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**REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND
THE COUNCIL**

**Report on the application of Directive 2006/54/EC of the European Parliament and of
the Council of 5 July 2006 on the implementation of the principle of equal opportunities
and equal treatment of men and women in matters of employment and occupation
(recast)**

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REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL

Report on the application of Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast)

1. INTRODUCTION

On 5 July 2006, the European Parliament and the Council adopted Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) ('the Directive')¹. This Directive consolidates and modernises the EU *acquis* in this area by merging previous Directives² and introducing some novel features. It is based on Article 157(3) of the Treaty on the Functioning of the European Union ('TFEU').

This report assesses Member States' transposition of the Directive's novel features and the effectiveness of its application and enforcement³. It is without prejudice to any infringement procedures on the transposition of the Directive.

The European Parliament has consistently called for more action to enhance the application of the equal pay provisions at European level and adopted resolutions to that effect in 2008⁴ and 2012⁵.

The Commission's Strategy for equality between women and men 2010-2015⁶ set out ways to implement the principle of equal pay more effectively in practice and actions to reduce the persistent gender pay gap. The Commission launched a study assessing options to strengthen the application of this principle, such as improving the implementation and enforcement of existing obligations and measures aimed at enhancing the transparency of pay.

This report includes a section that assesses how equal pay provisions are applied in practice. In order to better promote and facilitate the application of equal pay provisions in practice, this report is accompanied by a Commission Staff Working Document that consists of four annexes: (1) a section on gender-neutral job evaluation and classification systems; (2) a summary of equal pay case law of the Court of Justice of the European Union ('CJEU'); (3) examples of the national case-law on equal pay; and (4) a description of the factors that cause the gender pay gap, the Commission's actions to tackle it and examples of national best practices.

¹ OJ L 204, 26.7.2006, p. 23-36.

² Council Directive 75/117/EEC, OJ L 45, 19.2.1975, p. 19; Council Directive 76/207/EEC, OJ L 39, 14.2.1976, p. 40; Directive 2002/73/EC of the European Parliament and of the Council, OJ L 269, 5.10.2001, p. 15; Council Directive 86/378/EEC, OJ L 225, 12.8.1986, p. 40; Council Directive 96/97/EC, OJ L 46, 17.2.1997, p. 20; Council Directive 97/80/EC, OJ L 14, 20.1.1998, p. 6; Council Directive 98/52/EC, OJ L 205, 22.7.1998, p. 66.

³ In line with Article 31 of the Directive.

⁴ P6_TA(2008)0544.

⁵ P7_TA-PROV(2012)0225.

⁶ COM(2010) 491.

2. STATE OF TRANSPOSITION AND INFRINGEMENT PROCEDURES

As a result of the Commission's conformity checks, questions were raised with 26 Member States on the conformity of their national legislation with the Directive's novelties⁷. In two Member States the transposition is sufficiently clear and compliant that no further information is required⁸.

Some of the Directive's elements come from previous Directives, which have been repealed as a result of the recasting exercise. Transposition of these older elements of the Directive was already monitored as part of conformity checks on the previous Directives, most recently Directive 2002/73/EC⁹. Initially, infringement proceedings on the basis of non-conformity with Directive 2002/73/EC were launched in 2006 against 23 Member States. All these proceedings apart from one¹⁰ have been closed, since the Member States have brought their national laws in conformity with EU law. The remaining case concerns the obligation to adequately protect the rights of employees on maternity, adoption or parental leave when they return to work. It was referred to the CJEU on 24 January 2013¹¹.

3. THE IMPACT OF THE DIRECTIVE

Since the Directive mainly consolidates EU law on equal treatment by bringing together, modernising and simplifying the provisions in previous Directives and incorporating case law of the CJEU, the obligation to transpose only applies to provisions that imply substantive changes¹². These novelties concern:

- (1) the definition of pay¹³;
- (2) the express extension of the application of equal treatment in occupational social security schemes to pension schemes for particular categories of workers, such as public servants¹⁴;
- (3) the express extension of the horizontal provisions (i.e. on defence of rights, compensation or reparation and burden of proof) to occupational social security schemes¹⁵; and
- (4) the express reference to discrimination arising from gender reassignment¹⁶.

In general, implementation in Member States did not specifically focus on these novelties. Some Member States have explicitly transposed the Directive either with new legislation or with substantive amendments to existing legislation¹⁷. In two Member States, the Directive

⁷ These concerns were raised through the Commission's EU Pilot system, which is the process for exchanging administrative letters prior to any infringement proceedings under Article 258 TFEU.

⁸ NL, FR.

⁹ OJ L 269, 5.10.2002, p. 15.

¹⁰ NL

¹¹ The case concerns the non-compliance by NL law with Article 2(7) of Directive 76/207/EEC as amended by Directive 2002/73/EC, specifying that employees coming back from maternity, adoption or parental leave are entitled to return to their job or to an equivalent post and to benefit from any improvement in working conditions to which they would have been entitled during their absence. NL legislation lacks the required express provisions on this matter which casts doubt over the degree of protection provided and makes it difficult for citizens to know and enforce their rights.

¹² Article 33(3).

¹³ Article 2(1)(e).

¹⁴ Article 7(2).

¹⁵ Articles 17-19.

¹⁶ Recital 3.

¹⁷ CZ, DK, EE, EL, HR, IT, CY, LT, PT, SI, SK, SE, UK.

was transposed together with other non-discrimination directives¹⁸. In two other Member States, transposition was considered necessary only in relation to occupational social security schemes¹⁹ and return from maternity leave²⁰.

Transposition was not considered necessary by some Member States because transposition of earlier directives was sufficient to comply with the requirements of the present Directive²¹.

3.1. Definition of pay

Article 2(1)(e) of the Directive defines pay in the same terms as Article 157(2) TFEU, i.e. as *‘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’*. In most Member States, the concept of pay is defined in national legislation and corresponds to this definition²². In others, the legal definition of pay is not identical to that in the Directive, but the overall effect appears to be the same²³ or national courts interpret the term ‘pay’ in line with the case law of the CJEU²⁴.

In some Member States, pay is not expressly defined in national legislation²⁵. For example, one Member State’s national legislation entitles women to equal treatment in contractual terms (including but not limited to pay) with appropriate male comparators²⁶.

3.2. Pension schemes for particular categories of workers, such as public servants

Article 7(2) incorporates some well-established CJEU case law and therefore clarifies that pension schemes for particular categories of workers, such as public servants, have to be considered as being occupational pension schemes and hence pay for the purpose of Article 157(2) TFEU, even though they form part of a general statutory scheme²⁷. In the majority of Member States, this provision has been implemented either by express provision or implicitly where the national legislation does not distinguish between categories of workers²⁸. In a significant number of Member States, transposition is lacking or unclear²⁹. Of these: two Member States seem to have a different pensionable age for men and women in both the private and public sectors³⁰; four Member States’ national legislation on occupational social security schemes does not contain any provisions on equal treatment³¹ and one Member State’s provisions on equal treatment in occupational social security schemes do not extend to public servants³².

¹⁸ FR, PL.

¹⁹ RO, where legislation on such schemes is pending.

²⁰ BG.

²¹ BE, DE, IE, ES, LV, LU, HU, MT, NL, AT, FI.

²² BE, BG, CZ, DK, IE, EL, ES, FR, HR, CY, LT, LU, HU, MT, PT, RO, SI, SK.

²³ EE, PL. In EE an employer’s activities are considered discriminatory if it establishes conditions for remuneration or benefits that are less favourable for an employee of one sex as compared with an employee of the opposite sex doing the same work or work of equal value.

²⁴ NL. See Cases 80/70, 43/75, 12/81, C-262/88, C-360/90, C-200/91, C-400/93, C-281/97, C-366/99, available at <http://curia.europa.eu/>.

²⁵ DE, IT, LV, AT, FI, SE, UK.

²⁶ UK.

²⁷ Cases C-7/93 and C-351/00.

²⁸ BE, BG, CZ, DE, EE, IE, EL, FR, CY, LT, LU, NL, AT, FI, UK. In HU, legislation does not distinguish between categories of workers, but there are no specific pension schemes for public servants.

²⁹ DK, EL, ES, HR, IT, LV, MT, PL, PT, RO, SI, SK, SE.

³⁰ IT, SK.

³¹ LV, PL, PT, SE.

³² RO.

3.3. Extension of horizontal provisions to occupational social security schemes

One of the Directive's significant novelties is the extension of the horizontal provisions in Title III to occupational social security schemes³³. The previous Directive on occupational social security schemes³⁴ did not expressly provide for these provisions, which encompass the defence of rights³⁵, compensation or reparation³⁶, burden of proof³⁷, equality bodies³⁸, social dialogue³⁹ and dialogue with non-governmental organisations⁴⁰. Consolidating EU law on equal treatment in the Directive presented an opportunity to explicitly extend the application of these horizontal provisions to occupational social security schemes. In the majority of Member States, the horizontal provisions have been transposed into national legislation and apply to occupational social security schemes⁴¹. In four Member States, this does not appear to be the case for all the horizontal provisions in the Directive⁴². In one Member State it is unclear whether the equality body can act in the area of occupational social security schemes⁴³. In another Member State, once the legislation on occupational pension schemes is in place, the anti-discrimination law framework, which incorporates the horizontal provisions, will apply⁴⁴. In two Member States, the legislation on occupational social security schemes does not appear to contain any provisions on equal treatment⁴⁵. In another Member State, where there are at present no occupational social security schemes, it is unclear whether the national legislation containing the relevant horizontal provisions would apply were such schemes to come into existence⁴⁶.

3.4. Gender reassignment

Recital 3 to the Directive refers to CJEU case law, which provides that the principle of equal treatment for men and women cannot be confined to the prohibition of discrimination based on the fact that a person is of one sex or the other, and that it also applies to discrimination arising from a person's gender reassignment⁴⁷. Very few Member States have explicitly transposed this novelty⁴⁸. Two Member States included 'sexual or gender identification'⁴⁹ and "gender identity"⁵⁰ in their grounds of discrimination. Two Member States' national legislation already provided for grounds of discrimination to include 'sexual identity'⁵¹. It seems that these terms include, but are not limited to, gender reassignment. In one Member State the Equality Ombudsman has issued guidelines providing that the grounds of discrimination cover all transgender people and not only those who have undergone gender

³³ Although these schemes were not expressly mentioned in the horizontal rules, the CJEU's clarification that an occupational pension constitutes (deferred) pay implies that the pre-existing horizontal rules on equal pay and on working conditions (including pay) also apply to these schemes.

³⁴ Council Directive 86/378/EEC.

³⁵ Article 17.

³⁶ Article 18.

³⁷ Article 19.

³⁸ Article 20.

³⁹ Article 21.

⁴⁰ Article 22.

⁴¹ BE, BG, CZ, EE, IE, EL, ES, FR, IT, CY, LV, LT, LU, HU, MT, NL, AT, SE, UK (with doubts remaining for Northern Ireland).

⁴² DE, SI, SK, FI.

⁴³ DK

⁴⁴ RO

⁴⁵ PL, PT.

⁴⁶ HR.

⁴⁷ Cases C-13/94, C-117/01 and C-423/04.

⁴⁸ BE (with what appears to be the exception of the Brussels region), CZ, EL, UK.

⁴⁹ SK.

⁵⁰ MT.

⁵¹ DE, HU.

reassignment⁵². In four Member States, where there are no specific implementing measures, national courts have interpreted domestic equal treatment legislation as prohibiting discrimination on the grounds of gender reassignment⁵³. In three other Member States, where again there are no specific implementing measures, reliance is placed directly on the effect of CJEU case law in domestic law⁵⁴. In several others, where this novelty has not been specifically transposed and where there is no pre-existing express reference in national equality legislation to prohibiting discrimination on grounds of gender reassignment, the existing prohibited grounds of discrimination may be sufficiently non-exhaustive to cover discrimination on grounds of gender reassignment. For example, in one Member State it is possible that discrimination on grounds of gender reassignment may be covered by discrimination on grounds of ‘personal circumstances’⁵⁵. However, most Member States have not taken the opportunity presented by the Directive to clearly include the right of people who are undergoing or who have undergone gender reassignment to not be discriminated against in their national legislation.

3.5. Overall assessment

Member States were only obliged to transpose the Directive’s novelties. In general, they do not seem to have used this opportunity to more comprehensively review their national systems to simplify and modernise equal treatment legislation.

The Commission’s services are currently asking detailed questions of 26 Member States concerning their transposition and implementation. The issues under discussion should be resolved as a matter of priority. The future challenge for all Member States will be to move from correctly transposing the Directive into national law to ensuring full application and enforcement of the rights established by the Directive in practice.

4. APPLICATION OF THE EQUAL PAY PROVISIONS IN PRACTICE

While the equal pay principle has been an integral part of the Treaties since the Treaty of Rome and has since been further developed in EU law and national laws of the Member States, problems with effectively applying it in practice remain.

Article 4 of the Directive establishes the principle of equal pay by providing that, for the same work or for work of equal value, direct and indirect discrimination on grounds of sex is prohibited in all aspects and conditions of remuneration. Where job classification systems are used to determine pay, the Directive states that they must be based on the same criteria for both men and women and drawn up to exclude any discrimination on the grounds of sex.

Member States implement the equal pay principle largely through equality legislation and labour codes. Several have embedded the principle in their constitutional provisions⁵⁶. A few have passed laws specifically implementing the principle of equal pay⁵⁷ and some have transposed the provision by way of collective labour agreements⁵⁸.

⁵² FI.

⁵³ DK, IE, ES, FR.

⁵⁴ CY, AT. In HR, the Gender Equality Act provides that its provisions shall not be interpreted or implemented in contradiction with EU law.

⁵⁵ SI.

⁵⁶ EL, ES, IT, HU, PL, PT, RO, SI, SK, FI.

⁵⁷ DK, EL, CY.

⁵⁸ BE, DK.

Most Member States' legislation explicitly prohibits pay discrimination⁵⁹. However, despite the national legal frameworks prohibiting pay discrimination, application of the equal pay principle in practice remains problematic. This is illustrated by the persistent gender pay gap and the low number of pay discrimination cases being brought before the national courts in most Member States.

The gender pay gap currently stands at an average of 16.2% in the EU Member States⁶⁰. Although estimates vary as to how much of the total gender pay gap arises from pay discrimination as prohibited by Article 157 TFEU and Article 4 of the Directive, it appears to be consensual that a considerable part of it can be traced back to discriminatory practices⁶¹. While direct discrimination in relation to the exact same job appears to have reduced in significance, there are substantial problems with evaluating work done predominantly by women or men, particularly where this evaluation is carried out in collective agreements.

The number of pay discrimination cases referred to national courts is low or very low in most Member States, with only few exceptions⁶². At the same time, when equal pay cases occur they are lengthy⁶³. However, due to a lack of data and ineffective monitoring in many Member States, no comprehensive information on court or tribunal decisions on pay discrimination is available. This makes it challenging to fully assess and quantify pay discrimination between men and women⁶⁴.

The scarcity of national case law on equal pay may indicate a lack of effective access to justice for victims of gender pay discrimination. The effective application of the provisions on the equal pay principle in practice may be hindered by three factors: (i) the lack of clarity and legal certainty on the concept of work of equal value; (ii) the lack of transparency in pay systems; and (iii) procedural obstacles. These three obstacles are discussed below.

4.1. Definition and application of the 'work of equal value' concept and job evaluation systems used to determine pay

There is no EU-level definition of work of equal value or any clear assessment criteria for comparing different jobs. However, the CJEU has clarified the concept of equal pay on several occasions⁶⁵. A full overview of the CJEU's case law is provided in Annex 2 of the Staff Working Document. Recital 9 of the Directive provides that, in accordance with CJEU case law, to assess whether workers are performing the same work or work of equal value, it should be determined whether they may be considered to be in a comparable situation, by taking into account a range of factors including the nature of work and training and working conditions.

⁵⁹ Several Member States (e.g. BE, DE, PL, SE) do not have such an explicit ban, but a general prohibition of sex discrimination also seems to cover pay discrimination.

⁶⁰ Eurostat Online Database 2011, available at <http://epp.eurostat.ec.europa.eu/tgm/table.do?tab=table&init=1&plugin=1&language=en&pcode=tsdsc340>.

⁶¹ See for instance Belgian Presidency report 2010 'The gender pay gap in the Member States of the European Union: quantitative and qualitative indicators', available at: <http://register.consilium.europa.eu/pdf/en/10/st16/st16516-ad02.en10.pdf>.

⁶² E.g. IE, UK. In 2011, the UK impact assessment on legislative measures to promote equal pay estimated that there were 28000 equal pay claims annually in employment tribunals.

⁶³ This includes UK. The Annual Tribunal Statistics 2011-2012 indicates the equal pay cases to be the slowest of all categories, see <http://www.justice.gov.uk/downloads/statistics/tribs-stats/ts-annual-stats-2011-12.pdf>.

⁶⁴ Several Member States lack specific statistics on the number and types of pay discrimination cases.

⁶⁵ See Cases 237/85, C-262/88, C-400/93, C-381/99. See also Recital 9 of the Directive.

Most Member States' legislation does not explain what should be understood as work of equal value, leaving it to the interpretation of national courts. Twelve Member States⁶⁶ have introduced a definition of this concept in their legislation, indicating an analytical framework or the most important criteria for comparing the value of different jobs. In most of these cases, the legislation lists skills, effort, responsibility and working conditions as the main factors for assessing the value of work. Including such a definition in national laws could be a major asset for victims of pay discrimination, helping them to bring claims before national courts. Several Member States without specific provisions like these explained that the concept was developed by their national courts⁶⁷ or is provided in the commentary⁶⁸ or the preparatory work of legislation on equal pay⁶⁹.

One way of determining work of equal value is by using **gender neutral job evaluation and classification systems**. However, the Directive does not oblige Member States to put such systems in place and their availability at national level varies significantly. While some Member States' legislation explicitly ensures that job evaluation and classification systems used for determining pay are gender neutral⁷⁰, others do not have this explicitly reflected in their legal provisions⁷¹. In a few Member States, gender-neutral job evaluation is safeguarded by collective labour agreements⁷². Practical instruments designed to assist in establishing gender-neutral job evaluation and pay systems also vary by Member State. A few have established guides and checklists for job evaluation and classification which makes it possible to assess jobs in a more objective manner and avoid gender bias. These specific tools are mostly issued by Member States' gender equality bodies⁷³ or by national authorities⁷⁴. Several Member States have training programmes to assist employers in implementing gender-neutral job classification systems⁷⁵.

Annex 1 of the Staff Working Document accompanying this Report, on gender-neutral job evaluation and classification systems, could contribute to better implementation of the equal pay principle in practice.

4.2. Transparency of pay

Increased transparency of wages can reveal a gender bias and discrimination in the pay structures of an undertaking or an industry and enable employees, employers or social partners to take appropriate action to ensure implementation of the equal pay principle. In line with Article 21(3) and (4) of the Directive, several Member States have put in place specific wage transparency measures. These can be divided into measures that disclose the pay of individual employees and measures that collectively disclose pay information for categories of employees. While measures that provide for individual disclosure of wages may help build individual cases and have a preventive effect, collective disclosure of wages may be the basis for more general measures to reduce the gender pay gap.

In cases of alleged pay discrimination, in some Member States the employer is obliged to provide the employee with information on pay, which helps to assess whether there has been

⁶⁶ CZ, IE, FR, HR, CY, HU, PL, PT, RO, SK, SE, UK.

⁶⁷ DK, DE, EL, ES, LV, AT.

⁶⁸ AT.

⁶⁹ FI.

⁷⁰ E.g. EL, FR, IT, CY, LT, AT, SI.

⁷¹ E.g. BE, DE, EE, IE, HR, LV, LU, HU, PL, FI.

⁷² E.g. in BE.

⁷³ E.g. BE, NL, PT, SE, UK.

⁷⁴ E.g. BE, EE, LU, AT.

⁷⁵ E.g. BE, EE, CY, SE.

discrimination⁷⁶. In some Member States this information can be obtained by the employee's representative, with the consent of the employee⁷⁷. If disclosure is refused, in some Member States it can be obtained via the courts⁷⁸. Regulations in some Member States include an obligation to indicate the legal minimum wage when advertising jobs⁷⁹, or make it unlawful for an employer to prevent employees from disclosing their pay to others, where the purpose of such disclosure is to determine whether there are links to differences in pay and to a protected characteristic such as sex⁸⁰. Several Member States' equality bodies are entitled to request information on pay⁸¹, for example information on income figures for comparable employees from the social security institution⁸². However, information on pay is often considered confidential under national data protection and privacy legislation. Therefore, in many Member States such information cannot be released by employers. Employees may even be contractually prohibited from informing other employees about their pay. Disclosing pay information is usually more problematic in the private sector than in the public sector.

As far as collective measures are concerned, several Member States encourage the promotion of equality planning by obliging employers to regularly assess pay practices and pay differences and by drawing up an action plan for equal pay⁸³. This obligation is usually placed on larger employers. Breaches of this obligation may be subject to pecuniary sanctions⁸⁴. Some Member States also require employers to draw up pay surveys⁸⁵, while others require employers to gather employment-related statistical data based on gender⁸⁶. In some Member States employers are obliged to periodically provide employees' representatives with a written report on the gender equality situation in the undertaking, including details of pay⁸⁷.

4.3. Procedural obstacles in equal pay cases

Victims of pay discrimination face certain obstacles to accessing justice, including: lengthy and costly judicial proceedings, time limits, lack of effective sanctions and sufficient compensation, and limited access to the information necessary to make an equal pay claim.

Individual employees usually have limited access to the information necessary to make a successful equal pay claim, such as information about the pay of people who perform the same work or work of equal value. This is an obstacle to the effective application of the **shifting of the burden of proof** rule, provided in Article 19 of the Directive, which requires the victim to first establish facts from which it can be presumed that there has been discrimination. An employer is only then obliged to prove that no discrimination took place. The application of the shift of the burden of proof rule remains problematic in some Member States where there seems to be a higher threshold than stipulated in the Directive to bring about the shift⁸⁸.

⁷⁶ E.g. BG, EE, IE, SK, FI.

⁷⁷ E.g. FI.

⁷⁸ E.g. CZ, LV.

⁷⁹ E.g. AT.

⁸⁰ E.g. UK.

⁸¹ E.g. EE, SE.

⁸² E.g. AT.

⁸³ E.g. BE, ES, FR, FI, SE.

⁸⁴ This is the case in FR.

⁸⁵ E.g. FI, SE.

⁸⁶ E.g. DK, EE.

⁸⁷ E.g. BE, DK, FR, IT, LU, AT.

⁸⁸ E.g. CY, MT, BG. RO recently amended its legislation to remove that problem.

The costs of legal assistance and judicial proceedings are usually high and place a burden on a victim. Also, the compensation and reparation that can be obtained is often limited⁸⁹. Therefore, the **active role of gender equality bodies and trade unions** in providing independent assistance to victims of discrimination would help them gain access to justice and ensure the effectiveness of the legal framework on equal pay. It could also reduce the litigation risk for individual employees and could be a possible solution to remedy the significant scarcity of equal pay cases. Therefore, involving gender equality bodies is instrumental for effectively applying the equal pay principle. However, the tasks and powers of national gender equality bodies are very diverse and it is only in some Member States that the role of equality bodies includes representing individuals in such claims⁹⁰. Representation of individuals can be also exercised by trade unions⁹¹ and NGOs.

The Directive requires Member States to take **preventive measures** related to breaches of the equal pay principle⁹², again leaving the choice of measures up to them. Prevention measures could include conducting investigations that aim to prevent pay inequality, organising training for stakeholders, and awareness-raising activities.

5. CONCLUSIONS AND WAY FORWARD

The Directive introduced several important novelties that aim to make EU legislation in this area more coherent, to bring it into line with CJEU case law and, ultimately, to make the law more effective and accessible to practitioners and the general public.

With regard to the correct transposition of these novelties into national law, the Commission's services still have questions for most Member States. These remaining issues will be clarified as a matter of priority, if necessary through infringement proceedings. For the future, the main challenge for all Member States is the correct application and enforcement in practice of the rights in this Directive.

The practical application of equal pay provisions in Member States seems to be one of the Directive's most problematic areas. This is illustrated by the persistent gender pay gap, which could be caused in considerable part by pay discrimination and by the lack of challenges by individuals in national courts.

Member States should make use of the tools provided in the attached Staff Working Document to increase the effectiveness of the application of the equal pay principle and to tackle the persisting gender pay gap.

The Commission will continue to comprehensively monitor the application of the equal pay principle. In line with the Europe 2020 Strategy, in addition to awareness-raising activities and dissemination of best practice, the Commission will continue to put forward country-specific recommendations that address the causes of the gender pay gap during the annual European Semester exercise.

Moreover, the Commission is planning for 2014 to adopt a non-legislative initiative aiming to promote and facilitate effective application of the principle of equal pay in practice and assist

⁸⁹ In most cases compensation is equal to lost earnings based on the wage difference between claimant and comparator. In some Member States immaterial damage suffered is also included. The national legal framework on sanctions differs significantly between Member States.

⁹⁰ E.g. BE, BG, EE, IE, IT, HU, MT, AT, SK, FI, SE, UK.

⁹¹ E.g. in BE, DK, FR, SE, UK.

⁹² Article 26 of the Directive.

Member States in finding the right approaches to reduce the persisting gender pay gap⁹³. This initiative is likely to focus on wage transparency.

⁹³ Commission Work Programme 2014, COM(2013) 739 final, available at http://ec.europa.eu/atwork/pdf/cwp_2014_annex_en.pdf.



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COMMISSION STAFF WORKING DOCUMENT
Accompanying the document

Report from the Commission to the Council and the European Parliament
on the application of Directive 2006/54/EC of the European Parliament and of the
Council of 5 July 2006 on the implementation of the principle of equal opportunities and
equal treatment of men and women in matters of employment and occupation

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ANNEX 1: GENDER NEUTRAL JOB EVALUATION AND CLASSIFICATION SYSTEMS

1. Introduction

The EU's commitment to eliminating inequalities and promoting equality between women and men is laid down in Article 8 of the Treaty on the Functioning of the European Union ("TFEU") and Article 3(3) of the Treaty on European Union. The principle of equal pay was enshrined in EU law from its origins and further developed by the Equal Pay Directive 75/117/EEC¹, which introduced the concept of equal pay for work of equal value.

This principle is now embodied in Article 157 TFEU and incorporated in Article 4 of Directive 2006/54/EC on equal treatment between women and men². The Directive provides 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. 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 the grounds of sex'.

The gender pay gap measures the difference in average gross hourly earnings paid to men and women across the whole economy and in all establishments. Statistics show a persistent gender pay gap that in 2011 averaged 16.2% for the 27 EU Member States³. This trend persists despite significant progress in women's educational achievements and work experience⁴. Women are now outperforming men in terms of educational attainment, with 40.0% of women aged 30-34 having completed tertiary education compared to 31.6% of men in 2012⁵.

The causes of the gender pay gap are complex. They include not only direct or indirect pay discrimination, but also: more difficulties for women in reconciling paid work and private life; segregation of the labour market; stereotypes that influence the evaluation and classification of jobs and the educational choices men and women make⁶.

Addressing the gender pay gap thus requires a multi-faceted approach, addressing underlying factors such as sectoral and occupational segregation, education and training, job classifications and pay systems, awareness raising and transparency.

¹ Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women, OJ L 045, 19.02.1975 p. 19 – 20.

² Directive 2006/54/EC of the European Parliament and of the Council of 6 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast): OJ L 204, 26.7.2006, p. 23-36.

³ Eurostat Online Database 2011, available at <http://epp.eurostat.ec.europa.eu/tgm/table.do?tab=table&init=1&plugin=1&language=en&pcode=tsdsc340>.

⁴ International Labour Office, *Promoting equality: Gender neutral job evaluation for equal pay: A step-by-step guide* (2008), International Labour Organisation, Geneva, available at http://www.ilo.org/declaration/info/publications/eliminationofdiscrimination/WCMS_122372/lang--en/index.htm. See also the Belgian Presidency's report (2010), The gender pay gap in the Member States of the European Union: quantitative and qualitative indicators, available at: <http://register.consilium.europa.eu/pdf/en/10/st16/st16516-ad02.en10.pdf>.

⁵ Eurostat news release, 11 April 2013: http://epp.eurostat.ec.europa.eu/cache/ITY_PUBLIC/3-11042013-BP/EN/3-11042013-BP-EN.PDF

⁶ The European Network of Legal Experts in the Field of Gender Equality (2010) The Gender Pay Gap in Europe from a Legal Perspective (including 33 country reports), available at: http://ec.europa.eu/justice/gender-equality/files/gpg_legal_perspective_2010_en.pdf.

2. Purpose of this Annex

The use and application of gender-neutral job evaluation and classification systems can help to improve human resources management and work organisation practices in companies⁷ in terms of:

- staff recruitment and selection: they help to give a more detailed, up-to-date picture of job content, i.e. the real demands of a job in terms of skills, responsibilities, effort and working conditions, based on systematised, accurate information. It facilitates the recruitment of the right person for the job, reducing costs incurred by staff turnover due to poor selection or lack of awareness of the real demands a job entails;
- vocational training: they help to identify areas where training is needed to improve performance;
- performance evaluation: by improving understanding of the factors and sub-factors that make up a job, there can be more objective performance evaluation criteria that, as management tools, can help to improve business productivity and competitiveness. This can have a positive impact on jobholders' quality of life and satisfaction;
- collective bargaining: they reinforce the process by providing objective criteria agreed by both parties. Applying an evaluation method presupposes the active involvement of representatives of both the workforce and the management of an enterprise;
- pay: by defining a ranking order based on the real content of jobs, the question of whether pay is proportionate to skills, responsibilities, effort and working conditions can be addressed from the perspective of equal pay for work of equal value;
- health, safety and hygiene at work: they can provide information that can help to alleviate or eliminate the arduousness of certain jobs.

Job evaluation systems are not discriminatory *per se*, but they may, if not used in a gender neutral manner, contribute to the gender pay gap by evaluating male and female dominated jobs differently, for example, by assuming traditional stereotypes⁸. When gender-neutral job evaluation and classification systems are used, they can support credible definitions of work of equal value and detect indirect pay discrimination on grounds of sex.

Some Member States' national laws and policies have established gender neutral job evaluation systems. Some Member States ensure in their national laws⁹ or collective agreements¹⁰ that job evaluation and classification systems used for determining pay are gender neutral, while others¹¹ have issued soft-law tools (non-binding guides, check-lists) to encourage equal treatment in job evaluation and classification. However, developing and using such gender-neutral job evaluation and classification systems is not widespread yet at national level.

⁷ Confederação Geral dos Trabalhadores Portugueses — Intersindical Nacional (CGTP-IN) et al., *Value of work and gender equality — Guide to applying a methodology for assessing the value of work free from gender bias* (November 2011), Lisbon, available at http://www.cite.gov.pt/asstscite/downloads/guia_revalorizar_en.pdf.

⁸ Eurofound (European Foundation for the Improvement of Living and Working Conditions), *Addressing the gender pay gap: Government and social partner actions* (2010), Dublin, available at <http://www.eurofound.europa.eu/pubdocs/2010/18/en/2/EF1018EN.pdf>.

⁹ E.g. Austria, Cyprus, Poland, Spain, Sweden, the United Kingdom.

¹⁰ E.g. Belgium.

¹¹ E.g. Belgium, Austria, Estonia.

This Annex is primarily a practical tool for employers, social partners and other relevant stakeholders to use in establishing gender-neutral job classification systems. It aims to provide assistance in establishing gender-neutral job evaluation and classification systems to ensure they exclude any indirect discrimination on grounds of sex. It also aims to raise awareness among relevant stakeholders throughout the EU with a view to promoting and increasing the use of gender-neutral job classification systems.

The document proposes an up-to-date methodology for establishing gender neutral job classification and evaluation systems. This includes recommendations on gender-neutral job evaluation factors, their weighting and scoring methods, as well as practices to be avoided.

The document takes into account the Commission's 1996 Code of Practice on Equal Pay for Work of Equal Value¹², while considering changes in the labour market as well as relevant jurisprudence of the Court of Justice of the European Union ('CJEU'). It also takes into account best practices in Member States and EFTA/EEA countries in the field of equal pay, as well as materials developed by the International Labour Organisation.

The Commission services consulted the social partners on this document. The views proposed by the social partners were, as far as possible, reflected in this instrument.

3. Gender-neutral job evaluation methods

There are many variations in job evaluation methodologies used worldwide. However, basic general methods of job evaluation are: ranking¹³, classification¹⁴, factor comparison¹⁵ and points¹⁶.

Analytical job evaluation methods based on comparison of different factors, taking into account of their importance and complexity, enable the position of a job to be established in relation to another in a sector or organisation, regardless of whether the job holder is a man or a woman. Methods should be designed so that all positions or groups in an organisation can be assessed using the same job evaluation system, enabling comparisons across disciplines and professional boundaries¹⁷. The analytical job evaluation methods, being systematic and complex, have the potential of being less discriminatory than non-analytical methods and they are therefore considered to be most appropriate for job evaluation in a gender equality context. They can thus be used to establish one of the most important components of the equal

¹² Commission of the European Communities, Communication from the Commission, *A code of practice on the implementation on equal pay for work of equal value for women and men*, (17 July 1996), COM(96) 336 final.

¹³ The methods examine the description of each job being evaluated and arrange the jobs in order according to their value to the company. It does not break down the jobs by specific weighted criteria.

¹⁴ According to these methods, a predetermined number of job groups or job classes are established and jobs are assigned to these classifications. This method places groups of jobs into job classes or job grades. Separate classes may include office, clerical, managerial, personnel, etc.

¹⁵ Under these methods, instead of ranking complete jobs, each job is ranked according to a series of factors. These factors include mental effort, physical effort, skill needed, responsibility, supervisory responsibility, working conditions and other such factors (for instance, know-how, problem solving abilities, accountability, etc.). Pay will be assigned in this method by comparing the weights of the factors required for each job, i.e., the present wages paid for key jobs may be divided among the factors weighted by importance (the most important factor, for instance, mental effort, receives the highest weight). In other words, wages are assigned to the job in comparison to its ranking on each job factor.

¹⁶ Jobs are expressed in terms of key factors. Points are assigned to each factor after prioritising each factor in order of importance. The points are summed up to determine the wage rate for the job. Jobs with similar point totals are placed in similar pay grades.

¹⁷ See Case C-237-85 *Rummler* [1986] ECR 2101.

pay principle, namely ‘work of equal value’. This is the basis of the methodology presented in this section.

Analytical job evaluation methods break job content down into a number of factors that enable jobs to be compared in a non-discriminatory manner, provided that the selected factors themselves are not discriminatory. These factors are criteria for assessing the various dimensions and characteristics of jobs and should be applied equally to all jobs to determine their relative value.

The CJEU has held on several occasions that determining what work of equal value is involves comparing the work of a female employee and a male counterpart by reference to demands made on workers in carrying out given tasks. Skills, effort and responsibility, or the work undertaken and the nature of the tasks involved in the work to be performed¹⁸ must be taken into account.

3.1 Gender-neutral job evaluation factors

In line with this case-law, most analytical job evaluation schemes used across Member States consider four main factors to evaluate jobs, regardless of sector, namely:

- (i) skills,
- (ii) responsibility,
- (iii) effort,
- (iv) working conditions.

These four factors are essential, and are sufficient for evaluating in a gender-neutral manner all tasks performed in an organisation, regardless of the sector to which it belongs. The factors are also consistent with those used in the ILO 2008 guide¹⁹.

(i) Skills

Skills comprise the knowledge, abilities and attitudes required to carry out a job. They cover three types of capabilities and their respective learning domains, namely:

- cognitive domain (knowing how to learn);
- psychomotor domain (know-how); and
- behavioural domain (knowing how to behave).

These capabilities can be acquired in many different ways, for example, through theoretical learning, practical training, work experience, professional employment, self-study or a combination of these.

Skills include the ability to interact and relate to different groups (internal groups: peers, subordinates and supervisors at work, and external groups: clients and suppliers of goods and

¹⁸ See Case C-400/93 *Specialarbejderforbundet i Danmark v Dansk Industri, formerly Industriens Arbejdsgivere, acting for Royal Copenhagen A/S.*, ECR 1995 I p. 1275; Case C-237-85 *Rummler* [1986] ECR 2101; Case C-333/97 *Lewen* [1999] ECR I-7243; Case C-471/08 *Parviainen* [2010] ECR I-6533 and Case C-194/08 *Gassmayr* [2010] ECR I-6281.

¹⁹ International Labour Office, *Promoting equality: Gender neutral job evaluation for equal pay: A step-by-step guide* (2008), International Labour Organisation, Geneva, available at http://www.ilo.org/declaration/info/publications/eliminationofdiscrimination/WCMS_122372/lang--en/index.htm.

services), and sensory and physical abilities, such as manual dexterity, ability to work fast, etc.²⁰

The length of time it takes to acquire the knowledge needed is used as a measure of the level of theoretical training and the depth of experience required to perform the work. When assessing the requirements for problem-solving and social skills, on the other hand, the different aspects that make up these factors are evaluated holistically. For the purpose of evaluation, what matters is the combination of the number of skills required and the degree to which they are required²¹. These skills need to be considered only if they are relevant to a particular job.

(ii) Responsibility

There are different types of responsibility. Overall responsibility is often referred to as formal responsibility and can therefore disregard *de facto*, informal responsibility. However, responsibility is not always exercised by the person formally responsible.

Actual responsibility requires knowledge of how the task is to be performed and often entails physical involvement or activity. Unlike formal responsibility, actual responsibility can be shared with others. It can also be exercised for a limited period of time. A job may require different kinds of responsibility, sometimes simultaneously²².

Responsibilities may involve:

- People — for example, health and safety, coordination, supervision, collaboration and work organisation;
- Goods and equipment (machinery, products and utensils used at different stages of a work process);
- Information;
- Financial resources.

(iii) Effort

Effort is the employee's response to the workload assigned to them — the term load being used here in the sense of all the influences to which people are subjected in the workplace.

(iv) Working conditions

'Working conditions' refer to all the characteristics of the process (e.g. the task at hand, the person, necessary means for the work, work process, input, output and influences), and to all

²⁰ *Ibid.*

²¹ Diskriminerings Ombudsmannen, *Analys lönelots* (2009) Stockholm, available (in Swedish) at <http://www.do.se/sv/Material/Analys-lonelots/>.

²² Norges offentlige utredninger NOU 1997: 10, *Arbeidsvurdering som virkemiddel for likelønn*, utredning fra utvalg oppnevnt ved kongelig resolusjon den 10. mars 1995, avgitt til Barne- og familiedepartementet 15. januar 1997 (Norwegian Government Investigation NOU 1997:10, *Job evaluation as a tool for equal pay*, Report from the committee appointed by Royal Decree on 10 March 1995, submitted to the Ministry of Children and Family Affairs on 15 January 1997, available (in Norwegian) at: <http://www.regjeringen.no/Rpub/NOU/19971997/010/PDFA/NOU199719970010000DDDPDFA.pdf>; Confederação Geral dos Trabalhadores Portugueses — Intersindical Nacional (CGTP-IN) et al., *Value of work and gender equality — Guide to applying a methodology for assessing the value of work free from gender bias* (November 2011), Lisbon, available at: http://www.cite.gov.pt/asstscite/downloads/guia_revalorizar_en.pdf.

the environmental influences that affect the person undertaking a task, positively or negatively.

Other factors to be taken into account include discomfort the employee may face because of the physical, psychological or social environment, and the risks of injury or illness due to the tasks themselves or because of the environment in which they are carried out.

The assessment of these factors will depend on how long and how often the employee is exposed to them and whether he or she can influence/mitigate these. When making the assessment, it is assumed that health and safety regulations in place are actually observed²³.

3.2 Gender-neutral sub-factors

Each of the four factors can be broken down into sub-factors capturing the characteristics of different jobs in greater detail. In general, sub-factors must meet three conditions: they should be appropriate to the sector concerned, methodological and not have any gender bias.

The number of sub-factors may vary according to the information needed to characterise jobs as accurately as possible. It is not possible to provide a complete overview of all possible sub-factors as there is no standard set applicable to all jobs.

Nevertheless, by way of illustration, sub-factors of a general nature that could be used in different sectors are outlined below:

Sub-factors related to skills²⁴:

(1) *Knowledge (know-how)*

This sub-factor assesses the level of experience, formal education and basic skills necessary to meet the requirements of a job. Skills and knowledge may be learned on the job, off the job and/or through education.

(2) *Interpersonal Skills (how to behave)*

This sub-factor assesses the requirement to deal effectively with people both within and outside the organisation. It considers the type, importance and purpose of contacts and the degree of interpersonal skills required.

(3) *Problem-Solving (how to learn on the job by solving problems)*

This sub-factor assesses the problem-solving/judgment required on the job. It assesses the difficulty in identifying possible options and in exercising judgment to select the most appropriate action. It also considers mental processes such as analysis, reasoning or evaluation.

Sub-factors related to responsibility:

(1) *People*

This sub-factor assesses the extent to which key activities and responsibilities are achieved through the direction, management, education, training, evaluation and motivation of others.

(2) *Goods and Equipment*

²³ Diskriminerings Ombudsmannen, *Analys lönelots* (2009) Stockholm, available (in Swedish) at <http://www.do.se/sv/Material/Analys-lonelots/>.

²⁴ Definition of sub-factors available at http://www.payequity.gov.on.ca/en/resources/eval/sub_def.php, for a general approach see Pay Equity Office, Ontario Pay Equity Commission, *A Guide to Interpreting Ontario's Pay Equity Act* (May 2012), available at <http://www.payequity.gov.on.ca/en/resources/guide/opec/index.php>.

This sub-factor assesses the degree of responsibility for the collection, storage, retrieval, safe use and maintenance of material resources including office equipment, supplies, products and machinery required to perform a job. It also measures the value and nature of involvement with the resources.

(3) *Information*

This sub-factor assesses the degree of responsibility for the collection, storage, retrieval, interpretation and maintenance of information/data/files required to perform the job. It also assesses the nature of the involvement with the information.

(4) *Financial resources*

This sub-factor assesses the degree of accountability for money, financial data, financial records and related decisions, and the acquisition and/or expenditure of funds.

Sub-factors related to effort:

(1) *Mental and Psycho-Social Effort*

This sub-factor assesses the duration and intensity of mental and psycho-social effort required to perform the job. Mental and psycho-social effort is related to the amount of concentration and attentiveness required, both in terms of thinking, watching and listening. All tasks requiring concentration and dealing with unexpected situations should be considered.

(2) *Physical Effort*

This sub-factor assesses the duration and intensity required to perform the job. Physical effort is related to physical demands on the body or the energy required to perform tasks such as standing, walking, lifting, typing or remaining in one position for long periods. One should be careful when applying this sub-factor to avoid indirect discrimination.

Sub-factors related to working conditions:

(1) *Environment (physical, psychological or emotional)*

This sub-factor assesses the nature and severity of the working conditions and hazards that have an impact on the job.

(2) *Organisational environment*

This sub-factor measures the duration of a working day, night shifts and irregular working hours.

3.3 Weighting of job evaluation factors and job classification

After establishing gender-neutral factors and sub-factors, the next step in job evaluation is to weight the factors and sub-factors, by assigning points to them to establish their relative importance.

The weighting of different factors and sub-factors is a subjective process, so there is a risk of sex discrimination at this stage, through, for instance, gender-based stereotypes. For example, those in charge of weighting might be inclined to assign a high weight to some factors, simply because they are representative of male-dominated posts²⁵.

²⁵

International Labour Office, *Promoting equality: Gender neutral job evaluation for equal pay: A step-by-step guide* (2008), International Labour Organisation, Geneva, available at http://www.ilo.org/declaration/info/publications/eliminationofdiscrimination/WCMS_122372/lang--en/index.htm.

The organisation should be able to justify assigning a particular set of weightings by reference to the importance of the factors to the organisation as a whole²⁶. The assignment of point scores must take into consideration the sector's and/or the company's mission and the relative importance of each factor and sub-factor for the success of the organisation/sector in the terms of that mission.

Different organisations have different values depending on the management and goals of the business and the work being performed. This should be reflected in the weight given to the various factors. The weighting process is far more than a mere technical task: the parties that interact in the sector/company²⁷ need to consider them carefully.

Job evaluation systems can weigh the consolidated values of the four main factors (skills, responsibility, effort and working conditions) by multiplying the total value of each factor with a specific coefficient (e.g. skills 40%, responsibility 20%, effort 20%, and working conditions 20%). This is called external or visible weighting.

After weighting the four main factors, each sub-factor is assigned an internal weight as a percentage of the weight allocated to its main factor. This procedure is called inner weighting or hidden weighting.

Once weighting is completed, each job position is assigned a number of points for each factor and sub-factor. The jobs are then classified into the groups according to their value, to determine the pay level of each job.

Below, some potential discriminatory practices to be avoided are considered.

4. Job evaluation practices to be avoided

Job evaluation systems are used to classify jobs and could be the source of indirect pay discrimination on the grounds of sex, if not based on fair, non-gender based criteria.

By way of example, the following bad practices in existing job evaluation and classification systems should be avoided:

- (1) The use of different evaluation systems within a company, e.g. for professionals and non-professionals.
- (2) Failure to examine whether the catalogue of requirements includes those generally associated with typically male as well as typically female jobs.
- (3) Failure to evaluate typically female job requirements, e.g. psycho-social competences and responsibilities. Some requirements considered traditionally as 'female', e.g. 'care', are often undervalued or overlooked. It is important to include all qualifications, no matter how they have been acquired, and to assess how these qualifications correspond to the requirements of the specific job being evaluated.
- (4) The use of different evaluation criteria for male- and female-dominated tasks, as e.g. 'necessary muscular strength' only as criteria for male-dominated laymen/laywomen workplaces, but not for female-dominated professional workplaces. The criterion itself may be discriminatory and should then be compensated by other criteria²⁸.

²⁶ Equality and Human Rights Commission, *Equality Act 2010 Statutory Code of Practice Equal Pay* (2011), available at <http://www.official-documents.gov.uk/document/other/9780108509742/9780108509742.pdf>.

²⁷ *Ibid.*

²⁸ See *Rummler* case (Case C-237/85 [1986] ECR 2101).

- (5) Double assessment of the same requirement, e.g. ‘necessary muscular strength’ and ‘continuous physical strength’, which would favour male dominated jobs.
- (6) Disproportionate weighting of the requirements which are typical for male-dominated jobs, e.g. ‘muscular strength’ or discriminatory interpretation of requirements such as ‘responsibility’ only as ‘managerial responsibility’, even if certain jobs require other types of responsibility.
- (7) Defining ‘responsibility’ of a job solely by hierarchical position, e.g. some female-dominated jobs (HR managers or teachers) have their level of responsibility disregarded.
- (8) The ambiguous definition of requirements that could be interpreted against female-dominated jobs — example: just ‘work load’ instead of describing more precisely the kind of work load.
- (9) Linking of requirements, e.g. ‘special responsibility’ is only assessed if the requirement ‘specialised knowledge’ is evaluated.
- (10) Assessment of requirements, e.g. ‘responsibility’ only if they account for a certain share of the whole working time, e.g. 50% of the daily working time.

5. Follow-up action

Once job evaluation and classification systems based on gender-neutral criteria are in use, there needs to be follow-up to monitor the results.

A committee to implement the job evaluation could be set up, with members representing all relevant parties, including employees. This may be particularly useful in bigger organisations. A committee can contribute a broad range of knowledge about different employee groups in a business, and the results of its work are more likely to be perceived as fair and acceptable for all concerned.

National equality bodies could be asked to play a role in this monitoring exercise²⁹.

Regular reviews are then recommended to monitor whether the principle of equal pay for work of equal value is being applied.

Below are some examples of possible follow-up action:

- establishing new gender-neutral job evaluation and classification systems in organisations;
- modifying or adapting an existing job evaluation method in an organisation or sector (e.g. by addressing shortcomings identified in the assessment);
- redefining and re-evaluating formal qualifications (e.g. certain skills which women are likely to acquire in an informal manner could be taken into account and put on an equal footing with formal skills that are traditionally male);
- re-evaluation of skills traditionally associated more with women than with men (e.g. manual dexterity);
- ensuring dissemination of clear, adequate information on the results of job evaluation in the company, so that employees can assess its contents (i.e. transparency).

²⁹ Equality bodies of several Member States issued guides on gender neutral job evaluation and classification systems (e.g. Sweden, Belgium, the United Kingdom).

ANNEX 2: OVERVIEW OF LANDMARK CASE-LAW OF THE COURT OF JUSTICE OF THE EUROPEAN UNION ON EQUAL PAY

1. Introduction

Equal pay for equal work for women and men is one of the EU's founding principles, embedded in the Treaties since 1957.

Article 119 of the Treaty establishing the European Economic Community ('TEEC') laid down the principle of equal pay for women and men. In 1997, with the Amsterdam Treaty, Article 119 became Article 141 of the Treaty on the European Community ('TEC'). Today after the Lisbon Treaty, the principle of equal pay is enshrined in Article 157 of the TFEU but its wording has remained unchanged. The provision stipulates that 'each Member State must ensure the principle of equal pay for male and female workers for work of equal value is applied'.

The principle of equal pay was further amplified and specified by EU secondary legislation and the case-law of the CJEU. Directive 75/117/EEC, which was replaced by Directive 2006/54/EC, reiterated the Treaty concept of equal pay for equal work and work of equal value and provided some more detail, including on requirements to ensure access to justice and protection against victimisation.

Article 4 of Directive 2006/54/EC provides 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 provision also stipulates that *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*.

Furthermore, in line with the TFEU and the jurisprudence of the CJEU, Article 2(1)(e) of the Directive provides an extensive definition of pay, describing it as *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*.

The case-law of the CJEU has helped to clarify and further develop the interpretation and scope of the principle of equal pay. In particular, in its landmark *Defrenne II* judgment³⁰ the CJEU has declared that the principle of equal pay enshrined in the Treaty is one of the fundamental principles of the Community and has a direct effect, therefore can be invoked by any citizen in front of national jurisdictions. The CJEU passed judgments on equal pay provisions on several occasions, resulting in a large body of case-law which has had a marked impact on the law in this area.

However, the EU's legal provisions on equal pay and the jurisprudence address questions of considerable complexity, in particular with regard to the principle of equal pay for work of equal value which implies the intricate task of assessing the value of different types of work. It is crucial for individuals to have the possibility to understand exactly the scope of rights granted under these provisions so that they can rely on this principle before the national courts. The correct interpretation of the different elements forming the equal pay principle is also important for the effective application of equal pay provisions by employers and social partners in the context of pay systems and collective agreements.

³⁰ Case 43/75 *Defrenne II*, ECR [1976] p. 455.

This overview of the case law provides an synopsis of the CJEU's interpretation of the principle of equal pay and its different elements. The overview, together with the Annex 1 on gender neutral job evaluation and classification systems, aims to facilitate and promote the effective application of this principle in practice by the relevant stakeholders at national level. The overview is offered for information and consideration to all relevant stakeholders, including employers, social partners, employees, Member States and national judiciaries.

The overview of the case law draws on the Commission's 1994 Memorandum on Equal Pay for Work of Equal Value³¹. It provides a comprehensive overview and analysis of the CJEU's landmark cases on equal pay, covering the definition of pay, the meaning of the concept of work of equal value as well as discrimination in job classification and evaluation.

2. Definition of pay

The definition of pay is enshrined in Article 157(2) of the TFEU and is also provided in Article 2(1)(e) of the Directive. The CJEU has repeatedly held that the concept of pay within the meaning of Article 157 TFEU encompasses all benefits in cash or in kind, present or future, provided they are paid, directly or indirectly by the employer to the worker in connection with his employment³². Over the years, the CJEU has had various occasions to comment on the concept of 'pay' and to clarify its scope.

2.1. Basic and additional pay

The CJEU held that a gradual increase in the salary of a worker who remains in the same position for a certain period of time provided for by a collective agreement (C-184/89 — *Nimz*³³) and piece-work pay schemes (C-400/95 — *Royal Copenhagen*³⁴) constitute 'pay'.

The fact that payments to employees are not governed by the contract of employment does not remove them from the scope of 'pay' in ex-Article 119 TEEC (now Article 157 TFEU). Gratuities paid at the discretion of an employer are encompassed (case 12/81 — *Garland*³⁵). Therefore pay, whether under a contract, statutory or collective provisions or on a voluntary basis is covered.

Moreover, the CJEU found that several payments additional to basic and minimum pay fall within the scope of ex-Article 119 TEEC, such as individual pay supplements (calculated on the basis of such criteria as mobility, training or the length of service of the employee) to basic pay (case 109/88 — *Danfoss*³⁶) and increments based on seniority (case C-184/89 — *Nimz*³⁷) as well as 'heads of household' allowances granted to civil servants (case 58/81 — *Commission v Luxembourg*³⁸). It would appear that any direct payments supplementing a basic wage are covered. This would appear to include overtime and all forms of merit and performance pay.

³¹ COM(94) 6 final, 23.6.1994.

³² See for instance Case C-262/88, *Barber*, ECR [1990] p. 1889.

³³ Case C-184/89 *H. Nimz v Freie und Hansestadt Hamburg* [1991] ECR I-297, paragraph 15.

³⁴ Case C-400/93 *Specialarbejderforbundet i Danmark v Dansk Industri, formerly Industriens Arbejdsgivere, acting for Royal Copenhagen A/S*. [1995] ECR I-1275, paragraph 12.

³⁵ Case 12/81 *Eileen Garland v British Rail Engineering Ltd* [1982] ECR 352.

³⁶ Case 109/88 *Handels-og kontorfunktionaerenes Forbund i Danmark v Dansk Arbejdsgiverforening (Danfoss A/S)* [1989] ECR 3199.

³⁷ Case C-184/89 *H Nimz v Freie und Hansestadt Hamburg* [1991] ECR I-297.

³⁸ Case 58/81 *Commission of the European Communities v Grand Duchy of Luxembourg* [1982] ECR 2175.

In addition, time off with pay for part-time employees undertaking Works Council training, pay for overtime in respect of employees' participation in training courses or compensation received by members of trade unions from their employer in the form of paid holidays was also considered to constitute pay and to fall within the scope of application of ex-Article 119 TEEC (C-360/90 — *Bötel*³⁹, C-457/93 — *Lewark*⁴⁰, C-278/93 — *Freers*⁴¹).

The same applies to a monthly salary supplements agreed on in individual employment contracts (C-381/99 — *Brunnhöfer*⁴²) and wages for additional hours (C-285/02 — *Elsner*⁴³).

2.2. Benefits

Benefits calculated in monetary terms, such as sick pay allowances, constitute pay (case 171/88 — *Rinner*⁴⁴). The same applies to the benefits paid by an employer under legislation or collective agreements to a woman on maternity leave (C-342/93 — *Gillespie*⁴⁵), as well as to an allowance for female workers taking maternity leave which is designed to compensate for the professional disadvantages which result from these employees' absence from work (C-218/98 — *Abdoulaye*⁴⁶).

The following count as pay: pensions, travel facilities obtainable on retirement, severance schemes (12/81 — *Garland*⁴⁷, C-249/96 — *Grant*⁴⁸, C-262/88 — *Barber*⁴⁹), end-of-year bonuses that an employer pays to an employee under a law or collective agreement as a gratuity at Christmas (C-281/97 — *Krüger*⁵⁰), 'even if paid voluntarily and even if paid mainly or exclusively as an incentive for future work or loyalty to the undertaking' (C-333/97 — *Lewen*⁵¹).

The same applies to benefits an employer pays to an employee on compulsory redundancy, whether under a law or voluntarily (C-262/88 — *Barber*⁵²), and to severance grants paid to workers, including those working part-time, on termination of their employment relationship, in particular on account of retirement (C-33/89 — *Kowalska*⁵³) and additional redundancy payment (C-173/91 — *Belgium*⁵⁴).

³⁹ Case C-360/90 *Arbeiterwohlfahrt der Stadt Berlin e.V. v Monika Bötel* [1992] ECR I-3589, paragraphs 13, 14.

⁴⁰ Case C-457/93 *Kuratorium für Dialyse und Nierentransplantation e. V. v Johanna Lewark* [1996] ECR I-243, paragraph 23.

⁴¹ Case C-278/93 *Edith Freers and Hannelore Speckmann v Deutsche Bundespost* [1996] ECR I-1165, paragraphs 19, 20.

⁴² Case C-381/99 *Susanna Brunnhofer v Bank der österreichischen Postsparkasse AG* [2001] ECR I-4961, paragraph 34.

⁴³ Case C-285/02 *Edeltraud Elsner-Lakeberg v Land Nordrhein-Westfalen* [2004] ECR 2004 I-5861, paragraph 19.

⁴⁴ Case 171/88 *Ingrid Rinner-Kühn v FWW Spezialgebäudereinigung GmbH & Co. KG* [1989] ECR 2743, paragraph 7.

⁴⁵ Case C-342/93, *Joan Gillespie and Others v Northern Health and Social Services Boards, Department of Health and Social Services, Eastern Health and Social Services Board and Southern Health and Social Services Board* [1996] ECR I-475, paragraph 14.

⁴⁶ Case C-218/98 *Oumar Dabo Abdoulaye E.A. v Regie Nationale des Usines Renault SA* [1999] ECR I-5742, paragraph 14.

⁴⁷ Case 12/81 *Eileen Garland v British Rail Engineering Ltd* [1982] ECR 352, paragraph 9.

⁴⁸ Case C-249/96 *Lisa Jacqueline Grant v South West Trains Ltd* [1998] ECR I-621, paragraphs 14, 15.

⁴⁹ Case C-262/88, *Barber*, ECR [1990] p. 1889.

⁵⁰ Case C-281/97 *Andrea Krüger v Kreiskrankenhaus Ebersberg* [1999] ECR I-5127, paragraph 17.

⁵¹ Case C-333/97 *Susanne Lewen v Lothar Denda* [1999] ECR I-7243, paragraph 21.

⁵² Case C-262/88, *Barber*, ECR [1990] p. 1889, paragraph 20.

⁵³ Case C-33/89 *Maria Kowalska v Freie und Hansestadt Hamburg* [1990] ECR I-2591, paragraph 11.

⁵⁴ Case C-173/91 *Commission of the European Communities v Kingdom of Belgium* [1993] ECR I-673, paragraph 15.

This also covers a bridging pension that an employer may pay to employees who have taken early retirement on grounds of ill health (C-132/92 — *Birds Eye Walls*⁵⁵) and to wages for a bridging allowance provided for by a work agreement (C-19/02 — *Hlozek*⁵⁶).

The compensation granted to the worker for unfair dismissal ‘falls within the definition of pay for the purpose of [ex-] Article 119 TEEC’, since it ‘is designed in particular to give the employee what he would have earned if the employer had not unlawfully terminated the employment relationship’ (C-167/97 — *Seymour-Smith*⁵⁷).

Moreover, the CJEU found that pay can include benefits received by persons performing military or compulsory civilian service (C-220/02 — *Österreichischer Gewerkschaftsbund*⁵⁸). For example, if they receive a termination payment, they may subsequently be able to claim this is part of their pay within the meaning of ex-Article 141 TEC (now Article 157 TFEU).

2.3. Social security benefits

The question of whether benefits under social security schemes have to be considered as pay within the meaning of ex-Article 119 TEEC was addressed by the CJEU in the *Defrenne I* judgment⁵⁹. In this judgment, the CJEU excluded statutory social security schemes from the concept of ‘any other consideration’ of ex-Article 119 TEEC. The CJEU ruled that the concept of consideration paid directly or indirectly, in cash or in kind, could not encompass statutory social security scheme benefits that apply to workers in general and are not provided for in an agreement within a specific company or industry. The CJEU noted that, to fund such schemes, workers, employers and public authorities contribute in line with social policy rather than in compliance with an agreement covering the employer-employee relationship. It thus concluded that statutory social security schemes could not be included in ‘any other consideration’. This was particularly true of retirement pensions, determined by statute rather than by agreements in the workplace or industrial sector⁶⁰.

However, company occupational pension schemes, for instance, are included, as they are not enforced by law. They involve reaching an agreement within a company or industrial sector, and are not compulsory for workers in general, only for those covered within a specific organisation. They are financed by employers or workers who contribute directly, depending on the schemes’ funding requirements, not according to social policy.

In a more recent judgment, the CJEU confirmed the implicit *Defrenne I* ruling, namely that only benefits deriving from a statutory social security scheme were outside the scope of ex-Article 119 TEEC (case 70/84 — *Bilka-Kaufhaus*⁶¹). Accordingly, the CJEU ruled that an occupational pension scheme funded by the employer constitutes pay for the purposes of ex-Article 119 TEEC.

2.4. Occupational social security schemes

The CJEU has also clarified the scope of ‘pay’ in its numerous rulings, in particular in relation to occupational social security schemes.

⁵⁵ Case C-132/92 *Bird Eye Walls Ltd v Friedel M. Roberts* [1993] ECR I-5579, paragraph 12.

⁵⁶ Case C-19/02 *Viktor Hlozek v Austria Gesellschaft mbH* [2004] ECR I-11491, paragraph 40.

⁵⁷ Case C-167/97 *Regina v Secretary of State for Employment, ex parte Nicole Seymour-Smith and Laura Perez* [1999] ECR I-623, paragraph 26.

⁵⁸ Case C-220/02 *Österreichischer Gewerkschaftsbund, Gewerkschaft der Privatangestellten v Wirtschaftskammer Österreich* [2004] ECR 2004 I-5907, paragraph 39.

⁵⁹ Case 80/70 *Gabrielle Defrenne v Belgian State* [1971] ECR 445.

⁶⁰ *Ibid*, paragraphs 7 and 8.

⁶¹ Case 170/84, *Bilka-Kaufhaus v Weber*, ECR 1986, p. 1607.

In the *Barber* judgment⁶² and the subsequent jurisprudence the CJEU confirmed its earlier case-law in *Bilka*⁶³, that ruled that benefits and employee contributions under the terms of an occupational pension scheme fall within the concept of pay.

Therefore, it appears that benefits under occupational social security schemes constitute pay under Article 157 TFEU. Only pensions paid by the state acting as such are excluded from the scope of this provision.

In the *Barber* judgment the CJEU upheld what was implicitly stated in its judgment in *Defrenne I*, mentioned above, i.e. benefits granted under a pension scheme, which essentially relates to a person's employment, form part of that person's pay and come within the scope of concept of pay within the meaning of ex-Article 119 TEEC.

The CJEU included benefits awarded under an occupational scheme that take the place of the benefits that would have been paid by a statutory social security scheme (C-7/93 — *Beune*⁶⁴) as well as compulsory additional pre-retirement payments (C-166/99 — *Defreyn*⁶⁵).

Furthermore, the CJEU ruled that the following also qualified as pay: 'a contribution to a retirement benefits scheme which is paid by an employer in the name of employees by means of an addition to the gross salary and which therefore helps to determine the amount of that salary' (case 69/80 — *Worringham*⁶⁶; case 23/83 — *Liefting*⁶⁷) and the reduction in net pay because of a contribution paid to a social security scheme without affecting the gross pay (case 192/85 — *Newstead*⁶⁸) as well as the right to join an occupational pension scheme (C-57/93 — *Vroege*⁶⁹).

However, the use of actuarial factors differing according to sex in funded defined-benefit occupational pension schemes does not fall within the scope of Article 157 TFEU (C-152/91 — *Neath*⁷⁰).

Benefits paid under a 'contracted-out' private occupational scheme that partly replaced a general statutory scheme do constitute 'pay', even if paid after the termination of an employment relationship (C-262/88 — *Barber*⁷¹) as well as schemes supplementary to the statutory occupational pension scheme (C-110/91 — *Moroni*⁷²).

Article 157 TFEU also applies to a survivor's pension provided by an occupational pension scheme based on a collective bargaining agreement (C-109/91 — *Ten Oever*⁷³) and to benefits

⁶² Case C-262/88 *Douglas Harvey Barber v Guardian Royal Exchange Assurance Group* [1990] ECR I-1889.

⁶³ Case 170/84 *Bilka-Kaufhaus GmbH v Karin Weber von Hartz*, [1986] ECR 1607, paragraph 22.

⁶⁴ Case C-7/93 *Bestuur van het Algemeen Burgerlijk Pensioenfonds v G. A. Beune* [1994] ECR I-4471, paragraph 37.

⁶⁵ Case C-166/99 *Marthe Defreyn v Sabena SA* [2000] ECR I-6155, paragraphs 26, 30.

⁶⁶ Case 69/80 *Susan Jane Worringham and Margaret Humphreys v Lloyds Bank Ltd* [1981] ECR 767, paragraphs 15, 17.

⁶⁷ Case 23/83 *W. G. M. Liefting and Others v Directie van het Academisch Ziekenhuis bij de Universiteit van Amsterdam* [1984] ECR 3225, paragraphs 12, 13.

⁶⁸ Case 192/85 *George Noel Newstead v Department of Transport and her Majesty's treasury* [1987] ECR, paragraph 18.

⁶⁹ Case C-57/93 *Anna Adriaantje Vroege v NCIV Instituut voor Volkshuisvesting BV and Stichting Pensioenfonds NCIV* [1994] ECR I-4541, paragraph 18.

⁷⁰ Case C-152/91 *David Neath v Hugh Steeper Ltd* [1993] ECR I-6935, paragraph 32.

⁷¹ Case C-262/88 *Douglas Harvey Barber v Guardian Royal Exchange Assurance Group* [1990] ECR I-1889, paragraph 30.

⁷² Case C-110/91 *Michael Moroni v Collo GmbH* [1993] ECR I-6591, paragraph 15.

⁷³ Case C-109/91 *Gerardus Cornelis Ten Oever v Stichting Bedrijfspensioenfonds voor het Glazenwassers-en Schoonmaakbedrijf* [1993] ECR I-4879, paragraphs 12-14.

granted under a pension scheme, including survivors' benefits (C-147/95 — *Evrenopoulos*⁷⁴). The CJEU later found that pensions provided under, e.g., a retirement scheme for civil servants are 'pay' since 'civil servants must be regarded as constituting a particular category of workers' (C-366/99 — *Griesmar*⁷⁵).

3. Work of equal value

Victims of pay discrimination may face a major obstacle in bringing claims before national courts due to the problems of making comparisons. There is a lack of clarity in the assessment criteria for comparing different jobs.

The jurisprudence of the CJEU has clarified the scope of the Treaty provisions and the EU secondary laws laying down the principle of equal pay. There is no EU-level definition of work of equal value, however the CJEU case law has extensively interpreted the concept of "work of equal value".

The Court has held on several occasions that determining equal value involves comparing the work of a female and a male worker by reference to the demands made on them in carrying out their tasks. The skill, effort and responsibility required, or the work undertaken and the nature of the tasks involved in the work to be performed⁷⁶ are all relevant. This case law was also reflected in the Recital 9 of the Directive 2006/54/EC.

The CJEU declared early on that ex-Article 119 TEEC pursued an economic and social aim, thus showing that the principle that men and women should receive equal pay 'forms part of the foundations of the Community' and thus is a provision with direct effect (case 43/75 — *Defrenne II*⁷⁷). This Treaty provision may be invoked before national courts, in particular in cases of discrimination arising directly from legislative provisions or collective labour agreements, as well as in cases in which work is carried out in the same establishment or service, whether private or public (case 43/75 — *Defrenne II*⁷⁸, case 129/79 — *McCarthy*⁷⁹, case 96/80 — *Jenkins*⁸⁰).

The CJEU specified that ex-Article 141(1) TEC lays down the principle that equal work or work of equal value must be remunerated in the same way, whether it is performed by a man or a woman' (C-320/00 — *Lawrence*⁸¹, C-17/05 — *Cadman*⁸²). To be applicable, it presupposes that male and female workers are in comparable situations (C-320/00 — *Lawrence*⁸³).

⁷⁴ Case C-147/95 *Dimossia Epicheirissi Ilektrismou (Dei) v Efthimios Evrenopoulos* [1997] ECR I-2057, paragraph 24.

⁷⁵ Case C-366/99 *Joseph Griesmar v Minister of Economic Affairs, Finance and Industry and Minister of Public Service, State Reform and Decentralisation* [2001] ECR I-9383, paragraph 31.

⁷⁶ See for instance Case C-400/93 *Royal Copenhagen*, ECR 1995 I p. 1275; Case 237/85, *Gisela Rummler v Dato-Druck GmbH* [1986] ECR 2101; Case C-262/88 *Douglas Harvey Barber v Guardian Royal Exchange Assurance Group* [1990] ECR I-1889; Case C-381/99 *Susanna Brunnhofer v Bank der österreichischen Postsparkasse AG* [2001] ECR I-4961, paragraph 35.

⁷⁷ Case 43/75 *Gabrielle Defrenne v Société anonyme Belge de Navigation Aérienne Sabena* [1976] ECR 455, paragraph 12.

⁷⁸ *Ibid*, paragraph 40.

⁷⁹ Case 129/79 *McCarthy Ltd v Wendy Smith* [1980] ECR 1275, paragraph 10.

⁸⁰ Case 96/80 *J.P. Jenkins v Kingsgate (Clothing Productions) Ltd* [1981] ECR 911, paragraph 17.

⁸¹ Case C-320/00 *A.G. Lawrence and Others v Regent Office Care Ltd, Commercial Catering Group and Mitie Secure Services Ltd* [2000] ECR I-7325, paragraph 11.

⁸² Case C-17/05 *B. F. Cadman v Health & Safety Executive* [2006] ECR I-9583, paragraph 27.

⁸³ Case C-320/00 *A.G. Lawrence and Others v Regent Office Care Ltd, Commercial Catering Group and Mitie Secure Services Ltd* [2000] ECR I-7325, paragraph 12.

The principle of equal pay laid down in ex-Article 119 TEEC does not preclude the making of a lump-sum payment exclusively to female workers who take maternity leave where that payment is designed to counterbalance the occupational disadvantages which arise for those workers as a result of their being away from work (C-218/98 — *Abdoulaye*⁸⁴) because their particular situation due to maternity cannot be compared with that of male workers.

The CJEU held that Member States were responsible for guaranteeing the right to receive equal pay for work of equal value even in the absence of a system of job classification. If there is disagreement as to the application of the concept of ‘work to which equal value is attributed’, the worker must be entitled to claim before an appropriate authority that his/her work has the same value as other work and, if that is found to be the case, to have his/her rights under the Treaty and the Directive acknowledged by a binding decision (case 61/81 — *Commission v UK*⁸⁵).

If the worker presents evidence to show that the ‘criteria for establishing the existence of a difference in pay between a woman and a man and for identifying comparable work are satisfied, a *prima facie* case of discrimination would exist’ (C-427/11 — *Kenny*⁸⁶).

In *Barber* and subsequent case law the CJEU considered of fundamental importance the concept of transparency in relation to pay under ex-Article 119 TEEC. The CJEU stated that ‘with regard to the means of verifying compliance with the principle of equal pay, [...] if the national courts were under an obligation to make an assessment and a comparison of all the various types of consideration granted, according to the circumstances, to men and women, judicial review would be difficult and the effectiveness of [ex-] Article 119 TEEC would be diminished as a result. It follows that genuine transparency, permitting an effective review, is assured only if the principle of equal pay applies to each of the elements of remuneration granted to men or women.’ The application of the principle of equal pay must be ensured in respect of each element of remuneration and not only on the basis of a comprehensive assessment of the consideration paid to workers (C-262/88 — *Barber*⁸⁷, C-381/99 — *Brunnhöfer*⁸⁸).

Over the years, to decide if a difference in pay is ‘justified by objective factors unrelated to any discrimination linked to the difference in sex’ (C-427/11 — *Kenny*⁸⁹) the CJEU has established the following criteria to determine whether different types of work are of equal value.

3.1. Nature of work

In a case concerning whether a classification scheme might be discriminatory on grounds of gender, the CJEU ruled that the nature of tasks involved in the work to be performed ‘should be capable of measurement by a scheme’. Therefore, in differentiating rates of pay, it was consistent with the principle of non-discrimination to use a criterion based on the objectively measurable expenditure of effort necessary in carrying out the work or the degree to which,

⁸⁴ Case C-218/98 *Oumar Dabo Abdoulaye E.A. v Regie Nationale des Usines Renault SA* [1999] ECR I-5742.

⁸⁵ Case 61/81 *Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland* [1982] ECR 2601, paragraph 9.

⁸⁶ Case C-427/11 *Margaret Kenny and others v Ministry of Justice and others* [2013], paragraph 20.

⁸⁷ Case C-262/88 *Douglas Harvey Barber v Guardian Royal Exchange Assurance Group* [1990] ECR I-1889, paragraph 34, 35.

⁸⁸ Case C-381/99 *Susanna Brunnhofer v Bank der österreichischen Postsparkasse AG* [2001] ECR I-4961, paragraph 35.

⁸⁹ Case C-427/11 *Margaret Kenny and others v Ministry of Justice and others* [2013], paragraph 39.

reviewed objectively, the work was physically heavy (case 237/85 — *Rummler*⁹⁰). This also applies to part-time work (case 96/80 — *Jenkins*⁹¹).

3.2. Scope of comparison of work of equal value

The CJEU has developed criteria of comparability with regard to the principle of equal pay for men and women.

The CJEU provided that the Treaty and the Directive apply to piece-work pay schemes in which pay depends entirely or in large measure on the individual output of each worker (C-400/93 — *Royal Copenhagen*⁹²).

Moreover, for the purposes of the comparison to be made, with regard to the principle of equal pay for men and women, between the average pay of two groups of workers paid by the piece, the national court must satisfy itself that the two groups each encompass all the workers who, taking account of a set of factors such as the nature of the work, the training requirements and the working conditions, can be considered to be in a comparable situation and that they cover a relatively large number of workers ensuring that the differences are not due to purely fortuitous or short-term factors or to differences in the individual output of the workers concerned (C-381/99 — *Brunnhöfer*⁹³, C-400/93 — *Royal Copenhagen*⁹⁴).

In addition, the CJEU held that ‘the comparison must moreover cover a relatively large number of workers in order to ensure that the differences found are not due to purely fortuitous or short-term factors or to differences in the individual output of the workers concerned’⁹⁵.

The CJEU held that the principle of equal pay for work of equal value covers the situation in which a worker is engaged in work of higher value than that of the person with whom a comparison was to be made (case 157/86 — *Murphy*⁹⁶).

The work which may serve as a comparison does not necessarily need to be the same as that carried out by the person who invokes the principle of equality to their benefit (C-236/98 — *JämO*⁹⁷, C-192/02 *Nikoloudi*⁹⁸).

3.2.1. Location of employment

Early on, the CJEU found that both public and private sector employees can pursue equal pay claims. In *Defrenne II* followed by the subsequent judgments the CJEU ruled that ex-Article 119 TEEC applies in cases ‘in which men and women receive unequal pay for equal work which is carried out in the same establishment or service, whether private or public’.

These findings were confirmed when the CJEU stated that ‘in cases of actual discrimination falling within the scope of the direct application of [ex-] Article 119 TEEC, comparisons are

⁹⁰ Case 237/85, *Gisela Rummler v Dato-Druck GmbH* [1986] ECR 2101.

⁹¹ Case 96/80 *J.P. Jenkins v Kingsgate (Clothing Productions) Ltd* [1981] ECR 911, paragraph 10.

⁹² Case C-400/93 *Specialarbejderforbundet i Danmark v Dansk Industri, formerly Industriens Arbejdsgivere, acting for Royal Copenhagen A/S*. [1995] ECR I-1275, paragraph 38.

⁹³ Case C-381/99 *Susanna Brunnhofer v Bank der österreichischen Postsparkasse AG* [2001] ECR I-4961, paragraph 43.

⁹⁴ Case C-400/93 *Specialarbejderforbundet i Danmark v Dansk Industri, formerly Industriens Arbejdsgivere, acting for Royal Copenhagen A/S*. [1995] ECR I-1275, paragraphs 32, 33.

⁹⁵ *Ibid*, paragraph 34.

⁹⁶ Case 157/86 *Mary Murphy v Bord Telecom Eireann*, [1988] ECR 673, paragraph 6.

⁹⁷ Case C-236/98 *Jämställdhetsombudsmannen v Örebro Läns Landsting* [2000] ECR I-2189, paragraphs 48-50.

⁹⁸ Case C-196/02 *Vasiliki Nikoloudi v Organimos Tilepikinonion Elladoes AE* [2005] ECR I-1812, paragraph 28.

confined to parallels which could be drawn on the basis of concrete appraisals of the work actually performed by employees of different sex within the same establishment or service' (case 129/79 — *McCarthy*⁹⁹).

However, it was later specified that there was 'nothing in the wording of [ex-] Article 141(1) TEC to suggest that the applicability of that provision is limited to situations in which men and women work for the same employer' (C-320/00 — *Lawrence*¹⁰⁰).

In a case 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 [ex-] Article 141(1) TEC. The work and the pay of those workers cannot therefore be compared on the basis of that provision' (C-256/01 — *Allonby*¹⁰¹).

The above case law of the CJEU has introduced a new element broader than the same establishment or the same service for the comparison of work of equal value, that of single source. When the differences identified in the pay conditions of workers of different sex performing equal work or work of equal value cannot be attributed to a single source, they do not come within the scope of Article 157 TFEU.

3.2.2. Contemporaneous employment

The principle that men and women should receive equal pay for equal work applies whether or not that work is contemporaneous and for the same employer. It also applies if it is established that a woman received less pay than a man who was employed for a period before her, doing equal work for the employer. The CJEU stressed, however, that it could 'not be ruled out that a difference in pay between two workers occupying the same post but at different periods in time may be explained by the operation of factors which were unconnected with any discrimination on grounds of sex' (Case 129/79 — *McCarthy*¹⁰²).

3.2.3. Collective agreements

A number of cases before the CJEU have concerned the national collective agreements. In a segregated labour market men and women are often covered by separate agreements because of their different occupations, which precludes comparison between groups of workers, even in the same organisation, covered by different collective agreements.

The CJEU found that the fact that the pay rates were agreed by collective bargaining is not sufficient objective justification for the difference in pay (C-127/92 — *Enderby*¹⁰³). The principle of equal pay for men and women also applies where the elements of the pay are determined by collective bargaining or by negotiation at local level (C-400/93 — *Royal Copenhagen*¹⁰⁴).

3.2.4. Shift of the burden of proof

⁹⁹ Case 129/79 *McCarthy Ltd v Wendy Smith* [1980] ECR 1275, paragraph 15.

¹⁰⁰ Case C-320/00 *A.G. Lawrence and Others v Regent Office Care Ltd, Commercial Catering Group and Mitie Secure Services Ltd* [2000] ECR I-7325, paragraph 17.

¹⁰¹ Case C-256/01, *Debra Allonby v Accerington & Rossendale College, Education Lecturing Services, Trading as Protocol Professional and Secretary of State for Education and Employment* [2004] ECR I-873, paragraph 46.

¹⁰² Case 129/79 *McCarthy Ltd v Wendy Smith* [1980] ECR 1275, paragraph 12.

¹⁰³ Case C-127/92 *Dr Pamela Enderby v Frenchay Health Authority and Secretary of State for Health* [1993] ECR I-5535, paragraph 22.

¹⁰⁴ Case C-400/93 *Specialarbejderforbundet i Danmark v Dansk Industri, formerly Industriens Arbejdsgivere, acting for Royal Copenhagen A/S*. [1995] ECR I-1275, paragraph 47.

The CJEU held that where an undertaking applies a pay system which is totally lacking in transparency, the burden of proof is on the employer to show that his pay practice is not discriminatory where a female worker establishes, by comparison with a relatively large number of employees, that the average payment of female workers is lower than that of male workers (case 109/88 — *Danfoss*¹⁰⁵). The CJEU noted that female employees ‘would be deprived of any effective means of enforcing the principle of equal pay before the national courts if the effect of adducing such evidence was not to impose upon the employer the burden of proving that his practice in the matter of wages is not in fact discriminatory’.

The concept of transparency pronounced in *Danfoss* is applicable to every element of the determination of a pay system, including any form of classification.

The CJEU held that where significant statistics disclose an appreciable difference in pay between two jobs of equal value, one of which carried out almost exclusively by women, ex-Article 119 TEEC requires the employer to show that the difference is based on objectively justified factors unrelated to any discrimination on grounds of sex (C-127/92 — *Enderby*¹⁰⁶) or where there is a much higher percentage of women than men this provisions, ‘requires the employer to show that that difference is based on objectively justified factors unrelated to any discrimination on grounds of sex’ (C-236/98 — *JämO*¹⁰⁷; C-17/05 — *Cadman*¹⁰⁸; C-427/11 — *Kenny*¹⁰⁹). The fact that the pay rates were agreed by collective bargaining is not sufficient objective justification for the difference in pay. In the case of indirect pay discrimination ‘it is for the employer to provide objective justification for the difference in pay between the workers who consider that they have been discriminated against and the comparators’ (C-427/11 — *Kenny*¹¹⁰).

In *Royal Copenhagen*, concerning proof of pay discrimination in piece-work pay schemes, the CJEU explained that the principle of equal pay between men and women means ‘that the mere finding that in a piece-work pay scheme the average pay of a group of workers consisting predominantly of women, carrying out one type of work is appreciably lower than the average pay of a group of workers consisting predominantly of men, carrying out another type of work to which equal value is attributed does not suffice to establish that there is discrimination with regard to pay. However, in a piece-work pay scheme in which individual pay consists of a variable element depending on each worker’s output and a fixed element differing according to the group of workers concerned, where it is not possible to identify the factors which determined the rates or units of measurement used to calculate the variable element in the pay, the employer may have to bear the burden of proving that the differences found are not due to sex discrimination¹¹¹. Therefore, it would appear that also in piece-work schemes, the burden of proof may be shifted to employer where it is necessary to avoid depriving workers of effective means of enforcing equal pay principle.

4. Job evaluation and classification

¹⁰⁵ Case 109/88 *Handels-og kontorfunktionaerenes Forbund I Danmark v Dansk Arbejdsgiverforening (Danfoss A/S)* [1989] ECR 3199, paragraph 11.

¹⁰⁶ Case C-127/92 *Dr Pamela Enderby v Frenchay Health Authority and Secretary of State for Health* [1993] ECR I-5535, paragraph 19.

¹⁰⁷ Case C-236/98 *Jämställdhetsombudsmannen v Örebro Läns Landsting* [2000] ECR I-2189, paragraph 54.

¹⁰⁸ Case C-17/05 *B. F. Cadman v Health & Safety Executive* [2006] ECR I-9583, paragraph 39.

¹⁰⁹ Case C-427/11 *Margaret Kenny and others v Ministry of Justice and others* [2013], paragraph 17.

¹¹⁰ *Ibid*, paragraph 41.

¹¹¹ Case C-400/93 *Specialarbejderforbundet i Danmark v Dansk Industri, formerly Industriens Arbejdsgivere, acting for Royal Copenhagen A/S*. [1995] ECR I-1275, paragraph 28.

Job classification or job evaluation can be used to determine the hierarchy or hierarchies of jobs in an organisation or in a group of organisations as the basis for explaining the pay system. Since direct simple pay discrimination for the exact same work has become rare, the discrimination-related roots of the pay gap have to be located in the methods used to differentiate between male- and female-dominated jobs. Such discrimination is much less conspicuous and concealed in the technicalities of determining the value of work and pay through classification systems. Gender-neutral job classification systems support establishing ‘work of equal value’ and may detect indirect pay discrimination.

Job classification systems aim to measure the relative value not of job holders, but of jobs. In theory, the performance of the individual should not enter into the evaluation or classification of the job itself. However, if a job classification system is established in practice, it may be difficult to dissociate individuals from their jobs.

Job evaluation or job classification systems aim to provide an acceptable rationale for determining pay levels in existing hierarchies of jobs. Job classification systems are a management tool to achieve an acceptable rank order of jobs, implemented unilaterally or with varying degrees of participation on the part of the workforce. Acceptability, consensus and the maintenance of traditional hierarchical structures are essential parts of job evaluation or job classification systems.

Article 4, 2nd indent of the Directive 2006/54/EC provides that ‘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’.

Member States are not obliged to introduce job classification systems. Nevertheless, if such systems are used by a private or a public employer as a basis for determining pay rates, they have to be gender neutral.

A number of judgments of the CJEU provide guidance on the role and nature of job evaluation and classification systems.

Early on, the CJEU noted that comparative studies of entire branches of industry are needed to detect indirect and disguised discrimination. Therefore, the CJEU ‘requires, as a prerequisite, the elaboration by the Community and national legislative bodies of criteria of assessment’ (case 129/79 — *McCarthy’s*¹¹²). This would appear to encompass evaluation and classification techniques as well as statistical analyses of pay and gender differences.

In *Danfoss*, the CJEU held that the employer had to justify recourse to the criteria of mobility and training, but not to the criterion of length of service. This merely confirms that before any system of classification can be considered as a justification for the different grading of jobs, the Court seized of a dispute, must itself, with relevant information, determine the nature and demands of jobs compared for the purposes of equal pay. Job classification and evaluation may be reasons justifying differences in pay but their neutrality and appropriateness for particular jobs must be assessed against a review by the courts of the nature of disputed jobs to comply with the Directive.

Under Directive 76/207/EEC (now Directive 2006/54/EC) a job classification system is only one of several tools for determining pay for work to which equal value is attributed (case 61/81 — *Commission v UK*¹¹³). The CJEU held that ‘where a job classification system is used in determining remuneration, that system must be based on criteria which do not differ

¹¹² Case 129/79 *McCarthy’s Ltd v Wendy Smith* [1980] ECR 1275, paragraph 15.

¹¹³ Case 61/81 *Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland* [1982] ECR 2061, paragraph 4.

according to whether the work is carried out by a man or by a woman and must not be organised, as a whole, in such a manner that it has the practical effect of discriminating generally against workers of one sex’.

On the other hand, the CJEU provided that a classification system can use the criterion of the muscular effort required for the work, as long as the system as a whole precludes any discrimination on grounds of sex by taking into account other criteria for which workers may show particular aptitude on account of being male or female (case 237/85 — *Rummler*¹¹⁴).

The CJEU laid down three guiding principles following from paragraph 2 of Article 1 of Directive 75/117/EEC (now Article 4, 2nd indent of Directive 2006/54/EC) on the question of job classification (case 237/85 — *Rummler*):

- ‘a) the criteria governing pay-rate classification must ensure that work which is objectively the same attracts the same rate of pay whether it is performed by a man or a woman;
- b) the use of values reflecting the average performance of workers of the one sex as a basis for determining the extent to which work makes demands or requires effort or whether it is heavy constitutes a form of discrimination on grounds of sex contrary to the Directive;
- c) in order for a job classification system not to be discriminatory as a whole it must, insofar as the nature of the tasks carried out in the undertaking permits, take into account criteria for which workers of each sex may show a particular aptitude.’¹¹⁵

These guiding principles demonstrate that in the context of a dispute, according to the case law of the CJEU, a job classification system must be formal, analytical, factor based and non-discriminatory.

In subsequent judgment, the CJEU provided the following clarifications of its case law on job classification and on work of equal value (C-381/99 — *Brunnhofner*¹¹⁶):

- the fact that a female employee who claims to be the victim of discrimination on grounds of sex and the male comparator are classified in the same job category under the collective agreement regulating their employment is not in itself sufficient for concluding that those employees perform the same work or work of equal value, since this fact is only one indication amongst others that this criterion is met;
- a difference in pay may be justified by circumstances not taken into consideration under the collective agreement applicable to the employees concerned, provided that they constitute objective reasons unrelated to any discrimination based on sex and are in conformity with the principle of proportionality;
- in the case of work paid at time rates, a difference in pay awarded, at the time of their appointment, to two employees of the different sexes for the same work or for work of equal value cannot be justified by factors which become known only after the employees concerned start work and which can be assessed only once the employment contract is being performed, such as a difference in the individual work capacity of the persons concerned or in the effectiveness of the work of a specific employee compared with that of the colleague.

Confirming its previous case-law in *Danfoss*, the CJEU ruled that since, as a general rule, recourse to the criterion of length of service is appropriate to attain the legitimate objective of

¹¹⁴ Case 237/85 *Gisela Rummler v Dato-Druck GmbH* [1986] ECR 2101, paragraph 17.

¹¹⁵ *Ibid*, paragraph 25.

¹¹⁶ Case C-381/99 *Susanna Brunnhofer v Bank der österreichischen Postsparkasse AG* [2001] ECR I-4961, paragraphs 44, 63 and 68.

rewarding experience acquired which enables the worker to perform his duties better, the employer does not have to establish specifically that recourse to that criterion is appropriate to attain that objective as regards a particular job, unless the worker provides evidence capable of raising serious doubts in this regard (C-17/05 – *Cadman*¹¹⁷).

5. Conclusions

A considerable body of CJEU case law addresses various elements of the principle of equal pay. It provides valuable clarification about concepts of pay and work of equal value as well as guidance on discrimination in job evaluation and classification.

This case law could serve as guidance to all relevant stakeholders to facilitate the application of the principle of equal pay in practice. It could also be a source of inspiration for the authorities of Member States as well as national judiciaries to tackle the complex challenges related to equal pay.

ANNEX 3: EXAMPLES OF LANDMARK NATIONAL CASE-LAW ON EQUAL PAY¹¹⁸

Bulgaria

Legal practice on ensuring equal pay is being developed by the Commission for Protection against Discrimination. The Commission is still the preferred forum for women who seek protection against unequal pay.

The *Devnya Cement* case was decided by the *Second specialised panel of the Commission* and was confirmed by the Supreme Administrative Court¹¹⁹. The Commission found continuous unequal treatment of the applicant, a female worker in ‘Devnya Cement’, in the practice of unequal pay for work of equal value, to her male colleagues. The Commission declared that it constituted both a violation of Article 14 paragraph 1 (the equal pay provision) of the Law on Protection against Discrimination (LPAD), and direct discrimination based on sex within the meaning of Article 4 paragraph 2 of the law. The defendant could not justify before the Commission the difference in pay of 45 BGN (around 23 EUR), practised monthly *vis-à-vis* the applicant and to her detriment, compared to her male colleagues. The Commission ordered ‘Devnya Cement’ to discontinue the practice of unequal treatment based on sex in the enterprise, and to amend the Collective agreement so as to include guarantees on equal pay, based on sex and on all other grounds, as required by Article 14 paragraph 1 and 2 of the anti-discrimination law.

Germany

Same pay for the same work

Federal Labour Court, judgment of 25 January 2012, 4 AZR 147/10: This case concerned the allegedly unfair remuneration of the two groups of employees (clinical chemists and medical doctors) in relation to a job classification system which separated both groups of employees working in a public hospital. The court decided that neither Article 157 TFEU nor Sections 1

¹¹⁷ Case C-17/05 *B. F. Cadman v Health & Safety Executive* [2006] ECR I-9583, paragraph 39.

¹¹⁸ This Annex is based on the information provided by the European Network of Legal Experts in the Field of Gender Equality.

¹¹⁹ Decision of the Commission for Protection against Discrimination No 29/4. 07. 2006, confirmed by Decision No 10594/ 1. 11. 2007 of the Supreme Administrative Court.

or 7 of the General Equal Treatment Act (*Allgemeines Gleichbehandlungsgesetz, AGG*) provide for the general principle of ‘the same pay for the same work’. The court clarified that the principle of equal pay only applies in cases of sex discrimination. The ruling was confirmed by the *Federal Administrative Court, judgment of 9 April 2013, 2 C 5/12*.

Occupational pensions

Federal Constitutional Court, judgment of 18 June 2008, 2 BvL 6/07, and Federal Administrative Court, judgment of 12 December 2012, 2 B 90/11: The courts decided that statutory reductions of retirement pensions due to former part-time work violated the constitutional as well as Union law prohibiting sex and pay discrimination. Thus, the courts followed the ruling of the CJEU in joined cases C-4/02 *Schönheit* and C-5/02 *Becker*.¹²⁰

Definition for ‘work of equal value’

Federal Labour Court, judgment of 23 August 1995, 5 AZR 942/93: The applicant, a female packer, called for equal remuneration to her male colleagues doing the night shifts. The court held that the working activities of the female applicant and her male colleagues were not comparable. For a definition of work of equal value, the court mentioned the requirements for work performance such as necessary previous knowledge, skills and abilities with respect to their manner, variety and quality. The application was rejected due to the variety of professional duties performed by the male colleagues. Nonetheless, the court itself deplored the lack of objective criteria for definitions of work of ‘equal value’.

Equal pay versus autonomy of collective bargaining

See Federal Labour Court, judgment of 20 August 2002, 9 AZR 353/01: The female applicant claimed her entitlement to vacation benefits as, due to collective agreement regulations, she lost them because of her maternity leave taken before birth. The court held that the respective regulation of the collective agreement was unconstitutional and could not be justified by the freedom of collective bargaining because of its pressure exerted on pregnant employees to abandon their right to maternity protection before birth.

Burden of proof

Federal Labour Court, judgment of 10 December 1997, 4 AZR 264/96: The applicant, a female social worker, alleged a violation of the prohibitions of gender and pay discrimination by higher wages and better working conditions for technical workers guaranteed by a collective agreement for the public services. The court held that the claim was unfounded as the applicant could not establish facts leading to the conclusion that the job classification criteria for the two groups of employees were arbitrary.

Ireland

Judgment of the High Court in Brides v Minister for Agriculture, Food and Forestry [1998] 4 IR 250: Female applicants employed in the Department of Agriculture sought to rely on a male comparator employed by Teagasc, a statutory body, for an equal pay claim. The High Court held that the scope of the direct applicability of the right to equal pay under Community law extended to cases where there was discrimination in respect of like work within the same establishment or service. The relevant comparator had to be real and have a tangible connection with the type of work performed by the claimant. The principle of equal pay was

¹²⁰ [2003] ECR I-12575.

not one which extended to cases where the relevant comparator was not employed by the same or an associated employer. The claimant and comparator did not work for the same employer.

Judgment of the Supreme Court in National University of Ireland Cork v Ahern [2005] 2 IR 577: This case involved a claim brought by 42 male security service operatives employed by the appellant. The equality officer and Labour Court found that they were discriminated against, relying on two switchboard operators, employed on a job-sharing capacity, as comparators. The case ultimately came before the Supreme Court. The Supreme Court found that in considering whether there were grounds other than sex justifying the different rates of pay, the Labour Court had failed to properly consider the circumstances surrounding the different rates of pay. The Court ultimately accepted the appellant's contention that the different rates of pay were not based on grounds of sex, but were justified by a policy of facilitating the family obligations of employees.

Judgment of the High Court in Minister for Transport, Energy and Communications v Campbell [1996] ELR 106: This case concerned the defence of 'red circling' brought by the appellant in an appeal before the Labour Court. The case involved a number of female 'communications assistants' who argued that they were entitled to the same rate of pay as two male 'radio assistants'. The comparators had been assigned lighter duties on the grounds of ill health, but had retained the same rate of pay. The High Court held obiter that in arriving at a conclusion as to whether persons were being genuinely reassigned to protected pay posts on compassionate health grounds, the Labour Court was entitled to take account of all the facts surrounding the reassignment.

Judgment of the High Court in Flynn v. Primark [1997] ELR 218: The female appellants brought an equal pay claim relying on male store men as their comparators. The Labour Court found that while the appellants were performing like work, the difference in pay was on grounds other than sex, as the pay rates were arrived at by different industrial processes. The High Court held that the Labour Court should have considered whether the differences were justified on economic grounds and not merely a means of reducing the pay of workers of one sex; also the fact that the difference in rates of pay was achieved by different industrial routes does not objectively justify the practice. Further, findings of fact should be made explicitly, and not by implication.

Judgment of the High Court in Irish Crown Cork Co. v. Desmond [1993] ELR 180: This was a claim by 52 female employees for equal pay with a comparator on a higher pay grade. The Labour Court found that the comparator performed some duties which required greater skill than the women employees. When he performed these duties for an extended period, he was paid at the highest pay grade. The Labour Court discounted the periods during which the comparator was paid at grade 1 (the lowest grade) and found that during such periods, the comparator and female members of staff were performing like work. On appeal to the High Court, the Labour Court was found to be entitled to disregard the periods when the comparator was paid at the highest grade in assessing like work. The High Court found that the Labour Court had erred in not then considering whether the difference in pay was attributable to grounds other than gender.

Judgment of the High Court in C & D Food Ltd. v. Cunnion [1997] 1 IR 147: This case involved a claim by female workers for equal pay in respect of male workers in another pay grade. The High Court found that although an employer may genuinely believe that the value of work being carried by employees in one occupation is higher than the value of work carried out by others, he cannot justify a pay difference based solely on his belief. The fact that both men and women are recruited to the same job at the same wage is a matter to be taken into

account in determining the relative value of the different tasks within the work place, and the employer's belief, held in good faith, is not sufficient as a basis for conclusions. The legislation did not require all of the claimants' work to be identical to that of the comparator.

Judgment of the High Court in Golding v. The Labour Court [1994] ELR 153: This case examined the reasons to be given by the Labour Court where a finding is made against claimants. The 12 applicants' claim for equal pay in respect of a male comparator was rejected by the equality officer and the Labour Court. On application for judicial review of the decision, the High Court held that a determination by the Labour Court must give sufficient reasons for the court's decision, so that the parties can see if there is a point of law on which to appeal to the High Court. There is no prescribed format for the determination.

Judgment of the High Court in King v. Minister for Finance [2010] IEHC 307: This case examined the weight to be attributed to statistical evidence in an equal pay claim. The High Court considered an appeal on a point of law from the Labour Court on the grounds that there was an erroneous calculation in determining the ratio of women to men. Appeals to the High Court are on a point of law only and this was held not to be a point of law. The High Court approved the Labour Court determination stating that there was an inherent vulnerability in statistics taken at a fixed time or period which would be influenced by purely fortuitous factors. The Labour Court, as a specialised tribunal, was entitled to reach the conclusion that there were indeed such factors to be taken into account. The High Court endorsed the view that 'statistics are but an aspect for consideration and would not in any event be decisive in themselves'.

Determination of the Labour Court in Irish Ale Breweries Ltd. v. O'Sullivan [2007] ELR 150: This case examined the burden of proof in identifying a comparator. The claimant sought to rely on a comparator who was not known to her. The company failed or refused to supply her with information regarding the duties and remuneration of a possible comparator. The Labour Court found that while the onus of proving like work usually fell to the claimant, an overly rigid application of this principle could impair the protection that the Act offered. The Court found that it should proceed on the basis of a rebuttable inference that the claimant and the comparator were engaged in like work. As no evidence was put forward to rebut this, the Court found in favour of the claimant.

Greece

Judgment of the Supreme Civil and Penal Court, Civil Section (Full Court) (SCC) judgment No 3/1995: The question was whether family allowances paid by the employer constituted 'pay'. A female employee claimed the family allowance paid by her employer under the internal rules of the business were a percentage of the basic salary. This was paid to all male employees who were married and had children without any further condition, but female employees were subjected to two conditions: that their husband be unable to maintain himself due to invalidity or illness, and that the children be maintained by the mother. The SCC relied on the equal pay constitutional norm (Article 22(1)(b)) in the light of, and in conjunction with, ILO Convention No 100 and ex-Article 119 TEEC (now Article 157 TFEU), as interpreted by ECJ case law, which required a levelling-up solution¹²¹. This held that the concept of 'pay' includes family allowances paid by the employer, since they are paid in respect of the employment relationship. The SCC therefore reversed its previous case law, which had not found any discrimination in this respect, as it had applied the breadwinner concept.

¹²¹ This judgment is mentioned in ECJ Case C-187/98 *Commission v. Greece* [1999] ECR I-7713.

Spain

Judgment of the Constitutional Court of 1 July 1991 No 145/1991: The Court considered that certain professional classifications constituted indirect discrimination on grounds of sex because, although the collective agreement had valued the physical effort required in the category occupied mostly by men, it did not value other factors which were required in the category occupied mostly by women in the same way. This interpretation has been followed in other subsequent judgments of the Constitutional Court itself (for instance, Sentence 58/1994, 28 February 1994) and in other rulings of the ordinary courts.

Sentence of the Supreme Court of *18 July 2011, No 133/2010:* One of the factors that has most influence on the difference in pay between men and women is discrimination in career development. The Supreme Court established that a system of promotion that lacked even minimal transparency led to women stagnating in lower ranks, according to statistical analysis, and that this constituted indirect discrimination.

France

Judgment of Cour de Cassation of 12 February 1997, No 95-41694: The Court was faced with an equal pay claim from a female mushroom packer comparing her work with more highly paid male packers. The Court stated that it was clear that women packers were systematically paid less than their male equivalents. For the *Cour de cassation*, men and women were doing the same work and the employer could not give any objective reasons for paying them differently.

Judgment of Cour de Cassation of 6 July 2010, No 09-40021: In this case, a woman employee held a position as 'Human Resources, Legal and Office Department Manager'. Following her dismissal, the employee decided to file a claim for back pay on the grounds that there had been sexual discrimination against her. The employee provided evidence that her salary, despite equal classification, and more seniority than her direct male colleagues, was substantially lower than that of her male colleagues. For the French Supreme Court, the functions of the employee and those of her direct colleagues were identical as to hierarchical level, classification and responsibilities. Moreover, their importance was comparable with regard to the functioning of the company, as each of the managerial positions required comparable qualifications and involved a comparable level of stress. The French Supreme Court concluded that the employees performed work of equal value.

Judgment of Cour de Cassation of 3 July 2012, No 10-2301: Even if indirect discrimination is prohibited, there are very few cases in France on this issue. This case is the second in which the *Cour de Cassation* applied the concept of indirect discrimination. The decision is based on Article 157 TFEU as it concerns an occupational pension scheme in which the benefits for part-time workers were lower than for full-time workers. The *Cour de Cassation* found that a measure based on part-time work, which concerned mainly women and could not be justified, was discriminatory.

Italy

Tribunal of Venice of 2 May 2005 and Tribunal of Padova of 26 October 2007.¹²² The two judgments concerned similar claims brought to court by the Provincial Equality Advisers representing a group of female public employees who did not get the incentive pay provided by sectoral collective agreements for compulsory maternity leave.

In both cases, the Tribunals stated these periods were to be calculated at the aim of bonus pay for the part which is not linked by collective agreements, to a specific project aimed at boosting productivity or to reward the heaviness of a specific job, but is to be shared on the mere criteria of the presence (which means including all working days, Saturdays, Sundays, holidays, compensatory rest, and excluding all other kinds of absence from work). According to the judges, this criteria must be applied consistently with the constitutional principle of equality, therefore compulsory maternity leave cannot be affected by this kind of remuneration as the absence from work is actually compulsory for the working mother. This differential treatment amounted to discrimination on the ground of sex in breach of Art. 37 of the Constitution which provides that ‘*a working woman shall have the same rights and, for equal work, the same remuneration as a male worker (...)*’. In the case of the Tribunal of Padova the local collective agreement was also in contrast with the principles stated by the national collective agreement, providing that the allowance shall also include possible incentive pay bargained at local level.

Pretura of Turin of 4 December 1991 and Pretura of Parma of 24 November 1981.¹²³ These judgments held that a collective agreement bargained at enterprise level which entitled only working women to a contribution for crèche expenses infringed the principle of equal treatment between male and female workers. Following their reasoning, the contribution is linked to the array of duties which burden both parents. A different interpretation would be in contrast with the constitutional principle of equality as it would imply the working mother is the main and/or only subject who is charged with family duties. This reversed the traditional guideline which, until the 1980s, allowed such clauses considering women’s essential family function protected by Art. 37 of the Constitution (*Court of Cassation of 5 March 1986 No 1444*).

Cyprus

Judgment of the Supreme Court in Case no. 5/62 Jenny Xinari V The Republic of Cyprus 3 R.S.C.C. 98: Up to 1955, a husband and his wife, both working in the public service, were both entitled to a cost of living allowance. In 1955, the relevant regulation changed, with the result that the allowance was restricted to the officer drawing the higher of the two salaries. The Applicant was appointed to the public service in 1956 and until 1961, when she married a public officer, she received the allowance. After her marriage, the allowance was given to her husband, because he was paid a higher salary. The Applicant alleged that the decision to deprive her of the allowance was null and void on the basis of Article 28 of the Constitution. The Court held that the notion of ‘equal pay for equal work’ was an integral part of the principle of equality safeguarded by Article 28 and declared the new regulation as unconstitutional and awarded the applicant back pay in compensation.

¹²² Published on the official web site of the National Equality Adviser respectively at <http://consigliera nazionale.lavoro.gov.it/FileCaricati/file%2035.pdf>, and at

¹²³ <http://consigliera nazionale.lavoro.gov.it/FileCaricati/file%2048.pdf>, last accessed 26 September 2013
Respectively published in *Diritto e Pratica del Lavoro* 1992, p. 1387, and in *Giustizia Civile* 1981, p. 1406.

Judgment of the Supreme Court in Case no 541/86 page 3005 Melpo Gregoriou V Municipality of Nicosia 12 September 1991: The Applicant was an employee of Nicosia Municipality and in her application to the Supreme Court, she alleged that the decision of the Municipality not to approve her claim to be put on the same salary scale as her male colleagues who had the same job was null and void. The Supreme Court found in her favour and based its decision on Article 28 of the Constitution. It declared the Municipality's decision null and void. The Supreme Court recognised that the constitutional principle of equality guarantees substantive equality.

Hungary

Judgment of Supreme Court Kfv.IV.37.332/2007/5: A female employee in a manual job earned less than her male co-workers in the same position. The employer defended the wage-difference with reference to different job tasks and also to the fact that the employee had been granted a housing loan that, according to the employer, was paid as partial compensation for the wage difference. The employer referred to the interpretation of 'pay' by the CJEU, claiming that all benefits have to be considered 'pay' in this context. A detailed analysis of the scope of the job (its nature, quality and quantity, the required skill, effort, experience and responsibility) revealed that the work of the female employee was comparable with that of her male co-workers, in spite of some differences in the tasks. Furthermore, the Supreme Court established that the housing loan could not be taken into consideration when comparing hourly wages, because it was not proved that it was granted as compensation for lower wages. The case law of CJEU brings into the concept of pay solely benefits that provide effective material advantage (it referred to cases C-12/81 *Garland*, C-262/88 *Barber*), whereas a housing loan was not such a gain, as it had to be paid back.

Austria

Collective agreements¹²⁴

Decree of the Supreme Court 14 September 1994, 9 Ob A 801/94: Following the application of the Austrian Confederation of Trade Unions on behalf of the Trade Union Metal, Mining and Energy against the Syndicate of Power Utilities, the Court made a declaration concerning job classification criteria. In the case at hand, all workers to whom the collective agreement for power supply undertakings (*Elektrizitätsversorgungsunternehmen*) of 13 July 1990 applied, and who were classified in group V of this collective agreement were to be upgraded to group IV as from 13 July 1990 or a respective later commencement of their employment. Furthermore, the upgraded workers were entitled to the correspondingly higher wages from 2 February 1991. The criteria of group IV referred to 'supporting staff for heavy work', requiring physical performance though not special training, while group V was defined as 'supporting staff for easy tasks' and consisted of 100 % women. These were considered discriminatory job classification criteria analogous to the *Rummler* case¹²⁵ (*Leichtlohngruppe*); even if the then pertinent legislation did not explicitly refer to indirect

¹²⁴ According to data of 2006, Austria has an adjusted collective bargaining coverage of 94%, ILO *Decent Work Country Profile Austria* Geneva 2009, table 9, p. 54. Case law on work of equal value therefore has focused on collective labour norms. Legislation provided for an explicit basis to take individual action before courts not before 1990. Since, the focus of law enforcement has shifted from the Equal Treatment Commission to the Courts.

¹²⁵ Case 237/85 *Gisela Rummler v Dato-Druck GmbH* [1986] ECR 02101.

discrimination the principle of indirect discrimination was clearly implied and thus had to be implemented.¹²⁶

Decree of Constitutional Court 11 December 1998, G 57/98, Pharmazeutische Gehaltskasse: The applicant was a part-time employed pharmacist (as opposed to self-employed pharmacists) to whom a specific statutory pension scheme with the nature of a collective agreement applied. The Court, applying Article 119 TEEC directly and referring inter alia to the CJEU judgment in *Hill/Stapleton*,¹²⁷ found that taking into account periods of full-time and part-time employment differently for advancement (and therefore pay including contributions to a pension scheme) constituted indirect discrimination.

Decree of Supreme Court 1 December 2004, 9 Ob A 90/04g: The provision of a collective agreement, granting a hardship allowance for screen handling (visual display unit work) only to employees working normal working hours (i.e. full-time), amounts to indirect discrimination against women when the enterprise concerned employs more women than men in part-time.¹²⁸

Decree of Supreme Court 29 March 2012, 9 ObA 58/11m: The collective agreement of Austrian Airlines and Lauda Air (cabin crew) which does not include periods of parental leave into the seniority regime does not constitute (indirect) pay discrimination within the meaning of Article 141(1) TEC (*Defrenne III*¹²⁹); compare also *Tyrolean Airways Tiroler Luftfahrt GmbH*.¹³⁰

Public service (statutory pay schemes)

Decree of Supreme Court 9 May 2007, 9 ObA 41/06d: When taking previous periods of occupation into account for determining pay and other entitlements of public employees, imposing certain time limits and the less favourable assessment of part-time work are discriminatory. The Supreme Court, amending the decision of the second instance court, adjudicated the accordingly higher pay to the complainant, a female teacher.

Decree of Supreme Court 29 June 2005, 9 ObA 6/05 f: The Court held that the complainant, a hospital nurse and contractual employee of the *Land* Upper Austria, was not discriminated against by a statute which did not include periods of non-permanent part-time work into the assessment basis for severance pay.¹³¹

Other cases (private sector)

Decree of Supreme Court 17 March 2005, 8 ObA 139/04 f, after the preliminary ruling of the CJEU in *Hlozek*:¹³² Transitional payments (*Überbrückungsgeld*) on the basis of a severance scheme agreed upon by the collective parties in the enterprise following a merger and subsequent dismissals, are to be considered pay albeit not an occupational pension within the

¹²⁶ Commented by *R. Kirschbaum* in DRdA 1995, 21; cf. §3 Abs 2 Equal Treatment Act OJ No 410/1990, repromulgated as §11 OJ No. I 66/2004. The pertinent parliamentary materials refer to Article 1 paragraph 2 of Directive 75/117/EEC and quote, in order to exemplify discriminatory criteria, the judgment in the case 237/85 *Gisela Rummler*.

¹²⁷ Case C-243/95 *Kathleen Hill and Ann Stapleton v The Revenue Commissioners and Department of Finance* [1998] ECR I-03739.

¹²⁸ All decisions can be found at www.ris.bka.gv.at.

¹²⁹ Case 149/77, *Defrenne v Sabena (Defrenne III)* [1978] ECR 1365.

¹³⁰ Case C-132/11 *Tyrolean Airways Tiroler Luftfahrt Gesellschaft mbH v Betriebsrat Bord der Tyrolean Airways Tiroler Luftfahrt Gesellschaft mbH* [2012] ECR n.y.r.

¹³¹ § 56 Abs 9 Upper Austrian State Law on Contractual Staff (*Oberösterreichisches Landes-Vertragsbedienstetengesetz*).

¹³² Case C-19/02 *Viktor Hlozek v Roche Austria Gesellschaft mbH* [2004] ECR I-11491.

meaning of the relevant legislation. A male employee was not discriminated against on grounds of sex by different (lower) payments because of the different legal age of retirement and the higher risk of unemployment for women.

Poland

The Supreme Court judgment of 22 February 2007, I PK 242/06, Maria S. vs. The Municipal Office in J: The plaintiff, a female legal adviser employed in the municipal office, claimed that her employer discriminated against her on the grounds of sex. She received lower remuneration than a male legal advisor working in the same team, despite the fact that they performed the same work. The employer argued that the plaintiff's salary remained within remuneration brackets, set forth by provisions of law. He also indicated that her salary was lower than her colleague's because the plaintiff had less service experience, a lower standard of education (she didn't attend any specialisation courses besides her legal apprenticeship) and handled less cases. In two instances the courts found that those reasons were sufficient for justifying the difference in remuneration. They therefore found no sex discrimination in this case.

The plaintiff disagreed with those judgments and filed a cassation claim to the Supreme Court. The Supreme Court found unequal treatment of employees in the workplace, however based on a different reason than sex. In the court's opinion the differences in remuneration resulted from the fact that the plaintiff was hired earlier than her male colleague. The court decided that it was not the case of discrimination based on sex because other female legal advisers, who joined the team later than plaintiff, had pay equal with their male colleague. Nevertheless, the court argued that her employer should still prove that the wage difference between the plaintiff and her male colleague was motivated by objective reasons if he didn't want the differentiation to be qualified as discrimination. The Supreme Court also explained, referring to the case law of the CJEU, that if the employer took into account criteria such as the length of service and qualifications, while establishing the remuneration, s/he must prove that the particular skills and professional experience have special significance for the fulfilment of concrete the obligations conferred upon the employee.

The Supreme Court judgment of 25 May 2011, II PK 304/10, Bartłomiej S. vs. K-T Limited: The Plaintiff was employed as a sales specialist at the defendant company K-T Limited. The plaintiff received information concerning the pay of his co-workers by mistake, yet alarmed by high differences in the wages he decided to distribute this information among his colleagues, in order to clarify the differences. The direct supervisor could not explain the discrepancies of remuneration between the individual employees. The defendant company had however an unwritten rule forbidding the disclosure of employees' remuneration details, of which the plaintiff was aware. The plaintiff contract of employment was terminated without notice.

In this case the Supreme Court found that disclosing information covered by the so-called 'salaries confidentiality clause' in order to prevent unfair treatment and wage-related forms of discrimination, could not in any way serve as ground for termination of the employment contract with the plaintiff. With reference to Article 18.1e of the Labour Code, the Court emphasised that 'the exercise by an employee of the rights resulting from violations of the principle of equal treatment in employment, including the attempt to investigate or to provide any form of support to other employees, aimed at preventing the potential application of wage discrimination by the employer, can't constitute a reason for termination by the employer of the contract of employment, nor a dissolution without notice, regardless of the way the

employee accessed the information, that may indicate a violation of the principle of equal treatment in employment or application of wage discrimination’.

The Supreme Court judgment of 8 January 2008, II PK 116/07, the case of Grażyna P: In this case the plaintiff (a mother of five children) claimed damages for discrimination based on sex, age and family status. In her opinion, one of the signs of discrimination included the significant differences in remuneration between her and her colleagues. The employer argued that unfavourable remuneration of the plaintiff was partly the result of her frequent use of parental leave. The courts of first and second instance found that by differentiating the situation of the claimant in terms of pay, the defendant applied legally acceptable criteria. These judgments were overruled by the Supreme Court, recognising a cassation claim, arguing that ‘the exercise of powers conferred by law in connection with the birth and upbringing of the child can’t be regarded as an objective reason for determining a lower remuneration compared to other employees’.

The Constitutional Tribunal judgment from 9 July 2012, P 59/11, initiated by a legal question of the District Court in Białystok: In a case heard by the District Court in Białystok an employee claimed her right to an additional annual salary (so called thirteenth salary), guaranteed to employees of the public sector according to the Act of 12 December 1997 on additional annual salary for employees of the public sector.¹³³ It was denied to her by the employer who stated that she didn’t meet the required period of continuous work during a calendar year (which was for six months), due to the use of maternity leave.

The court decided to refer the case to the Constitutional Court with a legal question, whether Article 2 Paragraph 3 of the Act of 12 December 1997 dealing with an exception from the requirement to work for the employer for at least six months in a given calendar year in so far as it ignored the period of maternity leave as such exception, is in conformity with the Constitution. The Tribunal in its ruling first confirmed that the additional annual salary in the public sector remains within the wider concept of remuneration, due to the fact that it is closely related to the employment relationship, and has no discretionary character with regard to the employer. The Tribunal further held that Article 2 paragraph 3 of the Act of 12 December 1997 was incompatible with Article 32.1 prohibiting discrimination, in connection with Article 71.2 of the Polish Constitution, granting the mother the right to special assistance from public authorities before and after birth. This was insofar as to which Article 2 Paragraph 3 ignored the period of maternity leave as allowing for the acquisition of the right to additional annual salary in the amount proportional to the length of time worked in the situation when, throughout the calendar year, the employee didn't perform work for six months.

Finland

Judgment of the Labour Court TT 1998-34: The Labour court was asked to rule on whether a clause in a collective agreement was discriminatory. The clause stated that maternity and parental leave periods were not to be taken into account as time that entitled a person to additional pay on the basis of work experience. The court held that the clause was discriminatory and as such null and void. The court referred to cases Nimz and Gillespie, and used the Bilka test in assessing whether there was indirect discrimination.

Judgment of the Labour Court TT: 2002-7-10: The Labour Court held that the burden of proof may be shifted onto the defendant if the plaintiff can present at least one comparator of the

¹³³ JoL No. 160, item. 1080, as amended.

opposite sex who has higher pay for equal work, irrespective of whether there are both women and men in lower and higher pay brackets doing equal work.

Sweden

Judgment of the Labour Court Case 1996 No 41: This case concerned Örebro County and the health sector or, to be more exact, whether there was discrimination in paying a midwife less than a hospital technician. The Labour Court did not exclude the possibility that the work of a midwife and a hospital technician could be compared and found to be of equal value, but in the case at stake, it did not find the method used by the Equality Ombudsman to be sufficient to prove this. No discrimination was found.

Judgment of the Labour Court Case 2001 No 13: This case also concerned Örebro County and the health sector. It, too, concerned alleged pay discrimination, with a midwife being paid more/less than a hospital technician. In this case, the midwife and the technician were found to perform work of equal value following an assessment in terms of knowledge and skills, responsibility, effort and working conditions (now part of the definition of work of equal value according to the 2008 Discrimination Act). There was thus apparently a prima facie case of pay discrimination.

The Labour Court, however, accepted the employer's 'excuse' that the technician's higher wages were due to the market. The technicians had alternative job options at significantly higher wages, an acceptable reason to pay hospital technicians somewhat more. There was thus no discrimination. Compare also the 'parallel' Labour Court Case 2001 No 76 (a nurse and a hospital technician were compared and their work was found to be of equal value). The court found that there was no pay discrimination in this case either.

United Kingdom

Hayward v Cammell Laird Shipbuilders Ltd [1988] IRLR 247: the House of Lords ruled that the principle of equal pay required equality in relation to each element of pay rather than (as the employers here argued), the overall package paid to men and women respectively.

Ratcliffe & Ors v North Yorkshire CC [1995] IRLR 439: the House of Lords ruled that the employers could not justify pay differentials between workers in predominantly female and those in predominantly male jobs to the extent that such differences resulted from the application of stereotypical assumptions about the role of women in the workplace.

British Coal Corporation v Smith & Ors [1996] IRLR 404: the House of Lords ruled that for the purposes of an equal pay claim, the claimants could compare themselves with men who worked at a different establishment. This was because the same (national) collective agreement applied to all who worked for the establishment, whatever the location, albeit with minor local variations as a result of localised bargaining.

Glasgow City Council v Marshall & Ors [2000] IRLR 272: the House of Lords ruled that employers were not under any obligation to justify differences in pay between men and women doing work of equal value if the claimants could not prove that the employer's grounds for paying women less discriminated indirectly on grounds of sex. However, if the discrimination had been direct, the employer would not have been able to uphold it as justifiable.

Robertson & Ors v DEFRA [2005] IRLR 363: the Court of Appeal ruled that civil servants working in the Department for Environment Food and Rural Affairs (DEFRA) were not

entitled to compare themselves with those working for the Department of the Environment Transport and the Regions for the purposes of an equal pay claim under ex-Article 119 TEEC. Both were employed by the Crown, but terms and conditions of employment had been negotiated at departmental level. The Court of Appeal ruled that the pay of claimants and their comparators could not be attributed to a single source even though they had the same employer.

Powerhouse Retail Ltd & Ors v Burroughs & Ors [2006] IRLR 381 (following the decision of the ECJ in *Preston v Wolverhampton Healthcare NHS Trust* (case C-78/98)), for the purposes of an equal pay claim relating to occupational pensions, time began to run on the date of the transfer of the undertaking in which the claimants worked, rather than the date on which a claimant's employment ceased. This case concerned claims which had been brought against the eventual employer by claimants whose contracts of employment had been subject to transfers covered by the Acquired Rights Directive.¹³⁴

Fearnon & Ors v Smurfit Corrugated Cases (Lurgan) Ltd [2009] IRLR 132: Northern Ireland's Court of Appeal ruled that an industrial tribunal had erred in law in rejecting an equal pay claim because the comparator's wages had been set higher in 1988, when his then employer had been taken over. From that date, the comparator's annual pay rise had been the same as that of other staff in percentage terms, maintaining a differential. The Court ruled that the industrial tribunal was not entitled to accept that the reasons for the initial red-circling resulting in a differential were justified indefinitely, though there had been proper reasons for a differential in 1988.

Council of the City of Sunderland v Brennan & Ors [2012] IRLR 507: the Court of Appeal, considering the decision of the House of Lords in *Marshall*, pointed out that it would be difficult for an employer to demonstrate that pay practice which had a significantly disparate impact on men and women did not involve indirect sex discrimination.

Abdullah & Ors v Birmingham City Council [2013] IRLR 38: the Supreme Court held that employees who wished to claim equal pay were not required to do so in the employment tribunal (and therefore subject to strict time constraints) but could choose instead to do so by way of a claim for breach of contract in the civil courts, where there is a six-year time limit.

North and others v Dumfries and Galloway Council [2013] UKSC 45: the Supreme Court reaffirmed the original decision of the Employment Tribunal and held that although the men in this case did not work in the same workplace, under equal pay law they could nevertheless be used as comparators. The Supreme Court held that working in different locations for the same employer is not a barrier to achieving equality. The facts were that 251 women were working as classroom assistants and the comparable men were in manual work, in particular as grounds men, refuse collectors and as a leisure assistant. The men were entitled to bonus payments, whereas the women were not. The Supreme Court commented that the implementing legislation in the UK was sufficiently wide to enable this interpretation to be made and if it were not, the Court would be obliged to disregard domestic legislation and to base its conclusions on EU law.

North & Ors v Dumfries and Galloway Council [2013] IRLR 737: the Supreme Court considered the proper scope of comparators in equal pay claims, most such claims requiring an actual comparator. The Equality Act provides that a claimant may use as her comparator an

¹³⁴ Council Directive 77/187 of 14 February 1977, which aims at the approximation of the laws of Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses (as amended by Directive 98/50/EC of 29 June 1998; consolidated in Directive 2001/23 of 12 March 2001).

employee (of the opposite sex) who is employed by the employer or an associated employer at the same establishment or at an establishment at which “common terms and conditions of employment are observed either generally or for employees of the relevant classes”. In *North* the Supreme Court ruled that, where claimants seek to rely on comparators employed at a different establishment, the legislation does not require there to be a “real possibility” of the comparators doing the same, or broadly similar, jobs at the claimants’ place of work.

The claimants were employed by the local authority at schools as classroom assistants, learning assistants and nursery nurses while their comparators were employed by the authority elsewhere as road workers, grounds men, refuse collectors, refuse lorry drivers and a leisure attendant. The men’s terms and conditions were set by the Green Book, the collective agreement for manual workers, while the women’s were set by a collective agreement known as the Blue Book. The tribunal was satisfied that, had the men been employed in the women’s establishments, their terms and conditions would have been controlled by the Green Book, and that they were suitable comparators (subject to the establishment of equal value with the claimants’ jobs) regardless of the fact that there was no “real possibility” that the men could be employed at the claimants’ establishment to do the same or broadly similar jobs to the ones they did at their current place of work. The Supreme Court further held that, had they taken the view that domestic legislation required such a possibility, the relevant provision would have to have been disapplied to achieve conformity with EU law (in particular, the decision in *Lawrence v Regent Office Care Ltd* [2003] ICR 1092).

ANNEX 4. THE WIDER CONTEXT: TACKLING THE GENDER PAY GAP AND NATIONAL GOOD PRACTICES

1. Causes of the gender pay gap – a lifecycle approach

Women face multiple inequalities in the labour market. The equal pay principle covers part of the **wider context of the gender pay gap**, which is related to:

- **Violation of the equal pay principle in practice:** if women and men are not paid the same, even though they do the same work or work of equal value, this may be because of direct or indirect discrimination, violating the principle of equal pay.
- **Undervaluation of women’s work and skills and horizontal segregation:** tradition and stereotypes often influence the different choices that women and men make in choosing what they study and their careers. This leads to a gender-segregated labour market where women’s skills and competences and female-dominated occupations are undervalued and underpaid compared to male-dominated occupations.
- **Vertical segregation and gender imbalance in decision-making positions¹³⁵:** women are under-represented in senior and leadership positions in politics and in the economy. Even in sectors dominated by women, such as teaching, they are under-represented in senior positions.
- **Unequal burden of family and domestic responsibilities:** women often work shorter, more flexible hours, or part time. They have more breaks in their careers due

¹³⁵ For more information on this point see COM(2012) 615 final from 14/11/2012 on gender balance in business leadership: a contribution to smart, sustainable and inclusive growth.

to maternity leave or other family responsibilities in an effort to combine these with paid work.

- **Workplace practices and pay systems:** Women and men are treated differently in the workplace when it comes to access to career development and training. Different rates of pay for women and men may be the result of different methods of rewarding employees, for example, through bonuses and performance-related pay. The actual structure of pay, as well as job evaluation and job classification systems, can also contribute to this result.

The gender pay gap starts with segregation at school when girls and boys choose different fields of study. It continues during working life and has consequences beyond. There is then a **pension gap between women and men**, putting older women at higher risk of poverty than older men.

2. The Commission's actions to tackle the gender pay gap

The Commission has been taking action to reduce the gender pay gap in the EU¹³⁶. These activities fall within the following main areas: working with companies, working with Member States and social partners, funding and increasing knowledge.

Working with companies

‘Equality Pays Off’¹³⁷ initiative: in order to support employers in their efforts to tackle the gender pay gap, the Commission started an initiative in 2012 which helps to raise awareness in companies about the gender pay gap, its causes and consequences. The initiative supports companies in their efforts to tackle the gap by organising training activities and tools that they can use. The aim is to raise awareness of the ‘business case’ for gender equality and equal pay through making better use of women’s potential in a context of demographic change (an ageing population) and skill shortages.

Working with Member States and social partners

In the Europe 2020 Strategy framework and the European Semester process, the Commission's **Country Specific Recommendations** address the gender pay gap and its causes.¹³⁸ Member States with high gender pay gaps are warned about the risks and the need to tackle them. The Commission will continue monitoring the European Semester process on a yearly basis and proposing the Country Specific Recommendations on the gender pay gap and related causes.

European equal Pay Days: to follow up its campaign on the gender pay gap¹³⁹, in 2011, the Commission launched an annual European Equal Pay Day to increase awareness of the fact that there is still a wage gap between women and men.¹⁴⁰

In June 2013, the Commission services organised an **exchange of good practices** on equal pay days involving Member States and relevant stakeholders in order to foster synergies by

¹³⁶ For more information see COM(2010) 491 final on the Strategy for equality between women and men 2010-2015 and SWD(2013) 339 final on the Mid-term review of the Strategy for equality between women and men (2010-2015).

¹³⁷ <http://ec.europa.eu/justice/gender-equality/equality-pays-off/>.

¹³⁸ See the different COM and SWD by country available in http://ec.europa.eu/europe2020/index_en.htm.

¹³⁹ The European campaign on closing the gender pay gap ran from January 2009 to March 2012.

¹⁴⁰ See different press releases related to the European Equal Pay Days here: http://ec.europa.eu/justice/gender-equality/gender-pay-gap/eu-action/index_en.htm

strengthening collaboration both with and between the Member States who organize their own national equal pay days.¹⁴¹

Business Forum: A Business Forum was organised in Brussels on 21 March 2013 around European Equal Pay Day, in an action associated with the ‘Equality Pays Off’ project. The Forum offered about 170 participants from companies, social partners, multiplier organisations and institutions from all over Europe the opportunity to exchange knowledge and strategies on how best to foster gender equality and equal pay and how to make the most of current and future female talent.¹⁴²

Funding

Member States can make full use of the co-financing opportunities the **Structural Funds** offer to tackle the direct and indirect causes of the gender pay gap, including in the new funding period about to start.

In June 2013, the Commission published an open call for proposals¹⁴³ aiming to support projects organised by civil society and other stakeholders to promote equality between women and men, especially on gender balance in economic decision-making positions and the gender pay gap.

Increasing knowledge

The Commission regularly dedicates a chapter to equal pay in the **Annual Report on Progress on Equality between Women and Men**¹⁴⁴.

The Commission services encourage Member States to provide their national **statistics on the gender pay gap** in an accurate and timely manner. The Commission services have also started preparatory work on a methodology for an indicator to measure the differences in pension levels between women and men.

3. Examples of good practices on equal pay at national level¹⁴⁵

Belgium

In Belgium, a national collective labour agreement commits social partners to keeping up efforts to achieve equality between women and men. This includes reviewing job classifications so as to make them gender neutral. This Collective Labour Agreement No 25 on equal pay for male and female employees, obliges all sectors and single enterprises to assess and, if necessary, to correct their job evaluation and classification systems to ensure gender neutrality as a condition of equal pay. This Collective Labour Agreement, modified on

¹⁴¹ For more information, see here: http://ec.europa.eu/justice/gender-equality/other-institutions/good-practices/review-seminars/seminars_2013/equal_pay_days_en.htm

¹⁴² More information can be found here: <http://ec.europa.eu/justice/events/equality-pays-off-forum-2013/>

¹⁴³ Reference: JUST/2013/PROG/AG/GE.
http://ec.europa.eu/justice/newsroom/grants/just_2013_prog_ag_ge_en.htm

¹⁴⁴ The last report is SWD(2013) 171 final. The Annual Reports are available here: http://ec.europa.eu/justice/gender-equality/document/index_en.htm#h2-2

¹⁴⁵ This section is based on the information provided by the European Network of Legal Experts in the Field of Gender Equality and the European Network of Experts on Gender Equality (ENEGE). Some examples of national good practices to tackle the gender pay gap can be found here: http://ec.europa.eu/justice/gender-equality/gender-pay-gap/national-action/index_en.htm

9 July 2008, provides that discrimination between men and women has to be excluded concerning all conditions of remuneration.

On 22 April 2012, the Belgian parliament adopted a law to reduce the gender pay gap. According to this, differences in pay and labour costs between men and women should be stated in companies' annual reports ('bilan social'). The law stipulates that every two years, companies with over 50 workers should carry out a comparative analysis of their wage structure, showing the rates for their female and male employees. If this shows that women earn less than men, the company will have to draw up an action plan. If discrimination is suspected, women can turn to their firm's mediator, who will investigate whether there is indeed a pay differential. If there is a differential, the mediator will try to find a compromise with the employer.

In 2010, the Institute for the Equality of Women and Men developed a checklist, also referred to in the law on equal pay, on gender neutrality in job evaluation and job classification to be used by both private and public employers. Previously, in 2006, they had organised training programmes and published a guidebook on gender-neutral job classification for employers and trade unions to avoid and eliminate gender bias in pay systems as part of a broader project called EVA. A guidebook on job classification was made available for employers and trade unions to avoid and eliminate gender bias in pay systems (2006).

Belgium was the first country in Europe in which an Equal Pay Day was organised in 2005. *Zij-kant*, the progressive women's movement, is the main organiser of the event, which takes place every March in collaboration with the socialist trade union FGVB. Each year, an innovative campaign featuring posters and a video clip is launched around the Day to draw attention to the issue of equal pay. The first Equal Pay Day campaign focused on the pay gap between women and men. The Christian and liberal trade unions also organise their own events devoted to equal pay.

Czech Republic

Equal Pay Day was launched in 2010 and takes place annually in April. Recent activities have included mentoring sessions, and opportunities for women to ask successful women entrepreneurs and managers questions about work and career progression. The event is organised by BPW Czech Republic.

Germany

In Germany, the federal government has developed guidelines on the implementation of equal pay for work of equal value.

The Earnings Statistics Act implemented in 2007 provides¹⁴⁶ a data base for research on the development and causes of pay inequality, with possibilities for counter strategies to target the causes.

The Logib-D management tool helps employers identify if there is a pay gap between their male and female employees. Through analysing payment structures, this online tool enables employers to explore whether there is a gender pay gap and the reasons for it. It also helps employers to develop solutions to ensure equal pay for all employees. The instrument was developed by the German Federal Government in cooperation with partners.

¹⁴⁶ Via the Quarterly Earnings Survey required by the Act,

Germany first held an Equal Pay Day in 2008. Initiated by BPW Germany, the event takes place annually in March. Every year, a key aspect of the gender pay gap is highlighted for discussion. Separate events take place in the fourth quarter of the year to inform stakeholders about the key topic and to prepare activities for Equal Pay Day.

Works councils are entitled to have access to information about the wages of all employees in a company in detail under the Works Constitution Act. The employer is obliged to report on the state of affairs within the company, and this includes the topic of gender equality. If the employer is found to have committed grave violations of the prohibition on discrimination, works councils and trade unions can seek a court order obliging them to stop.

Estonia

Equal Pay Day takes place annually in Estonia during April and is organised by BPW Estonia. During the Day, cafes and restaurants serve salmon dishes (a play on words as 'lõhe' in Estonian, meaning both 'salmon' and 'gap') both with and without the herb dill¹⁴⁷. The dishes with dill are more expensive (by a percentage which corresponded to that year's gender pay gap in Estonia) than those without, so highlighting the country's gender pay gap. The gender pay gap is seen a complex issue, and measures to combat it have to be introduced simultaneously in all relevant fields.

An action plan to reduce the gender pay gap was approved in 2012¹⁴⁸. There are five main aims:

- to improve the implementation of the existing gender equality act (e.g. improving the collection of statistics, awareness raising);
- to achieve a better balance between work and family life (e.g. work with employers);
- to achieve gender mainstreaming, especially in education and employment policies;
- to reduce gender segregation in education and the labour market;
- to analyse organisational practices and pay systems, improving the situation where necessary.

Ireland

In Ireland, provisions to reduce the gender pay gap have been included in the last two national partnership agreements, which have resulted in a number of actions in the public sector. The most recent social partnership agreement 'Towards 2016' (agreed in 2006) includes measures to explore the causes of the gender pay gap so as to reduce it further.

Spain

Equal Pay Day has been held on 22 February each year following a declaration by the Spanish government in 2010. The Day is organised by the Spanish Ministry of Health, Social Services and Equality. Activities include the production of lottery tickets with a special design to raise awareness of the gender pay gap. Stakeholders such as women's groups and trade unions have also used the Day as an opportunity to address the gap by organising press conferences and

¹⁴⁷ There is also a word play, for herb dill and male genitals (slang word) the same word is used in Estonian.

¹⁴⁸ Memorandum valitsuskabineti nõupidamisele, 5. juuli 2012. Tegevuskava meeste ja naiste palgalõhe vähendamiseks (Action plan to reduce gender pay gap). http://www.sm.ee/fileadmin/meedia/Dokumendid/Sooline_vordoiguslikkus/Kabineti_memorandum_04_07_12doc.pdf (in Estonian), accessed 26 February 2013.

publishing reports on the issue. The Ministry has created an institutional logo. Special postage stamps were issued to support Equal Pay Day nationally in 2013.

France

In France, the 2006 Act on Equal Pay between Women and Men covers compulsory collective bargaining on gender equality and requires companies to report on salaries and plans to close the gender pay gap.

Businesses employing 50 or more employees are obliged to produce an action plan on gender equality and they face sanctions if they fail to do so.

One of the most important measures obliging employers to address the issue of equal pay is the information they have to give to workers' representatives (works councils and trade union representatives) on equality. Businesses employing 50 or more staff have to produce a written annual report for the works council comparing the situation of men and women in the company. This must comprise a comparative analysis in terms of recruitment, training, qualifications, pay, working conditions and balance between professional and private life, supported with relevant statistically-based indicators.

The employer has to record measures taken in the company over the previous year to attain employment equality, and an outline of the objectives for the year ahead. Publication of relevant indicators at the workplace is mandatory according to the law, to enable the report to be analysed in detail. Employees have the right to consult the report directly.

Employers also have to provide information on equality in annual negotiations. They have to give month-by-month data on trends regarding the number of staff and their qualifications by sex, and to state the number of employees on permanent contracts, the number of fixed-term contracts and the number of part-time employees.

In the first meeting complying with the annual obligation for unions and employers to negotiate at enterprise level, the employer has to provide trade union representatives with information that enables them to carry out a comparative analysis of the situation of men and women in jobs, qualifications, pay, hours worked and the organisation of working time. The accompanying information has to explain the situation captured by the statistics. Companies with fewer than 300 employees can conclude an agreement with the State to receive financial assistance to carry out a study of their employment equality situation and of the measures they would need to take to ensure equal opportunities between men and women (Article R 1143-1 of the Labour Code).

Equal Pay Day has been organised annually in April by the French Federation of Business and Professional Women (BPW France) since 2009. Every year, its symbol, a red carrier bag, symbolising the earnings women lose due to the gender pay gap, is given away at awareness-raising events in cities across the country.

Cyprus

NGOs, trade unions and employers' organisations organise seminars for their officers on job evaluation schemes and carry out surveys on equality between men and women.

The National Action Plan on Gender Equality (2007-2013) incorporates a comprehensive approach to gender equality, addressing six areas: employment, education, decision making, social rights, violence and gender stereotypes.

The social partners have abolished reference to male and female posts in collective agreements, but in some agreements, there is still job segregation. Social partners have not yet widely used job evaluation, as it may prove that the pay in jobs mainly carried out by women should match the pay in those mainly done by men.

The Department of Labour Relations of the Ministry of Labour and Social Insurance is implementing a project entitled 'Actions for reducing the gender pay gap', co-financed by the European Social Fund. The budget is approximately EUR 3 million. Implementation started in July 2010 and will conclude by the end of 2015.

The project consists of a broad mix of measures to combat the root causes that create and sustain the gender pay gap.

Cyprus's first Equal Pay Day was in 2013, and coincided with Women's Day. An event to raise public awareness took place on 9 March, co-organised by the Ministry of Labour and Social Insurance, the European Parliament Office in Cyprus, the European Commission Representation and the Press and Information Office, with the participation of Business and Professional Women Federation of Cyprus.

Lithuania

In 2005, an agreement was signed by national employer and trade union bodies on a 'Methodology for the Assessment of Jobs and Positions' in enterprises and organisations. This is based on the assessment of a job using eight factors: education, professional experience, levels of positions and management, scope of decision making and freedom of action, autonomy and creativity at work, responsibility, work complexity and conditions of work. The agreement was drawn up as a model that could be used in collective agreements at company level.

Gender equality policies are set out in the National Programme on Equal Opportunities for Women and Men for 2010-2014¹⁴⁹. A considerable number of measures are intended to improve the situation for women and men in the labour market. One of the priorities is reducing the gender pay gap through action to raise pay in female-dominated sectors such as education, arts and culture, and social work.

Luxembourg

In Luxembourg, all collective agreements have to include commitments to apply the principle of equal pay for men and women. The social partners are required to bargain on equal pay (law of June 2004). Collective bargaining has to include a provision concerning the implementation of the principle of equal pay between men and women. An action plan for equality between women and men was produced in 2006.

The online tool LOGIB-Lux, developed in 2009, has been restructured and made more user-friendly. The new software enables a company to analyse its salary structure to help identify the causes of wage inequalities. After entering data, the company receives a results report that discusses its pay structures from the point of view of the gender of the employees, examines causes, and suggests ways of achieving equal pay.

In 2009, a national action plan for equality between women and men for 2009-2014 was adopted. Measures to overcome pay inequality include indirect measures such as the

¹⁴⁹ http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=372298&p_query=&p_tr2.

generalisation of ‘Girls’day-Boys’day’ (‘GD-BD’) to break gender stereotypes, or direct measures such as the introduction of the LOGIB tool or the publication of a guide on gender-equal pay.

Malta

The National Commission for the Promotion of Equality awards the Equality Mark to companies that have good employment practices, including on equal pay¹⁵⁰.

Netherlands

In the Netherlands, through the consultative Labour Foundation, employers and trade unions have initiated a government plan for achieving equal pay, including a checklist for the social partners to use when negotiating pay.

Equal Pay Day is held in March. The main organiser is BPW the Netherlands. Recent activities have included the sending of e-cards to over a million women. The cards featured the question ‘Do you get paid what you earn?’, together with a link to a website where women can check their salaries to see if their organisation has a gender pay gap.

Austria

Equal Pay Day is marked twice a year, in April and October since 2009. As an awareness raising measure, the day is organised by Business and Professional Women (BPW) Austria and supported by the Federal Minister for Women’s Affairs¹⁵¹.

The Equal Treatment Act obliges companies to draw up equal pay reports. The confidential reports, aggregations of anonymous data, have to show the number of men and women classified under each category, as well as the average or median income, adjusted for working time, for women and men in each category. The goal is to create income transparency and to take measures to reduce gender pay gaps¹⁵².

The new provisions on the equal pay report are entering into force gradually. They have been compulsory for companies with more than 1000 employees from 2011 for the year 2010, for companies with more than 500 employees since 2012, and for companies with more than 250 employees in 2013. Companies with more than 150 employees will have to produce a report from 2014 onwards.

Employers and employment agencies have to state the legal minimum wage when advertising a job (entry into force: 1 March 2011); the job applicant or the Equal Treatment Ombudsman can report those who do not do so, and this can result in a penalty of up to EUR 360 (entry into force: 1 January 2012).

¹⁵⁰ See <http://www.nectar.com.mt/corporate/news/nectar-group-awarded-the-equality-mark-certificati/> for an example of such an award. Some fifteen such awards were made in the last year.

¹⁵¹ <http://www.equalpayday.at/>.

¹⁵² <http://www.frauen.bka.gv.at/DocView.axd?CobId=42582>.

A wage and salary calculator has been set up to provide up-to-date, easily accessible information about the pay customary in a sector or location. This was launched in October 2011. The calculator is part of the National Action Plan for Gender Equality in the Labour Market.

Poland

In 2011, the International Federation of Business and Professional Women (BWP International) implemented some initiatives at sub-national level, drawing attention to the gender pay gap and inviting other organisations and activist groups to take part in the action and to support Equal Pay Day. Specifically, BPW International launched an Equal Pay Week during which women from business, academia and culture took part in a debate on equal pay for equal work.

In 2013, the Government Plenipotentiary for Equal Treatment organised a seminar for professionals (academics, government representatives, social partners, etc.) to discuss the methodology to be used during the Supreme Audit Office's audit of the gender pay gap.

Portugal

A method for job evaluation free of gender bias has been produced in the hotel and restaurant sector in Portugal as part of the project 'Revalue work to promote gender equality'. The methodology was drawn up by employee and employer representatives, state public bodies and researchers and coordinated by the General Confederation of the Portuguese Workers (Confederação Geral dos Trabalhadores Portugueses — Intersindical, CGTP-IN). This enabled jobs that are male dominated and jobs that are female dominated to be evaluated and compared to determine whether the gender pay gap is a result of the unfair valuing of women's work and discrimination.

A guide co-financed by the European Commission, 'The value of work and gender equality'¹⁵³, developed a job evaluation method to assess the value of work free of gender bias. A training handbook¹⁵⁴ has also been developed.

Employers (with the exception of public authorities and entities and employers of domestic service workers) are obliged to collect information on their personnel records annually and to send this to the Ministry responsible for labour and employment. The information covers several aspects of working conditions, including pay.

The records are submitted to the labour inspection authorities (ACT); trade unions or workers committees (on request); and employer representatives on the Standing Committee for Social Dialogue (CPCS). Before this, the records have to be made available to the employees.

The 4th Plan for Equality includes among its objectives the reduction of gender pay gaps and the introduction of equality plans within enterprises.

On 6 March 2013, Portugal held its first National Equal Pay Day. This day marks the extra number of days that women would have had to work to earn as much as men did the previous year. To raise awareness about the persistence of the gender pay gap, the Commission for Equality in Labour and Employment (CITE) launched a campaign to be released on public transport, and posters were distributed across the cities of Lisbon, Almada and Oporto. In

¹⁵³ Commission for Equality in Labour and Employment, Portugal
http://www.cite.gov.pt/asstscite/downloads/guia_revalorizar_en.pdf

¹⁵⁴ http://www.cite.gov.pt/asstscite/downloads/referencial_revalorizar_en.pdf

addition, on 6 March, CITE brought the Equal Pay Day event to the attention of CEOs of the largest Portuguese companies, as well as to employers' associations and social partners by giving them a symbolic gift aiming to raise awareness on the equal pay issue.

Slovakia

Slovakia first held Equal Pay Day on 30 March 2012. It was organised in cooperation with the EU House in Slovakia¹⁵⁵.

Regular monitoring of gender pay differences is processed on a quarterly basis by a private company (Trexima ltd)¹⁵⁶ which provides statistical data for the Ministry of Labour, Social Affairs and Family of the Slovak Republic under the supervision of the national Statistics Office.

The Gender Equality Institute has a project to develop a methodology for labour inspectors examining compliance with the principle of equal treatment with an emphasis on equal pay.

Finland

In Finland, separately negotiated adjustments to pay scales have been put in place. Closing the gap has been put on the collective bargaining agenda in national pay agreements through an 'equality allowance'. Specially negotiated pay rises for the lowest paid women workers have had a significant effect on reducing the gender pay gap in several sectors in which the employees are predominantly women.

A Government Action Plan for Gender Equality 2012-2015 includes key measures by which the government promotes equality between women and men and combats gender-based discrimination. One measure involves publishing pay survey analyses in central government. The analyses may be published in annual reports, in HR accounts or in other HR reporting contexts. The Government will also commission a study on the impact of tax policy and income transfer solutions on the economic equality of women and men.

The tripartite Equal Pay Programme for 2006-2015 aims to reduce the gender gap from around 20% to 15% and to implement the principle of 'equal pay for work of equal value'. The programme includes actions on desegregation, the development of pay systems, measures to support women's careers, and calls on the social partners to reach agreements to reduce the pay gap.

The Gender Equality Act requires employers to draw up a gender equality plan, which must include proposals to reduce pay differences between women and men. The Equality Act requires the employer to actively promote gender equality, for example, in terms of employment and especially salary.

If an employer has 30 or more employees, they have to draw up an equality plan, which has to include a wage survey. The aim of the survey is to find out whether there are gender-based pay differences at the workplace and to evaluate the conclusions in the equality plan so as to remove unjustified differences. The wage survey should investigate whether the wage system is fair to women and men and whether work of the same level of difficulty is treated equally. To close the gap, it is essential to keep wage systems up-to-date, to ensure that wage elements are non-discriminatory and to monitor the impacts of the systems.

¹⁵⁵ www.equalpay.sk.

¹⁵⁶ <http://www.zenymuzi.sk/dokumenty-na-stiahnutie.html>.

The equality plan and the pay survey required by the Equality Act make it possible to assess pay gaps between women and men and to take action in the case of unjustified gaps. The Ombudsman for Equality and the Equality Board monitor compliance with the Equality Act.

Sweden

Sweden has held Equal Pay Day during April since 2011. Recent activities have included a round table with women, comprising the CEO of a large company, a police officer and heads of a university and a regional council, to debate different aspects of equal pay. The main organiser is BPW Sweden.

For International Women's Day 2012, the Swedish Women's Lobby initiated an extensive campaign to raise awareness on the gender pay gap. This involved a large number of trade unions, political parties and women's rights organisations. The message: 'After 15:51 women work for free every day. It is time for pay all day', was widely published on the internet.

The 2008 Discrimination Act provides that all employers with 25 or more employees are required to prepare an equal opportunities plan as well as a plan of action for equal pay every three years. The 2008 Discrimination Act also requires employers to carry out a pay survey every three years to detect, remedy and prevent unjustified differences between women's and men's pay, as well as their terms and conditions of employment, and to draw up an equal pay action plan. For more information, see the website of the Equality Ombudsman¹⁵⁷. The 2008 Discrimination Act includes a definition of what is to be regarded as 'work of equal value'. This states that assessment of the requirements of a job has to take into account criteria such as knowledge and skills, responsibility and effort.

The website of the Equality Ombudsman¹⁵⁸ provides guidelines on how to assess pay practices in a gender perspective ('Analys lönelots')¹⁵⁹.

The Swedish social partners in the municipal and county labour markets have had a project to draw up guidance material on how to formulate and implement wage policies that are not directly or indirectly based on gender to ensure that they do not have a negative impact on women.

Employers with 25 or more staff have to provide gender-specific pay statistics on request. Trade unions or employee representatives have the right to request such statistics. It is also the task of the Swedish National Mediation Office (Medlingsinstitutet) to provide national pay statistics from a gender perspective on a yearly basis¹⁶⁰.

Job evaluation free from gender bias has often been included in collective agreements based on four criteria: knowledge and experience, degree of effort, responsibility and working conditions. Other factors can also be taken into account, such as physical and mental stress, competence and degree of independence, planning and decision making.

United Kingdom

¹⁵⁷ www.do.se.

¹⁵⁸ www.do.se.

¹⁵⁹ Analys lönelots, DO H1 2009, Danagårds Grafiska, Ödeshög 2009 och <http://www.do.se/sv/Material/Analys-lonelots/>.

¹⁶⁰ <http://www.mi.se>.

In the UK, an agreement between the social partners, Agenda for Change, has resulted in the introduction of a new pay system in the National Health Service. The system involved widespread job evaluations and pay reviews. These have placed pay, grading, access to career development and working hours on a more equitable basis for women and men.

An agreement in Local Government, the Single Status Agreement, has had an impact in revaluing the low paid and undervalued work carried out by many women in the care sector.

The Equality and Human Rights Commission has established a framework for equal pay reviews in public sector organisations. In some organisations, historical or local reasons have allowed for flexibility, bonuses or other payments that tend to disadvantage women. An example can be found in the Environment Agency, which undertook a joint review of pay and grading. This identified widespread discrimination and resulted in an agreement for a new grading structure.

In the UK higher education sector, a joint working party on equal pay was set up to tackle wide-ranging pay discrimination identified in a report on that topic. This covers all categories of workers in higher education, including manual, administrative and teaching staff. A national enabling agreement and national guidelines for local implementation have been agreed.

Companies in the United Kingdom are encouraged to develop job evaluation free from gender bias. This ensures that their pay systems are gender neutral. Although the equal pay legislation does not require an employer to implement job evaluation free from gender bias, such evaluation is often used as a tool for determining equal pay for work of equal value when comparing pay for different jobs.

For example, in the civil service, a job evaluation and grading support system has been introduced as an analytical methodology free from gender bias for evaluating the jobs of all employees. Similar systems have been developed for employees in local government, and in the education and health sectors.

The Equality and Human Rights Commission in the United Kingdom has developed guidance for employers on implementing job evaluation free from gender bias. Job evaluation is promoted as part of equal pay audits designed for companies with over 50 employees as a tool to identify the gender pay gap.

In 2011, the United Kingdom published the Statutory Code of Practice on equal pay, a technical guide to illustrate where and how legislation on equal pay can be brought to bear in real-life situations. The tool is mainly for lawyers, human resources personnel, courts and tribunals¹⁶¹.

The UK government has launched a voluntary initiative on gender equality transparency, 'Think, Act, Report'. This asks private and voluntary sector employers to make things fairer for women at work, through greater transparency on pay and other workplace issues. Over 60 leading businesses have signed up, covering over a million employees.

Equal Pay Day in the UK has been organised by the Fawcett Society since 2009. This is held in autumn. The date, which varies depending on the country's gender pay gap that year, marks the day from which women in full-time employment effectively work for nothing until the end of the year.

¹⁶¹

http://www.equalityhumanrights.com/uploaded_files/EqualityAct/equalpaycode.pdf