

Equal pay for work of equal value

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EU Gender Equality Law - Seminar for legal practitioners

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Equal pay for work of equal value

Directive 2006/54/EC of the European Parliament and of the Council 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)

Article 141(3) of the Treaty provides a specific legal basis for the adoption of EU measures to ensure the application of the principle of equal opportunities and equal treatment in matters of employment and occupation, including the principle of equal pay for equal work or work of equal value.

The principle of equal pay for equal work or work of equal value laid down in Article 141 of the Treaty and consistently upheld in the case law of the Court of Justice constitutes an important aspect of the principle of equal treatment between men and women and an essential and indispensable part of the Community acquis, including the case law of the Court, as regards discrimination on grounds of sex, and it is therefore appropriate to adopt complementary provisions for its implementation.

Article 141

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.

3. The Council, acting in accordance with the procedure referred to in Article 251, and after consulting the Economic and Social Committee, shall adopt measures to ensure the application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, including the principle of equal pay for equal work or work of equal value.

4. With a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the underrepresented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers.

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Directive 2006/54/EC of the European Parliament and of the Council 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)

According to the settled case law of the Court of Justice, in order to assess whether workers are performing the same work or work to which the same value may be attributed, it must be ascertained whether, having regard to a set of factors such as the nature of the work, the training conditions and the working conditions, those workers may be regarded as being in a comparable situation.

The Court of Justice has established that, in certain circumstances, the principle of equal pay is not limited to situations where men and women work for the same employer.



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Directive 2006/54/EC of the European Parliament and of the Council 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)

Objective of the Directive: to ensure the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation.

- **Access to employment.**
- **Working conditions.**
- **Occupational social security schemes.**

Member States may maintain or adopt positive action measures with a view to ensuring full equality between men and women in working life.

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Directive 2006/54/EC of the European Parliament and of the Council 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)

EQUAL PAY

- a) 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
- b) 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.

EQUAL TREATMENT IN ACCESS TO EMPLOYMENT, VOCATIONAL TRAINING, PROMOTION AND WORKING CONDITIONS

Prohibition of discrimination:

- In the conditions for access to employment, including selection criteria and recruitment conditions.
- Access to all types and levels of vocational guidance, advanced vocational training and retraining, including practical work experience.
- On employment and working conditions, including dismissal.
- Membership and participation in a workers' or employers' organisation or in any organisation.

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Case law of the Court of Justice of the European Union (CJEU)

General Principles of the CJEU

Discrimination against women at work:

Since 1976, the Court of Justice has held that the principle of equal pay for men and women laid down in European Union law has direct effect, so that it can be invoked directly against the employer (judgment of 8 April 1976, Defrenne, 43/75).

The Court of Justice has held that the exclusion of part-time workers from an occupational pension scheme may constitute indirect discrimination against women if such exclusion affects a much higher number of women than men and where it is not objectively justified by factors independent of any discrimination on grounds of sex (judgment of 13 May 1986, Bilka, 170/84).

Finally, the Court of Justice has accepted the possibility of giving preference in promotion to female candidates (women), in those sectors of activity of the administration which, at the level of the post concerned, have fewer women than men, if they are equally qualified ("positive discrimination"), provided that the advantage is not automatic and that the candidates (men) are guaranteed an examination without a priori exclusion of their candidature (Judgment of 11 November 1997, Marschall, C-409/95).

Source: CJEU Report "The Court of Justice and equal treatment".

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Case law of the Court of Justice of the European Union (CJEU)

C-43/75 Sabena Case 8 April 1976

By a judgment of 23 April 1975, received at the Court Registry on 2 May 1975, the Cour de Travail, Brussels referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty two questions relating to the effect and application of Article 119 of the Treaty on the principle of equal pay for men and women for equal work. These questions arose in the context of a dispute between a air hostess and her employer, SABENA, concerning compensation claimed by the applicant in the main proceedings on the ground that, between 15 February 1963 and 1 February 1966, as a female worker, she suffered discrimination in terms of pay compared with her male colleagues who performed the same work as "cabin steward".

The first question asks whether Article 119 of the Treaty introduces 'directly into the national law of each Member State the principle of equal pay for men and women for equal work' and whether, 'independently of any national legislation, it gives workers the right to bring proceedings before national courts to enforce that principle'.

Conclusions:

The principle of equal pay for men and women established by Article 119 may be relied on before national courts. It is the duty of those courts to ensure the protection of the rights conferred on individuals by that provision, in particular in the case of discrimination directly caused by legislative provisions or collective labour agreements, and in the case of unequal pay for the equal work, which is carried out in the same establishment or service, whether private or public.

2) The application of Article 119 was to have been fully secured by the original Member States as from 1 January 1962, the beginning of the second stage of the transitional period, and by the new Member States as from 1 January 1973, the date of entry into force of the Accession Treaty. The first of these deadlines was not modified by the resolution of the Member States of 30 December 1961.

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C-43/75 Sabena case

3) Council Directive 75/117/EEC does not prejudice the direct effect of Article 119 and the period fixed by that Directive does not affect the time limits laid down in Article 119 of the EEC Treaty and the Treaty of Accession.

Even in areas where Article 119 does not have direct effect, that provision cannot be interpreted as reserving to the national legislature exclusive power to implement the principle of equal pay; since to the extent such implementation is necessary, it may be achieved by a combination of Community and national provisions.

(5) Except in the case of employees who have previously taken legal action or made an equivalent claim, the direct effect of Article 119 may not be invoked in support of claims in respect of pay periods prior to the date of this judgment.

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Case law of the Court of Justice of the European Union (CJEU)

C-170/84 Bilka case 13 May 1986

By order of 5 June 1984, received at the Court on 2 July 1984, the Bundesarbeitsgericht (Federal Labour Court) referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty three questions on the interpretation of Article 119 of that Treaty.

Those questions have been raised in proceedings between BilkaKaufhaus GmbH ('Bilka') and its former employee, Ms Karin Weber von Hartz, concerning the grant to her of a retirement pension under the supplementary pension scheme set up by Bilka for its employees.

It is apparent from the file that Bilka, which is part of a group of department stores established in the Federal Republic of Germany and which employs several thousand people, has, for several years, set up a supplementary (occupational) pension scheme (hereinafter 'company pensions') for its employees. That scheme, which has been amended on numerous occasions, is regarded as an integral part of the employment contracts concluded between Bilka and its employees.

Under the version in force as of 26 October 1973, part-time employees are only entitled to benefit from this scheme if they have worked full-time for at least 15 years out of a total period of 20 years.

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Case law of the Court of Justice of the European Union (CJEU)

C-170/84 Bilka case Conclusions

A department store company which excludes its part-time employees from the occupational pension scheme infringes Article 119 of the EEC Treaty where that measure affects a far greater number of women than men, unless the company shows that the measure is based on objectively justified factors unrelated to any discrimination on grounds of sex.

Under Article 119, a department store company may justify the adoption of a pay policy excluding part-time workers from the occupational pension scheme, irrespective of their sex, on the ground that it seeks to employ as few such workers as possible, where it is established that the means chosen to attain that objective meet a real need of the undertaking, are appropriate to achieving the objective in question and are necessary for that purpose.

Article 119 does not have the effect of obliging an employer to organise its occupational pension scheme in such a way as to take account of the particular difficulties encountered by employees with family responsibilities in meeting the conditions for entitlement to such a pension.

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Case law of the Court of Justice of the European Union (CJEU)

C-624/19 TESCO Case 3 June 2021

- a) Tesco Stores is a retailer that sells its products online and in 3 200 shops located in the United Kingdom. These shops, which vary in size, employ a total of approximately 250 000 people, paid on an hourly basis and performing different types of work. The company also has a distribution network consisting of 24 distribution centres with approximately 11 000 employees, who are also paid on an hourly basis and perform various types of work.
- b) The claimants in the main proceedings are employees or former employees of Tesco Stores, both female ('the female claimants in the main proceedings') and male, who work or used to work in its stores. They brought proceedings against Tesco Stores before the referring tribunal, the Watford Employment Tribunal (United Kingdom), from February 2018 onwards, on the ground that they had not received equal pay for equal work, contrary to the Equality Act 2010 and Article 157 TFEU.
- c) In support of their equal pay claims, the female claimants in the main proceedings submit, first, that their work and that of the male workers employed by Tesco Stores in the distribution centres in its network are of equal value and, second, that they are entitled to compare their work and that of those workers, although the work is carried out in different establishments, under both the Equality Act 2010 and Article 157 TFEU. They contend that, in accordance with section 79(4) of the Equality Act 2010, common terms of employment are applicable in the stores and distribution centres. Furthermore, in accordance with Article 157 TFEU, there is a single source, namely Tesco Stores, for the terms and conditions of employment of the female claimants in the main proceedings and those workers.

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C-624/19 TESCO case

In these circumstances, the Watford Employment Tribunal decided to stay proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

- ❖ Is Article 157 [TFEU] directly effective in claims made on the basis that claimants are performing work of equal value to their comparators?
- ❖ If the answer to Question 1 is no, is the single source test for comparability in [Article] 157 [TFEU] distinct from the question of equal value, and if so, does that test have direct effect?

With regard to the first question referred for a preliminary ruling:

- It must therefore be held that Article 157 TFEU may be relied on before national courts in a dispute based on work of equal value carried out by workers of different sexes with the same employer and in different establishments of that employer, provided that the employer constitutes a single source.
- In the present case, it follows from the request for a preliminary ruling that Tesco Stores appears to constitute, as an employer, a single source to which the pay conditions of the workers employed in its shops and distribution centres may be attributed and that it could be responsible for possible discrimination prohibited under Article 157 TFEU, which it is for the national court to determine.
- In the light of all the foregoing considerations, the answer to the first question referred for a preliminary ruling must be that Article 157 TFEU must be interpreted as having direct effect in disputes between private individuals in which it is alleged that the principle of equal pay for male and female workers for 'work of equal value', referred to in that article, has been infringed.

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Pay transparency measures

Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL reinforcing the application of the principle of equal pay for equal work or work of equal value for men and women through pay transparency measures and mechanisms for its effective enforcement

Pay transparency measures

1. Pay transparency for job applicants: employers will have to disclose the initial salary or salary range, either in the job advertisement itself or before the job interview. In this context, they may not ask applicants about their salary history.
2. Workers' right to information: workers have the right to request information from their employer on their individual pay and on average pay levels, broken down by sex and categories of workers performing the same work or work of equal value.
3. Information on the gender pay gap: For workforces of at least 250 persons, companies must publish information on the pay gap between male and female workers within the company. Internally, they must also provide information on the gender pay gap by job categories performing the same work or work of equal value.
4. Joint pay assessment: where pay information reveals an unjustified gender pay gap of at least 5 %, employers should carry out a pay assessment in cooperation with staff representatives.

Improved access to justice for victims of retributive discrimination

1. Compensation: Those who have suffered gender-based pay discrimination can obtain compensation, which may include reimbursement of back pay and related bonuses or payments in kind.
2. The burden of proof is on companies: by default, it is the employers, and not those who work for them, who will have to prove the absence of pay discrimination.
3. Sanctions (e.g. fines): for cases of repeated infringements, Member States will have to provide for a scale of specific sanctions, with an indication of what the minimum fines are.
4. Equality bodies and workers' representatives can intervene in judicial or administrative proceedings on behalf of workers as well as in class actions for equal pay.

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