



Equal pay issues in EU law and related CJEU case Law

Dr. Susanne Burri
Utrecht University

Faculty of Law, Economics and Governance

ERA Trier, December 2, 2019



This training session is funded under the 'Rights, Equality and Citizenship Programme 2014-2020' of the European Commission.



Outline

1. The Gender Pay Gap (GPG) in the EU
2. EU legislation on equal pay: an overview
3. Legislation and case law
 - 3.1 The concept of worker in Article 157 TFEU
 - 3.2 The concept of pay in Article 157 TFEU
 - 3.3 Direct sex discrimination in pay
 - 3.4 Indirect sex discrimination in pay
 - 3.5 Equal pay for work of equal value
 - 3.6 Job classification schemes
 - 3.7 Burden of proof and remedies
4. Pay transparency
5. Final remarks



1. The gender pay gap in the EU

- Definition European Commission: 'the relative difference in the average gross earnings of women and men within the economy as a whole'.
- Unadjusted (not taking into account of individual characteristics, such as specific supplements): women earn **16% less than men per hour in the EU**.
- Some factors:
 - Career breaks, less promotions, less career opportunities, segregated labour market, glass ceiling etc.
 - Probably part of it is discrimination



2. EU legislation on equal pay: an overview

Treaty on the Functioning of the EU: **Article 157 TFEU** (ex 119-EEC-Treaty; 141 EC):

'1. Each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied.

2. For the purpose of this Article, 'pay' means 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.

Equal pay without discrimination based on sex means:

(a) that pay for the same work at piece rates shall be calculated on the basis of the same unit of measurement

(b) that pay for work at time rates shall be the same for the same job.'



2. EU legislation on equal pay: an overview (cont.)

- **Article 157 TFEU:**
 - Has not only an economic, but also a **social aim** (43/75 *Defrenne II*)
 - In 2000: **the economic aim is secondary to the social aim** (C- 50/96, *Schröder*)
 - **Fundamental social right** (149/77, *Defrenne III*)
 - **Horizontal direct effect** since 8 April 1976 (43/75 *Defrenne II*)
 - Also private employers; collective agreements: see for example 43/75 *Defrenne II*, C-184/89 *Nimz*, C-33/89 *Kowalska*, C-399/92 *Helmig*, C-400/93 *Royal Copenhagen*



2. EU legislation on equal pay: an overview (cont.)

- Recast Directive 2006/54 (repealed Directive 75/117), Article 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.'

- Article 157 TFEU primary source of law (69/80 *Worringham*)
- Applies also to job of higher value (157/86 *Murphy*)



2. EU legislation on equal pay: an overview (cont.)

- **Charter** of Fundamental Rights and Freedoms of the EU, Article 23:

'Equality between women and men must be ensured in all areas, including employment, work and **pay**.'



3. Legislation and case law

3.1 The concept of **worker**

- Has a Community meaning
- Certain **period of time**; services for and under the **direction** of another person; **remuneration**: see for example 317/93 *Nolte* and 444/94 *Megner*.
- If a worker, qualification under national law as for example self-employed is not decisive (C-256/01 *Allonby*)
- Applies also to minor employment (171/88 *Rinner-Kühn*)



3.2 The concept of pay

- Very **broad concept** (overtime supplements, special bonuses paid by the employer, travel facilities, compensation for training courses, occupational pensions etc.)
- Not: social security schemes (*Defrenne I*): Directive 79/7/EEC on statutory social security schemes (not amended)
- Occupational pension schemes: 170/84 *Bilka* and C-262/88 *Barber*, (time limit: 17 May 1990). Any consideration, in cash or in kind, which the worker receives directly or indirectly **in respect of his employment**
- See also Recast Directive 2006/54 Chapter 2.
- Pension scheme for civil servants: C-7/93 *Beune*



3.3 Direct sex discrimination in pay

- No exception (only positive action Art. 157 (4) TFEU)
- Occupational pension schemes
 - Different pensionable age for men and women in occupational schemes
 - C-262/88 *Barber* (redundancy payment linked to pensionable age)
 - C-366/99 *Griesmar* (service credit for female workers who have had children)
- Relation with pregnancy and motherhood:
 - C-333/97 *Lewen* (Christmas bonus)
 - Denial of pay increases during periods of maternity leave (C-342/83 *Gillespie*; C-147/02 *Alabaster*)



3.4 Indirect sex discrimination

- Important concept developed by Court of Justice in this field
- Part-time work (for example 170/84 *Bilka*)
- Parental leave (for example C-333/97 *Lewen*)
- Mobility requirements (109/88 *Danfoss*)
- Etc.

- Prima facie case of indirect sex discrimination:
 - Guidance in C-167/97 (*Seymour-Smith*)
 - Statistics can be used, but are not always required (C-274/18 *Schuch-Gannadan*)



3.4 Indirect sex discrimination (cont.)

Some guidance of the CJEU:

- Budgetary considerations cannot justify discrimination against one of the sexes (for example :C-243/95 *Hill & Stapleton*, C-4/02 *Schönheit*)
- Arguments have to be specific (for example: C-33/89 *Kowalska*, C-184/89 *Nimz*, C-184/89, C-243/95 *Hill & Stapleton*, C-167/97 *Seymour-Smith*)
- If unequal pay finds its source in the application of two collective agreements, this does not provide a justification for the employer (C-127/92 *Enderby*)
- C-173/13 *Leone*: A legitimate social policy aim requires that it genuinely reflect a concern to attain that aim and be pursued in a consistent and systematic manner



3.5 Work of equal value

- A comparison is required, but not necessarily the same employer
- But there has to be a single source which can redress unequal pay (C-320/00 *Lawrence*; C-256/01 *Allonby*)
- No definition of 'work of equal value': Criteria for the comparison in case law:
- The nature of the work is decisive, in addition other factors might play a role such as training requirements, responsibilities etc. (129/79 *Macarthy*s; C-400/93 *Royal Copenhagen*; C-309/97 *Wiener Gebietskrankenkasse*)



3.5 Work of equal value (cont.)

- Preamble 9 Recast Directive: '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.'
- If classification in the same category under the applicable collective agreement is the only indication of equal value of the work, this is insufficient (C-381/99 *Brunnhofner*)



3.6 Job classification schemes

- 237/85 *Rummler*
- Muscular effort potentially indirect discriminatory
- ECJ: In order for a job classification system not to be discriminatory as a whole, it must, in so far as the nature of the tasks carried out in the undertaking permits, take into account criteria for which workers of each sex may show particular aptitude.



3.7 Burden of proof

- Article 19 Recast Directive: '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.'
- C-381/99 *Brunnhöfer*
- 109/88 *Danfoss* : pay system lacks transparency, burden of proof on employer



3.7 Burden of proof (cont.)

- Some case law:
- C-381/99 *Brunnhofers*: proof of lower pay for work of equal value rests on presumed victim of discrimination
- 109/88 *Danfoss*: when a pay system lacks transparency, the burden of proof lies on employer
- C-415/10 *Meister*: access to work: if the employer refuses to provide any information, the national court may take this into account
- C-104/10 *Kelly*: no right to receive information on other applicants to a course. But *effet utile*.
- C-274/18 *Schuch-Ghannadan*: lack of specific statistics or facts



4. Pay transparency

- Equal pay has to be applied to all aspects and each element in order to ensure genuine transparency permitting an effective review: 321/86 *Commission vs France*, 109/88 *Danfoss*; C-262/88 *Barber*, C-381/99 *Brunnhofers* etc.
- Recommendation of the European Commission C2014 (1405) on pay transparency (soft law):
 - an employee's right to request information on gender pay levels for the same work or work of equal value;
 - an employer's duty to report on average gender pay levels by category of employee or position;
 - an employer's duty to conduct an audit on pay and pay differentials on grounds of gender; and
 - measures to ensure that the issue of equal pay, including pay audits, is discussed at the appropriate collective bargaining level.



4. Pay transparency (cont.)

- Example of recent Icelandic legislation
 - Certification required for companies with 25 or more employees on an annual basis, based on management standard
 - Equal pay for jobs at the same level, as well as jobs of equal value
 - Assessment of company policies; job classifications according to equal value and wage analysis.
- More information:
 - European network of legal experts: Pay transparency (2017)
 - European network of legal experts: National cases and good practices on equal pay (2019)

See: equalitylaw.eu



5. Final remarks

- Gender pay gap in EU is decreasing only very slowly
- Important role of the Court of Justice
 - broad concept of pay
 - concept of indirect (sex) discrimination
 - some cases on the burden of proof
- At national level:
 - scarcity of cases
 - limits of enforcement based on individual actions (costs, lengths of procedures etc.), but also lack of pay transparency
- Future:
 - EU legislation on pay transparency?
 - Relation between directives (e.g. pregnancy; work-life balance; part-time work)