic minorities.⁵⁹ The conclusions of a report on Intersectional discrimination in EU gender equality and non-discrimination law is that it is possible to incorporate the perspectives of intersectionality into EU law as it currently stands without requiring new amendments, although it would be of considerable assistance if the scope and reach of the directives were to be harmonised.⁶⁰

2.4 “Other” pay gaps

For historical reasons, the focus has been on gender wage gaps but there are other differences in income between other various groups to be found. People from ethnic minority backgrounds and disabled people are, for example, still paid less on average than their counterparts. Previous research has shown that people from ethnic minorities tend to earn less, overall, than Caucasian white people. This is often associated with social disadvantage and is arguably also caused by discrimination.⁶¹

Another factor is a gap in wages between different groups of women. For example, women with disabilities are more likely than men and women without disability to be confronted with disadvantage, exclusion and discrimination in their work.⁶² In general, women from ethnic background are also paid less than Caucasian women and a recent study in the UK found that female Bangladeshi- and Pakistani immigrants both experienced around a 12% pay gap compared with Caucasian British women. However, the same study also demonstrated that all other groups from an ethnic background, either experienced no pay gap or a pay advantage. For example, black African British women had a particularly large pay advantage, earning 21% more than Caucasian British women.⁶³ Following from this, it has been argued that it is also so much variation in lifestyles and economic behaviour within the male and female populations that simple comparisons of average male and female pay are increasingly irrelevant.⁶⁴

Drawing attention to these different sorts of pay gaps is not meant to trivialise the gender pay gap in any way. The point is that by only addressing the gender pay gap we tend to disregard specific groups of people, whether they comprise of women or men.

⁵⁹ European commission (2017b), p.3.

⁶⁰ Fredman, (2016), p.87.

⁶¹ Longhi and Brynin, (2017), p. 7.

⁶² Lodovici and Orlando, (2017), p. 26.

⁶³ Longhi and Brynin (2017), p.8.

⁶⁴ Shackleton (2008), p. 14.

2.5 Why the need to close the gender (or any other) pay gaps?

Creating a fairer and more equal society by closing pay gaps benefits everyone. Receiving equal pay for equal work or work of equal value is a human right and by closing, for example, the gender pay gap the levels of poverty decreases.⁶⁵

Beside the human right approach, there is also a strong economic and business argument for closing the gender pay gap. Firstly, increasing the participation of women in the labour market are considered to provide a boost to economic growth to every country⁶⁶ because one obstacle of women's participation in the labour market are, beside of family responsibilities, gender pay gaps. Secondly, it is also good business for companies to implement equal pay for work of equal value. Also, pay systems that are transparent will promote gender equality without the need to positively discriminate and they demonstrate that companies value their entire workforce. This sends positive messages about a company's corporate social responsibility. Fair and non-discriminatory systems represent good management practice and contribute to the efficient achievement of business objectives by encouraging maximum productivity from all employees.

⁶⁵ European commission (2011), P. 8.

⁶⁶ European commission (2017b), P. 3.

3. Icelandic labour market from a gender perspective

3.1 Introduction

Iceland has topped the World Economic Forum's Gender Gap Reports for the past years. The main reasons for this high ranking are equal rights and equal opportunities in education, good health care, as well as women's success in increasing their political influence over the last three decades.⁶⁷ The weakest side, however, is gender equality on the labour market. It is pointed out that the Gender Pay Gap (GPG) in the Icelandic labour market is a concern and that women still seem to have limited representations in executive management positions.⁶⁸ The GPG has a strong profile both in the public debate and on the policy agenda in Iceland and one of the priorities of the Government action plan to implement gender equality for the period 2016-2019 is to promote equal pay for equal work.⁶⁹ The persistence of the GPG has initiated several policy initiatives targeted towards closing the gender pay gap and Iceland has emphasised on improving the effectiveness of equal pay legislation.

3.2 The gender wage gap

The unadjusted gender pay gap, in the Icelandic labour market, was 16.1% in the year 2016, and 17% in the year 2015. The GPG was approximately 16% in the private sector and the central government, but 8% in the local government. In Iceland, the GPG is based on the difference of hourly earnings of men and women as a proportion of men's hourly earnings. The hourly earnings include basic wages, regular bonuses and overtime payments. Working hours partly explain why men's mean total earnings were higher than women for full-time employees. The gender pay gap was thus less when comparing basic earnings, where overtime pay is excluded, for full-time employees or 12% but 15% when comparing regular earnings without overtime pay but with regular bonuses.⁷⁰

3.3 Women's work participation

3.3.1 Introduction

Iceland has a long tradition for a high participation rate in the labour market and more than 80% of the population 16-74 years old are active in the Icelandic labour market.⁷¹ In all EU countries, women's labour participation is lower than men's, in 2016 with a 76.8% employment rate for men and 65.3% for women.⁷² Women's participation in the Icelandic labour market was never higher than in 2016, or almost 80% while the rate was 87% for men.⁷³ Overall, women in

⁶⁷ World Economic Forum (2017).

⁶⁸ World Economic Forum (2011).

⁶⁹ Icelandic Parliamentary Resolution on Gender Equality action programme 2016-2019.

⁷⁰ Statistics of Iceland (2017).

⁷¹ Olafsdottir and Rögnvaldsdottir (2015), p. 28

⁷² European Commission (2017b), p. 1-2.

⁷³ Statistics of Iceland (2017b).

employment tend to work fewer hours, work in lower-paying sectors, and occupy lower-ranking positions than men, resulting in considerable gender pay and earnings gaps.⁷⁴

In Iceland, the participation of women was fairly high before the 1960's, approx. 34%. The government, supported by a strong women's movement, endorsed the dual earner mode instead of the bread winner model by deciding, for example, in 1957 that married women should only pay a 50% income tax, which meant that 50% of their wages was tax-free.⁷⁵ This act is an example of special measures, to simplify married women entering the labour market.

Icelandic women entered the labour market at an increased rate in the 1970s. The role of the women's movement and the social partners in shaping a more gender equal society is of great importance. They focused on how to remove barriers entering the labour market and focused on better working conditions for women. Equal pay, child care, better organisation of the school day, equal sharing of housework, reproductive rights and parental leave were put on the agenda.⁷⁶ The labour force participation rate of women in Iceland grew for the next few decades. This development was met by the government with, for example, childcare, a legal right for parents to return to their jobs after childbirth and a nine-month parental leave system where fathers were given three months' leave, mothers three months and the parents were given three months to share. Parents who were active in the labour market were paid 80% of their average salaries during the leave.⁷⁷ The aim of the Act is to ensure the child's access to its parents, and to enable both women and men to reconcile work and family life. However, the gap between the 9-month parental leave and daytime child care have been difficult to bridge, since Icelandic kindergartens, in general, admit children from 18-24 months of age and sometimes later due to waiting lists.^{78 79} In light of the gender pay gap, it is often more economically viable for the family if the woman rather than the man takes care of the children after parental leave ends.⁸⁰

However, even though granting parental leave to both parents does not result in as much increase in sharing of family responsibilities as aimed for, it leads to ideas about masculinity to change among young people which could contribute to the elimination of gender segregation in the labour market in near future.

3.3.2 Part-time work

The term part-time worker means an employed person whose normal hours of work are less than those of comparable full-time workers.⁸¹ A person working 1-35 hours per week are considered a part-time worker.⁸² In 2017, 65% of working women had a full-time job in Iceland, while 86% of men worked full time. This gap reflects the different situation of women and men

⁷⁴ European commission (2017b), p.1.

⁷⁵ Icelandic Parliament: Althingi.

⁷⁶ Webpage of Women's Rights Association (IWRA).

⁷⁷ Act no. 57/1987, now Act no. 95/2000 on parental leave.

⁷⁸ This varies depending on municipalities.

⁷⁹ See for example regulation on kindergarten service for Reykjavik city.

⁸⁰ Valdimarsdottir, (2006), p. 49.

⁸¹ ILO C-175 Part time Work Convention, 1944 (No. 175) Article 1(a).

⁸² Olafsdottir and Rögnvaldsdottir (2015), p. 38.

in working and private life, not least the fact that women are still responsible for most of the housework and caretaking.

The Icelandic gender equality act⁸³ has had an article on the reconciliation of work and family life since the year 2000 which stipulates that employers shall enable women and men to reconcile work life and family responsibilities, with flexible working arrangements such as working hours. However, in 2017, a high percentage of women in the Icelandic labour market worked part time work, 35% compared to 14% of men.⁸⁴ The percentage is higher than the European average which demonstrates that one third (31.4%) of women in employment worked on a part-time basis in 2016, a much higher proportion than the corresponding share for men (8.2%).⁸⁵ Icelandic women do not work part time by choice, the main reason given are family responsibilities. A survey from 2006 confirms the fact that family responsibilities have more influence on women's position on the labour market than on men's, and that men tend more than women to change jobs in order to secure better wages. Participants were, among other things, asked what proportions of their time they devoted to housework and to paid employment revealed a substantial difference between the sexes, with women spending far more time than men on housework and men spending far more time than women in paid employment.⁸⁶

The CEDAW committee⁸⁷ has declared concerns about women's concentration in part-time work in the Icelandic labour market, mainly owing to family obligations⁸⁸ and further recommended that efforts must be made facilitating women's transition from part-time to full-time employment and creating more opportunities for women to gain access to full-time employment.⁸⁹ CEACR has issued a direct request asking the Icelandic Government to provide information on the follow-up to studies on the causes of the gender pay gap, including that women are more likely to work part time or drop out of the labour market to pursue unpaid caregiving jobs, to be overlooked for professional development and to be offered lower wages than men.⁹⁰

The Icelandic Federation of State and Municipal Employees has demanded shorter work week, for example as a response to difficulties in balancing work and family life.⁹¹ The results of a pilot project, that began in 2015, in cooperation with Reykjavik City shortening the work week at chosen workplaces has had positive effects. For example, productivity continued at the same level, despite the work week being five or four hours shorter, and at the same time, costs remained the same. Employees reported greater work satisfaction, fewer sick days, and a greater level of well-being in general. Finally, the effect on equality are important, for example,

⁸³ Act on Equal Status and Equal Rights of Women and Men No. 10/2008, as amended by Act No. 162/2010 and No. 126/2011.

⁸⁴ The centre for Gender Equality (2018).

⁸⁵ The European Commission (2017b), P. 3.

⁸⁶ CEDAW (2007) Consideration of reports submitted by States parties under article 18 of the Convention on the Elimination of All Forms of Discrimination against Women.

⁸⁷ The Committee on the Elimination of Discrimination Against Women; CEDAW committee.

⁸⁸ CEDAW (2016) Concluding observations on the combined seventh and eighth periodic reports of Iceland. Para: 29(b).

⁸⁹ Ibid, para: 30(b).

⁹⁰ Direct Request (CEACR) adopted 2012, published 102nd ILC session (2013).

⁹¹ Webpage of The Federation of State and Municipal Employees.

dividing the family responsibility between men and women more equally and increasing women's possibility of higher future earnings and job developments.

3.3.3 Education

Icelandic women (age 25-64) with higher education have increased 20% from the year 2003 and in 2017 about 50% of women (age 25–64) have higher education. Women's participation in the Icelandic labour market increases with higher education, and in 2017, 95% of women with higher education participated in the labour market.⁹² However, added education does not always reflect in their pay. Pay is lower in sectors dominant by women than in sectors dominant by men and women also get paid less than men in men-dominated sectors.⁹³

3.4 Gender segregation

The Icelandic labour market is gender segregated, both horizontal and vertical. Professions occupied by 2/3 of women are considered female dominant and according to that definition women are dominant in education and parts of the health care sector, for examples among nurses. Women are also dominant among office workers. Men, however, are dominant in industry, agriculture and fishery.⁹⁴

The mean and median of women's earnings is lower than men's in all occupational groups. When comparing occupational groups, one must keep note of that occupations within the same group can vary greatly between the sexes. For example, the most common occupation of women in the occupational group of specialists are primary education specialists, however it is most common for men to be business professionals.⁹⁵

The mean and median of women's earnings for full-time work is also lower than men's in all economic activities. For example, men and women held different occupations in the economic activity of Human health and social activities. About 14% of women in that economic activity were nursing professionals, 13% held some managerial positions, 7% were nursing associate professionals and 6% were medical doctors. On the other hand, 19% of men were medical doctors and the same proportion held a managerial position. Only about 2% of the men were nursing professionals and 1% were nursing associate professionals.⁹⁶

Overall, pay is lower in sectors dominant by women than in sectors dominant by men.⁹⁷ Women working in sectors dominant by women, for example, nurses and midwives have 4-6 years of higher education⁹⁸ not reflecting in their pay compared to other occupations dominant by men with same education and similar responsibility.⁹⁹ However, women also get paid less than men in men-dominated sectors.¹⁰⁰ Wage statistics show that wage setting varies between institutions

⁹² Statistics of Iceland (2018).

⁹³ Olafsdottir and Rögnvaldsdottir (2015), p. 31.

⁹⁴ Ibid p. 29-31.

⁹⁵ Statistic Iceland (2017).

⁹⁶ Ibid, (2017).

⁹⁷ Olafsdottir and Rögnvaldsdottir (2015) p. 31

⁹⁸ Webpage University of Iceland.

⁹⁹ Einarsdottir, (2008), p. 5.

¹⁰⁰ Olafsdottir and Rögnvaldsdottir (2015), p. 31.

on the public market (state) and demonstrates direct connection between the number of women working at the institution. The more women working, the lower the wages.¹⁰¹

Vertical segregation does also exist in the Icelandic labour market. In the World Economic Forum's Global Gender Gap Reports it has been pointed out that women still seem to have limited representations in executive management positions.¹⁰² This is one of the most obvious embodiment of the 'glass ceiling' limiting women's full participation. In Norway, since 2008 it has been compulsory for companies to have 40% female board members. These measures raised the number of women on boards, close to 38 %. This was not unnoticed and in 2010, legislation promoting gender quota for company boards came into force, in Iceland, aiming for equal representation of men and women in company's boards. The provision stipulated that companies with more than 50 employees must have at least 40% of both sexes represented on their boards by 2013, and applies to private and publicly owned companies. Since the law came in force there has been an increase. The percentage of women on company boards went from, 9,5% - 12,7%, from the year 1999 - 2007, increasing to 33,2% in the year 2014. In 2017 the percentage was 32,6% the same as the year before.¹⁰³

Women are 22,1% of CEOs in Icelandic companies and 23,9% were chairmen of boards. Beside low ratio of women in top management position it is of concern that women are only 11% of CEOs of the 100 largest Icelandic companies.¹⁰⁴ These proportions are incongruent with the increase in higher education of women. Studies on discrimination and its link to segregation show that vertical segregation turns out to be less important than horizontal segregation in most countries. However, in most of the Nordic Countries, a high vertical component in ratio to the horizontal one is measured. This probably reflects the high share of part-time workers in those countries, among whom pay is comparatively lower.¹⁰⁵

The CEDAW committee has described concerns about the persistent horizontal and vertical segregation in the Icelandic labour market and recommends taking proactive measures to eliminate occupational segregation on the Icelandic labour market to eradicate the gender wage gap by facilitating women's transition from part-time to full-time employment and creating more opportunities for women to gain access to full-time employment, as well as by strengthening measures to overcome wage discrimination against women.¹⁰⁶

The causes of gender segregation on Icelandic labour market are multifaceted and harmonize with the discussion in chapter 2.2. Segregation also heighten differences in the quality of jobs between men and women, in addition to differences in pay. The quality of jobs can be regarded as career and employment security, health and well-being of workers, reconciliation of working and non-working life and skills development.

¹⁰¹ The Icelandic Confederation of University Graduates (BHM) review on the bill amending the Act No. 10/2008 Equal Status and Equal rights of Women and Men. 146. Parliament 2016-2017.

¹⁰² World Economic Forum (2016).

¹⁰³ Statistic Iceland (2018b).

¹⁰⁴ "Konur aðeins 11% forstjóra" (2018)

¹⁰⁵ Bettio and Verashchagina (2009), p. 48-49.

¹⁰⁶ CEDAW (2016) Concluding observations on the combined seventh and eighth periodic reports of Iceland. Para: 30(b).

3.4.1 Extreme feminisation

In Iceland the occupation of nursery care workers and pre-primary school teachers are extremely feminised, only about 1% are men, and even more feminised occupation than nurses, where about 2 % are men¹⁰⁷ a much lower percentage than in most countries in Europe.¹⁰⁸ In comparison, in Norway, Sweden and the UK about 10% of men work as nurses, and in South-Europe the percentage is about 20%.¹⁰⁹ In Iceland, pay is reported to be low in absolute terms or with respect to the level of qualification both for pre-primary school teachers which hold qualifications requiring five years of college attendance¹¹⁰ and nurses and midwives having 4-6 years of higher education.¹¹¹ It has been argued that the pay is lower in these professions because they are dominant by women and low pay is one of the reasons why there are so few men entering these professions. Other reasons mentioned for pre-primary school teachers are the association with part-time and with 'mere' care as opposed to teaching. The experience of Norway confirms that, if the objective is to increase the share of men among teachers of young children, raising pay is likely to work where other measures have failed.¹¹²

The mean and median of daytime pay of nurses in the Icelandic labour market is 12% lower than of other members of the Icelandic Confederation of University Graduates (BHM). However, if you add overtime and night-shift to the pay of nurses, their pay reaches approximately the same as other members of BHM.¹¹³ Furthermore, nurses working for the National University Hospital of Iceland (funded by the state) are paid 14% less than those who work for Reykjavík city. The University Hospital has responded to this by eliminating the lowest pay level in their pay-scale. However, despite that, the starting salary is lower for nurses that work for the hospital than those that work for the municipality of Reykjavik city.¹¹⁴ It's also problematic that nurses, adding to their education to become midwives does not result in higher pay. In fact, their pay drop below the pay of nurses working for the same employer.¹¹⁵

Overall, pay is lower in sectors dominant by women than in sectors dominant by men.¹¹⁶ Further supporting this is a study published by the Institute for Social Research in Norway that found a negative correlation between profession dominant by women and the wage level of that profession. The study concerned women and men with the same level of education and potential work experience and concluded that a profession with 10% more women than another profession has 1,7% lower wage.¹¹⁷ In occupations with extreme feminisation the effect is probably an even higher gender pay cap.

¹⁰⁷ Statistic Iceland (2017).

¹⁰⁸ Skúlason (2014), p. 3

¹⁰⁹ "Ráðast í átak"(2017).

¹¹⁰ Webpage university of Iceland.

¹¹¹ Webpage University of Iceland.

¹¹² Bettio and Verashchagina (2009), p.84.

¹¹³ The Icelandic National Audit Office (2017), p. 29.

¹¹⁴ The Icelandic National Audit Office (2017), p. 30.

¹¹⁵ "Kjaradeila ljósmæðra" (2018).

¹¹⁶ Olafsdottir and Rögnvaldsdottir (2015) p. 31.

¹¹⁷ Barth and Jensen, (2005), p.141.

3.5 Multiple discrimination

Multiple discrimination is under-researched in the Icelandic labour market. However, there are strong signs that women's status in the labour market, based on age, foreign background, sexual orientation and disability differs greatly. Age and women of foreign background are especially relevant for the Icelandic labour market. The Icelandic population is getting older and in January 2013, 11,3% of the Icelandic population were older than 67 years. In 2060 the percentage will reach 22,6%. It's of concern that unemployment rate for women older than 67 years old is high, and much higher than for men in the same age group. There has also been an increase of women with foreign background in the Icelandic labour market, facing prejudice and discrimination within their workplace and unemployment is higher for workers with foreign citizenship than Icelandic workers, even if they are better educated.¹¹⁸ Research has suggested that an intersectional approach is needed to account for the transformations taking place in the Icelandic labour market and regional development in Iceland. Immigration to Iceland has, for example, aimed at filling gaps in the labour market, where gendered and ethnicized migrants tend to be regarded as a temporary "labour force" and directed to specific slots in the labour market. In times of labour shortage in the food industry, in public care institutions, cleaning, and the construction industry, vacancies were easily filled by workers from Eastern European and Asian countries.¹¹⁹ The status of women workers with disability is under-researched as well as the status of women workers based on their sexual orientation. However, research suggested that women workers with disability experience prejudice, for example, of their capability to perform certain kind of work and disabled people are more likely to work part-time work. Thus, a gender-based protection may not sufficiently protect the migrant, older and disabled women from discriminatory practices, including unequal pay.

3.6 Icelandic labour law

The Icelandic labour market is divided into the public and private sectors and to a certain degree different regulation apply.¹²⁰ Basic principles concerning the rights and duties of workers are laid down by law, however a complete legislation covering labour and social affairs in Iceland does not exist. Regulation of the labour market beyond these basic principles is left to the social partners to negotiate in collective bargaining. There is an agreement between the social partners for the employment terms to be determined as much as possible by collective agreements and as little as possible by legislation. This is based on a long tradition and extensive participation in the organizations of employers and employees.^{121 122}

¹¹⁸ Olafsdottir and Rögnvaldsdottir (2015) p. 10-11.

¹¹⁹ Júlíusdóttir, Skaptadóttir and Karlsdóttir (2013), p. 272-273.

¹²⁰ The Act no. 80/1938 on Trade Unions and Industrial Disputes applies in the private sector. However, the provisions regarding conciliation in industrial disputes and the Labour Court applies to both private and public market. Act no. 94/1986 on Collective Agreements of public servants applies in the public sector.

¹²¹ Icelandic Confederations of Employers and Trade Unions (2013), p. 11.

¹²² Other legislation regarding the labour market is, for example, the Act No 55/1980 on Working Terms and Pension Rights Insurance, Act No. 55/2006 on Labour Market Measures, Act no.95/2000 on Maternity/Paternity Leave Fund, Act no. 88/2003 on the Wage Guarantee Fund, Act no. No. 60/2012 Vocational Rehabilitation and the Operation of Vocational Rehabilitation Funds *Law* and Act No. 46/1980 on Working Environment, Health and Safety in Workplaces.

Iceland participates in international labour collaboration through the forum of the International Labour Organisation (ILO) and Iceland has ratified ILOs eight fundamental Conventions, including Convention no. 100 in 1951 and Convention No. 111 in 1958. These Conventions have had a huge impact on Icelandic legislation regarding the labour market. These Conventions will be discussed in more details in chapter 4.3.1 and 4.3.2.

In Iceland, the focus has been on gender equality for the recent decades with less focus on discrimination on other grounds resulting in legislation on gender equality; the Act on the Equal Status and Equal Rights for Women and Men, no 10/2008. The Gender Equality Act specifically addresses equal pay for equal work and stipulates that employers may not discriminate between women and men in wages and other terms of employment on grounds of their gender. Those provisions will be discussed in more details in chapter 6.

3.7 Wage determination

It has been argued that one of the main causes of gender-based wage discrimination tends to lie in how wages are determined. Article 1 of Act no. 55/1980 on working terms and pension rights insurance, stipulates that wages, and other working terms agreed between the social partners shall be considered minimum terms, *independent of sex, nationality or term of appointment*, for all wage earners in the relevant occupation within the area covered by the collective agreement. In Iceland collective agreements may guarantee/stipulate the principle of equal pay for equal work for male and female workers. 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.¹²³

Article 6 of the Government Employees Act no. 70/1996 stipulates that women and men shall have an equal right to public employment and equal pay for equivalent work. Furthermore, article 19(2) of the Gender Equality Act states that the term “equal wages” constitutes that wages shall be determined in the same way for women and men and the criteria of which wages are determined shall not involve gender discrimination.

Attempts on urging managers to work against gender-based wage differentials have also been made in companies and institutions in the Icelandic labour market.¹²⁴

3.7.1 Collective bargaining

Collective agreements in Iceland can be divided into three categories; private, state and municipal, and employers are organized accordingly.¹²⁵ Trade unions represent workers in collective agreement negotiations and protect their interests as regards employers and the authorities. The Confederation of Icelandic Employers negotiates on behalf of employers in collective wage agreements in the general labour market. The State Negotiating Committee

¹²³ See collective agreements and relevant legislation.

¹²⁴ CEDAW (2007) Consideration of reports submitted by States parties under article 18 of the Convention on the Elimination of All Forms of Discrimination against Women.

¹²⁵ Icelandic Confederations of Employers and Trade Unions (2013) p. 4.

negotiates with state employees on behalf of the Minister of Finance and Economic Affairs, while the Municipal Wage Committee negotiates with unions representing their employees.

Through collective bargaining the social partners play an important role in setting wages in different sectors of the economy, working time arrangements and various employment rights of worker.¹²⁶ Labour law supports this system by providing the social partners with a legal framework which deals with certain aspects of collective bargaining, the right to strike and dispute resolution.¹²⁷ There is a clear will of the social partners for the employment terms being determined to the fullest extent possible by collective agreements and as little as possible by legislation.¹²⁸

Minimum wages are not stipulated by law in the Icelandic labour market. However, wages and other terms of employment negotiated in collective agreements are by law minimum terms, applying to all workers in the applicable occupation within the geographical area covered by each agreement.¹²⁹ However, minimum terms set by collective agreements do not hinder higher wages and/or better terms negotiated between workers and their employers. Employers and employees may, however, not negotiate for lower wages or worse employment terms than those provided for in the collective wage agreements. Such negotiated agreements are invalid.¹³⁰ The minimum wage for each sector of the labour market is negotiated in collective agreements by the social partners and is therefore not the same for every occupational sector. The minimum wages are determined on grounds of the nature of the work, work experience and education.¹³¹ Thus the minimum wage for a qualified and experienced carpenter is much higher than for an unskilled worker.¹³²

As mentioned, wages and other terms of employment concluded in collective agreements are minimum terms by law. However, the minimum rates do not always reflect the wages that are actually paid in the relevant sector.¹³³ A significant part of wage setting is outside the general and central collective bargaining and the common practice is that people negotiate individually with their employers about their pay and other terms of employment. These wages are called market wages, common in the private sector, because they are determined by supply and demand on the labour market. Most people that work in the private sector earn closer to market wages than the union rates.¹³⁴ Thus in the private sector, agreements between companies and employees are common and in the public market, institutional agreements determine the daily pay of each employee, adding to the general collective agreement. There has been criticism of non-transparency in how pay is determined in the public sector, for example when „over-time packages” are put on top of “basic pay” determined by pay category. Correct job categorisation and registration of educational qualifications, length of working experience and other factors

¹²⁶ Icelandic confederation of labour (2013), p. 6.

¹²⁷ Act on Trade Unions and Industrial Disputes no. 80/1938.

¹²⁸ Icelandic Confederations of Employers and Trade Unions (2013) p. 11.

¹²⁹ Icelandic confederation of labour (2013) p. 6.

¹³⁰ Article 1 of Act on Working Terms and Pension Rights Insurance, No. 55/1980 as amended by Act No. 58/1985, No. 33/1987, No. 21/1991, No. 69/1993, No. 129/1997, No. 145/2004 and No. 76/2010.

¹³¹ Icelandic confederation of labour (2013), p. 14.

¹³² Directorate of Labour (2008), p. 16.

¹³³ Icelandic confederation of labour (2013), p. 14.

¹³⁴ Directorate of Labour (2008), p. 16.

that influence wages. However, to be comparable with the private market overtime packages are added on top of the pay determined by job category.¹³⁵

The Equal Pay standard is an example of how collective bargaining and a cooperation of social partners can be used in promoting gender equality and in reducing pay inequalities between women and men. The Equal Pay Standard predecessor started out in 2008 as a provisional clause in a collective agreement on that a certification scheme for gender pay equality would be developed. At the same time a provisional clause followed, on the same subject, in the Act on Gender Equality no. 10/2008.¹³⁶ Now the Equal Pay standard is mandatory in companies with over 25 employees where employers need to undergo equal pay certification using the Equal Pay Standard, an equal pay management system developed by Icelandic trade unions, the employers' confederation and government officials. Article 19(4) (2) stipulates that the organizations of the social partners may negotiate to include in collective agreements a provision to the effect that in an audit of the equal pay system of a company or institution which employs an average of 25–99 employees on an annual basis, the company or institution shall have the choice of whether an audit is carried out on the basis of item b of Article 1 of the ÍST 85 standard which stipulates that confirmation will be sought with stake holders.

3.7.2 Transparency

Icelandic legislation does not provide employees with the right to obtain information on pay levels for the same work or work of equal value. However, the Equal Pay Standard demands a company, which wants a certification of paying equal pay for work of equal value, to disclose a wide range of wage information to a certification body, which will check and confirm that the company is practicing equal pay. One prerequisite for wage equality is that pay decisions are based on transparent and objective approaches that are constantly reviewed.¹³⁷

There is a “transparency” sub-article, Art. 19 (3), in the Act no. 10/2008, under the section regarding wage discrimination, which stipulates that workers shall always, upon their choice, be permitted to disclose their wage terms. The reason for this provision was the risk of discrimination in pay “behind closed door.”¹³⁸ However, this provision is not deemed very effective given the unlikelihood that men will disclose their higher wages to female colleagues.¹³⁹ Employees are not willingly to openly discuss their pay and are used to the pay structures. The wage setting is not openly discussed in workplaces and when the negotiations take place „behind closed doors”, the differences are destined not to be revealed. In order to achieve equal pay, it is important that pay and how it is set are transparent and also discussed

¹³⁵ The Icelandic Confederation of University Graduates (BHM) review on the bill amending the Act No. 10/2008 Equal Status and Equal rights of Women and Men. 146. Parliament 2016-2017.

¹³⁶ Act no. 62/2014 amending the Act no. 10/2008 on Equal Status and Equal rights of Women and Men.

¹³⁷ Bill of amendments of Equal Status and Equal rights of Women and Men. 146. Icelandic Parliament 2016-2017.

¹³⁸ Bill of Equal Status and Equal rights of Women and Men. 135. Icelandic Parliament 2007-2008.

¹³⁹ Timmer and Senden (2016), p. 23.

in the public debate. Then employees will be able to understand their pay and compare it with how much other people make for work of equal value.¹⁴⁰

The Information Act no. 140/2012 allows public access to personnel information of public entities. However, this information is not disaggregated by gender.

¹⁴⁰ The Federation of state and municipal employees review on the bill amending the Act No. 10/2008 Equal Status and Equal rights of Women and Men. 146. Parliament 2016-2017.

4. The principle of equal pay for work of equal value in international law

4.1 Introduction

“The claim to equality before the law is in a substantial sense the most fundamental of the rights of man,” wrote Sir Hersch Lauterpacht¹⁴¹. “It is the starting point of all other liberties.”¹⁴²

What the principle of equality and non-discrimination entails in practice is difficult to establish. No two human beings are equal in the sense that they are identical and to apply the principle of equality we first need to define the relevant criterion in respect of which people should be judged to be alike or different. Even when two persons can be said to be alike, it might still be questionable whether they should be treated equally? There is also important to decide what kind of equality we seek to achieve; formal and substantive equality.¹⁴³

Aristoteles classic definition of equality refers to formal equality; that equals must be treated equally or, more precisely, likes must be treated alike. This idea of equality focuses on the process rather than the outcome. Here, the notion is that the state should not give preference to any one group and people should be treated only on their individual merits and regardless of group membership. However, it can be difficult to distinguish when two cases are alike and practise shows us that legislations classify persons into groups that are treated differently.

The notion underpinning substantive equality are that equality must go further than consistent treatment of likes. There are two main aspects of substantive equality: *equality of opportunity* where true equality can only be achieved if people are not only treated equally but also given the same opportunities and *equality of result*, which aims to achieve an equal distribution of social goods such as education and employment. Equality of result addresses the barriers disadvantage groups face, and that it is often not enough removing them so those groups can grab available opportunities. In its strongest form, equality of result aims to increase the representation of disadvantaged groups, for example in the labour market, through preferential treatment and quota systems. To achieve substantive equality of treatment it is not sufficient to pursue it solely in law and practise. The outcome must be taken into consideration.

Thus, formal equality forms the conceptual bases of the requirement of equality before the law and prohibitions of direct discrimination, meanwhile the prohibitions of indirect discrimination is supported by the idea of substantive equality.¹⁴⁴

It has been noted that the principle of equality is complemented by the principle of non-discrimination.¹⁴⁵ Non-discrimination, together with equality before the law and equal protection of the law without any discrimination, constitute a basic and general principle

¹⁴¹ Sir Hersch Lauterpacht (1897-1960) was a Polish-British lawyer and judge at the International Court of Justice.

¹⁴² Lauterpacht, (2013), p. 115.

¹⁴³ Moeckli, (2014), p. 158.

¹⁴⁴ Moeckli, (2014), p. 158-160.

¹⁴⁵ See eg. Article 1 and 2(1) of the Universal Declaration of Human Rights (UDHR).

relating to the protection of human rights.¹⁴⁶ However, the right to equality sometimes requires states to treat people differently¹⁴⁷ in order to correct disadvantage of vulnerable groups and achieve real equality.¹⁴⁸ The principle of equality thus requires not only the equal treatment of equals, but also consideration of differences in assessing whether different treatment is just and is geared to achieving de facto equality, not just formal equality. This is the very approach taken in international human rights law.¹⁴⁹

Equality and non-discrimination in employment and occupation is a fundamental principle and human right to which all women and men are entitled, in all countries and in all societies.¹⁵⁰ However, globally, women earn approximately 77% of what men earn, though in some countries women earn considerably less. If wages of part-time workers are included in the calculation, the gap can increase to much higher levels.¹⁵¹ In the age of economic globalization, workers' rights are of great importance. These rights are meant to counter the negative consequences of economic globalization for labour such as extreme forms of income inequality, exploitation of workers and high levels of unemployment. The international arena has in this context called for social justice and decent work.¹⁵² As said, workers' rights are crucial in this respect. They aim is to protect and promote working conditions, as equal pay for work of equal value, by laying down international minimum standards.¹⁵³ ILO was far ahead of other human rights institutions in laying down work-related rights and has, for the last century, played a leading role in implementing and monitoring labour standards e.g. regarding equal pay for work of equal value and prohibition of discrimination on the labour market. However, before ILOs fundamental Convention on the matter will be addressed, the focal point will be on international human rights norms on equality and non-discrimination and equal pay for work of equal value.

4.2 Human Right Treaties

The underpinning importance of equality is proclaimed in the first article of the Universal Declaration of Human Rights (UDHR):¹⁵⁴ “*All human beings are born free and equal in dignity and rights*”.¹⁵⁵ It is worth mentioning that article 2 of the UDHR prohibits “*distinction[s] of any kind*”, which could be interpreted that no differences at all can be legally tolerated. However, such a restrictive interpretation has not been adopted by the international monitoring bodies. The right to equality before the law and equal protection of the law without any discrimination, does not make all differences of treatment discriminatory. A differentiation

¹⁴⁶ CCPR General Comment No. 18: Non-discrimination, para: 1.

¹⁴⁷ Ibid, para: 8.

¹⁴⁸ Moeckli, (2014), p. 157.

¹⁴⁹ Farrior, (2015) p. 2.

¹⁵⁰ ILO (2012), Para: 649.

¹⁵¹ ILO (2012), para: 669.

¹⁵² Article 23 and 25 of UDHR and Article 7 of ICCPR promote what encompasses decent work. Decent work involves access to quality jobs, dignity, equality, fair income and safety. LO has developed a Decent work agenda for the community of work focusing on e.g. rights at work, job creation, social protection and social dialogue, with gender equality as a „crosscutting” objective. Source: ILO webpage.

¹⁵³ Coomans, (2014), p. 249-250.

¹⁵⁴ UDHR – see also Art. 2(1) and 7.

¹⁵⁵ See also Article 1(3) of the Charter of the United Nations (UN Charter) emphasizes that one of the main purpose of the United Nations (UN) is the promotion of the equal guarantee of human rights for all without any distinction.

based on reasonable and objective criteria does not amount to prohibited discrimination.”¹⁵⁶ The Universal declaration on Human Rights (UDHR) stipulates in Article 23(2) that: „*everyone, without any discrimination, has the right to equal pay for equal work*”. Thus, everyone has the right to receive equal pay for equal work. Equal pay for equal work is a recognized human right, to which all are entitled. This principle is based on the general accepted principle of equality and non-discrimination.

Another important instrument promoting the principle of equality and non-discrimination is the International Covenant on Civil and Political Rights (ICCPR). Article 2, 3 and 26 of the ICCPR protects the right to equality and freedom from discrimination. Article 26 of ICCPR provides an autonomous right of equality and “*prohibits discrimination in law or in fact in any field regulated and protected by public authorities.*”¹⁵⁷ ¹⁵⁸ Article 26 of the ICCPR also gives protection from discrimination that is not related to a civil or political right. If a law discriminates, article 26 applies whether or not the subject matter of the law is covered by provisions of the ICCPR. Article 26 therefore has the potential to be widely used to oppose discrimination and provide a protection against discrimination in the enjoyment of economic, social and cultural rights.¹⁵⁹

The principles of non-discrimination and equality are recognized throughout the International Covenant on Economic, Social and Cultural Rights (ICESCR) and articles 2(2) and 3 of the ICESCR are aimed to guarantee the right to equality and non-discrimination. The preamble stresses the “*equal and inalienable rights of all*” and the ICESCR expressly recognizes the rights of “*everyone*” to the various rights protected by the ICESCR.¹⁶⁰ The Covenant also explicitly mentions the principles of non-discrimination and equality with respect to some individual rights and the States parties to the ICESCR also undertake, by article 3, “*to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant*”. Art. 7(a)(i) and 7(c) reflect the principle of equality and non-discrimination concerning the right of everyone to the enjoyment of just and favourable conditions of work, including “right to equal remuneration for work of equal value” discussed further in the next chapter.¹⁶¹

At least three specialized human rights treaties address certain forms of discrimination: The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), further discussed in chapter 4.2.2, and the Convention on the Rights of Persons with Disabilities (CRPD). The Convention on the Rights of the Child (CRC) and the International Convention

¹⁵⁶ CCPR General comment no. 18: Non-discrimination, para: 8.

¹⁵⁷ Ibid, para 12.

¹⁵⁸ ICCPR – see also Art. 20(2), 14(1), 14(3), 25 and 27.

¹⁵⁹ CCPR *Broeks v the Netherlands* Communication No. 172/1984

¹⁶⁰ CESCR General comment no. 20 Non-discrimination in economic, social and cultural rights (2009) para: 3.

¹⁶¹ Ibid, para: 4. For the views of the Committee on Economic, Social and Cultural Rights relating to discrimination, see General Comments No. 3, No. 4, No. 5, No. 6, No. 12, No. 13 and No. 14.

on the Protection of the Rights of All Migrant Workers and Members of their Families (ICRMW) contain explicit provision on equality and non-discrimination.^{162 163}

4.2.1 International Covenant on Economic, Social and Cultural Rights (ICESCR)

Articles 6-8 on International Covenant of Economic, Social and Cultural Rights (ICESCR) contain several elements that relate to the protection of work-related rights, and the principle of equal pay for work of equal value which is stipulated in article 7(a)(i) of International ICESCR, which guarantees:

„fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work”.

The notion of “*conditions of work for women not inferior to those enjoyed by men*” and “*equal pay for equal work*” mentioned in the second part of Article 7 (i) (a) seems more restrictive than the notion of “*equal remuneration for work of equal value*”.

First, the former is gender-explicit, specifically related to direct discrimination on the basis of sex, while “*equal remuneration for work of equal value*” is without distinction on any grounds. However, though equality between men and women is particularly important in this context the Committee on Economic, Social and Cultural Rights (CESCR) emphasises that equality applies to all workers without distinction based on race, ethnicity, nationality, migrant or health status, disability, age, sexual orientation, gender identity or any other ground.¹⁶⁴ This, gender explicit reference in article 7 (1)(a) should therefore not detract from the broader obligation of achieving equal remuneration for work of equal value.

Secondly, “*equal pay for equal work*” suggests a narrower comparison than “*equal remuneration for work of equal value*”, focusing on comparing the same job, normally in the same enterprise or organization, instead of the broader recognition of remuneration based on the value of work.¹⁶⁵ However, workers should not only receive equal remuneration when they perform the same or similar jobs, but their remuneration should be equal even when their work is completely different but nonetheless of equal value when assessed by objective criteria. The requirement goes beyond only wages or pay to include other payments or benefits paid directly or indirectly to workers.¹⁶⁶

The concept of *value* is not defined in the ICESCR but CESCR recommends assessment by objective criteria and the focus should be on the “value” of the work and evaluation factors should include skills, responsibilities and effort required by the worker as well as working conditions. This assessment could be based on a comparison of rates of remuneration across

¹⁶² The only two international human rights instruments without explicit non-discrimination clauses are the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT) and the International Convention for the Protection of All Persons from Enforced Disappearance (CPED).

¹⁶³ Moeckli (2014). P. 160-161.

¹⁶⁴ CESCR General Comment no. 23 on the Right to just and favourable conditions of work (2016), Para: 11.

¹⁶⁵ Ibid, Para: 16.

¹⁶⁶ Ibid, Para: 11.

organizations, enterprises and professions.¹⁶⁷ CESCR considers objective job evaluation to be important to avoid indirect discrimination when determining rates of remuneration and comparing the relative value of different jobs. And that the objective evaluation of whether the work is of equal value and whether the remuneration received is equal should be on-going to achieve equality.¹⁶⁸

4.2.2 The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)

The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) is aimed to secure equality between men and women in all respect, including in the field of employment. Article 11 of the CEDAW lays down detailed obligation for states aimed at eliminating discrimination against women in the field of employment. Article 11(1) (CEDAW) specifies that:

“States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular: ... ”

The principle of equal pay for work of equal value is promoted in article 11(1)(d) in the right to equal remuneration and the equality of treatment in the evaluation of the quality of work.

(d) The right to equal remuneration, including benefits, and to equal treatment in respect of work of equal value, as well as equality of treatment in the evaluation of the quality of work ...”.

In order to fully implement the CEDAW, the CEDAW committee emphasises the importance of ratifying ILOs Equal Remuneration Convention No. 100 and urges States parties to consider the study, development and adoption of:

„job evaluation systems based on gender-neutral criteria that would facilitate the comparison of the value of those jobs of a different nature, in which women presently predominate, with those jobs in which men presently predominate”.¹⁶⁹

The CEDAW Committee recognises that equal treatment under the law (formal equality) may not be enough to ensure women enjoying the same rights as men and under certain circumstances, non-identical treatment of women and men will be required.¹⁷⁰ Although such treatment, often referred to as special measures, is clearly incompatible with a formal notion of equality, international human rights law permits special measures to achieve substantive equality.¹⁷¹

¹⁶⁷ CESCR General comment no. 23 on the Right to just and favourable conditions of work. (2016), Para:12

¹⁶⁸ Ibid, Para:12-13

¹⁶⁹ CEDAW General Recommendation No. 13 Equal remuneration for work of equal value (1989), Para: 1-2.

¹⁷⁰ CEDAW General Recommendation No. 25 Temporary measures (2016), para:8. See also CESCR General comment no. 16 The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights. (2016), para 15.

¹⁷¹ See also article 1 (4) ICERD.

4.3 International Labour Organization (ILO)

The elimination of discrimination in the field of work has always been a cornerstone of ILO's command and its importance is echoed in the 1944 Declaration of Philadelphia, the 1998 ILO Declaration on Fundamental Principles and Rights at Work, the 2008 ILO Declaration on Social Justice for a Fair Globalization and the 2009 ILO Global Jobs Pact. ILO understands gender equality as a matter of human rights, social justice and sustainable development.¹⁷² The 2008 ILO Declaration on Social Justice for a Fair Globalization affirms that gender equality and non-discrimination are principles cutting across the ILO's Decent Work Agenda.

The right to equal remuneration for women and men for work of equal value has been acknowledged by the ILO since its foundation in 1919. The principle is set out in the opening lines of the ILO Constitution, which recognizes that it is a key element of social justice. The ILO Declaration of Philadelphia of 1944, part of the ILO Constitution, affirms that "*all human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity.*"

After the First World War, the principle of equal remuneration for work of equal value were highlighted.^{173 174} However, it wasn't until after the Second World War, when women had replaced men (soldiers) on the labour market, that a call came for immediate action and the emphasis on equal remuneration between men and women increased.¹⁷⁵ The myth that women could not do certain jobs or were not as productive as men could no longer be sustained.¹⁷⁶ In ILO's Recommendation no. 71 (R71) from 1944 stated:

„The redistribution of women workers in each national economy should be carried out on the principle of complete equality of opportunity for men and women in respect of admission to employment on the basis of their individual merit, skill and experience, and steps should be taken to encourage the establishment of wage rates on the basis of job content, without regard to sex.“¹⁷⁷

R71 clearly stated that wage rates should be based on job content not the gender of the worker.¹⁷⁸

The first fundamental instruments adopted with the specific objective of promoting equality and eliminating discrimination were the Equal Remuneration Convention (No. 100) and Recommendation (No. 90) in 1951. However, it was acknowledged from the beginning that equal remuneration between men and women would be hard to achieve without the elimination of discrimination in all areas of employment. Therefore, the Discrimination (Employment and Occupation) Convention (No. 111) and Recommendation (No. 111) were adopted in 1958, as

¹⁷² See the Declaration on Fundamental Principles and Rights at Work which is a very important element in the framework for promoting women workers' rights and gender equality.

¹⁷³ ILO (2000), p. 3.

¹⁷⁴ ILO (1986), para 3.

¹⁷⁵ Bjørst (2005), P. 69.

¹⁷⁶ ILO (2012), para:652.

¹⁷⁷ R071 - Employment (Transition from War to Peace) Recommendation, 1944 (No. 71)

¹⁷⁸ Bjørst (2005), P. 70.

the first comprehensive instruments dealing specifically with equality and non-discrimination in respect of employment and occupation.^{179 180}

4.3.1 Equal Remuneration Convention, 1951 (No. 100)

In 1951 ILO adopted The Equal Remuneration Convention no. 100¹⁸¹ (C-100), now ratified by 173 countries.¹⁸² Article 1 (b) states:

„the term equal remuneration for men and women workers for work of equal value refers to rates of remuneration established without discrimination based on sex.”

C-100, the first international instrument on this issue, is gender-explicit¹⁸³ seeking to address discrimination in remuneration by ensuring that women and men receive equal remuneration *not just for the same or similar work, but also for work of equal value*. States parties may accomplish this through legislation, introduction of a system for wage determination and/or collective bargaining agreements (Art. 2). States must ensure equal remuneration between men and women in the public sector and to promote the principle in the private sector.

C-100 sets out a very broad definition of “remuneration” in Article 1(a), which includes not only “*the ordinary, basic or minimum wage or salary*” but also “*any additional emoluments whatsoever payable directly or indirectly, whether in cash or in kind, by the employer to the worker and arising out of the worker’s employment*”. This includes all elements that a worker may get for his or her work, including payments in cash as well as in kind and payments made directly as well as indirectly by the employer to the worker.¹⁸⁴

C-100 requires that the right to equal pay should not be confined to equal pay for the same work, but should extend to work of equal value. The concept of *value* is, however, not defined in Convention no. 100 but refers to the worth of a job for the purpose of computing remuneration.¹⁸⁵ Work is of equal value if the same high demands are made on work criteria such as knowledge and skills, effort and stress, responsibility, conditions in the working environment.¹⁸⁶ “Value” in the context of the C-100 indicates that something other than market forces should be used to ensure the application of the principle, as market forces may be inherently gender-biased.¹⁸⁷ The Committee of Experts on the Application of Conventions and Recommendations (CEACR), considers that the notion of work of equal value implies comparison between jobs and that the comparison is not limited to the same job, the same employer or the same sector.¹⁸⁸ CEACR has also pointed out that work of equal value extends

¹⁷⁹ ILO (2012), para:650.

¹⁸⁰ Other related conventions worth mentioning are Workers with family Responsibilities Convention No. 156 and Maternity Protection Conventions Nos. 3, 103 and 183.

¹⁸¹ C100 - Equal Remuneration Convention, 1951 (No. 100).

¹⁸² April 2018.

¹⁸³ ILO (2000), p. 5.

¹⁸⁴ ILO (2012), para:686.

¹⁸⁵ CEACR (2001) para. 42.

¹⁸⁶ ILO (1986) Job evaluation and Bjørst, (2005), p. 229-258.

¹⁸⁷ CEACR (2001), para. 42-44.

¹⁸⁸ ILO (1986), para 21.

beyond jobs performed by both sexes and that work traditionally occupied by women should not be undervalued.¹⁸⁹

Because of difficulties in applying the C-100 in law and practice, due to a lack of understanding of the concept of “work of equal value” the CEACR has issued a general observation to clarify the meaning of “work of equal value”¹⁹⁰

“The concept of “work of equal value” lies at the heart of the fundamental right of equal remuneration for men and women for work of equal value, and the promotion of equality. Due to historical attitudes and stereotypes regarding women’s aspirations, preferences and capabilities, certain jobs are held predominantly or exclusively by women (such as in caring professions) and others by men (such as in construction). Often “female jobs” are undervalued in comparison with work of equal value performed by men when determining wage rates. The concept of “work of equal value” is fundamental to tackling occupational sex segregation in the labour market, which exists in almost every country, as it permits a broad scope of comparison, including, but going beyond equal remuneration for “equal”, “the same” or “similar” work, and also encompasses work that is of an entirely different nature, which is nevertheless of equal value”

But how do you value jobs? C-100 is not clear on this subject but gives us some guidance suggesting that measures shall be taken to promote *objective appraisal* of jobs on the *basis of the work to be performed*. Comparing the relative value of jobs in occupations which may involve different types of skills, responsibilities or working conditions, but which are nevertheless of equal value overall, is essential in order to eliminate pay discrimination resulting from the failure to recognize the value of work performed by women and men free from gender bias.¹⁹¹ However, C-100 does not provide an unconditional obligation to take measures for the objective appraisal of jobs on the basis of the work to be performed, and does not impose the choice of a particular job evaluation method. ILO has published guidelines for job-evaluation highlighting it should be accessible, impartial, simple and not discriminatory.¹⁹²

In the light of persistent gender pay gaps, greater focus should be placed on developing or implementing objective job evaluation methods. Measures for the objective evaluation of jobs can be taken at the enterprise, sectoral or national level, in the context of collective bargaining, as well as through wage-fixing mechanisms.¹⁹³ Whatever methods are used for the objective evaluation of jobs, particular care must be taken to ensure that they are not gender bias. Often skills considered to be “female”, such skills required in the caring professions, are undervalued or even overlooked, in comparison with traditionally “male” skills, such as skills needed in construction.¹⁹⁴

¹⁸⁹ ILO (1986), para 22.

¹⁹⁰ CEACR, general observation, Convention No. 100, 2007, para. 3

¹⁹¹ ILO (2012), para:675.

¹⁹² ILO (2008) and ILO (1986) Job evaluation.

¹⁹³ ILO (2012), para:696.

¹⁹⁴ *ibid*, para:701.

Consideration of the multiple and complex links between the principle of equal remuneration and the position and status of men and women more generally in employment and society led to the adoption of Recommendation (No. 90) (R-90)¹⁹⁵ at the same time as C-100. The accompanying R-90 gives guidelines and sets out special procedures for the application of the principle for equal pay for work of equal value.¹⁹⁶

C-100 and R-90 apply to all workers in all economic sectors, private or public. It is emphasised that the rule must be that the principle of equal remuneration for men and women shall apply *everywhere*.¹⁹⁷ These instruments set out principles for national policy on how to promote and secure equal remuneration for men and women workers for work of equal value. Committee of Experts on the Application of Conventions and Recommendations (CEACR) has pointed out that work of equal value extends beyond cases where work is performed in the same establishment¹⁹⁸ and the C-100 clearly applies to the public sector. This is emphasized by R-90, which cites as a first measure to implement the principle of equal remuneration for men and women for work of equal value in all occupations “*in which rates of remuneration are subject to statutory regulation or public control*”.¹⁹⁹ It is also noted that the state has an important role in setting an example in pursuing a policy that can serve as a pattern eg. for the private sector.²⁰⁰ Thus, there are no exclusions permitted under Convention No 100 and it applies to all workers, both nationals and non-nationals, in all sectors of activity, in the public and the private sectors, and in the formal and informal economy.²⁰¹

R-90 acknowledges that action to remedy wage inequality must be addressed in a broader context and some of what was addressed in R-90 became central to Convention No. 111 and its accompanying Recommendation no. 111 (R-111). Associating C-100 with C-111 is of particular importance as to overcome obstacles in applying C-100, measures are needed as set out in other Conventions, including on equal opportunities and reconciling work and family responsibilities.²⁰²

4.3.2 Discrimination (Employment and Occupation) Convention, 1958 (No. 111)

The Discrimination (Employment and Occupation) Convention, 1958 (No. 111) (C-111) is closely linked to Convention No. 100, as mentioned, and addresses discrimination and therefore gender equality but is not exclusively about gender-based discrimination. C-100 and C-111 are mutually reinforcing and their objectives are interlinked: the application to all workers of equal remuneration for men and women for work of equal value.²⁰³

C-111, ratified by 174 countries,²⁰⁴ prohibits distinctions, exclusions or preferences made on various grounds that have the effect of impairing equality of opportunity or treatment in

¹⁹⁵ R090 - Equal Remuneration Recommendation, 1951 (No. 90).

¹⁹⁶ ILO (2012), para:652.

¹⁹⁷ Ibid, para: 658.

¹⁹⁸ ILO (1986), para 22.

¹⁹⁹ ILO (2012), Para: 666.

²⁰⁰ Ibid, para:666.

²⁰¹ Ibid, para:658.

²⁰² Ibid, para:653.

²⁰³ Ibid, para:651.

²⁰⁴ April 2018.

employment or occupation, see Art. 1(a). In providing a specific but broad definition of what constitutes discrimination, C-111 places the general principle of equality and non-discrimination in the context of the world of work, addressing all forms of discrimination in employment and occupation on the basis of at least seven grounds; race, colour, sex, religion, political opinion, national extraction and social origin, with the possibility of extending protection to address discrimination on the basis of other criteria. Article 1(1)(a) stipulates a minimum standard. However, C-111 also provides for the determination of additional grounds of discrimination, after consultation with representative employers²⁰⁵ and workers²⁰⁶ organizations, and with other appropriate bodies.²⁰⁵ Additional grounds that have been added by a number of countries include age, health, disability, HIV and AIDS, employment status, nationality and sexual orientation.²⁰⁶

Discrimination occurs when a person is treated less favourably than others because of characteristics that are not related to the person's competencies or the inherent requirements of the job. Not all distinctions, exclusions and preferences are, however, deemed to be discrimination within the meaning of the Convention. These include: (i) measures based on the inherent requirements of a particular job (Article 1(2)); (ii) measures warranted by the protection of the security of the state (Article 4); and (iii) special measures designed for protection and assistance (Article 5). There are very few instances where the grounds listed in the C-111 actually constitute inherent requirements of the job.²⁰⁷ Also measures warranted by the protection of the security of the state are, in order to avoid any undue limitations on the protection which the C-111 seeks to guarantee, are to be interpreted strictly.²⁰⁸ Article 5 of the Convention provides for the adoption of special measures of protection and assistance, which shall not be deemed to be discrimination.

Recommendation no.111 (R-111)²⁰⁹ accompanying C-111 refers to the need to formulate a national policy for the prevention of discrimination in employment and occupation considering several principles. These principles include equality of opportunity and treatment with respect to remuneration for work of equal value for all, see Art. 2 (b)(v).

4.4 Discrimination

In international human rights law, non-discrimination, together with equality before the law and equal protection of the law without any discrimination, constitute a basic and general principle relating to the protection of human rights.²¹⁰ A definition of non-discrimination is contained in ILOs Discrimination Convention no. 111.²¹¹ Article 1(a), provides that discrimination includes:

²⁰⁵ ILO (2012). Giving globalization a human face; General Survey on the fundamental Conventions, para:806.

²⁰⁶ Ibid, para:654.

²⁰⁷ Ibid, para: 827.

²⁰⁸ Ibid, para: 832.

²⁰⁹ R111 - Discrimination (Employment and Occupation) Recommendation, 1958 (No. 111).

²¹⁰ CCPR General Comment No. 18: Non-discrimination, para: 1.

²¹¹ C111 - Discrimination (Employment and Occupation) Convention, 1958 (No. 111).

“any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation;”

Thus, the right to equal treatment and non-discrimination requires all persons to be treated equally before the law, without discrimination. However, the right to equality before the law and equal protection of the law without any discrimination, does not make all differences of treatment discriminatory followed by assessing whether different treatment is just and is geared to achieving de facto equality, not just formal equality. As mentioned, this is the very approach taken in international human rights law.²¹²

Non-discrimination law provides a tool to challenge differential treatment and exclusion. „*At the heart of non-discrimination law is an insistence on the inherent self-worth of all human beings, and on their equal inherent self-worth*”.²¹³ However, non-discrimination law primary focus is on relativities, how one person or one group is treated *relative* to another. This can be described as a uni-sectional approach²¹⁴ and not a multi- or intersectional approach.²¹⁵ And to qualify as a member of the uni-sectional protected group one must show that one shares the relevant feature, such as gender. Thus, the primary reality is *the group* and the primary object of protection is *the group*, with the individual only protected to the extent they share important group features. Another limit on non-discrimination law is that it only scratches the surface, but does not get to the underlying causes of the accumulated disadvantages of discrimination and exclusion.²¹⁶

4.4.1 Direct and indirect discrimination

At the core of all non-discrimination norms is the formal equality requirement that likes should be treated alike. Thus, international human rights law clearly prohibits direct discrimination. Direct discrimination occurs when a person, because of one or more of the prohibited grounds, is treated less favourably than someone else in comparable circumstances. It must therefore be shown that others have been treated better because they do not share the same characteristic or status. These others will also have to be in a comparable situation.

A single definition of the concept of indirect discrimination does not exist in international human rights law, but is said to occur when a practice, rule, or requirement that seems neutral, and not based on one of the prohibited grounds of distinction has a disproportionate impact on particular groups defined by reference to one of these grounds.²¹⁷ Indirect discrimination was first used by USA Supreme Court²¹⁸, as early as in 1971, and was later incorporated into *inter alia* EU law. It is also found in the jurisprudence of international human right bodies and the

²¹² Farrior, (2015) p. 2.

²¹³ Quinn (2016), p. 68.

²¹⁴ Before referred to as single-ground approach.

²¹⁵ For a discussion of the distinction between these approaches, see Fredman (2005), p. 13–20.

²¹⁶ Quinn (2016), p. 68-71.

²¹⁷ Moeckli, (2014), p. 165.

²¹⁸ The USA Supreme Court *Giggs v. Duke Power Co.* (1971).

Human rights committee²¹⁹ referred to indirect discrimination in 2001²²⁰ and 2007 the ECtHR came up with an explicit definition of the concept.^{221 222}

In international human rights law there are no requirements of showing a discriminatory intention or purpose to establish discrimination. Thus, both intended and unintended discrimination are prohibited. The Human Rights Committee has in its General Comment on no-discrimination²²³ and in its jurisprudence, acknowledge that discriminatory intention is not a necessary criterion of establishing discrimination.²²⁴

4.4.2 Multiple discrimination

As mentioned, international human rights monitoring mechanisms have traditionally relied upon a “single-ground” approach to enforce legal provisions prohibiting discrimination. The focus of human right bodies has been on discrete, mutually exclusive grounds of discrimination as they are recognised in human rights instruments,²²⁵ such as the Universal Declaration of Human Rights, which prohibits distinctions based on “race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”²²⁶

However, as early as 1991, the CEDAW Committee referred to the “double discrimination” faced by women with disabilities.²²⁷ CEDAW committee has since then identified multiple discrimination and that certain groups of women, in addition to suffering from discrimination directed against them as women, may also suffer from multiple forms of discrimination based on additional grounds such as race, ethnic or religious identity, disability, age, class or other factors. Such discrimination may affect these groups of women primarily, or to a different degree or in different ways than men. The CEDAW committee also states that states parties may need to take specific temporary special measures to eliminate such multiple forms of discriminations against women and its compounded negative impact on them.²²⁸ The CEDAW Committee goes on to note that states must “legally recognize such forms of discrimination and their compounded negative impact on the women concerned and prohibit them” and that policies and programmes to redress intersectional discrimination must also be adopted.²²⁹

In recent years, a number of other human rights treaty monitoring bodies, including, the Committee on the elimination of racial discrimination (CERD), the Committee on the Rights of the Child (CRC), the Human Rights Committee (CCPR) and the Committee on Economic,

²¹⁹ CCPR *Singh Bhinder v Canada*. In this case the Human Rights Committee recognized the possibility of indirect discrimination for the first time without mentioning it directly.

²²⁰ CCPR *Althammer v Austria*

²²¹ ECtHR *DH and others v Czech Republic*

²²² Moeckli, (2014), p. 165-166.

²²³ CCPR General comment no. 18: Non-discrimination,

²²⁴ CCPR *Simunek et al. V the Czech Republic* Para: 11.7.

²²⁵ Quinn (2016), p. 63-72.

²²⁶ Universal Declaration of Human Rights, Article 2.

²²⁷ CEDAW General Recommendation No. 18, Disabled women (1991) Preamble

²²⁸ CEDAW General Recommendation No. 25, Temporary measures (2004), Para 12.

²²⁹ CEDAW General Recommendation No. 28 on the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, (2010C), Para 18.

Social and Cultural Rights (CESCR) have „slowly” begun to recognise and mention forms of multiple and intersectional discrimination within their work.²³⁰

The Committee of Experts (CEACR) has emphasized the need to take into consideration and address the effects of multiple discrimination. However, the committee notes that addressing multiple discrimination, including through legislation, remains a challenge. It further states that legal approaches requiring each prohibited ground to be addressed separately and independently may prove to be inadequate to capture the manner in which individuals experience discrimination on multiple grounds. While many laws define discrimination with respect to a multitude of grounds, few offer the possibility of filing complaints of discrimination on combined grounds.²³¹

4.5 Special measures

The principles of equality and non-discrimination, by themselves, are not always sufficient to guarantee true equality. Temporary special measures may sometimes be needed in order to bring disadvantaged or marginalized persons or groups of persons to the same substantive level as others.²³² Special measures of protection are therefore aimed specifically at correcting the position of members of a target group.²³³ The most common special measures are positive action, preferential treatment or quota systems. These special measures can be used to advance e.g. women's integration into e.g. employment.²³⁴ Although such treatment is clearly incompatible with a formal notion of equality, international human rights law permits special measures to achieve substantive equality, thus it may be legitimate to prioritize the achievement of substantive equality over the requirement of consistent treatment.²³⁵ These special measures obviously stretches in the direction of positive obligations of the state discussed in next chapter.

The CEDAW contains a provision on special measures in Article 4 (1) and the CEDAW committee emphasizes that governments should seek to understand the root causes of inequalities between men and women, and to introduce laws, policies and public services that address them. This may mean treating women differently from men, to enable them to achieve the same results. This is very relevant on the labour market. The strongest form this treatment can involve the preferential treatment of women, for example when two equally qualified persons apply for a job, propriety is given to the female applicant. However, such measures must have a legitimate aim and be proportionate.²³⁶ Here proportionality means that the preferential treatment must be for the benefits of genuinely disadvantaged groups, be temporary and cease once the objectives have been achieved.²³⁷ However, not all measures that potentially are, or will be, favourable to women are temporary special measures and there is a clear

²³⁰ Truscan, Bourke-Martignoni (2016), p. 110.

²³¹ ILO (2012), para:748.

²³² CESCR General comment no. 16: The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights. (2005) Para: 15.

²³³ Moeckli, (2014), p. 171.

²³⁴ CEDAW General Recommendation No. 5: Temporary special measures (1988).

²³⁵ Moeckli, (2014), p. 171.

²³⁶ In *Jacobs v Belgium* The Human Rights Committee held that a measure to increase number of women in High Council of Justice was based on objective and reasonable grounds and was also considered proportional.

²³⁷ Moeckli (2014), p. 171.

difference between the purpose of the “special measures” under article 4(1), and 4(2) of CEDAW.

Article 4(2) states that special measures aimed at protecting maternity shall not be considered discriminatory. Other measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved.²³⁸ The States parties should clearly distinguish between temporary special measures taken under article 4, paragraph 1, to accelerate the achievement of a concrete goal for women of de facto or substantive equality. Not all measures that potentially are, or will be, favourable to women are temporary special measures.²³⁹

Article 5 of the C-111 provides for the adoption of special measures of protection and assistance, which shall not be deemed to be discrimination. These measures are to promote equality under Article 1. Article 5 includes, firstly, the special measures of protection and assistance provided for in international labour Conventions and Recommendations (Article 5(1)), such as for workers with family responsibilities and those protecting maternity.²⁴⁰ Those kinds of measures are expressly recognized as not being discriminatory within the meaning of C-111.²⁴¹ Secondly, Article 5(2) permits “special measures of protection or assistance” meant to cover the widest possible range of measures concerning different categories of workers in need of protection and assistance. These measures often include affirmative action, such as the quota system for employment. Thus, after consultation with representative employers and worker organizations, special measures designed to meet the particular requirements of persons who, for reasons such as sex, age, disablement, family responsibilities or social or cultural status, are generally recognized to require special protection or assistance.²⁴²

4.6 State Obligations

The terms „equality” and „non-discrimination” have often been used interchangeably and described as the positive and negative statement of the same principle. Like with other human right the right to equality and non-discrimination involves state obligation of different sort. The obligation to *respect* requires states to refrain from any discriminatory action and to ensure that all their laws and practices comply with the right to non-discrimination. The obligation to *protect* imposes a duty on states to prevent discrimination by non-state actors by introducing comprehensive legislation prohibiting discrimination eg. in fields of employment. This is supported by jurisprudence of the UN treaty bodies and various human rights treaties provisions eg. CEDAW Art. 2(e), ICERD Art. 2(d) and in most human rights treaties, you can find norms that require states to prohibit discriminating actions of private parties.²⁴³

However, it is not sufficient for states to have anti-discrimination legislation in place. They also have an obligation to *promote, guarantee, and secure* equality by taking proactive steps to eliminate structural patterns of disadvantage and to further social inclusion. This demand for

²³⁸ CEDAW General Recommendation No. 25 Temporary measures (2016), para:3.

²³⁹ Ibid. Para: 19.

²⁴⁰ These concern also, for example, indigenous peoples, older workers, persons with disabilities or persons living with HIV or AIDS.

²⁴¹ ILO (2012), para:836.

²⁴² Ibid, para: 837.

²⁴³ See: Art. 20 ICCPR, Art. 4 ICERD, Art. 13(5) ACHR, Art. 6 CEDAW, Art. 5(e) ICERD.

positive action includes eg. affirmative action programmes or special measures of protection. These actions are aimed at correcting the position of members of a particular group in order to obtain effective equality. For example, when two equally qualified persons apply for a job, priority is given to the person in targeted group eg. the woman. The right to equality therefore allows and sometimes require states to treat people differently to overcome historical patterns of disadvantage to achieve real equality.

In recent years there has been an increased focus on the positive formulation emphasizing that equality implies not only a negative obligation not to discriminate but also a duty to recognize difference between people and to take positive action to achieve substantive equality.²⁴⁴ Thus sometimes human rights law, to some extent, require states to adopt special measures for protection: „*The principle of equality sometimes requires States parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination....*“^{245 246}

Article 7 (a) of the ICESCR and article 11 of the CEDAW lay down detailed obligation for states in order to promote equal pay for work of equal value and eliminate discriminations against women in the field of employment. Article 11(1)(d) (CEDAW) specifies that:

“States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular...” “...The right to equal remuneration, including benefits, and to equal treatment in respect of work of equal value, as well as equality of treatment in the evaluation of the quality of work ...”

Article 7(a) of ICESCR requires States parties to recognize the right of everyone to enjoy just and favourable conditions of work and to ensure, among other things, fair wages and equal pay for work of equal value. The Committee on Economic, Social and Cultural Rights (CESCR) mentions specific examples of state obligation in its General Comment no. 23 and stipulates that:

„Article 3, in relation to article 7 requires, inter alia, that the State party identify and eliminate the underlying causes of pay differentials, such as gender-biased job evaluation or the perception that productivity differences between men and women exist. Furthermore, the State party should monitor compliance by the private sector with national legislation on working conditions through an effectively functioning labour inspectorate. The State party should adopt legislation that prescribes equal consideration in promotion, non-wage compensation and equal opportunity and support for vocational or professional development in the workplace. Finally, the State party should reduce the constraints faced by men and women in reconciling professional and family responsibilities by promoting adequate policies for childcare and care of dependent family members.²⁴⁷

²⁴⁴ Moeckli, (2014), p. 158.

²⁴⁵ CCPR, General Comment No. 18 on Non-discrimination (1989), Para: 10.

²⁴⁶ See also CESCR, General comment 16 The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights. (2005), para: 15.

²⁴⁷ CESCR General Comment No. 16: The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights (2005) Para: 24.

Article 3 sets a non-derogable standard for compliance with the obligations of States parties as set out in articles 6 through 15 of ICESCR.²⁴⁸

The obligation of states when ratifying ILOs C-100 is to “*promote*” the application of the principle of equal pay for work of equal value and to “*ensure*” its application to all workers. C-100 is quite flexible in terms of how this can be achieved. The terms mentioned in the C-100 are national laws or regulations, legally established or recognized machinery for wage determination, collective agreements between employers and workers or a combination of these means.²⁴⁹ However, even if C-100 is flexible regarding the measures used and the timing in achieving its objective, it allows no compromise in the objective to be pursued ie. equal pay for work of equal value. States are obliged to ensure the application of the principle of equal pay for work of equal value in the following situations: where the State is the employer or otherwise controls business, where the State is in a position to intervene in the wage fixing process, for example where the rates of remuneration are subject to public control or statutory regulation, or where there is specific legislation on the issue, or relating to equality and non-discrimination with respect to remuneration. In promoting the application of the principle where it is not in a position to ensure its application, the State must take strong and proactive measures and must act in good faith.²⁵⁰ Regarding the time frame the period for the full application of the Convention should be as short as possible.²⁵¹

²⁴⁸ Ibid, para: 17.

²⁴⁹ ILO (2012), para:659.

²⁵⁰ ILO (1986), para: 25 and 29.

²⁵¹ ILO (2012), Para:671.

5. The principle of equal pay for work of equal value in European Law

5.1 Equality and non-discrimination in European law

The principle of equality and the prohibition of discrimination are considered a fundamental principle in Europe firmly constructed in the Treaties of the European Union²⁵², the Charter of Fundamental Rights of the European Union and secondary legislation.

Charter of Fundamental Rights of the European Union promotes the principle of equality and non-discrimination see Articles 20, 21(1) and article 23 of the charter aimed to ensure equality between men and women in all areas. Thus, the Charter prohibits discrimination on any ground, without limiting this prohibition to any specific fields. With the Lisbon Treaty²⁵³, the Charter of Fundamental Rights of the European Union became a binding set of EU fundamental rights.²⁵⁴

The Treaty on the Functioning of the European Union (TFEU) prohibits discrimination on grounds of nationality and on the basis of sex in the context of employment. It also enables the European Council to take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.²⁵⁵ TFEU addresses equality and non-discrimination in eg. Art. 10, 18, 19 and in Art. 157 in relations to equal pay.

The Court of Justice of the European Union (CJEU) has held the principle of equality as one of the general principles of EU law.²⁵⁶ Within the sphere of EU law, this principle of equality precludes comparable situations from being treated differently, and different situations from being treated in the same way, unless the treatment is objectively justified.²⁵⁷

The right to equality and non-discrimination is guaranteed by all major regional human rights instruments.²⁵⁸ The focus, because of the content of this thesis, will however be on the two main legal sources of equality and non-discrimination in the European legal context: European Convention on Human Rights (ECHR) and EU primary and secondary legislation, along with the judgments of CJEU, affecting all Member States of the European Union (EU) and the EEA countries.²⁵⁹

²⁵² Two core functional treaties, the Treaty on European Union and the Treaty on the Functioning of the European Union, lay out how the EU operates.

²⁵³ The Treaty of Lisbon is an international agreement that amends the two treaties which form the constitutional basis of the EU. The Treaty of Lisbon was signed by the on 13 December 2007, and entered into force on 1 December 2009.

²⁵⁴ See article 19(1) of TFEU.

²⁵⁵ Other grounds for discrimination than nationality and sex were first mentioned in the Amsterdam treaty.

²⁵⁶ CJEU *Ruckdeschel & Co.* Para: 7.

²⁵⁷ CJEU *Sermide SpA v Cassa Conguaglio Zuccherio* Para: 28 and more cases.

²⁵⁸ See African Charter on Human and Peoples Right 1981, African Charter on the Rights and Welfare of the Child 1990, American Convention on Human Rights 1969, Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights 1988, Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against women 1994, Inter American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities 1999.

²⁵⁹ Iceland, Liechtenstein and Norway.

5.1.1 European Convention on Human Rights

Article 14 is an autonomous provision of the European Convention on Human Rights (ECHR) which contains a general prohibition of both direct and indirect discrimination in relation to the enjoyment of the rights guaranteed by the ECHR and its Protocols.²⁶⁰ Besides prohibiting discrimination based on “the usual suspects” (sex, race, colour, religion)²⁶¹ the European Court of Human Rights (ECtHR) has suggested that distinctions based on for example nationality²⁶² and more generally, membership of any particularly vulnerable group in society that has suffered considerable discrimination in the past²⁶³ should be treated as inherently suspect.

According to the ECtHR case-law, a difference of treatment is discriminatory, for the purposes of Article 14 if it “has no objective and reasonable justification”.²⁶⁴ Moreover the Contracting States enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment. Regarding sex as a ground of distinction, the ECtHR has stated that only „very weighty reasons” could be regarded as compatible with the ECHR.²⁶⁵

In considering allegations of violations of Article 14, the ECtHR reflects on four different aspects. First if the complaint is within the “scope” or ambit of one of the substantive provisions of the ECHR. Secondly, if the alleged reason for the discriminations is one of the grounds listed in Article 14 and thirdly, if the applicants properly compare themselves with another class of persons which is treated more favourably. Fourthly, the ECtHR assess if the difference in treatment reasonably and objectively justified.

Differences in treatment are permissible if they meet the general justification test. As mentioned the Human Rights committee in its General Comment on non-discrimination has emphasized that for the purposes of the ICCPR, not every different treatment constitutes discrimination. If the reasons for different treatment are reasonable and objective and if the aim is legitimate the different treatment can be justified. The European Court of Human Rights has developed a “test” for distinguishing between justified and unjustified distinction. The difference in treatment must pursue a legitimate aim and be proportionate.²⁶⁶ This test has been adopted by most other human rights bodies in assessing what constitutes as reasonable and objective criteria. Reasons regarded insufficient to justify differential treatment is for example; mere administrative inconvenience²⁶⁷, prevailing views in society²⁶⁸, stereotypes²⁶⁹ or convictions of

²⁶⁰ Ovey, Rainey and Wicks, (2017), p. 631.

²⁶¹ Article 14 prohibits discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status

²⁶² ECtHR *Gaygusuz v Austria* Para 42.

²⁶³ ECtHR *Kyutin v Russia* Ap Para: 63-64.

²⁶⁴ E.g. ECtHR *Gaygusuz v Austria* Para: 42 and more cases.

²⁶⁵ E.g. ECtHR *Abdulaziz and others v UK* para: 78 and more cases.

²⁶⁶ ECtHR. *Belgian linguistics Case* para:10.

²⁶⁷ CCPR *Ibrahima Gueye et al. v. France* para: 9.5

²⁶⁸ CCPR *Broeks v. The Netherlands* Para: 14. See also ECtHR *Konstantin Markin v Russia* Para:127.

²⁶⁹ ECtHR *Konstantin Markin v Russia* Application no.30078/06 Para: 141-143. The ECtHR found that denying military servicemen parental leave was discrimination on the ground of sex and that gender stereo types cannot justify discrimination.

the local population²⁷⁰.²⁷¹ The CJEU has also adopted similar approach, and in order for the treatment to be justified, it would need to be shown that the treatment correspond to a real need on the part of the undertaking, is appropriate with a view to achieving the objectives pursued, and are necessary to that end.²⁷²

Article 14 is an important provision of ECHR but as case-law has developed, it has become more difficult to predict when a matter will be regarded as falling within the scope of the ECHR, what constitute relevantly similar situations and when objective and reasonable justification can be established. Article 14 is joined, for those Contracting Parties which have ratified it, by a more general equality provision in Protocol no. 12.²⁷³ This protection is however narrower than under Art. 26 ICCPR discussed in chapter 4.2, in that it only applies to the enjoyment of rights set forth by (national) law.²⁷⁴

The lack of ratification to Protocol 12²⁷⁵, in generally, has not dissuaded the ECtHR from developing protection under Article 14 and with the development of indirect discrimination there is now the prospect of a collective approach to discrimination at least in the field of the protection of minorities and possibly in other cases where the discrimination is systematic. There is an increasing focus by ECtHR on stereotyping and stigmatisation as discriminatory practice and alongside the development of indirect discrimination, the focus on structural problems within States is arguably leading to a more substantive approach to equality.²⁷⁶

5.1.2 The Council of Europe

The principle of equality and non-discrimination is a governing principle in a number of other Council of Europe documents. The European Social Charter (revised) includes both a right to equal opportunities and equal treatment in matters of employment and occupation, prohibiting discrimination on the grounds of sex.²⁷⁷ Article 4(3) of the Charter guarantees the right to equal pay without discrimination on grounds of sex. The principle of equal pay is for work of equal value, promoted in the Social Charter, means that the equal pay principle applies to the same work and to “mixed jobs”, that is ones performed by both women and men, but also to work of the same value. The principle of equality should cover all the elements of pay, that is basic or minimum wages or salary plus all other benefits paid directly or indirectly in cash or kind by the employer to the worker by reason of the latter’s employment. It must also apply between full-time and part-time employees, covering the calculation of hourly wages, pay increases and the components of pay.²⁷⁸

²⁷⁰ ECtHR *Inze v Austria* Para: 44.

²⁷¹ Moeckli, (2014), p. 167-168.

²⁷² CJEU *Bilka-Kaufhaus GmbH v. Weber Von Hartz* Para: 30.

²⁷³ Ovey, Rainey and Wicks, (2017), p. 661.

²⁷⁴ Moeckli (2014). P. 163.

²⁷⁵ Iceland has a signatory status regarding Protocol 12.

²⁷⁶ Ovey, Rainey and Wicks, (2017), p. 661. See also Timmer (2011) and Fredman (2016).

²⁷⁷ See part II of the European Social Charter (Revised) (1996).

²⁷⁸ Council of Europe (2008), P.45

Additional protection against discrimination is promoted in the Framework Convention for the Protection of National Minorities,²⁷⁹ in the Convention on Action Against Trafficking in Human Beings²⁸⁰ and in the Convention on the Access to Official Documents²⁸¹. There is also protection against discrimination in the Additional Protocol to the Convention on Cybercrime²⁸². Thus, the principle of equality and non-discrimination has obviously influenced legislative documents produced by the Council of Europe and is seen as a fundamental freedom that needs to be protected.

5.2 Equal pay for work of equal value

5.2.1 Introduction

In Europe, the principle of equal pay for men and women for equal work and work of equal value was laid down in Article 119, in the original EEC Treaty of 1957, which later became Article 141. Now the principle is embodied in Article 157 of the Treaty on the Functioning of the European Union (TFEU) and the Equal treatment directive 2006/54/EC.²⁸³

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 Treaty²⁸⁴, the EU, today, faces a constant and resilient gender pay gap.²⁸⁵ This is despite a great effort EU institution have given the gender pay gap and the principle of equal pay e.g. through primary and secondary legislation refining the first laid down treaty provision.²⁸⁶

The Court of Justice of the EU (CJEU)²⁸⁷ has also established the principle and defined certain aspects of it through its jurisprudence. The European Commission has also devoted its attention to the matter through policy actions and in its recent Strategic Engagement for Gender Equality (2016-2019) the European Commission again set the reduction of the gender pay gap as one of its five key actions.^{288 289}

²⁷⁹ The Framework Convention for the Protection of National Minorities was adopted by the Committee of Ministers of the Council of Europe on 10 November 1994 and entered into force on 1 February 1998.

²⁸⁰ The Council of Europe Convention on Action against Trafficking in Human Beings was adopted by the Committee of Ministers of the Council of Europe on 3 May 2005, following a series of other initiatives by the Council of Europe in the field of combating trafficking in human beings.

²⁸¹ Convention on the Access to Official Documents was adopted by the Committee of Ministers of the Council of Europe on 18 June 2009.

²⁸² The Convention on Cybercrime and its Explanatory Report was adopted by the Committee of Ministers of the Council of Europe on 23 November 2001 and it entered into force on 1 July 2004.

²⁸³ 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)

²⁸⁴ Treaty of Rome.

²⁸⁵ EU still finds itself confronted with a persisting gender pay gap of 16.3 % on average for the 28 Member States in 2015.

²⁸⁶ Foubert, (2017), P. 7.

²⁸⁷ Formerly the European Court of Justice (ECJ).

²⁸⁸ European Commission (2016) Strategic Engagement for Gender Equality (2016-2019).

²⁸⁹ European Commission (2017).

5.2.2 Primary legislation

The principle of equal pay for work of equal value was originally set forth in Article 119 of the Treaty of Rome stating that each Member state should during the first stage ensure and subsequently maintain the application of the principle that men and women should receive *equal pay for equal work*. There was no mention of work of equal value as in ILO's Convention no. 100. The equal pay directive 75/117/EEC²⁹⁰ later clarified that the principle of equal pay “...means, for the same work or for work to which equal value is attributed...elimination of all discrimination on grounds of sex” but the directive was principally designed to facilitate the practical application of the principle of equal pay outlined in Article 119 of the Treaty and in no way, alters the content or scope of that principle as defined in the Treaty.²⁹¹

The principle of equal pay was then covered by article 141 of the Treaty of Amsterdam stating that each Member State should ensure that the principle of equal pay for male and female workers *for equal work or work of equal value* were applied. The article facilitated the same wide definition of “pay” as in article 119 and created a legal base for further legislation regarding the subject.

The principle of equal pay for men and women is now stated in article 157(1) of the TFEU²⁹².

„Each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied.”

According Article 157(2) ‘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.”

Article 157 furthermore states that equal pay without discrimination based on sex means that pay for the same work at piece rates shall be calculated on the basis of the same unit of measurement and that pay for work at time rates shall be the same for the same job. Article 157 not only prohibits direct discrimination based on sex in the field of pay, but also indirect discrimination.

Article 157 has a direct effect, meaning it can be directly relied upon by individuals before national courts not only against the state (vertical), but also against individuals, such as private employers (horizontal).²⁹³ Initially, when laid down in article 119, the principle had dual aim, an economic aim with an interstate competition linked clause and a social purpose.²⁹⁴ A problem of competition arose where Member States that had introduced equal pay schemes for men and women were disadvantaged compared to Member States that allowed differences in pay based on sex, and consequently would be able to produce more cheaply.²⁹⁵ Today, however,

²⁹⁰ 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.

²⁹¹ CJEU, *J.P. Jenkins v Kingsgate (Clothing Productions) Ltd.* Case 96/80 Para:22

²⁹² 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).

²⁹³ CJEU, *Defrenne v Sabena* C-43/75.

²⁹⁴ *Ibid*, Para: 12.

²⁹⁵ *Ibid*, para: 9.

it must be concluded that the economic aim, namely the elimination of distortions of competition between undertakings established in different Member States, is secondary to the social aim pursued by the same provision, which constitutes the expression of a fundamental human right.²⁹⁶ Discrimination against women has also been defined as a social problem and discrimination in payment is seen as a breach of one of the fundamental human rights as laid down in international and European instruments, such as the European Convention on Human Rights and the European Social Charter.²⁹⁷

The CJEU has described the principle of equal pay for work of equal value for men and women as one of the “founding”²⁹⁸ of the European union stipulating that for the same work or for work to which equal value is attributed, the elimination of all discrimination on the ground of sex with regards to all aspects and condition of remuneration.²⁹⁹

5.2.3 Secondary legislation

The principle of equal pay was laid down not only in primary law but also in secondary law in the form of directives. A very important driving force for bringing the equal pay principle into practice was provided by Equal Pay Directive 75/117/EEC.³⁰⁰ The Equal pay directive put the provisions in Article 119 into concrete terms and subsequently the provisions in Article 141 and later Article 157 currently in force. The Directive prohibited all discrimination on the grounds of sex in relation to pay. The directive clarified the meaning of the principle of equal pay laid down in Art. 1(1);

„The principle of equal pay for men and women outlined in Article 119 of the Treaty, hereinafter called "principle of equal pay", means, **for the same work or for work to which equal value is attributed**, the elimination of all discrimination on grounds of sex with regard to all aspects and conditions of remuneration.”

It has been argued that this clarification was an important extension of the scope of protection because, in the past, it had not been possible in some cases to prove discrimination in respect of pay because it had not been possible to prove that the work involved was equal work. However, as mentioned, the directive was principally designed to facilitate the practical application of the principle of equal pay outlined in Article 119 of the Treaty in no way meant to alter the content or scope of that principle as defined in the Treaty.³⁰¹

Article 1(2) stated that where a job classification system was used for determining pay, the criteria must be the same for both men and women to exclude any discrimination on grounds of sex. Thus, the principle of non-discrimination applies to job classification schemes.

The directive also offered recourse to judicial process for persons disadvantaged by a failure to comply with the principle of equal pay and protected complainants against the employer's

²⁹⁶ CJEU, *Deutsche Post v Sievers and Schrage*. C-270-/97 Para: 57.

²⁹⁷ CJEU Defrenne I C-80/70, and *Deutsche Telekom v. Schröder* C-50/96 para: 56.

²⁹⁸ CJEU Defrenne v. Sabena. C-43/75. Para: 12.

²⁹⁹ CJEU *Brunnhöfer v. Bank der Österreichischen Postsparkasse AG*. C-381/99. Para: 5.

³⁰⁰ 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.

³⁰¹ CJEU, *J.P. Jenkins v Kingsgate (Clothing Productions) Ltd*. Case 96/80 Para:22

reaction. The Member States were also to eradicate any discrimination laid down in national laws, regulations or administrative provisions and to inform workers of measures taken in application of the Directive.

All the directives on equal treatment of men and women, including the Equal Pay Directive, were repealed by Equal Treatment Directive – Recast 2006/54/EC.³⁰² This directive helped to clear up the legal situation regarding equal treatment for men and women in matters of employment and occupation, which had become too confusing. In the Community law currently in force, the principle of equal pay is laid down more specifically in Article 4 of the Equal Treatment Directive:

„For the same work or for work to which equal value is attributed, direct and indirect discrimination on grounds of sex with regard to all aspects and conditions of remuneration shall be eliminated.”

Thus, both direct and indirect pay discrimination is prohibited. This general prohibition of pay-related discrimination is supplemented in Article 4(2) by means of a special provision which refers to the use of a job classification system (e.g. in collective agreements) to determine pay. 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, Article (4)(2).

Also, the Equal Treatment Directive – Recast, 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.

5.2.3.1 Transparency

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 Equal Treatment Directive’s most problematic areas.³⁰³ 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.³⁰⁴

³⁰² „Since all the areas covered by the original Directives 75/117/EEC, 86/378/EEC, as amended by Directive 96/97/EEC, 76/207/EEC as amended by Directive 2002/73/EC and 97/80/EC, as amended by 98/52/EC fall within the legal category of „matters of employment and occupation “the recast Directive can be put on the same legal basis”

³⁰³ 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.

³⁰⁴ Commission Recommendation on strengthening the principle of equal pay between men and women through transparency, C (2014) 1405 final.

The Recommendation provides specific pay transparency measures that aim to tackle pay inequality and the persisting gender pay gap. Those measures are firstly, *right of employees to obtain information on pay level*, because by enabling employees to request information on pay levels for categories of employees performing the same work or work of equal value, broken down by gender, including complementary or variable components such as payments in kind and bonuses makes the wage policy of a company or organisation more transparent. By this way, unexplained gender pay gaps can be detected by employers, trade unions and workers, helping them to resolve them through dialogue. Pay transparency at pay level, also helps employees to compare their pay, both within their own category and in comparison to similar categories.³⁰⁵ Secondly, *reporting on pay at company level* ensuring that employers in companies and organisations with at least 50 employees regularly inform employees, workers' representatives and social partners of the average remuneration by category of employee or position, broken down by gender³⁰⁶ and, thirdly, it is recommended that appropriate measures to ensure that *pay audits* are conducted in companies and organisations with at least 250 employees. These audits should include an analysis of the proportion of women and men in each category of employee or position, an analysis of the job evaluation and classification system used, and detailed information on pay and pay differentials on grounds of gender. They should be made available to workers' representatives and social partners on request.³⁰⁷ Other measures are; improved statistics on gender pay gap data, clarification of the concept of "work of equal value", implementation of gender neutral job evaluation and classification systems and ensuring that the implementation of the equal pay principle is consistently monitored and that all available remedies to combat pay discrimination are enforced.³⁰⁸

The recommendations main criticism is that it is not binding, only recommending, and that companies, by themselves, are not going to implement these measures. In, the European Commission's Report on the implementation of the Recommendation it is concluded that:

“...the lack of visible progress in combating pay discrimination, as well as the persisting gender pay gap and the limited follow-up to the Recommendation suggest a possible need for further targeted measures at EU level”³⁰⁹

This puts pressure on social partners and most importantly governments, which must ensure non-discrimination, and in the end the ones that have to make transparency compulsory and enforce it.

5.2.4 The Court of Justice of the European Union (CJEU)

5.2.4.1 Introduction

The extensive case law of the CJEU, often induced by requests for preliminary rulings by national judges, has been of major importance in clarifying the equal pay principle. CJEU case law has played a key role in the development and substantiation of the principle of equal pay

³⁰⁵ Section 3 of the Recommendation.

³⁰⁶ Section 4 of the Recommendation.

³⁰⁷ Section 5 of the Recommendation.

³⁰⁸ European Commission (2017c), p.7-9.

³⁰⁹ Ibid, P. 11.

and in its implementation in practice. The case law has for example clarified the concepts of worker, pay and the coverage of various forms of remuneration, direct and indirect pay discrimination and equal work and work of equal value.

5.2.4.2 Worker

There is no single definition of the concept “worker” in EU-law and the definition varies according to the area in which the definition is to be applied.³¹⁰ The term “worker” within the meaning of Article 157 of the TFEU is, thus, not expressly defined and it is therefore necessary, in order to determine its meaning, to apply the generally recognised principles of interpretation, having regard to its context and to the objectives of the Treaty. Therefore, worker must be considered as a person who, for a certain period of time, performs services for and under the direction of another person in return for which he receives remuneration.^{311 312} The CJEU has repeatedly stressed that the concept must be interpreted broadly. This broad definition includes for example, trainees³¹³, the on-call worker³¹⁴, the part-time worker³¹⁵ and a researcher on a doctoral grant³¹⁶. The concept of a worker does not include self-employed or independent providers of services. However, the formal classification of a self-employed person under national law does not exclude the possibility that a person must be classified as a worker if his/her independence is merely notional, thereby disguising an employment relationship.³¹⁷

5.2.4.3 Pay

A broad definition of the concept pay has been established, both in primary and secondary legislation. The concept of pay has been defined in Article 157 of TFEU and Article 2(1)(e) of the Equal treatment directive as being:

“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/her employer”.

This broad scope has been confirmed by the CJEU. Thus, pay includes not only basic pay, but also, for example, overtime supplements³¹⁸, special bonuses paid by the employer³¹⁹, travel allowances³²⁰, compensation for attending training courses and training facilities³²¹, termination

³¹⁰ CJEU *Martínez Sala v Freistaat Bayern*, C-85/96, para: 31

³¹¹ CJEU *Allonby v Accrington & Rossendale College* C-256/01 Para: 63-67.

³¹² See, in relation to free movement of workers, in particular *Lawrie-Blum* Case 66/85, para: 17 and *Martínez Sala*, para: 32.

³¹³ CJEU *Deborah Lawrie-Blum v Land Baden-Württemberg* C-66/85. This case concerned the free movement of workers. However, the CJEU in *Inge Nolte v Landesversicherungsanstalt Hannover* C-317/93 and CJEU C-444/93 *Ursula Megner and Hildegard Scheffel v Innungskrankenkasse Vorderpfalz, now Innungskrankenkasse Rheinhessen-Pfalz* the CJEU made it clear that the same definition applies in the areas of gender discrimination.

³¹⁴ CJEU *Raulin* C-357/89

³¹⁵ CJEU *Kempf* C-139/85

³¹⁶ CJEU *Raccanelli* C-94/07

³¹⁷ CJEU *Allonby v Accrington & Rossendale College* C-256/01 Para: 71

³¹⁸ CJEU *Brunnhöfer v. Bank der Österreichischen Postsparkasse AG*. C- 381/99 Para: 34.

³¹⁹ CJEU *Lewen v Lothar Denta* Case C-333/97 Para: 24.

³²⁰ CJEU *Garland v British Rail Engineering Ltd* C-12/81 Para 10.

³²¹ CJEU *Bötel v Arbeiterwohlfahrt der Stadt Berlin* C-360/90, Para: 12-13.

payments in the case of dismissal³²² and occupational pensions³²³. The concept of pay therefore covers a wide variety of benefits that a worker receives due to having entered a working relationship.

5.2.4.4 Work of equal value

Article 4 of the Equal Treatment Directive establishes the principle of equal pay by providing that, *for the same work or for work of equal value*, direct and indirect discrimination on grounds of sex is prohibited in all aspects and conditions of remuneration. Where job classification systems are used to determine pay, the Directive states that they must be based on the same criteria for both men and women and drawn up to exclude any discrimination on the grounds of sex. There is no EU-level definition of work of equal value or any clear assessment criteria for comparing different jobs.³²⁴ However, CJEU has in its case law clarified the concept of same work and work of equal value.

Equal work does refer to identical work or to a great extent the same work with regard to the type of activity, work processes, the work environment and working materials. The CJEU has concluded that same work is not confined to identical work, it should include jobs which display a higher degree of similarity. The job comparisons are confined to parallels which may be drawn on the basis of *concrete appraisals of the work actually performed* by employees of different sex within the same establishment or service.³²⁵ And a comparison is possible between a male and a female worker who are not working at the same time.

However, the principle of equal pay applies not only to equal work, but also to work of equal value. Recital 9 of the Directive provides that, in accordance with CJEU case law that when to assessing whether workers are performing the same work or work of equal value, it should be determined whether they may be considered to be in a comparable situation, by taking into account a range of factors including the nature of work and training and working conditions.³²⁶ It is clear from CJEU case law that the terms: *the same work*, *the same job* and *work of equal value* are entirely qualitative in character in that they are exclusively concerned with the nature of the work actually performed.³²⁷

Equal Treatment Directive 2006/54/EC refers to the question of how to assess whether workers are performing the same work or work of equal value. One way of determining work of equal value is by using gender neutral job evaluation and classification systems. However, the Equal Treatment Directive does not oblige Member States to put such systems in place, and it is for the national courts to determine if work is of equal value.³²⁸ Classification in the same job category is, however, not enough for work to be considered of equal value³²⁹

³²² CJEU *Kowalska v Freie und Hansestadt Hamburg* C-33/89 Para 11.

³²³ CJEU *Douglas Harvey Barber v British Rail Engineering Ltd.* C-262/88 Para: 12.

³²⁴ European Commission (2013), P. 7

³²⁵ CJEU *Macarthy Ltd vs. Smith.* C-129/79 para: 15.

³²⁶ CJEU *Rummeler vs. Dato-Druck GmbH.* C-237/85 para: 13 and 23.

³²⁷ CJEU *Brunnhöfer vs. Bank der Österreichischen.* C-381/99 para: 42 and CJEU *Macarthy Ltd vs. Smith.* C-129/79 para: 13 and 23.

³²⁸ CJEU *Brunnhöfer vs. Bank der Österreichischen.* C-381/99, para: 65.

³²⁹ *Ibid*, para: 44.

EU has issued a code of practise on the implementation of equal pay for work of equal value for women and men emphasizing that all gender discrimination is excluded.³³⁰

In this context, recital 10 refers to the fact that the CJEU has established that, in certain circumstances, the principle of equal pay also applies when men and women do not work for the same employer.

5.2.4.5 Same employer

CJEU has addressed the aspect of “same employer” stating that there is nothing in the wording of article 141 (now 157 of TFEU) that suggest that the applicability of that provision is limited to situations in which men and women work for the same employer.³³¹ In the foreword of the Equal treatment directive 2006/54/EC it is stated that in certain circumstances, the principle of equal pay is not limited to situations in which men and women work for the same employer. The CJEU has however, concluded that the payments need to come from a „single source”. Thus, where the differences identified in the pay conditions of workers performing equal work or work of equal value cannot be attributed to a single source, there is no body which is responsible for the inequality and which could restore equal treatment.³³²

5.2.4.6 Direct and indirect discrimination

Equality directive defines direct discrimination in Art. 1(a) as:

“where one person is treated less favourably on grounds of sex than another is, has been or would be treated in a comparable situation”

Thus, a determination of discrimination is based on when the treatment is unfavourable by comparison to someone in a similar situation. A complaint about ‘low’ pay is not a claim of discrimination unless it can be shown that the pay is lower than that of someone employed to perform a similar job. Therefore a “comparator” is needed: that is, a person in materially similar circumstances. This can get problematic when the comparator has to be of the opposite sex, because it can be hard for a woman working a job in gender segregated labour market to find a male comparator performing the same job.

ECJ has found that there is discrimination for the very simple reasons that a person has been put at a disadvantage for reasons of being female or male, without engaging in comparisons of the situations. One of the reasons for this is that the issue of comparisons is not always raised by the national court. However, in cases where the national court puts this issue to the CJEU, the latter will deal with comparison.³³³

Direct discrimination between women and men regarding pay is no longer considered a major problem in the EU. The causes of the GPG are much more complex and related to indirect discrimination. The focus has therefore shifted towards greater difficulties for women in

³³⁰ EU (1996) Code of practise on the implementation of equal pay for work of equal value for women and men. P. 135-142. See also *Rummler vs. Dato-Druck GmbH*. C-237/85, Para: 13.

³³¹ CJEU *Debra Allonby vs. Accrington and Rosendale Collage and others* C-256/01 Para: 45.

³³² *Ibid*, para: 46 and CJEU *A.G. Lawrence and others vs. Regent Office Care Ltd. Comercial Catering Group and Mitie Secure Service Ltd.* C-320/00, Para: 18.

³³³ See for instance in the area of equal pay: CJEU *Birds Eye Walls* C-132/92

balancing work and private life, segregation of the labour market and stereotypes that influence the evaluation and classification of occupations or the choice of education undertaken by men and women.³³⁴

The Equal Treatment Directive defines indirect discrimination:

„where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary”

The first question is whether a measure disadvantages significantly more persons of one sex than the other. It is for the employee/worker to prove that a measure or a practice amounts to indirect discrimination.³³⁵ Thus, in principle, the burden of proving the existence of sex discrimination in the matter of pay lies with the worker who, believing himself to be the victim of such discrimination, brings legal proceedings against his employer with a view to having the discrimination removed. However, it is clear from the case-law of the Court that the burden of proof may shift when this is necessary to avoid depriving workers who appear to be the victims of discrimination of any effective means of enforcing the principle of equal pay.³³⁶ Thus, where an undertaking applies a system of pay which is totally lacking in transparency, it is for the employer to prove that his practice in the matter of wages is not discriminatory, if a female worker establishes, in relation to a relatively large number of employees, that the average pay for women is less than that for men.³³⁷ Secondly, the employer has to provide an objective justification for the indirect discriminatory criterion or practice. As mentioned, indirect discrimination can be justified if the aim is legitimate and the measures to attain that aim are appropriate and necessary. The arguments put forward have to be specific, and supported by evidence.³³⁸

The development of the concept of indirect discrimination in the jurisprudence of CJEU has meant that a step has been taken towards a more substantive approach to equality because the focal point is on the effect of a rule or a practice.

5.2.4.7 Multiple discrimination

The Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation³³⁹ seeks to implement the principle of equal

³³⁴ Foubert (2010), Foreword.

³³⁵ CJEU *Susanna Brunnhofer v Bank der österreichischen Postsparkasse AG* C-381/99 para: 52. and CJEU *Enderby v C-127/92* para: 13.

³³⁶ CJEU *Susanna Brunnhofer v Bank der österreichischen Postsparkasse AG* C-381/99 para: 53 and CJEU *Enderby C-127/92* para: 13 and CJEU *Enderby C-127/92* para: 14.

³³⁷ CJEU *Handels- og Kontorfunktionærernes Forbund I Danmark v Dansk Arbejdsgiverforening, acting on behalf of Danfoss*, para: 10 and CJEU *Susanna Brunnhofer v Bank der österreichischen Postsparkasse AG* C-381/99 paras: 51-62.

³³⁸ CJEU *Regina v Secretary of State for Employment, ex parte Nicole Seymour-Smith and Laura Perez* C-167/97 paras: 58-65.

³³⁹ The Council Directive 2000/78/EC of 27 November 2000 Establishing a general framework for equal treatment in employment and occupation.

treatment and eliminating inequalities between men and women in the workplace, recognizing that women are often victims of multiple discriminations.

However, in Europe neither legislation nor jurisprudence has really addressed the issue of multiple discrimination. As a result, despite the warning against multiple discrimination given in the preambles of The Race Directive 2000/43/EC³⁴⁰ (14)³⁴¹ and above-mentioned Directive 2000/78/EC³⁴² (3)³⁴³, the Court of Justice of the European Union (CJEU) has never officially acknowledged the existence of this type of discrimination. Advocate general Kokott addressed the notion of multiple discrimination in his opinion in the Parris-case.³⁴⁴ The circumstances of the case regarded discrimination on the grounds of age and/or sexual orientation, referred to as discriminatory *combination* of several factors in the opinion, adding a new dimension to a case where discrimination is because of combination of two or more different grounds, and must be taken duly into account in its assessment under EU law.³⁴⁵

However, an observation of the few cases of multiple discrimination brought to the CJEU reveals some elements that have been considered useful to ensure better protection of equality for victims of multiple discrimination, despite the numerous obstacles posed by a predominantly single-ground non-discrimination system in the EU.³⁴⁶ However, for a genuine multiple discrimination approach, the Court would need to be more open to recognising and articulating the ways in which relationships of power interact in vertical, diagonal and layered ways so that the most disadvantaged will be the most protected.³⁴⁷

5.2.4.8 Special measures

Article 157(4) has a reference similar to article 4(1) CEDAW on special measures, promoting that the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the underrepresented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers. This is defined in Directive 2006/54, article 3 as follows:

³⁴⁰ Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.

³⁴¹ (14) In implementing the principle of equal treatment irrespective of racial or ethnic origin, the Community should, in accordance with Article 3(2) of the EC Treaty, aim to eliminate inequalities, and to promote equality between men and women, especially since women are often the victims of multiple discrimination.

³⁴² Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

³⁴³ (3) In implementing the principle of equal treatment, the Community should, in accordance with Article 3(2) of the EC Treaty, aim to eliminate inequalities, and to promote equality between men and women, especially since women are often the victims of multiple discrimination.

³⁴⁴ Opinion of advocate general Kokott in the case of Dr David L. Parris v Trinity College Dublin and Others. (2016) C-443/15.

³⁴⁵ Ibid para: 147-159

³⁴⁶ CJEU *Pensionsversicherungsanstalt v Kleist* (2010) C-356/09, (combination of age and sex), *Odar v Baxter Deutschland GmbH* (2012) C-152/11 (combination of age and disability) and *Z v A Government department and The Board of management of a community school* (2014) C-363/12 (combination of sex and possible disability) and *Milkova v Izpalnitelen direktor na Agentsiata za privatizatsia i sledprivatizatsionen kontrol* (2017) C-406/15 (combination of disability and civil servant status).

³⁴⁷ Fredman (2016) p. 87.

„Member States may maintain or adopt measures within the meaning of Article 141(4) of the Treaty with a view to ensuring full equality in practice between men and women in working life.”

According to the CJEU measure that would give automatic and unconditional preference to one sex is not justified in this respect unless regard is given to the principle of proportionality and the measures must be within the limits of what is necessary in order to achieve the aims pursued.³⁴⁸ The development of the CJEU has been in the direction in favour of positive action.³⁴⁹ Positive action is rather controversial in some Member States and is therefore only allowed for, but it is not laid down as an EU-law obligation.

5.2.4.9 Burden of proof

In principle, the burden of proving the existence of sex discrimination in the matter of pay should lie with the worker who, believing him or herself to be the victim of such discrimination.³⁵⁰ However, a particular difficulty arises in such cases, because in practice, complainants will generally be in a difficult placed to prove unlawful discrimination because in many cases, discrimination is hidden or indirect. For a person who is faced with discrimination, it is a difficult and sometimes an impossible task to sustain such evidence on which a prima facie or straightforward case of discrimination can be based. In practice, for example, employers do not always maintain a clear and transparent pay systems.

CJEU has concluded that where a company applies a pay system which is totally lacking in transparency and statistical evidence reveals a difference in pay between male and female workers, the burden of proof shifts to the employer to explain the pay difference because of factors unrelated to sex.³⁵¹ Also CJEU has found that the use of statistics, indicating that men earn more than women when performing work of equal value, could lead to “apparent discrimination”. Then the burden of proof shifts to the employer.³⁵² These developments with regard to the use of statistical data were reinforced in a ruling of 1999 regarding indirect discrimination.³⁵³

5.2.4.10 Objective justification

Direct pay discriminating on the ground of gender cannot be objectively justified. However, difference in treatment does not always constitute as discrimination and pay difference for the same work or work of equal value if it can be objectively justified.³⁵⁴ In a case of pay difference it would not be enough for the employer to establish that the pay difference is not on grounds

³⁴⁸ CJEU, *Lommers v Minister van Landbouw, Natuurbeheer en Visserij* C- 476/99 Para: 39.

³⁴⁹ CJEU, *Lommers v Minister van Landbouw, Natuurbeheer en Visserij* C- 476/99 This case was decided in favour of positive measures. However, it also illustrated the potential dangers of positive action, in the sense that it continues to stereotype women as in this case as caregivers.

³⁵⁰ CJEU *Enderby v Frenchay Health Authority and Secretary of State for Health* C-127/92, para: 13.

³⁵¹ CJEU *Handels- og Kontorfunktionærernes Forbund I Danmark v Dansk Arbejdsgiverforening, acting on behalf of Danfoss*. Case 109/88 para: 16.

³⁵² CJEU *Enderby v Frenchay Health Authority and Secretary of State for Health*. C-127/92, para: 14 and 19.

³⁵³ CJEU *R. v. Secretary of State for Employment, ex parte Seymour Smith and Perez* Case C-167/97.

³⁵⁴ Steiner, Twigg-Flesner og Woods (2006). p. 535.

of gender, objective reasons for the pay difference would also have to be demonstrate the. There can be an objective reason, which justify a wage difference despite the fact that it has a discriminatory effect on women.³⁵⁵

In cases of indirect discrimination, the CJEU has stipulated that if the pay discrimination correspond to a genuine need of the enterprise it can be objectively justified. However, need to cut costs are not considered a genuine need. Also, if the pay discrimination is suitable for obtaining the objective pursued by the enterprise, and are necessary for that purpose, it is justified. Thus, there is no unlawful pay discrimination in so far as the employer constitute objectively justified reasons unrelated to any discrimination based on sex and in conformity with the principle of proportionality.^{356 357}

CJEU has accepted length of service and better training³⁵⁸ as an objective justification and has concluded that “productivity” of an employer can justify pay supplements. However, the mentioned productivity must be based on the actual output of the employee once having already taken up employment. A pay supplement cannot be given on the suggested expectation of more productivity of an employer.³⁵⁹ CJEU has also suggested that economic factors³⁶⁰ could fall in this category as well,³⁶¹ that if the employer is able to show “precisely what proportion of the increase in pay is attributable to market forces”³⁶² However, pay difference that is arrived at as a result of collective bargaining with different groups of staff has not been considered objective justification.³⁶³

³⁵⁵ CJEU *Bilka-Kaufhaus GmbH v. Weber Von Hartz*

³⁵⁶ CJEU *Susanna Brunnhofer v Bank der österreichischen Postsparkasse AG* C-381/99 para: 68.

³⁵⁷ CJEU *Enderby v Frenchay Health Authority and Secretary of State for Health*. C-127/92, para: 25-26.

³⁵⁸ CJEU *Handels- og Kontorfunktionærernes Forbund I Danmark v Dansk Arbejdsgiverforening, acting on behalf of Danfoss*. Case 109/88 para: 24 and *Cadman v Health & Safety Executive* C-17/05.

³⁵⁹ CJEU *Susanna Brunnhofer v Bank der österreichischen Postsparkasse AG* C-381/99.

³⁶⁰ CJEU *Jenkins v Kingsgate (Clothing Productions) Ltd.* C-96/80 para: *Bilka - Kaufhaus GmbH v Karin Weber von Hartz* C-170/84.

³⁶¹ Steiner, Twigg-Flesner og Woods (2006). Bls. 539.

³⁶² CJEU *Enderby v Frenchay Health Authority and Secretary of State for Health* C-127/92, para: 27.

³⁶³ *Ibid.*

6. The principle of equal pay for equal work in Icelandic legislation

6.1 Introduction

The Icelandic Constitution stipulates the principle of equality, stating that men and women are to have equal rights in every respect. Iceland has also, since 1976, had a special statute intended to ensure equality between women and men and their equal status in all respects. The current legislation on gender equality is the Act on Equal Status and Equal Rights of Women and Men No. 10/2008 (Gender Equality Act)³⁶⁴ consist of general provisions about equality eg. in regard to employment. The aim of the act is to establish and maintain an equal status and equal opportunities for women and men, and thus to promote gender equality in all spheres of society.

Although there has been more than fifty years of equal pay legislation in Iceland, the gender pay gap in the Icelandic labour market has remained resilient. Iceland has emphasised on improving the effectiveness of equal pay legislation aiming at tackling direct and indirect gender wage discrimination and recently made new amendments, the Equal Pay Standard, to the Gender Equality Act. This new provision, as of January 2018, requires companies and institutions employing 25 or more workers to obtain equal pay certification of their equal pay system and its implementation. The purpose of this obligatory certification is to enforce the current legislation, prohibiting discriminatory practices in pay based on gender. However, before the provisions promoting equal pay for work of equal value in Icelandic legislations will be addressed, it is necessary to briefly introduce the Icelandic legal system.

6.1.1 The Icelandic legal system

The Icelandic legal system is a civil law system. Its most prevalent feature is that its core principles are codified in a referable system, which serves as the primary source of law. The Constitution of the Republic of Iceland No. 33/1944 is the highest source of law and the principle of equality is specifically addressed in Article 65 of the Constitution; *“everyone shall be equal before the law and enjoy basic human rights irrespective of gender, religion, opinions, national origin, race, colour, property, birth or other status”*. The same article states, furthermore, that men and women shall enjoy equal rights in all respects. This was added at a later stage during parliamentary debates to ensure gender equality by resorting to affirmative measures.³⁶⁵ All statutory laws, regulations and executive actions must comply with the provisions of the Constitution (Lex superior). Legislation which fails to do so can be determined invalid by the Icelandic courts.³⁶⁶

Furthermore, gender equality is emphasised in the Executive Procedure Act, No. 37/1993, which states the basic principle that when handling a case, government authorities are to ensure

³⁶⁴ The Act on Equal Status and Equal Rights of Women and Men No. 10/2008 as amended by Act No. 162/2010, No. 126/2011 and No. 62/2014 (Gender Equality Act)

³⁶⁵ Constitutional Committee ‘s opinion, 118. parliament 1994-1995.

³⁶⁶ LÍndal, (2002), p. 86-96.

consistency and equality in the legal context. It is specifically stated that when resolving cases, it is prohibited to discriminate between parties on the basis of a position based on their gender. However, there is no comprehensive anti-discrimination legislation in Iceland.³⁶⁷

The Icelandic legal system adheres to the principle of dualism. Therefore, ratified international treaties do not assume the force of domestic law and are only binding according to international law. Iceland has incorporated in to its domestic legislation some of its ratified international treaties and obligations. For example, the European Convention of Human Rights as law no. 62/1994³⁶⁸ and The Convention of the Rights of the Child as law no. 19/2013. Iceland has ratified the International Covenant on Economic, Social and Cultural Rights (ICESCR), the International Covenant on Civil and Political Rights (ICCPR), the Convention on the Elimination of All forms of Discrimination against Women (CEDAW), the Convention on the Rights of Persons with Disabilities³⁶⁹ and the European Social Charter, thus only binding according to international law. However, many of the human rights obligation covered by these treaties are protected in the Icelandic Constitution³⁷⁰ and the Supreme Court of Iceland has interpreted Icelandic law in conformity with Iceland's international obligations.³⁷¹ It is generally accepted in Icelandic jurisprudence to interpret domestic provisions that confine human rights of the citizens, narrowly³⁷² and Icelandic jurisprudence show that the Supreme Court of Iceland will stretch very far when interpreting domestic law to be in conformity with Iceland's international obligations, especially when it comes to protection of human rights.³⁷³ The CEDAW committee has raised its concerns about the non-incorporation of the CEDAW into Icelandic legislation. The committee has mentioned that there is a general lack of awareness of CEDAW and the Optional Protocol among government officials, the judiciary and other law enforcement officials. The CEDAW committee is also concerned about the lack of cases adjudicated by the courts, including the Supreme Court of Iceland, in which reference has been made to the Convention. Most importantly it is problematic that women themselves are not aware of their rights under the Convention and of the individual communications and inquiry procedures under the Optional Protocol, and thus lack the information necessary to claim their rights.³⁷⁴

Iceland is not a member of the EU but a party to the Agreement on the European Economic Area (EEA) which entered into force in 1994. The EEA Agreement unites the EU member states and the three EEA states into one single market governed by the same basic rules. These rules cover the „four freedoms”, free movement of goods, capital, services and persons, and

³⁶⁷ There has been a bill on equal treatment in the labour market (not yet passed as legislation) before the Icelandic Parliament for some time now. This bill promotes equal treatment in the labour market banning discrimination, for example, on the grounds of disability, ethnicity, sexual orientation and other grounds mentioned in the bill.

³⁶⁸ Iceland has a signatory status regarding Protocol no. 12.

³⁶⁹ Iceland has also ratified numerous of other human right treaties.

³⁷⁰ Thorarensen, (2009), P. 77

³⁷¹ Icelandic Supreme Court e.g.: case no. 239/1987, case no. 274/1991, case no. 1992/174 and more.

³⁷² Björgvinsson, (2008), p. 150.

³⁷³ Ibid, p. 270.

³⁷⁴ CEDAW Committee (2016) Concluding observations on the combined seventh and eighth periodic reports of Iceland para: 7.

competition rules.³⁷⁵ The EEA Agreement enables Iceland³⁷⁶ to enjoy the benefits of the EU's single market without the full privileges and responsibilities of EU membership. The EEA Agreement is based on the primary legislation of the European Union and has had a huge impact on Icelandic legislations along with EU secondary legislation (EU directives). Thus, Iceland adopts EU labour market directives as a part of the European Economic Agreement (1994) either as laws or in collective agreements and the judgements of CJEU has a precedence in Iceland. However, the European Union directives against discrimination, 2000/78/EU and 2000/43/EU, have still not been implemented in Iceland through the adoption of a comprehensive anti-discrimination law.

6.2 Article 19 of the Act on Equal Status and Equal Rights of Women and Men no. 10/2008

The principle of equal pay for work of equal value is put forth in Article 19 (1) of the Act on Equal Status and Equal rights of Women and Men no. 10/2008 (Gender Equality Act) which states:

„Women and men working for the same employer shall be paid equal wages and enjoy equal terms of employment for the same jobs or jobs of equal value.”

Article 19(2) states that by “equal wages” wages shall be determined in the same way for women and men and the criteria of which wages are determined shall not involve gender discrimination. There is a “transparency” sub-article under the section regarding wage discrimination, Art. 19 (3), that workers shall always, upon their choice, be permitted to disclose their wage terms. The Equal Pay Standard, is laid down in Art. 19(4).

The concept of “wages” in Article 2(8) is defined as “*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*”. There is also a definition of the concept “terms” in article 2(9) as “*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*”.

6.2.1 Work of equal value

Article 19(1) stipulates equal pay for „the same work or work of equal value”. There is however no definition of the concept „value” in the Gender Equality Act. The principle of equal pay for work of equal value should be interpreted in compliance with the EEA-agreement. The principle of equal pay for work of equal value is a general principle of the EEA-agreement³⁷⁷ and article 69³⁷⁸ stipulates that Each Contracting Party shall ensure and maintain the application of the principle that men and women should receive equal pay for equal work and in compliance with

³⁷⁵ Icelandic Ministry of Foreign affairs.

³⁷⁶ And the two other EEA-countries Liechtenstein and Norway.

³⁷⁷ Schram, (1992), p. 66.

³⁷⁸ According to article 2. Of Act no. 2/1993 EEA-agreement.

Article 157 of the TFEU.³⁷⁹ Thus equal value, according to Icelandic jurisprudence, refers to nature of the work and not the characteristics of the employer.³⁸⁰

The drafters also noted that the CJEU has, in its case law, concluded that very different jobs could be of equal value. The drafters further stated that when jobs are compared it should be done by „comprehensive assessment”.³⁸¹ Further instructions on how to compare jobs are not found in the bill nor in the legislation. In article 19(2) it is stated that by “equal wages” is meant that wages shall be determined in the same way for women and men.

Article 19(1) is gender-explicit referring to *women and men* working for the same employer shall be paid equal wages and enjoy equal terms of employment for the same jobs or jobs of equal value. Thus, the comparator in pay discrimination cases must be of opposite sex.³⁸²

Iceland has not developed any consistent national strategy or method on the implementation of objective job evaluation. In Iceland the use of job evaluation is limited to the local government and the municipalities have been leading the way. The job evaluation scheme is intended to ensure that employees receive wages that are determined on the same basis, independent of their gender. The system takes various job types into account. The rules on job evaluation are official and comply with rules on equality and work according to certain procedural rules and rules on the handling of disputes and appeals concerning evaluations.³⁸³ The Supreme court of Iceland has confirmed that different jobs can be of equal value referring to the „comprehensive assessment”.³⁸⁴

6.2.2 Comparable work and work of equal value

The wording in article 19(1) of the Gender Equality Act „...for the same jobs or jobs of equal value” is intended to ensure that women and men is to be paid equal wages and enjoy equal terms of employment for the same jobs or jobs of equal value. This wording was said in compliance with Equal Pay Directive no. 75/117/EEC (in force at that time) on that matter and the drafters emphasized, as mentioned, that the CJEU jurisprudence had stated that different jobs could be of equal value.³⁸⁵ However, in previous Gender Equality Acts the wording of the provisions promoting the principle of equal pay for work of equal value did not only refer to work of equal value but also stipulated equal wage for: “the work of equal value and comparable work.”

The first legislation addressing gender equality in Iceland was Act no. 37/1911 which concerned education and some work of women in the public sector.³⁸⁶ Nearly 50 years later the next step was taken and Act no. 60/1961 about equal pay for “women’s work”, factory and office work was adopted. The drafters assumed if more professions were included in the comparison the

³⁷⁹ EFTA-court has interpreted that the provisions of article 141 (now 157 of the TFEU) are in compliance with article 69 of the EEA-agreement, see EFTA-court, *EFTA Surveillance Authority v. Norway* E-02/07.

³⁸⁰ The opinion of the Gender Equality committee no. 3/2016.

³⁸¹ Bill of Equal Status and Equal rights of Women and Men. 135. Icelandic Parliament 2007-2008.

³⁸² The opinion of the Gender Equality Committee no.5/2016

³⁸³ Webpage of Reykjavik-city and the webpage of job evaluation.

³⁸⁴ See for example case no. 11/2000 and case no. 258/2004.

³⁸⁵ Bill of Equal Status and Equal rights of Women and Men. 135. Icelandic Parliament 2007-2008.

³⁸⁶ Act no. 37/1911 about the right of women to education, scholarships and office.

practice would be complicated and impossible to perform. When the legislation was adopted, employers' organisation suggested: "equal pay for work of equal value" in compliance with ILOs Convention No. 100. The drafters, however, assumed that such comparison would be difficult, and the legislation emphasized "equal pay for equal work".³⁸⁷

It was soon clear that legislation alone wasn't enough to achieve equal pay for men and women and Act no. 37/1973³⁸⁸ was supposed to follow up on violation and the scope of equal pay principle was widened, now applying to all work performed by women no matter in what profession or with which employer, stating: "Equal pay for work of equal value and comparable work". The drafters claimed the principle in compliance with ILOs Convention No. 100.³⁸⁹ However, there is no stipulation in Convention no. 100 that the work had to be of equal value *and* comparable.

The first complete equality legislation, The Act on Equal Status and Equal rights of Women and Men, adopted in 1976, stipulated the principle of equal pay and prohibited discrimination. The legislation was considered progressive, aiming for equality in all aspects of the society. People were optimistic that this legislation would put an end to inequality on the labour market, wages were just numbers on a paper, it wouldn't be so difficult to just change it.³⁹⁰

The equality legislation has been reviewed four times from 1976³⁹¹ and until the year 2008 the principle of equal pay stipulated that the work had to be of equal value *and* comparable. There was some discussion about it being inconsistent with Convention no. 100 and when Iceland came a party to EEA-agreement the principle of equal pay was supposed to be amended in compliance with our EEA agreement obligation.³⁹² However, the principle of equal pay still consisted of "work of equal value *and* comparable work" in the Gender Equality Act no. 96/2000, and the drafters, with little explanations, also stipulated that the work in question had to be with the same employer.³⁹³

Icelandic jurisprudence suggests some legal uncertainty whether the work had to be both of equal value *and* comparable. In Icelandic Supreme Court Case No.258/2004 the majority of the Supreme Court concluded that the work compared were work of equal value. The Court came to the conclusion that the jobs done by B and the man with whom she compared herself with, were so closely comparable in terms of content and outward appearance that she had been the victim of discrimination. However, in a dissenting opinion the minority concluded that the work compared were not considered comparable even if the work was of equal value.^{394 395}

In 2008, when the Equality Act was last reviewed, an important change was made when the article stipulated equal pay for: "*the same work or work of equal value*". However, the condition of the "same employer" was left unchanged without explanation.

³⁸⁷ Bill of equal pay for men and women. 81. Parliament 1960-1961.

³⁸⁸ Jafnlaunaráð

³⁸⁹ Bill of equal pay committee. 93. Icelandic Parliament 1972-1973.

³⁹⁰ Bill of equality between men women and men. 97. Icelandic Parliament 1975-1976.

³⁹¹ See: Act no. 65/1985, Act no. 28/1991, 96/2000 and 10/2008.

³⁹² Bill of Equal Status and Equal rights of Women and Men. 125. Icelandic Parliament 1999-2000.

³⁹³ Ibid.

³⁹⁴ The Supreme Court of Iceland. Case no. 258/2004.

³⁹⁵ See also: The Supreme Court of Iceland. Case no. 11/2000 and Case no. 172/1976

6.2.3 Same employer

Article 19(1) stipulate that the work in question must be with the same employer. That condition isn't to be found in article 157 of the TFEU, EUs secondary legislation, ILO Convention no. 100, article 4 of the European Social Charter nor article 69 of the EEA-agreement.

The CEDAW committee has recommended amendments to article 19(1) of the Gender Equality Act in order for it to be in compliance with article 11 (1) (d) of the CEDAW Convention. The CEDAW committee has emphasised that article 19(1) should be without the limitation to “the same employer”. Thus, the committee is concerned of the limited scope of article 19 which provides that the equal pay principle applies only to women and men working for “the same employer”.³⁹⁶

In CEACR direct requests, the limited scope of comparison in article 19(1) of the Icelandic Gender Equality Act, has repeatedly been criticized, ie. that only men and women working for the same employer are entitled to equal wages and equal terms of employment for the same jobs or jobs of equal value and the CEACR has demanded the Icelandic government to extend the scope of comparison beyond the enterprise. Furthermore, the CEACR has pointed to the fact, that the Icelandic labour market is still highly segregated and that a large majority of women are working in the public sector, in caretaking, teaching and other services. The effective application of the principle is needed, where women are more heavily concentrated in certain sectors or occupations and there is a risk that the possibilities for comparison at the enterprise or establishment level will be insufficient.³⁹⁷ Ensuring a broad scope of comparison is essential for the application of the principle of equal remuneration given the continued prevalence of occupational sex segregation where “female jobs” are undervalued in comparison with those of men who are performing different work and using different skills, when determining wage rates.³⁹⁸

The European Committee of Social Rights (European Committee) in its conclusions adopted in 2007 considered that the right of women and men to “equal pay for work of equal value” must be expressly provided for in legislation. Furthermore, that in cases where the legislation did not authorize pay comparisons to determine whether there was equal pay for equal work or work of equal value beyond a single employer, the situation was not in conformity with section 4(3) of the European Social Charter. The European Committee has consistently found that “*is of fundamental importance for a system of effective job evaluation to be efficient in certain circumstances, in particular in enterprises where the workforce is largely, or even exclusively, female*” and that “*the possibility to look outside an enterprise for an appropriate comparison should exist where necessary*”.

CJEU has addressed the aspect of “same employer” stating that there is nothing in the wording of article 141 (now 157 of TFEU) that suggest that the applicability of that provision is limited

³⁹⁶ CEDAW committee (2016) Concluding observations on the combined seventh and eighth periodic reports of Iceland para: 29(a) and 30(a).

³⁹⁷ Direct Request (CEACR) adopted 2012, published 102nd ILC session (2013).

³⁹⁸ ILO (2012), para: 697.

to situations in which men and women work for the same employer.³⁹⁹ In the foreword of directive 2006/54/EC it is stated that in certain circumstances, the principle of equal pay is not limited to situations in which men and women work for the same employer. The CJEU has however, concluded that the payments need to come from a „single source”. Thus, where the differences identified in the pay conditions of workers performing equal work or work of equal value cannot be attributed to a single source, there is no body which is responsible for the inequality and which could restore equal treatment.⁴⁰⁰

The Supreme Court of Iceland has not directly commented on the criteria of the same employer but in its judgment no. 248/2004 the majority of the Supreme Court accepted a comparison between employees of different municipality institutions. Thus, a municipality can be seen as the same employer under the scope of article 19(1) of the Icelandic Gender Equality Act. Thus, the State could also constitute as the same employer on the public market.

6.3 The Equal Pay Standard

6.3.1 Introduction

A new sub article (4) to article 19 of the Gender Equality act came into force on January 1, 2018.⁴⁰¹ Article 19(4) stipulates that companies and institutions employing 25 or more workers will be required to obtain equal pay certification of their equal pay system and its implementation. The purpose of this obligatory certification is to enforce the current legislation prohibiting discriminatory practices based on gender and enforcing the principle of equal pay for work of equal value for men and women working for the same employer. The Equal Pay Standard does not address wage determination. It is a tool for assessing a company's pay policies, classification of jobs according to equal value and wage analysis on the basis of the classification, as well as formalizing policies and processes related to pay decisions.⁴⁰²

6.3.2 Background

In 2014 a new article was added to the Gender Equality law under the section regarding wage discrimination, which allowed the secretary to add regulations regarding the implantation of that section; including, implementing standards regarding wage discrimination.⁴⁰³

A tripartite cooperation of Icelandic trade unions, the employers' confederation and government officials developed the Equal pay management system: ÍST 85 Standard⁴⁰⁴ usually called “The Equal Pay Standard” that are supposed to help employers prevent wage discrimination and enable them to become certified. The standard was developed from 2008-2012 by a working

³⁹⁹ CJEU *Debra Allonby vs. Accrington and Rosendale Collage and others* C-256/01 Para: 45.

⁴⁰⁰ Ibid, para: 46 and CJEU *A.G. Lawrence and others vs. Regent Office Care Ltd. Commercial Catering Group and Mitie Secure Service Ltd.* C-320/00 Para: 18.

⁴⁰¹ Article 3 of Act no. 56/2017 amending Act no.10/2008 Equal Status and Equal rights of Women and Men. 146. Parliament 2016-2017.

⁴⁰² The webpage of Government Office of Iceland and Bill of Equal Status and Equal rights of Women and Men. 146. Icelandic Parliament 2016-2017.

⁴⁰³ Article 2 of Act no. 62/2014 amending Act no.10/2008 Equal Status and Equal rights of Women and Men. 143. Parliament 2013-2014.

⁴⁰⁴ Webpage of Icelandic Standards. *Equal pay management system – requirements and guidance.*

group and financed by the social partners and the Icelandic Ministry of Welfare, with the participation of several other parties.⁴⁰⁵ The working group analysed the Icelandic labour market and developed guidelines for the valuation of work.⁴⁰⁶ In order to ensure equal pay within the workplace the employer must determine which work tasks each position entails and then assign a value. The pay must be decided based on the position and not the person carrying out the work. The standard makes employers pay a fixed salary for a certain type of work. However, there is some room for an upward adjustment for example if a worker adds extra value to the work, but such exceptions must be decided in accordance with the standard and justified in writing.⁴⁰⁷

The finished standard was published by Icelandic Standards, the country's national standards body⁴⁰⁸ in 2012 and was implemented in several companies experimentally.⁴⁰⁹ The standard was voluntary and companies and public institutions were free to implement it. However, few companies applied the standard so voluntary approach didn't seem to address the issue and GPG on the Icelandic labour market stayed approximately the same. It is thus understandable, that the decision on an obligatory Equal Pay Standard became the next step in tackling gender inequality within companies and the gender pay gap. Those companies that implemented the standard voluntarily stressed that the implementation was a demanding process in need of support at the highest level of management. However, it was considered worth it because the workplace would benefit from a fair and transparent pay system.⁴¹⁰

As mentioned, the standard describes the process that companies and public institutions can follow and the standard aims at implementing effective and professional methods for pay decisions, effective review and improvement. The process of implementation and maintenance of an equal pay system composes of assessment -> an equal pay policy -> improvements -> planning -> implementation and maintenance -> checking -> management reviews and when the company has implemented those changes it can get a certification of its pay system.⁴¹¹ The standard is applicable to all companies not matter what size or shape.⁴¹² The standard was written in conform to international standards and accepted practices in ISO standards.⁴¹³

⁴⁰⁵ The Icelandic Confederation of Labour (ASI) review on the bill amending the Act no.10/2008 Equal Status and Equal rights of Women and Men. 146. Parliament 2016-2017 and Bill of Equal Status and Equal rights of Women and Men. 146. Icelandic Parliament 2016-2017.

⁴⁰⁶ Olafsdottir and Rögnvaldsdottir (2014) The gender pay gap in Iceland. Conference on Equal pay and Gender Equality in the Labour Market

⁴⁰⁷ ÍST 85:2012

⁴⁰⁸ Icelandic Standards is an independent association whose role is the publication of Icelandic standards and the representation of Iceland in international and regional standards bodies. IST is the only national standards body in Iceland. Source: The webpage of Icelandic Standards.

⁴⁰⁹ ÍST 85:2012

⁴¹⁰ The Icelandic Confederation of Labour (ASI) review on the bill amending the Act no.10/2008 Equal Status and Equal rights of Women and Men. 146. Parliament 2016-2017, The Icelandic Federation of Trade review on the bill amending the Act no.10/2008 Equal Status and Equal rights of Women and Men. 146. Parliament 2016-2017. The Centre for Gender Equality review on the bill amending the Act no.10/2008 Equal Status and Equal rights of Women and Men. 146. Parliament 2016-2017.

⁴¹¹ Olafsdottir and Rögnvaldsdottir (2014) The gender pay gap in Iceland. Conference on Equal pay and Gender Equality in the Labour Market and Equal Pay Management System ÍST 85:2012.

⁴¹² Equal Pay Management System ÍST 85:2012

⁴¹³ Bill of Equal Status and Equal rights of Women and Men. 146. Icelandic Parliament 2016-2017.

6.3.3 Article 19(4) - Equal Pay Standard

In June 2017, the Equality Act was amended with Act no. 56/2017 and a fourth paragraph, referring to the Equal Pay standard, was added to the law under the section regarding wage discrimination (Art.19) stipulating that the Equal Pay Standard is mandatory for companies with 25 employees or more, from 1st of January 2018.

The Equal Pay standard requires a company or institution with an average of 25 or more employees *to prove* that they are paying men and women equally, by acquiring certification. The Certification is a written statement in which it is stated that the companies/institutions equal pay system and its implementation meet the requirements of the Equal Pay Standard (art.1(c) of the standard). Once certification has been finalised, the Centre for Gender Equality shall receive it, together with a report on the outcome of the audit. Certification shall be renewed every three years. The certification body shall also inform the Centre for Gender Equality if the audit does not result in certification and state the reasons for this by submitting a report on the outcome of the audit. The Centre for Gender Equality is authorized to grant the organizations of the social partners access to the certification body's report on the outcome of audits of equal pay systems of companies or institutions if the audit does not lead to certification.

The article also specifies that the organizations of the social partners may negotiate to include in collective agreements a provision to the effect that in an audit of the equal pay system of a company or institution which employs an average of 25–99 employees on an annual basis, the company or institution shall have the choice of whether an audit is carried out based on item b of Article 1 of the ÍST 85 standard or item c of Article 1 of the ÍST 85 standard. If such an agreement is concluded and an equal pay audit is conducted the company or institution shall be provided with confirmation. A written statement from a stakeholder which is provided with a confirmation certificate, following the stakeholder's audit of a company's or institution's equal pay system, in which it is stated that the equal pay system and its implementation meet the requirements of the ÍST 85 standard. (Art. 1(b) of the standard). Once confirmation has been finalised, the stakeholder shall send a copy of the confirmation certificate to the Centre for Gender Equality, together with a report on the outcome of the audit. As a means of further securing the aims of the legislation in the long term, companies and institutions are required to have their equal pay certification renewed every three years. The stakeholder shall also inform the Centre for Gender Equality if the audit does not result in confirmation and state the reasons for this by submitting a report on the outcome of the audit. The Centre for Gender Equality is authorized to grant the organizations of the social partners access to the stakeholder's report on the outcome of audits of equal pay systems of companies or institutions if an audit does not lead to confirmation.

When the Centre for Gender Equality has received a certification certificate in accordance with the fourth paragraph along with the certification body's report on the outcome of the audit, the Centre for Gender Equality shall award an equal pay symbol to the company or institution based on the certification and the equal pay symbol shall remain valid for the duration of validity of the certification. If the Centre for Gender Equality receives a confirmation certificate in accordance with the fifth paragraph, together with the stakeholder's report on the outcome of

the audit, the Centre for Gender Equality shall award equal pay recognition to the company or institution based on the confirmation and the equal pay recognition shall remain valid for the duration of validity of the confirmation.

The Centre for Gender Equality shall maintain a register of companies and institutions that have acquired certification (cf. item 10 of Article 2), or confirmation (cf. item 11 of Article 2), and display it in an accessible manner on the Centre's website.

The organizations of the social partners shall monitor to ensure that companies and institutions which employ an average of 25 or more employees on an annual basis acquire certification or confirmation and that these are renewed. If a company does not get a certification the certification body shall notify the Centre for Gender Equality which can grant the organizations of the social partners access to the certification body's report on the outcome of audits of equal pay systems of companies or institutions if the audit does not lead to certification.

The minister shall have assessments made every two years of the results of certification and confirmation of the equal pay systems of companies and institutions. The minister shall issue regulations on the execution and structure of these assessments. The minister may also issue a regulation regarding further implementation of The Equal Pay Standard, e.g. regarding the conduct of certification and confirmation of the equal pay systems of companies or institutions and their implementation, and on the Centre for Gender Equality's procedure in cases where companies or institutions have not acquired certification or confirmation or fail to provide the organizations of the social partners with the necessary information or materials.

The sixth, seventh, eighth and ninth paragraphs of Article 18 shall apply as regards per diem fines under this provision. Employers who fail to undergo certification are faced with daily fines. The amount of *per diem* fines has not yet been decided, but according to Article 18 of the Act of Equal Status and Equal Rights of Women and Men, fines can be as high as ISK 50.000 ISK *per diem*.

6.3.4 Certification of equal pay systems of companies and institutions

Regulation no. 1030/2017 apply on the certification of equal pay systems of companies and institutions according to the ÍST 85 Standard (Equal Pay Standard). The aim of this regulation is that the equal pay management systems of companies and institutions should be certified in accordance with the requirements of the Standard ÍST 85, and with international requirements applying to certification and certification bodies enumerated in the standard ÍST EN ISO 17021-1:2015. (article 2)⁴¹⁴

Certification bodies shall acquire accreditation from the Accreditation Division of the Icelandic Patent Office or a comparable entity in the European Economic Area. (Art 4) In demonstration of the accreditation, certification bodies shall be able to produce an accreditation certificate confirming that they meet the requirements of the ÍST EN ISO 17021-1:2015 standard and are considered competent to certify the equal pay systems of companies and institutions according

⁴¹⁴ Webpage of Icelandic Standards. ÍST EN ISO 17021-1:2015 Conformity assessment - Requirements for bodies providing audit and certification of management systems - Part 1: Requirement

to the Equal Pay Standard, and the requirements of this regulation. Certification bodies that have acquired accreditation according to the requirements of the ÍST EN ISO 17021-1:2015 standard may carry out audits and certify the equal pay systems of companies and institutions in accordance with the Equal Pay Standard, until 31 December 2019. (Art 5).

Certification bodies shall direct and carry out audits of equal pay management systems of companies or institutions. When a certification body has completed examination establishing that the equal pay management system of a company or institution meets the requirements of the Equal Pay Standard, the certification body shall take a decision on certification and issue a certificate in confirmation thereof. (Art 7)

6.3.5 Closing the GPG?

Iceland has a target of closing the GPG in the Icelandic labour market before 2022 and the Equal Pay Standard is supposed to speed up the process. However, there are limitations to the scope of the Equal Pay Standard as it is presented in Icelandic legislation.

Firstly, the Equal Pay Standard does not address wage determination in the beginning of a hiring process. It is first and foremost a management requirement standard; an administrative tool designed to establish and maintain gender equality in wages systems *within* a company or an institution. Also, it is not promoted and designed to tackle wage differences *between* companies and institutions. The implementation of the Equal Pay Standard does not address the undervaluation of women's work in occupation dominated by women.⁴¹⁵ Thus, the Equal Pay Standard does not correct wage differences between institutions nor professions in the public sector.

Secondly, there is no requirement of participation of employees in the process of classifying and assigning value to jobs. This could possible lead to employers implementing the standard and achieve the certification "behind closed doors" and without actually changing unfair processes in the determination of wages. However, the job classification is based on job description and according to Icelandic rules each employee must have a formal contract of employment with a job description, signed by both parties. So, the employer's participation is indirect through this and also through a yearly review of his/her job description and salary, which employees are entitled to, according to collective agreements. Furthermore, requirement no 4.3.1. in the standard deals with "Equal wage criteria". It lists up how an organization shall define all jobs and establish, implement and maintain procedures. In the end it is stated that "The organization shall document and update this information. The organization shall ensure that the criteria are objective and appropriate at all times." When a workplace has implemented the requirements of the standard the implementation must be certified by external certification bodies. The certification body must be accredited by a recognized accrediting body for its competence to audit and issue certification confirming that an organization meets the requirements of the Equal Pay standard.

⁴¹⁵ The Icelandic Confederation of University Graduates (BHM) review on the bill amending the Act No. 10/2008 Equal Status and Equal rights of Women and Men. 146. Parliament 2016-2017.

Thirdly, the limited time frame has also been criticised. In view of the time that it will take to adopt equal pay management systems that meet the requirements of the standard, workplaces receive a different period, according to the size of the workplace, in which to acquire the certification. Companies and institutions with 250 or more employees shall have acquired certificate before 31st of December 2018. Companies and institutions with 150–249 employees before 31st of December 2019 and companies with 25–149 employees before 31st of December 2020.⁴¹⁶ This time frame has been considered short, and there will be little time to adjust and evaluate the effects the Equal Pay Standard will have on companies and institutions.⁴¹⁷

Fourthly, it has been criticised that the process is expensive, bureaucratic and that small and medium sized companies without a human resource manager will have difficulties taking part.⁴¹⁸ Also, that the voluntary process had not been tried to the fullest.⁴¹⁹ It is also of concern that the cost of the implementation in the public sector will restrain pay increases with in public institutions.⁴²⁰ Furthermore, it could be complicated for the Equal Pay standard to address different collective agreements. Work experience and various rights of the employee differ between collect agreements.⁴²¹

Finally, it has been criticised that Equal Pay standards is obligatory⁴²² for companies and institutions. That this kind of tool for assessing a company's pay policies, classification of jobs according to equal value and wage analysis on the basis of the classification, as well as formalizing policies and processes related to pay decisions, should be voluntary and part of a corporate social responsibility and a more sustainable way to achieve gender equality. The equal pay symbol itself should be an incentive for companies to practise equality. Also enforcing pay audits and equal pay reviews across the economy, could cause damage to the economic position of many men and women, and increase costs to business.⁴²³

However, it has been argued that there is another way of looking at this, and even if the equal pay standard is mandatory it can be justified. First of all, it helps companies to practice equality. Secondly, customers can choose to only buy products from a company that is certified “equal-pay”. This brings a new pressure on companies and institutions to pay men and women equally, a pressure that is added to the pressure of equal-pay legislation and the collective bargaining of workers. There are thus major ethical as well as business advantages. A company’s competitiveness is strengthened when skills are rewarded. A company must also be able to explain and stand up for its pay structure to a much higher extent than before, and certification

⁴¹⁶ Bill of Equal Status and Equal rights of Women and Men. 146. Icelandic Parliament 2016-2017.

⁴¹⁷ The Iceland Chamber of Commerce review on the bill amending the Act no.10/2008 Equal Status and Equal rights of Women and Men. 146. Parliament 2016-2017.

⁴¹⁸ SA Confederation of Icelandic Enterprise review on the bill amending the Act no.10/2008 Equal Status and Equal rights of Women and Men. 146. Parliament 2016-2017.

⁴¹⁹ The Icelandic Federation of Trade review on the bill amending the Act no.10/2008 Equal Status and Equal rights of Women and Men. 146. Parliament 2016-2017.

⁴²⁰ The Icelandic Confederation of University Graduates (BHM) review on the bill amending the Act No. 10/2008 Equal Status and Equal rights of Women and Men. 146. Parliament 2016-2017.

⁴²¹ SA Confederation of Icelandic Enterprise review on the bill amending the Act no.10/2008 Equal Status and Equal rights of Women and Men. 146. Parliament 2016-2017

⁴²² SA Confederation of Icelandic Enterprise review on the bill amending the Act no.10/2008 Equal Status and Equal rights of Women and Men. 146. Parliament 2016-2017.

⁴²³ Shackleton (2008), p. 14.

is an efficient way of showing transparency and fairness. Certification is a clear competitive advantage for businesses that want to recruit the best qualified labour. Thus, inclusion of the standard can increase credibility of the employer, both internally and externally regarding human resources, social responsibility and good management.⁴²⁴

The Equal Pay standard shifts the responsibility from the employee to the employer and the employer is responsible for “proofing” equal pay for work of equal value. The employer has better access to wage information and is considered in a better position than the employee to detect wage discrimination. With this responsibility comes training and that could increase awareness raising both within companies and in the society as a whole.⁴²⁵ Furthermore, the Equal pay standard could also address discrimination on other grounds than gender.⁴²⁶

6.4 Discrimination

6.4.1 Direct and indirect discrimination

Article 65 of the Icelandic constitution prohibits direct discrimination on grounds of sex, religion, opinion, national origin, race, colour, property, birth or other status and article 24 of the Gender Equality Act promotes a general prohibition against all forms of discrimination, direct or indirect, on grounds of gender.

Article 19(2) of the Gender Equality Act states that the term “equal wages” constitutes that wages shall be determined in the same way for women and men and the criteria of which wages are determined shall not involve gender discrimination. Thus, the Gender Equality Act prohibits direct and indirect discrimination on the ground of gender when determining pay. Furthermore, Article 25 of the Gender Equality Act provides that employers are prohibited from discriminating between women and men in wages and other terms of employment on grounds of their gender. It is also worth mentioning that the aim of Article 1 of the Act no. 10/2004 on part time worker is to avoid that part time workers are discriminated against.

The concepts direct and indirect discrimination were defined for the first time in Icelandic legislation in article 2 of the Act no. 10/2008 (Gender Equality Act). Those concepts had previously been defined in Regulation No. 47/2003, on the functions of the Centre for Gender Equality. The definitions of Article 2 were based on Article 1 of the CEDAW Convention and EU acts on the matter.⁴²⁷ Those definitions found in Article 2 were, however, changed when Act No. 62/2014, amending the Gender Equality Act, No. 10/2008, with subsequent amendments, was approved by the Icelandic Parliament. The reason for the changes were remarks made by the EFTA Surveillance Authority (ESA), that the definitions of direct and

⁴²⁴ Olafsdottir and Rögnvaldsdottir (2014) The gender pay gap in Iceland. Conference on Equal pay and Gender Equality in the Labour Market

⁴²⁵ The federation of state and municipal employees (BSRB) review on the bill amending the Act No. 10/2008 Equal Status and Equal rights of Women and Men. 146. Parliament 2016-2017.

⁴²⁶ The Icelandic Teachers' Union review on the bill amending the Act no.10/2008 Equal Status and Equal rights of Women and Men. 146. Parliament 2016-2017.

⁴²⁷ Bill of Equal Status and Equal rights of Women and Men. 135. Icelandic Parliament 2007-2008.

indirect discrimination⁴²⁸ were incompatible with the definitions found in Article 2(1) of the Equal Treatment Directive No. 2006/54/EC, and Article 3 of Directive No. 2010/41/EU⁴²⁹. The ESA remarks referred to the fact that the previous definition of the concept direct discrimination did not explicitly mention that it was possible to make a comparison to a past or hypothetical situation, thus not allowing for a complainant to illustrate the discrimination through comparison with a made-up situation regarding an individual of the opposite sex.⁴³⁰

Direct discrimination stipulated in article 2(1) now refers to:

“when one individual is treated less favourably than another individual of the opposite sex is treated, has been treated or would be treated in comparable circumstances”

and indirect discrimination stipulated in article 2(2) refers to:

“when an apparently impartial requirement, standard of reference or measure would be less favourable for an individual of either of the sexes compared with an individual of the opposite sex, unless legitimately justifiable by a legal objective where the means to obtain that objective are appropriate and necessary.”

Now the definitions are in compliance with the above-mentioned directives.

It is acknowledged by the authorities that research is lacking on the labour market regarding indirect discrimination on the ground of gender. There are also few research in relation to indirect discrimination on other grounds such as disability or age.⁴³¹ Few cases where indirect discrimination is claimed have been submitted before the courts and the Gender Complaints Committee.

6.4.2 Multiple discrimination

Multiple discrimination, discrimination based on two or more grounds simultaneously and/or intersectional discrimination – i.e. discrimination resulting from the interaction of grounds of discrimination is not explicitly addressed in the Gender Equality Act nor in other national legislation. No case law that addresses multiple discrimination and/or intersectional discrimination have reach the Gender Complaints Committee nor national courts, where gender is one of the grounds at stake.⁴³²

6.5 Special measures

Article 65 (2) of the Constitution stipulates that men and women shall enjoy equal rights in all respects. This provision implicitly permits positive measures to achieve gender equality as is evident from the explanatory report when adopted in 1995.

⁴²⁸ This remark from ESA also referred to the definitions of sexual harassment and gender-based harassment

⁴²⁹ Directive No. 2010/41/EU on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC.

⁴³⁰ Bill of amending Act. No. 10/2008 on Equal Status and Equal rights of Women and Men with subsequent amendments. 143 Parliament 2013-2014.

⁴³¹ Olafsdottir and Rögnvaldsdottir (2015) p.

⁴³² Thorgeirsdottir (2017), p. 11.

In article 2(7) of the Gender Equality Act, affirmative actions are defined as „*special temporary measures that are intended to improve the position of, or increase the opportunities of, women or men aimed at establishing gender equality in a specific field where either sex is at a disadvantage.*” In such cases it may become necessary to give either sex temporary priority in order to achieve balance. Article 24 of the Gender Equality Act prohibits discrimination on grounds of gender but explicitly states in paragraph 2 that „*affirmative action shall not be regarded as being contrary to this Act*”. An example of special measures on the labour market is the provision on gender quotas on boards of companies and preferential treatment, for example when priority is given to the female applicant when two equally qualified persons apply for a job, has developed in Icelandic jurisprudence. The Equal Pay Standard is also an example of special measures.

The CEDAW committee has raised attention to the limited use of temporary special measures, on the Icelandic labour market, to accelerate the substantive equality of women and men. In particular as regards the representation of women in decision-making positions at the local level, in academic institutions and in the justice, foreign policy, private and law enforcement sectors. The CEDAW committee suggests that the impact of existing measures should be evaluated, including through the collection and analysis of data disaggregated by gender, and adopt temporary special measures, in line with article 4 (1) of the Convention and the Committee’s general recommendation No. 25 on temporary special measures, to accelerate the achievement of substantive gender equality in all areas under the Convention in which women continue to be disadvantaged and underrepresented⁴³³

6.6 Burden of proof

As mentioned, article 25 (1) of the Gender Equality Act, provides that employers are prohibited from discriminating between women and men in wages and other terms of employment on grounds of their gender. Article 25(2) stipulates that if a likelihood is adduced that a woman and a man working for the same employer receive different wages for the same work, or work of equal value, then the employer shall have to demonstrate, if there is a difference in their wages, that the difference is explained on grounds other than their gender. This is a so-called probability rule which does not comply with the wording of article 19 of the 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). In article 19 of the Directive there is no mention of the „same employer” or that the work has to be „the same or work of equal value”. One might there for argue that the burden of proof is heavier in Icelandic legislation than the directive stipulates.⁴³⁴

There are no instructions in the Gender Equality law nor in the directive what facts have to be presented in order to adduce likelihood of direct or indirect discrimination. According to article 25(2) of the Gender Equality Act the difference in pay for the same work or work of equal value

⁴³³ CEDAW (2016) Concluding observations on the combined seventh and eighth periodic reports of Iceland. Para: 15-16.

⁴³⁴ Björst (2005). p 10 and discussions in the 132. parliament 2005-2006.

is probably the strongest sign that there is a discrimination. Then it is for the employer to prove that the pay discrimination is not because of the employees' gender.

The Icelandic Supreme Court case law establishes the shift of burden of proof to the employer in cases of alleged wage discrimination with certain circumstances. In Supreme Court Case no. 255/1996, the court concluded that The Icelandic National Broadcasting Service (RUV) had been in a better position than the claimant/employee to do a comparison between the employees pay and the aspects of different collect agreements. In Icelandic Supreme Court Case No. 258/2004, the Court concluded that the employer A (a municipality) would have to demonstrate that the difference in the applicants' wages was not due to their gender. See furthermore, the opinion no. 4/1997 of The Gender Equality committee which confirmed the shift of burden of proof to the employer because of „completely opaque pay system”.⁴³⁵

6.7 Objective justifications

The Icelandic Supreme court has concluded that different collective agreements cannot objectively justify pay difference. In Icelandic Supreme Court Case No. 258/2004, the Court came to the conclusion that the employer A (a municipality) did not succeed to demonstrate the existence of objective and relevant reasons for the difference in wage terms, and reference to different collective agreements could not justify discrimination in the terms of employment of women and men in the sense of the Gender Equality Act. However, Icelandic jurisprudence has concluded that work experience and education can objectively justify pay difference.⁴³⁶

Icelandic jurisprudence suggests that economic factors and market forces could possibly be considered as objective justifications. For example, in the Icelandic Supreme Court Case no. 11/2000 and No. 258/2004, the Court concluded that the employer A (a municipality) had not presented sufficiently cogent arguments in support of the view that, when the employees positions were examined in the context of A's administrative system, market considerations could explain such a difference in their wage terms. In Norway market value as a justification has come to question and in the *Harstad* case municipality's market value argument for paying higher wages to engineers than to nurses was not accepted, going against the purpose of the principle of equal pay for work of equal value.⁴³⁷

⁴³⁵ The opinion of the Gender Equality committee no. 4/1997.

⁴³⁶ The opinion of the Gender Equality committee no. 10/2017.

⁴³⁷ Equality and anti-discrimination Ombud *Harstad* Case LDO 06/1834.

7. Analyses, conclusions and recommendation.

In the following chapter four aspects, addressed in the previous chapters, will be analysed. Firstly, if the implementations of the principle of equal pay for work of equal value in Icelandic legislations is in compliance with the promotion of the principle in international and EU-law and if its enforcement is effective, especially in regard to legal certainty and transparency in pay systems? Secondly, how the Equal Pay Standard will address wage discrimination in the Icelandic labour market and its possibilities in closing the gender wage gap in Iceland. Thirdly, how and why undervaluation of women's work in the Icelandic labour market keeps the gender wage gap alive and if it is contrary to the principle of equal pay. Finally, if the principle of equal pay for work of equal value, as promoted in Icelandic legislation, protects women discriminated in wages on multiple grounds.

7.1 The implementation of the principle of equal pay for work of equal value

Iceland has adopted a substantive number of legislative provisions aimed at tackling the gender pay gap, most often incited by ILOs conventions and in recent years by EU legislation in the field. Iceland has implemented the principle of equal pay for work of equal value on the legislative level as a part of its equality legislation, Gender Equality Act, as a gender explicit provision. Furthermore, equal pay may also be guaranteed by collective agreements in the Icelandic labour market.

Article 19(1) of the Gender Equality Act stipulates that:

„Women and men working for the same employer shall be paid equal wages and enjoy equal terms of employment for the same jobs or jobs of equal value.“

Firstly, a very detailed definition is provided by the Gender Equality Act for the concept of “wages” in Article 2(8) as “*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*”. There is also a detailed definition of the concept “terms” in article 2(9) as “*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*”. This is in compliance with the broad definition of pay provided for in ICESCR stipulating wages or pay to include other payments or benefits paid directly or indirectly to workers, CEDAW referring to the right to equal remuneration, including benefits, ILOs Convention no.100 (C-100) including not only “the ordinary, basic or minimum wage or salary” but also “any additional emoluments whatsoever payable directly or indirectly, whether in cash or in kind, by the employer to the worker, the same definition as in Recast Directive 2006/54/EC and as it ensures from the CJEU's interpretation of Article 157 TFEU. Such a broad definition of pay is necessary since if only the basic wage were being compared, much of what can be given a financial value paid by the employer to the worker would not be captured. Such additional elements are often substantial, and a big part of the overall pay package and discrimination often found when adding those additional elements.

Secondly, it is important to note that the concept of *equal value* is found in the Icelandic provision. There is however no definition of the concept and Icelandic jurisprudence gives little guidance on what the concept of *value* entails, other than when different jobs are compared a „comprehensive assessment” should take place and that article 19(1) should be interpreted in compliance with the article 69 of the EEA-agreement which is in compliance with Article 157 of the TFEU. The concept of *value* is not defined in the ICESCR, CEDAW, C-100 and the Equal Treatment Directive, for that matter. There is however guidance given by the monitoring bodies on the concept of value. When assessing the concept of *value* CESCR recommends that the focus should be on the *value* of the work and evaluation factors should include skills, responsibilities and effort required by the worker as well as working conditions. This assessment could be based on a comparison of rates of remuneration across organizations, enterprises and professions. C-100 refers to the worth of a job for the purpose of computing remuneration and is considered of equal value if the same high demands are made on work criteria such as knowledge, skills, effort, stress, responsibility and conditions in the working environment. Recital 9 of the Equal Treatment Directive provides that, in accordance with CJEU case law *value* refers to a range of factors including the nature of the work, training and working conditions. All of these instruments dance along the same line referring to the nature or worth of the work, focusing on the *value* of the work and evaluation factors not at the person performing the job. Icelandic jurisprudence has referred to the nature of work when the value of work is estimated. This assessment focuses on the nature of the work (for example, working conditions, responsibility, etc.) and not the characteristics of the employer in compliance with the above instruments.

Thirdly, Article 19(2) of the Gender Equality Act states that the term *equal wage* constitutes that wages shall be determined in the same way for women and men and the criteria of which wages are determined shall not involve gender discrimination. The definition of direct and indirect discrimination was changed in the Icelandic Gender Equality Act after remarks made by the EFTA Surveillance Authority (ESA) because of the previous definition of the concept direct discrimination did not explicitly mention that it was possible to make a comparison to a past or hypothetical situation, thus not allowing for a complainant to illustrate the discrimination through comparison with a made-up situation regarding an individual of the opposite sex. The definitions are now in compliance with article 2 of Recast Directive 2006/54/EC. Furthermore, Article 25 of the Gender Equality Act provides that employers are prohibited from discriminating between women and men in wages and other terms of employment on grounds of their gender. Complementary aspects of equal pay for men and women for work of equal value and non-discrimination on the basis of sex are thus reflected and mutually supportive in the Icelandic Gender Equality Act. At the core of all non-discrimination norms is the formal equality requirement that likes should be treated alike. Thus, international human rights law, EU-law and Icelandic law clearly prohibits direct discrimination. Direct discrimination occurs when a person, because of one or more of the prohibited grounds, is treated less favourably than someone else in comparable circumstances. A complaint about ‘low’ pay is not a claim of discrimination unless it can be shown that the pay is lower than that of someone employed to perform the same work or work of equal value. Therefore a “comparator” is needed: that is, a person in materially similar circumstances. This can get problematic when the comparator has

to be of the opposite sex, because it can be hard for a woman working in gender segregated labour market to find a male comparator performing the same work or work of equal value. Direct discrimination between women and men regarding pay is no longer considered a major problem in Iceland. The causes of the GPG are much more complex and related to indirect discrimination. The focus has therefore shifted towards greater difficulties for women in balancing work and private life, segregation of the labour market and stereotypes that influence the evaluation and classification of occupations or the choice of education undertaken by men and women.

Fourthly, Article 19(1) is gender explicit and thus requires that there should be a comparator of the opposite sex and has the assumption underlying that the comparator is working for the same employer. That condition isn't to be found in article 157 of the TFEU, EUs secondary legislation, ILO Convention no. 100, article 4 of the European Social Charter nor article 69 of the EEA-agreement. Monitoring bodies have criticised this criterion of the *same employer* that obviously limits the scope of the principle of equal pay for work of equal value in Icelandic legislation and makes comparison between the public and the private market impossible. The CEDAW committee has emphasised that article 19(1) should be without the limitation to the *same employer* and the European Committee of Social Rights has stated that that in cases where the legislation did not authorize pay comparisons to determine whether there was equal pay for equal work or work of equal value beyond a single employer, the situation was not in conformity with section 4(3) of the European Social Charter. Committee of Experts on the Application of Conventions and Recommendations (CEACR) has pointed out that work of equal value extends beyond cases where work is performed in the same establishment and the C-100 clearly applies to the public sector. In CEACR direct requests, the limited scope of comparison in article 19(1) of the Icelandic Gender Equality Act, has repeatedly been criticized. and the CEACR has demanded the Icelandic government to extend the scope of comparison beyond the same employer. Furthermore, the CEACR has pointed to the fact, that the Icelandic labour market is still highly segregated and that a large majority of women are working in the public sector, in caretaking, teaching and other services. The effective application of the principle is needed, where women are more heavily concentrated in certain sectors or occupations and there is a risk that the possibilities for comparison at the enterprise or establishment level will be insufficient. Ensuring a broad scope of comparison is essential for the application of the principle of equal remuneration given the continued prevalence of occupational sex segregation where "female jobs" are undervalued in comparison with those of men who are performing different work and using different skills, when determining wage rates. Court of Justice of the European Union (CJEU) has addressed the aspect of "same employer" stating that there is nothing in the wording of article 141 (now 157 of TFEU) that suggest that the applicability of that provision is limited to situations in which men and women work for the same employer. The CJEU has however, concluded that the payments need to come from a „single source”, that someone needs to be responsible for the pay difference. This seems to narrow the scope of the principle of equal pay for work of equal value as it is laid down in international human rights law because it is hardly possible to attributed pay difference to a single source when the comparison is between, for examples, public and private market. However, the criteria of a "single source" does not seem to limit the scope of the principle when comparing work within the public sector. In fact, where

pay is subject to public control this should be possible under the scope of article 157 of the TFEU and sensible for eg. state or municipalities in achieving equality on the public labour market. The Supreme Court of Iceland has never especially addressed the criteria of single employer but accepted a comparison between employees of different municipality institutions. Thus, the State could also constitute as the same employer on the public market.

Conclusion: The principle of equal pay for work of equal value is in compliance with the ICESCR, CEDAW, C-100 and EU-law except for the criteria of “same employer” which limits the scope in equal pay cases to the same employer. Even though CJEU seems to have narrowed the scope of the principle to the criteria of a “single source” it does not seem to limit the scope of comparison when comparing work within the public sector. In fact, where pay is subject to public control this should be possible under the scope of article 157 of the TFEU and sensible for eg. state or municipalities in achieving equality on the public labour market.

Recommendations: The right of women and men to “equal pay for work of equal value” must be expressly provided for in legislation. Furthermore, where the legislation limits pay comparisons to a single employer, the legislation is not in conformity with Iceland’s international obligations. Thus, the Icelandic legislation must be changed accordingly.

7.2 The enforcement of the principle of equal pay for work of equal value

In previous chapter, the implementations of the principle of equal pay for work of equal value in Icelandic legislation was analysed. The conclusion was that the principle is not correctly implemented because of the criteria of “same employer”. The criteria limit the scope and the wider the scope is the implementation is better. The scope of the principle may also have a great impact on how successful the enforcement of equal pay for equal work for men and women may be in the Icelandic labour market. The criteria that the comparators have to be working for the same employer hinders its effective enforcement, especially in a gender segregated labour markets. In the following two sub-chapters the enforcement of the principle of equal pay for work of equal value will be analysed i.e. if the enforcement is effective, especially in regard to legal certainty and transparency in pay systems.

7.2.1 Legal certainty

One of the most problematic area when effectively enforcing the principle of equal pay for work of equal value is the (lack of) understanding of the concept of *work of equal value*. In Iceland, until the year 2008, when the Gender Equality Act no. 10/2008 came in force, the understanding of the concept *work of equal value* and its application was unclear. While equal pay for men and women for work of equal value is a principle that has been widely accepted in Iceland for the past 60 years, the scope of the concept and its application in practice was more difficult to grasp and apply. In previous Gender Equality Acts, before the Gender Equality Act no. 10/2008 came to force, the wording of the provisions promoting the principle of equal pay for work of equal value did not only refer to *work of equal value* but also stipulated equal wage for: “*the work of equal value and comparable work.*” Even though it was stated that the wording was in compliance with C-100 and later EU-law on the matter, Icelandic jurisprudence suggests some

legal uncertainty when applying the concept of work of equal value eg. whether the work had to be both of equal value *and* comparable. The earlier wording of “work of equal value *and* comparable work” and later the criteria of “the same employer” creates, without a doubt, a legal uncertainty. The CJEU has commented on legal certainty in its judgement in Case 143/83 (Commission of the European Communities vs. Kingdom of Denmark) stating that: „*The principles of legal certainty and the protection of individuals thus require an unequivocal wording which would give the persons concerned a clear and precise understanding of their rights and obligations and would enable the courts to ensure those rights and obligations observed.*” It is highly likely that the lack of understanding of the concept of work of equal value due to its unequivocal wording in the provision until 2008 in Icelandic legislation led to inconsistency in its application, caused persons not understanding their rights and obligations and has made it difficult for the courts to ensure those rights and obligations. Thus, it was not effectively enforced regarding the concept of *work of equal value*.

Unequal pay is often due to subtle, chronic problems that are difficult to overcome without a clear understanding of the concepts and their relevance to the workplace and society in general. The understanding of the concept of work of equal value has been problematic in Europe. For example, in Hungary an extra criterion for judging equal value has been added to their Labour Code stating that market value can now also be taken into account. In Norway, the discussion regarding the degree to which the argument of market value may be taken into account as objective justification for pay difference is ongoing. However, *value* in the context of C-100 indicates that something other than market forces should be used to ensure the application of the principle, as market forces may be inherently gender-biased.

We know that work might appear to be different but work is of equal value if the same high demands are made on work criteria such as knowledge and skills, effort and stress, responsibility and conditions in the working environment. But how do we value jobs? The international instruments are not clear on this subject, but mention on-going objective job evaluation on the *basis of the work to be performed* to be important and to avoid discrimination when determining rates of remuneration and comparing the relative value of different jobs. However, there is no unconditional obligation to take measures for the objective appraisal of jobs on the basis of the work to be performed, and the choice of a particular job evaluation method is up to the states. In Iceland article 19(1) stipulates equal pay „For the same jobs or jobs of equal value” and article 19(2) that by “equal wages” is meant that wages shall be determined in the same way for women and men This is intended to ensure that women and men should be paid equal wages and enjoy equal terms of employment for the same jobs or jobs of equal value. In the light of persistent gender pay gaps, greater focus should be placed on developing or implementing objective job evaluation methods. However, Iceland has not developed any consistent national strategy or method on the implementation of objective job evaluation and the use of job evaluation is limited to the local government and the municipalities. The international instruments all emphasize gender-neutral objective evaluation of jobs. Often are skills considered to be “female”, such skills required in the caring professions, are undervalued or even overlooked, in comparison with traditionally “male” skills. Thus, a particular care must be taken to ensure that they are not gender bias. The Equal Treatment Directive 2006/54/EC refers to the question of how to assess whether workers are performing

the same work or work of equal value and suggests, like the other instruments, using a gender-neutral job evaluation and classification systems. However, the Equal Treatment Directive does not oblige Member States to put such systems in place, and that it is for the national courts to determine if work is of equal value. The Supreme court of Iceland has confirmed that different jobs can be of equal value referring to the „comprehensive assessment” eg. referring to job-evaluation. It is of fundamental importance for a system of effective job evaluation to be efficient in certain circumstances, in particular where the workforce is largely female and that there has to be “the possibility to look outside a company or an institution for an appropriate comparison where necessary”. In order to fully implement the CEDAW, the CEDAW committee emphasises the importance of ratifying ILOs Equal Remuneration Convention No. 100 and urges States parties to consider the study, development and adoption of: „job evaluation systems based on gender-neutral criteria that would facilitate the comparison of the value of those jobs of a different nature, in which women presently predominate, with those jobs in which men presently predominate” The Committee on Economic, Social and Cultural Rights (CESCR) mentions specific examples of state obligation in its General Comment no. 23 and stipulates that: „Article 3, in relation to article 7 requires, inter alia, that the State party identify and eliminate the underlying causes of pay differentials, such as gender-biased job evaluation or the perception that productivity differences between men and women exist.”

But in spite of gender-natural job-evaluation, discrimination often creeps in through the back door in the employer’s objective justification for the pay difference. Objective justifications are often tied to the performance of the job and justifications based on a person’s performance are especially sensitive to gender-bias. Market value as a justification needs high scrutiny and should be handled with care. The reason is that it goes against the purpose of the equal pay and is especially relevant in the discussion of undervaluation of women’s work.

7.2.2 Transparency in pay systems

The principle of equal pay for work of equal value addresses the occupational differences component of the gender pay gap at the point at which it occurs: when pay rates are set in an occupation. Often the basic wages are the same but when adding other benefits to the basic wage, discrimination often occurs, and additional benefits can sometimes make up increasingly more of the overall earnings package than basic wage. An effective enforcement of the principle of equal pay for work of equal value is difficult when pay systems are non-transparent and the lack of available information about pay levels of employees performing the same work or work of equal value are major contributing factors to the persistent gender pay gap.

Thus, differences in wage structures play a large part in accounting for and perpetuating the gender pay gap. When wages are determined, the aim is to look closely at the value placed on skills, responsibilities, effort and other job components and to ensure that any pay differentials between women and men are justifiable and not based on gender and gender-neutral job evaluations have uncovered consistent patterns of under-valuation in a wide range of women's jobs. However, gender-neutral job evaluation placing work of equal value into same categories only addresses a part of the problem, the transparency needs to include all the benefits added to the basic wage. That’s why specific measures to promote wage transparency in all stages of wage determination are of great importance. Transparency in pay system means that everyone

including managers, employees and trade unions understand how each element of the pay packet contributes to employee's total earnings in any pay period. Transparent pay system based on gender neutral job evaluation that covers all employees might thus help eliminate unlawful pay gaps.

In Iceland, wages and other terms of employment concluded in collective agreements are minimum terms by law. However, the minimum rates do not always reflect the wages that are actually paid in the relevant sector. A significant part of wage setting is outside the general and central collective bargaining and the common practice is that people negotiate individually with their employers about their pay and other terms of employment. These wages are called market wages, common in the private sector, because they are determined by supply and demand in the labour market. Thus, even if the minimum terms concluded in the collective agreements are transparent and gender-neutral, the market wages can be less transparent. There has been criticism of non-transparency in how pay is determined in the public sector, for example when „over-time packages” are put on top of “basic wages” determined by gender-neutral pay category based on registration of educational qualifications, length of working experience and other factors that influence wages. Those „over-time packages” are not transparent and it is difficult for the employee to get information on what they are based on because Icelandic legislation does not provide employees with the right to obtain information on pay levels for the same work or work of equal value.

However, the Equal Pay Standard addresses this to a certain degree because it demands a company or an institution to disclose a wide range of wage information to a certification body, which will check and confirm that the company is practicing equal pay. However, it does not stipulate the right of employees to obtain information on pay level. The transparency sub-article, (Art. 19 (3)), in the Gender Equality Act stipulating that workers can, upon their choice, disclose their wage terms does not cover this either, thus not contributing to the effective enforcement of the equal pay for work of equal value principle. The wage setting is not openly discussed in workplaces and when the negotiations take place „behind closed doors”, the differences are destined not to be revealed. In order to achieve equal pay, it is important that pay and how it is set, in all stages, are transparent and also discussed in the public debate. Then employees will be able to understand their pay and detect if there is discrimination in pay difference compared to other employees. Norway has been considered to have the most progressive employee's information right and has been mentioned as the country with the best practise supporting an employee's information right concerning gender pay levels for the same work or work of equal value. On the basis of the Norwegian Gender Equality Act employees have the right to request pay data of individual comparators at company level. The data received must be kept confidential and the comparators must be informed, but do not have to consent to disclosure.

Right of employees to obtain information on pay level is of high importance and very relevant in the Icelandic labour market because by enabling employees to request information on pay levels for categories of employees performing the same work or work of equal value, broken down by gender, including complementary or variable components such as payments in kind and bonuses makes the wage policy of a company or organisation more transparent. By this way, unexplained gender pay gaps can be detected by employers, trade unions and employees. Pay transparency at pay level, also helps employees to compare their pay, both within their own category and in comparison, to similar categories in other professions or sectors.

Conclusion: The enforcement of the principle of equal pay for work of equal value regarding the concept of *work of equal value* was not effectively enforced until the year 2008 because of lack of understanding of the concept of work of equal value. The unequivocal wording in the provision in Icelandic legislation led to inconsistency in its application and increased the probability of persons not understanding their rights and obligations and also making it difficult for the courts to ensure those rights and obligations. The wording of the provision now is, however, in compliance with the Equal treatment directive and C-100 and its application accordingly. The enforcement of the principle of equal pay for work of equal value is not enforced as effectively as it could be regarding transparency in pay systems. Even though minimum terms are determined in collective agreement which promote gender equality and basic wages are decided on transparent job-categories, the transparency is lacking in later stages of the wage determination and the right for the employee to get that information is not protected. Thus, there is a need for more transparency in wage determination.

Recommendation: Wage transparency can be addressed by more effective Equal Pay legislation promoting transparency with an employee's information right at company level concerning gender pay levels for the same work or work of equal value. Also, it is recommended that the Icelandic government recognises and further studies and promotes job evaluation systems based on gender-neutral criteria that facilitate the comparison of the value of work of a different nature, especially between professions in female dominated sectors and male dominated sectors.

7.3 The Equal Pay Standard - closing the gender pay gap?

Iceland has a target of closing the GPG in the Icelandic labour market before 2022 and the Equal Pay Standard is supposed to speed up the process. Thus, it is necessary to analyse how the Equal Pay Standard address wage discrimination in the Icelandic labour market and its potential in closing the gender pay gap in Iceland.

A tripartite cooperation of Icelandic trade unions, the employers' confederation and government officials developed the Equal pay management system: ÍST 85 Standard, usually called "The Equal Pay Standard" that is supposed to help employers tackle pay discrimination and enable them to become certified that they pay equal pay for work of equal value. It is a tool for assessing a company's pay policies, classification of jobs according to equal value and wage analysis on the basis of the classification, as well as formalizing policies and processes related to pay decisions. The Equal Pay standard is an example of how collective bargaining and a cooperation of social partners can be used in promoting gender equality and in reducing pay inequalities between women and men. The Equal Pay Standard is now mandatory as a form of special measure in the Gender Equality act, aimed specifically at correcting the position of women in the Icelandic labour market with the aim of reaching substantive equality.

However, there are limitations to the Equal Pay Standard, as it is presented in Icelandic legislation, in addressing the gender pay gap. The Equal Pay Standard does not address wage determination in the beginning of a hiring process nor the employer's justifications of pay difference. It is first and foremost a management requirement standard; an administrative tool designed to establish and maintain gender equality in pay systems *within* a company or an institution and to a certain degree the undervaluation of women's work within a company or an

institution. Also, it is not promoted and designed to tackle wage differences *between* companies and institutions the implementation of the Equal Pay Standard does not address the undervaluation of women's work in occupation dominated by women and thus, the Equal Pay Standard does not correct wage differences between institutions nor professions for example in the public sector.

Conclusion: The Equal Pay Standard is a form of special measures and will not close the GPG by itself because it does not address the undervaluation of women's work in occupation dominated by women constituting for a large part of the gender pay gap. The Equal Pay Standard does first and foremost, tackle gender inequality within companies and institution and thus an important tool in decreasing the gender pay gap. However, it does not tackle wage difference between companies and institutions. The Equal Pay Standard increases transparency in pay system within companies and institutions but does not address wage discrimination in the beginning of the hiring process. However, it could increase awareness raising both within companies and in the society as a whole. Furthermore, the Equal pay standard can also address discrimination on other grounds than gender. With legislative- and other measures, the Equal Pay Standard is a great additional tool in the fight against the gender pay gap.

7.4 Undervaluation of women's work

Giving legislative effect to the principle of equal pay for men and women for work of equal value is necessary but not sufficient to achieve its aims. It is also important to deal with the persistent underlying causes of the gender pay gap because there are multiple and complex links between the principle of equal pay for men and women, and the position and status of men and women more generally in employment and society. So how does undervaluation of women's work in the Icelandic labour market add to the gender wage gap and is this undervaluation contrary to the principle of equal pay?

The Icelandic labour market is gender segregated, both horizontal and vertical, with extreme feminisation in some professions adding to the gender wage gap. There can be no single-factor explanation for such a gender segregation but choice of study field and the demand for shorter or flexible hours of work because of family responsibilities play a significant part. High proportion of women in the Icelandic labour market are part time workers because of family responsibility. The equal pay legislation is not able to address this to a great extent and awareness raising, promotion of equal opportunities and measures influencing the choice of study field are more likely to be successful. Some might even argue that raising the pay would reduce gender segregation.

In the Icelandic labour market pay is lower in occupations dominant by women than in occupations dominant by men. This is a fact even when men and women have the same level of education and potential work experience, sometimes women are even out-performing men in education. The causes of this undervaluation of professions dominant by women are because of social construction of value and non-transparent payment systems and largely coincides with discrimination. Much has been done in trying to change the social construction of value in the Icelandic labour market. However, it seems more difficult to change pay systems and make them more transparent. Also, the justification of market value cannot systematically suppress

women from receiving equal pay to men when they are performing work of equal value. This goes against the purpose of the principle of equal pay for work of equal value which sets limitations for when wage differences based on market value justifications can be deemed acceptable. Undervaluation can be tackled, at least partially, with more effective Equal Pay legislation which emphasises on transparency in pay systems. The implementation of the Equal Pay Standard is, however, insufficient because it does not address the undervaluation of women's work in occupation dominated by women except to a certain degree, mainly challenging the social construction of value. Also, the gender-explicit nature of the provision in ILOs convention no 100, EU-law and Icelandic legislation, eg. the fact that the comparator must be of opposite sex makes a comparison in a gender segregated labour market difficult. It is thus important to have a hypothetical comparator. However, the gender-explicit approach also makes it impossible for women in a certain profession to compare them self to women in another profession, eg. midwives and nurses.

It is of great concern that women, often with higher education, working in sectors dominant by women, have lower pay compared to other occupations dominant by men with same education and similar responsibility. Wage statistics show that wage setting varies between institutions in the public market and demonstrates direct connection between the number of women working at the institution. The more women working, the lower the wages. Subsequently, the over-representation of women in sectors in the Icelandic labour market, where their work is undervalued constitute as a discrimination, resulting in a gender pay gap. This is highly relevant in the public sector. It is not sufficient for states to promote formal equality. They also have an obligation to *promote, guarantee, and secure* equality by taking proactive steps to eliminate structural patterns of disadvantage and to further social inclusion. Thus, the Icelandic Governments actions should be aimed at correcting the position of women in the Icelandic labour market in order to obtain effective equality. However, there is also a duty to recognize differences between people and to take positive action to achieve substantive equality. Finally, social partners (trade unions) can also use the promotion of gender-neutral job-evaluation as a starting point when bargaining because it opens the door for comparison between work usually performed by women to work performed by men. That adds more weight in their claims when addressing undervaluation of women's work and the necessity of fighting the gender wage gap promoting the principle of equal pay for work of equal value.

Conclusion: While direct discrimination, when a woman is paid less than a man for the same job, is relatively rare in the Icelandic labour market, the due to strong laws prohibiting it. A more persistent problem is the discrimination found in undervaluing women's work, with women being paid less for a job of equal value due to careers dominated by women being undervalued as a whole. This undervaluation is contrary to the principle of equal pay for work of equal value and the justification of market value goes against the purpose of the principle of equal pay for work of equal value. Legislation can address undervaluation to a certain extent, for example with better drafted and more effective Equal Pay legislation, which is in full compliance with international law, and emphasises transparency in pay systems. Also, high scrutiny is needed when the justification of market value is presented because of its effect on valuation of women's work.

Recommendation: Undervaluation of women's work is hard to tackle. The Icelandic government can start by recognizing the discrimination found in the undervaluation of women's work in the Icelandic labour market and then try to correct it. It is not sufficient to have provisions promoting equal pay for work of equal value and an anti-discrimination provision regarding pay. They also need to be effectively enforced. The Icelandic government has an obligation to *promote, guarantee, and secure* equality by taking proactive steps to eliminate structural patterns of disadvantage and to further social inclusion. Undervaluation can be tackled, at least partially, with more effective Equal Pay legislation which emphasises on transparency in pay systems. The extreme feminisation and its link to undervaluation can be addressed with better drafted law more in full compliance with international law. A wider scope of comparison would help reach these sectors, objective job evaluation and transparency would address much of the low value attributed to work women perform, in particular care work. Regarding the gender segregated labour market, the Icelandic government should recognize that Icelandic women do not work part time by chose, the main reason given are family responsibilities. Well-designed work-life balance policies can reduce the gender pay gap, for example by bridging the „gap” between parental leave and child care and with more flexible working conditions. A positive gender equality effects in „shortening the work week” pilot's projects is worth exploring further. Also equalizing wages across sectors may encourage more men in female dominated professions.

7.5 Discrimination in pay on multiple grounds or other grounds than gender

The Icelandic provision promoting equal pay for work of equal value (Article 19) and its accompanying provision banning discrimination in wages (Article 25) are gender explicit in nature. C-100, article 157 of TFEU and the Equal treatment directive also focus on a difference in pay between man and women. This gender-explicit approach is understandable for historical reasons. However, it has its limitations. For example, it does not address discrimination in pay on multiple grounds and thus does not adequately address the multiplicity of aspects that go to make up a person's identity. Also, the gender explicit approach and the lack of comprehensive anti-discrimination legislation in Iceland, makes it difficult for employees discriminated against in pay on other grounds than gender to get protection. Furthermore, the criteria of a comparator of opposite sex makes it hard for a same gender pay difference comparison.

The Icelandic Gender Equality Act treats people with a „single ground” approach as do the other International Human Rights Instruments. This does not provide adequate protection for women discriminated against on multiple grounds, for example because of their foreign background or disability. Intersectional analysis and approach is considered more effective handling of multiple discrimination than the “single ground” approach, however, in Europe neither legislation nor jurisprudence has really addressed the issue of multiple discrimination. There is also no comprehensive anti-discrimination legislation in Iceland and multiple/intersectional discrimination is under research in the Icelandic labour market. It's a fact that the more a person differs from the norm, the more likely she is to experience multiple

discrimination and less likely to gain protection. Thus, multiple, but especially intersectional, discrimination is problematic because often its complex nature is focused to a single ground approach and thus consequently falls outside of equality protection. The Committee of Experts (CEACR) has noted that addressing multiple discrimination, including through legislation, is a challenge. Furthermore, the CEDAW committee has emphasized that states parties may need to take specific temporary special measures to eliminate such multiple forms of discriminations against women and its compounded negative impact on them and that states must “*legally recognize such forms of discrimination and their compounded negative impact on the women concerned and prohibit them*” and that policies and programmes to redress intersectional discrimination must also be adopted.

Conclusion: The principle of equal pay for work of equal value, as promoted in Icelandic legislation, International Human Rights Instruments and EU-law, does not protect women discriminated in wages on multiple grounds. Thus, it is a need for a more direct and genuine multiple discrimination approach, both in international legislation and within the monitoring bodies, and the Courts would need to be more open to recognising and articulating the ways in which relationships of power interact in vertical, diagonal and layered ways so that the most disadvantaged will be the most protected. The gender explicit approach and the lack of comprehensive anti-discrimination legislation in Iceland, makes it difficult for employees discriminated against in pay on other grounds than gender to get protection. It is therefore necessary to have a comprehensive anti-discrimination legislation and legally recognize multiple forms of discrimination and their compounded negative impact on the women concerned and prohibit them. This can be done through legislation and policies and the Courts would need to reconsider their single-ground approach in cases dealing with multiple discrimination.

Recommendation: The Icelandic government should start by legally recognize forms of multiple discrimination and its compounded negative impact on the women concerned. That can be done through legislative measures. Firstly, multiple discriminations should be defined in a comprehensive anti-discrimination legislation protecting people, for example in the labour market, discriminated against on other grounds than gender. Secondly, The Equal Pay Standard should be used to detect discrimination on other grounds than gender within companies. Thirdly, further studies on multiple discrimination is needed to fully understand their compounded negative impact on the women concerned. Fourthly, special measures need to be taken concerning the gender explicit nature of the equal pay provision, so same gender pay difference comparison can be addressed and covered. Finally, awareness raising of multiple discrimination is needed in the society and its grave negative effect on certain groups of women.

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