Equal pay for equal work and work of equal value for men and women

Prof. Dr. Christa Tobler, LL.M.

Europa Institutes of the Universities of Basel (Switzerland) and Leiden (The Netherlands)

EU gender equality law
ERA Seminar for legal practitioners
24 and 25 September 2012, Trier
Introduction (1)

The 'gender pay gap'

- Gender pay gap: Male - female income disparity, as found on the basis of statistics.
- Part of the gap appears to be based on sex discrimination (rather than on other factors).
- The historical background:
  - E.g. Elizabeth von Arnim in her novel ‘Elizabeth and her German garden’ (1875). On pay for hired hands on the estate of the author’s husband:
    ‘[The men] get a mark and a half to two marks a day and as many potatoes as they can eat. The women get less, not because they work less, but because they are women and must not be encouraged.’
  - E.g. the Netherlands in 1955: on average, women earned 58% of a man’s wage. There was an agreement concluded by the government with the social partners according to which the upper limit was 60%.
Introduction (2)

The present situation in the EU

• Commission reports:
  – ‘Equality between men and women - 2008’: ‘The pay gap has stabilised at 15% since 2003 (it was 16% in 2000).’
  – ‘Equality between men and women - 2009’: ‘persisting gender pay gap (17.4% on average in the EU).’
  – ‘Equality between men and women - 2010’: idem.

• Thus:
  Over the past years the pay gap has actually widened.

• Note: the above concerns the average pay gap; in public employment it is considerably less; in private companies it is more
Introduction (3)

Policy responses


• Commission ‘Strategy for equality between women and men 2010-2015’:
  – Equal pay for work of equal value is a thematic emphasis.
  – The Commission commits to supporting initiatives in the workplace which aim to encourage equal pay, such as the development of tools for employers to close unjustified gender pay gaps.
Introduction (4)

Legislative responses:

• On the global level:
  – ILO (International Labour Organization):
    Equal Remuneration Convention (Nr. 100) of 1951.
  – UN (United Nations):

• On the regional level:
  – Council of Europe:
  – European Economic Community (EEC, later 'EC', now - after abolishing the EC - simply ‘EU’):
    Art. 119 of the EEC Treaty (now Art. 157 Treaty on the Functioning of the European Union (TFEU)); later also secondary law.
Introduction (5)

EU-Context: other types of prohibited discrimination

- Pay discrimination is prohibited not only on grounds of sex.
- Other types of discrimination:
  - Discrimination on grounds of nationality, Art. 45 TFEU and Regulation 492/2011/EU.
  - Discrimination on grounds of racial or ethnic origin, Directive 2000/43/EC.
  - Discrimination on grounds of religion or belief, disability, age and sexual orientation, Directive 2000/78/EC.
- Thus: sex discrimination is just one element of EU equal pay law.
Gender: legislation (1)

At the beginning: Art. 119 of the EEC Treaty

- **Raison d’être:**
  - Fears of France concerning a level playing field (competition).
  - Included against the original resistance of some Member States (including e.g. the Netherlands: reservation).

- **Scope:**
  Art. 119 mentioned only ‘equal work‘ but not yet ‘work of equal value‘. This was later ‘included‘ by the ECJ; *Jenkins* (1981).

- **Nature:**
  - Double aim, both economic and social; *Defrenne II* (1976);
  - In fact more social; *Schröder* (2000).

- **Effect in the Member States:**
  *Very* little at the beginning. Better only as of the mid-1970s.
Gender legislation (2)

Development of secondary law

• The First Equal Treatment Directive or Equal Pay Directive:
  – Adopted on the basis of Art. 100 of the EEC Treaty (now Art. 115 TFEU).

• Now merged into the so-called Recast Directive:
  – Adopted on the basis of Art. 141(3) EC (now Art. 157(3) TFEU).
  – Equal pay: Art. 4 [see later].
Gender legislation (3)

Treaty revision Art. 157 TFEU

• Amsterdam revision (1997/1999): revision of Art. 119 EC (including notably ‘work of equal value’) and renumbering (Art. 141 EC, with four sections).
• Lisbon revision (2007/2009): renumbering and renaming into Art. 157 TFEU
• Basic principle:
  – ‘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.’
Gender legislation (4)

Art. 4 of the Recast Directive on equal pay

• Place in the system of the directive:
  Title II: Specific provisions - Chapter 1: Equal Pay -
  Art. 4: Discrimination.

• Text of Art. 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."
Scope (1)

The concept of ‘worker’

• Did not raise questions for a long time.

• Eventually question in Allonby (2004). ECJ:
  – Not necessarily a uniform term in EU law.
  – However, here in fact the same meaning as in EC law on the free movement for workers.
  – Namely: a person who, for a certain period of time (that is, on a permanent as opposed to a temporary basis) performs services for and under the direction of another person in return for which he or she receives remuneration; compare Lawrie-Blum (1986).

• Thus: very broad term.
All types of economic activities, including e.g. training on the job, part-time work
Scope (2)

The concept of 'pay'

- Art. 157(2) TFEU: '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.

- Thus: very broad concept. In addition to actual salary, e.g.:
  - Under certain conditions even pensions, if based on agreement/labour contract (*Barber*-case law).
Scope (3)

Pay versus employment conditions

• Dividing line may not always be easy to determine!

• An example: *Sass* (2004).
  
  – German case concerning the promotion to a higher salary grade, i.e. an upgrade based on the duration of employment.
  
  – Issue: how much of the (long) maternity leave that Ms Sass had taken at the time of the former GDR must be taken into account for this purpose? National court asks whether it is acceptable under Art. 141 EC (now Art. 157 TFEU) or under Directive 76/207/EEC (now Recast Directive) if only part of the leave is taken into account (namely the 8 weeks then prescribed by the law of the FRG).
  
  – Pay or employment condition?
  
  – ECJ: employment condition. Reason: the real issue is the calculation of the qualifying period and the role, in this context, of the maternity leave.
Comparison and comparability (1)

The principle

• Under the general equality principle of EU law, as expressed in case law such as *Sermide* (1984):
  – What is comparable must be treated equally, and
  – What is not comparable must be treated differently.

• Equal treatment therefore requires comparable situations; accordingly, a comparison must be made.

• Art. 157(1) TFEU:
  – Explicitly mentioned element, namely *equal work* and *work of equal value*.
  – Thus: right to equal treatment (i.e. equal pay) only if the work is the same or comparable.
  – Other elements concerning comparability are also conceivable, compare e.g. *Abdoulaye* (1999), on maternity payments.
Comparison and comparability (2)

What to compare in equal pay cases

- Single source requirement; *Lawrence* (2002), *Allonby* (2004): ‘[…] where the differences identified in the pay conditions of workers performing equal work or work of equal value cannot be attributed to a single source, there is no body which is responsible for the inequality and which could restore equal treatment. Such a situation does not come within the scope of Article [157(1)]. The work and the pay of those workers cannot therefore be compared on the basis of that provision […].’

- What does this mean in practice?
  - Work that is compared must be done for the same employer.
  - Jobs do not have to be held simultaneously; *Macarthys* (1980).
  - Under the Recast Directive, an actual comparator is not necessary.
Comparison and comparability (3)

Equal work

• So called qualitative approach: Job content is decisive, not other elements such as individual performance.

• ECJ Macarthys (1980):
  'The scope of that concept is entirely qualitative in character in that it is exclusively concerned with the nature of the services in question [...].‘

• Particularly famous examples: The Defrenne cases, where Sabena stewardesses and stewards did precisely the same work.
Comparison and comparability (4)

Work of equal value

• Again: qualitative approach; *Rummler* (1986).
  – Heavy muscular demand as one element for determining wage. Same application for men and women. Claim by Ms Rummler that for her as a woman her particular work was heavier than for a male colleague.
  – ECJ: if the nature of the work demands it, then an objective criterion is acceptable, provided that this is done not just with regard to one criterion but in relation to the entire pay system.

• What about the opposite case, i.e. work of higher value? ECJ in *Murphy* (1988): the equal pay principle also catches this situation, otherwise it would be rendered ineffective and nugatory.
Forms of discrimination (1)

Treaty vs secondary law

• Treaty on the Functioning of the European Union:
  – No mention of different types of discrimination.

• Art. 2 Recast Directive: four types of discrimination.
  – Direct discrimination (with a legal definition).
  – Indirect discrimination (with a legal definition).
  – Harassment and sexual harassment (with legal definitions).
  – Instruction to discriminate.

• Relevant in relation to pay:
  – Direct and indirect discrimination.
  – Is harassment conceivable? No ECJ case law.
Types of discrimination (2)

Direct and indirect discrimination in the Recast Directive

• Direct discrimination, Art. 2(1)(a):
A situation - '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, Art. 2(1)(b):
A situation - '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‘.
**Types of discrimination (3)**

**Examples**

- **Direct pay discrimination:**
  Today few examples; e.g. *Defrenne II*.

- **Indirect pay discrimination:**
  - The classic case: less pay for part-time workers, where these predominantly consist of women; *Jenkins* (1981), *Bilka* (1986).
  - Could also be any other criterion that in fact disadvantages one sex, e.g. length of service; *Cadman* (2006) [see later].
Types of discrimination (4)

Direct and indirect discrimination: dividing line

- Assumption until recently:
  Formally neutral measures can at the most lead to indirect discrimination; *Schnorbus* (2000).

  - Focus on the effect of the measure rather than on its form.
  - Outcome (without much explanation by the ECJ):
    Formally neutral criteria that, due to legal provisions, have the same effect as the prohibited criteria itself - direct discrimination.

Importance of the distinction

- Possibly in the context of proof.
- Certainly in the context of justification:
  - Direct discrimination:
    Only justification grounds explicitly stated in the law, if any [regarding equal pay, see later].
  - Indirect discrimination:
    - Objective justification inherent in the concept (see definition).
    - Plus the usual statutory derogations.
Justification (1)

Justification under Art. 157(1) TFEU

• *Note*: no statutory derogations!
  (If positive action under Art. 157(2) TFEU is not seen as a derogation)

• Consequence for direct discrimination - only two possibilities to treat differently:
  – Lack of comparability of situations:
    E.g. *Abdoulaye* (1999), difference in situation between mothers on maternity leave and fathers on the job.
Justification (2)

Justification for indirect discrimination

- The ECJ in *Bilka* (1984):
  , [...] if the undertaking is able to show that its pay practice may be explained by objectively justified factors unrelated to any discrimination on grounds of sex there is no breach of Article [157 TFEU].’

- Art. 2(1)(b) Recast Directive:
  ,unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary‘.
Case law on objective justification

- System: legitimate ground plus proportionality.
- Legitimate ground:
  - Can be anything, in principle (open category).
  - Different from other areas of EU law, this may even include economic justification such as 'the state of the employment market', *Jenkins* (1981). Can be criticised.
  - Well-known example: different pay based on seniority.
    - Issue: does seniority automatically lead to more experience and, therefore, to better performance?
    - Case law leading up to *Cadman* (2006):
      General assumption that this is indeed so. Can be rebutted.
Legal protection (1)

Various aspects

• Springboard: EU law as a comparatively robust legal system in terms of enforcement.

• Specific rules:
  A number of provisions in the recast directive: esp. defence of rights, burden of proof, penalties.

• Also general aspects, in particular:
  – Direct vertical and horizontal effect of Art. 157 (1) TFEU; cf. Defrenne II.
  – Duty of member states to provide compensation (Francovich).
Legal protection (2)

Jonkman (2007)

• Concerns the pension rights of air hostesses in Belgium; follows in the line of Defrenne II on equal pay, but relates this time to social insurance

• CJEU sums up some general aspects:
  – “following a judgment […] from which it is apparent that the national legislation is incompatible with [Union] law, it is for the authorities […] to take the general or particular measures necessary to ensure that [Union] law is complied with within that state”, i.e.:
    – individual measures relevant to the specific case, “levelling up”
    – “those authorities must in particular ensure that national law is changed so as to comply with [Union] law as soon as possible”.
  – The rights individuals derive must be given full effect.
CJEU case-law on pay discrimination

Most cases older in date …

- Important role of CJEU case-law
- Numerous cases, esp. preliminary rulings
- Especially in early years, some of the judgments having acquired fundamental status (*Defrenne II*)
- In recent years few cases about the gender pay gap
- Instead pay issues from other fields of law, especially discrimination on grounds of sexual orientation (e.g. *Maruko*) – indirectly also relevant to gender discrimination
Thank you for your attention!

For further information

• Basel:
  – Website: [www.europa.unibas.ch](http://www.europa.unibas.ch)
  – e-mail: christa.tobler@unibas.ch

• Leiden:
  – Website: [http://www.law.leidenuniv.nl/org/publiekrecht/europainstituut](http://www.law.leidenuniv.nl/org/publiekrecht/europainstituut)
  – e-mail: r.c.tobler@law.leidenuniv.nl

• The *Essential EU Law in Charts* Project: [http://www.eur-charts.eu](http://www.eur-charts.eu)