Equal Pay for Work of Equal Value: EC Legal Framework and ECJ Case Law

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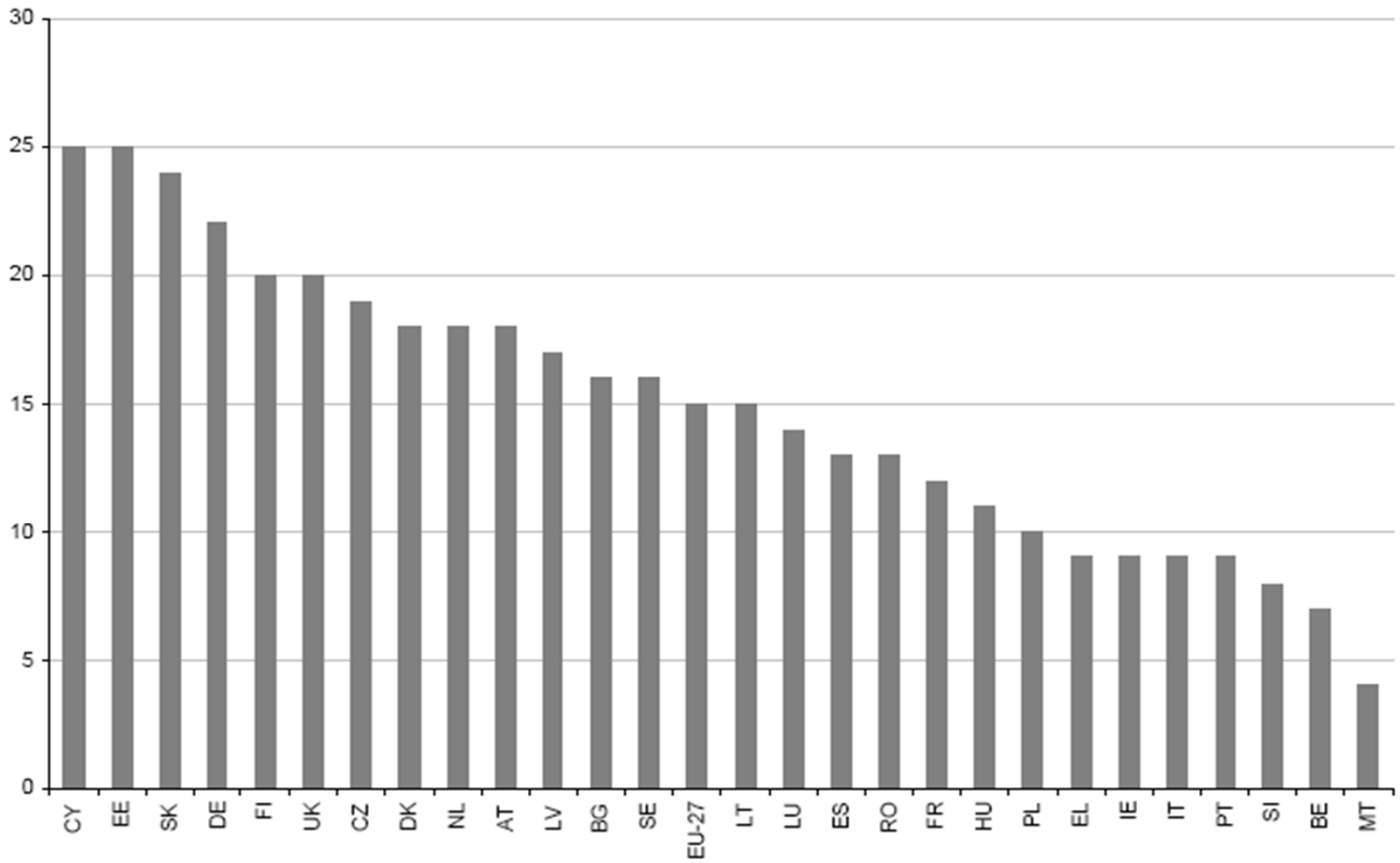
Gender Pay Gap in the EU

3. STATISTICS ON THE PAY GAP AND THE SITUATION OF WOMEN ON THE LABOUR MARKET

Figure 1 – Gender pay gap in the EU, 2005 (%) (1)



Reasons for the gender pay gap (1)

"Objective differences":

- between *individuals* (age, education, professional experience),
- between *types of employment* (occupation, type of contract or working conditions), or
- between *companies* (industry or size of company)

Reasons for the gender pay gap (2)

Discrimination based on sex

- Unequal pay for the same work
- Unequal pay for work “of equal value”
  - occupations and activities predominantly performed by women are valued less than those predominantly performed by men
  - segregation of the sexes
    - traditions and stereotypes
    - issue of combining work and family responsibilities

Legal bases for the equal pay precept

- Art. 141 TEC
- Directive 75/117/EEC

  (replaced from 15 August 2009 by Art. 4 of Directive 2006/54/EC)

Elements of Art. 141 TEC

- male/female worker
- different pay

  Dir. 2006/54/EC: “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
- equal work or work of equal value

  - includes equal treatment for part-time workers

Effect of Art. 141 TEC

General principle of Community law

Direct horizontal effect

- binding on Member States
- effective between private parties

Legal consequences of violating the equal pay principle

- In the past:

  adjustment upwards

- In the future:

  adjustment downwards possible, but levelling must be non-discriminatory

Provisions of Directive 2006/54/EC

Article 4 Prohibition of discrimination

- 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.

The pay concept

- basic pay, performance-related components, other components such as supplements and bonuses, Christmas pay packet
- “social benefits” such as continued pay during sick leave
- severance pay, loans, employee shares, continued pay for workers’ representatives while attending necessary training courses
- payment in kind: private use of company cars, company homes, reduced fares
- occupational pensions
  - including those managed by a third party (pension fund)
  - benefits paid to family members or surviving relatives
  - civil service pensions

Every component of pay must in itself satisfy the equal pay principle.

Equal value

- ECJ: when workers are in a comparable situation with regard to various factors, including nature of work & training and working conditions.
- Equal value of the activities performed in terms of demands and burdens.
- Equal value must be established on a case-by-case basis.
- Each evaluation must be measured by the same yardstick.

Methods of comparison

- Job-to-job comparison
  - matches two individuals
  - usually a “female dominated” activity is compared with a “male dominated” activity.
- Proxy method
  - comparison between female dominated activities in one company with the same female dominated activities in another company
  - when there is no comparable male in the company and in the company chosen for comparison the “women’s jobs” concerned have already been assessed as being of equal value with a male dominated activity.
- Statistical comparison
  - concerns the company’s entire pay structure
  - the complete income data are used to compare rates at which female dominated and male dominated activities are remunerated.

Choice of comparator

- Comparator group/individual of the other sex
  - the activity need not be performed at the same time
  - comparison may be made with an activity of lower value
- Not necessarily the same employer
- But: pay must be governed by rules from the same normative authority.

Statistical comparison

Burden of proof shifts to the employer

- non-transparent remuneration system,
- significant pay gap between women and men despite activities of equal value

Free collective bargaining cannot be used to justify unequal pay for work of equal value.

Admissible differentiation criteria

- Flexibility
  - if it refers to adaptability to variable hours and varying places of work
  - if this adaptability is of importance for the performance of specific tasks
- Vocational training
  - if the training is of importance for the performance of specific tasks
- Seniority
  - does not normally require special justification, as it is usually goes hand in hand with experience “which generally enables the employee to perform his duties better”.
  - unless the worker demonstrates facts which cast serious doubt on this conclusion.

Proof of discrimination

- Art. 19 Directive 2006/54/EC
- Section 22 German Equal Treatment Act [AGG]:
  - Worker provides **circumstantial evidence** from which it may be **presumed** that discrimination has occurred on one of the grounds named in Section 1;
  - then the employer must demonstrate that anti-discrimination provisions have not been violated.

Pay system requirements

- Transparency
- Objective criteria
  - associated with the type of activity
  - and reflecting the “nature” of the work;
  - common criteria for male and female workers;
  - including criteria “in relation to which women workers may have a particular aptitude”
- Non-discriminatory interpretation and application
- Non-discriminatory as a whole; “adequate room” for the criteria in the overall system

Implementation in German labour law

- Until 2006 (Prohibition of sex discrimination): Section 612a Civil Code [BGB]
- Since August 2006: Section 8 Equal Treatment Act [AGG]

Art. 21 (4) Dir. 2006/54/EC

[…] employers shall be encouraged to provide at appropriate regular intervals employees and/or their representatives with appropriate information on equal treatment for men and women in the undertaking.

Such information may include an overview of the proportions of men and women at different levels of the organisation; their pay and pay differentials; and possible measures to improve the situation in cooperation with employees' representatives.