



Legal Seminar 9 November 2010
Making Equality Rights Work in Practice

DISCUSSION PAPER WORKSHOP 2

The Gender Pay Gap in Europe from a Legal Perspective

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The present discussion paper is based on the conclusions of a report recently published by the European Network of Legal Experts in the field of Gender Equality and Petra Foubert: 'The Gender Pay Gap in Europe from a Legal Perspective'.¹ It does not necessarily reflect the opinion or position of the European Commission, Directorate-general for Employment, Social Affairs and Equal Opportunities.

Introduction

Equal pay for men and women for work of equal value has been a concern of the European Union from its very beginning. The principle is currently embodied in Article 157 of the Treaty on the Functioning of the European Union and has been brought into practice by a number of directives. Also the Court of Justice's case law has boosted its importance.

At the national level, the principle of equal pay is, in general, fully reflected in the legislation of the 27 EU Member States and the 3 countries of the European Economic Area (EEA): Iceland, Liechtenstein and Norway. The three candidate countries of Croatia, the FYR of Macedonia and Turkey have also adapted their legislation to EU standards.

Notwithstanding all those efforts on the legal plane, Eurostat data show a persisting gender pay gap, reportedly of 17.6 % on average for the 27 EU Member States in 2007 and 2008. Progress in closing the gender pay gap appears to be very slow, and in a number of countries the gender pay gap is even widening again. With regard to the fact that the European Union has been taking action in the field for more than 50 years, this is a disappointing result.

It is against this background that the European Commission asked its *European Network of Legal Experts in the Field of Gender Equality* (hereinafter 'Network') to collect data on national policies, initiatives and legal instruments aimed at tackling the gender pay gap in practice, and to explore potential links between equal pay and other national labour law provisions.

¹This report will be published electronically at:

<http://ec.europa.eu/social/main.jsp?catId=641&langId=en> in English, French and German and will also be available in print (see EU Bookshop, at:

http://bookshop.europa.eu/is-bin/INTERSHOP.enfinity/WFS/EU-Bookshop-Site?request_locale=EN).

In spring 2010, the *Network* sent out questionnaires to legal experts in the current 27 EU Member States, the EEA countries and the candidate countries. The country reports that resulted from this questionnaire round made up the basis for a print publication, offering a general overview of the most important findings. The 33 individual national reports can be consulted on the website of the *Network*, where they will be attached *in extenso* to the electronic version of the general overview.²

- Statement for discussion: Given, on the one hand, the fact that the principle of equal pay is already fully reflected in the legislation of the 27 EU Member States, the 3 EEA countries and the 3 candidate countries and, on the other hand, the fact that the gender pay gap is persisting, it is obvious that the legal combat of the gender pay gap has failed.

1. The general situation in Europe

The EU (27) average being 17.6 % in 2007 and 2008, the differences among the countries studied are large, varying from a reported unadjusted pay gap of around 10 % in e.g. Poland to a pay gap of around 30 % in e.g. Estonia. While some national experts have mentioned a gradual downward trend over the last years, some of them have pointed at a widening of the gender pay gap.

The national reports have allowed to distil from them a 'snapshot' of the gender pay gap in Europe.

- **Public/ private** - The gender pay gap is considerably lower in the public sector, as compared to the private sector.
- **Age** - The gender pay gap is highest in the 30-49 age bracket, when most women have children and tend to take time off in this respect.
- **Sector of industry** - Gender pay gaps are very high in the sectors of finance and insurance, and also in sectors that tend to be highly feminised (like education and healthcare services).
- **Education** - The largest gender pay gaps are for people with lower education on the one hand, and for those with postgraduate education on the other. These findings indicate the existence of a 'sticky floor' on the one hand, and a 'glass ceiling' on the other.
- **Position** - The highest gender pay gap rates are observed among senior executive officers.
- **Female employment** - A small gender pay gap is often connected with lower rates of female employment.

Several studies have been conducted on the national level to try and find out about the main explanations for the gender pay gap. These explanations are allegedly not related to discrimination in the strict legal sense, and thus reduce the 'unadjusted' pay gap to the 'corrected' pay gap.

²The publications of the European Network of Legal Experts in the field of Gender Equality can be found at: <http://ec.europa.eu/social/main.jsp?catId=641&langId=en>.

Recurring explanations for the gender pay gap include:

- **Part-time work** - Taking into account the gross salary per hour, a considerable pay gap can be observed between part-time and full-time employees. This is often caused by the fact that part-time jobs are more frequent in low-paid and highly feminised sectors.
 - **Temporary (fixed-term) work** - Part of the gender pay gap can also be explained by the use of fixed-term contracts (with low pay rates), which often seem to be entered into by (young) women.
 - **Horizontal or sectoral segregation of the labour market** - Women tend to work in sectors where their work is lower valued and lower paid than those dominated by men, like healthcare, education and public administration.
 - **Vertical or occupational segregation of the labour market** - Within the same sector or company, women predominate in lower valued and lower paid occupations, like administrative assistants, shop assistants or low-skilled or unskilled workers.
 - **Frequent career interruptions and the combination of a profession with family duties** - Shorter periods of accumulated professional experience of women, caused by more frequent interruptions of their career paths due to family-related leave, contribute to the gender pay gap.
- Question for discussion: Should pay differences between typically male dominated and typically female dominated sectors of industry be seen as mere explanations for the gender pay gap, or should they rather be discussed in terms of pay discrimination?

2. Tackling the gender pay gap

The national experts have reported about different ways in which the gender pay gap is being fought in their countries:

- **Legislative provisions** - Most countries have adopted constitutional provisions and/ or acts of parliament aimed at tackling the gender pay gap, often incited by EU legislation in the field.
- **Social partners** - The gender pay gap does not appear to be the social partners' priority target. Their (limited) interest in the issue is usually channelled into studies and awareness-raising programmes, rather than into concrete legal action.
- **Employers** - Some countries have adopted legislative instruments that specifically oblige/ encourage employers to address the issue of the gender pay gap in a more active way, e.g. the (compulsory) delivery of gender-specific pay statistics and (anonymous) reports showing salaries paid to both women and men, the use of public procurement procedures to force bidders to comply with the equal pay principle, and the adoption of equality plans or strategies.

- **Other** - National instruments to close the gender pay gap also include:
 - Instruments that may assist individuals to establish pay discrimination (e.g. measures on the reversal of the burden of proof, and measures regarding the national equality bodies, which often assist victims of discrimination in pursuing their complaints by providing advice, information).
 - Instruments (checklists, software programmes, web-based tools) that may assist in establishing gender-neutral job evaluation and pay systems.
 - Monitoring of collective labour agreements in order to detect discriminatory provisions.
 - (Limited) efforts of the labour inspectorate to monitor the implementation of the equal pay principle.
 - Special pay policies, e.g. the technique of earmarking an amount of money per year for pay rises targeted at low-paid 'female' branches.
- Statement for discussion: The delivery of anonymous reports showing salaries paid to both women and men should be made compulsory for every employer and the costs for producing such reports should be borne by the government.

3. Problems of enforcement of equal pay rules

National case law on equal pay issues is very scarce. Explanations for such scarcity are reportedly multiple:

- **Problematic scope of comparison** - Often the scope of comparison in pay discrimination claims (what is work of equal value?) is not laid down in statutory law. Also, most countries do not accept a hypothetical comparator and only allow comparisons within the same company or sector.
- **Lack of personal resources** - Costs for legal assistance and proceedings have a deterrent effect.
- **Limited compensation** - Compensation is usually composed of the difference with the salary of the comparator. There exist different views on which elements of pay are to be compensated and also the periods that can be covered by compensation vary substantially from country to country.
- **Time limits** - (Too) short time-limits may also substantially reduce the number of claims that eventually reach the competent courts.
- **Lack of trust in the judiciary** - Some experts have indicated lack of trust in the judiciary as one of the reasons for scarcity of case law.

In some countries procedures before national equality bodies - which are generally free of charge, straightforward and not formalistic - are a good alternative for a procedure in court.

- Statement for discussion: Employees who want to bring an equal pay claim before a court should always be able to do so at the expense of their employer.

4. Relationship between the gender pay gap and other parts of law

The national experts were asked to look for unexpected connections between the gender pay gap and other parts of law, e.g. labour law. Some of the most striking connections include:

- **Overtime work** - In some countries the extra remuneration for overtime work in sectors with high female presence is very low or even non-existent.
 - **Fixed-term contracts** - The 'creative' use of fixed-term contracts (with lower pay) often works to the disadvantage of female employees.
 - **Posting of workers** - The posting of workers, or contracting-out, has been mentioned as an important downward driver of female pay. Contractors undercut public sector rates either for all staff or for new recruits.
 - **Reconciliation of work and family life** - The high level of protection of labour law with regard to female workers (e.g. lengthy family-related leaves) may have a double negative impact on women's pay: (1) the social security benefits (if any) that go along with such leaves never reach the level of normal pay, and (2) the employee faces the risk of receiving lower pay/missing pay rises from the employer due to the taking up of (lengthy) family-related leaves.
- Statement for discussion: Measures obliging men to be more actively involved in household and childrearing tasks (e.g. compulsory paternity leave at childbirth) could help to reduce the gender pay gap, and enhance gender equality on the work floor more in general.

5. Conclusion

Although the answers provided to the *Network's* questionnaire have shown that the gender pay gap is not high on the agenda of national governments and social partners, a number of interesting instruments (legislative and other) have been uncovered. Good practices that are worth mentioning include compulsory equal pay plans to be drafted by large employers and the earmarking of an amount of money for pay rises targeted at low-paid 'female' branches.