

Equal Pay for Work of Equal Value

EU Legal Framework & CJEU Case Law

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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
 - E.g.: Christmas bonus, paid leave, marriage allowance, occupational pensions, ...
 - Work of equal value? 
 - ✓ Importance of finding the right comparator
 - E.g.: work of lesser/ higher value, held at different points of time, ...
 - ✓ Importance of job classification schemes
 - Criteria should be the same for men and women
 - Danger of reproducing sex discriminatory effects

EU legislation

- Dir. 2006/54 (recast)
 - 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
 - Also facilitates the implementation of principle of equal pay for equal work/ work of equal value

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.”

Persisting wage inequality

- Notwithstanding EU law: still no equal pay for equal work/ work of equal value
 - Macro level: persisting gender pay gap
 - Micro level: (a limited amount of) 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

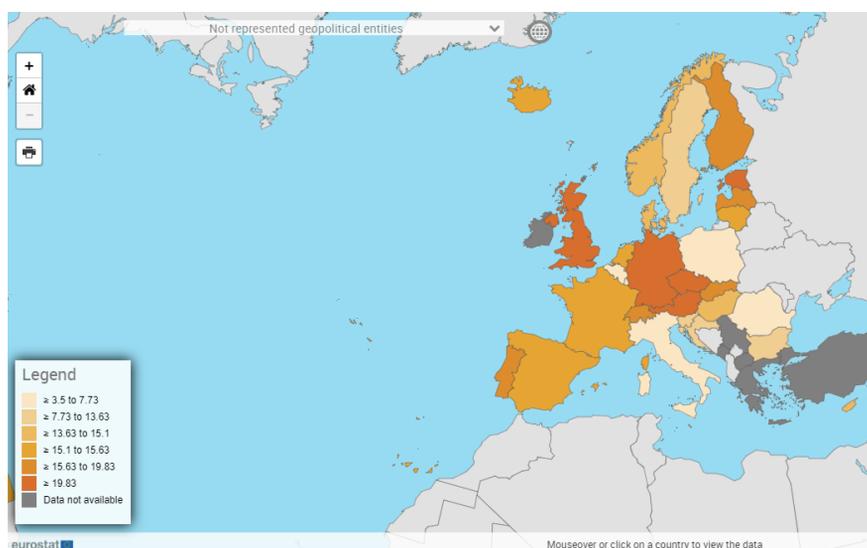
Macro level: the gender pay gap

- 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 duties
 - These reduce the 'unadjusted' gender pay gap to the 'adjusted' gender pay gap (i.e. product of pure discrimination)
- May 'incorporate' sex discriminatory ideas ...

Macro level: the gender pay gap

- The facts (Eurostat 2017 data)
 - Persisting gender pay gap of 16.0 % on average for 28 EU Member States
 - Large differences among countries: from 3,5 % in Romania to 25,6% in Estonia
 - In a number of countries: gender pay gap is even widening again (e.g. Lithuania, Malta, Slovakia)

Macro level: the gender pay gap 2017



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 prohibiting disclosure of wage information
- Claimants' lack of resources
- Issues of job security, reputation

Single source

Micro-level: equal pay cases

- How to prove pay discrimination?

- Directive 2006/54, Art. 19(1)

"Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment."

- When is there a sufficiently serious indication of discrimination for the burden of proof to shift to the employer?

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

For national court to determine, in light of actual nature of activities

Micro level: equal pay cases

- Most CJEU equal pay cases:
 - Cases of indirect discrimination
 - One line of cases: part-time work
 - Over time, cases become more complex

Equal pay for part-time workers

- *Jenkins* (96/80), 31 March 1981

- Hourly wage for part-time workers was lower than for full-time workers performing the same job

"Where the hourly rate of pay differs according to whether the work is part-time or full-time *it is for the national courts to decide* in each individual case whether, regard being had to the facts of the case, its history and the employer's intention, a pay policy [...] although represented as a difference based on weekly working hours is or is not in reality discrimination based on the sex of the worker."

"Such may be the case, in particular, when [...] the employer is endeavouring, on economic grounds which may be objectively justified, to encourage full-time work irrespective of the sex of the worker."

Equal pay for part-time workers

- *Bilka-Kaufhaus* (170/84), 13 May 1986

- Only full-time employees qualify for supplementary occupational pension scheme

"If [...] a much lower proportion of women than of men work full time, the exclusion of part-time workers from the occupational pension scheme would be contrary to Article 119 of the Treaty [...]."

However, if the undertaking is able to show that its pay practice may be explained by objectively justified factors unrelated to any discrimination on grounds of sex there is no breach of Article 119.

If [...] the measures [...] correspond to a real need [...], are appropriate with a view to achieving the objectives pursued and are necessary to that end, the fact that the measures affect [more] women than men is not sufficient to show [...] an infringement of Article 119."

Equal pay for part-time workers

- CJEU: a real need on the part of the undertaking can be such an objective reason!

"to discourage part-time work, since in general part-time workers refuse to work in the late afternoon and on Saturdays"

"Article 119 does not have the effect of requiring an employer to organize its occupational pension scheme in such a manner as to take into account the particular difficulties faced by persons with family responsibilities in meeting the conditions for entitlement to such a pension."

Equal pay for part-time workers

- *Rinner-Kühn (171/88)*, 13 July 1987

- Only full-time workers entitled to continued payment of wages by employer in the event of illness

"[...] it must be concluded that a provision such as that in question results in discrimination against female workers in relation to male workers and must, in principle, be regarded as contrary to the aim of Article 119 of the Treaty. [...] However, if the Member State can show that the means chosen meet a necessary aim of its social policy and that they are suitable and requisite for attaining that aim, the mere fact that the provision affects a much greater number of female workers than male workers cannot be regarded as constituting an infringement of Article 119."

"It is for the national court [...] to determine [...]"

Equal pay for part-time workers

- *Helmig* (C-399/92), 15 December 1994,
Elsner (C-285/02), 27 May 2004, *Voß* (C-300/06), 6 December 2007
 - More complex cases!
 - Overtime pay for part-time workers
 - ✓ *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)

Equal pay for part-time workers

- 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

- Other lines of case law:
 - Effect on wage of (part-time) parental leave – e.g. *Meerts, Praxair*
 - Effect on wage of other career breaks (maternity leave, ...) – e.g. *Griesmar, Leone*
 - Effect on wage of difference in training/ professional qualifications – e.g. *Kenny*
- Also men may claim unequal pay: see workshop!

Thank you for listening!

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Further reading ...

- ✓ Report on 'Legal aspects of the gender pay gap' (2010) - 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. Enforcement of the equal pay principle (to be published in November 2017)