

Equal Pay for Men and Women in Europe Anno 2011: The Gender Pay Gap on the Retreat?

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Introduction

Equal pay for men and women for work of equal value has been a concern of the European Union (EU) from its very beginning. The principle was included in the original EEC Treaty, and is currently embodied in Article 157 of the Treaty on the Functioning of the European Union (TFEU).²

Throughout the previous decades, the principle has been brought into practice by directives³ and also the Court of Justice's case law has boosted its importance. In particular, the ECJ's findings in the 1970s that the Article is directly effective in both vertical (private person versus public authority) and horizontal (private person versus private person) relations⁴ proved to be a powerful instrument for enforcing the principle in national courts, doubtless also with considerable preventive effects.

At the national level, the principle of equal pay is, in general, also 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. Provisional figures for 2008 and 2009 show gender pay gaps of 17.5 % and 17.1 % respectively.⁵ Progress in closing the gender pay gap appears to be very slow, and in a number of countries the gap is

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² Article 157 TFEU (ex Article 141 TEC) states:

‘1. Each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied.

2. For the purpose of this Article, ‘pay’ means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his employment, from his employer.

Equal pay without discrimination based on sex means:

(a) that pay for the same work at piece rates shall be calculated on the basis of the same unit of measurement;

(b) that pay for work at time rates shall be the same for the same job.

3. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, and after consulting the Economic and Social Committee, shall adopt measures to ensure the application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, including the principle of equal pay for equal work or work of equal value.

4. With a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the underrepresented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers.’

³ These directives include Directive 75/117/EEC on the approximation of the laws of the Member States, relating to the application of the principle of equal pay for men and women, OJ L 45, of 19 February 1975, p. 19, recently replaced by 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), OJ L 204, of 26 July 2006, p. 23.

⁴ Case 43/75 *Defrenne II* [1976] ECR 455.

⁵ These figures do not yet include the values of all Member States.

even widening once again.⁶ 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.

This article, which is based on a recent study of the gender pay gap in Europe,⁷ intends to highlight some of the characteristics of the gender pay gap, to indicate a number of explanations for its high levels and, finally, to point out a few traditional and less traditional ways to combat the gender pay gap.

*1. A snapshot of the gender pay gap in Europe*⁸

1.1. The bare figures

The EU (27) provisional value in 2009 being 17.1 %, the differences among the countries studied are large, varying from a reported gender pay gap of around 10 % in, e.g., Poland and Portugal, to a pay gap of around 26 % in, e.g., the Czech Republic.⁹ It is interesting to note here, however, that low national gender pay gap levels do not necessarily mirror a good position of women workers in the national labour market concerned. In Turkey, for example, the negative gender pay gap of – 2.2 % in 2006¹⁰ could be explained by the fact that female participation in the labour market is still extremely low in this country. Similar situations are reported in, e.g., the FYR of Macedonia, Malta and Poland. These countries tend to focus on policies to encourage women to enter the labour market, rather than on policies to address the gender pay gap.

A number of countries (including Cyprus, Romania and Spain) show a gradual downward trend in the gender pay gap over the last few years. In Cyprus and Romania, such a trend has allegedly been triggered by the introduction of national minimum wages or the increase of such minimum wages, which is said to be to the advantage of occupational categories in which women are overrepresented.

However, as already indicated above, in some countries the gender pay gap is again widening. This is the case in, e.g., Poland and Portugal. Part of the explanation could be found in the introduction by Eurostat of a uniform methodology to calculate the gender pay gap (see below). It could be interesting in this respect to look into the relationship between the economic crisis and the recent widening of the gap in a number of countries.

1.2. Putting the bare figures into perspective

It must be stressed that comparisons between countries need to be made with a great deal of caution. After all, it is not always entirely clear whether the data provided by the different

⁶ See Eurostat table of the gender pay gap in unadjusted form, available on <http://epp.eurostat.ec.europa.eu/tgm/table.do?tab=table&init=1&plugin=1&language=en&pcode=tsiem040>, accessed 26 April 2011 (hereinafter 'Eurostat table').

⁷ P. Foubert, *The gender pay gap in Europe from a legal perspective*, Luxembourg, Publications Office of the European Union, 2010, 39 pp., available online on <http://ec.europa.eu/social/main.jsp?catId=738&langId=en&pubId=578&type=2&furtherPubs=no>, accessed 22 May 2011.

⁸ In this article 'Europe' refers to: the 27 EU Member States, the 3 countries of the European Economic Area (EEA): Iceland, Liechtenstein and Norway, and the 3 candidate countries of Croatia, the FYR of Macedonia and Turkey.

⁹ See Eurostat table.

¹⁰ See Eurostat table.

countries have been collected and processed in a comparable way. Also, the time period covered by the data may differ among the countries and different pay concepts are used in the discussion of the gender pay gap. For example, when the income per worked hour is measured, the gender pay gap is considerably lower than when the income per paid hour is used. The explanation for this difference is that women, more often than men, receive pay for more hours during which they do not perform work, e.g. due to illness, care functions, etc.

In 2007¹¹ Eurostat improved the methodology used to calculate the gender pay gap in the EU. Instead of a mix of various national sources, it is now an EU harmonised source (called the 'Structure of Earnings Survey') which is used. Notwithstanding the fact that this is certainly a good development, account should be taken of 'transition problems'. In some countries, part of the increase/decrease in the gender pay gap since 2007 may not correspond to a real increase/decrease, but may merely be the result of the change in methodology.

Another element that should be highlighted is that, at the EU level, the 'gender pay gap' is defined as the relative difference in the average gross hourly earnings of women and men within the economy as a whole.¹² This indicator has been defined as 'unadjusted', as it has not been adjusted according to individual characteristics that may explain part of the earnings difference. Such individual characteristics relate, among other things, to traditions in the education and career choices of men and women; to a gender imbalance in the sharing of family responsibilities; to the fact that men and women still tend to work in different sectors; to part-time work, which is often highly feminised, etc. Very often these characteristics are seen as the result of the free choice of individuals.

The above implies that the 'unadjusted' gender pay gap – also referred to as the 'absolute' or 'raw' gender pay gap - comprises both potential pay discrimination and pay discrepancies based on factors that have nothing to do with discrimination as such, but which may at least explain part of the difference.

The 'corrected' or 'net' pay gap, by contrast, corresponds to the portion of the pay gap that cannot be explained, and that, for an important part, is assumingly caused by pay discrimination.

1.3. The main characteristics of the gender pay gap

In nearly all European countries the gender pay gap (whether high or low) features a number of recurrent characteristics.

1.3.1. Lower gender pay gap in the public sector

The gender pay gap is usually considerably lower in the public sector, as compared to the private sector. Iceland, Hungary and Sweden were the only countries to mention a gender pay gap that is higher in the public than in the private sector. In Hungary this phenomenon could allegedly be related to limited opportunities in the public sector to resort to non-reported labour and non-reported payments, the use of which is said to be widespread in the Hungarian

¹¹ Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions, entitled 'Tackling the pay gap between women and men', COM (2007) 424 final.

¹² See the website of the European Commission on <http://ec.europa.eu/social/main.jsp?catId=681&langId=en>, accessed 4 April 2011. Note that some researchers consider the comparison of a median of wages to be more appropriate. In probability theory and statistics, a median is described as the numeric value separating the higher half of a sample from the lower half.

private sector. Because of this habit, reported salaries in the private sector would be kept at a minimum – non-discriminatory – level (the ‘supplement’ being the ‘real’ pay, frequently a multiple of the formal, reported wage). As a consequence, the gender pay gap is not visible here. In the public sector, by contrast, the operation is more formalised (bank transfers, public visibility) and the gender pay gap is consequently more visible.

1.3.2. Impact of age

Generally speaking, the lowest levels of the gender pay gap are found in the 20-29 age group, at the beginning of both men’s and women’s professional careers. This is the time when both men and women tend to be professionally active (high employment rates for both men and women) and work full time.

The gender pay gap is usually highest in the 30-49 age bracket, when most women have children and tend to either leave their jobs, take time off in this respect (periods of leave and part-time work), or do not aspire to seek jobs with more responsibilities (and higher pay). Men of the same age continue their careers at the same pace as before and see their pay grow. Quite surprisingly, Germany, Belgium and Greece reported the highest levels of the gender pay gap in the higher age brackets (55+ and 60+). Explanatory factors advanced include: low levels of female employment in this age bracket and lower levels of education and vocational training of those women who are professionally active.

1.3.3. Large differences between sectors

Gender pay gaps are very high in the well-paid sectors of finance and insurance, and also in sectors that tend to be highly feminised (like education and healthcare services), although in the latter sectors pay is reported to be low in general.

Quite the opposite happens in sectors like construction and building, and mining and quarrying. In these sectors the gender pay gap appears to be very low, for the obvious reason that these sectors employ very few women. Moreover, those women tend to fill clerical positions rather than physical jobs. That could explain why in some countries (e.g. Croatia, Hungary and Slovenia) women are earning even more than men in these sectors!

1.3.4. Impact of education and position

The largest gender pay gaps are for people with lower education on the one hand, and for those with postgraduate education on the other. The smallest differences are generally recorded for people with upper secondary education and for those with a technical education. Also the position of the workers seems to play a role. The highest gender pay gap rates are observed among senior executive officers. These are typically positions with salaries that reflect the employee’s ‘negotiating capacities’, capacities that are allegedly male rather than female.

1.4. Main explanations for the gender pay gap

Several studies have been conducted on the national level to try to find out the main reasons for the gender pay gap. Such explanations reduce the ‘unadjusted’ gender pay gap to the ‘corrected’ gender pay gap. What is left is allegedly partly due to discrimination.

Below is an overview of recurrent explanations for the gender pay gap.

1.2.1. Part-time work and temporary (fixed-term) work

Taking into account the gross salary per hour, a considerable pay gap can be observed between part-time and full-time employees. Such a pay gap, however, is not necessarily the result of directly discriminatory wages, but often a consequence of the fact that part-time jobs are more frequent in low-paid and highly feminised sectors, like e.g. the healthcare and cleaning sectors. Among part-time workers, the gender pay gap is reportedly smaller than when part-timers are compared to full-timers.

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.

1.2.2. Frequent career interruptions and a combination of a profession with family duties

Shorter periods of accumulated professional experience by women, caused by more frequent interruptions to their career paths due to family-related leave, also contribute to the gender pay gap. The number of children would clearly increase the gender pay gap in each sector, occupation and level. The financial disadvantage women suffer is double. First, during such interruption or leave a woman feels the direct impact as she receives no wages, a lower wage, or a (low) social security benefit during this period. Second, her choice may also produce an indirect consequence: she may be excluded from benefits related to employment, for instance, benefits related to the lack of absence despite justification, or be disadvantaged regarding entitlement to social security benefits.¹³

1.2.3. Horizontal/sectoral and vertical/occupational segregation of the labour market

On the one hand, women and men tend to predominate in different sectors (i.e. horizontal or sectoral segregation). Women often work in sectors where their work is valued lower and is consequently lower paid than those dominated by men. Recurrent examples are the healthcare, education and public administration sectors.

On the other hand, within the same sector or company, women predominate in lower valued and lower paid occupations (i.e. vertical or occupational segregation, to be connected with the ‘glass ceiling’). Women are frequently employed as administrative assistants, shop assistants or low-skilled or unskilled workers. Many women work in low-paying occupations, for example, cleaning and care work. Women are underrepresented in managerial and senior positions.

2. Tackling the gender pay gap

Many European countries have developed measures to fight the gender pay gap. For the time being, however, those ‘traditional’ measures do not seem to have substantially reduced the gender pay gap. Therefore, it is important to think outside the box and to try and find more ‘novel’ ways to combat the gender pay gap.

2.1. The traditional way to combat the gender pay gap: equal pay legislation

¹³ See e.g. Case C-537/07 *Gómez Limón Sánchez Camacho* [2009] ECR I-6525.

2.1.1. Legislative provisions

Most European countries have adopted legislative provisions (in constitutions, acts of parliament, or other legislative instruments) aimed at tackling the gender pay gap, often because of the requirements of EU legislation in the field.

The social partners must comply with those legislative provisions. That is probably the reason why most collective agreements today do not contain provisions which are *directly* discriminatory. However, many collective labour agreements continue to contain provisions with an *indirect* discriminatory impact on female employees' pay. Such indirectly discriminatory provisions include job evaluation and pay systems that are neutral on their face value, but appear to structurally disadvantage female workers. Some countries (e.g. Austria, Malta and Portugal) have established a monitoring system, implying that collective labour agreements are scrutinised - systematically or on an *ad hoc* basis - to detect discriminatory provisions. Such examinations can be conducted by a governmental body, or by research institutions, e.g. universities.

Most countries do not have legal measures in place that induce or oblige the social partners to actively address the gender pay gap in collective agreements. In a very limited number of countries the social partners are encouraged by law to adopt measures to tackle (pay) discrimination, but such measures are found to be very general and vague (e.g. Romania). A notable exception is the French *Génisson* law of 9 May 2001, which has introduced an obligation for the social partners to negotiate on occupational gender equality.¹⁴

Like the social partners, employers are also obliged to comply with the legislative provisions aimed at tackling the gender pay gap. This obligation serves as an indirect way to realise equal pay for men and women in the workplace. After all, the threat of legal action by individuals and the prospect of significant periods of back pay in the event that they succeed may incite employers to scrutinise their pay policies on their own initiative.

Apart from this, many countries have also adopted legislative instruments that specifically oblige/encourage employers to address the issue of the gender pay gap in a more active way. Such instruments include the (compulsory) delivery of gender-specific pay statistics. In Denmark, for example, employers can obtain such gender-specific wage statistics free of charge (i.e. at the expense of the Ministry of Employment) if they choose to use the statistics produced by the Statistical Bureau. If, however, employers prefer to use a different statistical method, they will have to do so at their own expense.

Another example is the compulsory delivery by employers of an (anonymous) report showing salaries paid to both women and men, but often also enumerating other elements like the placement of women and men in different jobs, an analysis of the job classification system, and pay and pay differentials of women's and men's jobs. Such reports may be examined by a monitoring body, and must sometimes be published and/or delivered to workers' representatives as well. In, e.g., Austria, Finland, France, Italy, Norway and Sweden, such reporting systems have already been introduced.

Sometimes large employers¹⁵ are obliged by law to adopt policy instruments that define how gender equality, including pay equality, will be achieved in the company. Such instruments are known by different names like 'pay mapping' (Finland), 'equal opportunity plans'

¹⁴ See S. Laulom, 'Gender Pay Gap in France', *European Gender Equality Law Review* 1/2009 p. 8.

¹⁵ It depends on national legislation which employers are to be considered as a 'large employer'.

(Hungary), ‘gender equality programmes’ (Iceland), ‘equality plans’ (Spain) or ‘action plans’ (Sweden).

2.1.2. Problems with the enforcement of legislative provisions

Notwithstanding the fact that numerous equal pay rules have been adopted, only very few (or even no) claims of gender pay discrimination seem to make their way up to the competent national (regular or administrative) courts. Multiple explanations for such a scarcity in national case law are reported.

Often the scope of comparison in pay discrimination claims (what is work of equal value?) is not laid down in statutory law and, therefore, is problematic. Most countries, for example, do not accept a hypothetical comparator and only allow comparisons within the same company.¹⁶ Finding a real-life comparator, as opposed to the mere hypothetical comparator, proves to be particularly difficult in highly segregated occupations, where fellow workers of the opposite sex are rare or even non-existent. In **France**, however, the *Cour de Cassation* stated in 2009 that the existence of discrimination does not necessarily imply a comparison with other workers,¹⁷ thus admitting a very broad scope of comparison, possibly also with a hypothetical comparator.

The costs of legal assistance and proceedings often have a deterrent effect, in particular given the often limited compensation that can be obtained. In some countries, pay discrimination claims can be brought on behalf of the employee by trade unions, ombudspersons, national equality bodies or other organisations (e.g. non-profit entities or NGOs). Costs are often borne by these organisations.

Sometimes claims can be brought on behalf of a group of victims. However, notwithstanding the importance of such class action suits, they are not yet available in all countries and sometimes national legal systems (e.g. Liechtenstein) provide that, in case of a class action, individuals can only be financially compensated when they each start separate and individual proceedings to this end.

Time limits (prescription periods) may also substantially reduce the number of claims that eventually reach the competent courts. Prescription periods are extremely diverse across Europe. In Latvia, for example, the general two-year time limit laid down in the Labour Code is not applicable to discrimination cases. As regards discrimination, applicants must bring a claim within three months from the violation of the principle of non-discrimination (equal pay) or from the moment the applicant learned or should have learned about such discrimination.¹⁸ It has been argued on many occasions that such a brief time limit does not correspond to the EU law principles of equality and effectiveness.

Finally, in some countries also the lack of trust in the judiciary could be indicated as one of the reasons why few gender pay discrimination cases reach the courts. Such lack of trust includes a suspicion of corruption within some courts, but also the belief that the courts

¹⁶ In doing so, the national courts follow the ECJ, which also tends to restrict comparisons to within the company, the idea being that only in that case can the differences in pay be attributed to one single source (i.e. the employing company). Cases C-320/00 *Lawrence* [2002] ECR I-7325 and C-256/01 *Allonby* [2004] ECR I-873.

¹⁷ *Cass. Soc.*, 10 November 2009, n° 07-42849.

¹⁸ Articles 34(1), 48(2), 60(3), 95(2) of the Labour Code (*Darba likums*).

simply do not have the capacity to effectively deal with complex cases like pay discrimination on the basis of sex.

Procedures before national equality bodies are in some countries a good alternative to bringing the case before the ordinary courts. Those procedures are generally free of charge and bringing the claim is usually straightforward and not formalistic. Sometimes the claim can even be brought on behalf of the employee, e.g. by the ombudsperson. Moreover, the national equality bodies have substantial know-how in discrimination matters, which makes them particularly well-equipped institutions to deal with cases of pay discrimination on the basis of sex. In Norway, for example, the procedure before the national equality body is allegedly so efficient that nearly no cases end up before the courts.

2.2. Innovative ways to combat the gender pay gap

As already mentioned above, combating the gender pay gap may require some thinking outside the box. In this respect it seems important to go beyond those provisions directly connected to equal pay for equal work for men and women, and also to investigate other parts of national (labour) law, so as to discover their possible influence on the gender pay gap.

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

In the first place, there is a link with legal rules on part-time work.

In many countries the equal treatment of part-time and full-time workers is guaranteed by law, which is in full accordance with the principle of non-discrimination between full-time and part-time employees as laid down in Directive 97/81/EC (part-time work).¹⁹ Quite contrary to this, there still exist legislative measures regarding part-time employees that influence the gender pay gap in an indirect way. In Belgium, for example, the courts' views have recently clashed with regard to the question whether the notice period and payment in lieu of notice upon the termination of a part-time employment contract should be calculated on the basis of the full-time or the part-time remuneration. Generally, the Belgian courts have refused to see the gender dimension of this issue and its obvious impact on the gender pay gap.

Secondly, legislation on overtime work also seems to have an impact on the gender pay gap.

In some countries, extra remuneration for overtime work in sectors with a high female presence is very low (e.g. Bulgaria) or even non-existent (e.g. Croatia).

On the other hand, making overtime easier and cheaper for employers entails the risk of negatively impacting those workers - mostly women - for whom the performance of overtime work clashes with, e.g., family duties. Their pay will not be increased with overtime pay and, as a consequence, the gender pay gap will increase.

A similar negative impact on the gender pay gap can be expected when certain groups of women (e.g. pregnant women, women who are breastfeeding, women raising young children, etc.) are prohibited by law from working overtime without their consent, as is the case, for example, in Lithuania.

¹⁹ Clause 4 of Directive 97/81/EC concerning the framework agreement on part-time work concluded by UNICE, CEEP and ETUC, OJ L 14, of 20 January 1998, p. 9.

In the third place, there also seems to be a link between the gender pay gap and legal rules on the use of fixed-term contracts. Where Directive 1999/70/EC (fixed-term work) intended to eradicate abuse arising from the use of successive fixed-term employment contracts or relationships,²⁰ we see that in some countries (e.g. Italy) a more flexible use of fixed-term contracts was allowed in order to improve female labour market participation. However, allegedly no positive effect from this on the gender pay gap could be recorded, as we are here talking about precarious and low-paid jobs. Also, fixed-term contract workers are often disadvantaged as to their pay: e.g., their seniority/length of service is not taken into account for the calculation of their pay, and they cannot work overtime. This is the case in Greece.

Also the legal possibility to contract-out work from the public to the private sector has been mentioned as an important downward driver of female pay. Private contractors undercut public sector rates either for all staff or for new recruits. Particularly for the United Kingdom, this has been mentioned as a problem. In the *Allonby* case²¹ the Court of Justice could not provide a solution for this type of problem as the (male) employee and the (female) posted worker did not work for the same employer.

Finally, also the high level of protection of labour law with regard to female workers is said to have a negative impact on women's pay. In particular, lengthy family-related periods of leave given primarily or entirely to women – although to be welcomed at first sight – eventually work to the disadvantage of female employees and have a negative impact on the gender pay gap (see above).

2.2.2. Innovative ways to combat the gender pay gap: a few best practices

It is remarkable that some countries have started to discover that novel ways to combat the gender pay gap can be based on the idea that explanations for the - unadjusted - gender pay gap (see above) should be revisited in order to find out whether the legislation regarding these explanations still reflects discriminatory practices and ideas.

For example, since one of the explanations for the unadjusted pay gap is that it is caused by the low wages that are being paid in highly feminised branches of the public sector, the Finnish Government has taken the initiative to earmark an amount of money as an 'equality pot' and this has meant that municipal governments could fund pay rises in low-paid highly educated 'female' sectors; this seems to be a very good practice that could inspire other countries.

Also, given the fact that women tend to interrupt their careers frequently and often combine their profession with family duties, it has been suggested that policies to support continuity in women's employment could help to reduce the gender pay gap. In this respect, reference should be made to employment policies to reconcile family and working life, like the establishment of pre-school classes and childcare facilities at the workplace. It has also been argued that the extension of statutory maternity leave is not necessarily a good idea. It is said to reinforce traditional gender roles and to counteract continuity in women's employment. Such opposition to the extension of statutory maternity leave is often combined with a call for measures that oblige men to be more actively involved in household and child-rearing tasks.

²⁰ Directive 1999/70/EC concerning the framework agreement on fixed-term work concluded by *ETUC, UNICE* and *CEEP*, OJ L 175, of 10 July 1999, p. 43.

²¹ Case C-256/01 *Allonby* [2004] ECR I-873.

This would be another way to fight the gender stereotype that involves the reconciliation of family and work life, and would eventually also have a positive impact on the gender pay gap.

3. Conclusion

From the above it has become clear that research with regard to the discovery of unexpected links between the gender pay gap and a wide variety of legal provisions should be encouraged. As direct instances of pay discrimination have become rather exceptional in many parts of Europe, the focus for legal action by both the EU and the Member States should be on the indirect instances of discrimination, including those that are unexpected and unattended.