Equal Pay for Work of Equal Value
EU Legal Framework
and ECJ Case-Law

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I. Legal Developments at EU Level

1) Starting point: Art. 119 ECT

Purpose: To avoid distortion of competition

Complemented by ECJ on 8 April 1976, C-43/75 (Defrenne II) para. 8-11.

“Secondly, this provision (Art. 119) forms part of the social objectives of the Community which is … intended, by common action, to ensure social progress and seek the constant improvement of the living and working conditions …”
a. Substance of Art. 119 ECT:

- Each Member State shall ensure that the principle of “equal pay for equal work” is applied.

→ at the time, Union had no further legislative competence, only the Member States were expected to act

- Direct effect between parties to employment contracts (ECJ, 8 Apr. 1976, C-43/75 (Defrenne II) ECR 1976, I-455)

- Extends the principle of equal pay to: the same work or work to which equal value is attributed.

→ ECJ

no change, but interpretation of substance of Art. 119 ECT
(ECJ, 6 July 1982, C-61/81 (COM./.UK) ECR 1982, I-2545)

- Member States must guarantee enforceability by judicial process
c. Pay:

- any kind of remuneration which a worker receives directly or indirectly, in respect of his employment, from his employer.

→ benefits in money’s worth, based on the employment contract concluded between the two parties.

→ all pay components are not assessed collectively, but each component is assessed separately.
d. Equal work

• identical tasks or mutual replaceability of employees
  (ECJ, 11 May 1999, C-309/97 (Wiener Gebietskrankenkasse) ECR 1999, I-2865)

Criteria are: nature of the tasks, training requirements, working conditions

not relevant:
- simultaneous employment
  (ECJ, 28 Sept. 1994, C-200/91 (Coloroll) ECR 1994, I-4389)
- full-time and part-time work
  (ECJ, 31 March 1981, C-96/80 (Jenkins) ECR 1981, I-911)
  (ECJ, 6 Dec. 2007, C-300/06 (Voß) ECR 2007, I-10573)
d. Work of Equal Value

- no clearly defined criteria, but autonomous interpretation under EU law

(ECJ, 6 July 1982, C-61/81 (COM./.UK) ECR 1982, I-2545)

Criteria cited:
- job requirements,
- knowledge,
- decision-making powers,
- working conditions,

(ECJ, 31 May 1995, C-400/93 (Royal Copenhagen) ECR 1995, I-1275)

which are, or should be, attributed equal value

→ Member States are obliged to facilitate judicial review of work of equal value
2. Revision after the Treaty of Amsterdam: Art. 141 ECT/ identical after the Treaty of Lisbon: Art. 157 TFEU

• Member States to guarantee equal pay for equal work/work of equal value
• Legal basis for future legislation at EU level (Art. 141(3))
• Member States can take “positive measures” providing for specific advantages to “prevent or compensate for disadvantages in professional careers” (Art. 141(4))
3. Recast
Equal Treatment Directive 2006/54/EC:

- Repealing Directive 75/117 (Equal Pay) and Directive 97/80 (Burden of Proof, with first definition of indirect discrimination)

- Includes parts of equal pay case-law
II. ECJ Case-Law on the Principle of Equal Pay

1. The ECJ’s concept of pay:

• Bonuses
  → Christmas bonus
  → for extra work

• Premiums
  (ECJ 30 March 2000, C-236/98 (JämO) ECR 2000, I-2189)
  → for unfavourable working time

• Social Benefits
  (ECJ 13 July 1989, C-171/88 (Rinner-Kühn) ECR 1989, I-2741)
  → Staff discount
• Benefits during non-working periods
  (ECJ 27 October 1998, C-411/96 (Boyle) ECR 1998, I-6401)
  → Maternity leave
  (ECJ 14 Dec. 1993, C-110/91 (Moroni) ECR 1993, I-6591)
  → Upon termination of employment
  (ECJ 13 July 1989, C-177/88 (Rinner-Kühn) ECR 1989, I-2741)
  → Continued pay in case of sickness
2. Concept of Pay and Company Pension Schemes

- Statutory social security systems are *not* covered by principle of equal pay.
- Company pension schemes are covered:
  - access
  - contributions
  - benefits
• Effects in Time:
  → persons who want retroactive access, will have to pay relevant contributions
  Retroactive entitlement to benefits until 17 May 1990 (ECJ, 6 October 1993, C-109/91 (Ten Oever) ECR 1993, I-4879)
  → see recitals 18-18, Art. 5-13
    Directive 2006/54/EC
3. Suitable Comparator

- Persons performing equal work or work of equal value
- working for the same employer
  (ECJ 8 April 1976, C-43/75 (Defrenne II) ECR 1976, I-455)
- not necessarily working for the same employer?
  (ECJ, 13 January 2004, C-256/01 (Allonby) ECR 2004, I-873)
  (ECJ, 17 Sept. 2002, C-320/00 (Lawrence) ECR 2002, I-7325)

The pay conditions must be attributable to the same source (employer/ collective parties/ legislator), which also be able to eliminate a difference of treatment.

→ however: Directive 2006/54/EC has not explicitly included this principle
• Predecessor in job
  (ECJ 27 March 1980, C-129/79 (Macarthys) ECR 1980, I-1275)

→ only if external circumstances are largely unchanged
  (ECJ 28 Sept. 1994, C-200/91(Coloroll) ECR 1994, I-4389)
4. Indirect Discrimination

According to original definition in Burden-of-Proof Directive 97/80/EC, indirect discrimination exists where an apparently neutral provision, criterion or practice disadvantages a substantially higher proportion of the members of one sex, which cannot be justified.

→ Definition developed, based on part-time work (ECJ, 27 Oct. 1993, C-127/92 (Enderby) ECR 1993, I-5535)
• Now definition in Equal Treatment Directive 2006/54/EC:
  … where an apparently neutral provision, criterion or practice *would put persons of one sex at a particular disadvantage* …
→ Definition of indirect discrimination developed on grounds of nationality
  (ECJ, 21 Sept. 2000, C-124/99 (Borawitz) ECR 2000, I-7293)
  It is sufficient that a provision “by its nature” has a particular effect on the protected group
→ Hypothetical view, now seems to be established (Directive/primary law), however reduces evidentiary value
• Justification
Less favourable treatment is not inadmissible if it can be justified.

Conditions:
(ECJ, 13 May 1986, C-170/84 (Bilka) ECR 1986, I-1607)

– The objective must correspond to a legitimate (social policy) need of the undertaking
– Means must be suitable for achieving the objective
– And it must be used in a way that is necessary and appropriate
Example: Length of service as a determinant of pay
(ECJ, 3 Oct. 2006, C-17/05 (Cadman) ECR 2006, I-9583)

In general, more professional experience enables workers to perform their duties better (?)

Employer usually does not need to prove the relevance of more professional experience for a specific job

However, employees may furnish evidence that question this connection; in this case, the employer has the burden of proof
Examples that do **not** justify gender-related pay:

- **Need to cut cost**
  
  (ECJ, 6 April 2000, C-226/98 (Jørgensen) ECR 2000, I-02447)
  
  (→ must not affect members of one sex more than members of the other sex)

- **Provisions in collective agreements/ statutory rules**
  
  
  (→ must comply with the principle of equal pay)
5. Legal Consequence

• Discriminating pay provisions shall be set aside

• Equal pay shall be provided by means of an upward alignment
  (ECJ, 27 June 1990, C-33/89 (Kowalska) ECR 1990, I-2591)

→ until the difference of treatment is eliminated.

(for the past, the more favourable regime remains the applicable reference system, ECJ, 7 Feb. 1991, C-184/89 (Nimz) ECR 1991, I-297).
III. Conceptual Problem

• Equal pay is related to the work performed “equal work/work of equal value” [assessment of work]
  (ECJ, 1 July 1986, C-237/85 (Rummler) ECR 1986, I-2101)
  (ECJ, 26 June 2001, C-381/99 (Brunnhofber) ECR 2001, I-4961)

• Pay concepts are guided by the success of the work performed [performance appraisal]

• Human capital theory includes objective factors such as: training, length of service, professional experience