



ARTICLES

THE EUROPEAN SOCIAL CHARTER TURNS 60: ADVANCING ECONOMIC AND SOCIAL RIGHTS ACROSS JURISDICTIONS

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MIND THE GAP: EMERGING STANDARDS OF PROTECTION OF THE RIGHT TO EQUAL PAY UNDER THE EUROPEAN SOCIAL CHARTER AND EU LAW

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ABSTRACT: The legal frameworks protecting the right to equal pay at European level are being reshaped. This reshaping is taking place in parallel within the European Social Charter (ESC) system, through the case-law of the European Committee of Social Rights, and in EU law, through a proposal for a Directive on pay transparency and enforcement mechanisms. In this *Article*, we revisit the interaction between the ESC and EU law, in the context of the right to equal pay between men and women for equal work or work of equal value. Emerging equal pay standards are detailed and address long-standing enforcement problems that have deprived legal frameworks of their full potential as an avenue for the effective realisation of the right to equal pay. We show, however, that there are some differences between the ESC and the EU instrument underway. The ESC seems to set more progressive standards in certain respects and has the potential of accommodating workers' interests with fewer restrictions. This is particularly evident in relation to employers' wage reporting obligation and positive obligations to promote equal pay. With regard to the interaction of EU law with the ESC system, we argue that recent equal pay developments do not suggest a major break from existing critical accounts of the stance of the EU legal order towards more progressive social rights standards found in the ESC.

KEYWORDS: equal pay – transparency – social rights – Europe – gender equality – enforcement.

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I. INTRODUCTION

The European Social Charter (ESC) is the primary Council of Europe treaty in the field of social rights, the latter broadly defined to include a long list of rights referring to labour, social protection, health, social security, housing, and education. The original version of the treaty was adopted in 1961,¹ and then subjected to a series of reforms during the 90s to update and modernize the system,² leading up to a revised version.³ The Revised ESC incorporates the rights contained in the original 1961 ESC and the 1988 Additional Protocol and establishes new rights.⁴ Apart from a number of core provisions, States parties to the (Revised) ESC do not have to accept as binding the instrument as a whole. They can choose between rights and paragraphs of the (Revised) ESC articles.⁵

All EU Member States (MS) are States parties to the ESC (1961 or Revised) and fifteen of them are signatories to the protocol providing for a system of collective complaints.⁶ That is, EU MS are bound by ESC and EU law standards, which raises questions pertaining to the relationship and interaction between the two systems. While the ESC's interpretive body, the European Committee of Social Rights (ECSR), takes EU sources into account, it has explicitly refrained from establishing a presumption of conformity of EU law with the ESC.⁷ EU MS have to observe commitments under the ESC when agreeing on the content of Directives and when they transpose them into national legal systems.⁸ In turn, reference to the ESC can be found in some EU law sources,⁹ but the place of the ESC in adjudication and law-making appears marginal.¹⁰ Although the ESC was a source of

¹ European Social Charter [1961].

² Additional Protocol of 1988 extending the social and economic rights of the 1961 Charter, Amending Protocol of 1991 reforming the supervisory mechanism, Additional Protocol of 1995 providing for a system of collective complaints. On this point see also O De Schutter, 'The Two Lives of the European Social Charter' in JY Carlier, O De Schutter and M Verdussen (eds), *La Charte sociale européenne: une constitution sociale pour l'Europe* (Bruylant 2010) 12.

³ Revised European Social Charter [1996]. See also O De Schutter, 'The Two Lives of the European Social Charter' cit. 11-14; K Lukas, 'The European Social Charter: Its History, Application, Procedures and Impact' in K Lukas, *The Revised European Social Charter* (Edward Elgar Publishing 2021) 3-5.

⁴ "New" rights are for instance the right to protection from poverty and social exclusion and the right to housing.

⁵ Art. 20 of 1961 ESC prescribed that States should be bound by at least five of arts 1, 5, 6, 12, 13, 16 and 19 and by at least 10 more articles or 45 numbered paragraphs from the rest of the text. The same system is also followed in the Revised ESC, where States are required to accept at least six arts from arts 1, 5, 6, 7, 12, 13, 16, 19 and 20 and by at least 16 articles or 63 paragraphs from the rest of the text (Part III – art. A).

⁶ See European Social Charter, Signatures and Ratifications, available at www.coe.int.

⁷ See European Committee of Social Rights (ECSR) decision of 23 June 2010 complaint n. 55/2009 *Confédération Générale du Travail (CGT) v France* para. 31-42.

⁸ *Ibid.* para. 33.

⁹ E.g. art. 151 TFEU, Preamble of the Charter of Fundamental Rights of the European Union [2012].

¹⁰ C O'Connell, 'The European Social Charter and EU Labour Law' in A Bogg, C Costello and ACL Davies (eds), *Research Handbook on EU Labour Law* (Edward Elgar Publishing 2016) 191-192.

inspiration for the social provisions of the EU Charter of Fundamental Rights (CFREU),¹¹ the latter does not secure interpretative convergence with the treaty in the same way that it does with the European Convention on Human Rights (ECHR).¹²

The recent history of the interaction between the European Social Charter (ESC) and EU law, or more broadly, legal sources formulated with the involvement of EU institutions, has had moments of tension.¹³ This has taken the form of direct conflict of standards, such as in the case of *Laval*¹⁴ or in the case of financial assistance conditionality in the context of the sovereign debt crisis in Europe.¹⁵ Another form in which tensions have manifested is not through conflicting, but through diverging standards that create gaps between the protection provided by the two systems,¹⁶ such as in the case of maternity leave,¹⁷ protection

¹¹ N Jääskinen, 'Fundamental Social Rights in the Charter: Are They Rights? Are They Fundamental?' in S Peers and others (eds), *The EU Charter of Fundamental Rights: A Commentary* (Hart Publishing 2021) 1858; O De Schutter 'The European Pillar of Social Rights and the Role of the European Social Charter in the EU Legal Order' (Council of Europe 2018) 14.

¹² Art. 52(3) of the EU Charter of Fundamental Rights.

¹³ C Kilpatrick, 'The Human Rights Puzzle of the Euro-Crisis: Why Massive Breaches of Human Rights but None of the EU Charter of Fundamental Rights?' in M González Pascual and A Torres Pérez (eds), *Social Rights and the European Monetary Union* (Edward Elgar Publishing 2022); O De Schutter, 'The European Social Charter in the Context of Implementation of the EU Charter of Fundamental Rights' (AFCO Committee 2016) www.europarl.europa.eu; M Rocca, 'Enemy at the (Flood) Gates: EU "Exceptionalism" in Recent Tensions with the International Protection of Social Rights' (2016) *European Labour Law Journal* 52; C O'Cinneide, 'The European Social Charter and EU Labour Law' cit.; S Garben, 'The Problematic Interaction Between EU and International Law in the Area of Social Rights' (2018) *Cambridge International Law Journal* 77; K Lukas, 'The Collective Complaint Procedure of the European Social Charter: Some Lessons for the EU?' (2014) *Legal Issues of Economic Integration* 275; S Robin-Olivier, 'The Relationship Between International Law and European Labour Legislation and its Impact on the Development of International and European Social Law' (2020) *IntlLabRev* 483, 495; A Aranguiz, 'Bringing the EU up to Speed in the Protection of Living Standards Through Fundamental Social Rights: Drawing Positive Lessons from the Experience of the Council of Europe' (2021) *Maastricht Journal of European and Comparative Law* 601; U Khaliq, 'The EU and the European Social Charter: Never the Twain Shall Meet?' (2013) *CYELS* 169.

¹⁴ ECSR decision of 3 July 2013 complaint n. 85/2012 *Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) v Sweden*.

¹⁵ ECSR decision of 7 December 2012 complaint n. 76/2012 *Federation of employed pensioners of Greece (IKA-ETAM) v Greece*; ECSR decision of 7 December 2012 complaint n. 77/2012 *Panhellenic Federation of Public Service Pensioners v Greece*; ECSR decision of 7 December 2012 complaint n. 78/2012 *Pensioners' Union of the Athens-Piraeus Electric Railways (I.S.A.P.) v Greece*; ECSR decision of 7 December 2012 complaint n. 79/2012 *Panhellenic Federation of pensioners of the public electricity corporation (POS-DEI) v Greece*; ECSR decision of 7 December 2012 complaint n. 80/2012 *Pensioner's Union of the Agricultural Bank of Greece (ATE) v Greece*; ECSR decision of 23 March 2017 complaint n. 111/2014 *Greek General Confederation of Labour (GSEE) v Greece*.

¹⁶ S Garben, 'The Problematic Interaction Between EU and International Law in the Area of Social Rights' cit. 83-84; C O'Cinneide, 'The European Social Charter and EU Labour Law' cit. 207.

¹⁷ Conclusions XV-2 of the United Kingdom of 31 December 2001, art. 8(1), available at hdoc.esc.coe.int; U Khaliq, 'The EU and the European Social Charter' cit. 188-189.

of Roma minorities,¹⁸ and working time arrangements.¹⁹ Commentators have raised concerns regarding the risks of deviating standards, in particular where the reluctance of the EU legislature to engage and comply with ESC standards leads to levelling down of standards of social protection and diverging degrees of labour and social rights' commitments and obligations among EU MS.²⁰

In this *Article*, we revisit the interaction between the ESC and EU law, in the particular context of the right to equal pay between men and women for equal work or work of equal or comparable value. The right to equal pay has featured in both systems since their very beginning. Unlike social rights, the principle of equal pay has been part of the EU *acquis* since the Treaty of Rome of 1957, providing a legal basis for secondary legislation, and has been strongly developed in EU law through the case-law of the Court of Justice of the EU (CJEU) and secondary legislation. In the ESC, art. 4(3) of the (Revised) ESC²¹ and art. 1 of Additional Protocol of 1988, now corresponding to art. 20(c) of the RESC,²² prohibit discrimination in pay for work on the basis of gender.

Equal pay has gained renewed attention recently in both the ESC and EU law, with additional standards of protection emerging in both systems in parallel within a short period of time. The reason for this is that women across Europe still earn less than men, despite the fact that the right to equal pay has long been recognised by multiple legal sources.²³ In 2020, the gender pay gap in the EU27 stood at approximately 13 per cent,

¹⁸ ECSR decision of 24 January 2012 complaint n. 64/2011 *European Roma and Travellers Forum (ERTF) v France*; ECSR decision of 11 September 2012 complaint n. 67/2011 *Médecins du Monde – International v France*; K Lukas, 'The Collective Complaint Procedure of the European Social Charter' cit. 282-283; U Khaliq, 'The EU and the European Social Charter' cit. 188.

¹⁹ *Confédération Générale du Travail (CGT) v France* cit.; O De Schutter, 'The European Social Charter in the Context of Implementation of the EU Charter of Fundamental Rights' cit. 44; C O'Connell, 'The European Social Charter and EU Labour Law' cit. 207.

²⁰ U Khaliq, 'The EU and the European Social Charter' cit. 183; A Aranguiz, 'Bringing the EU up to Speed in the Protection of Living Standards Through Fundamental Social Rights' cit. 622; S Robin-Olivier, 'The Relationship Between International Law and European Labour Legislation and its Impact on the Development of International and European Social Law' cit. 495; O De Schutter, 'The European Social Charter in the Context of Implementation of the EU Charter of Fundamental Rights' cit. 44.

²¹ Art. 4(3) of the (Revised)ESC states that "with a view to ensuring the effective exercise of the right to a fair remuneration, the Parties undertake: [...] to recognise the right of men and women workers to equal pay for work of equal value".

²² Art. 20 of the Revised ESC states that "with a view to ensuring the effective exercise of the right to equal opportunities and equal treatment in matters of employment and occupation without discrimination on the grounds of sex, the Parties undertake to recognise that right and to take appropriate measures to ensure or promote its application in the following fields: [...] c. terms of employment and working conditions, including remuneration; [...]".

²³ In national law see e.g. Discrimination Act (2008:567), Chapter 3 in Swedish law; arts 23-28 and 30-32 of Portuguese Labour Code; art. 37 of the Italian Constitution; art. 22(1) of the Greek Constitution. At an international level, International Labour Organization, Equal Remuneration Convention of 29 June 1951, No. 100 art. 4(3) of the European Social Charter and 20(c) of the Revised European Social Charter and art.

having closed by less than two percentage points over the last decade.²⁴ There are many factors that contribute to this gap, including vertical and horizontal occupational segregation, women's engagement in part-time or temporary work, direct and indirect pay discrimination based on gender, as well as the systemic undervaluation of work performed predominantly by women.²⁵ Among the multiple reasons for the lack of significant progress in closing the gender pay gap over the last years is the fact that legal frameworks prohibiting pay discrimination on the grounds of gender face long-standing problems of implementation and enforcement.²⁶

In the ESC system equal pay standards were revisited in 15 decisions of the ECSR on the conformity of States parties with the ESC provisions protecting equal pay, published in July 2020.²⁷ The ECSR addressed equal pay for the first time within the context of the collective complaints procedure. With its extensive and relatively detailed interpretation, it set comprehensive standards regarding the right to equal pay under the ESC.²⁸ Since the ECSR

1 of its Additional Protocol [1988] all protect the right to equal pay. At an EU level, see art. 23 of the Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) (Gender Equality Directive); Principle 2 of the European Pillar of Social Rights [2017].

²⁴ See Eurostat data, available at appsso.eurostat.ec.europa.eu. The unadjusted gender pay gap is defined as "the difference between average gross hourly earnings of male paid employees and of female paid employees as a percentage of average gross hourly earnings of male paid employees", see Eurostat data description, available at ec.europa.eu/eurostat.

²⁵ European Institute for Gender Equality, 'Tackling the Gender Pay Gap: Not Without a Better Work-Life Balance' (29 May 2019) Publications Office of the European Union. These factors contribute to the unexplained part of the gender pay gap, which is estimated to constitute around two thirds of the gap; see European Institute for Gender Equality, 'Gender Inequalities in Care and Consequences on the Labour Market' (20 January 2021) Publications Office of the European Union 26.

²⁶ P Foubert, 'The Enforcement of the Principle of Equal Pay for Equal Work or Work of Equal Value: A Legal Analysis of the Situation in the EU Member States, Iceland, Liechtenstein and Norway, Luxembourg' (2017) Publications Office of the European Union.

²⁷ ECSR decision of 6 December 2019 complaint n. 124/2016 *University Women of Europe (UWE) v Belgium*; ECSR decision of 6 December 2019 complaint n. 125/2016 *UWE v Bulgaria*; ECSR decision of 5 December 2019 complaint n. 126/2016 *UWE v Croatia*; ECSR decision of 5 December 2019 complaint n. 127/2019 *UWE v Cyprus*; ECSR decision of 5 December 2019 complaint n. 128/2019 *UWE v Czech Republic*; ECSR decision of 5 December 2019 complaint n. 129/2016 *UWE v Finland*; ECSR decision 5 December 2019 complaint n. 130/2016 *UWE v France*; ECSR decision of 5 December 2019 complaint n. 131/2016 *UWE v Greece*; ECSR decision of 5 December 2019 complaint n. 132/2016 *UWE v Ireland*; ECSR decision of 6 December 2019 complaint n. 133/2016 *UWE v Italy*; ECSR decision of 6 December 2019 complaint n. 134/2016 *UWE v the Netherlands*; ECSR decision of 5 December 2019 complaint n. 135/2016 *UWE v Norway*; ECSR decision of 5 December 2019 complaint n. 136/2016 *UWE v Portugal*; ECSR decision of 5 December 2019 complaint n. 137/2016 *UWE v Slovenia*; ECSR decision of 6 December 2019 complaint n. 138/2016 *UWE v Sweden*. See also of the European Committee of Social Rights, *Realising Equal Pay and Equal Opportunities for Women in Employment: Criteria Developed by the European Committee of Social Rights* (17 November 2020) rm.coe.int.

²⁸ M Kotsoni, 'Placing Gender Equality in the Workplace at the Forefront of Social Rights in Europe: Equal Pay and Equal Opportunities under the Scrutiny of the European Committee of Social Rights' (5 October 2020) Strasbourg Observers strasbourgobservers.com; B Kresal, 'Gender Pay Gap and Under-

decisions were handed down, the European Commission proposal for new binding measures on pay transparency and enforcement mechanisms has emerged, which seeks to expand significantly obligations relating to the principle of equal pay under EU law. The topic attracted attention from the EU legislature for various reasons, including the impact of the Covid-19 pandemic on frontline workers – the majority of whom are women – and on gender equality more generally.²⁹ The European Commission's proposal was published in March 2021 and is still making its way through the legislative procedure.³⁰ It addresses issues relating to the implementation and enforcement of the existing EU equal pay framework, set out in the 2006 EU Gender Equality Directive. With new standards of protection developing in parallel, the right to equal pay offers a new testing ground for existing accounts of the interaction between standards of protection set by the ESC and EU regulation on social protection and equality in the field of employment.

The aim of this *Article* is to explore these legal developments in the sphere of equal pay and some of the issues that arise from the emergence of parallel standards under both systems, and how these reflect on the relationship and dynamics between the EU and the ESC. To this end, we first look at the standards of protection under the (Revised) ESC, as developed and enhanced through the ECSR's recent case-law, highlighting the key role of EU law in this case-law (section II). For reasons of space, the extensive body of EU case-law on equal pay is mentioned in outline, with the remainder of the *Article* focusing more specifically on the European Commission proposal for a new Directive on pay transparency. We then examine this proposal and its potential contribution to promoting equal pay in the EU (section III). By contrast to the treatment of EU materials by the ECSR, this initiative makes no mention of ESC standards at all.

This *Article* moves on with a discussion on convergences and divergences between equal pay standards that seem to be arising under the ESC and EU law respectively (section IV). We show that, even though EU law has been shaping legal frameworks implementing the principle of equal pay for decades, the ESC has taken the lead in raising relevant standards on this occasion, in particular with respect to pay transparency and obligations to actively promote equality in pay. Although the relevant case-law takes inspiration from EU law, we argue that protection under the ESC goes further than the Commission proposal in some important respects, at least in part because the two systems have different normative

Representation of Women in Decision-Making Positions: UWE Decisions of the European Committee of Social Rights' (2021) ERA Forum 311.

²⁹ European Institute for Gender Equality, *Gender Equality and the Socio-Economic Impact of the COVID-19 Pandemic* (26 May 2021) Publications Office of the European Union.

³⁰ Proposal for a Directive COM(2021) 93 final of the European Parliament and of the Council of 4 March 2021 for a Directive to strengthen the application of the principle of equal pay for equal work or work of equal value between men and women through pay transparency and enforcement mechanisms, ec.europa.eu (hereafter, Proposal for a Directive on Pay Transparency). It has so far been welcomed in the Opinion SOC/678-EESC-2021 of the European Economic and Social Committee (EESC) of 9 June 2021 on binding pay transparency measures.

foundations. Finally, we argue that even though the context of equal pay offered good opportunities for exchange and mutual reinforcement between the ESC and EU systems, there was no engagement on the part of the EU legislature with the ESC that contradicts existing accounts of the interaction of the two systems on this particular topic (section V). Deviating standards and lack of engagement on the EU side again give rise to concern about levelling down and asymmetries in protection between Member States.

II. EQUAL PAY STANDARDS UNDER THE EUROPEAN SOCIAL CHARTER

With the ECSR being the main supervisory body, the supervisory machinery of the ESC consists of two processes: the reporting system, a regular monitoring process based primarily on State reporting,³¹ and the collective complaints procedure. Under the latter, trade unions and (international) non-governmental organizations can bring collective claims challenging the conformity of national law and practice with the ESC.³² The in-depth examination that takes place in the context of the collective complaints procedure allows the ECSR to develop its interpretation of the treaty and protective standards with a focus on specific issues that feature in the submitted complaints and relying on information provided by various sources.³³ The ECSR also issues statements of interpretation setting out the interpretation of rights.

Following complaints lodged by University Women of Europe, an international NGO, against all fifteen (at the time) States that were part of the collective complaints procedure, the ECSR had the opportunity to further develop its equal pay standards.³⁴ The complainant organization alleged the violation of the ESC based on two main arguments. The first argument referred to States' failure to realize the principle of equal pay, as a gender pay gap persists despite the existing national and international legal framework.³⁵ The second argument related to the underrepresentation of women in decision-making positions in the private sector.³⁶ For the purpose of this *Article* we focus only on the review of the complaints concerning the right to equal pay. All except for one State party were found to be in violation of the ESC in relation to the right to equal pay (see Table 1).

³¹ Arts 21-24 of the European Social Charter.

³² Additional Protocol to the European Social Charter Providing for a System of Collective Complaints (ETS n. 158) of 1 July 1998 www.coe.int.

³³ K Lukas, 'The European Social Charter' in C Binder and others (eds), *Research Handbook on International Law and Social Rights* (Edward Elgar Publishing 2020) 133; C O'Connell, 'Social Rights and the European Social Charter: New Challenges and Fresh Opportunities' in O De Schutter (ed.), *The European Social Charter: A Social Constitution for Europe – La Charte européenne: Une Constitution sociale pour l'Europe* (Editions Bruylant 2010) 170-171; C O'Connell, 'The European Social Charter and EU Labour Law' cit. 198.

³⁴ *UWE v Belgium* cit.; *UWE v Bulgaria* cit.; *UWE v Croatia* cit.; *UWE v Cyprus* cit.; *UWE v Czech Republic* cit.; *UWE v Finland* cit.; *UWE v France* cit.; *UWE v Greece* cit.; *UWE v Ireland* cit.; *UWE v Italy* cit.; *UWE v the Netherlands* cit.; *UWE v Norway* cit.; *UWE v Portugal* cit.; *UWE v Slovenia* cit.; *UWE v Sweden* cit.

³⁵ *UWE v Belgium* cit. para. 13.

³⁶ *Ibid.*

State party	Protection and enforcement	Promotion
Belgium	violation	conformity
Bulgaria	violation	violation
Croatia	violation	violation
Cyprus	violation	conformity
Czech Republic	violation	violation
Finland	violation	violation
France	conformity	violation
Greece	violation	violation
Ireland	violation	violation
Italy	violation	violation
Netherlands	violation	violation
Norway	violation	violation
Portugal	conformity	violation
Slovenia	violation	violation
Sweden	conformity	conformity

TABLE 1. Findings of the ECSR on CC 124-138/2016.

II.1. OBLIGATIONS DERIVING FROM THE PROTECTION OF EQUAL PAY UNDER THE EUROPEAN SOCIAL CHARTER

The ECSR began unfolding its reasoning and interpretation by stressing that equal pay is central to the achievement of decent working conditions and alleviation of poverty and social exclusion.³⁷ Under the ESC, the right to equal pay is an aspect of the right to a fair remuneration guaranteed by art. 4, as well as art. 20(c) (R)ESC. The obligations deriving from equal pay provisions may be divided into two broad categories: first, the obligations attached to the *respect* of the right of equal pay, namely its recognition and enforcement, and, second, the obligations attached to its *promotion*.³⁸

The first set of obligations, referring to recognition and enforcement of the right to equal pay, includes its explicit protection in the national legal order, which should be

³⁷ *Ibid.* para. 105.

³⁸ *Ibid.* para. 11. See also M Kotsoni, 'Placing Gender Equality in the Workplace at the Forefront of Social Rights in Europe' cit.; B Kresal, 'Gender Pay Gap and Under-Representation of Women in Decision-Making Positions' cit.

grounded on a specific domestic legal framework.³⁹ Equal pay is understood as covering not only wages, but also benefits and all kinds of remuneration.⁴⁰ Any legislation, regulation or other administrative measure that fails to comply with the principle of equal pay must be repealed or revoked.⁴¹

As the ESC aspires to the protection of social rights not only in text, but also in practice, the ECSR also looked at the availability of effective remedies to victims of pay discrimination. It concluded that access to effective remedies in cases of pay discrimination includes 'affordable and timely' proceedings.⁴² In addition, victims of pay discrimination should be entitled to adequate compensation, which should not be restricted by ceilings.⁴³ Where someone claims to have suffered pay discrimination on the basis of their gender and can establish facts making it reasonable to suppose that discrimination has occurred, the burden of proof must be shifted to the defendant.⁴⁴ Victims of alleged pay discrimination must be protected from retaliatory dismissals, having the right to reinstatement and compensation.⁴⁵

Most aspects of the ECSR's approach on effective remedies were already part of existing standards. The shift of the burden of proof, the lack of ceilings in compensation and protection from retaliatory dismissals are issues to which the ECSR already paid attention in the reporting procedure. However, it had not previously discussed barriers to access justice, such as costs and duration of proceedings ("affordable and timely"). For example, in *UWE v Greece*, the ECSR for the first time found Greece to have violated the ESC, *inter alia*, on the basis of the high cost of litigation, which in combination with the low minimum wage posed a serious obstacle for workers to access justice.⁴⁶

Pay transparency is another important element that appeared in the ECSR's review. The ECSR stressed that "pay transparency is instrumental in the effective application of the principle of equal pay for work of equal value", because it enables workers, employers and their respective representatives, and relevant authorities to uncover and take corrective action against pay discrimination.⁴⁷ Relevant obligations related to pay transparency include the clarification in domestic legislation of the notion of equal work or work of equal or comparable value.⁴⁸ They also include measures that enhance the application of equal pay, such as the introduction of employers' obligation to report on wages and to

³⁹ *UWE v Belgium* cit. paras 139-140.

⁴⁰ *Ibid.* para. 139.

⁴¹ *Ibid.* para. 131.

⁴² *Ibid.* para. 145.

⁴³ *Ibid.* para. 146.

⁴⁴ *Ibid.* para. 147.

⁴⁵ *Ibid.* para. 148.

⁴⁶ *Ibid.* paras 176-181.

⁴⁷ *Ibid.* para. 154.

⁴⁸ *Ibid.* para. 156.

provide relevant data broken down by gender to States authorities.⁴⁹ In addition, workers have a right to request and receive information on “pay levels broken down by gender, including on complementary and/or variable components of the pay package”, while victims of alleged discrimination should be granted access to information regarding the remuneration of fellow workers, “while fully respecting applicable rules on personal data protection and commercial and industrial secrecy”.⁵⁰ National law should provide the possibility of comparisons of pay and jobs beyond one company.⁵¹

The novelty in this interpretation is two-fold. First, the reference to employers’ pay reporting obligations is a novel element. The ECSR had not previously referred to the introduction of such measures by States parties. It had noted relevant information provided by States in the reporting process, but this does not seem to have been decisive for the outcome.⁵² Generally speaking, in past interpretations, the nature of measures undertaken by States to strengthen the enforcement of equal pay was understood to be a matter falling within the discretion of national authorities. While the wording of the decisions does not indicate that the introduction of employers’ obligation to report on wages is necessary or the only measure that could be implemented, this is strongly suggested.⁵³ The second novel element is that the ECSR explicitly recognizes a right of workers to information on pay levels and more specific data when bringing a pay discrimination claim. In its statements of interpretation and recent Conclusions, the ECSR had not explicitly recognized these rights, nor asked States parties specifically for this information. Where such information was provided, it was not decisive for the finding of the ECSR.⁵⁴

Another element on the side of the protection of the rights, refers to equality bodies. The ECSR held that establishing equality bodies is an obligation of States parties in respect to their broader commitment to address discrimination.⁵⁵ These bodies should have monitoring powers with respect to the implementation of the principle of equal pay and promote the application of the right through awareness-raising;⁵⁶ their mandate should include decision-making powers, as well as assistance to victims of pay

⁴⁹ *Ibid.* para. 155.

⁵⁰ *Ibid.* para. 157.

⁵¹ *Ibid.* para. 158.

⁵² See e.g. Conclusions 2018 of Austria of the European Committee of Social Rights of 24 January 2019, art. 4(3), available at hudoc.esc.coe.int.

⁵³ See also Conclusions 2020 of the European Committee of Social Rights of 29 January 2021, art. 20.

⁵⁴ See e.g. Conclusions XXI-3 of Spain of the European Committee of Social Rights of 24 January 2019, art. 4(3), available at hudoc.esc.coe.int; Conclusions XX-3 of Spain of the European Committee of Social Rights on 5 December 2014, art. 4(3), available at hudoc.esc.coe.int. Spain was found to be in conformity with the ESC, despite restrictions to information on out-of-company pay comparisons available to workers and despite concerns voiced by the *Confederación Sindical de Comisiones Obreras* that legislation did not ensure workers’ access to information regarding the gender pay gap.

⁵⁵ *UWE v Belgium* cit. para. 167.

⁵⁶ *Ibid.* para. 168.

discrimination.⁵⁷ States are obliged to allocate to equality bodies the resources and infrastructure necessary for the fulfilment of their purposes.⁵⁸ The ECSR had in the past looked into the availability of recourse equality to bodies and independent authorities,⁵⁹ but it had not previously inquired into their funding, resources and effectiveness, as it did in the examination of the collective complaints.⁶⁰ For example, Bulgaria was found to have violated the ESC on this point, partly because of the inadequate funding of the Commission for Protection against Discrimination.⁶¹

The second set of obligations refers to States' obligation to promote the right to equal pay through measuring disparities in pay and adopting measures that *actively* promote equality in pay.⁶² States are obliged to collect data disaggregated by gender, to analyse the causes of existing inequality in pay, to measure the progress of measures adopted to combat inequality in pay and to assess the impact of gender segregation in employment.⁶³ The ECSR did not list specific measures to remove *de facto* inequalities,⁶⁴ but it suggested gender mainstreaming in employment policies as a suitable strategy.⁶⁵ It also referred to other measures as relevant to assessing compliance with the ESC, including the adoption of national action plans to promote gender equality and equal pay; requiring employers to draw up action plans to secure equal pay; encouraging collective bargaining on equal pay; and raising awareness of the equal pay principle.⁶⁶ The indicator that the ECSR considered as suggesting compliance with the ESC was the gender pay gap as indicated by Eurostat data.⁶⁷ The ECSR did not rely only on the relevant data, but rather on the State's effort reflected in the data. For example, the data for Sweden showed that disparities in pay have not been eliminated,⁶⁸ but the gender pay gap is lower than the EU average with a downward trend. The ECSR found the situation to be in conformity.⁶⁹

In a nutshell, this ECSR case-law established a comprehensive set of obligations relating to the right to equal pay, in relation to the recognition, enforcement and promotion of that right. The standards that emerge through the examination of the collective complaints do not only apply to the States under scrutiny, but extend to all States parties that have ratified

⁵⁷ *Ibid.*

⁵⁸ *Ibid.* para. 169.

⁵⁹ See Conclusions 2014 of the European Committee of Social Rights of 5 December 2014, art. 4(3).

⁶⁰ *UWE v Belgium* cit. paras 168-170.

⁶¹ *UWE v Bulgaria* cit. para. 162.

⁶² *UWE v Belgium* cit. para. 115.

⁶³ *Ibid.* paras 202-203.

⁶⁴ *Ibid.* para. 204.

⁶⁵ *Ibid.* para. 206.

⁶⁶ *Ibid.* para. 208.

⁶⁷ *Ibid.* paras 201-202.

⁶⁸ *Ibid.* para. 180.

⁶⁹ *Ibid.* para. 193.

the provisions protecting equal pay and, more broadly, gender equality in employment.⁷⁰ This is the first time that many of the obligations set out above – aside from those that are already enshrined in EU law – emerge as *binding* standards at the European level, although pay transparency legislation in different forms exists in some States parties.⁷¹

Throughout the years, in its statements of interpretation⁷² and through its Conclusions,⁷³ the ECSR had already outlined some important features of the right to equal pay. However, statements of interpretation have been issued years apart and the development of the content of the right to equal pay appeared fragmented. In addition, the reporting process does not allow for in-depth review of the situation in each State and it relies primarily on States' reporting. The interpretation of the ECSR under the collective complaints procedure – which allows for information to be provided through multiple actors and closer scrutiny of national situation by the ECSR –, brought together the *acquis* of previous interpretations in a concise way, and added new aspects of the right to equal pay. It allowed for a better mapping of the implementation of the right within different domestic contexts, and a more comprehensive and precise definition of its content.⁷⁴ Compared with statements of interpretation and the most recent reporting cycles before the decisions,⁷⁵ this case-law is more developed in respect of effective remedies and pay transparency. Pay transparency surfaces as a central element of the effective protection of equal pay, and failure to ensure it – including owing to a lack of a pay transparency legal framework – was the most common

⁷⁰ In its latest reporting cycle on art. 20, the ECSR incorporated the novel elements of its interpretation under the collective complaints procedure, see Conclusions 2020 of the European Committee of Social Rights of 29 January 2021, art. 20. See also B Kresal, 'Gender Pay Gap and Under-Representation of Women in Decision-Making Positions' cit.

⁷¹ *E.g.* Sweden, France and Belgium have relevant frameworks.

⁷² Conclusions I Statement of interpretation of the European Committee of Social Rights, art. 4(3), available at hudoc.esc.coe.int; Conclusion II Statement of interpretation of the European Committee of Social Rights, art. 4(3), available at hudoc.esc.coe.int; Conclusions III Statement of interpretation of the European Committee of Social Rights, art. 4(3), available at hudoc.esc.coe.int; Conclusions V Statement of interpretation of the European Committee of Social Rights, art. 4(3), available at hudoc.esc.coe.int; Conclusions VIII Statement of interpretation of the European Committee of Social Rights, art. 4(3), available at hudoc.esc.coe.int; Conclusions XIII-3 Statement of interpretation of the European Committee of Social Rights, art. 1 Additional Protocol, available at hudoc.esc.coe.int; Conclusions XII-5 Statement of interpretation of the European Committee of Social Rights, arts 1(2), 4(3), 1 Additional Protocol, available at hudoc.esc.coe.int; Conclusions 2012 Statement of interpretation of the European Committee of Social Rights, art. 20, available at hudoc.esc.coe.int.

⁷³ *E.g.* Conclusions 2014 of the European Committee of Social Rights of 5 December 2014, art. 4(3); Conclusions 2016 of the European Committee of Social Rights of 9 December 2016, art. 20; Conclusions 2018 of the European Committee of Social Rights of 24 January 2021, art. 4(3).

⁷⁴ *UWE v Belgium* cit. para. 119-121.

⁷⁵ Conclusions 2016 of the European Committee of Social Rights of 9 December 2016, art. 20; Conclusions 2018 of the European Committee of Social Rights of 24 January 2021, art. 4(3).

violation of obligations related to the enforcement of the right to equal pay.⁷⁶ A notable omission of the decisions, on the other hand, is that the ECSR did not reiterate a previous suggestion to States parties to introduce a right of trade unions to take legal action in cases of gender discrimination in employment and to intervene in individual litigation, as well as to enable class action in such cases.⁷⁷

II.2. WHAT PLACE FOR EU LAW?

The ECSR relied on multiple legal sources to develop its interpretation. Among them are legal sources that are part of the Council of Europe system, ILO Convention no. 100, and UN treaties.⁷⁸ While the ECSR regularly takes EU requirements into account in setting ESC standards,⁷⁹ EU law sources had a particularly prominent role in the ECSR's consideration of the existing equal pay legal framework in these cases.⁸⁰ A simple comparison between the place that CJEU case-law has in the decision with that of European Court of Human Rights (ECtHR) is telling. While the ECSR considered numerous decisions issued by the CJEU,⁸¹ it only cited one ECtHR judgement concerning gender equality in employment, even though there were also other cases that could be considered as relevant.⁸²

This asymmetry is perhaps justified by the fact that, unlike the ECtHR, the CJEU has a significant and innovative body of case-law on equal pay, that has been key to the

⁷⁶ *UWE v Belgium* cit.; *UWE v Bulgaria* cit.; *UWE v Croatia* cit.; *UWE v Cyprus* cit.; *UWE v Czech Republic* cit.; *UWE v Finland* cit.; *UWE v France* cit.; *UWE v Greece* cit.; *UWE v Ireland* cit.; *UWE v Italy* cit.; *UWE v the Netherlands* cit.; *UWE v Norway* cit.; *UWE v Portugal* cit.; *UWE v Slovenia* cit.; *UWE v Sweden* cit.

⁷⁷ Conclusions XII-5 Statement of interpretation of the European Committee of Social Rights, arts 1(2) and 4(3), 1 Additional Protocol, available at hudoc.esc.coe.int.

⁷⁸ *UWE v Belgium* cit. para. 65-79.

⁷⁹ U Khaliq, 'The EU and the European Social Charter' cit. 185-186.

⁸⁰ The ECSR considered art. 2 of the Treaty of the European Union [2007], arts 8 and 157 of the Treaty of the Functioning of the European Union [2009], arts 21 and 23 of the EU Charter of Fundamental Rights Directive 2006/54/EC cit.; Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work; Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC, Principle 2 of the European Pillar of Social Rights cit.; Recommendation 2014/124/EU of the Commission of 7 March 2014 on strengthening the principle of equal pay between men and women through transparency; Report COM(2013) 861 final from the Commission to the European Parliament and the Council of 6 December 2013 on the application of Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast). See *UWE v Belgium* cit. 81-104.

⁸¹ *UWE v Belgium* cit. paras 93-104.

⁸² See e.g. ECtHR *Emel Boyraz v Turkey* App n. 61960/08 [2 December 2014], a case concerning gender discrimination in employment. Also, ECtHR *di Trizio v Switzerland* App n. 7186/09 [2 February 2016] could be seen as relevant, insofar as it concerns gender discrimination in social policy and, most importantly, it highlights the importance of statistical data in establishing discrimination.

development of the specific content of this principle and ensuring its effectiveness.⁸³ There is a long-standing EU legal framework implementing that principle – and related case-law – which prohibits direct and indirect sex discrimination with respect to pay and requires that job evaluation and classification systems, where they are used, are not discriminatory. The central provision in this regard is now art. 4 of the Gender Equality Directive 2006. In addition, in 2014 the European Commission published a non-binding Recommendation on pay transparency, which suggests measures that MS could adopt to improve the effectiveness of the EU equal pay framework, including information, pay reporting and audit obligations.⁸⁴

Elements of the ECSR's interpretation of the right to equal pay, some of them long-established under the ESC before the 2019 decisions,⁸⁵ are also found in the EU equal pay *acquis*. The Gender Equality Directive 2006 consolidates some of the EU *acquis* on equal pay and discrimination based on sex – including principles established in earlier CJEU case-law, such as on the burden of proof⁸⁶ – and there is a rich body of case-law elaborating on, for example, “pay” (defined in art. 2(1)(e) of the Gender Equality Directive),⁸⁷ “same work” and “work of equal value”,⁸⁸ the concept of “indirect” discrimination,⁸⁹ effective remedies,⁹⁰ and so on. The ECSR cited this body of case-law extensively, and many of the principles (pre-existing and new) set out in the *UWE* decisions align with EU obligations. For example, ESC requirements relating to the shift of the burden of proof

⁸³ E.g. case C-43-75 *Defrenne v Sabena* ECLI:EU:C:1976:56; case C-400/93 *Specialarbejderforbundet i Danmark v Dansk Industri 'Royal Copenhagen'* ECLI:EU:C:1995:155; case C-320/00 *Lawrence and Others* ECLI:EU:C:2002:498; case C-427/11 *Margaret Kenny and Others* ECLI:EU:C:2013:122. For an overview of the CJEU's extensive equal pay case-law, see European Commission, 'Equal Pay: Overview of Landmark Case-Law of the Court of Justice of the European Union' (2019) Publications Office of the European Union; C Barnard, *EU Employment Law* (Oxford University Press 2012 fourth edition) ch. 6.

⁸⁴ Recommendation 2014/124/EU cit.

⁸⁵ Conclusions XII-5 Statement of interpretation of the European Committee of Social Rights, arts 1(2), 4(3) and 1 Additional Protocol, available at hudoc.esc.coe.int.

⁸⁶ Case C-381/99 *Brunnhofner* ECLI:EU:C:2001:358 para. 53; case C-17/05 *Cadman* ECLI:EU:C:2006:633 para. 31.

⁸⁷ See e.g. case C-12/81 *Garland v British Rail Engineering* ECLI:EU:C:1982:44; case C-109/88 *Handels-og kontorfunktionaerenes Forbund i Danmark v Dansk Arbejdsgiverforening (Danfoss A/S)* ECLI:EU:C:1989:383; case 171/88 *Rinner-Kuhn v FWW Spezialgebäudereinigung* ECLI:EU:C:1989:328; case C-184/89 *Nimz v Freie und Hansestadt Hamburg* ECLI:EU:C:1991:50; *Specialarbejderforbundet i Danmark v Dansk Industri 'Royal Copenhagen'* cit., among many others.

⁸⁸ See e.g. case C-129/79 *McCarthy's v Smith* ECLI:EU:C:1980:103; *Specialarbejderforbundet i Danmark v Dansk Industri 'Royal Copenhagen'* cit.; *Lawrence and Others* cit.

⁸⁹ See e.g. case C-170/84 *Bilka v Weber von Hartz* ECLI:EU:C:1986:204; case C-96/80 *Jenkins v Kingsgate* ECLI:EU:C:1981:80.

⁹⁰ See e.g. case C-14/83 *Von Colson and Kamann v Land Nordrhein-Westfalen* ECLI:EU:C:1984:153 and case C-271/91 *Marshall v Southampton and South West Hampshire Area Health Authority* ECLI:EU:C:1993:335 on compensation; case C-63/08 *Pontin* ECLI:EU:C:2009:666 on principle of effectiveness.

are effectively identical to art. 19(1) of the Gender Equality Directive and CJEU case-law.⁹¹ Art. 18 of the Gender Equality Directive provides for effective compensation that is not subject to ceilings, except in limited circumstances; and art. 24 requires protection against retaliatory dismissal or adverse treatment. The CJEU has also established that comparisons need not be limited to the same company, if differences are attributable to a “single source”, such as a holding company.⁹²

There is also procedural significance to the equal pay cases of the ESC that touched upon its relationship with EU law. Following the invitation from the President of the ECSR,⁹³ the European Commission submitted its observations on the cases.⁹⁴ The Commission had only intervened once before in the examination of a collective complaint throughout the history of the collective complaints procedure. That was the case of the *Greek General Confederation of Labour v Greece*,⁹⁵ stemming from financial assistance conditionality agreed with the European Commission, European Central Bank and the International Monetary Fund. In this case, the European Commission had challenged the claims made by the complainant, whereas in the cases of equal pay it remained neutral in respect of the complaint and simply summarised the relevant EU law.⁹⁶

In other words, this case-law is an example of the dynamic development of ESC standards informed by EU sources. Of course, the fact that these sources shaped to some degree the interpretation of the equal pay provisions of the ESC does not necessarily mean that the standards emerging from the ESC are identical to those existing in EU law, nor that the ECSR is constrained by EU law in developing a more advanced protection of the right to equal pay. In particular, the second pillar of ECSR case-law, the obligation to *promote* the right to equal pay through various measures, is much less prominent in EU standards. We will return to this point in section IV below. A more specific example is, for instance, that ECSR case-law requires reinstatement in case of retaliatory dismissal, whereas EU law currently does not necessarily require this.

Furthermore, many of the pay transparency obligations formulated in the UWE decisions were not at the time *mandated* by EU law. While the concept of transparency has been stressed by the CJEU in the context of determining relevant elements of pay⁹⁷ and burden

⁹¹ See e.g. case C-381/99 *Brunnhöfer* ECLI:EU:C:2001:358 para. 53; *Cadman* cit. para. 31.

⁹² *Lawrence and Others* cit. para. 17.

⁹³ Art. 32(A) of Rules of the ECSR.

⁹⁴ European Union observations of 25 May 2018 regarding complaints n. 124-138/2016 *University Women of Europe (UWE) v Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Finland, France, Greece, Ireland, Italy, the Netherlands, Norway, Portugal, Slovenia and Sweden*.

⁹⁵ *GSEE v Greece* cit. para. 12. On this point see also C Kilpatrick, ‘The Human Rights Puzzle of the Euro-Crisis: Why Massive Breaches of Human Rights but None of the EU Charter of Fundamental Rights?’ in M González Pascual and A Torres Pérez (eds), *Social Rights and the European Monetary Union* (Edward Elgar Publishing 2022) 130-131.

⁹⁶ *GSEE v Greece* cit.

⁹⁷ Case C-262/88 *Barber v Guardian Royal Exchange Assurance Group* ECLI:EU:C:1990:209 paras 34-35.

of proof,⁹⁸ EU law did not require reporting on wages or the regular provision of data and information on pay. Certain pay transparency measures, such as reporting on pay levels, pay audits and a right to request information on pay, were instead included in the non-binding Commission Recommendation. In establishing obligations under the ESC, the ECSR referred to the Recommendation stating that States should take measures such as those set out in the Recommendation to ensure adequate pay transparency in practice.⁹⁹ With this statement, the ESC in effect made the Recommendation – which has had only limited effect in EU MS to date – a benchmark for compliance with *binding* obligations under the ESC.

ESC standards established in this case-law thus draw inspiration and reinforce EU standards on equal pay and go beyond current EU obligations in some respects, such as in respect of pay transparency. We discuss the Commission proposal on binding pay transparency measures in the next section, before comparing these emerging EU standards to those provided for under the ESC.

III. THE EUROPEAN COMMISSION'S PROPOSAL ON BINDING MEASURES REGARDING PAY TRANSPARENCY

As highlighted above, the principle of equal pay between men and women is found in various EU legal sources and the European Pillar of Social Rights. However, significant barriers still remain to the effectiveness of the EU equal pay framework, and the persistent gender pay gap raises questions about the EU's strategy to address inequalities in pay based on gender.¹⁰⁰ Such barriers include a lack of clarity over the concept of “work of equal value” and the objective criteria for the assessment of the value of work; the difficulty of finding an actual comparator of the opposite gender in sectors, occupations or workplaces that are highly gender-segregated; the lack of (access to) information that is pivotal in bringing equal pay claims, such as information on pay levels, broken down by gender; and overall lack of transparency in pay structures.¹⁰¹ The lack of awareness of their rights and the cost and the length of proceedings pose serious obstacles to workers in bringing equal pay claims, especially to low-paid ones, as does fear of retaliation by employers.¹⁰² The 2014

⁹⁸ *Handels-og kontorfunktionaerenes Forbund i Danmark v Dansk Arbejdsgiverforening (Danfoss A/S)* cit. para. 11.

⁹⁹ *UWE v Belgium* cit. para. 155.

¹⁰⁰ M Smith, ‘Social Regulation of the Gender Pay Gap in the EU’ (2012) *European Journal of Industrial Relations* 365, 367-369.

¹⁰¹ Report COM(2013) 861 final from the Commission to the European Parliament and the Council on the application of Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast); Staff Working Document SWD(2020) 50 final from the Commission of 5 March 2020, Evaluation of the relevant provisions in the Directive 2006/54/EC implementing the Treaty principle of “equal pay for equal work or work of equal value”; P Foubert, ‘The Enforcement of the Principle of Equal Pay for Equal Work or Work of Equal Value’ cit.

¹⁰² P Foubert, ‘The Enforcement of the Principle of Equal Pay for Equal Work or Work of Equal Value’ cit.

Recommendation on pay transparency was intended to address some of these issues without resorting to binding measures, but with very limited success.¹⁰³

In March 2021, a long-awaited proposal on binding pay transparency measures was finally published. Since then, the European Parliament has published its position based on the report drawn up by the Committee on Employment and Social Affairs and Committee on Women's Rights and Gender Equality,¹⁰⁴ and the Council of the EU has published its General Approach.¹⁰⁵ At the time of writing, trilogues – that is, negotiations between the Commission, Parliament and Council with a view to reaching a compromise between their respective positions – are still on-going. At this stage, a final compromise is still some months away. While the text of the Directive has not yet been finalised, however, it is possible to determine what are likely to be the main features of the new legislation and to reflect on the regulatory options proposed by the three institutions, where they diverge, as discussed below.

The proposed Directive on the implementation of the principle of equal pay is a comprehensive and complex piece of legislation, which focuses on pay transparency and enforcement mechanisms. The Commission proposal includes clarifications of legal concepts, rights for workers and job applicants, employer obligations, as well as many important provisions relating to remedies and enforcement. It incorporates some already existing elements of EU law, such as the requirement that discrimination must be attributable to a single source,¹⁰⁶ but also a wide range of new obligations. With respect to the clarification of concepts, the proposal sheds some light on the objective criteria to be used to determine the value of work, in line with existing CJEU case-law, and obliges MS to take steps to ensure that employers have pay structures ensuring that men and women are paid equally and to develop tools and methodologies for assessing the value of work.¹⁰⁷ It also provides that, where no actual comparator can be established, there is a possibility to use a hypothetical comparator or to advance other evidence that allows for discrimination to be presumed.¹⁰⁸

¹⁰³ Report from the Commission COM(2017) 671 final to the European Parliament, the Council and the European Economic and Social Committee on the implementation of the Commission Recommendation on strengthening the principle of equal pay between men and women through transparency.

¹⁰⁴ Report COM(2021) 93 on the proposal for a Directive of the European Parliament and of the Council of 22 March 2022 to strengthen the application of the principle of equal pay for equal work or work of equal value between men and women through pay transparency and enforcement mechanisms (EMPL and FEMM Committees) www.europarl.europa.eu (hereafter, Report of the European Parliament COM(2021) 93).

¹⁰⁵ Council of the European Union Proposal for a Directive of the European Parliament and of the Council to strengthen the application of the principle of equal pay for equal work or work of equal value between men and women through pay transparency and enforcement mechanisms, General Approach, Document 2021/0050(COD), available at data.consilium.europa.eu (hereafter, Council General Approach).

¹⁰⁶ Proposal for a Directive on Pay Transparency cit. art. 4(4).

¹⁰⁷ *Ibid.* art. 4.

¹⁰⁸ *Ibid.*

On the side of workers' rights, the proposal includes a right of job applicants to receive information about the initial pay level or its range for a given position,¹⁰⁹ and a right of workers to receive information on their individual pay level and average pay levels, broken down by gender, for categories of workers doing equal work or work of equal value.¹¹⁰ This latter provision should make it easier for workers to obtain information necessary to identify discrimination and bring an equal pay claim.

An important feature of the proposed Directive is a provision on employers' obligation to report on pay gaps, though not on actual pay levels, and to conduct joint pay assessments with workers' representatives. More specifically, it introduces the obligation of employers with more than 250 workers to provide different types of information on a regular basis, including the pay gap between men and women workers across the organisation and the pay gap for different categories of workers.¹¹¹ Where a gap of more than five per cent is identified in any category of workers that cannot be justified by objective factors, employers must conduct a joint pay assessment.¹¹² These provisions are crucial to ensuring that workers, unions, and other interested parties are able to detect discrimination and gender bias in pay structures, and to encouraging employers to reflect on and address gender disparities in pay within their organisation.

The proposed Directive attempts to address many of the challenges that victims face in enforcing their rights outlined above through proposals on remedies and enforcement. For example, it seeks to ensure that equality bodies and workers' representatives can act on behalf or in support of victims of pay discrimination.¹¹³ It adds that full back pay should be an element of real and effective compensation.¹¹⁴ In addition, the burden of proof is to shift to the defendant/employer where they have not complied with their reporting and joint assessment obligations.¹¹⁵ The proposal also includes rules on limitations periods¹¹⁶ and legal and judicial costs¹¹⁷ that are favourable to claimants. Member States will be obliged to take measures to ensure that equality bodies – which must be established under the Gender Equality Directive – have adequate resources to carry out

¹⁰⁹ *Ibid.* art. 5.

¹¹⁰ *Ibid.* art. 7.

¹¹¹ *Ibid.* art. 8. The information on gaps across the organisation must be made publicly available, whereas the information on gaps by categories of workers must be provided to workers, workers' representatives and the proposed monitoring body.

¹¹² *Ibid.* art. 9.

¹¹³ *Ibid.* art. 13.

¹¹⁴ *Ibid.* art. 14.

¹¹⁵ *Ibid.* art. 16.

¹¹⁶ *Ibid.* art. 18.

¹¹⁷ *Ibid.* art. 19.

their functions.¹¹⁸ Member States will also be subject to obligations related to monitoring and awareness-raising, including the designation of a “monitoring body”.¹¹⁹

Overall, the proposal puts more weight on enforcement, particularly through equal pay claims, than on pay transparency, as well as pay reporting and action to address pay disparities by employers themselves.¹²⁰ For example, the exemption of employers with fewer than 250 workers from reporting and assessment requirements leaves out all small and medium-sized enterprises, which constitute almost all enterprises and account for *two thirds* of employment in the EU.¹²¹ Furthermore, unlike the 2014 Recommendation, the Directive proposal does not include a requirement to discuss the issue of equal pay in collective bargaining.¹²² Collective bargaining is an important means to ensuring transparency in pay structures and equality in pay, with potentially much more far-reaching, structural effects than enforcement through equal pay claims.¹²³

The proposal will, of course, undergo changes as it makes its way through the legislative procedure and the Directive is finalised, reflecting some compromise between the positions of the three institutions. For the most part, the positions of the Parliament and the Council do not radically depart from the Commission’s proposal. The report of the European Parliament, however, overall seeks to strengthen the Directive and includes important proposals for amendments that are generally in the interest of workers. These include a possibility for cross-sector comparison¹²⁴ a lowering of the threshold for reporting and assessment obligations to employers with 50 workers or more,¹²⁵ as well as an obligation to strengthen social dialogue and ensure that trade unions can collectively bargain on equal pay.¹²⁶

On the other hand, the Council of the EU’s General Approach seeks to introduce fewer changes to the Commission proposal, and certainly to maintain the threshold of 250 workers. The Council also proposed to introduce special rules for micro and small enterprises from some of the other obligations,¹²⁷ to replace the proposed ‘monitoring body’ with a ‘control body’ with more restricted functions,¹²⁸ and water down some of the enforcement

¹¹⁸ *Ibid.* art. 25.

¹¹⁹ *Ibid.* art. 26.

¹²⁰ K Arabadjieva, ‘A Small Step Towards Gender Equality in Pay’ (26 March 2021) Social Europe socialeurope.eu.

¹²¹ *Ibid.*

¹²² Recommendation 2014/124/EU cit. recommendation 6.

¹²³ J Pillinger, ‘Bargaining for Equality: How Collective Bargaining Contributes to Eliminating Pay Discrimination Between Women and Men Performing the Same Job or Job of Equal Value’ (2014) European Trade Union Confederation; K Arabadjieva, ‘A Small Step Towards Gender Equality in Pay’ cit.

¹²⁴ Report COM(2021) 93 cit. art. 4(4).

¹²⁵ *Ibid.* art. 8(1).

¹²⁶ *Ibid.* art. 11.

¹²⁷ General Approach 2021/0050(COD) cit. e.g. arts 6(2) and 7(2)(a).

¹²⁸ *Ibid.* art. 26.

provisions such as those on costs and penalties.¹²⁹ The trilogue process has been criticised for often favouring the Council over the democratically elected Parliament.¹³⁰ It is therefore, at this stage, reasonable to assume that many of the more generous provisions proposed by the Parliament will probably not be fully transposed into the final text.

III.1. WHAT ROLE FOR ESC STANDARDS?

Unlike the ECSR, which referred extensively to EU law, the European Commission proposal does not refer to the ESC and its recent case-law, neither in the background section of the document nor in the proposed Preamble. Although the ESC does not occupy the special position that the ECHR does under the CRFEU,¹³¹ it is to be expected that the Commission is familiar with the relevant ESC standards. According to art. 151 TFEU, the “Union and the Member States, having in mind fundamental social rights such as those set out in the European Social Charter [...] shall have as their objectives the promotion of employment, improved living and working conditions”. Furthermore, art. 23 CFREU on equality between men and women – cited in the proposal – draws on art. 20 (R)ESC.¹³²

Indeed, some, but not all, of the elements of ECSR case-law that go beyond the existing EU framework and case-law and the Recommendation on pay transparency outlined above feature in the proposal, though it is not possible to establish a causal connection there. For example, the provisions regarding resources of equality bodies and the designation and tasks of a monitoring body did not feature as such in the Recommendation, but were emphasized in ECSR case-law. The ECSR case-law also strongly emphasized the importance of effective remedies, including affordable and timely proceedings – a dimension that has been further developed by the Directive proposal as compared to the 2014 Recommendation, stretching beyond the existing requirements of the Gender Equality Directive and CJEU case-law that touch on the question of effective remedies.

Unfortunately, without explicit reference to the ESC, the role of ECSR case-law in the drafting of the proposal is a matter of speculation. While it is not unreasonable to suggest that the norms set by another European-level body have been one source of inspiration for the Commission, it is impossible to determine whether and to what extent these norms have been taken into account by consulting legal sources and preparatory documents. That is, whereas the role of EU standards in shaping ECSR case-law is clear, the same is not true the other way around. This lack of engagement is a well-known issue that has been subject to commentary in various corners, and some of the dangers in this approach are discussed

¹²⁹ *Ibid.* arts 19 and 21.

¹³⁰ See e.g. C Collombet and A Math, ‘La nouvelle directive “équilibre” sur les congés parentaux, de paternité et d’aïdant: une avancée de l’Europe sociale?’ (2019) *Chronique internationale de l’IRES* 3.

¹³¹ See e.g. art. 52(3) CFREU that guarantees interpretative convergence with regard to the rights laid down in the CFREU and those laid down in the ECHR.

¹³² Explanations relating to the Charter of Fundamental Rights of the European Union [2007].

in section V below. The opinion of the European Economic and Social Committee on the proposal, by contrast, includes a reference to the ECSR's case-law discussed here.¹³³ A reference also appeared in a model Directive proposal published by the European Trade Union Confederation in its campaign for pay transparency measures.¹³⁴

IV. HOW DOES THE PROPOSAL COMPARE TO THE ESC STANDARDS?

In this part we compare the ESC equal pay standards with those of the Commission proposal. We argue that, even though similar standards emerge from the two instruments, their different normative underpinnings and approaches on certain matters suggest that the ESC may offer a less detailed, yet broader protection in certain respects.

There are common standards set by the two instruments on certain aspects of the principle of equal pay. In both instruments, the principle of equal pay is broken down in elements that are more or less the same. These aspects include, for instance the definition of legal concepts, provisions relating to gender-neutral pay systems, employers' obligations to report on wages, effective remedies, the shift of the burden of proof and protection from dismissal, as well as provisions relating to equality and monitoring bodies. However, this common understanding of *what* should be protected does not necessarily mean that there is a shared understanding of *how* and *how much* it should be protected.

A first important difference is, of course, the level of precision of the proposed EU norms compared to those of the ESC. This is not surprising, since the ECSR case-law interprets a relatively vaguely formulated treaty text, whereas the proposed Directive, like the existing framework laid down in the Gender Equality Directive, is a secondary law act. Obligations under the ESC are formulated in a way that leaves much more room for discretion to States parties as regards implementation. That is not to say that Directives do not leave any room for discretion. In the case of the proposed Directive, MS are free to provide a higher level of protection. As they are more concrete, however, EU standards might be more demanding on MS than obligations under the ESC. One example here is the requirement to provide for a possibility of a hypothetical comparator under the proposal, compared to an obligation to ensure that comparisons can be made beyond one company, which does not *necessarily* imply hypothetical comparisons. Similarly, whereas ECSR case-law requires that proceedings must be affordable in general terms, the Commission proposes concrete measures to reduce costs for workers, such as the possibility for workers' representatives and equality bodies to make claims on behalf of workers, or a limitation on the circumstances in which an employer can recover legal and judicial costs.¹³⁵

¹³³ Opinion SOC/678-EESC-2021 cit.

¹³⁴ ETUC, *Model Proposal for a Directive on Strengthening the Principle of Equal Pay Between Women and Men Through Pay Transparency* www.etuc.org.

¹³⁵ Commission Proposal for a Directive on Pay Transparency cit. arts 13 and 19.

The proposed Directive also goes further than some of the requirements set out in ECSR case-law in its substance. For example, there is nothing in this case-law on the provision of information on salary to job applicants or on equal pay matters in public contracts.¹³⁶ The Commission proposal contains also an additional provision on the shift of the burden of proof where employers have not complied with information and reporting obligations set out in the Directive.¹³⁷ Of course, it is yet to be seen whether these elements will make it into the final text of the Directive.

There are also aspects of ECSR standards that go beyond those set out in the proposed Directive, or that have not been incorporated into the proposal. The main example in the first category are the provisions on reporting, which under the proposal are limited to employers with at least 250 workers. The ECSR referred to adoption of measures on employers' wage reporting as an indication of conformity with the ESC, citing the Recommendation of 2014, which excludes only employers with fewer than 50 workers from the reporting obligations.¹³⁸ The ECSR did not itself set any explicit limit regarding the size of an enterprise applicable to the scope of this measure, so it is not entirely clear whether it accepts this threshold. It does seem to accept some thresholds applicable at a national level: for instance, in Sweden, which held to be in conformity with the ESC, the national framework establishes certain wage reporting obligations for employers that employ more than 10 workers.¹³⁹ The considerably higher threshold of 250 workers, however, will exclude two thirds of the workforce from the benefit of the provision. It may benefit an even lower proportion of women workers, since women tend to work in smaller enterprises.¹⁴⁰ Given that rights under the ESC must be protected *effectively*, a threshold that excludes the great majority of workers is likely to fall short of ESC standards.

The reason underlying the threshold of 250 workers that has been advanced is that reporting and assessment obligations would impose additional burdens on businesses in the aftermath of the Covid-19 pandemic,¹⁴¹ but this high threshold has been hotly disputed.¹⁴² As noted above, the proposal places much more emphasis on removing procedural barriers and improving monitoring and State enforcement than it does on employers' obligations to report on wage differences and take steps to address them. Another example here is the fact that the proposal requires reporting on pay gaps rather than actual average pay levels in companies – which would make it easier for workers to assess

¹³⁶ *Ibid.* art. 21.

¹³⁷ *Ibid.* art. 16(2).

¹³⁸ *UWE v Belgium* cit. para. 155; Recommendation 2014/124/EU cit. recommendation 4.

¹³⁹ *UWE v Belgium* cit. para. 146.

¹⁴⁰ EIGE, 'Tackling the Gender Pay Gap: Not Without a Better Work-Life Balance' (2019) Publications Office of the European Union 11.

¹⁴¹ Proposal for a Directive on Pay Transparency cit.; K Arabadjieva, 'A Small Step Towards Gender Equality in Pay' cit.

¹⁴² See e.g. Opinion SOC/678-EESC-2021 cit.

whether to bring a claim – and it does not require full pay audits, but only a “joint assessment”. That is, it still places the onus primarily on workers and those acting on their behalf, as well as on the State, to take action against pay discrimination. Particularly given the context of the Covid-19 pandemic, this is a clear attempt to accommodate the concerns of employers – which strongly oppose the proposed Directive¹⁴³ – over additional costs and administrative burdens. Such considerations do not feature, *prima facie*, in the ECSR standard-setting.

This is a reminder of the fact that these two instruments are constructed on different, at least to some extent, normative underpinnings. Market-related incentives are creeping into the European Commission's initiative. The explanatory memorandum accompanying the proposal does not leave any doubt: “the fact that national pay transparency measures are fragmented and scarce increases the risk of competition being distorted by having different levels of social standards. There is a risk of businesses competing on an uneven playing field, which would hamper the operation of the internal market. Action at EU level is needed in order to ensure a similar level of protection for workers across the EU and a level playing field for operators in the internal market”.¹⁴⁴

This is in line with the well-known CJEU statement in *Defrenne II*, a case on the application of the principle of equal pay, that the union has social objectives as well as being an economic union.¹⁴⁵ It also reflects the EU's original single-market objectives. The justifications for the proposal highlight not only the social, but also the business case for the new measures. The part of the explanatory memorandum that discusses the proportionality of the measures introduced with the directive, among others, states: “[...] the main benefit is the full protection of a fundamental EU value. In addition, it contributes to the EU's wider social ambitions as set out in the European Pillar of Social Rights. Moreover, further benefits may come from more secure employment, workforce retention and more productive workers and firms. Therefore, it will have a positive impact on business profitability and the functioning of the internal market”.¹⁴⁶

Social and economic objectives often conflict, however. This is a tension that comes up in other areas of EU law, too.¹⁴⁷ The ECSR, on the other hand, being a human rights body, is not constrained by economic, competition or market-oriented considerations to justify the promotion of gender equality in employment. Under the ESC, workers should

¹⁴³ BusinessEurope, ‘EU Action Plan on Tackling the Gender Pay Gap’ (Position Paper May 2018); V Guerra, ‘Binding Pay Transparency Measures Have to Fully Take into Account the Reality of SMEs’ (20 June 2020) SMEUnited www.smeunited.eu.

¹⁴⁴ Explanatory memorandum to Proposal for a Directive on Pay Transparency cit. 4.

¹⁴⁵ *Defrenne v Sabena* cit.

¹⁴⁶ Explanatory memorandum to Proposal for a Directive on Pay Transparency cit. 5.

¹⁴⁷ For example, see ACL Davies, ‘One Step Forward, Two Steps Back? The Viking and Laval Cases in the ECJ’ (2008) *ILJ* 126; KA Polomarkakis, ‘A Tale of Two Approaches to Social Europe: The CJEU and the Advocate General Drifting Apart in Case C-201/15 AGET Iraklis’ (2017) *Maastricht Journal of European and Comparative Law* 424; A Gerbrandy, W Janssen and L Thomsin, ‘Shaping the Social Market Economy After the Lisbon Treaty: How “Social” is Public Economic Law?’ (2019) *Utrecht Law Review* 32.

be treated equally just because they are workers and because they are human beings, not because equal treatment makes them more productive or increases business profit. The implementation of gender equality in employment does not have to be justified by reasons pertaining to the free-market economy. The ECSR therefore did not balance the strengthening of the implementation of the right to equal pay against potential “costs” for employers or for the market overall.

This normative underpinning, namely the egalitarian understanding behind the ECSR approach to equal pay, is what makes it different from the EU’s approach to this topic. In this respect the ESC, concerned primarily with the protection of social rights – and not with the impact of this implementation in the free-market European economy – is an instrument more open to evolution in response to challenges that workers face, putting social rights at the centre of its considerations. This does not mean that the ESC standards are the highest attainable – still in some respects the treaty sets minima. However, being free from employing free-market economy as a lens or motive, the ECSR leaves room for further development towards a direction that is more protective for workers. These different underpinnings of the two instruments, when it comes to their relationship with competition and economy, perhaps explain why the proposed Directive does not put pressure on SMEs to report on pay gaps, despite the fact that the cost of reporting is very modest.¹⁴⁸ There are also other aspects of the proposal that seek to accommodate employer interests at the expense of pay transparency in the interest of workers. For example, employers are still able to require employees not to disclose their pay or information obtained under the Directive, aside from where they are specifically seeking to enforce the principle of equal pay.¹⁴⁹ It is to be seen whether the final form of the Directive will contain further compromises between worker and business interests, such as the exemption of smaller businesses from some provisions, as suggested by the Council.¹⁵⁰

It is also the case that ESC obligations go further in their positive dimension, namely obligations to *promote* the right to equal pay, and in this respect the Commission proposal does not incorporate many of the elements contained in the ECSR case-law. Unlike ECSR case-law, the proposal contains nothing on collective bargaining – only that the provisions under the Directive should be “discussed” with the social partners¹⁵¹ – nor on State or employer action plans to close the pay gap. Yet, such provisions are important elements of a strategy to promote the right to equal pay through encouraging deeper *systemic* changes that stem from the action of governments and social partners. These actions have the potential to address the phenomenon of pay inequality in a more holistic and far-reaching manner than the more piece-meal enforcement through equal pay claims advanced by workers or by trade unions and equality bodies. Equal pay claims

¹⁴⁸ K Arabadjieva, ‘A Small Step Towards Gender Equality in Pay’ cit.

¹⁴⁹ Proposal for a Directive on Pay Transparency cit. arts 7(5) and (6).

¹⁵⁰ General Approach 2021/0050(COD) cit.

¹⁵¹ Proposal for a Directive on Pay Transparency cit. art. 11.

generally address instances of pay discrimination affecting the claimant(s) in the case, and at most the particular employer or “single source” responsible for discrimination. Collective agreements, especially at sectoral or even national level, on questions pertaining to equal pay – such as gender-neutral job evaluation and classification systems or low pay in female-dominated occupations – cover a significantly higher proportion of workers and seek to eliminate discrimination and undervaluation of work typically performed by women from the outset, rather than placing the onus on workers to uncover and challenge these issues *ex post*.¹⁵² The same goes for proactive steps by employers or State authorities to uncover discrimination and gender bias in pay structures. These approaches shift the burden of enforcing the principle of equal pay from potential victims to those actors that are able to address pay discrimination and other causes underpinning gender pay inequalities more effectively.

Existing provisions in the Gender Equality Directive on the creation of equality bodies, which the Commission proposal reinforces, reflect this positive dimension to some extent. The proposal also includes some new elements. The joint pay assessment must include measures to address pay differences that are not objectively justified. This is reminiscent of an action plan to close pay gaps, but the language used is – quite likely, deliberately – different from “action plan” or “audit”, and it is unclear how extensive these assessments will be. The provision also only applies to employers with more than 250 workers. Another proposal is the designation of a monitoring body that would effectively contribute to fulfilling some positive obligations, including awareness-raising and tackling the causes of the gender pay gap.¹⁵³ The Council’s general approach, however, sets out to remove the reference to a specific body and only requires States to analyse, but not tackle the causes of the gap. The final text of the Directive may constitute a compromise on this point, reflecting a reluctance to impose additional legal obligations on States.

It is not surprising that this positive dimension is less developed in EU law. The emphasis of existing EU secondary law on equal pay and discrimination is on individual redress, rather than tackling structural issues. Systemic problems are the subject of policy, rather than legal solutions at the EU level – the Gender Equality Strategy 2020–2025 and action plan on Tackling the gender pay gap 2017–2019 do refer to the need for policies to address other causes of the gap, though they do not mention action plans or collective bargaining.¹⁵⁴ By contrast, it is the ECSR’s main task to assess systemic issues and to recommend systemic changes that are to be implemented by States, to which ESC obligations are addressed. The ESC response thus recognizes to a greater extent the responsibility of the State, but also other actors to address structural challenges that are at the root of pay

¹⁵² On the role of collective bargaining in promoting equal pay, see J Pillinger, ‘Bargaining for Equality’ cit.

¹⁵³ Proposal for a Directive on Pay Transparency cit. art. 26.

¹⁵⁴ Communication COM(2020) 152 final from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 5 March 2020, A Union of Equality: Gender Equality Strategy 2020-2025.

inequalities; and it appears to be more informed by background social justice issues. This reflects, again, some fundamental differences between the EU and ESC frameworks.

V. OPPORTUNITIES AND CHALLENGES

The interaction between the instruments, as well as the ultimate divergence in standards, illustrate the added value of the ESC system and its position *vis-à-vis* the EU system. Although the ECSR built on EU law and the non-binding Commission Recommendation, it was the first to emphasize and elaborate on *binding* European-level standards regarding pay transparency, and the need for even further strengthening of enforcement mechanisms. In doing so, it sent a strong signal regarding the measures that must be put in place to realise the right to equal pay, asserting its place as Europe's primary standard-setting body in the sphere of social rights. As such, it has an important complementary function *vis-à-vis* EU law, which for the time being subordinates social objectives to economic and market objectives.¹⁵⁵ Since the ECSR is not limited by the need to balance a broader range of interests and considerations, including economic ones, ESC standards – where they apply to States parties – can complement EU standards by requiring that States put in place measures that go beyond EU law.

Absent a presumption of conformity of EU law to the ESC, the ESC system in this context ensures that State obligations to guarantee the right to equal pay do not stop at compliance with EU legislation. This is particularly significant when it comes to the positive dimension of State obligations, which underscores the need for deeper systemic changes through actions by a broader range of actors. Of course, a crucial issue here is the extent to which States parties actually comply with ESC obligations over and above the requirements of EU law, with which they must comply in accordance with the EU doctrine of supremacy. At the same time, ESC standards constitute a *benchmark*, against which existing or planned EU measures – and the extent to which they truly promote the protection of certain social rights, or indeed infringe them – can be assessed, by the EU institutions themselves, MS or other actors.

Since the ECSR is a specialist body with long-standing expertise in the sphere of social rights, its case-law is also a rich resource regarding both the definition of the content of particular rights and the assessment of compliance of State (in)action with such rights.¹⁵⁶ In this respect, ESC standards provide a potential source of inspiration for EU policy and

¹⁵⁵ See e.g. KA Polomarkakis, 'The European Pillar of Social Rights and the Quest for EU Social Sustainability' cit.; D Schiek, 'Towards More Resilience for a Social EU: The Constitutionally Conditioned Internal Market' (2017) *European Constitutional Law Review* 611; FW Scharpf, 'The Asymmetry of European Integration, or Why the EU Cannot Be a "Social Market Economy"' (2010) *Socio-Economic Review* 211; K Ewing, 'The Death of Social Europe' (2015) *King's Law Journal* 76.

¹⁵⁶ A Aranguiz, 'Bringing the EU Up to Speed in the Protection of Living Standards Through Fundamental Social Rights' cit. 623; O De Schutter, 'The European Social Charter in the Context of Implementation of the EU Charter of Fundamental Rights' cit.

lawmakers, as well as the CJEU, particularly because the ESC is a European instrument that has been the inspiration for a number of provisions now contained in the CFREU, such as art. 23 on gender equality in employment, and the earlier Charter of the Fundamental Social Rights of Workers. The CJEU has, at times, also noted the fact that EU MS are parties to the ESC as a reason to draw on ESC – alongside other sources – in formulating general principles of EU law, such as in the *Viking* case.¹⁵⁷ The ECSR provides an authoritative interpretation of social rights standards at the European level, which pays attention to constitutional and other national legal sources. While other international instruments, such as the ILO Conventions and UN Covenants, are also important sources of inspiration for EU law, these existing linkages strengthen the case for paying particular regard to the ESC. Indeed, many of the reasons for the special place of the ECHR in the EU legal order – for example, divergence in the interpretation of the same or similar rights and rights’ standards that might lead to conflicting transnational obligations and to the undermining of non-EU human rights systems by the development of EU law¹⁵⁸ – apply also in the case of the ESC, particularly now that the EU social legislation is expanding and covering new areas, including, for example, minimum wages.¹⁵⁹

In the case of equal pay, the ESC collective complaints resulted in comprehensive analysis of relevant obligations and of compliance issues in a significant number of States parties, almost all of which are EU MS. The fact that the ECSR engaged extensively with EU law sources and incorporated them into its analysis strengthens both the linkages and parallels between the two systems, at least where the right to equal pay is concerned, highlighting the scope for fruitful exchange and judicial dialogue. To the extent that the detailed ECSR decisions go further than current EU standards, they provide a reference point for the future development of EU legislation and case-law. Given the various links outlined above, it would have been possible for the European Commission to mention and engage more explicitly with the relevant standards emerging in ECSR case-law in its proposal for pay transparency measures. In view of the different underpinnings of the two systems discussed in the previous sections, some differences in standards are to be expected. However, explicit mention of ESC standards (including in the preamble) and some explanation in the background to the proposal of how these relate to the proposed EU measures would have been desirable. This would acknowledge the position of the ESC as a European norm-setting body in the field of social rights and that EU MS have obligations under this system – that is, recognizing the authority of the social rights counterpart to the ECHR – and it could provide an opportunity to clarify relevant differences.

¹⁵⁷ Case C-438/05 *The International Transport Workers' Federation and The Finnish Seamen's Union* ECLI:EU:C:2007:772 para. 43.

¹⁵⁸ M Kuijer, 'The Challenging Relationship between the European Convention on Human Rights and the EU Legal Order: Consequences of a Delayed Accession' (2020) *IJHR* 998.

¹⁵⁹ See the recent Directive of the European Parliament and of the Council on adequate minimum wages in the European Union, not yet published in the OJ.

It remains to be seen whether the CJEU will engage with ESC in the interpretation and application of existing law or the new Directive. Its track record on this front has been relatively poor so far and criticised by a number of commentators.¹⁶⁰ At the very least, both these and any future collective complaints, as well as cyclical reports on compliance with the now much more detailed ESC requirements, will be useful materials to put before the Court. Again, the CJEU is not bound to follow the case-law of the ECSR, and there is currently no formal basis in the treaties or the CFREU for doing so, unlike in the case of the ECHR. However, the CJEU can, as it has done before,¹⁶¹ draw on the ESC in the interpretation of CFREU provisions that are based on or correspond to ESC rights, as well as in their application to a particular case.

The right to equal pay is therefore an area in which there is scope for dialogue and productive synergies between the two systems, and opportunities for EU and ESC standards to be mutually reinforcing. Given that EU law formed part of ECSR analysis and that ESC and EU standards on pay transparency and enforcement mechanisms are emerging at more or less the same time, it is also an area that provides particularly salient opportunities for interaction. These can only bear fruit, however, if there is engagement from both sides. Unfortunately, the issue of equal pay is yet another example of the reluctance of EU bodies, be it legislative or judicial, to engage substantially with the ESC. The lack of any reference to the ESC in the text of the proposed Directive – which may have also given a basis for the CJEU to refer to the ESC in future equal pay case-law – is a missed opportunity to create interfaces between parallel standards on equal pay. This reluctance is not new, and has been identified by commentators in different contexts, too. Certain problems might arise from it regarding the effective implementation of the equal pay principle.

The first one is the development of inconsistent obligations of EU MS that have ratified the ESC and are also bound by ESC obligations regarding equal pay. This is perhaps not so problematic in the present case, since emerging standards at least do not appear in direct *conflict*, and EU MS are permitted to introduce measures more protective than those set out in the proposed Directive, to comply with ESC obligations. This was different, of course, in the cases of economic assistance conditionality,¹⁶² as well as Swedish

¹⁶⁰ E.g. O De Schutter, 'The European Social Charter in the Context of Implementation of the EU Charter of Fundamental Rights' cit.; M Rocca, 'Enemy at the (Flood) Gates: EU "Exceptionalism" in Some Recent Tensions with the International Protection of Social Rights' cit.; C O'Connell, 'The European Social Charter and EU Labour Law' cit.; and others, cited in the introduction to this *Article*.

¹⁶¹ Case C-116/06 *Kiiski* ECLI:EU:C:2007:536 para. 48; case C-268/06 *Impact* ECLI:EU:C:2008:223 paras 113-114; see also O De Schutter, 'The European Pillar of Social Rights and the Role of the European Social Charter in the EU Legal Order' cit. 15-16.

¹⁶² *Federation of employed pensioners of Greece (IKA-ETAM) v Greece* cit.; *Panhellenic Federation of Public Service Pensioners v Greece* cit.; *Pensioners' Union of the Athens-Piraeus Electric Railways (I.S.A.P.) v Greece* cit.; *Panhellenic Federation of pensioners of the public electricity corporation (POS-DEI) v Greece* cit.; *Pensioner's Union of the Agricultural Bank of Greece (ATE) v Greece* cit.; *Greek General Confederation of Labour (GSEE) v Greece* cit.

lex Laval case.¹⁶³ Still, given the asymmetry between the force of EU law and that of ESC standards at national level, EU MS are likely to limit themselves to EU standards or invoke their conformity with EU law when scrutinized by the ECSR. What we mean here by “asymmetry” is the fact that EU law prevails over national law and has direct effect, whereas the ESC is binding in international law and its implementation depends on the States parties. This has some positive implications: the system of enforcement of the ESC allows for the setting of more ambitious standards that can be progressively realised, which may not be politically feasible under the EU system. However, as the EU legal order is increasingly dealing with social issues that fall within the domain of the ESC, a lack of explicit engagement with already existing ESC standards and justification of differences risks displacing ESC standards, rather than ensuring complementarity between the two.

Indeed, scholarly accounts have raised concerns about the potential levelling down of social rights standards, due to the disregard of the ESC and other international law sources on the part of the EU. For instance, Khaliq, Garben, Aranguiz and Robin-Olivier, in their accounts of the relationship between the EU and the ESC or international law more broadly, have argued that where diverging standards between the ESC and EU law conflict, despite being at least equally binding from a legal point of view, EU MS will prioritize their obligations under EU law.¹⁶⁴ In an early account of the collective complaints procedure, Churchill and Khaliq argued that the ECSR should seek to ensure compatibility with deviating EU law standards and diverging/conflicting obligations, warning, however, that such an undertaking might end up lowering the standards of obligations stemming from the ESC.¹⁶⁵ That is, the existence of multiple norms of different scope and diverging standards, in combination with the limited outreach of the ESC in general, but particularly compared to the legal effect of EU law sources in national law,¹⁶⁶ could ultimately lead to a “levelling down” of standards.¹⁶⁷

In the present context, this could for instance mean that States putting in place pay reporting and assessment requirements will be inclined to limit those to the employer size threshold set by EU law, and to assume, or at least to argue, that this is sufficient to comply with their obligations under the ESC. This kind of argument was advanced in the

¹⁶³ *Swedish Trade Union Confederation v Sweden* cit.

¹⁶⁴ U Khaliq, ‘The EU and the European Social Charter’ cit. 183; S Garben, ‘The Problematic Interaction Between EU and International Law in the Area of Social Rights’ cit. 85; A Aranguiz, ‘Bringing the EU Up to Speed in the Protection of Living Standards Through Fundamental Social Rights’ cit. 622; S Robin-Olivier, ‘The Relationship Between International Law and European Labour Legislation and its Impact on the Development of International and European Social Law’ cit. 495.

¹⁶⁵ RR Churchill and U Khaliq, ‘The Collective Complaints System of the European Social Charter: An Effective Mechanism for Ensuring Compliance with Economic and Social Rights?’ (2004) EJIL 417, 456.

¹⁶⁶ C O’Cinneide, ‘The European Social Charter and the UK: Why it Matters’ (2018) King’s Law Journal 275.

¹⁶⁷ Schlachter makes this argument in respect of EU and ESC standards on the right to strike, see M Schlachter, ‘The Right to Strike: A Need to Align Different Interpretations?’ in *Ensuring Coherence in Fundamental Labor Rights Case Law: Challenges and Opportunities* (Leiden University 2016) 19.

other cases of diverging standards mentioned earlier. In the case of maternity leave for instance, the UK government invoked the transposition of the Pregnant Workers Directive, in order to argue conformity with the ESC under art. 8(2).¹⁶⁸ Similarly, in the case of *CGT v France*, where the ECSR delineated the relationship of the ESC with EU law, the French government argued that the transposition of the Working Time Directive ensured conformity with the ESC.¹⁶⁹

The second issue, which has been already pointed out by De Schutter in the context of EU and ESC working time standards, is the different level of commitment and content of obligations between EU MS that are also party to the ESC.¹⁷⁰ The *à la carte* system of ratification the ESC permits States parties, with the exception of some core provisions, to commit to the ESC system in varying degrees.¹⁷¹ By contrast, EU regulation on matters touching upon social protection or employment set out minimum common standards to be implemented across EU MS. This means that if a matter regulated by EU law falls within the ambit of an ESC provision, then EU MS that have not ratified the said provision have limited social rights obligations compared to those MS that are also bound more extensively by the ESC. This risk of asymmetry of obligations also exists in the case of equal pay, as some States parties have not ratified some of the equal pay provisions.¹⁷²

As mentioned earlier, there is no engagement with ESC standards on the part of EU legislature that indicates that these risks of levelling down or circumventing higher social rights standards do not also apply in the case of equal pay. This is far from a theoretical problem, which could lead to disparities in the protection of the right to equal pay between States parties. It also means that, unless there is already robust national legislation in place, the onus is on EU standards to provide the adequate level of protection. These issues, as well as the potential gains from a positive relationship between the EU and ESC systems, speak for a deeper and more explicit engagement with ESC standards on the part of EU institutions in the field of equal pay. The cost of the refusal to do so will be endured by (women) workers.

VI. CONCLUSIONS

The legal framework protecting equal pay in Europe is being reshaped. By coincidence or not, this reshaping is driven in parallel by the ESC system and the EU legislature. The new ESC standards in the field of equal pay are the result of a dynamic interpretation by the

¹⁶⁸ U Khaliq, 'The EU and the European Social Charter' cit. 188-189.

¹⁶⁹ *CGT v France* cit.

¹⁷⁰ O De Schutter, 'The European Social Charter in the Context of Implementation of the EU Charter of Fundamental Rights' cit. 44.

¹⁷¹ *Ibid.*

¹⁷² Cyprus, Croatia and Hungary have not ratified art. 4(3) ESC, but have ratified the Additional Protocol of 1988 to the 1961 ESC or art. 20 (R)ESC employed in this case, while Luxembourg and Poland have not ratified the Additional Protocol of 1988 to the 1961 ESC.

ECSR, taking into account all existing standards in international human rights law and EU law, but going even further in some important respects. New EU minimum standards are, on the other hand, the result of a legislative initiative for a Directive on pay transparency by the European Commission. By contrast, the Commission proposal makes no mention of the ESC – or indeed any other non-EU international standards on equal pay – and an explicit acknowledgement of legal pluralism is absent from the proposed Directive.

The emerging standards in the ESC system and EU law are overlapping to some extent. The content of the principle of equal pay that is surfacing through the recent developments is overall more detailed than in the past. It pays attention to the long-standing enforcement problems that have deprived the legal framework of its full potential as an avenue for the effective realisation of the right to equal pay. However, some divergencies exist between the ESC and the EU instrument underway. Notwithstanding that its States parties' welfare States and gender equality law and practice are much more diverse than those of EU MS, the ESC seems to set more progressive standards in certain respects and has the potential to accommodate workers' interests with fewer restrictions. This is particularly evident in relation to employers' wage reporting obligation and positive obligations to promote equal pay.

Though one may question the "balance" struck between worker protection and other interests in certain aspects of the Commission proposal as such, some differences in the scope and content of emerging standards are certainly to be expected given the different normative foundations of the ESC and the EU. Indeed, in this can also lie opportunities for productive synergies and complementarity between the two systems, but these require that they both engage in dialogue. Given the proximity in time and degree of overlap between ECSR case-law and the Commission initiative, reference to the ESC in the proposal would have been particularly pertinent. The lack of any mention of the ESC and other international social rights standards is therefore also particularly disappointing in this case. In that sense, the equal pay developments do not suggest a major break from existing critical accounts of the stance of the EU legal order towards more progressive social rights standards found in the ESC. This is not to say that the proposed Directive is not a very significant step towards strengthening legal obligations in the area of equal pay. More explicit engagement with the ESC could, however, further enrich and reinforce emerging EU standards.

