

EC Law on Equal Treatment between Women and Men in Practice

ERA seminar, Trier, 9-10 November 2009

“Equal Pay for Equal Work and Work of Equal Value”

Julia Eichinger

Institute of Austrian and European Labour and Social Law
Vienna Business School

1. Topic

I have broadened the scope of the title of my presentation as listed in the seminar programme because the topic “Equal pay for work of **equal value**” covers **only part** of the provisions prohibiting discrimination on grounds of sex in the area of pay. For a better understanding of this specific question, I will discuss it within the overall context of the general principle of “**equal pay for equal work**”.

In the first part of my presentation, I will give an **overview** of the **legal bases** that are relevant to the principle of equal pay in current Community law. I will complement this overview by making a few comments about the **historical development** of the principle of equal pay.

The main part of my presentation will be devoted to the **case law** of the **European Court of Justice** on the principle of equal pay for men and women. In this context, I will analyse and structure the Court’s extensive jurisprudence in this area. By way of illustration, I will present **groups of cases** on the most important subsections of the protection against pay-related discrimination on grounds of sex.

2. Legal bases in EU law

2.1. Primary law

The principle of equal pay for equal work irrespective of the gender had already been laid down in the Treaty establishing the European Economic Community. At the time, the principle of equal pay was stipulated in **Article 119 of the EEC Treaty** primarily for reasons of competition policy.

The successor provisions to this article in the law currently in force are found in **Articles 141(1) and (2) of the EC Treaty** (Treaty establishing the European Community).

According to the established practice of the ECJ, both former Article 119 of the EEC Treaty and Article 141 of the EC Treaty currently in force are directly applicable law in the various Member States.

2.2. Secondary law (“Equal Treatment Directives”)

The principle of equal pay was laid down not only in primary law but also in secondary law in the form of directives.

Over a period of several decades, **Directive 75/117/EEC (“Equal Pay Directive”)** provided the relevant legal basis. It put into concrete terms the provisions in Article 119 EEC Treaty and subsequently the provisions in Article 141 EC Treaty currently in force.

In the Equal Pay Directive, the Community legislator explicitly stipulated for the first time that the protection against discrimination on grounds of sex was not limited to the performance of equal work but also to cases involving the performance of **work of equal value**. This was an important extension of the scope of protection because, in the past, it had not been possible in some cases to prove discrimination in respect of pay because it had not been possible to prove that the work involved was equal work.

The first legal definition of **indirect discrimination** on grounds of sex (including in respect of pay) was provided in **Article 2(2) of Directive 97/80/EC (“Burden of Proof Directive”)**.

The principle of equal pay was also included in **Article 3(1) lit c of Directive 76/207/EEC as amended by Directive 2002/73/EC**.¹ In terms of substance, however, this inclusion was limited to a reference to the Equal Pay Directive of 1975. In addition, the Directive also provided a definition of indirect discrimination in its Article 2(2).

All the directives on equal treatment of men and women cited above, including the Equal Pay Directive 75/117/EEC, were repealed effective 15 August 2009² and replaced by **Directive 2006/54/EC (“Equal Treatment Directive – Recast”)**. This directive helped to clear up the legal situation with regard to equal treatment for men and women in matters of employment and occupation, which had become too confusing. This clarification was achieved by merging in a single Equal Treatment Directive all the provisions that had previously been laid down in several specific directives. This essentially led to a consolidation of the relevant legal situation.

¹ Overall, the primary purpose of amending the original Equal Treatment Directive of 1976 was to adapt it to the two so-called “Anti-Discrimination Directives” of the year 2000. Directive 2000/43/EC (“Anti-Racism Directive”) and Directive 2000/78/EC (“Equal Treatment Framework Directive”) extended the scope of prohibited grounds for discrimination in employment and occupation to include additional protected distinguishing criteria, i.e. ethnic origin, age, disability, religion, belief and sexual orientation.

² In addition, Directive 86/378/EEC and Directive 96/97/EC amending Directive 86/378/EEC on equal treatment for men and women in occupational social security schemes were also repealed at the same time.

In the Community law currently in force, the principle of equal pay is laid down more specifically (along with Article 141 EC Treaty) in **Article 4 of Directive 2006/54/EC**.³

3. The principle of equal pay for equal work and work of equal value in Article 141 EC Treaty

Under **Article 141(1) EC Treaty**, Member States are obliged to ensure that the principle of equal pay for men and women for equal work or work of equal value is applied. In addition, **paragraph 2** provides a **legal definition** of the term “pay” within the meaning of this Article. According to this definition, “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”. Finally, literae (a) and (b) of this paragraph define in greater detail what equal pay without discrimination based on sex means. In these two subparagraphs, the Community legislator distinguishes between pay for work at piece rates (lit a) and pay for work at time rates (lit b). **Litera (a)** stipulates for “wage incentive systems” that pay for the same work at piece rates shall be calculated on the basis of the same unit of measurement. **Litera (b)** stipulates for “time work systems” that pay for work at time rates shall be the same for the same job.

4. The principle of equal pay for equal work and work of equal value in Directive 2006/54/EC

4.1. General background

Both in the text (see Article 1 lit (b) on the scope of application, Article 2(1) lit (e) on the definition and Article 4 on the prohibition of discrimination as well as Article 5 to 13 specifically on company pensions) and in the recitals of Directive 2006/54/EC (see recitals 8 to 11 as well as 12 to 18 on company pensions), there are explicit references to the principle of equal pay for men and women for equal work and work of equal value.

4.2. Relevant provisions in the Directive

Article 1 lit (b) of Directive 2006/54/EC adds pay together with the (other) working conditions as a “new” **item** covered by the principle of equal treatment of men and women under the Equal Treatment Directive.

³ This provision is included in Title II, Chapter 1 of the Directive.

According to **Article 2(1) lit (e)** of this Directive, “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”. The prohibition of discrimination on grounds of sex, as defined in Article 4 of Directive 2006/54/EC, is based on this **legal definition** of the term “pay”, in conjunction with the definition in Article 141 EC Treaty.

Article 4 – Prohibition of discrimination – (1) stipulates that “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”. This general prohibition of pay-related discrimination is supplemented in (2) by means of a special provision which refers to the **use of a job classification system** (e.g. in collective agreements) **to determine pay**. If such 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”.

According to the ECJ’s established practice, the **term “pay”** as used in Community law should be **broadly** interpreted.

Pursuant to the ECJ’s jurisprudence, **company pensions** are therefore also considered pay. However, in Directive 2006/54/EC, a separate chapter is devoted to equal treatment in occupational social security systems. **Articles 5 to 13** of the Directive⁴ essentially codify the most important results of the ECJ’s case law on equal treatment in connection with company pension systems (in particular after the landmark decision in the *Barber* case and subsequent decisions). This is also clearly stated in the recitals of the “recast” Equal Treatment Directive (see recitals 12 to 18).

4.3. Relevant recitals

In the recitals of Directive 2006/54/EC, the Community legislator explicitly emphasises the great practical relevance of the principle of equal pay for equal work or work of equal value. According to **recital 8**, the principle of equal pay as laid down in primary law and consistently upheld in the case law of the ECJ “constitutes an important aspect of the principle of equal treatment between men and women” in general and “an essential and indispensable part” of both positive Community law and the ECJ’s case law concerning sex discrimination.

Recital 9 refers to the question (which is necessary for the applicability of the principle of equal pay) of how to assess whether workers are performing the **same work** or **work of equal value**. According to the ECJ’s case law, the first thing to be done is to find out whether the workers concerned are in a **comparable situation** with regard to a range of factors. These factors include in particular the nature of work and training and working conditions.

⁴ See Title II, Chapter 2 Directive 2006/54/EC.

In this context, **recital 10** refers to the fact that the ECJ has established that, in certain circumstances, the principle of equal pay also applies when men and women **do not** work for **the same employer**.

In **recital 11**, the Community legislator calls upon the Member States to continue to collaborate with the **social partners** in their efforts to combat pay-related discrimination in order to address “the problem of the continuing gender-based wage differentials and marked gender segregation on the labour market”. The means recommended to achieve this objective include flexible working time arrangements which enable both men and women to combine family and work commitments more successfully. A promising **set of measures** should also include parental leave arrangements which could be taken up by either parent as well as the provision of accessible and affordable child-care facilities and care for dependent persons.

The collaboration with the social partners requested by the Community legislator in measures designed to implement the principle of equal pay must be seen against the background of the promotion of the social dialogue in EU law in general and in Directive 2006/54/EC (see Article 21) in particular.

5. Importance of the ECJ’s case law on equal pay

Today, there is very **extensive ECJ case law**, which is almost overwhelming, with regard to pay-related discrimination on grounds of sex; this case law has continuously evolved over decades.

It is therefore certainly no exaggeration to say that the ECJ’s case law has played a key role in the **development** and **substantiation** of the principle of equal pay and in its **implementation** in practice and hopefully will continue to do so in future.

It has become very difficult to grasp this jurisprudence, not only because of its large scope but also because of its great variety. For this reason, it is necessary to **structure** this jurisprudence. In my presentation, I shall try to do this by forming several **groups of cases**.

However, I will only be able to cite selected **subsections** of this jurisprudence.

6. Overview of selected groups of cases

Case group 1:
The term **“pay”**

Case group 2:
Coverage of various **forms of remuneration** and **aspects of remuneration**

Case group 3:
Company pensions as pay

Case group 4:
The term **“equal work”**

Case group 5:
The term **“work of equal value”**

Case group 6:
Definition of **direct** and **indirect pay discrimination**

Case group 7:
Direct pay discrimination due to **differences in hourly pay rates** for men and women

Case group 8:
Direct pay discrimination due to **“wage brackets for women”** in collective agreements

Case group 9:
Indirect pay discrimination against women due to **“bottom wage groups”** in collective agreements

Case group 10:
Indirect pay discrimination against **part-time employees** (e.g. in connection with company pensions)

Case group 11:
Definition of the term **“pay”** versus **other cash benefits** (e.g. pension benefits from statutory **social security** schemes)

Case group 12:
Definition of the principle of equal pay versus **other aspects of the principle of equal treatment** (e.g. career advancement)