EQUAL PAY FOR EQUAL WORK OR WORK OF EQUAL VALUE

Sara Iglesias Sánchez

EU Law Professor,

Universidad Complutense of Madrid

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OUTLINE

- The principle of equal pay in the Treaty
- Directive 2006/54 and equal pay
- Relevant case-law of the CJUE
- The future: pay transparency

… SOME FACTS

- EUROSTAT findings

  - The gender pay gap is today 14 % and has minimally changed over the last decade (Eurostat 2020)
  - The gender overall earnings gap (combined impact of average hourly earnings, number of hours paid and employment rate) was 36.7% in 2018
  - Gender pay gap is broader than pay discrimination:
    - Sectoral segregation (overrepresentation of women in low-paying sectors like care, health and education): feminised jobs are systematically undervalued!
    - Women have more work house hours / childcare, per week (unremunerated)
    - Glass ceiling: less than 8% top companies' CEOs are women
    - **Pay discrimination**

… SOME FACTS

- Consequences spread on :
  - Less income, career breaks,
  - Less investment, less pension rights (in 2014, pensions 39% lower!)
  - MORE POVERTY

- Unadjusted gender pay gap: difference between average remuneration between men and women (ratio)
  - Not itself a measure of discrimination (includes objective factors: sectoral and occupational segregation, vertical segregation, qualifications, working time, job tenure)

- Adjusted gender pay gap: removing the part ”explained” by objectife factors
  - In the EU: the explained part > 3%
  - The adjusted GPG: 11,4 %
  - Adjusted GPG does not equal discrimination

… SOME FACTS

- Regulation strategies?
  - General policy making
  - Prohibition of discrimination
- Pay equality only one aspect
  - European care strategy / work life balance Directive
  - Women on Boards Proposal
  - Pay transparency proposal

EQUAL PAY IN THE TREATY

TREATY FRAMEWORK

- Not only the 'core' of EU equality policy but also the first true EU "fundamental right"
- Defrenne Sabena 43/75
  - Eliminate competitive imbalances but also social function
  - social function

- Old art. 119 TCEE: only contained the mandete to "ensure and subsequently maintain the application of the principle" of equal pay for equal work
- Soon the Court introduced the idea of equal pay for work of equal value (ILO Convention 1951 on equal pay), and this was reflected in the 1975 Directive

EQUAL PAY IN THE TREATY

TREATY FRAMEWORK

- The current wording of art. 157 comes from the Amsterdam Treaty:
  - Equal pay for equal work and work of equal value + definition of pay
  - Legal basis to regulate equal treatment in employment and occupation (before that, legal basis – art. 325 TFEU)
  - Point 4: prevent and compensate disadvantages (positive discrimination)

EQUAL PAY IN THE TREATY

Article 157 (ex Article 141 TEC)

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.

EQUAL PAY IN THE TREATY

Article 157 (ex Article 141 TEC)

3. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, 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.

EQUAL PAY IN THE TREATY

- Essential features of Treaty interpretation by the ECJ:
  - Forms part of the "social objectives of the [EU] which is not merely an economic unión, but is at the same time intended, by common action, to ensure social progress and seek the constant improvement of the living and working conditions of their peoples" > **part of the foundations of the EU!! > fundamental human rights!**
  - "The principle, referred to in that provision, of equal pay for male and female workers for equal work or work of equal value forms part of the foundations of the European Union" (C-624/19, Tesco, para 33)
  - **Direct effect** (Defrenne) even in horizontal relationships (contracts and collective agreements)! (precursor of horizontal direct effect of EU fundamental rights) (only prospective direct effect after Defrenne II)

EQUAL PAY IN THE TREATY

- Definition of 'PAY'
  - Definition in the Treaty (art. 157 (2) TFEU) : "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."
  - **Large interpretation:** covering, eg.
    - Benefits (health, insurances…)
    - Bonuses
    - benefits in kind (e.g. company cars)
    - refunds of payment
    - overtime pay,
    - severance and redundancy payments, compensation for unfair dismissal,
    - sick pay schemes, maternity benefits…

EQUAL PAY IN THE TREATY

- Definition of 'PAY'
  - **The relevant test**: consideration in respect of employment
  - However:
    - Id does not need to be for the work *actually* done (e.g. expatriation allowance, in the field of EU officials)
    - The source does not matter
    - The reason does not matter
    - Whether it is one-off, regular, or indexed on salary, does not matter
  - Definition of 'pay': relevant also in other fields of discrimination (see Maruko C-267/06)
  - Equality for **each element of pay:**
    - 'Equal pay must be ensured not only on the basis of an overall assessment of all the consideration granted to employees, but also in the light of each aspect of pay taken in isolation' Case C-381/99 Brunnhofer
  - Relevance of the distinction of 'pay' from other working conditions

EQUAL PAY IN THE TREATY

Are pensions 'pay' under Art. 157 TFEU?

- IT DEPENDS:
- … complex evolution of the case-law and interaction with secondary law (pensions covered by Directive 79/7 not covered by Directive 2006/54)
- 'The term 'pay' within the meaning of Article 157(2) TFEU
  - covers pensions **which depend on the employment relationship** between worker and employer,
  - **excluding** those deriving from a statutory scheme, to the financing of which workers, employers and possibly the public authorities contribute in a measure determined less by the employment relationship than by considerations of social policy.
  - Accordingly, that concept cannot be extended to encompass social security schemes or benefits — such as retirement pensions — which are directly governed by statute to the exclusion of any element of negotiation within the undertaking or occupational sector concerned and which are obligatorily applicable to general categories of employee

  (see judgment of 22 November 2012, Elbal Moreno, C-385/11, EU:C:2012:746, paragraph 20 and the case-law cited).'

EQUAL PAY IN THE TREATY

- Pensions

(Case law codified in Directive 2006/54)

Recitals (13) and (14)

- all forms of occupational pension constitute an element of pay within the meaning of Article 141 of the Treaty.

- Although the concept of pay within the meaning of Article 141 of the Treaty does not encompass social security benefits, it is now clearly established that a pension scheme for public servants falls within the scope of the principle of equal pay
  - if the benefits payable under the scheme are paid to the worker by reason of his/her employment relationship with the public employer,
  - notwithstanding the fact that such scheme forms part of a general statutory scheme.
  - According to the judgments of the Court of Justice in Cases C-7/93 and C-351/00, that condition will be satisfied if the pension scheme concerns a particular category of workers and its benefits are directly related to the period of service and calculated by reference to the public servant's final salary.

EQUAL PAY IN THE TREATY

Equal work or work of equal value

- Difficulty in finding the comparator
- Different positions in same company? Equivalent positions in different companies? or even sectors? Cross-temporal comparison?
- Different posible approaches :"… "entirely qualitative in caracter because exclusively concerned with the **nature of the work actually performed**" : work that has **equivalent value** in terms of the cualifications or skills required, the effort involved … (factual assessment by national judge)
- Recital 9 of Recast directive :"in order to assess whether workers are performing the same work or work of equal value, it shoudl 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"

EQUAL PAY IN THE TREATY

Equal work or work of equal value

- Jobs of equal value with different employers?
- Single source approach (Lawrence; Allonby) :
  - If no single source, no entity responsable for inequality that can restore equal treatment > not in the scope of art. 157 TFEU
  - AG Geelhoed in Lawrence: defence rights of employer (lack of information, different economic situation
    - But this could be taken into account at the justification stage…
  - McCarthys case: also covers Jobs held at different points in time
  - Murphy v Board Telecom Eireann: also covers Jobs of lesser value

EQUAL PAY IN SECONDARY LAW

- Equal Pay Directive – Directive 75/117/EEC
- Equal Treatment Directive – Directive 76/207 EC
- Occupational schemes Directive- Directive 96/97 (ex 86/378)
- Equal Treatment in Social Security Directive – Directive 79/7

- Self-employed Directive (Today Directive 2010/41)

- RECAST Directive – 2006/54

- Gender Equality in Goods and Services – (Directive 2004/113)
- **The added value of secondary law**

DIRECTIVE 2006/54

- Article 2(1)(e)'pay': 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/her employment from his/her employer;

- 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."

DIRECTIVE 2006/54

- Article 14 Prohibition of discrimination

There shall be no direct or indirect discrimination on grounds of sex in the public or private sectors, including public bodies, in relation to:

(c) employment and working conditions, including dismissals, as well as pay as provided for in Article 141 of the Treaty;

- Horizontal provisions
  - Compensation and Reparation (art. 18)
  - Burden of Proof (art. 19)

DIRECTIVE 2006/54

Key concepts:

- Direct discrimination - Art. 2(1)(a)

where one person is treated less favourably on grounds of sex than another is, has been or **would** be treated in a comparable situation;

- Indirect discrimination and Justifications - Art. 2(1)(b)

where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary;

PAY INDIRECT DISCRIMINATION

- Apparently neutral provisions puting in practice one sex at a particular disadvantage:
  - Part time work
  - Impact of maternity leave
  - Temporary work
- Justifications and comparability

- Remedies

PAY TRANSPARENCY

- "The far largest part of the gender pay gap remains unexplained in the EU and cannot be linked to worker or workplace characteristics such as education, occupation, working time or economic activity the person works for. **More transparency in pay would help uncover unjustified gender-based pay differences** for equal work or work of equal value and help victims of pay discrimination to seek redress and enforce their equal pay right."

https://ec.europa.eu/info/policies/justice-and-fundamental-rights/gender-equality/equal-pay/gender-pay-gap-situation-eu_en

PAY TRANSPARENCY

- Resilience of the pay gap despite legislation: lack of transparency as one cause
- Problem:
  - Invisibility : lack of litigation
  - Lack of information, confidentiality, data protection
  - Fear and risks for job security… social barriers
  - Freedom to conduct business
  - costs

- Commission Recommendation 2014/124/EU of 7 March 2014 on strengthening the principle of equal pay between men and women through transparency https://ec.europa.eu/commission/presscorner/detail/en/MEMO_14_160

- Invites EU Member States to grant the right to request information on pay levels by employees, oblige companies to report and audit, and include equal pay in collective bargaining

PAY TRANSPARENCY

- Proposal of the Commission (2021) 93 Final
  - Obligation of transparency
  - Not ask about previous salaries
  - Right to request information about pay averages (for workers doing same work or work of equal value) broken down by sex
  - Larger companies (250 employees): must publish information on internal pay gaps
    - If pay gap exceeds 5%> assessment with employee representatives
- Critizism:
  - Only applies within companies, not across them, not accross sectors
  - No impact on low-paid sectors –feminised
  - Need to combine with other measures
    - Work-life balance directive 2019
    - 2012 Proposal for Directive on gender balance among non-executive directors
    - 2020 Proposal for Directive on minimum wages

Thanks for your attention!