



Enforcement of the Principle of Equal Pay for Equal Work or Work of Equal Value

Sanctions, Redress and Compensation

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The 2010 report on the gender pay gap

- Some conclusions

- Most countries (27 EU, 3 EEA, 3 candidates): substantive number of legislative provisions
- Still: progress in closing gender pay gap is very slow (2007: 17,6% for 27 EU)
- Gender pay gap is not high on national governments' and social partners' agendas
- Some measures (legislative and other) targeted at social partners and employers = good practices
- The enforcement of equal pay rules is problematic!

2016-2017: 2 new reports

- 2014: gender pay gap of 16,1% for 28 EU
- Legislation does not reach its aim?
- Commission asked EELN to prepare 2 new reports - focus on 2 specific aspects of gender pay gap
 - Pay transparency measures (A. Veldman)
 - Enforcement
 - ✓ Compensation
 - ✓ Reparation
 - ✓ Sanctions
 - ✓ Role of equality bodies

Action plan

- Nov. 7, 2016: started reading national reports
- Jan. 30, 2017: first draft to Commission
- Today, Nov. 25, 2016:
 - Work in progress!
 - Some first impressions, trends, ...
 - Based on the following reports: AT, BE, BG, CY, CZ, DE, DK, EE, EL, ES, FI, FR, HR, HU, IE, **IS**, **IT**, **LI**, **LT**, **LU**, **LV**
 - Your input is valuable!

General legislative framework

- Updating info from 2016 general report + 2010 gender pay gap report
 - Legislation has been put in place
 - ✓ Constitution (e.g. FI, EL, IT, no longer in HU?)
 - ✓ Acts of Parliament
 - General labour law (BG, CZ)
 - Anti-discrimination legislation (e.g. AT, BE, BG, CY, CZ, FI)
 - Collective agreement (e.g. BE)
 - ✓ Combinations of the above
 - Scope varies substantially
 - ✓ Not in detail; some examples (e.g. no definition of 'pay' in FI; ; 'labour market conditions' that can justify different pay in HU)

Enforcement of equal pay principle

- Art. 17 Recast Directive 'Defence of rights'
 - Judicial procedures for enforcement of obligations under this directive should be made available to all persons who consider themselves wronged
 - Associations, organisations or other legal entities, may engage, either on behalf or in support of complainant, with his/her approval, in any judicial and/or administrative procedure
- Implementation?
 - Specifically for equal pay (e.g. IE)
 - In other legislation: equality (e.g. CZ), labour law (e.g. HR), general procedural law (e.g. AT)

Judicial enforcement

- Which bodies?
 - Civil courts (e.g. AT, BG, FR)
 - Labour courts (e.g. BE, DE, ES)
 - Administrative courts (in some countries, re. civil servants) (e.g. AT, BE, DE, ES, FR)
 - Penal courts (e.g. BE, EL, FR) – if criminal offence
 - Constitutional court – if discrimination caused by law (e.g. BE)
 - Labour inspectorate (e.g. EL?)
 - Other, e.g.
 - ✓ Equality Board (DK)
 - ✓ Workplace Relations Commission (IE)

Judicial enforcement

- Who can bring claims to these bodies?
 - Individual claim by employee
 - Class actions? (e.g. HU, draft bill in FR, IT, LI)
 - Labour inspectorate (e.g. ES, IT)
 - Role of associations, trade unions, equality bodies, ombudsman?
 - ✓ Represent the victim (e.g. CY, DK, HR)
 - ✓ Intervene in proceedings (e.g. HR)
 - ✓ Assist the victim (e.g. DE, FI)
 - ✓ Bring claim on behalf of the victim: preceding approval (e.g. BE, EL, ES, IT), if no opposition afterwards (e.g. FR)

Judicial enforcement

- Which procedural rules apply?
 - Civil procedure
 - Labour court rules
 - Administrative procedure (in EL: inquisitorial)
- Representation?
 - Employee him/herself (quite often!)
 - Lawyer (e.g. FI, - EL: i.e. the only option)
 - Trade union (e.g. BE, DE)
 - NGO (e.g. HU)
- Expert witness and statistics?
 - Often accepted (more in-depth study required)
- Prescription periods?

Judicial enforcement

- Division of burden of proof
 - Art. 19 Recast Directive (shift of burden of proof): quite well implemented in national law
 - Crucial problem (signalled by several experts): find the necessary information to show presumption of discrimination
 - ✓ Which evidence is necessary to shift the burden (e.g. statistics?)
 - ✓ How much evidence is required to shift the burden of proof? (e.g. LV)
 - ✓ Confidentiality clauses ... (↔ IS: workers shall at all times be permitted to disclose their wage terms)

Judicial enforcement

- Access to judicial bodies
 - Often good in theory
 - But practical obstacles/ difficulties
 - ✓ High costs (e.g. AT, BE, EE, **IS**)
 - ✓ No pay transparency (e.g. DE, HR): confidentiality clauses, social climate, ...
 - ✓ Lengthy procedures (e.g. HU)
 - ✓ Poor knowledge of rights, victims (e.g. EE, **IT**) and lawyers (e.g. BG, **IT**)
 - ✓ Role of employees' representatives, who are often involved in pay structures (e.g. DE, ES)
 - ✓ Political reasons (e.g. EL, HU, **IT**)
 - ✓ **Fear of marginalization (troublemaker) (e.g. EL, IS)**
- Info about cases?
 - No data available/ very few cases

Non-judicial enforcement

- Internal procedures (within company)
 - Informal/ non-formalized/ not arranged by law (e.g. CZ, DE, FR, HU, IE)
 - External procedures
 - ✓ Labour inspectorate (e.g. EE, ES, FR)
 - ✓ Ombudsman (e.g. CY)
 - ✓ Trade unions (e.g. EE: they are weak and participate in the tripartite negotiation process)
- Role of ADR?
 - Not provided by law (e.g. BG, CY, DK, EE)
 - Labour courts: first try conciliation (e.g. DE, FR)
 - Mediation provided by law (e.g. BE, CZ, ES)

Non-judicial enforcement

- Legal obligation to report on equal pay?
 - Report by A. Veldman
 - Often: no legal obligation (e.g. BG, CY, CZ, ES)
 - Legal obligation (e.g. BE, DK, FI, FR)
 - ✓ Key question: who can consult reports? (e.g. FR: employees can consult directly)
 - ✓ What info do the reports contain?
 - ✓ Do all employers have to gather these data?
 - ✓ Sanctions if data not published?

Non-judicial enforcement

- Other efforts to prevent pay discrimination?
 - Surprisingly often: 'no' (DK, EL, ES, IE)
 - Quite common: Equal Pay Day (AT, CY, HR, **LI**)
 - Foreign funded projects (incl. EU) (e.g. BG, EE)
 - Actions towards social partners (e.g. BE, FI, FR)
- Figures re. non-judicial enforcement
 - Often: 'no'
 - Why?
 - ✓ Settlement is most often confidential

Remedies in judicial enforcement

- Art. 18 Recast Directive
 - Compensation and reparation
 - Specific implementation re. equal pay (e.g. AT, FR, IE)
 - More often: generally implemented in legislation on equality/ non-discrimination (e.g. CZ, DE, DK, ES, FI)
 - Other legislation, in particular labour law (e.g. EE, HR, HU)

Remedies in judicial enforcement

- Typical remedies
 - Contested clause is null and void (e.g. BE, FR)
 - Monetary compensation
 - ✓ Levelling up (e.g. BG, DE, DK, EL)
 - ✓ Wage difference in the past – crucial question: how far can one go back (e.g. HU and IE: max. 3 years)?
 - ✓ Has a maximum amount been set?
 - ✓ Intent/ (gross) negligence required?
 - Non-material damage (e.g. HR)
- Are judicial bodies generous?
 - Generally: pretty modest compensation (e.g. BG, CZ, EE, HU) – only backpay
 - Interesting: IE expert: equal pay is not a discretionary remedy!

Remedies in non-judicial enforcement

- No data available (e.g. BG, BE, ES)
- Often: confidentiality clauses (e.g. DE)
- In case of ADR
 - Very little info available
 - Typical remedies: financial compensation (e.g. FR, CZ, HU), public apology (e.g. CZ)
- Collection of data?
 - Most often: no info available
 - Ombudsman collects data (e.g. CY, EL)

Victimization

■ Art. 24 Recast Directive

- Protection of employees who lodge a complaint/ aim at enforcing compliance with equal pay principle
 - ✓ HR: pending bill: broaden scope to also include persons who became aware of the procedure
- Implementation through very specific legislation (equal pay): in many countries (e.g. AT, BE, BG, CZ, DE, EL, FI, FR, HR)
- Implementation in more general (equal treatment) legislation (e.g. EE, HU)
- No implementation (e.g. BG)
- Typical remedies: financial compensation (e.g. BE, DK) – dismissal = void (e.g. DK, ES)

Penalties

- Art. 25 Recast Directive
- Specific implementation with regard to equal pay?
 - Yes: in criminal code (e.g. FI), equality legislation (e.g. IE)
 - No: in labour code (e.g. FR), equality legislation (e.g. HR, HU)
 - Intent or severe negligence required (e.g. CY)
- Type of penalties?
 - Criminal (e.g. BE) or administrative (e.g. CZ)
 - Fine and imprisonment (e.g. BE, FI)
 - Publication of judgment (e.g. BE, FR, HR, HU)
 - ✓ With or without the parties' names?

Equality bodies

- Art. 20 Recast Directive
- Competences
 - Providing independent assistance to victims
 - Conducting independent surveys
 - Publish reports/ make recommendations
 - Exchange info with corresponding Eur. bodies
- Many national bodies: also competent for other discrimination grounds!
 - Just sex/gender: e.g. BE, HR
 - Recent evolution seems to be towards bodies that are competent for more grounds than just sex/ gender (positive or not?)

Equality bodies

- Role in judicial enforcement?
 - Often: no (but their studies, opinions, could be used in court) (e.g. AT)
 - Assisting victims in bringing claim (e.g. BG, FI, ES)
 - **Bringing the claim (e.g. IS)**
 - 'Amicus curiae' - may be heard (e.g. FR, IE)
 - Intervene in order to claim damages (e.g. BE)
 - Even: deciding on individual complaints (e.g. DK)

Equality bodies

- Role in non-judicial enforcement?
 - Most often: yes
 - No: e.g. DK, ES
 - Awareness raising campaigns (e.g. BE, BG, EL, HR, IE)
 - Publishing reports, opinions (e.g. CZ, EL, DE)
 - Training lawyers (e.g. BG, EE)
 - Out-of-court assistance (e.g. HR)
 - Practice ADR (e.g. HU)

Equality bodies

- Remedies (compensation, reparation) in judicial and non-judicial enforcement
 - Compensation (e.g. DK, EE: also for non-material damage, FR)
- Penalty powers?
 - Sometimes yes: e.g. BG, CY, IS
- Do equality bodies gather data?
 - Yes: e.g. BE, CY, DE, EL, FI, FR
 - ✓ But: sometimes information is very general!
 - No: e.g. AT, BG, CZ, ES, HU

General thoughts

- Influence of political situation (e.g. HU, EL)
- Position of the social partners (many experts!) – interesting case from IS on value of collective agreements
- Expert IE: no consideration of equal pay for part-time workers and workers on temporary contracts

Good practices

- FR: guide reflecting the work of a multidisciplinary group of experts to promote the principle of equal pay for work of equal value in collective agreements and to propose a methodology to social partners to ensure its effectiveness
- More to come ...

Thank you for your attention!