



## Equal Pay for Work of Equal Value EU Legal Framework & CJEU Case Law



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**UHASSELT**

KNOWLEDGE IN ACTION



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### Equal pay in the EU: the legal perspective

- EU legislation
  - Art. 157 TFEU (ex Art. 141 TEC; ex Art. 119 EEC)
  - Dir. 75/117 (equal pay) - replaced by Dir. 2006/54 (recast)
- Principle is well reflected in national legislation of 28 MS and 3 EEA countries
- Important case law of the CJEU
  - E.g. *Defrenne II* (1976): Art. 119 EEC has direct effect



## EU legislation

- Art. 157 TFEU
  - Equal pay for equal work/ work of equal value
  - Pay?
    - ✓ Ordinary basic or minimum wage or salary
    - ✓ Any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his employment, from his employer
  - Equal value?
    - ✓ Importance of job classification schemes (criteria?)
    - ✓ Importance of finding the right comparator
    - ✓ Danger of reproducing sex discriminatory effects

## EU legislation

- Dir. 2006/54 (recast)
  - Facilitates the implementation of principle of equal pay for equal work or work of equal value
  - Replaces Dir. 75/117 and ensures implementation of equal opportunities and equal treatment of men and women in employment and occupation (more general)
  - Relates to:
    - ✓ Access to employment
    - ✓ Working conditions, including pay
    - ✓ Occupational social security schemes

## EU legislation

### ➤ Dir. 2006/54, Art. 4:

“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.”

## Still: persisting wage inequality

- Notwithstanding EU law: still no equal pay for equal work or work of equal value
  - Macro level: persisting gender pay gap
  - Micro level: individual cases are being brought up to the level of the CJEU

## Macro level: the gender pay gap

- Gender pay gap
  - A lot of confusion regarding the precise meaning of the concept
  - In the EU: the relative difference in the average gross hourly earnings of women and men within the economy as a whole (unadjusted/ absolute/ raw gender pay gap)
  - Relative difference is caused by:
    - ✓ Factors that have nothing to do with discrimination = 'explanations'
    - ✓ Pay discrimination in the strict legal sense

## Macro level: the gender pay gap

- Recurrent 'explanations' for unadjusted wage gap include:
  - Part-time work
  - Temporary work
  - Horizontal segregation and vertical segregation (glass ceiling) of labour markets
  - Frequent career interruptions – combination of profession with family dutiesSome of these explanations are not so innocent!
- These reduce the 'unadjusted' gender pay gap to the 'adjusted' gender pay gap (i.e. product of pure discrimination)

## Macro level: the gender pay gap

- The facts (2015 data)
  - Persisting gender pay gap of 16.3 % on average for 28 EU Member States (Eurostat data 2015)
  - Large differences among countries: from 5,5 % in Italy and Luxembourg to 26,9% in Estonia (Eurostat data 2015)
  - In a number of countries: gender pay gap is even widening again (e.g. Poland, Croatia and Malta – Eurostat data 2015)

## Macro level: the gender pay gap

- European Commission:
  - European Equality Law Network (EELN)
    - ✓ Report on 'Legal aspects of the gender pay gap' (2010) - [http://ec.europa.eu/justice/gender-equality/files/gpg\\_legal\\_perspective\\_2010\\_en.pdf](http://ec.europa.eu/justice/gender-equality/files/gpg_legal_perspective_2010_en.pdf)
    - ✓ 2 new reports (2017):
      1. Pay Transparency in the EU: <http://www.equalitylaw.eu/downloads/4073-pay-transparency-in-the-eu-pdf-693-kb>
      2. The enforcement of the equal pay principle (to be published)
  - 'European Equal Pay Day'
    - ✓ Since March 5, 2011 (date changes yearly)
    - ✓ Indicates how much longer women have to work than men to earn the same

## Micro level: equal pay cases

- CJEU case law on equal pay is not abundant
- Enforcement of the law seems problematic
  - Why is that?
    - Problematic scope of comparison
      - ✓ Comparison across businesses/ industries?
      - ✓ Hypothetical comparator?
    - Lack of information on pay
      - ✓ Information is individual and confidential
      - ✓ National laws re. disclosure of wage information
    - Claimants' lack of resources
    - Issues of job security, reputation

## Micro level: equal pay cases

- 'Recent' cases:
  - Cases of indirect discrimination
    - ✓ Cases re. overtime pay for part-time and full-time workers
    - ✓ Cases re. same/comparable work and objective justifications of pay discrimination

### Micro level: equal pay cases

- Indirect discrimination: different steps  
CJEU (*Brunnhofer*, C-381/99)
  - 'Prima facie' case of indirect discrimination on the grounds of sex
    - Two groups of workers do the same or like work
    - One group: predominantly women; other group: predominantly men
    - Different pay
  - Employer should
    - Show that activities of two groups are not comparable
    - Provide objective justification for pay difference unrelated to sex discrimination
  - = shift of burden of proof: Art. 19(1) Recast Directive

### Micro level: equal pay cases

- Overtime pay (*Helmig*, C-399/92 and other, *Elsner* (C-285/02) and *Voß* (C-300/06)
  - Part-time and full-time employees are given the same treatment
    - ✓ *Helmig*: higher overtime pay only for hours in excess of normal (full-time) working hours (no indirect discrimination)
    - ✓ *Elsner*: only overtime work of + 3 hours is remunerated (indirect discrimination)
    - ✓ *Voß*: overtime work remunerated at rate lower than normal hourly rate (indirect discrimination)

## Micro level: equal pay cases

- Critique re. *Helmig* and *Voß*
  - ✓ Shows problematic scope of comparison
  - ✓ Strictly formal approach to equality: same pay for same hours of work
  - ✓ But: overtime work is treated differently for full-time and part-time employees
  - ✓ Reinforces (male) norm of full-time work
- *Elsner*: idea of proportionality; cfr. Part-time work directive

## Micro level: equal pay cases

- *Kenny* case (C-427/11)
  - Prima facie case of indirect discrimination?
    - National court says: yes
    - ✓ Two groups of workers do the same or like work
    - ✓ One group: predominantly women; other group: predominantly men
    - ✓ Different pay
  - Employer should
    - ✓ Show that activities of two groups are not comparable
    - ✓ Provide objective justification: this is what national court focuses on + asks questions about to CJEU!

## Micro level: equal pay cases

### ➤ What does the CJEU do?

- ✓ File of national court shows that there is a mere assumption that work of two groups is comparable
- ✓ Although: *Enderby* (C-127/92): CJEU can rule on justification without establishing whether jobs are equivalent
- ✓ Here: such verification of comparability is necessary for the case in which difference in pay would not be objectively justified
- ✓ CJEU can give guidance in this respect...

## Micro level: equal pay cases

### ✓ CJEU advises to take into account:

- Nature of work (CJEU: 'seemingly identical' duties)
- Training requirements (CJEU: 'training or professional qualifications are different')
- Working conditions

### ➤ Only then: referred questions re. objective justification

- ✓ Justifications may be diverse
- ✓ Quid: good industrial relations as objective justification?
- ✓ In itself: cannot constitute the only basis for justification

## Micro level: equal pay cases

- Par. 49: 'Nevertheless, the Court has previously held that the fact that the rates of pay have been determined by collective bargaining or by negotiation at local level may be taken into account by the national court as a factor in its assessment of whether differences between the average pay of two groups of workers are due to objective factors unrelated to any discrimination on grounds of sex (see *Royal Copenhagen*, paragraph 46).'
- Is this the right direction?

## Micro level: equal pay cases

- *Leone* case (C-173/13)
  - Early retirement for civil servants who have 3 children and who have taken career breaks for each one of them
  - Career break = maternity leave, paternity leave, adoption leave, parental leave, ...
  - Mr. Leone: 3 children, but no career breaks
  - Mr. and Ms. Leone: this is indirect discrimination on grounds of sex (Art. 157 TFEU) – biological mothers are automatically qualified

Micro level: equal pay cases

- Reminder: Case C-366/99, *Griesmar*
  - ✓ French pension scheme crediting an extra year of service to the record of female (but not male) employees for each of their children
  - ✓ CJEU:
    - i.e. directly discriminatory, inasmuch as it excludes male civil servants who are able to prove that they assumed the task of bringing up their children
    - No justification: this is no positive action, as scheme did nothing to offset disadvantages in women's careers
- French scheme has been changed afterwards to meet CJEU's judgement

Micro level: equal pay cases

- AG Jääskinen
  - No indirect discrimination
  - As regards maternity leave male and female workers are not in a comparable situation
  - Even if indirectly discriminatory: these measures do offset disadvantages in women's careers

## Micro level: equal pay cases

### ➤ CJEU

- ✓ Did not follow AG
- ✓ As maternity leave included: much easier for women to meet the criteria than for men
- ✓ Justification?
  - Legitimate aim? Providing financial compensation for career-related disadvantages for employees who take time out to bring up their children
  - BUT: is the aim pursued in a consistent and systematic matter? CJEU makes some remarks ...
  - E.g.: service credit is also given to female civil servants who gave birth as a student, prior to recruitment ...

Thank you for your attention!