

STUDY

Requested by the JURI committee



Reporting Obligations Regarding Gender Equality and Equal Pay

State of play among Member States and avenues
for upgrading and implementing legal sanctions
towards companies



Policy Department for Citizens' Rights and Constitutional Affairs
Directorate-General for Internal Policies
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Reporting Obligations Regarding Gender Equality and Equal Pay

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Abstract

This study, commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the JURI Committee, provides an in-depth analysis of the policy and legal state-of-the-art concerning gender pay discrimination in the European Union. To this end, it builds on a comprehensive comparative study covering European countries (i.e., Italy, France, Germany, Denmark, Iceland, and Spain), in order to conclusively design and develop specific policy recommendations to move towards a shared and well-informed solution to wage discrimination in the EU, especially in light of the European Commission's recently adopted proposal for a Corporate Sustainability Reporting Directive (CSRD).

This document was requested by the European Parliament's Committee on Legal Affairs.

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LIST OF ABBREVIATIONS

AGG	General Equal Treatment Act
CDSB	Climate Disclosure Standards Board
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CJEU	Court of Justice of the European Union
CRD IV	Capital Requirements Directive IV
CSRD	Directive on Corporate Sustainability Reporting
DA	Danish Employer's Association
EEOC	Equal Employment and Opportunity Commission
EIGE	European Institute for Gender Equality
ESG	Environmental, Social, and Governance Criteria
ESS	European Employment Strategy
EU	European Union
GRI	Global Reporting Initiative
IFRS	International Financial Reporting Standards Foundation
IIRC	International Integrated Reporting Council
ILO	International Labour Organization
ISTAT	Italian National Institute of Statistics
LO	Danish National Organization
NFRD	Non-Financial Reporting Directive
PNRR	National Plan for Recovery and Resilience
PTA	Pay Transparency Act

SA	Social Accountability
SASB	Sustainability Accounting Standards Board
SDGs	Sustainable Development Goals
SMEs	Small- and medium-sized enterprises
STC	Spanish Constitutional Court β
STEM	Science, Technology, Engineering, and Mathematics
TFEU	Treaty on the Functioning of the European Union
TUC	European Trade Unions Congress
UK	United Kingdom
UN	United Nations
US	United States
WEF	World Economic Forum

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EXECUTIVE SUMMARY

Background

Currently, working women in the European Union (EU) are paid on average 14.1% less per hour than their male counterparts.¹ In addition to being a form of injustice on a personal level, the gender pay gap, a key dimension of the overall gender gap, has substantial socio-economic implications, as gender equality is intrinsically linked to economic growth and sustainable development.² Not surprisingly, after publishing an in-depth study in 2013,³ the European Commission's 2020-2025 Gender Equality Strategy makes equal access to the economy for both women and men one of its priorities, and respectively, in 2021 the European Parliament adopted "a resolution on the EU Strategy for Gender Equality, calling on the Commission to draw up an ambitious new gender pay gap action plan, which should set clear targets for EU countries to reduce the gender pay gap over the next five years."⁴ With the aim to tackle the determinants of the gender pay gap, the Members of the European Parliament also advocated for increased accessibility for women and girls to study and work in male-dominated sectors, for more flexible work arrangements, and also for the improvement of wages and working conditions in female-dominated sectors.⁵

Fostering gender equality is also listed as part of the United Nations (UN) Sustainable Development Goals (SDGs), precisely target number 5.⁶ However, there is still a lack of attention on the issue at the corporate governance level, and investors do not yet pay adequate attention to sustainability-related risks in their investment decisions, despite research showing that companies meeting sustainability requirements (which include gender equality in the case of the EU) enjoy better returns.⁷

Pay discrimination on the basis of gender constitute one of such gaps. The EU has implemented a variety of soft and hard policy tools to enhance equal pay for women and men. This policy approach stems from the fact that the pay gap is cut across two main dimensions; on the one hand, the issue of 'equal pay for equal work of equal value' and, on the other hand, the structural and institutional factors that keep women at a significant economic disadvantage *vis-à-vis* their male counterparts.⁸ These factors, which include outdated stereotypes about women's and men's roles in society, mean that women, on average, are highly concentrated in the lowest-paying sectors of the economy and also disproportionately involved in childcare and unpaid household tasks compared to their male counterparts.

¹ European Commission, "Factsheet on the Equal Pay Gap" (2020).

² In fact, the United Nations Sustainable Development Goals dedicate goal number 5 to achieving gender equality on several fronts, including advancing equality laws.

³ European Commission, "Tackling the gender pay gap in the European Union" (2013), <https://op.europa.eu/en/publication-detail/-/publication/d339a089-b1ec-4f16-88a9-a96a57af8d0f>.

⁴ Euromonitor, "Understanding the gender pay gap: definition and causes" (8 April 2021).

⁵ European Parliament, "Women in science: how to achieve equality in academia" (2 February 2017); European Parliament, "Understanding Covid-19's impact on women (infographics)" (1 March 2021).

⁶ United Nations Development Programme (UNDP), "The SDGs in Action" (2021); while the resolution is available at https://www.europarl.europa.eu/doceo/document/TA-9-2021-0025_EN.html.

⁷ Jennifer Howard-Grenville, Gerald F. Davis, Thomas Dyllick C. Chet Miller, Stefan Thay, and Anne S. Tsui, "Sustainable Development for a Better World: Contributions of Leadership, Management, and Organizations," *Academy of Management Discoveries* 5, 4 (2019): 355-366.

⁸ For an in-depth and updated overview of the topic, see European Parliament, "Equal Pay for Equal Work Legislation. Legislative train 08.2021," as well as its related references and readings; see also Joanna Hofman, Madeline Nightingale, Michaela Buckmayer, and Pedro Sanjurjo, "Equal Pay for Equal Work: Binding pay-transparency measures," Study requested by the European Parliament's Committee on Employment and Social Affairs (2020): 5-43.

Policymakers have implemented policies to address gender pay discrimination at both European and Member State levels.⁹ One of the main policy instruments employed at a regional level by the EU is the Non-Financial Reporting Directive (NFRD), which requires large companies with more than 500 employees to disclose diversity information. While diversity disclosures help hold companies accountable for gender equality in the workplace, there is an urgent need to increase corporate involvement in working cooperatively with policymakers to narrow the gender gap, including when it comes to equal pay. In this way, the Commission recently adopted a proposal for a Corporate Sustainability Reporting Directive (CSRD), with the objective of amending the NFRD and broadening the scope and breath of reporting obligations. On the one hand, the CSRD will include more companies as it extends the obligations to all listed companies in the EU; on the other hand, the CSRD will be substantially different in the way it incorporates sustainability issues, requiring companies to provide a detailed account of how they are incorporating sustainability issues into their business and the impact of their business on society and the environment.¹⁰ The proposal also allows small- and medium- sized enterprises (SMEs) to voluntarily report on their sustainability obligations. In addition, it seeks to simplify the reporting process by reducing disincentives for non-compliance. The implementation of legal sanctions towards large non-compliant companies is also under discussion.

Key findings

With the objective of understanding the policy solutions to move forward in eliminating pay inequalities, we conducted a comparative analysis on the current situation in the EU and in six selected case studies, namely Denmark, France, Germany, Iceland, Italy, and Spain. The country selection was carefully made to represent the equal pay situation in the region, and was thus based on geography, gender gap indicators, each country's legal framework, and their recent developments in the legal and policy dimensions. Our comparative analysis suggests that although general conditions apply, Member State contexts and specificities remain relevant. This is largely due to the fact that the gender pay gap is intrinsically linked to other forms of systemic exclusion in the economy and society, as reflected in other gender imbalances in employment, education, skills, care, and pensions. Cultural, structural and institutional factors keep women concentrated in the lowest-paid sectors of the economy, and largely excluded from decision-making positions. At the same time, women in the EU represent the main providers of unpaid work in household and childcare, which means that many women face a trade-off between being a mother or entering the workforce.

On the one hand, significant progress has been made in tackling gender inequalities in Europe in recent decades – gender stereotypes are increasingly challenged socially, women enjoy greater inclusion in the economy than in the past, and policymakers increasingly recognize the importance of gender mainstreaming in public policy. On the other hand, however, no European country has achieved gender parity in wages yet, and progress in reducing the gender pay gap has stalled over the past years.

The EU guarantees the principle of 'equal pay for work of equal value' and, in fact, European employees count with the possibility to take legal action in cases of discrimination without retaliation from their employer. The principle of 'equal pay for equal work' is included in Article 157 TFEU. Article 23 of the Charter of Fundamental Rights of the European Union explicitly addresses gender equality in various dimensions, including remuneration. Narrowing the gender pay gap has also been part of the European Employment Strategy (ESS) since 1999. And, moreover, the EU has set a date (10 November) as European Equal Pay Day, in an effort to increase awareness about the topic with the slogan #MakeHerCount. The EU also supports Member States in improving their application of the equal pay

⁹ Hofman *et al.* (2020), 11-12.

¹⁰ Howard-Grenville *et al.* (2019).

principle, as in the example of the 2014 recommendations made by the European Commission to Member States regarding pay discrimination on the basis of gender. The 2014 Commission Resolution placed emphasis on definitional differences, which presents a crucial point of heterogeneity in the legal frameworks of Member States, and thus the Commission recommended individual countries to clarify the concept of ‘work of equal value.’

With regard to the structural, institutional, and cultural determinants of the gender pay gap, the EU has been working on implementing strategies such as the Work-life Balance Directive, with the aim of altering traditional family arrangements, promoting flexible work for both men and women, and supporting the equal distribution of household and care tasks between partners. The EU also enacted the Women-On-Board Directive, which aims to improve gender balance in the boardrooms.

One of the most decisive steps in consolidating a culture of equal pay in the EU was Directive 2006/54/EC, which also helped to confirm the effectiveness of directives as the main tool for achieving important goals through soft law mechanisms. Another decisive step was the proposal to amend the NCRD, which is now referred to as the CSRD.

Similarly, Member States show heterogeneity in the factors leading to their respective gender gaps. A comparative analysis of the legal framework at both EU and country level suggests that national laws differ in their legal sources for enforcing equal pay, and in their definability of the principle. Although most countries have been successful in addressing the issue of ‘equal pay for work of equal value,’ and pay discrimination for equal work is illegal and socially condemned in virtually all countries, defining equal pay is important to address the disincentives for women to remain out of the labour force and the obstacles they face in escalating the professional ladder.

The case of Italy, which has a below-the-average gender pay gap of 5% helps to depict how a low female employment rate can hide positive selection into the labour market, helping to artificially reduce the gender pay gap. Positive selection implies that only highly skilled women are employed, and less skilled women are kept out of the labour force, mainly to partake childcare and household responsibilities. In light of this, Italy’s most recent legislative development, the forthcoming National Plan for Recovery and Resilience (PNRR), includes incentives for companies to value women’s work and provisions to discourage women from choosing between work or care duties, which could potentially present a decisive step towards targeting indirect pay discrimination.

The cases of France, Denmark, and Spain portray moderate gender pay gaps, largely explained by women’s concentration in the lower paying sectors of the economy and, additionally, their disproportionate involvement in unpaid care work. The female employment rate in these countries, however, is relatively higher than in Italy. France has recently established the 2019 Professional Future Act, which set up indicators to measure the equal pay situation in companies with at least 50 employees. The Professional Future Act also outlines potential sanctions for companies of this size. Although the Act is relatively recent for evaluation, it has contributed to bringing salience to gender-sensitive policies, proving particularly important during the COVID-19 pandemic. In the case of Denmark, unlike other Member States, the principle of gender equality is not explicitly included in the Constitution, and Denmark has instead based its legislation on gender equality on EU directives. Denmark’s most recent development is the 2019 Equal Pay Act which includes basic non-discrimination provisions. Unlike other Member States, however, Denmark’s legislation provides for some cases of indirect discrimination. Spain’s latest developments, Royal Decree 6/2019 and Royal Decrees 901 and 902/2020, require companies with 50 or more employees to draft equality plans, provide tools to help companies be compliant, and also outline sanctions in cases of discrimination.

Germany and Iceland represent exceptionally different cases from the average.

Germany, on the one hand, reportedly has one of the highest gender pay gaps in the EU, which is partly explained by its prevalence of women's involvement in part-time and temporary employment. Germany's most recent legislation, the Pay Transparency Act of 2017, allows employees of companies with more than 200 employees to request information on the criteria and procedure for determining wages. At the same time, it requires companies with more than 500 employees to publish regular reports on gender equality. German legislation is nevertheless lacking in enforcement mechanisms, and in addressing some of the structural factors contributing to the gender pay gap.

Iceland, on the other hand, represents an exemplar case in how it targets and prohibits (in)direct gender-based pay discrimination. Under its Equal Pay Certification Law, Icelandic legislation outlines clear parameters to evaluate injustices and specifically appoints authorities in charge of evaluating claims of discrimination in the workplace.

Recommendations

Even if the latest steps taken at both the European and Member State level show a growing awareness of the principle of pay equity, the measures taken so far are still lacking. Much attention has been placed on diversity, leaving ample room for improvements in sustainability issues, including the impact of business activities on vulnerable social actors – in this case, women. This is why the current CSRD proposal to amend the NFRD represent a decisive step in considering equality for women in addition to the other components of sustainability, even if women's well-being is still added as a sub-category and does not yet count with a directive. In the current socio-political context, as Member States and the Union recover from the COVID-19 pandemic, the implementation of gender equality practices in company cultures cannot be overlooked.

Sharing best practices among European partners is the proper step to addressing equal pay and bridging the gap between equal pay policies and non-compliance sanctions. We recommend a cooperative solution at the policymaking and corporate levels, and at the national and supranational levels. We advocate for the development of a specific directive addressing equal pay for men and women, rather than one treating the gender pay gap as merely an add-on.

At the national level, we advocate for the transposition of the principle at stake adapted to the peculiarities of each Member States' geographical and socio-economic context, and the identification of the most appropriate authority to undertake enforcement and control functions with respect to compliance with equal pay, and which also monitors cases of discrimination. We suggest the emulation of the Icelandic model for the construction of a certification scheme and the development of proper indicators to assess cases of discrimination and make different actors (employees, investors, supervisory authorities, *inter alia*) aware of the state of the art. Both these European and Member States authorities should utilise appropriate technology to process personal data, making it possible to generate information on the status of each worker, and thus classify the company's remuneration schemes.

At both the regional and Member State levels we encourage the increased understanding of the concept of equal pay in the realm of soft law which, to date, has made a relevant contribution to the growth of corporate cultures, increasing salience of issues such as gender balance in the boardroom and disclosure on remuneration. Similarly, we also recommend joint action to support the path taken by Europe on the part of trade unions, which could contribute significantly to the spread and affirmation of this work culture.

In order to support these efforts, it is also crucial for policymakers to develop welfare policies in relation to parenting, work-life balance, and care leave (as also recommended in the ESS) to empower women to devote themselves to work effectively and efficiently.

"Some women get erased a little at a time, some all at once. Some reappear. Every woman who appears wrestles with the forces that would have her disappear. She struggles with the forces that would tell her story for her, or write her out of the story, the genealogy, the rights of man, the rule of law. The ability to tell your own story, in words or images, is already a victory, already a revolt."

— Rebecca Solnit (*Men Explain Things to Me*)

1. INTRODUCTION

Despite having gained salience in the European Union's (EU) socio-political agenda under the 2020-2025 Gender Equality Strategy, gender gaps and their main dimension of gender pay gaps – i.e., the difference between the average earnings between men and women – still represent a real issue in Europe.¹¹ Although this is a phenomenon common to all European countries, the geographical, socio-political, economic, and legal specificities of Member States remain relevant and call for both general initiatives and specific actions to ensure women and men live a more equitable life in the EU.

Although economic discrimination based on gender is widely condemned in the EU, economic gender gaps (e.g., employment, pay, education, skills, care, pensions, *inter alia*) are oftentimes propagated by outdated institutions and legal frameworks. Apart from representing a form of injustice on a personal level, gender gaps have substantial socio-economic implications. Research has shown that gender equality is associated with economic growth and sustainable development (see for example, Profeta 2020),¹² and in fact, "to achieve gender equality and empower all women and girls" is recognised among the United Nation's (UN) 2030 Sustainable Development Goals (SDGs) (goal number 5).¹³ That is, research suggests that a more efficient employment of both male and female talent in society, institutions, and firms has beneficial effects on aggregate performance and outcomes.¹⁴ Not coincidentally, the EU's 2020-2025 Gender Equality Strategy also places strong emphasis on guaranteeing an equal access to the economy for both women and men.

Equal pay is a fundamental dimension of gender equality, and also represents one of the EU's founding principles. In this regard, pay discrimination has been addressed by various soft and hard policy instruments not only at the regional level but also by individual Member States. This has guaranteed that in the EU, at the personal level, people who suffer pay discrimination count with the possibility to take legal action without fear of retaliation from their employer. Considering its implications, the EU has also made equal pay a crucial component of its Sustainability Regulation, which has been significantly enhanced by the Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards the disclosure of non-financial and diversity information by certain large undertakings and groups (hereinafter also denominated Non-Financial Reporting Directive (NFRD)), according to which large companies are required to disclose non-financial and diversity information. According to NFRD, large public interest companies with more than 500 employees – including listed companies, banks, insurance companies and other public

¹¹ European Commission, "Questions and Answers: Gender Equality Strategy 2020-2025" (5 March 2020).

¹² Paola Profeta, *Gender and Public Policy: Measuring Progress in Europe* (Cambridge: Cambridge University Press, 2020).

¹³ United Nations Development Programme (UNDP), "The SDGs in Action" (2021).

¹⁴ Profeta (2020).

interest entities – are required to disclose Environmental, Social and Governance (ESG) information and metrics.¹⁵

Gender diversity is not only part of the EU's social and governance principles, but has also proven to enhance the sustainable performance of firms, including environmental and social performance.¹⁶ More recently, last April, the Commission adopted a proposal for a Corporate Sustainability Reporting Directive (CSRD), with the aim to amending the current NFRD reporting requirements by extending the scope to all large companies and all listed companies, and introducing more detailed reporting requirements according to mandatory EU sustainability reporting standards.¹⁷ Research has also shown that investments in companies that meet sustainability criteria are associated with better returns.¹⁸ Although disclosure has improved, it is still not enough for investors to sufficiently consider sustainability risks in their investment decisions. Further reporting requirements by firms are under discussion. Upgrading and implementing legal sanctions towards companies is also under discussion.

Recent academic research has investigated the role of pay transparency and disclosure requirements on gender gaps¹⁹, finding substantial significant effects on lower gender gaps and also on well-being of workers in those specific cases where the causal impact of the introduction of disclosure rules on gender gaps can be identified.

This study presents evidence on the gender pay gap in Europe, the existing public policies to address this gap, and the current legal framework. In addition to providing an overview about the issue, we concentrate on six case studies – Denmark, France, Germany, Iceland, Italy, and Spain – and present a comparative analysis of practices regarding the equal pay gap and reporting obligations. The selected case studies are representative of EU Member States in terms of geography, gender gap indicators, legal framework regarding equal pay, and recent developments in the legal and policy dimensions. Following a detailed comparative analysis, we conclude by providing recommendations and policy pointers.

The first level of analysis includes data on pay gaps which show the magnitude of the phenomenon, its nuances according to each case study, and a policy assessment. A comparative analysis of the six European countries at hand displays heterogeneity in the degree and quality of their respective gender pay gaps, but also heterogeneity in their public policy responses. In fact, one-size-fits-all policies have been effective in addressing the issue of 'equal pay for equal work' (i.e., the adjusted gender gap), which is illegal in all Member States. However, the quality of the issue depends on the cultural, structural, and institutional determinants that keep women earning less, on average, than men (i.e., the unadjusted gender gap). For instance, in some Member States the main issue is the prevalence of part-time work

¹⁵ European Parliament, "Corporate Sustainability Reporting Directive (CSRD)" (2021).

¹⁶ Edith Ginglinger and Caroline Raskopf, "Women Directors and E&S Performance: Evidence from Board Gender Quotas," European Corporate Governance Institute, Finance Working Paper No. 760/2021 & Université Paris-Dauphine Research Paper No. 3832100 (2020): 1-44.

¹⁷ It is worth highlighting that there is a sharp difference between sustainability reporting and sustainability management, as clarified by Diego Pérez-López, Ana Moreno-Romero, and Ralf Barkemeyer, "Exploring the Relationship between Sustainability Reporting and Sustainability Management Practices," *Business Strategy and the Environment* 24, 8 (2015): 720-734.

¹⁸ Howard-Grenville *et al.* (2019).

¹⁹ David Card, Alexandre Mas, Enrico Moretti, and Emmanuel Saez, "Inequality at work: The effect of peer salaries on job satisfaction," *American Economic Review* 102, 6 (2012): 2981–3003; Michael Baker, Yosh Halberstam, Kory Kroft, Alexandre Mas, and Derek Messacar, "Pay Transparency and the Gender Gap," NBER Working Paper Series, No. 25834, November 2019; Zoë B. Cullen, and Bobak Pakzad-Hurson, "Equilibrium effects of pay transparency," NBER Working Paper Series, No. 28903 (June 2021).

and the under-provision of formal care (e.g., Germany). In other Member States (e.g., Italy), the prevailing issue is an overwhelming low female employment rate.

The second level of analysis aims to examine the framework of legal provisions in the various Member States at a comparative level and then move on to the EU level to identify the latest advances in the field of the gender pay gap. When it comes to individual Member States, it becomes clear that in many countries, such as in Spain, constitutional principles of non-discrimination or equality exist and serve as the basis for constitutional court rulings in the area of labour law or, more generally, of discriminatory behaviour. In other countries, like in France and in Germany, there exists a specific principle of gender equality on top of the general principle of equality. Elsewhere, as in Italy, equal pay is a constitutional right for all employees. The equal pay principle is sometimes set in the employment legislation too (as in France and Spain), in certain Acts designed to implement EU equality directives (as in Denmark), or even in collective agreements, the legal status of which varies from country to country (as in France, where collective agreements are legally enforced among contracting parties).

Not only do national laws differ in their sources, but also in the way the concept of 'pay' has been defined. In this respect, Iceland stands out as the nation with the most detailed definitions. Icelandic legislation specifies the extent to which (in)direct gender-based pay discrimination is prohibited; the specific indicators to evaluate such claims; what parameters have been laid down for establishing the equal value of the work and what justifications for pay differences are allowed; and the authorities allowed to enforce it.²⁰

When it comes to the European context, it is noticeable that the Charter of Fundamental Rights of the European Union expressly devotes Article 23 to reaffirming gender equality, irrespective of its scope or subject matter.

From the above considerations, we claim there is a need to find a shared solution and encourage cooperation in implementing measures to close the gender pay gap at EU level. By learning from the good practices adopted in some Member States, positive experiences can be shared at regional level as an exemplary reform thus overcoming geographical differences. Even if the latest steps taken at the European level portray a growing awareness of the importance of equal pay, the measures adopted thus far are still lacking. Therefore, after taking a comparative approach in analysing the gender pay gap in Europe, the existing public policies to address this gap and the related legal framework, we conclude with specific recommendations to move forward in narrowing the pay gap and eliminating pay discrimination.

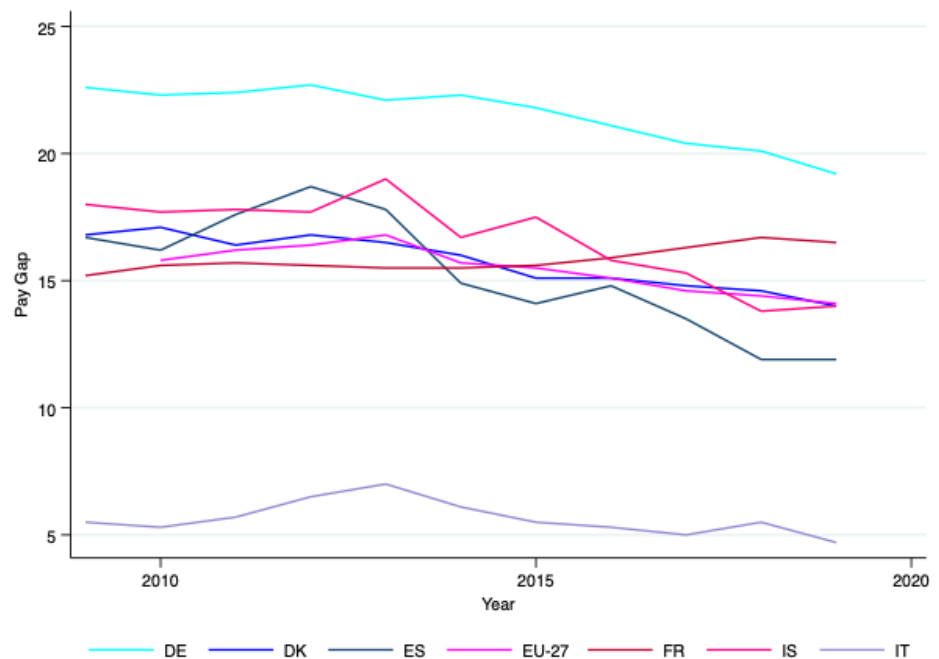
²⁰ Petra Foubert, *The enforcement of the principle of equal pay for equal work or work of equal value: A legal analysis of the situation in the EU Member States, Iceland, Liechtenstein and Norway*, (European Commission, Publications Office of the European Union, 2017): 42-45, 46-56.

2. THE GENDER PAY GAP IN EUROPE: OVERVIEW AND CURRENT DATA

Equal pay and equal access to the economy for women and men are not only fundamental aspects in the fight for gender equality but have also been incorporated into EU documents since 1957. Since the Treaty of Rome, the EU has acted to achieve equal pay through the implementation of hard and soft policy instruments, including directives, strategic development plans, frameworks for action, *inter alia*.²¹ Narrowing the gender pay gap has been part of the European Employment Strategy (ESS)²² since 1999 and gender equality has been embodied in the 2000 EU Charter of Fundamental Rights. Moreover, the EU has set a date (10 November) as the European Equal Pay Day, in an effort to increase the public's awareness of the topic with the slogan #MakeHerCount. Within these policy instruments, the EU has integrated a two-pronged approach; first by establishing measures to promote the idea of 'equal pay for equal work' (i.e., the adjusted/explained gender pay gap), and then by also addressing some of the institutional and structural determinants of the gender pay gap (i.e., the unadjusted/unexplained gender pay gap). Notwithstanding these efforts, there is still work to be done to ensure that these European founding values match the socio-economic and legislative background of the Member States. This relates mostly to the fact that the gender pay gap is intrinsically linked to other forms of systemic exclusion in the economy and society, which manifest themselves in alternative gender imbalances – i.e., in employment, education, skills, care, and pensions.²³

On the one hand, there has been significant progress in breaking down gender inequalities in the EU in recent decades. For example, gender stereotypes are increasingly challenged socially, women enjoy

Figure 1: The Gender Pay Gap in Selected Countries



Source: Author's elaboration on Eurostat 2020 and Statistics Iceland 2021 data (latest available).

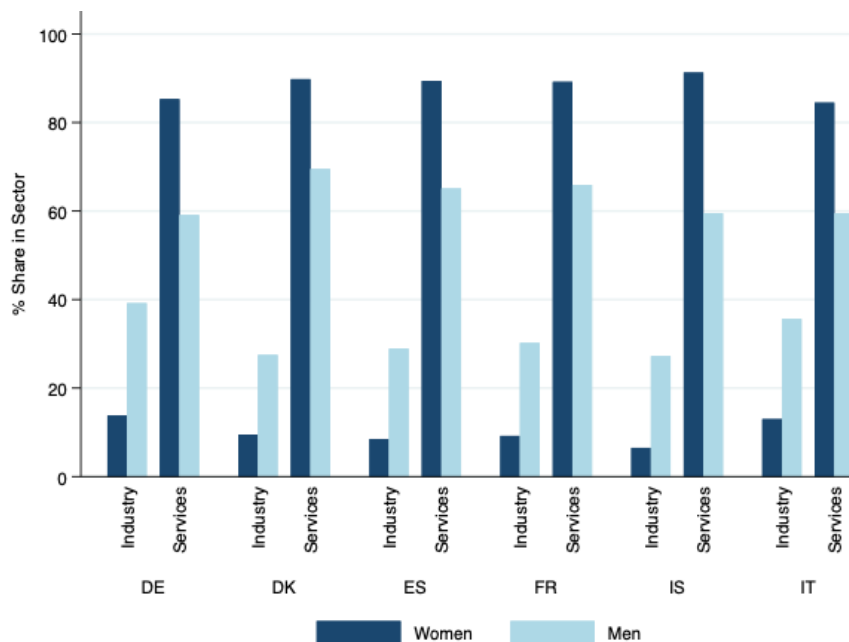
²¹ Hofman *et al.* (2020), 11-12.

²² One of the four key pillars of the European Employment Strategy (ESS) is that of 'equal opportunity' which encompasses the issue of non-discrimination on the basis of gender. In this regard, the ESS focuses on increasing women's access to the economy "by implementing policies on career breaks, parental leave, part-time work, and good quality care for children" ("The birth of the European Employment Strategy: the Luxembourg process" (November 1997), <https://eur-lex.europa.eu/legal-content/HU/TXT/?uri=LEGISSUM:c11318>).

²³ Hofman *et al.* (2020), 9-11.

greater inclusion in the economy, and policymakers increasingly recognize the importance of gender mainstreaming in public policies. The COVID-19 pandemic and the related 'she-cession' have also brought political salience to the employment and pay gender gaps. Yet, on the other hand, there is still a long way to go to ensure that women and men enjoy equal opportunities. In fact, no country has yet achieved gender parity in wages, and during the last few years, progress in the abatement of the gender pay gap has stalled (see Figure 1).²⁴ In the EU specifically, 79% of working-age men are employed compared to 67% of working-age women, and women who are employed tend to be paid, on average, 14.1% less per hour than their male counterparts.²⁵

Figure 2: Gender Share by Sector in Selected Countries



Source: Author's elaboration on OECD 2016 data (latest available).

The determinants of the gender pay gap in the EU relate to cultural, structural, and institutional factors which work hand in hand with outdated but resilient stereotypes to perpetuate inequalities.²⁶ One of the strongest factors in explaining the gender pay gap is a gendered division in the labour market – or, in other words, the combination of women's overrepresentation in lower-paid sectors and the apparent difficulty for women to access other, higher-paying fields (see Figure 2). The degree of

such gendered division varies across Member States but, in general, women in the EU tend to be overrepresented in the service sectors, and also in professional fields such as the arts and humanities. On the other hand, women also tend to be excluded from industry and professional fields such as STEM (i.e., science, technology, engineering, and mathematics). Traditional gender stereotypes which define women's and men's roles in society and the economy are one of the factors affecting women's choice of field of study. These stereotypes thus represent an increasingly significant obstacle to women's career selection and professional development, as opposed to real educational opportunities. Indeed, women in the EU are currently better educated than ever before; that is, there exists a negative gender gap in tertiary education, with 46% of women in the EU completing university in 2019 vis-à-vis 35% of men.²⁷ At the same time, research shows that education serves to mitigate the gender pay gap.²⁸ In

²⁴ World Economic Forum (WEF), "Global Gender Gap Report 2020" (2020): 1-370.

²⁵ European Commission, "Factsheet on the Equal Pay Gap" (2020).

²⁶ European Commission, "The Gender Pay Gap Situation in the EU" (2019).

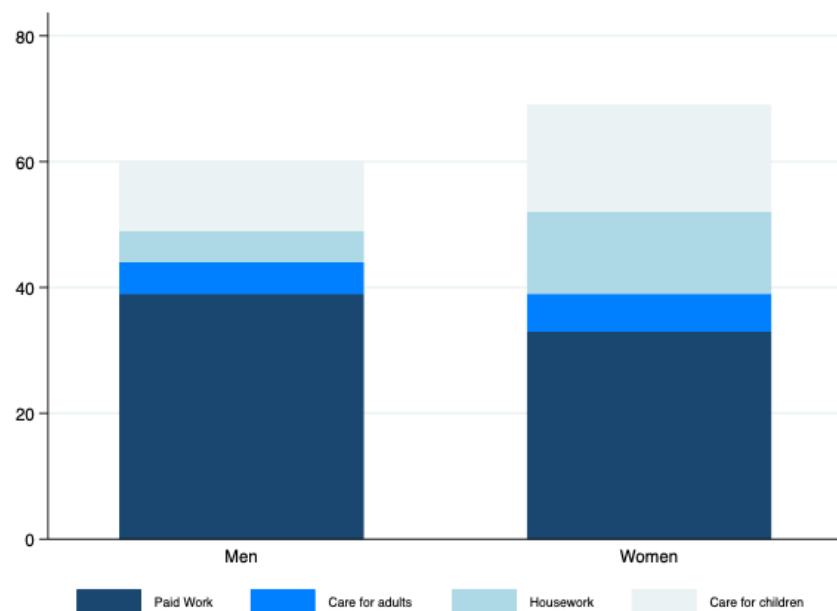
²⁷ Eurostat (2020), <https://ec.europa.eu/eurostat>.

²⁸ Christina Boll and Andreas Lagermann, "The Gender Pay Gap in EU Countries – New Evidence Based on EU-SES 2014 Data," *Intereconomics* 54, 2 (2019): 101-105.

addition to being discriminatory, gender divisions in the economy represent a market inefficiency, reflected for instance, in the shortage of professionals in high-paying sectors such as STEM.²⁹

Relatedly, women and men are also vertically divided in the economy, which oftentimes leads to the emergence of a gender-sensitive glass-ceiling, which presents an obstacle for women to access decision-making positions and thus higher salaries.³⁰ In fact, according to the latest 2019 EU statistics, less than 10% of CEOs and 38% of European policymakers are women.³¹ In this sense, both sectoral and hierarchical segregation of women translate into the fact that the founding value of 'equal pay for equal work' is not realised, largely because 'equal work' is hardly attained (i.e., the unadjusted wage gap). Because the general patterns of women's and men's work are so different, comparative research and comparative political conversation are challenging to transform into policy solutions, which allows gender-divided patterns to perpetuate themselves. However, it is important for the public and private sectors to work collaboratively by encouraging girls and women to consider a range of career options, respecting gender quotas on corporate and government boards, and periodically re-assessing relative earnings across sectors. In addition, the disincentives which present women with a trade-off between raising children or entering the labour force.

Figure 3: Hours in Paid and Unpaid Work by Gender in the EU



Source: Author's elaboration on Eurostat 2015 data (latest available).

In fact, another related factor which contributes to the perpetuation of the pay gap in the EU is the resilience of another set of stereotypes, norms, and attitudes which position women as the main care providers of children and the household (see Figure 3). Women already make up the majority of formal care providers, which segregates them in one of the lowest paid sectors of the economy. But, in addition, 80% of care provision in Europe is provided informally.³²

Women compensate for the under-provision of care in the EU in two main ways. First, they represent the main suppliers of care for young children, incurring a professional and economic 'motherhood penalty.' In the EU, 47.1% of children under the age of three are cared for by their parents alone, and

²⁹ European Commission, "EU Skills Panorama 2014" (2015).

³⁰ European Institute for Gender Equality (EIGE), "What lies behind the gender pay gap" (2019).

³¹ European Parliament, "Women in Politics in the EU: State of play" (2019).

³² Valentina Zigante, "Informal Care in Europe: Exploring Formalisation, Availability and Quality" (2018), <https://op.europa.eu/it/publication-detail/-/publication/96d27995-6dee-11e8-9483-01aa75ed71a1>, at 7.

mainly their mothers.³³ Childcare services for children under the age of three are largely supplied by the private market, meaning that already affluent women count with an advantage in finding private ways of care and entering the labour market. Further evidence comes from the fact that regardless of regional variations, the gender pay gap tends to be reduced for younger and single employees.³⁴ The importance of childcare provision is enshrined in the 2002 Barcelona Objectives, which set the goal for EU Member States to provide childcare to 90% of children between three years old and the mandatory school age, and 33% of children under three.³⁵ The targets have been met by only 12 Member States.

Second, women also represent the main care providers for an ageing and expanding population in the EU. In fact, while 9.8% of men are involved in caring for the elderly, this rate increases to almost 15% for women.³⁶ Acting as the main suppliers of informal care, women are often faced with the decision to engage in vulnerable forms of employment, such as part-time or temporary work, or to stop working altogether. These interrupted career paths translate into a gender pay gap that increases with age. On average, women spend 33 hours per week and men spend 39 hours per week in paid work, while women spend 36 hours per week and men an average of 11 hours per week in unpaid care and household tasks (see Figure 2).³⁷ Together, women work more hours per week but face a wage disadvantage compared to their male counterparts.

Even if sub-regional variations exist and are relevant, the latest Eurobarometer poll shows that 44% of Europeans still assert that the most important role of women is that of taking care of the home and family.³⁸ In light of such limiting beliefs, the EU has been working on implementing strategies such as the EU Work-life Balance Directive, with the aim of altering traditional family arrangements, promoting flexible work for both men and women, and supporting the equal distribution of household and care tasks between partners. It has also implemented the Women-On-Board Directive, in an effort to improve the gender balance on company boards and thus increase women's access to decision-making positions in all listed companies.

Once again, the most effective change comes with policymakers and private firms working together to ensure that transferable parental leave and workplace flexibility become the norm. However, the stagnant narrowing of the gender pay gap over the last decade (Figure 1) suggests that one-size-fits-all policies have not necessarily or fully successful; the gender pay gap is complex and thus Member State specificities remain relevant. For instance, there are countries such as Italy, Belgium, and Eastern European countries which report unadjusted gender pay gaps of 5% or less, which are significantly lower than the EU-27 average. There are also countries with moderate gender pay gap rates such as Spain, France and the Scandinavian countries, which report gender gaps in line with the EU-27 average of 14.1%. Finally, there are countries like Germany, Austria, and Estonia, which report relatively higher gender pay gap rates of over 20%. In some Member States the leading issue is the prevalence of part-time work and the low provision of formal care, such as in Germany, where 87% of part-time workers

³³ Eurostat, "How do parents organise childcare in the EU?" (2021).

³⁴ Janneke Plantenga and Chantal Remery, "The Gender Pay Gap: Origins and policy responses" (2006), <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.136.4054&rep=rep1&type=pdf>.

³⁵ European Commission, "Barcelona Objectives: on the development of childcare facilities for young children with a view to increase female labour participation, strike a work-life balance for working parents and bring about sustainable and inclusive growth in Europe" (2018); COM/2018/273 final, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52018DC0273&from=EN>.

³⁶ EIGE, "Gender Equality Index" (2017).

³⁷ European Commission, "Factsheet on the Equal Pay Gap" (2020).

³⁸ European Commission, "2021 Report on gender equality in the EU" (2021).

are women.³⁹ In other Member States, such as Italy, the prevailing issue is an overwhelmingly low female employment rate of 49.5%.⁴⁰ Low female employment hides a positive selection into the labour market, which excludes low-skilled women from labour participation. Selection implies that the average wage of working women is higher than it would be if all women (including low-skilled women) participated in the labour market, which artificially reduces the unadjusted gender gap.

Member States do not only show heterogeneity in the degree and quality of their respective gender pay gaps, but of course they also show heterogeneity in their public policy responses, and the impact of these policies according to different enforcement mechanisms.⁴¹ Thus, a background analysis of the state-of-the-art in six European countries, namely Italy, France, Germany, Denmark, Iceland, and Spain, follows.

³⁹ OECD Statistics (2021), <https://stats.oecd.org/>.

⁴⁰ Ibid.

⁴¹ Plantenga and Remery (2006), 43.

3. THE GENDER PAY GAP IN SELECTED COUNTRIES

3.1. Italy

As of 2019, Italy has a gender pay gap rate of 4.7% (see Figure 1), the third narrowest gender pay gap in the EU, after Luxembourg (1.4%) and Romania (2.2%).⁴² However, measuring the gender pay gap is not straightforward and in the case of Italy the positive selection effect mentioned above applies. In fact, considering a wide array of factors, the World Economic Forum (WEF) ranks Italy 117th out of 153 countries (below most European countries) in its index measuring economic participation and female participation in the labour market.⁴³ The WEF index considers factors beyond equal pay for similar work (i.e., the adjusted gender pay gap), but which also have an impact on the gender pay gap (i.e., the unadjusted gender pay gap), such as female unemployment and limiting socio-economic stereotypes. Although Italy presents a strong public policy framework to address the issue of 'equal pay for equal work,' there is a pressing need to de-stabilise the other side of the issue, namely the entrenched structural and institutional factors that prevent women, in practice, from enjoying equal access to the economy and which therefore keep the gender pay gap artificially low.

Italy has a female labour force participation rate of 52.7%, which is one of the lowest in the EU and well below the EU-27 average of 66.9%.⁴⁴ This rate also hides strong regional variation – while Northern and Central Italy have female employment rates of 59% and 56% respectively, the South lags behind with a mere 33% female employment rate.⁴⁵ Working women in Italy are also segregated horizontally (across occupations) and vertically (across careers levels). Following an EU trend (see Figure 2), women in Italy tend to be overrepresented in the service sector and in professional fields such as the arts, humanities, and the social sciences, while they remain under-represented in the business and STEM sectors.⁴⁶ Despite being better educated than men, with 71.5% of Italian women enrolling in university vis-à-vis 53% of men, women are concentrated in lower-paying sectors. In fact, while 33.9% of men choose careers in the STEM fields, only 15.7% of women do so.⁴⁷ STEM disciplines are associated with steeper wage profiles over the course of working life.

Similarly, women in Italy remain underrepresented in decision-making positions and dominate the lower ranks, holding, for example, only one third of seats in Parliament and the Senate. In the private sphere, women remain concentrated in the lowest ranks of firms, with only 27% of women in managerial positions. Substantial progress has been made in the last decade at the board level thanks to the introduction of Law 120/2011, which imposes board gender quotas for publicly listed and state-owned firms. As a consequence of the enactment of the Italian gender quota Law, the share of women in firms has increased from 7% to the current 39%.⁴⁸

While low female employment rates keep the gender pay gap artificially low, women who can access the economy still encounter obstacles in progressing in their professional careers. Additionally, the horizontal and vertical division of women and men in the labour market not only contributes to the

⁴² Eurostat (2020).

⁴³ WEF (2020), 197.

⁴⁴ Eurostat (2020), <https://ec.europa.eu/eurostat>.

⁴⁵ Italian National Institute of Statistics (ISTAT) (2021), <http://dati.istat.it>

⁴⁶ WEF (2020), 198.

⁴⁷ Ibid.

⁴⁸ "La partecipazione femminile negli organi di amministrazione e controllo delle società italiane," Commissione Nazionale per le Società e la Borsa, Presidenza del Consiglio dei Ministri Dipartimento per le Pari Opportunità, and Banca d'Italia (2021).

gender pay gap during a woman's working life, but also result in wide pension gaps and female-dominated poverty. In fact, the gender pension gap in Italy remains significantly higher than the EU-27 average.⁴⁹

The low female employment rate in Italy is not simply linked to occupational and position divisions, but also to the pressing issue of limiting and outdated social norms which place women as the main carers of children and the household. Despite an increasing trend towards flexible working and the spread of paternity leave, women remain the main childcare providers in Italy. The vast majority of women see their professional career as mutually exclusive from having a family and thus choose not to work, or to engage in vulnerable contracts such as part-time (34% of employed women in Italy) and fixed-term contracts (48.1% of employed women in Italy).⁵⁰

An inadequate provision of public childcare helps to perpetuate this trend. Overall, Italy offers 25 places in public childcare for every 100 children under the age of three, still far from achieving the 2002 Barcelona Objectives.⁵¹ Childcare provision also encounters regional variation – while cities in Northern and Central Italy count with more than 40 places for every 100 children, cities in the South offer only 10 places for every 100 children.⁵² Perhaps not surprisingly, a recent study by the Italian National Institute of Statistics (ISTAT) found that traditional socio-economic gender stereotypes are also dominant in those regions of the South.⁵³ In Italy as a whole, 32% of people assert that women are more suitable to pursue childcare and household tasks, and 33% of people assert that being professionally successful is more important for men than women.⁵⁴ These numbers rise to 67.8% of respondents in southern regions, with no significant gender variation.⁵⁵ Despite mainstream beliefs, the disproportionate amount of unremunerated work that women supply leaves them at a significant economic disadvantage *vis-à-vis* men and contributes to a large gender pay gap which is not accounted for in statistical measures.

3.2. France

France has an average pay gap of 16.5%, standing in the middle of the EU Member States, but still below the EU-27 average (see Figure 1).⁵⁶ The WEF indicator ranks France 65th out of 153 countries according to its economic participation and opportunity index, also in the middle of its European counterparts.⁵⁷

Regardless of the relatively small percentage of companies found to be non-compliant with the Professional Future Act (*cf. Section 4.1.2*), the Ministry of Labour has identified two main issues that predominantly affect French companies. These two issues are related to the structural and institutional determinants of the gender gap – i.e., the unadjusted gender gap. France has a female labour

⁴⁹ Eurostat (2020).

⁵⁰ OECD Statistics (2021).

⁵¹ ISTAT (2021).

⁵² *Ibid.*

⁵³ ISTAT, "Stereotypes about Gender Roles and the Social Image of Sexual Violence" (2018).

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*

⁵⁶ Eurostat (2020).

⁵⁷ WEF (2020), 163.

participation rate of 68.2%, which is significantly higher than that of Italy but in line with the EU-27 average.⁵⁸ Also in line with the mainstream, women in France tend to be overrepresented in the service sectors and professional fields such as the arts and humanities, while they remain under-represented in higher-paying sectors such as industry and fields such as STEM (see Figure 2).⁵⁹ That is, a mere 14.5% of women work in STEM compared to 39.8% of men.⁶⁰ Unlike Italy, however, women in France are equally represented as men in the business and administration fields, even if women and men remain highly vertically divided. In fact, even if women hold a third of the seats in French boards of directors, 37% of companies still have less than two women in the 10 highest-paying positions.⁶¹ Likewise in the public sphere, women hold 40% of seats in the National Assembly and 33% of seats in the Senate.⁶²

Even if France counts with a female labour participation rate which is comparable to the EU-27 average, it is still low compared to that of men. The main issue in France is the prevalence of part-time work among women, who represent 76.6% of part-time workers.⁶³ In addition, 53.7% of employed women in France are employed on a temporary basis, which allows women to disproportionately seek work flexibility to care for children and the household.⁶⁴

Women in France have little incentive to return to the workplace after childbirth, as a result of the improper enforcement of existing public policies to increase the female labour participation rate. In fact, the French Ministry of Labour estimates that only 13% of companies respect the rule in French law in which women should receive a pay rise after returning from maternity leave.

Although France met the 2002 Barcelona Objectives about the supply of public childcare services, with on average of 59 places available for children under the age of three,⁶⁵ regional variations are still relevant and are correlated with the outcome: in the French regions offering the highest number of childcare places (e.g., Pays de la Loire which has 90 places per 100 children) the female employment rate is also the highest in the country.⁶⁶

Part-time work, temporary work, and female unemployment mean that women in France still work more unpaid hours (see Figure 3), showing that the problem with the wage gap also lies in the unadjusted variation between men and women.

3.3. Germany

As of 2019, women in Germany earn on average, 19.2% less than men (see Figure 1).⁶⁷ Germany thus counts with the third largest gender pay gap in Europe, after Austria (19.9%) and Estonia (21.7%).⁶⁸ As is also the case for Italy and France, cumulative indicators such as those of the WEF present a different picture, and in fact rank Germany more favourably, at 48th out of 153 countries in terms of economic

⁵⁸ OECD Statistics (2021).

⁵⁹ WEF (2020), 164.

⁶⁰ Ibid.

⁶¹ WEF (2020), 164.

⁶² International IDEA Database (2021).

⁶³ OECD Statistics (2021).

⁶⁴ Ibid.

⁶⁵ National Institute of Statistics and Economic Studies (INSEE) (2021), <https://www.insee.fr/en/accueil>.

⁶⁶ Ibid.

⁶⁷ Eurostat (2020).

⁶⁸ Ibid.

opportunities for men and women – i.e., better positioned than most of its EU counterparts.⁶⁹ Regarding equal pay for equal work (i.e., the explained gender gap), the gap remains at 6%, signalling that socio-economic norms and stereotypes potentially play an important role in increasing the wage disparity between women and men. In fact, similarly to Italy, Germany's pay gap is regionally divided between the East and the West, with the East benefitting of a significantly lower pay gap. Before reunification, the East had a labour market female participation and family male participation, which helps to account for this regional disparity.

As in Italy and France, a significant issue in Germany is the horizontal and vertical division of women and men in the labour market. Germany does not count with significant gender differences in employment rates, even if a gap still exists – that is, 80.5% of men are employed to 72.8% of women.⁷⁰ Nevertheless, women in Germany remain concentrated in the lowest-paid sectors and fields (see Figure 2). For example, women in Germany remain overtly represented in the service sectors, and underrepresented in industry and professional fields such as STEM. While 52.7% of male graduates attain STEM degrees, only 19.2% of women do so.⁷¹ As in Italy and France, women and men in Germany also remain vertically divided and lack decision-making power. In the public sphere, women hold one third of the seats in both the Upper and Lower House.⁷² And, in the private sphere, women occupy only one third of the seats on company boards.⁷³

A factor contributing to the striking gender gap in Germany is that traditional norms and socio-economic stereotypes still put pressure on women to disproportionately endure the 'motherhood penalty.' Women spend an average of 58 weeks on leave after giving birth, compared to 8 weeks for men.⁷⁴ After re-entering the labour market, women also tend to opt for part-time employment in order to assume childcare and household responsibilities. In fact, in Germany, while 49.6% of women are employed on part-time contracts, this is the case for only 8% of men.⁷⁵ Part-time employment does not only mean that women work fewer hours and therefore earn less; these contracts are also concentrated in lower-paid sectors, contributing to the horizontal division of women and men in the labour market. Another 11.6% of women are employed under temporary contracts.⁷⁶

The lower number of unpaid hours that women work (see Figure 3) naturally widens the gap between women's and men's earnings and also contributes to a widening of the pension gap in the future. Germany, such as Italy, has a relatively high pension gap of 37.4%, the highest among the 27-EU countries.⁷⁷ In this regard, research suggests that the long-run 'child penalty' (also sometimes denominated the 'motherhood penalty') amounts to 61% in Germany.⁷⁸ This number encompasses the reduction in earnings of women compared to men at the time of child birth, which persists up to 10

⁶⁹ WEF (2020), 169.

⁷⁰ Federal Statistical Office of Germany (Destatis) (2021), https://www.destatis.de/EN/Home/_node.html.

⁷¹ WEF (2020), 170.

⁷² International IDEA Database (2021).

⁷³ WEF (2020), 170.

⁷⁴ Ibid.

⁷⁵ OECD Statistics (2021).

⁷⁶ Ibid.

⁷⁷ Eurostat (2020).

⁷⁸ Henrik Kleven, Camille Landais, Johanna Posch, Andreas Steinhauer, and Josef Zweimülle, "Child Penalties across Countries: Evidence and Explanation," *AEA Papers and Proceedings* 109 (2019): 122-126.

years after the birth of the first child. This is the highest value among the countries analysed by Kleven *et al.* (2019).⁷⁹

The issue is compounded by the fact that Germany also provides a relatively low number of childcare places. On average, there are 35 publicly funded childcare places for every 100 children under the age of three.⁸⁰ Although German placements are rightly aligned with the 2002 Barcelona Objectives, a low supply of childcare places remains an incentive for women to opt for precarious work contracts (i.e., part-time work, temporary work), and thus help account for the significant unadjusted portion of the gender pay gap in Germany.

3.4. Denmark

Denmark lies close to the median of EU Member States in terms of its gender equality gap, with women earning on average 14.0% less than men in 2019.⁸¹ Even if it is close to the EU-27 average, its gender pay gap represents an interesting paradox, as Denmark – alongside other Nordic countries – tends to rank exemplarily high in terms of gender equality. In fact, the WEF ranks Denmark on position number 19 out of 153 countries in terms of equal economic opportunities and participation for women and men,⁸² and according to the European Institute for Gender Equality (EIGE) Index, Denmark is the second most equal country in the EU, displaying major improvements since 2010.⁸³ Some of these improvements are in the areas of women's inclusion in the economy and in decision-making positions. However, progress has stabilised and more needs to be done to ensure that structural and institutional factors do not continue preventing women from earning a fair income compared to their male counterparts.

As in Germany, the employment gap in Denmark is remarkably small, with 73.2% of women employed vis-à-vis 77% of men.⁸⁴ However, traditional socio-economic stereotypes prevail, which might account for one of the leading causes of a relatively high gender pay gap in the country. Denmark – as the other Nordic countries – counts with a strong and responsive welfare state which allows women to enter the labour force. In fact, Denmark supplies and ensures care for all children under the age of three (i.e., 100 spots for every 100 children),⁸⁵ and paternity leave is increasingly normalised relative to the rest of the EU Member States. Yet, socio-economic stereotypes play a limiting role in wage equity in two main ways.

First, in Denmark, women and men remain horizontally and vertically divided in the labour market (see Figure 2). As in the rest of the Member States, women in Denmark tend to be concentrated in lower paid sectors, such as the public and service sectors, and in lower paid academic fields, such as the arts and humanities.⁸⁶ At the same time, while 31.6% of men are employed in STEM, only 12.8% of women enter this field.⁸⁷ Women also encounter obstacles in accessing decision-making positions. In fact, in

⁷⁹ Ibid.

⁸⁰ Destatis (2021).

⁸¹ Eurostat (2020).

⁸² WEF (2020), 143.

⁸³ EIGE (2017).

⁸⁴ Statistics Denmark (2021), <https://www.dst.dk/en>.

⁸⁵ European Commission, "Key Data on Early Childhood Education and Care in Europe" (2019).

⁸⁶ WEF (2020), 144.

⁸⁷ Ibid.

the public sector, women hold 39.6% of seats in Parliament.⁸⁸ In industry, women are not merely underrepresented, but they also hold only 28% of seats on company boards.⁸⁹ Preliminary research suggests that the minority of men working in the typically female employment sectors might be able to climb the hierarchical ladder faster than women in the stereotypically male sectors.

Second, the typically female employment sectors in which women in Denmark remain disproportionately represented are also those that predominantly offer vulnerable employment contracts, such as part-time work. In fact, 23.7% of women still choose part-time work despite Danish childcare provisions.⁹⁰ In addition, despite taking more parental leave than fathers in other European countries, Danish fathers take an average of 34.2 days of leave compared to an average of 280.3 days for women.⁹¹ Mothers also tend to work three hours more per week than men in childcare and household activities (see Figure 3).

In fact, according to the estimates produced by Kleven *et al.* (2019), in the years right after the birth of a couple's first child, women's fall by 30% in Denmark, while fathers' earnings remain unchanged.⁹² This 'child penalty' persists over time and, as long as ten years after the birth of the first child, this gap amounts to 21%.⁹³ Although the 'child penalty' is smaller than in other Member States (e.g., Germany), the issue is still significant in Denmark and, along with stereotypes that contribute to women's overrepresentation in the lower paid sectors of the economy, help to explain the unadjusted portion of the gender pay gap in the country.

3.5. Iceland

Iceland is not an EU Member State, but it is highly integrated with other Member States in economic terms, and thus takes part in a number of EU agencies (although without voting rights). Therefore, Statistics Iceland calculates the unadjusted pay gap rate according to Eurostat's measure, and thus provides statistics which are comparable to those of other EU countries. The unadjusted gender pay gap in Iceland in 2019 was 14.0%, in alignment with the European average (see Figure 1).⁹⁴ Nevertheless, as with other countries, the WEF ranks Iceland second out of 153 countries in terms of economic participation and opportunity and first in overall gender equality, for the ninth consecutive year.⁹⁵

Given how recent the latest 2018 Equal Pay legal amendment is (*cf.* [Section 4.1.5](#)), its long-term results are still unknown. Although Iceland has culturally a strong sense of gender equality and counts with public policies to ensure it, some entrenched and resilient socio-economic stereotypes play a role in widening the unadjusted gender pay gap. Like Germany and Denmark, Iceland has small differences in men and women's labour force participation, with 82.5% of women employed compared to 87.5% of men.⁹⁶

⁸⁸ Inter-Parliamentary Union (2020), <https://www.ipu.org/>.

⁸⁹ WEF (2020), 144; Equileap, "Gender Equality in Denmark and Sweden: Assessing leading companies on workplace equality" (2020).

⁹⁰ OECD Statistics (2021).

⁹¹ Statistics Denmark (2021).

⁹² Kleven *et al.* (2019).

⁹³ *Ibid.*

⁹⁴ Statistics Iceland (2021), <https://www.statice.is/>

⁹⁵ WEF (2020), 183.

⁹⁶ Statistics Iceland (2021).

A relevant issue in Iceland is that women remain concentrated in lower paid sectors (see Figure 2). Although there is not a high concentration of women in the arts and humanities (as in the other selected countries), women remain underrepresented in STEM fields and in business and administration. There are 10.3% of women and 26.7% of men working in STEM, and 21.9% of women and 34.7% of men working in business and administration.⁹⁷ In addition to being less likely to enter these fields, when adjusting for the gender pay gap by occupation, business and finance sectors seem to account for a considerable portion of the pay gap.⁹⁸

Women in Iceland also tend to be overrepresented in the public and service sector, where they account for 7 out of 10 employees.⁹⁹ This is largely explained by the fact that the public sector offers flexible and part-time employment opportunities, and half of employed women in Iceland still choose to work part-time.¹⁰⁰ Childcare sharing in Iceland is nevertheless more equal than in other European countries, where women represent even higher proportions of part-time workers; in fact, women take an average of 26 weeks of leave after childbirth, and men an average of 13 weeks of paternity leave.¹⁰¹ This more equitable share is due to policies that make care leave non-transferable. Nevertheless, women in Iceland still sometimes opt not to take it, as they are still more likely to cease working or choose a part-time job to endure the 'motherhood penalty' (see Figure 3).

3.6. Spain

Spain's gender pay gap stands at 11.9% as of 2019, representing a narrower gender gap than the EU-27 average (see Figure 1).¹⁰² According to the WEF, Spain ranks 72nd out of 153 countries in terms of equal economic opportunities and women's participation, although it ranks among the top 10 countries in terms of overall gender equality.¹⁰³ Spain's remarkable position represents significant progress compared to previous years, but this change has only been recent and therefore the gender pay gap is expected to remain for a few decades. Spain's overall position among the top 10 countries is largely related to the fact that it has focused on gender-based violence issues and the implementation of public policies to stop the spread of violence against women, but work remains in addressing other socio-economic issues that disproportionately affect women.

Yet, the Spanish government has also followed several strategies to specifically target the gender pay gap. First, Spain – such as France – is one of the few Member States which has established a national Equal Pay Day, on February 22nd. Second, the Spanish government increased the minimum wage from €900 to €1030, with the rationale that since women are the primary minimum wage earners, this policy would help reduce the gender pay gap. This policy, nevertheless, did not specifically target the structural and institutional inequalities that keep women systematically earning compared to their male counterparts. Third, the Spanish government released two relevant Royal Decrees in 2020 (*cf.* [Section 4.1.6](#)), which reinforced the principle of equal pay for equal work and introduced the principle of remunerative transparency.

⁹⁷ WEF (2020), 184.

⁹⁸ Nordic Statistics (2019), <https://www.nordicstatistics.org/>

⁹⁹ Statistics Iceland (2021).

¹⁰⁰ OECD Statistics (2021).

¹⁰¹ WEF (2020), 184.

¹⁰² Eurostat (2020).

¹⁰³ WEF (2020), 184.

Employment rates of men and women are similar to those in Italy, with 56.9% of women of working age in employment *vis-à-vis* 67.9% of men.¹⁰⁴ As in Italy, there are regional variations, with the two extremes being Asturias, with 42.3% of women participating in the labour force, and the Balearic Islands, with 61.1% of women being employed.¹⁰⁵ Coincidentally, these are the two regions with the widest and smallest gender pay gaps, respectively; that is, while the gender pay gap in Asturias is 29.3%, the gender pay gap in the Balearic Islands is 13.7%.¹⁰⁶ As in the rest of the EU, women's economic opportunities in Spain are limited by the horizontal and vertical division of women and men in the labour market. In fact, most employed Spanish women tend to work in the service sectors, which offer comparatively lower salaries. Similarly, women in Spain remain under-represented in higher paying fields such as STEM, with 12.4% of women and 37.3% of men obtaining employment in these fields.¹⁰⁷ At the same time, women in Spain encounter a glass ceiling throughout their careers and thus additionally remain underrepresented in decision-making positions. In the public sphere, 44% of seats in Congress and 41% of seats in the Senate are held by women.¹⁰⁸ The situation is worse in the private sphere, where a mere 22% of seats on company boards are held by women.¹⁰⁹

A prevalent problem in Spain is the gender care gap, which limits women's time in the labour force (see Figure 3). In Spain, while men are paid on average for 161 hours of work per week, women are merely remunerated for 146 hours per week, even if women tend to carry out more hours of unpaid work.¹¹⁰ The 'motherhood penalty' constrains women economically and professionally, which can be seen in the fact that 40.5% of women still choose part-time employment in order to take care of the household and the family.¹¹¹ In addition, women in Spain are 10% more likely to have temporary employment contracts than their male counterparts.¹¹²

Women in Spain take 16 weeks of leave after the birth of a child, compared to two weeks for men.¹¹³ As of January 2021, these two weeks of paternity leave, however, have been extended to a mandatory, non-transferable, and fully paid period of 16 weeks for men as well, under the recent reforms to the Spanish Law on Gender Equality. Even if non-transferable leave policies had already been implemented in other countries (e.g., the Nordics), this policy makes Spain the first Member State to count with equal maternity and paternity leave policies paid at 100% of the original salary.¹¹⁴ The issue, however, is that despite this generous care leave after birth, care periods during childhood are not covered by public policies, and thus can only be taken without any allowance. This is exacerbated by the fact that the Spanish government supplies, on average, merely half of the care placements for children under the age of three than those which are demanded. The inappropriate provision of childcare places forces

¹⁰⁴ Eurostat (2020).

¹⁰⁵ Instituto Asturiano de la Mujer (2020), <https://iam.asturias.es/inicio>; Govern Illes Balears (2019), <https://caib.es/govern/index.do?lang=ca>.

¹⁰⁶ Spanish Statistical Office (INE) (2021), <https://www.ine.es/en/>.

¹⁰⁷ WEF (2020), 318.

¹⁰⁸ International IDEA Database (2021).

¹⁰⁹ WEF (2020), 318.

¹¹⁰ Eurostat (2020).

¹¹¹ OECD Statistics (2021).

¹¹² Claudia Hupkau, and Jennifer Ruiz-Valenzuela, "Work and children: is the motherhood penalty in Spain too high for working women?" (2021), <https://blogs.lse.ac.uk/businessreview/2021/03/12/work-and-children-is-the-motherhood-penalty-in-spain-too-high-for-working-women/>.

¹¹³ WEF (2020), 318.

¹¹⁴ Caps at about €4,000 per month.

some parents, primarily mothers, to stop working or engage in part-time and temporary employment in order to take care of children. Due to socio-economic stereotypes that still disadvantage women, the care burden at the expense of professional development still tends to fall disproportionately on the mother.

4. THE LEGAL FRAMEWORK ON THE GENDER PAY GAP

Heretofore, gender diversity in the legal sphere has been explored from the perspective of gender diversity, which has been fostered mainly by the proposed directive on gender balance and the Capital Requirements Directive (CRD) IV in the banking sphere. The principle driving this type of action was essentially ethical, and the reasons for increasing use of such policies relate to improving the conditions of corporate governance and greater weighting of decisions.

On the contrary, the gender pay gap in the legal sphere refers to issues of equality, constitutionally protected by all legal systems, and which results in equal social dignity before the law, without distinction of sex, personal and social conditions, as a matter of substance. The constitutional affirmation is flanked by the supranational one, since also the recent UN SDGs, to be pursued in the time of Horizon 2030, reaffirm how gender equality is not only a fundamental human right, but the necessary condition for the realization of a prosperous, sustainable, and peaceful world. The aforementioned goal (number 5)¹¹⁵ is dedicated to this issue, as it aims to achieve ambitious goals such as gender equality and empowerment for all women.

This brief reflection therefore makes it intuitive to understand how two levels must be addressed when dealing with the legal framework at stake – the national context, on the one hand, and the European dimension, on the other.

The first framework, the national one, is addressed in this paper with the same approach used in the first part; that is, with a focus on the specific realities of the selected countries. It should be noted, however, that the frameworks explored are not the only ones that are worthy of attention on this topic.

Contrastingly, attention to the gender pay gap is not exquisitely European. In the United States (US), for instance, the US Securities and Exchange Commission has raised its attention to diversity, equity, and inclusion in public companies,¹¹⁶ and it is legally required for companies with more than 100 employees to disclose information on compensation, broken down by gender, race, and ethnicity to the Equal Employment Opportunity Commission (EEOC). Recently, in late March 2021, Rep. Carolyn B. Maloney, the Chairwoman of the Committee on Oversight and Reform, held a hybrid hearing in honour of Equal Pay Day “to examine the economic harm caused by longstanding gender inequalities, particularly for women of color” even considering the pandemic effects which seems to have even exacerbated such long-standing inequities.¹¹⁷ Similarly, the United Kingdom (UK) – where wage gaps in general stand out as a major concern¹¹⁸ – introduced in 2017 the mandatory disclosure of hourly pay

¹¹⁵ See [fn 9](#) above.

¹¹⁶ David A. Katz, and Laura A. McIntosh, “SEC Regulation of ESG Disclosures,” Harvard Law School Forum on Corporate Governance (28 May 2021).

¹¹⁷ “Since February 2020, women have experienced a net loss of more than 5.4 million jobs—55% of the United States’ overall net job loss since the start of the coronavirus crisis. Women of color have borne the brunt of the pandemic’s impact, as they have experienced its compounded harms on both women and on communities of color. These harms aggravate longstanding economic discrimination and other barriers to economic equality, and raise concerns that women may be forced out of the workplace permanently.” (Carolyn B. Maloney, “Honoring ‘Equal Pay Day’: Examining the Long-Term Economic Impacts of Gender Inequality,” 24 March 2021, <https://oversight.house.gov/legislation/hearings/honoring-equal-pay-day-examining-the-long-term-economic-impacts-of-gender>). In the US, the attention for our policies and for Ursula von der Leyen’s catchy claim (“for equal pay, you need transparency”) is showed also in Monika Pronczuk, “E.U. Pushes Companies to Close Gender Pay Gap,” *New York Times* (4 March 2021).

¹¹⁸ The latest contribution in the field is represented by Katherine Sobering, “Survival finance and the politics of equal pay,” *British Journal of Sociology*, 72, 3 (2021): 742-756.

and bonuses for companies with more than 250 employees.¹¹⁹ Although it is not possible to contrast the gender pay gap situation before and after the introduction of the provision requiring mandatory disclosure, or to tell the extent to which the gender pay gap reflects a poor corporate culture, one of the few studies available on the matter tentatively concludes that the UK's disclosure rule had modest implications for gender pay equality and the gender pay gap.¹²⁰ In contrast, in Denmark, a positive effect of the law, *inter alia*, on equity was observed.¹²¹ In any case, it should be noted that COVID-19 overturned the considerations reached so far, and thus the effects of the pandemic in the implementation of gender pay gap practices in company cultures cannot be overlooked.¹²²

The second perspective, the European one, passes through an understanding of the very dimension of the supranational debate; that is, of the importance and usefulness of directives and regulations to achieve a common and shared objective. Moreover, it is combined with an even broader programmatic horizon, namely the one drawn by the ESG phenomenon, including the CSRD and the even more specific proposal for a Directive aimed to strengthen the application of the principle of equal pay for equal work or work of equal value between men and women through pay transparency and enforcement mechanisms.¹²³

4.1. The Legal Framework in Selected Countries

4.1.1. Italy

Although Italy does not have a clear gender mainstreaming strategy, gender equality is a fundamental right established by the Italian Constitution. The 1947 Constitution prohibits any sort of discrimination in remuneration, including discrimination due to gender in Articles 3, 4, and 37. Similarly, Article 51 grants equal access to education and the labour market, and the opportunity for equal advancement in professional careers for both men and women. However, beyond blanket declarations of intent by several politicians, no decisive and indispensable steps to close the gender pay gap have been taken in Italy in recent decades. In this context, the gap does not merely exist between men and women, but also between the private and public sectors.¹²⁴

The state of the art in terms of regulations on this point can be reconstructed only by moving from some considerations on the Code of Equal Opportunities for Men and Women (Legislative Decree April 112006 No. 198, O.J. May 31, 2006), which reinforced the prohibition of pay discrimination already settled in Law No. 903 of 1977 ("Equal treatment for men and women in matters of work"). Article 46, paragraph 1, of Law No. 903 of 1977 required public and private companies employing more than 100 employees to draw up a report at least every two years on the situation of male and female employees

¹¹⁹ Aneesh Raghunandan and Shivaram Rajgopal, "Mandatory Gender Pay Gap Disclosure in the UK: Did Inequity Fall and Do These Disclosures Affect Firm Value?" (2021). It must address the average and median gender pay gap, the proportion of men and women in each pay quartile and receiving a bonus payment. More generally, on the relevance of EU policies in the UK post-Brexit, see Colette Fagan and Jill Rubery, "Advancing Gender Equality through European Employment Policy: The Impact of the UK's EU Membership and the Risks of Brexit," *Social Policy & Society* 17, 2 (2018): 297-317.

¹²⁰ *Ibid.*

¹²¹ Morten Bennedsen, Elena Simintzi, Margarita Tsoutsoura, and Daniel Wolfenzon, "Research: Gender Pay Gaps Shrink When Companies Are Required to Disclose Them," *Harvard Business Review* (23 January 2019), <https://hbr.org/2019/01/research-gender-pay-gaps-shrink-when-companies-are-required-to-disclose-them>.

¹²² Helen Corden and Susannah Donaldson, "Gender pay gap rises: full impact of Covid-19 yet to be seen," *Out-law* (18 June 2021).

¹²³ European Commission, "Questions and Answers: Corporate Sustainability Reporting Directive proposal" (2021).

¹²⁴ Raffaele Ricciardi, "Stipendi, resta un gap di 2.700 euro tra uomini e donne. L'avanzata dei robot può frenare i miglioramenti," *La Repubblica* (20 January 2020).

in each of the professions and in relation to the state of recruitment, training, professional promotion, levels, changes of category of qualification, other mobility phenomena, the involvement of the Wages Guarantee Fund, redundancy, early retirements and retirements, and remuneration. The enforcement of the provision at issue is ensured by the last paragraph of the same article which, in the absence of the submission of a report in due time, the Regional Labour Office would request it within sixty days. In serious cases, the Regional Labour Office has the capacity to order a one-year suspension of any contributory benefits enjoyed by the company. Heretofore there have been no significant attempts to tackle the gender pay gap, except when in 2012 female workers at Fiat/FCA brought their situation to the attention of the Minister of Labour Elsa Fornero. Fiat/FCA's female employees asserted that utilising family leave or leave to care for their children penalised them and made it difficult for them to obtain the annual performance bonus that the company offered.¹²⁵

The provision set forth in the first version of the Code of Equal Opportunities required, after all, only a form of disclosure and provided for verification tools on equal pay that were not particularly compelling. However, the Code is currently being reviewed in the context of a bill presented on 11 May 2019, which counts with Hon. Chiara Gribaudo among its first signatories, precisely with the intention of strengthening these verification tools to ensure a more equitable pay between genders.¹²⁶ In particular, the bill proposes to reinforce the obligation for public and private companies with more than 100 employees to submit the biannual report on the situation of male and female workers; extending the audience to smaller companies who can optionally opt in (paragraph 1); to make public the list of companies that have submitted their results and those in default, available at the website of the Ministry of Labour (paragraph 2); to allow the inspection of the reports to the employees of each respective company, as well as making the procedures for releasing the reports available on each company's website; to make clear the definition of basic parameters concerning respect for equal opportunities, the form, methods of awarding, and publication of a certification of equal employment opportunities (paragraph); and to tighten control and sanction procedures (paragraph 4).

This initiative draws inspiration and strength from comparative considerations,¹²⁷ but remains weak in terms of enforcement. On the one hand, the proposed amendment has the merit of determining when the delay in the preparation of the report may be serious – i.e., if non-compliance continues for more than 12 months. On the other hand, however, it leaves to the National Labour Inspectorate alone, within the scope of its activities, the duties of verifying the genuineness of the reports at stake.

This first initiative runs parallel to bill No. 1423 of July 2019, aimed at ensuring the effective and complete equality of pay between women and men for the same job or work of equal value, and promoting support for employed mothers. Among its items, Article 3 recommends the inclusion of a number of provisions in Article 46 of the Equal Opportunity Code, namely information aimed at ensuring transparency on equal pay; data on the actual amount paid (fixed and variable); the average and median between the salaries of men and women; the difference in the average amount of productivity bonuses; the proportion of men and women who received bonuses in the previous 12 months; the percentage of men and women employed; the percentage of pay difference for the same level of classification and skills; *inter alia*. The bill stands out for the recognition of a tax credit to public or private companies awarded with the Equal Pay Mark (Article 5); an in-depth sanctioning apparatus

¹²⁵ "Niente premi di produzione perché siamo donne," Operaie del gruppo Fiat in rivolta, *Il Fatto Quotidiano* (14 March 2012).

¹²⁶ Camera dei Deputati, "Disposizioni in materia di rapporto sulla situazione del personale, di cui all'art. 46 del Codice delle pari opportunità (D.Lgs. 198/2006), A.C. 615, A.C. 1345, A.C. 1925, Dossier n° 234 - Schede di lettura", 26 November 2019, <http://documenti.camera.it/leg18/dossier/pdf/LA0139.pdf>.

¹²⁷ *Ibid.*

(Article 8); and specific measures to assist paternity and maternity, such as vouchers for the purchase of babysitting services and maternity leave (Articles 10 and 11). As for the bonus measures, it recognises a tax credit up to a spending limit of €20 million for each of the years 2019, 2020, and 2021. As for the sanctioning profiles, in the event of non-compliance with the warning to disclose data on equal pay within the following 12 months the offender is required to pay an administrative fine ranging from €1,500 to €3,000 for companies with less than 10 employees, from €3,001 to €5,000 for companies with 11 to 50 employees, from €5,001 to €7,000 for companies with 51 to 250 employees, and from €7,001 to €9,000 for companies with more than 250 employees. In the event that non-compliance continues for 24 months, the offender will suffer a one-year suspension of any contributory benefits enjoyed by the company, the exclusion from public tenders, and the termination of contracts with the public administration.

The proposal of Hon. Gribaudo was met favourably by the National Councillors for Equality,¹²⁸ appointed by decree by the Minister of Labour and Social Policies, in accordance with the Minister for Equal Opportunities, from a pool of experts in women's work, equal opportunity legislation and the labour market. The National Councillors for Equality have the task of promoting and monitoring the implementation of the principles of equal opportunities and non-discrimination between men and women in the realm of work. Serving for a four-year term (with the possibility of one renewal term), the advisers work in reporting cases of discrimination of national importance and have an active participation in developing labour policies. The work of the advisers, and especially their monitoring role, would be strengthened with the current bill. In fact, three decades after their establishment, the Equality Councils have not been incisive, with events such as the absence of a balance sheet from part of the Ministry of Labour, the National Council of Equality, and the network of regional and provincial Councils, to the difficulty of fighting the issue of equal pay, which is pervasive and resilient.

The most recent effort, the passing of bill C.2516 of May 2020 in June 2021, has been a fundamental step in the direction of bridging the pay gap between women and men.¹²⁹ Although the approval in this context does not put an end to the issue, as the text must now be approved by the Senate as well, it represents an important step towards the recognition of empirical research which shows that women earn 12.2% less than men for equal tasks, and 30.6% less in jobs requiring a university degree.¹³⁰ The bill's 'disclosure-enhancing' provision is the outcome of coordinated policy efforts and efficient leveraging on the value of brand reputation to incentivise companies to take significant steps in the direction of equality.

Along these lines, Prime Minister Mario Draghi also pointed out the need for action in the country and has signalled the tackling of the gender gap as a priority.¹³¹ This is certainly an overtly programmatic statement, but one that has been translated into concrete facts by looking at the provisions on employment and inclusion in the National Plan for Recovery and Resilience (PNRR),¹³² which provides for the establishment of a national certification system for gender equality in companies coordinated by an IT platform at the Ministry of Equal Opportunities. This 'pink label' is intended to reward

¹²⁸ "Proposta di legge per colmare il *gender pay gap*: dichiarazione delle Consigliere Nazionali di Parità," Ministero del Lavoro e delle Politiche Sociali (10 October 2019).

¹²⁹ "Modifiche al codice di cui al decreto legislativo 11 aprile 2006, n. 198, e altre disposizioni in materia di pari opportunità tra uomo e donna in ambito lavorativo" (2020), <https://temi.camera.it/leg18/dossier/OCD18-14482/modifiche-al-codice-cui-al-decreto-legislativo-11-aprile-2006-n-198-e-altre-disposizioni-materia-pari-opportunita-uomo-e-donna.html>.

¹³⁰ Nicoletta Cottone, "Parità salariale, primo sì della Camera in commissione Lavoro," *Il Sole 24 Ore* (23 June 2021).

¹³¹ Luisa Rosti, "Parità di genere, serve più trasparenza sulle retribuzioni," *Il Sole 24 Ore* (5 March 2021).

¹³² "Piano Nazionale di Ripresa e Resilienza," Italian Government (2020): 35.

companies that are committed to enhancing the value of women's work, guaranteeing them tax relief and benefits, but also facilitating access to calls for tenders and funds. The system, which aims to be in place in the second quarter of 2022, recalls the Icelandic experience, which requires all companies, whether public or private, with more than 25 employees to adhere to this certification, otherwise inflicting heavy fines and penalties. If, on the one hand, a less rigid enforcement and a rewarding intent differentiate the Italian model from its predecessor, on the other hand, the rigour of the former has proven its worth, allowing Iceland to achieve the remarkable results mentioned above (cf. [Section 3.5](#)).

At the same time, this system institutionalizes a mechanism that is not entirely unknown in Italy, but until now left only to private initiative. A group promoted by women managers, but also by far-sighted men, known as the Winning Women Institute, had in fact tried to encourage equal opportunities by fostering the use of the so-called Dynamic Gender Rating Model also at an economic level in companies, gathering voluntary adhesions and cultivating a form of corporate culture on this subject. On the one hand, adhering companies – ranging from BNP Paribas to Allianz, and from Cameo, Sanofi, and Sas to Ipsen – have, in fact, gradually understood the enormous impact that choices of this kind have (positively) on consumers; on the other hand, they have also acknowledged the impact (again, positively) on brand diffusion. Similarly, the Social Accountability (SA) 8000 certification had created an internationally acclaimed reference standard with the aim of guaranteeing optimal working conditions. This represents an effective accreditation for the correct management and constant monitoring of activities that impact on issues relating to working conditions (i.e., human rights, development, enhancement, training and professional growth, health and safety, non-discrimination, employment of minors), and which also extends to suppliers and subcontractors.

The Strategy and the PNRR also address the problem with a broader perspective, for example, by paying attention to the fact that Italy is one of the countries with the lowest fertility rate in Europe and it is necessary to act on the policies to promote birth rate already initiated with the Family Act.¹³³ Therefore, the PNRR includes measures designed not to force women to choose between motherhood and career, promoting policies in favour of parenthood through precise missions. Mission 1 aims to narrow gaps in labour market participation and career progress by affecting recruitment mechanisms in the public administration and reviewing opportunities for promotion to high-level executive positions, for example with measures for agile work in the public administration and technological investments that facilitate entrepreneurship, without gender and industry boundaries.¹³⁴ Mission 4 proposes to incentivise childcare services, from kindergartens to full-time schooling, thus encouraging support for mothers.¹³⁵ Mission 5 outlines an integrated strategy to narrow the different gender gaps, especially in the most critical areas for the professional growth of women, and strategies to strengthen salary transparency, which nowadays is all too often entrenched with privacy issues. At the same time, it outlines efforts to act on social housing projects so as to reduce the contexts of extreme marginality and risk of violence to which women are mostly exposed.¹³⁶ Mission 6 acts on another element highlighted in the policy analysis section of this report (cf. [Section 2](#)); namely, the need to act in a way that relieves women from numerous burdens of home support and family care through appropriate policies of support and assistance. The reward system planned by the PNRR is defined by a working table on the 'Gender Certification of Companies' at the Equal Opportunities Department, where the

¹³³ Law No. 46 of 1 April 2021 (Family Act) allows the Italian Government to adopt, within twelve months, one or more legislative decrees aimed at reordering, simplifying and strengthening measures in support of dependent children through the single and universal allowance.

¹³⁴ "Piano Nazionale di Ripresa e Resilienza" (2020), 36.

¹³⁵ Ibid.

¹³⁶ Ibid.

'Women's Task Force for a new Renaissance' has already operated. This mechanism is intended for all companies, regardless of their size, but in the experimental phase (which should last until 2026), this certification will be made increasingly accessible to medium, small, and micro-sized companies and will be supported by accompanying services and assistance.

Article 47 of the Simplification Decree No. 77/2021 (in force since 1 June 2021) also encourages the reduction of the gender pay gap by obliging companies with at least 15 employees entrusted with contracts for the works of the PNRR and the complementary fund to publish a report concerning its employees and the inclusion of women. This report, to be delivered within six months of the conclusion of the contract, must contain a precise indication of the state of recruitment and training, information on the levels and changes in qualifications, and it should be submitted by the contracting authority to union representatives and the regional council for equality. Companies that effectively use mechanisms aimed at increasing work-life balance, that in the previous three years promoted opportunities for young people and women (including access to senior positions), and that are committed to hiring young people under the age of 36, are rewarded with additional points in the event of calls for tender. Tenders could, moreover, an obligation on the part of the tender participant to reserve the quota for women and young people which is necessary to execute the contract. At the same time, cases of non-compliance are sanctioned to the point of making it impossible for the economic operator to compete for further tenders in the following 12 months.

In the regulations relating to the fishing sector, a sole mention of equal pay was already found in Article 26 of Law No. 117 of 4 October 2019, published in the Official Journal on 18 October 2019, No. 245. In the exercise of the delegation for the implementation of Directive (EU) 2017/159 of December 2016 ("Implementing the Agreement concerning the implementation of the Work in Fishing Convention, 2007 of the International Labour Organisation, concluded on 21 May 2012"), the Italian government is required to ensure – in addition to the general principles and guidelines set out in Article 1, paragraph 1 – that the regulations introduced guarantee suitable working conditions and adequate health and safety standards for workers in the sector by promoting, in compliance with European Union provisions, actions aimed at achieving equal pay for men and women and at combating all forms of discrimination.

Regarding case law, equal pay for men and women meets with only one important ruling in 1986, which considers the principle of equal pay for equal work stated in Article 37 of the Constitution exclusively to the benefit of women and minors, and thus not to be extensible in favour of men whose services are paid less than those of women. This inversion of the principle, moreover, cannot be derived from either Article 3 or Article 36. While Article 3 sets the obligation for the legislature and not for private individuals to observe the rule of equal treatment between genders, Article 36 is limited to establishing the principle of proportionality and adequacy of remuneration and thus does not provide for a principle of inter-subjective comparison – that is, equal economic treatment with equal qualifications and duties among employees in the same production unit.¹³⁷

In relation to the issue at stake, the Corporate Governance Code launched in January 2020 is also silent, as it only recommends the application of diversity policies in the composition of corporate bodies (Articles 2.7, 2.8 and 4.23) and the presence of an expert in financial matters or remuneration policies within the so-called remuneration committee (Articles 5, 26); however, without combining the two profiles (diversity and remuneration). This prominence seems somewhat surprising, since the Italian Code has drawn wide-ranging aspirations from the UK Code (issued in 2018) which recommends that

¹³⁷ Cass. civ. Sez. lavoro, 5 March 1986, n. 1444, Soc. La Parmense prosciutti c. Piastra, *Notiz. Giur. Lav.*, 1986, 333; *Foro It.*, 1986, I, 3051; *Mass. Giur. Lav.*, 1986, 380.

the remuneration committee outlines in its annual report a description of the work of the remuneration committee, "including [...] reasons why the remuneration is appropriate using internal and external measures, including pay ratios and pay gaps" (41, second bullet).¹³⁸

4.1.2. France

Gender equality is included in the preamble of the 1946 French Constitution, and it thus represents a fundamental right.¹³⁹ France has also established a Secretary for Women's Rights and Equality in the Workplace in 2000 and a Woman's Rights Ministry in 2012. Nevertheless, research suggests that progress in reducing gender gaps is stagnant and that it will take the French a disproportionate number of years compared to the average of Member States – i.e., hundreds of years vis-à-vis an EU-27 average of 60 years - to achieve parity.¹⁴⁰ In fact, the gender pay gap has narrowed by only 0.1 percentage points since 2010.

Following the Commission's initiative, France is one of the 12 EU Member States to have established an Equal Pay Day, which is key to raising awareness of the issue. It also implemented the Law on Equal Pay in 1972, introducing the principle of 'equal pay for equal work' in its Labour Code. Yet, efforts to reduce the gender pay gap received a boost with the publication of the outcome of a consultation with social partners on professional equality between women and men (the so-called Grésy Report) in 2010¹⁴¹ and, more recently, with the Law No. 2018-771 of 5 September 2018, also known as the 'Professional Future Act.'¹⁴²

The Professional Future Act requires that, as of 1 January 2019, companies with at least 50 employees measure the pay gap between women and men, using specific data based on an annual reference period chosen by the employer. The results must then be reported, according to a flexible timetable, and published on the company's website by 1 March each year. If the company does not have a website, it still has the obligation to inform its employees by all appropriate means, and also the Economic and Social Committee or the Labour Council through an economic database known as the *base de données économiques*.¹⁴³ The results are to be published as a numerical value also denominated the "Men versus Women Equality Wage Index," which captures five factors: (1) the difference in the average wages between men and women, by age group, for the same positions; (2) the disparity in individual salary increases not related to promotions; (3) the disparity in the promotion rates (a factor which, for companies with 50 to 250 employees, blends with the disparity in individual salary increases

¹³⁸ On the importance of such provisions in the UK soft law system, and on the need not to limit it to a more general gender pay only, see "Corporate Governance Needs to go Beyond Gender Pay," *PRNNewswire* (21 February 2020).

¹³⁹ An in-depth view on the French scenario is available in Mark Smith, "Social Regulation of the Gender Pay Gap in the EU." *European Journal of Industrial Relations* 18, 4 (2012): 365–380.

¹⁴⁰ EIGE (2021).

¹⁴¹ The Report has been extensively referred to in Smith (2012), 19. Also, the main A. of the Report – Brigitte Grésy, Secrétaire générale du CSEP (Commission pour l'égalité entre les femmes et les hommes (GEC)) - delivered a speech during the 8th Gender Equality Commission Meetings organized on 18-20 November 2015 by the Council of Europe about the same topic, updating some of the results referred to in the aforementioned Report, <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680593cad>.

¹⁴² Loi n° 2018-771 du 5 septembre 2018 pour la liberté de choisir son avenir professionnel, <https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000037367660/>. Previously, see also Dossier Législatif: Ordonnance n° 2017-1491 du 25 octobre 2017 portant extension et adaptation de la partie législative du code du travail, et de diverses dispositions relatives au travail, à l'emploi et à la formation professionnelle à Mayotte, <https://www.legifrance.gouv.fr/dossierlegislatif/JORFDOLE000035882250/>

¹⁴³ Christine Artus, "In France, Measuring Wage Inequality Between Women and Men Has Become Legally Required," *National Law Review* 7, 250 (2019).

unrelated to promotion and simply translates into the disparity relative to the rate of individual salary increases between men and women); (4) the percentage of employees who received a salary increase within the year after returning from maternity leave; and, (4) the number of employees of the underrepresented gender among the 10 highest paid employees.

The five listed factors add up to a total of 100 points. If a company achieves a score of less than 75 points, then it needs to establish a plan to eliminate the discrepancies by including the issue on the agenda of the next mandatory collective bargaining meeting on professional equity between men and women, which should be held once a year for a four-year period. In the absence of a collective agreement, the measures are unilaterally determined by the employer after consulting the Economic and Social Committee or the Works Council. In both cases, however, the measures introduced must be implemented within the next three years. If the company does not achieve the minimum 75 points within this period, then the employer must first enter into dialogue with the director to verify any scope to justify the results in light of the actions taken. If the situation is yet not correct, then there is a financial penalty to be applied, the amount of which is set by the administrative authority at a maximum of 1% of the salaries and earnings subject to social security contributions. This situation of not reaching the minimum target is far from being surreal, as a considerable number of companies do not reach the target and the average company value lies at 80 points.

The results of the French measure is up for evaluation, but it has the virtue of having catalysed a number of practices on the matter, especially in the current pandemic context in which women have been disproportionately impacted by the resulting economic crisis. In fact, women's employment is seen to be 19% more at risk than that of men.¹⁴⁴

Although the French Code of Corporate Governance of 2020, like the Italian Code referred to above (cf. [Section 4.1.1](#)), recommends diversity in the composition of corporate bodies (Articles 1.7, 6.2 and 7), it does not deal with issues concerning remuneration, thus offering recommendations on equal pay to be drawn upon in this study.

4.1.3. Germany

Despite its significant gender pay gap (cf. [Section 3.3](#)), Germany has been one of the only 11 Member States to act upon the 2014 pay gap recommendations made by the European Commission. The German Constitution lays the foundation for subsequent developments by recognizing gender equality under § 3 Para 2 and 3 Grundgesetz, which can be condensed into the principle of 'equal pay for equal work' (*gleicher Lohn für gleiche Arbeit*) and, since 1955,¹⁴⁵ 'equal pay for work of equal value' (*gleicher Lohn für gleichwertige Arbeit*). The latter concept has taken on a different perspective – from direct to indirect pay discrimination – since 1970, although this has not translated into new laws. In 1975, following the adoption of Directive 75/117/EEC, Member States were required to adopt regulations on equal pay in implementation of Article 119 of said Directive, but Germany considered that Article 3 of its Constitutional Charter already fulfilled the intended purpose and thus made no changes to its national legislation.¹⁴⁶ Only the initiation of legal proceedings against Germany for breach of contract by the European Commission that led to the integration of the German Civil Code

¹⁴⁴ Mahaut de Fougères, "The French Brief – The Road to Gender Equality in France's Labour Market," Institut Montaigne Blog (7 April 2021).

¹⁴⁵ Until that year, special wage groups for women were allowed in collective agreements, which provided for lower pay even for equal work performed. They were later declared unconstitutional and replaced by so-called light-duty wage groups or lower wage groups (*Leichtlohngruppen*).

¹⁴⁶ Friederike Maier, "The Persistence of the Gender Wage Gap in Germany," Harriet Taylor Mill-Institut Discussion Paper 01/2007 (2007): 16.

(§ 612(3) BGB),¹⁴⁷ which enshrined the need for equal pay not only for equal work but also for work of equal value,¹⁴⁸ although without clearly defining the latter.¹⁴⁹

Based on this obligation, Germany enacted the Act on Equality between Women and Men in the Federal Administration and in Federal Enterprises and Courts in 2001. Similarly, in 2006, the aforementioned Article 119 was replaced by *the Allgemeines Gleichbehandlungsgesetz* (General Equal Treatment Act (AGG)),¹⁵⁰ prohibiting unequal treatment within any employment relationship.¹⁵¹ Even if, on the one hand, there are no visible gaps in the national regulatory fabric; on the other hand, German law is concise in relation to the way in which the principle of equal pay is implemented,¹⁵² for instance in the absence of involvement of employers' associations, trade unions, works councils (scarcely involved),¹⁵³ and government institutions, as well as in the absence of proactive initiatives by the public sector.¹⁵⁴

Some historical and geographical considerations cannot be ignored in the case of Germany. Already right after the fall of the Berlin Wall, marked differences in relation to equal pay were reported between East and West Germany, where the former was characterized by a greater difficulty in recovering lost ground, and where the post-unification decrease in the demand for low-skilled work was the real cause of the marked decline in female employment.¹⁵⁵ But this historical nod is not merely compilatory, and the differences between various areas of the country have not yet been overcome.¹⁵⁶ Despite this reality, Germany – a country characterized by a traditionally conservative welfare system¹⁵⁷ – has not adopted a completely inert approach to the subject from a regulatory point of view. In fact, following the Commission's 2014 recommendations, Germany has also implemented the Pay Transparency Act

¹⁴⁷ Victoria Asaba Chege, "Legislative framework" in *Multidimensional Discrimination in EU Law: Sex, Race and Ethnicity* (2010): 256-270.

¹⁴⁸ Ingo Amthauer, "Grundlagen des Anspruchs auf gleiches Entgelt für gleiche oder gleichwertige Arbeit" in *Zu den Auswirkungen des AGG auf die Betriebsverfassung* (2009): 130-131.

¹⁴⁹ Heide M. Pfarr and Klaus Bertelsmann, *Lohngleichheit – Zur Rechtssprechung bei geschlechtsspezifischer Entgeltdiskriminierung* (Stuttgart and Berlin: Kohlhammer Verlag, 1981).

¹⁵⁰ Gesine Fuchs, "Strategic litigation for gender equality in the workplace and legal opportunity structures in four European countries," *Canadian Journal of Law and Society* 28, 2 (2013): 189–208.

¹⁵¹ Specifically see Abschnitt 2 - Schutz der Beschäftigten vor Benachteiligung - Unterabschnitt 1 - Verbot der Benachteiligung, § 7 Prohibition of Discrimination (1) Employees may not be discriminated against on any ground referred to in section 1; this shall also apply if the person committing the discrimination merely assumes the existence of a ground referred to in section 1 at the time of the discrimination. (2) Provisions in agreements which violate the prohibition of discrimination in paragraph 1 shall be invalid. (3) Discrimination under subsection (1) by employers or employees is a breach of contractual obligations.

¹⁵² Dagmar Schiek, "Germany," in *Legal Aspects of the Gender Pay Gap, Report by the Commission's Network of legal experts in the fields of employment. Social affairs and equality between men and women* (Brussels, 2007).

¹⁵³ Nevertheless, some authors believe that such factor is not a key element in the enhancement of the policy under analysis. See for example, Michael Oberfichtner, Claus Schnabel, and Marina Töpfer, "Do unions and works councils really dampen the gender pay gap? Discordant evidence from Germany," *Economics letters* 196 (2020): 109509.

¹⁵⁴ Maier (2007), 19.

¹⁵⁵ Jennifer Hunt, "The Transition in East Germany: When Is a Ten-Point Fall in the Gender Wage Gap Bad News?" *Journal of Labour Economics* 20, 1 (2002): 148-169; Andrea Schäfer, and Karin Gottschall, "From wage regulation to wage gap: how wage-setting institutions and structures shape the gender wage gap across three industries in 24 European countries and Germany," *Cambridge Journal of Economics* 39, 2 (2015): 467-496; Christina Boll and Julian Sebastian Leppin, "Overeducation among graduates: An overlooked facet of the gender pay gap?: Evidence from East and West Germany," *DIW Berlin Paper No. 627* (2014): 6-42.

¹⁵⁶ See for example, "Why the pay gap in Germany is so large," *The Economist* (14 March 2020).

¹⁵⁷ Nadja Bergmann, Alexandra Scheele, and Claudia Sorger, "Variations of the same? A sectoral analysis of the gender pay gap in Germany and Austria," *Gender, Work, and Organization* 26, 5 (2019): 668-687.

(*Entgelttransparenzgesetz* or *EntgTranspG*), aimed at closing the gender pay gap and which came into force in 2017.¹⁵⁸

Under this law, in companies with more than 200 employees, individual employees have the right to request information on the employer's criteria and procedure for determining wages (their own and those of members of the other gender in comparable occupations), provided that at least six employees of the other gender belong to the 'comparable' group.¹⁵⁹ In this way, companies are required to provide a written response within three months, unless they are bound by collective bargaining agreements. In the absence of a response, the company bears the burden of proof; that is, it must prove that there is no violation of the Equal Pay Act if the employee concerned files an equal pay lawsuit (*Entgeltgleichheitsklage*). Within a two-year period, the employee may only reapply if the individual's situation has changed significantly (e.g., due to a promotion). Companies with more than 500 employees are obliged to publish regular reports on their efforts to promote gender equality, while companies with more than 250 employees are encouraged (i.e., not yet obliged) to implement internal audits of their pay structures to ensure that company remuneration policies comply with legal provisions. In addition, those that are required to provide a financial report under the German Commercial Code (*Lagebericht*) will be obliged to publish regular reports on their efforts to promote equality between men and women.

Above all, the law forbids discrimination for equal work in terms of duties or value. Two colleagues who perform comparable or homogeneous work on a value level by looking at the type of work, the qualification requirements, and the working conditions, must therefore receive equal treatment. It is precisely the definition of 'comparable' or 'equal level of value' (*gleichen Entgelts bei gleicher oder gleichwertiger Arbeit*) that contributes to the emergence of disputes on this point.¹⁶⁰ Among these disputes, a particularly relevant case concerns the court ruling that establishes that if a woman sues for the same pay for the same work or work of equal value, the fact that her pay is lower than the comparative (median) pay of the comparable male employee regularly establishes a rebuttable presumption that the pay disadvantage is gender-related (BAG, judgment of January 21, 2021 - 8 AZR 488/19 -, PM 1/21). In the present case, the plaintiff was a department head who, according to the information received under the Salary Structure Transparency Act, received a comparative

¹⁵⁸ For a general overview of the Act and an evaluation of its content see Eva Kocher, "Das Entgelttransparenzgesetz: ein Gesetz (nur) für Betriebsräte?" *Arbeit und Recht* 66, 1 (2018): 8-18. Previously, in September 2011, the Federal Office for Equal Pay (*Bundesgeschäftsstelle Entgeltgleichheit*) was created. Then, in October 2013, the Federal Confederation of Trade Unions initiated the first day of equal pay in companies (see Alexandra Scheele, and Andrea Jochmann-Döll, "Some Facts about the Gender Pay Gap in Germany," Country Fact Sheet prepared for the project 'Gender Pay Gap: New Solutions for an Old Problem. Developing Transnational Strategies Together with Trade Unions and Gender Equality Units to Tackle the Gender Pay Gap,' Cottbus (2015). Moreover, in 2009, a new tool (*Lohnvergleich im Betrieb* or "Logib-D") was created by the Ministry for Families, Seniors, Women and Youth to enable "companies to analyze their earnings structure with regard to gender on a voluntary basis [...] calculat[ing] which part of the gender pay gap in the company is due to (1) years of vocational training, (2) years of work life, (3) hierarchical position, (4) part time, (5) size of team and (last but not least), (6) gender" (see *Ibid*, 5). Then, since 2010, *eg-check.de* allows "employers, employee representatives, collective bargaining parties and – as far as data is provided – employees themselves can check pay regulations and pay practices in order to identify possible direct and indirect pay discrimination", while *WageMirror* provides "data on wages and income which have been collected through online evaluation" (*Ibid*). Unions have also had initiatives on the matter (*Ibid*).

¹⁵⁹ In other words, the mere presence of less than six employees of the opposite sex working in comparable positions deprives the employee of the right to information.

¹⁶⁰ On the true meaning of the expression in the academic literature see Sabine Marion Vianden, *Gleiches Entgelt Für Gleiche und Gleichwertige Arbeit: Ein Prinzip und Seine Rechtliche Durchsetzung Auf Grundlage des Entgelttransparenzgesetzes* (Bern: Peter-Lang-Verlagsgruppe, 2020) and Micaela Del Monte, *Bewertung des europäischen Mehrwerts über die Anwendung des Grundsatzes der gleichen Entgelts für Männer und Frauen für gleiche und gleichwertige Arbeit* (Brussels: European Parliament, 2013).

remuneration - looking at the statistical median projected to full-time equivalents - lower than that of male department heads. The reasons she had received from the employer were deemed by the lower court to be insufficient to qualify as circumstantial evidence under Section 22 of the Equal Treatment Act for a finding of disadvantage "because of gender," but on appeal, the Federal Labor Court assumed, based on the disclosure request, that the plaintiff had suffered direct discrimination under §3(2)(1) *EntgTranspG*. In fact, her lower pay constituted an indication under §22 *EntgTranspG* of discrimination "because of gender" and, therefore, it was incumbent upon the respondent to rebut the presumption of discrimination "because of sex." The Federal Labor Court remanded the case to the Court of Appeals because it could not determine whether the respondent had rebutted this presumption in accordance with the requirements of §22 of the Equal Treatment Act, and therefore it is still uncertain how the case will proceed before the Regional Labor Court. However, the Federal Labor Court's decision could have great significance for practice and lead to the proliferation of a number of cases on the issue, as it effectively removed procedural hurdles for employees in terms of burden of proof.

The case decided in a judgment of 3 June 2021 (Case C-624/19, *K and Others v Tesco Stores Ltd.*) by the European Court of Justice (CJEU) is also particularly relevant and recent, ruling on whether Article 157 TFEU in legal disputes between private parties, where the violation of the principle of equal pay between men and women for "Work of equal value" is asserted under the provision, has immediate effect. Indeed, the direct effect of Article 157 TFEU is not limited to cases in which workers of the opposite sex in comparison perform the "same work," but extends to those in which they perform "work of equal value." Of course, the decision as to whether the workers involved perform "the same work" or "work of equal value" within the meaning of Article 157 TFEU is a matter of factual assessment by the national court, but it is important to reiterate that for equal pay to occur, a uniform source is required, although not the same transaction. The decision is, of course, strengthening as it comes from the CJEU, but, as the Federal Labour Court correctly argued, given the transposition of European guidance with both the AGG and the Pay Transparency Act (PTA), a breach of the principle of equal pay for women and men will, with a high degree of probability, continue to be resolved through national provisions.

Also under the PTA, the Commissioners of Equal Opportunity in Federal Administration and Business and the Federal Courts and the Commissioners of Equal Opportunity in Business are charged with the task of enforcing this Act with respect to the enforcement of the requirement of equal pay to promote equal work or work of equal value for women and men (§ 24). Still, the law does not provide regulations on enforcement when requests for equal pay are made. The de facto mechanism thus incentivizes an active role, at least in the response, of the employer by encouraging a greater degree of detail than the attached justifications. Once again, the 2019 German Corporate Governance Code remains silent, addressing the issue of diversity and remuneration of the bodies (management and supervisory board), without combining them by advocating policies instrumental in closing the so-called gender pay gap.

4.1.4. Denmark

Unlike other Member States (e.g., Italy, France, Germany), the Danish Constitution of 1953 does not explicitly include the principle of gender equality. Gender mainstreaming in Denmark has come as an influence of the EU since Denmark's accession in 1973, and in response to the enactment of the 1999 Amsterdam Treaty,¹⁶¹ which provided a legal basis for the directive on equality between women and men in the EU. Gender mainstreaming was legally introduced in Denmark in 2000 through the Gender Equality Act. Although Denmark does not have a repertoire of gender equality laws like other Member

¹⁶¹ EIGE (2021).

States, it also enacted the Equal Pay Act (*Lov om lige løn til mænd og kvinder*) in 1976, which introduced the value of equal pay for equal work and work of equal value (i.e., the adjusted portion of the pay gap). The Equal Pay Act is based on the EU Equal Pay Directive of 1975, and also includes direct and indirect discrimination, the right for employees to request information on their salaries, protection against dismissal because equal pay has been requested, evaluation of evidence in equal pay cases, and the obligation for some companies to compile gender-disaggregated wage statistics.¹⁶²

In addition, the Ministry of Labour and the Department for Gender Equality, established within the Ministry for Gender Equality, in collaboration with the Danish Employers' Association (DA) and the Danish National Organization (LO), have prepared a guide with a markedly practical character, which also brings together personal experiences of participation by workers and union representatives in work on equal pay, for equal pay aimed at companies that want to take action to promote this goal.¹⁶³ Specifically, the guide identifies eight areas of action that directly or indirectly affect women's and men's pay, ranging from salary mapping, the gender breakdown of work performed, personnel policy, career plans, and recruiting, to working hours, flexibility, and workplace culture.

Although a declining gap has been registered between the average earnings of women and men in Denmark from 1980 to 2010 – a trend which is driven “by increased labor force participation and increases in hours worked by women, and to a smaller extent by a decline in the gender wage gap”¹⁶⁴ – Denmark has succeeded in eradicating only that kind of wage inequality that occurs when a man and a woman perform the same kind of work in the same kind of workplace, but not that which occurs in the case of unequal pay for work of the same ‘value.’¹⁶⁵ Similarly to the case of Germany, the concept of ‘work of the same value,’ introduced in the Danish Equal Pay Act, is difficult to disentangle, especially since there exists no criteria for understanding when two jobs are of the same value. In fact, the guidelines for comparing two types of work merely require that the assessment of the value of the work be based on an overall assessment of qualifications and other relevant factors, related to the fact that only limited case law has developed in this area.

Among the (very few) equal pay cases in Denmark there is a case dating back to 1993 at the Royal Porcelain Factory, in which female blue painters lost out to the mostly male ‘drejere.’¹⁶⁶ The predominantly female group had a wage difference of DKK 12.93 per hour, who brought the case to the Danish Court of Arbitration for violation of the equal pay requirement under Article 119 of the EEC Treaty and Directive 75/117/EEC of 10 February 1975. The trade union arbitration Court found that the dispute was related to the interpretation of Article 119 and the Directive and chose to refer preliminary questions to the CJEU, stating in its referral decision that the focus of the CJEU was due precisely to the special nature of the case, in which pay is based on a system that creates disparities between groups created precisely by the special workers' union. In fact, it should be noted that in Denmark the

¹⁶² “The Equal Act,” Ministry of Employment – *Beskæftigelsesministeriets*.

¹⁶³ “En ligelønsguide til virksomheder, der vil arbejde med at fremme lige løn mellem kvinder og mænd,” Ministry for Gender Equality (2006).

¹⁶⁴ Yana Gallen, Rune V. Lesner, and Rune Vejlin, “The Labor Market Gender Gap in Denmark: Sorting Out the Past 30 Years,” IZA Institute of Labor Economics, Discussion Paper No. 10789 (2017): 1-37.

¹⁶⁵ Regarding other Nordic countries, in Sweden, these rules are found in the Discrimination Act and employers are required to implement active measures to promote equal rights and opportunities and combat discrimination, regardless of the underlying reasons. Similarly, in Norway, employers are expected to implement preventive and active anti-discrimination measures, but in contrast with the Swedish law, are not required to conduct payroll surveys.

¹⁶⁶ C-400/93 Royal Copenhagen. See Caroline Bilenberg Sønderup, “Equal Pay in Denmark: A Commercial Law Analysis of the Equal Pay Legislation in Denmark with a Labour Economics Perspective,” Copenhagen Business School (CBS) Paper No. 108251 (2018): 1-96.

legislation depends on the social partners' control of the labour market through their agreements and, therefore, the role of the state in reducing the gender wage gap is diminished relative to other countries in the same geographical area, such as Sweden and Finland. This is the reason why it has mainly been the trade unions that campaigned for equal pay. At the same time, however, the state is committed to monitoring the situation; that is, the Minister of Labour and the Minister responsible for Gender Equality are required to report on their efforts in this regard every three years.

In 2006, the Danish government approved the introduction of the Danish Gender-Specific Pay Statistics Act, which requires companies with more than 35 employees to report salaries for groups of employees broken down by gender, and to inform their employees of any pay discrepancies between men and women (Section 5a). It should be noted, however, that these statistics are only required when the company has at least ten women and ten men working in the same job classification code. Employers must produce gender-disaggregated wage statistics with the assistance of Statistics Denmark, but they may also opt to submit a wage statement every three years. Most Danish employers opt for gender-disaggregated statistics and only a few of them commit to reporting every three years. Despite this, no state authority provides oversight power over compliance with the regulation and, even if since 2011 the Danish Institute for Human Rights has been entrusted with the task of promoting, evaluating, and monitoring gender equality initiatives in Denmark and combating gender discrimination,¹⁶⁷ not even this body takes on the role of monitoring companies' compliance with the Equal Pay Act. In fact, regulations do not provide for any sanctions in the event of non-compliance.

More recently¹⁶⁸ the Equal Pay Act was amended in 2019 (LBK No. 156 of 22 February 2019)¹⁶⁹ but it does not apply to cases where a corresponding obligation to provide equal pay arises from a collective agreement (§1, PZ. 4.). In addition, public authorities have a duty to actively consider the goal of gender equality in the formulation and implementation of laws and administrative regulations, policies and activities in the areas covered by this law (§1 b.). It explicitly specifies that an employer may not discharge or expose an employee to unfavourable treatment in retaliation for a complaint, or because the employee or employee representative has filed a claim for equal pay, or because he or she has submitted salary information (§ 3.), including in relation to collective bargaining areas where employees are entitled to equal pay, including equal pay conditions, but there are no severance pay rules that are not reasonably justified by the circumstances of the employee or the company (§ 4.). It is possible, however, for the company to enter into an agreement with employees to make an equal pay statement (paragraph 1). This statement should include a description of the important conditions for the pay of men and women and an action plan to prevent or reduce the gap. The statement should cover all employees in the company and be prepared in accordance with the principles of the Law on Information and Consultation of Employees or in a collective agreement (see section 3 of the Law on Information and Consultation of Employees). It must cover a period of 1 to 3 years and must be drawn up by the end of the calendar year in which the obligation to compile gender-disaggregated salary statistics existed (§ 5a, PZ. 6.). In this regard, the same considerations made so far in relation to Corporate Governance Codes can easily be extended to the Danish Code.

¹⁶⁷ Lise Rolandsen Agustin, "The Policy on Gender Equality in Denmark: Update," Directorate-General for Internal Policies, Policy Department C: Citizen's Rights and Constitutional Affairs, European Parliament (2015): 1-29.

¹⁶⁸ In the meantime, some amendments occurred extending the scope of the previous law by making it applicable to companies of at least 10 employees and requiring companies to make gender-disaggregated pay statistics. See Rolandsen Agustin (2015), 13.

¹⁶⁹ "Promulgation of the law on equal pay for men and women," Danish Ministry of Employment (*Beskæftigelsesministeriet*) (2019).

4.1.5. Iceland

Iceland is globally renowned for its strong culture of equality, even if most of its policies are not substantially different from those of other Member States. Article 65 of its Constitution forbids any sort of gender discrimination, and in 2008, Iceland also enacted the Act on Gender Equal Status and Equal Rights of Women and Men (Equal Rights Law) which sought to ensure that both women and men have equal opportunities. In this regard, the Office of the Prime Minister's Directorate of Equality is required to provide an overview of the issue and submit a gender equality action plan every four years. Prior to the establishment of the Equal Rights Law, Iceland had an early legislation mandating equal pay for men and women more than half a century ago, and the members of the Parliament (*Alþingi*) believed "that full pay equality would be reached in only six years, in 1967."¹⁷⁰ Then another Equality Act in 1976 was passed before the 2008 Equality Act. One of the articles in the 1976 Act stated that women and men ought to be paid the same for work of equal value.¹⁷¹ This provision was then also included in the 2008 Act.

On 1 June 2017 the Icelandic Parliament passed a law mandating all companies and employers with 25 or more workers to provide evidence – which has to be renewed every three years – showing that they paid equal wages to both men and women.¹⁷² "Job evaluation systems have a history of being critiqued as upholding gender inequality. Paradoxically, however, the Icelandic Equal Pay Standard (IEPS), a novel and publicly praised gender equality policy, is based on a job evaluation tool".¹⁷³ This change in Icelandic legislation took effect through an amendment to Article 19 of the Act on Equal Status and Equal Rights, stipulating that "employers need to undergo equal pay certification using the Equal Pay Standard, an equal pay management system developed by Icelandic trade unions, the employer's confederation and government officials."¹⁷⁴ In this way, with its Equal Pay Certification Law, Iceland distanced itself from the mainstream equal pay policies of most Member States. Equal Pay Certification also means that job applicants can check whether a company is certified before applying for a job, while companies may also be subject to public shaming, or face daily fines in the future. Although pay discrimination on the basis of gender is illegal all over the world, Iceland stands out as it provides a unique case in that it places the responsibility on the employer (rather than the employee) and includes medium-sized companies and institutions (rather than just a few companies with more than 200 employees as in the case of Germany).

Looking at the more technical aspects, companies' certification is expected to meet the requirements of the Standard ÍST 85, Equal Wage Management System – requirements and guidance – also called "The Equal Pay Standard," that is designed "to confirm that when decisions on wage are taken, they are based only on relevant consideration. The Standard ÍST 85 is a management requirement standard and can be used by all companies and institutions regardless of the size of the workplace, operation, role or gender balance amongst staff, as it ensures professional working methods in order to prevent direct or indirect discrimination."¹⁷⁵ Accredited certification bodies shall confirm that a company's or institution's equal pay system and its implementation thereof meet the requirements of the Standard

¹⁷⁰ "Equal Pay and Working Conditions: Background material," SSN (2018): 18-19.

¹⁷¹ Ibid.

¹⁷² Ibid.

¹⁷³ Ines Wagner, "Equal Pay for Work of Equal Value? Iceland and the Equal Pay Standard," *Social Politics: International Studies in Gender, State and Society* (2020): 1-20.

¹⁷⁴ Ibid.

¹⁷⁵ "Equal Pay Certification," Government of Iceland, <https://www.government.is/topics/human-rights-and-equality/equality/equal-pay-certification/>.

ÍST 85. In this way, Iceland's 'world leader;' status is commendable because it fills several gaps in equal pay policy: it shifts the burden of proof from the employee to the employer, creates a system of checks and balances with third-party enforcement institutions authorized to impose fines for non-compliance, and creates a transparent institutional support system favourable to employees, employers, and external certification bodies.

To fully understand this reform, however, it is also important to understand the role of politics. The tripartite coalition was divided on the measure in question, and some believed that the problem of pay inequalities could be solved through administrative rigour, without the interference of social value systems in the job evaluation process. Also, in the policy formation phase, it was understood that managers often place a lower value on work that is considered lighter, done indoors, clean, safe, physically undemanding, and often monotonous and boring. This shows the importance of recognizing who is implementing the rules, as female and male managers have different perspectives on how tasks and jobs are valued. This shows that definitions of qualifications and competencies are ideological and social constructs that are crystallized in legal provisions.¹⁷⁶ Consequently, when evaluating the outcomes of the Icelandic reform in the coming years, it will be crucial to keep in mind the different notions of gender within job evaluation systems, and also the potential tensions between Icelandic policy and collective bargaining, as different notions of gender could be an issue in workplaces negotiating collective bargaining agreements with various unions.¹⁷⁷ Also, we must recall a key remark recently stated in the literature: "equal pay for work of equal value can be achieved. At the same time, [] the need for more emphasis on and awareness of the value of feminized work within organizations, which remains underrecognized in the IEPS"¹⁷⁸ still needs to be addressed.

The same considerations made so far in relation to all the Corporate Governance Codes considered can be easily extended to the Icelandic code, which regards the two key elements of the analysis (gender and pay) only as elements to be considered when assessing the composition of the board and the remuneration of its work.

4.1.6. Spain

Article 14 of the Spanish Constitution of 1978 forbids discrimination on the basis of gender (and other faculties). Following Directive 2006/54/EC, Spanish legislation also grants the application of the principle of equal opportunities and equal treatment for men and women in employment matters. In fact, gender mainstreaming has been intrinsic to Spanish policymaking since 1996,¹⁷⁹ and was institutionalised with the Organic Act 3/2007 of 22 May (i.e., the Equality Law), which requires all policies to consider gender specificities and stipulates the creation of gender units in all ministries, as well as the establishment of the national Inter-Ministerial Commission for Equality. Moreover, the State Government gradually started approving an intermediate evaluation, including measures to attain the objective of equality between women and man without any sort of gender discrimination, known as the Strategic Plan for Equal Opportunities.¹⁸⁰

¹⁷⁶ Wagner (2020).

¹⁷⁷ Ibid.

¹⁷⁸ Ibid.

¹⁷⁹ EIGE (2021).

¹⁸⁰ For instance, see the Equal Opportunity Strategic Plan 2014-16, which can be accessed at <https://www.inmujeres.gob.es/actualidad/PEIO/docs/PEIO2014-2016Ingles.pdf>.

Article 11 of the Equality Law also regulates affirmative actions, stating that public authorities shall take specific measures in favour of women to correct situations of manifest inequality to ensure the effectiveness of the constitutional right to equality. Such measures must be reasonable and proportional to the objective pursued. Chapter 3 of the Act is devoted to corporate equality plans, which recite the measures, strategies and practices adopted and to be adopted after a diagnosis of the situation and must be aimed at achieving equal treatment and opportunities for women and men within each company.

More recently, the Royal Decree 6/2019 of March 1st provides for urgent measures to guarantee equal treatment and opportunities between men and women in the employment sphere. It modifies the Organic Act requiring companies with 50 or more workers to draft equality plans, and mandates that such plans are registered accordingly. If an employee believed that her own company did not adhere to them, he is entitled to initiate an internal procedure in order to have her labour rights protected or, in case the company has no specific procedure to this end, to bring the case before the courts or authorities conducting labour law inspections to ensure equal pay policies. Employers are also required to keep track of wages paid, irrespective of the number of workers in their company, in the Salary Record, including the average value of wages, supplements and extra-salary perceptions, sorted by occupational categories and groups. Where companies have less than 50 employees, and where the average remuneration of a specific gender is at least 25% higher than that of the others, considering the total payroll or the average of the paid perceptions, the employee has the obligation to include in the Salary Record a justification for such difference. If the difference constitutes wage discrimination on the basis of gender, the employees in question will be entitled to be paid the remuneration they would have received for work of equal value.

Royal Decrees 901 and 902/2020 – known as the Equality Plan Decree and Equal Pay Decree, respectively – have more recently reaffirmed the principle of gender equality in the workplace. Specifically, the second decree cited above (which took effect on 14 April 2021) establishes useful processes and practices to identify and correct problems of gender discrimination in compensation. To this end, the Spanish government promoted the development of a tool that companies can use free of charge to record their various compensation. This tool provides information on average and median salaries, overtime pay, gender and professional group breakdowns, job positions and other classification systems. In setting up such a register, the employer is required to consult with employee representatives,¹⁸¹ through whom the employees can subsequently consult the records.¹⁸² Following this consultation, when instances of unequal treatment between genders are evident and the explanation provided by the employer does not seem to be sufficient,¹⁸³ employees may take legal action to correct situations of direct and indirect discrimination. Where such discrimination exists, the penalty imposed on companies is between €6,251 and €187,515. The implementation of this plan is gradual, depending on company size; that is, companies with 150-200 employees are required to have an equality plan in place as of 7 March 2020, companies with 100-150 employees on 7 March 2021, and companies with 50-100 workers on 7 March 2022. In addition, companies with more than 100

¹⁸¹ They shall also be notified at least ten days prior to the date on which the register is prepared and whenever a change is made to it.

¹⁸² In the event that there are no legal representatives of the workers in the company, the register will be accessible by the employees directly, but only as far as the percentage differences between the average compensation paid to men and women. The amount shall also be disaggregated according to the nature of the amount and the classification system used.

¹⁸³ Pursuant to section 28.3 of the decree, where a firm has at least fifty workers and the average salary of the workers of one gender exceeds that of the jobs of the other by 25% or more, then the employer is required to enclose an explanation for the difference detected, other than the gender of the employees, in the record.

employees must audit the register and make specific decisions if women are found to be paid less than their male counterparts. In this way, it becomes necessary to make factual assessments of the work performed and understand whether it is of equal value, but also to highlight any factors that may generate inequality.

Spanish case law has established how in collective agreements the right to equality and non-discrimination cannot have the same scope as it does in other contexts, such as in the field of private relations, where fundamental rights (including equality) must be balanced with other values that derive from the principle of autonomy (First Chamber of Constitutional Court (STC), 2/1998). Collective differences in working conditions must be reasonable and in accordance with the values and interests of this area of social life, which include the type of work performed, its performance, the economic capacity of the company, the bargaining power of the parties, and the cost of living. In other words, differential treatment is not a sign of discrimination when it meets objectives and is sufficiently justified. Article 14 EC determines the prohibition of discrimination, which is particularly relevant to private relationships. While the principle of equality binds the government and the collective agreement, the prohibition of discrimination (on the special intensity of protection) is projected into the sphere of private relations (STC, 11 November 2008).¹⁸⁴

As far as the double wage scale is concerned, the Spanish Supreme Court held that a case in which the salary structure of the company was differentiated, on the basis of a collective agreement, solely on the basis of personal seniority and years of service with the company was not discriminatory. Despite the fact that the salary treatment is pejorative, the differentiation in salary based on the date of entry is not an issue of discrimination, since the reason for the difference is not gender or another prohibited factor, but the application of the principle of equality. It is therefore necessary to find an unbiased and reasonable justification for the differences in remuneration, but also to observe the principle of proportionality between the difference in treatment, the reason justifying it and the outcome of the measure. Where an objective and reasonable justification is found to justify the remuneration treatment, it is not to be considered prohibited (First Chamber of the Constitutional Court (STC), 13 October 2004), but the objective reason in the case at hand does not justify the differential treatment since the temporariness of the employment link does not give legitimacy to the unequal treatment (STC, 27 September 2004).¹⁸⁵ In the case law regarding discrimination there also exists a case in which the classification and personal career development of employees distorts equal pay policies, and a case in which the discrimination concerns the remuneration foreseen by collective agreements between categories of workers and cleaners, usually men and women respectively, who in fact undertake the same activity.¹⁸⁶

Wage discrimination on the basis of sex usually involves a form of indirect discrimination, the proof of which, according to the case law of the CJEU, must be constructed on the basis of the following jurisprudential concept. While direct discrimination is caused by differential treatment based on sex, indirect discrimination does not have to be caused by a discriminatory motive but will still produce discriminatory effects. When it comes to determining the existence of this mode of discrimination, a number of steps have been established, including the existence of adverse effects; a collective, serious, or persistent effect; and differential treatment without a well-founded reason. Hence the need for certain essential elements, such as the difference in treatment between groups or categories of

¹⁸⁴ Eduarda Aragão da Rocha, Paula Díaz Murcia, Gratiela Moraru, and María Mercedes Oviedo Soler, "The regulation of wages in Spanish law," Seminar of the European Working Group on Labour Law (University of Castilla-La Mancha, Spain): 10.

¹⁸⁵ *Ibid.*, 11.

¹⁸⁶ *Ibid.*

persons, homogeneous or comparable objective situations, and an objective and reasonable justification (Article 14 of the Spanish Constitution). In the decision of the STC 145/1991 three cornerstones for this type of assessment are determined: (1) indirect discrimination consists of formally non-discriminatory treatment that produces, due to the actual differences that occur between workers of different sexes, unequal harmful consequences due to the differentiated and unfavourable impact that formally equal or reasonably unequal treatment has on workers of either sex; (2) the constitutional principle of non-discrimination in wages covers all assumptions in which there is an unequal valuation of equivalent jobs or jobs of equal value from the standpoint of the nature and conditions of presentation because of sex; (3) the criterion of physical exertion as a rationale must be adopted and, thus, the physical capacity of workers cannot be defined solely in response to the values of one gender, because the only end point corresponds to the standard of a male worker.¹⁸⁷

As far as collective agreements are concerned, the Constitutional Court specifies that the right to collective bargaining under Article 37.1 of the Spanish Constitution by no means implies that collective agreements are not subject to rules of normative hierarchy and therefore do not escape the provision of Article 14 of the Spanish Constitution. The same Constitutional Court also has the merit of having specified (in decision 145/1991) how the expression 'work of equal value' should be understood, analysing a case in which the professional category of 'cleaner' in a hospital (comprising women only) earned between 33% and 35% less than the category of 'laborers and warehouse workers' employed by men. By 'work of equal value' it is not meant that the work has to be strictly equivalent, but that the nature of the work and the conditions of service should be taken into account without including criteria related to the gender of the workers in the evaluation, as they reflect a social or economic undervaluation of women's work. It therefore becomes important to establish gender-neutral differentiation criteria in the job classifications to which the various salary levels correspond.

4.2. The European Legal Framework

4.2.1. Overview

The issuance of two documents by international law organizations on the matter of equal pay marked the world stage in 1951 and 1979. First, in 1951, the International Labour Organization (ILO) issued the Equal Remuneration Convention (No. 100). Then, in 1979, the UN signed the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). In parallel, at the EU level, the 1950 European Convention on Human Rights included this kind of gender discrimination (Article 14, Protocol 12) and, in 1961, the Council of Europe signed the European Social Charter. The topic was also enhanced by primary EU law (ex Art. 119 para. 1 of the Treaty establishing the European Economic Community, ex Art. 141 of the Treaty Establishing the European Community (TEC) – now Art. 157 (1) of the Treaty on the Functioning of the European Union), that states the following:

"Each Member State shall ensure the application of the principle of equal pay for men and women for equal work or work of equal value."

¹⁸⁷ "The Constitutional Court in the STC 250/2000 has indicated that the utilization of the physical effort like criterion of determination of the professional classification and remuneration has to be rejected by general character, for not considering it to be a neutral element from the point of view of the sex, though it is possible to admit with exceptional character that it is a question of an essential factor in the task to realizing;" *Ibid*, 12-14.

This principle remains relevant in the EU, having significant legal (being the expression of a fundamental right) and socio-economic implications (Case C-270/97, Sievers and Schrage)¹⁸⁸.

Secondary EU law, specific Articles of foundational EU treaties and EU strategies over time also considered the principle of equal pay in the following main circumstances – which are worth mentioning in this context:

- Directive on the approximation of the laws of the Member States on the application of the principle of equal pay for men and women.¹⁸⁹
- Article 100 of the Treaty establishing the European Economic Community (then Article 4 of the Directive on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation).¹⁹⁰
- Article 23 of the 2000 EU Charter of Fundamental Rights’.
- Council Directive establishing a general framework for equal treatment in employment and occupation.¹⁹¹
- Council Directive implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.¹⁹²
- European Employment Strategy (EES),¹⁹³ after which “addressing the gender pay gap has become linked to the effective utilization of female human resources in Europe and broader goals of high sustainable employment rates. So after its 2005 re-formulation [...] the so called Roadmap for gender equality became the main axis for action on the gender pay gap”.¹⁹⁴

The groundwork laid in those years was later consolidated, as the following paragraphs show. On the one hand, the aforementioned Directive 2006/54/EC represented an important step in consolidating the goals achieved and confirmed the usefulness of directives as the main tool to effectively achieve important goals, such as the one in question, through soft law mechanisms. On the other hand, the attention to the theme concerned has only recently undergone an important acceleration, which took place precisely with two pending-for-approval directives. More correctly, one of them is aimed at

¹⁸⁸ Case C-270/97, Sievers and Schrage, Judgment of the Court (Sixth Chamber) of 10 February 2000. Deutsche Post AG v Elisabeth Sievers (C-270/97) and Brunhilde Schrage (C-271/97). Reference for a preliminary ruling: Landesarbeitsgericht Niedersachsen – Germany, Joined cases C-270/97 and C-271/97. *European Court Reports 2000 I-00929*. ECLI identifier: ECLI:EU:C:2000:76, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61997CJ0270>.

¹⁸⁹ Smith 2012, referring to the Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women. OJ L 45, 19.2.1975, p. 19–20, <https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A31975L0117>.

¹⁹⁰ 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. OJ L 204, 26.7.2006, p. 23–36, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32006L0054>.

¹⁹¹ Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

¹⁹² Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin. OJ L 180, 19.7.2000, p. 22–26.

¹⁹³ See the overview provided by Eurofond on the Strategy at stake <https://www.eurofond.europa.eu/observatories/eurwork/industrial-relations-dictionary/european-employment-strategy> and, for a comment on the document, also Catherine Palpant European Employment Strategy An Instrument of Convergence for the New Member States? Policy paper N°18, <https://institutdelors.eu/wp-content/uploads/2020/08/policypaper18-en-3.pdf>

¹⁹⁴ *Ibid*, 6.

updating an already existing directive, i.e., the one on the disclosure of non-financial information, while the other is aimed at closing the gender gap also from a wage point of view.

In other words, we could observe that, while the first proposal for a directive works on a physiological level, constitutes an element of primary importance and of concrete interest for companies, and is oriented towards strengthening disclosure with respect to objectives of only apparently non-economic interest (i.e. those well summarized by the acronym ESG), the second proposal for a directive also works on a physiological level. In fact, it fills some definitional uncertainties highlighted in the discussion of the national jurisprudence ("worker of equal value"), constitutes an essential tool for workers who thus have the opportunity to interact with employers to obtain certain information, and combines the measures in question with the action of some national agencies (such as the Labour Inspection Office), but its scope is limited to wage policies. It therefore appears useful to anticipate how the interpretative recommendation resulting from this could, among other things, move in the direction of integrating the two bodies of legislation. In this way, the EU legislator will speak to both companies and workers, at the same time clearly demonstrating both that it is giving autonomous dignity to the issue of the gender pay ratio in the sphere of social policies and that it is providing coordinated and all-inclusive instruments to strengthen these aspects.

4.2.2. The Consolidation Age : Directive 2006/54/EC

The following decade was defined as a period of consolidation,¹⁹⁵ when the Directive on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation¹⁹⁶ required Member States to take adequate measures to promote social dialogue in order to foster equal treatment in the workplace,¹⁹⁷ and a communication was published by the EU Commission in order to tackle the gender pay gap.¹⁹⁸ The Commission aimed at ensuring better application of existing legislation, promoting equal pay especially through social responsibility and supporting the encouragement of the implementation of good practices by Member States. Some social partner activities supported this communication, as the European Trade Unions Congress (TUC) expressly committed itself to prioritizing actions to reduce this gap, envisaging a more active role for collective bargaining in closing the gap under discussion.¹⁹⁹ A year later, in 2008, the EU Parliament published a Resolution on the pay gap, focusing on many factors, way beyond hourly pay and equal pay, and aiming at prioritizing actions to reduce the gap especially in collective bargaining.

In the 2014 recommendation²⁰⁰ the European Commission accordingly recommended that Member States clarify the concept of 'work of equal value' in light of the case law of the CJEU, arguing that the value of work should be assessed and compared on the basis of objective criteria, including

¹⁹⁵ Ibid, 7.

¹⁹⁶ 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. OJ L 204, 26.7.2006, p. 23–36, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32006L0054>.

¹⁹⁷ The Equal Pay Directive 75/117/EEC, replaced by Recast Directive 2006/54/EC, "prohibits both direct and indirect pay discrimination. Where job classification schemes are used in order to determine pay, these must be based on the same criteria for both men and women and should be drawn up to exclude discrimination on grounds of sex (Article 4). Also, the Recast Directive requires that the Member States shall ensure that all employment-related arrangements, including provisions in individual or collective agreements and contracts, internal company rules, rules governing independent professions and rules governing employees' and employers' organisations contradicting the principle of equal pay shall be or may be declared null and void or may be amended (Article 23)"; Foubert (2017), 34.

¹⁹⁸ Eurofound, "Commission issues Communication on tackling the gender pay gap" (2007).

¹⁹⁹ Smith (2012), 14-16.

²⁰⁰ C(2014) 1405 final.

educational, training and professional requirements, qualifications, workload and responsibilities, as well as the activities undertaken, and the type of tasks performed. A gender-neutral approach to the job classification should be adopted, taking into account Annex 1 to the Commission Staff Working Document accompanying the Report on the Application of Directive 2006/54/EC.²⁰¹

The first criteria it lists are gender and sector-neutral assessment factors, including qualifications and knowledge (encompassing the skills and attitudes required to perform a job, from the cognitive to the psychomotor to the behavioural domain, which requires an ability to integrate with different groups both internally and externally); responsibilities (with respect to people, goods, equipment, financial resources); burdens in relation to the workload assigned to the employee; and working conditions (referred to the characteristics of the process, the task to be performed, the person, the resources required for the work, the environmental influences with regard to the performance of a task, in a positive or negative way). In addition, gender-neutral sub-factors which capture in detail the characteristics of different jobs must be appropriate for the field concerned, methodologically adequate without gender bias. For example, the following sub-factors related to skills may be considered, in an illustrative and non-exhaustive sense: knowledge (know-how), which refers to the level of experience, formal education, and basic skills needed to meet the requirements of a job; interpersonal skills within and outside the organization, parameterized by the nature, importance, and purpose of contacts; and problem solving, which requires mental processes of analysis, reasoning, or evaluation. Among the subfactors it is necessary to consider: the personal elements (leadership, management, education, training, evaluation and motivation); the ancillary elements (goods and equipment, which also measure the value and nature of interest in the resources); and the information gathered, stored, retrieved, interpreted to perform the task; the degree of responsibility for financial resources, financial data, related decisions, acquisition and/or expenditure of funds; the mental and psychosocial effort required to complete one's task (concentration and attention, ability to handle unforeseen situations), but also that required to perform one's task; the environment (physical, psychological or emotional, but also the organizational environment, i.e., length of workday, night shifts, work schedules).

Once the gender-neutral factors and sub-factors have been established, the evaluation is then weighted to determine their relative importance. Such assessment is a subjective process, where there is risk of gender discrimination, for example by allowing stereotypes to prevail. This is a task of extreme importance, great technicality, and difficult weighting. Job evaluation systems can weigh the consolidated values of the four main factors through a process of external or visible weighting, i.e., multiplying the total value of each factor by a certain coefficient (e.g., skills 40%, responsibility 20%, effort 20% and working conditions 20%), followed by internal or hidden weighting, i.e., assigning each sub-factor an internal weight as a percentage of the weight assigned to the main factor. Once the weighting operation is complete, each job item is assigned several points for each factor and subfactor, and thereafter jobs are grouped according to their value to determine the wage level of each. At the same time, certain behaviours should be excluded in job evaluation, and among these are the disproportionate appreciation of job requirements typical of women (e.g., aptitude for greater caring and psychosocial responsibilities); the disproportionate weighting of requirements typical of poorly named jobs, such as 'muscular strength' or 'assumption of responsibility;' and the definition of 'responsibility' for a job based solely on a hierarchical position.

Heretofore, there has been a "shift in focus from hard law to soft law, from governmental action to social partner action that reflects the realpolitik of European institutions with a more limited focus on

²⁰¹ SWD(2013) 512 final.

promoting equality goals, a high concern for creating jobs and a large and heterogeneous Member State membership."²⁰² But more recently, the EU Commission has set the reduction of the gender pay gap as one of its key goals, for example in the Strategic Engagement for Gender Equality (2016-19),²⁰³ in the EU agenda under the 2020-2025 Gender Equality Strategy,²⁰⁴ in the soon to become the Corporate Sustainability Reporting Directive, and in the 2021 proposal aimed at strengthening the application of the principle of equal pay for men and women for equal work or work of equal value through pay transparency (COM (2021)93).²⁰⁵

4.2.3. The Proposal for the Corporate Sustainability Reporting Directive: between Strengths and Weaknesses, Effectiveness and Enforcement

On 21 April 2021, the European Commission – albeit with its characteristic timidity and in the wake of the EU Green Deal and ambitious Sustainable Finance Strategy – has adopted the proposal for the CSRD,²⁰⁶ which will revise and extend the reporting requirements introduced by the NFRD.²⁰⁷ It is expected that the CSRD will be partially enacted by October 2022 and the rest by October 2023 with additional, industry-specific information, so that large companies will be required to report under the new sustainability standards in 2024, based on information from the 2023 fiscal year.

Its commendable goal is to bridge the gap between the sustainability information disclosed by companies under the NFRD (Directive 2014/95/EU), and users' needs for comparable, relevant, and reliable information, but also to ensure alignment with other sustainable finance initiatives. The change of pace is marked by a change that is far from negligible variation; in fact, contrary to mainstream practice, the directive has not been named 'NFRD II,' but it constitutes an absolutely different directive precisely to highlight sustainability, the characterizing feature of the current socio-economic-regulatory scenario that needs to be enhanced the most. "This also aligns with the approach that the EU and other policymakers have taken more broadly over the past few years – shifting the concept of ESG from a loose collection of non-financial objectives towards a sustainability policy programme focused on implementing the Paris Agreement and UN Sustainable Development Goals."²⁰⁸

²⁰² Smith (2012), 20.

²⁰³ European Commission, "Strategic Engagement for Gender Equality 2016-2019" (2015), https://ec.europa.eu/anti-trafficking/sites/default/files/strategic_engagement_for_gender_equality_en.pdf. See also Foubert (2017), 37-38.

²⁰⁴ European Commission, "Questions and Answers: Gender Equality Strategy 2020-2025" (5 March 2020).

²⁰⁵ COM(2021) 93. In the literature, the comments available are the following: Henning Zülch, Philipp Ottenstein, and Anne Schneider, "The New Corporate Sustainability Reporting Directive (CSRD) Proposal," *Zeitschrift für internationale und kapitalmarktorientierte Rechnungslegung*, 7-8 (2021): 345-348; Selena Aureli, Mara Del Baldo, Rosa Lombardi, and Fabio Nappo, "Nonfinancial reporting regulation and challenges in sustainability disclosure and corporate governance practices," *Business strategy and the environment* 29, 6 (2020): 2392-2403.

²⁰⁶ Proposal for a Directive of the European Parliament and of the Council amending Directive 2013/34/EU, Directive 2004/109/EC, Directive 2006/43/EC and Regulation (EU) No 537/2014, as regards corporate sustainability reporting, COM/2021/189 final, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52021PC0189>.

²⁰⁷ For the analysis of the Directive 2014/95/EU – that *per se* represents a significant result after the initial path towards the reporting of key information, see Susanne Arvidsson, "An Exposé of the Challenging Practice Development of Sustainability Reporting: From the First Wave to the EU Directive (2014/95/EU)," in *Challenges in Managing Sustainable Business* (Palgrave MacMillan, 2019): 3-4; and Fabrizio Granà, *Redesigning Organizational Sustainability Through Integrated Reporting* (Routledge, 2020). In a legal perspective, also considering its national transpositions, see Maria Lucia Passador, and Federico Riganti, "Less is More in the Age of Information Overload: The Paradigm Shift from a Shareholder- To a Stakeholder-Oriented Market," *New York University Journal of Law and Business* 15, 3 (2019): 567-651.

²⁰⁸ Matthew Townsend, Gauthier van Thuyne, Kelly Sporn, and Isabella Kelly, "Corporate Sustainability Reporting Directive," Allen & Overy (11 May 2021).

The pending-for-approval CSRD is aimed at reaching out to a significant number of companies. In fact, while previously the NDRF covered merely 11,000 companies, the CSRD currently covers 49,000 companies (all large companies)²⁰⁹ which are governed by EU law or are established in any of the EU Member States, and all European listed companies (except for micro-entreprises). These new requirements may also apply to global companies with operations in the EU. In this case, the CSRD proposal obliges the publication of the sustainability report by the parent company, which would thereby exempt the other group companies from the relevant disclosure in the annual report. In order to protect small- and medium-sized enterprises (SMEs) from the imposition of disproportionate reporting burdens, the CSRD proposal refers to a “development of separate and proportionate standards” for such. When listed on regulated markets, SMEs have the option of simpler reporting standards. And, when SMEs are not listed, then they have the option to apply these standards on a voluntary basis. The SME reporting requirements would apply from 1 January 2026, so as to allow them adequate time to adapt despite the unpredictable and additional challenges posed by the post-COVID-19 environment.

Specifically, in order to report on sustainability issues (and similar to the NFRD), the proposed CSRD will need to disclose the following types of information: (1) environmental issues; (2) social and workforce issues; (3) respect for human rights, and (4) fight against corruption and bribery. It is precisely under item number 2 that information relating to gender-segregated pay policies should be listed. The main weakness of this document pending for approval, however, is the definability issue addressed in this study. That is, the importance of said gender-segregated pay policies is purely social and the forms of reporting on this point must be carefully detailed, yet the CSRD text does not seem to have accurately highlighted all of these aspects so far. Some of these aspects include – but are not limited to – the definition of the parameters to be evaluated; the concept of ‘work of fair value;’ the methods of communication of information on remuneration; and the methods of rewarding or incentivizing virtuous behaviour. What has changed, however, is the level of detail of the existing information requirements and the substance of reporting duties.²¹⁰ Companies are now required to specifically report the following:

- Business model and strategy, such as the resilience of the business model and the company's strategy with respect to sustainability risks.
- Opportunities for the company in relation to sustainability issues.
- Plans to ensure compatibility of the business model and strategy with the transition to a sustainable economy and limiting global warming.
- Consideration of stakeholder interests.
- Evolution with respect to the implementation of the sustainability strategy.
- Sustainability goals set by the company and progress towards achieving them.
- Company's sustainability policies, the due diligence process and the role of administrative, management, and control bodies.

²⁰⁹ "Large firms" are those that meet two out of three of the following criteria: (1) €40 million net sales, (2) €20 million balance sheet, and (3) 250 or more employees. Companies not established in the EU but with securities on EU-regulated markets may also be covered.

²¹⁰ The reporting aspects of the Non-Financial Disclosure Directive are dealt with in Daniel Kinderman, “The challenges of upward regulatory harmonization: The case of sustainability reporting in the European Union,” *Regulation & governance* 14, 4 (2020): 674-697.

- Main actual or potential negative impacts related to the company's value chain.
- Actions taken (and their outcome), as well as the main risks related to sustainability aspects.
- Relevant performance indicators and the methods by which the reported information has been determined.

This information is required to be qualitative as well as quantitative, forward-looking as well as retrospective, and take into account short, medium and long-term horizons. In addition, unlike the NFRD, the pending-for-approval CSRD requires the inclusion of information on intangible assets, including intellectual capital, human capital (including skills development), social and relationship capital (including reputational capital) and research and development.

Initially, auditors would be required to provide an opinion based on a 'limited assurance' engagement regarding the compliance of sustainability reporting with CSRD requirements, including applicable reporting standards. Member States should open the market for sustainability assurance services to so-called 'independent assurance providers,' provided that they are subject to requirements consistent with those applicable to auditors. Thus, Member States could choose to allow firms other than regular financial information auditors to assure sustainability information. However, 'limited assurance' could be downgraded to 'reasonable' at a later stage, after the publication of the sustainability standards and following a review by the European Commission within 3 years of the entry into force of the CSRD.

Companies are required to draft their financial statements and management reports in XHTML format ESEF Regulation and to tag the sustainability information²¹¹ reported according to a digital classification system as and when specified in that regulation, in order to facilitate the incorporation of sustainability information into the 'single European access point' envisaged in the Capital Markets Union Action Plan, for which the Commission will present a proposal later this year.

In terms of enforcement, Member States will be required to provide minimum penalties for non-compliance with sustainability reporting standards: (1) a public statement identifying the responsible natural or legal person and the nature of the violation; (2) an order requiring the responsible natural or legal person to cease the conduct constituting the violation and desist from repeating such conduct; and (3) administrative fines.

The European Commission has also expressed its support for initiatives by the G20, G7, the Financial Stability Board and others (including the International Financial Reporting Standards (IFRS) Foundation, the Global Reporting Initiative (GRI), the Sustainability Accounting Standards Board (SASB), the International Integrated Reporting Council (IIRC), and the Climate Disclosure Standards Board (CDSB)) to develop a basis for global sustainability reporting standards that would build on the work of the Task Force on Climate-related Financial Disclosures.

²¹¹ "The Commission plans to make publicly reported data under various EU regulations and directives more accessible via a common data platform, the European Single Access Point (ESAP). More detail is expected in Q3 2021 when the Commission is anticipated to publish its proposal for an ESAP Regulation, but early indications suggest that the ESAP may also be available for voluntary reporting. The CSRD anticipates the establishment of the ESAP with a new requirement that undertakings subject to the new sustainability reporting requirements prepare their financial statements and management report using a single electronic reporting format and mark-up their sustainability reporting. Disclosures under article 8 of the Taxonomy Regulation will also require this digital approach"; Townsend *et al.* (2021).

4.2.4. The Proposal for a Directive of the European Parliament and of the Council to strengthen the application of the principle of equal pay for equal work or work of equal value between men and women through pay transparency and enforcement mechanisms²¹²

Given that the steps taken according to the 2014 Commission Resolution²¹³ were not sufficient to spread the application of the principle of equal pay as originally hoped, a proposal for a Directive dating to March 2021 aimed to strengthen the application of the principle of equal pay between the genders,²¹⁴ which moreover constitutes the outcome of a series of public consultations and the work of the Advisory Committee on Equal Opportunities for women and men.²¹⁵ This pending-for-approval document has the virtue of specifying what is meant by ‘work of equal value,’ and also requires that comparisons between the salaries of two people at the same level be carried out using objective, gender-neutral criteria. Where salaries differ, it requires that they be based on objective and gender-neutral criteria in order to make it easier to prove discrimination. It also has the merit of including in the term ‘worker’ any form of employment, whether fixed-term or part-time, in the public or private sector, and in the term ‘remuneration’ the ancillary components received directly or indirectly from the employer.

Workers must make requests, to which employers have to react within a reasonable period of time, but annual reporting obligations and reports have to be made only be formulated by employers with more than 250 employees (Article 8). This is a fairly limited reporting activity, but with considerable added value, since it has been shown that a 1% reduction in the gender pay gap could even lead to a 0.1% increase in GDP²¹⁶ and a 3% reduction in the gender pay gap could lower the risk of poverty and an uptick in public tax revenues.²¹⁷

In the event that the gap between the salaries of the two genders is equal to or exceeds 5% and cannot be justified by the employers, the Labour Inspection Office, the equality agencies and the workers' representatives would have to redress the situations of inequality that have arisen (Article 9). The equality agencies would intervene *ad adiuvandum* in individual and collective disputes of discrimination (thus for instance, remaining in line with the provisions of Articles 37 *et seq.* of Italian Legislative Decree No. 198/2006).²¹⁸ In addition, the currently pending-for-approval directive (Article 19) provides for the possibility of offsetting costs in the event that employees are unsuccessful, clearly

²¹² Proposal for a Directive of the European Parliament and of the Council to strengthen the application of the principle of equal pay for equal work or work of equal value between men and women through pay transparency and enforcement mechanisms, COM/2021/93 final, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52021PC0093>.

²¹³ Commission Recommendation of 7 March 2014 on strengthening the principle of equal pay between men and women through transparency (2014/124/EU), <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014H0124&from=LT>.

²¹⁴ For an assessment of the evolution of the European standards in question, see the Explanatory Memorandum to the proposed directive, paragraph 2.

²¹⁵ *Ibid*, paragraph 3.

²¹⁶ Micaela Del Monte, *European added value assessment on the application of the principle of equal pay for men and women for equal work of equal value* (Brussels: Publications Office of the European Union, 2016).

²¹⁷ European Commission, “Commission Services working Document Summary of the Impact Assessment Report accompanying the document Proposal for a Directive of the European Parliament and the Council aimed at strengthening the application of the principle of equal pay for men and women for equal work or for work of equal value through the transparency of wages and executive mechanisms” (2021).

²¹⁸ “Codice delle pari opportunità tra uomo e donna, a norma dell'articolo 6 della legge 28 novembre 2005, n. 246,” <https://www.normattiva.it>; 198.

in the absence of bad faith, in order to avoid that any difficult costs they may incur disincentivize them from initiating legal proceedings against their employers.

Sanctions are left to the discretion of Member States (Article 15), which must be effective, proportionate, and dissuasive, ensure full compensation to discriminated individuals against for the damage suffered, loss of opportunities, personal injury, and avoid capping compensation or perpetuating discretionary powers in the matter (Article 14). Finally, from the technological profile, which (as mentioned in the [Introduction](#)) is certainly a valid support to strengthen the objectives of the review, the proposal itself entrusts to the Member States the power to grant the accessibility of information only to workers' representatives or equality bodies, which will be able to inform workers of their situation, without revealing only the actual salary levels of individual colleagues performing a job of equal value or the same work (Article 10).

4.2.5. Relevant case-law

The principle of equal pay entails that men and women are in an identical or comparable situation (ECJ C-342/93 Gillespie),²¹⁹ thus, it would be contrary to that to apply the same rule to objectively different situations (ECJ C-19/02 Hlozek).²²⁰ That is, comparable situations are to be treated similarly and different situations are to be treated differently (ECJ C-106/83 Sermide).²²¹ This can both lead to forms of direct and indirect discrimination. For instance, if the undertaking is able to show that its differences in pay policy is objectively justifiable, then – also in the light of Art. 2(1)(b) Directive 2006/54/EC, which allows certain provisions or criteria that are justified by appropriate and necessary aims – no violation of Article 119 can be claimed (ECJ 170/84 Bilka).²²²

Among other remarkable cases²²³ there is one involving an employee of a pharmaceutical wholesaler, where she worked as a store manager with a weekly salary of 50 GBP, while her male predecessor was paid a higher amount per week.²²⁴ Precisely in this context, the European Court of Justice had the chance to spell out that the concept of "equal work" must not be limited by introducing a requirement of simultaneity, because it is a purely qualitative concept referring exclusively to the nature of the work concerned and the hiring of a hypothetical comparator is not admissible,²²⁵ but a comparator may well be a person of the opposite sex employed in the same job or in an equivalent job previously.

Part-time employees must also be able to enjoy the benefits arising from the application of this principle, as pointed out in connection with another case: a female chambermaid had her part-time

²¹⁹ Case C-342/93, Judgment of the Court of 13 February 1996. Joan Gillespie and others v Northern Health and Social Services Boards, Department of Health and Social Services, Eastern Health and Social Services Board and Southern Health and Social Services Board, <https://curia.europa.eu/juris/liste.jsf?language=en&num=C-342/93>.

²²⁰ Case C-19/02, Judgment of the Court (First Chamber) of 9 December 2004, Viktor Hlozek v Roche Austria Gesellschaft mbH, <https://curia.europa.eu/juris/liste.jsf?language=en&num=C-19/02>.

²²¹ Case 106/83, Judgment of the Court (Fourth Chamber) of 13 December 1984, Sermide SpA v Cassa Conguaglio Zucchero and others, <https://curia.europa.eu/juris/liste.jsf?language=en&num=C-106/83>.

²²² Case 170/84, Judgment of the Court of 13 May 1986, Bilka - Kaufhaus GmbH v Karin Weber von Hartz, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61984CJ0170>.

²²³ An extensive analysis of the EU case-law can be retrieved from "*Gleicher Lohn Für Gleichwertige Arbeit. Rechtsgutachten für die Gleichbehandlungsanwaltschaft*" (2019); and Equinet, "How to build a case on Equal Pay" (2016).

²²⁴ ECJ 27 March 1980, Macarthy Ltd, C-129/79, ECLI:EU:C:1980:103.

²²⁵ ECJ 1 July 1986, Rummler, C-237/85, ECLI:EU:C:1986:277.

contract (to which the collective agreement system did not apply) converted to a full-time contract two years before her retirement age.²²⁶

Where groups of employees do not possess the same professional qualification and perform an apparently identical activity, it is necessary to look at the extent to which - taking into account the nature of the tasks that may be assigned to each group of employees, the training requirements for the performance of such activities and the working conditions in which the activities are carried out - they engage in the same work within the meaning of Article 157 TFEU.²²⁷ Indeed, vocational training cannot objectively justify a difference in pay for workers performing the same work. On the contrary, it is one of the criteria for determining whether workers perform the same work,²²⁸ thus becoming, depending on the case, both a building block and a justification.²²⁹

²²⁶ ECJ 10 March 2005, *Nikoloudi*, C-196/02, ECLI:EU:C:2005:141.

²²⁷ ECJ 28 February 2013.

²²⁸ C-309/97, ECLI:EU:C:1999:241.

²²⁹ „*Gleicher Lohn Für Gleichwertige Arbeit. Rechtsgutachten für die Gleichbehandlungsanwaltschaft*“ (2019).

5. CONCLUSIONS & RECOMMENDATIONS

5.1. Conclusions

Although it remains relevant to recognize the significant steps taken to narrow the gender gaps in the EU over the past decades, progress has stagnated and work remains in assuring that gender equality, a fundamental European right, is well-established in all Member States. The COVID-19 pandemic presents a new challenge in this realm, but also a potential opportunity for change. The '*she-cession*' and the rearrangement of family responsibilities as a consequence of work from home orders has brought increased political salience and discussion about gender imbalances and their institutional, structural, and cultural determinants. This means that the current recovery period presents an opportunity to specifically address the issue of gender pay discrimination which has been the focus of this policy report.

Heretofore, no EU country has closed the gender pay gap. Wage differences between men and women emerge as substantial from the beginning of working life, increase with the birth of children (the so-called child penalty), especially in some countries, and persist throughout working life. They are the result of multiple factors, including the use of part-time work especially by women, cultural stereotypes which still predict a clear division of labor in the household and in the market between partners, no gender-neutral selection and promotion process in firms and a general lack of policies to support mothers' employment and their careers and policies to support the equal sharing of family responsibilities within the couple.

A comparative approach to analysing the state of affairs of equal pay in the EU suggests that the gender pay gap remains a real issue in Europe, particularly when it comes to indirect forms of discrimination. An analysis of the policy and legal situation of six representative case studies – Italy, France, Germany, Denmark, Iceland, and Sweden – additionally depicts the significance of the heterogeneity of Member States in terms of geography, gender gap indicators, legal frameworks, and policies. This diversity amongst Member States has important implications for regional policies and for understanding the nuances of transposing EU policy into national legislation.

Indeed, our comparative analysis suggests that Member States do not merely display heterogeneous patterns in relation to the size and quality of their relative gender gap rates, but also in the policy and legal responses implemented to address pay discrimination. One of the main divisive aspects is that of the definability of cases of pay discrimination. In fact, the 2014 Commission Resolution placed emphasis on definitional differences amongst countries and thus recommended that Member States clarify the concept of 'work of equal value.' Iceland serves as a best practice example in this regard, as under its Equal Pay Certification Law, it outlines clear parameters for assessing injustice and specifically designates the authority responsible for evaluating such claims.

Although all European countries forbid pay discrimination for equal work, no Member State has yet achieved equal pay. The EU has actively supported Member States in transposing the concept into their national legislations, even if work remains to be done in addressing the institutional, structural, and cultural determinants that widen the gender pay gap across countries (albeit to divergent degrees). For example, the EU guarantees the principle of 'equal pay for equal work of equal value' under Article 157 TFEU; Article 23 of the Charter of Fundamental Rights of the European Union explicitly addresses gender equality in remuneration (among other dimensions); the ESS has included reducing the gender pay gap since 1999; and, the EU has established 10 November as the EU's Equal Pay Day in an effort to help build a culture of equal pay.

Recent legislative developments at the EU level, similar to the Icelandic case, represent a decisive step in addressing the institutional, structural, and cultural factors that prevent women from enjoying the same opportunities as their male counterparts. Here it is relevant to recall that equal access to the economy for both genders is one of the objectives of the 2020-2025 Gender Equality Strategy. Prior to the CSRD proposal, the EU implemented strategies such as the Work-life Balance Directive to promote flexible working for both men and women, and support the equitable distribution of unpaid care duties. The EU has also enacted the Women-On-Board Directive, which seeks to improve gender balance on the board of directors of all listed companies.

In this report, we have placed special emphasis to the CSRD proposal to amend and extend the legal scope of the current NFRD under which large companies are required to disclose diversity information. Until now, much attention has been placed on diversity when it comes to addressing gender imbalances, while sustainability issues have counted with decreased salience, especially when considering the impact of business activities on societal actors (in this case, women). CSRD takes non-discrimination a step forward by extending the reporting obligations to all large companies and listed companies, and also by requiring increasingly detailed information on employees. This is why the current CSRD proposal to amend the NFRD is decisive in addressing the gender pay gap, even if gender pay equity is still considered as a sub-category and does not yet count with a stand-alone directive.

Given the window of opportunity that the current recovery period presents, and given that equal pay represents one of the founding principles and fundamental rights of the EU, we call for a coordinated approach to bridging the gap between equal pay policies and non-compliance sanctions. We also recommend that European partners share best practices, support the proliferation of an equal pay culture across the EU, and work to address the institutional, structural, and cultural factors that create unfair gender divisions. Our recommendations and policy pointers follow.

5.2. Recommendations

In the light of the above, there is a clear need to intervene at several levels. At a policy and political level, in order to limit the gender pay gap, policies are needed to enhance the value of the work of both genders, but also to promote women's parental choices with appropriate interventions for the creation of nurseries, kindergartens, the introduction of a more gender-balanced parental leave and the use of flexible working hours by men and women equally. At firms' level, we recall the need to establish appropriate recruitment and career advancement, including at senior level, transparency in relations and support for their multiple commitments in family life.

Despite the fact that at the European level there is a shift in regulatory focus from hard law to soft law, our analysis suggests that there is a lack of attention to this issue at the corporate governance level, at least in the Corporate Governance Codes, which have served for years as a laboratory to test some of the provisions that later proved successful.

It would be advisable to take action in this context not only to recommend that companies (first and foremost listed ones, as recipients of the Codes) implement gender policies to ensure a homogeneous composition of the board of directors or the audit function, but also to verify compliance with equal pay policies. Or, where companies intend to deviate from them, that explanations be provided in the annual report on corporate governance released to the market. The reputational factor would probably play in favour of greater attention to the subject under examination, in addition to the fact that investors could gradually become sensitive to the matter. After all, it is already well known that investors are sensitive to the application of ESG policies in the society as a whole, which rightly includes the policy aimed at reducing the gender pay gap.

At the same time, it will be necessary to put in place tools to intervene and monitor the problems detected, an adequate and clear system with respect to remuneration policies, first, and then sanctions. Employees must be made aware of the criteria, guidelines and procedures through which the internal reward and remuneration system is arranged, overcoming the shields of privacy, confidentiality and secrecy in the definition of the criteria that inspire pay and reward choices or, more generally, the policies for managing employees. In other words, it is necessary to implement a set of rigorous, accountable and democratic policies. In this regard, it should be emphasised that today we have technological systems decidedly more advanced than in the past, which make it possible to reduce information asymmetries between male and female workers.²³⁰

Overall, the *ex-ante* and *ex-post* evaluation of the impact of gender equality measures has become a common and shared approach to gender policies, which can be successfully adopted in the case of the equal pay regulations.

The specific actions for a shared and effective solution to narrow the gender pay gap in Europe that we propose are as follows:

- A specific directive addressing equal pay based on gender, rather than one which treats the gender pay gap as just an add-on. We propose a directive which includes gender in one of the three letters that make up the acronym ESG. Above all, that it is an ad-hoc directive that reflects on (a) the most appropriate level to allow for the balancing of instances of privacy (which constitute a notable obstacle to the dissemination of information on remuneration) and disclosure in the interest of workers on the subject, (b) the definition of 'work of equal value,' which should be specifically defined and should include specific evaluation criteria for comparing different activities, (c) the person to whom the burden of proof should be attributed, (d) the role of trade union representatives in consulting the documents or the need for the employee himself to become aware of them, (e) the enforcement profiles concerning compliance with the provisions, and (f) any reward incentives or, conversely, remedies.
- National-level implementation of the principle of equal pay, also capable of: (a) tailoring the measure to the peculiarities of their geographical and socio-economic context, (b) identifying the most appropriate authority to undertake the enforcement and control functions with respect to compliance on the issue of the gender pay gap, and (c) monitoring the effectiveness of the explanations attached to cases of discrimination in order to understand whether they were really justifiable, and possibly to raise the bar with respect to the threshold outlined by European provisions.
- An understanding of this issue in the realm of soft law from which, up to date, has made the largest contribution to the growth of a corporate culture, increasing sensitivity to matters such as gender balance in the boardroom and disclosure on remuneration, such as Corporate Governance Codes which have not been able to meet this challenge at present. This would be, even in the absence of a method to ensure enforcement *stricto sensu*, yet another mechanism to solicit attention to this problem by leveraging reputational mechanisms.
- A joint action to support the path taken by Europe on the part of trade unions (including national ones), of those organizations that have so far shown their support, especially at a supranational level, for this issue, but that could contribute significantly to the spread and establishment of this ethical work culture.

²³⁰ Anna Zili, "La trasparenza salariale tra diritti e tecnologia," *Il lavoro nella giurisprudenza* (2021): 579.

- A development of welfare policies in relation to parenthood, work-life balance, care leave that, together with the rules more strictly aimed at compensating the gender pay gap, can effectively and efficiently empower women to devote themselves to their work.
- The planning for a certification scheme similar to the Icelandic one, which, when combined with a disclosure of such data in the non-financial statement or annual report, would certainly be an effective means of making employees, third parties, potential investors, the market, and supervisory authorities aware of the state of the art.
- The identification of a supranational body to monitor the European situation, which would be called upon to draw up an annual report and, if necessary, to identify critical areas, in respect of which actions should be toned down, as well as a follow-up of the effectiveness of the explanations attached to discrimination cases for understanding whether they are really justifiable.
- The use of technology in the most appropriate ways to process personal data and, at the same time, to generate information on the status of workers, making it possible to profile each employee, to reprocess the available data and thus to classify the company's remuneration schemes.
- Lastly, the CSRD directive should to consider precise forms of disclosure and reporting, even if these represent an absolute priority, as evidenced by our case study analysis on several Member States. Although another similar approach to developing a directive was launched simultaneously, this second initiative does not appear to be different whatsoever. We propose that these ideas converge and work simultaneously to effectively narrow the gender pay gap. In this sense, it would be useful to transpose the detailed information, especially in terms of reporting, but also the reward mechanisms outlined in the pending-for-approval proposal for a directive aimed at strengthening the application of the principle of equal pay for equal work or work of equal value between men and women through pay transparency and enforcement mechanisms, within the proposal for Corporate Sustainability Reporting Directive (COM (2021)189).

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This study, commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the JURI Committee, provides an in-depth analysis of the policy and legal state-of-the-art concerning gender pay discrimination in the European Union. To this end, it builds on a comprehensive comparative study covering European countries (i.e., Italy, France, Germany, Denmark, Iceland, and Spain), in order to conclusively design and develop specific policy recommendations to move towards a shared and well-informed solution to wage discrimination in the EU, especially in light of the European Commission's recently adopted proposal for a Corporate Sustainability Reporting Directive (CSRD).

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