Equal pay for work of equal value: EU legal framework and ECJ case-law

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Gender Pay Gap (Eurostat 2011)

(1) Enterprises employing 10 or more employees; NACE Rev. 2 B to S ( - O).
(2) Provisional. (3) 2007 data and NACE Rev.1.1, sections C to O ( - L). (4) 2008.
Source: Eurostat (tseim040)

The unadjusted gender pay gap, 2009 (% difference between average gross hourly earnings of male and female employees, as % of male gross earnings, unadjusted form)
Gender Pay Gap (Eurostat 2012)
Gender Pay Gap

- Male-female income disparity
  - Various reasons
    - Differences between individuals (age, professional experience, education)
    - Differences between types of employment (occupation, type of contract or working conditions)
    - Differences between companies (branch of industry, size of the company etc.)
Gender Pay Gap

- Contribution of sex discrimination to the gender pay gap
  - Unequal pay for the same work
  - Unequal pay for the work of “equal value”

- Devaluation of women’s work
- Segregation in the labour market
- Stereotypes and traditions
- Balancing work and family responsibilities
Legal responses

- **At global level**
  - International Labour Organization
    - Equal Remuneration Convention no 100 of 1951
  - United Nations
    - Convention on the Elimination of all Form of Discrimination against Women (CEDAW) 1979

- **At regional level**
  - Council of Europe
    - European Social Charter 1961
European Union
(European (Economic) Community)

- Primary legislation
  - TFEU
    - ex Art. 119 (1) EEC, ex 141 EC – now 157 (1)
    - TFEU:
      - “each Member State shall ensure and subsequently maintain the application of the principle that men and women should receive equal pay for equal work”
    - Initially economic aim – interstate competition linked clause
Role of CJEU I

- Extensive and intensive interpretation
  - Direct effect
  - Direct horizontal effect
  - Ranking of the principle of EU legal system
    - “equal pay for male and female workers for equal work principle forms part of the foundation of the European Community”
      - CJEU 43/75 Defrenne II
Role of CJEU II

- Double purpose – economic plus social
  
  CJEU 43/75 Defrenne II

- Purpose more social

  “elimination of distortions of competition between undertakings established in different Member States, is secondary to the social aim pursued by the same provision, which constitutes the expression of a fundamental human right”

  C-270/97 Sievers u. Schrage
Secondary legislation

- Directive 75/117/EEC on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women
  - Basis – ex Art. 100 EEC – economic competence
- Since 15.8.2009 – Art. 4 Directive 2006/54/EC (recast)
  - Basis – 157 (3) TFEU (ex Art. 141 (3) EC) social policy competence
Impulses for the EU antidiscrimination policy

- Rank of fundamental right
- Recognition among the “new” fundamental rights in
  - CJEU jurisprudence
  - EU fundamental rights documents
    (At 23 EU Charter of Fundamental Rights 2000)

- Secondary legislation on equality (eg. D 2000/78, D2000/43/EC)
  - “Directive does not add to the Treaty in terms of substance”
    (CJEU Jenkins)
### Structure of the principle of equal pay

Interplay of primary and secondary legislation

<table>
<thead>
<tr>
<th>Art. 157 FEU (ex 141 EC)</th>
<th>Art. 4 Dir 2006/54/EC</th>
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<tbody>
<tr>
<td><strong>Basic provision</strong></td>
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<tr>
<td>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.</td>
<td>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.</td>
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<tr>
<td><strong>Explanations</strong></td>
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<tr>
<td>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</td>
<td>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.</td>
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<tr>
<td><strong>Definitions</strong></td>
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<td>2. For the purpose of this Article, &quot;pay&quot; 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</td>
<td></td>
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</tbody>
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Scope of application I

- Addressees (Art. 157 TFEU)
  - Member States?
    - Legislator
    - Other creators of normative acts
      - Parties to collective bargaining
      - CJEU C-284/02 Sass
  - Employer?
  - Direct vertical and horizontal effect
    - Private and public employers

- Addressees (Art. 4 Dir 2006/54/EC)
Scope of application II

- The concept of worker
  - Community law meaning
    - “it cannot be defined by reference to the legislation of the Member States but has a Community meaning. Moreover, it cannot be interpreted restrictively
      - CJEU C-256/01 Allonby
    - “a person who, for a certain period of time, performs services for and under the direction of another person in return for which he receives remuneration
      - CJEU 66/85 Lawrie-Blum
  - Parallels with concept of free movement of workers (Art. 45 TFEU (ex 39 EC))
Scope of application III

- Employees, incl. trainees
- Public servants incl. military forces
- Limits of coverage
  - Quasi-employees?
  - Self-employed?
    - Art. 157 TFEU (ex Art. 141 EC) – definitely not
    - Art. 4 Directive 2006/54/EC?
  - Not national meaning of self-employed
Scope of application IV

- If applicable law of Member State
- Exceptions (mandatory provisions):
  - Place of work in Member State
  - Employer’s domicile in Member State
The concept of ‘Pay’ I

- Broad definition

  - Art. 157 TFEU (ex Art. 141 EC)
    - 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
Broad interpretation by CJEU

- Usual salary and supplements
  - 12/81 Garland
- Travel benefits for workers and family members
  - 171/88 Rinner-Kuehn
- Continued payment of wages in the event of illness
  - 171/88 Rinner-Kuehn
- Maternity benefit
  - C-218/98 Abdoulaye
- Christmas bonus
  - C-281/97 Krueger
- Compensation for attendance of training courses of staff councils
  - C-360/90 Bötel
- Redundancy benefits
  - C-262/88 Barber
- Survivors pension based on collective bargaining agreement
  - C-109/91 Ten Oever
- Bridging allowance (‘Überbrückungsgeld’) provided for by a works agreement
  - C-19/02 Hlozek
- Etc (company cars, company homes, shares, loans…)

- The fact that certain benefits are paid after the termination of the employment relationship does not prevent them from being in the nature of pay within the meaning of the abovementioned provisions
  - C-262/88 Barber
The concept of ‘Pay’ II

- Important: not the differentiation between various types of pay, but division from other working conditions (Art. 14-16 Directive 2006/54/EC)
  - Stimulation, gratification for loyalty?
  - The future performance - yes
    - CJEU C-333/97 Lewen
  - Promotion to a higher the salary grade (upgrade based on the duration of employment) – no
    - the real issue is the calculation of the qualifying period and the role, in this context, of the maternity leave
    - CJEU C-284/02 Sass
Consideration classified as pay specifically includes consideration paid by the employer under a contract of employment whose purpose is to ensure that workers receive income even where, in certain cases specified by the legislature, they are not performing any work provided for in their contracts of employment

- CJEU C-218/98 Abdoulaye
The concept of ‘Pay’ II

- Pension benefits = pay
  - social security schemes or benefits directly governed by legislation without any element of agreement within the undertaking or the occupational branch concerned are not pay
    - CJEU 23/83 Liefting
  - occupational pension systems
    - Contracted out retirement scheme - pay
      - CJEU 69/80 Worringham
      - CJEU C-262/88 Barber - limited temporary effect
    - Occupational pension scheme – pay
      - CJEU C-170/84 Bilka
    - Pension of civil servants - pay
      - CJEU C-7/93 Beune

Decisive: whether the retirement pension is paid to the worker by reason of the employment relationship between him and his former employer, that is to say, the criterion of employment
Codification of CJEU jurisprudence in Chapter 2 “Equal treatment in occupational social security schemes” of the Directive 2006/54/EC

- Principle of non-discrimination
- Limited personal scope
- Limitation of material scope
  - exceptions
Equal treatment

- Elimination of unequal treatment but not faire remunerations
  - But: “principle of equal pay presupposes that the men and women to whom it applies are in identical or comparable situations
    - CJEU C-342/93 Gillespie

- Equal pay for equal work or work of equal value
  - It be contrary to the principle of equal treatment to apply the same rule to objectively different situations
    - CJEU C-19/02 Hlozek

- What is comparable must be treated equally and what is not comparable must be treated differently
  - CJEU 106/83 Sermide
Comparison

- Equal treatment requires comparable situations
  - Equal work –
    - identical work or to a great extent the same work with regard to the type of activity, work processes
  - Decisive – nature of work
    - Interchangeable employees
  - Nature of work rather than individual performance
  - Training
  - Working conditions
  - Other?
Work of equal value

- work that might appear to be different but work is of equal value if the same high demands are made on work criteria – such as knowledge and skills, effort and stress, responsibility, conditions in the work environment

- Qualitative approach
  - CJEU 237/85 Rummler
Comparator
- individual or group of the other sex
- The activity need not be performed at the same time
- Comparison with activity of lower value
  - CJEU Murphy
- Not necessarily the same employer, but the same source (e.g., collective bargaining agreement)
  - Doctrine of ‘same source’ (Lawrence, Allonby) – not in Directive
  - “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 141(1) EC”

Burden of proof on employer
CJEU: The best approach to the comparison of statistics is to consider, on the one hand, the proportion of men in the workforce affected by the difference in treatment and, on the other, the proportion of women in the workforce who are so affected.

- CJEU C-167/97 Seymour-Smith and Perez
Forms of discrimination I

- Direct discrimination
  - Different retirement ages for women and men in occupational pension systems
  - Women in maternity leave not benefiting from any improvement in working conditions
    - CJEU C-66/99 Pedersen

- No justification.
- Possibility to treat differently:
  - Lack of comparability of situations
    - CJEU C-218/98 Abdulaye
  - Possibly positive action to offset the occupational disadvantages
Forms of discrimination II

- Indirect discrimination
  - Criterions that in fact disadvantages one sex:
    - Part-time workers
    - Lengths of service
Justification of indirect discrimination I

- CJEU: 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 119

  - CJEU 170-84 Bilka

- Art. 2(2) b) Directive 2006/54/EC:
  “unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary”.
Justification of indirect discrimination II

Possible criteria for differentiation: needs of the company, state policies, labour market situations

- If this is of importance for performance of work
  - Flexibility - Adaptability to variable hours and places of work
  - Vocational training

- Seniority
  - CJEU C-17/05 Cadman
    - Does not require ad-hoc justification, because length of service goes hand in hand with experience which generally enables the employee to perform his duties better
    - If the worker not demonstrates facts which casts serious doubts on this conclusion
Remedies

- Levelling **up** or levelling **down**?
  - Levelling up as long as the criterion has not been changed; i.e. the same higher pay for the person/group that so far has been discriminated against

  **CJEU C-231/06 Jonkman**

  - When the criterion is changed, then both is possible: levelling up or levelling down, i.e. either higher pay for all or lower pay for all.