

Equal pay for work of equal value

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Presentation outline

I - Background: Pay gaps in the EU

II- Legal framework and CJEU case law: Equal pay for women and men for the same work or work of equal value

III- Gender-neutral job classification systems: a tool for reducing pay gaps

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I - BACKGROUND

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1- Pay gaps in the European Union

- The average (hourly) pay gap between women and men in the EU is 16.3% (Eurostat 2013)
- The hourly pay gap between women and men corresponds to the difference in gross hourly pay between women and men within the economy (without bonuses or supplements)
- Unadjusted gap = not adjusted according to differences in individual characteristics that may explain part of the earnings difference

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2 - Frequent explanations of the unadjusted gap

- ❑ Qualifications
- ❑ Horizontal and vertical segregation
- ❑ Employment structures
- ❑ Types of employment contracts
- ❑ Career interruptions. Impact of motherhood and family responsibilities
- ❑ Part-time work
- ❑ Stereotypes
- ❑ Pay discrimination

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3 - Breakdown of gaps

Pay gap: 15.3% in 2010, slightly lower than the 16.3% (Eurostat 2013)

- Gap explained by observable characteristics (qualification, job, activity, sector, enterprise type, etc.): 4.4%
- Gap unexplained and due to unobserved characteristics: 10.9%

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II - LEGAL FRAMEWORK AND CJEU CASE LAW

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1- Birth of the principle of equal pay

- ILO Convention no. 100
- Article 119 of the EEC Treaty (1957) establishes the principle of equal pay for male and female workers for equal work
- To avoid distortion of competition between workers in different Member States
- No reference to equal pay for work of equal value. But women and men rarely perform “equal work”

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CJEC 8 April 1976, Defrenne C43-45

Direct effect of the provision.

- May be directly relied upon before the national courts
- For sanctioning discrimination arising directly from legislative provisions or collective labour agreements, as well as in cases in which women and men receive unequal pay for equal work which is carried out in the same establishment or service, whether private or public.
- Must be understood “from the point of view of extending the narrow criterion of 'equal work' in accordance in particular with the provisions of Convention no 100 on equal pay concluded by the ILO in 1951, article 2 of which establishes the principle of equal pay for work 'of equal value'.”

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2 - Changes to the principle: the concept of work of equal value

- Directive 75/117/EEC on the application of the principle of equal pay for men and women.
- Article 141 Amsterdam Treaty of 1997 (amended by comparison with Article 119),
- Directive 2006/54 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)
- Today, Lisbon Treaty, Article 157 TFEU (unchanged text)

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3 - Focus on Article 4 of Directive 2006/54/EC (recast)

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

In particular, where a job classification system is used for determining pay, it shall be based on the same criteria for both men and women and so drawn up as to exclude any discrimination on grounds of sex.

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a) Direct and indirect discrimination

Article 2 § 1, a).

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

Article 2 § 1, b).

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

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b) Pay

Article 2 § 1 e)

- “pay”: the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his/ her employment from his/her employer;
- Includes inter alia all the forms of occupational pensions constituting a component of remuneration (C-262/88 *Barber*).
- The principle of equal pay applies to each of the components of remuneration paid to men and women workers (C-236/98 *Jamö*) (comparison of a midwife's basic monthly pay with that of a clinical technician)

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c) Scope

- The principle of equal pay is not limited to situations in which men and women work for the same employer (Recital 10).
- Scope of enterprise or service concerned (C-129/79 *Macarthy*, 27 March 1980)
- Single source: differences in pay conditions must be attributable to a single source. Body which could establish equal treatment (C-320/00 *Lawrence*, 17 September 2002)

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d) The concept of work of equal value

Assessing work of equal value

Recital 9 (Recast Directive 2006/54)

In accordance with settled case-law of the Court of Justice, in order to assess whether workers are performing the same work or work of equal value, it should be determined whether, having regard to a range of factors including **the nature of the work and training and working conditions**, those workers may be considered to be in a comparable situation.

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d) The concept of work of equal value

A practical assessment

- Purely qualitative assessment: refers solely to the **nature of the duties actually performed** (CJEC, 1 July 1986, *Rummler C-237/85*)
- A set of factors such as the **nature of the work**, the **training requirements** and the **working conditions** and a relatively large number of workers ensuring that the differences are not due to purely fortuitous factors (*Royal Copenhagen C-400/93*, *Brunnhofner C-381/99*, *Kenny C-427/11*)
- The case where a worker is engaged in work of higher value than that of the person with whom a comparison is to be made (*Murphy C-157/86*).
- The job that serves as a comparison does not necessarily have to be the same as that performed by the person relying on the principle to obtain equal pay (clinical technician/midwife - *Jamö C-236/98*)
- Assessment is a matter for the national court, which alone has jurisdiction to establish and assess the facts relating to the nature of the work (*Jamö C-236/98*).

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d) The concept of work of equal value

Assessment criteria

- Professional training: a criterion for determining whether or not the same work is being performed (*Wiener Gebietskrankenkasse C-309/97, Kenny C-427/11*)
- Activities of psychologists and doctors, both charged with treating the patient: the value of their work is not the same: different scope of the qualifications resulting from their training. The qualifications of doctors allow them to perform other tasks (*Wiener Gebietskrankenkasse C-309/97*).

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d) The concept of work of equal value

Assessment criteria

- The fact of belonging in the same job category under the applicable collective agreement is not in itself sufficient for concluding that the female employee is performing the same work or work of equal value as her male colleague.
- The general indications provided in the collective agreement must in any event be corroborated by precise and concrete factors based on the activities actually performed by the employees concerned. (*Brunnhofers C-381/99*)

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d) The concept of work of equal value

Assessment criteria

- Classification system based on physical effort, taking account of criteria such as effort of the muscles or heaviness of work (*Rummler C-237/85*)
- Values corresponding to the average performance of only one sex in order to measure the effort and value of physical work constitutes a form of gender-based discrimination.
- In order for a classification system to be non-discriminatory, it must take account, insofar as the nature of the work carried out in the enterprise allows, of criteria for which workers of either sex can present particular aptitudes (see Article 4 § 2).

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d) The concept of work of equal value

Comparison with French law on assessment criteria

Article L. 3221-4 of the Labour Code:

- “Jobs are considered to be of equal value if they require of employees a comparable set of professional skills established by a title, qualification or professional practice, capabilities acquired through experience, responsibilities and physical or mental workload.”
- Decision of the Employment Division of the *Cour de Cassation* of 6 July 2010

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c) Presumption of discrimination

Lack of transparency

- A system of pay which is lacking in transparency where the average pay for women is less than that for men is presumed to be discriminatory (*Danfoss C-109/88*)
- A lack of transparency entails a lack of access to evidence demonstrating the basis of the pay gap
- It is for the employer to show that its practice is not discriminatory,
- It must demonstrate that its pay adjustment criteria are applied in a way that is
 - Objective/Non-discriminatory/Proportionate

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c) Presumption of discrimination

Lack of transparency (cont.)

- A collective agreement states that contractual wage rates may be increased by the employer in the light of the following criteria:
 - Mobility
 - Professional training, and
 - Seniority
- The average pay of men is 6.85 % higher than that of women
- No information is available about the criteria for applying these adjustment factors

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c) Presumption of discrimination

Apparent discrimination

- Pay gap between two jobs of comparable value due to different pay levels in collective agreements in the public health sector:
 - Speech therapists (women)
 - Pharmacists (men)
- Apparent discrimination due to statistics showing the majority presence of women in the lower-paid job category (*Enderby C- 127/92*)

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d) Justifications

- The work actually performed by the two workers or groups of workers (women and men) concerned are in fact not comparable
- The pay gap observed is justified by objective factors unrelated to any discrimination

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d) Justifications

Collective bargaining

- The argument that the pay gap was decided by collective bargaining processes conducted separately, and that taken in isolation they have no discriminatory impact within each group, is dismissed. (*Enderby*, see above)
- Collective agreements, like all legislative, regulatory or administrative provisions, must respect the principle set out in Article 141 EC
- The interests of good industrial relations are subject to the observance of the principle of non-discrimination between male and female workers in terms of pay (*Kenny*).

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d) Justifications

Pressure in the labour market

- Not a justification in itself
- The employer must demonstrate the presence of market pressure and the court must assess the proportionality of its impact in each case (*Enderby*)

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d) Justifications

- Professional training
 - Pay awarded on the criterion of training may be justified “by showing that such training is of importance for the performance of the specific tasks which are entrusted to the employee” (*Danfoss*, see above)
- Seniority and experience
 - Length of service goes hand in hand with experience, and experience generally enables the employee to perform his duties better (*Danfoss*, see above)
 - However, there may be situations in which recourse to the criterion of length of service must be justified by the employer in detail (*Cadman C-17/05*)

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III- GENDER-NEUTRAL JOB CLASSIFICATION SYSTEMS

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1- A tool for reducing pay gaps

- ILO recommendations (1986):
“It requires adopting a new way of looking at job characteristics, modifying the perception of women’s work compared to men’s work, re-examining the pay systems in force in organizations and raising the pay for female-dominated jobs.”

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2- European Commission’s Code of Conduct (1996)

- Recommendations: “Pay systems based on classification and skills/competency-based systems to determine the hierarchy or hierarchies of jobs [...] may have been in place for many years without any review and many incorporate features which contribute to the undervaluing of work undertaken by women”
- “Factors which are more likely to be present in female jobs may not be identified at all by a scheme and therefore not valued at all”

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Male-dominated jobs

- ❑ Strong professional culture
- ❑ Detailed job description
- ❑ Significant technical aspects
- ❑ Enhancement of organisational role
- ❑ Defined career paths
- ❑ Technical legitimacy
- ❑ Strongly supported by professional values, etc.

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Female-dominated jobs

- ❑ One title for a range of activities (e.g. administrative assistant)
- ❑ Imprecise definition and job description
- ❑ Invisible and non-specific skills
- ❑ Assistance work (with patients, vulnerable people, superiors, colleagues, etc.)
- ❑ Unacknowledged skills treated as devoid of technical content, etc.

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Examples of criteria taken into account in classification systems (gender bias)

Skills:

Interpersonal skills absent or undervalued: resolving a human problem (crisis with a patient or a customer) is not a matter of people skills, it is a technical skill.

Responsibility:

Responsibilities that are not just financial and economic
What value is attributed to assuming responsibilities involving people (patients, customers, confidentiality, communication, etc.)

Working conditions

The arduousness of predominantly female jobs, standards based on "male" work
The human environment... and not just the industrial value of work

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3 - Commission Report on the application of Directive 2006/54/EC (recast), 6 December 2013

- Follow-up to the Resolutions of the European Parliament (2012) calling for more action to enhance the application of the equal pay provisions at European level.
 - Lack of clarity on the legal concept of "work of equal value"
- Finding of the document issued by the Commission's working party:
 - Direct discrimination in relation to the exact same job appears to have reduced in significance.
 - Substantial problems with evaluating work done predominantly by women or men, particularly where this evaluation is carried out in collective agreements.

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The Commission's working party document: a practical tool

- *Analytical methods [...] can thus be used to establish one of the most important components of the equal pay principle, namely "work of equal value".*
- They break job content down into a number of factors that enable jobs to be compared in a non-discriminatory manner, provided that the factors selected are not themselves discriminatory.
- These factors are criteria for assessing the various dimensions and characteristics of jobs and **should be applied equally** to all jobs to determine their relative value.

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Good practices

- Four common and objective factors considered to evaluate jobs without gender stereotyping
 - Skills (sub-factors: knowledge, interpersonal skills, problem-solving)
 - Responsibilities (sub-factors: responsibilities involving people, goods and equipment, information and financial resources)
 - Effort (sub-factors: mental and psychosocial effort, physical effort)
 - Working conditions (sub-factors: working environment, organisational environment)
- The weighting of different factors and sub-factors without gender discrimination e.g.: systematically assigning a higher weight to factors representative of male-dominated posts

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Conclusion

- Awareness of the principle of equal pay for women and men for work of equal value is still poor, with little recourse before national courts: essentially individual approach (group action?)
- Legal proceedings are not enough in themselves.
- Collective bargaining and the revision of classification systems to upgrade predominantly female jobs present a major challenge (preventative aspect)
- A stronger lead from the Commission is required.