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Commission for Equality in Labour and Employment

Guaranteeing Equal Pay between Women and Men In the European Union

Maria do Rosário Palma Ramalho

CITE
COMMISSION FOR EQUALITY
IN LABOUR AND EMPLOYMENT

Guaranteeing Equal Pay between Women and Men in the European Union

Maria do Rosário Palma Ramalho
PhD in Law

Study conducted within the ambit of the Project "Guaranteeing Equal Pay Rights", which was co-financed by the European Commission as part of the V Community Gender Equality Programme (2001 – 2005)

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FOREWORD

This study was undertaken within the ambit of the Project "Guaranteeing Equal Pay Rights", which was sponsored by the European Commission as part of the Community "Gender Equality" Programme and was coordinated by Comissão para a Igualdade no Trabalho e no Emprego (CITE – Commission for Equality in Labour and Employment, Portugal).

Inasmuch as the Project was conducted in partnership with public and private institutions from Portugal and other States (Ireland, Italy, Luxembourg and Norway), some of the elements that have been incorporated in the study were derived from the valuable contributions made by these Partners, whom we would like to thank for their collaboration.

Due to editorial difficulties, it has not been possible to publish these contributions – which are referred to throughout the text as Appendices and the list of which is set out at the end of this book – together with the study itself. They are, however, available for consultation at Comissão para a Igualdade no Trabalho e no Emprego.

Lisbon, December 2002

Maria do Rosário Palma Ramalho

LIST OF MAIN ABBREVIATIONS

Ac. – *Acordão* / Decision of the Supreme Court our of the Court of Appeal (Portugal)

APG – *Associação Portuguesa dos Gestores e Técnicos dos Recursos Humanos* / Portuguese Association of Human Resources Managers and Specialists (Portugal)

art. – article

BGB – *Bürgerliches Gesetzbuch* / German Civil Code

CCT – *Convenção Colectiva de Trabalho* / Collective Agrement

CEJ – *Centro de Estudos Judiciários* / Judicial Studies Centre (Portugal)

CGTP-IN – *Confederação Geral dos Trabalhadores Portugueses – Intersindical* / Portuguese Workers General Confederation (Portugal)

CIDM – *Comissão para a Igualdade e para os Direitos das Mulheres* / Commission for Equality and Women's Rights (Portugal)

CITE – *Comissão para a Igualdade no Trabalho e no Emprego* / Commission for Equality in Labour and Employment (Portugal) –

CJ – Court of Justice of the European Communities

CJ – *Colectânea de Jurisprudência* / Jurisprudence Collection (Portugal)

CRP – *Constituição da República Portuguesa* / Portuguese Constitution

CSM – *Conselho Superior da Magistratura* / High Council of the Judiciary (Portugal)

DGAP – *Direcção-Geral da Administração Pública* / Directorate-General for Public Administration (Portugal)

DGCT – *Direcção-Geral das Condições de Trabalho* / Directorate-General for Labour Conditions (Portugal)

Dir. – Directive

DL – Decree-law (Portugal)

EEC – European Economic Community

ECT – European Community Treaty

IGMSST – *Inspecção-Geral do Ministério da Segurança Social e do Trabalho* / General Inspectorate of the Ministry of Social Security and Labour (Portugal)

IGT – *Inspecção Geral do Trabalho* / General Inspectorate of Labour (Portugal)

ILO – International Labour Organisation

Judg. – Judgment

L. – Law

LCT – *Regime Jurídico do Contrato de Trabalho (Portugal)* / Labour Contract Act (Portugal)

LRCT – *Regime Jurídico dos Instrumentos de Regulamentação Colectiva do Trabalho (Portugal)* / Collective Agrements Act (Portugal)

OJ – Official Journal of the European Communities

Res. – Resolution

ROA – *Revista da Ordem dos Advogados* / Bar Association Magazine (Lisbon)

STJ – *Supremo Tribunal de Justiça* / Supreme Court of Justice (Portugal)

GUARANTEEING EQUAL PAY BETWEEN WOMEN AND MEN IN THE EUROPEAN UNION

SUMMARY

I - INTRODUCTION

1. The importance of the principle of equal pay between men and women in the European Union – brief considerations

I. The principle of equal remuneration for men and women workers for equal work or work of equal value was enshrined initially in ILO Convention no. 100 of 1951 and was included as a fundamental principle of community law in art. 119, no. 1 of the Treaty of Rome, which currently corresponds to art. 141 no. 1 of the ECT.

The principle of equal pay for male and female workers for equal work or work of equal value has developed at the level of both community law and the legal systems of the Member States since its inclusion in the fundamental legal texts of the Community.

II. At the community level, the principle has developed via legislation and case law and also played an important role in overall progress of the right of men and women to equal treatment at work and in employment within the Community, and in the development of a system which protects maternity and paternity rights and the promotion of a balanced reconciliation of work and family life.

The principle of equal pay for male and female workers is the subject matter of Dir. 75/117/EEC, of 10 February, which introduced the production of Community legislation in the area of equal treatment at work and in employment. This Directive, which is currently being revised, strengthened the effectiveness of the principle by confirming the broad content of the concepts of remuneration and discrimination (art. 1 no. 1); by requiring that job classification systems be gender neutral (art. 1 no. 2); and by imposing various obligations on Member States with a view to the elimination of discriminatory provisions in existing legislation, regulations and collective agreements (arts. 3 and 4), and to guarantee the effectiveness of the principle by ensuring that employees have access to the courts in this area and are protected against retaliation

by employers against the invocation of the principle in legal proceedings and otherwise (art. 2 and 5).

III. Community case law has played a very important role in the application of art. 119 and Dir. 75/117 by contributing to the integration of key concepts for putting the principle of equal pay into practice (the concepts of remuneration, of direct and indirect discrimination and of equal work and work of equal value), by discussing the problems raised by the practical application thereof and increasingly emphasising aspects adjacent to this topic, which have contributed to increasing the effectiveness of the principle of equal pay. Some of these aspects subsequently became the subject matter of separate legislation. We are thinking of problems such as that of the entitlement to invoke the direct effect of this Treaty principle before national courts, which has been considered several times by the European Court of Justice – Judgment of the Court of 8 April 1976, case 43/75 (DEFRENNE v. SABENA, known as DEFRENNE II Judgment of the Court of 31 March 1981, case 96/80 (JENKINS v. KINSGATE), Judgment of the Court of 4 February 1988, case 157/86 (MURPHY), Judgment of the Court of 19 June 1990, case C-213/89 (FACTORTAME), Judgment of the Court of 28 September 1994, case C-7/93 (BEUNE), or Judgment of the Court of 28 September 1994, case 200/91 (COLOROLL) –, *inter alia*; or problems related to the sharing of the burden of proof in pay discrimination cases, considered on many occasions by the Court of Justice, which gave rise to Council Directive 97/80/EC of 15 December 1997.

IV. Finally, it is important to emphasise the fundamental role of the equal pay principle in the development of the current community system for the protection of the rights inherent in the principle of equal opportunities and equal treatment of men and women in Europe. What has occurred is an ample development of secondary Community Law, based on the limited provision in art. 119 of the Treaty of Rome, both in areas directly related to equal treatment in access to employment and the workplace and in linked areas, such as the protection of maternity and paternity and the promotion of reconciliation between family life and work, or equal access to social welfare and social security systems and also the promotion of gender equality in other areas of social life.

For, as we have previously noted elsewhere[1], of the social matters in the Treaty of Rome, equal treatment of men and women is perhaps one of those, which has developed most. Indeed from a limited principle, i.e. equal pay, emerged a relatively comprehensive gender equality protection system by way of the development and extension of the principle and the application thereof.

V. As is well known, this multifaceted development resulted in the recognition of the eminent significance of the general principle of gender equality in primary European law and in the revision of the Treaties, and in the assumption of the duty to promote this principle as one of the fundamental tasks of the European Union, to be pursued transversally in all its policies and areas of activity, as provided in art. 2 and art. 3 no. 2 of the ECT.

There is therefore no doubt regarding the evident extent and legal value of the principle of equal pay in community law and within the European Union. For as the Court of Justice already noted, in 1976, in the DEFRENNE II decision[2], the principle of equal pay forms part of the foundations of the Community.

VI. So far as the legal systems of Member States are concerned, the principle of equal pay between male and female workers doing equal work or work of equal value has been increasingly accepted, and has even been included in the constitutions of some Member States.

The principle of equal pay between men and women has been widely developed in the law, collective bargaining agreements and case law of Member States[3].

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[1] MARIA DO ROSÁRIO PALMA RAMALHO, *Da Autonomia Dogmática do Direito do Trabalho,* Coimbra, 2001, 628 *et seq.* and notes 492 and 493.

[2] Judgment of the Court of 8 April 1976, case 43/75 (DEFRENNE v. SABENA, known as DEFRENNE II). Similarly, Judgment of the Court of 15 June 1978, case 149/77 (DEFRENNE v. SABENA, known as DEFRENNE III) and Judgment of the Court of 20 March 1984, cases 75 and 117/82 (RAZZOUK and BEYDOUN v. COMMISSION), state that the principle of equal treatment of both sexes, forms part of the fundamental rights the observance of which the court has a duty to ensure.

[3] *Infra,* Part III.

VII. Finally, the efforts made over many years by the European Commission to monitor the implementation of the principle in Member States, both by monitoring of the time limits imposed for the adaptation of national legal systems to community law, and by the taking of enforcement proceedings against Member States which fail to introduce the principle in due time, and also by the multiplication of periodic initiatives by special commissions to evaluate the situation and the publication of studies and monitoring reports[4], and the approval of a Code of Practice in this area[5], should be noted.

2. Difficulties in the practical implementation of the principle of equal pay

I. Despite the considerable development of the principle of equal pay in terms of legislation and case law and its prominence in the sources of community and international law and the legal systems of Member States, it has so far proved difficult to implement the principle of equal pay for men and women workers for equal work or work of equal value; as is proved by the differences between men's and women's pay which still exist.

These differences appear to be common to countries with a wide range of social and economic characteristics, as can be confirmed from the data

[4] For more details regarding these European Commission measures see Beverly JONES, *Working Document in Connection with the Memorandum on Equal Pay for Work of Equal Value*, Belfast, 1993, 19 *et seq.*

[5] *Code of practice on the implementation of equal pay for work of equal value for women and men* – European Commission's Communication of 17/07/1996 (COM (96) 336 final).

provided by the Member States[6].

II. These differences can be partially explained by reference to objective factors, such as the fact that more women work part-time than men, and the fact that more women than men interrupt their professional careers for reasons connected with maternity or family assistance. Women's shorter careers, which are a consequence not only of these interruptions but also of the fact that mass access by women to the labour market was a late development, and because women are less available for work due to the need to care for their family, contribute to the pay gap between men and women, not only because of the direct effect of these factors on pay levels but also because of the indirect effects of the said factors, namely greater career development difficulties.

Another category of factors that has been identified as a cause of pay differences between men and women is the tendency for gender segregation in the labour market. This results in a high female employment rate in productive areas in which work is not as well paid as

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[6] For example, consider the references to Luxembourg, where, according to the data provided by the *Ministère de la Promotion Féminine du Luxembourg*, in Appendix 11 to this study, the overall difference between men's and women's wages is 12%; in the case of Belgium, the data in the Ministère Fédéral de l'Emploi et du Travail publication; Direction de l'égalité des chances, *Évaluation et classification de fonctions. Des outils pour l'égalité salariale*, Bruxelles, 2000, 5, in relation to employees, states that female workers amounts to 79.44% of the pay of their male colleagues. According to the information provided by the *Office of the Director of Equality Investigations*, the Irish partner in this Project (to be found in Appendix 12) in relation to 1997, there is an average gap of 15% between the pay earned by men and women in Ireland. See HELEN RUSSELL e BRENDA GANNON, *The Male/Female Wage Gap in Ireland*, a paper given within the ambit of the project "Guaranteeing Equal Pay Rights", Sintra, 7 – 9 November 2002, particularly p. 3 *et seq.* regarding the pay gap between men and women in Ireland. For details of the Norwegian case, Norway is also a Project Partner; see Lars CHRISTENSEN, *Equal Pay in Norway - An Introduction*, a paper given within the ambit of the project "Guaranteeing Equal Pay Rights", Sintra, 7 – 9 November 2002, particularly p. 2 *et seq.* For details of the Portuguese case see the interesting study by HELOÍSA PERISTA, *O Contexto: análise das desigualdades salariais de género em Portugal*, a paper given within the ambit of the project "Guaranteeing Equal Pay Rights", Sintra, 7 – 9 November 2002, particularly p. 6 *et passim*, which describes a pay gap in the earnings of men and women of 27.4%, in 1999, which, according to the Author, merely confirms a trend, which has existed for the last few decades.

in sectors in which male labour predominates[7].

Finally, another factor that is identified as an objective reason for the said pay gap is the lower level of educational and vocational training of women in relation to men, which is inherent in the tendency for women to be employed in positions of lesser responsibility, which are therefore lower paid[8].

III. Various conclusions can be drawn from the studies of this subject matter.

On the one hand, it emerges that the said factors only explain part of the pay differences between men and women. Which, put in another way, means that if the differences attributable to the lower level of academic qualifications and vocational training, to shorter and spasmodic professional careers and to part-time work are disregarded, there appears still to be wage discrimination between men and women doing identical work, who have the same skills and equivalent performance.

Furthermore, some of the factors identified to explain pay differences between men and women show that the source of these differences frequently lies, not in a deliberate intention to treat male and female employees differently, but rather, in factors, with this indirect consequence, which frequently antedate the discrimination.

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[7] The data provided in HELOÍSA PERISTA; *O Contexto: análise das desigualdades salariais de género em Portugal* in which she notes the horizontal segregation, which arises from the tendency for women to be concentrated in a small number of business sectors and occupations, is particularly informative with regard to this trend in Portugal. According to the Author, (p. 4) "In 1999, there were only six business sectors (eight in the case of men) which accounted for 54.4% of all female workers: retail trade – 12.4%, clothing industry – 11.4%, other services to enterprises – 8.9%, accommodation and catering – 8.6%, health and social work – 7.5% and wholesale trade – 5.6%. The concentration is even greater in terms of occupations, as 53.3% of all female workers are concentrated in only four occupations (six in the case of men): office workers – 16.6%, other skilled and similar workers – 15.4%, unskilled workers in services and retail trade – 11.1% and direct and private protection and security services staff – 10.2%". According to this Author there is an identical vertical segregation: "Despite the fact that the rate of women working at all qualification levels increased between 1991 and 1999, (in line with the increase of the rate of female employment from 39% to 43% during the same period). It is clear that the categories, which have the greatest percentage of female employees correspond to those with the lowest qualification level – semi-skilled and unskilled workers, trainees and apprentices – with rates of female employment of between 59% and 53% in 1999" - *op.* and *loc. cit.* The segregation of the labour market as a source of the *pay gap* was particularly emphasised by the Norwegian Partner in this Project - see, L. CHRISTENSEN, *Equal Pay in Norway - An Introduction cit.*, 2 *et seq.*.

[8] These factors are referred as a source of the pay gap between men and women in, e.g. *the Code of practice on the implementation of equal pay for work of equal value for women and men,* Office for Official Publications of the European Communities, Luxembourg, 1996, 7 *et seq.*. BEVERLY JONES, *Working Document in connection with the Memorandum on Equal Pay for Work of Equal Value cit.*, 13 also identifies these factors.

Thus the following factors may be at the source of different pay for work of equal value, in addition to the objective reasons identified above for the pay gap between men and women:

1. The persistence of occupational categories, which tend to be female and of others, which tend to be male, namely in the context of collective bargaining, which results in a differing valuation of the tasks involved therein[9]. This factor is of major importance *per se* and because it combines directly with another source of weakness: i.e. the lesser power of women in the negotiation of the terms of their contracts, i.e. because of their relative lack of representation on trade union bodies, which are responsible for the conduct of collective bargaining.
2. The persistence of vertical employee classification criteria and horizontal job evaluation criteria, which favour factors that are more easily complied with by male employees than by female employees (such as physical strength, as against attention to detail or patience, for example) – i.e. the persistence of job evaluation and classification criteria which are themselves socially stigmatising.
3. The persistence of apparently neutral job evaluation criteria, which, in reality, affect male employees and female employees differently, i.e. when combined with the traditional division of social roles, with regard to the reconciliation of work and family

[9] This situation is frequent in Portugal. A close study of collective bargaining agreements shows that while the principle of equal treatment for male and female workers (which includes equal pay) is frequently reiterated in the agreement texts, the occupational categories described in many agreements are gender differentiated, despite the fact that they involve functionally identical tasks, and attribute differing pay levels to each category – for more on this see the conclusions of the studies made by the *Observatório para a Igualdade nas Convenções Colectivas de Trabalho* / (Observatory for Equality in Collective Bargaining and in Collective Agreements), in 1998 and following years, in the fish canning industry, textile industry and the private and co-operative education sectors (CITE - Portugal).

life (e.g. the greater weight given to attendance as against productivity)[10] [11].

IV. Finally the difficulty involved in the implementation in practice of the principle of equal pay for men and women doing equal work or work of equal value appears to be due to a technical factor: i.e. the difficulty involved in the integration of the content of the operational concepts in the principle itself, i.e. the concept of remuneration, the concept of discrimination and, above all, the concept of work of equal value.

The first key concept involved in the operationalization of the principle of equal pay for male and female workers is evidently the concept of *remuneration*. Art. 119 no. 2 of the Treaty of Rome (currently art. 141 no. 2 of the ECT) provides a broad content for this concept, as it comprises not only salary in the technical sense (i.e. the sum payable to the employee in consideration of the work done) but all the benefits arising in favour of the employee as a consequence of the employment contract[12]. Community case law has developed this concept considerably by considering a wide range of questions relating to the benefits received by employees, such as pension contributions, paid in part by the employer[13], annual bonuses[14], Christmas bonuses[15], dismissal compensation[16],

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[10] Some examples easily illustrate this idea. In a company with an equal number of male and female employees, in which the pay is supplemented by an attendance bonus, the attribution of which is subject to a total lack of absences during a specific period, it will be easy to note an overall pay difference between male and female workers, merely because it is above all women who are absent from work in order to care for their family. Although criterion for the attribution of the bonus is apparently neutral it in fact penalises female employees, because it is they who traditionally provide family assistance.

[11] Legal theory is unanimous in recognising the importance of Job evaluation criteria in pay discrimination. See E. VOGEL-POLSKY, *O papel do direito comunitário, Igualdade de oportunidades entre mulheres e homens no trabalho, no emprego e na formação profissional*, paper given at the International Conference organised by the Commission for Equality in Labour and Employment and the Economic and Social Council, CITE, Lisbon, 2000, 93 *et seq.*, which states that "... job evaluation and classification according to predetermined standards has been recognised for a long time as the hard core of the equal pay problem".

[12] What is therefore at issue is not only legal provision regarding pay but also provision regarding what legal theory refers to as "remuneration". On this distinction, which is classic among labour law theorists, see A. MENEZES CORDEIRO, *Manual de Direito do Trabalho*, Coimbra, 1991, 717 and 721 *et seq.*

[13] Judgment of the Court of 11 March 1981, Case 69/80 (WORRINGHAM v. LLOYDS BANK Ltd).

[14] Judgment of the Court of 9 September 1999, Case 281/97 (KRÜGER).

[15] Judgment of the Court of 21 October 1999, Case C-333/97 (S. LEWEN e L. DENDA).

[16] Judgment of the Court of 17 May 1990, Case 222/61 (BARBER); Judgment of the Court of 17 February 1993, Case 173/91 (COMMISSION v. BELGIQUE); Judgment of the Court of 9 February 1999, Case C- 167/97 (REGINA v. SECRETARY OF STATE FOR THE HOUSE OF THE LORDS).

payment of training courses[17], payment of the salary while the employee is sick[18], absent by reason of maternity[19] or incapacity of female employees related to maternity[20], payment of family allowances[21] and salary bonuses[22].

It can therefore be said that, of the key concepts linked to the principle of equal pay for men and women, the concept of remuneration is, despite everything, the key concept, which has developed most in community law.

However, this concept can give rise to difficulties in the application of the principle of equal pay, when combined with the concepts of remuneration and salary in the various Member States, i.e. when a general principle of equal pay has also been enshrined in their domestic legislation, which may diverge from the community law principle. If this is so, different treatment of pay discrimination problems will have to be available, depending on whether the discrimination is based on the gender of the employees in question (when the community rules, with the broad scope given to the concept of remuneration, in such matters, should prevail) or on another factor[23].

The difficulties involved in the implementation of the principle arise, above all, in the interaction between the concept of remuneration developed for this purpose by community law, and the concepts of remuneration developed by the legal systems of the Member States.

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[17] Judgment of the Court of 4 June 1992, Case 360/90 (BÖTEL).

[18] Judgment of the Court of 13 July 1989, Case 171/88 (RINNER-KÜHN).

[19] Judgment of the Court of 13 February 1996, Case 342/93 (GILLESPIE); Judgment of the Court of [16] September 1999, Case 218/98 (ABOULAYE).

[20] Judgment of the Court of 19 November 1998, Case 66/96 (H.PEDERSEN).

[21] Judgment of the Court of 9 June 1982, Case 58/81 (COMMISSION v. GRAND-DUCHÉ DU LUXEMBOURG).).

[22] Judgment of the Court of 26 June 2001, Case 381/99 (S. BRUNHOFER v. BANK DER ÖSTERREICHISCHEN POSTPARKASSE AG).

[23] An example of the co-ordination difficulties we indicate is the Portuguese case, because our constitution enshrines the principle of protection of equal pay and the prohibition of pay discrimination, on various grounds including gender - art. 59 no. 1 a) of the CRP. It is clear that the courts have applied a restrictive concept of pay in the application of this general principle, above all in recent years – for more on this see *inter alia*, Ac. STJ of 20/01/1993, CJ, 1993, I, 238, and Ac. STJ of 8/02/1995, CJ, 1995, I, 267 – in the case that the pay discrimination is gender-based this interpretation will conflict with Community law and require a differentiated treatment. For more on this see, MARIA DO ROSÁRIO PALMA RAMALHO, *Igualdade de tratamento entre trabalhadores e trabalhadoras em matéria remuneratória: a aplicação da Directiva 75/117/CE em Portugal,* ROA, 1997, 159-181.

V. The significance of the concept of *discrimination* for the purposes of the community principle of equal pay for male and female workers for equal work or work of equal value is, in itself, more difficult.

So far as this concept is concerned, the difficulties arise primarily from the broad meaning given to it, in the development of community law in this area, as a consequence of the recognition of indirect discrimination as discrimination, as with direct discrimination – art. 2, no. 1 of Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions [24].

For, although the concept of indirect discrimination has been dealt with amply in community case law, in cases such as JENKINS, BILKA, NIMZ, FREERS or RINNER-KÜHN[25], *inter alia,* and has been expressly included in art. 2 no. 2 of Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex, it is common knowledge that this is the form of discrimination which is most difficult to detect and prevent, exactly because it is the consequence of factors that are apparently neutral from a gender point of view.

Much gender-based pay discrimination is indirect, so that the difficulties involved in detecting it and even some variations, which exist with regard to the meaning of the concept[26], have hampered the practical effectiveness of this principle.

VI. The final operational concepts of the principle of equal pay for men and women, which appear to be more difficult to define, are the concept of *equal work* and, above all, that of *work of equal value*.

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[24] Despite the fact that the first direct reference in legislation to the concept of indirect discrimination was only made in Directive 76/207, there was no doubt about the inclusion of this type of discrimination within the legal protection of the right to equal pay pursuant to art. 119 of the Treaty of Rome, particularly because Dir. 75/117 in its art. 1 § 1 in detailing this principle provides for the "elimination of all discrimination on grounds of sex". Over the years, community case law has confirmed this broad understanding of the concept of discrimination, for the purposes of the application of the principle of equal pay.

[25] Judgment of the Court of 31 March 1981, case 96/80 (JENKINS), on equality and part-time work; Judgment of the Court of 13 May 1986, case 170/84 (BILKA), equal access to occupational social security schemes; Judgment of the Court of 7 February 1991, case C-184/89 (H. NIMZ v. Freie und hanstadt Hamburg), Judgment of the Court of 7 March 1996, case C-278/93 (E. FREERS e H. SPECKMANN v. Deutsches Bundespost), and Judgment of the Court of 3 July 1989, case 171/88 (I. RINNER-KÜHN v. FWW Spezialgebäudereinigung GmbH and Co. KG (all on equality and part-time work).

[26] Cf., *infra,* Part II, the various interpretations of the Partners in this Project regarding the concepts of direct and indirect discrimination.

According to art. 141 no. 1 of the ECT, the application of the principle of equal pay for men and women is based on the assumption that the workers in question are in a comparable position, because they do equal work or work of equal value. The intention is evidently to ensure equal treatment in identical circumstances or in circumstances which should be given equal value, but not in disparate situations. The confirmation of the existence of pay discrimination presupposes two things: the determination of the value of the work in question; and, once this has been done, an evaluation of each of them in comparison with the other.

It is this evaluation of work in order to be compared subsequently with other work, which is very complex and difficult to control from an equality point of view, given the heterogeneous nature of the possible evaluation criteria and the ease with which the same can be permeated by non-gender neutral aspects. If these difficulties make themselves felt when work done by men and women, which is materially or formally identical, is being compared, they are even greater in relation to the concept of work of equal value, as the work being compared is then, by definition, formally and materially diverse.

The difficulty involved in the application of the concepts of equal work and work of equal value, for the purposes of compliance with the principle of equal pay for men and women, was recognised in Dir. 75/117/EEC, which established two requirements in this area:

- "... the elimination of all discrimination on grounds of sex with regard to all aspects and conditions of remuneration" (art. 1 no. 1 *in fine*); and
- that the criteria used to evaluate jobs be gender-neutral and be common to male and female workers, as provided by art. 1 no. 2: "In particular, where a job classification system is used for determining pay, it must be based on the same criteria for both men and women and so drawn up as to exclude any discrimination on grounds of sex".

It should be noted however that although these requirements may be the key to the detection and elimination of pay discrimination between men and women, they are the most difficult to implement in practice. This difficulty is evident from the wage gap between men and women in Europe, which continues almost half a century after the inclusion of the principle of equal pay in the Treaty of Rome.

VII. Having detailed the difficulties involved in the practical implementation of the principle of equal pay for men and women, the efforts made over the years to promote the implementation of this principle, via the approval of complementary legislation and various measures at both community and Member State level, can be understood.

This is the context in which this study has been written. The methodology adopted in this study is detailed below.

3. The context, objective and methodology of this study

I. This study was commissioned within the context of the Project "Guaranteeing Equal Pay Rights", undertaken under the auspices of the European Commission, within the framework of the "Gender Equality" Community Programme, co-ordinated by the Commission for Equality in Labour and Employment - CITE (Portugal). This project has been developed in partnership with various other public and private institutions in Portugal and other States (Ireland, Italy, Luxembourg and Norway).

This study is part of the first strand of the said Project, which has the following objectives:

1) Assessment of the legal systems of some Member States and possibly other States with regard to equal pay for men and women, with a view to confirming the existence of legislative solutions and good practices which contribute to promote the principle of equal pay between men and women in the European Union.
2) Preparation of a report including the results of the study conducted, possibly including recommendations of legislation and/or good practices in this area, which could contribute to the implementation of the principle of equal pay, particularly in the context of the forthcoming revision of Dir. 75/117.

II. As the Project, of which this study is part, is a partnership project, the work done to prepare the same involved valuable contributions by the Project's national and transnational partners and therefore involved the scientific co-ordination of these contributions.

This study is therefore not just the result of our own research in the areas of legislation, case law and legal theory of some Member States and other States – and the reflections suggested by this research – but is also the product of the analysis of the contributions to the study requested from the Project Partners, without prejudice to the fact that we are solely responsible for the methodology adopted and the guidelines proposed.

III. The fact that the Project is being conducted in Partnership and the eminently practical and prospective nature of the objective proposed, in general, and the aspect in which we were invited to collaborate, in particular, justify the methodological approach adopted in our research, which resulted in this study being structured in three parts:

1) The first part, which seeks to identify the main difficulties involved in the practical implementation of the principle of equal pay for men and women.
2) The second part, which analyses some legal systems, in order to determine the extent to which there are existing solutions or strategies to contribute to overcoming these problems.
3) The third part, in which we seek to propose some legislative guidelines and good practices in this area.

IV. Bearing in mind that the objective of this study is to seek new legislative solutions and to define good practices which are capable of increasing the effectiveness of the community principle of equal pay for men and women for equal work or for work of equal value, the primary concern of our research was naturally to diagnose the current situation by seeking to detect the factors which could be at the source of the difficulties involved in the practical implementation of the principle of equal pay for men and women within the European Union.

The collaboration of the national and transnational Partners in this Project, in addition to the consultation of other sources, was fundamental for this diagnosis. Taking advantage of the fact that the Partners are members of public and private institutions who work in various areas and who therefore approach the subject matter of this study at differing phases

thereof and from differing points of view, we addressed a questionnaire on equal pay to the Partners (Appendix 1 of this study). This questionnaire focused first on the main reasons for the persistence of discrimination and on the identification of the main weaknesses of the system intended to protect equal pay for men and women.

The first part of this study was therefore intended to report on this diagnosis, which was made possible by the contributions made by the Project Partners. These contributions are presented in appendix to this study.

V. Having established the causes of pay discrimination and having identified the main weaknesses of the protection system, the second part of this study presents the results of a comparative law study of this subject matter, conducted in accordance with our remit.

It should however be noted that the analysis we present is neither an overall assessment of all aspects of this topic, nor does it cover the entire immense and diverse range of legal systems of Member States. As the principle of equal pay for men and women is enshrined in community law and in the legal systems of the Member States, the extensive and descriptive analysis would be unnecessary and is above all unsuited to the practical and prospective objective of this study, which is to improve the effectiveness of the equal pay principle in practice.

In line with this objective, we have therefore concentrated on the consideration of a selection of legislative solutions and good practices detected in various European and non-European legal systems, which we consider could contribute to overcoming the problems involved in the implementation of the principle of equal pay, as identified in the first part of this study.

VI. In the third and final part of this study, we shall seek to draw some conclusions from the analysis made by identifying possible areas for legislative intervention and the introduction of good practices, in each of them, which could contribute to improving the effectiveness of the equal pay protection system within the European Union.

The contributions made by the Project Partners were also of great importance to this part of the study and are referred to constantly therein.

II - DIAGNOSIS OF THE GAP: POSSIBLE CAUSES OF THE DIFFICULTIES INVOLVED IN THE IMPLEMENTATION OF THE PRINCIPLE OF EQUAL PAY FOR MEN AND WOMEN

1. Sequence

I. As stated in the introduction to this study, the primary objective of this study was to diagnose the difficulties involved in the practical implementation of the principle of equal pay for men and women, by way of the identification of possible causes of the pay gap and a characterisation of the existing situations of discrimination.

In order to pursue this objective and in the light of the practical and prospective nature of this work, we based our research essentially on the contributions of the national and transnational Project Partners.

These contributions were primarily the replies to a questionnaire, the first part of which was intended to contribute to this diagnosis, in the elaboration of which we shall seek to take the maximum advantage of the synergies arising from the fact that the various Project Partners are involved with this topic at differing phases thereof and from the perspectives inherent in their specific technical qualifications and the positions they hold, which are also very varied.

We therefore targeted the questionnaire addressed to the Partners, at two research levels, which correspond to two groups of questions:

1) At a first research level, we posed two questions to the Partners, which were intended to emphasise the difficulties experienced in the practical implementation of the principle, not only in general terms, but specifically in relation to the various occupational areas:

- What are the difficulties experienced in the implementation of this principle in your area of involvement?
- At what level or levels do you find these difficulties in your professional experience?

2) The following four questions were posed to the Partners at a second research level, which was intended to characterise pay discrimination between men and women, the first of which seeks a general characterisation, while the others are more specific:
   - What are the reasons for pay discrimination between men and women?
   - How do you classify this pay discrimination, particularly is it direct or indirect discrimination?
   - So far as direct pay discrimination is concerned, what pay level is affected and why?
   - So far as indirect pay discrimination is concerned, what, in your experience, are the factors which contribute most to discrimination?

II. The methodology adopted enables us to divide this part of our study into three points. In the first point, we shall list the difficulties involved in the application of the principle of equal pay for men and women, indicated by the Partners, both in general terms and in relation to the specific area of action of each Partner. In the second point, we provide the characterisation of the situations of discrimination reported by the Partners[27]. Finally, we will seek to make an overall evaluation of the Partners' contributions in order to identify those which could currently be the main problems in the practical implementation of the principle.

[27] These points can be compared in the Appendices to this study, which contain the Partners' contributions.

2. Difficulties experienced by the Partners in the implementation of the principle of equal pay for men and women

2.1. Difficulties indicated by the Partners in the implementation of the principle, in their various areas of action

I. The replies by the Partners to this question show the wide range of opinions regarding this matter and the different stages at which the problem exists in various States.

The following distinctions emerge from an analysis of the replies obtained:

- most Partners admit the existence of gender-related pay discrimination in their areas of action and list the difficulties experienced in the application of the principle; however, some Partners state that they experience no difficulties or consider that the principle is fully complied with in their organisation, sector or area of action;
- the level at which the problem of pay discrimination exists in Portugal and in the systems of some transnational Partners is also diverse.

The fact that these differences exist led us to present the results obtained in reply to the question posed to the Partners, considering three categories of replies individually:

- the replies of national Partners, who admit that there are difficulties in the implementation of the principle and indicate the same;
- the replies of Partners, who state that they experience no difficulty or who did not reply;
- the replies of transnational Partners.

II. In their response to the question posed, most Partners recognised the existence of difficulties in the implementation of the principle of equal pay for men and women in their areas of action and indicate some reasons for this. The main difficulties indicated are as follows:

a) Difficulties in the detection of circumstances of indirect discrimination, for the following reasons:
   - lack of objective indicators for these situations (CIDM - Commission for Equality and Women's' Rights[28], CSM - High Council of the Judiciary[29]), and lack of comparative information (CGTP - Portuguese Workers General Confederation[30]);
   - lack of transparency of job evaluation criteria (*Ministère de la Promotion Féminine du Luxembourg*[31]);
   - excessive individualisation of salary supplements (*Ministère de la Promotion Féminine du Luxembourg*); and
   - lack of statistical data regarding these situations (*Office of the Director of Equality Investigations,* Ireland)

b) Difficulties in the implementation of the concept of "work of equal value", because of the lack of objective legal criteria for the application of this concept (DGCT - Directorate General for Labour Conditions[32], IGT - General Inspectorate of Labour [33], CIDM, CSM, CEJ - Judicial Studies Centre[34], a member of the APG - Portuguese Association of Human Resources Managers and Specialists[35]). According to some Partners, this lack of objective legal criteria renders the concept of work of equal value "totally inoperable" (IGT, Appendix 2, p. 1); for other

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[28] Appendix 3.
[29] The contribution of the CSM - Higher Council of the Judiciary to this study, submitted by Honourable Judge-Secretary of the said body, Dr. Eduardo Miranda Santos Sapateiro (Appendix 5), was given on a purely personal basis and does not reflect an official position on the part of the CSM or its members. Notwithstanding this fact the said study and contribution are identified herein as CSM.
[30] Appendix 10.
[31] Appendix 11.
[32] Appendix 7.
[33] Appendix 2.
[34] Appendix 9.
[35] Appendix 6.

Partners (CGTP[36]), there is more than a "lack of awareness" of the concept of work of equal value on the part of those involved. According to them, one could even speak of "opposition" to this concept and of the existence of a "culture [according to which] men must earn more than women".

c) Job classification and evaluation difficulties, for the following reasons:
   - lack of detailed and rigorous job classification and evaluation systems, as a precondition of the implementation of the principle of equal pay (*Ministère de la Promotion Féminine du Luxembourg*)[37];
   - lack of a specific employee for the purposes of comparison, especially in small enterprises, with the admission, in such cases, of recourse to a merely virtual comparative statistical factors or to comparisons with other enterprises in the same area (CSM); and
   - difficulties in the identification of the tasks which comprise the jobs being compared, *e.g.*, by virtue of the increasing trend towards technical specialisation and when very specific forms of work organisation, such as temporary work, work at home and tele-work are involved (CSM).

d) Difficulties arising from the designation of the categories of workers being compared or even the creation of artificial categories for salary differentiation purposes (CSM).

e) Difficulties arising from the differing organisation of the working hours of the employees being compared, *e.g.*, when factors such as exemption from fixed working hours, night-work or shift-work and part-time work make comparison even more difficult (CSM; *Ministère de la Promotion Féminine du Luxembourg*).

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[36] Appendix 10, p. 1.

[37] This partner considers that the job description criteria used in Luxembourg, i.e. in collective bargaining agreements, are limited and vague in content, contain qualitative classifications which are too summary and an insufficient number of occupational categories (Appendix 11, p. 1).

f) Other difficulties indicated by the Partners:
   - lack of information and lack of initial and complementary training regarding these matters (CSM);
   - fragmented legislation on equality and a lack of Portuguese case law in this area, to which can be added the lack of dissemination of Community case law, i.e. "a lack of legal awareness of this area of the law" (CEJ, Appendix 9, p. 2).

III. Some Partners adopt a position different from the above and considered that there are no difficulties involved in the implementation of the principle in their areas of involvement or organisation.

The most important of those who reply in the manner is the DGAP - Directorate-General for Public Administration - [38] which comments with regard to the application of the principle of equal pay in the public sector that it experiences no difficulty in the application of the principle, both in relation to civil servants and workers hired by the state and public bodies.

This group also includes most of the contributions made by the private business sector, which we received via the APG. The opinion that there are no difficulties in the implementation of the principle of equal pay and that there is no pay discrimination in the corresponding institution (fifteen replies to this effect and only three to the effect that it is difficult to determine the content of the concepts of equal work and work of equal value) predominates in the replies to this questionnaire obtained by the APG from some of its members (20 entities) contained in Appendix 6.

Other Partners took a slightly different stance in relation to the question posed and stated that they were unable to reply to it. For example the IGMSST - General Inspectorate of the Ministry of Social Security and Labour[39] considered, with regard to the question of pay discrimination within the context of its inspection duties, that it is, as yet, unable to make a complete evaluation of the difficulties encountered in the implementation of the principle of equal pay, because the measures it is taking in this area are still at a very early stage.

[38] Appendix 4.
[39] Appendix 8.

IV. Finally, the replies given by the Partners reveal that the problem of pay discrimination between men and women is not currently posed in a legal system such as the Portuguese legal system in the same manner as it is posed in other legal systems.

For, while the replies of Portuguese Project Partners indicate, above all, the difficulties encountered in the appreciation of discrimination between individual employees, the responses of some transnational partners reveal a different stage in the evolution of the implementation of the principle of equal pay in their countries.

An example of the latter case is the reply to the questionnaire given by the office of the *Gender Equality Ombudsman in Norway*[40], which indicates that the greatest difficulty in the implementation of the principle of equal pay is not the application thereof to specific cases of discriminated employees (this partner referred to the frequent complaints regarding this type of situation to the *Gender Equality Ombudsman* and the experience of the *Ombudsman* in the resolution of this type of case[41]), but rather the application thereof to occupational groups or categories, because of the difficulty involved in the definition of criteria for the implementation of the concept of work of equal value, which make it possible to compare predominantly female occupational groups with predominantly male occupational groups[42].

This partner refers that pay differences between these groups are not difficult to detect because of the tendency of the Norwegian labour market to segregate according to gender, but that it is very difficult to solve this problem because of the lack of legal rules which embody the concept of work of equal value in such circumstances[43].

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[40] Appendix 13.

[41] According to information provided by this Project partner, the *Ombudsman* receives 10 – 15 complaints a year regarding pay discrimination.

[42] The examples given by this partner of predominantly female occupational groups are nursing and other health workers, while the examples of male dominated occupational groups are engineers and technical workers.

[43] This partner, however, mentions an on-going project of the *Ministry of Children and Family Affairs*, the aim of which is to develop a method for the determination of the value of different jobs or occupational categories.

2.2. The level or levels of difficulty encountered in the implementation of the principle of equal pay of men and women, in the Partners' specific areas of involvement

I. So far as this question is concerned, which was intended to clearly identify the difficulties mentioned by the Partners in reply to the first question, the Partners indicated the following difficulties in the treatment of discrimination situations:

a) Difficulties in the interpretation and application of the legal rules regarding this matter (CSM, *Gender Equality Ombudsman in Norway*, *Ministère de la Promotion Féminine du Luxembourg*). The Partners explained this by reference to:
   - the faulty drafting or vagueness of the rules (CSM);
   - lack of knowledge of the said rules, because they are scattered between various legislative sources (CSM); and
   - lack of information and of training of workers' representatives with regard to existing rights (*Ministère de la Promotion Féminine du Luxembourg*).

b) Difficulty involved in the interpretation of clauses in collective bargaining agreements with regard to this subject matter (*Gender Equality Ombudsman in Norway*).

c) Difficulties in the detection of discrimination (DGCT, *Ministère de la Promotion Féminine du Luxembourg*, IGT, CGTP, CSM, *Gender Equality Ombudsman in Norway*). The Partners attributed this difficulty to the following reasons:
   - absence of complaints regarding these situations by female employees, because of fear of retaliation by the employer (DGCT, *Ministère de la Promotion Féminine du Luxembourg*), and by their representatives (IGT);
   - lack of sensitivity to the problem on the part of trade unions, inspectors, lawyers, magistrates of the Attorney General's Department and judges (CSM, CGTP).

d) Difficulties in the implementation of the principle in collective bargaining, which the Partners attribute to the following reasons:
   - the fact that the problem of discrimination has not been detected or is not considered to be a priority by the social Partners (CSM, a member of the APG, *Gender Equality Ombudsman in Norway, Ministère de la Promotion Féminine du Luxembourg*);
   - in systems in which the question of equality is a mandatory part of collective bargaining (as we are informed by the *Ministère de la Promotion Féminine du Luxembourg*, in relation to the legal system in that country) the fact that this obligation is frequently not complied with;
   - the fact that women are poorly represented at the top levels of the trade unions that negotiate collective bargaining agreements (*Ministère de la Promotion Féminine du Luxembourg*).

e) Difficulties in terms of the public monitoring of the performance of enterprises in this area, which the Partners attribute to the following reasons:
   - lack of sensitivity to the issue of pay discrimination on the part of inspection departments (IGT[44], CGTP[45]);
   - the fact that inspection departments stressed other areas of their activity until recently (IGMSST);
   - lack of specific powers and responsibilities in this area (*Ministère de la Promotion Féminine du Luxembourg*).

f) Legal difficulties, at three levels:
   - absence or an insignificant number of legal proceedings regarding these matters (CSM, CEJ, *Ministère de la Promotion Féminine du Luxembourg*)[46];

[44] In its contribution to this study, the IGT states expressly that: "The Employment Inspectorate only became aware of this matter in 1999..." (Appendix 2, p. 2). This fact is *per se* elucidative if we realise that the Portuguese legal system has enshrined the principle of equal pay in the Constitution since 1976, and has had an overall legal framework in respect of discrimination since 1979.

[45] Appendix 10.

- difficulty involved in the detection of discrimination problems within the ambit of legal proceedings (CIDM, CSM, CEJ, *Gender Equality Ombudsman in Norway*);
- difficulties of proving discrimination in court (CIDM, CSM, CEJ, *Gender Equality Ombudsman in Norway*), which is explained by some Partners by reference to the complexity of the said proof (CSM), and, by others, by the fact that discrimination is above all indirect (DGCT). So far as evidential difficulties are concerned, the *Office of the Director of Equality Investigations* compares the number of employment cases won by employees on the basis of equality-related matters and other types of employment proceedings and shows that the percentage of successes in proceedings commenced on other grounds is higher, despite the fact that equality and discrimination-related rights benefit from greater legal protection and concludes that it is apparently more difficult to succeed in discrimination-related proceedings[47].

2.3. Analysis

I. It is possible to draw the following conclusions regarding the current situation, from the Partners' contributions as regards the difficulties encountered in the implementation of the principle of equal pay for male and female workers:

1. Most, but not all, Partners recognise the existence of pay discrimination between men and women; namely, the

[46] In a note, which does not coincide completely with this recognition of the absence or insignificance of the number of complaints or legal proceedings in relation to equal pay, indicated by most Project Partners but is, in any event, inconclusive. See the contribution of the *Office of the Director of Equality Investigations* (Appendix 12): This partner mentions the trend for an increase in the number of pay discrimination cases between 1994 and 1999, in Ireland, but observes that this trend was reversed in 2000 and 2001, and draws attention to the fact that the former trend could be artificially inflated by the different criteria used to compare the cases.

[47] Appendix 12, p. 2.

representatives of the employers and the public sector do not admit that there is discrimination in their areas.

Prima facie, this position indicates that the problem does not exist with the same seriousness in all sectors of the economy. However the fact that members of the APG represent enterprises in the most varied sectors of the economy, on the one hand, and the correlation of the reply to this question with the replies given by the same Partners to the following questions (in which they identify discriminatory practices, even if they are not all related to their organisation or economic sector) reveals, on the other hand, that the real issue may be a lack of visibility of this problem, arising from the fact that in most cases discrimination is not evident or even intentional, rather than a real absence of discrimination in the sectors in question. Some of the replies received seem to reflect a somewhat restrictive understanding of the principle of equality (e.g. the reduction of the concept to equal opportunities), which results in a lack of awareness on the part of some Partners of the discriminatory consequences of some practices, despite the fact that they appear to be gender neutral.

In any of the cases this conclusion could be grounds for legislation or the promotion of good practices in order to increase the visibility of the principle and create a greater awareness of the content thereof.

2. In Portugal, at least, it is acknowledged that the problem of pay discrimination between men and women was not treated as a priority until recently, by the public labour inspection departments – in this regard, see the response of the IGMSST[48]. Given the formal recognition of the importance of the principle, both in community and national law, and so far as the latter is concerned, in both the constitution and legislation, for decades, there is clearly cause for concern.

   This fact may be a reason for measures to promote sensitivity in relation to these matters, targeted at the official departments with powers and duties in this area.

[48] *Supra*, point 2.1.III.

3. So far as the difficulties involved in the implementation of the principle indicated by the Partners are concerned, we note two general points: i.e. the fact that these difficulties have been recognised by most Partners and the fact that the said difficulties are very heterogeneous.

   First of all, the fact that the difficulties involved in the implementation of the principle have been noted by Partners, which are involved with this topic from very different perspectives and at different phases thereof (magistrates, inspection services, business and public sector managers and organisations with specific objectives in the area of equality, such as organisations which defend women's rights). This fact demonstrates that the principle is generally considered by those involved and the bodies and institutions with which they deal, to be difficult to apply.

   Furthermore, the heterogeneous nature of the difficulties indicated by the Partners proves that these difficulties affect all the implementation phases of the principle of equal pay. It follows from the above that the principle is unknown at the grassroots and is easily infringed when working conditions are established in collective bargaining agreements or in company agreements. It follows also that the principle is also neglected by the inspection departments because of the difficulty involved in the detection of discrimination and further that it is difficult to enforce judicially because of the lack of initiative to commence proceedings on the part of the interested parties, evidential difficulties and the low level of awareness of these matters on the part of judges and the magistrates of the Attorney General's Department. We are therefore of the opinion that it is not possible to identify a particularly vulnerable moment or area in the process to implement the principle, but rather that the situation is one of general vulnerability. We therefore conclude that any intervention with a view to increasing the effectiveness of the principle should be targeted at many different aspects.

II. Having demonstrated the difficulties involved in the implementation of the principle of equal pay, we shall now consider the characterisation of the circumstances of discrimination made by the Partners.

3. The Partners' characterisation of pay discrimination between men and women

3.1 Reasons indicated by the Partners for pay discrimination between men and women

I. The following reasons for pay discrimination between men and women arise from the Partners' replies to this question:

a) Structural/cultural reasons related to the overall organisation of society in accordance with a *male paradigm* (DGCT, IGT, CIDM, CSM, seven members of the APG, *Ministère de la Promotion Féminine du Luxembourg*), which is stigmatised by the traditional idea that "men do the paid work, while women do the unpaid work" (CIDM, Appendix 3, p. 1), or, to quote the *Ministère de la Promotion Féminine du Luxembourg* (Appendix 11, p. 3), "... *il est trop souvent fait l'amalgame femme et famille, homme et vie professionelle et publique*").

This social and cultural stigma involves various consequences, which are also referred to by the Partners, when they explain gender-based pay discrimination:

- differences in the schooling levels between men and women (DGCT) and the lower average skill level of female labour (a member of the APG);
- recognition of typically male and typically female jobs (DGCT);
- the traditionally greater value given to male work in relation to female work (CSM, IGMSST, *Ministère de la Promotion Féminine du Luxembourg*), and the traditional identification of the man with the "financial support" of the family (*Gender Equality Ombudsman in Norway*).

b) The fact that the combination of a career and motherhood and family assistance is almost always undertaken by women (DGCT, CSM, IGMSST, most members of the APG – fifteen out of the twenty members, which replied to the questionnaire - *Ministère de la Promotion Féminine du Luxembourg*). Some Partners also indicated two other factors linked to this factor:
   - the fact that women tend to have shorter or interrupted careers (*Office of the Director of Equality Investigations*)[49];
   - the idea that male employees have more time available or greater working capacity (five APG members).

c) Possible market requirements, which give rise to better pay for activities which are mostly male (DGCT).

d) Ineffectiveness of the existing legal provisions regarding these matters (DGCT, IGT).

e) Lack of information on the part of workers with regard to their rights in relation to pay discrimination and in relation to the agencies and institutions to which they should have recourse and the manner in which they should proceed in the event of discrimination (DGCT).

f) Lack of an effective negotiation procedure and the outdated nature of the collective bargaining instruments in force (IGT).

g) Inadequate performance evaluation systems in enterprises (IGT).

h) "Interiorisation" by workers and their representatives that pay inequality is despite everything "a lesser evil" (IGT, CGTP).

II. As we can see, the reasons indicated by the Partners are also heterogeneous in nature, which reinforces the idea stated above that any intervention in this area will have to be targeted at many aspects of the process.

[49] According to information submitted by this Partner, in Ireland, this fact means that women have, on average, a career 6 years shorter than men (Appendix 12, p. 1).

3.2. The predominantly direct or indirect nature of pay discrimination

I. The replies to this question divide the Partners, but we consider that this division has its source in a differing understanding of the very concepts of direct and indirect discrimination. These replies therefore have to be understood in the light of these differing understandings.

II. The DGCT, IGT, CGTP, CIDM, IGMSST, most members of the APG (fourteen out of the twenty, who replied to the questionnaire), and the *Ministère de la Promotion Féminine du Luxembourg*, consider that most pay discrimination is indirect. It should however be borne in mind that some of these replies are based on a concept of direct discrimination, which relates exclusively to pay differences in respect of the same work – i.e. a restrictive understanding of the concept of direct discrimination.

The DGCT accordingly relates pay discrimination problems, which it identifies as being most important (i.e. discrimination in relation to salary supplements, in relation to maternity), to indirect discrimination. Similarly, the IGT states that direct pay discrimination is practically insignificant, but includes undervaluation of "essentially female occupations" within indirect discrimination[50].

The CSM considers that the response depends on the sectors in question and refers that in some sectors such as agriculture there is direct pay discrimination, while the discrimination in other sectors is indirect.

III. The Partners who give a broad meaning to the concept of direct discrimination state that direct pay discrimination is prevalent. However, according to them there is direct pay discrimination when, for example, pay gaps arise from the different value given to occupational categories and groups which are predominantly male or female, but correspond to work of equal value – an example of this is the contribution of the *Gender Equality Ombudsman in Norway*.

[50] (Appendix 2, p. 2). This partner also included discrimination arising from the exercise of rights related to maternity and family assistance within the ambit of direct and indirect discrimination.

3.3. Characterisation of direct pay discrimination / incidence level

I. We asked the Partners about the prevalent incidence of these practices, in basic salary, supplemental payments or other employment-related payments by the employer (e.g. meal allowances, productivity, attendance and other bonuses, etc...), or a combination of these two factors, in order to obtain a better characterisation of direct discrimination.

II. The following Partners considered that direct pay discrimination exists both at the level of pay and at the level of other supplemental payments: CGTP, CIDM, CSM (although it considers that there is less direct discrimination because it is easier to detect and control), some members of the APG (2), and the *Ministère de la Promotion Féminine du Luxembourg*.

The DGCT, IGMSST and the CEJ, and seven members of the APG, considered that direct pay discrimination exists above all, but not exclusively, in relation to employment related payments by the employer, other than the salary, such as meal allowances and bonuses.

III. It follows from the above that it is not possible to establish a majority opinion regarding the incidence of direct discrimination from the Partners' replies. We therefore conclude that these practices may affect both basic salary and supplemental payments.

3.4. Characterisation of indirect pay discrimination / trigger factors

I. We also questioned the Partners regarding the motivations related to indirect pay discrimination in order to achieve a better characterisation of indirect pay discrimination.

The Partners' replies indicate various factors which trigger this type of discrimination. It should however be noted that some of these factors

were considered to be of general incidence, while others were considered by some Partners to apply more to specific occupational categories or sectors.

II. Subject to this proviso, the following factors were identified as being at the source of indirect discrimination:

a) The workers' family circumstances and the fact that it is women who are above all responsible for family assistance and reconciliation (DGCT, IGT, CIDM, CSM, CEJ, CGTP and most members of the APG (15, of the 20 who replied to the questionnaire), and the *Ministère de la Promotion Féminine du Luxembourg* – which are considered by the Partners to be a factor of discrimination of general incidence.

b) Maternity (DGCT, IGT, CIDM, CSM, CGTP, CEJ, and most of the APG members (15, of the 20 who replied to the questionnaire, and the *Ministère de la Promotion Féminine du Luxembourg*) – which the Partners consider to be a discrimination factor of general incidence.

c) The tendency to attribute a lesser value to essentially female occupations (IGT, CSM, IGMSST, CGTP)[51] – considered by the Partners to be a discrimination factor of general incidence.

d) The major segmentation of the labour market between men and women combined with the previous factor (*Ministère de la Promotion Féminine du Luxembourg*) – which is considered by this Partner to be a discrimination factor of general incidence. The CGTP also refers to this factor.

e) The fact that promotion criteria emphasise factors which are easier for male workers to comply with (CIDM, two member of the APG) – considered by these Partners to be a discrimination factor of general incidence; other Partners (DGCT, CSM, CEJ) consider that this factor is particularly relevant in specific occupational sectors.

[51] It should be noted however that Partners such as the *Gender Equality Ombudsman in Norway* value this type of factor as indicators of direct discrimination, *e.g.*, because of the direct effect thereof on pay discrimination between groups of workers belonging to occupational categories, which are mostly male or mostly female dominated.

f) The formal integration of male and female workers in different occupational categories at the time of the signing of employment contracts (IGMSST, CEJ), i.e. associated with the existence of predominantly female occupational categories (IGMSST[52]) – considered by the Partners to be a discrimination factor of special incidence in certain occupational areas.

3.5. Analysis

I. The following conclusions in terms of the diagnosis of the current situation can be drawn from the contributions made by all the Partners regarding the characterisation of existing discrimination and the reasons therefor:

1. So far as the reasons underlying discriminatory practices are concerned, it emerges that pay discrimination has its origin in a combination of factors which are very heterogeneous in terms of both the nature thereof (sociological and economic factors, but legal and administrative factors as well) and the moment at which they arise (discrimination can arise during the performance of a contract or prior to the making thereof, in relation to the creation of occupational categories in collective bargaining agreements, or as a consequence of the traditional segmentation of the labour market).

   This combination of factors renders such discrimination very complex. It is therefore advisable that any legislative intervention or promotion of good practices in this area should take the many factors in play into consideration.
2. Some of the factors indicated by the Partners are particularly likely to give rise to indirect pay discrimination – for example, maternity and the family circumstances of female workers or other career interruptions for family reasons. This fact demonstrates the importance of the link between equal pay and

[52] This partner links the recognition of predominantly female occupational categories with jobs involving tasks which demand manual dexterity or which are related to organisation - Appendix 8.

the right to a balanced reconciliation between family life and work.

3. The interpretation of the concepts of direct and indirect discrimination by the Partners is not unanimous and affects the categorisation of certain discriminatory practices. It may accordingly be useful to clarify these concepts.
4. Pay discrimination affects both basic pay and pay supplements. However, in the latter case, the Partners are not always aware of the existence of a discriminatory practice.
5. The repeated references by the Partners to the "ineffectiveness" of the law, the imprecise nature of some concepts in this area – i.e. the concept of "work of equal value" – and the above-mentioned difficulty in the interpretation of the concepts of direct and indirect discrimination, indicate that there is a need for a legislative intervention or for the promotion of good practices in order to obtain an improved specification of some key operational concepts in this area.
6. The repeated references by the Partners to discrimination arising from collective bargaining, i.e. with regard to the description of occupational categories in collective bargaining agreements, and the recognition of a certain lack of interest on the part of collective bargainers in this topic suggest that legislative intervention or promotion of good practices, so that these issues are systematically taken into account by social partners in collective bargaining, may be in order.
7. The references to the trend to the segmentation of the labour market and the inherent discriminatory consequences thereof, which are a consequence of the lesser value given to the work done in predominantly female sectors, give rise to a need for a particularly careful reflection on the concept of work of equal value, which is the main tool in the fight against such discrimination.
8. The references made by the Partners to a lack of information on the part of workers (and of others involved), with regard to existing rights in this area and the applicable legislation, suggest that there is a need for good practices in enterprises, among trade unions and in Courts with a view to the creation of an awareness of this subject matter.

9. Finally, the references to the difficulties in the implementation of the principle of equal pay in the legal system (both in the commencement of proceedings, success therein and evidential difficulties) suggest the need for reflection on the possibility of improving the rules regarding the burden of proof and the procedural rules in order to increase the effectiveness of the principle.

4. Conclusions: diagnosis of the current situation regarding the implementation of the principle of equal pay between men and women and identification of the main problem areas for the application of this principle

I. In this part of our study, we shall draw some conclusions regarding the diagnosis of the current situation in terms of the implementation of the principle of equal pay between men and women for equal work or work of equal value.

In our opinion, the analysis made justifies a general conclusion and the identification of various specific problem areas, which exist within the overall principle of equal pay.

II. The general conclusion is naturally the confirmation of the difficulties in the practical implementation of the principle of equal pay for male and female workers who do equal work or work of equal value. Despite the prominence given to this topic in community law and in the legal systems of most Member States, the principle is of limited effect. Implementation problems are common to States with differing economic characteristics and socio-cultural traditions, although the nature of the problems is different.

III. In addition to this general diagnosis, which confirms the results of previous studies of this subject matter, mentioned in the introduction to this study, this analysis introduces an additional factor into the debate.

For the fact is that the replies to the various questions posed by the Partners also enable us to identify the most problematic areas in terms of the implementation of the principle of equal pay.

Based on the Partners' contributions we consider that the following main problem areas can be identified, so far as the principle of equal pay is concerned:

1) Problems of the visibility of the principle of equal pay
2) Problems of the clarification of the content of the principle's operational concepts, particularly the concepts of direct and indirect discrimination and the concept of work of equal value
3) Evidential problems involved in proving discrimination and other linked procedural problems
4) Sociological/cultural problems with regard to the traditional division of social roles between men and women

IV. The first major problem area, which affects the principle of equal pay between men and women concerns the lack of visibility of the principle within the legal system.

It should be borne in mind that this lack of visibility is observed in the various sectors of the economy and affects the many institutions involved in this subject-matter. Accordingly:

- there is a certain lack of awareness in enterprises and in some public departments of the discriminatory nature of some practices;
- so far as workers and their representatives in collective bargaining are concerned, the problem of gender-related pay discrimination is considered to be a lesser evil and it is recognised that the poor representation of women on the decision-making bodies in collective bargaining procedures renders the question even less visible at that level;
- so far as the public inspection services are concerned, it is acknowledged that the problem is neither recognised nor considered to be a priority and further that the work of the inspection services is obstructed by the lack of powers and duties in this area;
- finally, there is a poor awareness of this subject matter in the courts.

Accordingly, measures which could increase the visibility of the principle could be a first area for legislative intervention or for the promotion of good practices, to contribute to increasing the effectiveness of the principle.

V. A second problem area in the implementation of the principle of equal pay, which is eminently technical, concerns the key operational concepts of the principle of equal pay. As we have seen, the Partners consider that some of these concepts are vague or inaccurate and state that there are difficulties in detecting and proving discrimination.

It appears to be particularly difficult to interpret and apply the concepts of direct and indirect discrimination and particularly the concept of work of equal value. Furthermore, so far as the interpretation and application of this latter concept is concerned, this involves two steps (job classification and the selection of the criteria to be used in job comparison), which are *per se* difficult to control from the point of view of gender neutrality.

A second area for legislative intervention in this area could be to increase the operational effectiveness of these concepts by way of an improved integration of the contents thereof.

VI. The third problem area identified by the analysis made in this study concerns the procedural difficulties inherent in the principle of equal pay, which was particularly referred to by Project Partners who have a judicial role, is the insignificant number of proceedings commenced with regard to equality (a particularly serious aspect in the Portuguese case, which is also referred to by Partners from other countries) and the difficulty involved in the successful prosecution of such proceedings because of evidential difficulties.

It is recognised that the volume of legal proceedings with regard to a specific right, guarantee or legal concept, to a certain extent proves the vitality of the said right or legal concept, while a lack of such litigation may indicate both a high level of compliance with the legal provision or a generalised lack of confidence in the capacity of the legal system to promote co-active compliance therewith... In the Portuguese case, we fear that the absence of legal proceedings indicates the second alternative, as the low number of existing cases regarding gender-related pay discrimination is a matter of public knowledge.

A third area of legislative intervention could be the improvement of the procedural rules, which apply in these cases.

VII. Finally, we consider that the Partners' replies to the questionnaire indicate a final problem area in the implementation of the principle of equal pay for men and women: i.e. the clear connection between job evaluation and pay calculation systems, on the one hand, and some traditional social stigmas, on the other.

Of these social stigmas, the following appear to us to be particularly relevant:

- the overvaluation of occupational factors, which are easier for male workers to fulfil than for female workers, which has a direct effect on job evaluation criteria;
- the traditional gender-based segregation of the labour market, which is, *per se,* a discrimination factor, but which has greater weight when combined with the preceding factor and is a source of pay discrimination between categories of workers;
- the traditional assumption of family tasks by women, even if they are workers, which is reflected in pay systems and renders access to pay supplements established by reference to the typical employment relation, in terms of career continuity and full-time working more difficult[53].

Although this is the area which is perhaps the most difficult to deal with, given the extra-legal nature of these factors, it is important to bear them in mind because of the direct impact thereof on aspects which are susceptible to legislative intervention – such as those related to job evaluation criteria, the concept of work of equal value or the way in which the legal system is organised in relation to the protection of maternity and family assistance.

It is therefore opportune to consider whether this area should also be the subject matter of study, to consider the extent to which the promotion of good practices or the introduction of new rules regarding job evaluation criteria, the concretisation of the concept of work of equal value or the promotion of a more balanced division of the tasks inherent in family life

[53] On the concept of typical work see M. R. PALMA RAMALHO, *Da Autonomia Dogmática do Direito do Trabalho cit.,* 537 *et seq.*

between men and women (including the tasks involved in maternity and paternity) can contribute to the reversal of the traditional social roles on which discrimination is based.

VIII. The general conclusion we have reached demands the study of the possibility of new legislative solutions or the promotion of good practices, which make it possible to increase the level of the practical effectiveness of the principle of equal pay. The identification in this study of the areas, which are most problematic in terms of the implementation of the principle, will make it possible to establish the parameters of this study.

It is this study which will occupy the following chapters of this work. We shall first review existing legislative solutions developed in some legal systems in order to increase the effectiveness of the principle and then suggest some legislative solutions and good practices to the same end.

III - THE EFFECTIVENESS OF THE PRINCIPLE OF EQUAL PAY BETWEEN MEN AND WOMEN IN SOME LEGAL SYSTEMS

1. Methodology and sequence

I. This part of our study seeks to determine the point to which the Member States of the European Union or other States have already developed legislative solutions and good practices that are able to help improve the effectiveness of their legal systems in the practical implementation of the principle of equal pay for women and men who do equal work or work of equal value.

II. As referred in the introductory part of this study, our analysis does not attempt to be exhaustive and certainly does not hope to reconstitute the complex package of rules that seek to further the Community principle of equal pay for men and women in each of the different countries we have looked at, quite simply because that is not the objective of our study.

Inasmuch as our intention is to contribute to improving the real effectiveness of the equal pay principle, the methodology that we have adopted is based on a transversal analysis and on the selection of information from various legal systems. This will enable us to see the extent to which states have already managed to develop solutions that overcome the problems which this principle poses and which we identified in the previous part of the study.

Before we move on to this analysis, we would like to make just a few general comments which were suggested by our overview of the legal systems of a number of EU Members and which in our opinion are justified by their possible repercussions on the effectiveness of the equal pay principle.

2. Overview of the extent to which the legal systems of a number of Member States have instituted the principle of equal pay for women and men and the influence that that process has had on the effectiveness of the principle

I. As we said in the introduction of this paper, the Member States of the European Union attach great value to the principle of equal pay for men and women, either in their constitutions or in their general law. What is more, as required by Directive 117/75, this principle is substantially reflected in each country's legal system.

II. Thus, albeit in different ways, the principle of equal pay is formally recognised in the majority of legal systems.

a) One of the techniques that are adopted is that of the principle's inclusion in constitutional law. Some legal systems have enshrined the principle of equal pay in their constitution, following from the broader principle of the equality of all citizens, which includes gender equality.

This is the case in Portugal, which has enshrined the principle under the heading of workers' fundamental rights in article 59, no. 1, para. a) of the Portuguese Constitution[1], where it constitutes a further development of the general principle of equality set out in article 13 which includes gender equality.

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[1] Article 59 (Workers' Rights) of the CRP (Constitution of the Portuguese Republic) states that:
"1. Todos os trabalhadores, sem distinção de idade, sexo, raça, cidadania, território de origem, religião, convicções políticas ou ideológicas, têm direito:
a) À retribuição do trabalho, segundo a quantidade, natureza e qualidade, observando-se o princípio de que para trabalho igual, salário igual, de forma a garantir uma existência condigna;
b) ....."
In turn, the general principle of equality is set out in article 13 of the CRP and is worded as follows:
"1. Todos os cidadãos têm a mesma dignidade social e são iguais perante a lei.
2. Ninguém pode ser privilegiado, beneficiado, prejudicado, privado de qualquer direito ou isento de qualquer dever em razão de ascendência, sexo...."

The same is true of the Italian (art. 3 and para. 1 of art. 37[2]) and Spanish (art. 14 and para. 1 of art. 35 of the Spanish Constitution[3]) legal systems.

b) Other systems, however, do not include the principle at the constitutional level – in part, perhaps, because their constitutions are older – but rather enshrine it either in their civil law, or directly in their labour law and develop it on that basis.

This is the case of Germany (the principle is enshrined in § 612 III of the BGB), France (*Code du Travail*, art. L.140-2[4]), the United Kingdom (the principle is both established and developed in section 5 of the 1970 Equal Pay Act), Norway (section 5 of the 1978 Gender Equality Act), Luxembourg (which both enshrines and develops the subject in the *Règlement du* Grand *Duché* of 10 July 1974) and Ireland (originally the 1974 Anti-Discrimination (Pay) Act, as replaced by section 19 (1) of the 1998 Employment Equality Act).

c) Lastly, other countries recognise the principle via the direct application of international provisions (in this case, ILO Convention no. 100) and Community rules (here, the former art. 119 of the Treaty of Rome and the current art. 141 of the Treaty of the European Communities (ECT) and Directive 75/117) and

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[2] The wording adopted by the Italian Constitution is as follows:
Article 3: «*Tutti i citaddini hanno pari dignità sociale e sono eguali davanti alla legge, sensa distinzione di sesso ....*»
Article 37: «*La donna lavoratrice ha gli stessi diritti e, a parità di lavoro, le stesse retribuzioni che spettano al lavoratore ...*»

[3] The Spanish Constitution employs the following wording:
Article 14: «*Los españoles son iguales ante la ley, sin que pueda prevalecer discriminación alguna por razón de nacimiento, raza, sexo ...*»
Article 35: «*Todos los españoles tienen el... derecho a una remuneración suficiente para satisfacer sus necesidades y las de su familia, sin qui en ningún caso pueda hacerce discriminación por razón de sexo.*»

[4] However, where the French legal system is concerned it is necessary to bear in mind the debate that has enlivened both the case law and legal theory on the relationship between the principle of equal pay for men and women set out in this article and the more general principle of "equal work, equal pay" which other articles of the Labour Code refer to in relation to the content of collective agreements and their assessment by the *Commission Nationale de la Négociation Collective* (CNNC) (item 7 of article L. 136-2, as introduced by Law no. 2001-1066, of 16 November 2001). For more on this discussion in French case law and legal theory see, for example, LYON-CAEN, A., *L'égalité de traitement en matière salariale (à propos de l'arrêt Ponsolle, Cass. Soc. 29 octobre 1996)*, DS, 1996, 12, 1013-1015, and BONNECHÈRE, MICHÈLE, *Contrat de travail. Salaires. Salariés placés dans une situation identique. Différence de traitement non justifié. Indemnisation. Cour de Cassation (Ch. Sociale), 15 décembre 1998 - Observations*, DS, 1999, 2, 187-188.

develop them in collective bargaining agreements which are binding by law.

This method has been adopted by the Belgian legal system, which established the principle in *Collective bargaining agreement no. 25 on equal pay for men and women workers* signed by the *Conseil National du Travail* on 15 October 1975 and rendered binding by *arrêté royal of 1 December 1975.*

III. When it comes to the development of the principle of equal pay in the law, it is necessary to make one substantive observation and one formal observation.

From the substantive point of view, we find that the Member States have developed systems to protect the principle of equal pay for men and women that are of an all-embracing nature and touch on all the different aspects that this protection entails. Thus:

- the principle of equal pay for men and women for equal work is either set out in the general law, or is restated in those cases in which it is enshrined in the constitution, and any exceptions are clearly laid out;
- some systems refer to the concepts of gender-based discrimination, the definition of remuneration for the purposes of determining the existence of discrimination practices, and equal work and/or work of equal value;
- provision is made for measures designed to strengthen the systems' effectiveness, particularly in terms of proof (i.e. the reversal or sharing of the burden of proof in such situations), and for solutions that entail the automatic replacement of discriminatory provisions on remuneration by egalitarian ones, for example in collective bargaining agreements;
- provision is made for protecting workers who wish to exercise their rights in this area.

From the formal point of view, the various European countries have opted for different technical solutions in their rules on this subject:

- in some countries the rules on equal pay are incorporated into general labour statues – this is the case of the French system,

which deals with the matter in the Labour Code *(Code du travail)*[5];

- in other countries these rules are set out in statutes on equal treatment for men and women or for male and female workers that either have a general scope, or are aimed at broad categories of workers – this is the case of Portugal[6] and Italy[7];
- in still others, these matters are the object of one or more specific statutes (the case of the English[8], Norwegian[9] and Luxembourg legal systems, for example).

However, even in those countries that seek to create a more integrated set of regulations, there is a tendency towards a legislative and regulatory dispersion in this area, whereby rules are scattered among a series of different legislative and regulatory acts.

IV. We believe that these different orientations on the part of the Member States in relation to the development of the principle of equal pay for men and women for equal work or work of equal value in their legal systems (in the constitution or other legislation), should not be neglected because they can affect the visibility of the principle itself. We should remember that lack of visibility was one of the problems that the project partners raised in relation to the effectiveness of the principle.

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[5] However, it is worth mentioning that the *Code du Travail* is not a codification of the law in the strict sense of the term, inasmuch as, as is well known, it is the product of the linking of successive individual statutes.

[6] The Portuguese legal system has developed the constitutional principle of equal pay for men and women in the act governing equality and non-discrimination on the grounds of sex, as brought in by *Decree-Law no. 392/79, of 20 September 1979*, which addresses the issue of pay discrimination in article 9 and article 12, no. 2 . This statute applies to private sector workers as a whole, but not to civil servants, who are the object of a special statute – *Decree Law no. 426/88, of 18 November 1988*. Finally, the equal pay protection system is completed by Law no. 105/97 of 13 September 1997.

[7] In Italy the principle of equal pay is developed in *Law no. 903, of 9 December 1977*, on equal treatment for men and women at work (article 2), but equal pay is also referred to in *Law no. 125, of 10 April 1991*, (on positive actions to promote gender equality at work) and in *Decreto Legislativo no. 196*, of 23 May 2000.

[8] The *1970 Equal Pay Act*, but also the *1975 Gender Discrimination Act*.

[9] The *1978 Gender Equality* Act, as amended in June 2002.

Thus, where the constitutional level is concerned, given that one of the roles of constitutional rules is to provide general guidance for the legal system as a whole, we believe that any failure to recognise the equal pay principle in a Member State's constitutional laws can have negative effects on its visibility[10].

The fact is that notwithstanding the direct reliance of internal rules on the Community principle of equal pay as set out in article 141 of the TEC and the possibility of directly invoking the Community norm within the ambit of a country's internal law, the existence of an explicit constitutional provision on equal pay makes it easier for private individuals to invoke it and for the courts to apply it[11].

At the same time, if we look at the protection system's organisation at infra-constitutional level, the fragmented legislation that we find in the various countries can also be detrimental to the clarity of the principle when it comes to applying it in practice.

V. Having made these general observations, let us now highlight the solutions which have been developed by the legal systems of a number of countries – some members of the European Community, some not – and which can help to overcome the problems of the effectiveness of the principle of equal pay for male and female workers that we identified in Part II of this study: the problems of the visibility of the principle; the difficulties involved in defining the concepts that are used to operationalize the principle; the problems posed by that operationalization in practice – particularly that of proving the existence of wage discrimination; and the socio-cultural problems related to the traditional attribution of social roles to men and women.

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[10] In this respect it is possible to generalise what MARIO SERIO has said about the constitutional grounds for the equal pay protection system: that the constitutional law on this matter serves as a fundamental parameter for the whole protection system - SERIO, M., *Osservazioni sulla parità retributiva nel diritto italiano con riferimento alla tematica di genere,* (paper given within the ambit of the Project entitled "Guaranteeing Equal Pay Rights", Sintra, 7-9 November 2002, 1 *et seq.*).

[11] See ECKER, VIVIANNE / THOMAS, GUY, *Rapport sur la législation et la jurisprudence luxembourgeoise en matière d'égalité de salaire entre les femmes et les hommes,* (paper given within the ambit of the Project entitled "Guaranteeing Equal Pay Rights", Sintra, 7-9 November 2002, 1 *et seq.*), which gives an account of a judicial ruling handed down in Luxembourg, in which the court did not consider the invocation by private individuals of the general constitutional law on equality to be relevant in a case on equal pay, precisely because that law does not contain any specific reference to the subject of remuneration.

3. Increasing the visibility of the principle of equal remuneration for men and women who do equal work or work of equal value; some legislative and regulatory models

I. Lack of visibility of the principle of equal pay for men and women is the first area to pose difficulties for the principle's implementation. This lack of visibility can be found at the level of the law (particularly in the shape of the tendency for legislation and regulations to be dispersed, as we saw above), in collective bargaining (with the relegation of this topic to secondary status by both employers and workers' representatives), at company level (with a lack of awareness of the discriminatory nature of some practices), at that of the various inspection services (in terms of the lack of attention paid to this matter during inspections) and at the judicial level (in the form of the lack of sensitivity to and awareness of these problems displayed by judges and magistrates).

II. Given these multiple aspects of the problem of the visibility of the principle, we have looked at the legal systems of a number of European Union Member and other states with a view to identifying legislative and regulatory solutions that are capable of helping to increase that visibility on the various levels we have just pointed out.

3.1. The visibility of the principle of equal pay in the law – provision for the transverse nature of the principle and its inclusion in national employment plans

I. At the legal level the visibility of the principle of equal pay for men and women for equal work or work of equal value is formally ensured in the various countries by the affirmation of the principle (or reaffirmation, when it is established in the country's constitution) in the law in a format that is identical to that of article 141 of the TEC. Examples of this are the

Portuguese system *(Equality Act*, art. 9, no. 1[12]), the French system (*Code du Travail*, art. L. 140-2 § 1), the Spanish system (art. 28 of the Workers' Statute *(Estatuto de los Trabajadores)*, as approved by *Real Decreto Legislativo* 1/1995, of 24 March 1995) and the Italian system (art. 2 of *Law no. 903, of 9 December 1977 – "Equal treatment for men and women at work"*.

II. More than this affirmation or reaffirmation of the principle in labour statutes and regulations, it seems to us that two other types of legal provision, which we also found in some systems, can make a positive contribution to an increase in its visibility:

- an explicit reference to the transverse nature of the principle in the sources of the law;
- the requirement to draw up plans for the promotion of the equal pay principle and then to periodically assess and review them.

III. In various systems the transverse nature of the principle is affirmed both in the sources and in constitutional or general law and is related to the principle of equality between men and women in general, rather than specifically to the principle of equal pay (just as it is at Community level). This is the solution that we find in the Portuguese system, for example, where the Constitution includes the "promotion of gender equality (art. 9, para. h) as one of the "state's basic responsibilities".

Already significant in general terms, the transverse nature of the equal pay principle is of the greatest importance in that the adoption of a policy or concrete measure that may affect men and women in different ways must systematically consider the remuneration implications thereof. At the same time the fact that the protection of gender equality covers indirect discrimination makes this need to be attentive to the remuneration implications all the more demanding.

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[12] The text of no. 1 of article 9 of the *Equality Law (Decree-Law no. 392/79, of 20 September 1979)* reads as follows: "É assegurada a igualdade de remuneração entre trabalhadores e trabalhadoras por um trabalho igual ou de valor iguial prestado à mesma entidade patronal». No que toca aos trabalhadores públicos, o art. 6° n° 1 do *DL n° 426/88, de 18 de Novembro 1988,* dispõe em sentido idêntico.

IV. The second aspect that is potentially important to an increase in the visibility of the equal pay principle at source level concerns the establishment of the requirement to ponder the gender effects when Governments come to set the strategic outlines of their employment policies, particularly national employment plans.

To our mind, this kind of measure, which we came across in several systems, including in Portugal[13], helps to increase the visibility of the principle on condition that it provides for periodic monitoring of the implementation of the measures established in this area.

3.2. The visibility of the equal pay principle in collective bargaining: the promotion of gender equality as a mandatory element in collective bargaining agreements concerning equal treatment for men and women

I. The analysis in the earlier part of our study shows that one of the main weaknesses of legal systems as regards the protection of the principle of gender equality lies in the insufficient attention paid to the subject at collective bargaining level. Amongst other things – and namely in the case of Portugal – it is not uncommon for collective bargaining agreements to formally proclaim the principle of equal opportunities and equal treatment for men and women and then immediately establish discriminatory clauses in fields such as the definition of categories, the protection of maternity and paternity, or the definition of criteria governing pay increases, promotions and so on.

It is therefore imperative to look for legislative and regulatory solutions which go beyond the mere proclamation of the principle during collective bargaining and which contribute to its implementation in practice.

[13] In this respect, see Pillar 17 of the *2001 National Plan for Employment*, which requires the Portuguese state, in collaboration with the social partners, to adopt active policies designed to fight pay discrimination and eliminate gender pay gaps.

Of the group of systems we looked at from this perspective, we would especially highlight the French legal system, because it seems to us to be particularly complete. *Law no. 2001-397, of 9 May 2001*, recently added a whole set of rules on this subject to the *Labour Code* (art. L. 132-27).

II. The system that has now been introduced in France is founded on two complementary key ideas:

- the obligation to address the objective of achieving gender equality in the workplace in annual collective wage negotiations (*Code du Travail*, art. L. 132-27-1, as introduced by art. 6 of *Law no. 2001-397, of 9 May 2001)*; and
- the obligation to annually organise negotiations on the objectives of gender equality in the workplace, to include concrete measures designed to attain them (*Code du Travail,* art. L. 132-27, as introduced by art. 4 of *Law no. 2001-397, of 9 May 2001)*.

These core concepts are then developed in the following manner:

1. For the purposes of setting the objectives related to the promotion of gender equality in the workplace, employers must prepare an annual written report comparing the situation of the company's male and female employees in terms of general working conditions, remuneration and vocational training (*Code du Travail*, art. L. 432-3-1, as introduced by *Law no. 83-635, of 13 July 1983)*.

   Under the terms of article 1 of *Law no. 2001-397 of 9 May 2001*, as incorporated in the *Labour Code*, this report must address the following:

   a) On the one hand the report must use pertinent indicators to compare the situation of the male and female workers employed by the company. These indicators must include data broken down according to gender on the topics set out in the Law, as well as such complementary items as may be needed to assess the relative situation of the men and women employed in each occupational category as regards the areas in which they work, vocational training, promotions and professional qualifications, working conditions and actual remuneration.

Article D. 432-1 of the *Labour Code* (introduced by *Decree no. 2001-832, of 12 September 2001)* sets out the items that the report must cover in relation to each of the four areas in considerable detail[14].

b) On the other hand, the report must list the measures that have been taken over the course of the year in question to promote equal treatment for male and female workers (or provide reasons why they have not been taken) and define both the objectives in this respect for the following year and the measures that are planned to achieve them. The latter must be set out in both qualitative and quantitative terms and must be accompanied by the applicable budget. They can also include temporary positive actions in favour of women designed to

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[14] Given the practical importance of this issue, it is worth giving a brief account of the indicators which French Law has established as mandatory in order to be able to conduct a comparative assessment of the situation of men and women in companies and which must be evaluated in relation to each of the four areas that must obligatorily be covered by these reports:

1. General employment situation including data broken down by gender in relation to the following:
   - Staff numbers (including a breakdown of employment contracts by occupational category and details of the employees' ages by occupational category);
   - The duration and organisation of work (including a breakdown of staff by number of hours worked and of full-time or part-time staff; and a breakdown of the way in which work is divided up throughout the day – daytime, night-time or shift workers, those who work at weekends and any other system);
   - Suspensions of employment contracts and other absences (including a list by occupational category of the number and type of suspensions and the reasons thereof);
   - Employment contracts entered into and terminated (with data broken down by occupational category and with an indication of the types of contract signed and the reasons for the terminations);
   - The employees' positions within the company (including a breakdown of staff by occupational category and their relationship to the salary scales provided for in the applicable collective agreements);
   - Promotions (including data on the breakdown of promotions in general and the number of promotions following training actions).
2. Remuneration, where the requirement is for data broken down by gender and occupational category, to include details of remuneration formats, their average value and the number of women in the ten highest salary scales.
3. Training, where law requires data on participation in training actions broken down by gender and occupational category and by type of such action, as well as on the average number of hours spent on training.
4. Working conditions, which means the provision of general data regarding exposure to occupational risks and arduousness of the work, including the repetitive nature of the tasks, to be broken down by gender and position.

compensate for existing *de facto* inequalities (*Code du Travail*, arts. 123-3 and 123-4).

2. The participation in this process of the workers' representative bodies is ensured by the obligation to submit this report to the *comité d'entreprise* (works council) or, if none exists, to the *délégués de personnel* (union delegates), who must issue a formal opinion on it. This submission is either direct, or, in the case of companies with more than 200 employees, via the company's equality committee (*Code du Travail*, art. L. 432-3-1).
3. The information in the comparative report that is drawn up pursuant to article 432-3-1 of the Labour Code serves as the basis for the negotiations on both the question of occupational equality in the workplace and that of the measures needed to achieve those objectives, which the employer is obliged to promote, either within the ambit of the annual wage negotiations, or separately (*Code du Travail,* art. 132-27).

   If the employer does not comply with this obligation within 12 months of the previous round of collective bargaining, negotiations about this subject become obligatory whenever requested by a representative trade union.
4. If agreement is not reached, once it has consulted the works council (or in its absence, the union delegates), the employer can initiate the professional equality plan established in the report, particularly the positive action measures, on its own initiative (*Code du travail*, art. 123-4).
5. Any collective bargaining agreement which is adopted by a company and which establishes objectives and measures intended to promote gender equality in the workplace must be reviewed within three years (*Code du Travail,* art. 132-27, as revised by *Law no. 2001-397, of 9 May 2001*).
6. The law also provides for the possibility for companies with less than 300 employees to enter into an agreement with the state (called a "*contrat pour l'égalité professionnelle*" – occupational equality contract) whereby the latter helps fund a study to assess the comparative situation of employees of the two sexes in the company and the implementation of measures designed to correct any *de facto* inequalities (*Code du Travail*,

art. L. 123-4-1, as introduced by *Law no. 89-488, of 10 July 1989*, and arts. D. 123.1 to D. 123-11, as introduced by *Decree no. 92-953, of 1 April 1992* and amended by *Decree no. 2001-1035, of 8 November 2001).*

III. What is our assessment of the legislative and regulatory solution we have just described? In our opinion this type of situation makes an effective contribution to practical implementation, and to an increase in the visibility of the principle of gender equality, particularly as regards equal pay. We say this for a number of reasons:

- firstly, the fact that it is obligatory to consider the question of gender equality in the annual wage review of the various collective bargaining agreements, and to an even greater extent, that it is obligatory to hold collective negotiations about gender-equality matters, of itself has the pedagogic effect of making the social partners aware of this issue. Given the observation that we made in the previous chapter, whereby both companies and employees' representatives find it difficult to attach priority to this subject, this pedagogic effect is of the greatest interest;
- secondly, the requirements concerning the content of the company reports on this question (particularly their comparative structure and the mandatory nature of the quantitative indicators in the various areas mentioned above) increase the visibility of any existing wage discrimination and particularly facilitate the identification of indirect discrimination, as well as generically making it easier to prove the existence of discriminatory situations as a whole;
- at the same time, the requirement to periodically review the terms of collective bargaining agreements in this respect guarantees the necessary monitoring of the measures that have been implemented, and, based on that monitoring, makes it easier to adapt the agreements to new needs and to make corrections to them;
- lastly, the provision for state intervention in the matter – particularly in the shape of partial public funding – highlights the public importance of the objective of promoting equal opportunities and equal treatment for male and female workers, which in turn has direct effects on the remuneration aspect of the principle.

IV. As far as the Portuguese legal system is concerned, it should be noted that the adoption of a system of this kind could contribute to very substantial qualitative changes in the field of equal pay for men and women, inasmuch as for many years most annual reviews of collective agreements have merely considered the question of wages. Making it obligatory to consider the issue of gender discrimination as part of the review of the wages element of collective agreements, as well as during the overall reviews of the agreements, could thus immediately lead to some far-reaching results.

What is more, it seems to us that from a technical point of view there is nothing in our system that would preclude the introduction of this subject as a mandatory element in the periodic review of collective agreements. The fact is that in Portugal, although the content of collective agreements is only determined in negative terms – i.e. by subjecting collective bargaining to a number of limitations (set out in art. 6 of the LRCT) – this does not mean that it would not be possible to oblige negotiators to consider certain issues as part of the collective bargaining process. In this particular case the public interest, as the Constitution (art. 9, para. h)) provides that the promotion of gender equality is one of the state's basic responsibilities, would be sufficient grounds for the adoption of this type of regime.

3.3.The visibility of the equal pay principle in companies

I. Having seen in the previous part of our study that the principle of equal pay for men and women lacks visibility within businesses themselves, both because of the lack of awareness of the discriminatory effects of certain employer practices and because employees commonly feel that there is a certain inevitability about the differential treatment of male and female workers, in our comparative research we sought to ascertain the extent to which states have taken measures to increase the visibility of this topic within companies.

II. Here again we highlight the French legal system, which provides for several measures intended to reinforce the efficiency of the duty to draw up reports and plans designed to promote occupational equality between

men and women referred to above. To our mind, these measures also help to increase the visibility of this subject within businesses, both where employers are concerned and among employees and their representatives.

Without trying to present an exhaustive list, we would particularly point out the following measures adopted by the French system:

1. The obligation to communicate the report on occupational equality between men and women to the works council and the trade union representatives (*Code du Travail,* art. L. 432-3-1, as revised by *Law no. 2001-397, of 9 May 2001*).
2. The obligation to notify employees of the criteria that govern the contents of the above-mentioned report, either by publicly displaying them in the company, or by some other suitable means (*Code du Travail,* art. L. 432-3-1, as revised by art. 3 of *Law no. 2001-397, of 9 May 2001*).
3. In companies with more than 200 employees the *comité d'entreprise* must include a committee with a specialised responsibility for gender equality. This committee is the body that issues a formal opinion on the equality report (*Code du Travail,* art. L. 434-7, as revised by art. 14 of *Law no. 2001-397, of 9 May 2001*).
4. Any worker is entitled to consult the report on occupational equality between men and women (*Code du travail,* art. L. 432-3-1, as revised by *Law no. 2001-397, of 9 May 2001*).

3.4. The visibility of the equal pay principle in the administrative and judicial services

I. Inasmuch as the equal pay principle is also greatly lacking in visibility among the administrative services of the labour inspectorate and the courts, as part of our comparative analysis we used the partners' answers to the questionnaire to identify rules and practices that have been developed by the various legal systems we have considered that may contribute to create awareness of the principle in these areas.

II. Although this analysis bore little fruit, we nevertheless feel that the following measures, which we came across in some legal systems and which can make a contribution in the desired direction, are positive:

1. In general terms, the provision by several legal systems for administrative bodies with specific competence in the field of equal opportunities and equal treatment for men and women in labour and in employment. One example of this is the Portuguese legal system, which has created a tripartite body (with state, employers and workers' representatives) with competence in the area of gender equality in labour and employment[15].

   However, it is necessary to bear in mind the fact that it is difficult for this kind of body to have the competence to act specifically in the equal pay area[16].

2. Where inspection departments are concerned, the legal obligation on companies to provide the Labour Inspectorate (IT) with copies of both the annual reports on equal treatment for men and women and the formal opinions that the workers' representatives issue thereon, within 15 days of each document's completion – a rule that the French legal system established as a complement to the obligation to draw up reports on this subject, as described above (*Code du travail,* art. L. 432-3-1).

3. Where both inspection and judicial bodies are concerned, access to company records in order to carry out assessments in proceedings involving discriminatory issues, and the obligatory existence of such records (which must break data down by gender) in the first place (Portuguese legal system, arts. 6 and 7 of *Law no. 105/97, of 13 September 1997*).

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[15] The Commission for Equality in Labour and Employment (CITE), which was created by the *Equality Act – Decree-Law no. 392/79*, article 14. For more about the Commission's activities, specifically in the equal pay area, see MENEZES LEITÃO, M. JOSEFINA, *A CITE e a sua intervenção na aplicação da legislação sobre igualdade salarial,* Presidency of the Council of Ministers and Ministry of Social Security and Labour, Lisbon, November 2002.

[16] This is the case with the Commission for Equality in Labour and Employment (CITE) in Portugal.

4. Reducing the difficulties involved in defining the concepts that underlie the operationalization of the principle of equal pay for men and women for equal work or work of equal value: some legislative and regulatory solutions

4.1.Sequence

I. The diagnosis we made in the previous part of the study revealed that one of the main areas of difficulty when it comes to implementing the equal pay principle results from the problems that are encountered when one tries to integrate the various concepts, which operationalize the principle itself: the concept of remuneration or pay; the concepts of direct and indirect discrimination; and the concepts of equal work and work of equal value. Our analysis also showed that of all these concepts, those that arouse the greatest difficulties are the concept of work of equal value and that of indirect discrimination.

II. In our comparative research we therefore sought to determine to what extent the various states have developed these concepts and, above all in relation to the two concepts that are proving hardest to grasp, the point to which criteria that increase their practical operationalization have been tested.

We will now present this research's results in relation to each of the key concepts behind the equal pay principle.

4.2. The concept of remuneration, for the purposes of applying the principle of equal pay for men and women

I. Despite everything, of all the key operational concepts behind the principle of equal pay for men and women for equal work or work of equal value, the concept of remuneration or pay itself was the one which we found to be most uniformly handled by the various legal systems.

II. In this respect various legal systems transcribe the concept of remuneration as set out in article 119° § 2° of the Treaty of Rome (art. 141 of the ECT) and award it the same broad content as Community law. This is the case, amongst others, of the Portuguese legal system (para. c) of article 2 of the *Equality Act – Decree-Law no. 392/79, of 20 September 1979*[17]), the French system (*Code du travail*, art. L. 140-2), the German system (§ 612 III of the BGB)[18], the Belgian system (art. 4 of *CCT no. 25, of 15 October 1975*, and the *Law of 4 August 1978* concerning civil servants[19]), the Spanish system (*Workers' Statute*, art. 28 *in fine*) and the Luxembourg system (*Grand Duchy Regulation of 10 July 1974*)[20].

The Anglo-Saxon legal systems also recognise the far-reaching content of the concept of remuneration when used to determine the existence of discrimination practices, both by directly invoking Community law and by means of the creation of case-law precedent by rulings in discrimination cases handed down by the Court of Justice. In this respect, for example, the British legal system has considered that the *Equal Pay Act* applies to discrimination involving both wages themselves and wage supplements[21]; while in Ireland the broad scope of the concept of remuneration was expressly stated in section 1(1) of the *1974 Anti-Discrimination (Pay) Act*[22] and is now included in identical terms in the *1998 Employment Equality Act*, which replaced the 1974 statute.

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[17] Para. c) of article 2 of *Decree-Law no. 426/88, of 18 November 1988* sets out the same provisions for civil servants.

[18] For confirmation of the broad extent of the concept of remuneration for this purpose in the German system, see BERTELSMANN, K. / RUST, U., *L'égalité juridique entre femmes et hommes dans la Communauté européenne - Allemagne*, European Commission, Brussels, 1994, 33.

[19] For confirmation of the broad extent of the concept of remuneration for this purpose in Belgian law, see PICHAULT, C., VOS, DOMINIQUE DE, HERBERT, F., JACQMAIN, J., *L'égalité juridique entre femmes et hommes dans la Communauté européenne - Belgique*, European Commission, Brussels, 1994, 36.

[20] For confirmation of the broad extent of the concept of remuneration for this purpose in Luxembourg law, see ECKER, V., THOMAS, G., *Rapport sur la législation et la jurisprudence luxembourgeoises*...op. cit., 6.

[21] In this respect, for information on English law, see McCRUDDEN, C., *L'égalité juridique entre femmes et hommes dans la Communauté européenne - Royaume-Uni*, European Commission, Brussels, 1994, 37.

[22] The legal theory observes that this notion has been interpreted in a broad sense – for example, see CALLENDER, R. / MEENAN, F., *L'égalité juridique entre femmes et hommes dans la Communauté européenne - Irlande*, European Commission, Brussels, 1994, 45 and 151.

III. While still on the subject of this operational concept, it should be borne in mind that in some legal systems its implementation may be problematical for another reason: i.e. the need to make it compatible with other concepts of remuneration in cases in which there is an equal pay principle with a general scope, but where the protection provided cannot be the same, precisely because of the less far-reaching content of the concept of remuneration.

This is a problem that arises in the Portuguese legal system, where the general principle of "equal work, equal pay" established in the Constitution (art. 59, no. 1, para. a)) has only been applied to salary itself and therefore does not include other benefits to which an employee is entitled by his/her employment contract.

In our opinion the solution to this problem will have to include clear recognition of the differences between the content of the concept of remuneration when applied to situations of gender-based discrimination on the one hand, or those based on some other reason on the other – a move that would naturally also bring with it a recognition of the different levels of protection provided in the different situations[23].

4.3. The concepts of direct and indirect discrimination

I. As we can see from our diagnosis in the first part of this study, there are some variations in the understanding of the concepts of direct and indirect discrimination. To the extent that they make it harder to detect discriminatory situations, these differences contribute to making the equal pay principle less effective.

We therefore concentrated our comparative analysis on a search for legislative and regulatory solutions that help to clarify these concepts. In doing so, we primarily concerned ourselves with the clarification of the

[23] For the Portuguese legal system, especially as regards the need to distinguish between the concept of remuneration applied to pay discrimination on the grounds of gender or some other motive, see M. R. PALMA RAMALHO *Igualdade de tratamento entre trabalhadores e trabalhadoras em matéria remuneratória*, cit. et passim.

concept of indirect discrimination, which the project partners had said was the most difficult to put into practice.

II. The assessment made from this point of view enabled us to conclude that most legal systems have developed the concepts of direct and indirect discrimination in ways that coincide with Community law, but that only a few of them include rules that help to concretely define discriminatory practices, particularly where indirect discrimination is concerned.

At the same time, in some countries these concepts are laid out in formal terms, while in others they either derive from the conjugation of a variety of provisions or are developed from case law.

The concepts of direct and indirect discrimination are thus formally present in the law of various legal systems: this is the case of the Portuguese system (for the concept of gender discrimination in general, see para. a) of art. 2 of the *Equality Act*, which is applicable to workers in general, and para. b) of art. 3 of *Decree-Law no. 426/88* for civil servants; for that of indirect discrimination, see art. 2 of *Law no. 105/97, of 13 September 1997*); the Italian system (art. 1 of *Law no. 903, of 9 December 1977 – "Equal treatment for men and women at work"*[24] and art. 4 of *Law no. 125, of 10 April 1991 – "Positive actions for achieving gender equality at work"*[25]); and the Irish system, which goes quite a long way in addressing the concept (*Employment Equality Act 1998*, Section 19 (4)).

In other systems these concepts are not formally defined, but rather derive from the conjugation of various legal provisions that prohibit discriminatory treatment on the grounds of gender, marital status or

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[24] This article reads as follows: *«È vietata qualsiasi discriminazione fondata sul sesso per quanto riguarda l'accesso al lavoro, indipendentemente dalle modalità di assunzione e qualunque sia il settore o il ramo d'attività, a tutti i livelli della gerarchia professionale. La discriminazione di cui al comma precedente è vietata anche se attuata: 1) attraverso il riferimento allo stato matrimoniale o di famiglia o di gravidanza; 2) in modo indiretto, attraverso meccanismi di preselezione ovvero a mezzo stampa o con qualsiasi altra forma pubblicitaria che indichi come requisito professionale l'appartenenza all'uno o all'altro sesso».*

[25] This article reads as follows: *«1. Costituisce discriminazione, ai sensi della legge 9 dicembre 1977, n. 903, qualsiasi atto o comportamento che produca un effetto pregiudizievole discriminando anche in via indiretta i lavoratori in ragione del sesso. 2. Costituisce discriminazione indiretta ogni trattamento pregiudizievole conseguente alla adozione di criteri che svantaggino in modo proporzionalmente maggiore i lavoratori dell'uno o dell'altro sesso e riguardino i requisiti non essenziali allo svolgimento dell'attività lavorativa».*

family situation (this is the case of the French system, for example[26]) or from the application of case law and the application of the Community principle (this is the Belgian system's stance in relation to this issue[27]).

III. An assessment of the various notions of direct and indirect discrimination encountered reveals that the greatest difficulties occur in the delimitation of the concept of indirect discrimination, due to the fact that the latter refers to aspects which are hard to define in practice.

It therefore seemed to us that it would be particularly useful from the point of view of the practical operationalization of this aspect of discrimination law to take two aspects – which we came across scattered in the laws and regulations of some of the legal systems we looked at – into account when the concept is defined. These aspects develop the notion of indirect discrimination as stated in Community law – currently article 2 (2) of Directive 97/80/EC on the burden of proof in cases of discrimination based on sex; article 2 (2 b) of Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, article 2 (2 b) of Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation and the recent Directive 2002/73/EC of 23 September 2002, amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions.

- on the one hand, statistical data, such as evidence of the disproportionate allocation of workers of each sex as a result of a measure that is apparently neutral from the gender standpoint;
- on the other, recognition of presumptions or indications of discrimination based on this type of factor.

In any case, the fact is that our comparative analysis did not reveal any very effective solutions that would improve the ways in which these concepts are operationalized.

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[26] In this respect, for the law in France see LANQUETIN, M.T., PETTITI, C. and SUTTER, C., *L'égalité juridique entre femmes et hommes dans la Communauté européenne - France*, European Commission, Brussels, 1994, 17 *et seq.* and 22 *et seq.*

[27] For the Belgian law in this respect, see PICHAULT, C., VOS, DOMINIQUE DE, HERBERT, F., JACQMAIN, J., *L'égalité juridique entre femmes et hommes dans la Communauté européenne – Belgique, cit,* 19 *et seq.* and 23 *et seq.*

4.4. The concepts of equal work and work of equal value: general observations; the Quebec model

I. The diagnostic analysis we carried out in the previous chapter leads us to conclude that the key concepts in the operationalization of the principle of equal pay for men and women that are most difficult to grasp and implement are that of equal work, and above all, that of work of equal value. This is due to the difficulties involved in assessing two people's jobs and comparing the work they do, particularly as the work in question is by definition materially different.

At the same time, so far as the concept of equal work is concerned, it is important to bear in mind that in addition to being a key concept when it comes to operationalizing the equal pay principle for the job evaluation of individual workers and comparing their performance, it is above all the key concept used in the detection of situations involving pay discrimination between the various occupational categories that have resulted from the gender segregation of the labour market (i.e. the so-called cases of systemic pay discrimination), which has been recognised – including by this project partners – as one of the factors responsible for the wages gap between men and women in general. The operationalization of this concept is thus doubly important.

In our comparative analysis we therefore sought to identify the extent to which solutions that assist the implementation of these concepts – especially that of work of equal value – and ensure the development of neutral job assessment and comparison.

II. This analysis enabled us to draw the following conclusions:

1. Besides restating the Community principle of equal pay for equal work and work of equal value, various legal systems take care to formally define the latter concepts in the law. Examples include the Portuguese legal system, which defines the two concepts in paras. d) and e) of article 2 of the *Equality Act*[28]; the French system, which defines equal work in article L. 140-2 of the *Labour Code*; the Irish system, which develops the concept of "like work" in Section 7 of the 1998 *Employment Equality Act*; and the Norwegian system, which sets out the concepts of

[28] For the identical treatment of civil servants in Portugal, see paras. d) and e) of article 3 of Decree-Law no. 426/88.

"equal work" *and* "work of equal value" in Section 5 of the *Gender Equality Act.*

2. The notions of equal work and work of equal value are generally underpinned by elements that are vague and hard to integrate. For examples of this, let us look at a number of references:

   - regarding the concept of equal work: the Portuguese legal system resorts to the idea of "tasks that are equal or objectively of the same nature" (para. d) of art. 2 of the *Equality Law*[29]), and when comparing those tasks, refers to the "intensity, quality and quantity" of the work done (para. a) of art. 59 (1) of the CRP) – notions that are by nature vague and must be integrated on a case-by-case basis[30];
   - regarding the concept of work of equal value: the Portuguese system resorts to the idea of "tasks that are of different nature (...), but are equivalent if one applies objective criteria to the evaluation of the jobs concerned". However, it does not define those criteria[31].

   Only a few systems refer to more objective elements in order to define these notions – this is the case of the way in which the French system handles the notion of work of equal value by drawing on indicators such as academic qualifications, diplomas and professional practice, together with experience, the degree of responsibility and the intensity of the physical and/or nervous effort involved (*Code du travail,* art. L. 140-2,

[29] The formula that the Portuguese legal system employs to define the concept of equal work is as follows: trabalho igual é «o trabalho prestado à mesma entidade patronal, quando as tarefas desempenhadas são iguais ou de natureza objectivamente semelhante".

[30] Inasmuch as court actions are rarely brought on the grounds of gender discrimination, Portuguese case law has integrated these notions in the application of the constitutional principle of equal pay (which has a general scope and thus covers discrimination, be it based on gender or other factors) to cases of pay discrimination for reasons other than gender. See M. PAULA SÁ FERNANDES, *Projecto "Garantir os Direitos em matéria de Igualdade Salarial no âmbito do V Programa de Acção para a Igualdade de oportunidades promovido pela Comissão Europeia" - Recolha de alguma Jurisprudência Portuguesa sobre a aplicação do principio constitucional "Para Trabalho Igual Salário Igual"*, Lisbon, CEJ, 2002.

[31] The Portuguese legal system uses the following formula to define work of equal value: "trabalho prestado à mesma entidade patronal, quando as tarefas desempenhadas, embora de diversa natureza, são consideradas equivalentes em resultado da aplicação de critérios objectivos de avaliação de funções» (paras. d) and e) of article 2 of the *Equality Law.*

para. 3[32]); it is also the case of the Irish system, which considers work to be "equal in value" when it requires the same skills, physical and/or mental effort and responsibility (*Employment Equality Act 1998*, Section 7 c)); and of the Norwegian system, which subjects the concept of "work of equal value", as provided for in Section 5 of the *Gender Equality Act*, to the factors of effort, responsibility and working conditions, but also observes (since 2002) that the principle of equal pay for equal work or work of equal value can be applied even if the work is done in different sectors of business or occupations and the wages in question are established by different collective labour agreements [33].

3. Like Community law, most of the systems link this subject to the workers' integration into occupational categories and to the latter's description, as well as to job evaluation. They require that all this be done in accordance with criteria that are the same for both sexes and are neutral from a gender point of view, and that comparisons of performance be similarly neutral. This is the case of French law (*Code du travail*, art. L. 140-3), the Portuguese system, (sub-arts. Nos. 2 and 3 of art. 9 of the Equality Act), the Belgian system (art. 3 of *CCT no. 25 cit.*), the Italian system (art. 2 of *Law no. 903, of 9 December 1977 – "Equal treatment for men and women at work"*) and the Luxembourg system (*Règlement grand-ducal of 10 July 1974*)[34]
4. However, only a few systems clearly establish objective factors that must be taken into account when occupational categories are defined and the performance of workers is evaluated. In these cases, the impression is that this topic is considered to be something that belongs exclusively to the human-resource management realm – an area in which the Law's ability to intervene is limited.

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[32] French law uses the following concept for work of equal value: *«Sont considérés comme ayant valeur égale les travaux qui exigent des salariés un ensemble de connaissances professionelles consacrées par un titre, un diplôme ou une pratique professionelle, de capacité découlant de l'expérience acquise, de responsabilités et de charges physique ou nerveuse».*

[33] On this point, see especially Lars CHRISTENSEN, *Equal Pay in Norway - An Introduction*, cit., 4.

[34] For the Luxembourg law on this point, see V. ECKER, and G. THOMAS, *Rapport sur la législation et la jurisprudence luxembourgeoise ...*, cit., 8.

III. From our analysis of all the systems we looked at with a view to assessing the operationality of the concept of equal work and thus an increase in the effectiveness of the equal pay principle, one example does show that it is possible for the law to play a substantial role in this area: that of the model that the government of Quebec (Canada) has put into place in the form of the *Loi sur l'Équité Salariale* (Pay Equity Act), which has been in force since November 1997. Although this law provides for a very complete system for promoting equal pay, we have chosen to consider it within the context of the job evaluation and operationalization of the concept of work of equal value because it is in this particular respect that its contribution to an increase in the effectiveness of the equal pay principle appears to us to be especially valuable.

Before we consider the system created by this law, it is appropriate to make two general observations about the statute:

- The first concerns the operational concept to which this law resorts and which evinces a different perspective on the equal pay principle – which is particularly suited both to equality for work of equal value and to the eradication of systemic forms of discrimination: the concept of *pay equity*.

  In our opinion this is not a question of mere wording, because the concept of equity helps to define the frontier between the material equality of the work done (which is at stake in the principle of equality for equal work) and the equivalence of value attached to different types of work (which involves the principle of equal pay for work of equal value) more clearly.
- Our second general observation concerns the ample scope of this legal regime – it only excludes companies with less than 10 employees[35] and even the latter are required to comply with the provisions of the *Charter of Human Rights and Freedoms*. It is thus a regime that has a general scope, although it does make provision for certain differences in the way in which smaller businesses are treated.

[35] The law does not apply to federal companies either, inasmuch as it is a state-based measure. However, we have not mentioned this exclusion in the main text because it arises from Canada's federative structure.

Having made these general observations, we shall now consider the main outlines of this law. In schematic terms we can say that in order to promote pay equity, this system subjects businesses to three types of duties, which vary depending on the company's size:

1. The duty to redress differences in compensation between men and women (applicable to all companies with more than 10 workers, to include both full- and part-time staff, whatever form their employment contracts may take) – articles 6, 8 and 9[36];
2. The duty to draw up and implement a pay equity plan (mandatory for companies with more than 50 employees and optional for those with between 10 and 49);
3. The duty to create a pay equity committee (mandatory for companies with more than 100 employees and optional for those with between 10 and 99).

It is worth looking at these duties in greater detail ...

IV. The duty to create a pay equity committee ensures that the company's employees participate in the process. The law also goes into some detail in addressing the problems of the committee's composition and responsibilities (arts. 16, 17, 24, 26 31, 53, 56, 59 and 69):

- composition: the pay equity committee shall be composed of not less than three members, 1/3 of whom represent the employer and 2/3 the employees; 50% of the employee representatives must be women, and as far as possible, all the main occupational categories present in the company must be represented;
- responsibilities: the pay equity committee takes part in drawing up the pay equity plan described below and has the competence to take decisions during the first three stages and the right to be consulted during the last one.

[36] The only people who do not count as company staff in this respect are students who work there for training purposes during the academic year, students who work there during the academic holidays, trainees who work there within the framework of a certified vocational training action, certain beneficiaries of labour market integration measures – the disabled, for example, senior management officers, police officers and fire fighters and independent workers. A company's size is determined by the average number of staff who worked for it in the twelve months prior to the date on which the law took effect.

V. The rule is that the pay equity plan must be applicable to all the company's staff, although the law does make provision for the option to apply special plans to certain categories of worker or to different establishments, if justified by regional differences (arts. 10, 11, 31, 32 and 34).

The law establishes four stages for the implementation of the pay equity plan:

> Stage 1 – identify predominantly female job classes and predominantly male job classes in the company.
>
> Stage 2 – select the method and tools to determine the value of the job classes and draw up an intervention plan (this phase includes the posting of the methods and the plan so decided).
>
> Stage 3 – determine the value of job classes and evaluate the differences in compensation.
>
> Stage 4 – fix the terms and conditions of payment of compensation adjustments (includes the posting of the results and the monitoring of the system in order to ensure that pay equity is maintained in the future).

Each of these stages is subject to detailed regulations, which we will briefly summarise due to their interest for the subject of this paper:

1. Stage 1, which is designed to identify predominantly female job classes and predominantly male job classes in the company, includes two operations (arts. 53, 54, 55 and 60):
   a) Identifying predominantly female job classes and predominantly male job classes by grouping together jobs that have the following characteristics in common:
      - similar duties or responsibilities;
      - similar required qualifications;
      - the same remuneration, that is, the same rate or scale of compensation.

   b) Determining if a job class is predominantly female or predominantly male. To this end the law provides a series

of indications, namely a job class shall be considered predominantly female or predominantly male:

- if 60 % or more of the positions in that class are held by employees of the same sex;
- if the difference between the rate of representation of women or men in the job class and their rate of representation in the total workforce of the employer is considered significant;
- if the historical incumbency of the job class in the enterprise indicates that it is a predominantly female or predominantly male job class;
- if, owing to gender stereotypes of fields of work, the job class is commonly associated with women or men.

2. Stage 2, which serves to determine the value of each of the regrouped job classes, entails the choice of the method and tools for that purpose and the drawing up of an intervention plan, as follows (arts. 51, 56 and 57):
   a) Assessment method: the law requires it to reduce the degree of subjectivity in this process as far as possible and to take four factors (which can in turn be broken down into lesser ones) into account:
      - Required qualifications;
      - Responsibilities;
      - Effort required;
      - The conditions under which the work is performed.

      The law also requires the method to be able to effectively compare predominantly male and female job classes and to highlight their most obvious characteristics.
   b) Assessment tools: the law provides for a large number of tools, such as the use of questionnaires, interviews, etc.
   c) Draw up the intervention plan: integrates the two previous operations and must provide for both the methods that are to be used and a schedule for the actual

intervention. The law requires that neither the assessment method, nor the assessment tools, nor the programme itself can be discriminatory.

d) This stage also includes the posting of the results of the process so far (arts. 75 and 76), to be accompanied by a statement of the right to obtain clarifications within a certain period of time. Either the pay equity committee or the employer must consider any observations that are made as a result and possibly alter the programme to respond to them.

3. Stage 3, which is intended to determine the value of each predominantly female job class and of each predominantly male job class and evaluate the differences in compensation, includes two operations:
   a) Determine the value of job classes: the law requires that this assessment be directed at the job classes themselves and not at the people who belong to them; moreover, it must be conducted in accordance with criteria that are objective and free from gender-discriminatory factors (arts. 51 and 59).
   b) Evaluate the differences in compensation: three phases:
      - Determine the remuneration in each job class – in this respect the law is based on a broad concept of remuneration, which includes elements that vary depending on output, competence or other factors, as well as any non-wage benefits received by the worker in relation to assistance with the coverage of social risks, pensions, tools or other instruments supplied, risk allowance, meal or transport allowances, etc.);
      - Compare predominantly female job classes and predominantly male job classes: on an overall basis (compare all the job classes and draw up an earning curve) or on an individual basis (compare those job classes of equal value occupied mostly by men or mostly by women).

The comparison operation must exclude certain factors that can give rise to differences (length of service, for example).

The law also provides for overcoming the absence of a comparable job class in which the other sex is predominant by comparing the job class that does exist in the company with one of a number of standard job classes.

- Determine any pay adjustments required to eliminate differences; these adjustments are not retroactive and cannot be achieved by reducing the remuneration of the higher-paid employees.

4. The 4th and last stage involves defining the terms and conditions of payment of compensation adjustments that may have been decided at the end of the previous stage and putting them into practice (arts. 1, 69 and 73) – these are determined by the employer, who must first consult the pay equity committee, if one exists.

   This stage is divided into three phases:

   - Posting the results of the four stages of the pay equity plan and make provision for complaints at this point too (arts. 35, 75 and 76);
   - Payment of adjustments: instalments are annual and equal in amount. They may be spread over a period of four years, which may then be extended for a further three years in the case of proven financial difficulties; failure to pay any of the instalments or delay in doing so entitles employees to the payment of compensation (arts. 39, 70, 71 and 72);
   - The obligation to maintain pay equity in the future: the law requires the employer to make its best efforts to maintain the new wage equity, as well as to take it into account when hiring new staff or revising collective labour agreements (arts. 40, 42 and 43).

VI. We consider that the system described above is particularly complete and can be very effective, above all in the fight against both direct and indirect systemic pay discrimination because:

- this is a very rigorous system that makes it easier to detect situations in which there is systemic discrimination;
- it has the advantage of directly involving those with an interest in the problem, given that it is essentially a self-regulated system (as we have seen, the intervention of the administrative authorities – in this case the *Commission pour l'équité salariale du Gouvernement du Québec* – is merely residual), which means that it is consensual and contributes to its effectiveness;
- at the same time, by focusing directly on the company, the system makes it possible to overcome the traditional reservations that both trade unions and employers' organisations feel in relation to this subject – an issue that the project partners saw as one of the obstacles to the practical implementation of the equal pay principle;
- when considered from another point of view, addressing the problems of pay discrimination from this perspective also makes it possible to overcome the difficulties traditionally encountered in the denunciation of individual cases of discrimination, for fear of retaliation by the employer;
- if we specifically consider the integration of the concept of work of equal value, we can see that this systemic approach also offers a major step forward;
- finally, we believe that although it is primarily aimed at systemic pay discrimination, this regime also has positive consequences at the individual level.

To our mind these reasons justify at least giving some more in-depth consideration to the possibilities of adopting a solution of this kind as part of the European legal framework, even though we are fully aware of the financial costs that this would entail for businesses and the difficulties that could arise as a result of the social partners' failure to participate in the system, which is contrary to European tradition.

5. Increasing the operationalization of the equality rules on both the practical and the procedural levels – some legislative and regulatory solutions

I. Another problematic aspect of the implementation of the equal pay principle – which was confirmed by our diagnostic analysis – concerns the difficulties involved in operationalizing the equal pay rules, particularly when it comes to proving the existence of such situations and the rapid eradication thereof.

We therefore researched the various legal systems with a view to identifying the solutions developed in order to reduce these difficulties.

Our analysis emphasises four types of measure, which we feel can contribute to achieving the desired objectives:

- Solutions which act directly at collective agreement level and which entail the annulment of discriminatory clauses and their automatic replacement by the most favourable pay treatment, as well as directly linking this subject to the clauses concerning categories;
- Measures which operate at a procedural level and the conjugation of which can work towards the same end – the most significant of these are rules of evidence, presumptions of discriminatory treatment and more favourable procedural rules;
- Also at procedural level, the creation of courts with specific competence in the area of equality;
- Measures that ensure the protection of employees who wish to exercise their rights in this matter.

We shall now consider this type of measure in greater detail ...

II. At the collective agreement level, the solution that makes the best contribution to an increase in the effectiveness of the principle (which was encountered in various legal systems) is that of the nullity of clauses in agreements which provide that men and women who do equal work or work of equal value be treated differently in terms of remuneration. This is the case in Portugal (sub-art. no. 2 of art. 12 of the *Equality Act*) and

France (*Code du Travail*, art. L. 140-4), for example. Some systems go to the trouble of adding to the nullity of such clauses by specifically stating that they "do not have any effect", or that the nullity is an "absolute entitlement" (this is the case of the French system).

We consider that only the automatic nullity of these clauses is commensurate with the importance of the equal pay principle, given that this expresses the legal condemnation of this type of practice which is stringent enough to prevent the discriminatory situation from being validated merely as a consequence of the passage of time – something that might happen if such clauses were merely voidable. We therefore consider that it is particularly important that the consequence of this type of clause be that the same is void rather than voidable.

However, we consider that the practical operationalization of this solution also depends on its being complemented by two other measures, one prior to the moment at which the discrimination is identified in the collective agreement and the other subsequent thereto – something that was not encountered in all the legal systems considered:

a) On the one hand the efficacy of the solution entailing the nullity of any discriminatory pay clauses in collective bargaining agreements depends on the conjugation of these clauses with those that define occupational categories in the collective agreement in question. This is because of the ease with which it is possible to avoid the equal pay principle beforehand by integrating male and female workers into formally distinct occupational categories, solely for this purpose. In addition to stating the principle, it is thus necessary to ensure that the description of each occupational category is itself neutral from a gender point of view and that the way in which workers are included in the various categories obeys rules that are gender-neutral.

   To this end, we consider very interesting the solution that we observed in a number of systems, whereby a direct link is established between the nullity of collective labour regulation instruments and the distribution of workers among the various occupational categories in the collective instrument itself – this is the solution adopted by the Portuguese legal system, for example (sub-art. no. 2 of art. 12 of the *Equality Law*).

b) On the other hand, the effectiveness of the solution of the nullity of discriminatory clauses in collective agreements would be greater if it were to be accompanied by a mechanism that ensured the rapid establishment of the desired situation of equality. The solution that appears to best achieve this objective, which was encountered in a few systems, is the automatic replacement of the less favourable pay treatment arising from the discriminatory clauses (which are *per se* null and void because they are discriminatory) with the more favourable treatment of those workers of the other sex who do equal work or work of equal value.

   The Portuguese legal system includes a solution of this type, which is worded as follows: when a collective agreement provides for lower remunerations for women in the same or equivalent occupational categories, the clauses concerned are null and void and the remuneration in question is automatically replaced by the higher remuneration established for men no. 2 of art. 12 of the *Equality Act*). The French system acts in the same way (*Code du travail*, art. L. 140-4, para. 2).

III. On the procedural plane the solutions found to be most widespread in the various legal systems concerned the allocation of the burden of proof, either in line with, or as a further development of Council Directive 97/80/EC.

The Portuguese system thus provides for the sharing of the burden of proof in pay-related matters. According to this system the female worker must provide grounds for her allegation of discrimination by referring to the male worker or workers in comparison to whom she feels herself to be discriminated, while the employer must prove that the differences in remuneration are based on one or more factors that do not involve gender. no. 4 of art. 9 of the *Equality Act*); in proceedings brought by trade unions in accordance with their direct procedural legitimacy (which we consider below) the burden of proof is completely reversed (art. 5 of *Law no. 105/97, of 13 September 1997*). The French system also enshrines a system in which the burden of proof in pay-related proceedings is inverted – the worker must plead facts to sustain the alleged discrimination, while the employer must prove that the differential treatment is based on objective, non-discriminatory grounds (*Code du travail*, para. 5 of art. L. 123-1, as applied pursuant to art. L. 140-8 and

introduced by *Law no. 2001-1066, of 16 November 2001*[37]. The Italian system also contains a proof-sharing solution (sub-art. no. 5 of art. 4 of *Law no. 125, of 10 April* 1991 – "*Positive actions for achieving gender equality at work*").

In addition to these burden of proof rules, in the procedural domain, two other rules developed by the Portuguese legal system and one encountered in the northern European countries should be noted.

The Portuguese rules are as follows:

- Trade unions are granted direct procedural legitimacy to bring proceedings in this area, not only on behalf of workers who feel themselves to be individually discriminated against, but also in direct terms – i.e. without any representative cause, whenever indications of discriminatory practices exist. This solution is adopted by art. 4 of *Law no. 105/97, of 13 September 1997*).
- For the purpose of bringing such actions, a "significant disproportion between the percentage of workers of one sex in a given employer's service and the percentage workers of the same sex in the branch of activity as a whole is evidence of the existence of discriminatory practices" (art. 3 of *Law no. 105/97, of 13 September 1997*).

The following are the rules encountered in the Norwegian and Irish legal systems, which we consider can help to increase the effectiveness of the principle of equal pay for men and women in this procedural domain:

- The creation of an Equality Ombudsman with specific powers and particularly procedural powers in this area (this is the system we find in Norway, for example, in the person of the Gender Equality Ombudsman – a position that was instituted precisely to foster the implementation of the *Gender Equality Act* and who provides counselling and information and investigates alleged breaches of the *Equality Act*[38]).
- The creation by the *Irish 1998 Employment Equality Act* of an Equality Court (Equality Tribunal, or Office of the Director of

[37] For specific information on this matter in French law, see LANQUETIN, M.T., *Discrimination fondée sur le sexe,* DS, 2000, p. 589 *et seq.*

[38] On this format, and for further comments, see CHRISTENSEN, Lars, *Equal Pay in Norway - An Introduction*, op. cit., 8 *et seq.*

Equality Investigations), which originally had jurisdiction in the area of equal treatment at work and in employment, but was extended to other equality-related areas by the *2000 Equal Status Act*[39]. It is an official para-judicial body that is responsible to the Ministry of Justice and investigates and mediates charges of unlawful discrimination, including gender discrimination.

IV. Lastly, it should be noted that some provision for measures to protect workers who wish to exercise their rights in this field against retaliation by their employers is particularly important if there is to be an increase in the effectiveness of the principle of equal pay for men and women who do equal work or work of equal value.

In this respect, the Portuguese protection system is especially complete. It consists of three rules (art. 11 of the *Equality Act*):

- "Employers shall be prohibited from dismissing, applying sanctions to or in any way prejudicing a female worker because she has complained and alleged the existence of discrimination" (art. 11, no. 1).[40]
- "The application of any sanction to a female worker (including dismissal) within one year of the date of the discrimination-based complaint shall be presumed abusive until proven otherwise (art. 11, no. 2).
- Female workers are entitled to increased compensation for any breach of the provisions of sub-article no. 1 (art. 11, no. 3).

[39] On this point see RUAIRÍ GOGAN, *Equal Pay in Ireland. Legal mechanisms for seeking redress*, Paper given within the ambit of the Project entitled "Guaranteeing Equal Pay Rights", Sintra, 7-9 November 2002, 3 et seq.

[40] Along the same lines, for another example of cases in which dismissing staff is prohibited, also see the provision included in the French legal system (*Code du Travail*, art. L- 123-5).

6. Tackling the stigma of the traditional allocation of social roles at work and in the family – a few guidelines

I. The last of the areas that pose problems for the effectiveness of the principle of equal pay for men and women which we identified in our initial research concerns the traditional division of social roles between women and men which emphasises the former's insertion into the family and the development of the latter's professional careers.

It is also well known that this is the area in which the sociological nature of the problem means that legislative interventions in favour of the principle of equal treatment have the least effect and are least likely to be successful.

II. Despite these difficulties, we conclude on the basis of our analysis that two types of measure that we have observed in a number of states can help open up paths towards changes in this stigma of the traditional gender-based allocation of social roles:

1. On the one hand, the implementation of measures designed to correct existing discrimination by further developing the concept of positive action, which Community law has enshrined to a substantial extent where the principle of equality is concerned (Dir. 207/76 and ECT, art. 141, no. 4). Various States have adopted and have been applying this approach – *inter alia*, we find positive action measures in the Portuguese (*Equality Act*, art. 3, no. 2), French (*Code du Travail*, art. L-123-3) and Italian (*Law no. 125, of 10 April 1991 – "Positive actions for achieving gender equality at work"*) legal systems.
2. On the other hand, the assumption of a clear link between the principle of equal treatment for men and women (including that of equal treatment where remuneration is concerned) and the issue of reconciling work and family life (including the protection of maternity), not from the traditional perspective adopted by the laws of the Community and many of its Member States, which see the maternity protection system as a (legitimate) exception to the principle of equal treatment for

male and female workers[41], but rather from one which incorporates the protection of maternity within the broader idea of the reconciliation of work and family life and which promotes a balance between men and women in this respect as a precondition for the effectiveness of the whole principle of equality. The latter perspective is already beginning to be seen in legal systems in Portugal (in the *Law governing the Protection of Maternity and Paternity*) and Italy (which has gone to the extent of taking positive action measures intended to promote a balance between workers of both sexes in the reconciliation of work and family life (*Law no. 125, of 10 April 1991 – "Positive actions for achieving gender equality at work"*, art. 1, no. 2, e)), but is not yet predominant in Community law, notwithstanding the different view of the conjugation of these two issues that is already beginning to be apparent in a number of legislative instruments (see above all *Resolution of 29 July 2000 on the balanced participation of men and women in family and working life*)[42].

III. We consider that reference to this type of measure in a study on equal pay is justified, as our diagnostic analysis showed that a significant proportion of cases of pay discrimination are to be found among complementary forms of remuneration. It is well known that discrimination at this level frequently results from women's lesser availability for professional work due to both the need to care for their families and to career interruptions and the preference for atypical forms of work, which are more frequent among women, precisely for family-related reasons.

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[41] This is the point of view that stands out from no. 3 of art. 2 of Directive 207/76, of 9 February 1976, on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions which continues to be dominant in Community law and has been retained in Dir. 207/76's recent revision by Dir. 2002/73/EC, of 23 September 2002.

[42] On this perspective of the link between the subject of maternity and reconciling work and family life and the gender equality principle, see M. ROSÁRIO PALMA RAMALHO, *"Conciliação equilibrada entre a vida profissional e familiar - uma condição para a igualdade de mulheres e homens na União Europeia"*, paper presented to the European Conference on Maternity, Paternity and Reconciling Work and Family Life – an initiative taken by the Portuguese Presidency of the European Union (Évora University, 19 and 20 May 2000), and *"Protection de la maternité et articulation de la vie professionnelle par les hommes et les femmes – une nouvelle problématique" in L'égalité entre femmes et hommes et la vie professionnelle", Actes du colloque de l'Association française des femmes juristes (AFFJ) et de European Women Lawyers Association (EWLA)*, at press in France, Editeur Dalloz.

In this respect we consider that measures to correct existing *de facto* inequalities by means of positive actions in general, and via legislative and regulatory measures to promote a balanced reconciliation of work and family life in particular, help to reduce the wage gap between men and women and to increase the effectiveness of the equal pay principle.

7. Conclusions

I. The selective analysis of a number of legal systems that we have just presented enables us to draw some general conclusions:

- despite the nature of the method used to assess these legal systems – one that is quite unorthodox, but is designed to achieve the practical objectives of this study – it is clear from our analysis that the majority of countries are concerned about the low degree of effectiveness of the principle of equal pay for men and women who do work that is equal or of equal value;
- some measures have been taken to increase the effectiveness of the equal pay principle, but the preferred approaches adopted vary from country to country – a fact that undoubtedly reflects the different states of development attained by the principle itself, as revealed by the diagnostic part of our study.

II. Against this background we consider that it is not only possible, but also appropriate to improve the equal pay protection system by legislative and regulatory means. Nevertheless, our analysis also shows that this intervention can take a number of different paths, the choice of which lies beyond the strictly technical/legal scope of our work.

For this reason, in the last part of this paper we will limit ourselves to an indication of a few guidelines as to possible legislative and regulatory interventions in this field, some of which are derived from the analysis that we have just expounded and some from suggestions made by the project partners. In doing so we shall not consider the degree to which the equal pay principle has been developed in each legal system, or the legal and socio-cultural traditions that are dominant in each different context, although of course these will have to be borne in mind when the concrete measures that are to be taken are actually adopted.

IV - PROMOTING THE EFFECTIVENESS OF THE EQUAL PAY PRINCIPLE: SOME LEGISLATIVE SUGGESTIONS AND GOOD PRACTICES

1. General considerations: the need for an integrated legislative and regulatory framework for the promotion of the effectiveness of the equal pay principle and the need to involve all the partners in that process

I. The previous chapter ended with the conclusion that the legislative and regulatory framework should be improved in order to increase the effectiveness of the principle of equal pay for men and women for equal work or work of equal value. The final part of this study provides suggestions as to legislative and regulatory measures and best practices that could help to achieve that objective.

These are based, on the one hand, on the conclusions that arose from our comparative study and, on the other, on the very useful suggestions made by the project partners.

II. Before going any further, it is necessary to make three observations of a general nature that were made possible by our earlier study: the first is concerned with the scope of the legislative/regulatory measures that are required in this area; the second with the targets of the new rules and good practices that are to be implemented in the future; and the third with something that appears to be a political condition that is *sine qua non* to the success of any measures in this area – the active recognition by the public authorities of the importance of this subject and the consequent need to invest in its pursuit, not only in financial terms, but also as regards the inspection and supervision of compliance with the measures that are adopted.

III. The first general observation is that it would be difficult to put the equal pay principle into effect by means of one-off, partial legislative and

regulatory measures, because it requires a coherent, integrated legal framework that covers all the various aspects of the principle's application.

However, this conclusion cannot be dissociated from another, which results from the diversity of the legal systems of the Member States of the European Union: that of the recognition that there are different routes to attaining the desired objective of increasing the effectiveness of the principle.

These conclusions are based on two findings:

- on the one hand, that virtually every country recognises the difficulties involved in implementing the principle, and that there can be no doubt that the various legal systems are indeed different and that the points of view as to the ways in which this issue should be addressed also differ from context to context;
- on the other, that the lack of effectiveness of the principle is usually due to the interaction of a whole set of different factors, the most important of which vary from one country to another, depending on economic development, cultural traditions and the internal organisation of their labour system.

Given all this we consider that before adopting any measure designed to promote the equal pay principle, it is necessary to determine for each legal system which are the most vulnerable points when it comes to the protection of the principle – a task which, although it can be monitored by the competent Community bodies, obviously falls to the individual State in question.

Once this assessment has been made, it would then be possible to determine the best measures with which to ensure the completeness and efficacy of the system in question – another point at which a number of different paths could be chosen. Therefore, the scope of the future measures, in those systems that are already relatively effective and complete, may include the introduction of additional individual measures or the promotion of best practices in this or that area, whereas in others it would be necessary to engage in a more complete legislative/regulatory intervention aimed at multiple areas.

At the same time it is also necessary to bear in mind that certain measures are easier to implement in certain systems, whereas the specific characteristics of other legal frameworks make them more receptive to

other types of model. It is thus not advisable to import solutions that have been tried in other contexts without first considering their suitability to the situation in the new country.

IV. The second general observation suggested by our study is that it is necessary for all the agents who intervene in this area to be involved in the new legislation/regulations, i.e. employees and employers, the bodies that represent them – particularly trade unions and employers' associations, the labour inspection bodies, and the courts.

In our opinion this aspect is of the greatest importance, because as we have seen, a lack of effectiveness of the principle can result from any of a number of different factors and/or from the actions (or inaction!) of any of the actors in question.

This is also one reason why it is advisable to make legislative and regulatory changes that work towards an integrated protection system and not engage in merely partial interventions aimed at one or another problematic aspect of the principle, and why the measures should be aimed at all the various actors involved in the process.

However, we should again note the heterogeneity of the situations in the various countries and the differing traditions of their labour systems as regards the involvement of the different partners in the employment area. For example, because it is based on a direct dialogue between employer and employees at company level, a model like the Canadian one for tackling discriminatory remuneration for work of equal value done by different categories of worker could be easier to introduce in a law-based labour system like the German one, which is heavily focused on the idea of co-management; whereas in a system like the Portuguese one, where the negotiation of the terms of employment contracts (including remuneration and occupational categories) lies exclusively in the hands of the trade unions, implementing a measure of this kind might arouse some resistance; on the other hand, in countries where collective negotiation is a very dynamic tradition it might conceivably be easier to introduce measures of the French kind to highlight this issue in collective bargaining processes, but it might simultaneously be more difficult to get the authorities to intervene in the way the French government is supposed to.

In short, in order to decide what measures are best suited to achieving this objective, it will be necessary to bear in mind both the general characteristics of each State's labour law and its socio-cultural traditions.

V. The last general point that we cannot fail to make in relation to legislative and regulatory interventions in this area transcends the legal domain. To our mind the success of any measures designed to promote the effectiveness of the principle of equal pay for men and women for equal work or work of equal value is subject to a prior political condition – that the public authorities really take the importance of both this subject and the resulting need to invest in its pursuit on board.

We reached this conclusion on the basis of the fact that our study shows that whatever their format and timing, the measures that seem to be most effective when it comes to promoting the equal pay principle always involve the State.

In this respect we can only conclude that the effectiveness of the principle is not only dependent on the action and will of employers and employees, but also requires the public authorities to commit themselves both in the shape of financial support measures when needed to pursue wage equalisation plans, and in terms of the inspection and supervision of compliance with the solutions that are adopted.

VI. Having made these general observations, we will now describe some legislative and regulatory suggestions that could help to promote the effectiveness of the equal pay principle in the various problematic areas that we identified in the previous phase of our study.

These suggestions will be set out in generic terms and without reference to any specific legal system, because they are just clues to a possible change in the law, which would itself presuppose a State-by-State evaluation of the needs and objectives in each case in the light of each state's existing legal framework and the weaknesses it displays. When justified, we will also simultaneously consider some best practices that could help to achieve the same objective.

It should be noted that our suggestions for legislative and regulatory measures and best practices do not come with the traditional justifications for including them, because their *raison d'être* simply results from the analysis we have conducted in the earlier chapters of our study. Instead we will limit ourselves to giving additional justifications in a few individual cases.

2. Suggestions for legislation/regulation and best practices to increase the visibility of the equal pay principle

Taking the various areas in which we have noted the need to increase the visibility of the equal pay principle – formal visibility in the law, visibility during collective bargaining, visibility in businesses and visibility among the authorities with responsibility for inspection and supervisory actions and the courts[1] – as our basis, we will make the following suggestions for new laws and regulations and best practices:

1. In order to ensure visibility in terms of the law, we propose the following measures (among others):
    - A rule which formally grants the highest status (*verbi gratia*, inclusion in the constitution) to the principle of gender equality and which highlights the gender pay equality aspect thereof in internal legal sources;
    - Mandatory reference to the equal pay principle in all legal provisions, whenever justified;
    - A rule requiring that gender equality be taken into account when drawing up any legal or regulatory provisions affecting the employment, social security or family law areas; and another requiring that the issue of gender equality be taken into account whenever the provisions in question may have direct or indirect material or financial effects;
    - A rule requiring that the community objective of mainstreaming gender equality, as well as equal pay, in state policies concerning employment, working conditions, the protection of maternity and paternity, the reconciliation of work and family life and social security be achieved, particularly by means of the mandatory (consultative) participation of both the administrative authorities and the most representative NGO's with specific competence in the equality area when such policies are defined and such measures are drawn up.

[1] See Part III, point 3 above.

2. In order to promote the visibility of the principle in collective bargaining, *inter alia*, we suggest the measures provided for in the French[2] and the Quebec[3] legal systems, although with such adaptations as may be necessary (*verbi gratia* as regards the Quebec system, which is directly designed for the business context), namely:

    - A rule requiring collective bargaining agreements to cover the promotion of gender equality as well as equal pay or the preparation of plans to that effect;
    - A rule to that end requiring periodic assessments, broken down by gender, that make it possible to compare the situations of companies' male and female staff as regards remuneration (in the broad sense of the term), jobs and occupational categories, type of employment contract, etc.;
    - A rule requiring that gender equality committees, or even equal pay committees (the Quebec model) be created, both within companies of a given size (including trade union representatives, the works council, mixed committees or even committees with employer representatives), and also within the bodies that represent the workers themselves (*verbi gratia,* in trade unions); additionally, a provision which ensures that women are effectively represented on these bodies and that the committees in question actually take part in collective bargaining;
    - A rule which provides that public institutions (and possibly even private ones, provided that they are sufficiently representative) with competence in the equality area take part in social dialogue bodies and requires that they be consulted when it comes to drawing up social dialogue agreements;
    - A best practice that promotes actions designed to provide training and raise awareness about this subject, to be aimed particularly at trade unions and employers' associations.

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[2] Which we described in Part III, point 3.2 above. For the justification for this set of legislative/regulatory recommendations, see the same point.

[3] See above, Part III, point 4.4, para. II.

3. In order to ensure the visibility of the principle at company level and among workers themselves, the following measures (*inter alia*):
    - A rule requiring employers to keep up-to-date records broken down by gender concerning the hiring of staff and the most significant aspects of their employment status – distribution by occupational category, tasks and position, pay and complementary benefits, working hours, attendance, training and contractual vicissitudes;
    - A rule permitting both workers' representatives in the equality area and the administrative bodies with competence in the matter to gain access to those records;
    - Rules governing the drawing up of reports on the monitoring of the comparative situation of a company's staff, by gender;
    - A rule creating a duty to display workers' gender equality rights in a visible location within each company, or to include them in the company regulations, together with another establishing a duty to provide staff with information about this subject (proposed by some of the partners)[4];
    - Best practices involving actions designed to provide training and raise awareness about this topic among both employers and employees.

[4] The fact is that the partners pointed to the lack of information available to workers about their equal pay rights, bodies to whom complaints should be directed and how to do so in cases of discriminatory treatment as one of the main reasons for the lack of complaints about pay-related discrimination (DGCT). Community law – Council Directive no. 91/533/EEC, of 14 October 1991, which has already been transposed by the majority of Member States (for Portuguese law, see Decree Law no. 5/94, of 11 November 1994) – imposes a general duty on employers to inform employees of the most significant aspects of the conditions applicable to their contract and the importance of this aspect of the labour law regime justifies its inclusion in this duty to inform in its own right.

4. In order to ensure the visibility of the principle among the administrative bodies responsible for labour inspections and the courts, the following measures (*inter alia*):
    - A rule granting specialised competence in the gender equality area to the public inspection services;
    - A rule requiring companies to send copies of the equality reports they produce to those public inspection services;
    - A rule requiring periodic inspections directed specifically at this matter;
    - A best practice to include the issue of gender equality, not only in university law courses, but also in those in the sociology and management areas, at both degree and post-graduate training level, in those subjects that directly or indirectly address labour-related questions, social security, the family, Community law, human-resource management, etc.;
    - A best practice involving actions designed to provide training and raise awareness about this subject, to be aimed especially at judges and public inspection services.

3. Legislative and regulatory suggestions that facilitate the integration of the equal pay principle's operational concepts: i.e. the concepts of remuneration, direct and indirect discrimination, and equal work and work of equal value

I. We have already seen[5] that due to its development in Community case law and the extent to which it has been addressed by the Member States, of all the various operational concepts of the equal pay principle, the concept of remuneration is the one that poses the least difficulties.

[5] See Part III, point 4.2 above.

Our recommendation in this matter is that those systems in which the equal pay principle is already more broadly developed should pay heed to its gender aspect. In this respect it is necessary to ensure that the concept of remuneration, as applied for the purposes of the gender issue, is effectively seen in the wide terms set out in Community law, even if it is employed in a more restricted sense where other applications of the general principle are concerned[6].

The point here naturally concerns the moment at which the law is applied to concrete cases and we are therefore not suggesting any additional legislative or regulatory measures in this respect.

Where best practices are concerned, we consider that it would be worthwhile to promote training initiatives to ensure that the rich Community case law on this matter is made known, not only among labour inspectorates and the courts, but also among employers and workers' representatives. The fact is that merely disseminating the range of benefits that this case law has been incorporating into the concept of remuneration for the purposes of the application of the concept of the equality principle would in itself help to identify discriminatory situations.

II. As regards the concepts of direct and indirect discrimination, both our comparative study[7] – particularly the differing understanding of the very concepts of direct and indirect discrimination – and the answers the project partners gave on this subject in the questionnaire[8], especially their reference to the difficulties involved in detecting discriminatory practices, justify the suggestion that it is necessary to improve these concepts, which already exist in the majority of legal systems, with a rule that lists indications of discrimination. This would facilitate both the concepts' integration and discriminatory practices' detection by those responsible for applying the law (suggestion made by some of the partners – CIDM, CSM). Foremost among these indicators should be statistical data such as those provided by the Quebec system[9], the objectivity of which greatly facilitate the identification and proof of the existence of discriminatory situations.

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[6] As we have already said, this point is particularly significant in the case of Portuguese law.
[7] See Part III, point 4.3 above.
[8] See Part II, points 2.1 and 3.2 to 3.4 above.
[9] See Part III, point 4.4 above.

III. As regards the concept of equal work and above all that of work of equal value – which virtually all the project partners considered the most difficult concept to operationalize[10] – we would refer to the legal model that has been developed in Quebec[11], which is very complete and particularly suited to tackling the situations of discrimination between different categories of workers (systemic discrimination) and to counteracting the perverse effects of the segregation of the labour market.

Even though this model does need to be adapted for use in some European countries, there are some very effective measures among its provisions, including[12]:

- For the purpose of detecting discriminatory situations: the set of measures designed to determine whether any categories of jobs and positions in a company are predominantly occupied by male or female workers. These particularly entail the use of statistical data, such as the absolute percentage of men and women in each category, a comparison of the percentage of staff of a given sex in each individual category with all the categories present in the company and with other companies in the same sector, but also involve resorting to known sociological data that are applicable to the case in question;
- In order to integrate the concept of work of equal value: the rules that list criteria for comparing types of work by drawing on objective factors (such as qualifications, the degree of responsibility involved, experience and the existence or otherwise of identical working conditions), while simultaneously requiring that when other factors are considered, the same weight should be attributed to factors that are traditionally associated with men (like physical strength and greater temporal availability or attendance) and those that are customarily associated with women (such as attention to detail and care with and productivity within the amount of time available);

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[10] Indeed, one of the factors that virtually all the partners pointed to as posing the greatest difficulties when it comes to detecting and proving pay discrimination is precisely that of determining the value of work done in order to compare it with other types of work (IGT, DGCT, CIDM, CSM, IGMSST). Some partners also note that the concept is also made harder to operationalize by the inadequacy of the systems designed to assess performance in companies (IGT).

[11] See Part III, point 4.4 above, especially para. II.

[12] For the justification for these measures, see especially Part III, point 4.4, para. III above.

- The rule that ensures that these job-evaluation parameters are applicable to all businesses;
- The rule that guarantees the equal participation of staff of both sexes in both the determination and the relative weighting of job-evaluation criteria (either by giving them seats on the company's equality or wages committee or the works council, or in some *ad hoc* manner, or, if the subject is negotiated at trade union level, in a way that produces an equivalent result);
- The rule that guarantees that the interested parties are aware of the job-evaluation parameters.

Specifically where the rules that govern the evaluation of jobs are concerned, it is also appropriate to clarify the following points, which are derived from suggestions made by the project partners:

- the job-evaluation parameters should be considered as a whole and not in isolation (proposed by DGCT);
- in order to ensure that the system is a flexible one, it should be clear that the criteria are not necessarily limiting (proposed by various partners – DGCT, CEJ, IGT and IGMSST).

4. Legislative and regulatory suggestions intended to increase the operationality of the equal pay rules on the practical and the procedural levels

Our suggestions in relation to this difficult area of the equal pay principle are again derived from our own comparative work[13] and the suggestions made by the project partners.

Inter alia, we would particularly emphasise suggestions for rules and best practices at the level of collective agreements, legal proceedings and the effective protection of workers who wish to exercise their rights in this

[13] See Part III, point 5 above.

matter, and finally, proposals for positive incentives for voluntary compliance with the legal and Community rules on this subject.

1. Amongst others, the following measures could help to increase the effectiveness of the equal pay principle at the collective agreement level:
    - The automatic nullity of any clauses in collective bargaining instruments regulating employment conditions that contradict the equal pay principle;
    - In addition to the previous measure, a rule providing for the automatic replacement of such clauses either by the more favourable pay treatment, where applicable, or by their interpretation in accordance with the principle of equality (particularly as regards the determination of occupational categories);
    - As a best practice, carrying out an assessment and comparative analysis of the nomenclature and job description of the occupational categories in collective bargaining agreements with a view to identifying any categories that are clearly defined on the basis of gender[14], so that when any situation of this kind exists, the negotiating partners will have an incentive to merge the categories in question into a single one for men and women during their review of the agreement[15];
    - As a best practice, providing an incentive for the social partners to include in collective bargaining agreements a list of factors which can be used in the objective evaluation of jobs and which will help to integrate the concept of work of equal value.

[14] It should be borne in mind that in Portugal the Observatory for Equality in Collective Bargaining and Collective Agreements (OINCCC) has already begun to do this work.

[15] In the case of Portugal, the Portuguese partners (CIDM and IGMSST, for example) said that the justification for this measure is that wage discrimination often results from workers' incorporation into categories that are formally different, but which in substance correspond to a job that includes the same tasks, which means that many agreements contain artificial categories designated as such. What is more, in the Portuguese system the occupational categories set out in collective agreements were defined many years ago and have not been reassessed in the successive revisions of the collective bargaining instruments – a fact that justifies their review now in its own right.

2. The following measures (the great majority of which were suggested by the project partners) could help to promote the effectiveness of the equal pay principle at the judicial level and facilitate proof of the existence of discriminatory situations:
    - In order to make it easier to bring proceedings for pay discrimination, a rule granting direct procedural legitimacy (i.e. whether or not the proceedings are brought on behalf of a specific person) to the institutions that represent workers (trade unions and workers' committees), particularly when the discriminatory practice in question involves a group of workers or one or more entire occupational categories[16];
    - To the same end, a rule granting procedural legitimacy to the public institutions with competence in the equality area (proposed by CSM);
    - In order to facilitate proof in court of the existence of pay discrimination, firstly rules that establish objective criteria with which to assess jobs, but also rules that provide for the reversal of the burden of proof – which various partners (DGCT, CSM) consider very important, due to the difficulties of providing proof in this domain;
    - As a complement to the reversal of the burden of proof, a rule that allows the court to examine of its own motion discrimination situations which had not been claimed by the parties during the course of the trial (proposed by CSM);

[16] Regarding the Portuguese system, the Portuguese project partners referred that one of the reasons for the absence of complaints and proceedings for gender-based pay discrimination – despite the general opinion that such situations are very commonplace – is fear of retaliation by the employer. In this respect a rule that attributed procedural legitimacy to trade unions and workers' committees to bring such proceedings without the need to plead on behalf of named workers could make the system much more effective. At the same time, extending this direct procedural legitimacy to workers' committees – particularly in systems like the Portuguese one, which have already granted it to trade unions – could be justified by the conjugation of various factors: the fact that trade unions are not very representative in some sectors; the possibility that workers' committees would be more attentive to these types of problem because they act within a given company; and the obvious lack of effectiveness of the existing rule, as demonstrated by the absence of proceedings brought by trade unions since the law came into effect in 1997.

- Also to facilitate proof of discriminatory situations, a rule creating the principle that in case of doubt, the court shall rule in favour of the worker discriminated against (proposed by DGCT);
- Also in order to facilitate proof, a rule establishing a presumption of pay discrimination where there is a significant pay gap between men and women as set out in a company's balance sheets or personnel charts (it should be borne in mind, however, that the effectiveness of such a rule would be dependent on the requirement to produce personnel charts that show the staff's gender);
- Still on the subject of proof, given the doubt as to the need for another specific employee for comparative purposes (in cases of individual discrimination), or where a business does not include another comparable occupational category (in cases of systemic discrimination), a rule that permits comparison with a national classification of occupations drawn up using neutral criteria and periodically reviewed by the administrative bodies with competence in the equality area;
- Again on the subject of proof, given the doubt as to how to interpret the concept of company and employer in cases in which the working relationship takes place within a group of companies that have stakes in or control one another, we consider particularly relevant the suggestion made by a number of partners that for comparative purposes, the notion of the "same employer" could either refer to the controlling company, or take as its criterion the average remuneration throughout the whole group for the occupational category under consideration;
- Once more where proof is concerned, and given the doubt in relation to the requirement for situations that are under comparison to be contemporary with one another, a rule granting exemption from such requirement under certain circumstances and permit that the comparison should be with the worker who

used to occupy the same job (as per the Court of Justice's case law guidelines).

3. The following measures could help to facilitate speed in the settlement of pay discrimination disputes and particularly to avoid the lengthy delays in the court proceedings in this area:
    - A rule subjecting wage discrimination disputes to mediation or arbitration (along the lines of the Irish model, for example[17]); and particularly the provision in collective agreements for arbitration in such cases;
    - The appointment of an Equality Ombudsman or an equivalent figure, with powers to inform, inspect and possibly mediate reconciliation in this area (as per the Norwegian model, for example[18]).

4. The following measures could help to ensure employees' protection against retaliation following complaints of discriminatory practices:
    - A rule providing that any penalty imposed by an employer in retaliation to such a complaint, either directly or under the guise of penalty for some other act, is abusive;
    - Rules establishing a presumption of unfair dismissal or of unlawful disciplinary sanctions that fall short thereof during a certain period following a complaint;
    - In the event of dismissal for such a reason, an increase in the compensation to which the worker is entitled (in the event that he/she does not opt for reinstatement).

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[17] In effect, some of the partners (including DGCT) referred the lengthy delay in settling such cases as one of the factors that dissuade the workers involved from reporting these discrimination situations and that a speedier system for settling such disputes could be an alternative. Furthermore, these means of settling labour disputes amicably are already available in other situations and it would not be difficult to extend them to the case in question. Looking specifically at Portugal, it would not be difficult to implement this solution, given that resort to conciliation, mediation and arbitration mechanisms is already provided for as a means of settling disputes that arise from the interpretation and application of collective labour agreements, as well as disputes arising from employment contracts (LRCT, art. 5, para a) *in fine* and c) and arts. 30 *et seq.*).

[18] See Part III, point 5 above, particularly para. IV.

5. In order to emphasise the social value of the equal pay and promote its effectiveness among employers, penalty rules such as:
    - Fines for employers who engage in pay discrimination;
    - Increases in the amount of fines when the discriminatory practice is motivated by situations related to maternity or paternity or involve a large number of staff[19].

5. Suggestions for legislation, regulations and best practices with which to tackle the stigma of the traditional allocation of social roles at work and in the family

I. Although for the reasons referred to above[20], this is the problematic aspect of the application of the equal pay principle in which the lawmaker's intervention is likely to be the most limited, we would nonetheless like to suggest some ideas for legislation, regulations and best practices which, thanks to the direct effect they could have on the elimination of the social stigma in these cases, would also have positive repercussions in terms of wage discrimination:

- Positive action rules designed to promote the hiring of staff of the sex that is underrepresented in occupations that are currently predominantly male or female, either directly, or indirectly by associating the new jobs with financial incentives for the employer, such as tax benefits, exemptions

[19] The partners suggested that the introduction of heavy penalties for those employers found in breach of the law would help to make the equal pay protection system more effective, not only in terms of the concrete elimination of discriminatory practices, but also as a mechanism via which to prevent future discrimination in general (argument put forward by the DGCT). In the partners' opinion, increasing the fines in cases of pay discrimination on the grounds of pregnancy, childbirth or breast-feeding – or more exactly, the exercise of maternity or paternity rights, whatever the worker's gender – is justified by the fact that pay-related discriminatory practices are frequently linked to maternity or paternity (argument invoked by the DGCT). Increasing the fines when discrimination affects a large number of female workers (proposed by DGCT) can in turn be justified by the fact that such a situation reveals that the employer particularly intended to breach the law.

[20] See Part III, point 6 above.

from or temporary reductions in social security contributions, etc.[21];

- Rules that provide incentives for the balanced reconciliation of work and family life for men and women, as regards working hours, holidays, etc.;
- Best practices designed to provide incentives for businesses that help their employees care for their children.

II. In general terms we would also highlight the need to always consider the direct and indirect consequences that any new rules or good practices which are instituted or developed in the equal pay area can have on the issue of the reconciliation of work and family life, specifically where the regime governing the protection of maternity and paternity is concerned.

[21] It should be noted that as we referred earlier, Community law now provides ample grounds for this type of rule. When considering specifically the Portuguese system, various project partners emphasised that additional justification for this kind of financial incentive measure can be found in the tradition of using such steps to pursue important social objectives. Examples along these lines include financial incentives – particularly in the form of the suspension or temporary reduction of employers' contributions to the social security system – designed to promote the employment of young people in search of their first job, the long-term unemployed and the disabled. In this respect, and without trying to equate these cases to gender-based pay discrimination, we would add a further justification – inasmuch as the principle of equality is a fundamental principle of both Community law and the legal systems of the individual Member States, it would be impossible to promote it any less vigorously than them.

LIST OF APPENDICES

Appendix 10 - Answers to the questionnaire given by CGTP-IN - *Confederação Geral dos Trabalhadores Portugueses - Intersindical* / General Confederation of Portuguese Workers (Portugal)

Appendix 11 - Answers to the questionnaire given by *Ministère de la Promotion Féminine du Luxembourg* (Luxemburg)

Appendix 12 – Comments by the *Office of the Director of Equality Investigations* (Ireland)

Appendix 13 - Answers to the questionnaire given by the *Office of Deputy Gender Equality Ombudsman in Norway* (Norway)

RELEVANT LEGISLATION

- *Anti-Discrimination (Pay) Act 1974* – Equal pay for men and women (Ireland)
- *Arrêté royal du 1 décembre 1975* (Belgium) – gives binding force to Collective agreement no. 25 on Equal pay for men and women, signed by the *Conseil national du travail*, on 15 October 1975
- *Bürgerliches Gesetzbuch* (BGB) – German Civil Code
- *Collective Agreement no. 25 on Equal pay for men and women* signed by the *Conseil national du travail*, on 15 October 1975 (Belgium)
- *Charter of Human Rights and Freedoms* (Canada)
- *Code du travail* / Labour Code (France)
- *Code of practice on the implementation of equal pay for work of equal value for women and men – European Commission's Communication of 17/07/1996* (COM (96) 336 final)
- *Constitución Española* / Spanish Constitution, approved in 1978
- *Constituição da República Portuguesa* (CRP) / Constitution of the Portuguese Republic, approved in 1976
- *Costituzione della Repubblica Italiana*, / Constitution of the Italian Republic, approved in 1947
- *Décret n. 92-953 du 1er avril 1992,* amended by *Décret n. 2001-1035, du 8 novembre 2001*- Gender equality at work, - Equality *contracts signed with the Government for the implementation of studies on gender equality and the elimination of existing inequalities* (France)
- *Décret n. 2001-832, du 12 septembre 2001* - Gender equality at work. Annual report on equality plans and gender equality in collective bargaining (France)
- *Decreto legislativo n. 196,* 23 May 2000, - Equal treatment for men and women (Italy)
- *Council Directive 75/117/EEC of 10 February 1975, relating to the application of the principle of equal pay for men and women*
- *Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women*

as regards access to employment, vocational training and promotion, and working conditions

- *Council Directive 91/533/EEC of 14 October 1991 on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship*
- *Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex*
- *Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin*
- *Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation*
- *Directive 2002/73/EC of the European Parliament and of the Council, of 23 September 2002, amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions*
- *DL nº 49408, de 24 de Novembro de 1969* (LCT) – Labour contract act (Portugal)
- *DL nº 392/79, de 20 de Setembro* – Gender equality and non-discrimination based on sex / Equality Act (Portugal)
- *DL nº 519-C1/79, de 29 de Dezembro* (LRCT) – Collective agreements act (Portugal)
- *DL nº 426/88, de 18 de Novembro* – Gender Equality and non-discrimination based on sex within the ambit of the civil service (Portugal)
- *DL nº 5/94, de 11 de Novembro* - Employer's obligation to inform employees (Portugal)
- *DL nº 307/97, de 11 de Novembro* – Equal treatment for men and women in occupational social security schemes
- *Equal Pay Act*, 1970 (United Kingdom)
- *Employment Equality Act from 1998* (Ireland)
- *Equal Status Act from 2000* (Ireland)
- *Estatuto de los Trabajadores,* approved by the *Real Decreto Legislativo 1/1995, de 24 de Marzo* (Spain)
- *Gender discrimination* Act, 1975 (United Kingdom)
- *Gender Equality Act*, 1978 - amended in June 2002 (Norway)

- *L. nº 105/97, de 13 de Setembro* – Equal Treatment in Labour and in Employment (Portugal)
- *L. nº 118/99, de 11 de Agosto* - General legal provisions governing employment offences (Portugal)
- *Legge 903, del 9 dicembre 1977* – Equal treatment for men and women at work (Italy)
- *Legge 10 Aprile 1991, n. 125* – Positive Actions for achieving gender equality at work (Italy)
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- *Pay Equity Act (1997)* (Quebec - Canada)
- *Plano Nacional para o Emprego 2001* – 2001 National Plan for Employment (Portugal)
- *Règlement grand-ducal du 10 juillet 1974* (Luxembourg)
- *Resolution of the Council of 29 June 2000 on the balanced participation of women and men in family and working life*

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