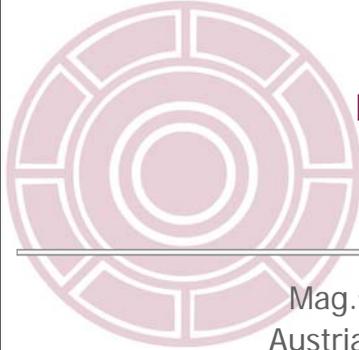




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Equal pay for work of equal value: EU legal framework and CJEU case law

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GLEICHBEHANDLUNGSANWALTSCHAFT ÖSTERREICH



Lecture and workshop

Lecture

- Presentation
- Gender Pay Gap in the EU
- Basis of European law on pay discrimination - relationship to national law
- Principle of equal pay & the CJEU
- Summary



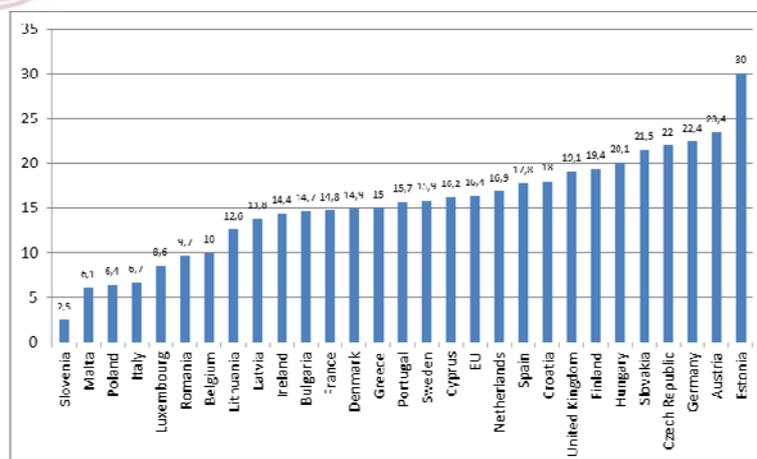
Austrian equal treatment service (GAW)

- **GAW is an equality body** as defined by Directive 2006/54/EC, Art 20; Directive 2000/43/EC, Art 13; Directive 2004/113/EC, Art 12 (bodies for the promotion of equal treatment) with the following responsibilities:
- Advice, support and mediation – confidential, free of charge, unaligned, autonomous and independent
- Information activities and raising awareness
- Report on developments in equal treatment
- Europe-wide networking – Equinet (www.equineteurope.org)

3



Gender Pay Gap in the EU (1)



4



Gender Pay Gap in the EU (2)



- 2013 GPG average in the EU 16.4%
- Very slow reduction from the 2008 GPG average - 17.3%
- Statistical data are not adjusted in respect of working time, sector, level of education, etc...
- Adjustment factors operate in a discriminatory way – but legally only when tangible (e.g. part-time – indirect discrimination)
- Adjusted statistics nonetheless lead to an “unexplained remainder” of more than half of the GPG

5



Some causes



- History and culture
- Different career paths
- (Horizontal) segregation in the labour market
- Hypotheses, stereotypes and generalising images of gender and their constant reproduction (socialisation)
- Direct and indirect discrimination (wage systems, job evaluation, vertical segregation/glass ceiling)



6



Commission Communication on the application of the Equal Treatment Directive 2006/54/EC

Obstacles to the effective application of equal pay

- Lack of transparency concerning pay systems
- **Lack of clarity** and legal certainty regarding the **concept of work of equal value**
- Procedural obstacles (protection of individual rights, costs, problems of evidence, lack of expertise on the part of decision makers, etc.)

7

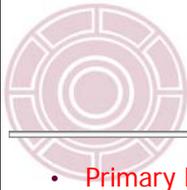


International legal provisions on equal pay for women and men

- Convention No. 100 of the International Labour Organization (**ILO No. 100**) - 1953
"Each Member shall ... promote and, in so far as is consistent with such methods, ensure the application ... of the principle of equal remuneration ... for work of equal value."
- Art 11 of the Convention on the elimination of all forms of discrimination against women (**CEDAW**) - 1982
"The right to equal remuneration"
"The right to equality of treatment in the evaluation of the quality of work"
"States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment"



8



EU measures



- **Primary legal basis** of the principle of equal pay for equal work from the beginning (1957)
- **Secondary law** - minimum standards binding on MS
- Since 2009 **Charter of fundamental rights** – part of primary legislation
- **The European Commission's Strategic Engagement for Gender Equality 2016-2019** – “closing the GPG” is a primary aim
- **Commission Recommendation** on strengthening the principle of equal pay between men and women through transparency of 07/03/2014, 2014/124/EU – **Aim: Improve wage transparency** by providing guidance to MS such as the introduction of the law on information on pay levels, regular reporting, pay audits, attention during collective bargaining, defining the concept of “work of equal value”, gender-neutral job evaluation systems

9



European legislation on equal treatment/anti-discrimination in the world of work

- Employment Equality Directive 2000/78/EC
 - Racial Equality Directive 2000/43/EC
 - Protection of Pregnant Workers Directive 92/85/EEC
 - Parental Leave Directive 2010/18/EU
- Pay discrimination by gender:**
- Art 157 TFEU (formerly Art 141 EC, formerly Art 119 EEC)
 - Art 23(1) Charter of Fundamental Rights
 - Equal Treatment Directive 2006/54/EC, Art 4

10



“Equal pay principle”

- “Equal pay principle” in Art 157 TFEU
as a specific expression of the general principle of equality
- The same pay for the same work or work of equal value:
*...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 employment, from his
employer.*
- Extensive CJEU case law since 1970 on pay discrimination on
the grounds of gender – many requests for interpretation and
clarification

11



“Equal pay principle” and the CJEU (1)

- Art. 157 TFEU: Equal pay principle as **fundamental principle** of the
Community – fulfils economic and social objectives (CJEU Defrenne II)
- Economic objective supports the social objective (CJEU Schröder)
- Direct applicability of Art 157 TFEU (CJEU Defrenne II) - legally
enforceable for legislation, social partners and individuals (CJEU Helmig)
- Equality of pay must be guaranteed for **each individual element of pay**
(CJEU Barber and others)
- It must be possible to trace pay inequality back to a **single source** (CJEU
Allonby) – no requirement that it be applicable only to the same employer
(CJEU Lawrence)

12



“Equal pay principle” and the CJEU (2)

- What is covered by “pay”
- What is equal work or work of equal value
- How is the burden of proof distributed
- When does a comparable situation arise
- Decisions concerning direct discrimination
- Decisions concerning indirect discrimination
- When/by what can discrimination be justified

13



“Equal pay principle” and the CJEU (3)

“What is covered by “pay”?”

• All current or future remuneration paid **in cash** or **in kind**, provided that the employer pays it at least indirectly **in return for the performance of a service** (CJEU Defrenne I)

- For example:
 - Allowances
 - Overtime pay
 - Bonuses
 - Special payments
 - Rewards
 - Sick pay
 - Interim payments during unemployment
 - Occupational pensions

14



“Equal pay principle” and the CJEU (4)

“What is equal work or work of equal value?”

- Equal work: identical working activities can be carried out by another person
- “Equal work” is a purely qualitative concept – it refers to the manner of working, the employment of the persons compared does **not** have to be **contemporaneous** (CJEU Macarthys)
- A comparison with persons who carry out **work of lower value** also falls within the scope of application (CJEU Murphy)
- An **occupational classification system** must be considered and fair and balanced in terms of the criteria applied – the use of criteria based on physical strength may indirectly discriminate against women (CJEU Rummler)

15



“Equal pay principle” and the CJEU (5)

- Work of equal value: Established by comparing the **nature of the activities** which employees can be assigned, the **educational requirements** for performing them and the **nature of the working conditions** (CJEU WGKK and others)
- Classification in the **same user group** in a collective agreement can be an indicator for equality of value (CJEU Brunnhofer)
- Different **vocational training** can be considered to justify indirect discrimination, where work of equal value is performed (CJEU Kenny)

16



“Equal pay principle” and the CJEU (6)

- The **national court has to assess** whether there is a case of work of equal value. For comparison of average pay all employees must be included in the comparator groups and these groups comprise a **relatively large number** in order to exclude purely fortuitous or short-term factors (CJEU Royal Copenhagen)
- Presuming equal value between the work of midwives and that of clinical technicians, indirect discrimination then arises, if **more women than men** are active as midwives (CJEU JämO)

17



“Equal pay principle” and the CJEU (7)

“When does a comparable situation arise?”

- Worse settlement for employees who left to care for a child compared with those who took early retirement because of employment conditions or the employer’s conduct – **no comparable situation** (CJEU Gruber)
- Failure to award a bonus where its distribution fell during the period of maternity leave constituted discrimination, where it represented **pay for a past period** (CJEU Lewen)
- Withholding an increase in seniority for men who can show time spend rearing children compared to women can give rise to discrimination (CJEU Griesmar)

18



“Equal pay principle” and the CJEU (8)

- Temporary part time employees with fixed-term contracts are not in a comparable position with those in indefinite contracts – **not included in a comparison** (CJEU Nikoloudi)
- Non-consideration of qualifying periods by contrast with time spent on military service in the calculation of length of service for termination payments is not discrimination, since no comparable situation exists (CJEU ÖGB)

19



“Equal pay principle” and the CJEU (9)

“Direct discrimination - pay”

- Non-payment of a pay increase which was granted to others **during the period of an employee's maternity leave** is direct discrimination (CJEU Gillespie)
- **Different qualifying ages for an occupational pension** is direct discrimination (CJEU Smith)
- Regulation permitting female civil servants to take retirement on their husband's becoming disabled or incurably ill while this is not permitted for male civil servants is direct discrimination (CJEU Mouflin)
- Transfer of a pregnant employee to different duties for her protection **must not lead to the withholding of allowances** linked to her **occupational status** (managerial position, length of service, professional qualification) (CJEU Parviainen)

20



“Equal pay principle” and the CJEU (10)

“Indirect discrimination - pay”

- Different rates of pay for part-time and full-time workers constitutes indirect discrimination if it **cannot be justified by objective factors** which have nothing to do with gender (CJEU Jenkins)
- **Failure to provide an occupational pension** to employees who have not completed 15 years full-time service constitutes indirect discrimination unless a permissible justification is possible (CJEU Bilka)
- Differing treatment of part time and full-time workers in the allocation of **training sessions** is indirect discrimination (CJEU Bötöl, Lewark, Freers)

21



“Equal pay principle” and the CJEU (11)

- The payment of **overtime supplements only when exceeding full-time working hours** is not indirect discrimination, as long as the same pay is received for each hour up to the normal working hours and an overtime supplement is paid to both for hours in excess of that (CJEU Helmig)
- **Lower pay scale classification of part time workers moving onto full time work** is indirect discrimination (CJEU Hill/Stapleton)
- If **lower pay** is offered for one activity compared with another and if the **former is almost exclusively performed by women and the latter primarily be men**, then there is a prima facie case of indirect discrimination on the basis of gender if the two activities are of equal value and the statistical data on the matter is significant (EuGH Enderby)

22



“Equal pay principle” and the CJEU (12)

“How is the burden of proof distributed?”

- if an employee becomes a **prima facie** victim of discrimination, the burden of proof is reversed and the employer must show that different treatment is justified by objective factors unrelated to gender discrimination (CJEU Enderby, Danfoss, etc.)
- The directives contain no requirement for the publication of application documentation. Refusal of information could compromise the objective of the directive; for clarification national court must, if enough indications exist, take **all circumstances of the individual case into account** (CJEU Kelly, Meister)

Directive 2006/54/EC, Art. 19: *“when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court, facts from which it may be presumed that there has been ... discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.”*

23



Prima facie direct discrimination – pay

the **Claimant** can credibly show

- the existence of a comparable situation (including the existence of the same job or a job of the same value)
- the existence of a disadvantage...

such that she is **“prima facie”** the victim of discrimination which can only be explained on the basis of gender – the connection between disadvantage and gender as a reason is indicated

24



Rebuttal of the prima facie case

The employer can rebut this presumption by:

Evidence

- that **no comparable** situation (including same activity or activity of same value) exists
- that **no disadvantage** (difference in pay) exists
- a greater probability that **another reason** accounts for the difference in pay, i.e. the difference does not depend on gender

25



Procedure in a case of presumed discrimination in a company

- Start first with **direct** discrimination (disadvantage "on the basis of gender")...
for an objection to a reason independent of a gender basis (reason) for the disadvantage by the employer
...
- ... also proof of the existence of **indirect** discrimination
"Does this gender-independent basis lead to a systematic disadvantaging of women/men?"
(**statistical difference** or special feature of the neutral criterion)

26



Prima facie indirect discrimination – pay

the **Claimant** can credibly show

- the existence of a **comparable situation** (inc. the existence of the same work or work of equal value)
- the existence of a **disadvantage**

...

- because of a **criterion, neutral in itself** as far as gender is concerned, which is however liable to particularly disadvantage women compared to men or vice versa
(statistical difference and lack of transparency in pay systems or particular features of the criterion)

27



Rebuttal of the prima facie case

The employer can rebut this presumption by:

Evidence

- that **no comparable situation** (including same activity or activity of same value) exists
- that **no disadvantage** (difference in pay) exists
- of the existence of an **admissible justification** and the suitability of the remedy

A balance must be found between...

28



Justification of indirect discrimination

- ... between
 - the **requirement for equal treatment** and
 - the **desired objective** of the company (the grounds on which the systematic disadvantage would not be unlawful)
- Question: Are the grounds (the objective) admissible and are the measures to achieve that objective appropriate, necessary and proportionate?
- CJEU Bilka: Justification possible via objective factors unrelated to gender discrimination if the **objective is a real necessity for the company** and the **means are proportionate**

29



Frequent attempts to justify pay differentials on gender lines

- "She has not been in the company very long"
- "She is less productive"
- "She does not work longer hours as often"
- "She has not been in employment as long"
- "She had a shorter education"
- "He was our preferred candidate"
- "The company needs to make savings"

Where credible case made by employer → **rebuttal of the allegation of direct discrimination** (on grounds other than gender) → Test for admissibility, in the case of presumed indirect discrimination

30



“Equal pay principle” and the CJEU (13) Possible reasons for justification

“When and how can discrimination be justified (or not)?”

- CJEU Danfoss, Cadman, Nimz: **seniority/professional experience**
- CJEU Brunnhofer: **performance**
- CJEU Danfoss, Bilka, Enderby: **flexibility**
- CJEU WGKK, Kenny: **education**
- CJEU Enderby: **market value**
- CJEU Hill and Stapleton: **economic aspects**

31



“She has not been in the company very long” “She has not been in employment as long”

- Here the neutral criteria of **seniority** and **professional experience** are addressed
- Seniority is in principle acceptable grounds for justification (CJEU Danfoss) since professional experience tends to go with better working performance, but ...
- If an employee can make a credible case that seniority will not lead to any improved working performance, the employer must provide evidence for this (CJEU Cadman)
- **Note:** no longer probation period for part-time staff if the grounds for this rule are the broad notion that full time staff are faster to acquire the skills required for an activity (CJEU Nimz)

32



“She is less productive”

- The neutral criterion in question is **performance**
- Criteria which can only be assessed after the start of employment cannot justify any difference that starts at the beginning of employment; on recruitment only the objective need for a given performance can be determined (CJEU Brunnhofer)
- The “performance” criterion may not be recompensed alone, but the actual added value received by the employer – **proportionality** must also be considered, to avoid “discrimination through the back door”

33



“She does not work longer hours as often”

- The neutral criterion in question is **flexibility**
- **Admissible**, if it relates to flexibility concerning various working times and locations, if this is important for the performance of duties (CJEU Danfoss, Bilka, Enderby)
- The “flexibility” criterion may not be recompensed alone, but the actual added value received by the employer – **proportionality** must also be considered, to avoid “discrimination through the back door”
- Exclusion of all women on the presumption that they are typically less flexible than men = direct discrimination

34



“She had a shorter education”

- The neutral criterion in question is **vocational training**
- **Admissible**, if the education is important for the performance of the tasks assigned
- The theoretical professional qualification must be relevant to the workplace, even if the employer has not previously required it (CJEU WGKK)
- Invoking the criterion is not admissible if it is not just practically but also theoretically inconsequential
- **Proportionality** must also be considered, to avoid “discrimination through the back door”

35



“He was our preferred candidate” “He would not have accepted otherwise”

- The neutral criterion in question is the **strong individual bargaining position (market value)** in recruitment negotiations for this particular case
- This criterion is arguably particularly liable to disadvantage women more than men, since women moving up the career ladder are very often disadvantaged which has an impact on their market value
- The shortage of candidates for a job will in principle be considered as an objectively justified reason (CJEU Enderby)
- If considered as admissible justification (there is a lack of case law), probably only within narrow limits and only for a limited time – sustained unequal treatment cannot be consistent with real commercial needs
- If so, admissibility in an individual case remains subject to the principle of **proportionality**

36



“The company needs to make savings”

- The neutral criterion in question is the **economic burden** (additional costs)
- This is **not in itself an admissible criterion**, otherwise the application and scope of the fundamental principle of Community law of “equality of women and men” would be being applied differently in terms of space and time on the basis of the financial position of the company (CJEU Hill and Stapleton, inter alia)

37



Admissibility of justification

- Justification must always be tested against the **individual situation** in the company
- Only grounds of significant importance are admissible, e.g. health, property, public safety, environmental protection...
- **Consideration of alternative ways** of achieving the objective – “encroachment on the principle of equal treatment is only admissible in exceptional cases and only to the smallest possible extent”

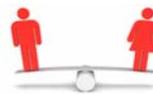
(CJEU Seymour-Smith and others - no undermining of the principle of equal pay)

38



Conclusion

- Gender Pay Gap – a familiar long-standing issue which has also been the subject of many legislative measures
- Many years' worth of wide-ranging CJEU case law available
- Many extra-legal measures
- Still the case in every Member State difficult to overcome
- Still more political will and measures (including structural measures) are required
- The vision of a better quality of life remains.....



"Grandma, are you as old as the Equal Pay Act?"

39



Further information

www.gleichbehandlungsanwaltschaft.at

- Information on the Equal Treatment Service
- Legal
- Recommendations of the Equal Treatment Service
- Current "case of the month"
- Electronic newsletter

Thank you for your attention



40



Annex – CJEU (1)

- Defrenne II, C-43/75
- Schröder, C-50/96
- Enderby, C-127/92
- Leger, C-528/13
- von Colson and Kamann, C-14/83
- Küçükdeveci, C-555/07
- Helmig, C-399/92
- Barber, C-262/88
- Allonby, C-256/01
- Lawrence, C-320/00
- Defrenne I, C-80/70
- Macarthys, C-129/79
- Murphy, C-157/86
- Rummler, C-237/85
- WGKK, C-309/97
- Brunnhofer, C-381/99
- Kenny, C-427/11
- Royal Copenhagen, C-400/93
- JämO, C-236/98
- Gruber, C-249/97
- Lewen, C-333/97
- Griesmar, C-366/99
- Nikoloudi, C-196/02
- ÖGB, C-220/02
- Gillespie, C-342/93
- Smith, C-408/92
- Mouflin, C-206/00

41



Annex – CJEU (2)

- Parviainen, C-471/08
- Jenkins, C-96/80
- Bilka, C-170/84
- Bötzel, C-360/90
- Lewark, C-457/93
- Freers, C-278/93
- Hill & Stapleton, C-243/95
- Danfoss, C-109/77
- Kelly, C-104/10
- Meister, C-415/10
- Cadman, C-17/05
- Nimz, C-184/89
- Seymour-Smith, C-167/97

42