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# The Gender Pay Gap in Europe from a Legal Perspective (including 33 country reports)

EUROPEAN NETWORK OF LEGAL EXPERTS IN THE FIELD OF GENDER EQUALITY



# **The Gender Pay Gap in Europe from a Legal Perspective (including 33 country reports)**

EUROPEAN NETWORK OF LEGAL EXPERTS IN THE FIELD OF GENDER EQUALITY

Petra Foubert, Susanne Burri and Ann Numhauser-Henning

European Commission  
Directorate-General for Employment, Social Affairs and Equal Opportunities  
Unit EMPL/G/2  
Theme  
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## Foreword

The European Union from its very beginning has pursued the goal of equal pay for women and men for work of equal value. However, notwithstanding all efforts to achieve the goal of equal pay, statistics show a persisting gender pay gap, of 17.6 % on average for the 27 EU Member States in 2008. Thanks to the European legislation on equal pay, direct discrimination between women and men as regards pay is no longer a major problem in the EU. The causes of the gender pay gap are much more complex and include indirect discrimination, greater difficulties for women in balancing work and private life, segregation of the labour market, and stereotypes that influence the evaluation and classification of occupations or the choice of education undertaken by men and women. 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. Taking into account the fact that the European Union has been taking action in the field for more than 50 years, this is a disappointing result.

We must significantly improve the situation as regards the gender pay gap. This complex phenomenon requires a multifaceted approach to address various kinds of inequalities between men and women in the labour market. The Commission will continue to use all available instruments, both legislative and non-legislative, to tackle the gender pay gap in the European Union. However, the gender pay gap can only be effectively tackled by acting on all levels, involving all interested parties, in particular Member States and social partners, and focusing on all the factors that cause it.

This report by the Commission's *European Network of Legal Experts in the Field of Gender Equality* analyses national policies, initiatives and legal instruments aimed at tackling the gender pay gap in 33 states, including the current 27 EU Member States, the EEA countries of Iceland, Liechtenstein and Norway, and the candidate countries of Croatia, the FYR of Macedonia and Turkey. It points to a number of instruments, legislative and otherwise, with a good potential for combating the gender pay gap. In the EU's and Member States' common endeavour to reduce the gender pay gap it is important that we learn from the positive actions already implemented by some Member States.

In the Women's Charter adopted in March 2010, the European Commission has reaffirmed its commitment to promote equal pay for equal work and work of equal value by working with Member States to reduce significantly the gender pay gap over the next five years. In its Strategy for gender equality the Commission will provide a coordinated framework for action across all EU policies to implement gender equality in general and equal pay in particular.



**Viviane Reding**

Vice-President of the European Commission  
Justice, Fundamental Rights and Citizenship



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## Part I

# The Gender Pay Gap in Europe from a Legal Perspective

*Petra Foubert\**

### INTRODUCTION

#### The gender pay gap: a continuing source of sorrow

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 laid down in the original EEC Treaty of 1957, in Article 119. In 1997, when the founding Treaties were renumbered the first time, Article 119 EEC Treaty became Article 141 EC Treaty. Currently, the principle of equal pay between men and women is embodied in Article 157 of the Treaty on the Functioning of the European Union (TFEU), which entered into force on 1 December 2009.<sup>1</sup>

An important impetus for bringing this principle into practice was provided by Directive 75/117/EEC (equal pay)<sup>2</sup> – recently replaced by Directive 2006/54/EC (recast)<sup>3</sup> – and by the case law of the European Court of Justice (ECJ).<sup>4</sup> In particular, the ECJ's findings in the 1970s that Article 119 is directly effective in both vertical (private person versus public authority) and horizontal (private person versus private person) relations<sup>5</sup> proved to be a powerful instrument for enforcing this 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**.<sup>6</sup> The three candidate countries of **Croatia, the FYR of Macedonia and Turkey** have also adapted their legislation to EU standards.

Still, 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 in general. For **Belgium** (from 9.5 % to 9.0 % in 2007), **Finland** (from 21.3 % to 20.0 %), **Spain** (from 20.2 % to 17.1 %), **Slovakia** (from 27.7 % to 20.9 %), Eurostat data covering the years 2002, 2006, 2007 and 2008 (provisional and incomplete) show a light, though steady reduction of the gap. In

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<sup>1</sup> The Treaty of Lisbon, signed in Lisbon on 13 December 2007, amended the European Union's two core treaties, the Treaty on European Union (EU Treaty) and the Treaty establishing the European Community (EC Treaty). The latter has been renamed the Treaty on the Functioning of the European Union (TFEU).

<sup>2</sup> 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.

<sup>3</sup> 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.

<sup>4</sup> The Treaty of Lisbon has made the ECJ part of the 'Court of Justice of the European Union'.

<sup>5</sup> Case 43/75 *Defrenne II* [1976] ECR 455.

<sup>6</sup> The EEA Agreement, which entered into force on 1 January 1994, enables Iceland, Liechtenstein and Norway to enjoy the benefits of the EU's single market without the full privileges and responsibilities of EU membership.

**Austria**, the gender pay gap is stable, at the high percentage of 25.5 %. In **Bulgaria, Cyprus, Denmark, Greece, Hungary, Ireland, Latvia, Malta, Romania, Sweden** and **the United Kingdom**, however, the trend is not clear. Most of these countries feature average to high gender pay gaps, except for Malta (varying between 2.4 % and 9.2 %) Finally, and contrary to what one would expect, in **the Czech Republic, Germany, Estonia, France, Italy, Lithuania, Luxembourg, the Netherlands, Poland, Portugal** and **Slovenia** the gender pay gap is even widening again. Most of these countries score average to high for the gender pay gap, with **Italy** (from 4.4 % to 4.9 %), **Luxembourg** (from 10.7 % to 12.4 %), **Poland** (from 7.5 % to 9.8 %), **Portugal** (from 8.4 % to 9.2 %) and **Slovenia** (from 6.1 % to 8.5 %) as notable exceptions.<sup>7</sup>

With regard to the fact that the European Union has been taking action for more than 50 years to defend the principle of equal pay for equal work or work of equal value between men and women, this is a disappointing result. This explains why the gender pay gap has encouraged several initiatives by the European Commission in the last few years and continues to be one of the Commission's great concerns in the area of gender equality.

Equal pay was a priority mentioned in the 'Roadmap for equality between women and men 2006-2010'.<sup>8</sup> In 2007 the European Commission adopted a Communication examining the causes of the gender pay gap and putting forward a series of actions to tackle the problem, including, for example, the increase of care services for children and elderly people and the elimination of gender stereotypes in education, training and culture.<sup>9</sup>

In 2007 the European Commission's *Network of legal experts in the fields of employment, social affairs and equality between men and women* ('Network')<sup>10</sup> published a report on the 'Legal Aspects of the Gender Pay Gap'.<sup>11</sup> The aim of this report was not so much to provide a detailed overview of the national equal pay legislation, but rather to help reduce the often blurred discussion about the gender pay gap to its essence and to reflect on the question of how law and legal instruments may help to close the gap.

Given the persistence – and rise in many countries – of the gender pay gap since 2007, the European Commission felt the need for a new report, to update the information provided in the 2007 report, but also to further develop it in two specific directions:

- In the first place, the Commission was interested in obtaining better data on the national policies, initiatives and legal instruments aimed at tackling the gender pay gap in practice.

<sup>7</sup> See Eurostat table for 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 29 April 2010.

<sup>8</sup> Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions, entitled 'Roadmap for equality between women and men 2006-2010', COM (2006) 92 final.

<sup>9</sup> 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.

<sup>10</sup> For more information on the Network, see the European Commission's website on <http://ec.europa.eu/social/main.jsp?catId=748&langId=en>, accessed 3 May 2010.

<sup>11</sup> This report is available on <http://ec.europa.eu/social/main.jsp?catId=641&langId=en>, accessed 29 April 2010.

- In the second place, the Commission envisaged an exploration of the potential links between equal pay and other national labour law provisions.

The *Network* sent out detailed questionnaires to legal experts in 33 states, including the current 27 EU Member States, the EEA countries of **Iceland**, **Liechtenstein** and **Norway**, and finally **Croatia**, **the FYR of Macedonia** and **Turkey** as candidate countries. The country reports that resulted from this questionnaire round are the basis for the current overview and can be consulted on the website of the *Network*, where they have been attached *in extenso* to the electronic publication of this overview.<sup>12</sup>

The 33 national reports clearly show that in many countries the gender pay gap is on the political agenda. Consensus is growing that action ought to be taken. Still, there is disagreement as to how to tackle the problem. In some countries, however, the gender pay gap is still not an issue that is given great importance or priority, in terms of urgency, by the Government. This is the case for example in **the FYR of Macedonia**, **Malta** and **Turkey**, where female participation in the labour market is still very low. These countries focus on policies to encourage women to enter the labour market, rather than on policies to address the gender pay gap.

Many of the findings that can be read in the national reports are also confirmed in a very recent (2010) publication of Eurofound,<sup>13</sup> entitled ‘Addressing the Gender Pay Gap: Government and Social Partners’ Actions’.<sup>14</sup>

### **The concept of the gender pay gap**

The gender pay gap is a rather loose concept, which in some countries has no specific meaning. In many countries, however, there is agreement on what it stands for. In most countries, the gender pay gap is defined as the difference between the average pay level of male and female employees, respectively. The average usually concerns the economy as a whole. If one considers the various sectors of occupations and industry or the age of the working population separately, there is a considerable variation in the gap. Similarly, as a rule, the pay gap is larger in the private sector than in the public sector.

Occupational pensions are not always included in this concept. However, it is obvious that the ‘pension gap’ is a continuation of the pay gap after retirement. This pension gap persists despite the anti-discrimination provisions in national law in the area of statutory and occupational pensions (although it must be pointed out that this legislation seems to be rather complicated, non-transparent and sometimes lacunal).

At 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.<sup>15</sup> 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

<sup>12</sup> See <http://ec.europa.eu/social/main.jsp?catId=641&langId=en>, accessed 21 June 2010.

<sup>13</sup> Eurofound, the European Foundation for the Improvement of Living and Working Conditions (Dublin, Ireland), is a European Union body, set up by the European Council in 1975, to contribute to the planning and design of better living and working conditions in Europe.

<sup>14</sup> This publication is available from the Eurofound website on <http://www.eurofound.europa.eu/pubdocs/2010/18/en/2/EF1018EN.pdf>, accessed 26 April 2010.

<sup>15</sup> See the website of the European Commission on <http://ec.europa.eu/social/main.jsp?catId=684&langId=en>, accessed 26 April 2010. 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. Reference to a median was made, for example, by the Polish and UK experts.



individual characteristics relate, among other things, to traditions in the education and career choices of men and women; to 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.<sup>16</sup>

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 with the portion of the pay gap that cannot be explained, and that, for an important part, is assumingly caused by pay discrimination in the strict legal sense.

The **Dutch** Government has explicitly made it clear that in its view the ‘corrected’ or ‘net’ gender pay gap is not to be equalled to pay discrimination. While ‘pay discrimination’ is a legal concept, the ‘corrected’ or ‘net’ pay gap is the result of a calculation on the basis of several statistical factors, resulting in an impression of the situation in various sectors of the labour market.<sup>17</sup>

For the purposes of this legal report, the national experts were asked to concentrate on the net pay gap, as this is the portion of the (unadjusted) pay gap that lawyers intend to diminish or even eradicate. However, it is clear that, sometimes, the line between the unadjusted and the adjusted pay gaps is thin, as it is connected with the question of how much information one has with respect to the groups of employees that are being studied. Moreover, as this report also aims at investigating the possible links with other parts of national (labour) law (e.g. measures regarding leaves, part-time work, atypical work arrangements), it can also be seen as an exercise to further move parts of the ‘adjusted’ or ‘net’ pay gap to the ‘unadjusted’ or ‘absolute’ pay gap, and in doing so make those parts more susceptible to legislative solutions.

## 1. THE GENERAL SITUATION IN EUROPE

Many of the 33 experts that filled in the questionnaire have reported an increasing – unadjusted – gender pay gap. Some experts (e.g. **Cyprus**, **Romania** and **Spain**) have mentioned a gradual downward trend over the last few years.<sup>18</sup> In **Cyprus** and **Romania**, such trend has allegedly been triggered by the introduction of national minimum wages (**Romania**) or the increase of such minimum wages. The introduction or increase of minimum wages is said to come to the advantage of occupational categories in which women are over-represented.

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<sup>16</sup> For a slightly more detailed overview of the causes of the gender pay gap, see the European Commission’s website on <http://ec.europa.eu/social/main.jsp?catId=682&langId=en>, accessed 26 April 2010.

<sup>17</sup> The Dutch Government’s 9<sup>th</sup> report on Equal Pay (*Negende voortgangsrapportage gelijke beloning*), submitted to Parliament on 1 December 2008, TK 2008-2009, 27 099, no. 20, Paragraph 2.3.

<sup>18</sup> Only for Spain, this downward trend is clearly confirmed by Eurostat data. For Cyprus and Romania, the trend is not so clear. See the Eurostat table for 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 29 April 2010.

The EU (27) average being 17.6 % in 2007, 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**.<sup>19</sup>

It is to be stressed, however, 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 countries have been collected and processed in a comparable way. Also, the time period covered by the data may differ among the countries.

However, following the Communication adopted by the European Commission in 2007,<sup>20</sup> Eurostat, in collaboration with Member States, 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 'Structure of Earnings Survey') which is used, with the support of comparable national sources for the yearly estimates. Part of the increase of the gender pay gap since 2007 may not correspond to a real increase, but may merely be the result of the change in methodology.<sup>21</sup>

When comparing different countries, account should also be taken of the different pay concepts that are being used in the discussion of the gender pay gap.

**Denmark**, for example, clearly distinguishes between the following concepts:

- narrow income, excluding pension and employee benefits;
- narrow income, including pension and employee benefits but excluding some other wage components;
- income per paid hour;
- income per worked hour.

When the income per worked hour is measured, the gender pay gap is considerably lower than when the first three pay concepts are 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.

## 1.1. Characteristics of the gender pay gap

### 1.1.1. Lower gender pay gap in the public sector

Nearly all experts have reported a considerably lower gender pay gap in the public sector, as compared to the private sector. In the **Belgian** public sector, the pay gap appears to be highest for contractual workers, who often happen to be women. In **Latvia** the difference in the gender pay gap between the public and private sectors is reportedly small. **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 opportunity in the public sector to resort to non-reported labour and non-reported payment, the use of which is said to be widespread in the **Hungarian** private sector.

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<sup>19</sup> These data, reported by the national experts, are confirmed by the Eurostat table for 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 29 April 2010.

<sup>20</sup> 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.

<sup>21</sup> See the website of the European Commission on <http://ec.europa.eu/social/main.jsp?catId=684&langId=en>, accessed 26 April 2010.

### ***1.1.2. Age***

Age is certainly a significant factor of the pay gap. 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. The gender pay gap is highest in the 30-49 age bracket. This is the age bracket in which most women have children and tend to take time off in this respect, while men of the same age continue their careers and see their pay grow. This is the situation reported in countries like **the Czech Republic, Germany, Belgium and Greece**, by contrast, reported the highest level of the gender pay gap in the higher age brackets (55+ and 60+).

### ***1.1.3. Large differences between sectors***

Some sectors of industry feature very high gender pay gaps. Such sectors typically include finance and insurance, where the average income for both men and women is high. Also in sectors that are, in most countries, highly feminised (e.g. education, healthcare services and social work) the gender pay gap can reach high values, although in these sectors pay is reported to be low in general. **Greece**, however, has reported that the pay gap is lower in the feminised sectors of banking and tourism (hotels, restaurants) than in industry.

Quite the opposite happens in sectors that employ very few women, like construction and building, and mining and quarrying. In these sectors the gender pay gap appears to be very low (reported in e.g. **Belgium, the Czech Republic, France, Germany, Hungary and Norway**). **Croatia, Hungary and Slovenia** even reported that women are earning more than men in these sectors!

### ***1.1.4. Education and position***

Many experts report the largest gender pay gaps for people with lower education on the one hand (e.g. **the Czech Republic, Estonia, Hungary and Poland**), and for those with postgraduate education on the other (e.g. **the Czech Republic, Finland, France, Hungary and Poland**). These findings indicate the existence of a 'sticky floor' on the one hand, and a 'glass ceiling' on the other. The smallest differences are generally recorded for people with upper secondary education and for those with technical education. **Iceland**, by contrast, notes the smallest differentials for women who have completed Master's or doctoral studies and **Greece** for university graduates.

Also the position of the workers seems to play a role. E.g. **Belgium, the Czech Republic and Poland** have observed the highest (over 30 %) gender pay gap rate among senior executive officers. Surprisingly, the **Czech** report also referred to a study, entitled 'Gender in Management'<sup>22</sup> that came to another conclusion, namely that if the incomes of female managers are looked at more closely, the pay gap is more or less the same as the average pay gap – some 15 %. The pay gap is said to be lower at the highest levels of management, whereas in lower management it is said to reach average values.

### ***1.1.5. Influence of low female employment levels***

A small gender pay gap is very often connected with lower rates of female employment. This was reported, for example, by the **Polish** and **Turkish** experts.

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<sup>22</sup> J. Vlach et al. *Gender v managementu* Praha, VUPSV 2008, available on [http://praha.vupsv.cz/Fulltext/vz\\_268.pdf](http://praha.vupsv.cz/Fulltext/vz_268.pdf), accessed 8 March 2010.

In **Poland** only every second woman is employed and usually those who are employed are better educated and qualified, resulting in employment in higher and better remunerated positions.

The **Turkish** expert also noted that moderate pay discrimination and high selectivity are probably on par, and that it is also likely that pay discrimination will increase when more women enter the **Turkish** labour market.

**Malta** is another example of a country that combines low levels of female employment with a low gender pay gap.

#### ***1.1.6. Influence of the economic crisis***

It is still too early to find out whether or not the economic crisis has influenced the gender pay gap. The **Icelandic** report mentions no influence yet in the private sector. However, no comprehensive pay gap survey has been conducted after the financial collapse of the autumn of 2008. Still, this expert expects that men's wages will be reduced, while women's working hours will be cut. A widening of the pay gap is also expected in **Greece**.

#### ***1.1.7. Immigrants***

The pay gap is said to be wider for immigrants than for nationals. Female immigrants are said to consequently become the victim of multiple discrimination. This was reported e.g. by the **Greek** and **Finnish** experts.

### **1.2. From unadjusted/absolute gender pay gap to corrected/net gender pay gap**

Most of the countries have conducted studies to try and find out about the main reasons for the gender pay gap. Recurring explanations include: female part-time work and temporary work, the horizontal and vertical segregation of the labour market, and women's frequent career interruptions. Such explanations reduce the unadjusted gender pay gap to the corrected gender pay gap. What is left, is allegedly partly due to discrimination in the strict legal sense (see above, in the Introduction).

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

In many countries, a large portion of part-time workers are women (reported e.g. in the **Belgian**, **Cyprus**, **Dutch**, **German**, **Slovakian**, **Spanish** and **United Kingdom** reports). Quite opposite to this, **Romanian** data show that in 2005 the number of part-timers in **Romania** was approximately equal for women and men.

A recent **Austrian** study showed that half of the **Austrian** women working part time explicitly do so in order to reconcile work and care for family members. By contrast, only 3 % of the male part-time workers do so due to childcare obligations. Other men work part time in order to conduct further studies or training. Most women work part time between the age of 30 and 44, i.e. during their main earning years, whereas men mainly work part time at the beginning or the end of their professional careers.

The **Austrian** and **German** reports also showed a considerable pay gap (about 30 % in **Austria** and 21 % in **Germany**, taking into account the gross salary per hour) between part-time and full-time employees. In **Germany**, however, this was said to be typical of the private sector, with the public sector showing a gender pay gap that is mostly independent of the volume of employment.

Such a pay gap 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. The **Irish** expert even reported that, in some sectors, female part-time employees earned more than male part-time employees.

Part of the gender pay gap can also be explained by the use of fixed-term contracts, which often seem to be entered into by (young) women. In **Italy**, for example, the 2001 reform of the fixed-term contract increased the options for the conclusion of such contracts.<sup>23</sup> In doing so, the number of employed women increased, but the quality of those jobs appeared to be bad (low pay rates and few opportunities to change to a regular contract).

### ***1.2.2. Horizontal and vertical segregation of the labour market***

Many experts (e.g. **Finland, France, the FYR of Macedonia, Norway, Sweden, Latvia and Cyprus**) mentioned gender-based segregation of the labour market as one of the main reasons for the continued gender pay gap.

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 lower valued and 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 under-represented in managerial and senior positions.

Horizontal and vertical segregation of the labour market is an area where the line between the unadjusted and corrected pay gaps is thin. This was also highlighted in the **Finnish** report, indicating strong national disagreement about the degree to which segregation-related differentials should be considered in terms of discrimination. This disagreement has instigated studies on job assessment and statistics development. Also in other countries (e.g. **Malta** and, to a certain extent, also **the Netherlands**) the importance of gender-neutral job classifications has been indicated as an important instrument to fight the gender pay gap.

### ***1.2.3 Frequent career interruptions and 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 also contribute to the gender pay gap. In this respect, the **Hungarian** report indicated that the number of children clearly increases the gender pay gap in each sector, occupation and level.

It has been suggested that policies to support continuity in women's employment could help to reduce the gender pay gap. In this respect, the extension of statutory maternity leave is said (e.g. in **Turkey**) to reinforce traditional gender roles and to counteract continuity in women's employment. The **Irish** report, however, qualified

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<sup>23</sup> Decree No. 368 of 6 September 2001, on the fixed-term contract, implementing Directive 1999/70/EC, published in OJ No. 235 of 9 October 2001, available on <http://www.parlamento.it/leggi/deleghe/03276dl.htm>, accessed 20 March 2010.

this position by its finding that of all the flexible arrangements only career breaks are found to reduce the gender pay gap.

The **Portuguese** report has stressed that, as women still invest more time in (unpaid) work at home or care tasks, this may work so as to exclude them from benefits related to employment (for instance, benefits related to the lack of absences despite justification).

## 2. THE LEGAL FRAMEWORK

A gender pay gap still persists throughout Europe, although most countries have adopted a substantive number of legislative provisions aimed at tackling it, often incited by EU legislation in the field (see above, in the Introduction).

It is remarkable that the candidate countries of **Croatia, the FYR of Macedonia and Turkey** have known the principle of equal pay for men and women for quite some time and seem to be in full accordance with EU law, at least from a purely legalistic point of view.

### 2.1. Constitutional provisions

Several experts referred to the existence of a general constitutional principle of non-discrimination or equality. Such a constitutional principle is usually linked to one or more forbidden grounds, like e.g. race, sex and religion. This is, for example, the case in **Cyprus**, where the constitution prohibits any direct or indirect discrimination against any person, on various grounds including sex.

In some national constitutions a separate article is devoted to the equal treatment of men and women. In **France**, for example, the principle of equality between men and women was first recognised in 1946, in the Preamble to the **French** Constitution. Also the **German, Hungarian, Luxembourg, Macedonian and Slovenian** constitutions contain a specific gender equality clause, often on top of a more general non-discrimination article.

Even the very precise idea of equal pay for equal work or work of equal value has been laid down in a surprising number of national constitutions (e.g. **Finland, Greece, Hungary, Italy, Poland, Portugal, Romania, Slovakia and Spain**).

### 2.2. Acts of Parliament

In a number of countries, the principle of equal pay for work of equal value for men and women is only to be found on the level of an Act of Parliament. This is inevitably the case in common law countries with no written constitution, like **the United Kingdom**. But also States that do have a constitution, possibly containing a clause relating to the principle of equal pay for men and women, have adopted legislation that further implements the equal pay principle.

Sometimes the equal pay principle has been laid down in the Labour Code (e.g. **Bulgaria, the Czech Republic, France, Hungary, Latvia, Lithuania, Poland and Slovakia**), or even in the Civil Code (**Liechtenstein**).

Sometimes the principle is also to be found in a special equal treatment act, directly aimed at implementing EU equality directives (see above, in the Introduction). Coverage of those Acts of Parliament may vary substantially, both *ratione personae* (employees are usually covered, but sometimes also service providers, liberal professions, independent workers, etc.) and *ratione materiae* (e.g.

occupational pensions are sometimes seen as part of ‘pay’ and sometimes they are not).

Some Acts define what should be understood to constitute equal work or work of equal value (e.g. **Hungary, Romania, Slovakia and Sweden**), but very often such definition is lacking, thus leaving it all up to the courts.

In many countries there also exist different Acts for the public and the private sectors (e.g. **Austria, Germany, Luxembourg and Portugal**).

### 3. INSTRUMENTS OF SOCIAL PARTNERS

#### 3.1. Collective bargaining

Collective labour agreements, in particular those concluded on sector level, typically contain minimum pay standards for the branches of industry covered. As a consequence, they should be looked into carefully when doing research on the gender pay gap.

##### ***3.1.1. Collective labour agreements must respect the equal pay principle***

It is clear that the parties to a collective labour agreement have to comply with the equal pay principle, as laid down in EU law and in various legal provisions (see above, in Section 2 on the legal framework). This implies that the provisions of a collective labour agreement should be in accordance with the principle of equal pay for men and women, and that lacking such accordance, the related provisions will usually be deemed to be null and void.

That is probably the reason why most collective agreements today do not contain provisions which are *directly* discriminatory. However, many national reports highlighted that 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 the face of it, but appear to structurally disadvantage female workers.

##### ***3.1.2. Importance of collective labour agreements decreasing***

Many national reports (e.g. **Austria, Germany, Hungary, Lithuania, the Netherlands and Sweden**) put the importance of collective labour agreements into perspective. These reports referred to the fact that individual salaries are often individually negotiated far above the bottom lines laid down in the collective agreements, and to the fact that part of the workforce, typically those in higher positions, may not be covered by collective agreements.

The fact that the pay gap is largest among employees in better paid quality jobs (see also above, in Section 1.1.4) shows that the lack of coverage by collective agreements might indeed have a negative impact on the gender pay gap. In **Greece**, for example, it is feared that the recent weakening of national general collective agreements fixing national *minimum* standards will again widen the gender pay gap.

##### ***3.1.3. Collective negotiation structure reproducing the gender pay gap***

The **Norwegian** and **Swedish** reports also indicated that the collective negotiation structure itself is an element which reproduces differences in men and women’s pay. As negotiations are conducted on sector level, sectors dominated by women seem to be at a disadvantage when it comes to negotiate good pay rates. The **Austrian** and **Romanian** reports also stressed the importance of cross-sector comparison of

collective agreements and monitoring the implementation of the equal pay principle through the bargaining mechanism.

An example taken from the **Finnish** report illustrates that it is not always easy, however, to try and break through the collective negotiation structure. The judiciary, in particular, is not always prone to approve of experiments in that respect.

The **Finnish** case concerned the negotiation of a municipal collective agreement. One particular trade union was especially dissatisfied with the promised pay rise and managed to achieve for its members a better collective agreement than other unions in the field of healthcare. The Equality Ombudsman participated in the conciliation negotiations and in concluding the collective agreement. The Chancellor of Justice, who supervises the legality of the acts of authorities, received a complaint stating that the collective agreement as restricted to the members of that one union was discriminatory, because other employees performed equal work under other collective agreements for smaller pay. The Assistant Chancellor of Justice confirmed that the collective agreement violated the prohibition of discrimination, on the ground of trade union membership. While the issue at hand was firmly rooted in the gender pay differentials in the municipal sector, it was treated as a matter concerning discrimination on the basis of trade union membership.<sup>24</sup>

### 3.2. Measures inducing/obliging social partners to address the gender pay gap

Directive 2006/54/EC (recast) provides that the EU Member States shall, in accordance with national traditions and practice, take adequate measures to promote social dialogue between the social partners with a view to fostering equal treatment, including, for example, through the monitoring of practices in the workplace, in access to employment, vocational training and promotion, as well as through the monitoring of collective agreements, codes of conduct, research or exchange of experience and good practice.<sup>25</sup>

Notwithstanding the above provision, the vast majority of the 33 countries questioned have no legal measures in place yet that induce or oblige the social partners to actively address the gender pay gap in collective agreements.

Generally speaking, the social partners are said to oppose to the idea of governmental intervention in this respect (e.g. **Belgium**). If, in a very limited number of countries, the social partners are encouraged by law to adopt measures to tackle (pay) discrimination, such measures are found to be very general and vague (e.g. **Romania**).

A notable exception to the above is the **French** *Génisson* law of 9 May 2001, which has introduced an obligation for the social partners to negotiate on occupational gender equality.<sup>26</sup> Another law of 23 March 2006 specified that the gender pay gap must disappear by 31 December 2010.

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<sup>24</sup> Decision 11.01.2010 Dnro OKV/1333/2007 by the Assistant Chancellor of Justice Mikko Puumalainen.

<sup>25</sup> Article 21(1) of 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.

<sup>26</sup> See S. Laulom 'Gender Pay Gap in France', *European Gender Equality Law Review* (1/2009) p. 8.



### 3.3. Other practices of social partners aimed at tackling the gender pay gap

Given among other things the current employment crisis, the gender pay gap does not appear to be a priority target for the social partners' actions (reported in e.g. **Belgium, Croatia, the Czech Republic, Poland and Slovenia**). It is said that their limited interest in the gender pay gap is usually channelled into studies, the declaration of principles, awareness-raising programmes (e.g. an annual equal pay day) and the setting up of substructures (e.g. committees or specific sections within employers' and employees' organisations) devoted to gender equality issues including equal pay, rather than into concrete legal action (reported in e.g. **Finland, Germany, Greece, Iceland, Italy, Liechtenstein, Lithuania, Luxembourg, Malta, the Netherlands and Poland**).

A recurring item in a number of national reports, however, is the in-depth examination or monitoring of collective labour agreements in order to detect discriminatory provisions, among which provisions that violate the equal pay principle. While one would expect such examinations to be conducted by government bodies (e.g. an ombudsperson or a national equality body), in some countries such examinations are conducted by the social partners themselves (e.g. **Austria**). One may wonder, however, to what extent such examination can be objective, as it is conducted by the bodies that have concluded the collective agreements. The results of such examinations are often used for the development of transparent and non-discriminatory job evaluation systems.

## 4. INSTRUMENTS SPECIFICALLY AIMED AT EMPLOYERS

Like the social partners, employers are also obliged to comply with the equal pay principle, as laid down in EU law and in various legal provisions (see above, in Section 2 on the legal framework). 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 adopted legislative instruments that specifically oblige or encourage employers to address the issue of the gender pay gap in a more active way. Most of these countries have probably been incited to do so by Directive 2006/54/EC (recast), which asked the EU Member States to encourage employers to promote equal treatment for men and women in a planned and systematic way in the workplace, in access to employment, vocational training and promotion. To this end, employers must be encouraged to provide employees and/or their representatives with appropriate information on equal treatment for men and women in the organisation at appropriate regular intervals. Such information may include an overview of the proportions of men and women at different levels of the organisation; their pay and pay differentials; and possible measures to improve the situation in cooperation with employees' representatives.<sup>27</sup>

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<sup>27</sup> Article 21(3) and 21(4) of 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.

#### 4.1. Measures relating to statistics

Several countries (e.g. **Austria** and **Denmark**) have installed a system that, on certain conditions, obliges employers to deliver gender-specific pay statistics – often on a regular basis – to the competent authorities.

In **Denmark**, the employer can obtain such gender-specific wage statistics free of charge (i.e. at the expense of the Ministry of Employment) if he chooses to use the statistics produced by the Statistical Bureau. If, however, the employer prefers to use a different statistical method, he will have to do so at his own expense.

In **Austria**, employers who do not deliver the required statistics are publicly named on the homepage of the Federal Ministry for Women's Affairs. However, this sanction is reportedly not very deterrent.

#### 4.2. Measures relating to transparency of pay

Many experts have reported a deeply rooted (cultural) taboo regarding the release of information about wages of other people (e.g. **Belgium**, **Malta**). Former communist countries, like **Hungary** and **Lithuania**, have even reported a move back to extreme caution with regard to the release of information about pay from the beginning of the shift to a market economy.

From a legal point of view, information regarding pay is often considered to be private/confidential information under national data protection and privacy legislation. As a consequence, such information generally cannot be released by employers, and neither can employees be obliged to do so. Employees may even be contractually obliged not to inform other employees about their pay (reported e.g. by **the Czech Republic**, **Latvia** and **Slovakia**). In **Poland**, the legality of such contractual non-disclosure clauses is also based on the Law of 16 April 1993 regarding unfair competition.<sup>28</sup> **Iceland**, by contrast, has recently adopted legislation that explicitly allows employees, upon their choice, to disclose their pay terms.

The taboo regarding the release of information on pay appears to be greater in the private than in the public sector, where the publication of uniform (but still anonymous) pay scales seems to be common (reported e.g. in **the Netherlands** and **Norway**). When the ban on releasing pay information is loosened, it always seems to happen in the public sector first (e.g. **Latvia**). **Estonia**, by contrast, has reported the exceptional situation that the national pay system in the civil service is not transparent. Although all positions in the civil service are in theory ranked according to fixed salary scales (generally with low pay),<sup>29</sup> in practice, civil servants in higher positions often earn salaries that are several times higher. It is clear that different components of the salary are used 'creatively' to move away from the salary scales. Although the **Estonian** Gender Equality and Equal Treatment Commissioner has recently decided that such composition of salaries has at least in one case led to discriminatory treatment,<sup>30</sup> this has not yet led to a more widespread analysis of salaries in the public sector.

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<sup>28</sup> JoL 1993, n° 47, item 211, with amendments.

<sup>29</sup> Wages of Estonian civil servants are regulated by the Civil Service Act, State Civil Servants Official Titles and Salary Scale Act and Government Regulation No. 182 of 30 December 2008 on Remuneration of State Civil Servants.

<sup>30</sup> H. Rudi *Ministeerium tegi palka makstes naisametnikule liiga* (Ministry violates rights of female employee in remuneration) – *Postimees*, 24 August 2009, available on: <http://www.postimees.ee/?id=155601&print=1>, accessed 24 August 2009.

The idea being that a right to disclosure is vital to enable an individual worker to bring a successful equal pay claim, a number of countries have installed the compulsory delivery 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, 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.

In some countries, a public authority has been given the right to require from the employer the release of specific pay information on a more *ad hoc basis*, so as to enable an employee to bring a successful equal pay claim. This is, for example, the case in **the Netherlands**, where the Equal Treatment Commission has the power to ask the employer to disclose all necessary pay information as soon as someone has brought a claim in court. In **Greece**, the Data Protection Authority (HDPA),<sup>31</sup> relying among other things on the principle of equal treatment, has held that the employer must supply a worker with other workers' personal data, when he/she needs them for the review of his/her own assessment by the employer.<sup>32</sup>

#### 4.3. Measures regarding public procurement

Although public procurement procedures offer an ideal opportunity for governments to force bidders to comply with the equal pay principle, it appears that only a very limited number of countries have actually made use of this opportunity.

**Austria** seems to be one of the few countries that have some limited experience in this respect. Also **Norway** and **the United Kingdom** seem to be on their way of introducing legislation that uses public procurement to tackle the gender pay gap.

As there is a great deal of uncertainty about the conformity with EU and national procurement law of the use of public procurement to tackle the gender pay gap, some experts have called for a 'toolbox' or a list of measures that are definitely in conformity with EU law and that could assist the national authorities (see the **Austrian** and the **United Kingdom** reports).

Many experts have linked the absence of any attention for the gender pay gap in public procurement law to a manifest lack of genuine political will (e.g. **Iceland** and **Hungary**) or complete ignorance regarding the possibilities of tackling the gender pay gap through public procurement law (e.g. **Lithuania**).

Notwithstanding the fact that there is very little attention for the gender pay gap in public procurement law, several experts (**Germany** and **Hungary**) highlighted that, even under the current legislation, there are certainly possibilities for the tender announcer to include – by way of so-called 'social criteria' – requirements regarding equal pay in the announcement. Also, in **Spain** there seems to be a possibility to take into account gender-friendly wage policies when comparing several competing bidders.

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<sup>31</sup> The HDPA is an independent authority which issues opinions and recommendations on data protection and imposes administrative sanctions for breaches of data protection legislation.

<sup>32</sup> HDPA Decisions Nos. 1/2008 and 35/2008: <http://www.dpa.gr/portal>, accessed 25 March 2010.

#### 4.4. Measures regarding the adoption of equality plans/strategies

Sometimes large employers<sup>33</sup> 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’ (**Hungary**), ‘gender equality programmes’ (**Iceland**), ‘equality plans’ (**Spain**) or ‘action plans’ (**Sweden**).

An interesting initiative may be found in **Germany**, where national legislation grants employees affected by discrimination a right of appeal to a competent unit within the company. This right corresponds with the employer’s duty to establish such a body. Complaints have to be examined and the employee has a right to be heard and to be informed of the results of the considerations. This complaint procedure is no condition for bringing a court claim and the rights of worker representatives remain unaffected. The effectiveness of the procedure still remains to be established.

#### 4.5. Other measures encouraging employers to fight the gender pay gap

The 33 national reports enumerated a wide variety of measures that serve to encourage – as opposed to oblige – employers to fight the gender pay gap.

Such measures include, for example, the possibility for the employer to order an equality audit. In this respect, the **German**, **Luxembourg** and **Liechtenstein** reports have referred to *Logib*,<sup>34</sup> a tool originally developed in Switzerland, allowing companies to statistically analyse their salary structure to identify gender pay gaps. This tool is generally being presented to the employers by the national governments.

Other measures that have been introduced in a number of countries include the governmental award of labels like ‘best female workplace’ or ‘family-friendly workplace’ (e.g. **France**, **Hungary** and **Spain**), and financial incentives like the **Greek** ‘equality prizes’.

Also, brochures and official awareness-raising campaigns targeted at employers are often mentioned among the instruments that are specifically aimed at employers. Such awareness-raising campaigns include initiatives promoting female entrepreneurship.

### 5. OTHER INSTRUMENTS TO CLOSE THE PAY GAP

#### 5.1. Instruments that may assist individuals to establish pay discrimination

##### 5.1.1. *Shifting the burden of proof*

Because an employee normally does not have access to the information necessary to bring a successful equal pay claim (i.e. information about the pay of persons who perform the same work or work of equal value), shifting the burden of proof to the opponent (i.e. the employer) is indispensable.

Such reversal of the burden of proof, imposed upon the EU Member States by Directive 97/80/EC<sup>35</sup> – as recently replaced by Directive 2006/54/EC (recast)<sup>36</sup> –

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<sup>33</sup> It depends on the national law which employers are to be considered as a ‘large employer’.

<sup>34</sup> *Logib* stands for ‘*Lohnungleichheit im Betrieb*’.

<sup>35</sup> Directive 97/80/EC on the burden of proof in cases of discrimination based on sex, OJ L 14 of 20 January 1998, p. 6.

implies that the claimant only needs to establish facts from which it can be presumed that there has been discrimination. Then it is for the defendant (i.e. the employer) to show that no discrimination has taken place, either because there was no different treatment of men and women or because the unequal treatment was justified.

In **Greece**, the rule on the reversal of the burden of proof was included in legislation transposing Directives 97/80 and 2002/73, but was not laid down in the procedural codes, as recommended by the **Greek** Council of State.<sup>37</sup> As a consequence, this rule is mostly unknown in **Greece**, and hence not applied.

In **Italy**, the first evidence of discrimination can also be given by statistical data. Also the **German** judiciary has slowly started to accept statistical evidence on the distribution of men and women in different levels of positions to prove discrimination.<sup>38</sup>

### ***5.1.2. National equality bodies may help to gather information***

Directive 2002/73/EC<sup>39</sup> has obliged the EU Member States and the EEA countries to designate national equality bodies. The tasks of these bodies are the promotion, analysis, monitoring and support of equal treatment between women and men, including equal pay. They may form part of agencies with responsibilities at the national level for defending human rights or safeguarding individual rights.<sup>40</sup>

The **Danish** expert reported that her country still has not complied with this provision. **Denmark** consequently does not have an equality body yet that fully satisfies the EU requirements. In some countries a specific ombudsperson performs the functions of the national equality body (reported in e.g. **Greece** and **Latvia**).

The tasks and powers of the national equality bodies are very diverse. A typical competence, however, which is given to the national equality bodies by Directive 2002/73/EC, is the assistance of victims of discrimination by providing advice, information, etc. in pursuing their complaints about discrimination. The **French** national equality body, for example, is in charge of assisting individuals who turn to it in identifying discriminatory practices and countering them. It provides advice on legal options and helps to establish proof of discrimination. It also plays an important role in the dissemination of European concepts related to discrimination. Also the **Slovenian** equality body helps victims of pay discrimination by giving them legal advice.

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<sup>36</sup> 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.

<sup>37</sup> See Council of State opinion No. 348/2003 on the legality of the draft decree transposing Directive 97/80.

<sup>38</sup> See State Labour Court (*Landesarbeitsgericht, LAG*) Berlin-Brandenburg, 15.Sa.517/08, *Streit* (2009) pp. 22-33. For a discussion of the judgment see J. Heyn & G. Meinel 'Rückenwind für Diskriminierungsklagen, Die Entscheidung des LAG Berlin-Brandenburg vom 26.11.2008', *Neue Zeitschrift für Arbeitsrecht (NZA)* 2009 pp. 20-23. But also compare LAG Berlin-Brandenburg, 2.Sa.2070/08, *Neue Zeitschrift für Arbeitsrecht – Rechtsprechungsreport (NZA-RR)* 2009 pp. 357-362, where statistical evidence was not admitted in the circumstances of the case.

<sup>39</sup> Directive 2002/73/EC amending Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, OJ L 269 of 5 October 2002, p. 15.

<sup>40</sup> Article 1(7) of Directive 2002/73/EC.

## 5.2. Instruments that may assist in establishing gender-neutral job evaluation and pay systems

Several experts have reported that national guidelines for the development of job evaluation systems, pay systems etc. – as a rule – do not contain provisions or instruments directed at supporting the gender-neutral approach (e.g. **the FYR of Macedonia**).

A limited number of experts reported moderate steps in the right direction. In **Germany**, for example, the Government has provided checklists for examining pay systems and identifying potential pitfalls for discrimination.

Still another group of countries, with a number of Northern European countries (**the Netherlands, Norway and Sweden**) as excellent pupils, seems to already have quite extensive experience with checklists, software programmes and web-based tools to scrutinise evaluation and pay systems for compatibility with the non-discrimination principle.

In **the Netherlands**, for example, reference can be made – among other things – to the *‘Equal Pay Quick Scan’*. This software programme was developed by the Equal Treatment Commission (ETC) and allows it to analyse the pay data of a company, to see whether an investigation into the pay system of a company is required. This quick scan was applied by the Labour Inspectorate in an investigation of several sectors in the second half of 2005. A simplified version of the quick scan was developed in 2007-2008, for the use of individual employers.

In **Norway**, a white paper recommending the use of pay evaluation as an instrument to achieve equal pay was already presented in 1997.<sup>41</sup> In 1998, the Ministry of Children, Equality and Social Inclusion developed a set of guidelines for gender-neutral work evaluation.<sup>42</sup> In 2005, a governmental pilot project on the development of a gender-neutral job evaluation scheme was initiated.<sup>43</sup> Furthermore, an example of a job and pay evaluation scheme is provided in the ombudsperson’s brochure aimed at the sector for higher education.<sup>44</sup>

In **Sweden**, the equality ombudsperson also provides specific tools that may assist in establishing gender-neutral job evaluation schemes, pay systems etc.<sup>45</sup> Reference ought to be made to the pay evaluation scheme *‘Analys Lönelots’*, and a more general tool for gender equality analysis of pay, *‘Jämsställhetsanalys av löner – steg för steg’*.

## 5.3. Monitoring of collective labour agreements, job evaluation systems, etc.

In most countries, collective labour agreements must be deposited with the ministry of labour. This ministry, however, usually does not have the power to check agreements for compatibility with, for example, the equal pay principle. This does not mean that there is no monitoring at all of collective agreements.

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<sup>41</sup> See: *NOU 1997:10 ‘Arbeidsvurdering som virkemiddel for likelønn’*: <http://www.regjeringen.no/nb/dep/bld/dok/nouer/1997/nou-1997-10.html?id=116322>, accessed 21 March 2010.

<sup>42</sup> <http://www.regjeringen.no/nb/dep/bld/kampanjer/familia/familia-12005/diverse-saker/forsok-med-arbeidsvurdering-som-virkemid.html?id=536488>, accessed 21 March 2010.

<sup>43</sup> <http://www.regjeringen.no/nb/dep/bld/kampanjer/familia/familia-12005/diverse-saker/forsok-med-arbeidsvurdering-som-virkemid.html?id=536488>, accessed 21 March 2010.

<sup>44</sup> [www.ldo.no/Global/Brosjyrer%20PDF/Utdanning\\_handbok.pdf](http://www.ldo.no/Global/Brosjyrer%20PDF/Utdanning_handbok.pdf), pp. 42-43, accessed 21 March 2010.

<sup>45</sup> The tools mentioned are available from the Equality Ombudsman website (only in Swedish), on [www.do.se](http://www.do.se), accessed 10 March 2010.

As highlighted before (Section 3.3), in some countries collective labour agreements are scrutinised in order to detect discriminatory provisions, in accordance with the encouragements of Directive 2006/54/EC (recast) (see above, in Section 3.2).

Such examinations are often conducted by a governmental body, usually the national equal treatment body. This is the case for example in **Austria** and **Portugal**.

Monitoring can also be done by research institutions, e.g. universities (**Malta**).

In some countries monitoring is systematic, in other countries collective labour agreements are scrutinised on a more *ad hoc* basis.

#### **5.4. The role of labour inspectorates**

Some countries, but not all, know the institution of the labour inspectorate. The labour inspector usually belongs to the national ministry of employment or social affairs and is – generally speaking – charged with monitoring compliance with a number of social law provisions. Competences of this institution may, however, vary substantially from country to country.

In **the Netherlands**, for example, the labour inspectorate has no tasks with respect to the enforcement of equal pay legislation, as it is only competent for general labour conditions and not for the enforcement of the (equal) terms of individual labour contracts. Also in **Romania** it is rather unclear to what extent the labour inspectorate is competent with regard to equal pay legislation. In **Belgium**, the labour inspectorate's powers are also quite limited when it comes to equal pay. The **Belgian** inspectorate's jurisdiction depends on penal sanctions whilst the legislative measures implementing the equal pay principle hardly contain any such sanctions.

In a number of countries, the labour inspectors are clearly competent to intervene when employers do not respect the equal pay principle. In **Italy**, for example, labour inspectors can issue an order to stop the unlawful conduct and allow the employer to discontinue the crime by completing the order and the payment of an administrative sanction.

Many experts have indicated, however, that labour inspectors – even if they have competences in the field – are hardly interested in the gender pay gap and that no serious issues are raised through this mechanism. This seems to be the case in e.g. **Bulgaria, France, Greece, Hungary, Italy, Latvia, Lithuania, the FYR of Macedonia, Poland and Portugal**.

In **Norway** the limited interest of the labour inspectorates is said to be due to the fact that the equal pay legislation is the responsibility of the equal treatment bodies.

In **Greece**, the labour inspectorates' limited interest is admittedly said to be due to understaffing and lack of material means.

The **Portuguese** report highlighted that employees very often are not willing to inform the labour inspectorates of pay discriminatory practices while their labour contract is still in effect. It is clear that employees may fear retaliation from their employers if they lodged a complaint with the labour inspector.

Some experts highlighted, however, that the labour inspectors' poor attention for the gender pay gap has started to grow (e.g. **Slovakia** and **Spain**), which results in a more active approach.

In **Slovakia**, the labour inspectorate has been monitoring the implementation of the equal pay principle since the year 2002. In the years 2006 and 2007, reviews were conducted with a special focus on 'Determinants of Gender Equality in Industrial Relations'. In 2009 no review with special focus on the equality of remuneration was planned, but it was implemented within the framework of the general inspection, the

results of which were summarised in the ‘Report on results of labour inspection in the area “Strengthening of Equal Opportunities – Equal Remuneration of Women and Men for the Equal Work and for Work with the Equal Value” for the year 2009’.

In **Spain**, the labour inspectorate has drawn up a programme, valid until 2010, for the supervision of real corporate equality between women and men. For this purpose, the inspectorate has set out equality guidelines for itself to follow, the aim being to provide a methodology by which a complete external analysis can be made of issues affecting equal treatment of men and women in the company.

## **5.5. Special pay policies**

As highlighted above (see Section 1.2.2), gender-based segregation of the labour market is one of the main causes of the continued gender pay gap.

As a consequence, policies aiming at a reduction of the segregation are often prominent in pay equality policies. Reducing the gender segregation of the labour market has been very slow; while girls and women have made their way to male branches, especially those that require high education, men have not entered traditionally female-dominated branches such as education and care – assumingly because of the low pay in these branches.

In this respect, the **Finnish** report pointed out an interesting initiative. A recurring governmental technique in **Finland** is to earmark an amount of money per year as ‘equality pot’ for municipal employment pay rises targeted at low-paid highly educated ‘female’ branches.

In **Norway**, the 2010 collective pay negotiations for the public sector culminated on 27 May 2010 in a pay rise of 3.3 % for the female-dominated sectors, thus targeting the part of the equal pay problem that stems from the gender-segregated employment market.

## **6. PROBLEMS OF ENFORCEMENT OF EQUAL PAY RULES**

### **6.1. Court proceedings**

A considerable number of experts have reported that only very few (or even no) claims on gender pay discrimination make their way up to the competent (regular or administrative) courts (e.g. **Austria, Belgium, France, Croatia, Finland, Greece, Latvia, Liechtenstein, the FYR of Macedonia, Malta, the Netherlands, Norway, Poland, Romania, Slovakia and Slovenia**).

Case law on equal pay issues is indeed very scarce. Explanations for such scarcity are multiple, including the problematic scope of comparison, the lack of personal resources of the claimant, problems regarding time limits, limited compensation and sanction possibilities and also lack of trust in the judiciary.

Some national experts also referred to the fact that victims of pay discrimination on the basis of sex are often advised to first try to come to an agreement with their employer (e.g. **Bulgaria and the Czech Republic**).

#### **6.1.1. Problematic scope of comparison**

It has been indicated above (in Section 4.2) that employees may face substantial difficulties in gathering information regarding pay of colleagues who perform the same work or work of equal value. A preliminary question, however, concerns to whom the employee should compare him/herself (i.e. the ‘comparator’). Who



performs the same work, or work of equal value? This is one of the most difficult issues when talking about gender pay discrimination.

In the majority of the 33 countries studied in this report, the scope of comparison in pay discrimination claims is not laid down in statutory law. This gives a great deal of leeway to the national courts. **Sweden** is an exception in this respect, with the 2008 Discrimination Act giving a definition of what should be understood to be work of equal value: 'Work is to be regarded as of equal value to other work, if, on overall assessment of the requirements and nature of the work, it can be deemed to be equal in value to the other work. The assessment of the requirements of the work is to take into account criteria such as knowledge and skills, responsibility and effort. In assessing the nature of the work, particular account is to be taken of working conditions.'<sup>46</sup>

Most countries do not accept a hypothetical comparator. An **Irish** court has stated, for example, that a claimant must be able to indicate 'an actual concrete real-life comparator of the other sex' performing like work.<sup>47</sup> Finding such 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 **Italy**, however, Article 25 of the Code for Equal Opportunities refers to 'neutral factors, which disadvantage more the workers of one sex compared to the workers of the other sex'. No quantitative elements are necessary anymore and the attention has shifted from the group to the individual. The discriminatory effect can be merely hypothetical and not yet accomplished. This should facilitate the use of the ban on discrimination in relation to the issue of the pay gap, as well. In **France**, the *Cour de Cassation* stated in 2009 that the existence of discrimination does not necessarily imply a comparison with other workers,<sup>48</sup> thus admitting a very broad scope of comparison, possibly also with a hypothetical comparator.

Courts generally decide that comparisons can only be made within a company. In other words: comparators can never be found with another employer. This is the case in **Bulgaria, Cyprus, the Czech Republic, Hungary, Ireland, Latvia, Lithuania, Norway, Poland, Sweden** and **the United Kingdom**. In doing so, the national courts are faithful to the ECJ, which also tends to restrict comparisons to within the company, the idea being that only in that case the differences in pay can be attributed to one single source (i.e. the employing company).<sup>49</sup>

**Cyprus, Ireland** and **the United Kingdom** also allow comparisons with employees working for an 'associated employer'. In **the United Kingdom**, the test for this is a corporate one, which requires the employer companies to have the same ownership.

Within the same company or the same sector, several countries allow comparisons between jobs of different occupational categories. This is the case, for example, in **Iceland**, where the Supreme Court has held that a woman's position as manager in the social service sector could be seen as of equal value as a man's position as manager in the technical sector of the same municipality.<sup>50</sup>

Cross-employer, and even cross-sector, comparison in general is still unthinkable in most EU, EEA and candidate countries. Still, a number of countries have noted

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<sup>46</sup> Chapter 3, Section 2, second paragraph of the 2008 Discrimination Act (2008:567).

<sup>47</sup> J. Budd in *Brides v Minister for Agriculture* [1998] 4 I.R. 250 on p. 270.

<sup>48</sup> *Cass. Soc.*, 10 November 2009, n° 07-42849.

<sup>49</sup> Cases C-320/00 *Lawrence* [2002] ECR I-7325 and C-256/01 *Allonby* [2004] ECR I-873.

<sup>50</sup> *Hrd.* 258/2004.

developments in this direction. In **Greece**, comparisons across organisations or sectors are allowed for workers covered by the same wage-fixing instrument. Also in **Malta**, national legislation seems to allow comparisons as wide as the scope of a collective agreement (company or sector level).

It is clear that collective labour agreements, setting minimum pay standards at sector or company level, play an important role in restricting comparisons to within the sector or company. In this respect, the **Austrian** report indicated that the examination of collective labour agreements, to detect indirectly discriminatory provisions (see above, in Paragraph 5.3), might eventually also boil down to cross-employer and cross-sector comparisons. The **Austrian** experience in particular has shown that cross-sector comparison of collective agreements can be realised, when sufficient political will between the social partners is present.

#### ***6.1.2. Lack of personal resources of claimants***

Very often, employees who are a victim of gender pay discrimination do not have the financial means to start legal proceedings against their employer. Whilst it is true that some countries have installed bodies that advise and assist persons upon submission of complaints regarding (pay) discrimination, such measures do not alter the fact that court proceedings are usually very expensive.

Given the often limited compensation that can be obtained (see below in Section 6.1.4) when a complaint proves to be well-founded, costs for legal assistance and proceedings certainly have a deterrent effect (reported e.g. in the **Croatian** and **Hungarian** reports).

In a number of countries, pay discrimination claims can be brought on behalf of the employee by trade unions (e.g. **Bulgaria, Croatia, Denmark, France, Italy, Latvia, Portugal, Sweden** and **the United Kingdom**), ombudspersons, national equality bodies or other organisations, like non-profit entities or NGOs (e.g. **Bulgaria, Croatia, Italy, Latvia, Sweden** and **the United Kingdom**). In this case, the costs are often borne by these organisations. In the **FYR of Macedonia** legislation enabling trade unions and NGOs to represent victims in court is in the course of being adopted by parliament.

Sometimes claims can even be brought on behalf of a group of victims (e.g. **Bulgaria, Croatia, Denmark, Italy** and **Liechtenstein**). The **Liechtenstein** report highlighted, however, that, in case of a class action, individuals can only be financially compensated when they each start separate and individual proceedings to this end.

The **German** expert considered it to be a great disadvantage that in her country trade unions and the equality body cannot bring claims on behalf of individuals. Also in **Greece** the *locus standi* of trade unions to pursue claims of employees is very limited.

In e.g. **Slovenia** and **Finland**, trade unions and the equality bodies can merely assist victims of pay discrimination with legal advice.

#### ***6.1.3. Time limits***

Time limits (prescription periods) may also substantially reduce the number of claims that eventually reach the competent courts. Prescription periods are extremely diverse in the 33 countries studied.

In **Belgium** for example, the Employment Contracts Act of 3 July 1978, which applies to an employee challenging gender pay discrimination, imposes a double time limit: the claim must be brought within five years from the disputed facts and, in any

case, within one year from the effective termination of the employment contract. For tenured staff members in the public services, the time limit is – generally speaking – five years from the disputed facts. Relying on the **Belgian** Protection of Remuneration Act of 12 April 1965, however, it might be possible to claim compensation for a discrimination that started at the moment the victim was hired by the employer and continued during the whole period of occupation, whatever the duration of such discrimination may have been.

In **Latvia**, however, 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.<sup>51</sup> It has been argued many times that such a brief time limit does not correspond to the EU law principles of equality and effectiveness. Also in **Malta** and **the United Kingdom** the very short prescription periods applicable to equal pay claims have been criticized.

In many countries there also seems to be discussion as to when the time limit should start to run: either at the moment the discrimination occurred, or at the moment the victim learned of such discrimination. In **Poland**, for example, the Supreme Court seems to have decided that the crucial moment is the moment when the employee became aware of the discrimination,<sup>52</sup> which will undoubtedly entail difficulties of proof.

#### **6.1.4. Limited compensation and sanctions**

Compensation for gender pay discrimination is in most cases composed of the difference with the salary of the comparator, implying that the highest remuneration is automatically substituted when pay is not equal. In the **Greek** report this has been called the ‘levelling up’ solution,<sup>53</sup> the **German** expert called it ‘*Anpassung nach oben*’.<sup>54</sup>

The number of months for which compensation can be claimed usually depends on the prescription periods discussed in the previous section (6.1.3). Given the enormous diversity in national prescription periods, the periods that can be covered by compensation also vary substantially. Some experts reported that there are no limits to the period that can be taken into account (e.g. **the Czech Republic** and **France**). **Croatia** and **Italy** mentioned that the amounts of damages that can be paid are not capped.

In some countries, national legislation provides for a lump sum compensation. In **Belgium**, for example, the victim of pay discrimination may apply for either fixed damages equal to six months’ pay, or for the compensation of the actual damage, the extent of which must be demonstrated by the victim.

In **Austria** and **Lithuania**, pension rights are not taken into account in determining the amount of compensation or the sanctions. In **Hungary**, by contrast, the employer has to pay (and also deduct) and transfer to the social security fund all social security fees that should have been paid in case of lawful wage setting, thereby

<sup>51</sup> Articles 34(1), 48(2), 60(3), 95(2) of the Labour Code (*Darba likums*).

<sup>52</sup> I PK 242/06.

<sup>53</sup> See S. Koukoulis Spiliotopoulos ‘Gender equality in Greece and effective judicial protection: issues of general relevance in employment relationships’, *Neue Zeitschrift für Arbeitsrecht Beilage* 2/2008, pp. 74-82.

<sup>54</sup> R. Winter in: W. Däubler (ed.) *Tarifvertragsgesetz*, § 1, marginal notes 455 et seq. (with further references) Baden-Baden, Nomos 2<sup>nd</sup> ed. 2006.

correcting the pension entitlement of the employee. Also in **the United Kingdom**, missed contributions to pension schemes are allegedly included as an element of pay that is to be compensated.

In e.g. **Cyprus**, **Iceland**, **Lithuania** and **Romania**, damages include pecuniary satisfaction to compensate for moral damages caused to the claimant by the offender.

Sometimes also criminal sanctions are provided by law. This is the case, for example, in **Italy**. The **Lithuanian** report referred to the possibility of imposing administrative fines.

#### ***6.1.5. Lack of trust in the judiciary***

The **Croatian** expert also indicated a lack of trust in the judiciary as one of the reasons why very few gender pay discrimination cases reach the courts. Such lack of trust includes suspicion of corruption within the courts, but also the belief that the courts simply do not have the capacity to effectively deal with complex cases like pay discrimination on the basis of sex.

Also the **Portuguese** report referred to the fact that technical notions related to pay discrimination (e.g. the notions of direct and indirect discrimination, and of work of equal value) remain unclear to courts and also labour inspectors. The **Finnish** report voiced similar thoughts with respect to labour union lawyers and general lawyers, who are said to prefer to handle cases on the basis of ordinary labour law, and leave non-discrimination law out of the picture.

### **6.2. Procedures before national equality bodies**

As highlighted above (in Section 5.1.2), national equality bodies may have very diverse competences.

Some equality bodies have the authority to hear complaints on gender equality (including equal pay). The way in which the procedure is organised, and the outcome of the procedure (binding or non-binding opinions, mediation, etc.) varies from country to country.

In **Hungary**, for example, the equality body can proceed only in case of violation of the provisions relating to equal treatment and normally it only acts upon a claim. It has no power, however, to promote active measures to close the pay gap. If violation of equal pay is found, it can stop the unlawful practice, and can impose a fine, but it cannot award financial compensation. An interesting additional sanction is the publication of the final and binding decision on the equality body's website whereby the employer is excluded from the qualification of having 'orderly labour relations', a precondition of applying for public money.

Also in **Latvia**, the national equality body opens investigation cases in response to complaints of individuals.

In **Greece**, the equality body opens investigations, but cannot start judicial proceedings. It takes binding decisions or imposes sanctions, mainly through mediation.

Procedures before the national equality bodies 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 (e.g. **Cyprus**). 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.

Because of the above-mentioned advantages, the procedure before the national equality body is, in some countries, a good alternative for bringing the case before the ordinary courts. In **Norway**, for example, the procedure before the national equality body is allegedly so efficient that nearly no cases end up before the courts.

However, some experts (e.g. **Bulgaria**) have reported a high number of complaints to the national equality bodies, resulting in a considerable backlog.

Other experts registered very few claims regarding the gender pay gap presented to the equality bodies (e.g. **Luxembourg**). In the **FYR of Macedonia** the equality body was said to be much too passive. Also in **Lithuania**, the national equality body reportedly is not very interested in problems of equal pay for men and women. In **Estonia** concerns have been expressed about insufficient financial resources and staff for the equality body to fulfil its competences effectively.

## **7. RELATIONSHIP BETWEEN THE GENDER PAY GAP AND OTHER PARTS OF LAW**

The experts of the 33 countries were asked in particular to check whether other parts of law, e.g. labour law – other than just those provisions directly connected to equal pay for equal work for men and women – could influence the gender pay gap. This question was meant to invite the national experts to think out of the box, and beyond the ordinary boundaries.

As will become clear in the following sections, this question implies that many of the explanations for the - unadjusted - gender pay gap (see above, in Paragraph 1.2) should be revisited in order to find out whether the legislation regarding these explanations still reflects discriminatory practices and ideas.

### **7.1. Part-time work**

Many countries have adopted legislation guaranteeing equal treatment for part-time and full-time workers, 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).<sup>55</sup> Quite contrary to this, one can still detect 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 on 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.

The **Norwegian** expert referred to the working hours regulations laid down in the Working Environment Act of 17 June 2005 (WEA). The specific regulations with regard to part-time work have resulted in a practice by the employers in the female-dominated health sector, like e.g. hospitals, to work with many small part-time positions (rather than full-time positions), in order to facilitate shift work/rotational work and avoid overtime pay. In Norway, it is hard to find comparable male-dominated professions with an equally high number of part-time positions. According to the **Norwegian** expert, it is typical that, with regard to Acts like the **Norwegian** WEA, the gender perspective is lost. After all, the WEA does not contain gender

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<sup>55</sup> Clause 4 of the 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.

equality and equal pay provisions, and seems to work – at least at first sight – within the gender-neutral context of working hours arrangements.

## 7.2. Overtime

In recent years, **Belgian** employers' organisations have exerted pressure on the Federal Government to adopt legislation allowing more flexible and cheaper overtime work, the current legislative measures being too strict and too expensive in their view. The Government has partly met these requests by reducing taxes on overtime pay. The **Belgian** expert warned that 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 rise.

In **Bulgaria**, the sectors where women tend to work overtime – i.e. sectors with high female presence – the remuneration for such overtime work is usually very low. If these women receive additional pay for overtime work, it is usually part of the grey economy and thus not counted for social security purposes. Also, the **Croatian** report pointed out that many women work overtime, in particular in the trading sector which appears to be dominated by women, but are not paid for it at the increased rate, as provided by law.

In **Greece**, part-timers receive additional overtime pay for work in excess of their part-time hours at a rate that is lower than the full-timers' rate. They receive the same rate as full-timers only where they exceed the full-time limits. Also in **Latvia**, issues on pay for overtime with regard to part-time workers are not regulated. Whilst, in the nineties, the ECJ defended the position that overtime pay for work in excess of part-time hours is only due for hours that exceed full-time limits,<sup>56</sup> more recent case law of the ECJ seems to be more favourable to part-time workers.<sup>57</sup>

In **Lithuania**, certain groups of women (e.g. pregnant women, women who are breastfeeding, women raising young children, etc.) are prohibited by law to work overtime without their consent.

## 7.3. Temporary (fixed-term) work arrangements

In many countries, fixed-term contracts constitute an exception only allowed for explicitly prescribed reasons. This is in line with Directive 1999/70/EC (fixed-term work) which intended to eradicate abuse arising from the use of successive fixed-term employment contracts or relationships.<sup>58</sup>

Notwithstanding the above-mentioned principle, many countries reported the 'creative' use of fixed-term contracts, which eventually works to the disadvantage of female employees.

**Croatia**, for example, reported higher abuse of fixed-term contracts in sectors dominated by women, such as the trading sector. Also in **Greece**, state schoolteachers employed on a private-law fixed-term contract – a quite large and overwhelmingly female category – are 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.

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<sup>56</sup> Case C-399/92 *Helmig* [1994] ECR I-5727.

<sup>57</sup> Case C-285/02 *Elsner-Lakeberg* [2004] ECR I-5861.

<sup>58</sup> 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.

In some countries (e.g. **Italy**) the 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 talking about precarious and low-paid jobs.

#### 7.4. Posting of workers

**The United Kingdom** highlighted that, in particular in the public sector, the posting of workers, or contracting-out, has been one of the most significant downward drivers of female pay. Contractors undercut public sector rates either for all staff or for new recruits.

#### 7.5. Issues related to reconciliation of work and family life

Many national reports referred to the high level of protection of labour law with regard to female workers, and the negative influence this may have on women's pay (e.g. **Croatia, the Czech Republic, Italy, Lithuania, Slovakia** and **Turkey**).

For example, lengthy family-related leaves – 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 in a double way. In the first place, the social security benefits (if any) that go along with such leaves – whatever their amount may be – never reach the level of normal pay (see e.g. the **Bulgarian** and **Croatian** reports). In the second place, 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 (reported by the **Croatian** and **Slovenian** experts).

Also, the **Irish** expert suggested that policies to support continuity in women's employment could help to reduce the gender pay gap. She referred to a national report that came to the remarkable, though somewhat confusing conclusion that of all flexible arrangements only career breaks are found to reduce the gender pay gap (also see above, in Section 1.2.3).<sup>59</sup>

The **Swedish** report indicated that in collective labour agreements, parental pay rights tend to reflect 'the need' of the typical member in the relevant area of the labour market. This said to reinforce gender segregation in labour markets (making women prefer the public sector) and the gender-biased 'parental-leave behaviour'. Still, no discrimination in the legal sense is at hand, talking about gender-neutral rules in different sectors and branches of the labour market.

**Croatia** also questioned its national ban on night work for pregnant women, except when approved by a medical doctor and irrespective of the woman's personal interests.<sup>60</sup> As night work is remunerated better than daytime work, the effect on the gender pay gap is obvious.

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<sup>59</sup> See the joint report from both the Equality Authority and the Economic and Social Research Institute entitled *The Gender Wage Gap in Ireland – Evidence from the National Employment Survey 2003*, published in September 2009 by S. McGuinness et al., available on <http://www.equality.ie/index.asp?locID=105&docID=817>, accessed 23 March 2010.

<sup>60</sup> Note that this is the opposite of what Directive 92/85/EEC (pregnancy) provides in its Article 7: subject to the submission of a medical certificate, pregnant workers cannot be obliged to perform night work. See Directive 92/85/EEC on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC), OJ L 348, of 28 November 1992, p. 1.

A similar question was posed by the **Macedonian** expert. In the **FYR of Macedonia**, a female worker with a child until the age of three cannot be obliged to do night shifts, whilst this only applies to fathers on strict conditions, e.g. when the mother has left the child. This implies that female workers are more often in a position to reject highly paid night work, which will negatively affect the gender pay gap. It even means that, on the family level, parents who want to switch their obligations (because of better payment of the woman's job), cannot do so.

The **Turkish** report mentioned the legal obligation for large employers to establish pre-school classes and providing childcare facilities at the employer's expense. One can easily imagine that such measures discourage employers from hiring women.

The **Italian** and **United Kingdom** experts both highlighted that rules inducing fathers to take up leaves would be very useful to progressively reduce the gender pay gap. In this respect, it is worthwhile to mention a project started by the **Polish** Ministry of Labour and Social Policy on the 'Reconciliation of professional and family roles of women and men'. This project involves research and training of employers and trade unions on new legal opportunities facilitating such reconciliation, including the 2008 law amendment, which allows to cover from enterprises' social funds the children's day-care services organised at the workplace.

## **7.6. Party autonomy in contract law**

Several national experts (e.g. **the Netherlands**) highlighted that party autonomy in contract law may be an important cause of unequal pay. It is a well-known fact that women, when negotiating the terms of their labour contract, are not so keen on getting a salary as high as men's. They often prefer to negotiate about other contractual terms instead (e.g. having the possibility to work flexible hours, or the possibility to do part of the work at home).

As already mentioned before, however, party autonomy is not absolute as the employer is bound by legal provisions recognising the principle of equal pay for men and women (see Section 4), and possibly also by collective labour agreements (see Section 3.1.2).

## **7.7. Measures to fight unemployment**

In many countries (reported e.g. in the **Belgian** and **Greek** reports) the number of unemployed women is higher than the number of unemployed men. As a consequence, measures that fight unemployment can have an impact on the gender pay gap, and sometimes they may even be targeted at the female unemployed in particular.

In **Greece**, for example, measures to combat unemployment include subsidies (funded by the European Social Fund) to employers for hiring unemployed workers, or to young unemployed for setting up a business. They favour women directly (by giving them priority) or indirectly (by giving priority to mostly 'female' categories, such as the long-term unemployed or single-family heads).

Also in **Bulgaria**, **Hungary** and **Italy**, women (in particular women with small children) are said to use measures and special policies to fight unemployment more often than men. Such measures and policies are often related to ensuring (subsidised) employment, but at a low level of pay (usually at the level of the minimum wage).



Thus women more often accept receiving lower pay, which does not positively affect the gender pay gap.

### 7.8. Pensionable age and pension systems

As stressed in the **Italian** report, most pension systems are structured in such a way that they mirror any differences in women's working patterns. After all, it is typical of a pension system to create links between pay and contributions on the one hand, and the amount of pension benefits on the other.

In **Bulgaria**, women's pensionable age in the first pillar of social security is still lower than men's. As a consequence, the unequal pay reflects directly on their pensions.

In **Greece**, statutory provisions and internal rules allow dismissal at the pensionable age, which is still often lower for women than for men. As a consequence, women are deprived of possibilities of promotion and higher pay and pension. The Supreme Civil Court found these provisions contrary to the equal treatment principle,<sup>61</sup> but the relevant measures remain on the books and continue to be applied.

### 7.9. Measures regarding seniority/length of service/evaluation

In some countries, collective agreements or other measures provide for allowances for length of service with an employer (e.g. **Greece** and **the United Kingdom**). Length of service often is also a condition for the calculation of redundancy pay. This is the case, for example, in **Greece**. Women are clearly disadvantaged by this system due to frequent career breaks and also atypical work arrangements. Whilst the **Latvian** labour legislation requires taking into account the time spent on childcare leave for purposes of seniority, this does not seem to happen in reality.

The **Croatian** report referred to a legal rule providing that civil servants who have been absent from work for more than six months within a period of one year will not be subject to work evaluation, regardless of the reasons for such absence.<sup>62</sup> It is clear that this apparently neutral provision works to the disadvantage of women's possibilities of promotion, and consequently also their pay. Moreover, it is also contrary to the case law of the ECJ.<sup>63</sup>

### 7.10. Provisions of family law

The **Latvian** report was the only one to also focus on family law provisions. The interpretation and application of the national provisions on guardianship over children after divorce, and the amount of maintenance payments were said to create serious obstacles for the equal opportunities of women in the labour market, and for equal pay in particular.

For example, although **Latvian** civil law provides that every parent has a duty to perform daily care of his/her child, there is no enforcement mechanism to force an unwilling parent (usually fathers) to perform his/her duties. In addition to this, due to stereotypical ideas regarding social roles – which are still widely spread among national courts – it proves to be impossible to obtain an increase in the maintenance

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<sup>61</sup> Supreme Civil Court Nos. 85/1995, 449/1999 (Article 5(1) Act 435/1976).

<sup>62</sup> Article 82 of the State Officials Act.

<sup>63</sup> Case C-136/95 *Thibault* ECR [1998] I-2011.

payment with a view to compensate for such unequal sharing of the childrearing burdens.

Generally speaking, one could imagine that many national provisions on guardianship after divorce still work to the advantage of the mother, which at the same time clearly negatively affects the mother's wage-earning capacities. Also here, the obligatory and more evenly shared implication of fathers in guardianship after divorce could eventually have a positive effect on the gender pay gap.

## 8. SOME GOOD PRACTICES

National instruments to fight the gender pay gap are very diverse. Still, many national experts concluded that their respective governments are not doing enough.

It is remarkable that many national reports called for more compulsory measures, as mere voluntary instruments are said to be insufficient.

In this respect, there was a recurring call for legislation obliging employers to publish detailed information regarding wages paid and other advantages given to employees within the company. Compulsory reporting systems like the ones that currently exist in e.g. **Austria, Finland, France, Italy, Norway** and **Sweden**, can serve as good practices.

Also the compulsory equal pay plans, to be drafted by large employers in Nordic countries like **Finland, Iceland** and **Sweden**, but also in **Spain**, were highlighted as good practices.

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 initiative to earmark an amount of money as 'equality pot' meant for municipal employment pay rises targeted at low-paid highly educated 'female' branches is a very good practice that could inspire other countries. **Norway** seems to have followed the Finnish example by adopting, in May 2010, a considerable pay rise in the female-dominated professions of the public sector.

As far as the social partners are concerned, the compulsory negotiations on occupational gender equality (including equal pay), as imposed by the **French G  nisson law** are exceptional, and can certainly be called an excellent practice. After all, many countries have indicated that the social partners in their countries are not interested in the gender pay gap. Compulsory negotiations on the matter thus seem to be the only way to place the issue on the social partners' agenda.

Also the systematic and compulsory analysis of all collective labour agreements by an independent governmental body (e.g. a national equality body) would be a good way to force social partners to take into account the principle of equal pay for male and female workers. In this respect, **Austria** and **Portugal** can serve as good practices.

A number of national experts also called for measures that oblige men to be more actively involved in household and childrearing tasks. This would, according to the **Italian** and **United Kingdom** experts, be the only 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. Here, the **Polish** project on the 'Reconciliation of professional and family roles of women and men' could be mentioned as good practice.

As regards the enforcement of equal pay provisions, several reports stressed the importance of class action suits, which in many countries are still not available.

Finally, reference should also be made to **Austria**, being one of the few countries that have – limited – experience with public procurement as a instrument for fighting the gender pay gap. Many experts regretted that their governments still do not use this ideal opportunity to force bidders to comply with the equal pay principle, thus indirectly diminishing the gender pay gap.

## 9. CONCLUSION

An unadjusted gender pay gap of 17.6 % (EU average in 2007) constitutes a considerable challenge for the European Commission. This is particularly true, as progress in closing the pay gap appears to be very slow, with an obvious increasing trend in the pay gap in a substantial number of countries. It is clear that the average of 17.6 % masks a number of differentiations, which do not only concern differences among the countries. For example, on a transnational level, the gender pay gap tends to be higher in the private sector, in the 30-49 age bracket, in particular sectors of industry (e.g. finance, insurance and healthcare), and for people with either lower education or postgraduate education.

Parts of the unadjusted gender pay gap can certainly be explained by phenomena like the disproportionate representation of women in part-time and temporary work, the horizontal and vertical segregation of the labour market, and women's frequent career interruptions. Still, the part of the gender pay gap that remains unexplained (i.e. the adjusted gender pay gap) continues to be significant.<sup>64</sup>

This disappointing state of affairs has encouraged the European Commission to remain very active in the area of equal pay for men and women, and to further update and develop its information on the gender pay gap. In that respect the Commission asked its *Network of Legal Experts in the Field of Gender Equality*<sup>65</sup> to send out a detailed questionnaire to the legal experts of this Network. The national reports cover 33 states (the 27 EU Member States, the three EEA countries and Croatia, the FYR of Macedonia and Turkey).<sup>66</sup> The Commission wanted to obtain better data on the national policies, initiatives and legal instruments aimed at tackling the gender pay gap in practice, and to explore the potential links between equal pay and other national labour law provisions.

The answers provided to the questionnaire have clearly shown that in many countries the gender pay gap is not very high on the agenda of national governments and social partners. Still, the national legal experts pointed out some interesting instruments (legislative provisions, and other – soft-law and non-enforceable – measures) targeted at social partners or employers, which definitely contain good possibilities for combating the gender pay gap.

As far as the social partners are concerned, many national reports have highlighted that collective labour agreements continue to contain provisions with an *indirect* discriminatory impact on female employees' pay. Such indirectly

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<sup>64</sup> A. Dupuy, D. Fouarge and B. Buligescu have advanced that, depending on the country studied, the adjusted gender pay gap is similar, smaller or even larger than the unadjusted gender pay gap. See *Development of econometric methods to evaluate the gender pay gap using structure of earnings survey data*, a study carried out by the Research Center for Education and the Labour Market at Maastricht University, Eurostat, 2009, available on [http://epp.eurostat.ec.europa.eu/cache/ITY\\_PUBLIC/KS-RA-09-011/EN/KS-RA-09-011-EN.PDF](http://epp.eurostat.ec.europa.eu/cache/ITY_PUBLIC/KS-RA-09-011/EN/KS-RA-09-011-EN.PDF), accessed 23 June 2010.

<sup>65</sup> For more information on the Network, see the European Commission's website on <http://ec.europa.eu/social/main.jsp?catId=748&langId=en>, accessed 3 May 2010.

<sup>66</sup> The 33 national reports are available on the Network's website: <http://ec.europa.eu/social/main.jsp?catId=641&langId=en>, accessed 21 June 2010.

discriminatory provisions include job evaluation and pay systems that are neutral on the face of it, but appear to structurally disadvantage female workers. In this respect national experts have welcomed instruments involving the systematic and compulsory analysis (sometimes by the social partners themselves) of all collective labour agreements in order to detect provisions that violate the equal pay principle.

Experts have also presented several measures targeted at employers. The most frequent ones include measures relating to the compulsory delivery by the employers of gender-specific pay statistics, measures relating to transparency of pay, and measures regarding the compulsory adoption by employers of equality plans or strategies. Although public procurement procedures would reportedly offer an ideal opportunity for governments to force bidders to comply with the equal pay principle, it appears from the national reports that only a very limited number of countries have actually made use of this opportunity. There is certainly room for a more proactive policy in the national public procurement field.

The 33 national experts have also presented a wide variety of other measures aimed at tackling the gender pay gap. Some of the most interesting measures include those that may assist in establishing gender-neutral job evaluation and pay systems. Furthermore, a number of Scandinavian countries have reported novel initiatives trying to remedy the gender segregation of the labour market, through pay rises paid out of an 'earmarked' source and targeted at low-paid and highly feminised branches of the economy (e.g. healthcare).

The enforcement of equal pay rules is reportedly problematic. Case law on equal pay issues indeed remains very scarce. One of the explanations is the problematic scope of comparison. Many countries do not accept a hypothetical comparator and cross-employer and cross-sector comparison is still unthinkable in most countries. Other explanations relate to the lack of personal resources of the claimant, problems regarding time limits, limited compensation and sanction possibilities and finally, in some countries, also the lack of trust in the judiciary.

As hoped for, the 33 national reports also uncovered a number of interesting links between the gender pay gap on the one hand and other parts of law on the other hand. Some of these links are rather unexpected, and provide a novel view on the gender pay gap. The link with the posting of workers, for example, was signalled by only one country, but is without any doubt relevant to many other countries. The posting of workers, also referred to as contracting out, would be one of the most significant downward drivers of female pay, especially in the public sector.

Research with regard to the discovery of such unexpected links should be encouraged. As direct instances of pay discrimination have become rather exceptional in most of the 33 countries involved, the focus for legal action by both the EU and the Member States should be on the indirect instances of discrimination, including the unexpected and unattended ones.



## Part II

### National Law: Reports from the Experts of the Member States, EEA Countries, Croatia, FYR of Macedonia and Turkey

#### AUSTRIA – Anna Sporrer

##### 1. General situation

In Austria the gender pay gap is still increasing. According to the *Global Gender Pay Gap Report* which was published by the World Economic Forum<sup>1</sup> in the autumn of 2009, Austria is in 26th place out of the 27 EU countries, and among all 134 countries examined in 2010 Austria is in 42nd place, where it was 29th in 2009.

The most recent official data which is available from 'STATISTIK AUSTRIA'<sup>2</sup> dates from 2008. Based on these statistics, in 2008 the gender pay gap in Austria looked as follows:

With respect to the average gross income of all full-time employees in Austria who were employed the whole year, the income gap between women and men amounts to 21 %, but there are different results in different groups. The gender pay gap among apprentices amounts to 21 %, among blue-collar workers it amounts to 33 %, among white-collar workers it amounts to 35 %, among civil servants employed under private contracts<sup>3</sup> it amounts to 2 % and the gender pay gap among civil servants employed under public law decree<sup>4</sup> it amounts to 7 %.

If all part-time employees and those who were not employed the whole year are included, the gender pay gap in 2008 in total amounts to 41 %. In detail, the gender pay gap among apprentices amounts to 19 %, among blue-collar workers it amounts to 57 %, among white-collar workers it amounts to 51 %, among civil servants employed under private contracts it amounts to 8 % and the gender pay gap among civil servants employed under public law decree amounts to 23 % when including part-time and discontinuous workers.

As the gender pay gap almost doubles when including part-time workers into the statistics, this indicates that part-time work bears the risk of lower income and that the increasing numbers of females among the part-time employees and workers lead to disadvantages concerning the economic participation of women in society. According to a study that was recently published by the Minister for Women Affairs,<sup>5</sup> in Austria 700 000 women are working part time, half of them explicitly in order to reconcile work and care for family members. In contrast to this, only 3 % of the male part-time workers do so because of childcare needs, the others are working part time in order to conduct further studies or trainings. Differences between female and male part-time

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<sup>1</sup> The Gender Pay Gap report 2009 is based on the Gender Pay Gap Index 2009, which is the result of a collaboration with Harvard University and the University of California, Berkeley.

<sup>2</sup> 'Statistik Austria' is a public institution, which offers services in the public interest. See [www.statistik.at](http://www.statistik.at), accessed 31 May 2010.

<sup>3</sup> *Vertragsbedienstete*.

<sup>4</sup> *Beamteninnen und Beamte*.

<sup>5</sup> *Qualität von Teilzeitbeschäftigung und die Verbesserung der Position von Frauen am Arbeitsmarkt* Forschungsbericht der L&R Sozialforschung und FORBA im Auftrag von Bundeskanzleramt – Bundesministerin für Frauen und öffentlicher Dienst, Wien 2010, [www.frauen.bka.gv.at](http://www.frauen.bka.gv.at), accessed 31 May 2010.

workers also exist concerning the age of the workers: most women work part time between 30 and 44, which coincides with their main earning years, whereas men mainly work part time at the beginning or the end of their professional career.

The study also showed huge discrepancies between gross salaries per hour: the gender pay gap between part-time and full-time employees amounts to 30 %.

Austria also faces the fact that a significant number of girls leave school immediately after the obligatory 9 years<sup>6</sup> and that girls still choose stereotyped professions in low-income branches.

These facts also lead to disadvantages concerning pensions: The gender pension gap in Austria amounts to 46 %.

## 2. The legal framework

In accordance with the constitutional principle of the division of legislative competences between the Federal State and the regions, the law concerning equal pay for equal and equivalent work between women and men is enshrined in two main Acts on federal level and various Acts at the level of the nine regions. For the private sector, the principle of equal pay is regulated in the Equal Treatment Act:<sup>7</sup> §3 Paragraph 2 contains the prohibition of discrimination on grounds of sex in the field of remuneration and based on §11, job classification systems on plant level as well as sectoral collective agreements have to take into account the principle of equal pay for equal and equivalent work and must not contain different criteria for women and men constituting discrimination. For the public sector, equivalent regulations are stipulated in §4 and §6 of the Federal Equal Treatment Act.<sup>8</sup> Since 1979, equal treatment legislation has included the principle of equal pay, but legislation does not define the term equal pay for equal or equivalent work between women and men. Occupational social security schemes, in particular occupational pension schemes, are not explicitly mentioned by these Acts, but are covered by legal interpretation.

Legislators have always been reluctant and never directly participated in the negotiations on collective agreements and the question of salaries. Austria has a long-term tradition of 'social partnership' between industry and labour and the freedom of social partners to conclude collective agreements<sup>9</sup> constitutes one of the basic principles of the Works Constitution Act.<sup>10</sup> In general, collective bargaining traditionally plays an important role in the regulation of salaries. In Austria the most important collective agreements are valid on sector level. Collective agreements on organisation level<sup>11</sup> have a lower position in the ranking of legal regulations and cannot regulate general conditions of work. In branches where collective agreements do not exist (e.g. for house facilitators and workers in agriculture), 'basic-income tariffs'<sup>12</sup> may be regulated by the Federal Agreement Board,<sup>13</sup> which is part of the Ministry for Labour, Social Affairs and Consumer Protection.

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<sup>6</sup> In 2006, 34 % of girls and 21 % of boys left school after the obligatory school years, see: *Frauen und Männer in Österreich, Statistische Analysen zu geschlechtsspezifischen unterscheiden* Statistik Austria im Auftrag von Bundeskanzleramt – Bundesministerin für Frauen, Medien und Öffentlicher Dienst, Wien 2007.

<sup>7</sup> Official Journal (OJ) I 66/2004.

<sup>8</sup> OJ 100/1993 as amended by Official Journal I 65/2004.

<sup>9</sup> *Kollektivvertragsfreiheit*.

<sup>10</sup> *Arbeitsverfassungsgesetz*, OJ 22/1974 as amended by OJ I 74/2009.

<sup>11</sup> *Betriebsvereinbarungen*.

<sup>12</sup> *Mindestlohnstarife*.

<sup>13</sup> *Bundeseinigungsamt*.

### 3. Instruments of social partners

There are two provisions contained in the Works Constitution Act that are aimed at inducing social partners to include the issue of equal opportunities in their work and in collective or other agreements:

- according to §69 of the Works Constitution Act, works councils may install a committee on issues of equal opportunities;
- based on §97(1)25 of the Works Constitution Act, collective agreements on organisation level may be concluded on issues of equality of women and men at the workplace, in particular on affirmative action in favour of women and on the reconciliation of work and family life.

One of the examples, which may be regarded as a ‘good practice’ for the promotion of gender equality, is a collective agreement in the Bank Sector (*Sparkassen-kollektivvertrag*), which took effect on 1 January 2005. This collective agreement contains an explicit paragraph on equal opportunities of women and men and tackles the gender pay gap by at least three regulations:

- terms of parental leave count as terms of employment for the regular promotion into higher wages’ steps;
- additional qualifications (languages or social skills) are remunerated and shall be considered in procedures for job promotion;
- better remuneration for starters and better chances of promotion to higher positions, by which the opportunities for higher incomes for women will be enhanced.

With respect to the principle of equal pay for equal or equivalent work for women and men, awareness has been raised in particular by campaigns and projects. One of these projects was an in-depth analysis of collective agreements in the metal and the textile sector which was conducted in 2002 by the Ombudswoman on Equality Affairs together with women’s representatives of the unions. The conclusion of this study was that there were still gender-discriminatory provisions, mainly with an indirect discriminatory impact on female employees. It turned out, for instance, that in the male-dominated metal sector the wage groups distinguished between skilled and unskilled workers, whereas in the female-dominated textile sector a remarkable percentage of men, who were to be classified as unskilled, quickly earned as much as skilled female workers, which obviously constitutes an example of unjust job evaluation.

Currently the Austrian Federation of Trade Unions is conducting a project aiming at the analysis of all collective agreements to detect indirect discriminatory provisions in particular. The next step will be the development of obligatory and transparent criteria for the assessment of work, by which working places will be made comparable in order to meet gender equality requirements.

The Union for Private Employees also issued a model for collective agreements on organisation level, which also contains explicit regulations on gender equality and equal pay.<sup>14</sup>

In Austria collective agreements have to be opened for inspection in all enterprises concerned and employees have to be informed on these agreements, but

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<sup>14</sup> A model collective agreement contains example provisions and is to support and empower works councils for better negotiation with the employers. Such model agreements are not publicly available, but can be downloaded by union members on the homepage of the Union for Private Employees, see [www.gpa-djp.at](http://www.gpa-djp.at), accessed 31 May 2010.



besides this, collective agreements are not publicly available for ‘outsiders’. Therefore, and because of the huge number of existing collective agreements – about 450 at sector level – an independent analysis and assessment of these efforts would not be easy to conduct. Nevertheless, the detection and elimination of discriminatory provisions in collective agreements is a necessary precondition for the enforcement of gender equality in the field of income. One will have to see what the outcome of the Austrian Federation of Trade Unions’ project will show and what the reactions it will trigger. Provisions in collective agreements can only be eliminated by an amending agreement concluded between the contractual partners or by a court’s decision – on application of one of the social partners or in an individual court case where this provision would be applied.

Although all these efforts are made in order to improve the existing collective agreements towards better conformity with the principle of equal pay, one has to know that collective agreements just create minimum standards for salaries in general and that the individual salaries are often negotiated far above that bottom line. Furthermore, one has to bear in mind, that part of the workforce in Austria is not covered by collective agreements.

#### **4. Instruments specifically aimed at employers**

According to §13 of the Federal Act on the Establishment of the Equal Treatment Commission and the Ombudsperson for Equality Affairs<sup>15</sup> if the Equal Treatment Commission suspects discriminatory employment policies, the Commission can oblige the employer to deliver a report containing statistics including a comparison of male and female employees regarding e.g. the conditions of work. If the Commission finds a violation, it can ask for this report for one or more subsequent years. An employer who does not comply with the commission’s request and does not deliver the required report, will be publicly named on the homepage of the Federal Minister for Women’s Affairs. Unfortunately, some enterprises rather risk to be named publicly than to be examined and assessed by the Equal Treatment Commission, obviously because they do not meet negative consequences in public, but on the other hand fear a negative or costly impact on their personnel policies after being found guilty of a violation by the Equal Treatment Commission. Another weakness of this instrument is in the fact that the Equal Treatment Commission’s request to present a comparison of the work conditions of female and male employees always only affects the single enterprise concerned for a certain period of time and therefore may not cause any broader impact.

Another voluntary instrument that might be used by the employers is the already mentioned §97(1)25 of the Works Constitution Act, inducing employers to conclude collective agreements on organisation level with the works council on issues of equality for women and men at the workplace, in particular concerning affirmative action in favour of women and the reconciliation of work and family life. Unfortunately this instrument is just a voluntary option for employers and is not enforced very often. Therefore it has been proposed to establish this as an obligation for the employer, but this proposal up to now has not (yet) reached political consensus.

Another instrument on the transparency of salaries was recently proposed by the Austrian Minister for Women’s Affairs for enterprises with more than 25 employees. According to this proposal the employer will be obliged to deliver an anonymous list

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<sup>15</sup> OJ I 66/2004.

showing all salaries paid comparing women and men. These lists are to be examined by a monitoring body like the Ombudsperson for Equality Affairs or a ministry. Unfortunately up to now this proposal has been rejected, in particular by the Minister for Economic Affairs.

With respect to the use of public procurement powers for addressing the pay gap, reference is made to the existing Austrian Federal Public Procurement Act: §84 of this Act obliges the contracting authority in the tender to refer to the obligation that the offer has to be compiled in compliance with all labour and social security laws (including the Equal Treatment Act) and that the bidder will be obliged to obey all these provisions when performing his work in Austria. Furthermore, §19 of the Act *inter alia* allows taking into account issues of employment of women in the procurement procedure, which can be implemented while describing the required product or service, when defining the technical specification, by defining criteria for the final decision or by defining conditions in the contract. With reference to these legal measures, the Ministry for Labour, Social Affairs and Consumer Protection in 2008 issued a directive on how to take into account social aspects in public procurement, in particular gender mainstreaming. The Ministry for Agriculture, Forestry, Environment and Water Management, also in 2008, issued a study on how to consider gender criteria in public procurement. Further measures are currently discussed by the Minister for Women Affairs as well and the City Council for Women Affairs of the City of Vienna. These discussions are based on the 'Berlin Model', which obliges parties inviting tenders for contracts worth more than EUR 50 000 to choose from a list of 18 measures on equal treatment, promotion of women or the reconciliation of work and family life, and to commit to these measures in the awarding of the contract.

With respect to the possibility to include women's employment criteria into the public procurement procedure, opponents of this often argue the lack of conformity with EU and national public procurement law. Unfortunately, EU law and jurisdiction are not clear and precise enough on these issues. The interpretative Communication of the Commission on the Community Law Applicable to Public Procurement and the Possibilities for Integrating Social Considerations into Public Procurement<sup>16</sup> set out the possibilities offered by Community Law to integrate social considerations into public procurement procedures, but after this publication the Court of Justice delivered a series of relevant judgments, which brought new aspects into the legal discussion. What would be needed in order to overcome the legal concerns which are raised would be some clear guidelines, a toolbox or a list of measures, which in the eyes of the Commission are definitely in conformity with EU law. A Commission draft of a manual on how to take account of social considerations in public procurement, which was circulated internally among Member States' administrations for comments in the Spring of 2009, has not been published up to now.

Although some rules exist which would make it possible to combine equality and procurement issues, these regulations do not have much practical impact: On the one hand, there are no clear regulations or instruments e.g. on how to handle the monitoring and there is no information available on employers who have violated the Equal Treatment Act. Labour Court decisions in the first instance are only open for the parties to the trial, High Court decisions are published anonymously only. In addition to this, it is not feasible for public procurement officials generally to search for non-complying employers.

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<sup>16</sup> COM (2001) 566 final, 15 October 2001.

In Austria, to implement these measures – in order to produce clear and visible impact on employers’ strategies – would only make sense in areas where many public procurement proceedings are handled, like – for the Federal Ministries – the Federal Public Procurement Company Ltd.<sup>17</sup> Regarding areas where the implementation of these measures would be most effective there also seems to be a lack of political will, which might derive from the opinion that public procurement procedures and decisions are already complex enough and cannot be overloaded by new criteria other than public procurement related ones.

## **5. Other instruments to close the pay gap**

Other legal instruments to close the gender pay gap are provided for in equality and labour legislation: discriminatory clauses in individual contracts, for example, may firstly be challenged by the person who feels discriminated in labour court proceedings. Here, in particular the shift of burden of proof to the opponent (the employer) is an indispensable precondition for the enforcement of individual rights, because the employee normally does not have access to the information which is needed, in particular the salaries of the comparators. Therefore the legal instrument of the shift of burden of proof consequently has to be implemented not only by legislation, but also by the legal practice, which – in actual proceedings – often seems to be a difficult task and needs proper and timely safeguarding of the proof and well-skilled lawyers and judges in equality law matters.

Furthermore, the Ombudsperson on Equal Treatment Affairs may file a complaint with the Equal Treatment Commission on behalf of a person who feels discriminated against. This is free of costs for the applicant and – because of the specialisation of the Ombudsperson – this helps to bring forward the right facts and arguments. The procedure before the Equal Treatment Commission is a soft-law mechanism without coercive powers, but without cost risks for the applicant. Because of its composition (members from industry and labour) and its specialisation, this procedure can bring well-founded results in particular with respect to the assessment of equal and equivalent work. The findings of the commission can be used as an expert opinion in a subsequent labour court case. The social partners represented in the Equal Treatment Commission as well as the Ombudsperson for Equal Treatment Affairs are entitled to bring motions to court for declaratory judgments if an employer/the opponent does not comply with the Equal Treatment Commission’s recommendations.

Moreover, according to §54 Paragraph 2 of the Labour Court Act, collective bargaining partners are entitled to bring a motion to the Supreme Court for a declaratory judgment on the question of the existence or non-existence of rights. This question has to deal with labour law matters and has to be of interest for a minimum of three employees or employers. These rights may derive from the application or non-application of a collective agreement provision, which might be illegal under equality legislation. The Court may declare the provision as invalid and in one case actually did so after examining a discriminatory group classification within a wages’ scheme.<sup>18</sup> This claim of the collective agreement partners to the Supreme Court is the only collective remedy against discriminatory provisions and unfortunately it has only been used once in the field of gender equality law. One may presume that a good social climate between the collective agreement partners does not allow a dispute on these questions before the Supreme Court.

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<sup>17</sup> *Bundes-Beschaffungs-Ges.m.b.H* is a private limited liability company, owned by the Federal State.

<sup>18</sup> Supreme Court decision of 14 September 1994, ObA 801/94.

Most of the means described here follow a single-case approach, which on the one hand is necessary for the enforcement of individual rights, but on the other hand this single-case approach does not contribute to a systematic and collective strategy which is needed in order to visibly and sustainably combat the gender pay gap.

With respect to instruments that may generally assist in establishing gender-neutral job evaluation schemes or pay systems on behalf of Austria, the Ombudswoman for Equal Treatment participated in an EU project on equal pay in 2002/2003.<sup>19</sup> The outcome of this project, in particular the results and instruments for detecting and combating inequalities, are regularly presented by the Austrian Ombudspersons in seminars for works councils, gender equality agents and other stakeholders, and can be used in their practical work.

Regarding the monitoring and scrutinizing of collective agreements generally, each collective agreement has to be deposited immediately after its conclusion at the Federal Ministry for Social Affairs, which has to submit a copy of every collective agreement to all labour courts and has to publish the conclusion of the collective agreement in an official gazette.<sup>20</sup> On the occasion of registration, there is no analysis of the content of the collective agreement. Even more, there is no other systematic monitoring of collective agreements by the Government. But the Equal Treatment Commission is empowered to deliver an opinion on sex discrimination issues also concerning collective agreements. These opinions do not have a legally binding effect. Cases of direct discrimination have been detected by the Equal Treatment Commission following the entry into force of the 1979 Equal Treatment Act and the establishment of the work group of gender equality law experts of both sides of industry in the 1980s. As a consequence, social partners themselves have eliminated some directly discriminatory clauses (concerning wage groups) which existed in collective agreements. In the 1990s, the Equal Treatment Commission delivered four further opinions on collective agreements, basically concerning cases of indirect discrimination.

Moreover, collective agreement provisions which are not in conformity with superior legal norms can be declared null and void by courts and will therefore not be applicable in relevant cases. In this context, the Supreme Court ruled that any violation of Article 141 TEC, due to its direct effect, renders all non-conforming regulations in laws, collective agreements (on sector and on organisation level) and in single contracts inapplicable.<sup>21</sup>

## **6. Problems of enforcement and how to tackle them by good practices**

Within the existing legal system in Austria, the gender pay gap can be tackled individually by proceedings before the Equal Treatment Commission or the Labour Courts. In general the claimant has to claim her/his own rights: Individuals can claim their rights deriving from their labour contract at labour courts and may also challenge discriminatory provisions in collective agreements by claiming that provisions must not be applied in their case. The equality bodies provide for good support, but it has to be mentioned that the lack of personnel resources and independent budgets lead to an overload of cases at these institutions. Long-term proceedings and – as proof in general has to be saved properly and promptly – a loss of quality of proof in subsequent court cases are the consequence of these circumstances. Interestingly, there have only been few cases even before the Equal Treatment Commission on

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<sup>19</sup> See [www.equalpay.eu](http://www.equalpay.eu).

<sup>20</sup> *Amtsblatt zur Wiener Zeitung*.

<sup>21</sup> Supreme Court decision of 13 November 2002, 9ObA193/02a et al.

equal pay questions, and there are almost no labour court judgments, maybe also because many disputes might be settled by an agreement between the parties. Furthermore, there are no data or statistics available for the general public on these issues.

With respect to the scope of comparison in case of a complaint there has only been one Supreme Court decision on equal pay, where the Court stated that different wage groups for psychologists on the one hand and medical doctors on the other hand are in conformity with EU and national equality law, even if both groups are working equally as psychotherapists, because due to different basic academic studies, they perform their tasks and duties differently.<sup>22</sup>

According to the Equal Treatment Act, sanctions are defined as the difference of the salary to the comparator only. Due to the general time limits of up to three years prior to the claim, the building up of pensions is not subject of compensation or part of the sanctions.

Regarding questions of enforcement the Equality Bodies, in particular the Ombudsperson or Equality Affairs, have always played an important role, not only by counselling and supporting individuals, but also by conducting surveys and studies, by inventing and installing instruments as well as by information supply and capacity building of all stakeholders, in particular by holding seminars or participating in conferences. Moreover, the Federal Work Chamber and the Work Chambers of the regions<sup>23</sup> give legal counselling and advice for employees and workers and provide for support and legal aid in labour court proceedings.

Furthermore, trade unions play an indispensable role in the enforcement of gender equality. A project that is currently conducted by the Austrian Federation of Trade Unions<sup>24</sup> aiming at the analysis of all collective agreements to detect in particular indirect discriminatory provisions can be regarded as a good practices model. With regard to the fact that the vertical gender segregation of the workforce in different sectors and branches is one of the causes of the gender pay gap, also the legal dimension of tackling the gender pay gap should be further developed towards the cross-sector comparison of collective agreements.

## **7. Relationship between the gender pay gap and other parts of labour law**

When combating gender-related disadvantages in employment, the phenomenon of the ‘working poor’ has to be monitored. The number of workers who work full time, but do not earn more than the poverty limit of EUR 951 is 247 000, including 116 000 women. The chairperson of the women’s organisation within the Austrian Federation of Trade Unions therefore demanded a basic income of EUR 1300.

With respect to matters of age, age limits and seniority issues, jurisdiction plays an important role. For instance, the Supreme Court ruled that female workers are discriminated against when periods of work beyond the age of 55 for the female worker do not count for the calculation of business pensions.<sup>25</sup>

Also, Austrian ECJ cases play an increasing role in the field of age and gender (multiple) discrimination, namely the *Hütter* case<sup>26</sup> and the pending *Kleist* case.<sup>27</sup>

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<sup>22</sup> Supreme Court decision 26 January 2000, 9ObA291/99f, ECJ judgment of 11 May 1999, C-309/97, *Angestelltenbetriebsrat der Wiener Gebietskrankenkasse et al.*

<sup>23</sup> *Bundesarbeitskammer und Arbeiterkammer der Länder.*

<sup>24</sup> *Österreichischer Gewerkschaftsbund.*

<sup>25</sup> Supreme Court decision of 23 April 2003, 9ObA256/02s; 9ObA48/06h.

<sup>26</sup> C-88/08.

<sup>27</sup> C-365/09.

These cases are related to the gender pay gap to the extent that the possible consequences of these cases will indirectly affect women's employment: In *Hütter*, a national provision for contractual civil servants was found to oppose EU law, distinguishing between general education in school and vocational training on the job before the age of 18 years for the classification into wage groups. As this judgment will also have retroactive impact and envisaging the fact that young women in Austria leave school before they turning 18 more often than young men do, this judgment might have a (slightly) compensating impact on the issue of equal pay. The *Kleist* case concerns the forced termination of the job relation of persons reaching the pensionable age, taking into account that the statutory pensionable age in Austria still differs between women and men. If the question for the preliminary ruling will be answered by the European Court of Justice in favour of the claimant in the national court trial, this might also have a positive impact on the continuation of women's employment and will enhance the opportunities of women to earn an active income.

As described in the introductory remarks, the relationship between the gender pay gap and part-time work in Austria is crucial. The mentioned study in particular showed huge discrepancies between gross salaries per hour: the gender pay gap between part-time and full-time employees amounts to 30 %. It has to be assessed whether or not discriminatory factors cause these differences or if they are based on different work of full-time and part-time employees. According to the study, part-time work often causes de-qualification of work: 20 % of former part-time workers after returning to full-time work do not find a job of the same qualification as before. Half of the 700 000 female part-time workers work less than 24 hours/week, but 25 % of them would like to increase the number of working hours.

Also other forms of atypical work arrangements have to be monitored when combating the gender pay gap: In Austria, the number of 'minimum employed'<sup>28</sup> is still increasing. In December 2009 a number of 296 224 persons were employed in that manner, 65 % of them women. These persons suffer from different kinds of disadvantages, e.g. they are not fully integrated into mandatory social security and may never be included into insurance against unemployment.

With respect to the reconciliation of family life and work, the length of leave for childcare determines the chances for returning to qualified employment: the longer the leave, the more difficult it is for the returning employee to find an equivalent job. Therefore the Austrian Minister for Women's Affairs proposed to eliminate the longest form of parental leave (30/36 months) in order not to induce women to take a leave of such length and thus minimize their chances for returning to the labour market or to qualified jobs.

With respect to the horizontal segregation of the labour market, it has to be highlighted that the obligatory promotion of women definitely contributed to the increasing number of women in higher positions within the public sector. The Austrian example for the public service over 15 years of experience shows that quota systems work, if they have a clear concept, binding force and the outcome of these measures is monitored regularly.

Other more general legal issues might also contribute, when general legal principles are observed. Due to the Austrian legal system, contractual law may be regulated by legislation under the precondition that the law which restricts the autonomy of the contractual parties is in conformity with the constitutional principle

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<sup>28</sup> 'Minimum employed' is someone who does not earn more than EUR 366.33 per month in a regular job.

of proportionality, which means that the law has to serve a legitimate aim and the means are necessary and adequate to reach this aim.

Data protection might be an issue when discussing the proposals for transparency of salaries, but to have an indicator whether the wages schemes might be discriminatory or not, the employer should first be obliged to deliver anonymous list and reports.

All means of collective law enforcement, co-representation and/or co-interventions of trade unions and equality bodies, group or class action, legal aid etc. would help to enforce individual rights before the court. In Austria it seems to be a contradiction that the pay gap is increasing while there is only a very small number of proceedings in court concerning issues of equal pay. In order to create a broader effect in a single court case, courts should also be entitled to examine and assess the wages schemes and the employment policy of an employer in its deliberations on a single case.

## **8. Final assessment of good practices**

- The projects and approaches of the trade unions are absolutely necessary and promising;
- The proposal of the Minister for Women's Affairs on transparency is of the utmost importance and should be enforced in the near future;
- The Ombudsperson for Equality Affairs plays an important role and should be provided with better personnel and financial resources;
- Any kind of improvements concerning the enforcement of individual rights before the courts should be further developed and applied.

## **BELGIUM – Jean Jacqmain**

### **1. General situation**

The most recent survey<sup>29</sup> concerns data collected in 2006. According to that document:

- the general pay gap (based on the gross monthly remuneration; no net data available) was 24 %;
- the pay gap among employees in full-time occupation was 12 %;
- the obvious (and purely mathematical) explanation of the difference between these percentages is the structure of part-time employment: 44.2 % women and 7.8 % men;
- the sectors with the highest gaps (30-40 %) remain those of clothing and furs; finance and insurance intermediaries; air transport; energy production and supply; computer hardware production; and telecom hardware production. At the other end of the scale, the pay gap is very small (less than 10 or even 5 %) in some sectors such as the building industry, for the obvious reason that they employ very few women;
- as to professions, the highest gap rate (33 %) can be observed among senior executive officers;

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<sup>29</sup> Institute for Equality of Women and Men/Federal Ministry of Employment/Federal Ministry of Economy/Federal Office of Planning, *L'écart salarial entre les femmes et les hommes en Belgique*, 2009, in French and Dutch.

- in the public sector, the general pay gap of 3 % must be examined very closely: there is no gap at all among tenured staff members but a gap of 7 % among contractual employees, two third of whom are women; in turn, the latter pay gap probably results from recruitment in lesser paid jobs and from part-time employment;
- age is certainly a significant factor of the pay gap: in the 25-29 year group, 74 % of women and 81 % of men are employed and the pay gap is 6 %; in the 55-64 year group, 22 % of women and 41 % of men are employed and the pay gap is 17 %, mainly due to the difference in education or vocational training.

## **2. The legal framework**

The Federal Act of 10 May 2007 ‘aimed at combating discrimination between women and men’ (colloquially, the ‘Gender Act’) is purported to implement all EU gender directives (although Directive 2006/54 is not mentioned), and deals with equal pay in compliance with EU law, including the wide definition of pay (admittedly, it does not mention ‘work of same value’ as in Article 157.1 TEU, but the omission is purely formal as the scattered relevant case law reveals that the principle of application to work of same value is not disputed).

The Gender Act abrogated and replaced the previous Equal Treatment Act of 7 May 1999. It applies to all work situations in the private sector, and in those sections of the public sector which fall within the federal jurisdiction.

Consequently, equal pay in the remainder of the public sector must be regulated by the various instruments which the federate authorities had to adopt in order to implement EU non-discrimination law within their respective jurisdictions:

- Flemish Community and Region: *decreet* of 8 May 2002;
- German-speaking Community: *Dekret* of 17 May 2004;
- Region of Brussels Capital: *ordonnance/ordonnantie* of 4 September 2008;
- Walloon Region: *décret* of 6 November 2008, amended by the *décret* of 19 March 2009;
- French-speaking Community: *décret* of 12 December 2008.

Given that those various instruments do not add anything meaningful to the Federal Act, they will not be mentioned hereafter. Since they came into force, the first Belgian Equal Treatment piece of legislation (Heading V of the Economic Reorientation Act of 4 August 1978) must be regarded as obsolete (where it was not formally abrogated), except in the German-speaking Community as the *Dekret* of 17 May 2004 does not deal with equal pay in the public service.

Finally, Directive 75/117/EEC was first implemented in the private sector by Collective Agreement n°25 on equal pay for male and female employees, adopted in the National Labour Council on 15 October 1975. When legislation was passed on the same object, the social partners insisted on keeping their Collective Agreement in force, and they updated it in 2002 (C.A. n°25*bis*) and more decisively in 2008 (C.A. n°25*ter* of 9 July 2008). See below in Section 3.

## **3. Instruments of social partners**

There is absolutely no statutory provision to compel the social partners to include the issue of equal pay in collective agreements. Indeed, the very idea is taboo in the private sector, where the whole structure of wage determination is purely contractual and the rare interventions of political authorities in that field were bitterly resisted by the social partners. However, precedents do exist, such as the federal legislation on



defence of competitiveness (Acts of 6 January 1989 and 26 July 1996), which empowers the Government to slow down the general rise of wages if the social partners do not agree to do so on their own.

As to the public sector, the obligation for all authorities to comply with the principle of equality under the law (Articles 10 and 11 of the Constitution) results in the gender neutrality of all pay schemes, but it also makes it unthinkable (and thus not thought of) that factors such as glass-ceiling practices and indifference to conciliation problems may induce indirect discrimination and pay gaps.

Concerning good practices, the social partners have certainly declared themselves deeply concerned by the gender pay gap in their last two blanket agreements (a biennial exercise aimed at drawing a framework for further collective agreements at sector level). However, the conclusions of the survey mentioned above in Section 1 must state that very few results can be observed.

Given the defensive posture which the trade unions have been compelled to adopt in the present context of employment crisis, it is hardly surprising that the gender pay gap does not appear to be a priority target for their actions.

#### **4. Instruments specifically aimed at employers**

Apart from the obligation to annex the full text of C.A. n°25 to the work rules of each enterprise, the only compelling provision to be mentioned under this heading is Article 3 of Collective Agreement n°25 (see above in Section 2). As redrafted by C.A. n°25<sup>ter</sup>, this provision obliges all sectors and single enterprises to assess and, when necessary, to correct their job evaluation and classification systems in order to assure gender neutrality as a condition of equal pay. However, the trade unions failed to convince the employers that having a job evaluation and classification system at all should be made compulsory, so that Article 3 remains inapplicable to many small concerns. Besides, there is no report on the enforcement of Article 3.

Yet, Article 37 of the Gender Act empowers the King (i.e. the Federal Government) to take steps in order to guarantee that job classifications comply with the principle of gender equality. Still, three years after the Act came into force, no ancillary decree has been adopted on such grounds, and none seems to be in preparation.

There is no effort at all aimed at the release of information about the wages of other persons; here is another deeply-rooted cultural taboo. To give a very recent example: in the public sector, given the uniform character of pay scales and the availability of personal data concerning seniority, anybody can calculate the remuneration of anybody else; however, the very idea of making available a list of beneficiaries of a new allowance which would be granted to certain staff members under certain circumstances was resisted not only by the federal government representatives but also by at least one trade union. See below in Section 8 on the legal aspects of confidentiality.

As to aggregate pay information broken down by gender, the conclusions of the survey mentioned above in Section 1 suggest that it could be added to the data concerning the workplace which employers must include in their annual accounts under the heading 'Social Balance', introduced by a Royal Decree of 4 August 1996; employers could be helped in that task by the Social Security Office. However, so far, employers' organisations have refused to discuss such a notion, claiming that it would increase the burden of paperwork.

Concerning public procurement, the Gender Agency has published an interesting booklet<sup>30</sup> to illustrate how the national legislation allows for conditions related with 'social objectives', a notion which can apply to equal treatment (the booklet does not mention the elimination of the pay gap specifically). Obviously, the Gender Agency applies its own guidelines in its own operations of public procurement, but no information is available on similar practices with other public bodies. Better results might be expected when the Gendermainstreaming Act of 12 January 2007 finally begins to be implemented in the federal public services (the delay is due to the long period of political instability which Belgium has gone through recently).

*En passant*, the expert feels he must draw the readers' attention on the ECJ's decision in case C-346/06 *Rüffert* [2008 – I - 1989], in which a 'social clause' (on minimum wages) inserted in a public procurement contract was deemed incompatible with the Posted Workers Directive 96/71/EC.<sup>31</sup>

## **5. Other instruments to close the pay gap**

Apart from what concerns court proceedings (see below in Section 6), the legislation does not provide any specific tools which an individual employee may use to establish pay discrimination. Indeed, the Act of 8 April 1965 provides that the work rules which any employer must establish and make available to his/her personnel must include information on what systems are used to measure work (so many items to be processed per hour, etc), but this is too basic to serve the purpose of detecting discrimination.

Still under the impulse of the Gender Agency and with the support of the European Social Fund, the EVA (*EValuation Analytique/analytische EVAluatie*) project continues offering training in gender-neutral job evaluation to delegates of the social partners. Moreover, there is no shortage of specialised firms which can provide such training commercially.

As mentioned in Section 4, those enterprises which use job classification systems are supposed to make them gender neutral if they have not done so already, but C.A.n°25 does not provide any monitoring system, and the public authorities have not taken any initiative to that effect.

Still, the compulsory provisions of C.A. n°25 theoretically give the Labour Inspectorate grounds for intervention as failure to comply with such provisions is liable to penal sanctions under the Collective Agreements Act of 5 December 1968. However, there is no known occurrence of such an intervention, most probably because no employee or trade union ever thought of filing a complaint. And yet, relying on C.A. n°25 is nearly the sole effective way to apply to the Labour Inspectorate on such matters, as the Gender Act of 10 May 2007, in contrast with the two previous Acts of 1978 and 1999, hardly provides any penal sanctions as means of redress, while the Inspectorate's jurisdiction is dependent on the existence of such sanctions.

As mentioned above, the conclusions of the yearly Survey and the EVA project are the main efforts of the Gender Agency to address the pay gap.

## **6. Problems of enforcement and how to tackle them by good practices**

Concerning court proceedings, it should first be mentioned that recent (i.e. the last ten years) case law includes one case of pay discrimination, in which the Labour Court of

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<sup>30</sup> *Égalité des femmes et des hommes dans les marchés publics*, Institut pour l'égalité des femmes et des hommes, 2007 (in French and Dutch).

<sup>31</sup> See Paul Davies, 'Case C-346/06....', *Industrial Law Journal* (2008) 37, 293.

Appeal in Brussels<sup>32</sup> found in favour of the claimant through simply relying on the ECJ's decision in 109/88 *Danfoss* [1989-3199] concerning a pay system, the application of which appeared opaque. Moreover, in that case it must be said that the claimant had met no difficulty in demonstrating that she had been denied a pay increment which had been granted to male colleagues.

Thus, the expert can provide no useful information on the effectiveness of litigation to challenge the pay gap. While Article 33 of the Gender Act seems to transpose Article 9 of Directive 2006/54/EC correctly, whether a claimant is capable of building up a *prima facie* case (were it only by producing 'elementary statistical material which reveals an unfavourable treatment', as provided in Article 33 (3)<sup>30</sup>) will remain a matter of circumstance and there is no point of comparison to predict the courts' readiness to reverse the burden of proof on such grounds. Still, the common rules on proof in litigation (Articles 870 and 871 of the Judicial Code) empower a Court to order each party to produce any element relevant to the case, including the pay sheets.

Regarding terms of limitation, Article 15 of the Employment Contracts Act of 3 July 1978 imposes a double limit: five years after the disputed facts and, in any case, one year after the effective termination of the contract. For tenured staff members in the public services, the limit is five years after the disputed facts (to simplify an unconscionably complicated matter). Those limits will apply to an employee challenging gender discrimination in pay. However, relying on the Protection of Remuneration Act of 12 April 1965, which provides penal sanctions, it might be possible to claim compensation for a discrimination which was established as soon as the victim was hired by the employer and continued during the whole period of occupation, whatever its duration may have been (there is no such precedent in the field of gender equality).

As to compensation, Article 23 of the Gender Act provides that the victim of discrimination in working conditions may apply either for fixed damages equal to six months' pay, or for the compensation of the actual damage, the extent of which the victim must demonstrate. There is no case law related to this new provision. In rather a distant past, when the legal retirement ages were different for men and women, several female employees who had been dismissed in circumstances similar to those of the ECJ's 152/84 *Marshall I* case [1986-723] had claimed for compensation which included the negative effect of the untimely termination of their contracts on the build-up of their pensions; in the most favourable decision, the Labour Court of Appeal in Brussels<sup>33</sup> simply granted a lump sum as equitable reparation of the global damage.

## **7. Relationship between the gender pay gap and other parts of labour law**

The following answers are purely speculative as there is no case law to provide any hints.

- Working time: in recent years, employers' organisations have been exerting increased pressure in favour of overtime as a means of greater flexibility, and the Federal Government has responded positively by reducing the taxation on the corresponding extra pay. Obviously, such a development can only concern those employees for whom performing overtime will not clash with the necessities of reconciliation.

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<sup>32</sup> Judgment of 19 October 2004, *Chroniques de droit social*, 2005, p.16 with comments by J. Jacquemain.

<sup>33</sup> Judgment of 8 June 1988, *Chroniques de droit social*, 1988, p. 340.

- Age: as mentioned above in Section 1, the very low rate of employment of women in the 55-64 year group is certainly a significant factor of the pay gap.
- Part-time work: while certain aspects of part-time work have been disputed recently as conducive to discrimination in comparison with full-time work (e.g. should the payment in lieu of notice period be calculated on the full-time or the part-time remuneration?), usually the courts refused to envisage that the issue could have a gender dimension.<sup>34</sup>
- Posting of workers and fixed-term contracts: there is no known survey of the gender dimension in those forms of employment.
- Arrangements to fight unemployment: there is presently a bitter controversy involving the Federal Government and the authorities of the three Regions concerning the effectiveness of the measures which have been adopted in the last ten years in order to ‘activate’ unemployed persons, i.e. making the proof of strenuous efforts to find employment a condition to retaining the right to benefits. Given the higher rate of unemployment of women (in 2009, 7.8 % W, 6.0 % M), the gender dimension of the issue should be obvious, but it is hardly mentioned at all.
- Reconciliation: a period of employment crisis is hardly auspicious for proposals of new or longer leaves (e.g. lengthening of the maternity leave). Perhaps the following example is illustrative: on the one hand, the Federal Government recently amended regulations so that social security benefits can be granted to employees who take parental leave for a child under the age of 12 (instead of 8 previously); but on the other hand, so far no steps have been taken to implement the amendment to the European framework agreement which was adopted on 18 June 2009, lengthening parental leave to 4 months instead of 3 (which the social partners could have undertaken without having to wait for Directive 2010/18/EU).
- Promotion: there is no dearth of surveys concerning glass ceilings, in the private and public sectors, but the main factors for the improvement of such situations seem to remain the passing of time and the developments in the gender breakdown of workforces (e.g. given the increasing female majority among the judiciary, inevitably some women were finally appointed to the Court of Cassation, where they remain a small minority however).
- Party autonomy in contract law is strongly restricted by the general practice of collective bargaining (see above in Section 3), but this limitation does not apply to executive positions; however, one may expect that discrimination made possible by party autonomy would concern peripheral elements such as stock options rather than the remuneration itself. Party autonomy is irrelevant to pay systems in the public sector, including (normally) contractual employees.
- Protection of confidentiality: confidentiality of pay is protected by the cultural taboo mentioned in Section 4, rather than by legislation. For instance, the Act of 8 December 1992 aimed at restricting the use and communication of personal software data provides that the protection of confidentiality does not apply if it hinders compliance with a legal obligation; hence, an employer who must observe the prohibition of gender discrimination in pay (under C.A. n°25) must not prevent the Labour Inspectorate from examining his pay sheets.
- Aspects of procedure: not only are trade unions enabled to represent their members in court, they also have the capacity to take legal action in order to

<sup>34</sup> See for instance the Constitutional Court’s judgment n°51/2008 of 13 March 2008 on [www.constitutional-court.be](http://www.constitutional-court.be), accessed 8 March 2010.

challenge discrimination under the Gender Act. Again, the expert can only report the scarcity of case law concerning equal pay (although one public sector trade union has been repeatedly challenging various regulations which induced pay discrimination, usually with success).

## **8. Final assessment of good practices**

The Federal Government's programme of 2006 in favour of equal pay, which the expert mentioned in the Network's expert of 2007, was mainly aimed at promoting good practices. Its only visible application is the Gender Agency's yearly report; its other guidelines seem to have been the victims first of the period of political instability, and then of the employment crisis.

In such a context, the mood of mutual willingness which prevailed when the social partners agreed to update C.A. n°25 (see above in Section 4) appeared promising; whether this reinforced instrument can boost the elimination of the pay gap remains to be seen.

## **BULGARIA – *Genoveva Tisheva***

### **1. General situation**

The reports of the Bulgarian Government usually assess the situation with respect to gender equality as very optimistic. Bulgaria is often described as a country with strong equality legislation and traditions in the field of equal pay of men and women. Despite this, data from statistics and research, recently confirmed, reveal a gender pay gap, showing horizontal and occupational sex segregation. These inequality trends also existed during the socialist period and could not be curbed during the transition period or during the accession to the EU. Currently, inequalities are being exacerbated by the economic crisis.

Most sociological surveys do not reveal a gender pay gap in Bulgaria. According to a recent survey of the Ministry of Labour and Social Policy, there are differences in payment of men and women. One of the main reasons identified is the lower price of labour in the feminised sectors (education, healthcare, services, state administration). Thus, the gender pay gap in different sectors can reach up to 30 %.

The above-mentioned information was confirmed by the Confederation of Independent Trade Unions in a report distributed on 8 March 2009, which is based on statistical data. During the last quarter of 2009, women were a majority in services in hotels and restaurants – (64.8 %), in education – (78.9 %), in healthcare – (79.3 %), and in financial mediation – (67.3 %). Yes, it is said 'they are a majority'.

The average pay of women in 2009 was 15.7 % lower compared to men's pay. Women in financial mediation receive 31.4 % less than men, in healthcare and social services – it is 35.7 % less, in education 22 % less, in the processing industry 29.7 % less. Women are the majority in the lowest-paid sectors: they are 2/3 of the employed there. The salaries in these sectors are 75 % lower than the average salary in the country. According to the report, the economic crisis has most strongly affected the lowest-paid sectors, which is the reason for the increase of poverty among women, who are already a majority among the working poor.

The fact that this is a trend and not a result of the crisis in recent years, has been established by the results of a study commissioned by the Ministry of Labour and Social Policy to Sofia University focused on the status and policy of income from

labour in Bulgaria (trends for the period 2001-2007).<sup>35</sup> Women are not equal in the Bulgarian labour market. On the whole, they receive a lower pay. The difference between the average income levels of men and women in 2007 is clear: women's income represents 77.8 % of men's. The income differences increase in the groups with a lower educational level – below secondary education. In the sectors where women are under-represented, or where they predominantly occupy administrative positions, they receive a lower pay. The study identifies a trend of lower pay in the private sector compared to the public sector. This trend may entail a wider gender pay gap in this sector.

According to EUROSTAT, the pay gap in unadjusted form (difference between men's and women's average gross hourly earnings as a percentage of men's average gross hourly earnings) in Bulgaria for 2007 is 12.5 %.

## **2. The legal framework**

The issue of equal pay is regulated in the Labour Code<sup>36</sup> for the persons who work under labour contracts:

Article 243 defines that women and men have the right to equal remuneration for equal work or work of equal value. This is valid for all payments related to the labour contract.

A more general provision on equal pay, including for women and men, is provided in the Law on Protection against Discrimination (LPAD):<sup>37</sup>

Article 14 stipulates that the employer shall provide equal remuneration for equal work or work of equal value. This paragraph shall apply to all remuneration paid directly or indirectly, in cash or in kind. In addition to this, it is specified that the criteria of work appraisal when determining remuneration and performance assessment shall be equal for all workers and employees and shall be stipulated in collective labour agreements or in internal remuneration rules, or under the normatively established conditions for the civil servants' attestation in public administration, regardless of the grounds listed in Article 4(1).<sup>38</sup>

According to Article 28 of the LPAD, the above-mentioned provision also applies to civil servants.

## **3. Instruments of social partners**

Article 14 of the LPAD referred to above contains the obligation to include in collective labour agreements equal criteria for work appraisal when determining remuneration and performance assessment. This obligation, although stipulated by law, is not effectively monitored. Nevertheless, it creates opportunities for an increased role of the social partners to regulate equal pay in the collective agreements. There is no consistent practice of the social partners in Bulgaria regarding inclusion of clauses on equal pay in the collective agreements. Outside this context, there are no other practices and policies of the social partners or of the trade unions for tackling the gender pay gap.

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<sup>35</sup> Kl. Ohridsky *Income from labour in Bulgaria: Private or Public Issue*, Sofia University, 2008.

<sup>36</sup> In force since 1 January 1987 (S.G. 27/86), last amended S.G. 15/2010.

<sup>37</sup> In force since 1 January 2004 (S.G. 86/2003), last amended S.G. 103/2009.

<sup>38</sup> Article 4 of the LPAD prohibits any direct and indirect discrimination based on sex, race, nationality, ethnicity, human genome, citizenship, origin, religion or belief, education, views, political allegiance, personal or social status, disability, age, sexual orientation, marital status, property status, or on any other ground, established by law or an international treaty to which the Republic of Bulgaria is a party.

Trade unions are aware of the existence of the gender pay gap, but they fail to formulate any active policy or take measures. There is no awareness among employers about this problem. So far, the social partners have not organised any campaigns for equal pay in society.

The lack of clear policy and mechanisms for ensuring equal pay is also due to the absence of a special gender equality law to define clear obligations for the social partners in order to ensure equal pay .

#### **4. Instruments specifically aimed at employers**

The legal obligations for the employers in the field of equal pay are provided in the above-mentioned provision of Article 14 Paragraph 3. This obligation is not consistently implemented and compliance is not monitored. There are no other legal or voluntary instruments for employers to address the gender pay gap. The country lacks strategies requiring the release of information about pay to individuals, about other individuals in the firm, and about the publication of aggregate pay information broken down by gender and by firm. The governmental bodies do not use in any way their public procurement powers to require firms that they contract with to address the pay gap.

As a consequence, it can be concluded that there are no effective mechanisms aimed at the employers to close the gender pay gap.

#### **5. Other instruments to close the pay gap**

There are no other instruments to close the Gender pay gap, like special tools that may assist individuals to establish pay discrimination, tools that may assist in establishing gender-neutral job evaluation schemes, pay systems etc. The content of and the implementation of the collective agreements is not consistently monitored with regard to equal pay.

The role of the equality body – the Commission for Protection against Discrimination – and the role of the labour inspectorates in ensuring equal pay is mentioned in the enforcement section below.

#### **6. Problems of enforcement and how to tackle them by good practices**

The legal practice to ensure equal pay is being developed by the Commission for Protection against Discrimination. The Commission for Protection against Discrimination is an independent specialised state authority for the prevention of discrimination, protection against discrimination and ensuring equal opportunities. According to Article 47 of the LPAD, the Commission has the competence, among other things, to establish infringements of the anti-discrimination law, to decree measures for the prevention and termination of infringements and restoration of the original situation, to impose the penalties stipulated and apply measures of administrative coercion as provided in the law. It is important to note that the Commission cannot rule on compensation claims. Only the courts have competence in compensation claims for discrimination. In the course of a concrete case on equal pay, the Commission for Protection against Discrimination can monitor the implementation of the obligation provided in Article 14 Paragraph 3 of the LPAD and can prescribe the insertion of the missing clause on equal pay into the relevant collective agreement.

An important case – the *Devnya Cement* case – was decided by the Second Specialized Panel of the Commission and was confirmed by the Supreme

Administrative Court.<sup>39</sup> In this case, brought by a female worker at Devnya Cement Varna, a joint stock company, the Commission found continuous unequal treatment of the claimant, by the practice of unequal pay for work of equal value, compared to her male colleagues. The Commission declared that this constitutes a violation of Article 14 Paragraph 1 (the equal pay provision) of the Law on Protection against Discrimination (LPAD). Furthermore, the Commission found that the violation represents direct discrimination based on sex within the meaning of Article 4 Paragraph 2 of the Law. The arguments of the Commission were that the claimant was continuously discriminated against in the period from January 2003 until the moment of her retirement in May 2006, because she received unequal pay compared to her male colleagues. For the period in question, the claimant was appointed as ‘mill operator’, like her colleagues, and performing work of equal value. (It is explicitly referred to as work of equal value and not as equal job.) The respondent could not justify before the Commission the monthly difference in pay of approximately EUR 23 (45 BGN), at the disadvantage of the claimant, compared to her male colleagues. Moreover, the respondent confirmed before the Commission that, during the period under consideration, the company failed to ensure equal pay for its workers. Subsequently, the Commission ordered Devnya Cement to discontinue the practice of unequal treatment based on sex in the enterprise, and to amend the collective agreement in order to include guarantees for equal pay, regardless of sex and all other grounds, as required by Article 14 Paragraphs 1 and 2 of the anti-discrimination law. No compensation claim was brought, as the Commission has no competence in this field. The decision of the Commission was confirmed by the final decision of the Supreme Administrative Court. The procedure itself is before the Commission and not before the Court. The appeal before the Supreme Administrative Court does not change the nature of the procedure as such before the Commission, which does not include compensation. No compensation claim can be brought before the Commission under this procedure. Consequently, no decision related to compensation can be taken by the Supreme Administrative Court, where the decision can be appealed.

The *Devnya Cement* case is the first case related to equal pay which got the final sanction of the Supreme Administrative Court. It has the potential to provoke further cases and case law on the matter. The analysis of this case can also spark a review of existing policies and mechanisms for assessment of work of equal value, as well as the adoption of other instruments aimed at ensuring the principle of equal pay.

The final decision on this case took about eighteen months. It was at the starting stage of the Commission for Protection against Discrimination, when it used to decide the cases brought before it very quickly. It is regrettable that this good practice is no longer applied, especially in cases related to gender equality.

There are no specific cases on equal pay brought before court that have provoked a public debate. The court procedure usually takes longer than the procedure before the Commission, also bearing in mind the time needed for the appeal. In terms of procedure, according to the legislation and legal practice so far, the comparison in an alleged case of unequal pay is limited to the same employer or company. There have been no publicly discussed equal pay cases involving compensation yet.

According to the LPAD, trade unions and NGOs can represent the victims of discrimination in court. Article 71 Paragraph 2 states: ‘Trade unions and their

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<sup>39</sup> Decision of the Commission for Protection against Discrimination No. 29/4. 07. 2006, confirmed by Decision No. 10594/1 November 2007 of the Supreme Administrative Court.



divisions, as well as legal non-profit entities with public profit, may lay claims on behalf of individuals whose rights were violated, upon their request. In addition, such organisations may join pending proceedings specified under Paragraph 1, in the capacity of interested party. The trade unions and NGOs can also bring an independent claim in cases of violation of the rights of many individuals.'

Another form of control is the administrative control exercised by the labour inspectorates. The implementation of the labour law, among other things, is monitored by the Chief Labour Inspectorate, according to the Law on Labour Inspectorate, in force since 1 January 2009, which is also in charge of the control over the Law on Employment Promotion and the Law on Health and Safety at Work. The control over the equal pay principle is not specified. In the Rules and Proceedings of the Labour Inspectorate from July 2009, the procedure for the identification of violations and their report to the high executive authorities is regulated. In addition to this, the measures taken have to be reported, including the obligatory prescriptions under Article 404 Paragraph 1 of the Labour Code, issued with respect to employers in cases of violation of the labour legislation.

No specific control is exerted by the labour inspectorates over the compliance with the equal pay principle and no serious issues of gender pay gap have been raised through this mechanism.

## **7. Relationship between the gender pay gap and other parts of labour law**

Some links can be identified between the gender pay gap and other parts of the labour market in Bulgaria. The issue of working hours, for example, can influence the gender pay gap in several ways. It may increase the remunerations of women if they are offered opportunities to work overtime. The concern is that they often cannot afford this, in contrast with men, because of care and household obligations. On the other hand, in the sectors where women do work overtime, which are highly feminised sectors, the remuneration is very low. If they receive additional pay, it is usually part of the grey economy and does not count for social security.

In Bulgaria, women's pensionable age in the first pillar of social security is lower than men's and the unequal pay reflects directly on pensions. Atypical and flexible working arrangements are not widely spread in Bulgaria and do not pose any equality problems yet.

The measures and special arrangements under the Employment Promotion Act and the measures against unemployment affect women and their pay because they use these measures and policies more often. The measures aim to ensure employment, but at the lowest level of pay, usually at the level of the minimum wage. Thus women more often accept lower pay.

Despite the declared governmental policy towards reconciliation both for men and women, women are still those who have to reconcile family life and work, they take the leaves to care for children and other relatives most of the time. The trend is that women are less healthy during their professional life, they more often use sick leave and the health system in general. The social security compensation received in such cases of leave is lower than the respective pay. It also influences the situation of women with respect to their employer more in general, with higher risks to receive lower pay due to the incidence of sickness and other leaves related to reconciliation.

In addition to these considerations, it is worth mentioning that gender stereotypes still play a role in the field of employment promotion, where a glass ceiling exists.

Women experience more factual restrictions of their autonomy to enter labour and other employment contracts in the labour market. Especially in the current crisis situation, they are pressed to accept any employment conditions, including lower pay.

## **8. Final assessment of good practices**

No specific good practices can be assessed in the field of implementation, analysis and monitoring of equal pay and in fighting the gender pay gap in Bulgaria. As a good practice, it can be mentioned that the legislation is in line with EU standards, and that it is possible to bring cases both before the court and before the Commission for Protection against Discrimination. In addition, persons who suffer discrimination through unequal pay can be represented by trade unions or NGOs in court proceedings.

## **CROATIA – Goran Selanec**

### **1. General situation**

The quality of statistical data concerning the position of men and women in Croatia, especially the pay distribution between the sexes, is rather questionable. The most significant problem is the out-datedness of the data.<sup>40</sup> Furthermore, the outdated data is incomplete. For example, one cannot find statistical data concerning the distribution of pay between the sexes broken down to branches within particular sectors of industry or according to the professional qualifications or pay grades within a particular sector. Similarly, one cannot find data concerning the pay distribution between the sexes according to factors such as full/part-time work or indefinite/fixed-term agreements/contracts. The data does not show the number of women on a national minimum salary or the pay distribution among the sexes in the public services employment hierarchy. Also there are no data showing pay differences between the sexes in public and private sectors respectively or comparatively. Consequently, the following data ought to be considered with some reserve.

According to the 'most recent' data, for every (gross) Euro earned by men, women in Croatia earned on average 89.2 cents. The widest gap was found in the sector of financial intermediation where women earned 72.7 % of the men's average salary and the sector of health and social work where they earned 73.7 % of the men's average salary. Moreover, these two sectors are dominated by women. In the financial intermediation sector, women comprise 70.6 % of the workforce while in the health and social work sector they comprise 78.1 % of the workforce. In other sectors dominated by women, such as education (78.1 %) or wholesale and retail trade (51.4 %), women earned 81.8 % and 80.3 % of the men's average salary, respectively. Women earned more than men in two industrial sectors. In the sector of construction, women earned 112 % of the men's average salary, while in the sector of mining and quarrying, women earned 102 % of the men's average salary.

### **2. The legal framework**

The principle of equal pay between men and women has historically held a rather prominent position in Croatian law. It has been part of Croatian labour law for

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<sup>40</sup> For example, the most recent statistical yearbook concerning men and women from the year 2009 is based on data from the year 2007. See Statistical Yearbook *Women and Men in Croatia*, the Central Bureau of Statistics of the Republic of Croatia, 2009, available on <http://www.dzs.hr/>, accessed 20 March, 2010.

decades.<sup>41</sup> Since the recent EU harmonization reform of the Labour Act the principle is regulated by Article 83, which provides that ‘the employer has a duty to provide equal pay for the same work or work of equal value to men and women.’<sup>42</sup> The same provision provides a definition of the term ‘pay’, which is in full accordance with the *acquis*. It also provides that any provisions of individual or collective employment contracts that are opposite to the equal pay principle as defined by this provision are null and void.

Interestingly, the legislator used the provision to elaborate the meaning of the terms ‘equal work’ and ‘work of equal value’. In that sense Article 83/2 provides that ‘two individuals of a different sex perform equal work or work of equal value if: 1) they perform the same job under the same or similar conditions or they can replace each other in relation to the job that they perform; 2) the work one of them performs is of a similar nature to the work performed by the other and differences between the performed jobs and the conditions under which they are performed are of no relevance in light of the nature of the job on the whole or they occur so rarely that they do not affect the nature of the job on the whole; 3) the work performed by one of them is of equal value as the work performed by the other taking into account criteria such as professional qualifications, skills, responsibilities, conditions under which the work is performed and whether the work is of a physical nature.’

In addition to the Labour Act, the guarantee of equal pay between the sexes can be found in Article 13/1/4 of the Sex Equality Act.<sup>43</sup> A general equal pay guarantee is also provided by Article 10 of the State Officials Act.<sup>44</sup>

### 3. Instruments of social partners

The Sex Equality Act merely provides that social partners have an obligation to observe the provisions of the Sex Equality Act and the special measures aimed at achieving the equality between the sexes provided by the National Sex Equality Policy (NSEP), which is the central document setting the national sex equality policy for a period of 4 years.<sup>45</sup> The NSEP is drafted by the Government and enacted by Parliament. There is no provision of national law explicitly requiring social partners to address the problem of pay inequality between men and women in a process of collective bargaining. Moreover, neither of the two NSEPs included any measures related to the problem of pay inequality between men and women.<sup>46</sup>

The situation on the level of implementation is equally discouraging. For example, an analysis of the 120 collective agreements on the Croatian labour market has shown that less than 10 % of the analysed agreements include any reference to the principle of equal pay between men and women.<sup>47</sup> What is more, almost all of those

<sup>41</sup> For example, although the 1974 Yugoslavian Socialist Constitution did not explicitly mention the equal pay for equal work principle it was clear from its provisions that men and women were guaranteed equality in all employment rights, including the right to pay. Similarly, Article 2 of the 1976 Joint Labour Act provided the right to pay under equal conditions without any subordination or exploitation.

<sup>42</sup> *Zakon o radu* (Labour Act), *Narodne Novine br. 149/09* (Official Gazette no. 149/09).

<sup>43</sup> *Zakon o ravnopravnosti spolova*, *Narodne Novine br. 82/08*.

<sup>44</sup> *Zakon o državnim službenicima*, *Narodne Novine br. 92/05, 107/07*.

<sup>45</sup> Article 11/6 of the Sex Equality Act.

<sup>46</sup> *Nacionalna politika za promicanje ravnopravnosti spolova 2006.-2010.* (National Policy for the Promotion of Sex Equality 2006-2010), *Narodne Novine br. 114/06*; *Nacionalna politika za promicanje ravnopravnosti spolova 2001.-2005.* (National Policy for the Promotion of Sex Equality 2001-2005), *Narodne Novine br. 112/01*.

<sup>47</sup> The analysis was conducted by the Office of the Ombudswoman for Sex Equality and it will be published in April 2010.

agreements merely copied the equal pay provisions from the Labour Act. Less than 2 % of the analysed agreements included certain special sex equality measures, but none of them was related to the issue of pay inequality.

In an interview conducted for the purposes of this country report, officials of the Union of Autonomous Trade Unions of Croatia (UATUC) confirmed that the problem of sex inequality is rarely an issue of negotiations in the collective bargaining involving their association's members.<sup>48</sup> The UATUC officials acknowledged the problem of pay inequality of women. They admit that there is an awareness problem regarding the issue among their members. Consequently, although social partners engage in negotiations about the value of positions and jobs within a particular industrial sector ('job coefficients' negotiations) the issue is very rarely approached from the perspective of sex equality. Consequently, most of the special measures taken at the level of union activities still concern awareness raising and education.

#### **4. Instruments specifically aimed at employers**

The Sex Equality Act merely provides that employers employing over 20 people must introduce the antidiscrimination guarantees from the Act into their bylaws, such as the prohibition of direct, indirect discrimination or sexual harassment and other special statutory measures aiming to achieve equality.<sup>49</sup> However, there are only a few special statutory measures prescribed by Croatian law, such as the explicit obligation to publish employment vacancies in gender-neutral terms or that all jobs and positions within a particular employer must be stated in gender-neutral terms.<sup>50</sup> However, there is not a single specific statutory or policy measure aiming at elimination of pay inequality between men and women provided by the Croatian legal order. In addition, I am not aware of any voluntary instruments aiming at the elimination of pay inequality that are or might be used by employers.

As far as I am aware, none of the institutions of state government, national or local, has ever used public procurement to achieve any of the sex equality goals. None of the National Sex Equality Policy Documents mentions public procurement as a tool. In addition, the Government's Office for Sex Equality confirmed that they are not aware that the Government has ever used public procurement as a sex equality instrument.

#### **5. Other instruments to close the gap**

One instrument that individuals employed in state and public institutions may find useful in establishing pay discrimination is the statutory employment classification system.<sup>51</sup> The relevant regulation prescribes a job classification system that accords degrees of difficulties to different jobs and positions within the state administration and public services sector. A degree of difficulty determines a pay coefficient for a particular job. A final salary is a product of the basic salary (determined either by a collective agreement or a government decision) and the pay coefficient. Consequently, workers can determine whether they are paid less than the law prescribes and compare themselves to workers of the other sex employed in positions

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<sup>48</sup> The Union of Autonomous Trade Unions of Croatia is the largest Union Association in Croatia and the only Croatian union association participating in the European Confederation of Unions.

<sup>49</sup> Article 10/5 of the Sex Equality Act.

<sup>50</sup> Articles 13/2 and 13/6 of the Sex Equality Act.

<sup>51</sup> *Uredba o nazivima radnih mjesta i koeficijentima složenosti poslova* (Ordinance on the Names of Employment Positions and Coefficients of Complexity of Jobs in the State Service), *Narodne Novine* br. 37/2001.

with the same or lower coefficient. If nothing else, this will help them shift the burden of proof on the employer in the judicial proceedings.

However, none of the Acts and regulations regulating such systems of evaluation even indicates that the legislator designed the system of classification having in mind the notion of equal pay for work of equal value between men and women. Moreover, they do not even include a provision guaranteeing equal pay for the same work or work of equal value between men and women. When asked, the Government's Office for Sex Equality admitted that they are not aware that the Government and the relevant unions negotiated and designed the evaluation systems on the basis of the notion of equal pay for work of equal value between sexes.

Another useful tool that may help individuals to establish pay discrimination on the grounds of sex is the Office of the Ombudswoman for Sex Equality.<sup>52</sup> The Sex Equality Ombudswoman is an independent sex equality body established by the Sex Equality Act.<sup>53</sup> The Ombudswoman is given monitoring and investigative powers, although she cannot deliver legally compulsory decisions.<sup>54</sup> Her powers are limited to warnings, suggestions and recommendations. Nevertheless, the Sex Equality Act provides individuals with the right to address the Ombudswoman if they believe that state institutions, public bodies or privately owned entities have practised sex discrimination even though they were not victims of such acts personally.<sup>55</sup> In that case, the Ombudswoman will start an investigation if she considers that such is appropriate or necessary. In practice the Ombudswoman reacts to every complaint or request. All individuals or legal entities, regardless of their public or private character, have a duty to provide the Ombudswoman with the required information regardless of their confidentiality status.<sup>56</sup> Although it is not explicitly stated in the Sex Equality Act, this duty also includes data related to pay policy and practices. Acting upon such data, the Ombudswoman can recommend to the employer to establish a job evaluation scheme with an aim of eliminating sex-based pay discrimination. If the employer refuses or ignores the recommendation, the Ombudswoman can request the State Inspectorate to investigate the pay practices of the particular employer.<sup>57</sup>

However, the State Inspectorate has rather limited powers in relation to employment discrimination. The Labour Act requires the Inspectorate to monitor the implementation of the Act's provisions, which includes the prohibition of sex discrimination.<sup>58</sup> An employer is required to provide the Inspectorate with all information and documents necessary to perform its duty.<sup>59</sup> However, this is where the Labour Act falls short, since it provides the Inspectorate merely with the power to record the act of discrimination without granting it any power to prevent it. The situation is somewhat different in relation to the employees of state institutions and public services. The inspection of pay practices within these entities falls within the

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<sup>52</sup> The information about the Office of the Ombudswoman for Sex Equality is available on the official website <http://www.prs.hr>, accessed 19 March 2010.

<sup>53</sup> The official name of this independent sex equality body is *Ured pravobranitelj/ice za ravnopravnost spolova*. It is rather challenging to translate the term *pravonranitelj* (male form) – *pravobraniteljica* (female form) into English. The closest term would be an Ombudsman. However, in order to stress the importance of the person's gender, it has become practice to use the term Ombudswoman when referring to a female person carrying out this job.

<sup>54</sup> Articles 19 – 26 of the Sex Equality Act.

<sup>55</sup> Article 22/3 of the Sex Equality Act.

<sup>56</sup> Article 25 of the Sex Equality Act.

<sup>57</sup> Article 23/3 of the Sex Equality Act.

<sup>58</sup> Article 288 of the Labour Act.

<sup>59</sup> Article 294/58 of the Labour Act.

competence either of the Ministry of Administration or a particular Ministry responsible for a particular public service.<sup>60</sup> In contrast to the State Inspectorate, the Ministry inspectorates can initiate the procedure of nullifying discriminatory pay decisions.<sup>61</sup>

The Croatian law does not *explicitly* empower any particular institution to monitor and/or scrutinize collective agreements or evaluation schemes. The Ombudswoman has an *implicit* right to monitor collective agreements in light of the sex equality guarantees. Unfortunately she lacks institutional capacity for any deeper scrutiny of collective agreements.

## **6. Problems of enforcement and how to tackle them by good practices**

The enforcement of the equal pay guarantee in the Croatian legal system is primarily built around judicial proceedings. Article 17 of the Suppression of Discrimination Act provides three antidiscrimination complaints: declarative action to determine discrimination, action to ban or suppress discrimination, and compensation action.<sup>62</sup> If an antidiscrimination claim is filed due to pay discrimination it will be considered a labour action, which will determine its time limits.<sup>63</sup>

According to the Labour Act an employee has 15 days to warn an employer about the violation of her right.<sup>64</sup> If the employer fails to remove the violation within the next 15 days, the employee can file a complaint within a period of 15 days following the employer's failure.<sup>65</sup> If an employee fails to warn an employer about the violation giving him a chance to correct it, she will not be granted access to judicial proceedings except in those instances where a complaint concerns a monetary compensation of occurred damages.<sup>66</sup> The key lies in the provision stating that in cases concerning the compensation of damages, an employee has to file the complaint within the period of 15 days after she receives the decision violating some of her rights provided by the Act *or* after she *finds out* about the violation of her right.<sup>67</sup> The openness of such formulation allows the argument that a worker can demand compensation for pay discrimination in relation to salary payments paid in the period of three years before the filing of the complaint. There is nothing in the statutory text preventing the interpretation of the expression 'finds out about the violation' that would require that the 15-day period starts at the moment when the employee discovered that the employer's practice to pay her a lower salary were related to the criterion of sex. Consequently, the only limitation of the period to be taken into account when calculating the amount of compensation for pay discrimination is provided by the Labour Act provision prescribing a statutory limitation of three years for any claim arising from employment relations.<sup>68</sup> However, since the Croatian courts strongly prefer clear-cut rules and are reluctant to engage in any type of sophisticated interpretation it is not particularly likely that they will actually interpret the Labour Act in the described fashion, which may have a deterrent effect on potential claimants.

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<sup>60</sup> Article 142 of the State Officials Act and Article 10 of the Salaries in Public Services Act (*Zakon o plaćama u javnim službama*, Narodne Novine br. 27/2001).

<sup>61</sup> Article 143 of the State Officials Act.

<sup>62</sup> *Zakon o suzbijanju diskriminacije*, Narodne Novine 85/08.

<sup>63</sup> Article 16/2 of the Suppression of Discrimination Act.

<sup>64</sup> Article 129/1 of the Labour Act.

<sup>65</sup> Article 129/2 of the Labour Act.

<sup>66</sup> Article 129/3 of the Labour Act.

<sup>67</sup> Article 129/1 of the Labour Act.

<sup>68</sup> Article 135 of the Labour Act.

The Croatian statutory law does not specify the scope of comparison in the case of a pay discrimination complaint. However, there is nothing in the statutory text preventing the comparison with other employers in the same sector. On the contrary, Article 83/3 of the Labour Act provides that a man and a woman perform work of equal *‘if the work performed by one of them is of equal value to work performed by the other taking into account criteria such as professional qualifications, skills, responsibilities, conditions under which the work is performed and whether the work is of a physical nature’* without explicitly specifying that the comparison must be limited to the same employer or company. What is more, the Labour Act also provides that when an employer’s bylaws (or collective agreement) fail to specify the criteria for determining the amount of pay, a court will determine the ‘appropriate pay’. The appropriate pay is defined as the pay that is paid for the same work. If it is not possible to determine the ‘same work’, the appropriate pay will be determined in light of the circumstances of the particular case.<sup>69</sup> This allows the court to engage in comparison with other employers if they found such method desirable.

Croatian law prescribes that any harm caused by sex discrimination, including pay discrimination, will be compensated through the institution of civil-law damages.<sup>70</sup> The amount of compensation will be determined according to the provisions of the Obligatory Relations Act.<sup>71</sup> Croatian law does not prescribe a cap for the amount of damages in discrimination cases.

However, the most significant problem with the judicial protection of pay equality is the absence of judicial proceedings. It is remarkable that notwithstanding the fact that the equal pay principle holds a very prominent position in Croatian labour law, it seems that there have not been any judicial proceedings concerning pay discrimination on grounds of sex.

It is not easy to explain the absence of pay discrimination proceedings. According to the UATUC officials, individuals frequently complain to their legal support office about pay discrimination but are not willing to file legal action. Their reluctance is usually related to reasons such as the length and cost of the court proceedings, lack of faith in the judiciary, either because of corruption suspicions or simply because claimants do not believe that the courts have the capacity to effectively deal with difficult cases such as pay discrimination.

In this respect it should be noted that the Discrimination Suppression Act provides several instruments that could facilitate antidiscrimination claims. First, the Act allows that any institution or organization dealing with the protection of equality rights of a particular social group whose member filed the antidiscrimination action gets involved in the judicial proceedings on the side of the claimant.<sup>72</sup> Second, the Act also allows the so-called action by association.<sup>73</sup> This instrument provides any institution or organization dealing with the protection of the equality rights of some social group protected by the Act with the procedural right to file an antidiscrimination claim and start the proceedings against a defendant whose actions violated the right to equal treatment of one or several members of that particular

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<sup>69</sup> Article 82/4 of the Labour Act.

<sup>70</sup> Article 30 of the Sex Equality Act.

<sup>71</sup> *Zakon o obveznim odnosima, Narodne Novine br. 35/05*. Article 1046 of the Act allows three types of damages actions: regular damages, loss of profit, and non-proprietary damages. All three types of damages claim could be used in pay discrimination proceedings.

<sup>72</sup> Article 21 of the Suppression of Discrimination Act.

<sup>73</sup> Article 24 of the Suppression of Discrimination Act.

group. Both of these instruments are equally available to the Ombudswoman and to the unions, although neither of them has used it yet.

## **7. Relationship between the gender pay gap and other parts of labour law**

It would be worthwhile to examine in greater detail the relation between sex-related pay inequality and several aspects of the regulation of labour market participation.

Above all, it seems that employers are more prone to abuse the possibility of fixed-term contracts in those sectors of occupations and industry dominated by a female labour force. Although workers on fixed-term contracts are not necessarily paid less, employment uncertainty related to these contracts allows employers to keep lower salaries in the sectors with frequent abuse of fixed-term contracts. The UATUC officials believe that the abuse is particularly frequent in the retail sector, which is traditionally dominated by women. According to the Labour Act, fixed-term contracts are an exception allowed for explicitly prescribed reasons.<sup>74</sup> However, the enforcement of that rule has not been particularly successful so far. A similar barrier stressed by the UATUC is the fact that many women work overtime but are not properly paid for their work especially in the retail sector. The Labour Act provides that work performed after regular hours must be paid at an increased rate.<sup>75</sup> However, the actual enforcement of that rule has apparently been more than unsatisfactory.<sup>76</sup>

There also is a certain relation between pay inequality and the regulation of employment of pregnant women. In addition to optional maternity leave, the Pregnancy and Parental Support Act prescribes an obligatory pregnancy leave for the duration of 28 days before the birth and 42 days after the birth regardless of the woman's personal interests.<sup>77</sup> The Act also obliges a worker using pregnancy or parental leave to provide the employer with a notice informing him about her desire to return to work 30 days before the expiration of the leave.<sup>78</sup> Since maternity allowance is usually lower than a regular salary these provisions clearly affect women's pay. Moreover, although it prescribes that night work must be paid at a higher rate, the Labour Act still prohibits employers to employ pregnant women at night without the doctor's confirmation that night work is not harmful for the person's health or health of her unborn regardless of the woman's personal preferences.<sup>79</sup>

In addition, the State Officials Act provides that workers who have been absent from work for more than six months within a one-year period will not be subjected to a work evaluation, which is crucial for their promotion, regardless of the reasons for absence.<sup>80</sup> This apparently neutral provision tends to disfavour women more than men, especially pregnant women. It is also contrary to Article 15 of the 2006/54/EC Recast Directive and the ECJ's *Thibault* ruling.<sup>81</sup> On the other hand, Croatian law does not provide any rules regarding promotion criteria that would encourage employers to take into account qualities that are usually related to social roles

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<sup>74</sup> Article 10 of the Labour Act.

<sup>75</sup> Article 86 of the Labour Act.

<sup>76</sup> Consequently, the Croatian Central Bureau for Statistics frequently reports that women are paid less but according to their data they also work less.

<sup>77</sup> Article 12 of the Pregnancy and Parental Support Act (*Zakon o rodiljnim i roditeljskim naknadama*, *Narodne Novine* 85/08, 110/08).

<sup>78</sup> Article 47 of the Pregnancy and Parental Support Act.

<sup>79</sup> Article 49 of the Labour Act.

<sup>80</sup> Article 82 of the State Officials Act.

<sup>81</sup> *C-136/95 Caisse nationale d'assurance vieillesse des travailleurs salariés (CNAVTS) v Eveline Thibault* [1998] ECR I-2011.



performed predominantly by women, especially the roles of childcare and/or family care.

## **8. Final assessment of good practices**

It is somewhat difficult to talk about good practices in relation to pay inequality between men and women in the Croatian legal order. Despite frequent ‘lip service’ paid by the state institutions and officials, the problem has not been addressed in any serious or comprehensive manner, especially when it comes to the notion of equal pay for work of equal value. If anything deserves to be pointed out as a good practice, it is the potential that lies with the Office of the Ombudswoman for Sex Equality. The Sex Equality Act implicitly gives the Ombudswoman a power to monitor and scrutinize collective agreements and evaluation schemes, since it authorizes the Ombudswoman to require and access any information necessary for performing her task of ensuring equality between the sexes. The Ombudswoman has used this power recently in order to scrutinize collective agreements. However, the analysis did not deal with evaluation schemes in any great detail, mostly due to the limited institutional capacity of her Office for such tasks. In fact, the problem of insufficient institutional capacity of institutions responsible for the protection and promotion of sex equality has proved to be one of the key barriers to any serious implementation of the notion of equal pay between men and women.

## **CYPRUS – *Lia Efstratiou-Georgiades***

### **1. General situation**

According to the Labour Relations Department of the Ministry of Labour and Social Insurance (MLSI), the gender pay gap in the general pay level in Cyprus, although considered to be relatively high, has decreased significantly since 1995 (29 %) and keeps following a downward trend from 25 % in 2005 to 24 % and 23.1 % in 2006 and 2007 respectively and 21.8 % in 2008.

Continuous annual increases of the minimum wages during the last years have significantly contributed to the reduction of the pay gap, since the minimum wage order covers occupational categories in which women are overrepresented. A study prepared for the Department in 2007, ‘Analysis of the Gender Pay Gap in Cyprus and Practical Suggestions for Reducing the Gap’ revealed that gender stereotyping, the overrepresentation of women in non-skilled occupations and low-pay sectors and the underrepresentation of women in collective bargaining are the main causes of pay gaps. Generally, horizontal and vertical segregation are present in Cyprus’ labour market. Moreover, the shorter periods of accumulated professional experience of women, caused by more frequent interruptions to their career paths due to family-related leave, also result in pay gaps. Lastly, the greater presence of women in temporary and part-time employment also explains part of the pay gap between men and women.

The Statistical Service of Cyprus has published figures regarding the overall gender pay gap, expressed in percentages of the difference between gross hourly earnings of male and female paid employees as a proportion of gross earnings of male paid employees for 2006 and 2008. The 2008 data are provisional:

<u>Economic sectors</u>	2006	2008
Public	7.9	11.9
Private	31.2	28.4
<u>Age classes</u>		
-25	19.8	13.9
25-34	7.4	9.2
35-44	21.2	21.3
45-54	24.3	26.3
55-64	29	26.1
65 <sup>+</sup>	47.6	32.1

The difference in gaps is probably due to the different sources for the data of 2006 and 2008. For the year 2006, the source was the structure of earnings survey and for the year 2008 the source was the Social Insurance Archives. Please note that the data of 2008 are provisional.

Furthermore, one of the reasons for the big gap in the 65+ category may be the withdrawal of women from the labour market at these ages mainly for family reasons, e.g. care of grandchildren and elderly parents. However, the data show a growing improvement in favour of women because facilities for the care of children and elderly people have improved.

The Cyprus Organization of Business and Professional Women carried out a survey, published on 18 March 2010, on the issue of equality and equal pay between the two sexes at the workplace in the private sector. The following are some of the conclusions of the survey: a) In Cypriot businesses, 87 % of managerial posts are occupied by men; b) As regards the nature of the work, 44 % of women occupy clerical posts, whereas 22 % of men occupy clerical posts. As regards technical posts, the percentage is 38 % men and 13 % women; c) The most important reason for changing jobs is, for men, a better salary (49 %), whereas for women it is a better time-table (44 %).

## **2. The legal framework**

Equality between men and women is enshrined in Article 28(1) of the Constitution which prohibits any direct or indirect discrimination against any person, inter alia, on grounds of sex (Article 28(2)).<sup>82</sup> The Supreme Court recognizes that the constitutional principle of equality guarantees substantive equality. Ever since 1962 the Court has accepted a broad meaning of the term remuneration.<sup>83</sup> The legislative framework providing for the application of the principle of equal pay between men and women has been in place since 2002 through the Equal Pay for Men and Women for Same Work or for Work to which Equal Value is attributed Law.<sup>84</sup> This Law was later amended by Law No. 193(I)/2004 which granted the Commissioner of Administration (Ombudsman) the authority to examine complaints in relation to equal pay between men and women. A new amendment law was enacted in 2009 (No. 38(I)/2009) transposing into national law the new 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).

Furthermore, the following laws and regulations deal with equal pay:

<sup>82</sup> *Nitsa and Georgia Zoukof v Republic of Cyprus*, 25 July 1990, case 912/89; *Zoe Nicolaidis v Republic of Cyprus*, 19 January 1999, appeal no. 2148.

<sup>83</sup> *Xinari V Republic of Cyprus*, 1962 3 CLR p. 98.

<sup>84</sup> No. 177(I)/2002 as amended 193(I)/2004, 38(I)/2009.

- (a) The Equal Treatment of Men and Women in Employment and Vocational Training Law;<sup>85</sup>
- (b) the Maternity Protection Law;<sup>86</sup>
- (c) the Maternity Protection (Safety and Health) at Work Regulations 2002;<sup>87</sup>
- (d) the Parental Leave and Time Off Work on Grounds of Force Majeure Law;<sup>88</sup>
- (e) the Part-Time Employees (Elimination of Unfavourable Treatment) Law;<sup>89</sup> and
- (f) the fixed-Term Work Employees (Prohibition of Discrimination Treatment) Law.<sup>90</sup>

### 3. Instruments of social partners

Article 6(2) of Law No. 177(I)/2002, as amended, provides that trade unions shall inform the employees about the content of the Law and the measures taken for its implementation so as to ensure the application of the principle of equality in pay, by written announcements posted on boards in the workplace, outside working hours, or in any other appropriate manner.

According to the latest amendment of the Law (Article 6(A)(1)), trade unions and employers' associations are obliged to engage in social dialogue with a view to fostering equal treatment, through the monitoring of practices in the workplace, in access to employment, vocational training and promotion, as well as through the monitoring of collective agreements, codes of conduct, research or exchange of experience and good practice, and also by including anti-discrimination rules regarding pay in collective agreements. Moreover, according to Article 7, provisions in legislation or collective agreements that are contrary to the principle of equal pay are abolished to the extent that they contain a direct or indirect discrimination against one of the sexes. Moreover, Article 8(1) provides that within three months from the date that the law entered into force, the competent authority should invite the employers' and workers' organizations to examine the existing provisions of collective agreements in order to find any provisions that were contrary to the law and amend them so that any direct or indirect discrimination against one sex would be formally eliminated. This task was completed in 2005, so provisions and terms in collective agreements which were discriminatory against one sex were deleted and the general terms concerning working conditions and pay are neutral in respect to gender. The social partners are obliged to include in the collective agreements relevant provisions of legislation and general principles on matters such as minimum wage, salary increments, cost of living allowance, working hours, overtime, annual leave, sick leave, provident fund, maternity leave, etc. However, in practice, job segregation between men and women continues in some collective agreements where jobs are classified as jobs category A and jobs category B. Women occupy more than 95 % of posts in category B.

In the Public Service, employees are covered by the Public Service Law.<sup>91</sup> For every permanent post in the Public Service there is a scheme of service which sets out the duties of the post, the qualifications required and the relevant remuneration. In the

<sup>85</sup> Nos. 205(I)/2002, 191(I)/2004, 40(I)/2006, 176(I)/2007, 39(I)/2009 implementation of Directives 2002/73/EC and 2006/54/EC (RECAST).

<sup>86</sup> No. 100(I)/1997 as amended by Laws 45(I)/2000, 64(I)/2002, 109(I)/2007, 8(I)/2008, 43(I)/2008.

<sup>87</sup> Administrative Regulations Official Gazette 255/2002.

<sup>88</sup> No. 69(I)/2002 as amended by Laws 102(I)/2007, 111(I)/2007, 11(I)/2010 implementation of Directive 96/34/EC.

<sup>89</sup> No. 76(I)/2002, 79(I)/2002 implementation of Directive 97/81/EC.

<sup>90</sup> No. 98(I)/2003.

<sup>91</sup> Nos. 1/1990, 71/1991, 72(I)/1994, 83(I)/1995, 60(I)/1996.

Public Service there is equal pay between men and women if they hold the same post. However, women who represent 54.28 % of the workforce, are accumulated in low-paid posts, thus creating an 11.9 % pay gap (2008 statistics). This is also the case in semi-state organizations, local authorities, banks and in the tourism sector. Trade unions have carried out various surveys in order to identify the problems. The following are some of these surveys: a) In 2008, PEO (trade union) carried out a study on 'the gender equality in collective agreements', which intended to show the job segregation and the perceptions of Cypriot society on this issue; b) In 2009, DEOK (trade union) translated into Greek the Swedish Ombudswoman's guide entitled 'Steps on pay equality', in order to help introduce a simple classification and evaluation system in Cyprus; c) PEO is working on a survey entitled 'The pay gap between women and men in semi-state organizations: determining factors and measures to address it'. The conclusions of the survey will form the basis for the development of dialogue between social partners aiming at the gradual elimination of pay inequalities disadvantaging women in semi-state organizations.

The National Machinery for Women's Rights (in which social partners, NGOs, and the Ministry of Justice and Public Order are represented), has prepared a National Plan for Equality between men and women 2007-2013, which includes ambitious measures for implementation of gender equality at all levels. It also subsidizes various programmes and surveys undertaken by NGOs on this matter.

#### **4. Instruments specifically aimed at employers**

Article 6(3) of the above Law No. 177(I)/2002, as amended, provides that employers should facilitate the employees' organizations activities in raising awareness among employees regarding the content of the law.

Article 6(A)(2) encourages employers to promote equal treatment for men and women in a planned and systematic way in the workplace and provide their employees and/or their representatives, upon request, once a year or at other appropriate intervals that will be agreed between them, with appropriate information on equal pay for men and women in the organization. Such information includes an overview of the proportions of men and women at different levels of the organization, their pay and pay differentials and possible measures to improve the situation in cooperation with employees' representatives. Article 6(A)(2) was approved in April 2009 and there is no information from the social partners as to its application in practice.

According to the Public Procurement Department of the Cyprus Government no recommendation has been given to require firms to address the pay gap for the reason that such measure is considered difficult to implement in public procurement.

#### **5. Other instruments to close the pay gap**

The Labour Relations Department of the Ministry of Labour and Social Insurance has prepared an action plan on the application of the principle of equal pay between men and women, which has been submitted for co-funding to the European Social Fund for the period 2007-2013. Suggested actions include: 1. Reinforcement of the machinery that follows up the application of equality in employment, which includes training of the responsible Officers/Inspectors on matters of gender equality and application of the law, preparation of manuals to help Inspectors deal with matters of discrimination in employment and pay; 2. Encouragement of firms to create a working environment which favours the equality of sexes and the professional advancement of women and to prepare a guide for pay equality; 3. Taking of measures for combating occupational

segregation on the basis of sex; 4. Seminars on pay equality and pay gaps addressed to lawyers, legal advisors, personnel officers and officials of social partners organizations; 5. Guide for trade unions officers for promoting pay equality during collective bargaining.

According to the above Law No. 177(I)/2002, as amended, the Minister of Labour and Social Insurance appoints Inspectors for the effective application of the Law, including the examination of complaints submitted for violations of the law.

The small number of complaints submitted to the competent authorities so far, can be partly explained by the fact that the terms and conditions of employment of public and semi-government employees are regulated by national laws and regulations, while the terms of employment of many private sector employees are determined through collective agreements, since in Cyprus the general coverage by collective agreements is high. Another reason is the fact that, under Law No. 177(I)/2002, as amended, employees can submit complaints to the Ombudsman, an institution that has existed for a long time and is well-known to the public. As far as vulnerable groups of employees are concerned, especially those not represented by trade unions, a minimum wage is secured, through a Minimum Wage Order issued and revised annually.

However, the Ministry aims at improving the performance of the inspectorate mechanism, through continuous quantitative and qualitative enhancement of the labour inspectors' fleet, as well as through the promotion of a comprehensive proposal of measures to be co-financed by the European Social Fund. The proposal consists of a broad mix of measures and includes the following:

- Specialized training programmes for inspectors, with the purpose of establishing an effective mechanism for the enforcement of equal pay legislation;
- financing equality schemes of enterprises;
- establishment of a gender equality Certification Body;
- measures for eliminating occupational and sectoral segregation which include interventions in education issues;
- campaigns to raise awareness on equal pay;
- training programmes for trade unions and employers' associations; and
- development of manuals, guides, self-assessment tools, codes of practice and job evaluation tools for managers/human resource professionals.

## **6. Problems of enforcement and how to tackle them by good practices**

According to Article 22(1) of Law No. 177(I)/2002, the Industrial Tribunal Court has jurisdiction to try the disputes arising from the application of this Law (subject to the exclusive jurisdiction of the Supreme Court under Section 146 of the Constitution). As regards compensation, Article 22(2) of the above-mentioned Law provides that in case of action before a District Court according to Article 146(6) of the Constitution and provided that the conditions of the material right for a fair and reasonable compensation are fulfilled, the competent District Court shall adjudicate to the beneficiary whichever of the two amounts is greater:

(a) the adjudicated fair and reasonable compensation under Article 146(6) of the Constitution, or (b) the total real damage and pecuniary satisfaction for any moral damage of the plaintiff caused by the decision, action or omission which was declared void in accordance with Article 146(4) of the Constitution. In each case, the legal interest rate shall be added to the adjudicated amount, from the date that the above damage occurred until the full payment of the compensation.

Article 22(3) provides that the Industrial Tribunal Court shall adjudicate a fair and reasonable compensation, covering most of the assessed damage and include the pecuniary satisfaction for any moral damage caused to the claimant by the respondent and in either case, the legal interest rate shall be added to the above adjudicated amount, from the day that the contravention was made until the full payment of the compensation.

The application to the Industrial Tribunal Court must be filed within one year from the date that the law is violated. The trial before the Industrial Tribunal Court may last 6-12 months. In case of appeal, a further period of 18 months to two years will be needed.

The Industrial Tribunal Court shall, where it deems necessary, issue an order of binding recognition of the rights of the claimant in relation to the contravention about which the complaint has been made. According to Article 23A any person that believes that he/she has been harmed by a contravention of this law, may submit a complaint to the Ombudsman, who has the authority to investigate complaints. The burden of proof lies on the employer.

Scope of comparison: According to the latest amendment of the above Law (Article 5(3) of Law No. 38(I)/2009), the comparison in case of a complaint was extended to employees who are employed or were employed by the same employer or associated companies of the same group of companies during the last two, or following two years.

The Ombudsman examined the complaint of the Equality Observatory of Cyprus against the Cyprus Telecommunications Authority (CYTA), on behalf of a group of 14 women, who work as cleaners at CYTA, stating that they were not granted equal opportunities for occupational training as compared to their male colleagues (unskilled workers and gardeners), who were granted occupational training (Ombudsman File No. A.K.I. 27/2008 dated 16 April 2009). As a result of this, the cleaners were deprived of the possibility of occupational advancement by transfer to a different job category with higher pay. It is noted that for the work of general cleaning, CYTA employed only female cleaners.

The Ombudsman found out a) that through the years, in the collective agreements from 1980-2003, access to training was given to men, whereas to female cleaners, who belonged to the same category of personnel, such access was not given and that this constituted indirect discrimination on ground of sex in the field of access to occupational training, contrary to the Equal Treatment of Men and Women in Employment and Occupational Training Laws of 2002-2007; b) that in the collective agreement neither the work of female cleaners nor that of machinery cleaner, guard, porter and unskilled worker are evaluated; c) that the fact that female cleaners were denied the possibility to have occupational training, which was one of the prerequisites for salary advancement, deprived them of any prospect for occupational development until their retirement, and that this constituted indirect discrimination on grounds of sex; and d) that the dimension of the equality of sexes was persistently absent from the agenda of negotiations for the collective agreements.

The Ombudsman (as Equality Authority) also examined a complaint by female Non-Commissioned Officers of the 3<sup>rd</sup> series of the National Guard against the Ministry of Defence regarding alleged adverse discriminatory treatment, relating to the terms and conditions of their employment as well as their professional promotion, on grounds of sex (Ombudsman File No. A.K.I. 25/2006, A.K.I. 41/2006). The claimants in question had been recruited as Volunteers Non-Commissioned Officers on contract in February 1991 in the rank of Sergeant, scale A1 (the lowest in the

public sector) and received a permanent contract after 10 years. The claimants asserted that, although they satisfied all necessary requirements for promotion, none of them had been promoted by the date that the complaint was submitted (10 April 2006), i.e. 15 years after. The claimants asserted that this was due to their sex, since their male colleagues, who were recruited at the same time as they were, are now at the level of Staff Sergeant (a position higher than that of Sergeant). Furthermore, they stated that at the regular yearly appraisal in 2004, there had been 120 vacant promotion posts in the rank of Sergeant Major and none of the women of their own seniority had been promoted. The same thing happened in 2005.

On the other hand, men working in the army complained to the Ombudsman that female Non-Commissioned Officers of the Cyprus Army receive more favourable treatment as regards their salary when they are appointed to the permanent post of Sergeant, since they are appointed in the 3<sup>rd</sup> or 5<sup>th</sup> step of the salary scale, depending on whether they have an education higher than secondary school or have a university degree, whereas there is no such treatment for men. Male Non-Commissioned Officers assert that this constitutes discrimination on grounds of sex when it comes to salary at the time of their permanent appointment in the army.

After studying all the facts and relevant laws and regulations concerning the complaints, the Ombudsman reached the following conclusions: a) There are differences between the army's job descriptions of 'men's work' and 'women's work' where it concerns the post of Non-Commissioned Officers; b) there are different marking scales for work appraisal for men and women, which creates direct discrimination on ground of sex; c) there are regulations on the basis of which access to a post depends not on the abilities of the person but on sex, thus also creating direct discrimination against women; d) there is direct discrimination against men in the fact that women are treated more favourably in terms of salary in the case of appointment to the post of Sergeant, which results in violation of the principle of equality in remuneration under the Law of Equal Pay between Men and Women for the Same Work or for Work of Equal Value of 2002 to 2004.

Finally, the Ombudsman suggested that the above-mentioned provisions in the laws relating to working in the Cyprus army should be revised to abolish any provision which creates direct or indirect discrimination on the grounds of sex in the field of access to working in the army (against women), of remuneration, of transfer of pension to surviving widower (against men), as explained above. The Ombudsman also submitted her report with her findings and recommendations to the Attorney General of the Republic who, as the Government's Legal Advisor, must study the matter and advise the Minister of Defence and/or the Council of Ministers on the necessary amendments of the relevant laws, so as to delete discriminatory provisions. There is information that the Ministry of Defence will proceed with the necessary amendments.<sup>92</sup>

## **7. Relationship between the gender pay gap and other parts of labour law**

a) The Law of Equal Treatment for Men and Women in Employment and Vocational Training<sup>4</sup> safeguards the implementation of the principle of equal treatment between men and women concerning vocational guidance, education and training, access to employment, terms and conditions of employment, terms and conditions of dismissal from any job position as well as access to and exercise of self-employed jobs. The Law also safeguards the protection of women from any direct or indirect

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<sup>92</sup> Internet sources and additional information: [www.ombudsman.gov.cy](http://www.ombudsman.gov.cy), accessed 18 May 2010.

discrimination due to pregnancy, delivery, breastfeeding, maternity or sickness resulting from pregnancy or delivery, and provides for judicial and extra-judicial protection in case of violation of the provisions of the law.

b) The Maternity Protection Law<sup>5</sup> provides measures for protection, safety and health of pregnant workers and of workers who have recently given birth or are breastfeeding. Such measures are: maternity leave may not affect employment rights such as rank and position, seniority of the right to promotion or return to work. The above provisions safeguard the presence of women in the labour market and their occupational advancement, thus contributing to the narrowing of pay gap.

c) The Parental Leave and Time Off on Grounds of Force Majeure Law<sup>6</sup> through a recent amendment (Law No. 11(I)/2010) encourages both men and women to exercise their right to parental leave, as a means to a more balanced share of family responsibilities.

As up to now mostly women use parental leave, the protection provided in the law allows women to keep their post and benefits, thus contributing to the narrowing of the pay gap.

d) The Fixed-Term Work Employees (Prohibition of Discrimination Treatment) Law No. 98(I)/2003<sup>9</sup> as well as the Part-Time Employees (Elimination of Unfavourable Treatment) Law No. 76(I)/2002<sup>8</sup> apply to all fixed-term employees respectively, with no discrimination based on sex.

According to Article 5 of Law No. 98(I)/2003 in respect of terms and conditions of employment, a fixed-term employee shall not be treated less favourably than a comparable permanent employee by reason only that he/she has a fixed-term employment contract or relationship, unless different treatment is justified on objective grounds. Where appropriate, the principle of *pro rata temporis* shall apply. A length of service requirement in employment shall be the same for fixed-term employees as for permanent employees, except where different lengths of service qualifications are justified on objective grounds.

Article 6(1) of Law No. 76(I)/2002 provides that a part-time employee shall not be treated less favourably than a comparable full-time employee by reason only that he/she works part time unless different treatment is justified on objective grounds. Furthermore Article 7(1) provides that every part-time employee shall be entitled to equal terms and conditions of employment and to equal treatment and shall be afforded the same protection as that given to a comparable full-time employee, in particular with regard to (a) salary and benefits; (b) the social insurance schemes; (c) the termination of employment; (d) protection of maternity; (e) annual leave with pay and paid public holidays; (f) parental leave; and (g) sick leave. According to Article 7(2), a part-time employee is entitled to enjoy the same protection as a full-time employee in relation to (a) the right to join and participate in the activities of a union, the right to collective negotiations and the right to act as an employees' representative; (b) health and safety at work; and (c) protection from unfavourable discrimination in employment and occupation.

The provisions of the above laws apply to all workers, men and women, and as women are the majority of fixed-term and part-time workers, they also help to narrow the pay gap.

## **8. Final assessment of good practices**

In the study 'Analysis of the Gender Pay Gap in Cyprus and Practical Suggestions for Reducing the Gap' the Ministry of Labour and Social Insurance proposed measures aiming at reducing the gender pay gap. The proposed measures are: Specialized



training for inspectors aiming at establishing an effective inspection mechanism for the enforcement of equal pay legislation, financing equality schemes of enterprises, and the establishment of a Certification Body.

Furthermore, NGOs, Trade Unions and Employers' Organizations organize seminars for training 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, namely 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, as mentioned in Section 3, in some agreements there is still job segregation. Social partners have not yet widely used job evaluation, which is an effective measure to close the pay gap, as it may prove that the pay of jobs mainly occupied by women should be at the same level as the pay of jobs mainly occupied by men.

In women NGOs' opinion, the social partners must negotiate equal pay for same work or work of equal value in a way which will not hide discrimination between sexes any longer. If the criteria, the qualifications and the duties are not agreed for the same work or work for equal value, it will be a long time before equal pay between men and women becomes a reality. The social partners up to now have not put into practice the inclusion in the collective agreements of the gender perspective or any reference to positive measures to address the pay gap.

The best practices are: a) To establish the practice of carrying out job evaluation of jobs; b) to take more measures for balancing work and family life; c) to help change the traditions and stereotypes which influence the evaluation and classification of occupations and employment patterns; d) to incorporate in educational programmes at all levels of education (from nursery to secondary schools) the principle of equality/non-discrimination of sexes and the concept that to achieve equality, gender stereotyping should be eliminated; e) to provide proper career counselling to students so that a gender-neutral approach to jobs/professions is established; and f) to provide special training to women so that they can enter or re-enter the labour market, especially in new technologies jobs which are needed in the labour market. In Cyprus, this task is officially undertaken by the Human Resources Development Authority.

## **CZECH REPUBLIC – *Kristina Koldinská***

### **1. General situation**

As regards the general situation of the pay gap (gender pay gap or GPG) in the Czech Republic, the following is extracted from a regular report entitled *Men and Women in Data* (2008).<sup>93</sup>

Almost 90 % of the two million (2 116 million) women, and less than 80 % of the almost three million (2 806 million) men in the labour force work as employees in their main job. Women work part time more often than men (8.6 % of women and 2.3 % of men work part time).

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<sup>93</sup> Czech Statistical Office *Women and Men in Data* Prague, CZSO 2008, available on [http://www.vlada.cz/assets/clenove-vlady/ministri-pri-uradu-vlady/michael-kocab/rovne-prilezitosti-zen-a-muzu/dokumenty/Women-and-men-in-data-2008\\_1.pdf](http://www.vlada.cz/assets/clenove-vlady/ministri-pri-uradu-vlady/michael-kocab/rovne-prilezitosti-zen-a-muzu/dokumenty/Women-and-men-in-data-2008_1.pdf), accessed 20 March 2010.

Women earn less than men, regardless of their achievements in education. The income of both groups rises proportionately with education, although the median wage for Czech women in 2007 only amounted to 80.2 % of the median wage for men. The average gender pay gap (hereinafter GPG) was therefore 19.8 %.<sup>94</sup> The largest differences were identified for people with lower secondary education (GPG = 29.6 %) and for those with a postgraduate (Master's or PhD) education (GPG = 25.3 %). The smallest differences were recorded for people with upper secondary education (GPG = 19.3 %) and for those with further technical or bachelor's education, as well as for those with basic or incomplete education (GPG was the same for both categories: 23.4 %).

As regards the difference according to age groups, up to the age of 29, differences in wages for men and women are relatively small. Differences are more marked in the 30–39 age group, where the average earnings for women only amount to 74.4 % of those for men (i.e. GPG is 25.6 %). In the subsequent 40–49 age group, the level of GPG is still relatively significant – 22.5 %; gender differences are again less at a higher age. In the 50–59 age group, GPG drops to 17.5 %. In the 60 and over age group, average earnings for women make up 85.8 % of average earnings for men, i.e. the GPG is at one of its lowest levels (14.2 %). The lowest level of GPG (12.8 %) however was found in the 20–29 age group.

In all sectors, women's wages are lower than men's wages. The largest difference between women's wages and men's wages was found in the sector in which both women's wages and men's wages are at their highest: the financial services sector (GPG = 37.8 %). Compared to men, the lowest level for women's earnings can also be found in the wholesale and retail trade, repair of goods sector (GPG = 31.1 %) and in the industry sector (GPG = 28.8 %). In all these sectors, women's wages are less than three quarters of men's wages. The lowest differences in women's and men's wages were found in the other community, social and personal service activities sector (GPG = 4.6 %) and also in the construction sector (GPG = 7.8 %).

If we look at differences within profession, the largest difference between incomes for men and women can be found among craft and related trades workers, where the median earnings in 2007 for women made up 68.0 % of the median earnings for men. Among legislators, senior officials and managers, the median earnings in 2007 for women made up 69.4 % of the median earnings for men. For these occupations, the gender pay gap reached over 30 %, which is a very marked difference between the levels of earnings for women and men.

## **2. The legal framework**

The situation described above (average gender pay gap is quite high, in some areas it even exceeds 30 %, which is alarming) does, however, not mirror the legal framework in the Czech Republic. The current legislation prohibits pay discrimination on ground of sex – either in the Labour Code, or in the Antidiscrimination Act.

Part 6 of Act No. 262/2006 Coll., Labour Code deals with remuneration. This part includes two definitions, namely wages provided in the private sphere and pay provided in the public sphere. For pay in the public sphere there is a certain ceiling, as remuneration is financed from the state budget. The labour code also includes basic principles and elements of remuneration, including the principle of equal pay. However, the principle of equal pay for men and women is not explicitly mentioned.

<sup>94</sup> According to recent data of Eurostat, the gender pay gap in unadjusted form was 26.2 % in the year 2008; see <http://epp.eurostat.ec.europa.eu/tgm/table.do?tab=table&init=1&language=en&pcode=tsdsc340&plugin=0>, accessed 20 March 2010.

Section 110 Paragraph 1 states: ‘For equal work of equal value, equal pay shall be provided to all employees by an employer.’

Act No. 198/2009 Coll., Antidiscrimination Act states in its Section 5 that ‘In matters of the right and access to employment and access to an occupation, business or other self-employment, work activities and other paid employment, including remuneration, employers shall be obliged to provide for equal treatment.’ Remuneration is defined in the same section as ‘any performance, whether monetary or non-monetary, recurring or one-off, which is directly or indirectly provided to a person in paid employment.’

Sections 8 and 9 of the same Act further regulate equal treatment in occupational systems, according to relevant EC directives: ‘Where an employer provides to employees, former employees and their family members monetary performance or performance corresponding to a monetary value in order to substitute or supplement the benefits provided from the basic scheme of social protection covering illness, invalidity, old age, including early retirement, occupational injury and occupational disease, unemployment, other monetary or non-monetary performance having the characteristics of social benefits, particularly survivors’ or family benefits, to the extent that they are paid by the employer to the employee on the basis of employment, the employer shall be obliged not to discriminate on the ground of sex.’

### **3. Instruments of social partners**

Within the Czech legislative framework there is no provision which would directly oblige social partners to include the issue of equal pay or equal treatment as such into collective agreements.

The Czech social partners are in general not very enthusiastic about issues connected with equal opportunities. E.g. employers are not very much interested in having information about discrimination issues as such, the issue of gender pay gap included. E.g. if they receive the suggestion to have a gender pay gap audit, in general they refuse, because they are afraid they could be described as discriminating employers in the future.

However, there has been a step forward regarding the policies of trade unions. The biggest trade union confederation – the Czech and Moravian Confederation of Trade Unions – in April 2007 published a guide entitled ‘Collective bargaining – implementation of equality for men and women in practice’.<sup>95</sup> This guide includes a chapter (more than ten pages long) which focuses on equal pay and which provides practical information and concrete proposals for parts of collective agreements.

Generally speaking, trade union activity regarding equal pay is not very effective, most probably because trade unions are not so active in making an effort to put the principle of equal pay into collective agreements. In fact, in general, trade unions are not very interested in equal treatment issues as such; they are more oriented toward playing an important role in current politics, by organising protests and launching a general discussion on ‘social rights,’ which unfortunately, however, has more of a confrontational tone, rather than taking on the form of a real and constructive debate that takes a real interest in social rights as such.

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<sup>95</sup> ČMKOS *Kolektivní vyjednávání aneb uplatnění rovnosti mužů a žen v praxi* Prague, ČMKOS 2007.

#### 4. Instruments specifically aimed at employers

There are legislative instruments that oblige employers to address the issue of equal pay, in particular in the Labour Code and the Antidiscrimination Act, as mentioned above.

Moreover, employers are monitored in their activities by labour inspectorates, according to Act No. 251/2005 Coll., on labour inspection (Sections 3 and 5).

According to the Act on labour inspection, discrimination is an administrative offence. Section 11 of the Act defines four forms of offences in the area of equal treatment:

- a) the employer does not ensure equal treatment for all employees;
- b) the employer discriminates against employees;
- c) the employer disadvantages an employee who has asserted his/her rights arising from a labour-law relationship; and
- d) the employer does not discuss with an employee or the employee's representatives the employee's complaint that some duties arising from a labour-law relation are not respected.

For such an offence, the inspectorate may order a fine of an amount of up to EUR 15 500 (CZK 400 000; in contrast to other administrative offences, for which the inspectorate may order a fine of only up to EUR 7 800 (CZK 200 000)).

From the report on activities of labour inspectorates in 2008<sup>6</sup> it is clear that employers sometimes do not pay equal remuneration for equal work or work of equal value.

Employers may also order an equality audit which can be provided by some NGOs. There is also the possibility for an employer to use some methodologies to check whether the equal pay principle is observed within the company or not.<sup>97</sup>

In the Czech Republic there are no strategies to require the release of information about pay broken down by gender. Information on pay is regarded as private information and is not normally released by employers; employees may even be obliged by some labour contracts not to inform other employees about their salary.

Currently, there is no real policy document or systematic support from the Government to promote equal pay. There are, however, no official reasons for this.

## 5. Other instruments to close the pay gap

As tools to identify and tackle discrimination in pay, the following may be mentioned:

– First of all, several documents and methodologies could be used: the methodology on equal pay (mentioned above) should help individuals to establish that discrimination in pay has occurred and also help employers to establish gender-neutral evaluation schemes, pay systems and so on.<sup>98</sup> In 2007, a book on equal pay was

[illegible]

<sup>97</sup> For example the publication by P. Boučková et al. *Metodika hodnocení kritérií nediskriminačního přístupu k odměňování mužů a žen za stejnou práci či práci stejné hodnoty pro zaměstnavatele* Prague. Poradna pro občanství, občanská a lidská práva 2007.

<sup>98</sup> There are some studies, methodologies included, by the NGO ProEquality, which focus on gender equality (equal pay included) in larger regions: P. Pavlik *Metodika genderového auditu krajského úřadu* Prague Nadace Open Society Fund 2007, available on [www.proequality.cz/res/data/003/000395.pdf](http://www.proequality.cz/res/data/003/000395.pdf), accessed 8 March 2010, and from cities' and local authorities; and P. Pavlik *Metodika genderového auditu městského / obecního úřadu* Prague.

published in the Czech language,<sup>99</sup> so that information on the legal basis of gender equality in pay is available.

– There are also many other publications – methodologies and analyses – available on the website of the NGO ProEquality.<sup>100</sup>

– There is almost no monitoring of collective agreements and other documents, which might be a source of information about potential pay discrimination. The only monitoring body is that of labour inspectorates, which still face problems, in particular in connection with problems of proof.

Hopefully, the equality body – the ombudsman in the Czech Republic – will be able to address the pay gap at least through publishing some reports on this topic. The Antidiscrimination Act provides an already existing ombudsman with new competencies regarding discrimination cases. According to Act No. 349/1999 Coll., on the Public Defender of Rights, as amended by the Antidiscrimination Act, the public defender of rights (ombudsman) ‘shall contribute to promotion of the right to equal treatment of all persons and shall provide methodological assistance to victims of discrimination in lodging their proposals for commencement of proceedings concerning discrimination, undertake research, publish reports and issue recommendations on discrimination-related issues, and provide for exchange of the available information with the relevant European parties.’ There are, however, no real or special competencies for the equality body to concretely address the pay gap.

– Currently, an information campaign financed by the European Commission is visible on billboards and in the media, focusing especially on equal pay.<sup>101</sup>

All the above-mentioned instruments have not been very effective yet (and in fact, there are not so many real instruments to close the pay gap), as the pay gap in the Czech Republic is still quite high.

## **6. Problems of enforcement and how to tackle them by good practices**

In the Czech Republic, it is not always very easy to enforce equal pay rules.

One problematic area is the fact that the employer is not obliged to publish schemes of work evaluation, nor gender-differentiated statistics regarding pay. Therefore it is not easy to prove that there has been discrimination in pay.

Even within the policy of the labour inspectorates, victims of pay discrimination are in particular recommended to try to resolve the situation directly with the employer first. Only if this is not possible should they then go to court, which will decide on the case in a civil procedure.

There are no fixed rules yet for a comparison. The court usually compares wages in the same organisation.

In the case of pay discrimination, the most frequent sanction is a compensation, whereby the claimant asks for a certain amount as compensation for pay lost because of discrimination. Another possibility is to ask for compensation as part of the concept of damages as provided for by labour law. There are no special time limits to the period that can be taken into account, so general rules for private-law relationships will be used, which means that a general prescription period of three years will be applied. There have been no cases yet regarding the question of future rights connected with the pension system.

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Nadace Open Society Fund Praha 2007, available on [www.proequality.cz/res/data/003/000397.pdf](http://www.proequality.cz/res/data/003/000397.pdf), accessed 8 March 2010.

<sup>99</sup> B. Havelková *Rovnost v odměňování žen a mužů* Prague, Auditorium 2007.

<sup>100</sup> <http://www.proequality.cz/publikaceII.html>, accessed 8 March 2010.

<sup>101</sup> <http://ec.europa.eu/social/main.jsp?catId=681&langId=en>, accessed 20 March 2010.





choice of women who work as managers.<sup>104</sup> This study confirms that after the age of 29, there is a strong decline in the numbers of female managers as such, as women decide in favour of concentrating on their family.<sup>105</sup> However, if the incomes of female managers are looked at more closely, the pay gap is more or less the same as the average pay gap – approximately 15 %. The pay gap is lower at the highest levels of management, whereas in lower management it reaches the average values.

## 8. Final assessment of good practices

Unfortunately, no really good practices can be mentioned as very important.

It should be underlined, however, that NGOs are very much struggling to inform the general public about the problems related to the pay gap, to explain the convenience to the employer about paying attention to the equal pay principle, and last but not least, to provide useful guidance and recommended practice for those employers who would like to eliminate the gender pay gap in their company.

## DENMARK – *Ruth Nielsen*

### 1. General situation

In broad terms, the gender pay gap is between 15 and 20 % in Denmark. The gender pay gap is usually discussed in Denmark by reference to four different pay concepts:

- narrow income (*smalfortjeneste*) excluding pension and employee benefits;
- narrow income (*smalfortjeneste*) including pension and employee benefits, but excluding some other wage components;
- income per paid hour;
- income per worked hour.

When the first three pay concepts are used, the result is a gender pay gap in the magnitude of 15-20 %. If income per worked hour is measured, the gender pay gap is around 10 % less, because women receive pay for more hours where they do not perform work (for example due to illness, care functions, paid lunch breaks, etc.) than men.

In the Danish discussion of the gender pay gap, the reference is not to the total income difference between women and men but to payment per hour, either paid hour or worked hour. Men get paid for more hours than women and men perform work for a greater proportion of their paid hours than women. Employers generally prefer a pay concept related to worked hours, whereas the trade unions generally prefer to look at the paid hours. In the discussion on wage statistics it is a controversial issue which (Danish) pay concept should be applied; also see below for the different views on Section 5a of the Equal Pay Act.

The gender pay gap is about the same in the private sector and in the municipal part of the public sector, but lower in the state part of the public sector than in the private sector and the municipal sector.

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<sup>104</sup> J. Vlach et al. *Gender v managementu* Prague, VUPSV 2008. Available on [http://praha.vupsv.cz/Fulltext/vz\\_268.pdf](http://praha.vupsv.cz/Fulltext/vz_268.pdf), accessed 8 March 2010, p. 33.

<sup>105</sup> J. Vlach et al. *Gender v managementu* Prague, VUPSV 2008 Available on [http://praha.vupsv.cz/Fulltext/vz\\_268.pdf](http://praha.vupsv.cz/Fulltext/vz_268.pdf), accessed 8 March 2010, p. 28.

## 2. The legal framework

In Denmark, equal pay between men and women is governed by the Equal Pay Act which dates back to 1976, when it was adopted to implement the Equal Pay Directive from 1975. It has been amended several times, most recently in 2008<sup>106</sup> in connection with the implementation of the Recast Directive.<sup>107</sup>

The Act provides in Section 1 that for the same work or work of equal value men and women must be paid the same. This provision is an implementing measure in respect of the underlying EU provisions (Article 157 FEU and the Recast Directive (2006/54/EC)). This provision therefore has to comply with EU law which *inter alia* implies that Section 1 of the Equal Pay Act applies to all wage components in accordance with the EU law pay concept, and not only to wage components covered by gender-specific wage statistics under Section 5a of the Danish Equal Pay Act; also see below for this provision. Originally, Section 1 of the Danish Equal Pay Act only provided for equal pay for the same work because that was the wording preferred in collective agreements. After the Commission brought an infringement case against Denmark<sup>108</sup> the European Court of Justice found against Denmark. After that judgment, the wording of Section 1 of the Danish Equal Pay Act was changed.

In addition to Section 1 (which, as mentioned, implements EU law and therefore must apply the EU law pay concept) there is a purely Danish provision in Section 5a on wage statistics, stipulating that Denmark in regard to the EU has the competence to do as the political majority in Denmark prefers, including choosing a Danish pay concept for statistical purposes that does not include all wage components and thus deviates from the pay concept in Section 1 of the Danish Equal Pay Act (and the underlying EU provisions).

Section 5a of the Danish Equal Pay Act (and the pay concept(s) used in relation to it) is a politically highly controversial provision where there are two opposing views: the social-democratic view as enshrined in the 2001 version of Section 5a (which never came into force) which is largely supported by the trade unions, and the liberal-conservative view of the present Danish government as enshrined in the present version of Section 5a which dates back to 2006 and is largely supported by employers and management.

In the original 2001 version of Section 5a, which was introduced by the then social-democratic Government in the summer of 2001, the gender-specific wage statistics required should be designed to show whether men and women who did work of equal value received unequal pay in violation of the ban on sex discrimination in Section 1 of the Equal Pay Act (and the underlying EU provisions) so that the gender-specific wage statistics could serve as an instrument for the trade unions in equal pay litigation. That provision was not put into force immediately, because some practical matters had to be solved. The Minister of Employment was given competence to put the provision into effect. A few months later – in November 2001 – the political majority shifted in the general elections and the present liberal-conservative government took office. It did not like the social-democratic version of Section 5a of the Equal Pay Act and the new (liberal) Minister of Employment decided that Section 5a should not enter into force.

In 2006, the liberal-conservative Government introduced the present version of Section 5a.<sup>109</sup> Section 5a is, according to the preparatory works for the Equal Pay Act,

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<sup>106</sup> See consolidated Act No. 899 of 5 September 2008 on Equal Pay between Men and Women.

<sup>107</sup> 2006/54/EC.

<sup>108</sup> Case 143/83.

<sup>109</sup> It reads:



designed to enable wage statistics at enterprise level to be used as a management tool in firms with 35 employees or more, to encourage information and consultation and not litigation on whether the discrimination ban in Section 1 of the Act (and the underlying EU provisions) has been violated.

The *DISCO* code referred to in the provision (see footnote 4) is fixed by the Statistical Bureau and is not closely linked to whether or not men and women do work of equal value within the meaning of the ban on unequal pay for work of equal value. Many persons in the same *DISCO* code category do not do work of equal value, and many persons doing work of equal value are in different *DISCO* codes categories. Wage statistics produced by the Statistical Bureau do not cover all wage components but only the so-called narrow income (in Danish *smalfortjeneste*). Presently (April 2010), a Wage Commission (*lønkommission*) in which the social partners are represented is discussing among other things the pay concepts to be applied in Denmark in the future. The Commission is very secretive about its work and it is not possible to say anything more precise about what is happening. The Pay Commission is supposed to publish a report before the next general wage negotiations in the public sector in the spring of 2011.

### 3. Instruments of social partners

Collective bargaining is of paramount importance for all wage issues in Denmark. In practice, most often there are no express equal pay clauses in Danish collective agreements. That is about to change as a result of the equal pay strategy adopted by the Danish *LO* (the Confederation of Danish Trade Unions) in 2009; see below. The

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**5(a)** An employer with a minimum of 35 employees shall each year prepare gender-segregated wage statistics for groups of a minimum of 10 persons of each sex calculated on the basis of the 6-digit DISCO code for the purpose of consulting and informing the employees on wage gaps between men and women in the enterprise. However, this does not extend to companies in the fields of farming, gardening, forestry and fisheries. If the gender-segregated wage statistics are received confidentially for the good of the company's legitimate interests the information must not be passed on.

(2) The gender-segregated wage statistics under Subsection (1) shall be calculated for employees' groups with a degree of detail corresponding to the 6-digit DISCO code. The employer also has a duty to give an account of the design of the statistics and for the wage concept applied.

(3) Enterprises that submit information to the annual wage statistics of Statistics Denmark may obtain, without charge, gender-segregated wage statistics under Subsection (1) from Statistics Denmark.

(4) The employer's obligation to prepare gender-segregated wage statistics under Subsection (1) shall lapse if the employer enters into an agreement with the employees in the enterprise to prepare a report. The report is required to contain a description of the terms which are of significance to the payment of men and women in the enterprise as well as specifically action-oriented initiatives which may run for a course of 3 years, and the more specific follow-up on this in the period of the report. The report is required to comprise all employees of the enterprise and must be considered in accordance with the rules laid down in Section 4 of the Act on Information and Consultation of Employees or the rules in a collective agreement which substitute the Act on Information and Consultation of Employees. The report must be prepared, at the latest, before expiry of the calendar year in which the duty to prepare gender-segregated wage statistics existed.

**6** An employee who finds that the employer does not comply with the duty to offer equal pay, including equal pay conditions under the Act may bring legal action to establish the claim.

(2) Where a person who finds that he or she has been discriminated against under Section 1 establishes facts which give cause for presuming that direct or indirect discrimination has taken place, it is incumbent on the other party to prove that the principle of equal treatment has not been violated.

The Danish Equal Pay Act in the 2006 version is available in English on <http://www.ligelon.dk/sw1177.asp>, accessed 5 April 2010.

Labour Court has ruled<sup>110</sup> that when there is no express regulation of equal pay in a collective agreement, the workers cannot require a dispute to be decided by industrial arbitration if the employer protests; see below in Section 6 of this country report on enforcement.

Denmark has adopted no legislative provisions to implement Article 21 on social dialogue in the Recast Directive.<sup>111</sup>

On 15 May 2009, the Confederation of Trade Unions (*LO*) adopted an equal pay strategy.<sup>112</sup> The equal pay strategy is composed of 12 actions, which are divided into two parts. The first part includes legislation and more general efforts and the second part actions that may be included in collective agreements. Three of the proposals (1, 5 and 11) require measures both by legislation and collective agreements.

The first part, i.e. the legislation-oriented part, of the strategy lists the following actions:

1. greater transparency in wage formation;
2. insisting on the establishment of an independent gender equality body;
3. strengthening the efforts to discover Equal Pay Cases;
4. clarification of the concept 'work of equal value';
5. increased maternity/paternity/parental rights for men;
6. clarification of the significance of provisions on extra work (overtime, etc.);
7. identification of the importance of wage increases being fixed as a percentage;
8. insisting on making public employers comply with their mainstreaming duties under the Equal Pay Act § 1b.

The second part, i.e. the collective agreement oriented part, of the strategy lists the following actions:

1. greater transparency in wage formation;
2. increased maternity/paternity/parental rights for men;
3. explicit equal pay provisions in collective agreements;
4. schemes for salary equalisation;
5. further development of the existing Maternity Compensation Fund (which spreads the cost of maternity-related payments between employers) into a fund compensating employers' care-related wage costs more generally;
6. insisting on making public employers comply with their mainstreaming duties under the Equal Pay Act § 1b;
7. payment during children's sickness.

In continuation of the equal pay strategy adopted by the *LO* in 2009, the *LO* has put forward demands for an equal pay clause in the basic collective agreement between *LO* and *DA* (*Dansk Arbejdsgiverforening*, the Danish Employers' Association). The outcome of the general wage negotiations between the social partners in the private sector in the spring of 2010 is likely to include the insertion of an equal pay provision in the basic collective agreement between *LO* and *DA* (*Hovedaftalen LO-DA*). At the time of writing (5 April 2010) it is too early to say for sure.

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<sup>110</sup> A 2005.226.

<sup>111</sup> 2006/54/EC.

<sup>112</sup> Available (in Danish) on [http://www.lo.dk/AKTUELTL/LOnyheder/20090520\\_ligeloen.aspx](http://www.lo.dk/AKTUELTL/LOnyheder/20090520_ligeloen.aspx), accessed 5 April 2010.

#### **4. Instruments specifically aimed at employers**

There are, as mentioned, provisions on gender-specific wage statistics at enterprise level in Section 5a of the Equal Pay Act. These provisions require employers with 35 employees or more and at least 10 of each sex to disclose gender-specific wage statistics; see for details above in footnote 4. There is already a duty on the part of the employers to report their wages to Denmark's Statistical Bureau for statistical purposes. If the employer so wishes, the Statistical Bureau will process the data and deliver gender-specific statistics for the individual employer's business. The costs of the Statistical Bureau's processing of the data are paid by the Ministry of Employment. This means that employers can obtain the gender-specific wage statistics, which they have to disclose to their employees free of charge (i.e. at the expense of the tax payers). According to government estimates, the provision covers around 800 000 workers/employees (500 000 in the public sector and 300 000 in the private sector; the total number of Danish wage earners is around 2.2 million persons). In the public sector, before the insertion in 2006 of rules on gender-specific wage statistics in the Equal Pay Act, employers already produced more detailed gender-segregated wage statistics than required by the provision in the Equal Pay Act. This means that in particular the approximately 300 000 persons in the private sector benefit from the provisions of the Equal Pay Act.

#### **5. Other instruments to close the pay gap**

Addressing pay problems on behalf of the workers is mainly a task for the trade unions. The degree of unionisation is pretty high in Denmark (around 70 %) in comparison to many other countries.

The labour inspectorate has nothing to do with pay problems but only with the working environment and equal pay is not regarded as a working environment problem.

Since 2002, by virtue of Directive 2002/73, the Member States and EEA countries have been obliged to designate Equality Bodies. Similar provisions are found in the Recast Directive (2006/54) and the Supply of Goods and Services Directive (2004/113/EC). The tasks of these bodies are the promotion, analysis, monitoring and support of equal treatment between women and men including equal pay. Denmark has not complied with this provision. In Denmark, there is no equality body with the full range of competences as required in the gender equality directives. Denmark has an Equality Complaints Board which is empowered to deal with complaints about discrimination on grounds of sex, ethnic origin, religion, age, disability, sexual orientation, etc. from victims of discrimination including equal pay claims. This body has no competence to conduct independent surveys concerning discrimination, to publish independent reports or to make recommendations on any issue relating to such discrimination and it cannot start cases at its own initiative. It is therefore not a monitoring body in the sense required by the above provision. In matters of ethnic equality, the parallel requirement in Article 13 of Directive 2000/43/EC is correctly implemented in Denmark. In addition to the Complaints Board, which is also competent in cases of ethnic discrimination, there is a provision in Section 10 of the Ethnic Equality Act that empowers the Danish Institute of Human Rights to promote ethnic equality. An easy way for Denmark to comply with the gender equality directives on this point would be to extend the competence of the Danish Institute of Human Rights to also cover gender equality.

The European Commission has commenced infringement proceedings against Denmark over the issue of independent bodies. On 20 November 2009, the

Commission sent a reasoned opinion to Denmark. On 10 December, the Danish Minister of Employment, who at the time was also Minister of Gender Equality, was called to a meeting with a committee under the Danish Parliament to answer questions about what the Government will do in response to the Commission's criticism. The Minister answered that the Government plans to extend the competence of the Danish Institute of Human Rights so as to cover gender equality. It is therefore likely that Denmark in the near future will get a body which can assist in closing the gender pay gap.

## **6. Problems of enforcement and how to tackle them by good practices**

The enforcement system in Danish labour law is divided into a part where claims are based on legislation or individual contracts, for example the Equal Pay Act, and a collective labour law part where claims are based on a collective agreement. If the matter is governed by a provision in a collective agreement, an equal pay case can be brought before an industrial arbitration tribunal by the trade union that is party to the collective agreement. Individual workers cannot bring a case before industrial arbitration but must leave that to the relevant trade union.

As mentioned above, the Labour Court has ruled that when there is no express regulation of equal pay in a collective agreement, the trade union cannot require a dispute to be decided by industrial arbitration if the employer protests. The case can then be dealt with by the ordinary courts at the request of the individual worker/employee concerned on the basis of the Equal Pay Act or the individual contract.

Equal pay claims based on legislation or individual contracts can be brought before the ordinary courts by the individual workers concerned. In practice, this is most frequently done by the trade union of which the worker is a member on behalf of and with the consent of the individual worker. Most trade unions pay the cost of the cases (as part of the service they offer their members in return for the membership fees) and handle the cases on behalf of their members if they so wish. If the individual worker can afford it and so wishes, he or she can bring the case on his/her own without asking the trade union. If a case is covered by a collective agreement and the trade union that is party to the agreement chooses to pursue the case through the collective labour law system, the case cannot be brought before the ordinary courts.

Complaints that can be brought before the ordinary courts can also be brought before the Equality Complaints Board which handles the case free of charge, i.e. paid by the tax-payers. After the case has been decided by the Complaints Board, it may be brought before the ordinary courts if one of the parties is unwilling to accept the ruling of the Complaints Board.

The burden of proof provisions in the underlying EU directives have been implemented in Denmark and are used in Denmark. One worker (represented by her trade union), for example, won an equal pay case before the Supreme Court recently because the employer could not provide sufficient evidence to counter the claim.<sup>113</sup>

## **7. Relationship between the gender pay gap and other parts of labour law**

The Danish labour market is highly gender-segregated and this segregation is usually believed to be an important reason for the persistence of the gender pay gap. In typical women's jobs there are lower pay and softer conditions than in typical male jobs, for example more paid hours without work (for example paid lunch time where the

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<sup>113</sup> U 2009.2993 H.

worker receives money without performing work) than in typical male jobs where the employers do not pay much without getting performance of work in return. As mentioned above, in Section 1 of this country report, the gender pay gap is narrower if one compares the pay for hours where work is actually performed than if one compares the payment for all paid hours, irrespective of whether the worker performs work or does something else (for example eats lunch or is at home due to illness).

There is no Danish case law showing that there is a relationship between, on the one hand, unequal pay between men and women and, on the other hand, rules (or absence of rules) governing *inter alia* the following aspects of professional life:

- working time;
- age, age limits, seniority issues etc.;
- part-time work;
- posting of workers;
- atypical work arrangements (including flexible application of fixed-term contracts);
- special arrangements to fight unemployment;
- other issues related to the reconciliation of family life and work (e.g. leaves);
- promotion (e.g. how to break glass ceilings).

## **8. Final assessment of good practices**

In my view, there are no clear examples of good equal pay practices in Denmark, but the issue is fairly high on the public agenda nowadays and collective agreement practices seem to be in the process of changing; also see above on LO's equal pay strategy.

# **ESTONIA – Anneli Albi**

## **1. General situation**

In Estonia, the gender pay gap is one of the largest in Europe. According to Eurostat, the gender pay gap has consistently been approximately 30 % in recent years.<sup>114</sup>

Statistics Estonia, based on data from 2007, has noted that 16 % of men and 33 % of women work in the public sector and 84 % of men and 67 % of women in the private sector; 88 % of men and 95 % of women are employees, 12 % of men and 5 % of women are entrepreneurs; and 12 % of women and 4 % of men work part time. In 2007, the average net monthly wage of men was EUR 563 (9 300 EEK), and for women EUR 370 (6 100 EEK). The average wage of women constituted 66 % of the average wage of men. In the case of part-time work, the average wage of women constituted 83 %, and in full-time employment 69 % of the average wage of men. The gender pay gap is the highest for employees in the age of 30-39 years, where the average wage of women constituted only 63 % of the average wage of men. In the private sector, the average wage of women constituted 64 % and in the public sector 75 % of the average wage of men. Taking into account the field of activities, the gender pay gap is highest in the area of financial services (approximately 48 %), wholesale and retail (45 %), real estate (38 %), transport (32 %) and medicine (28 %). The gender pay gap is the lowest in the field of energy (6 %) and public administration (12 %). Taking into account the occupations, the gender pay gap is

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<sup>114</sup> Gender pay gap in unadjusted form. Available on: <http://epp.eurostat.ec.europa.eu/tgm/table.do?tab=table&init=1&language=en&pcode=tsdsc340&plugin=0>, accessed 20 March 2010.

higher among mechanical operators (36 %), unskilled employees (34 %), tradesmen (34 %), higher officials, legislators and members of top management (33 %), civil servants (32 %), mid-level specialists and technicians (32 %), and it is lower among top specialists (25 %), specialists in the field of agriculture and fishing (26 %), tenders, salesmen and shop assistants (28 %). The gender pay gap is higher among persons having secondary or lower education only (45 %).<sup>115</sup>

## 2. The legal framework

The issues concerning equal pay are regulated by the Gender Equality Act (GEA) and the Employment Contracts Act. The new Employment Contracts Act<sup>116</sup> (hereafter the ECA) took effect on 1 July 2009. It fully reformed the legislative framework regulating labour relations. The new Act is designed in line with the general law of obligations, and based on the underlying tenets in that field of law it leaves considerable scope for negotiation between the parties. When the new ECA took effect, the Wages Act was invalidated.

With the invalidation of the Wages Act, the concept of pay is no longer expressly defined in legislative acts. However, the following provisions may play a role in the formation of pay. Article 3 of the ECA stipulates that employers shall ensure the protection of employees against discrimination, follow the principle of equal treatment and promote equality in accordance with the Equal Treatment Act<sup>117</sup> and Gender Equality Act.<sup>118</sup> According to Article 28(2)(2) of the ECA, the employer is required to pay remuneration for work at the time and in the amount agreed. If, in addition to salary, it has been agreed that an employer shall grant an employee other benefits, the employee shall have the right to demand them (Article 29(4) of the ECA). The parties can agree that an employee has a contractual right to receive a part of an employer's profit or turnover or other economic results (Article 30 of the ECA), or a right to a fee if a transaction is made between an employer and a third party (Article 31 of the ECA). According to Article 38 of the ECA, an employer has to pay an employee an average salary for a reasonable period if the employee could not perform work due to a reason on the part of the employee, but not caused intentionally or due to severe negligence, or if the employee cannot be expected to do work for another reason not attributable to the employee. The employer and employee may agree that in the case of overtime an employer shall pay the employee the salary exceeding the normal salary by 1.5 times to compensate the overtime in money; the alternative being to compensate overtime work by giving time off equal to the overtime (Article 44(6) and 44(7) of the ECA). If the working hours are at night (from 10:00 p.m. to 6:00 a.m.), employers shall pay the salary for the work exceeding the normal salary by 1.25 times, unless it has been agreed that the salary includes remuneration for working at night. If the working hours are on a public holiday, employers shall pay the salary for the work exceeding the normal salary by 2 times (Article 45 of the ECA). The provisions regarding overtime and night work may be of relevance to pay equality, as such work is predominantly performed by men, given the childcare and family commitments that women typically have.

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<sup>115</sup> M. Randoja *Soolised palgaerinevused* (Gender pay gap). Available on (in Estonian): [http://www.stat.ee/otsing?query=palgaerinevus&search\\_type=or&exclude=&section=&last\\_change\\_d=&order=relevance&op=search](http://www.stat.ee/otsing?query=palgaerinevus&search_type=or&exclude=&section=&last_change_d=&order=relevance&op=search), accessed 20 March 2010.

<sup>116</sup> RT (the State Gazette) I 2009, 5, 35; 2009, 36, 234.

<sup>117</sup> RT I 2008, 56, 315; 2009, 48, 323.

<sup>118</sup> RT I 2004, 27, 181; 2009, 48, 323.



According to Article 6(2)(3) of the GEA, the activities of an employer shall be deemed to be discriminatory if the employer establishes conditions for remuneration or conditions for the provision and receipt of benefits related to the employment relationship which are less favourable regarding an employee or employees of one sex compared to an employee or employees of the other sex doing the same work or work to which equal value is attributed.

### **3. Instruments of social partners**

There are no legislative or other provisions inducing or obliging social partners to include the issue of equal pay in collective and other agreements.

Neither is information available with regard to any other practices of the social partners (in or outside the context of collective agreements) aimed at tackling the gap nor any particular policies/measures of trade unions. The Estonian public sector Employees' Unions' Confederation has indicated that its objectives include adopting the principle of equal pay for men and women for equal work as one of their activities' guidelines, but no specific information is available.<sup>119</sup>

### **4. Instruments specifically aimed at employers**

As pointed out above, Article 3 of the ECA stipulates that employers shall ensure the protection of employees against discrimination, follow the principle of equal treatment and promote equality in accordance with the Equal Treatment Act and Gender Equality Act. Article 11 of the GEA regulates the duties of employers to promote gender equality. The Article does not expressly stipulate the obligation of employers to observe the principle of equal pay; however, as pointed out above, according to Article 3 of the ECA employers have an active duty to ensure that employees are protected against discrimination. For example, employers have a duty to inform employees of the rights ensured by the GEA and regularly provide relevant information to employees and/or their representatives concerning equal treatment for men and women in the organisation and measures taken in order to promote equality (Articles 11(1)(5) and 11(1)(6) of the GEA). These provisions impose a duty upon employers to actively address the issue of gender equality within the organisation. However, it is doubtful that employers follow these provisions in an active manner, as the general awareness of gender equality issues is rather low in Estonia.

Article 11(2) of the GEA stipulates that employers shall collect statistical data concerning employment which are based on gender and which allow, if necessary, the relevant institutions to monitor and assess whether the principle of equal treatment is complied with in employment relationships. The procedure for the collection of data and a list of data shall be established by a government regulation. The explanatory memorandum of the GEA points out that the purpose of this provision, which establishes a duty for employers to collect statistical data, is to allow a gender-based analysis of the respective data, including the data concerning pay of the employees.<sup>120</sup> This data may be necessary for the supervisory bodies to carry out their tasks, but also for the employers themselves to evaluate the situation within the organisation. As provided by this provision, the procedure for the collection of data and a list of data shall be established by a government regulation. The Government has not adopted the

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<sup>119</sup> *Teenistujate Ametiliitude Keskorganisatsiooni TALO tegevussuunad aastateks 2005–2009* (Directions of activity of the Estonian public sector Employees' Unions' Confederation for the years 2005–2009), Article 3(7). Available on: <http://www.talo.ee/>, accessed 31 March 2010.

<sup>120</sup> Explanatory memorandum of the draft Act for the equality of men and women (227 SE I). Available on (in Estonian): [www.riigikogu.ee](http://www.riigikogu.ee), accessed 22 March 2010.

respective regulation so far. The draft of the regulation was initiated in 2005, but received a lot of objections by the representatives of the employers and representative bodies of local government units.

Further, the Ministry of Social Affairs has published some brochures in which *inter alia* the concept of equal pay is explained. The publications present an overview of the steps to be taken by the organisation to analyse whether the principle of gender equality is being followed.<sup>121</sup> However, there are no recommendations addressed directly to employers or concrete handbooks concerning equal pay.

Article 7(2) of the GEA stipulates that employers are required to provide a written explanation concerning their activities to the person who believes that he or she has been discriminated against on a basis specified in Article 6(2) of the GEA – including the principle of equal pay – within fifteen days as of submission of the application. Article 7(3) of the GEA provides that an employee has the right to demand that the employer explain the grounds for the calculation of salaries and obtain other necessary information on the basis of which it is possible to decide whether discrimination as specified in Article 6(2)(3) of the GEA has occurred. However, according to Article 28(2)(13) of the ECA, employers are required not to disclose, without an employee's consent or legal basis, information about the salary calculated, paid or payable to the employee. Accordingly, the pay of the employees cannot be disclosed as such, but it could be possible to reveal this information in an anonymous manner (e.g. as data regarding pay for a group).

The analysis of gender-based data would be very important to estimate the existence of a gender pay gap and which components of the pay contribute to the gap. Therefore it is advisable for the Government to adopt the respective regulation and to also ensure its enforcement in practice.

As regards public procurement, the Public Procurement Act does not stipulate any criteria that would require that companies who make offers or are selected should follow the principle of gender equality or address the gender pay gap in their company, or that they would be given preferential treatment.

In Estonian legal commentaries, it has been argued that under Estonian law, public procurement contracts could be used to enhance social purposes, such as gender equality. This would be effective if such a requirement were stipulated in the terms of contracts; however, it would be preferable to stipulate such a requirement by law in order to guarantee transparency of the conditions of public procurement.<sup>122</sup>

## 5. Other instruments to close the pay gap

There is no information about any tools that could assist individuals to establish pay discrimination. As pointed out above, the employee has a right to request that the employer explain the grounds for calculation of salaries and obtain other necessary information on the basis of which it is possible to decide whether discrimination has occurred. It would be advisable for the Ministry of Social Affairs to prepare a form for the request for information and the respective guidelines, as it is the duty of the

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<sup>121</sup> E.g. V. Donlevy & R. Silvera *Kasu ja tasakaal: soolise võrdõiguslikkuse edendamise retseptiraamat Eesti ettevõtete juhtidele* (Gender Equality in your Company: the recipes for success). Available on (in English): [http://www.sm.ee/fileadmin/meedia/Dokumendid/Sotsiaalvaldkond/sooline\\_v6/Retseptiraamat\\_INGLISE\\_keeles.pdf](http://www.sm.ee/fileadmin/meedia/Dokumendid/Sotsiaalvaldkond/sooline_v6/Retseptiraamat_INGLISE_keeles.pdf), accessed 22 March 2010.

<sup>122</sup> M.-A. Simovart *Riigihanke sekundaarsete eesmärkide rakendamise võimalustest Eestis. Soolise võrdõiguslikkuse näide* (The possibility to apply the secondary purposes of public procurement in Estonia. The example of gender equality), *Juridica* 2009, No. 3, pp. 148-158.



Ministry to give instructions for the implementation of the GEA (Article 22(1) of the GEA).

To a certain extent, the labour inspectorates have a power to control the working conditions, taking into account the procedure as set forth in the Occupational Health and Safety Act, but currently this duty does not concern the gender pay gap, as the remit of the Labour Inspectorate was reduced in the course of labour law reform.

The Commissioner for Gender Equality and Equal Treatment has a relatively extensive competence under the law to make policy recommendations. According to Article 16 of the Equal Treatment Act (ETA), the Commissioner has the following competences: The Commissioner shall: 1) monitor compliance with the requirements of the ETA and the GEA; 2) advise and assist persons upon submission of complaints regarding discrimination; 3) provide opinions concerning possible cases of discrimination on the basis of the applications submitted by persons or on his or her own initiative on the basis of the obtained information; 4) analyse the effect of Acts of law on the situation of men and women in society; 5) make proposals to the Government of the Republic, government agencies, local governments and their agencies for amendments to legislation; 6) advise and inform the Government of the Republic, government agencies and local government agencies on issues relating to the implementation of the ETA and the GEA; 7) publish reports on implementation of the principle of gender equality and equal treatment; 8) cooperate with other persons and agencies to promote gender equality and equal treatment; 9) take measures to promote equal treatment and gender equality. However, effective practice of these competences, including addressing the causes and solutions of the gender pay gap, would require sufficient resources and staff.

## **6. Problems of enforcement and how to tackle them by good practices**

A complaint concerning a labour dispute can be submitted to the labour dispute committee or to the court. A complaint concerning the payment of wage can be submitted within three years (Article 6(3) of the Individual Labour Dispute Resolution Act<sup>123</sup> (ILDRA)). A labour dispute committee handles complaints up to the amount of approximately EUR 9600 (150 000 EEK ; Article 4(1<sup>1</sup>) of the ILDRA).

There is no case law by courts thus far that directly deals with the issue of equal pay. As pointed out above, Article 6(2)(3) of the GEA stipulates that the activities of employers shall be deemed to be discriminatory if the employer establishes conditions for remuneration or conditions for the provision and receipt of benefits related to employment relationship which are less favourable regarding an employee or employees of one sex compared to an employee or employees of the other sex doing the same work or work to which equal value is attributed. Thus the law does not expressly regulate whether the comparisons have to concern the same employer or whether comparisons with other employers in the same sector are possible. The content of comparisons and concepts of ‘same work’ and ‘work to which equal value is attributed’ need to be interpreted in case law taking into account the guidance of the ECJ.

According to Article 13 of the GEA, if the rights of a person are violated due to discrimination, he or she may demand from the person who violates the rights the termination of the harmful activity and compensation for the damage on the basis of and pursuant to the procedure provided by law; an injured party may demand that, in addition, a reasonable amount of money be paid to the party as compensation for non-

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<sup>123</sup> RTI 1999, 60, 616; 2009, 62, 405.

patrimonial damage caused by the violation. Upon determination of the amount of compensation, a court or a labour dispute committee shall take into account, inter alia, the scope, duration and nature of the discrimination (Article 13(3) of the GEA). The respective claim expires within one year as of the date when the injured party becomes aware or should have become aware of the damage caused (Article 14 of the GEA).

Thus, the respective provisions do not expressly specify the maximum period that might be taken into account for calculating the amount of compensation nor the consequences for the future and the building up of pensions. In principle, it is possible to interpret Article 6(3) of the ILDRA as limiting the claim to three years as generally applicable in disputes concerning the payment of salary. However, the GEA does not limit the period during which compensation can be required, but at the same time sets a time limit of one year for submitting a complaint. However, until now, there is no uniform position on how the different deadlines in the GEA and ILDRA should be interpreted, which of these Acts constitute a general act or specific act, as the nature of the provisions (specific v. general) is different depending on the concrete issue. It is expected that this issue will be further clarified in the course of judicial practice. In the opinion of the expert, it should be possible to claim for equal pay for the period for which it is possible to prove the violation of the principle of equal pay. The negative impact for other claims could be addressed as other types of damage.

## **7. Relationship between the gender pay gap and other parts of labour law**

The different aspects of labour contracts (including working hours, part-time work, posting of workers, atypical work arrangements etc.) are regulated by the ECA. The new ECA is designed in accordance with the general principles of the law of obligations. The law is more flexible in regulating labour relations, leaving a lot of room for negotiation and agreement between parties. However, as pointed out above, Article 3 of the ECA stipulates that employers have to ensure the protection of employees against discrimination, follow the principle of equal treatment and promote equality in accordance with the Equal Treatment Act and Gender Equality Act. Article 11(1) of the GEA establishes inter alia that upon promotion of equal treatment for men and women, employers have to act such that their activity would support the application by both men and women for vacant positions and that persons of both sexes are employed to fill vacant positions; ensure that the number of men and women hired in different positions is as equal as possible and ensure equal treatment for them upon promotion; create working conditions which are suitable for both women and men and support the combination of work and family life, taking into account the needs of employees.

The Commissioner for Gender Equality and Equal Treatment has handled cases which concern working hours and making overtime and night work available to persons with family duties. The Commissioner pointed out that although the law provides some guarantees for employees with family duties, employers should not assume that persons belonging to such category would never be open to such arrangements, particularly in cases where night shifts or overtime constitutes a considerable part of the salary.<sup>124</sup>

Thus, although there is a general legislative framework concerning different aspects of professional life, the law is quite general and the application of these rules

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<sup>124</sup> Annual report of the Gender Equality Commissioner of 2005/2006, pp. 29-30. Available on (in Estonian): <http://www.svv.ee/failid/2006.pdf>, accessed 22 March 2010.

in practice may have an impact upon the gender pay gap. This depends to a great extent on whether employers take an active role to monitor the pay system within the organisation and fulfil the positive duties of employers.

Further, as pointed out above, Estonian law establishes a duty not to disclose the data concerning the amount of the salary of the employee without his or her consent or in cases not specified in the Act. Thus, even if an employee does have doubts as to whether the principle of equal pay is followed, it is difficult to obtain concrete data that would allow drawing conclusions about the comparable duties, tasks and whether the differences in pay are justified.

Further, a recent case highlighted the fact that the pay system in the civil service is not transparent. Although all positions in the civil service are ranked according to salary scales, the amounts corresponding to salary scales are very low and, in practice, civil servants in higher positions often earn salaries that are several times higher. Different components of the salary are thus used 'creatively'. By way of background, in the Estonian civil service the salary has several components: a basic salary corresponding to the salary scale (the basic salary can be differentiated taking into account qualifications, working conditions, region or other characteristics of the work); an additional fee for more efficient working results or for additional obligations; additional fees for the length of service, academic degree, proficiency in foreign languages, processing state secrets or classified media as set forth in the law.<sup>125</sup>

This issue was also raised in a complaint submitted to the Gender Equality and Equal Treatment Commissioner concerning equal pay in the civil service. The Commissioner found that the Ministry of Defence had breached the principle of equal pay when paying a lower salary to a female civil servant than to her male colleagues who did the same job.

The claimant worked as an advisor in the Ministry of Defence. There were two male advisors in her department. All three advisors were in the same salary scale, but the amount corresponding to the salary scale was differentiated for each advisor. The differentiated salary scale is called a salary rate. The salary rate of the claimant was lower than the salary rate of her male colleagues. However, as the claimant also received an additional fee for the years of service, her total remuneration was higher than the total remuneration of her male colleagues. The Ministry explained that the salary rate was lower for the female advisor because she received an additional fee for the length of service. The Ministry also pointed out that this is quite common and that, for example, the salary rate for another female employee was also lower than the rate for her male colleagues because she received an additional fee for an academic degree.

The Commissioner established that the duties and responsibilities were similar for all advisors. The female employee had a longer term of service and higher education, whereas her male colleagues only had secondary education. The Commissioner found that the difference in the salary rate had no objective justification, given that the claimant had higher qualifications than her male colleagues. Therefore, the Commissioner found that discrimination on the grounds of gender had indeed occurred. The Commissioner additionally pointed out that according to the law the amount of any additional fees, leave benefits and redundancy compensation are calculated on the basis of the amount of the above salary rate, instead of one's total

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<sup>125</sup> Wages of civil servants are regulated by the Civil Service Act, State Civil Servants Official Titles and Salary Scale Act and Government Regulation No. 182 of 30 December 2008 on Remuneration of State Civil Servants.

actual pay; the additional fees, redundancy compensation and leave benefits can thus be rather low if the salary rate is low despite a higher overall actual pay package.<sup>126</sup>

The Commissioner's opinion could prove to be an important precedent, because generally the composition of salaries is not transparent in the public sector. However, the opinion of the Commissioner has not led to a more comprehensive analysis of the salaries in the public sector. The Government has submitted to Parliament a draft of the new Civil Service Act, which is yet to be processed. In the meantime, the person who brought the complaint was made redundant as the relevant department of the Ministry was closed.

## **8. Final assessment of good practices**

The Ministry of Social Affairs has initiated a project to analyse the gender pay gap in Estonia. The purpose of the project is an in-depth analysis of the causes of the gender pay gap in Estonia. The project also aims to assess the impact of different salary policies on the gender pay gap. Further, concrete policy recommendations should be made as a result of the project. The project should be completed by the end of 2010; however, no further details are available as of yet.

As pointed out above, one aspect contributing to the gender pay gap is the confidentiality of the data concerning salaries. The Commissioner for Gender Equality has recommended in interviews that one possibility for addressing this issue would be to disclose within organisations the data about the average wage of different positions. This enables the employees to assess whether their salary corresponds to the average wage, or is higher or lower; and accordingly raise questions on whether the amount of the salary is justified taking into account their responsibilities, qualifications, etc.

## **FINLAND – Kevät Nousiainen**

### **1. General situation**

The Finnish gender pay gap was approximately 19 % in 2008, or more accurately, women's average pay for regular working hours was 81.17 % of that of the men. The pay gap is slightly wider in the private than in the public sector, with women earning 82.44 % in the private sector, 83.76 % in state employment and 83.43 % in municipal employment. The pay gap is widest for women with higher education (73.9 %).<sup>127</sup> Immigrant women earn less than women on average, and also less than immigrant men, but exact figures are not available for people with an immigrant background. The information is based on the income index statistics 2008 by Statistics Finland. The gender pay differentials in Finland are above the average in the OECD countries, and have remained so for a considerable time; in the ten-year period 2000 – 2009, there was little change. The gender pay gap has been discussed in Finland's reports to international human rights instruments, such as the UN, the ILO Equal Remuneration Convention, the CEDAW Convention and reports to the UN Human Rights Council. The national report to the UN Human Rights Council in 2008 admitted that women face continuous discrimination in working life and pay differentials continued to place

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<sup>126</sup> H. Rudi 'Ministeerium tegi palka makstes naisametnikule liiga' (The Ministry violated the rights of a female employee in remuneration), *Postimees* 24 August 2009, available on: <http://www.postimees.ee/?id=155601&print=1>, accessed 24 August 2009.

<sup>127</sup> <http://www.samapalkka.fi/Resource.phx/samapalkka/tietopankki/tutkittua.htm>, accessed 21 March 2010.

women in an unequal position. The pay differentials were seen to be mainly due to gender-based segregation in the labour market.<sup>128</sup>

It has been established by a number of studies that the gender pay differentials in the Finnish labour market cannot be explained by characteristics like the deficit of education or experience of the female labour force, as women generally have a higher education than men, and have been present in the labour market for decades. When women and men with a similar education, working in the same branches and performing the same tasks are compared, the women are paid about 10 % less than men. While social partners agree that the gender segregation of the labour market should be considered as the major cause of pay differentials, there is disagreement about the degree to which the segregation-related differentials should be considered as discrimination. The differentials indicate that typically male and female jobs are evaluated differently, but the employers' organisations claim that pay discrimination is relatively rare, because in an enterprise-based decomposition by occupation only a small part of the differential remains 'unexplained'. The disagreement about hidden discrimination has motivated studies on job assessment and statistics development. So-called value discrimination, where female tasks are assessed disadvantageously compared to male tasks, is a grey area in the legal sense. Non-discriminative job and performance assessment across collective agreements might reveal such 'value discrimination'.

## 2. The legal framework

The Constitution of Finland (731/1999), Chapter 2, Section 6(4) provides that 'equality of the sexes is promoted in societal activity and working life, especially in the determination of pay and the other terms of employment, as provided in more detail by an Act'. The provision refers especially to the Act on Equality between Women and Men (609/1986). The Act contains provisions on *discrimination*. Section 7 of the Act contains a definition of discrimination in general, while Section 8, Subsection 1(3) of the Act defines discrimination in employment, which occurs where an employer 'applies pay or other terms of employment so that an employee or employees are more disadvantaged on the basis of sex than one or several other employees employed by the same employer'.

The *positive duties* of the employer are defined under Section 6 of the Act. Under Section 6, Subsection 2(3), the employer has the obligation to promote equality between women and men as regards terms of employment, especially the terms concerning pay. Under Section 6a, Subsection 1, the positive duty of the employers with 30 or more persons is further specified. Such an employer is to promote equality according to a plan concerning pay and other terms of employment. The plan is to be drawn up every year, as a separate plan or as a part of other planning such as a personnel plan. By local agreement, the plan interval may be lengthened up to three years. Under Section 6a, Subsection 2, the plan is to be made in cooperation with employees' representatives, and is to contain an analysis of the equality situation of the workplace. It is to include an analysis of the placement of women and men in different jobs, and an analysis of the job classification, as well as pay and pay differentials of women's and men's jobs. The plan is to contain measures for

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<sup>128</sup> Finland *National Report to the Human Rights Council Working Group on the Universal Periodic Review First Session*, 7-18 April 2008, Paragraph 67.

achieving equal pay. These new positive duties were introduced in 2005, and their impact is presently under evaluation.<sup>129</sup>

While pay is not defined in the Act on Equality itself, the preparatory works refer to a wide understanding of pay as all remuneration paid on the basis of the employment contract. Pensions are not mentioned under Section 8 of the Act, but the general prohibition of discrimination (Section 7) covers pensions. Occupational pensions in EU terms are relatively rare, the main pension system being a combination of statutory and occupational pensions. State pensions fall within the scope of the Article 157 of TFEU (Case C-351/00 *Niemi*). State pensions are similar in character to private sector pensions, which are not treated as a part of pay in quite the same sense as optional pension schemes paid by the employer.

There is no minimum pay regulation. Under Section 7 of the Employment Contract Act (55/2001), collective agreements have general applicability if they are considered representative in the sectors in question. A term of an employment contract that is in conflict with an equivalent term in the generally applicable collective agreement is void. The generally applicable collective agreements are listed within the electronic Finnish law reference system (*Finlex*).<sup>130</sup> It has been estimated that about 90 % of all employees work under generally applicable collective agreements. Thus, the collective agreements set the acceptable minimum in most branches. Recently, outsourcing of public services has brought new small employers into the market. Fixed-term or part-time work is widely used in ‘female’ branches. Generally, women are even more organised into labour unions than men, and union membership in general is quite high,<sup>131</sup> but new types of employment may have created areas not covered by generally applicable collective agreements.

### 3. Instruments of social partners

It is difficult to differentiate between the instruments used by social partners from those used by the Government, due to the tripartite traditions in the labour market. The Government and the national ‘central’ social partners launched a programme for equal pay in 2006,<sup>132</sup> which aims at reducing the pay gap by five percent by 2015; the tripartite programme is carried out in co-operation with the central labour market organisations. The programme for equal pay was preceded by a working group report whose task it was to propose such a programme for the entire labour market. The group consisted of Government and national social partners’ representatives.<sup>133</sup> A high-level follow-up group with representatives from ministries and central social partners was headed first by the Parliament spokesman Paavo Lipponen and later by Professor Pentti Arajärvi. Under the programme, equal pay for equal work and work of equal value is to be achieved by various means, such as collective agreements, reduction of gender segregation, changes in the pay systems and promotion of women’s careers. The programme consists of about 30 different projects, some of

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<sup>129</sup> The Ministry of Health and Social Affairs submitted a report on the impact of the amended provisions of the Act on Equality to Parliament dated 29 January 2010, see *Selvitys eduskunnan työelämä- ja tasa-arvovaliokunnalle naisten ja miesten välisestä tasa-arvosta annetun lain toimivuudesta*. Ministry of Social Affairs and Health, 29.1.2010.S.

<sup>130</sup> <http://www.finlex.fi/fi/viranomaiset/tyoehto/>, accessed 20 March 2010.

<sup>131</sup> L. Ahtiainen *Palkansaajien järjestäytyminen Suomessa vuonna 2004*. Työpoliittinen tutkimus 298, Työministeriö 2006.

<sup>132</sup> For the plan of the programme, see *Working group proposal for a programme to promote equal pay for women and men*, Working group Memorandums of the Ministry of Social Affairs and Health 2005:7.

<sup>133</sup> Working group on equal pay Report 18 May 2005, Ministry of Social Affairs and Health.

which are carried out by the Government, others by the Government and the social partners together, and some by the social partners only. The projects involve equal pay more or less directly. For example projects on pay statistics, pay systems and ‘pay mapping’ in equality planning concern equal pay directly.<sup>134</sup>

In 2007, the present Government promised to continue the Equal Pay Programme and provide resources for it, with the novelty that an extra state subsidy was promised to those municipalities which in their collective agreements would promise higher pay to ‘female’ branches with highly educated personnel (in practice healthcare and childcare sectors, education and culture). The sum targeted for this purpose was EUR 150 million per year for four years running. The Equal Pay Programme ordered a study in 2008 on the impact of the collective agreements round on the pay differentials, but at that point all pay rises had not been implemented. The rises in the ‘female’ public sector seemed somewhat higher than those in ‘male’ public sector. Exceptionally, the public sector pay rises were higher than those in the private sector, and even the municipal sector collective agreement of 2010 continues to target rises on ‘female’, relatively underpaid professional groups. The public sector ‘pay leadership’ has been heavily criticised by the private sector employers.

The equal pay policies of the national labour market organisations seem to suffer from the ending of the income policy agreement tradition,<sup>135</sup> which until 2008 provided the framework for these policies. At present, the national social partners participate in various working groups based on the ‘old’ tripartite model, involving both social partners and government representatives. Much of the work at present consists of rather technical issues related to statistics or studies on job assessment. For example, the employers’ research institute *ETLA* (Research Institute of the Finnish Economy) and employees’ research institute, *PT* (Labour Institute for Economic Research), together with Statistics Finland, carry out studies on equal pay concentrating on the impact of new pay systems (job assessment, performance assessment and result-based pay) on pay differentials. The mutual *SATU* project is to provide a report in 2010.<sup>136</sup> Thus, the social partners’ process on equal pay lately seems to have been channelled into studies rather than concrete collective agreement procedures, with the exception of the extra funding to the municipal low-pay branches. Local collective agreements are rare, and local equal pay policies mainly consist of the implementation of the equality planning prescribed by the Act on Equality. Employers’ unions seem less committed to this work than the employees’ unions.<sup>137</sup> The level of expertise in the unions varies greatly. Only less than half of the unions on both sides were actively engaged in equal pay disagreements during the previous year.<sup>138</sup>

<sup>134</sup> <http://www.samapalkka.fi/Resource.phx/samapalkka/avaintietoa/index.htm>, accessed 21 March 2010.

<sup>135</sup> From 1969 to 2008, income policy agreements were in use. The agreements were concluded between the Government and the social partners, and consisted of a general national level pay rise agreement between the social partners, as well as promises by the Government concerning taxation and social welfare measures. Occasionally, sector-based social partners agreements were in use. In 2008, the employers no longer wished to continue the tradition. Often, the income policy agreements included an ‘equality component’ to be paid to low-pay female sectors.

<sup>136</sup> <http://www.labour.fi/satu/>, accessed 20 March 2010.

<sup>137</sup> K. Uosukainen *Tasa-arvolaki ja työmarkkinajärjestöt. Järjestöjen käsityksiä lain toimivuudesta*. Tampereen yliopiston Työelämän tutkimuskeskus 2009.

<sup>138</sup> K. Uosukainen *Tasa-arvolaki ja työmarkkinajärjestöt. Järjestöjen käsityksiä lain toimivuudesta*. Tampereen yliopiston Työelämän tutkimuskeskus 2009.



Several trade unions have cooperated to set up a website for equality matters, *Tasa-arvoklinikka*,<sup>139</sup> which provides information on equal pay, among other equality issues. The information provided mainly contains general information provided by the Equality Ombudsman, however.

#### **4. Instruments specifically aimed at employers**

The *positive duties of the employer* under Section 6 and Section 6a of the Act on Equality, described above, vary as to the number of employees, and are rather unspecified for employers of less than 30 employees. Employers of 30 or more employees must carry out 'pay mapping' as a part of the duty to conduct equality planning. Under Section 6a, Subsection 2, the plan is to be made in cooperation with employees' representatives, and to contain an analysis of the equality situation of the workplace. It is to include an analysis of the placement of women and men in different jobs, and an analysis of the job classification, pay and pay differentials of women's and men's jobs. The plan is to contain measures for achieving equal pay.

Neither the provision on 'pay mapping' nor the preparatory works define in detail how the mapping is to be done. The aim of the 'pay mapping' exercise is to prevent discrimination,<sup>140</sup> and according to the preparatory works, information on the pay of men and women under different classifications across collective agreements should be provided. 'Pay mapping' should contain information about the pay systems and their application by mapping job classification, pay and pay differentials. In principle, assessments should be made at the workplace irrespective of collective agreements and concern all employees, including those who work part-time or on fixed-term contracts. In practice, there has been considerable confusion and disagreement about how the pay mapping should be carried out. There are conflicting guidelines on 'pay mapping', provided by the Equality Ombudsman, employers' unions, and employees' unions, which differ especially on whether pay is to be assessed across collective agreements or not.

As part of the government report to the Parliament on the impact of the Act on Equality, a study was made on the employers' duty to carry out 'pay mapping'. The study was based on enquiries made at workplaces with a minimum of 30 employees as well as with social partners. Interviews were used to assess the qualitative outcome of equality planning. A study on how the 'pay mapping' had proceeded in the workplaces<sup>141</sup> showed that the majority of employers followed the guidelines for pay mapping provided by the employers' union, and only 33 % followed the Equality Ombudsman's guidelines. According to the study, it is difficult to classify jobs so that both women and men are included in the classifications, because of the strong gender segregation of the labour market. Especially in smaller workplaces such classifications were difficult to achieve. The study showed that all pay components were compared very seldom. Usually the comparison was made at aggregate pay level, or was based on pay earned in regular working hours. Very few pay maps made comparisons across agreements. Because equality planning may be a part of various other planning instruments (personnel plans or similar), there was a great deal of variation as to whose task it was to carry out the pay mapping at the workplace level.

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<sup>139</sup> [http://www.tasa-arvoklinikka.fi/index.php?option=com\\_frontpage&Itemid=1](http://www.tasa-arvoklinikka.fi/index.php?option=com_frontpage&Itemid=1), accessed 20 March 2010.

<sup>140</sup> K. Ahtela, N. Bruun, P.K. Koskinen, A. Nummijärvi, J. Saloheimo *Tasa-arvo ja yhdenvertaisuus* Helsinki 244, 2006.

<sup>141</sup> K. Uosukainen, H.L. Autio, M. Leinonen *Tasa-arvosuunnitelma ja palkkakartoitus: Selvitys suunnitteluvaiheen toteutumisesta*. Tampereen yliopiston Työelämän tutkimuskeskus 2008.



The Act on Equality lays the responsibility for carrying out the ‘pay mapping’ with the employer, but the exercise should be made in co-operation with representatives of the employees. Especially where the ‘pay mapping’ was done as a part of such planning where these representatives are not regularly involved, they had little say in the part of the procedure that involved ‘pay mapping’. A considerable number of workplaces seemed not to have done the pay mapping at all. Even where the mapping had revealed pay differentials, a follow-up of the causes and measures to combat differentials was not necessarily performed.<sup>142</sup>

## **5. Other instruments to close the pay gap**

The present Government’s (Prime Minister Vanhanen, 2007-2011) Equal Pay Programme (see above in Section 3) contains a number of measures such as development of pay systems, reducing gender-based segregation in education and working life, women’s career development, pay and agreement policies, equality planning, and reconciliation between work and family. The Government’s commitment to the programme was presented as the main means of reducing pay discrimination in Finland’s report to the UN Human Rights Council in 2008.<sup>143</sup>

The Equal Pay policies have reduced the gap very little, however, the reduction from 2007 to 2008 being 0.175, and only 1 % in 5 years, which was enough to bring the differentials to the level they were 10 years ago. As mentioned above, the Government earmarked EUR 150 million per year as ‘equality money’ to fund municipal employment pay rises targeted at low-paid highly educated ‘female’ branches. Until lately, a major tool in gender pay equality policies was to earmark an ‘equality component’ in the ‘incomes policy agreements’ to be paid as extras in low-pay fields where the employed are mainly women.<sup>144</sup> The ‘incomes policy agreements’ between the national social partners ceased in 2008, and collective agreements are at present made at the union level, which weakens the national collective agreement pay equality policies.<sup>145</sup> The Finnish labour market is strongly gender segregated, which is generally taken to relate to the pay gap, and policies aiming at a reduction of the segregation have been prominent in pay equality policies. Reducing the gender segregation of the labour market has been very slow; while girls and women have made their way into male branches, especially those that require higher education, men have not entered traditionally female-dominated branches such as education and care – supposedly because of the low pay in these branches.<sup>146</sup>

## **6. Problems of enforcement and how to tackle them by good practices**

Problems encountered in the enforcement of the positive duty of the employers to conduct equality planning in general and ‘pay mapping’ in particular have been

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<sup>142</sup> *Selvitys eduskunnan työelämä- ja tasa-arvovaliokunnalle* (see above), 17-22.

<sup>143</sup> Finland *National Report to the Human Rights Council Working Group on the Universal Periodic Review First Session*, 7-18 April 2008, Paragraph 69.

<sup>144</sup> <http://www.labour.fi/satu/>, accessed 20 March 2010. The ‘equality component’ in centralised ‘income policy agreements’ was introduced in the 1970s. The ‘equality component’ within each sector was not necessarily distributed taking gender pay differentials into account. Thus, the policy has tended to reduce pay differentials in general, but not necessarily the gender pay gap as such. For a history of such pay components in ‘income policy agreements’: Tuulikki Petäjäniemi *Selvitys hallituksen samapalkkaisuusohjelman rakentamisen edellytyksistä yhdessä työmarkkinaosapuolten kanssa* Selvityshenkilön raportti. Helsinki, Sosiaali- ja terveysministeriön työryhmämuistioita 2004:13, 49, 2004.

<sup>145</sup> Finnish report to ILO C 100 Convention in 2009.

<sup>146</sup> Country Report by Finland: *Implementation of the Beijing Platform for Action*, March 2009.

discussed in Section 4. On a more general level, it is problematic that the policy measures aiming at reducing the pay gap and legal means aiming at reducing pay discrimination are not co-ordinated. When the 'pay mapping' was introduced, the remedies available to persons suspecting pay discrimination remained difficult to apply.

Under Section 8 (1)3 of the Act on Equality, an employer who applies pay or other terms of the employment contract so that one or several employees end up in a less advantageous position than another employee or employees working for the same employer violates the prohibition of pay discrimination. Thus, the definition is based on comparison between employees of different sexes. In order to know whether the employer applies less advantageous pay conditions he/she has to know the terms applied to the comparator. Under Section 10(3) of the Act, the employer is to give the employee information 'on the grounds of pay and other necessary information concerning the employee' that show whether the prohibition against pay discrimination has been violated. Under Section 10(4), however, the employee him/herself is not entitled to require information on the pay of other employees. The union-based or other representative of the employees may receive information on another employee, but only by consent of that other employee. If the comparator refuses to allow the use of his/her pay, the person suspecting discrimination or the representative of the employees may ask for the relevant information via the Equality Ombudsman. The Ombudsman may receive the relevant information under Section 17(3) of the Act. In practice, the remedy against pay discrimination is thus made difficult by blocking the relevant comparator information. Thus it is not surprising that the number of pay discrimination cases in Finnish courts is low. According to a recent study, pay discrimination cases numbered 0 in 2005, 1 in 2006, 6 in 2007, and 0 in 2008 in courts of first instance.<sup>147</sup> The obstacles to access pay information have been defended by arguments based on protection of private life and salary confidentiality.

Trade unions do not have the right to represent victims without their consent in courts, but they often assist them in practice. There are considerable differences between various trade unions in this respect, some being more willing to go to court and more knowledgeable about equality law than others. Finnish labour law gives the social partners a strong position as parties represented in the Labour Court and the Equality Board, as well as parties that may bring cases before these bodies. On the other hand, NGOs representing equality or gender interests have no access to these bodies, nor do they have a part in representing or assisting victims of discrimination. Compensation for discrimination is structured in a manner that tends to make labour law more important than anti-discrimination law in legal appreciation. Compensation both under the Act on Equality (gender discrimination) and the Non-Discrimination Act (other prohibited grounds of discrimination) consists partly of compensation under other legislation for the same act of infringement, in practice most often the Employment Contracts Act. General lawyers and labour union lawyers usually know labour law better than anti-discrimination law. Therefore, the compensation based on anti-discrimination law often seems to come as an afterthought to other types of compensation.<sup>148</sup> Where it is possible to prove violation of labour law without

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<sup>147</sup> L. Välimäki *Tasa-arvolain soveltaminen oikeuskäytännössä vuosina 2005-2008 ja työryhjäntärikospykälän soveltaminen oikeuskäytännössä vuosina 2000-2008*. Ihmisoikeusliitto ry:n selvitys, 2009.

<sup>148</sup> This is especially clear concerning other grounds of discrimination than gender, because the compensation under the Non-Discrimination Act is capped. In a notorious recent case, the Appellate

reference to anti-discrimination, lawyers may leave discrimination out of the picture altogether.

The ‘pay mapping’ exercise of employers of 30 or more persons would be more effective, if the employers implemented it in the manner prescribed in the preparatory works. The ‘pay mapping’ is not efficiently monitored. The Equality Ombudsman who monitors the provision may under Section 19(3) of the Act on Equality set a deadline for an employer to implement the provision. The Equality Board may, on request by the Equality Ombudsman, impose a conditional fine on the employer. The resources of the Equality Ombudsman to monitor the positive duty are quite limited, however, and no cases concerning conditional fines to back up the duty have so far been presented to the Equality Board.

The difficulties in trying to assess work of equal value may be illustrated by a recent case related to the Government’s policy to promise to compensate municipalities, which in their collective agreements target ‘female’ branches with highly educated personnel. Before the elections in 2007, the low pay of nurses was especially highlighted in political discussions. When the municipal collective agreements were negotiated at that time, the Union of Health and Social Care professionals (*Tehy ry.*) was especially dissatisfied with the promised rise and managed to receive a better collective agreement than other unions in the field of healthcare. A conciliation board was appointed for the negotiations when the members of *Tehy* threatened with a collective withdrawal from their jobs. The Equality Ombudsman participated in the conciliation negotiations and in concluding the collective agreement with *Tehy*. The Chancellor of Justice, who supervises legality of the acts of authorities, received a complaint claiming that the collective agreement restricted to the members of the *Tehy* was discriminatory, because other employees performed equal work under other collective agreements for lesser pay. *Tehy* mainly represents nurses with longer training than another union, *SuPer* (Finnish Union of Practical Nurses), but nurses belonging to these two unions occasionally perform tasks that may be assessed as of equal value, or equal to the extent of being quite similar. The Assistant Chancellor of Justice stated that the collective agreement violated the prohibition of discrimination under Non-Discrimination Act (21/2004), on the ground of trade union membership. The Equality Ombudsman as a member of the conciliation board had violated the said provision by giving an instruction to discriminate on the ground of trade union membership. While the issue at hand was firmly rooted in the gender pay differentials in the municipal sector, it was treated as a matter concerning discrimination on the basis of trade union membership.<sup>149</sup>

## **7. Relationship between the gender pay gap and other parts of labour law**

It is well understood by the players in the field (Government, social partners, researchers) that the pay differentials are caused by various factors that differentiate the male and female workforce, such as gender segregation of the labour market, the fact that women combine family life and labour market duties differently, often by staying on long leaves of absence after children are born, and that there is a connection between these long absences from work and the fact that a-typical work

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Court of Helsinki decided that the dismissal of an editor-in-chief even before she started her job at a regional newspaper had been due to discrimination on the ground of sexual orientation. The Court awarded her a compensation for illegal dismissal (EUR 41 000), for lost pay (EUR 35 000), and compensation for discrimination (EUR 5 000).

<sup>149</sup> Decision 11.01.2010 Dnro OKV/1333/2007 by the Assistant Chancellor of Justice Mikko Puumalainen.

arrangements are common among women, and further that women meet difficulties in their career development. Indeed, the policies on the gender pay gap have paradoxically concentrated on so many issues that pay discrimination as such has received relatively little attention. The discussion on the pay gap has not advanced from the notion of general ‘absolute’ pay gap to the unacceptable reasons underlying a systematic undervaluing of the ‘female’ jobs.

## **8. Final assessment of good practices**

Taking into account the history of gender equality policies aiming at reducing the gender pay gap, commitments by several governments, participation of central labour market organisations, and the meagre results these policies have gained in the last 10 years, it seems that the good practices have not been very effective. In fact, it seems that in order to tackle the pay differentials, it would be necessary to apply mandatory positive duties more vigorously, and allow better access to pay information.

## **FRANCE – Sylvaine Laulom**

### **1. General situation**

Despite the increasing participation of women in the labour market (in 2007, the female activity rate was 65.6 %), the gender pay gap shows little sign of improvement in France. According to a report in 2006,<sup>150</sup> the gender pay gap (the difference between the average hourly pay for women and men) was around 16 % (the average is 17.4 % in the European Union). Women’s total earnings are on average 27 % lower than those of men. The gender gap could partly be explained by structural factors, namely qualification, occupation, career breaks, company size and sector. The report shows differences in this gap according to age (the hourly wage gap is more significant among older workers, increasing from 8 % in earnings per hour for workers aged under 35, to 26 % for those aged over 55), sector and the diplomas of the workers. The higher the workers’ education, the more significant the gap is. The explanation could be that well-educated women more often work in lower-paid sectors. Generally, women also receive far fewer bonuses than men do. Up to 50 % of the gap in bonuses can be explained by the gender difference in exposure to risks and arduous working conditions, such as noise and night work, which affect men more. Women do less overtime than men. The hourly wage gap is also greater among management staff (19.4 %) and blue-collar workers (16.7 %), while it is over 6.7 % among administrative staff. With regard to sectors, the pay gap is greater in feminised sectors (e.g. financial sectors), while it is less wide in sectors with fewer women, like construction, transport and the car industry. Women are also over-represented in part-time jobs and low-paid activities. Occupational sex segregation is significant in France, directing women to less valued sectors.

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<sup>150</sup> L. Muller ‘Les écarts de salaire entre les hommes et les femmes en 2006: des disparités persistantes’ in: *Premières synthèses, Dares*, octobre 2008, n°44.5. See also, SDFEFH, *Les chiffres clefs de l’égalité femmes-hommes en 2009*, mars 2010, [http://www.travail-solidarite.gouv.fr/IMG/pdf/Egalite\\_-\\_chiffres-cles\\_2009.pdf](http://www.travail-solidarite.gouv.fr/IMG/pdf/Egalite_-_chiffres-cles_2009.pdf), accessed 22 March 2010.

## 2. The legal framework<sup>151</sup>

It was after the Second World War that equal pay for men and women started to be addressed in France. The principle of equality between men and women was first recognized in 1946 in the Preamble to the French Constitution. The revision of the Constitution adopted in July 2008 rewrote Article 1, which now states that the law favours the equal access of women and men to political mandates and functions and also to professional and social responsibilities. This new article clearly gives a constitutional basis to some positive action that was recently not accepted.

Concerning equal pay, the law of 11 February 1950 included this principle in the mandatory provisions that have to be inserted in collective agreements. Thus, among other clauses, to be extended,<sup>152</sup> collective agreements must respect the principle of equal pay between men and women for the same job. In 1972, in order to integrate the ILO convention into the French system, the principle of equal pay for work of equal value for men and women was introduced into the Labour Code. However, the law provided no criteria for the production of pay information and no criteria to guide the courts in determining whether the jobs were of equal value. There were very few cases on that issue, and courts seemed to be reluctant to limit employers' freedom and to recognise sex discrimination in pay.<sup>153</sup> As such, the introduction of this principle into the Labour Code did not change the way wages were determined in enterprises. The next important step was the law of 13 July 1983. Labour code provisions were amended to implement Directive 76/207/EEC. Articles L.3221-2 and following of the Labour Code provide for equal pay for men and women 'for the same job or a job of equal value'. It also gives a definition of remuneration, including all the elements of the definition of Article 157 TFEU.

Moreover, for the first time, the question was not only to recognize the principle of equality but also to define some rules to improve its effective application. One of the most important measures taken was the introduction of an instrument to measure and analyse occupational differences between men and women. Thus, since the Law of 13 July 1983, employers in enterprises with at least 50 employees must present to the works council, each year, a written report on the comparative situation of men and women in the enterprise (see Article L.2323-57 of the Labour Code).

The Law of 9 May 2001 was the subsequent step aimed at promoting gender equality at work. Collective bargaining at professional branch and enterprise levels has been the main tool used by this law to promote gender equality (see below).

Acknowledging the persistence of the pay gap, the legislator adopted a new Law on 23 March 2006, specifically devoted to the reduction of wage disparities. Indeed it specifies that the gap must disappear before 31 December 2010.<sup>154</sup> Continuity with the

<sup>151</sup> For a general presentation of the French legal framework, see S. Laulom 'Gender Pay Gap in France' in: *EGELR* 2009-1, p. 5. P.Y. Verkindt 'L'égalité de rémunération entre les hommes et les femmes' in: *Droit Social* 2008, p. 1051. Also see Conseil économique, social et environnemental, *1968-2008: évolution et prospective de la situation des femmes dans la société française* Avis et Rapport, 2009.

<sup>152</sup> The extension is an act of the Ministry of Labour whereby a collective agreement is rendered compulsory applicable in all enterprises falling within its occupational and territorial scope. Failing such extension, an agreement is binding only on those enterprises where the employer is a member of the signatory employers' association.

<sup>153</sup> M.-Th. Lanquetin 'Chronique juridique des inégalités de salaires entre les femmes et les hommes' in: *Travail, genre et sociétés*, 2006/1, p. 69.

<sup>154</sup> On the 2006 Law, see M.-Th. Lanquetin 'L'égalité des rémunérations entre les femmes et les hommes, réalisée en 5 ans?' in: *Droit Social* 2006; J.-F. Cesaro 'Le code du travail est pavé de bonnes intentions' in: *JCP ed. S*, 2006, 2173; 'L'application de la loi du 23 mars 2006 relative à l'égalité salariale entre les femmes et les hommes' in: *JPC ed. S*, 2007, 1501.

previous laws is maintained, as the Law mainly refers to collective bargaining for the accomplishment of this aim. Some provisions of the Law dealing with pregnancy and maternity directly influence women's wages. According to the legislation, wages must be increased after maternity leave, in order to reflect general pay increases as well as the average individual increase enjoyed during that period by employees of the same category (Articles 1225-26 of the Labour Code).

Since 2006, other measures have been taken to try to encourage collective bargaining again. In order to reinforce the effectiveness of the legal framework, the Government first modified the content of the report on the comparative situation of men and women in the enterprise (*Décret* n°2008-838, 22 August 2008, JO 26 August). The aim of the Decree is to clarify and simplify the elaboration of the report. The Government has also published models of reports to be used by enterprises.

New measures are actually under discussion in the Parliament or between the social partners. A preparatory report<sup>155</sup> for a national collective negotiation that is to take place in 2010 proposes to strengthen the obligation to negotiate on gender equality. To improve the content of the collective agreements to be newly concluded, the report proposes to define ten new measures that those collective agreements must contain. The report also proposes to adopt financial sanctions to be imposed on companies which have not complied with the obligation to draw up the report on the comparative situation between men and women and to negotiate on equality. The report recommends the adoption of measures to improve the quality of part-time jobs.

### **3. Instruments of social partners**

The Law of 13 July 1983 provides that equality plans containing actions to promote equality can be negotiated at company level. This plan can present temporary measures to promote equal opportunities for men and women, in particular by removing existing inequalities which affect women's opportunities. But very few employment equality plans have actually been adopted.

After the Law of 9 May 2001, management boards and unions were clearly designated as the key agents in the process of implementation of equal opportunities, with collective bargaining expected to promote equality at work. The Law of 9 May 2001 created the new obligation to negotiate on sex equality including equal pay. First, this Law integrates gender objectives in the general negotiations on wages, working time and organisation of work, applying a mainstreaming approach as the issue of equality should be taken into account in every topic of bargaining. Second, it creates specific duties to bargain on occupational gender equality. Thus every year, at company level, the employer has the duty to negotiate with trade unions in order to define the objectives concerning equality between men and women in the enterprise and to design the measures to be implemented in order to attain these objectives. If an agreement is reached, the obligation to negotiate will only apply every three years. The 2001 Law also recognizes a duty to bargain on equality at professional branch level every three years, on the measures to be taken towards attaining occupational equality and on catch-up measures tending to remedy inequalities which have been ascertained. A report on the comparative situation of men and women in the sector is to be drawn up to be used as a basis for the negotiations. To improve negotiations, the Law adopted on 23 March 2006 specifies that the pay gap must disappear before 31 December 2010.

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<sup>155</sup> B. Gresy *Rapport préparatoire à la concertation avec les partenaires sociaux sur l'égalité professionnelle entre les femmes et les hommes*, 8 juillet 2009, <http://www.ladocumentationfrancaise.fr/rapports-publics/094000313/>, accessed 22 March 2010.

Although obviously the gender pay gap is not going to disappear by the end of 2010, the laws of 9 May 2001 and of 23 March 2006 have forced social partners to show a bigger interest in equality issues, even if there are still few collective agreements dealing with this issue.

In the spring of 2004, an important cross-industry national agreement on a balanced representation of both sexes and professional equality between women and men was concluded.<sup>156</sup> This agreement recognized the responsibility of social partners to guarantee ‘the mixing of sexes’ and professional equality at work. It emphasised some particular points: maternity should not hinder a mother’s career and to avoid this, two things must be done. Firstly, a link must be maintained with the company during periods of leave. Secondly, the company must provide a specific interview, both before and after the leave is taken, in order to discuss her career development; unjustified wage differentials between men and women must be rectified; the stereotypes about women’s work combated; and access to training must be the same for everyone. This agreement also aimed to guide career choices towards occupations with a bright future, to ensure gender balance in recruitment and career development, and to reduce gendered pay differentials. All these measures might influence the absolute pay gap as they intend to give access to better jobs and careers for women. Concerning wages, the agreement provides that when a pay gap is ascertained, the sectors and the companies have to make its reduction a priority. The agreement is important as it addresses the structural obstacles to equality at work and it challenges pay discrepancies based on career choices, gender imbalance in the sharing of family responsibilities, the glass ceiling, job segregation, etc. However, it is a framework agreement whose application has to be worked out at sector and company levels. It also has been criticized because it contains neither specific statistical targets nor disciplinary measures, its goal being simply to set out parameters for future sector and company-level bargaining.

The most recent annual report on collective bargaining analyses the number and the content of the agreements concluded on gender equality.<sup>157</sup> The report confirms a slow increase in the number of collective agreements dedicated or referring to equality, but the subject of equality is still relatively marginal compared to the traditional topics of collective bargaining. At branch level, 19 specific agreements on equality were concluded in 2008 (against 9 in 2007 and 1 in 2006) and 34 agreements refer to equality (on a total of around 1 117 agreements concluded in 2008). At enterprise level, 1 235 agreements referring to equality were concluded, against 1 076 agreements in 2007, on a total of 27 100 agreements. Concerning the content of the agreements, the report distinguishes between 3 categories of agreements. The first one (representing 1/3 of the specific agreements, and 2/3 of the general agreements) is simply formal: they refer to the principle of non-discrimination and declare their willingness to respect the law without any concrete measures. The second category of agreements (1/2 the specific agreements and 1/3 of the general agreements) refers to the principles of non-discrimination and proposes at least one concrete measure which is, most of the time, the ‘neutralisation of maternity leave’ with respect to wage (which is in fact a legal obligation). Some agreements specify some objectives in terms of career development and recruitment. The third category (23 specific agreements and no general agreement) tries to take into account the structural causes

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<sup>156</sup> *Accord national interprofessionnel relatif à la mixité et à l’égalité professionnelle entre les hommes et les femmes*: <http://www.lexisnexis.fr/pdf/DO/mixite.pdf>, accessed 22 March 2010.

<sup>157</sup> Direction générale du travail *La négociation collective en 2008*, Ministère du travail, juin 2009, [http://www.travail-solidarite.gouv.fr/IMG/pdf/Bilan\\_NC\\_2008.pdf](http://www.travail-solidarite.gouv.fr/IMG/pdf/Bilan_NC_2008.pdf), accessed 22 March 2010.



of gender discrimination and adopts various measures on recruitment, promotion, access to training, access to part-time work, parental measures, etc.

A report published by the 'Study Center for Corporate Social Responsibility' (*ORSE*) on a quantitative and qualitative evaluation of agreements concluded on equality confirms this increasing trend.<sup>158</sup> Some of the agreements only contain very vague provisions on equality. But others contain various real and concrete measures on the gender pay gap with, for example, the definition of a methodology to measure the differences, measures on parenthood (balance between family and work life), recruitment, the mixing of sexes in jobs, fighting stereotypes of men/women, promoting female managers to tackle the glass ceiling, etc. Therefore, these agreements could provide significant contributions to the enforcement of gender equality as they try to combat some structural factors which contribute to the gender pay gap in the enterprises.

#### **4. Instruments specifically aimed at employers**

One of the most important measures that oblige employers to address the issue of equal pay is the information that the employer must give to workers' representatives (works councils and trade union representatives) on equality. Employers in enterprises with at least 50 employees must present to the works council, each year, a written report on the comparative situation of men and women in the enterprise. The content of the report has been improved several times. The report must contain a comparative analysis between men and women in terms of recruitment, training, qualification, pay, working conditions and balance between professional and private life; this comparative analysis should contain relevant statistically-based indicators. The employer must record in this report the measures taken in the enterprise in the previous year to reach employment equality, and an outline of the objectives for the year ahead. The law also provides for the mandatory publication of these indicators at the workplace by the employer, allowing a detailed analysis of the report, and the employees, if they wish, have the right to access this report directly.

In the frame of the annual negotiations, employers must also give information on equality: they must retrace month by month the development of the number and qualifications of employees by sex, indicating 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 must provide the trade union representatives with information which allows a comparative analysis of the situation of men and women in the field of jobs, qualifications, pays, hours worked and the organisation of working time. Furthermore, the information must clarify the reasons for these situations as revealed by these statistics.

However, it seems that few enterprises are actually compiling the report as required and that there are only few demands of the workers' representatives. This is why a Decree dated 22 August 2008 tries to clarify and simplify the elaboration of the report and the Government has also published models of reports to be used by enterprises, as many of them still do not compile this report.

To promote the negotiations, the legislator has also provided for financial support. Companies with fewer than 300 employees can conclude an agreement with the State to receive financial assistance in order to carry out a study of their employment

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<sup>158</sup> [http://www.orse.org/site2/maj/phototheque/photos/actualite/bilan\\_accords\\_egalite\\_060309.pdf](http://www.orse.org/site2/maj/phototheque/photos/actualite/bilan_accords_egalite_060309.pdf), accessed 22 March 2010.



equality situation and of the measures which would be appropriate for them to take to re-establish equal opportunities between men and women (Article R 1143-1 of the Labour Code). The financial incentives can account for up to 70 % of the costs of the audit. Companies employing fewer than 300 employees can also obtain financial assistance from the State to draw up a forward-looking job and skills management plan incorporating actions to foster equality at work (L.5121-3 of the Labour Code). Companies with fewer than 50 employees can receive financial support to replace women on maternity leave. Here again, there is a lack of knowledge on these financial support options, and few enterprises are actually using them.

More recently, to promote equality, an 'Equality Label' was created in 2005. This Equality Label is awarded to businesses with the best gender equality at work practices, using objective criteria defined with management and employees. Among these criteria, actions in order to reach equal pay are considered in awarding the 'Equality Label'. By January 2010, 42 businesses had been awarded this label.

### **5. Other instruments to close the pay gap**

French legislation contains measures which aim to provide a more effective level of protection against discrimination. For example, the right to bring legal proceedings concerning discrimination has been recognized for trade unions and for associations legally established. Workers may also use the information given in the report on the comparative situation of men and women in the enterprise. However, there are no specific measures dealing with the pay gap. Despite the recognition of these different instruments intended to strengthen the enforcement of equal treatment rights, there are very few claims on the grounds of sex discrimination in general and on pay in particular in France.

Some specific powers are also granted to the labour inspectorates. The French labour inspectorate is charged with ensuring the application of labour law, including the principle of equal pay for work of equal value. Labour inspectors may require the employer to provide information on the different elements determining pay in the enterprise. They must also receive the report on the comparative situation. However, professional equality has never seemed to be a priority for labour inspectorates, who actually do not seem to control very strictly the obligation of employers to draw up the report on equality.

The HALDE, the French Equal Opportunities and Anti-Discrimination Commission, was established at the end of 2004. This independent statutory authority is in charge of assisting any and all individuals who turn to it in identifying discriminatory practices and countering them. It provides advice on legal options and helps establish proof of discrimination. The HALDE could also play a very important role in the dissemination of the European concepts. The HALDE has delivered some deliberations<sup>159</sup> on equal pay<sup>160</sup> that demonstrate better knowledge of the specificities of these claims. However, it is still very difficult for an individual worker to build a solid argumentation that her work is of equal value to someone else's. Very often, the necessary information and analysis are missing. This is the reason why collective actors could be in a better position to tackle the pay gap.

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<sup>159</sup> Deliberations are the HALDE's decisions based on the complaints lodged. They are not legally binding but very often have practical effect

<sup>160</sup> See *Délibérations* n° 2009-26, 9 February 2009; n° 2008-263, 1 December 2008; n° 2008-73, 14 April 2008; n°2009-404, 14 December 2009.

## **6. Problems of enforcement and how to tackle them by good practices**

Concerning the time limits, Article L.1134-5 of the Labour Code provides a time limit of 5 years starting when the discrimination is discovered. Damages granted should also compensate for the entire discrimination, whatever its length has been. Sanctions and time limits do not seem to be the problems of enforcement of the principle of equal pay.

Considering the scope of comparison, as there are few cases, it is difficult to assert how the tribunals are willing to define the scope of comparison. In its last report,<sup>161</sup> the HALDE states that it uses the comparison between comparable groups of men and women. Until now, I think that no comparison has been made with other employers in the same sector. In a decision of 10 November 2009, the *Cour de cassation* states that ‘the existence of discrimination does not necessarily imply a comparison with the other workers’.<sup>162</sup> In the relevant case, a woman asserted to have been discriminated against because of her participation in a strike. After the strike, in 1985, she asserted that her career was much slower than before the strike. The Court of Appeal dismissed her claim because she did not compare her situation with the situation of colleagues in the same position. For the *Cour de cassation*, the Court of Appeal should have analysed if the slowing down of her career and the difficulties in her work after her participation in the strike did not presume that there had been discrimination without any comparison having to be made with other workers.

## **7. Relationship between the gender pay gap and other parts of labour law**

If we concentrate on the net pay gap, the relationship between unequal pay between men and women on the one hand, and rules governing professional life on the other could be difficult to establish. But the relationship is essential if we look at the absolute pay gap. It is because women are part-time workers, because there is a gender imbalance in the sharing of responsibilities etc., that there is still an important pay gap. This is why action on these issues is essential to fight the pay gap.

## **8. Final assessment of good practices**

The content of some collective agreements shows that social partners can contribute to the realisation of gender equality. Some agreements contain various real and concrete measures on the gender pay gap with, for example, the definition of a methodology to measure the differences, measures on parenthood (balance between family and work life), recruitment, the mixing of sexes in jobs, fighting stereotypes of men/women, promoting female managers to tackle the glass ceiling, etc. Therefore, these agreements could make significant contributions to the enforcement of gender equality.

The report on the comparative situation of men and women is also very important. Without a shared and complete diagnosis of the equality situation, collective negotiations do not have any chance to succeed and the content of the collective agreements will be very weak. It is now important to focus on the implementation of the legal framework and to ensure that employers compile this report. The financial incentives available must also be given more publicity.

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<sup>161</sup> *Rapport annuel 2009*, <http://www.halde.fr/-Rapports-annuels-.html>, accessed 22 March 2010.

<sup>162</sup> *Cass. Soc.*, 10 November 2009, n°07-42849.

### 1. General situation

In Germany, the principle of equal pay for equal work is one ‘without practice’.<sup>163</sup> The absolute<sup>164</sup> gender pay gap amounts to 23 %.<sup>165</sup> It differs considerably between the federal states (*Länder*) of the former Federal Republic, where in 2008 it actually rose up to 25 %, and the ‘new Länder’, the territory of the former GDR, where it sank from 6 % to 5 %.<sup>166</sup>

The gender pay gap varies considerably among the different economic sectors. But there is no economic sector where women actually earn more than men. The pay gap is above average in those sectors where many women are employed. In 2008 it was largest in business services (34 %), ‘art, tourism and entertainment’ (31 %), the credit and insurance industry (29 %), manufacturing (29 %), retailing (25 %) and in health and welfare (24 %). Only small pay gaps exist in mining (3%) and transport and communication (7 %), where virtually no women are employed.

Although there are no great differences with respect to the educational accomplishment of men and women, well-paid leadership positions are nevertheless occupied mostly by men. In 2006, 70 % of senior executives were male.<sup>167</sup> This has great significance, especially because the average gross hourly earnings of executive employees are 91 % higher than that of the average earner.

Furthermore, there are still considerable differences between the sexes when it comes to choosing a profession. Traditional ‘women’s and men’s jobs’, which are hardly ever done by members of the other sex, can still be identified. In addition, well-paid jobs still are for men, whereas the badly paid ones are for women. For example, in the highest-earning occupations such as corporate managers, chemical engineers, and aviation professionals, women constitute around 20 % of the workforce, while they constitute around 80 % in the lowest-paying jobs, such as hairdressers, launderers, or housecleaners.<sup>168</sup>

Additionally, 80 % of all part-time workers are women. A markedly higher share of women (35 %) than of men (5 %) works part time. In turn, many more men (82 %) than women (46 %) have full-time jobs: Reducing working time is affiliated with a financial disadvantage, as a comparison across professions shows that the hourly

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<sup>163</sup> R. Winter *Gleiches Entgelt für gleichwertige Arbeit*, Baden-Baden, Nomos 1998 (‘Prinzip ohne Praxis’). See also E. Kocher ‘Gleichstellungspolitik und Individualansprüche’, *Kritische Justiz* (2007) pp. 22-34 (22).

<sup>164</sup> Also called ‘unadjusted’ pay gap: It encompasses differences between women and men with regard to the occupations and lines of business they choose and in their careers.

<sup>165</sup> If not marked otherwise, all data are taken from R. Droßard ‘Pay differential between men and women’, 26 August 2008, *STATmagazin*, Federal Office for Statistics, (*Statistisches Bundesamt*), available on <http://www.destatis.de>, accessed 7 April 2010.

<sup>166</sup> This comparison is based on significantly higher earnings of men in the former territory of the Federal Republic than in the new federal states (*Länder*). The gross hourly earnings of men in the former territory of the Federal Republic were 46 % higher than those of men in the new federal states (*Länder*). For women the difference was only 18 %.

<sup>167</sup> See also Federal Ministry for Family, Seniors, Women, and Youth (*Bundesministerium für Familie, Senioren, Frauen und Jugend, BMFSFJ*), *Frauen in Führungspositionen - Barrieren und Brücken*, 15 March 2010, available on <http://www.bmfsfj.de>, accessed 7 April 2010.

<sup>168</sup> For details, see R. Droßard ‘Pay differential between men and women’, 26 August 2008, *STATmagazin*, Federal Office for Statistics (*Statistisches Bundesamt*), available on <http://www.destatis.de>, accessed 7 April 2010.

earnings of part-time employees are lower than those of full-time employees.<sup>169</sup> This contributes considerably to the gender pay gap in Germany. Within the group of part-time workers, the net gender pay gap amounts to only 4 %, whereas it is at 21 % within full-time employment.<sup>170</sup>

In this context, it has to be noted that the German gender pay gap increases with the increasing age of employees.<sup>171</sup> When women begin their working life, the pay difference between men and women is comparatively small. In 2006, it amounted to 8 % for the 25 to 29-year-olds. It had more than doubled for the 35 to 39-year-olds with 21 %, and with 30 % it was largest for those who were sixty and over. The fact that 65 % of all working women aged between 25 and 29 years were employed on a full-time basis, whereas it is 57 % of the 30 to 34-year-olds, and only 46 % of the 35 to 39-year olds, reveals the relevance of part-time work for the pay gap.

Compared to these figures for the private market, the gender pay gap in public service is comparatively low – it amounts to 7 %.<sup>172</sup> In 2008, it was largest in education (15 %) and in public administration (8 %). Unlike in private employment, the gender pay gap in public service is mostly independent of the volume of employment: It amounts to 7 % with respect to full-time employment and to 8 % with respect to part-time work.

## 2. The legal framework

In Germany, there is still no specific legislation addressing the gender pay gap. However, gender discrimination in labour relations is prohibited by law and hence also applies to gender-based pay discrimination.

First of all, the equal pay principle is part of the constitutional gender equality clause embedded in Articles 3(2) and (3) of the Basic Law (The German Constitution, *Grundgesetz, GG*).<sup>173</sup> Legal doctrine and the case law of the Federal Constitutional Court (*Bundesverfassungsgericht*) have developed a substantial approach to the provision focusing on equal opportunities in actual practice. Articles 3(2) and (3) prohibit both direct and indirect discrimination. Indirect discrimination is easier justifiable than direct discrimination: a rule that constitutes indirect discrimination can be justified if it pursues a legitimate aim by proportionate means.<sup>174</sup> Direct discrimination can only be justified if the rule in question is absolutely necessary to

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<sup>169</sup> The gross hourly earnings of part-time workers were 23 % lower than those of full-time workers. This can, *inter alia*, be ascribed to the fact that 11 % of those working full time, but only 5 % of those working part time are in leadership positions. Moreover, the share of part-time workers is significantly higher for non-skilled workers when compared to well-educated workers. For details see Federal Office of Statistics (*Statistisches Bundesamt*), *Verdienste und Arbeitskosten, Begleitmaterial zur Pressekonferenz am 13.05.2009*, available on <http://www.destatis.de>, accessed 7 April 2010.

<sup>170</sup> Federal Office of Statistics (*Statistisches Bundesamt*), press release No. 331 of 8 September 2009, available on <http://www.destatis.de>, accessed 7 April 2010.

<sup>171</sup> Böckler Impuls 4/2008, available on <http://www.boecklerimpuls.de>, accessed 7 April 2010.

<sup>172</sup> Federal Ministry for Family, Seniors, Women, and Youth (*Bundesministerium für Familie, Senioren, Frauen und Jugend, BMFSFJ*), *Der Verdienstunterschied von Frauen und Männern im öffentlichen Bereich und in der Privatwirtschaft*, 29 January 2010 available on <http://www.bmfsfj.de>, accessed 7 April 2010.

<sup>173</sup> (2) 'Men and women shall have equal rights. The State shall promote the actual implementation of equal rights for women and men and take steps to eliminate disadvantages that now exist.  
(3) No person shall be favoured or disfavoured because of sex, parentage, race, language, homeland and origin, faith, religious or political opinions. No person shall be disfavoured because of disability.'

<sup>174</sup> Decision of the Federal Constitutional Court, *BVerfGE* 113, 1 (20).

solve problems that, due to their nature, only arise for women or for men.<sup>175</sup> Article 3 is directly applicable only between the citizens and the State. However, it is considered to reflect a fundamental concept of justice and thus to be at the basis of the legal system as a whole; therefore, it also permeates legal relations between citizens, and in particular between employers and employees. Moreover, according to the case law of the Federal Labour Court, Articles 3(2) and (3) have direct effect for the parties to collective labour agreements.<sup>176</sup>

Additionally, unequal treatment of workers or groups of workers is prohibited under the unwritten general principle of equal treatment in labour law (*allgemeiner arbeitsrechtlicher Gleichbehandlungsgrundsatz*) if they are in a comparable situation and if there is no objective justification.<sup>177</sup> This principle is not only understood as a formal prohibition to discriminate, but also ‘as a vehicle to equal distribution of services granted by the employer.’<sup>178</sup> It does not specifically prohibit unequal pay, yet such unequal treatment is within its scope.

Today, most important for the principle of equal pay are the rules contained in the General Equal Treatment Act (*Allgemeines Gleichbehandlungsgesetz, AGG*) of 2006, which implements the European Equality Directives.<sup>179</sup> Section 3 of that Act explicitly defines direct discrimination and - for the first time in German law - indirect discrimination, and it does so basically in the same way as the European Equality Directives. Apart from general norms defining its scope of application and the concept of discrimination, the Act consists of two main parts: the first part regulating labour law, and the second dealing with general contract law. For employment relationships, the prohibition of discrimination is explicitly repeated in Section 7 *AGG*. Accordingly, unequal treatment of persons within any employment relationship, and hence also with respect to pay, is forbidden. Section 8(2) *AGG* clarifies that an agreement of a lower rate of remuneration for the same or equivalent work on the ground of sex (or any of the other grounds referred to under Section 1) cannot be justified by the existence of special protective regulations for members of one sex (or for any other groups listed in Section 1). If, for example, success-related payments are calculated on the basis of the employee’s average monthly income, reduced maternity leave payments may not be taken into account.<sup>180</sup> Section 24 *AGG* renders all these provisions applicable to public servants.

The law on the works councils (Works Constitution Act of 1972, *Betriebsverfassungsgesetz - BetrVG*) also contains rules prohibiting discrimination. According to Section 75(1), the employer and the works council shall ensure that

<sup>175</sup> Decision of the Federal Constitutional Court, *BVerfGE* 92, 91 (109).

<sup>176</sup> Federal Labour Court (*Bundesarbeitsgericht, BAG*), judgment of 15 January 1955 – 1 AZR 305/54, *Arbeitsrechtliche Praxis (AP)* no. 4 on Article 3 *GG* (Basic Law).

<sup>177</sup> U. Preis in: T. Dieterich et al. (eds.) *Erfurter Kommentar zum Arbeitsrecht*, § 611 *BGB*, marginal note 572 with further references, München, C.H. Beck 2010.

<sup>178</sup> M. Weiss ‘Proceedings of the Toronto Conference: The Interface between constitution and labor law in Germany’, in: 26 *Comparative Labor Law & Policy* (2005) pp. 181-198.

<sup>179</sup> Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ (L303/16) (hereinafter Framework Directive); Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, [2000] OJ (L 180/22), (hereinafter Race Directive). Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (Text with EEA relevance) OJ L 269, 5 October 2002, pp. 15–20.

<sup>180</sup> Federal Labour Court (*Bundesarbeitsgericht, BAG*), judgment of 2 August 2006, 10 AZR 425/05, <http://www.lexetius.com/2006.2868>, accessed 7 April 2010.



every employee is treated in accordance with the principles of law and equality. Particularly, they have to respect the prohibition against discrimination on certain grounds including sex.

Non-discrimination on grounds of sex or gender is also envisaged by the Federal Staff Representation Act (*Bundespersonalvertretungsgesetz*) and the Federal Law on Equal Treatment (*Bundesgleichstellungsgesetz, BGleiG*), which are both applicable for employees in the public service. Section 67 of the first-mentioned Act stipulates a duty of the staff representation to ensure the equal treatment of all employees. It is the counterpart of Section 75 *BetrVG* for the public sector. The Federal Law on Equal Treatment contains several provisions aiming at the equality of men and women, which give rise to specific individual rights. In particular, Sections 12 to 15 deal with working time and other working conditions in the context of employees having family duties: e.g. Section 13 offers a right to part-time work, which can only be denied in case of compelling official interests. Under Section 14, employees having family duties must be considered primarily when applying for full-time employment again. However, regulations specifically addressing the gender pay gap cannot be found in this Act.

A further prohibition of unequal treatment with consequences for the gender pay gap is contained in Section 4 Paragraph 1 of the Part-Time and Fixed-Term Employment Act (*Teilzeit- und Befristungsgesetz, TzBfG*). This norm prohibits unequal treatment of part-time workers as compared to full-time workers, and it stipulates that remuneration for part-time work has to be granted according to the *pro-rata-temporis* principle.<sup>181</sup> As most part-time workers are women, this rule *de facto* serves the prohibition of (indirect) discrimination on grounds of sex<sup>182</sup> and thus tackles the gender pay gap.

According to all these rules and regulations, gender-based discrimination in employment relationships including unequal pay for equal work is prohibited. However, the pay gap in Germany is among the highest within the EU. The question, therefore, is how to implement and enforce the prohibition against discrimination in practice.

### 3. Instruments of social partners

The persistent net gender pay gap can partly be explained by the existence of indirectly discriminating provisions in collective agreements.<sup>183</sup> Although the number of employment contracts that are directly covered by a collective agreement is decreasing, collective bargaining is still decisive for the majority of employment relationships in Germany.<sup>184</sup> Despite the lack of a tradition of collective bargaining specifically for equal pay, trade unions and other social partners have begun to address the problem. They have used, and still use, the negotiations for collective

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<sup>181</sup> The principle of equal treatment of part-time workers is also included in Section 15 Paragraph 1 Federal Law on Equal Treatment (*Bundesgleichstellungsgesetz*).

<sup>182</sup> J. Jousen in: W. Boecken & J. Jousen *Teilzeit- und Befristungsgesetz*, § 4, marginal note 3, Baden-Baden, Nomos 2007.

<sup>183</sup> E. Kocher 'Gleichstellungspolitik und Individualansprüche', in: *Kritische Justiz*, (2007), pp. 22-34 (24). *Bericht der Bundesregierung zur Einkommenssituation von Frauen und Männern vom 24.04.2002*, BT-Drucks (documents of the Federal Parliament) 14/8952.

<sup>184</sup> D. Schiek in: *Legal Aspects of the Gender Pay Gap*, Report by the Commission's Network of legal experts in the fields of employment, social affairs and equality between men and women, 2007, p. 36, available on: <http://ec.europa.eu/social/main.jsp?catId=641&langId=en>, accessed 7 April 2010.

agreements to check wage groups and pay systems for their gender neutrality.<sup>185</sup> In addition, they offer seminars, checklists, and brochures in order to raise awareness and educate employees and employers on the issue of equal pay.

According to the Act on Collective Agreements (*Tarifvertragsgesetz, TarifVG*), the parties to collective agreements are entitled to act as if they were legislators, namely to set norms to be respected by the parties to an individual employment contract. Therefore, the bargaining partners are directly bound by the fundamental rights guaranteed by the Constitution, namely by Article 3 (2) GG, by Article 157 TFEU, and the provisions of the AGG, although the *TarifVG* does not contain a specific prohibition of discrimination in collective agreements or a provision dealing with equal pay. Consequently, the parties to collective agreements have to comply with the principle of equal pay. For this reason, most of the agreements today do not contain provisions which directly discriminate on ground of sex. Yet, provisions discriminating indirectly can still be found, in particular discriminatory job evaluations (for details, see below, note 191). Collective agreements violating the prohibition of (direct and indirect) discrimination are void pursuant to Section 7 Paragraph 2 AGG. The problem, however, is to establish such discrimination in court proceedings (see below, in Section 7 of this country report).

Section 17 AGG specifically requires that the bargaining parties ‘become actively involved’ in preventing discrimination on the grounds of sex (and other characteristics protected by the AGG) within the context of their duties and scope of action. Although Section 17 intends to implement the norms on social dialogue in the Directives,<sup>186</sup> it is merely of appellative character and thus falls short of their scope. The Directives oblige the Member States to take ‘adequate measures to promote dialogue between the social partners with a view to fostering equal treatment including through the monitoring of workplace practices, collective agreements, codes of conduct and through research or exchange of experiences and good practices.’ The German legislator has delegated all responsibility to the social partners and thus seems to dodge its own.<sup>187</sup> ‘Becoming involved in achieving’ equality can hardly be qualified as being *adequate* in the sense of the directives.

Not only collective agreements (*Tarifverträge*) but also company agreements (*Betriebsvereinbarungen*) concluded between one works council and the employer must be free of discriminatory pay clauses. Such agreements may cover matters that are regarded as pay under the case law of the ECJ and are consequently a possibly powerful instrument to address the gender pay gap. Under Sections 75 and 77 *BetrVerfG*, the works council and the employer are obliged to observe the purpose of the AGG when negotiating such agreements. However, the works council does not have express powers in the field of pay.<sup>188</sup> Under Section 80 Paragraph 1 *BetrVerfG*, the works council’s general task is, however, ‘to enforce the substantial equality of women and men, in particular in reference to hiring, to employment conditions’ and ‘to promote the compatibility of employment and family obligations’. Under Section 99 the works council is entitled to monitor the legal requirements referring to

<sup>185</sup> E.g. negotiations of the new *TVöD* by VER.DI, see below footnote 196. See also D. Schiek in: *Legal Aspects of the Gender Pay Gap*, Report by the Commission's Network of legal experts in the fields of employment, social affairs and equality between men and women, 2007, p. 37, available on: <http://ec.europa.eu/social/main.jsp?catId=641&langId=en>, accessed 7 April 2010.

<sup>186</sup> Article 11 Paragraph 2 Race Directive, Articles 2 Paragraph 5 and 13 Paragraph 2 Framework Directive, Article 8 b Paragraphs 2, 3 Gender Directive.

<sup>187</sup> See also S. Roloff in: C. Rolfs et al. (eds.) *Beckscher Onlinekommentar zum Arbeitsrecht*, § 17 AGG, marginal note 1, München, Nomos 14th ed. 2009.

<sup>188</sup> Cf. §§ 92 II, 93, 94, 95, 96ff., 99 *BetrVG*.

discrimination in case of any individual measure on personnel (hiring, transfer, promotion, classification), pay being part of classification.<sup>189</sup> The works council may refuse its consent for discriminatory measures, which prevents the employer from taking such.

However, one has to note that works councils' powers are not a guarantee that they are actually executed.<sup>190</sup> It is up to each works council to decide how to use its powers. A works council might be 'gender prejudiced' itself. In order to minimise that risk, Section 15 Paragraph 2 *BetrVG* establishes the obligation that the sex that is in the minority within the workforce has to be represented in the works council at least to its proportion within the workforce of the company. Yet, in German law there is no right for the individual to sue the works council if it fails to live up to its duties. In addition, the provision is of limited applicability as many small and medium-sized companies do not have a works council and because the *Betriebsverfassungsgesetz* is not applicable in the public sector or to religious communities and their charitable or educational institutions.

In recent years, the problem of equal pay has become one of the most important fields of activity of trade unions and associations. Especially the trade union in the services sector, *VER.DI*,<sup>191</sup> and the German Confederation of Trade Unions (*DGB*) have taken up the task of promoting pay equality. In projects like *Frauenlohnspiegel* (women's pay level),<sup>192</sup> Equal Pay Day<sup>193</sup> or *Entgeltgleichheit*,<sup>194</sup> data with respect to women's pay is collected and evaluated, and employees and employers are made aware of the problem. A first step into the direction of pay equality was the replacement of the old – sex discriminatory – collective agreement for white-collar workers with the public services (*Bundesangestelltentarifvertrag*, *BAT*) by the new one (*Tarifvertrag für den öffentlichen Dienst*, *TVöD*) in 2006. Yet, up until now the parties have not been able to agree on the details of the new wage system. The old wage system was a mixture between wage groups naming specific activities and describing activities with progressing degrees of difficulty. The very complex system resulted in overrating typical male work as compared to typical female work. Already the methods of job evaluation were, and still are, discriminatory. Especially the non-analytical job-evaluation includes the potential for discrimination, as the criteria for evaluation are not completely revealed.<sup>195</sup> A new wage group system should therefore be established by March 2010. However, the bargaining parties only reached an agreement that they will continue negotiations about a transparent wage group system.<sup>196</sup> Consequently, for the time being the old discriminatory rules of the *BAT* remain applicable.

#### 4. Instruments specifically aimed at employers

Chapter 2 of the *AGG* stipulates employers' duties with respect to non-discrimination: vacancies must not be advertised in a discriminatory way (Section 11) and employers

<sup>189</sup> G. Thüsing in: R. Richardi, *BetrVG*, § 99, marginal note 60, München, C.H. Beck 12<sup>th</sup> ed. 2009.

<sup>190</sup> M. Weiss 'Proceedings of the Toronto Conference: The Interface between constitution and labor law in Germany', in: *26 Comparative Labor Law & Policy* (2005) 181-198 (190).

<sup>191</sup> *Vereinigte Dienstleistungsgewerkschaft* (United Service Union).

<sup>192</sup> <http://www.lohnspiegel.de>, accessed 7 April 2010.

<sup>193</sup> <http://www.equalpayday.de>, accessed 7 April 2010.

<sup>194</sup> <http://www.entgeltgleichheit.de>, accessed 7 April 2010.

<sup>195</sup> R. Winter in: W. Däubler, *Tarivertragsgesetz*, § 1, marginal note 436 (with further references), Baden-Baden, Nomos 2<sup>nd</sup> ed. 2006.

<sup>196</sup> Union Agreement (*Tarifeinigung*), *TVöD* 2010, available on <http://oeffentlicher-dienst.info/tvoed/tr/2010>, accessed 7 April 2010.



have the organisational duty to provide for working conditions that are free from discrimination, including prevention, special training, information and sanctions against employees violating the principle of non-discrimination (Section 12). These measures help ensure that women apply for higher-paying jobs, which contributes to decreasing the absolute gender pay gap. Additionally, employers are obliged to establish a unit competent for complaints of employees feeling discriminated against (Sections 13 and 12 Paragraph 5 *AGG*). The details concerning the establishment of this body are within the prerogative of the employer.

Until recently, the German Government and Parliament did not consider public procurement law to be suitable for realising gender equality or equal pay.<sup>197</sup> In 2009, however, the Act against Restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen, GWB*) was amended so as to authorise considering environmental, social or innovative criteria in the process of public procurement (Section 97(4)(2) *GWB*). However, up until now the criteria of equal pay have not been expressly used as social criteria; all that can be found are clauses requiring firms to take steps for the advancement of women.<sup>198</sup>

The federal initiative for the equality of women in trade and industry (*Bundesinitiative zur Gleichstellung von Frauen in der Wirtschaft*)<sup>199</sup> also pursues the aim of equal pay for equal work and is directed at employers. Projects by employers for overcoming the gender pay gap can be sponsored for up to three years. Since the programme dates from 2009, an evaluation is not yet possible.

In an attempt to convince employers of the advantages of non-discrimination and diversity, the Federal Anti-Discrimination Body (*Antidiskriminierungsstelle des Bundes*) launched a 'Coalition with Corporations.'<sup>200</sup> Few details and even less results are known of this project.

A further instrument is *Logib-D*,<sup>201</sup> which is made available by the Federal Ministry for Women, Seniors, Family and Youth (*Bundesministerium für Family, Senioren, Frauen und Jugend, BMFSFJ*). It is a tool (originally developed in Switzerland) for companies to analyse their salary structure to identify gender pay gaps. Based on statistical analysis, it allows finding out whether men and women are paid the same salary if they are equally qualified. Critics argue that the tool is

<sup>197</sup> Reply of the Federal Government (*Bundesregierung*) to a parliamentary question (*Kleine Anfrage*) 'Berücksichtigung von Ausbildungsplatzangebot und Förderung von Gleichstellung bei der Vergabe öffentlicher Aufträge' BT-Drs. 16/1712, pp. 4-5; see also Reply to a parliamentary question (*Kleine Anfrage*) BT-Drs. 16/5028; *Beschlussempfehlung und Bericht des Bundestagsausschusses für Wirtschaft zu der Mitteilung der Kommission KOM (98) 143 endg. 'Das öffentliche Auftragswesen in der EU'* (BT-Drs. 13/11160, p. 4.).

<sup>198</sup> For an overview of the changes to the law of public procurement cf. C. Just & D. Sailer 'Neues Vergaberecht 2009 – Praxisrelevante Änderungen im Überblick' in: *Landes- und Kommunalverwaltung (LKV)* (2009) pp. 529-536.; I. Diemon-Wies & S. Graiche 'Vergabefremde Aspekte – Handhabung bei der Ausschreibung gemäß § 97 IV *GWB*' in: *Neue Zeitschrift für Baurecht (NZBau)* (2009) pp. 409-413. Generally on the application of social and other criteria in public procurement see W. Frenz 'Soziale Vergabekriterien' in: *NZBau* (2007) pp. 17-23; M. Böhm & C. Dankert 'Politische Zielvorgaben als Vergabekriterien' in: *Neue Zeitschrift für Verwaltungsrecht (NVwZ)* (2000) pp. 767-768. Cf. also the draft of a new Law on Public Procurement for the state (*Land*) of Berlin, where a duty for bidders to give a 'Declaration on the advancement of women' shall be introduced (*Tagesspiegel*, 10. Februar 2009).

<sup>199</sup> <http://www.bundesinitiative-gleichstellen.de>, accessed 7 April 2010. See also *Bundesanzeiger* (Federal Gazette) 2009, No. 74, pp. 1742-1743.

<sup>200</sup> 'Bündnis mit der Wirtschaft', <http://www.antidiskriminierungsstelle.de/ADS/Tipps-fuer-Unternehmen/buendnis-mit-der-wirtschaft.html>, accessed 7 April 2010.

<sup>201</sup> 'Logib-D' is an abbreviation of 'Lohnungleichheit im Betrieb – Deutschland'. It is available on <http://www.logib-d.de>, accessed 28 March 2010.

incapable of detecting whether work done by women is lesser valued than that done by men and hence does not address the underlying grounds of gender-based discrimination.<sup>202</sup>

Another instrument aimed at employers is the voluntary commitment on promoting gender equality, which the top association of German employers (*Spitzenverbände der deutschen Wirtschaft*) entered into in 2001 to prevent the federal legislature from introducing a law on this issue. Studies show that only 10 % of the employers (employing 20 % of the female workforce) have taken any measures.<sup>203</sup>

## 5. Other instruments to close the pay gap

Section 13 *AGG* grants employees affected by discrimination a right to appeal to a competent unit within the respective company. This right corresponds with the employer's duty to establish such a body. Complaints have to be examined and the employee has a right to be heard and to be informed of the results of the considerations. This complaints procedure is no condition for bringing a court claim under Section 15. Moreover, the rights of worker representatives remain unaffected. That means that employees have the possibility to settle disputes in the context of discrimination extra-judicially. The effectiveness of the procedure still remains to be established.

The German Federal Government recently published guidelines for the enforcement of the principle of equal pay, which highlight the factual problems still existing.<sup>204</sup> They address all parties in this context and explain details and tools which can be helpful in practice.<sup>205</sup> Employers are urged to inform and educate their employees about their right to equal pay for equal work and to introduce 'Equality Controlling' so as to identify a gender pay gap within the pay system in their firm. Works council are prompted to use their rights under the *AGG* and employees are advised, when suspecting discrimination, to look into the suspicion, collect evidence, get legal advice, and bring a lawsuit. Checklists for examining pay systems and identifying potential areas of discrimination are offered. Again, no evidence on the effectiveness of these measures is yet available.

## 6. Problems of enforcement and how to tackle them by good practices

Problems of enforcement are partly caused by provisions that violate Community law (1), partly by the weakness of rules concerning proof (2), and partly by the limitation of enforcement to individual claims (3).

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<sup>202</sup> See e.g. the statement of the German Women Lawyers Association (*Deutscher Juristinnenbund, djb*), <http://www.djb.de/Kommissionen/K1/st10-3>, accessed 7 April 2010); C. Klenner & A. Ziegler 'Mit Logib-D zur Überwindung der geschlechtsspezifischen Entgeltlücke?' in: *WSI Report 3 March 2010*, [http://www.boeckler.de/pdf/p\\_wsi\\_report\\_3\\_10.pdf](http://www.boeckler.de/pdf/p_wsi_report_3_10.pdf), accessed 7 April 2010.

<sup>203</sup> See the study of the Institute for Labour Market and Occupation Research (*Institut für Arbeitsmarkt- und Berufsforschung, IAB*) of the Federal Agency of Employment (*Bundesagentur für Arbeit*), available on <http://doku.iab.de/forschungsbericht/2009/fb0409.pdf>, accessed 14 December 2009.

<sup>204</sup> Federal Ministry for Family, Seniors, Women, and Youth (*Bundesministerium für Familie, Senioren, Frauen und Jugend, BMFSFJ*), *Fair Pay – Entgeltgleichheit für Frauen und Männer, Leitfaden zur Durchsetzung des Grundsatzes des gleichen Entgelts bei gleicher und gleichwertiger Arbeit*, available on <http://www.bmfsfj.de>, accessed 7 April 2010.

<sup>205</sup> Federal Ministry for Family, Seniors, Women, and Youth (*Bundesministerium für Familie, Senioren, Frauen und Jugend, BMFSFJ*), *Fair Pay – Entgeltgleichheit für Frauen und Männer, Leitfaden zur Durchsetzung des Grundsatzes des gleichen Entgelts bei gleicher und gleichwertiger Arbeit*, available on <http://www.bmfsfj.de>, accessed 7 April 2010, p. 29 et seq.

(1) Section 15 *AGG* stipulates that the employer has to compensate the victim of discrimination for material and immaterial damage. However, contrary to European law, compensation for material damage is granted only in case of fault by the employer. Additionally, employers who apply discriminatory collective agreements are liable for discrimination only if they acted with intent or gross negligence (Section 15(3) *AGG*).

(2) With respect to the burden of proof, Section 22 *AGG* requires (in accordance with European law<sup>206</sup>) only that the claimant establish facts from which it can be presumed that there has been discrimination. Then, it is for the defendant to prove that there has been none – either because there was no different treatment of men and women or that it was justified. Yet, this does not alleviate the problems of proving a gender-based discrimination with relation to pay: Claimants rarely have knowledge of the pay structure within a company, and hence cannot establish them without a specific right to disclosure of information about the pay that other individuals in the firm receive.<sup>207</sup> To enable the individual to bring a successful claim such a right to disclosure is necessary, but is not obligatory under the European Directives. Some authors deduce such a right to disclosure at least in the context of recruitment and promotion<sup>208</sup> from Section 242 of the German Civil Code (*Bürgerliches Gesetzbuch, BGB*)<sup>209</sup> in conjunction with the spirit and purpose of the *AGG*, but this view has not (yet?) gained recognition in the courts. At any rate, legal certainty would require it to be expressly contained in the *AGG*.<sup>210</sup> In addition, the German judiciary is only slowly starting to accept statistical evidence on the distribution of men and women in different levels of positions for proving discrimination.<sup>211</sup>

(3) Another serious problem limiting the enforcement of the principle of equal pay in Germany is that works councils, unions and equality bodies cannot bring claims for individuals. Only in cases of gross violations of the prohibition of discrimination by the employer, are works councils or trade unions entitled to demand a court order for a necessary act, default or omission by the employer, in order to stop the discrimination (Section 17(2)(1) *AGG* in conjunction with Section 23 *BetrVerfG*). This may result in the obligation to pay an administrative fine to the State. However, the clause expressly excludes claims of the victims of discrimination from being asserted in the application.

Moreover, under Section 23 *AGG*, non-profit anti-discrimination organisations with at least 75 members can act as legal advisors, but not as authorised proxy to a

<sup>206</sup> M. Bertzbach in: W. Däubler/M. Bertzbach *Allgemeines Gleichbehandlungsgesetz*, § 22 *AGG*, marginal note 3 (with further references) Baden-Baden, Nomos 2nd ed. 2008.

<sup>207</sup> See generally for a right to disclosure M. Bertzbach in: W. Däubler/M. Bertzbach *Allgemeines Gleichbehandlungsgesetz*, § 22 *AGG*, marginal note 28 et seq., Baden-Baden, Nomos 2nd ed. 2008; Grobys 'Die Beweislast im Anti-Diskriminierungsprozeß' in: *Neue Zeitschrift für Arbeitsrecht (NZA)* (2006) pp. 898-904 (903).

<sup>208</sup> E.g. M. Bertzbach in: W. Däubler/M. Bertzbach *Allgemeines Gleichbehandlungsgesetz*, § 22 *AGG*, marginal note 29 (with further references) Baden-Baden, Nomos 2nd ed. 2008.

<sup>209</sup> 'The debtor must perform its obligation in accordance with the requirements of good faith, taking into account prevailing customs.'

<sup>210</sup> Cf. also the motion of the parliamentary group of the Social Democratic Party of Germany (*Antrag der SPD-Fraktion im Deutschen Bundestag*) of 25 February 2010, BT-Drs. 17/821, p. 3.

<sup>211</sup> Cf. State Labour Court (*Landesarbeitsgericht, LAG*) Berlin-Brandenburg, 15.Sa.517/08, *Streit* (2009) pp. 22-33. For a discussion of the judgment see J. Heyn/G. Meinel 'Rückenwind für Diskriminierungsklagen, Die Entscheidung des LAG Berlin-Brandenburg vom 26.11.2008' in: *Neue Zeitschrift für Arbeitsrecht (NZA)* 2009 pp. 20-23. But also compare LAG Berlin-Brandenburg, 2.Sa.2070/08 *Neue Zeitschrift für Arbeitsrecht – Rechtsprechungsreport (NZA-RR)* 2009 pp. 357-362, where statistical evidence was not admitted in the circumstances of the case.

victim of discrimination in court hearings, and only if the procedural norms do not prescribe representation by a lawyer. In the absence of class action, anti-discrimination organisations can only assist individual victims of discrimination with their consent, but they cannot generally advance the enforcement of the principle of equal pay. In particular, such individual court proceedings result in the upward adjustment of the victim's wage (*'Anpassung nach oben'*).<sup>212</sup> Yet a court does not have the power to change an underlying collective agreement; it remains up to the bargaining parties to negotiate a just and non-discriminatory wage system. Thus, there are no legal remedies to challenge collective agreements outside individual cases, although the parties to collective agreements are bound by the principle of equal pay for equal work.

## **7. Relationship between the gender pay gap and other parts of labour law**

As already mentioned, most part-time workers are women.<sup>213</sup> For this reason, the provisions of the Part-Time Work Act (*Teilzeit- und Befristungsgesetz*) have considerable impact on the problem of unequal pay. Section 4 *TzBefG* serves the protection of all part-time workers. In fact, it is a provision for the protection against indirect discrimination of women.<sup>214</sup> It is applicable to both individual contracts and collective agreements, and it stipulates that part-time work has to be remunerated according to the *pro-rata-temporis* principle. The enforcement of this principle is rather difficult. One reason would seem that the burden of proof lies entirely with the person claiming to be discriminated against and that the *TzBefG* does not contain a rule easing the burden of proof (comparable to Section 22 *AGG*).<sup>215</sup>

## **8. Final assessment of good practices**

German law as it stands prohibits the discrimination on grounds of sex; it does not, however, alleviate the gender pay gap or overcome the structural grounds for pay inequality.

Germany has tried to implement the Equality Directives and the principle of equal pay – unfortunately not very successfully in many areas. German law neither contains specific mechanisms to implement the principle of equal pay nor effective means to ensure that the principle of equal pay is observed. The difficulties in successfully bringing a court claim are obvious; claims because of pay discrimination are seldom brought to court.<sup>216</sup> More effective tools of implementation, control and sanctions are necessary. In particular, means for collective enforcement seem better suited to tackling the problem of systemic discrimination. Such means should permit courts to scrutinize salary structures.

At the same time, individual remedies must be improved because they are a manifestation of the character of the prohibition of gender-based discrimination as a fundamental right. A legal duty to release information as to pay and other equality-relevant data would be a first and important step in order to enable successful

<sup>212</sup> R. Winter in: W. Däubler (ed.) *Tarifvertragsgesetz*, § 1, marginal notes 455 et seq. (with further references) Baden-Baden, Nomos 2<sup>nd</sup> ed. 2006.

<sup>213</sup> See above, p. 102.

<sup>214</sup> J. Joussen in: W. Boecken & J. Joussen *Teilzeit- und Befristungsgesetz*, § 4, marginal note 3, Baden-Baden, Nomos 2007.

<sup>215</sup> J. Joussen in: W. Boecken & J. Joussen *Teilzeit- und Befristungsgesetz*, § 4, marginal notes 60-61, Baden-Baden, Nomos 2007,

<sup>216</sup> R. Winter, in: W. Däubler, *Tarifvertragsgesetz*, § 1, marginal note 457a (with further references), Baden-Baden, Nomos 2<sup>nd</sup> ed. 2006.

individual claims for equal pay. In addition, better support for victims of discrimination by organisations seems called for, such as class actions. More generally, employers need to actively advance the equality of women. Voluntary measures have largely been unsuccessful – hence the time has come to legally oblige employers to act so as to alleviate the factors that contribute to the absolute pay gap.

## GREECE – *Sophia Koukoulis-Spiliotopoulos*

### 1. General situation

#### *1.1. Difference in general pay level*

The following data concern the ‘unadjusted’ gender pay gap in Greece (not adjusted according to individual characteristics that may explain it). They reflect the difference between men’s and women’s average gross hourly earnings as a percentage of men’s average gross hourly earnings. As Karamessini (2006)<sup>217</sup> points out, we cannot form a comprehensive and reliable picture of the exact level and trend in this gap due to serious limitations of national and EU-wide data sources on earnings. Moreover, some data concern both full-timers and part-timers, while other data concern full-timers only (see below).

Furthermore, not all elements of ‘pay’ in the EU sense are taken into account. This happens e.g. with redundancy payments, which are not considered pay. Their amount depends on length of service and level of pay. As women’s working life is often shorter and their real pay often lower than that of men, their redundancy payments are likely to be lower. Thus, if redundancy payments were taken into account for both men and women, women’s average earnings would be lower and the gender pay gap would be wider. This may be so in other EU countries as well, but we do not know whether it has ever come up.

The *full-timers*’ gap shrank after 1981 and increased from 1994 onward, reaching 18 % in 2001. In 2003, it dropped to 11 % (Eurostat figure referred to by Karamessini 2006). The OECD also reports an 11 % gap for 2004.<sup>218</sup> According to Papapetrou (2007),<sup>219</sup> in 2003, women’s average earnings across the whole pay distribution were 84 % of those of men.

According to Eurostat (2010), the overall pay gap between men and women, including both *full-timers* and *part-timers*, in undertakings with at least 10 employees, was 25.5 % in 2002, 20.7 % in 2006, 21.5 % in 2007, and 22.0% in 2008.<sup>220</sup> The

<sup>217</sup> M. Karamessini ‘The Gender Pay Gap in Greece - Origins and Policy Responses’ in: EU expert group on Gender, Social Inclusion and Employment (EGGSIE) *The gender pay gap - Origins and policy responses. A comparative review of 30 European countries*, p. 53 July 2006, <http://ec.europa.eu/social/main.jsp?catId=748&langId=en&furtherPubs=yes>, accessed 19 March 2010.

<sup>218</sup> OECD *Babies and Bosses-Key Outcomes of Greece compared to OECD average*: [http://www.oecd.org/document/45/0,3343,en\\_2649\\_34819\\_39651501\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/45/0,3343,en_2649_34819_39651501_1_1_1_1,00.html), accessed 19 March 2010.

<sup>219</sup> E. Papapetrou ‘Education, labour market and wage differentials in Greece’ *Bank of Greece Economic Bulletin* No. 28 (February 2007) pp. 51-73 (in Greek): <http://www.bankofgreece.gr/BogEkdoseis/oikodelt200702.pdf>, accessed 18 March 2010.

<sup>220</sup> Eurostat *Gender pay gap in unadjusted form*: [http://epp.eurostat.ec.europa.eu/tgm/web/\\_download/Eurostat\\_Table\\_tsdsc340HTMLDesc.htm](http://epp.eurostat.ec.europa.eu/tgm/web/_download/Eurostat_Table_tsdsc340HTMLDesc.htm); Eurostat *Population and social*

European Foundation for the Improvement of Living and Working Conditions (Eurofound)<sup>221</sup> found an overall unadjusted gap of 21 % to 22 % for 2007.

### **1.2. Gaps in various sectors of occupations and industry**

The overall gap in *industry* in 1995 was 33.2 % (Karamessini & Ioakimoglou 2003);<sup>222</sup> in 2000 it was 31 % (Ntermanakis et al. 2002).<sup>223</sup> For *services* the gap was 29 % in 1995 (Karamessini & Ioakimoglou 2003); and in 2000 it was 20 % (Ntermanakis et al. 2002).

In the *manufacturing and retail* business, the overall gap in both sectors shrank between 1960 and 1998 (Karamessini 2006): for *retail*, in 1995 it was 16 % between male and female full-timers and 11.5 % between male and female part-timers (Ntermanakis 2003).<sup>224</sup>

In *banking*, the gap shrank between 1985 and 1998 (Karamessini 2006), in 1995 the overall gap was 23 % (Ntermanakis 2003) and in 2002 it was 18.5 % (Ioakimoglou 2009).<sup>225</sup>

In *tourism (hotels, restaurants)*, the gap was 15.5 % in 1995 between male and female full-timers, and 13 %, between male and female part-timers (Ntermanakis 2003).

In the *health services*, the overall gap was 23.2 % in 1995, and in 1999 it was 38 % (Ntermanakis 2003).

### **1.3. Differences in private and public sector**

The gap seems wider in the private than in the public sector. In 1998, it was 21 % in the private sector and 9 % in the public sector (Karamessini & Ioakimoglou 2003). Karamessini (2006) points out that the substantial increase of the overall gap in Greece between 1994 and 2001 is exclusively due to its rise in the private sector.

### **1.4. The gap according to age of the working population**

In 2001 and 2003, the overall gap was the lowest in the 25-54 years' age group and among highly-educated workers and it was the highest in the 55-64 years' age group and among the lower-educated workers (Karamessini 2006).

In *retail, tourism (hotels and restaurants)* and *banking* the gap increases with the workers' age: in 1995, for *retail* workers up to 29 it was 5 %; for the 55-59 years' age group it was 39 %. In *tourism*, up to 29 it was 7 %; for the 55-59 years' age group it

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conditions. *Statistics in focus* 3/2010: [http://epp.eurostat.ec.europa.eu/portal/page/portal/product\\_details/publication?p\\_product\\_code=KS-SF-10-003](http://epp.eurostat.ec.europa.eu/portal/page/portal/product_details/publication?p_product_code=KS-SF-10-003), both accessed 20 March 2010.

<sup>221</sup> Eurofound *Addressing the gender pay gap: Government and social partner actions*, 2010: <http://www.eurofound.europa.eu>, accessed 19 March 2010.

<sup>222</sup> M. Karamessini & E. Ioakimoglou *Determinants of the gender pay gap* Athens, Research Centre for Gender Equality (Κέντρο Ερευνών για Θέματα Ισότητας, ΚΕΘΙ) (KETHI) 2003 (in Greek): <http://www.kethi.gr>, accessed 20 March 2010.

<sup>223</sup> N. Ntermanakis et al. *Towards a closing of the gender pay gap. Country report. Greece*, KETHI 2002: [http://www.suchthilfe.net/peripherie/docs/genderpaygap/greek\\_finalreport.pdf](http://www.suchthilfe.net/peripherie/docs/genderpaygap/greek_finalreport.pdf), accessed 22 March 2010.

<sup>224</sup> N. Ntermanakis *Pay inequality in selected branches and professions in Greece: the cases of the retail trade, tourism, banking and health* Athens, Research Centre for Gender Equality (Κέντρο Ερευνών για Θέματα Ισότητας, ΚΕΘΙ) (KETHI) 2003 (in Greek): <http://www.kethi.gr>, accessed 20 March 2010.

<sup>225</sup> E. Ioakimoglou *The pay gap between men and women in the banks* Institute of Employment of the Federation of Bank Employees Organisations (Ινστιτούτο Εργασίας Ομοσπονδίας Τραπεζοϋπαλληλικών Οργανώσεων Ελλάδος - ΙΝΕ ΟΤΟΕ) Athens 2009: <http://www.ine.otoe.gr>, accessed 18 March 2010.



was 26 % (Ntermanakis 2003). In *banking*, in 1995, for up to 29 , there was a negative gap (5.7 % in favour of women); for the 55-59 years' age group it was 30.7 % gap in favour of men (Ntermanakis 2003). In 2002, the 20-30 years' age group (which included an important percentage of university graduates) saw a negative gap (in favour of women), and the 60-64 years' age group of university graduates had a pay gap of 10 %. For high school graduates, the variations were analogous, but the gap in the 55-59 years' age group was 25 %. Workers of the 55-59 years' age group who had not completed high school saw a gap of 36 % (Ioakimoglou 2009).

## **2. The legal framework**

### **2.1. Constitution and legislation**

Article 22(1)(b) of the Constitution (Const.) reads: 'All workers, irrespective of sex or other distinction, shall be entitled to equal pay for work of equal value.' This provision is wider in scope than Article 141 TEC (now 157 TFEU) in that it prohibits discrimination on any ground whatsoever. According to the Supreme Special Court, it applies to employment under private law only, not to employment under public law.<sup>226</sup> Thus, it can be invoked against individual employers or private undertakings and against the State and other public bodies by persons employed by them under a contract of private law. It is the general gender equality provision of Article 4(2) Const. ('Greek men and women have equal rights and obligations') that the courts apply to employment under public law (civil servants of the State, local authorities and other legal entities governed by public law). The reference to Greeks in Article 4(2) does not seem to create any problems regarding European Union citizens.

Act 3488/2006 transposing Directive 2002/73 has a very wide scope. It covers all workers in the private and public sector, under any relationship or form of employment, including contracts for services (*contrats d'ouvrage*) and remunerated mandates (e.g. for regularly retained company lawyers), the liberal professions and professional trainees. This statute copies the Article 141 TEC (now 157 TFEU) definition of 'pay' and requires non-discriminatory job evaluation and classification – a vague requirement, since no specific measures or criteria are provided to this effect by the legislation or collective agreements. The issue of the fairness of existing job evaluation and classification does not seem to have come up in practice. It also copies the Directive 2002/73 definitions of direct and indirect discrimination and prohibits such discrimination 'on grounds of sex, by reference in particular to family status' in all areas included in its scope (hence also in pay). It does not include job evaluation criteria. Directive 2006/54 (recast) has not yet been transposed.

### **2.2. Collective agreements**

There is a long tradition of collective agreements for workers on a private-law contract. They are made in writing, after collective bargaining between unions and employers' organisations or individual employers. They may deal with any terms and conditions of employment and social security, except pensions; in practice, their main object is *minimum* wages (monthly for white-collar workers, daily for manual workers) (legal *minimum*). Collective agreements, in particular n.g.c.a.s (see below) also often improve maternity protection and measures for work-family reconciliation. Collective agreements concern full-timers, with part-timers having proportional

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<sup>226</sup> Supreme Special Court No. 16/1983.

rights, in accordance with Article 38(7) of Act 1892/1990 (see below, in 7.4). The categories are the following:

(i) *national general agreements* (n.g.c.a.), concluded by the General Confederation of Labour and employers' federations (fixing *minimum* pay and other terms and conditions of work, for all workers in the country); (ii) *branch agreements* (for several undertakings that produce the same or similar products in a town or region or in the whole country); (iii) *undertaking agreements* (applying to all workers in the undertaking – in practice rather scarce); (iv) *national professional agreements* (for a certain profession); (v) *local professional agreements* (for a profession in a town or region). The n.g.c.a.s are *legally binding* as a *minimum* on all employers in the country. Agreements under (ii), (iv) and (v) are binding for employers and workers belonging to the signatory organisations. Undertaking agreements are binding on the undertaking for all its workers. All agreements are *legally enforceable* (Act 1876/1990).

Consequently, workers of an undertaking may be covered by several agreements, e.g. by the n.g.c.a. only, or in some respects by the n.g.c.a. and in other respects by a branch agreement (ii) or a national or local professional agreement (iv, v). Workers of several undertaking may be covered by the same agreement, e.g. by the n.g.c.a. only or in some respects by the n.g.c.a. and in other respects by a branch agreement or a national or local professional agreement. It is the more favourable agreement that prevails.

A recent development that weakens the guarantee of *minimum* national standards must be noted. Article 3(2) of Act 1876/1990 did not allow that these standards, as fixed by n.g.c.a.s, be lowered by any collective agreement of a narrower scope (i.e. those mentioned above under (ii), (iii), (iv) and (v)). However, this is now allowed by Article 2(7) of Act 3845/2010.<sup>227</sup> Thus, the hierarchy of collective agreements – an important safety net against poverty and social exclusion which hit women strongly – was overturned and collective autonomy was restricted. This is very likely to widen the gender pay gap. Moreover, this provisions seems incompatible with ILO Convention 87 (freedom of association and protection of the right to organise),<sup>228</sup> hence also with Article 28 of the Charter of Fundamental Rights (right of collective bargaining and action), which must be read in the light of this Convention (see Article 53 of the Charter).

Civil servants' unions may conclude agreements with the State, local authorities or other legal persons governed by public law as their employers (Act 2738/1999). However, their pay is not fixed by collective agreements; it is fixed by statute (Act 3205/2003).

### 3. Instruments of social partners

There are no legislative provisions, collective agreements or other instruments inducing social partners to deal with equal pay. Act 3488/2006 transposing Directive 2002/73 merely stipulates that the State encourages the dialogue between social partners with a view to promoting gender equality (Article 18) without providing measures to this effect.

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<sup>227</sup> Act 3445/2010 'Measures for implementing the mechanism of support of the Greek economy by the Euro area Member States and the International Monetary Fund' OJ A 65/6.5.2010.

<sup>228</sup> See e.g. 'Liberté syndicale et négociation collective' (Étude d'ensemble de la Commission d'Experts pour l'application des conventions et recommandations), Conférence internationale du Travail, 81<sup>e</sup> session, 1994, paragraphs 195 and 249.



Act 3491/2006 (Article 8) set up a National Commission for Gender Equality, with a biennial mandate. It was composed of representatives of ministries, local authorities, the Economic and Social Committee, social partners' federations, three NGOs and two experts, and was chaired by the Minister of the Interior. This body was meant to implement the requirements of Directive 2002/73 for social dialogue and dialogue with civil society. It was to propose gender equality policies and measures and assess their implementation. It does not seem, however, that it had any impact on any policies, including pay, as it did not propose any concrete measures nor did it assess the implementation of existing measures.

Collective bargaining is instrumental in promoting measures for reconciling family and work. However, neither indirect discrimination nor the pay gap seems to be among unions' priorities, probably due to the low unionization of women. Thus, while direct discrimination was eradicated, professional classification, based on felt-fair traditional, non-transparent criteria, remains unchanged and under-classification of predominantly female categories persists, making indirect discrimination very probable. No review of classifications has been undertaken, in search of indirect discrimination.

In the 1993 n.g.c.a. (see above, in 2.2) the social partners acknowledged the gender equality principle. They agreed to contribute to its implementation, including in *pay*, and established a bipartite gender equality committee which would propose specific measures to this effect. The 1996-1997 n.g.c.a. established a bipartite gender equality body. It is not clear whether these clauses were implemented. The proposals of the General Confederation of Labour (GSEE) for the 2010 n.g.c.a. include important clauses on maternity protection and reconciliation of family and work, but they do not mention the gender pay gap.<sup>229</sup>

Some branch agreements contain clauses on gender equality, without mentioning the pay gap. Some examples are the banking sector agreements, signed by the Bank Employees' Federation (OTOE), a powerful branch union.<sup>230</sup> The 1994 agreement created a bipartite equal opportunities committee in each bank, with the task to monitor the position of women and contribute to ensuring equal opportunities. The 1996 agreement created such a committee at branch level. The 1997 agreement granted the bank committees the power to give opinions on complaints. It is not clear how these clauses are implemented.

#### **4. Instruments specifically aimed at employers**

Article 11 of Act 3488/2006 transposing Directive 2002/73 requires that employers promote gender equality in a planned and systematic way and impart information to workers, their representatives, the Ombudsman, the Ministry of Employment and the Labour Inspectorate, at their request. This information may include the proportion of men and women in all levels of the undertaking and equality measures planned by the employer in collaboration with workers' representatives. There are no data on the implementation or impact of this provision. There is no provision obliging employers to address equal pay.

The General Secretariat of Gender Equality (GSGE), a public service, formerly under the Ministry of the Interior and currently under the Ministry of Justice, has introduced *incentives* for employers to promote gender equality, in particular by

<sup>229</sup> General Confederation of Labour (GSEE) (Γενική Συνομοσπονδία Εργατών Ελλάδας - ΓΣΕΕ): [http://www.gsee.gr/left\\_menu\\_files/left\\_m\\_p.php?p\\_id=13&men\\_pos=2](http://www.gsee.gr/left_menu_files/left_m_p.php?p_id=13&men_pos=2), accessed 20 March 2010.

<sup>230</sup> Federation of Bank Employees' Organisations (Ομοσπονδία Τραπεζοϋπαλληλικών Οργανώσεων Ελλάδος - ΟΤΟΕ): <http://www.otoe.gr>, accessed 15 March 2010.

means of: i) a project called ‘Positive Action in favour of Women in Medium-Small & Big Enterprises’ providing financial incentives to undertakings for women’s training, creating childcare centres and imparting information on gender equality, with a view to encourage the promotion of women to high posts; ii) a Memorandum of Cooperation with the Hellenic Network for Corporate Social Responsibility (HNCSR) for promoting gender equality, involving an Equality Prize to undertakings excelling in positive action; iii) a Protocol of Cooperation with the largest federations of employers’ organizations and the HNCSR for promoting gender equality in undertakings.<sup>231</sup> Although the pay gap is not mentioned, these actions may lead to its reduction.

The Greek State does not use public procurement to promote gender equality.

## **5. Other instruments to close the pay gap**

There are no other instruments to close the pay gap.

## **6. Problems of enforcement and how to tackle them by good practices**

**6.1.** All Greek courts review the conformity of statutes to the Constitution, EU law and ratified treaties, and set aside those that they deem contrary thereto. Statutory provisions may be declared invalid because of unconstitutionality by the Special Supreme Court, when supreme courts have given conflicting judgments on their constitutionality (Article 100 Const.). The remedies below are also used for pay claims or cases that have repercussions on pay. The Ombudsman, an independent authority designated as the equality body, opens investigations, but it cannot lodge judicial proceedings, make binding decisions or impose sanctions; it mainly deals with complaints through mediation. Labour inspectors have wide investigating powers: they can visit undertakings and check their workplaces and files any time, day or night; they can impose fines and lodge complaints with penal courts, but they seldom use their powers for violations of gender equality law.<sup>232</sup>

### **6.2. Remedies in administrative courts**

*Administrative acts of general applicability* (including acts fixing pay and collective agreements extended by ministerial decision<sup>233</sup>) can be challenged for annulment before the Supreme Administrative Court (Council of State), on points of law, within sixty days from their publication in the OJ. The annulment has retroactive effect *erga omnes* (the annulled provision is invalid from the date that the act was issued); the lawful provisions of the act remain in effect and are applied to the persons that were covered by the annulled provision. Thus, the annulment amounts to an amendment of the act.<sup>234</sup> *Certain individual administrative acts* may be challenged for annulment on points of law before an administrative court of appeal, within sixty days from the claimant’s knowledge of the act.<sup>235</sup> The Council of State rules in the last instance upon appeal. Among these acts are acts regarding the appointment and status,

<sup>231</sup> General Secretariat for Gender Equality: <http://www.isotita.gr>, accessed 22 March 2010.

<sup>232</sup> See Labour Inspectorate annual reports: <http://www.ypakp.gr>, accessed 22 March 2010.

<sup>233</sup> An agreement that binds employers employing at least 51 % of the workers of a branch or profession may be extended by decision of the Minister of Labour to the whole branch or profession.

<sup>234</sup> ‘Petition for annulment’ (αίτηση ακυρώσεως), Article 45-50 Decree 18/1989.

<sup>235</sup> Act 702/1977.

including promotion, of civil servants,<sup>236</sup> which have repercussions on pay. In view of the ‘glass ceiling’ blocking women’s advancement, such acts may contribute to the gender pay gap. *Individual administrative acts* may be challenged for annulment or modification, on both points of law and points of fact, before a first instance administrative court, by a ‘recourse’, sixty days from the claimant’s knowledge of the act.<sup>237</sup> Among these acts are acts relating to social security benefits, including benefits replacing pay during maternity leave.

Civil servants may bring an *action* for pay before a first instance administrative court.<sup>238</sup> The time limit is two or five years, depending on the legal basis.<sup>239</sup> Appeals are heard by administrative courts of appeal and final appeals by the Council of State.<sup>240</sup>

All appeals and final appeals must be lodged within sixty days from the service of the ruling appealed against or, if it is not served, three years from the date it was taken.

The *locus standi* of unions to pursue claims of workers in administrative courts is limited. They may only seek the annulment of administrative acts of general applicability which affect all their members or a category thereof, provided that the annulment affects the interests of no other category of members.<sup>241</sup> Unions may not challenge an individual administrative act which is prejudicial to one of their members nor bring an action for a member’s claim. Act 3488/2006 transposing Directive 2002/73 does not extend this *locus standi* nor does it grant *locus standi* to other organisations.

*Interventions* in favour of claimants in annulment trials are not allowed by procedural legislation. In case of a ‘recourse’ or action, only a third party who has a personal legal interest may intervene in favour of the claimant.<sup>242</sup> Article 12 of Act 3488/2006 allows unions and other organisations to intervene in any trial in favour of the claiming worker. However, instead of requiring the claimant’s ‘*approval*’, in accordance with the Directive, it requires his/her ‘*consent*’. The ‘*approval*’ can be given *a posteriori*, while the ‘*consent*’ must be given *a priori* (Articles 236, 238 Civil Code); thus, the right to intervene may well be time barred before the consent is given. Moreover, as this provision is not included in the procedural codes, it is mostly unknown and not applied.

The *burden of proof* rule is included in legislation transposing Directives 97/80 and 2002/73, but not in the procedural codes, as the Council of State recommended; it is thus also mostly unknown and not applied.<sup>243</sup>

### **6.3. Remedies in civil courts**

Workers on a private-law contract may bring an *action* for pay before a first instance civil court. The time limit is five years.<sup>244</sup> Appeals are heard by the civil courts of

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<sup>236</sup> Articles 58-67 Decree 18/1989.

<sup>237</sup> ‘Recourse’ (προσφυγή), Articles 63-70 Administrative Procedure Code (Act 2717/1999).

<sup>238</sup> Articles 63-70 and 71-78 Administrative Procedure Code.

<sup>239</sup> Article 90 Act 2362/1995, Article 44 Act 496/1974 (time bar of the claims).

<sup>240</sup> Appeal: Articles 92-100 Administrative Procedure Code. Final appeal: Articles 53-57 Decree 18/1989.

<sup>241</sup> Council of State Nos 1082/2001, 1389/2005.

<sup>242</sup> Article 113 Administrative Procedure Code (Act 2717/1999).

<sup>243</sup> Council of State opinion No. 348/2003 on the legality of the draft decree transposing Directive 97/80.

<sup>244</sup> Articles 663-676 Civil Procedure Code; Article 250 Civil Code (time bar of the claim).

appeal and final appeals by the Supreme Civil Court,<sup>245</sup> within thirty days from the service of the ruling appealed against, or three years from the date it was taken, if it is not served.

The *locus standi* of unions to pursue workers' claims in civil courts is limited. They may only lodge actions for members' claims that are based on collective agreements, unless the member objects, and intervene in favour of members in any trial.<sup>246</sup> Act 3488/ 2006 does not extend this *locus standi*. It only allows an intervention, with the disadvantages mentioned above, which also affect the *burden of proof* rule (see above, in 6.2).

#### **6.4. Penal and administrative sanctions**

Employers breaching labour law incur a fine imposed by the labour inspector (Article 16(2) Act 3488/2006). Employers delaying payment of wages fixed by collective or individual agreement or legislation are liable to penal sanctions (fines or imprisonment up to three months), upon complaint of the aggrieved worker, his/her union, the labour inspector or the police (Act 690/1945). This could contribute to narrowing the pay gap, by improving the position of women. However, women, although more likely to be paid lower wages than those provided by wage fixing instruments, are also more likely not to complain about it. Moreover, labour inspectors' control is inadequate regarding gender discrimination, including pay inequalities (see above in 6.1. and below in 6.11). Thus, although discrimination against women regarding pay seems to occur often, it does not seem to be punished with the above penal sanctions, something that contributes to the maintenance of the pay gap.

#### **6.5. Case law**

The courts interpret the Constitution and legislation in the light of EU law regarding the meaning of *pay*, and they adopt a *levelling up* solution.<sup>247</sup> However, in spite of existing discrimination (direct and indirect in the private sector, mostly indirect in the public sector), gender equality litigation is limited. *Equal value* and *indirect discrimination* are scarce issues. There are no equal value criteria and there is a tendency to justify different treatment on budgetary grounds and by mere generalisations. This was shown in the *Nikoloudi* case, where preliminary questions concerned, *inter alia*, indirect discrimination in pay. There do not seem to be any further developments in Greek courts regarding this case. Thus, the effectiveness of this ECJ (now 'Court of Justice of the European Union') judgment cannot be measured.<sup>248</sup>

**6.6.** Most equal pay judgments do not concern gender discrimination (which is not the only ground prohibited by Article 22(1)(b) Const.; see above, in 2.1). Thus, the criteria for the application of the equal pay principle derive from cases dealing with other grounds of discrimination. Gender discrimination judgments mostly concern the notion of *pay*.

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<sup>245</sup> Articles 511-537 and 552-582 Civil Procedure Code.

<sup>246</sup> Article 669 Civil Procedure Code.

<sup>247</sup> See S. Koukoulis Spiliotopoulos 'Gender equality in Greece and effective judicial protection: issues of general relevance in employment relationships' *Neue Zeitschrift für Arbeitsrecht* Beilage 2 (2008) pp. 74-82.

<sup>248</sup> Case C-196/02 *Nikoloudi* [2005] ECR I-1789.

**6.7.** Some judgments refer to the ‘same nature and value’ of the jobs compared, without further specification and without questioning the classification made in collective agreements or legislation. The *major premise* of judicial reasoning is usually as follows: The equal pay principle applies to workers employed by the same employer who belong to the same category, have the same formal qualifications and provide the same services under the same conditions. It does not apply to workers who have different formal qualifications or discharge different duties, even where they perform the same work under the same conditions. Some judgments require that the content of the work performed be specified, but the criteria required are not clear.<sup>249</sup>

**6.8.** Pay differences, even in the same undertaking or service and for the same work are deemed lawful, *inter alia*, when the legal nature of the employment relationship of the workers compared is different (e.g. private-law contract v. public-law relationship); or the workers are covered by different wage fixing instruments; or one of them is covered by such an instrument, while the other is not covered by any instrument regarding the element of pay at stake.<sup>250</sup>

**6.9.** Thus, comparisons are made *in the same undertaking or service*: i) between workers covered by the same instrument, whose employment relationship is of the same legal nature (see above, in 6.8); ii) on the basis of individual agreements, regarding pay above the legal *minimum* (see above, in 2.2) or where the workers are not covered by any instrument; iii) for benefits paid voluntarily by the employer.<sup>251</sup> Comparisons *across* undertakings or sectors are made between workers covered by the same instrument, e.g. the national general collective agreement or a branch or national professional collective agreement which applies to workers of several undertakings. As undertaking agreements are rather scarce and many undertakings may be covered by the same agreement(s) (see above, in 2.2), such comparisons can often be made. However, it is the total amount of pay that is compared, not every element thereof,<sup>252</sup> as required by the ECJ.<sup>253</sup>

**6.10.** The maximum period for back pay is two or five years for claims before administrative courts and five years for claims before civil courts (see above, in 6.2 and 6.3). Where the factual and legal basis of a claim is the same as the basis of a claim that was upheld by final judgment, the *res judicata* can be invoked. Pensions that were lower due to discrimination in pay are adjusted on the basis of such *res judicata*.

### **6.11. Conclusion**

Litigation levels are very low as compared to existing discrimination. *Enforcement problems* are mainly due to inadequate transposition of the directives, in particular regarding unions’ *locus standi* and the *burden of proof*, to non-clarification of the ‘equal value’ notion and to lack of value assessment criteria. The last two aspects may explain the restrictive Supreme Civil Court case law, which may discourage women from pursuing their cases. Moreover, while the Ombudsman fulfils his/her tasks

<sup>249</sup> Supreme Civil Court Nos 242/2007, 684/2007, 1483/2006, 107/2006, 1818/2005, 1483/2006.

<sup>250</sup> Supreme Civil Court Nos 3/1997 (Plen.), 1451/2003, 1065/2002, 800/2002; 288/2003; 453/2002.

<sup>251</sup> Case C-262/88 *D. H. Barber v Guardian Royal Exchange Assurance Group* [1990] ECR I-1889.

<sup>252</sup> Supreme Civil Court No. 1165/2006.

<sup>253</sup> Case C-262/88 *D. H. Barber v Guardian Social Exchange Assurance Group* [1990] ECR I-1889.

effectively, the same is not true for the Labour Inspectorate, admittedly due to understaffing and lack of material means, which it deplores in its own reports (see above, in 6.1).

## **7. Relationship between the gender pay gap and other parts of employment law**

**7.1.** According to the legislation and collective agreements, overtime, night work, as well as work on Sundays and holidays give employees the right to a higher hourly pay (Article 1 Act 3385/2005, Decree 748/1966). As, due to family obligations, women are more likely to avoid overtime, night and Sunday work, they often do not receive such pay supplements.

**7.2.** Statutory provisions and internal rules allow *dismissal at pension age* (which is often lower for women). Thus, women are deprived of possibilities of promotion and higher pay and pension. The Supreme Civil Court found these provisions contrary to Article 4(2) Const. and Directive 76/207,<sup>254</sup> but they remain on the books and are still applied.

**7.3.** *Seniority or length of service* increases pay in various ways. Collective agreements provide for 'triennial allowances' at a percentage of the basic *minimum* wages, for length of service with any employer. Length of service also entitles to seniority allowances by the same employer, and it conditions basic salary increases and redundancy pay. Women are disadvantaged by this system due to career breaks and atypical work arrangements.

**7.4.** *Atypical work:* *Fixed-term* workers were 10 % of all workers in 2009; 70 % of them were women. State schoolteachers employed on a private-law fixed-term contract – a quite large and overwhelmingly female category – are disadvantaged in pay (e.g. their seniority/length of service is not taken into account; they cannot work overtime). *Part-timers* were 6 % of all workers; 70 % of them were women. The main reason to work part time is the impossibility to find full-time work (43 % for men, 86.6 % for women); care of children and the elderly is the reason for 23.2 % of the women and 0.2 % of the men.<sup>255</sup> The hourly pay is proportional to the hourly full-time pay for the same work (Article 2 Act 2639/1998); this may create indirect discrimination for work which is not the same, but of equal value. Overtime pay supplements are due for work in excess of the agreed part-time hours at a 10% rate, which is less than the overtime rate for full-timers.<sup>256</sup> It is only when they exceed the full time limit (45 hours for a five-day week or 48 hours weekly for a six-day week), that part-timers are entitled to the higher overtime rate applying to full-timers; this may be considered indirect discrimination against women. *Temporary work* is performed by workers who are hired by a 'temporary employment company' (direct employer) and temporarily 'lent' to other (indirect) employers. This form of employment also concerns cleaners (overwhelmingly women, mostly immigrants). Although the setting up and activity of such companies and their obligations, along

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<sup>254</sup> Supreme Civil Court Nos 85/1995, 449/1999 (Article 5(1) Act 435/1976).

<sup>255</sup> Labour Institute of the General Confederation of Labour & the Civil Servants Federation (*INE GSEE/ADEDY*) *Enimerossi* 151/2008, 164 and 165/2009: <http://www.inegsee.gr>, accessed 20 March 2010.

<sup>256</sup> Article 2(11) of Act 3846/2010 OJ A 66/11.5.2010.

with the indirect employers' obligations are regulated by law (Act 2956/2001), control is inadequate and working conditions, including pay, are very bad.<sup>257</sup>

7.5. *Immigrants*, in 2009, were 11.3 % of workers (1/3 of them women), mostly in atypical or informal work (see above, in 7.4) as unskilled workers. It seems that the gender pay gap is wider than for other workers and that women are victims of multiple discrimination.<sup>258</sup>

7.6. The *female unemployment* rate is 1.5 times higher than the average and more than twice as high as the male rate.<sup>259</sup> Measures to combat it include subsidies (funded by the European Social Fund) to employers for hiring unemployed workers or to young unemployed for setting up a business. They favour women directly (by giving them priority) or indirectly (by giving priority to mostly 'female' categories, such as the long-term unemployed or single-family heads). However, female unemployment is rising fast.

7.7. The courts traditionally favour *maternity/parental protection*, but some recent judgments conflict with EU law. It was held, e.g., that maternity protection ends upon expiry of a fixed-term contract, the employer not being obliged to renew it; and that a woman/a parent was not entitled to a voluntary pay rise given during maternity/parental leave to all colleagues performing the same work.<sup>260</sup> Dismissal during pregnancy and one year after childbirth or longer, in case of pregnancy-related sickness, is prohibited, and mothers are entitled to their previous position upon return from maternity leave,<sup>261</sup> but infringements are not rare. Most complaints to the Ombudsman concern such infringements.<sup>262</sup> In the public sector, maternity and parental leave are fully paid. In the private sector pay during maternity leave is mostly replaced through social security benefits. However, in the private sector, women who are pregnant or on maternity leave are worse off than workers who are sick, when they have a short working period: social security benefits replacing pay are subject to two hundred working days within the two years preceding the probable childbirth date, while sickness benefits are subject to only one hundred working days within the year preceding sickness.<sup>263</sup> *Parental leave* in the private sector is unpaid.

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<sup>257</sup> See *INE GSEE/ADEDY Labour relationships in the cleaning sector – Results of an empirical research* Athens, 2009: <http://www.inegsee.gr>; Greek National Commission for Human Rights [http://www.nchr.gr/media/gnwmateuseis\\_eeda/ergasia/fin\\_EEDA\\_ergolavikes\\_anatheseis\\_ioul09.doc](http://www.nchr.gr/media/gnwmateuseis_eeda/ergasia/fin_EEDA_ergolavikes_anatheseis_ioul09.doc), accessed 9 March 2010.

<sup>258</sup> See *INE GSEE/ADEDY Labour relationships in the cleaning sector – Results of an empirical research* Athens, 2009: <http://www.inegsee.gr>; Greek National Commission for Human Rights [http://www.nchr.gr/media/gnwmateuseis\\_eeda/ergasia/fin\\_EEDA\\_ergolavikes\\_anatheseis\\_ioul09.doc](http://www.nchr.gr/media/gnwmateuseis_eeda/ergasia/fin_EEDA_ergolavikes_anatheseis_ioul09.doc), both accessed 9 March 2010. See also N. Ntermanakis et al. *Towards a closing of the gender pay gap. Country report. Greece*, KETHI 2002: [http://www.suchthilfe.net/peripherie/docs/genderpaygap/greek\\_finalreport.pdf](http://www.suchthilfe.net/peripherie/docs/genderpaygap/greek_finalreport.pdf), accessed 22 March 2010.

<sup>259</sup> *INE GSEE/ADEDY Enimerossi* 164/2009 (immigrants, unemployment), accessed 20 March 2010.

<sup>260</sup> Supreme Civil Court Nos 1341/2005 and 1221/2004, respectively.

<sup>261</sup> Article 15 Act 1483/1984, Article 5(3)(b) Act 3488/2006.

<sup>262</sup> Ombudsman Special Report *Equal treatment of men and women in employment and labour relationships* November 2009: <http://www.synigoros.gr/diakriseis>, accessed 20 March 2010.

<sup>263</sup> Articles 39 and 35(1) Act 1846/1951 (statutory scheme for workers on a private-law contract, *IK4*).



7.8. A *glass ceiling* persists in most sectors, even where women are the majority (e.g. education, health services),<sup>264</sup> seemingly due to indirect discrimination, but it is not addressed by either collective bargaining or legislation.

7.9. The principle of *party autonomy* in contract law is limited by the horizontal effect of the constitutional gender equality and equal pay principles and by legislation transposing the gender equality directives. However, assessment for hiring purposes often lacks transparency, in particular due to interviews whose content cannot be proved. Promotion systems either lack transparency or rely on indirectly discriminatory criteria (glass ceiling, see above).

7.10. The Hellenic Data Protection Authority (HDPa), relying on the principle of equal treatment and also referring to Act 3304/2005 that transposed Directives 2000/43 and 2000/78, held that the employer must supply a worker with other workers' *personal data*, when he/she needs them for the review of his/her own assessment by the employer.<sup>265</sup>

7.11. The rules on unions' *locus standi* and on the burden of proof are ineffective not only in courts (see above in 6.2, 6.3), but also in proceedings before administrative authorities, as they are not included in the Administrative Process Code (Act 2690/1999).

## 8. Final assessment of good practices

The pay gap is mainly due to the fact that women's 'real' pay is lower than men's 'real' pay. Legislation and collective agreements contribute to the pay gap, mainly by indirect discrimination in pay (due to persisting traditional, felt-fair, non-transparent job classifications), or other working conditions, e.g. promotion or dismissal. However, the pay gap is *terra incognita* in Greece. It is not on the agenda of either state authorities or social partners, while legal authors, practitioners and workers are not aware of it. Gender equality litigation levels are very low, in spite of discrimination in practice, which mostly affects women. High and constantly rising female unemployment, in particular in times of economic crisis, limited *locus standi* of unions, non-application of the burden of proof rule and restrictive equal pay case law are important deterrents for women's recourse to courts or other authorities. Moreover, women may delay, interrupt or give up employment due to difficulties in reconciling work with family obligations. Thus, effective transposition of EU procedural rules, along with strong measures in favour of reconciliation of work and family and effective implementation thereof, are crucial. Pay during parental leave in the private sector should be replaced by social security benefits.

The adverse factors mentioned above, in the framework of a largely segregated labour market<sup>266</sup> marked by women's concentration in low-paid jobs, employers'

<sup>264</sup> INE GSEE/ADEDY Enimerossi 151/2008: <http://www.inegsee.gr>, accessed 20 March 2010; Center for Research on Equality Issues (KETHI) *Equal Andromeda Project*: [www.kethi.gr](http://www.kethi.gr), accessed 20 March 2010.

<sup>265</sup> HDPa Decisions Nos 1/2008 and 35/2008: <http://www.dpa.gr/portal>, accessed 25 March 2010. The HDPa is an independent authority which issues opinions and recommendations on data protection and imposes administrative sanctions for violation of data protection legislation.

<sup>266</sup> See N. Ntermanakis 'Horizontal-professional segregation in the Greek labour market', in KETHI 3<sup>rd</sup> Statistical Bulletin: <http://www.isotita.gr>, accessed 22 March 2010. M. Karamessini & E. Ioakimoglou 'Wage determination and the gender pay gap: a feminist political economy analysis



reluctance to hire, keep and promote female workers, and the stereotype that women are occasional and dispensable workers, weaken their bargaining power. Thus, where pay exceeds the legal *minimum*, women cannot compete with men. The recent change in the hierarchy of collective agreements is very likely to worsen women's situation (see above 2.2) Professional desegregation can be achieved by educational desegregation *via* vocational orientation. State and social partners' initiatives for the promotion of gender equality, while not tackling the pay gap *per se*, may contribute to its narrowing, in particular when they involve strong incentives for employers to hire women and promote reconciliation of family and work. However, we have found no impact assessment of such initiatives. Moreover, the Labour Inspectorate needs strengthening and continuous training, in order to be able to use its important powers in favour of gender equality.

## HUNGARY – Csilla Kollonay Lehoczky

### 1. General situation

The average pay gap in Hungary is 20.8 % for gross wages and 17.8 % for net wages. The gross median pay gap is indicated to be 14 % by a recent survey published in 2009.<sup>267</sup> This is higher than the 11 % reported by the National Statistical Office or by other sources. In all surveys, the overall average widely varies and there are strong differences in the pay gap according to training and education level and length of employment career: women with a higher level of education, not too young, with a longer employment history and in a higher position suffer relatively stronger wage discrimination.

Surprisingly, the pay gap is higher in the public sector (22 %), than in the private sector (18 %). The pay gap grows with the size of the employer and with the executive level. While the pay gap is normally higher in sectors and occupations where men outnumber women in comparison to women-populated fields,<sup>268</sup> the pay gap still remains in these fields, too. The intention of employers to attract and retain male employees at such workplaces, for example in the teaching profession, by preferential treatment is widely known. It is notable that female wages are higher in the construction industry, which is a traditionally male sector. One possible explanation is given by the survey, i.e. that women rather fill clerical positions than physical jobs. Another explanation might be the widespread occurrence of non-reported labour and non-reported income in the Hungarian economy, which keeps reported salaries at a minimum level while the 'supplement' is the 'real' pay, frequently a multiple of the formal, reported wage. Such 'extras'<sup>269</sup> are free zones for gender discrimination. The wider pay gap at larger companies, in the capital city, in

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and decomposition', *Feminist Economist* 13(1) January 2007, pp. 31-66, strongly emphasise gender segregation, followed by accumulated work experience.

<sup>267</sup> S. Borbély & M. Vanicsek *Wage differences between men and women* p. 26. (For more detailed bibliographic information, see the list of relevant literature.) This study will be used in the report as the main source of recent information. It is based on data gained from 10 000 questionnaires collected from voluntary respondents through the 'BerBarometer' (Wage Barometer) website, established by the EQUAL project H005 'Equal pay for equal work! Establishing e-WageBarometer in partnership' (July 2005-April 2008) through the co-operation of trade unions and a civil organization, featuring an online questionnaire, collecting data, establishing a database and publishing studies on that basis. See: [www.berbarometer.hu](http://www.berbarometer.hu), accessed 31 May 2010.

<sup>268</sup> A. Rigler & M. Vanicsek *Sex-based inequalities in the labour market* p. 19.

<sup>269</sup> Mentioned in another context also by Borbély-Vanicsek, on p. 27.

certain sectors, such as the public sector, may, in part, also be connected to the more formalized operation in these areas, which means more formally regulated management and decision making, less face-to-face personal relations, more formalized money movement through banks, more paper work, more public visibility which, on the whole, imply less opportunity to resort to non-reported payment. The number of children clearly increases the pay gap, in each sector, occupation and level. The net pay gap is 25-26 % with 2 or more children, where it is 8 % for women without children and 14 % in case of women with one child.

In summary: the causes of the persistent gender pay gap are attributable in part to the labour market attributes of women determined by social roles and stereotypes, and in part to discriminatory practices especially at the two 'ends' of the job and wage hierarchy: at the upper end (high level of education, high level of position, high wages) where salaries might largely depend on the individual negotiating power of the employees, the higher gap might be attributed to the lower individual capacity of women – determined, again, by group (class) attributes of women as well as by the overall position of women on the labour market. The biggest pay gap is found in the real estate business and in economic and financial services, moving between 31 and 34 %. Going down on the 'status' ladder and money-making perspective of occupations, the pay gap narrows, and even shifts. It is lowest in sectors that are characterized by the lowest wages.<sup>270</sup>

## 2. The legal framework

The legal framework is determined by the Constitution, the Equality Act and the Labour Code. The Constitution, in addition to its general non-discrimination provision, specifically guarantees the equality of men and women in respect of all civil, political, economic, social and cultural rights (Article 66, Paragraph 1) and the right to equal pay for everyone (Article 70/B, Paragraph 2). The Equality Act<sup>271</sup> lays down detailed norms regarding the possible violations of equal treatment within employment, including the provision of wages and other benefits beyond the general obligation to observe equal treatment in all kinds of relations.

The Labour Code<sup>272</sup> contains a special 'equal pay Article' (Article 142/A, paragraph (1)) adopted in order to fully comply with the equality requirements of the EU. It provides that the requirement of equal treatment should be observed in the remuneration of equal work or work that is acknowledged to be of equal value.<sup>273</sup> The equal value of the work shall be assessed on the basis of the nature of the work, its quality and quantity, working conditions, vocational training, physical and intellectual efforts, experience and responsibilities. For the purpose of this provision, 'pay' means, as in Article 157 of TFEU (ex Article 141 of TEC), any compensation, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his employment. Wages based on performance or on the job category should be set in compliance with the principle of equal treatment.

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<sup>270</sup> In public administration and social insurance the gap is only 8 %, in healthcare and social work it is 9 % and in education it is 12 %; Borbély-Vanicsek p. 29. It would be hard not to see that these are 'typical' female jobs as much as they are low paid, but associated with higher job security.

<sup>271</sup> Act CXXV of 2003 on Equal Treatment and Equal Opportunities.

<sup>272</sup> Act XXII of 1992.

<sup>273</sup> Article 142/A, Paragraph (1). The circumspect text expresses the general caution of the drafters.

### 3. Instruments of social partners

While the equal pay principle has to be observed, no general legislative or other provisions oblige the social partners to explicitly include the issue of equal pay in collective negotiations and/or collective agreements with a view to narrowing the gap and, as a rule, they do not. The number of employers and employees covered by a wage agreement (collective agreement) – either concluded by one employer or by multiple employers – has radically decreased in the last decade.<sup>274</sup>

A soft, vague provision that might have prompted the social partners to address the pay gap is Article 70/A of the Labour Code on the ‘Equal Opportunity Plan’ (EOP). Employers may adopt an EOP together with the trade unions or works council. Since this is not an obligation, its adoption depends on the social partners. Regarding the content of a Plan, the wording of the provision shows such caution that rather constitutes a lack of intention to oblige employers to anything. It only mentions ‘analysing’ the situation of disadvantaged groups, including women, formulating ‘annual goals’ and implementing the ‘necessary means’ to achieve the goals, and other ‘programmes’. The vague and soft text of the Labour Code increases the importance of the negotiating capacity (and gender awareness) of social partners.

### 4. Instruments specifically aimed at employers

The Equality Act makes the adoption of an Equal Opportunity Plan (EOP) mandatory for public employers and for employers with a majority state share, provided that they have more than fifty employees. In addition to covering only a limited number of employers, this duty only refers to the adoption of an EOP; its content and implementation depends on the intention of the employer (or on the pressure that employee representatives can exert on the employer). Thus, even if the violation of the duty of adopting such an EOP can be sanctioned (upon a complaint) by the Equal Treatment Authority,<sup>275</sup> there is no legal way to review its content (whether it only consists of empty declarations) or its implementation. The parties may voluntarily include its provisions into the legally enforceable collective agreement, but scarcely do so and even if this occurs it is not about the pay gap, but rather about other issues of equality. A good part of the EOPs are formal, without any true knowledge or perspective of the situation of women.

Voluntary instruments to promote good/best practices – in addition to voluntary adoption and effective implementation of an EOP – could be the various awards (‘Best female workplace’, ‘Family-friendly workplace’, ‘Best workplace’) intended to promote fair employer’s practices in every respect. Unfortunately, these awards are not an effective tool to close the pay gap. Not only because a relatively small group of employers are showing interest in applying for such an award and because smart PR seems to play a major role in winning the award, but also and mainly because none of them seriously considers the applicants’ equal pay policy. The word ‘pay’ is not even found in the list of criteria of the 2009 ‘Best female workplace’ awards and the 2010 application form, and the evaluation form of the ‘Family-friendly workplace’ only addresses wage differences in a loose, general way, asking or saying nothing about

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<sup>274</sup> The number of employers covered by a sectoral or multiple-employers’ wage agreement was 3048 in 1998 and 150 in 2008. The number of employees covered was around 305 000 and 40 000, respectively. The respective numbers of single-company wage agreements are 768 (1998) and 202 (2008), and the rough number of employees covered was 583 000 and 100 000. Labour Market Mirror, 2009, pp. 293-294, statistical charts 10.13 and 10.14.

<sup>275</sup> This is the administrative authority established by the Equal Treatment Act.

wage disclosure issues or the right to information of employees returning from childcare leave.<sup>276</sup>

Regarding the release of information about pay – either individual or aggregate – extreme caution has continuously reigned from the beginning of the shift to a market economy.<sup>277</sup> Wages and other benefits have been considered as strictly private data from the first moment of the transition up to now. True, the Labour Code on the EOP stipulates, that ‘special personal data’ necessary for drawing up the programme of equal opportunities may be processed only if supplied voluntarily by the data subject and in strict observation of the statutory provisions regarding the protection of personal data. But this provision refers to ‘sensitive’ data such as race, ethnicity, religion and political views, and not to wage information. Nonetheless, the handling of pay information has reached the same level of confidentiality, thereby continuing the practice that makes it practically impossible to get information about comparators’ wages.

Act CXXIX of 2003 on Public Procurements gives some minor attention to equal treatment of the bidders’ employees; it cannot influence the gender pay gap. While ‘equal treatment’ of the bidders by the party inviting tenders is given strong emphasis, equal treatment practices by the bidders is only mentioned as an ancillary, potential requirement. Namely, it is an opportunity for the party inviting tenders to include in the invitation for tenders that the contract to be concluded will have a ‘social clause’. In addition to other employment goals, such a contractual clause might include that the bidder has to offer part-time employment to those taking some form of childcare leave, either during the leave or upon its termination and might also include a ‘requirement of measures adopted in order to guarantee equal treatment’. There is no systematic data collected on the provisions required by parties inviting tenders. On the basis of the available information, parties inviting tenders do not include any pay gap provisions in their contracts.

The reason for this and the overall inefficiency of ‘closing the gap’ efforts can be attributed to the lack of genuine ‘political will’. It might be rooted in indifference, misunderstanding (e.g. the lack of manifest discrimination is interpreted as a positive attitude by employers) or in satisfaction with the existing situation regarding pay equality. In contrast to evident facts, the opinion of the respondents – male and female, subordinate and managerial – reflects a belief that there is no notable difference among the wages of men and women at the respondents’ workplace.<sup>278</sup>

The overall attitude towards employers might be illustrated by a handbook intended to raise awareness and to assist employers in promoting gender equality,<sup>279</sup>

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<sup>276</sup> Article 84 of the Labour Code establishes an enforceable right of such employees to have their salary raised in accordance with the average annual wage rise implemented during their absence for employees in the same position with similar experience. A major barrier is the lack of information on the amount of adjustment and the reluctance of the employers to give such information. Thus, a minimum of fair practice would be an obligation for the employer to provide information and wage adjustment without request. Such a measure or kind of practice is not even mentioned among the criteria of winning any of these awards, let alone wage-difference information.

<sup>277</sup> It might be attributed to the backlash of the pre-transition past when salaries on the whole were much rather a ‘public’ than a ‘private’ matter (similarly to many other private issues): almost everyone knew the salaries of colleagues and fellow workers, and furthermore, officials of the monolithic trade union not only had access to personal wage information but also had a say in setting them.

<sup>278</sup> Sz. Borbély et al. *Female sectors under loupe*, p. 15 and p. 165.

<sup>279</sup> ‘With Regard to Gender’ (*Nemre való tekintettel*). Handbook on the application of theory and practice of social equality for men and women (for top managers of institutions and companies). E/004 Development Partnership, Budapest, 2008.

which surveys the practice of seven selected employers and their presumed good practices. Among the proposals to support young mothers, there is no mention of the duty to raise wages after childcare leave. The survey presents a number of questions on motherhood and women in leading positions etc., but there is not a single question on the compared wages of men and women (e.g. in leading positions, where commonly the pay gap is high).

The handbook mentions, as a positive example, the EOP of a public transportation company that ‘addresses the issue of equal pay’ – without any concrete information, suggesting that ‘addressing’ the issue is a result in itself. In addition to the several nice programmes and projects that might truly facilitate the reconciliation of workplace and private duties, there is not a single measure for or commitment to

- giving information on aggregate (or job-related) wage differences;
- automatically supplying information and wage increases to employees returning from parental leave;
- efforts to establish gender-neutral evaluation systems;
- disclosing individual or aggregate wage data – under a confidentiality obligation – to employee representatives;
- setting up any forum in order to carry out neutral, objective inquiries regarding wage complaints.

Two appendices conclude the book. Appendix 1 is a proposed questionnaire and presents some questions on wages, but these remain highly general, lacking a targeted, efficient approach: ‘whether and in what way the principle of equal pay is taken into consideration’, ‘whether there are records on average wages of men and women, and the representation of sexes in the different wage brackets’, ‘whether there has ever been a complaint on wage discrimination, why it emerged and how was it handled?’). Appendix 2 is the EOP of Corvinus University, a university with a prominent role in equality research and teaching, with prestigious equality experts among its teaching staff. This supposed ‘model plan’ has not a single reference to the disclosure of wages or access to information on them or anything concrete with the purpose to know and narrow the pay gap.

## **5. Other instruments to close the pay gap**

Tools that may assist individuals to establish pay discrimination are limited. They have the right to address either a competent administrative body (especially the equal treatment authority, and also the labour inspectorate) or the court. These authorities are only entitled to request the employer to reveal information on wages, either individual or aggregate.

There might be a potential tool enshrined in the duty of the employer to provide the works’ council (for lack of a works’ council, the trade unions) with regular (at least semi-annual) information on the state and trends of wages.<sup>280</sup> No data is available about whether employers are required to include pay gap data in such information.

The wage – the basic pay and possible application of performance-based wage – has to be included in the employment contract and the employer has to provide the employee with information on the various elements of the wage in compliance with the relevant EU requirements. This right of employees to information is frequently violated, especially in case of complex wage systems (e.g. minimal hourly pay

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<sup>280</sup> Articles 22 (3) and 65 (4) c.) of the Labour Code.

combined with multiple, variable supplements, performance-based payment where company-related elements should be filtered out etc.) in spite of the fact that clear and detailed information on the various elements of the pay has increased in importance, and, more importantly, that all this frequently concerns the most vulnerable workers. The lack of correct information deprives them from the possibility to check and enforce the fulfilment of their pay rights, including equal pay.<sup>281</sup>

There is a 'wage check' tool on the 'Wage Barometer' page of the Ministry of Social and Employment affairs.<sup>282</sup> Due to its random job categories and overly broad wage categories it is not very helpful in establishing whether the visitor's salary is discriminatory.

Tools that may assist in establishing gender-neutral job evaluation schemes, pay systems, etc. are not known. Article 142/A. of the Labour Code requires employers to determine performance-based pay in compliance with the principle of equal treatment. However, this is not enforced. Pay equality and pay systems are most frequently assessed in cases of unlawful termination of employment that bring up the calculation of back pay as part of the dispute about certain elements of pay. The courts correct evident violations of equal pay. On the other hand, the promotion of gender-neutral pay systems is rather undermined by a court decision that accepts that bonus and wage rise policies punish the use of sick leave in spite of their discriminatory impact on women with family duties (the concrete case concerned a woman who, similar to most mothers with small children, used her right to sick leave during the sickness of her child.).<sup>283</sup> Interestingly and contradictorily, a Supreme Court decision in late 2009 found discrimination in a similar case when a man, absent due to sickness for more than 15 % of the total working hours, lost part of his salary due to a company rule conditioning certain supplements on being present at least 85 % of the working hours.<sup>284</sup> In this case, discrimination was found on the ground of health condition.

There is a national catalogue to classify occupations, with training and skills criteria. However, this is primarily established for statistical purposes, issued by the National Statistical Office, and even if it is referred to for wage classification, too, its purpose is not to set up a gender-neutral classification or wage system.<sup>285</sup>

While the law on labour inspectorates extends their competence to equal treatment and working conditions of women, the authority would proceed only in case of a complaint and not on its own initiative. Aggrieved employees will rather, if at all, turn to the Equal Treatment Authority. Thus, from among all possible 'tools' available to victims of discrimination, the ETA is the most easily accessible one.

The ETA, as an administrative equality body, can proceed only in case of violation of the provisions relating to equal treatment and normally it only acts upon a claim,<sup>286</sup> but it has no power to promote active measures to close the pay gap. If violation of equal pay is found, it can stop the unlawful practice, and can impose a

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<sup>281</sup> See *Female sectors under loupe*, p. 167.

<sup>282</sup> <http://www.berbarometer.hu/main/berellenorzo>, accessed 31 May 2010.

<sup>283</sup> Court Decision BH 2008/253, Supreme Court: *Legf. Bír. Mfv. I.* 10.390/2007.

<sup>284</sup> *Kfv.III.37.155/2009*. It might be added that while the 2008 decision not finding discrimination was issued by the Labour Law section of the Supreme Court in a case where the employee initiated the case claiming back pay, the 2009 decision was issued by the Public Administration section, in a case when the employer litigated against a fine imposed on it by the ETA, and no back pay was at stake.

<sup>285</sup> Its last version was issued in 1997.

<sup>286</sup> The first and so far only case where it started proceedings on its own initiative was a recent case of violation of the dignity of Roma women. (An accusation that they intentionally harm their foetus in order to draw higher family allowance.)

fine, but it cannot award financial compensation. An additional (automatic) sanction is the publication of the final and binding decision on the ETA website, and if this is the second punishment within two years, the employer is excluded from the qualification of having 'orderly labour relations', a precondition of applying for public money.<sup>287</sup>

The effectiveness of the available methods is low. Again, the reason is that for lack of manifest and striking violation of existing norms, the competent authorities do not see discrimination, thereby lining up with the prevalent societal opinion, reflected by employers and employees as well, including representative interest groups. General opinion is that apart from individual occurrences of unfair and discriminatory employers' conduct, equal pay is more or less guaranteed, and the existing pay gap is due to individual reasons, which do not need active measures.

## **6. Problems of enforcement and how to tackle them by good practices**

Enforcement through court proceedings is long, expensive and bears a significant number of uncertainties. Thus, employees only opt for court proceedings in cases when their employment has been terminated and they already have nothing to lose by submitting their wage discrimination claim also for the pre-dismissal period and for the period of calculating termination benefits.

Neither the Labour Code nor the Equality Act gives guidance on the scope of comparison. While comparability within the same employer is not questioned, there is no case law yet regarding the comparability of jobs at different employers.

The sanctions (compensation, maximum period taken into account, etc.) if established by the court, are not different from other violations of the employment contract or wage regulation. The compensation has to include the difference for the total period preceding the claim submitted to the court within the three-year (or longer) statutory time limit.<sup>288</sup> The same is relevant to pension rights: the employer has to pay (and also deduct) and transfer to the social security fund all social security fees that should have been paid in case of lawful wage setting, thereby correcting the pension entitlement of the employee.

## **7. Relationship between the gender pay gap and other parts of labour law**

There is an obvious and commonly known link between the gender pay gap and other terms and conditions of labour law: the more vulnerable the situation of an employee, the less negotiating capacity this employee has. In case of no or low qualifications and skills, desperate need of a job, need of irregular (flexible) time schedule, lack of mobility<sup>289</sup> would not only decrease the subjective and objective bargaining capability of the employee but might also obscure the real considerations behind the wage setting.

In case of posting of workers, correct information on wage, supplements and other benefits have increased importance. This has relatively small importance in the gender pay gap, since women are less available for posting.

A number of special arrangements to fight unemployment have been adopted by the Government in order to increase the labour market chances of women, especially

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<sup>287</sup> Act no. XXXVIII of 1992 on State Finances, Articles 15 (5) (h) and (6) (c), as amended by Act XXXVIII of 2009 on the amendment of certain laws on the requirement of 'orderly labour relations'.

<sup>288</sup> Actions by the claimant might interrupt and re-start the lapse of time.

<sup>289</sup> Also the fact revealed by some surveys that in Hungarian working families that have, if at all, one car, this car is used by the male wage earner, which limits the comparative job opportunities of women using public transportation.

when raising small children. Such measures might in part compensate employers for the undeniable and objective disadvantages of hiring employees with young children. These are in particular the various forms of subsidized employment when the employer may be reimbursed for part of the overhead of the pay bill.<sup>290</sup>

The post-transition enthusiasm for party autonomy in contract law and protection of private life/confidentiality (of salary etc.) as a reaction to the pre-transition overall ‘collectivisation’ and strong deprivation from the right to privacy is still dominant when there is a clash between individual freedom and protection of the weak party. One element, the almost sanctified confidentiality of private data, especially individual salaries, is to be mentioned here; it is strongly boosted by employers in order to preserve their uncontrolled prerogatives in wage setting.

The restricted possibility for trade unions to represent their members in court excludes them from being a claimant in their own name; they can only represent the employee as a private attorney. This solution can save attorney’s costs for the worker, but cannot save them from the disadvantages of suing an employer. The deprivation of trade unions from their right to autonomously sue the employer on behalf of an employee was based on the decision of the Constitutional Court that, in 1990, considered such a trade union entitlement as a violation of the fundamental right of individuals to dispose of their own rights and duties and thus as a violation of human dignity.<sup>291</sup>

## **8. Final assessment of good practices**

So-called good practices might only be evaluated in the light of the results they produce, and it is difficult to see such results for the time being. Although good practices are inherently voluntary, if employers and public organizations use a significant amount of public money (national and European), the elaboration of a method of ‘cost-benefit’ assessment seems reasonable.

Similarly, some minimal requirements for the various awards – set freely, but using public money – should be established, along with the elements for closing the pay gap mentioned at the end of Section 4 of this country report. The existence and enforcement of a meaningful EOP – with enforceable individual rights – might be a test for the genuine intentions of an employer aspiring to the title of good (best) employer.

The extension of sectoral collective agreements has proved useful by forcing employers to pay ‘reported wages’ in full(er) amount, thereby preventing employers from arbitrary payment practices (and supposed discrimination).

## **ICELAND – *Herdís Thorgeirsdóttir***

### **1. General situation**

The first comprehensive survey of the labour market was conducted by the Institute of Social Sciences of the University of Iceland in 2008. Its objective was to examine wages and the combination of wages of men and women on the Icelandic labour market, in particular to examine whether there is a gender-based pay gap, how large it is and how it can be explained.

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<sup>290</sup> This is the so-called ‘Start Plus’ programme that is available for two years when applied for within one year from the termination or interruption of childcare leave.

<sup>291</sup> Trade union lawyers may represent workers on the basis of a power of attorney, however, in such cases the employee is the claimant; they may not represent workers in their own name, as claimants.



The above survey led to the following main conclusions:<sup>292</sup> (1) Women earn 77 % of the basic wages of men and 74 % of their total wages; (2) when considering the longer working hours of men, women earn 84 % of their wages; (3) in rural areas, women in the public sector earn 69 % of the total wages of men working in the public sector; (4) total hourly earnings per month of men in the urban area are 16 % higher than that of men in the rural area and total hourly earnings of women in the urban area are 29 % higher than that of women in rural areas; (5) the net pay gap of total wages is 19.5 %. When taking into account factors such as working hours, type of job, education, age, working sector, job responsibility,<sup>293</sup> whether the individual is self-employed or a wage earner (leaving aside the interplay between these factors) the survey reveals that men earn 19.5 % more in total wages. When asked in the survey how much lower the pay is that women get in comparison with men the answer was 16.3 %; (6) the net pay gap in basic wages is 19.6 %. When asked in the survey how much less women earn in comparison with men the answer was 16.4 %; (7) the net pay gap in the public sector among those with post-compulsory or further education is 28.4 % (men have 28.4 % higher total wages than women; women have 22.1 % lower total wages than men.<sup>294</sup> There is no difference in basic wages). The gap between those with university education was not remarkable<sup>295</sup>; (8) the net pay gap in the private sector is 22.4 % (men have 22.4 % higher total wages when compared with women and women earn 18.3 % less in total wages than men); (9) in the urban area, the net pay gap of total wages is 10.3 % (men earn 10.3 % higher total wages than women, but women have 9.3 % lower total wages than men); (10) in the rural area, the net pay gap in total wages is 38 % (men earn 38.0 % higher total wages than women, women have 27.5 % lower total wages than men). An explanation of why the net pay gap is less in the private sector than in the public sector is that a higher proportion of men work in the private sector.

A research from 2007 shows that men have higher expectations with regard to pay than women and that both men and women in managerial positions would offer women lower wages.<sup>296</sup> According to the 2008 University of Iceland survey women, expect and ask for 80 % of what men ask for.<sup>297</sup> When corrected, the gap in expectation regarding pay was remarkable among women with further education (not women with higher education). The authors of the survey say that they cannot confirm that expectations are contributing to the pay gap, as the attitudes of employers also need to be analysed in relation to the gender-based pay gap.<sup>298</sup>

For three consecutive years, 2007, 2008 and 2009, a parallel survey was conducted by the Commercial Workers' Union, *VR*, a trade union representing workers in more than 100 occupations in the commercial and service sectors<sup>299</sup> and

<sup>292</sup> The respondents in the survey were asked about their total wages before taxes; the total wages were categorized into basic wages, fixed overwork, variable overwork and other terms. About 40 % did not enjoy any extra terms apart from the fixed wages.

<sup>293</sup> Job responsibility includes having staff, financial responsibility, managerial responsibility, responsibility for certain tasks, and responsibility for security and welfare.

<sup>294</sup> When asked in the survey.

<sup>295</sup> Institute of Social Sciences, University of Iceland *Gender-based pay gap on the Icelandic Labour Market*, September 2008, p. 49.

<sup>296</sup> Þorlákur Karlsson, Margrét Jónsdóttir og Hólmfríður Vilhjálmisdóttir (University of Reykjavík, 2007).

<sup>297</sup> Institute of Social Sciences, University of Iceland *Gender-based pay gap on the Icelandic Labour Market*, September 2008, p. 54.

<sup>298</sup> Institute of Social Sciences, University of Iceland *Gender-based pay gap on the Icelandic Labour Market*, September 2008, p. 58.

<sup>299</sup> <http://www.vr.is/index.aspx?GroupId=475971>, accessed 18 April.

*SFR* (an association of employees in public service).<sup>300, 301</sup> When the results are compared, it is apparent that the gender-based pay gap is larger in the public service than in the commercial and service sector. Workers on the private market earn 20 % more on average than employees in public service. In 2008, the net pay gap in the public service was 17.2 %. The net pay gap in the commercial and service sector on the private labour market was 12.3 % in the parallel survey.

### ***Public service employees (SFR)***

The survey in 2008 shows that the gender-based pay gap still persists and is regarded as a growing problem within the public sector. The total pay gap is 27 %. The corrected (net) pay gap between women and men in public service has grown 3 % from 2007 until 2008. The average absolute wages of *SFR* members working full time was EUR 2 394 (ISK 304 000) per month.<sup>302</sup> The average absolute wages of men were EUR 2 962 (ISK 376 081) and the average absolute wages of women were EUR 2 162 (ISK 274 417). According to this survey, women earned 27 % less than men. This is not the whole story according to *SFR*, as the absolute average wages of men may be explained by 'age, working hours, extra working hours etc.'<sup>303</sup> The corrected pay gap, i.e. unexplained is 17.2 %, which is 'a remarkable increase from previous surveys'.

In the 2008 *SFR* survey, 'extra shifts' was added as a factor to explain the gender-based pay gap, called *Method A*. Using *Method A*, the unexplained pay gap is 17.2 %, but was 14.3 % in the previous year (2007). If the method used in the survey in the previous year here called *Method B*, had been used in 2008, the unexplained pay gap would have been 18.3 % instead of 14.7 % the previous year (2007). Taking into account the extra shifts therefore reduced the net pay gap in 2008 to 17.2 % instead of being 18.3 %.

### ***The commercial and service sector (VR)***

The situation on the private labour market is not as bad as in the public service, according to the parallel surveys conducted for the *VR*, the trade union representing workers in more than 100 occupations. The *VR* has been conducting surveys of this kind for the last decade. According to its most recent survey, the difference in absolute wages is now 14.7 % but was 16.7 % in 2008. The difference was 20.4 % in 2000. The average pay of women increased by 2 % from 2008 to 2009: it is now EUR 2 937 (ISK 373 000) and was EUR 2 882 (ISK 366 000) in 2008. The absolute average wages of men measure 0.4 % less in 2009 compared with 2008: they decreased from EUR 3 504 (ISK 445 000) to EUR 3 489 (443 000) on average per month in 2009.<sup>304</sup>

The net pay gap, when taking into account 'area of work, age, education and working age', is 10.1 % compared with 12.3 % in 2008. The net pay gap was 15.3 % among *VR* members in 2000 and has thus decreased by one third in the last nine years.

<sup>300</sup> *SFR* stands for *Stéttafélag í almannajónustu* (<http://www.sfr.is/kannanir-sfr/launakonun-sfr/>, accessed 18 April 2010).

<sup>301</sup> *Stéttafélag í almannajónustu*, <http://www.sfr.is/kannanir-sfr/launakonun-sfr/>, accessed 18 April.

<sup>302</sup> The average value of the EURO being 127 ISK for 1 EURO – the currency collapsed with the financial collapse of all the banks in Iceland in October 2008.

<sup>303</sup> <http://www.sfr.is/kannanir-sfr/launakonun-sfr/launakonun-2008/helstu-nidurstodur/launamunur-kynjanna/>, accessed 18 April.

<sup>304</sup> Information given to the author of this report personally by the staff of *VR* (Elías Magnússon). See also: <http://www.vr.is/index.aspx?GroupId=475971>, accessed 18 April 2010.

### ***Age***

Among *VR* members, women in the youngest age group are found to be closest to men in their absolute wages (10 % gap). Women in their forties earn 18 % less than men. Higher education reduces the gender-based pay gap among *VR* members. Women earn 15 to 18 % less than men in all education groups unless they have finished their masters' or doctoral studies. In the last mentioned groups the difference is 2 %. Female managers and specialists earn 11 % less than men in the same groups.

The net pay gap is smaller in the private sector as opposed to the public sector given the above-mentioned surveys conducted by the Commercial Workers' Union (*VR*) and the association of employees in public service (*SFR*). The comprehensive survey of the labour market conducted by the Institute of Social Sciences in 2008 confirms this.

### ***The impact of the financial crisis***

According to the Commercial Workers' Union (*VR*) the main impact of the financial collapse is a reduction in the wages of men while women's working hours are cut. According to the 2009 survey of *VR*, 44 % of men said their wages had been cut as opposed to 36 % of women. Roughly 37 % of women said that their wages were less because their working hours were cut.

### ***Gender wage differential in the private sector 2000-2007 according to recently published statistics from the Bureau of Statistics***<sup>305</sup>

In February 2008, an analysis of gender wage differentials in the private sector was conducted following an agreement between Statistics Iceland, the Confederation of Icelandic Employers (SA) and the Icelandic Confederation of Labour (*ASÍ*) regarding collective agreements of main signatories in the private sector.<sup>306</sup> The results shows wage differences between men and women, where women earn less than men. In the years 2000-2007 the relative gender difference declined from 24.8 % to 15.9 % for regularly hourly earnings. The total hourly earnings difference declined from 24.9 % to 18.5 % in the same period.

### ***Explanations of other factors influencing the pay gap***

According to the Statistics Iceland analysis, the family situation has a different impact on men's pay as opposed to women. During the financial boom men were rewarded for their higher education with higher wages. Having young children is a disadvantage to women when it comes to wages.

Men in a relationship with children have a higher hourly rate. It has a negative impact on the hourly rates of women who have children and the more negative as the children are younger. Men with a university degree earn 4.5 % more than men without a university degree. Women with a university degree have 3.1 % higher hourly rates than women without a university degree.

Being in a managerial position has the same impact on both sexes, who benefit with an 11 % raise.

## **2. The legal framework**

In the wake of the parliamentary elections in the spring of 2007, the government policy was to combat the gender-based pay gap. Highest on the agenda was the

<sup>305</sup> Statistics Iceland: Wages, income and labour market, 2010:3 – 18 February 2010.

<sup>306</sup> The analysis is available on the Statistics Iceland's website [www.hagstofa.is/utgafur](http://www.hagstofa.is/utgafur), accessed 18 April 2010.

intention to implement a programme to decrease the corrected (net) pay gap by half before the end of the election period. The Government expressed its intention to work with social partners and public employees to seek methods of eliminating the gender pay gap in the labour market.

With the amended Act on Equal Status and Equal Rights of Women and Men No. 10/2008 (Gender Equality Act, hereinafter GEA), passed by the Parliament (*Althing*) in February 2008, workers were guaranteed the right to disclose their wages.<sup>307</sup> Article 19 on wage equality states that: 'Women and men working for the same employer shall be paid equal wages and enjoy equal terms for the same jobs or jobs of equal value. By 'equal wages' is meant that wages shall be determined in the same way for women and men. The criteria on the basis of which wages are determined shall not involve gender discrimination. Workers shall at all times, upon their choice, be permitted to disclose their wage terms.'

The equal wage clause in Provision 19 of the GEA must be interpreted in accordance with the EEA Treaty and directives, regulations and decisions that fall under the EEA Treaty. What constitutes 'equal value' is based on a broad, contextual assessment. The previous wording of the equal wages clause was 'equal value and comparable work'. The present wording 'same jobs or jobs of equal value' is intended to ensure that women and men are paid equal wages and enjoy the same terms for the same jobs and for other jobs that are considered of equal value and equal importance.<sup>308</sup>

### 3. Instruments of social partners

The new Gender Equality Act no. 10/2008 included an Interim Provision IV, which stated: 'The Minister of Social Affairs and Social Security shall ensure that a special certification system is developed in collaboration with the organizations of the social partners to certify the implementation of the policy of wage equality and equality in connection with employment and dismissal. This project shall be completed by 1 January 2010, when a review of this Act shall be undertaken.'

With reference to this Interim Provision IV in the new GEA, the social partners – the Confederation of Icelandic Employers (*SA*) and the Icelandic Confederation of Labour (*ASI*) – signed a working agreement with the Government and Icelandic Standards (*IST*: the national standards body)<sup>309</sup> in October 2008 to ensure the working progress of the special certification system to certify the implementation of the policy of wage equality and equality in connection with employment (see below).

In the 2008 collective agreements, the *SA* (Confederation of Icelandic Employers) and *ASI* (Icelandic Confederation of Labour) signed a special protocol for the promotion of gender equality on the labour market. The protocol has three main emphases:

- To develop a certification system to use for companies and/or enterprises to certify their implementation of a gender equality programme and gender equality pay policy: equal pay for equal work of equal value;

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<sup>307</sup> Gender Equality Act no. 10/2008, adopted by the *Althing* on 26 February 2008.

<sup>308</sup> Explanatory report with the amended Gender Equality Act No. 10/2008. See also Supreme Court decision no. 1258/2004.

<sup>309</sup> Icelandic Standards (*IST*) is the national standards body of Iceland. It is an independent association whose role, by law, is the publication of Icelandic standards and the representation of Iceland in international and regional standards bodies. *IST* is a member of the European standards organizations CEN, CENELEC and ETSI and of the international standards organizations ISO and IEC.

- a cooperation with Statistics Iceland regarding gender-based statistics to analyse the outcomes and to identify a possible gender pay gap;
- to promote information and education on gender equality with accessible information material for workers and companies. Such information material should be accessible for all human resources management and others engaged in consulting.

The effectiveness of this method remains to be seen.

#### **4. Instruments specifically aimed at employers**

The GEA obliges employers to take express actions to bring women and men on an equal footing on the labour market. Employers must work specifically to put women and men on an equal footing within their enterprise or institution and to take steps to avoid jobs being classified as specifically women's or men's jobs. Particular emphasis is to be placed on achieving equal representation of women and men in managerial and influential positions. Enterprises and institutions with more than 25 employees, on average over the year, must produce a gender equality programme or mainstream gender equality perspectives into their personnel policy. This must specifically include statements of aims, with a plan of how they are to be achieved in order to guarantee e.g. wage equality and shall be reviewed at three-year intervals.<sup>310</sup>

Voluntary measures by companies more often appear to be public relations gestures than credible efforts to seriously attack the gender pay gap. The same goes for the useless addition in 2008 to the wage equality clause that workers are permitted to disclose their wage terms. The survey of the whole labour market in 2008 shows that men in the public sector enjoy much better terms than women. It therefore seems rather evident despite this clause that men in such a position will not disclose such information to female colleagues with lower pay.

The State has not used its public procurement powers to require firms that they contract with to address the pay gap. The reason why the State is not using its public procurement powers, in the view of the author of this report, is in short a lack of genuine, political will and awareness of the problem, its unjustness and seriousness in the social context.

#### **5. Instruments to close the gap**

There are no effective tools assisting individuals to establish pay discrimination. A job evaluation system was adopted at the municipal level in 2001 as a method to ensure pay equality in collective agreements. A collective agreement must not entail provisions incompatible with the GEA. According to the Centre for Gender Equality, there is no research available on the impact of such job evaluation systems.. There are no labour inspectors. Efforts have been made to establish an equality benchmark for employers but these are not intended for individual use calling for assessment or comparable information according to the benchmark.

#### **6. Problems of enforcement and how to tackle them by good practices**

Individuals, enterprises, institutions and non-governmental organisations, either in their own name or on behalf of their members who consider that they are victims of violations of the GEA may submit their case to the Gender Equality Complaints Committee. The time limit for submitting cases, in writing, is six months from the

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<sup>310</sup> Section III of the GEA No. 10/2008.

date when the alleged violation became known or came to an end, or from the time that the person concerned became aware of the alleged violation. This has been criticized as being a very short time limit. The scope of comparison must be based on a contextual assessment. The Supreme Court has emphasized that the equal wage clause must be considered in a broad, contextual assessment and that other jobs with a different educational background may be of equal value. In a case in 2004, a female manager in the social service sector of the town of Akureyri initiated legal proceedings against the municipality and asked for compensation due to breach of the gender equality law because of the work evaluation assessment, where a male manager in the technical sector of the same municipality enjoyed better terms. The Court stated that different collective agreements should not justify different pay terms for women and men in the light of gender equality law. A woman's position as manager in the social service sector was seen as of equal value as a man's position as manager in the technical sector of the same municipality.

According to Article 31 of the GEA, employers who deliberately or through negligence violate gender equality law will be liable to pay compensation according to ordinary rules. Furthermore, the party in question may be sentenced to pay the party affected by the violation compensation for non-financial loss, if appropriate, in addition to compensation for financial loss.

## **7. Relationship between the gender pay gap and other parts of labour law**

As no law may contradict the constitutional principle of non-discrimination, the relationship between the gender pay gap and other parts of labour law would most likely be entailed in the absence of rules or efforts to ensure equality. It does not constitute discrimination to have special concern for women due to pregnancy and birth. In addition to sex, women are discriminated against with regard to age, education, promotion, etc.

## **8. Final assessment of good practices**

The pay gap is not narrowing despite the gender equality law stipulating pay equality or the government policy to close the pay gap. The change in the law to allow the disclosure of one's salary is a very vague provision and not likely to make any difference at all. Women seem reluctant to seek their rights for fear of being subject to further discrimination which can take on devious forms other than being dismissed. Prejudice is prevailing on the market which can be described as being sex-segregated where certain sectors are women's jobs and others are men's jobs. Good practices seem like vague efforts of firms and politicians to establish political good will. They are vague as they do not even scratch the surface of the glass ceiling in light of the statistics above.

# **IRELAND – *Frances Meenan***

## **1. General situation**

Ireland is in the throes of a very deep recession with an unemployment rate of 13.4 %.<sup>311</sup> This rate of unemployment masks provisions for back to education facilities for the unemployed, significant number of persons from the Accession States leaving Ireland and Irish people emigrating.

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<sup>311</sup> [www.cso.ie](http://www.cso.ie), accessed 7 April 2010.



The report *Women and Men in Ireland 2009* (published February 2010)<sup>312</sup> reported that in 2009 the employment rate for men went down to 67.3 %. The employment rate for women also fell in 2009 but to a lesser extent. The male versus female employment rate in 2007 was 77.6 % compared to females at 60.7 %; in 2008 75.7 % compared to 60.4 % and in 2009 there was a massive rise in unemployment where there were 67.3 % males unemployed compared to 57.8 % of females. The drop in female unemployment is far less drastic than that of men mainly due to the total depression in the construction sector. In 2009, over 20 % of women were employed in clerical and secretarial occupations compared with 5.6 % of the men. Craft and related occupations were the least gender-balanced occupation, with men representing 96.1 % of workers in such occupations. The gender pay gap was 17.1 %. There are further reports below and there is a slight widening of the gap since the commencement of the recession.

The gender pay gap as set out in *Measuring Ireland's Progress 2008*<sup>313</sup> (published in August 2009) was 17 % i.e. the difference between average gross hourly pay<sup>314</sup> of male paid employees and those of female paid employees as a percentage of average gross hourly pay of male employees. The gender pay gap as published in the National Employment Survey 2007 (which was published in July 2009) show that in October 2007 male average hourly pay was EUR 21.17 compared to female pay of EUR 18.91 (equal to 89.3 % of male hourly pay). In all sectors, men earned more than women. The difference was smallest in public administration and the defence sector with men earning on average EUR 24 per hour while women earned EUR 22.40, or 93.3 % of male pay. The biggest gender pay gap was in the financial sector with average hourly pay for males of EUR 31.99 and EUR 23.48 for females (i.e. 73.4 % of male pay). The largest gap between full-time and part-time hourly rates was in the business services sector (EUR 21.37 compared with EUR 13.11 per hour); this gap was much narrower in the health services sector though. While full-time male employees had higher hourly earnings than full-time female employees in all sectors, part-time female employees earned more than male part-time employees in some sectors, to include manufacturing and construction.

A joint report from both the Equality Authority and the Economic and Social Research Institute entitled *The Gender Wage Gap in Ireland – Evidence from the National Employment Survey 2003*<sup>315</sup> was published in September 2009. It is important to note that this report was based on statistics from 2003 when Ireland was in the midst of an economic boom. Some six to seven years later, the Irish economy is in the worst recession within living memory. The Report states that the total observed gap<sup>316</sup> between men and women in 2003 was almost 22 %. Two thirds of the gap can be attributed to variations in observable characteristics between males and females

<sup>312</sup> [http://www.cso.ie/releasespublications/women\\_and\\_men\\_in\\_ireland\\_2009.htm](http://www.cso.ie/releasespublications/women_and_men_in_ireland_2009.htm), accessed 23 March 2010.

<sup>313</sup> <http://www.cso.ie/releasespublications/measuringirelandsprogress2008.htm>, accessed 23 March 2010 and also noted in *Men and Women in Ireland 2009* on [http://www.cso.ie/releasespublications/documents/other\\_releases/2009/womenandmen2009.pdf](http://www.cso.ie/releasespublications/documents/other_releases/2009/womenandmen2009.pdf), accessed 7 April 2010.

<sup>314</sup> The term used is 'earnings' which is gross pay before deductions of income tax, Pay-Related Social Insurance, pension levy and superannuation. It includes normal wages, salaries, overtime, bonuses, commission, holiday and sick pay. It excludes the employer portion of Pay-Related Social Insurance. See p. 10 of the Report.

<sup>315</sup> S. McGuinness et al.; available on <http://www.equality.ie/index.asp?locID=105&docID=817>, accessed 23 March 2010.

<sup>316</sup> The raw log wage gap is derived simply by taking the log difference in wages between males and females.

such as differences in education and labour market experience, family responsibilities and job and firm characteristics. Taking into account these factors the adjusted wage gap was just under 8 %. This gap was also considered for full-time employees with a raw gap in earnings at 18 % and the adjusted gap was 7 %. On the other hand, the situation for part-time workers emerged to be somewhat different. While the raw gap was assessed to be just under 6 %, this increased to 10 % when differences in various personal and employment attributes were taken into account. This result suggests that, based on their characteristics, part-time females should, in fact, earn slightly more than their male counterparts. The Report examined the contribution and relative importance of various group characteristics to include education, experience, tenure, family responsibilities and job and firm level factors, industry and occupation. Lower levels of female experience derive in part from the fact that women take time out of the labour market for family-related reasons. Higher levels of educational attainment among females served to reduce the wage gap but were insufficient to compensate for the effects of experience. Among males a lower incidence of part-time work and a higher incidence of supervisory responsibility, employment tenure and trade union membership widened the gap. Married men, irrespective of employment type, were found to have higher earnings as they were less likely to have spent time out of the labour market. Centralised wage bargaining assisted females (see below) in both full-time and part-time employment. In addition, the existence of family-friendly policies within employment, specifically career breaks, served to reduce the wage gap. This seemed to be beneficial to full-time employees only as these employees can preserve their position on re-entry to the labour market and avoid the negative wage implications of occupational downgrading. Flexitime working was found to have a neutral impact on the pay gap. Earnings for females were relatively higher in foreign firms as more probably such firms have more equitable human resource policies. In respect of occupation the greater presence of men in managerial occupations added to the pay gap as did women in clerical positions; however, the number of men in plant operative positions reduced this gap. The overall occupational segregation between males and females increased the pay gap by 1.6 %. As regards a sectoral analysis the number of men in construction and the number of females in the health sector increased the pay gap. The Report stated that, in respect of policy implications, the wage gap is increased by lower levels of accumulated work experience among women and the taking of time out for childcare and family responsibilities suggesting that policies to support continuity in women's employment could help to reduce the wage gap. Of all the flexible arrangements only career breaks are found to reduce the gender pay gap. Centralised pay bargaining has assisted females in both full-time and part-time employment. Also the social partnership arrangements, the national minimum wage and trade union membership are seen to have helped to standardise wages and in particular low wages of female part-time employees have benefited more particularly from such arrangements. The study showed that years of work experience remain an important influence on the gender pay gap in Ireland but it was noted that the authors were unable to fully assess the impact of time-out of the labour market due to lack of available information on this in the National Manpower Employment Survey. Cumulatively work experience was more valuable to full-time employees where the wage gap was increased by both lower levels of accumulated work experience among women, as well as by lower returns, as well as by lower returns for that experience. Among part-time employees women had somewhat longer work experience, but they received slightly lower returns for their experience than did men. These findings suggest that policies to reduce the gender wage gap could be



most effective if they serve to increase continuity in women's employment. Reference was made to the fact that statutory parental leave is unpaid, so that many families may not afford to take such leave. The extension of the statutory maternity leave to 26 weeks allied to unpaid parental leave 'may serve to reinforce traditional gender roles, including the primary role of women in childcare and other caring responsibilities and thus counteract policies to support continuity of women's employment'. The key issue is to preserve women's continuity of employment, and employment policies to reconcile family and working life must be carefully designed. Furthermore there must be provision of high-quality and affordable childcare. In summary the report states: 'Notwithstanding almost thirty years of policy and legislation to promote equality of pay and opportunities, and the development of a well-established policy framework to support gender equality in the labour market, the gap between the average hourly wages of men and women remains substantial, although it has narrowed slowly.'

## 2. The legal framework

The Employment Equality Acts 1998–2008<sup>317</sup> *inter alia* provide that there cannot be direct or indirect pay discrimination in relation to employment on the grounds of gender. 'Remuneration', in relation to an employee, does not include pension rights but, subject to that, includes any consideration, whether in cash or in kind, which the employee receives, directly or indirectly, from the employer in respect of the employment. This is a wide definition and includes not only basic pay, but has also been held to include accommodation, bonus earnings, commission payments, marriage gratuities, overtime payments, permanent health insurance, redundancy payments and sickness payments. A claimant must show that there is a person of the opposite sex (the comparator) in the same employment working for the same or an associated employer doing 'like work'. There is no provision for a hypothetical comparator.<sup>318</sup> Section 19(1) provides that a claimant is entitled to the same rate of remuneration as a comparator of the opposite sex who at the same time, or during the preceding or following three years, is doing 'like work'. There is no provision for job evaluation. The employer may use the defence of grounds other than sex.<sup>319</sup> One group that would appear to be in difficulty would be 'agency temps' where a claimant working as an agency temp may only use another agency temp as a comparator.<sup>320</sup> The net effect of such an arrangement may result in discrimination. Section 85A provides that the burden of proof is on the claimant to establish facts from which it may be presumed that there has been discrimination in relation to him or her and then it is for the respondent to prove the contrary.

Section 76(1)<sup>321</sup> of the Employment Equality Act 1998 provides that a person who considers that he/she is not receiving equal pay may seek information concerning remuneration from the employer or former employer. Material (i.e. information other than confidential) information may be provided, to include information concerning

<sup>317</sup> As amended by the Equality Act 2004 and the Civil Law (Miscellaneous Provisions) Act 2008. Discrimination and pensions is governed by the Pensions Acts 1990–2004.

<sup>318</sup> In *Brides v Minister for Agriculture* [1998] 4 I.R. 250 on p. 270 Budd, J. said that a claimant must be able to point to 'an actual concrete real life comparator of the other sex' performing like work.

<sup>319</sup> E.g. red-circling (*Minister for Transport, Energy and Communications v Campbell* [1996] ELR 106; see also *National University of Ireland Cork v Alan Ahern & Ors.*, [2005] 16 ELR 297). Defence accepted that pay difference was not on grounds of sex but on grounds of a policy of facilitating the family obligations of the female comparators.

<sup>320</sup> Employment Agency Bill 2009 has been published to transpose Directive 2008/104/EC.

<sup>321</sup> As amended by Section 31(5) of the Equality Act 2004. The Employment Equality Act 1998 (Section 76 – Right to Information) Regulations (S.I. no. 321 of 1999) apply.

remuneration of persons who stand in a similar position to the prospective claimant. However, there are the defences of confidentiality (e.g. information which relates to a specific individual). The Equality Tribunal and the Labour Court may investigate a complaint so that more information can be obtained through the investigative process, rather than through adversarial procedures. The Equality Tribunal has issued a Guide to Procedures in Employment Equality Cases.<sup>322</sup> An equal pay claim may be referred to the Equality Tribunal for investigation. A recommendation of the Equality Tribunal may be appealed to the Labour Court. At the Labour Court appeal stage, there is a provision for the appointment of technical assessors and the summoning of witnesses etc. Alternatively, an equal pay claim (on the gender ground only) may be referred, at first instance, to the Circuit Court.<sup>323</sup> If a gender equal pay claim is referred to the Circuit Court, the court procedures of discovery etc. are applicable. Notwithstanding the entitlement to seek information, the shifting of the burden of proof, the investigative process at the Equality Tribunal stage and the power of equality officers to enter and inspect an employer's premises, it is still difficult to succeed in an equal pay claim as an employer may raise the defence that the pay differences are on grounds other than the gender ground. There is no obligation to reply to the request to obtain information, and the provision that the Equality Tribunal will only 'draw inferences' from a refusal to reply is not strong enough. At the crucial first stage in the claims process there should be a provision that a claimant can apply to the Equality Tribunal for the granting of witness and document *subpoenas*. If the necessary information was available at the first stage, there could be a quicker resolution of claims.

### 3. Instruments of social partners

For the last twenty years, Ireland has had a system of centralised pay bargaining based on partnership between the Social Partners. However, more recently (as of early 2010), the centralised bargaining system appears to have been broken down in light of the very serious economic circumstances and reductions in public pay.<sup>324</sup> Over the years, these agreements have become detailed outlines of social policy for the period of the agreement. Since 1987, Ireland has had a number of partnership agreements that first dealt with matters of pay, e.g. the *Programme for National Recovery* in 1987 culminating in the current partnership agreement *Towards 2016 - Ten-year framework social partnership agreement 2006-2015*. Other forms of union management agreements are private and not necessarily in the public domain. Employment conditions, including pay, are based on the individual's contract of employment which may be subject to statutory obligations, e.g. organisation of working time. Certain agreements are enforceable where, for example, a collective agreement is registered in the Labour Court.<sup>325</sup> Other than the Employment Equality Acts, there are no legal instruments to close the gender pay gap.

### 4. Instruments specifically aimed at employers

As stated above there is the provision in respect of the Right to Information under the Employment Equality Acts where an employee may seek information on pay. However there is of course a right to confidentiality. There is no obligation on an

<sup>322</sup> On <http://www.equalitytribunal.ie>, accessed 23 March 2010.

<sup>323</sup> The author is not aware, however, of any pay reference to the Circuit Court.

<sup>324</sup> Financial Emergency Measures in the Public Interest Act 2009.

<sup>325</sup> Collective bargaining is conducted on a voluntary basis except for certain issues, e.g. collective redundancies, health and safety.

employer to communicate details of pay. There is of course provision in the Employment Equality Acts that the Equality Authority can carry out inquiries and issue non-discrimination notices.<sup>326</sup> The Guide to Tendering for Public Service Contracts refers to equal treatment in respect of treatment of suppliers in respect of nationality, location and bias of any description.<sup>327</sup> It is this writer's opinion that some of the general investigation provisions of the inspectors of the National Employment Rights Authority which ensure that all employees receive their statutory entitlements, for example compliance with pay entitlements, overtime payments, holiday entitlements and so forth, but there is no requirement that they would assess the terms and conditions of employment of an employee to ensure that he or she is not being discriminated against under the Employment Equality Acts. Therefore an employee who considers that they are being discriminated against must bring an individual claim under the Employment Equality Acts.

### **5. Other instruments to close the pay gap**

The right to information is crucial but any response from the employer may not be sufficient or complete. Whilst the Equality Tribunal may investigate a claim, there is no strict entitlement to discovery of documents at that level. Of course an equality officer of the Tribunal has a right of inspection, nonetheless it would be simpler to provide for discovery of documents. The Equality Authority has power to carry out an inquiry into any aspect in relation to its function when required by the Minister. There may be recommendations and reports. If on foot of such inquiry it is found that there is discrimination, a non-discrimination notice may be served on the employer who may appeal against such notice to the Labour Court. It is an offence not to comply with a non-discrimination notice.<sup>328</sup>

### **6. Problems of enforcement and how to tackle them by good practices**

Enforcement of equal pay for 'like work' is set out in the Employment Equality Acts 1998–2008. One of the major problems of enforcement is that there is a significant delay in getting claims heard due to the volume of equality claims generally. The major problem is still the requirement of having a comparator (as opposed to a hypothetical comparator) more especially in segregated employment. The lack of transparency and the individualisation of remuneration is a major issue but again there are issues of privacy. In pay claims, time limits are not a problem other than that compensation can only go back three years prior to the date of the claim. Further the definition of employer encompasses 'associated employers' which has a broad definition. Section 19 of the 1998 Act<sup>329</sup> provides that it shall be a term of the contract under which A is employed that A shall at any time be entitled to the same rate of remuneration for the work which A is employed to do as B who at that or any other relevant time<sup>330</sup> is employed to do like work by the same or an associated employer. Where B's employer is an 'associated employer' of A's employer, A and B shall not be regarded as employed to do like work unless they both have the same or reasonably comparable terms and conditions of employment. Section 2(2) defines 'associated

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<sup>326</sup> Sections 58–66.

<sup>327</sup> [http://www.enterprise-ireland.com/NR/rdonlyres/FD11DB4C-4902-43DA-AB41-FAF95436657B/0/tender\\_pub\\_servicepart1.PDF](http://www.enterprise-ireland.com/NR/rdonlyres/FD11DB4C-4902-43DA-AB41-FAF95436657B/0/tender_pub_servicepart1.PDF), accessed 7 April 2010.

<sup>328</sup> Sections 58 – 66 of the Employment Equality Act 1998 (as amended).

<sup>329</sup> As amended by Section 12 of the Equality Act 2004.

<sup>330</sup> Section 19(2) 'Relevant time' is any time during the three years which precede, or the three years which follow the particular time.

employer' as 'two employers shall be taken to be associated if one is a body corporate of which the other (whether directly or indirectly) has control or if both are bodies corporate of which a third person (whether directly or indirectly) has control'. Therefore an employer could try and avoid equal pay claims if there were entirely separate companies with segregated employment and avoidance of a group structure. Interestingly there is provision in the Employment Equality Acts that a person can initiate proceedings in the Circuit Court and if successful can result in a significant award. In such proceedings the order for compensation in the form of arrears is without limit and technically can go back six years prior to the referral of the claim. Alternatively if the employee brings a claim to the Equality Tribunal the period prior to referral of the claim is only three years. However the risk at Circuit Court level is that legal costs may be awarded against the unsuccessful litigant; costs cannot be awarded by the Equality Tribunal.

## **7. Relationship between the gender pay gap and other parts of labour law**

Overall, Ireland has a complicated structure of labour (employment) law which includes constitutional entitlement to fair procedures, the application of the various EU Directives, statute and the common law. In addition there is industrial relations dispute resolution machinery. There has been no specific linking of the application of other employment law statutes with the gender pay gap other than (in the opinion of this writer) the Protection of Employment (Part-Time Employees) Act 2001 (see below). There is no specific reference to any studies in respect of the gender pay and legislation. All the commentaries have been economic/statistical and just generally refer to statutes relating to employment equality and maternity leave and parental leave.

Regulation of pay and conditions of employment – the Industrial Relations Acts 1946 – 2004<sup>331</sup> provide for the regulation by the Labour Court of remuneration and conditions of employment of certain workers.<sup>332</sup> There is provision for joint labour committees (jlc) which provide statutory protection<sup>333</sup> for workers in matters such as overtime, shift allowances, pensions and sick pay, for example. The national minimum wage legislation has partly replaced joint labour committees, however workers in sectors covered by joint labour committees, in general, earn higher pay than the statutory minimum wage (currently EUR 8.65 per hour).<sup>334</sup> The sectors where the jlc operate are the catering, hotels, contract cleaning, hairdressing, retail grocery and allied trades; all of these committees may operate on a countrywide basis or regionally.<sup>335</sup> The National Employment Rights Authority carries out a significant number of inspections.<sup>336</sup> Other than registered agreements, collective agreements would not be monitored.

<sup>331</sup> <http://www.irishstatutebook.ie/acts.html>, accessed 22 March 2010.

<sup>332</sup> Frances Meenan *Regulation of Pay and Conditions of Employment* Paper presented to Round Hall Employment Law Conference, Dublin, May 2009; Frances Meenan *Regulation of Pay and Conditions of Employment* IELJ Volume 6, Number 4 – Winter 2009 92 (abridged and updated version of paper).

<sup>333</sup> Employment regulation orders.

<sup>334</sup> National Minimum Wage Act 2000.

<sup>335</sup> More recently due to the numbers of joint labour committees there have been amalgamations of joint labour committees. The up-to-date information may be found on <http://www.labourcourt.ie/labour/labour.nsf/lookuppagelink/HomeRatesOfPay>, accessed 22 March 2010.

<sup>336</sup> Annual Report 2009 was published on 4 February 2010. <http://www.employmentrights.ie/en/aboutnera/latestnewsevents/mainbody.11788.en.html>, accessed 23 March 2010.

More recently the procedural aspects of these committees has been challenged on grounds that the procedures *inter alia* are not in conformity with the Constitution of Ireland, as it is pleaded that there is an unlawful delegation of function as the employment regulation orders should be laid before the *Oireachtas* (parliament) and also there is no provision for the employer to plead inability to pay unlike in the National Minimum Wage Act 2000.<sup>337</sup> Arising from these difficulties and also the severe economic recession in Ireland, the Industrial Relations Bill 2009<sup>338</sup> was introduced to provide for necessary reform and is presently going through the *Oireachtas* (parliament).<sup>339</sup> Such reform is to include the laying of the employment regulation orders before the *Oireachtas*, various procedural changes for joint labour committees and the taking into account of economic circumstances. There is also provision in the Industrial Relations Acts for registered employment agreements for various industries, for example in construction and security sectors.

The Protection of Employment (Part-Time Employees) Act 2001 implemented Directive 97/81/EC. Whilst there is no strict proof, it is this writer's view<sup>340</sup> that given that so many women work part time, this legislation has had a significant impact on wage rates of women. There is provision for pro-rata entitlements with full-time employees. The Industrial Relations Act 1990 (Code of Practice on Access to Part-Time Working) Declaration Order 2006<sup>341</sup> provides that requests by employees to transfer from full-time to part-time work and *vice versa* or to increase working hours, should the opportunity arise, should be granted. Before this Act was passed, part-time female employees who considered that they were being discriminated against had to rely on employment equality legislation to pursue a claim. In respect of pay the female claimant would have had to obtain a male comparator. However with this legislation, the employee has to compare herself with a full-time employee regardless of gender.

The Protection of Employment (Fixed-Term Work) Act 2003 implemented Directive 1999/70/EC: again, if an employee is employed on a fixed-term contract, they are entitled to the same terms and conditions of employment as a permanent employee (regardless of gender).

As stated above, employment agency workers have a particular difficulty in that the comparator may only be another agency worker. Retirement ages in Ireland are the same for both genders. The Maternity Protection of Employees Acts 1994-2004 provides for 26 weeks of maternity leave as well as additional (unpaid) leave. The Adoptive Leave Acts 1995-2005 provide for similar provisions in cases of adoption. The Parental Leave Acts 1998-2006 provide for 14 weeks unpaid parental leave. The Carer's Leave Act 2001 provides for 104 weeks paid absence where an employee

<sup>337</sup> Frances Meenan *Regulation of Pay and Conditions of Employment* Paper presented to Round Hall Employment Law Conference, Dublin, May 2009; Frances Meenan *Regulation of Pay and Conditions of Employment* IELJ Volume 6, Number 4 – Winter 2009 92 (abridged and updated version of paper). These papers set out the background and constitutional difficulties of joint labour committees and their procedures. Available on [www.westlaw.ie](http://www.westlaw.ie) (subscription service).

<sup>338</sup> Presently at committee stage in *Dail Eireann*.

<sup>339</sup> The Explanatory Memorandum states 'Many of the Employment Regulation Orders (EROs) that have been created under the current system are constructed to promote and may be said to have led to the closure of numerous hotels, cafes, pubs and restaurants and the resultant loss of jobs. In particular, restriction on Sunday work and high minimum rates for non-overtime pay on Sundays have caused difficulties for employers and employees. They have also given an unfair competitive advantage to parts of the country not covered by the particular ERO....'.

<sup>340</sup> Frances Meenan *The Protection of Employment (Part-Time Employees) Act 2001 – A Five Year Review* Employment Law Journal – Ireland June 2005.

<sup>341</sup> S.I. No. 8 of 2006.



wishes to care for an ill relation, for example. However, specific career breaks are a matter of agreement with an employer and are more usually only available in the public service and other larger employers.

Over the years there has been a general move towards individualisation of pay rates. Such individualisation, of course, leads to issues of confidentiality. However, if an equal pay claim was made, the pay rates of the named comparator would have to be released. Where there is, for example, a named comparator who is part of a group of employees, the names of the other employees are redacted in order to preserve confidentiality.

## **8. Final assessment of good practices**

The general application of employment law and the various Directives have, in this writer's opinion, significantly improved the terms and conditions of employment and whilst there is no specific proof such applications must enhance the remuneration of women. This would appear to be the case subsequent to the application of Directive 97/81/EC. However, the absence of a real comparator is significant, especially in segregated employment, should an employee wish to bring a claim under the Employment Equality Acts. The practice of having agreed career breaks would appear to ensure that the women may return to their employment at the same level, as opposed to taking a part-time position where there may not be the same promotion opportunities.

# **ITALY – *Simonetta Renga***

## **1. General situation**

In Italy, the gender pay gap receives little attention either in the public debate or in the policy agenda, yet it is persistent in all sectors and at all levels.

Data on the gender pay gap are not updated. As they date back to 2002, they do not take into consideration the set of occasional and precarious working patterns introduced by the 2003 legislator. The 2002 data show that the gender pay gap is also influenced by both the employees' professional qualifications and the presence of children. In the private sector, female employees earn 29.8 % less than men and female managers have a pay gap of 37.1 %. Single female white-collar workers earn 17.1 % less than men in the same position; female managers with children have a pay gap of 49 %. Differences are smaller in the public sector: female employees earn 15.1 % less than men and female managers have a pay gap of 12.7 %. The hourly pay, which does not include overtime payments and is not influenced by the total amount of hours worked, shows the same trend. The difference range from a pay gap of 0.3 % for female employees to a pay gap of 20.9 % for female managers.<sup>342</sup>

As regards the private sector, studies carried out by labour economists give statistical evidence of job segregation affecting female employment.<sup>343</sup> In particular, they underline that the pay gap tends to increase in direct proportion with certain

<sup>342</sup> *ISFOL* (Institute for the development and the vocational training of workers) 'Esiste un differenziale retributivo di genere in Italia?' Roma (2007), on <http://www.lavoro.gov.it/Lavoro/Europalavoro/SezioneEuropaLavoro/DGPOF/ProdottiEditoriali/CollaneEditoriali/LibriFSE/differenzialeretriativo.htm>, accessed 22 March 2010.

<sup>343</sup> Conference on Gender Pay Gap promoted by *CNEL* 2008, on <http://www.italiannetwork.it/news.aspx?ln=it&id=3433>, accessed 22 March 2010, where *ISFOL* presented the results of a three-year research (2004-2007) on the Gender Pay Gap.

factors such as age and the level of education of the worker and the dimensions of the organisation. Moreover, the gap is larger in the richer and more productive regions.

In these studies, the gender pay gap is necessarily and broadly understood as the *de facto* difference between the average pay received by men and women in the labour market, which can mainly be the result of: a) job segregation; b) segregation in lower levels of job classification; and c) 'contractual segregation'.

Contractual segregation, in particular, is linked to the reform of the rules for fixed-term contracts (in 2001), which were made much more flexible, together with the reform of the labour market and atypical jobs (in 2003): both increased the number of employed women, but also favoured the entering of young people (most of all women) of the labour market in precarious jobs.<sup>344</sup> The latter are not 'good jobs', as pay rates are low and the opportunities to change to a qualified and more remunerated job are definitely low.

Even though to a lesser extent, as we have shown, the gender pay gap, in the form of horizontal (i.e. in sectors) and vertical (i.e. in levels) segregation, persists in the public sector as well,<sup>345</sup> although this sector has a typically compressed wage structure and a binding principle of equal treatment of all workers.<sup>346</sup> This seems to confirm once again that the main part of its reasons can probably be explained by factors other than unfair differential treatment by the employer.

## 2. The legal framework

Legislation regarding equal pay applies to all employees in the private as well as in the public sector. Article 37 of the Constitution states that 'a working woman shall have the same rights and, for equal work, the same remuneration as a male worker'.

The latter constitutional principle was reworded and clarified by Article 28 of the Code of Equal Opportunities,<sup>347</sup> as recently modified by Decree no. 5 of 25 January 2010 (implementing Directive 2006/54/EC), which now states: 'For the same work or for work to which equal value is attributed, direct and indirect discrimination with regard to all aspects and conditions of remuneration are forbidden. Occupational classification systems applied for the purpose of determining remuneration shall adopt common criteria for men and women and be drawn up as to eliminate any discrimination'. It is still too early to solve the doubt whether the use, in Paragraph 2 of Article 28, of the verb 'eliminate' instead of the verb 'exclude', used by Article 4, Paragraph 2, of Directive 2006/54/EC, is a mere choice of translation or entails a different level of enforcement of the Directive, which is more proactive.

No justifications for differences in pay are provided by Italian legislation, except those permitted on the ground of the general notion of indirect discrimination. The concept of pay is not defined by the law, but has widely been construed by Italian courts, on the basis of collective agreements, as including any economic benefit in cash or in kind directly and indirectly paid on the ground of the employment

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<sup>344</sup> Decree No. 368 of 6 September 2001, on Fixed-Term Contracts, implementing Directive 1999/70/EC, published in OJ No. 235 of 9 October 2001, on <http://www.parlamento.it/leggi/deleghe/03276dl.htm>, accessed 20 March 2010; Decree No. 276 of 10 September 2003, on the Reform of the Labour Market, published in OJ No. 235 of 9 October 2003, on <http://www.camera.it/parlam/leggi/deleghe/03276dl.htm>, accessed 20 March 2010.

<sup>345</sup> C. Lucifora & D. Meurs 'The Public Sector Pay Gap in France, Great Britain and Italy', *IZA Discussion Paper* No. 1041 (March 2004), on <http://www.iza.org>, accessed 20 March 2010.

<sup>346</sup> M.G. Ruggerini, 'I differenziali retributivi di genere nel nostro Paese', *LeNove - Studi e ricerche sociali*, CNEL (July 2008), on [www.portalecnel.it](http://www.portalecnel.it), accessed 20 March 2010.

<sup>347</sup> Decree No. 198 of 11 April 2006, in OJ No. 125 of 31 May 2006, Ordinary Supplement No. 133, on <http://www.parlamento.it/leggi/deleghe/06198dl.htm>, accessed 20 March 2010.

relationship. As a consequence, occupational pensions fall within the scope of the principle of equal pay. In any case, the recent Decree No. 5/2010 applied the prohibition of discrimination to occupational pensions; different treatment is, however, allowed as a consequence of the application of gender-based actuarial factors.

### **3. Instruments of social partners**

Under industry-wide agreements, different job classifications on the ground of sex have been abolished from the 1960s onwards.

However, it is not easy to detect the gender pay gap which may hide, as a form of indirect discrimination, in apparently neutral criteria of definition of wages stated by collective agreements or in additional wages bargained at local or enterprise level and in personal bonuses. In particular, job classification is gender neutral, but no formalized job evaluation and job analysis systems are available in our legal and industrial relationships systems. Moreover, local and enterprise contracts are not easily available and seldom published, either on websites or on paper.<sup>348</sup> Neither collective agreements nor job evaluation schemes are normally monitored.

The problem is less serious in the public sector, where there is extensive coverage of collective agreements and a rather centralised system of pay determination. Additional wage is bargained at local level, which implies a multitude of local agreements, but individual bargaining is absent.

No specific measures are provided inducing/obliging social partners to include the issue of equal pay in collective and other agreements.

Nevertheless, social partners can promote positive actions, which are provided by the Code for Equal Opportunities as an open list and, as a consequence, can also be aimed at tackling the gender pay gap. The role of positive actions in this area has been strengthened by Article 1 of the Decree no. 5/2010, which extended the list of possible aims of positive actions to the increase in value of professional skills of jobs where the percentage of women is higher. The role of social partners in this field is also reinforced by the provision of the Code for Equal Opportunities that gives priority, in the admission to public financing, to positive actions adopted on the basis of collective agreements bargained between employers and trade unions. However, the scanty data published, i.e. just the titles of the projects admitted to public financing, show that positive actions geared to close the pay gap appear rare or almost inexistent.<sup>349</sup>

No other remarkable and widespread practices of the social partners or particular policies/measures of trade unions are to be recorded in the gender pay gap area. There are not many data available on this. We lack, therefore, a general overview of such measures, especially when taken at local or production-category level. As far as we are able to monitor, however, items such as the gender pay gap, including the revision of job classifications, have never been fully considered by unions' strategies. The

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<sup>348</sup> Interconfederal agreements and industry-wide agreements are not officially published (i.e. in the Official Journal); they are usually published by many law reviews and by trade unions press as well as on the website of CNEL (National Committee of Labour and Economy), on [http://www.cnel.it/archivio/contratti\\_lavoro/BDCL.asp](http://www.cnel.it/archivio/contratti_lavoro/BDCL.asp), accessed 20 March 2010.

<sup>349</sup> Ministerial Decree of 28 May 2009, on [http://www.lavoro.gov.it/NR/rdonlyres/34162DFA-BD28-4FE0-A236-EE1C634F2497/0/090528\\_DIprogettipositivi.pdf](http://www.lavoro.gov.it/NR/rdonlyres/34162DFA-BD28-4FE0-A236-EE1C634F2497/0/090528_DIprogettipositivi.pdf), accessed 20 March 2010; Ministerial Decree of 5 December 2008, on [http://www.lavoro.gov.it/NR/rdonlyres/DFE59719-C42A-44A2-A366-739FC6B8A964/0/20081205\\_DI.pdf](http://www.lavoro.gov.it/NR/rdonlyres/DFE59719-C42A-44A2-A366-739FC6B8A964/0/20081205_DI.pdf), accessed 20 March 2010; Ministerial Decree of 28 December 2007, on [http://www.lavoro.gov.it/NR/rdonlyres/61460E78-8F4A-48AA-8DF2-9E8D34138A75/0/DecretoInterministeriale2007\\_12\\_28.pdf](http://www.lavoro.gov.it/NR/rdonlyres/61460E78-8F4A-48AA-8DF2-9E8D34138A75/0/DecretoInterministeriale2007_12_28.pdf), accessed 20 March 2010.



commitment of unions has always stopped up at setting joint commissions and making declaration of principles, which were rarely followed by concrete plans of intervention.<sup>350</sup> Several collective agreements at national level set up a specific commission or empowered the *Ente Bilaterale di Categoria* (bodies set up by employers and employees trade unions) to deal with gender equality items and, among others, collect and analyse data on women's working conditions in the sector, promote the adoption of positive action plans by the employers of the sector, and prevent mobbing. Nevertheless, no data are available on the real impact of such activities on collective agreements and specifically on tackling the gender pay gap.

The current trend towards a more decentralised and individualised system of wage setting makes the situation even more worrying.

#### **4. Instruments specifically aimed at employers**

Apart from the ban on discrimination provided by Article 28 of the Code for Equal opportunities, there are no other instruments that oblige employers to address the issue of equal pay.

Only in the public sector some provisions, which concern in general the promotion of equal opportunities, can have an impact on the enforcement of the principle of equal pay. In particular, Article 48 of the Code for Equal Opportunities provides that public employers shall draw up three-year positive action plans aimed at achieving a better balance between sexes in jobs and pay levels where women are under-represented (this means, according to the express provision of Article 48, that they are less than one third of the total). Nevertheless, no positive actions specifically aimed at tackling the gender pay gap are, so far, to be recorded. This shows a worrying trend not to use existing provisions that could be important in the process of equalization. In the private sector, positive actions can be promoted (as stated above in Section 3 of this country report) as voluntary instruments by employers.

A potentially important instrument concerns the release of information on pay to individuals and other data at firm level. Article 46 of the Code for Equal Opportunities provides that, every two years, public and private companies employing more than 100 employees shall submit to Regional Equality Advisers and trade unions a report concerning the situation of male and female employees in all jobs existing in a company, in relation to appointments, training, professional promotion, pay levels, mobility between categories and grades, other mobility aspects, redundancy fund, dismissals, early retirements and retirements, and remuneration actually paid. However, this report, which could be crucial to detect possible situations of discrimination, has actually remained unused. As a consequence, Decree No. 5/2010 provides that the Regional Equality Adviser shall also elaborate the data of the report and send them to the National Equality Adviser, to the Ministry of Labour and to the Department for Equal Opportunities that is part of the Prime Minister's. This should help the readability, usability and circulation of the data contained in the report.

No impact of the recommendations of the European Commission to use public procurement powers to require firms that they contract with to address the pay gap is to be recorded. As regards the information campaign promoted by the European Commission about the gender pay gap, no special prominence has been given to it to

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<sup>350</sup> Final questionnaire for the Eiro (European Industrial Relations Observatory) comparative analytical report on gender and career development – The case of Italy, on [http://www.eurofound.europa.eu/eiro/studies/tn0612019s/it0612019q\\_it.htm](http://www.eurofound.europa.eu/eiro/studies/tn0612019s/it0612019q_it.htm), accessed 20 March 2010.

date. Only the website of the Department for Equal Opportunities has a page to publicize the existence of this campaign.<sup>351</sup>

## **5. Other instruments to close the pay gap**

One of the main tools to assist individuals in establishing pay discrimination is the partial reversal of the burden of proof provided by Article 40 of the Code for Equal Opportunities. To this end, as first evidence of discrimination can also be provided by statistical data, the Report provided by Article 46 of the Code can also be useful; in particular, the choice to address the report to the Regional Equality Adviser is also consistent with his right of standing in case of gender discrimination and with his function of promoting positive action plans.

Under the Code for Equal Opportunities, both the Labour Inspectorate and Equality Bodies have instruments to tackle discrimination in general and therefore the gender pay gap as well. In particular, a fine to be paid by employers of EUR 516 to EUR 1 500 is provided in case of infringement of the ban on discrimination: in this case, labour inspectors can issue an order to stop the unlawful conduct and allow the employer to obtain the acquittal of the crime by carrying out the order and paying an administrative sanction (equivalent to a quarter of the maximum amount of the fine mentioned above).<sup>352</sup>

The Equality Advisers, who are in charge of detecting gender discrimination, promoting equal opportunities and counteracting discrimination, shall inform the public prosecutor's office at the Tribunal in case of infringement of the ban on discrimination, as they are public officials.

Collaboration between Equality Advisers and the Labour Inspectorate is also expressly provided by the Code in relation to exchange of data, good practices, dissemination of information, and drawing up of specific and effective procedures to detect gender discrimination. Equality bodies can also ask labour inspectors to obtain information on working conditions in the organisation.<sup>353</sup> Moreover, a national convention between the Labour Inspector General Direction at the Ministry of Labour and the National Web of Local Equality Advisors was signed in 2007 to strengthen and enforce these provisions.<sup>354</sup> This national convention has been followed by other conventions at local level. Nevertheless, the effects of these first efforts cannot yet be seen, as gender equality items are still very rarely addressed by labour inspectors.

The scarce use of the measures mentioned above is probably mainly due to the fact that women's job segregation and gender pay gap can hardly be overcome through legal monitoring, as they are often explained by factors other than unfair differential treatment.

## **6. Problems of enforcement and how to tackle them by good practices**

The main problem as regards the gender pay gap is probably difficulties in detecting it, as it can reside in gender-neutral criteria; most of the time, these criteria can easily be explained by the employer as objectively necessary and proportionate criteria,

<sup>351</sup> The material is published on <http://ec.europa.eu/social/main.jsp?catId=681&langId=en>, accessed 22 March 2010.

<sup>352</sup> Decree No. 124 of 23 April 2004, published in OJ No. 110 of 12 May 2004, on <http://www.dplmodena.it/leggi/124-04.doc>, accessed 22 March 2010 and Decree No. 758 of 19 December 1994, published in OJ No. 21 of 26 January 1995, Ordinary Supplement No. 9, on <http://www.dplmodena.it/leggi/Dlvo%20758-94.doc>, accessed 22 March 2010.

<sup>353</sup> See also Article 15 of the Code for Equal Opportunities.

<sup>354</sup> The convention can be read on <http://www.lavoro.gov.it/NR/rdonlyres/04862245-6F7E-4693-BB52-F3730D8048EF/0/PROTSERVIZIISPETTIVIDEFAGOSTO.pdf>, accessed 22 March 2010.

responding to a real need of the business. A step forward in the enforcement of equality law has been taken with the last changes in the notion of indirect discrimination. This is now wider, as the reference to criteria which disadvantage employees of one sex in a proportionally greater manner has been copied. Article 25 of the Code for Equal Opportunities now refers to 'neutral factors, which disadvantage more strongly the workers of one sex compared to the workers of the other sex'. Moreover, the discriminatory effect can also be merely hypothetical and not actually accomplished. This should facilitate the use of the ban on discrimination in relation to the issue of the pay gap as well. As regards judicial remedies, however, there is no established case law on the scope of comparison.

Under the ordinary procedure, the worker can act directly in his/her name or can delegate the Equality Adviser, who is also entitled to intervene in the proceedings. An urgent procedure is available for the employee and for Equality Advisers, trade unions and organizations promoting gender equality, who are entitled to act on the worker's behalf or to intervene in the process initiated by the employee. Equality Advisers can also bring to court a case of collective discrimination, even when the employees affected by the discrimination are not immediately or directly identifiable.

There are no age or length of service or weekly working hours requirements for presenting a claim. The general remedy of nullity is enforceable for all discriminatory acts. Compensation for economic damage can be awarded following the general principles on contractual and extra-contractual liability. There are no limits on the amount of compensation for the damages of discrimination, and the backdating of awards follows the general rules on prescription: 5 years for wage credits, under contractual liability;<sup>355</sup> 10 years for awards of damages under extra-contractual liability, with the right to damages to be proved by the claimant.

Also criminal sanctions are provided by the Code, and have recently been increased. They proved, however, unable to guarantee women's rights at work as the claimant could only obtain a sentence providing for a fine, without positive remedies, such as the same level of pay received by his or her comparator for the future, and/or the difference in pay with interest (which must be pursued in a civil action).

## **7. Relationship between the gender pay gap and other parts of labour law**

Decree no. 276/2003 made the rules for part-time work much more flexible by enabling the employer to unilaterally change the employee's working schedule. Apart from the fact that this hampers the use of this contract for reconciliation purposes, certainly it does not help to reduce the gender pay gap. In fact, these clauses, which often exclude women from part-time employment, are remunerated with a percentage of increase in hourly wage, as provided for overtime.

The reform of the labour market provided by Decree No. 276/2003, which promoted several forms of atypical working patterns (that is, precarious and low-paid jobs) to increase employment rates, was expressly presented as a measure also aimed at sustaining and improving female participation in the labour market; the same can be said of the reform of fixed-term contracts provided by Decree No. 368/2001. Nevertheless, despite a very light increase of the percentage of female employment, no positive effect on the gender pay gap can be recorded, as we are talking of precarious and low-paid jobs.

More in general, on the one hand, all measures of protection, such as compulsory and voluntary parental leave, time off for breastfeeding and so on, help working

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<sup>355</sup> See Court of Cassation 8 July 2002, case No. 9877.

mothers not to be excluded from the labour market but, on the other hand, have a negative effect on women's average pay, as they are normally used by mothers. Rules inducing fathers to take up leaves would be very useful to progressively reduce the gender pay gap. Our system, for example, provides an increase of one month in the total maximum amount of parental leave which can be used for each child (11 instead of 10 months), when the father takes up the leave for at least 3 months; this leave, however, is very seldom used by fathers, for cultural and economic reasons.

The recent reform of positive actions for the reconciliation of professional and family life partially addresses these issues, as it specifically refers to positive actions providing for innovative systems of job evaluation for those who are involved in family-care activities, in order to avoid their marginalization.<sup>356</sup> It therefore also addresses the problem of gender segregation in low-paid jobs and that of wage setting for workers involved in family-care activities (normally women), which are among the main causes of the gender pay gap.

A measure which is gender neutral but, on the contrary, could contribute to increasing the gender pay gap is provided by Article 2, Paragraphs 156 and 157 of the Budgeting Act for 2010, which provides for a temporary tax reduction on the productivity bonus.<sup>357</sup> In fact, this affects the part of remuneration which is more at risk of discrimination.

Finally, it must be recalled that any difference in women's working patterns is mirrored, often in the form of indirect gender discrimination, by the pension system: low wages endanger women's rights to pensions and lower their pension amount due to the links existing between earnings, contributions and social security benefits.

## **8. Final assessment of good practices**

As regards good practices, three examples in our country can be quoted as potentially relevant and useful.

One of them is the release of information about pay through the biannual report that organisations employing more than 100 workers are obliged to submit to the Equality Adviser and to union representatives. The report, however, as stated above, has not been used that much so far.

The second example is represented by the role of positive actions in this area. This has recently been strengthened, as mentioned, by extending the list of possible aims of positive actions by the increase in value of professional skills of jobs where the percentage of women is higher. In the area of positive actions, we also wish to recall the three-year positive action plans aimed at achieving a better balance between sexes in jobs and pay levels where women are under-represented, which must be drawn up by public employers, although no positive actions specifically aimed at tackling the gender pay gap are, so far, to be recorded. Finally, the recent reform of positive actions for the reconciliation of professional and family life partially addresses these items, as it specifically refers to positive actions providing for innovative systems of job evaluation for those who are involved in family-care activities, in order to avoid their marginalization.

The third example is the improvement of the collaboration between Equality Bodies and Labour Inspectorates, started by the described Protocol of 2007, which

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<sup>356</sup> Article 38 of Act No. 69 of 18 June 2009, in OJ No. 140 of 19 June 2009, Ordinary Supplement No. 95, on <http://www.parlamento.it/parlam/leggi/090691.htm>, accessed 19 March 2010.

<sup>357</sup> Act No. 191 of 23 December 2009, published in OJ, Ordinary Supplement No. 243 to No. 302 of 30 December 2009, on <http://www.parlamento.it/parlam/leggi/091911.htm>, accessed 19 March 2010.

could also have some positive results on the ground of voluntary measures (as well as in the area of repressive interventions). Indeed, voluntary measures can be really effective for the purpose of reducing the gender pay gap. For example, the role of the EONC (the Equal Opportunities National Committee, part of the Ministry of Labour) in formulating a yearly programme in order to fix the targets for positive actions to be admitted to public financing will be crucial in increasing the attention for this item.

As in our country there seems to be little attention for the gender pay gap on all levels, we will try to present a list of good practices which, if implemented, could help tackle the gender pay gap.

In the first place, a campaign to distribute information on the gender pay gap and on the instruments to tackle it seems a necessary step in the enforcement of equality principles.

A further and essential step should be the promotion of a specific professional training addressed to all parties (judges, lawyers, equality bodies, union representatives, labour inspectors) who might be involved in closing the gender pay gap. In this perspective, a good practice could be represented by the creation of several taskforces in different areas (judiciary, collective bargaining, promotion of positive actions, labour inspections) to elaborate a code/model of intervention to be experimented with and then disseminated. This should ensure a 'first aid kit' to face concrete problems, such as detecting and giving evidence of gender discrimination in wages.

As far as proof of discrimination is concerned, it could also be very important to have updated statistics by gender on different issues, such as the percentage of female employees in each sector, for each region, data on female employees' careers and so on, in order to facilitate the comparison of the organisation's situation with the trend of sectors and geographical areas. Also, more general statistical data differentiated by gender would be very useful.

In the area of repressive instruments, the Labour Inspectorate's intervention could be strengthened by raising the awareness of public bodies and, most of all, their professional training on gender discrimination and in particular on the gender pay gap.<sup>358</sup> Indeed, we wish to recall that under Article 15 of Decree no. 124/2004, the labour inspectors can order the employer to cease any unlawful conduct.

Good practices could, finally, be usefully experimented with as regards job evaluation and job analysis systems. These are apparently neutral in our legal and industrial relationship system. However, in-depth analysis of the possible implied factors (such as professional skills and qualifications, seniority requirements, and professional experience and capability) that could hide pay discrimination and the draft of a 'gender-correct' evaluation system to be followed in collective bargaining, could be very important in closing the gender pay gap. Similar good practices should be experimented with regarding wage setting at sector or company level.

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<sup>358</sup> Following the initiatives promoted in 2005 by the Regional Equality Adviser of Sardinia and Valle d'Aosta, who organised and financed a one-day professional training for Labour Inspectors on gender discrimination.

## 1. General situation

In comparison with the other EU Member States, the pay gap in Latvia is not very high. It is at an average level. The pay gap in Latvia is primarily due to horizontal segregation of the labour market. There is a quite strict division into ‘male’ and ‘female’ professions. The gender pay gap also exists due to vertical segregation, but in comparison with the other EU Member States, vertical segregation is not very strong. In total, the pay gap in the public and the private sector is almost the same. The most problematic sector with regard to the pay gap is the sector of financial and insurance services. In this sector, the overall pay gap is 43 % (in the public sector it is 55 %, in the private sector 38 %). Men working in the financial and insurance sector during the first quarter of 2009 monthly received a gross average pay of EUR 2 091 (LVL 1 470), while women only received EUR 1 198 (LVL 842). The sector where the pay gap is second highest – 29 % – is wholesale and retail. Here, men on average received EUR 685 (LVL 482), but women EUR 488 (LVL 343).<sup>359</sup>

Data on the pay gap from the perspective of gender and age is not available.

## 2. The legal framework

The sole legal provision on equal pay is provided by Article 60 of the Labour Law.<sup>360</sup> It simply states that the employer is under the obligation to define equal pay between men and women for equal work or equal value. From the point of view of wording, it may be argued that Article 60 does not correspond with EU law, because it requires ‘to define equal pay’ not ‘to provide or pay equal pay’. None of the normative Acts provide for criteria for the assessment of equal pay for work of equal value and none of the normative Acts provide for the concept of pay within the meaning of EU law.

Labour law is applicable to employees of the whole private sector and to persons employed in the public sector under an employment agreement. Article 60 of the Labour Law is also applicable to civil servants and servants of the system of the interior: Article 2(4) of the Law on the State Civil Service<sup>361</sup> and Article 3(2) of the Law on Service in the System of the Interior and Imprisonment System<sup>362</sup> provide that provisions of Labour Law on equal treatment, including equal pay, are applicable.

Consequently, legal regulation on equal pay in the public sector only covers employees (working on the basis of an employment agreement) of the public sector, civil servants and servants of the system of the interior and imprisonment, thus excluding a number of professions in the public sector such as judges, prosecutors and soldiers.

In addition to the gap in legal regulation on equal pay at the individual level, there are considerable problems in the whole system of pay in the public sector. Latvian law (external)<sup>363</sup> does not oblige the legislator to assess normative Acts from the

<sup>359</sup> Central Statistical Bureau of Latvia, 2010, data available in Latvian on <http://data.csb.gov.lv/Dialog/Saveshow.asp>, accessed 21 March 2010.

<sup>360</sup> *Darba likums*, Official Gazette No. 105, 6 July 2001.

<sup>361</sup> *Valsts civildienesta likums*, Official Gazette No. 331/333, 22 September 2000, with respective amendments on equal treatment, Official Gazette No. 180, 9 November 2006.

<sup>362</sup> *Iekšlietu ministrijas sistēmas iestāžu un Ieslodzījuma vietu pārvaldes amatpersonu ar speciālajām dienesta pakāpēm dienesta gaitas likums*, Official Gazette No. 101, 30 June 2006.

<sup>363</sup> There are two categories of normative Acts in Latvia: external – binding for everyone (laws, regulations of the Cabinet of Ministers, regulations etc.), and internal – binding to individuals within particular institutions (internal rules of organisations or institutions, instructions of Cabinet of Ministers etc.).

perspective of the principle of equal pay. It has never done such an analysis. At the same time, the legislator has adopted a number of legislative Acts regulating pay matters,<sup>364</sup> including particular rates of pay for categories, levels, branches and groups of professions. Such legislative Acts have never been assessed by the legislator from the perspective of the principle of equal pay for work of equal value systemically. This has led to a situation where typically female professions are remunerated lower than typically male professions, for example, teachers in comparison with police officers.

In addition, legal regulations setting particular levels of pay for categories, levels, branches and groups of professions define minimum and maximum levels of pay for specific professions (posts) only. Individual levels of pay must be determined by the employer (head of public institution) on the grounds of various factors such as education, term of service, qualification and results achieved. Such a system again leaves a wide margin for the violation of the principle of equal pay. First, criteria which must be taken into account for the purposes of setting a particular salary may lead to indirect discrimination. Second, assessment may be subjective. Third, pay for equal work may vary from institution to institution, because individual assessment is carried out within the limits of one public institution, not in the whole public sector, and even by one party of a particular system.

Consequently, the implementation of the principle of equal pay in Latvian law is incomplete with regard to both the persons covered and the matters regulated. First, the legislator does not assess the normative Acts setting particular pay levels for persons employed in the public sector. Second, Latvian law does not protect judges, prosecutors and soldiers against unequal pay. Third, the principle of equal pay for equal work remains unenforced, because of the total lack of criteria on how to compare and assess equal value of different work.

### 3. Instruments of social partners

There are no legal instruments obliging social partners to include issues of equal pay in collective or other agreements. Social partners are just subject to the same equal pay principle provided by Article 60 of the Labour Law. According to Article 6(1) of the Labour Law, provisions of collective and other agreements which are less favourable than the provisions of the Labour Law are void.

The Free Trade Union Confederation and the Employer's Confederation have no particular policies. They have not taken any particular measures to address issues of pay gap. So far they have merely recommended their members to pay attention to this problem.

It follows that the social partners do not have any special legislative instruments nor have they taken policy or other measures to promote closing the gap.

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<sup>364</sup> Of importance here is the 'Law on remuneration of officials and employees of state and municipal institutions' (*Valsts un pašvaldību institūciju amatpersonu un darbinieku atlīdzības likums*), Official Gazette No. 199, 18 December 2009; Regulations of the Cabinet of Ministers No. 310 'On classification of the posting system and on the procedure of classification at the institutions of direct administration' (*Noteikumi par amatu klasifikācijas sistēmu un amatu klasificēšanas kārtību valsts tiešās pārvaldes iestādēs*) Official Gazette No. 75, 12 May 2005; Regulation of the Cabinet of Ministers No. 1651 'Regulations on remuneration, posting grades and procedure for their award for officials and employees of the institutions of direct administration' (*Noteikumi par valsts tiešās pārvaldes iestāžu amatpersonu un darbinieku darba samaksu, kvalifikācijas pakāpēm un to noteikšanas kārtību*), Official Gazette No. 206, 31 December 2009.



#### 4. Instruments specifically aimed at employers

Employers are obliged to observe the principle of equal pay only insofar as it is provided by Article 60 of the Labour Law. There are no other obligations set by law with regard to employers.

Pay in the private sector is predominantly confidential information. Contracts of employment usually contain a clause of confidentiality, which precludes spreading information on pay not only outside an organisation but also within an organisation.

With regard to pay in the public sector, so far the Law on data protection of natural persons<sup>365</sup> has been interpreted as precluding release of information on pay with identification of a particular individual (employee of the public sector, official or servant). However, the Legal Office of the Parliament has now drafted amendments to the Law on remuneration of officials and employees of state and municipal institutions envisaging an obligation to provide information on pay of any individual employed or serving in the public sector.

It follows that most probably in the nearest future information on pay will be freely accessible in the public sector only. That will be the first and only instrument contributing to the fight against unequal pay.

The Law on Public Procurement<sup>366</sup> does not envisage any privileges to organisations promoting the principle of equal treatment. In addition, this Law does not provide for any restrictions on participating in public procurement organisations which have been in breach of the principle of non-discrimination.

#### 5. Other instruments to close the pay gap

There are no legal regulations or case law providing tools in addition to those set by the ECJ for establishing pay discrimination.

Collective agreements are not monitored, and neither is the existence of job evaluation schemes.

There are two institutions in Latvia having the competence to monitor the application of the principle of equal pay by employers: the Labour Inspectorate<sup>367</sup> and the Ombudsman Office,<sup>368</sup> performing the tasks of the National Equality Body.

The Labour Inspectorate formally has the right to monitor the application of all labour law stipulations by employers. However, so far, this institution has not taken any action to tackle the pay gap systematically.

Similarly, the Ombudsman Office has not taken any action to address the problem of the pay gap systematically. Its work in practice is focused on re-active rather than pro-active steps, meaning that the Ombudsman Office opens investigation cases in reaction to complaints filed by individuals. In 2008 and 2009, the Ombudsman did not receive any written complaints on unequal pay.

It follows that there are no instruments in Latvia in addition to those provided by the EU law for closing the pay gap.

#### 6. Problems of enforcement and how to tackle them by good practices

Violation of the principle of equal pay may be contested before regular<sup>369</sup> and administrative courts. Regular courts have the competence to review unequal pay

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<sup>365</sup> *Fizisko personu datu aizsardzības likums*, Official Gazette No. 123/124, 6 April 2000.

<sup>366</sup> *Publisko iepirkumu likums*, Official Gazette No. 65, 25 April 2006.

<sup>367</sup> State Labour Inspectorate Law (*Valsts darba inspekcijas likums*), Official Gazette No. 104, 9 July 2008.

<sup>368</sup> Ombudsman Law (*Tiesībsarga likums*), Official Gazette No. 65, 25 April 2006.

<sup>369</sup> Regular courts decide civil and criminal cases.



cases in employment relationships, but administrative courts have competence in public service relationships.

There are particular problems with regard to the time limits in all discrimination cases. The problem lies in the fact that Article 31(1) of the Labour Law provides for the general time limit regarding lapse of claims arising out of employment relationship, which is two years. However, this general time limit is not applicable to discrimination cases. In discrimination cases, individuals must bring a claim within a period of three months<sup>370</sup> after the violation of the principle of non-discrimination (equal pay) or after they have learned or should have learned of such fact.<sup>371</sup> It has been argued many times that this legal regulation does not correspond with the EU law principles of equality and effectiveness. Although Latvian scholars argue that one month (now three months) is a preclusive term, while the general two-year time limit stipulated in Article 31(1) is a negative prescription term,<sup>372</sup> this position may not be agreed with even if it has some logic from the point of view of legal theory. This is because in practice such a legal regulation results in shorter time limits for bringing discrimination claims than those that apply to claims for violation of other Labour Law provisions, and consequently puts individuals claiming discrimination into a less advantageous situation. Such a situation is incompatible with the principle of equivalence in EU law.<sup>373</sup>

In addition to the first problem with time limits in unequal pay cases, there may be a problem with the general time limit provided by Article 31(1) of Labour Law. It states that all claims arising from violation of the Labour Law lapse within the period of two years. Most probably national courts would apply this time limit in unequal pay cases by restricting the claim on arrears of underpayment to only two years prior to the time that a claim is brought. Consequently, application of Article 31(1) of Labour Law would lead to violation of EU law because in *Levez* the ECJ ruled that a national rule limiting an employee's entitlement to arrears of remuneration or damages for violation of the principle of equal pay to a period of two years prior to the date on which the proceedings were instituted is in breach of Community law or more particularly the principle of effectiveness.<sup>374</sup> There is no information available on whether Latvian courts have decided on such an issue so far.

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<sup>370</sup> Originally, the time limit for bringing a claim in discrimination cases was one month. It was extended to three months by the recent amendments to the Labour Law, after a long 'battle' of the Ministry of Welfare, which gave particular attention to the social partners regarding incompatibility with the EU law principles of equality and effectiveness of time limits relating to discrimination cases in comparison to general time limits under the Labour Law. Amendments to the Labour Law were adopted by Parliament on 4 March 2010 (not published and not entered into force yet), available in Latvian on [http://titania.saeima.lv/LIVS/SaeimaLIVS.nsf/webAll?SearchView&Query=%28\[NumberTxt\]=1181%29&SearchMax=0&SearchOrder=4](http://titania.saeima.lv/LIVS/SaeimaLIVS.nsf/webAll?SearchView&Query=%28[NumberTxt]=1181%29&SearchMax=0&SearchOrder=4), accessed 18 March 2010.

<sup>371</sup> Articles 34(1), 48(2), 60(3) and 95(2) of the Labour Law (*Darba likums*).

<sup>372</sup> E. Kalniņš 'Prasība par atjaunošanu darbā. Latvijas Vēstnesis', *Jurista Vārds* no.13 (6 aprīlis 2004): according to him, 'preclusive term' in German is *Ausschlussfrist*, the negative prescription term is *Verjährung*.

<sup>373</sup> See for example cases C-68/88 *Commission of the European Communities v Hellenic Republic* [1989] ECR I-2965, paragraph 24, and C-78/98, *Shirley Preston and Others v Wolverhampton Healthcare NHS Trust and Others and Dorothy Fletcher and Others v Midland Bank plc* [2000] ECR I-3201, paragraph 31.

<sup>374</sup> Case C-326/96 *B.S. Levez v T.H. Jennings (Harlow Pools) Ltd* [1998] ECR I-7835, paragraphs 32 and 34.

So far, national courts have limited comparison to employees of one single organisation.<sup>375</sup> There is no information on whether anyone has claimed comparison of pay outside their own organisation.

Victims of unequal pay are entitled not only to the arrears of underpayment but also to compensation.<sup>376</sup> According to Latvian law, in case of a positive court decision, victims of unequal pay must not experience negative effects of unequal pay in either aspect: with regard to all elements of pay and of social insurance. The employer is under the obligation to make contributions compensating for underpayment to the social insurance system retroactively.

## **7. Relationship between the gender pay gap and other parts of labour law**

In Latvia, the pay gap is caused by various factors related to the different social roles. Women on average spend 12 hours more a week than men on family and care duties. Consequently, women spend 4 hours less a week than men on gainful employment.<sup>377</sup> The lack of childcare and other types of care infrastructure, provisions and application of family law, and in particular, provisions on guardianship of children after divorce and the amount of maintenance payments creates serious obstacles for equal opportunities of women on the labour market. For example, although civil law provides that every parent has a duty to provide daily care to his/her child, there is no enforcement mechanism to compel any parent (usually fathers) to perform such duty, for example, taking children to kindergarten/school and back, cooking, washing clothes etc. Daily childcare takes a lot of time and effort, thus limiting the ability to do paid work of the parent providing childcare alone. In addition, due to stereotypes on traditional social roles governing among others national courts, it is impossible to increase maintenance payments for the purposes of compensating the inability to fully participate in the labour market for parents who perform child-rearing duties alone or to hire a baby-sitter because the other parent does not provide daily care.

Part-time employment has no considerable impact on pay in Latvia, since part-time employment as such constitutes only 9 % of the employed population. However, there are almost twice as many female part-timers as there are male part-timers.<sup>378</sup>

With regard to legal regulations, part-time and fixed-term workers must enjoy equal treatment with full-time and permanent workers,<sup>379</sup> but for part-time workers issues on pay for overtime are not regulated.

Age limits set by law concern several professions in the private sector and civil servants and officials of the system of the interior. Age limits are equal for both sexes.

Regulations on the posting of workers also require observance of the principle of equal treatment between men and women.

In general, formally, there should not be an impact of the seniority requirement on pay. It is due to the fact that Article 156(3) of the Labour Law requires taking into account the time spent on childcare leave for the purposes of seniority. However, it is difficult to believe that in practice employers indeed take into account periods spent on childcare leave for the purposes of pay and promotion. There is certainly information to indicate that some legal norms do not work in practice. Several judges

<sup>375</sup> The only known case decided on unequal pay is *Velga Čaikovska v A/S 'Falck Apsargs'*, 20 June 2007, decision of Riga Regional Court, case No. C-30-1667/9 2006.

<sup>376</sup> Article 29(8) of the Labour Law, also applied by a national court in case *Velga Čaikovska v A/S 'Falck Apsargs'*, 20 June 2007, decision of Riga Regional Court, case No. C-30-1667/9 2006.

<sup>377</sup> *Women and Men in Latvia 2008* Central Statistical Bureau of Latvia, Rīga 2008.

<sup>378</sup> *Women and Men in Latvia 2008* Central Statistical Bureau of Latvia, Rīga 2008.

<sup>379</sup> Articles 134(3) and 44(6) of the Labour Law (*Darba likums*).

in private conversation have complained that even time spent on maternity leave is not taken into account for the award of a higher qualification class. The Ombudsman Office in recent years has received a number of claims from women returning from childcare leave. They mainly complained about the breach of obligation by employers to provide them with their previous or equivalent work, also in terms of pay, and about not being entitled to the general improvement of working conditions, including pay rise, which occurred during their absence.

Consequently, in practice, the traditional division of social roles precluding equal opportunities on the labour market for women has the most negative impact on pay, and in second place come maternity and childcare leaves as well as the lack of an effective care infrastructure.

## **8. Final assessment of good practices**

The only planned forthcoming good practice could be the adoption of the draft amendments to the Law on remuneration of officials and employees of state and municipal institutions envisaging the obligation to provide information on pay to any person or any individual employed or serving in the public sector. This would at least allow obtaining information on colleagues' salary for the purposes of comparison of the level of pay for equal work.

# **LIECHTENSTEIN – Nicole Mathé**

## **1. General situation**

According to the fourth CEDAW country report<sup>380</sup> concerning Liechtenstein of 11 August 2009, the gender pay gap actually exists there too. It refers to pay statistics that show a general pay difference between men and women of 20 percent on the basis of a full-time occupation. Unfortunately no figures are available which describe the situation more precisely.

A study from 2006<sup>381</sup> in the administration of Liechtenstein confirms the gender pay difference but does not suppose pay discrimination. It states that the difference basically depends on age. In the age regions of up to 30, men and women have practically the same salary. Then a gap appears resulting from the underrepresentation of women in higher pay levels and the overrepresentation of women in lower pay levels.

## **2. The legal framework**

Basic legislation concerning equal pay is the Equality Act<sup>382</sup> of 10 March 1999, which entered into force on 5 May 1999 (*Gesetz über die Gleichstellung von Frau und Mann, or Gleichstellungsgesetz*, abbreviated *GLG*), and, where labour law is concerned, Section 1173a Article 9, §3, of the Civil Code<sup>383</sup> (*Allgemeines Bürgerliches Gesetzbuch*, abbreviated *ABGB*), which entered into force on 1 May 1995.

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<sup>380</sup> [http://www.llv.li/pdf-llv-scg-4\\_laenderbericht.pdf](http://www.llv.li/pdf-llv-scg-4_laenderbericht.pdf), accessed 18 March 2010.

<sup>381</sup> As referred to in the CEDAW country report of 11 August 2009 on [http://www.llv.li/pdf-llv-scg-4\\_laenderbericht.pdf](http://www.llv.li/pdf-llv-scg-4_laenderbericht.pdf), accessed 18 March 2010.

<sup>382</sup> LGBI. 1999 no. 96.

<sup>383</sup> See latest version on <http://www.gesetze.li/Seite1.jsp?q=ABGB&suchauswahl=1>, accessed 18 March 2010.

Section 3 of the *GLG* establishes the prohibition of direct and indirect discrimination of female and male employees on grounds of sex. The prohibition especially concerns sex discrimination resulting in unequal pay. Pursuant to Section 5 *GLG*, a person who is discriminated against by receiving unequal pay has the right to compensation for the difference in salary five years from the date of instituting proceedings to five years before and after that date, until the termination of the employment contract. This means that the right prescribes five years after the termination of the employment contract. Within the prescription period one has the right to ask for compensation of pay differences for five years retroactively from the date of instituting the proceedings, as well as for the future as long as the employment contract is not terminated.

The obligation to pay equal salaries for equal and equivalent work to men and women was already incorporated in labour legislation (Section 1173a Article 9, §3 *ABGB*) in 1995. Enforcement of the right to equal pay for equal and equivalent work then became possible on an individual basis. The *GLG* completes the Civil Code concerning gender equality especially with regard to conditions for men and women at the working place. The norms of both laws form a substantial part of gender equality law in Liechtenstein. Since the courts in Liechtenstein have not yet dealt in detail with cases regarding unequal pay, no further reference can be indicated where all elements of the pay concept are brought together and are applied in a coherent way. Based on the legal framework one can only presume that the pay concept will be close to the ECJ's case law.

### **3. Instruments to close the pay gap of social partners**

Collective bargaining (especially the so-called *Gesamtarbeitsvertrag*, *GAV*, Section 1173a Article 101 et seq. *ABGB*) is an instrument used in Liechtenstein's private law. Its function is rather similar to the law itself. This particular collective bargaining agreement, *GAV*, stipulates clauses between the parties that override the individual labour contract (e.g. if the *GAV* stipulates a minimum wage, the salary in the individual contract is at least as high as the minimum wage even if the individual contract indicates a lower salary), and partly reiterates the rules of the law (e.g. the *GAV* repeats in one of its clauses that equality between men and women has to be respected according to gender equality law). It can also apply to third parties which means that the *GAV* also applies to non-members of the representative of the employees. The *GAV* is mutually agreed and signed by the representative of the employees (trade union, *LANV*)<sup>384</sup> and by the representative of the employers (*GWK*).<sup>385</sup> The contracting parties want to achieve several goals by signing the *GAV*, such as preserving peace in the workplace, settling disputes by mutual consent, enhancing the social, economic and environmentally conscious development of each branch of trade as well as keeping Liechtenstein's market place competitive in a social market economy by encouraging innovations and modern labour organisation. This also includes equality of men and women with regard to pay. Thus, a third of all *GAVs* explicitly contain a clause concerning equal opportunities for men and women. It has to be mentioned that those *GAVs* (such as metal industry, non-metal industry and building trades) mentioning equal opportunities for men and women are applied to the largest number of employees.<sup>386</sup> In principle, collective bargaining agreements

<sup>384</sup> <http://www.lanv.li>; Liechtensteinischer ArbeitnehmerInnenverband, accessed 18 March 2010.

<sup>385</sup> <http://www.wirtschaftskammer.li>; Gewerbe- und Wirtschaftskammer für das Fürstentum Liechtenstein, accessed 18 March 2010.

<sup>386</sup> Information given by the *LANV*.

are publicly available and can be purchased from the organisation representing the employees.

Representatives of both employees and employers installed a specific section for women in their respective institutions that are active in enhancing equal opportunities between men and women (e.g. information campaigns concerning gender equality).<sup>387</sup> In my opinion, the effectiveness of these measures is still not satisfactory, since the gender pay gap of 20 % still persists. Nevertheless, the described measures are a step into the right direction in order to raise awareness of the fact of unequal pay between men and women.

#### **4. Instruments specifically aimed at employers**

The Government of Liechtenstein especially addresses employers by distributing information brochures about equal opportunities in firms.<sup>388</sup> The Office for Equal Opportunities has organised an awareness-raising campaign especially for employers about the content of the Gender Equality Act.<sup>389</sup> A Handbook with best practices for reconciling profession and family addresses employers in Switzerland also contains a chapter regarding Liechtenstein.<sup>390</sup> Furthermore, the Office for Equal Opportunities recently made an exhibition presenting information on balancing work and family life, which can be rented by firms and is then installed for a certain time in the firm. This will create opportunities in the firms to address several issues regarding gender equality, gender pay gap included - especially concerning equal pay and equal conditions for part-time workers compared to full-time workers.<sup>391</sup>

In my opinion, the effectiveness of these measures is still not satisfactory, since the gender pay gap of 20 percent still persists. Nevertheless, the described measures are a step into the right direction in order to raise awareness of the fact of unequal pay between men and women.

#### **5. Other instruments to close the pay gap**

In October 2009, the Office for Equal Opportunities organised an information event for social partners where instruments for companies were presented by which they can test their own salary politics. On the one hand, the tool 'Logib'<sup>392</sup> and, on the other, the tool 'Lohnungleichheitsdialog'.<sup>393</sup> Both tools were presented by experts from Switzerland where these tools are proposed to firms and social partners. The information event is planned to be continued in order to address companies, administrations, human resources experts, social partners and works councils.

#### **6. Problems of enforcement and how to tackle these by good practices**

The existence of the gender pay gap was already known before gender legislation was passed. It actually was the main reason that led to gender equality laws aiming at the

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<sup>387</sup> <http://www.lanv.li/Verband/SektionFrauen/tabid/95/Default.aspx>, accessed 18 March 2010.

<sup>388</sup> <http://www.llv.li/pdf-llv-scg-liechtenstein-2.pdf>: *Chancengleichheit in Betrieben, Diversity Management Info Broschüre der Regierung 2007*, accessed 3 March 2010.

<sup>389</sup> [http://www.llv.li/pdf-llv-scg-glg\\_brosch\\_06.pdf](http://www.llv.li/pdf-llv-scg-glg_brosch_06.pdf): *Gleichstellung lohnt sich, Info Broschüre*, Office for Equal Opportunities 2006, accessed 3 March 2010.

<sup>390</sup> [http://www.llv.li/pdf-llv-scg-handbuch\\_fl\\_web-5.pdf](http://www.llv.li/pdf-llv-scg-handbuch_fl_web-5.pdf): *KMU Handbuch für Beruf und Familie, Best Practices 2007*, accessed 3 March 2010.

<sup>391</sup> [http://www.llv.li/pdf-llv-scg-leitfaden\\_fuer\\_praktische\\_fragen\\_version\\_ii\\_sept.09\\_2\\_-2.pdf](http://www.llv.li/pdf-llv-scg-leitfaden_fuer_praktische_fragen_version_ii_sept.09_2_-2.pdf): *Leitfaden zur Wanderausstellung „Beruf und Familie in Balance“*, Office for Equal Opportunities (2009), accessed 3 March 2010.

<sup>392</sup> [http://www.llv.li/pdf-llv-scg-feldkirch2009\\_logib1.pdf](http://www.llv.li/pdf-llv-scg-feldkirch2009_logib1.pdf), accessed 18 March 2010.

<sup>393</sup> <http://www.lohnungleichheitsdialog.ch>, accessed 18 March 2010.

elimination of the wage differential. However, experience has shown, also in Liechtenstein (where the only case<sup>394</sup> – not published – concerning gender equality before the Administrative High Court dealt with unequal pay), that legislation only does not change the situation. It is necessary to take adequate accompanying measures to enforce the application of the law. This means that a legal basis such as gender equality legislation is absolutely necessary and also has to contain provisions on how to put into practice the principles laid down in the law. This includes, moreover, promotional and awareness-raising activities with regard to the aims of gender equality laws, which has to be done on a regular and structured basis by addressing all persons involved.

Experience of the past few years has shown that there are too many obstacles for court cases to succeed and that the inclusion of particular equality norms in labour legislation alone does not sufficiently guarantee the enforcement of the principle of equal pay for equal work. In order to improve the situation, the *GLG* now repeats the principle that women are not to be discriminated against in matters concerning remuneration and adds a new aspect, namely the introduction of rules facilitating the enforcement of the equal pay principle before the courts. A newly introduced measure<sup>395</sup> (Section 10 *GLG*) is the improved protection against unfair dismissal, which can be relevant in cases where an action regarding unequal pay is brought before the court by an employee and consequently this employee is dismissed. Then he or she is protected against the dismissal which can be considered to be unfair because it was pronounced in close connection to the action regarding unequal pay. Furthermore, the possibility for group actions was introduced. According to Section 7, the *GLG* gives organisations that have had a seat in Liechtenstein for the last five years, and which deal with equality matters between women and men, the opportunity to defend the interests of employees in sex discrimination cases before the courts. Individual persons affected by sex discrimination need to give their prior authorisation if a legal action is brought by the organisation and if it may result in a statement that discrimination is established. Before bringing the case to court, the employer's opinion has to be heard. The court's decision takes the form of a declaration that pay discrimination has been shown to have occurred. In order to receive compensation, the individuals concerned will each have to start separate and individual proceedings, although this will be much easier following a group action. In addition, the procedure was amended in order to facilitate the proof. In Section 6, the *GLG* has introduced a kind of reversal of the burden of proof. The discriminated employee has to show probable cause that e.g. the employer is guilty of pay discrimination, whereas the employer has to prove that there are relevant reasons that a woman gets less salary than a man fulfilling equal work. Before this change of the law, the discriminated employee had to prove the discrimination, which was normally too difficult because of the lack of sufficient access for the employee to information about salary policies of the employer.

## **7. Relationship between the gender pay gap and other parts of labour law**

In Liechtenstein, events related to Equal Pay Day on 11 March 2010<sup>396</sup> were organised to attract attention to the fact that women in Liechtenstein have to continue working until 11 March in order to have the same salary for equivalent work as men

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<sup>394</sup> VBl. 2002/107 of 18 June 2003.

<sup>395</sup> LGBI. 2006 no.152.

<sup>396</sup> [http://www.llv.li/pdf-llv-scg-newsletter\\_02-2010.pdf](http://www.llv.li/pdf-llv-scg-newsletter_02-2010.pdf): Newsletter of the Office for Equal Opportunities, February 2010, accessed 18 March 2010.



who achieved this salary already on 31 December of the previous year. In this context, gender pay statistics in general also refer to the fact that women often work part time, breaking their careers because of motherhood or other family obligations, working in less-paid sectors etc. So a link can be established between the gender pay gap and other parts of labour law. Since there is a very complex system to be observed one has to tackle the gender pay gap on several fronts at the same time.

## 8. Final assessment of good practices

The gender pay gap may only be closed if all stakeholders are willing to apply the legal framework. This is only possible if they are convinced that advantages are to be gained by doing so. Awareness-raising campaigns should focus on these advantages especially for employers so that they can understand why motivated people are so valuable to the company. Motivation is promoted by good working conditions. In my opinion, the gender pay gap is linked to the work-life balance: if employers do not realize that the full potential of employees can only be achieved by enabling a good work-life balance, they will not understand that equal pay for men and women is self-evident.

I am convinced that the effectiveness of the measures mentioned above is not satisfactory, since the gender pay gap of 20 percent still persists. Consequently, we have to continue and intensify all these measures.

## LITHUANIA – *Tomas Davulis*

### 1. General situation

Women make up half of the labour force in Lithuania, despite the fact that they clearly outnumber men in society (53.5 % of the population). Women mostly work in the public sector (66.6 % of the labour force) whilst men dominate (57 % of all employees) in the private sector. In spite of the fact that the salaries in the public sector are higher, there is a considerable general absolute pay gap which has been growing for the last few years and today is 19.4 %.

Year	Whole economy		Public sector		Private sector	
	Women (salary compared with men)	men	Women (salary compared with men)	men	Women (salary compared with men)	men
2000	956 (81.7 %)	1 170	980 (77 %)	1 272	918 (84.4 %)	1 087
2005	1 230 (82.38 %)	1 493	1 290 (77.9 %)	1 654	1 168 (82.1 %)	1 421
2006	1 432 (82.15 %)	1 743	1 510 (78.9 %)	1 913	1 356 (80.8 %)	1 677
2007	1 677 (79.2 %)	2 115	1 740 (79.3 %)	2 193	1 621 (77.6 %)	2 087
2008	2 020 (806 %)	2 505	2 139 (796 %)	2 685	1 916 (785 %)	2 440

The average gross monthly salary in LTL,<sup>397</sup> Source: Lithuanian Statistics

In the sectors of higher salaries, the general absolute pay gap is evident. For instance, in the last quarter of 2009 in the best-paid sector of financial services, the average pay of men reached EUR 1 665 (LTL 5 750) but was only EUR 940 (3 246 LTL) for

<sup>397</sup> EUR 1 = LTL 3.4528.

women (a general absolute gender pay gap of 43 %). The highest average salaries of women were registered in the sector of central public administration institutions (EUR 977; 3 373 LTL) but the general absolute pay gap still reached 16 %. The low-paid sectors or industries (hotels, restaurants, textile, manufactures, etc.) are clearly dominated by women. The current absolute general pay gap in the private sector is slightly bigger than in the public sector, in spite of the opposite situation a decade ago. The dynamics in the pay gap in the private sector demonstrate that men benefited more strongly from the recent tremendous increase of the level of salary in Lithuania.

## 2. The legal framework

The principle of equal pay is to be regarded as a specific implementation of the constitutional principle of non-discrimination (Section 29 of the Constitution of the Republic of Lithuania<sup>398</sup>) and of the general principle of non-discrimination of employees in the field of labour and employment relations (Section 2(1), p. 4, Labour Code of 4 June 2002<sup>399</sup>). The principle of equal pay is mainly discussed in the Labour Code and in the Equal Opportunities Act of Women and Men of 1 December 1999.<sup>400</sup>

The Labour Code defines the concept of 'pay' in Section 186(1): 'Pay shall comprise the basic salary and all additional payments directly<sup>401</sup> paid by the employer to the employee for the work performed under an employment contract'. As specified in Section 186(3), men and women shall receive equal pay for equal or equivalent work. Within the work classification system for determining pay, the same criteria shall be equally applicable to both men and women, and the system must be worked out in such a way as to avoid any discrimination on the grounds of sex (Section 188(3), Labour Code).

In addition, Section 188(3) of the Labour Code also consolidates the governing principles of appraisal systems: within the work classification system for determining pay, the same criteria shall be equally applicable to both men and women, and the system must be worked out in such a way as to avoid any discrimination on the grounds of sex. However, there is still a lack of knowledge and experience regarding how to use the provision of Section 188(3) in practice.

As stated, Section 186(3) of the Labour Code in its second sentence consolidates the principle that men and women shall receive equal pay for equal or equivalent work. In its first sentence, however, it provides a list of criteria for the differentiation of wages. The wages of an employee shall depend upon: a) the amount of work; b) the quality of work; c) the results of the activities of the enterprise; d) the labour demand and supply on the labour market. The list seems to be exhaustive, however, factors such as the employees' qualification, experience, professional skills,<sup>402</sup> length of service and productivity are not taken into account. There are two possible explanations why the legislator did not elaborate on these factors. Firstly, it allows the option to include them under the concept of 'labour demand' or the 'price of work of particularly experienced or qualified employee'. Secondly, the purpose of the present provision is of purely declaratory nature. Until now, there have been no legal attempts

<sup>398</sup> *Valstybės žinios* (Official Gazette), 1992, No. 33–1014.

<sup>399</sup> Official Gazette, 2002, No. 64-2569.

<sup>400</sup> Official Gazette, 1998, No. 112-3100.

<sup>401</sup> Thus, indirect payments or services provided by third parties do not fall under the notion of 'pay' in the Labour Code.

<sup>402</sup> It should be recalled that the general principle of equality introduced in Section 2(1), p. 4, of the Labour Code consolidates equal treatment of workers irrespective of their gender, sexual orientation, race (...) and other factors unrelated to the employee's professional qualities.



to challenge in any way the amount of wages negotiated on an individual or collective basis by an unsatisfied employee. As a result, the meaning and limits of the application of the said provision remain obscure.

The Equal Opportunities Act of Women and Men introduces the principle of equal pay in Section 5, which stipulates that the employer is obliged to provide equal pay for work of equal value (Section 5, no. 3), to provide equal working conditions and equal benefits (Section 5, no. 2) and to apply equal criteria in assessing the quality of work (Section 5, no. 3).

In its new Section 5-3, the Equal Opportunities Act of Women and Men prohibits different treatment based on sex in the occupational social security schemes, but these schemes are definitely an exception at enterprise level and in the private sector in Lithuania. Clear provisions on non-discrimination are lacking in the laws addressing the pensions of the state social insurance and state pensions. Some state pensions are awarded to public servants based on the fact that they have reached the pensionable age in accordance with the state social pension scheme. The problem lies in the fact that the state social insurance pension age is different for men and for women.

There are no other explicit stipulations on the implementation of the principle of equal pay in other areas of employment, such as the public service or self-employed persons. The concept of pay has not assumed a broader definition in other areas of national legislation.

### **3. Instruments of social partners**

As prescribed by law, the conditions for determining wages, rates, tariffs and qualification requirements for professions and positions, work quotas, the procedure of setting tariffs for work and the employees must be laid down in collective agreements, and individual hourly pay rates, monthly wages, other forms and conditions of remuneration for work, work requirements (output, time, service and other requirements) must be laid down in collective agreements and employment contracts (Sections 188(1) - 188(2), Labour Code). However, collective bargaining does not play a significant role and traditionally basic employment terms and conditions are shaped by individual agreements or by the State (e.g. in the public sector or by stipulating the minimum wage).

The Labour Code mainly stipulates two kinds of collective agreements: umbrella agreements (national, sectoral and territorial agreements) and enterprise agreements, where the latter type of agreements traditionally dominates. The Labour Code ensures the freedom of bargaining with regard to issues to be regulated by the agreement, although it provides some guidelines for the parties. Section 50 of the Labour Code presents a non-obligatory list of conditions specified in the national, sectoral or territorial agreements (e.g. terms and conditions of remuneration for work, working and rest time, safety and health of employees, system of remuneration for work in case of price increases or increasing inflation etc.) but does not include any topic related to equality. The same applies to Section 61 of the Labour Code, which describes the content of the enterprise collective agreement, giving a sample list of conditions without mentioning gender-related issues.

Collective agreements are not publicly available, except national, sectoral and territorial agreements which are all subject to registration by the Ministry of Social Security and Labour upon application (Section 54, Labour Code). However, in the Lithuanian system they are of marginal importance due to the fact that only a small

number of agreements has been concluded.<sup>403</sup> In Lithuanian practice, enterprise agreements that are almost absolutely dominant are not registered or monitored by state authorities. National trade union confederations or organisations are sometimes in a position to follow the number of those agreements and to observe the content, but they do not pay particular attention to the gender equality issues by monitoring or supporting collective bargaining conducted by their affiliates.

As an outcome of social partnership at national level, another type of agreements emerged a decade ago: agreements based on tripartite cooperation. These agreements, concluded by the Government, inter-sectoral trade union confederations and employers' organisations, are regarded as national 'social pacts' without normative effect. Until recently, the social pacts did not pay any particular attention to the implementation of the principle of equality. The Agreement on Tripartite Cooperation of 13 June 2005<sup>404</sup> recites seventeen priorities of cooperation of the parties, including the 'creation of equal opportunities in the labour market' (No. 8). However, the parties did not attempt to explain or develop this concept in the agreement. There are no particular measures or actions taken in this regard. The parties failed to include a clause encouraging their affiliates to tackle the pay gap in collective bargaining. Some measures indirectly related to the gender pay gap may be detected in the activities of national social partners, agreeing on the necessity of approval of classification of professions and pay transparency, but no significant progress has been made so far.

Despite the fact that the national centres of trade unions have so-called women committees or substructures devoted to these issues, there are no activities in drafting legal or soft-law instruments to deal with a pay gap issue.

The transposition legislation, namely the Equal Opportunities Act of Women and Men, contains no clause on the role of the parties in collective bargaining in this regard.

#### **4. Instruments specifically aimed at employers**

There are no legal or other instruments that oblige employers to address the issue of equal pay in Lithuania. Voluntary instruments are almost unknown in Lithuania and they do not consider the pay gap issue.

The requirement to firms in public procurement procedures to address the pay gap issue is unknown in Lithuania, probably caused by complete ignorance regarding practical implementation – the principle of equal pay is well known but the examples of practical inequalities and methods of dealing with them remain unknown. The Guidelines of Implementation of Horizontal Priorities in the Reclamation of EU Structural Funds for the Period of 2007-2013 mention gender equality among the horizontal priorities,<sup>405</sup> but the aim and measures addressing equal pay are not provided.

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<sup>403</sup> In September 2005, the Ministry of Social Security and Labour registered the first national sectoral agreement since 2003. The agreement was devoted to the sector of agriculture, but consisted mostly of the repetition of statutory provisions and did not encompass any significant stipulations on pay or other working conditions.

<sup>404</sup> Official Gazette, 2004, No. 75-2726.

<sup>405</sup> The Guidelines of Implementation of Horizontal Priorities in the Reclamation of EU Structural Funds for the Period of 2007-2013. Available on: [http://www.esparama.lt/es\\_parama\\_pletra/failai/fm/failai/Methodikos/Gaires\\_latest\\_version.doc](http://www.esparama.lt/es_parama_pletra/failai/fm/failai/Methodikos/Gaires_latest_version.doc), accessed 24 March 2010.

## **5. Other instruments to close the pay gap**

There are no other tools which may be employed when dealing with pay discrimination cases. Job evaluation schemes are still under early discussion between social partners but the joint position is not expected yet. The driving argument for this process is not the gender pay gap, but the promotion of collective bargaining. The existing collective agreements or job evaluation schemes are not monitored or scrutinized. The number and the content of enterprise collective bargaining agreements are publicly unknown because there is no requirement to register them with public institutions. Competing trade union centres do not share information on existing pay practices in collective agreements. The sectoral or territorial agreements are also absent.

The State Labour Inspectorates do not engage in this type of disputes or investigation, because the Office of the Equal Opportunity Ombudsman is competent in this area. In recent years, we can observe a clear deviation away from the problems of equal pay in the practice of the Equal Opportunity Ombudsperson. The Office of the Equal Opportunity Ombudsman was created in 1999 for gender equality purposes only. In 2005, the Office was made responsible for supervision of implementation of all anti-discrimination legislation, including race, origin, disability, age, religion and sexual orientation, and in 2008 the new grounds of nationality, social origin and language were added to the list of prohibited grounds of discrimination. The allocated funds are clearly insufficient to maintain the initial level of attention on gender equality. The overwhelming majority of investigated cases and delivered opinions concern other prohibited discriminatory activities, rather than gender equality in employment.

## **6. Problems of enforcement and how to tackle them by good practices**

The first practical problem is always related to the information on pay conditions. As prescribed by law, conditions for determining wage, rates, tariffs and qualification requirements for professions and positions, work quotas, the procedure of setting tariffs for work and the employees must be laid down in collective agreements, and individual hourly pay rates, monthly wages, other forms and conditions of remuneration for work, work requirements (output, time, service and other requirements) must be laid down in collective agreements and employment contracts (Sections 188(1) - 188(2), Labour Code).

There are only few collective agreements with a pay scheme. In some enterprises, general conditions of remuneration that are applicable to every employee are approved by internal regulations established by the employer unilaterally (e.g. the Regulation on the Salary Scheme). The collective bargaining agreements and internal regulations are regarded as so-called 'local normative acts' with normative power (Section 3, Labour Code). The normative nature of these 'acts' requires that the employee must be informed about them in an employment contract (Section 99(4), Labour Code). However, this stipulation does not allow the employee to request information on the individual salary of any particular employee.

The practice and legislation on the release of information about individual pay has been developing in the direction of keeping this kind of information confidential. In the employment relationship, the information on the salary of an employee must not be disclosed without consent of the employee. Under Section 208(1) of the Labour Code, information about wages can be made available or made public only in cases specified by the law or upon the employee's consent. In the public service, the

information is available at the request of each person,<sup>406</sup> but the Law on the Legal Protection of Data<sup>407</sup> prohibits the disclosure of private information. That is why only general information on pay schemes, pay scales for certain professions or positions is available. The information on the pay of individual persons is not available without additional statutory provisions or the order of a court.

No specific regulation governing the enforcement of equal pay rules exists in Lithuania. The general provisions on labour disputes would apply, i.e. the dispute would be resolved by the Commission of Individual Labour Disputes at the Enterprise or the court of general jurisdiction (Civil Court). The general period of limitation for relations regulated by this Code is three years (Section 27(2) Labour Code). The reversal of the burden of proof follows from Section 2-1 of the Equal Opportunities Act of Women and Men. Because practice is lacking, it is still early to identify the requirement of comparator and the scope of comparison, but the comparison with other employers or enterprises within the same sector is not likely to be accepted by the Lithuanian courts in the near future. Traditionally, the courts require the existence and proof of a direct link or relationship between the parties involved for the determination of any possible obligation. If the action is filed, the employee may claim the difference in salary for the last three years. In addition, the employee may ask for compensation of non-material damages. Consequences for pay in the future and the building up of pensions are not stipulated.

The application of less (or more) favourable terms of employment or payment for work to an employee is considered by Section 6, p. 1, of the Equal Opportunities Act of Women and Men as a ‘violation of equal rights for women and men’, which is punishable according to the rules of administrative law: the Administrative Penalties Act<sup>408</sup> imposing administrative fines of approximately EUR 35 to EUR 1100 should be applied.

## **7. Relationship between the gender pay gap and other parts of labour law**

There is no empirical evidence for the existence of a clear relationship between the pay gap and certain rules of labour law. However, one can assume that there may be different treatment of part-time workers or persons with fixed-term contracts, producing differences in pay between men and women. To some extent, the same may be true for parental leave, despite the fact that these differences in treatment would be prohibited by other special norms of labour legislation.

Women are generally more protected in labour law which may have an effect on the level of earnings. For example, overtime is prohibited for pregnant women, breastfeeding women, employees raising children until the age of three or raising children alone until the child reaches the age of 14 without consent of an employee. As a result, more men work overtime, which is paid at a higher rate. The legislator prohibits the posting of these same groups of employees without their consent, which also means that it is mostly men who are sent on business trips. Since the relevant legislation includes quite generous payments per day, not subject to tax, we can state that there could be an effect on the general income of the two sexes.

Age, atypical work arrangements (quite a few are allowed in Lithuania) or special arrangements to fight unemployment do not seem to have an impact on pay differences.

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<sup>406</sup> In accordance with the Law on the Right to Receive Information from the State and Municipality Institutions; State Gazette, 2000, no. 10-236.

<sup>407</sup> State Gazette, 1996, No. 63-1479.

<sup>408</sup> Official Gazette, 1985, No. 1-1.

Generally, women are more often highly educated<sup>409</sup> but the majority of key positions are held by men. There are no specific tools, except the general provisions of the Labour Code and Equal Opportunities Act of Women and Men, on the obligation of employers to apply gender-neutral criteria when promoting an employee (Section 5, p. 1) but there have been no cases indicating the practical application of this provision.

As pointed out in Section 4 of this country report (see above) the obstacles to reveal salary information are in national law and practical perception of the protection of private life and confidentiality. Party autonomy in contract law is generally ignored by the courts in labour law cases. The competence of the trade union in these situations is strictly limited to the representation of its members, but even the information concerning the member's salary would not be disclosed by the employer to the trade union. Only the court or the Commission on Individual Labour Disputes would be able to access the relevant salary data. The right to request information is granted to other state institutions in the cases foreseen by the law, in particular the Equal Opportunities Ombudsperson.

## **8. Final assessment of good practices**

Good practices and good examples are not available in Lithuania. It should be stressed that the national legislator established the principle of gender pay equality in a rather declaratory way. The mechanisms of practical enforcement are still lacking. The non-existence of case law or practice of the equality body reveals a strong need for further education and sharing of good practices.

# **LUXEMBOURG – Anik Raskin**

## **1. General situation**

According to figures published by the Ministry of Equal Opportunities, the general gender pay gap in the private sector per hour was 15 % in 2009.

In 2007, the *Service central de la statistique et des études économiques* (Central service for statistics and economic studies) published a study on the gender pay gap. The analysis refers to the year 2005. The study, which has not been repeated since 2007, reveals gender inequalities regarding wage distribution. For example, 23 % of the female workers earned a salary less than EUR 2 000 per month. 10 % of the male workers did so. It also confirmed that only a small proportion of women earned high incomes.

The study registered an income inequality of 19.6 %. It states that this can largely be explained by the type of profession and by the sector to which one belongs. Furthermore, some explanatory factors have been examined in order to study their common effects. The authors note that the gender effect is noticeable. The study concerns the private sector. No similar analysis exists of the public sector.

In the general population, the reality of the gender pay gap is partly contested. It appears to be a vague notion. The fact that figures do differ because of methodical reasons does contribute to the doubt on the reality of the gender pay gap.

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<sup>409</sup> According to Lithuanian Statistics, in 2009 there were 330 000 women with higher education, compared to 217 000 men. However, the overall number of unemployed women with higher education was lower (10 000 compared to 13 000 men). Source: Lithuanian statistics. Available on: <http://www.stat.gov.lt/lt/pages/view/?id=2670>, accessed 7 March 2010.

## 2. The legal framework

The Luxembourg Constitution lays down that women and men are equal regarding rights and duties and that the State promotes the elimination of any obstacles in the field of equality between women and men. For any positive actions that existed previously, the adoption of this provision provided a legal basis for those actions. In this area, the Ministry of Equal Opportunities has developed a programme in order to encourage private enterprises to adopt projects on equality between women and men. Such programmes may include specific provisions on the gender pay gap.

On 10 July 1974<sup>410</sup> equal pay for women and men for the same work or for work to which equal value is attributed was introduced by Grand Duchy Regulation. Remuneration includes the wages or the basic or minimum ordinary salary and all other direct or indirect advantages and benefits, in cash or in kind, paid by the employer. Since then provisions appearing in collective agreements, wage scales, wage agreements or individual contracts of employment which are contrary to the principle of equal pay have been declared null and void. When a difference in pay is acknowledged, the higher remuneration will automatically substitute the lower one. Concerning the public sector, the principle of equal pay is mentioned by legislation on the legal status of civil servants.<sup>411</sup>

Equal treatment between women and men in social security is regulated by the Law of 15 December 1986.<sup>412</sup> According to this law, equal benefits have to be provided by the public occupational social security legislation.

The Law of 8 June 1999<sup>413</sup> on complementary pensions includes specific provisions on equal treatment between women and men. It allows differences based on actuarial calculation.

## 3. Instruments of social partners

The gender pay gap is addressed by political stakeholders and social partners regularly. There is a consensus on the need to act in this field, but none on the way to do so.

According to the modified Law of 12 June 1965 on collective agreements, the social partners have to envisage in any collective agreement the application of the principle of equal pay between women and men. There is no obligation to agree on measures. Formally, social partners comply with the law by stating that women and men earn the same for the same work or work of equal value.

Social partners are able to negotiate collective agreements which can be declared a general obligation. In that case, the sectors concerned must obey the rules thus laid down. The monitoring carried out before a general obligation is declared relates to the form and not to the content of the filed agreement. Once the collective agreement is applied, workers may introduce a complaint regarding the gender pay gap. There is no systematic control mechanism.

Any provision which is contrary to the principle of equality between women and men is formally prohibited. According to the modified Law of 12 June 1965 on collective agreements, collective agreements must include the principle of equal pay and methods to prevent sexual and moral harassment. It can be considered regrettable

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<sup>410</sup> *Règlement grand-ducal du 10 juillet 1974 relatif à l'égalité de rémunération entre les hommes et les femmes.*

<sup>411</sup> *Loi modifiée du 22 juin 1963 fixant le régime des traitements des fonctionnaires de l'Etat.*

<sup>412</sup> *Loi du 15 décembre 1986 relative à la mise en œuvre progressive de l'égalité de traitement entre hommes et femmes en matière de sécurité sociale.*

<sup>413</sup> *Loi du 8 juin 1999 relative aux régimes de pension complémentaires.*

that the elaboration of equality plans does not appear among the obligatory measures imposed on the social partners. This matter was discussed during the revision of the Law on collective agreements in 2003. The social partners and the Government could not agree on this.

In fact, the legal provision consisting of an obligation to refer to the results of negotiation on different matters such as the application of equality plans of women and men can be considered as ineffective. As there is no obligation to implement specific measures, the social partners mostly respond to the law by mentioning that the matters have been discussed.

Trade Unions address the subject on a regular basis. As they have no mandatory power, their actions, as those of NGOs are limited to awareness-raising campaigns.

There are no analyses on the effectiveness of the listed instruments. However, the evolution of the registered gender pay gap leads to presume that their influence on the situation, if existent, is not significant. On the other hand, we do not know what the situation would be like if those instruments did not exist. As no impact analysis exists, a personal assessment does not make any sense.

#### **4. Instruments specifically aimed at employers**

As mentioned in Section 2 of this country report, equal pay for women and men for the same work or for work to which equal value is attributed was introduced by Grand Duchy Regulation. Employers have to comply with this regulation.

As already mentioned, social partners are able to negotiate collective agreements which can be declared a general obligation. In that case, the sectors concerned must obey the rules thus laid down. Thus, they could introduce measures regarding gender equality. Any provision which is contrary to the principle of equality between women and men is formally prohibited. Collective agreements must include the principle of equal pay and methods to prevent sexual and moral harassment. In practice, most collective agreements do refer to the law regarding equal pay and sexual and moral harassment. Thus, they do formally comply to the legal obligations. It can be considered regrettable that the elaboration of equality plans does not appear among the obligatory measures imposed on the social partners (employers and trade unions). In November, the Ministry for Equal Opportunities and the Central Service for statistics and economic studies presented software which allows employers to check gender pay equality in their organisation.

The software, called *LOGIB*, was developed by the Swiss Federal Office for Equality between women and men. The tool should enable companies to check whether wage differences between female and male workers can be explained by objective factors.

The Ministry is organising training sessions in order to encourage and enable employers to use the *LOGIB* software. It also offers assistance to employers who want to use the tool. By now, two firms have declared their interest for using the proposed tool.

In January 2010, Members of Parliament discussed the persistent gender pay gap and how to act against it. After this, the Government announced its intention to review the Grand Duchy Regulation of 10 July 1974 on equal pay in order to accord more investigative power to the *Inspection du Travail et des Mines* (Labour Inspectorate Agency).

There is no specification on the gender pay gap in contracts that the State concludes with external firms.



The effectiveness of the existing instruments aimed at employers is difficult to assess. It appears that many employers are not aware of the problem or even contest its existence. It also seems obvious that combating the gender pay gap, as gender inequality in general, is not a high priority for most of the employers. The present crisis will certainly further emphasise this phenomenon.

### **5. Other instruments to close the gap**

The *Inspection du Travail et des Mines* (Labour Inspectorate Agency) is designated to monitor and enforce compliance by employers with the provisions regarding equal pay. No specific body exists regarding gender equality. A national equality body, the *Centre pour l'égalité de traitement* (Centre for Equal Treatment; CET) was established by law on 28 November 2006. The Centre for Equal Treatment is concerned with discrimination based on race and ethnic origin, disability, age, religion or belief, sexual orientation and sex. The CET is directed by a board of five members who are designated by Parliament. The CET started its activities in November 2008. Since then, no complaints about gender pay inequality have been registered.

### **6. Problems of enforcement and how to tackle them by good practices**

As shown by figures, the gender pay gap persists in Luxembourg. NGOs ask for binding rules as an obligatory establishment of equality action plans in collective agreements.

As already mentioned, the Government announced in January 2010 its intention to review the Regulation of 1974 in order to accord more investigative power to the *Inspection du Travail et des Mines* (Labour Inspectorate Agency).

Trade Unions could have an important role regarding the gender pay gap. They could emphasize the obligation to negotiate about gender equality within the law on collective agreements and place the subject on the agenda as a priority. However, in practice, the very vague and general provision regarding gender equality in this context does not ensure that trade unions actually do so.

### **7. Relationship between the gender pay gap and other parts of labour law**

Labour law is said to be gender neutral, as labour regulations apply to both female and male workers. Protection regarding maternity is part of the social security code.

The legal framework for positive actions consists of Article L.243-1 to Article L. 243-5 of the national Labour Law. Positive actions are defined as concrete measures granting specific advantages in order to facilitate the exercise of a professional activity by the under-represented sex or to prevent or compensate disadvantages in the professional career path. Positive action projects can relate to either one or more companies, or a sector or an economic branch. The State subsidizes the agreed projects. Positive actions aiming at reducing the gender pay gap are accepted in this legal framework.

The Labour Law also contains provisions which allow employers to obtain financial support when they employ people of the under-represented sex.

### **8. Final assessment of good practices**

The present Government placed the fight against the gender pay gap at the top of its priority list. The existing legislation and good practices will be analysed and reoriented.

It seems obvious that the instruments in place have not influenced the situation in a significant way. It is not clear whether the Government intends to continue

exclusively with non-binding projects and tools. As social partners strongly reject binding rules, this will probably be the Government's choice, especially considering the present financial crisis.

## **FYR of MACEDONIA – Mirjana Najcevska**

### **1. General situation**

The employment rate (the number of employed persons as part of the total population aged 15 years and over) in the Republic of Macedonia in 2006 for women is 27.0 % and for men the employment rate is higher, at 43.5 %. Unemployment rates for women and men are quite close and are 37.2 % and 35.3 % respectively.<sup>414</sup>

The activity rate (participation of the labour force as part of the total population aged 15 years and over) for women is lower and is 42.9 %, and for men it is remarkably higher at 67.3 %. In 2008, women represented almost 64 % of the non-working population in the country.<sup>415</sup> Many of the non-working women are housewives who live in rural areas (74 %), with basic (or lower) education (67 %). About 83 % belong to the age group of 15-34 and 35-54.<sup>416</sup> Most women earn EUR 81 to 130 (5000 to 8000 denars). Only 11 % of female workers receive pay above the average, unlike men, whose number is double. In other words, 89 % of women in Macedonia receive pay up to the average of EUR 190 (12 000 denars).<sup>417</sup> The poor position of women in the world of money in most cases is due to the fact that they work as employees in less-paid industries such as agriculture, the processing industry, catering, trade, education and healthcare. Even in these sectors, they work in typically 'female jobs' with no prospects for advancement. Women in Macedonia are mostly factory workers, nurses, teachers, nannies, cleaners, accountants and archivists. Nearly 90 % of employees in the textile industry, which belongs to the less-paid industries, are women. According to data from 2006, there was not a single activity where the average pay of women was higher than those of men.<sup>418</sup>

The issue of the pay gap is the result of the general restrictive labour politics and it is increased by the conservative approach of the Government toward the position of women in society as introduced in recent years. The conservative Government is promoting traditional values of women who take care of the family and have more than three children. The perception of the place of women is changing toward the patriarchal model. One of the results is, for example, that from 84 municipalities not a single one has a woman as mayor. Certain estimates indicate that the average net pay (amount of money without payments for health and social insurance) for male workers is 32 % higher than the net income of female workers. The pay gap is larger in the private sector, rural areas and among workers with primary or lower level of education. The gender gap is smaller among workers with tertiary education among

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<sup>414</sup> *Women and men in Macedonia* Republic of Macedonia State Statistical Office, 2008

<sup>415</sup> In: *Statistical Review* no. 2.4.9.09 (628) 'Employees and Net Pay in the Republic of Macedonia in 2008' systematised data are presented from the statistical study *Report for employees and net pay*, conducted in 2008. This review presents an extension of series of editions of this type; <http://www.stat.gov.mk/Publikacii/2.4.9.09.pdf>, accessed 5 April 2010.

<sup>416</sup> *Progress Report on Macedonia for gender equality in 2009*, p. 18; [http://www.esem.org.mk/Root/\\_pdf/Извештај%20за%202009%20за%20напредокот%20на%20Македонија%20за%20родовата%20еднаквост.pdf](http://www.esem.org.mk/Root/_pdf/Извештај%20за%202009%20за%20напредокот%20на%20Македонија%20за%20родовата%20еднаквост.pdf), accessed 5 April 2010.

<sup>417</sup> <http://www.kapital.com.mk/DesktopDefault.aspx?tabindex=19&tabid=65&EditionID=452&ArticleID=9145>, accessed 5 April 2010.

<sup>418</sup> *Women and men in Macedonia* Republic of Macedonia State Statistical Office, 2008.

those who work outside the private sector (mainly public sector employees and state servants).<sup>419</sup>

There are many factors that could be referred to as cause of the situation. One very significant factor for Macedonia is the immobility of women in the labour force.<sup>420</sup>

However, there is no elementary awareness of the existence of such a gap, there are very few studies on the issue and there are no substantial debates (either on an expert level or on trade union level) nor are NGOs working on the gender issues level. The pay gap is not even mentioned in the National Action Plan for gender equality 2007-2012<sup>421</sup> and there are no activities designed to tackle it. The term 'gender pay gap' is not used by politicians and the media, and there is no clear reference to what is meant by this term.

## 2. The legal framework

There are several pieces of legislation which guarantee the right to work, and rights in the field of employment. Article 9 of the Constitution lays down the general principle of equality of the citizens of Macedonia, regardless of gender. Article 32 of the Constitution stipulates that 'everyone has the right to work, to a free choice of employment, protection at work and material assistance during temporary unemployment. Every job is open to all under equal conditions. Every employee has the right to appropriate remuneration'.

In addition to these equality rules that are relevant to everyone, the equality of men and women in respect of all civil, political, economic, social and cultural rights is specifically guaranteed in the Law on equal opportunities on women and men.<sup>422</sup> According to Article 1: 'This law regulates the basic and the special measures for establishing equal opportunities for women and men, the jurisdictions, the tasks and the obligations of the parties responsible in securing equal opportunities, the procedure for identifying unequal treatment of the women and men, the rights and duties of the Attorney for equal opportunities on women and men (hereafter 'Attorney'), as an appointed person for implementation of the procedure for identifying unequal treatment of women and men, as well as the rights and the obligations of the parties taking part in such procedure'. The prohibition goes for both the public and for the private sector: 'The discrimination on the basis of sex in the

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<sup>419</sup> *Republic of Macedonia- profile of the labour market 2004-2007*, Unit of the sector for human development Europe and Central Asia-World Bank, 2008.

<sup>420</sup> Diego F. Angel-Urdinola *Can the Introduction of a Minimum Wage in FYR Macedonia Decrease the Gender Wage Gap?*, Policy Research Working Paper 4795, The World Bank, Europe and Central Asia Region Human Development Sector Unit, 2008; 'Angel-Urdinola and Macias (2008) find that low labour mobility, especially among low-skilled women, strengthens the sense of 'local' (and non-convergent) labour markets whereby differences in employment outcomes across regions are quite large. Nevertheless, workers – especially women – do not seem to move from worse to better performing regions in order to seek better job opportunities'. This situation is generally prevalent in labour markets where firms have monopolistic power. The implication of this is that firms may be paying female workers below their marginal product of labour, which causes the supply of labour to be below that in a competitive setting (a feature that may be affecting women disproportionately). Indeed, in some regions in Macedonia, a large share of working women is employed by a few large textile companies. These women claim having to accept jobs with very precarious conditions (in terms of pay, safety and working hours) due to a lack of alternative employment opportunities (CRPM, 2008).

<sup>421</sup> National Action Plan for gender equality 2007-2012, Skopje, May 2007, <http://undp.gordsys.net/index.php/mk/news/21-national-actin-plan->, accessed 5 April 2010.

<sup>422</sup> Law on equal opportunities for women and men, Official Gazette of RM, No.66/06.

public and the private sector in the areas of employment and labour, education, social security, culture and sports, according to this or other laws is forbidden.<sup>423</sup>

According to the Law on Labour,<sup>424</sup> employers freely decide how many workers and whom they will employ, and how they fill their vacancies. The same law, in Article 6 on the Prohibition of Discrimination, stipulates: ‘(1) The employer shall not put the employment seeker (hereafter: employment candidate) or employee in a position of inequality on grounds of race, skin, colour, sex, age, health condition or disability, religious, political or other affiliation, trade union membership, national or social origin, family status, property, sexual preferences, or other personal circumstances. (2) Women and men shall have equal opportunities and equal treatment in employment, occupational advancement, training, education, retraining, pay, additional payments, leave from work, working conditions, working hours and termination of work contract.’

The Labour Law defines and prohibits both indirect and direct discrimination, as well as harassment and mobbing.<sup>425</sup> According to its Article 7, (4) discrimination in terms of Paragraph 6 of this law is prohibited in relation to: ... 4) conditions of working and work and all rights of employment and on employment, including equal pay.<sup>426</sup>

Article 108 of the Labour Law contains a special and explicit provision concerning equal remuneration for man and women, providing that: ‘an employer has a duty to determine equal remuneration for men and women for the same kind of work or work of equal value.’ According to the same article, all provisions of the contract for employment, the collective contract, or the general actions of the employer, which are in opposition with the previous rule, will be annulled. The equal pay provisions of the Labour Law are also applicable to civil servants.

### 3. Instruments of social partners

In the Republic of Macedonia, the most important collective agreements are two general agreements (one for the public sector<sup>427</sup> and another one for the industry<sup>428</sup>). There are 12 other collective agreements for different branches of industry.<sup>429</sup>

In general, collective bargaining and the respective agreements currently do not play any significant role in promoting the principle of equal pay in the Republic of Macedonia. Article 7 of the Labour Law obliges social partners to include the issue of equal pay in collective and employment agreements: ‘(...) (5) Provisions of collective agreements and employment contracts that define discrimination against any of the grounds of Article 6 of this law are void.’ This means that if an agreement provides unequal pay, such an agreement will be recognized as invalid.

It is further strengthened in Article 12: ‘Employment contracts or collective agreements cannot determine rights that are inferior to the rights stipulated by law; (...)’

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<sup>423</sup> Article 3, Law on equal opportunities for women and men, Official Gazette of RM, No.66/06.

<sup>424</sup> Labour Law (revised), Official Gazette of RM, No. 16/2010.

<sup>425</sup> Article 7, Labour Law (revised), Official Gazette of RM, No. 16/2010.

<sup>426</sup> Article 7, Labour Law (revised), Official Gazette of RM, No. 16/2010.

<sup>427</sup> Government of the Republic of Macedonia, Confederation of Free Trade Unions of Macedonia *The General Collective Agreement for the Public Sector*, Official Gazette, No. 10/08.

<sup>428</sup> Association of Trade Unions, Association of employers *The General Collective Agreement for the Industry*, 2009, [http://www.ssm.org.mk/index.php?option=com\\_content&view=article&id=141&Itemid=145&lang=mk](http://www.ssm.org.mk/index.php?option=com_content&view=article&id=141&Itemid=145&lang=mk), accessed 5 April 2010.

<sup>429</sup> [http://www.ssm.org.mk/index.php?option=com\\_content&view=article&id=128&Itemid=156&lang=mk](http://www.ssm.org.mk/index.php?option=com_content&view=article&id=128&Itemid=156&lang=mk), accessed 5 April 2010.

It is very clear from the Labour Law that there is an obligation for social partners to take the pay gap into account in the process of bargaining and in the development of the agreements. However, the pay gap is not mentioned in any of the collective agreements in the Republic of Macedonia. So far, there are no activities by the social partners aimed at tackling this gap. We could consider Articles 7 and 12 as sufficient protection, but the lack of practical application indicates the need for clarification in the agreements.

Trade unions have not developed policies or measures dealing with the pay gap or with any inequality based on gender. There is only one case where the Association of Trade Unions<sup>430</sup> brought the issue of gender inequality before the Constitutional Court. The subject of the claim was Article 17 of the Law on health insurance. According to this article, the basis for payments during temporary inability to work (pregnancy, birth and motherhood) is in an average amount of up to two net monthly salaries calculated by the State Statistical Office in the previous year (i.e. regardless of their individual earnings). In this way, women in higher and better-paid positions are discouraged to become pregnant.<sup>431</sup> The Constitutional Court rejected the claim, on the basis of solidarity.

The pay gap is not mentioned in the National Action Plan for gender equality (2007-2012) adopted in May 2007, or in any of the reports on the action plan.<sup>432</sup>

As regards the principle of equal pay for equal or equivalent work for women and men, awareness has not been raised through any campaigns and projects.

#### **4. Instruments specifically aimed at employers**

Article 108 from the Labour Law is the only article that obliges employers to address the issue of equal pay: 'An employer has a duty to determine equal remuneration for men and women for the same kind of work or work of equal value.' Pay rates, bonuses and other supplements are mostly negotiated on an individual basis, and discrimination in this field constitutes one of the most severe problems of unequal remuneration of women and men. Although businesses are forbidden to pay unequal pay based on gender, there is no obligation to have a strategy against the pay gap. Furthermore, there are no public records (statistics) on individual pay or on aggregate pay information broken down by gender.

The Republic of Macedonia has not introduced the pay gap as a criterion in the process of choosing its own contractors or subcontractors. Also, there are no other instruments specifically aimed at employers concerning the pay gap.

#### **5. Other instruments to close the pay gap**

In the guidelines for the development of job evaluation schemes, pay systems etc. there are no provisions or tools directed at supporting the gender-neutral approach. The implementation of the Labour Law and collective agreements is monitored by the Labour Inspectorate.<sup>433</sup> According to Article 256 of the Labour Law 'Supervision of implementation of this Law, other laws and employment regulations on labour relations, collective agreements and contracts for work dealing with rights and

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<sup>430</sup> Constitutional Court, No. 216/2005-0-0, 05/31/2006.

<sup>431</sup> Women were arguing that the payment during the pregnancy leave should be calculated on the basis of the salary that they received in the previous year and that was the basis for the social and pension payments.

<sup>432</sup> <http://undp.gordsys.net/index.php/mk/news/21-national-actin-plan->, accessed 5 April 2010.

<sup>433</sup> <http://www.mtsp.gov.mk/?ItemID=9863721A3FFC86428BB08EA40ACF1AD4>, accessed 5 April 2010.



obligations of the employee and the employer are carried out by the body of state administration responsible for the inspection of labour.’ The inspectorate has a very extensive mandate (recommendations and opinions, prohibitions to work, initiation of court procedures, initiation of procedures regarding misdemeanour). However, so far the inspectorates have not specifically tackled the pay gap and there are no cases addressing any situation of gender discrimination either on a general gender basis or connected with the pay gap.

The very same situation applies to the established equality body (agent at the Ministry of Labour and Social Politics).<sup>434</sup> Not a single claim for protection on the basis of general gender discrimination or, more specifically the issue of the pay gap, has been brought before this body and no activities are undertaken on the pay gap issues.

The warnings given in several analysis and reports on the issue of the labour market discrepancies between women and men and specific problems related to the pay gap level in Macedonia<sup>435</sup> have not produced any proper political action.

The lack of basic recognition of the pay gap issue is very much connected with the passivity of the gender equality body set up as an office in the Ministry of Labour and Social Politics.

## **6. Problems of enforcement and how to tackle them by good practices**

Discriminatory clauses in individual contracts may be challenged by the person who feels discriminated, through court proceedings in which the burden of proof is shifted to the opponent in the process, usually the employer. The remedies are mentioned in the Labour Law and in the collective agreements.

In Article 108 ‘an employer has a duty to determine equal remuneration for men and women for the same kind of work or work of equal value’ and ‘all provisions of the contract for employment, the collective contract, or general actions of the employer, which are in opposition with the previous rule, will be annulled’. However, these obligations are not further developed in other documents connected with employment. There only is a general provision about the remedy in cases of discrimination. The remedy is between 2 and 5 net average salaries for the previous month.

According to our court system, every court has the possibility to form its own opinion without the obligation to consider previous judgments. This means that there is no possibility for comparison (there is no book of evidence, there are no precedents and there is a legal possibility according to which the courts estimate the evidence following their own free opinion).

The general antidiscrimination legislation allows compensation:<sup>436</sup> ‘If the employee has suffered damage at work or in connection with work, the employer is obliged to compensate his/her damage, according to general rules of liability for

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<sup>434</sup> <http://www.mtsp.gov.mk/?ItemID=463B79E2DAE454468BBCDFEC8D2D7845>, accessed 5 April 2010.

<sup>435</sup> *Republic of Macedonia - Profile of the labour market 2004-2007*, Unit of the sector for human development Europe and Central Asia - World Bank, 2008; E. Viertel (European Training Foundation (ETF) *Gender study - barriers to labour market participation of women in the Former Yugoslav Republic of Macedonia*, November 2008, [http://www.etf.europa.eu/pubmgmt.nsf/\(getAttachment\)/761856C25580BBA2C125753E0055FD3A/\\$File/NOTE7NALCZ.pdf](http://www.etf.europa.eu/pubmgmt.nsf/(getAttachment)/761856C25580BBA2C125753E0055FD3A/$File/NOTE7NALCZ.pdf), accessed 5 April 2010; Diego F. Angel-Urdinola *Can the Introduction of a Minimum Wage in FYR Macedonia Decrease the Gender Wage Gap?*, Policy Research Working Paper 4795, The World Bank, Europe and Central Asia Region Human Development Sector Unit, 2008.

<sup>436</sup> Article 159, Labour Law (revised), Official Gazette of RM, No. 16/2010.

compensation of damage; (2) Liability for damages to the employee also means damage caused by the employer by violation of the rights of employee.' The General Collective Agreements include the general provision for compensation in the cases of discrimination.

However, so far no claims have been brought before court connected to pay gaps. The only similar case is the already mentioned claim of the women's division of the Association of Trade Unions before the Constitutional Court. The decision of Constitutional Court was negative (with a separate opinion of one judge).<sup>437</sup>

In addition to the legal provisions regulating gender equality, coordinators of gender equality are appointed in different ministries, and commissions for equal opportunities are developed on the local level.<sup>438</sup> These structures should be used in future to tackle the pay gap.

With regard to the fact that the gender segregation of the workforce between the different sectors and branches of the economy is one of the reasons for the gender pay gap, the legal dimension of tackling the gender pay gap should be further developed and a cross-sector comparison of collective agreements should be made. The adoption of the general non-discrimination legislation (currently before Parliament) will promote the possibility for NGOs and trade unions to represent victims in court.

## **7. Relationship between the gender pay gap and other parts of labour law**

The Labour Law includes several articles that could influence the pay gap (directly or indirectly).

We can consider several articles with a possible negative impact on the pay gap. According to Article 19, smaller employers are not obliged to define specific conditions (like: qualification, place of work, night work ...) for job positions. This could enlarge the number of small enterprises which do not employ women or are keeping them in lower-paid positions.

As problematic we can consider Article 26, according to which during the conclusion of the contract of employment the applicant is obliged to provide the employer with evidence about all conditions and all known facts that are important for the working relationship, as well as diseases or other circumstances that could be important for the performance of work obligations. In a broad interpretation of this Article, women could be obliged to give information about their obligations in the home (care for children or elderly people or some other conditions which could influence the work agreement). In practice, this Article is used to reject women who the employer could expect will have some more obligations concerning their care duties in the family, or could be absent because of therapy.

The agreement of fixed-term employment is very much abused to keep employees on unfavourable contracts, as there are no protective mechanisms which could be used. There are many cases where people engaged on the basis of a fixed-term contract are dismissed several days before the final expiry of the contract, and other people are engaged in the same position, again on a fixed-term basis. Such practice puts employees in a disadvantaged position of permanent insecurity and dependence, where the protective mechanisms are rarely used in case of violation of labour rights. Because the contract should be renewed, employees do not claim their rights and they do not assert failure by their employers in their obligations stipulated by law.

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<sup>437</sup> Constitutional Court, No. 216/2005-0-0, 05/31/2006.

<sup>438</sup> <http://www.mtsp.gov.mk/?ItemID=463B79E2DAE454468BBCDFEC8D2D7845>, accessed 5 April 2010.

According to statistical data, women are more often employed on a fixed-term basis than men (the participation of women in the total number of fixed-term employment contracts is 47 %, which is higher than their participation in the total number of employment contracts for an indefinite period of time, which is 41 %).<sup>439</sup> In the total number of employment contracts for an indefinite period of time, women are less present than in the total number of fixed-term employment contracts. So, it is more likely that women will be employed on a fixed-term basis than on a contract for an indefinite period of time.

Specific differentiation is possible in the light of Article 164, according to which the female worker with a child between one and three cannot be obliged to work more hours or in night shifts; however, the Article encompasses male workers – fathers – only in the situation that the mother has left the child, or is incapable of independent life and work. It means that female parents will be in the position to reject high-paid night work, while the male parent cannot. On the family level this could mean that even if parents want to switch their obligations (because of better payment of the woman's job) they cannot do so.

There are several articles that could have a positive impact on the general gender equality situation and also on the pay gap issue.

Article 24 says that the employer cannot issue a vacancy notice only for men or only for women, except when the sex is necessary for performance of the work. As the traditional value system is dominant in Macedonia, under the phrase 'necessary for performance of the work' could be easily abused to reject women for 'traditional men's jobs'.

Article 25 sets a clear obligation for the employer to only require from candidates the documentation connected with the conditions announced for the job position. Also, according to the same article, the candidate's health must not be checked for conditions that do not relate to the job position.

A general positive impact may be expected from the introduction of gender-sensitive budgeting: The gender budgeting analysis of the politics of employment and social protection as performed by the Ministry of Labour and Social Politics showed that 'The analysis of operating plans and instructions for 2007 confirmed that the gender questions or specific measures directed towards women as a target group are not included, despite the fact that the government strategy documents point out their importance in creating employment measures'. Therefore, we emphasize that the employment of women should not be left to coincidence, but that additional efforts to include women on the labour market should be made.'<sup>440</sup>

## **8. Final assessment of good practices**

In the case of the Republic of Macedonia it is still early to speak of good practices. There are some positive changes in the general approach (recognition of discrimination and mobbing) and a willingness to make changes contained in the projects and programmes run by the Government.

A worrying issue is the lack of direct measures tackling the pay gap in the National Action Plan for gender equality as well as of separate operative programmes adopted every year.

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<sup>439</sup> Republic of Macedonia State Statistical Office 'EMPLOYEES AND NET PAY – Status October 2008', in: *STATISTICAL REVIEW: Population and social statistics*.

<sup>440</sup> <http://www.mtsp.gov.mk/?ItemID=3332DF2E3823454383553AB818CD39BD>, accessed 5 April 2010.



The lack of good practices is due to the lack of specific engagement by trade unions and a lack of awareness and interest for the issue from NGOs.

## MALTA – *Peter G. Xuereb*

### 1. General situation

Briefly, the situation is that the pay gap has been documented over time, but with apparent conflicting results. It is often said that women are not so much paid less for equal work or work of equal value, as employed in the less well-paid jobs.<sup>441</sup> Certainly, they tend to be heavily present in part-time employment, and also in the less well-paid public and private sector jobs such as social and healthcare services and many sectors of the tourism industry. Clearly, this is due to their family and caring responsibilities in a society where men but also other women such as mothers and in laws expect the mother to take the brunt of the care for children and older dependants. However, unequal pay has also been documented in other areas such as in the field of financial intermediation.

While it has often been said that the ‘real’ problem is that Malta has one of the largest ‘job gaps’, with a very low percentage (at about 35 %) of women in work, it is also true that several comparative surveys have shown that the pay gap in Malta is among the lowest in Europe, sometimes as low as 2 %. Indeed, NSO<sup>442</sup> statistics indicated that the gender pay gap fell from 5.5 % in 2002 to 2.5 % in 2006. However, in reaction to and contradicting these figures and trend in Malta, the NCPE study carried out in 2006 indicated what the NCPE called ‘another reality’, namely that we should have been speaking of a pay gap in the region of around 15.7 % on a basic pay basis and a gap of 23.2 % on a basic pay plus supplementary pay basis. More recently, the latest EIRO report, published on International Women’s Day, 8 March 2010, indicates that the pay gap in Italy, standing at 4.4 %, is now the narrowest in the 28 States studied, including Malta. Various other reports have been produced over the years, such as one in 2005-2006 by the Malta Association of Women in Business.<sup>443</sup> No final satisfactory answer on the statistics has as yet been forthcoming.

Further, no fully comprehensive and final study has been carried out as to the impact of job classification on the relative status of men and women on pay, but it is generally believed that collective agreements could do more to equalise the situation by paying clearer attention to job classification schemes. There has been only one case on gender pay, and this in the Industrial Tribunal, which is a statutory body authorised to decide employment cases on certain issues in a speedy and informal manner, rather than in the courts. The National Commission for the Promotion of Equality (or NCPE, the Maltese equality body) does report that equal pay complaints have been made. Also, the Centre for Labour Studies at the University has reported that the pay gap is considerably lower in the public sector as compared with the private sector. The Government’s priority is addressing the challenge of getting women into employment in the first place. However, the NCPE has engaged in several activities to heighten awareness of the pay gap and to promote equal pay for

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<sup>441</sup> M. Debono & S. Rizzo *Malta: Wage Formation*, on <http://eurofound.europa.eu/eiro/studies/t0808019s/mt0808019>, accessed 13 March 2010.

<sup>442</sup> National Statistics Office Malta, <http://www.nso.gov.mt>, accessed 19 March 2010.

<sup>443</sup> MAWB, website <http://www.mawb.org>, accessed 18.March 2010.

equal work, including television spots, posters, advertising, conferences and seminars.<sup>444</sup>

## 2. The legal framework

For the purposes of the Employment and Industrial Relations Act of 2002, (Laws of Malta Chapter 452,<sup>445</sup> henceforth ‘EIRA’), ‘pay’ is now defined in line with the Recast Directive 2006/54/EC. Articles 26 and 27 of EIRA provide for no less favourable terms of payment for the same work or work of equal value, and that employees in the same class of employment are entitled to the same rate of remuneration for work of equal value. The ETE Regulations of 2004 (as amended)<sup>446</sup> also impose the duty on the employer ‘to ensure that for the same work or for work to which equal value is attributed, there shall be no direct and indirect discrimination on grounds of sex with respect to all aspects and conditions of remuneration’. They specify that the employer has the duty ‘to ensure, in particular, that 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’.<sup>447</sup> These provisions should be sufficient to cover the cases that have arisen under EC Law. The ETE Regulations are self-declared to be *minimum* requirements implementing the relevant directives, while leaving it open to collective agreements to take protection beyond the minima therein established.

## 3. Instruments of social partners

There is no such legislative provision which bears on the matter directly although the law provides in the EIRA, supplemented by the ETE Regulations, that any term in a collective agreement which does not respect the equal pay principle can be struck down by the Industrial Tribunal or the Courts. These legislative provisions prohibit pay discrimination. They fall short, however, of a direct and positive obligation on the social partners to include the issue of equal pay specifically and expressly in collective agreements, far less take active measures to promote it. The most effective type of provision would be that which imposed a specific obligation to justify job classification schemes on the basis of equal pay, as part of a package that sought to ensure accountability through transparency. Outside the area of the collective agreement as such, all the major trade unions are aware of the problem (although not all agree on its extent) and take steps to raise awareness among their members, as well as among employers. So do employers’ associations, as a matter of regular statement of position. These organisations are also themselves in turn targeted by the NCPE in awareness-raising efforts by the latter. Trade unions and others therefore regularly raise the question of the gender pay gap in terms of the need to raise awareness, but in terms of concrete action tend to focus on other issues, such as the rate of participation of women in work.

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<sup>444</sup> See NCPE response to the questionnaire on Implementation of the Beijing Declaration and Platform for Action (1995) and the Outcome of the twenty-third Special Session of the General Assembly (2000) from the UN Economic Commission for Europe (UNECE), <http://www.unece.org/gender/documents/Beijing+15/Malta.pdf>, accessed 16 March 2010.

<sup>445</sup> Accessible on <http://www2.justice.gov.mt/lom/home.asp>, accessed 19 March 2010.

<sup>446</sup> Equal Treatment in Employment Regulations 2004 (Legal Notice 461 of 2004) as amended by the Equal Treatment in Employment (Amendment) (No.2) Regulations, 2007 (Legal Notice 338 of 2007). Accessible on <http://www.doi.gov.mt/EN/legalnotices/2007>, accessed 17 March 2010.

<sup>447</sup> This is the language of Directive 75/117, with the duty cast by Maltese law squarely on the employer.

#### **4. Instruments specifically aimed at employers**

The ETE Regulations of 2004 (as amended), by Article 3A Paragraph 1, impose the duty on the employer ‘to ensure that for the same work or for work to which equal value is attributed, there shall be no direct and indirect discrimination on grounds of sex with respect to all aspects and conditions of remuneration’. Article 3A Paragraph 2 further provides that ‘the employer shall ensure, in particular, that 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 so as to exclude any discrimination on grounds of sex.’

The National Statistics Office produces such information from time to time. Otherwise, it is not easy to obtain such information from the employers, nor from collective agreements which are themselves not easy to get hold of. It is not clear how far data protection legislation will in fact make the compilation of such information difficult if not impossible in a particular case of alleged unequal pay. Court procedures may be necessary in the context of a particular case being filed by the complainant. The NCPE is in a position to require such information from the employer in the course of a particular investigation following a particular complaint. In general, the secrecy surrounding job classification, pay and pay scales makes it difficult for the complainant and also makes official statistics somewhat unreliable.

I am not aware that the State has used its public procurement powers specifically in order to oblige firms to respect equal pay norms. However, it does set out general obligations for firms that are successful in the procurement exercise to respect all applicable national and European legislation and where applicable European standards and requirements as to employment in general.

#### **5. Other instruments to close the pay gap**

Breaking through the secrecy on pay and job classification within firms is most important. The unions could do more to render employers more transparent about pay policy and practice. Transparency is a key tool in rendering employer policy fairer. Monitoring and scrutiny of collective agreements is undertaken by the Central Bank of Malta and also by the Economic Policy Division in the relevant Ministry, and it can be assumed that the unions carry out their own internal monitoring. These findings are rarely if ever shared. In 2003 a study of 80 collective agreements was carried out by Montebello,<sup>448</sup> and the University’s Centre for Labour Studies as well as the NCPE have also carried out some studies on collective agreements. However, a specific study is needed on the actual operation of these agreements. All collective agreements are meant to be deposited with the Department of Industrial and Employment Relations within the Ministry responsible for employment. There is a clear role for labour inspectorates and for the equality body in this area, as was pointed out in the Gender Network Report on Legal Aspects of the Gender Pay Gap in 2007,<sup>449</sup> centering on compulsory disclosure of data by the employer. The UK questionnaire model might be worth studying. Another idea worth pursuing might be that of obliging all employers to produce gender pay statistics on a model format. Yet again, the power of Unions to bring forward complaints on behalf of a particular employee, or even the entire female workforce of a particular employer as a whole, might be a tool worth considering. The argument is the same as for the NCPE, the national

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<sup>448</sup> Montebello ‘Trends in Collective Bargaining in Malta:1998-2003’ (2003), referred to in M. Debono & S. Rizzo *Malta: Wage Formation*, on <http://eurofound.europa.eu/eiro/studies/tn0808019s/mt0808019>, accessed 13 March 2010.

<sup>449</sup> Available on: <http://ec.europa.eu/social/main.jsp?catId=641&langId=en>, accessed 30 March 2010.

equality body. In cases such as that of equal pay, where data is not easy to come by, the individual complaint mechanism with associated burden of proof is liable to break down, and institutional action, whether by trade unions or by equality bodies, becomes vital.

## **6. Problems of enforcement and how to tackle them by good practices**

Under Article 30 of EIRA, a complainant has a right to access the Industrial Tribunal, without prejudice to court action. The action must be brought within four months of the alleged breach, and it is not entirely clear whether this begins to run in the absence of information being available as to the fact of unequal pay occurring. The Tribunal has wide powers, such as the power to strike out any offending clauses in any contract of employment or collective agreement. The Tribunal may order the payment of compensation. This is without prejudice to other avenues of redress.

In the absence of case law one cannot be categorical on this point. However, the EIRA refers to equal treatment for employees in the same class of employment, but the context is that of the terms agreed by contract with an employer or under a collective agreement, which is normally done at enterprise level in Malta. There is, however, nothing to prevent the application of the prohibition and therefore of comparison as widely as the scope of the collective agreement where the agreement is sectoral or even wider in scope.

In principle, compensation is available under all the heads mentioned, as Article 30 reflects the ordinary law, as applicable also by the courts, that there shall be compensation for loss or damage sustained by the aggrieved party as a consequence of the breach.

The same considerations arise under the Equality for Men and Women Act (Chapter 46, Laws of Malta), which saves the provisions of Article 30 of EIRA.

Enforcement is also possible through the NCPE. However, it appears that cases of equal pay have been very scarce and none has been brought by the NCPE in assistance of a complainant. The main problem appears to be, rather than lack of awareness as to the right to equal treatment, the lack of transparency about pay, possibly as linked to the short time period within which a complaint would need to be made. However, there is no clear empirical evidence for this assertion.

## **7. Relationship between the gender pay gap and other parts of labour law**

I am not aware of any scientific studies linking these factors to the gender pay gap that undoubtedly exists. However, many of them are spoken of as being self-evidently so linked. For example, it is clear that if the woman in a couple takes unpaid leave and the man does not there will be an impact in terms of actual income, whether or not the two are paid equally as employees of their respective or even same employer(s). This is one example of a situation in which a woman is more likely to go without pay than a man. We can accept this, or we can say that while on paper a male and a female are paid the same rate when in work, a woman is more likely to go without pay at certain times. Perhaps one needs a general definition of gender pay gap in order to properly address all the combining factors that lead to pay disadvantage and also, or therefore, relative lack of female participation in the labour market.

Of the other aspects, I would emphasise the lack of transparency and information, and the potential in this area of stipulating the power of unions to enforce discovery and take action in the common interest of a class of employees at the enterprise, sectoral or even (in the cases where this applies) national level.

## 8. Final assessment of good practices

In my view there is need to establish the good practice of disclosure of pay information, although there can be well limited, defined and justified exceptions on this. This is a priority, coupled to obligatory 'pay practice accounting'. Good practice on the part of employers in this regard should in all possible ways be recognised, highlighted and rewarded, as should all good practice on gender equality. Legal remedies should be clearly linked to the availability of such information to employees and/or their representatives, and it should be made clear that compensation will be full and can be granted in a class action to a class of employees found to have been the victims of pay discrimination. Emphasis should also be laid on good practice in relation to public tenders and resulting tender awards, in the context of general gender equality mainstreaming in government practice.

## THE NETHERLANDS – Rikki Holtmaat

### 1. General situation

Unequal pay on the ground of sex was official government policy in the first two post-war decades (1945-1965). Female workers, especially when they were married, were equated with youngsters who did not need a 'full wage' (i.e. a breadwinner wage). Women were said to work only for 'pin money' or (if unmarried) only had to earn a living for themselves. In government decrees until the mid-1960s about the allowed amount/increase of wages, women and youngsters were allowed to earn a certain percentage (mostly fixated at 60-70%) of the wages of adult men *for the same work*. These low wages for young people and women allowed the Dutch economy to be competitive and to grow relatively fast. Until the mid-1970s, this policy was continued in virtually all Collective Agreements. No legislation against pay discrimination existed until 1975.<sup>450</sup> In that year, also under the influence of strikes of female workers for equal pay,<sup>451</sup> women's wages – at least formally – became equal to men's wages. This does not mean that there is no pay gap in the Netherlands.

Unequal pay was a topic in almost all governmental 'emancipation action plans' from 1975 onwards. However, the situation did not improve. Therefore, in the year 2000, the Government started an action programme on equal pay.<sup>452</sup> The main outcomes of this programme are described in the various paragraphs of this report. The philosophy behind the programme, which in fact is still running today, is that only when there is close co-operation between all relevant stakeholders may one effectively combat unequal pay. Part of the ongoing activities is a close monitoring of the developments in the area of unequal pay.

The situation as regards the absolute and (net) corrected pay gap is researched biannually by the Government. The latest Report by the Labour Inspectorate (*Arbeidsinspectie*)<sup>453</sup> dates from 2008 and contains figures about the situation in the

<sup>450</sup> See for an early (critical) analysis of the 1975 Equal Pay Law, R. Holtmaat 'De Wet Gelijk Loon voor vrouwen en mannen', *Tijdschrift voor vrouwenstudies*, 1(4) 1980, pp. 428-456.

<sup>451</sup> Most famous were the strikes of female workers at the Champs-Clark and Optilon factories in 1970 and 1973, strongly supported by the emerging (second) feminist movement.

<sup>452</sup> TK 1999-2000, 27 099, no. 1, *Plan van aanpak gelijke beloning*. Since then, there is an almost yearly 'progress report' (*voortgangsrapportage*).

<sup>453</sup> Ö. Erben & J. Hoebe *De arbeidsmarktpositie van werknemers in 2006*, Arbeidsinspectie, The Hague 2008. The report is summarised in the Government's 9<sup>th</sup> report on Equal Pay (*Negende voortgangsrapportage gelijke beloning*), submitted to Parliament on 1 December 2008, TK 2008-2009, 27 099, no. 20. The Labour Inspectorate is part of the Ministry of Social Affairs.

year 2006.<sup>454</sup> A division is made between employment in private companies and employment in the civil service sector.<sup>455</sup>

Year	2004	2006
Private employment absolute	21 %	23 %
Private employment corrected / net	7.4 %	6.5 %
Civil servants absolute	14 %	12 %
Civil servants absolute corrected /net	2.9 % <sup>456</sup>	2.6 %

As compared to 2004, there is a slight decrease of the figures of the corrected or net unequal pay. In the bill introducing the annual budget for 2009, the Government announced that it aimed to reduce the pay gap in the private sector to 6 % in 2010.<sup>457</sup>

The Labour Inspectorate mentions the following factors that may influence the high percentage of absolute (or, as the Report calls it: *uncorrected*) unequal pay; it draws attention to the fact that female workers as compared to male workers

- on average are younger;
- in general have a lower level of education;
- work part time more often than men;
- relatively often have administrative or caring functions;
- relatively often have a ‘low’ function;
- more often have a flexible labour contract;
- more often work in the sectors of welfare and healthcare;
- less often work in the sectors of building and industry.

Apart from mentioning the average lower age of the female working population, no specific figures are available in which the age of the working population (m/f) is taken into account.

The Government makes it explicitly clear that in its view the corrected or net unequal pay figures are not the same as pay discrimination.<sup>458</sup> The latter is a legal concept, while the first is a calculation on the basis of several statistical factors. The

<sup>454</sup> In the 9<sup>th</sup> progress report (see previous footnote) the Government announced that the collection of data and the analysis thereof in the future would be conducted by the Central Bureau for Statistics (CBS), an independent expert institute. The first CBS study will be published in the summer of 2010. See TK 2009-2010, 27 099, no. 21.

<sup>455</sup> The following table is composed on the basis of the information in the figures summarised by the Government in the 9<sup>th</sup> report on Equal Pay (*Negende voortgangsrapportage gelijke beloning*), submitted to Parliament on 1 December 2008, TK 2008-2009, 27 099, no. 20. The Labour Inspectorate is part of the Ministry of Social Affairs. Other information used is the 2007 Network Report on Equal Pay: I. Sjerps ‘The Netherlands’ in: The Commission’s Network of legal experts in the fields of employment, social affairs and equality between men and women *Legal aspects of the gender pay gap* pp. 68-70 Brussels, European Commission 2007. Available on: <http://ec.europa.eu/social/keyDocuments.jsp?type=3&policyArea=418&subCategory=641&country=0&year=0&advSearchKey=noerep&mode=advancedSubmit&langId=en>, accessed 23 March 2010.

<sup>456</sup> The 2007 Network Report mentions 4 %. The Government in its latest report explains that this figure has been re-calculated, leaving out all jobs that had no official pay scheme.

<sup>457</sup> See the Budget for the Ministry of Social Affairs for 2009. This goal was subscribed by the Labour Foundation (*Stichting van de Arbeid*) in its letter of 6 November 2008. See <http://www.loonwijzer.nl/home/gelijkloon/alles-over-gelijke-beloning/overheid-en-sociale-partners>, accessed 8 March 2010.

<sup>458</sup> See the 9<sup>th</sup> report on Equal Pay (*Negende voortgangsrapportage gelijke beloning*), submitted to Parliament on 1 December 2008, TK 2008-2009, 27 099, no. 20. The Labour Inspectorate is part of the Ministry of Social Affairs, Section 2.3.



percentage that is thus found does not refer to salaries paid by individualised employers, but gives an impression of the situation in various sectors of the Dutch labour market. The question whether in an individual case there is pay discrimination, depends on legal criteria (see below, in Section 2 of this report.).

A few years ago, the Government commissioned a study by an independent expert institute (*SEO economisch onderzoek*). The study had two objectives: (1) to evaluate and adapt the research methods to be used in the future to analyse the pay gap, and (2) to provide a more elaborate explanation of the pay differences between men and women, which may be used to develop new policies. According to the SEO Report<sup>459</sup> as well as the Report by the Labour Inspectorate it appears that on average wages are lower in professions or sectors where many women are employed. The Government suggests to do further research into the following questions:

- (1) Why do women more often than men end up in low-paid jobs or sectors?
- (2) Why are the so-called ‘women’s jobs’ and work in ‘feminised sectors’ paid lower than work which is done in men’s jobs and in sectors where mostly men work?<sup>460</sup>

The Ministry of the Interior and Kingdom Relations (*Ministerie van Binnenlandse Zaken en Koninkrijksrelaties*), which is responsible for all (collective) labour contracts with civil servants who work for the *national* Government, announced in 2007 that a large-scale analysis would be made of pay differences that exist in the population of 120 000 civil servants. To date, the results of this study have not yet been published.

Although since 2000 we have had a steady stream of progress reports by the Government, the latest report was very disappointing. The Government, in late 2009, announced that new data about unequal pay were not yet available, and that the yearly ‘Equal Pay Day’ (on 31 March) would not be held in 2010, but in 2011 at the earliest.<sup>461</sup>

## 2. The legal framework<sup>462</sup>

The norm of equality of pay between men and women is laid down in Article 7:646 of the Civil Code (*Burgerlijk Wetboek*). The equal pay principle is further defined in the Equal Treatment Act (ETA; *Wet gelijke behandeling van mannen en vrouwen bij de arbeid*). According to Article 7:646 (1) of the Civil Code: ‘the employer is not allowed to differentiate between men and women as regards (...) working conditions (...)’. Since pay is one of the working conditions, this clause gives some additional protection (e.g. if there is discussion whether something constitutes ‘pay’).

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<sup>459</sup> SEO Economisch Onderzoek, *Verdiepende analyse van loonverschillen*, Amsterdam October 2008. The Report can be downloaded from <http://www.loonwijzer.nl/home/gelijkloon/alles-over-gelijke-beloning/onderzoek/loonachterstand-van-vrouwen-verder-uitgediept>, accessed 8 March 2010.

<sup>460</sup> See the 9<sup>th</sup> report on Equal Pay (*Negende voortgangsrapportage gelijke beloning*), submitted to Parliament on 1 December 2008, TK 2008-2009, 27 099, no. 20. The Labour Inspectorate is part of the Ministry of Social Affairs, Section 3. Although this report is now one year old, we have no information whether the Government really did assign anybody to do this research. The tenth report has been delayed and will be submitted to Parliament somewhere in the summer of 2010. See TK 2009-2010, 27 099, no. 21.

<sup>461</sup> See the letter of the Minister of Social Affairs and Employment to Parliament of 23 December 2009, TK 2009-2010, 27 099, no. 21.

<sup>462</sup> The following is based on the information provided by I. Sjerps, for the 2007 Network Report on Equal Pay. I. Sjerps ‘The Netherlands’ in: The Commission’s Network of legal experts in the fields of employment, social affairs and equality between men and women *Legal aspects of the gender pay gap* pp. 68-70 Brussels, European Commission 2007.



§2 (Articles 7-12) of the ETA is devoted to equal pay in particular. It gives special rules on the definition of pay, on how to compare jobs, on job evaluation, on other elements of pay (not just pecuniary) and on how to compare jobs/pay in case of part-time work. The definition of pay is as wide as the case law of the ECJ, and does not pose substantial problems in Dutch case law.

In fact, there are two methods to combat unequal pay on the basis of this legislation: an individual employee might claim that she receives lesser pay (for equal work) as compared to an individual male colleague, or she (or an organisation like a trade union, or the ETC) might state that a particular pay scheme or a particular other provision in the labour conditions – although formally making no distinction on the ground of sex – in fact results in unequal pay for women.

### 3. Instruments of social partners

There are no *legislative* or other *provisions* that may induce/oblige social partners to include the issue of equal pay in collective and other agreements. However, there are many other policy instruments with the same goal. The Government closely co-operates with the social partners in several projects concerning equal pay and other related topics (e.g. the glass ceiling or the fact that so many women work part time).

Close co-operation especially took place in the so-called Equal Pay Taskforce, which existed from December 2005 until December 2006 (*Werkgroep Gelijke Beloning: Dat Werkt!!*). The partners in this project were civil servants (wage system experts) from the Ministry of Social Affairs, representatives of the Equal Treatment Commission or ETC (*Commissie Gelijke Behandeling* or *CGB*), representatives of the Labour Foundation (*Stichting van de Arbeid* or *STAR*, an institution in which organisations of employers and employees work together) and of the Council for Civil Servants Employment Policies (*Raad voor Overheidspersoneelsbeleid* or *ROP*) 'Its objective was to stimulate knowledge about equal pay legislation, enhance the implementation of this legislation, give information about the above-mentioned instruments, stimulate the education of social partners, members of works councils etc. on equal pay issues, and do research.'<sup>463</sup> The outcome and recommendations of this Taskforce were discussed at a national conference in January 2007 and are summarized in the 7<sup>th</sup> Progress Report.<sup>464</sup> After this Taskforce ceased to exist in December 2006, the same partners have in fact continued to co-operate in an informal network on equal pay.<sup>465</sup> The most important activity that they organise together is the Annual Equal Pay Day on 31 March, which was held for the first time in 2006. Also, they regularly evaluate the effectiveness of the tools that have been developed since 2000 (see below, in Paragraph 5) and make suggestions for necessary adaptations or changes. The partners in this informal network also supply the necessary information for a website where all (links to) information/tools about equal pay are systematically presented for the various stakeholders and the general public.<sup>466</sup>

A great number of activities were undertaken by the social partners, either separately by organisations of employers or trade unions, or in mutual co-operation,

<sup>463</sup> As stated by Ina Sjerps in the 2007 Network Report on Equal Pay. I. Sjerps 'The Netherlands' in: The Commission's Network of legal experts in the fields of employment, social affairs and equality between men and women *Legal aspects of the gender pay gap* pp. 68-70 Brussels, European Commission 2007.

<sup>464</sup> 7<sup>th</sup> Progress Report Equal Pay (*Zevende voortgangsrapportage gelijk loon*); TK 2006-2007, 27 099, no. 18 of 11 June 2007.

<sup>465</sup> 7<sup>th</sup> Progress Report Equal Pay (*Zevende voortgangsrapportage gelijk loon*); TK 2006-2007, 27 099, no. 18 of 11 June 2007.

<sup>466</sup> <http://www.gelijkloon.nl>, accessed 8 March 2010.

like in the *STAR* or in the *ROP*. An example of a project organised by the main trade union organisation (*FNV*) and subsidised by the Ministry of Social Affairs, is the so-called CLOSE project (*Correctie LOonkloof in Sectoren*: ‘Correction of Pay Gap in Sectors’).<sup>467</sup>

#### 4. Instruments specifically aimed at employers

The legislation that is described in Paragraph 2 *indirectly* obliges individual employers to address the issue of equal pay. In fact, the legal instruments provided for give the individual employee and/or NGOs, Trade Unions and the ETC, the right to stand up against pay discrimination. The effect of this may be that employers (being afraid of being accused of pay discrimination) take action against unequal pay in their organisation. This effect is most feasible in case a certain pay scheme or job evaluation scheme is contested as being (indirectly) discriminatory. This deterrent effect is described in the 8<sup>th</sup> Progress Report of December 2007, where the Government states that employers might fear high amounts of ‘back pay’ to all employees who have been disadvantaged in the past and voluntarily take action against unequal pay.<sup>468</sup>

The only instrument that is *directly* aimed at employers was mentioned in December 2008, when the Government stated that it would give a certain role to the Labour Inspectorate. This role is described in the 9<sup>th</sup> report of the Government on Equal Pay, where it is announced that the Minister will instruct the Labour Inspectorate to react to signals of unequal pay given by e.g. the Trade Unions, the ETC or NGOs and to request employers to investigate and to report.<sup>469</sup> The Labour Inspectorate can force the employer to do more research and discuss the results with e.g. the Workers Council (*Ondernemingsraad*). The Labour Inspectorate, at this point, has no mandate to sanction the employer. To date, no evaluation of this particular instrument has taken place.

Earlier suggestions or requests to include pay discrimination in the Act on Working Conditions (*Arbeidsomstandighedenwet*), thus giving the Labour Inspectorate a task in the enforcement of the equal pay legislation, were rejected by the Government as being ‘out of place’.<sup>470</sup> The Act on Working Conditions is directed at general conditions of work (e.g. safety at work), not at enforcing (equal) terms of *individual* labour contracts. Other *voluntary* instruments that are or might be used by the employers are described in Paragraph 5 below.

As for the release of information about salaries to individuals, compared to other individuals in the firm, the ETA gives powers to the Equal Treatment Commission (ETC) to require the firm to submit all necessary information when an unequal pay complaint has been filed with the ETC. There is no legal obligation as regards the publication of aggregate pay information broken down by gender by employers. However, many firms publish this kind of information in their annual social reports.

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<sup>467</sup> See: M. van Klaveren, W. Sprenger, K. Tijdens *Dicht de loonkloof!! Verslag van het CLOSE (Correctie LOonkloof in SEctoren) onderzoek voor de FNV, ABVA-KABO FNV en FNV Bondgenoten*. Eindhoven, STZ advies & onderzoek/Amsterdam, Universiteit van Amsterdam/AIAS (2007).

<sup>468</sup> See the 8<sup>th</sup> report on Equal Pay (*Achtste voortgangsrapportage gelijke beloning*), submitted to Parliament on 13 December 2007, TK 2007-2008, 27 099, no. 19, Section 2.4.

<sup>469</sup> See TK 2008-2009, 27 099, no. 20, Section 1.

<sup>470</sup> See the 8<sup>th</sup> report on Equal Pay (*Achtste voortgangsrapportage gelijke beloning*), submitted to Parliament on 13 December 2007, TK 2007-2008, 27 099, no. 19, Section 2.3.

Also, all Collective Agreements, including pay scales, are publicly available on the general government website<sup>471</sup> and other websites.

To the knowledge of the author, the Dutch Government never uses its public procurement powers to require firms that they contract, to address the pay gap. The reason for this may be that so many other instruments are already being used.

## 5. Other instruments to close the pay gap

The following tools<sup>472</sup> have been developed in the past decade by private parties (often subsidised by the Government, by Trade Unions), by the ETC and by the Government itself. The informal network group (mentioned in Paragraph 3 of this report) monitors the practical usability of these instruments and regularly makes suggestions for their improvement. All tools can (easily) be found on the national websites on equal pay.<sup>473</sup>

- An *Equal Pay Checklist*, ('*Je verdiende loon*'; 'The wage you deserve') made by the national representatives of the social partners (*Stichting van de Arbeid, STAR*) with the support of the Ministry of Social Affairs. This checklist can be applied by individual employers, works councils, union representatives and individual employees, in order to establish whether pay systems are discriminatory. In 2008, the STAR announced that this instrument is still adequate, but that it will be updated with new legal information (e.g. on case law and legislation).
- An *Equal Pay Quick Scan*. This software programme was developed by the Equal Treatment Commission (ETC). With the help of this programme, the ETC can analyse the pay data of a company, to see whether an investigation into the pay system of that company is required. This quick scan was applied by the Labour Inspectorate in an investigation of several sectors in the second part of 2005. A simplified version of the quick scan was developed in 2007-2008, for the use of individual employers.
- An *Equal Pay Management Tool*. Pay differences can be analysed with the help of this tool, to establish whether these differences are discriminatory or not.
- A *Guide on sex-neutral job evaluation* which instructs people how to evaluate whether a job evaluation system is indeed sex neutral (also in its effects) and how to prevent that application of these (neutral) systems has discriminatory effects for women. This guide was sent to the 12 owners of the most frequently used job evaluation systems of the Netherlands. Out of these 12, 8 have applied the guide to their job evaluation system. The vast majority of all employers and employees are covered by these 8 systems. They all came to the conclusion that their systems are sex neutral.
- The *Wage Indicator (Loonwijzer)*. This Internet tool, an initiative of the University of Amsterdam, was subsidised by the Ministry of Social Affairs. Individual men and women can use this Indicator to see whether their wages are higher, lower or equivalent to those of others in the same branch, the same job

<sup>471</sup> <http://www.overheid.nl>, accessed 8 March 2010.

<sup>472</sup> The following has been copy-pasted from Ina Sjerps' report, in the 2007 Network Report on Equal Pay. I. Sjerps 'The Netherlands' in: The Commission's Network of legal experts in the fields of employment, social affairs and equality between men and women *Legal aspects of the gender pay gap* pp. 68-70 Brussels, European Commission 2007. Where necessary, I have updated the information on the basis of the latest government Progress Reports.

<sup>473</sup> See <http://www.gelijkloon.nl> or <http://www.loonwijzer.nl/home>, accessed 8 March 2010. The latter website is an activity of the *Stichting Loonwijzer* (Wage Indicator Foundation) and is independent from the Government, but the Foundation receives a subsidy to stay 'on air'. See TK 2009-2010, 27 099, no. 21.

(level) and with the same education and years of job experience. It also gives advice on how to negotiate for a higher wage.

In the 7<sup>th</sup> Progress report of June 2007, the Minister of Social Affairs and Employment also mentions the following instruments/tools developed by the Ministry of Social Affairs and Employment:<sup>474</sup>

- A practical test about the necessity of a proper and equal way of applying the wage scales to individual workers; the test is called ‘*Schaal ik wel gelijk?*’ (‘Do I apply equal scales?’) and is meant for Human Resource Managers and personnel managers.
- A test for employees, about what to take into account when discussing their placement in a wage scale, called ‘*Word ik wel gelijk geschaald?*’ (‘Am I in an equal scale?’)

The roles of the Labour Inspectorate and the ETC (equality body) have been described earlier. Although the figures show that progress is slow, it may be expected that the combined application of these instruments will have some future effect.

## **6. Problems of enforcement and how to tackle them by good practices**

The enforcement of the equal pay norms meets the general problem that individual victims of pay discrimination might find it extremely difficult to find out about the unequal pay in the first place. Even if someone has indications that he/she is paid less than a colleague for the same work, it will be difficult to establish this as a fact. Many factors, unknown to the claimant, might ‘excuse’ the difference in pay (e.g. the number of years of experience or some extra training or education of the colleague). Also, workers fear that the relationship with the colleague or employer may become troubled as a result of such a claim. However, the tools described above may be helpful for individuals to make such a claim. As for the more general causes of unequal pay (like e.g. inherent inequalities in job evaluation systems), for individual workers it may also be very difficult to even suspect that a certain neutral rule or criterion is in fact disadvantageous for them (as compared to the other sex; i.e. indirect discrimination). Therefore, it is good that other organisations have the right to bring such a claim and ask the ETC to investigate the general pay practice or job evaluation schemes of a particular employer. There are very few (individual) equal pay cases that end up in the courts (no numbers are available to the author).<sup>475</sup> The scope of comparison is limited to the same employer. The sanctions are very weak. Although an employer might be compelled to restore the inequalities, the amount of ‘back pay’ will not exceed the amount of money that he would have had to pay in the first place, if he had complied with the equal pay norm. No additional penalties, damages or fees need to be paid to the victim of unequal pay. The possible role of trade unions or equality (or other) bodies is to assist victims of pay discrimination and to investigate pay practices with the help of experts.

## **7. Relationship between the gender pay gap and other parts of labour law**

Although working time, age differences, atypical work arrangements, part-time work, etc., are *general social and economic factors* that have an influence on the existence

<sup>474</sup> All tools are placed on the website <http://www.gelijkloon.nl>, accessed 8 March 2010.

<sup>475</sup> The cases that are described/summarised on the general equal pay website are all from the 1980s and 1990s. See <http://www.loonwijzer.nl/home/gelijkloon/alles-over-gelijke-beloning/wetgeving-en-jurisprudentie/uitspraken-van-de-rechter-1>, accessed 8 March 2010.

of unequal pay (as a macro phenomenon), there are no indications that the *legislation* governing these issues is such that it causes (an increase of) unequal pay. On the contrary, all workers, irrespective of age, type of labour contract, numbers of hours worked, etc., have a right to equal treatment under the law.<sup>476</sup> The Dutch Government acknowledges that there is a connection between the fact that so many women work in small part-time jobs and that they on average have lower jobs (glass ceiling) and the existence of unequal pay.<sup>477</sup> Party autonomy in contract law may be an important cause of unequal pay. It is a well-known fact that women, when negotiating the terms of their labour contract, are not so keen on getting a high salary as men.<sup>478</sup> They often prefer to negotiate about other terms of the contract (e.g. having the possibility to work flexible hours or to do part of the work at home). However, it is quite unimaginable to abolish party autonomy in private labour law! A problem may be that more and more labour contracts are no longer governed by Collective Labour Agreements, but are negotiated individually. Private confidentiality of salaries is not a problem, since – once someone brings a claim – the ETC has the power to ask the employer to disclose all necessary information.

## 8. Final assessment of good practices

The development and implementation of all the different tools, mentioned in Paragraph 5, is a very positive/good practice. One might expect that these tools/instruments, in the long run, will have more effect than the individual right of workers to bring an unequal pay claim against their employer.

## NORWAY – Helga Aune

### 1. General situation

The term ‘pay’ means ordinary remuneration for work as well as all other supplements or advantages or other benefits provided by the employer, following the Gender Equality Act of 9 June 1978 no. 45 (GEA) Section 5, fourth paragraph. The gender pay gap is approximately 15 %, a figure that has remained stable since the mid-1980s. An Equal Pay Committee was appointed on 16 June 2006 and delivered its White Paper ‘Gender and Pay’ on 1 March 2008.<sup>479</sup> The annual salary for women is EUR 30 892 (NOK 254 476) while for men it is EUR 47 682 (NOK 392 778), which leaves women with a salary of 65 % of that of men. As regards monthly salary, adjusted according to working hours, women have a monthly salary of EUR 3 361.21 (NOK 27 688) while men receive EUR 3 966.49 (NOK 32 674), which leaves women with an income of approximately 85 % of that of men. A dominant feature of the

<sup>476</sup> There are specific laws which prohibit (inter alia) unequal treatment on the ground of age, working hours, type of labour contract, etc. As for part-time work, the principle of proportionality prevails.

<sup>477</sup> See e.g. the *Taskforce Deeltijd Plus* (Taskforce Part-time Plus), installed for the period 2008 – 2010. Mentioned in the 8<sup>th</sup> report on Equal Pay (*Achtste voortgangsrapportage gelijke beloning*), submitted to Parliament on 13 December 2007, TK 2007-2008, 27 099, no. 19, Section 2.1. The Government has announced that the final report of this Taskforce will be published in March 2010. See TK 2009-2010, 27 099, no. 21.

<sup>478</sup> See the remarks on this issue, made by Ina Sjerps in her report. I. Sjerps ‘The Netherlands’ in: The Commission’s Network of legal experts in the fields of employment, social affairs and equality between men and women *Legal aspects of the gender pay gap* pp. 68-70 Brussels, European Commission 2007.

<sup>479</sup> See, NOU 2008:6 *Kjønn og lønn*: <http://www.regjeringen.no/nb/dep/bld/dok/NOUer/2008/nou-2008-6.html?id=501088>, accessed 21 March 2010.

Norwegian employment market is that it is highly gender-segregated in typical male and female professions. Female professions are typically in the public sector, the health, education and services sectors. Male professions are in the private sector. The pay difference in the public sector is 12.1 %, of which in the state sector the difference is 9.3 %, in county and municipal sectors it is 7.2 %, and in the private sector it is 16.4 %.<sup>480</sup> A pay gap of 15 % is large, but when women's working hours (part-time work) in the various sectors is taken into account, the pay gap is reduced to approximately half. This means that the first half of the pay gap relates to all working hours and is not based on hourly pay. The remaining half of the pay gap then relates to the gender-segregated employment market which in turn relates to separate collective agreements and negotiations.<sup>481</sup> Women's dominant sector of employment is the State and the municipalities and these employers have a strong negotiation power as there is no competition from other possible employers offering better pay. The pay gap has been especially reported on in the reports from *Det tekniske beregningsutvalg for inntektsoppgjørene* (A committee helping the parties with the calculations) since 1990. Since 1997, these reports provide data on gender differences in pay according to area of negotiations, sector of employment and level of education.<sup>482</sup>

The Equal Pay Committee's White Paper summarises their findings in five points, addressing the reasons for the 15 % pay gap between men and women:

1. Differences in education and age explain very little of the present pay gap;
2. Men and women in general have equal pay for equal work in the same positions in the same enterprises;
3. The pay gap exists in the gender-segregated employment market;
4. The negotiation system of the parties in the employment market maintains stable pay relations, also between men and women;
5. The pay gap increases during periods of parenthood and parental leave. Women take most of the leave and for various reasons fall behind in pay.

The Equal Pay Committee presents six types of measures to combat the pay gap:

1. Strengthening the Gender Equality Act and the Gender Equality and Anti-discrimination Ombud Act. The aim is to increase the public availability of information on pay, including pay statistics divided by gender;
2. Increasing the pay level in the public sector. The Committee proposes that a total of EUR 380 797 644 (3 billion NOK) is added to the state budget and that this amount is used for collective tariff revisions, raising the pay level of female professions in the public sector;
3. Focusing on groups of employees/women with especially low pay and a clear focus on the pay level in male-dominated versus female-dominated groups;
4. Promoting that men and women evenly share parental leave;
5. Strengthening the rights of employees after their return from parental leave;
6. Increased recruitment of women for leading positions.

The Government has announced that it will present a Proposition to Parliament during the autumn of 2010 in which among various measures a discussion of the

<sup>480</sup> See the White Paper, Chapter 4.5.

<sup>481</sup> See the White Paper, Chapter 11.4.

<sup>482</sup> See the White Paper, Chapter 11.2.2.



responsibilities of the social parties and the political/public authorities will be given attention.<sup>483</sup>

## 2. The legal framework

The European Economic Area Agreement (EEA) of 1992, Article 69, states the duty of the Parties to ensure the principle of equal pay for work of equal value for men and women. Article 69 of the EEA then refers to Appendix XVIII of the EEA, which in turn lists Directives 75/117/EEC, 79/7/EEC, 86/378/EEC and 96/97/EC, as means to ensure the principle of equal pay. The Directives are made part of Norwegian law through implementation into the Gender Equality Act of 9 June 1978 no. 45 (GEA),<sup>484</sup> Sections 5 and 3.<sup>485</sup>

The GEA Section 3 states that direct or indirect differential treatment of men and women is not permitted. Section 5 provides regulations regarding equal pay for work of equal value and states that women and men in the same enterprise shall have equal pay for the same work or work of equal value.<sup>486</sup> Sections 3 and 5 also cover occupational pension schemes.

## 3. Instruments of social partners

There are no legislative or other provisions in regulations obliging social partners to include the issue of equal pay in collective and other agreements. However, the GEA Section 1a<sup>487</sup> second paragraph, second sentence obliges the social partners to make active, targeted and systematic efforts to promote gender equality in their spheres of activity. This includes attention to equal pay issues as well. The only control measure, as regards whether or not this activity duty is being respected, is carried out by the Ombud. The Ombud annually selects various sectors or groups of professions that will be checked. To my knowledge, the activity of the social partners has not yet been checked by the Ombud.

All main collective agreements at the central level include a chapter on equal treatment. In addition, many agreements at the local level have provisions stating that at local pay negotiations the local pay policy shall be in a form that ensures equal treatment of men and women as regards pay and promotions.<sup>488</sup> In the collective agreement *Verkstedsoverenskomsten (VO)* Chapter 4.1.4.3, it follows that at local pay negotiations the parties shall review both men and women's pay and evaluate reasons for possible pay differences. Some collective agreements also contain provisions about the development in various employees pay levels specifically over time. This is to ensure that parties are able to monitor that the provisions of the collective

<sup>483</sup> <http://www.regjeringen.no/nb/dep/bld/aktuelt/nyheter/2010/Stortingsmelding-om-likelonn-kommer.html?id=594362>, accessed 19 March 2010.

<sup>484</sup> See the Act (in Norwegian): [http://www.lovdata.no/cgi-wift/wiftldles?doc=/app/gratis/www/docroot/all/nl-19780609-045.html&emne=likestillingslov\\*&](http://www.lovdata.no/cgi-wift/wiftldles?doc=/app/gratis/www/docroot/all/nl-19780609-045.html&emne=likestillingslov*&) and English: <http://www.regjeringen.no/en/doc/Laws/Acts/The-Act-relating-to-Gender-Equality-the-.html?id=454568>, accessed 19 March 2010.

<sup>485</sup> White Paper NOU 2009:14 proposal for a new common discrimination Act for all types of discrimination proposes to maintain the same wording as the present equal pay provision in the GEA Section 5, see Chapter 19.2.5.2: <http://www.regjeringen.no/nb/dep/bld/dok/nouer/2009/nou-2009-14.html?id=566624>, accessed 19 March 2010.

<sup>486</sup> Hege Brækhus discusses possible changes in family and social insurance legislation to correct the effects on unequal pay, as more women than men traditionally perform the care work in families. See *Likelønn og likestilling i familien*, published by Festschrift til Jussformidlingens 35-årsjubileum 2008 s. 47 - (FEST-2008-uib-47).

<sup>487</sup> Added to the GEA by the Act of 14 June 2002 No. 21, in force from 1 July 2002.

<sup>488</sup> See for instance *Hovedtariffavtalen (HTA) mellom KS og LO* Chapter 3.2.



agreement as regards pay and equal pay are being respected and practised according to its intentions.<sup>489</sup>

Equal pay for men and women is a central topic for all large organisations and has remained a recurring topic for the last ten years; see the White Paper Chapter 11.4. This does not mean that the social parties easily agree on how to solve the pay gap problem. The various employee organisations are unable to unite, as each argues for their specific members' interests. The collective pay negotiations *lønnsforhandlinger* of spring 2010 clearly illustrate the problem: many employee organizations have argued for an equal pay profile (the Norwegian Nurses Organisation), while other organisations cannot join this as they fight for the interests of their members as low-income groups, employees with no or little education but not necessarily a majority of female employees (*Fellesforbundet*). The situation being as it is, the Government as the employer in the public sector has not clearly stated a strong intention to push for an equal pay profile.

The White Paper on Gender and Pay focuses on how the collective negotiation structure is an element which produces and reproduces the existing differences in men and women's pay. The negotiation model is not capable of inducing change to the existing differences.

#### **4. Instruments specifically aimed at employers**

The GEA Section 1a<sup>490</sup> second paragraph, first sentence obliges employers to make active, targeted and systematic efforts to promote gender equality within their enterprise. This includes attention to equal pay issues as well. This activity duty is only checked by the Ombud to a variable extent. Enterprises that are subject to a statutory duty to prepare an annual report must in the said report give an account of the actual state of affairs as regards gender equality in the enterprise. An account must also be given of measures that have been implemented and measures that are planned to be implemented in order to promote gender equality and to prevent differential treatment in contravention of this Act, see Section 1a third paragraph. This reporting duty also follows according to the Act on Accounting and Bookkeeping Section 3-3, fifth paragraph.<sup>491</sup>

Individuals have no legislative right to demand insight into fellow colleagues' pay level. There is a notably big difference in the public and private sector. The public sector is well regulated by collective agreements and there is great transparency as regards pay levels. The opposite is the case for the private sector. However, if a person suspects unequal pay for work of equal value and presents a complaint to the Ombud, the Ombud has a right to require release of information about pay to individuals in the firm as well as about aggregate pay information broken down by gender; see the Act on the Anti-discrimination Ombud and Tribunal Section 11 and Section 13.<sup>492</sup>

Norwegian public authorities have not yet introduced legislation or systems using their public procurement powers to require firms that they contract with to address the pay gap. The issue has been thoroughly evaluated in the White Paper regarding the proposal for a new discrimination Act<sup>493</sup>; see Chapter 17.5. The recommendation is that a new section is included in the proposal for a new Act stating that information

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<sup>489</sup> See for instance the Labour Court judgment of 4 December 2008, Case *ARD* 2008-16.

<sup>490</sup> Added to the GEA by the Act of 14 June 2002 No. 21, in force from 1 July 2002.

<sup>491</sup> See *Regnskapsloven* of 17 July 1998 no. 56.

<sup>492</sup> See *Diskrimineringsombudsloven* of 10 June 2005 no. 40.

<sup>493</sup> See NOU 2009:14 *Et helhetlig diskrimineringsvern*.

regarding equal pay may be required. It is suggested that such information is provided in the same inspection reports as regards Health-, Environment- and Security issues (HMS), which in turn are subject of inspection by the Labour Inspectorates. These provisions are recommended through amendments to the Regulation on Public Contracts of 7 April 2006 no. 402.<sup>494</sup> The new Discrimination Act with its amendments to regulations is expected to be presented through a Proposal to Parliament in 2012.

## 5. Other instruments to close the pay gap

A White Paper recommending the use of pay evaluation as a tool to achieve equal pay was presented in 1997.<sup>495</sup> This resulted in a pilot project as late as 2005, when the Government initiated a project developing a gender-neutral job evaluation scheme.<sup>496</sup> There also is a set of guidelines from 1998 on how to perform gender-neutral work evaluation in order to see if there is equal pay for equal work, issued by the Ministry of Children, Equality and Social Inclusion.<sup>497</sup> An example of a Job and Pay Evaluation Scheme is provided by the Ombud in a brochure especially aimed at the sector for higher education.<sup>498</sup>

Collective agreements, job evaluation schemes etc. are not monitored/scrutinized by any body/authority on a regular basis. The Ombud may in its monitoring of Section 1a evaluate the effect of provisions regarding the pay gap as a result of collective agreements and recommend use of certain job evaluation schemes. The labour inspectorates are not focused on equal pay issues due to the current legislation where equal pay is the responsibility of the equality bodies. In the proposal for a new discrimination act for all kinds of discrimination, following the White Paper *NOU* 2009:14, one of the proposals is that the Labour inspectorates are to take over the monitoring function following the employers' reporting and activity duty; proposal for new Sections 26 and 46 (currently the GEA Section 1a).<sup>499</sup> It is also a proposal for a new regulation on the employers' activity duty; see the White Paper Chapter 27.3.

Hege Brækhus, professor of law at the University of Tromsø, discusses in an article the possible changes in family and social insurance legislation to correct the effects on unequal pay, as more women than men traditionally perform the care work in families.<sup>500</sup> Brækhus discusses for example that the parent with the highest income should pay the spouse with less income so that she/he receives pay for performing his/her half of the care duties. As regards social rights, receiving various forms of benefits from the social insurance system for performing care work for children is often paid less than the work is actually worth. On the other hand, the women who choose these solutions all come from underpaid female professions.

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<sup>494</sup> <http://www.lovdata.no/for/sf/fa/xa-20060407-0402.html#3-4>, accessed 7 May 2010.

<sup>495</sup> See: NOU 1997:10 *Arbeidsvurdering som virkemiddel for likelønn*, <http://www.regjeringen.no/nb/dep/bld/dok/nouer/1997/nou-1997-10.html?id=116322>, accessed 21 March 2010.

<sup>496</sup> <http://www.regjeringen.no/nb/dep/bld/kampanjer/familia/familia-12005/diverse-saker/forsok-med-arbeidsvurdering-som-virkemid.html?id=536488>, accessed 21 March 2010.

<sup>497</sup> <http://www.regjeringen.no/nb/dep/bld/kampanjer/familia/familia-12005/diverse-saker/forsok-med-arbeidsvurdering-som-virkemid.html?id=536488>, accessed 21 March 2010.

<sup>498</sup> [www.ldo.no/Global/Brosjyrer%20PDF/Utdanning\\_handbok.pdf](http://www.ldo.no/Global/Brosjyrer%20PDF/Utdanning_handbok.pdf), see pp. 42-43, accessed 21 March 2010.

<sup>499</sup> <http://www.regjeringen.no/nb/dep/bld/dok/nouer/2009/nou-2009-14.html?id=566624>, accessed 21 March 2010.

<sup>500</sup> See H. Brækhus *Likelønn og likestilling i familien* published by Festskrift til Jussformidlingens 35-årsjubileum 2008 p. 47 - (FEST-2008-uib-47).

## 6. Problems of enforcement and how to tackle them by good practices

The rule on the shared burden of proof applies to equal pay for equal value, see the GEA Section 16. Liability for damages follows the provisions in the GEA Section 17. Any employee who has been subjected to treatment in contravention of provisions of the GEA by an employer or a person acting on the latter's behalf may demand compensation and redress regardless of the fault of the employer. Compensation will be fixed at the amount that is reasonable, having regard to the financial loss, the situation of the employer and the employee or job seeker and all other circumstances. Redress will be fixed at the amount that the court finds reasonable, having regard to the relationship of the parties and all other circumstances, see Section 17, first paragraph. In all other respects, the general rules regarding liability for damages in the event of wilful or negligent contravention of the provisions of this Act will apply; see Section 17, second paragraph. If a provision of a collective agreement is found to be invalid in violation of the law, it will be declared null and void by the Labour Court so that the compensation to be paid goes back to the moment that the invalid provision was put into force.<sup>501</sup> However, decisions by the Equality Tribunal only prescribe the employer to change the practice from the time of its decision, as the Tribunal may not order compensation to be paid in order to undo wrongful actions in the past.<sup>502</sup> Only the courts may award compensation and redress. The courts will grant compensation from the date of the claim and in general the date of limitation period for claims will be limited to three years.<sup>503</sup> There are hardly any cases regarding equal pay claims and the issue of limitation period for claims, but Norway being a part of the EEA agreement will be bound by the ECJ judgments in this respect, such as Case C-187/98.

If a person has an equal pay complaint, he/she can either ask the Gender Equality and Anti-discrimination Ombud for assistance or file a complaint before the ordinary courts. An employees' organisation may also file a complaint before the Labour Court regarding the interpretation of, existence and validity of collective agreements or its provisions. In the 25 years until October 2003, the Labour Court only handled eight cases regarding equal treatment legislation, while the court only decided the cases under the equal treatment legislation in three of these cases. In the remaining five cases, it was the employees' organisations that had relied on that legislation, while the court decided the cases on 'other' legal grounds, such as an interpretation of what the parties meant when the agreement was negotiated. In legal literature the 'closed' system, i.e. the collective parties' control over their agreements, has been criticised.<sup>504</sup> The fact that is pointed out is that the organisations first negotiate their own agreements and then have the sole competence to decide whether or not to go to the Labour Court and claim that the very agreements they have negotiated themselves are in violation of the principle of equal pay/equal treatment.<sup>505</sup> The small number of equal pay cases indicates that the critics may have a point. If the Labour Court finds that the equal pay rule has been violated, the clause is found to be invalid and the

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<sup>501</sup> See for instance the Labour Court judgment ARD-1990-148 – *Bio Engineers*.

<sup>502</sup> See *Diskrimineringsombudsloven* av 10 June 2006 no. 40, Section 7: <http://www.lovdata.no/all/tl-20050610-040-0.html#7>, accessed 21 March 2010.

<sup>503</sup> See Act relating to the limitation period for claims (*Foreldelsesloven*) of 18 May 1979 no. 18, Sections 3 and 9, see <http://www.ub.uio.no/cgi-bin/ujur/ulov/sok.cgi>, accessed 21 March 2010.

<sup>504</sup> E. Vigerust 'Kollektiv avtalefrihet og retten til likelønn. Likestillingsloven og Norges internasjonale forpliktelser', *Institutt for offentlig retts skriftserie* No. 4 (2003) pp. 1-50.

<sup>505</sup> See the Labour Disputes Act, Sections 5 and 8: [http://www.lovdata.no/cgi-wift/wiftldles?doc=/app/gratis/www/docroot/all/nl-19270505-001.html&emne=arbeidstvistlov\\*&&](http://www.lovdata.no/cgi-wift/wiftldles?doc=/app/gratis/www/docroot/all/nl-19270505-001.html&emne=arbeidstvistlov*&&), accessed 21 March 2010.

employees are entitled to be economically compensated on equal terms, with interest, in the same way as those who were not discriminated against. Individuals may present a complaint or equal pay case to the ordinary courts as opposed to the Labour Court.

Very few equal pay cases have been dealt with by the ordinary courts.<sup>506</sup> Most equal pay cases are treated by the Gender Equality and Anti-discrimination Ombud. During the period 1999-2005, 95 cases concerning wages were handled by the Ombud. If an individual files a complaint with the Gender Equality and Anti-discrimination Ombud, the latter will investigate the complaint by demanding information and documentation from the employer. Following investigations, the Ombud may make a recommendation. In most cases, the employers will follow the Ombud's recommendation and obey her suggestion to pay compensation. However, if one of the parties does not comply with the Ombud's recommendation, the dispute may be referred to the Equality Tribunal by either of the parties or by the Ombud herself. The Tribunal will decide whether or not the GEA has been violated and can decide that the discriminating actions must come to an end. The Tribunal does not have the right according to the law to award damages or financial compensation. Where a party does not pay compensation voluntarily, the victim may present an ordinary complaint to court.

The very small number of cases on equal pay in the ordinary courts as well as in the Labour Court indicates that the Ombud/Tribunal system is so efficient that no cases end up in the courts. It may be time to ask the question, however, if the Ombud/Tribunal system is in accordance with the requirement of efficient sanctioning as long as they have no right to award compensation for violation of the principle of equal pay.

The time from a complaint to a decision by the Ombud may vary, but up to a year is not uncommon. A complaint for the Tribunal may add another 6-12 months' time before a final decision. If the Tribunal's decision is disputed and presented to court, one may add another 6-12 months before a judgment is provided.

The scope of comparison in case of a complaint is limited to the same enterprise/employer; see the GEA Section 5, first paragraph, first sentence. The right to equal pay for the same work or work of equal value will apply regardless of whether such work is connected with different trades or professions or whether the pay is regulated by different collective wage agreements, see Section 5, second paragraph. In legal literature, the argument of market price as a valid argument for justifying unequal pay has been criticised.<sup>507</sup> Comparisons with other employers in the same sector are not possible according to the wording of the GEA. The evaluation of what is to be considered the same enterprise follows from the general principles of employment law.

The equality bodies need stronger economic funding in order to carry out more extensive monitoring of the fulfilment of the enterprises' and organisations' obligations to promote gender equality, see Section 1a.

## **7. Relationship between the gender pay gap and other parts of labour law**

The gender-segregated employment market and the different legislation and collective agreements of these male/female professions/markets hold many of the keys to the

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<sup>506</sup> See for instance: Judgment of Oslo Municipal Court of 27 December 2005 *Braathens* (TOSLO-2003-20935 and Eidsivating Appeal Court LE-2008-76592).

<sup>507</sup> H. Brækhus 'Likelønn – markedsloønn. I hvilken utstrekning kan markedsloønn begrunne lønnsdifferensiering etter likestillingslovens § 5?' in: Aune et al. *Arbeid og rett. Festschrift til Henning Jakhellns 70-årsdag* Oslo, Cappelen Damm Publishing House 2009.

pay gap. The wide practice of part-time work especially in the health sector is possibly a result of the working hours regulations in the Working Environment Act of 17 June 2005 no. 62 (WEA). Employers calculate with many small part-time positions in order to facilitate for shift work/rotational work and avoid overtime pay. The WEA Section 10-5 creates the possibility to calculate average normal working hours. This has resulted in a practice on the employers' side that favours employing people in part-time positions rather than full-time positions in the health sector. It is hard to find comparable male-dominated professions with an equal high number of part-time positions. Part-time workers have a conditional right to extend their hours instead of the employer hiring new people in vacant positions; see the WEA Section 14-3. A special Tribunal, *Tvisteløsningsnemnda*, will evaluate the employee's versus the employer's arguments if the employer does not see room for accepting the employee's wish for extended hours. A survey of the cases of the Tribunal in 2006 and 2007 revealed that the gender perspective is lost, thus the equal pay perspective on a larger scale is also lost as well.<sup>508</sup> The perspective is lost because the gender equality and equal pay provisions are found in the GEA and not the WEA, with the latter working in and with a gender-neutral context. The Tribunal, *Tvisteløsningsnemnda*, for instance, would be stronger if a gender discrimination expert had been appointed as member.

## 8. Final assessment of good practices

For Norway, a major part of the equal pay problem is caused by the highly gender-segregated employment market as well as stereotypical gender patterns in family life. Attention also needs to be placed on the education system as a provider of future generations of employees. CEDAW Article 5 is one of the legal instruments which most clearly spells out the need to free individuals from the limitations deriving from gender-stereotyped ideas. The CEDAW Committee is clear in its recommendations that Norway as a State needs to address the gender-segregated areas of employment and education and interpret Articles 5, 10 and 11 in a holistic perspective. This needs to be taken into consideration in the choice of measures to combat the pay gap, both in the long and the short term.<sup>509</sup>

## POLAND – Eleonora Zielińska

### 1. General situation

According to data collected by the Central Statistical Office,<sup>510</sup> in October 2008 the average gross monthly salary of women constituted 81.3 % of the average gross salary

<sup>508</sup> H. Aune *Deltidsarbeid. Vern mot diskriminering på strukturelt og individuelt grunnlag* (Part-time work. Protection against discrimination on a structural and individual level.) PhD at the University of Oslo, February 2009, see Chapter 8.7. Under publication in Norwegian by Cappelen Damm Publishing House, Oslo during 2010.

<sup>509</sup> H. Aune *Deltidsarbeid. Vern mot diskriminering på strukturelt og individuelt grunnlag* (Part-time work. Protection against discrimination on a structural and individual level.) PhD at the University of Oslo, February 2009, see Chapter 15. Under publication in Norwegian by Cappelen Damm Publishing House, Oslo during 2010.

<sup>510</sup> Data concerns full-time and part-time employees without conversion of part-time employees into full-time employee equivalents and includes entities employing more than 9 persons. Statistical Yearbook of the Republic of Poland 2009, Central Statistical Office, Warsaw, p. 270.

of men,<sup>511</sup> which produces a gender pay gap of 18.7 %. This gap had increased in comparison with 2006 and 2004, when it amounted to 17.8 % and 16.5 % respectively.<sup>512</sup> The gender pay gap is largest in the group of persons with highest and lowest remunerations. For example, in the group of public government representatives (senior officials and managers) the gap constituted 30 %.<sup>513</sup> In the group of craftsman and related trade workers it was 40 %.<sup>514</sup> In October 2006, according to the survey, wages and salaries of men were higher by 9.4 % than the country's average wages and salaries, while wages and salaries of women were lower by 10.1 %.<sup>515</sup> The gender pay gap is largest in the groups of best-educated and worst-educated persons.<sup>516</sup> Internet research on wages,<sup>517</sup> which for comparison applied a median of wages as more appropriate,<sup>518</sup> shows that in the last decade wages of men have generally been at least 30 % higher than that of women in the same position.<sup>519</sup> The largest gender pay gap appeared to be in the bank, insurance and healthcare sectors.<sup>520</sup> For example, in 2007 the median of wages for men in the position of a general director was EUR 1 250 (PLN 5 000) while the median of wages of women in the same position was two times lower. When comparing median wages in the public sector the gap in 2008, amounting to 20 %, was lower than in the private sector (22.5 %).<sup>521</sup> With age, the wages decrease to a greater extent for men than for women, mainly due to the fact that men's wages at starting point were higher.<sup>522</sup> In order to verify the assumption on wage gender discrimination, since 1986 in Poland different econometric studies have

<sup>511</sup> In figures, women's average salary amounted to EUR 732 (PLN 2892) and men's to EUR 889 (PLN 3557).

<sup>512</sup> *Kobiety w Polsce* (Women in Poland) p. 157 Warsaw, Central Statistical Office 2007, [www.stat.gov.pl](http://www.stat.gov.pl), accessed 17 March 2010; and *Statistical Yearbook of the Republic of Poland 2008* p. 264 Warsaw, Central Statistical Office.

<sup>513</sup> The average gross salary of women belonging to this group amounted to EUR 1449 (PLN 5797) and of men to EUR 2052 (PLN 8211).

<sup>514</sup> The average gross salary of women belonging to this group amounted to EUR 440 (PLN 1760) and of men to approximately EUR 721 (PLN 2887).

<sup>515</sup> *Zatrudnienie i wynagrodzenia w gospodarce narodowej w I półroczu 2009* (Employment and wages in the national economy in the first part of 2009), Central Statistical Office, [www.stat.gov.pl](http://www.stat.gov.pl), accessed 17 March 2010. In 2008, the average wage in Poland was EUR 618 (PLN 2475).

<sup>516</sup> The average monthly salary of men with a university Master's degree is EUR 1200 (PLN 4800) while that of women is EUR 825 (PLN 3300). The monthly average wage of men after basic professional school is EUR 525 (PLN 2100) and of women EUR 375 (PLN 1500). Compare: G. Domański 'Discussion on gender pay gap' *Polityka*, <http://www.polityka.pl/kraj/288318.1.za-malo-za-to-samo.read>, accessed 17 March 2010.

<sup>517</sup> The biggest non-governmental salary survey in Poland, conducted since 2003 by leading online portals, provides regular, up-to-date information concerning compensation levels in Poland. In 2009 more than 89 000 selected responders (from whom 73 % were below 35 and had completed higher education) participated in the survey. Source: A. Czajka *Wynagrodzenia kobiet i mężczyzn w Polsce w 2009* (The salaries of men and women in Poland in 2009), Sedlak & Sedlak, <http://www.wynagrodzenia.pl>, accessed 18 March 2010.

<sup>518</sup> Median in statistics means the middle value, which, by elimination of the borderline values, reflects reality better than the simple use of average wages.

<sup>519</sup> Compare E. Lisowska *Kobiety styl zarządzania* (Women's style of management) Gliwice, Publishing House Helion 2009, p. 28 and the discussion on the gender pay gap in *Polityka*, <http://www.polityka.pl/kraj/288318.1.za-malo-za-to-samo.read>, accessed 17 March 2010.

<sup>520</sup> <http://www.egospodarka.pl/tematy/dyskryminacja-placowa>, accessed 18 March 2010.

<sup>521</sup> In this study, the median of wages is used. Compare A. Czajka *Wynagrodzenia kobiet i mężczyzn w Polsce w 2009* (The salaries of men and women in Poland in 2009), Sedlak & Sedlak, <http://www.wynagrodzenia.pl>, accessed 14 April 2010.

<sup>522</sup> T. Słoczyński 'Zastosowanie metod ekonometrycznych do weryfikacji tezy o dyskryminacji płacowej kobiet w Polsce w latach 1998-2006' (The application of econometric methods for verification of wage discrimination of women in Poland in 1998-2006), unpublished Master's thesis, p.23.



been conducted, mainly based on linear regression models or its decomposition made by Blinder-Oaxaca. Although the results of all these studies confirmed the rather stable existence of a gender pay gap, they were inconsistent as to the dynamics and scale of wage sex discrimination.<sup>523</sup> The statistical data of Eurostat indicates that in Poland the pay gap does not exceed 10 %.<sup>524</sup> It means that the Polish situation seems to be rather good in comparison with other EU Member States. However, in the opinion of sociologists this relatively low rate is influenced by some factors (considerations) specific for Poland such as generally lower wages, compared to many other EU Member States, as well as a lower rate of female employment (only every second woman is employed and usually those who are employed are better educated and qualified, resulting in employment in higher and better remunerated positions).<sup>525</sup> In 2007, the CEDAW Committee, in its concluding comments, called upon Poland to narrow and close the gap in wages between women and men through, inter alia, additional wage increases in female-dominated areas of public employment and to monitor the impact of measures taken and achieved results.<sup>526</sup> Since then, nothing significant has been done; instead of progress, regress has been observed in this respect (the gender pay gap in Poland increased from 7.5 % in 2007, to 9.8 % in 2008).<sup>527</sup>

## 2. The legal framework

In Poland, the equal pay guarantee is traditionally included into Constitutions. This was true for the previous socialist Constitution of 1952, as well as for the one currently in force, the Constitution of the Republic of Poland of 1997,<sup>528</sup> which in Article 33(2) states that men and women shall have equal rights, in particular regarding equal compensation for work of similar value. In addition, since 2001, the principle of equal pay for men and women is also laid down in Article 11<sup>2</sup> of the LC,<sup>529</sup> which sets a rule, considered part of the fundamental principles of labour law, that employees shall have equal rights for the equal performance of the same obligations, applying in particular to equal treatment of men and women in

<sup>523</sup> Compare I. Magda & A. Szydłowski 'Płace w makro i mikroperspektywie' (Wages from macro and micro perspectives), in: M. Bukowski (ed.) *Zatrudnienie w Polsce 2007. Bezpieczeństwo na elastycznym rynku pracy* (Employment in Poland in 2007. Security on the flexible labour market), Warszawa 2008, p. 98 and L. Łatuszyński & Ł.P. Woźny 'Zróżnicowanie płac kobiet i mężczyzn na polskim rynku pracy w 2004' (The diversification of wages of women and men on the Polish labour market in 2004), in: W. Pachó & M. Garbicz (ed.) *Wzrost gospodarczy a bezrobocie i nierówności w podziale dochodu* (The economic growth and inequalities in the division of income), Warszawa 2008, p. 250, as well as T. Słoczyński 'Zastosowanie metod ekonometrycznych do weryfikacji tezy o dyskryminacji płacowej kobiet w Polsce w latach 1998-2006' (The application of econometric methods for verification of wage discrimination of women in Poland in 1998-2006), unpublished Master's thesis. Earlier research: M. Grajek 'Gender Pay Gap in Poland' *Economics and Planning* 2003, No. 36, p. 28.

<sup>524</sup> <http://epp.eurostat.ec.europa.eu/tgm/table.do?tab=table&init=1&language=en&pcode=tsiem040&plugin=1>, accessed 18 March 2010.

<sup>525</sup> Compare the discussion on the gender pay gap in *Polityka* no. 1 (2747) 13 March 2010 <http://www.polityka.pl/kraj/288318,1,za-malo-za-to-samo.read>, accessed 17 March 2010.

<sup>526</sup> Concluding comments of the Committee on the Elimination of Discrimination against Women: Poland, CEDAW/C/POL/CO/6 of 2 February 2007, <http://www.un.org/womenwatch/daw/cedaw/reports.htm>, accessed 17 March 2010.

<sup>527</sup> Eurostat data, [http://www.stat.gov.pl/gus/eurostat\\_PLK\\_HTML.htm](http://www.stat.gov.pl/gus/eurostat_PLK_HTML.htm), accessed 17 March 2010.

<sup>528</sup> Constitution of the Republic of Poland of 2 April 1997 with amendments, Journal of Laws of the Republic of Poland (hereafter referred to as the 'JoL') 1997, no. 78, item 93.

<sup>529</sup> Labour Code (hereafter referred to as the 'LC') of 26 June 1974 with amendments, JoL, 1994, no. 11, item 38; consolidated text in JoL 1998, no. 21, item 92, with amendments.



employment. Furthermore, Article 18<sup>3c</sup>(1) LC (introduced in 2001<sup>530</sup> and amended in 2003<sup>531</sup>) states that employees are entitled to equal remuneration for equal work or for work of equal value. Remuneration is understood to include all possible components, irrespective of their description or nature, as well as other benefits related to employment which are granted to workers as payment, either in money or in kind (Article 18<sup>3c</sup>(2) LC). Work of equal value is work which requires from the employees comparable professional skills and qualifications certified by documents set forth in separate regulations or by practice and professional experience (measured by length of employment), as well as comparable responsibility and effort (Article 18<sup>3c</sup>(3) LC). As violation of the principle of equal treatment is to be considered the unjustified differentiation of the situation of employees on the ground of their sex (or discrimination on multiple grounds e.g. sex and age), which results in an unfavourable decision as regards individual wage and salary, unless the employer can prove that they were driven by objective criteria (Article 18<sup>3b</sup> (2)(2) LC.) The recourse to the criterion of length of service, while establishing the rules of additional remuneration, is not considered a violation of the principle of equal treatment, on the condition that it is appropriate to attain the legitimate aim and that the requirement of proportionality is observed (Article 18<sup>3b</sup>(2)(4) LC<sup>532</sup>). In a judgment of 22 February 2007,<sup>533</sup> the Supreme Court explained that if the employer, while establishing the remuneration of the comparator, took into account such criteria as length of service and qualifications, they must prove that particular skills and professional experience have special significance for fulfilment of the obligations conferred on the employee. Pursuant to Article 72<sup>1</sup> LC, the conditions of remuneration should be established by way of a collective agreement. An entity employing at least 20 persons, to whom no collective agreement provisions apply, should issue (after negotiation with the employees) a special regulation on wages. Pursuant to Article 78 LC, remuneration should, in particular, be determined in a manner corresponding to the kind of work and the required qualifications as well as quantity and quality of work performed. The rate (amount) of wages and rules of their admission (assessment) in connection with the particular position or kind of performed work (as well as other additional components of the salary, if provided for) should be established through negotiation. In case of state employees, the conditions of remuneration, if not regulated by collective agreement, will be established by an order of the Minister responsible for labour, taken on the initiative of an appropriate Minister. The order should, in particular, provide for the conditions of establishment and payment of substantial wages and other additional components of the salary. The criterion of the length of service, as condition for additional payment related to the kind of work or special conditions of its performance, shall not exceed 20 % of the additional component of the salary (Article 77<sup>3</sup> LC). The LC also obliges the employer to apply objective and just criteria in the evaluation of employees and the results of their work. Any provisions of collective bargaining agreements as well as provisions of employment contracts infringing the principle of equal treatment in employment are deemed non-binding (Article 9(4) and Article 18(2) LC). Some positive developments can be observed with regard to the anti-victimization clause, which was modified by amendments of

<sup>530</sup> Act of 24 August 2001, JoL 2001, no. 128, item 1405. These provisions entered into force on 1 January 2002.

<sup>531</sup> Act of 14 November 2003, JoL 2003, no. 213, item 1081.

<sup>532</sup> As modified by Act of 21 November 2008, JoL 2008, no. 223, item 1460.

<sup>533</sup> I PK 242/06.

2008<sup>534</sup> and now protects the claimant against any discriminatory treatment of the employer, including dissolution of the labour contract, and also provides protection for employees who have assisted or supported the claimant (Article 18<sup>3e</sup> LC). There is no explanation in the law itself or in the commentaries what this provision means in case of pay discrimination. However, it may be assumed that also persons who disclosed their own wages to the claimant despite of having signed the confidentiality clause would be protected. A general system of occupational classifications for the purpose of determining remuneration, as well as a universal system for valuing work and establishing criteria permitting comparison of various kinds of work is still lacking. There are some enterprises in which various systems for valuing work are applied on a voluntary basis. However, various surveys have proved that the extent of work valuation practices is limited (concerning only 7 % of small enterprises, 9 % of medium-sized enterprises and 33 % of large enterprises (with more than 250 employees). In most of those cases, simplified methods of valuation are used.<sup>535</sup> In just a few publications on this issue, the use of valuation of work for the elimination of the gender gap is mentioned.<sup>536</sup> The creation of a general gender-sensitive system of occupational classification therefore seems to be the most important challenge and hope for narrowing the gender pay gap.

### 3. Instruments of social partners

There are no legislative provisions which may induce social partners to include the issue of equal pay into collective agreements. The analyses of selected collective agreements and interviews given by social partners,<sup>537</sup> who have participated in many collective bargaining procedures, proved that today – as in 2006 – the problem of diminishing the gender pay gap is of limited (if any) importance in the process of its negotiations. There is no information available on any collective agreements containing any concrete detailed provisions aiming at closing the gender pay gap. Some of them merely repeat the Labour Code provisions on equal treatment. Women's groups of the Trade Union *Solidarność* have tried to tackle the pay gap problem, launching a campaign for equal pay, aiming at improving the understanding of wage imbalance and changing the culture of collective agreements in this respect. However, the issue did not find sufficient resonance among the trade union's decisions makers. Another big trade union, *OPZZ*, tried to convince its enterprise's branches on the need of monitoring wages of women and men in the same positions, in order to reveal the gender pay gap and conduct special preparatory training. The Polish Confederation of Private Employers *Lewiatan*<sup>538</sup> in its various activities shows commitment to the diversity management policy and was involved in different

<sup>534</sup> As modified by Act of 21 November 2008, JoL 2008, no. 223, item 1460.

<sup>535</sup> M. Juchowicz *Wartościowanie pracy oraz ocena pracowników w polskich przedsiębiorstwach. Wyniki badań* (Valuation of work and the assessment of work of employees in Polish enterprises. The result of research) Warszawa, Institute of Labour and Social Policy (IPiPS) 2005; Z. Sekuła *Systemy wynagradzania w Polsce w świetle badań* (The wages system in Poland in research) Wrocław, XVII Zeszyty Naukowe WSZiF we Wrocławiu, 2004, <http://www.wynagrodzenia.pl>, accessed 18 March 2010.

<sup>536</sup> A. Kunysz *Dyskryminacja płacowa a wartościowanie stanowisk* (Gender wage discrimination and work positions valuation), Sedlak & Sedlak, <http://www.wynagrodzenia.pl>, accessed 18 March 2010.

<sup>537</sup> Compare the answers to the questionnaires that the author of this report sent to the biggest Polish Trade Unions *Solidarność* and *OPZZ* in 2006 and in 2010, as well as to employers' confederation *Lewiatan* and the Ministry of Labour and Social Policy.

<sup>538</sup> *Lewiatan*, established in 2005, is the largest and most active business network in Poland; [www.pkplewiatan.pl](http://www.pkplewiatan.pl), accessed 18 March 2010.

projects aimed at increasing the participation of women in employment and their equal treatment with men. Of greatest importance were the projects Gender Index (see below) and Employers Against Discrimination, aimed among others at changing the organisational culture of enterprises, influencing structural changes in the Government, facilitating reconciliation of professional and family obligations and building a model of corporate social responsibility. In 2009, the Congress of Women, a nation-wide women's initiative, supported among others by *Lewiatan*, recommended the Trilateral Commission<sup>539</sup> to initiate the creation of a job evaluation system and to impose on the Government the obligation of publishing and making use of evaluation tables in negotiation processes.<sup>540</sup> However, there has been no follow-up on this initiative yet.

#### **4. Instruments specifically aimed at employers**

There are no legislative and consistent policy instruments, nor any special strategies, which oblige or otherwise induce employers to tackle the gender pay gap problem. The Government Plenipotentiary for Equal Treatment, which as far as currently in existence in Poland plays the role of equality body in the sense of EU equality directives, tackled the issue directly only once, by blaming *Lewiatan* that, instead of encouraging employers to monitor wage discrimination, it supports the draft law on equal representation of women on electoral lists.<sup>541</sup> Within the Framework of Action of Gender Equality 2005, none of the initiatives was exclusively devoted to the gender pay gap.<sup>542</sup> There is no information available that the Government requires contracted firms to address the issue of unequal pay.

#### **5. Other instruments to close the pay gap**

There was no information to be found on tools that may assist individuals to confirm the existence of pay discrimination or tools to help design gender-neutral job evaluation schemes or pay systems. There is no agency responsible specifically for monitoring or evaluation of collective agreements or other policy documents from a gender equality perspective, although the Plenipotentiary for Equal Treatment could do it, if they would choose to. Such control may also be executed by the National Labour Inspectorate,<sup>543</sup> which holds a register of enterprises' collective agreements. In 9 % of the collective agreements registered in 2009, various irregularities in particular differentiations of employees benefits depending on the time of work and the kind of labour contract (which is explicitly prohibited by Labour Code equal treatment clauses) are mentioned,<sup>544</sup> which should be considered as possible indirect sex

<sup>539</sup> The Triangle Commission for Social and Economic Matters, composed of representatives of the Government, the main trade unions and the largest employers' organisations, is based on Law of 6 July 2001 (JoL 2001 no. 100, item 1080 with amendments). The main task of the Commission is to conduct a social dialogue on the matters of wages and social benefits and on other economic and social issues important for maintaining societal peace.

<sup>540</sup> <http://www.kongreskobiet.pl>, accessed 18 March 2010.

<sup>541</sup> <http://www.rownetraktowanie.kprm.gov.pl/userfiles/file/O%20projekcie%20Gender%20Index%20-%20new.pdf>, accessed 18 March 2010.

<sup>542</sup> Compare Framework of Action for gender equality 2005, first follow-up report 2006, Poland [http://www.etuc.org/IMG/pdf/Fram\\_of\\_actions\\_gender\\_1st\\_report\\_final.pdf](http://www.etuc.org/IMG/pdf/Fram_of_actions_gender_1st_report_final.pdf), accessed 18 March 2010.

<sup>543</sup> Acting on the basis of the Act of 6 March 1981 on the National Labour Inspectorate, JoL 2001 no. 124, item 1362 – consolidated text with amendments.

<sup>544</sup> *Sprawozdanie z kontroli PIP of 2009, załącznik no. 8* (Report from the Control Unit of the National Labour Inspectorate 2009, attachment no. 8), [http://www.pip.gov.pl/html/pl/sprawozd/05/zal\\_08\\_05.pdf](http://www.pip.gov.pl/html/pl/sprawozd/05/zal_08_05.pdf), accessed 15 April 2010.

discrimination. In the last decade, the National Labour Inspectorate has checked the enforcement of equal treatment labour law provisions at the workplace four times (the last check, which took place in 2005, covered 116 enterprises of different kinds). Although a gender pay gap of 13.5 % in higher managerial positions was revealed (which was not the case in the group of workers in lower positions), there is no information as to whether any detailed recommendations have been formulated, or any tools elaborated, that may assist employers in reducing the scale of gender pay discrimination.<sup>545</sup>

## **6. Problems of enforcement and how to tackle them by good practices**

In case of alleged discrimination, the person concerned may initiate a court claim and has the right to compensation in an amount no less than the monthly minimum remuneration for work<sup>546</sup> established on the basis of separate provisions (Article 18<sup>3d</sup> of LC). In addition, the LC provides for a reversed burden of proof in discrimination cases and the Supreme Court, in several judgments, has confirmed the practical importance of this solution in claims and related rights, thus creating general awareness as to how it should function.<sup>547</sup> In its judgment of 15 September 2006,<sup>548</sup> the Supreme Court pointed out that the relevant employee claiming wage discrimination should prove that he performed the same work for remuneration that was lower than another employee, or (if applicable), that he performed work of the same value. The lack of official comparative job valuation tables, as well as of specific legislation providing for a procedure for job evaluation in claims for equal pay for work of equal value, makes this latter requirement unrealistic. There is a time limit of three years, for the filing of lawsuits related to employment, counted from the moment that the claim can be made. This term cannot be changed on the basis of the contract (Article 292 of LC). According to case law of the Supreme Court<sup>549</sup> the alleged lapse of time for limitation is not established *ex officio*, but upon motion of the employer only. This means that the employer may compensate the victim of discrimination even after the three-year time limit has lapsed. The law does not explain from which moment the time limit starts to run in such specific cases as wage discrimination. The Supreme Court, while referring to discrimination in employment, resulting in damage to the employee's health, stressed that the decisive moment is not the time of dissolution of the labour contract but the time when the damage to the employee's health is revealed and the employee becomes aware of it. In the judgment of 22 February 2007,<sup>550</sup> the Supreme Court stated that, when the allegation concerns wage discrimination, besides punitive compensation for discrimination agreed on the basis of Article 18<sup>3d</sup> LC, the employee may also claim compensation, which ought to be equal to the difference between the wage received and the one which should have been received, if the principle of equal treatment had not been violated, for the period until the right has legally been terminated. It may be assumed that also in wage discrimination cases, the time limitation starts to run from the moment when the employee receives information about the existence of the specific situation related to a

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<sup>545</sup> In the reports of 2007 and 2008, the issue of protection of the principle of equal treatment was not mentioned, [http://www.pip.gov.pl/html/pl/sprawozd/06/spr\\_o6\\_05.pdf](http://www.pip.gov.pl/html/pl/sprawozd/06/spr_o6_05.pdf), accessed 18 March 2010.

<sup>546</sup> The gross minimum remuneration in 2009 was approximately EUR 315 (PLN 1276), and in 2010 it was approximately EUR 329 (PLN 1317) (41.3 % of average salary).

<sup>547</sup> Supreme Court in the decision of 3 June 2003, I PK 171/02, OSNP 2004/15/258.

<sup>548</sup> I PK 97/06.

<sup>549</sup> Judgment of Supreme Court of 2 May 2000 (III ZP 13/00).

<sup>550</sup> I PK 242/06.

gender pay gap. However, the lack of clarity in this respect may influence the effectiveness of enforcement of relevant anti-discrimination labour law provisions. In the reviewed court cases concerning wage discrimination, the scope of comparison was limited to the same employer. Theoretically, at least with regard to state employees, for whom the conditions of remuneration are established by order of Ministry of Labour and Social Policy, there is a possibility to compare salaries within the same sector. However, such a case has not yet been identified. The same may be said with regard to the possible impact of gender-based wage discrimination on future retirement benefits of employers and how to compensate it. The main difficulty, occurring in claiming the right for equal pay is connected with the fact that wage regulations mainly provide for the basic salary and some additional salary components, such as length of service benefits, 13<sup>th</sup> monthly wage, etc. The situation looks better in the public sector, where stable remuneration criteria exist. However, additional considerations, such as bonuses or benefits in kind, are negotiated on an individual basis, in particular in the private sector, and they are not known to other employees. To gain knowledge about unequal pay is also extremely difficult because of common exaggerated confidentiality. Due to the fact that the Labour Code contains no regulation on confidentiality concerning remuneration, different practices exist in individual enterprises. According to the law, the prohibition of revealing the information on salaries may be justified by protection of the employer against unfair competition,<sup>551</sup> as well as by protection of the privacy of individual employees. The Supreme Court decided that if an employer reveals the wage of a particular employee, this may be considered as violation of personal goods, but only in certain circumstances.<sup>552</sup> A different approach, namely that such information is always covered by personal data protection regulations, unless the law states otherwise,<sup>553</sup> was taken by the Inspector General for Personal Data Protection.<sup>554</sup> The latter opinion is followed by most employers, who usually refuse to disclose the information on other employees' salary to the employee asserting to be the victim of sex discrimination, unless she/he goes to court. Employees are often prohibited by the employer to reveal their salary to others and in the past there have been incidents of dismissal of employees for the reason of disobedience in this respect. Currently, the opinion prevails that disclosure of the salary, as such, may not be considered violation of substantial employee's obligations, which may result in immediate dismissal, unless it is proven that the disclosure occurred with intention to act on the detriment

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<sup>551</sup> According to the Law on combating unfair competition (Law of 16 April 1993, JoL 1993, no. 47, item 211, with amendments) employers may apply the confidentiality clause to all data of economic value, of which the information on employees' wages is also considered to be part.

<sup>552</sup> On the condition that such information may be considered as belonging to the sphere of private life and that it is only possible after analysis of the concrete situation in a given case. In particular, it should be prohibited when the employee opposes such disclosure or the information may touch on the intimate sphere of the employee's life, e.g. the information reveals alimony obligations deducted from the salary. Judgment of 16 July 1993, I PZP 28/93.

<sup>553</sup> The Law of 3 March 2000 on the wages of person directing certain legal entities (JoL 2000, no. 26, item 306) indicates the posts regarding which the wages are public. The Law on higher education provides e.g. that the salaries of rectors, vice-rectors, chancellors and head of financial services are not confidential.

<sup>554</sup> While responding to individual claims, *GIODO* even considered ill-founded the claim of a woman whose husband's employer refused to give information on his pay in a situation where she was entitled, on the basis of a court judgment, to 85 % of her husband's monthly pay and who alleged that the basis of the deduction was not fairly calculated by the employer; [http://www.giodo.gov.pl/1520007/id\\_art/2996/j/pl/](http://www.giodo.gov.pl/1520007/id_art/2996/j/pl/), accessed 15 April 2010.



of the employer in the sense of unfair competition.<sup>555</sup> Trade unions have the right to check compliance with labour regulations, also with respect to wages. In the opinion of the Supreme Court,<sup>556</sup> however, they are not entitled to obtain information on individual salaries unless the person concerned gives his/her consent. In the reasoning of this judgment, the Court explained that information on individual salaries is not a necessary tool for trade union activity, either for protection of group, nor of individual interests. In this circumstance, employees often find themselves in a hopeless situation if they want to know whether they are discriminated against. It is the main reason why claims on wage discrimination are rather seldom. A transparent system of remuneration, permanent monitoring of the wages from a gender perspective and clear rules of disclosure of the information on individual wages may be at least a partial antidote for those difficulties.

## 7. Relationship between the gender pay gap and other parts of labour law

The gender pay gap is sometimes tackled in the framework of broader equality projects. For example, the Ministry of Labour and Social Policy started to implement two projects, as part of the human capital programme, referring to the issue of gender pay gap.<sup>557</sup> Within the project 'Professional Activation of Women on Local and Regional Levels', a study is being conducted on the causes of unequal treatment in relation to wages (on both sides: employers and employees). In the opinion of the Ministry,<sup>558</sup> the results of this diagnosis will influence the attitudes of both parties of the labour relationship and will contribute to narrowing the gender pay gap. The second project, 'Reconciliation of Professional and Family roles of Women and Men', should facilitate the participation of women in employment on a more equal footing with men. One of the reasons of employers offering women lower salaries, as well as ignoring them in promotions, is the stereotyped conviction about the priority of family over professional role in the life of women. By facilitating the reconciliation of those roles for both parents, the project may contribute to narrowing the gender pay gap. There is no case law which reflects the interrelations between unequal pay and the rules governing other aspects of professional life, except one judgment in which the Supreme Court confirmed that women on maternity are entitled to all components of the salary which they would otherwise receive, e.g. the Christmas bonus.

## 8. Final assessment of good practices

Some good practices, mainly consisting of creating wage tables related to certain positions, have been described in detail in different publications. However, without knowing the individual characteristics of a given workplace, it is difficult to assess whether it is gender-sensitive enough.<sup>559</sup>

<sup>555</sup> *Klauzula poufności a dyskryminacja płacowa* (The confidentiality clause and wages discrimination, <http://www.prawo.egospodarka.pl/24330,Klauzula-poufnosci-a-dyskryminacja-placowa,2,34,3.html> and [http://www.rp.pl/artykul/339446\\_Pracodawcy\\_utajniaja\\_dane\\_o\\_pensjach.html](http://www.rp.pl/artykul/339446_Pracodawcy_utajniaja_dane_o_pensjach.html), accessed 18 March 2010.

<sup>556</sup> Resolution of 16 July 1993 (*I PZP 28.93, OSNCP 1994, no. 1, poz. 2* <http://www.prawo.egospodarka.pl/50845,Tajemnica-wynagrodzenia-a-zwiazki-zawodowe,1,34,3.html>, accessed 18 March 2010.

<sup>557</sup> <http://www.mpips.go.pl>, accessed 18 March 2010.

<sup>558</sup> Information from the General Directorate of the Ministry.

<sup>559</sup> Compare Z. Sekuła 'Płace bez dyskryminacji' (Wages without discrimination), *Personel i Zarządzanie* 2004, no. 9, [www.wynagrodzenia.pl/bibliografia.php/typ.1/kategoria.../](http://www.wynagrodzenia.pl/bibliografia.php/typ.1/kategoria.../), accessed 20 March 2010. As an example of a promising practice an enterprise was described (in the mining industry) that changed its system of remuneration. The weakness of its previous system was that

The Gender Index project conducted in 2006 deserves positive assessment.<sup>560</sup> The goal of this project was to create a tool enabling to assess and monitor the preservation of the principle of equal treatment of women and men at the workplace. One part of the questionnaire, which was supposed to be answered both by employers and employees, concerned equal pay. All answers were evaluated and provided the basis for general assessment. Several enterprises used this tool in order to estimate the degree of implementation of the principle of equal treatment of women. In January 2009, the Ministry of Labour and Social Policy used this tool as well.<sup>561</sup> Within this project, a manual of good practices was elaborated as well,<sup>562</sup> in which with respect to equal pay the following practices were identified as promising: the yearly audit of salaries, creating a zone system of salaries (every position is assigned to one of the zones with indicated salary), and monitoring salaries.

The influence of these promising practices, however, is limited to certain enterprises, and therefore they may not improve the situation as a whole. It is still true that everyone in Poland is aware of the existence of a gender pay gap and that many feel that its maintenance is unfair. The decision makers, as well as most of the employers, still seem to treat this gap as an inevitable evil, which can neither be reduced, nor eliminated by respective policies or programmes. As a sign of change may be perceived the billboard campaign launched in 2009 by the Ministry of Labour and Social Policy and continued in 2010, aimed at informing society about the existence of a gender pay gap and the need to eliminate it. However, the lack of a concrete agenda for change in the governmental plan of action with regard to employment for the years 2009-2011 provides no reason for greater optimism.<sup>563</sup>

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only the minimum basic salary for every employee was established, whereas the maximum amount could be set without any limitations by his/her superior, based on personal intuitive assessment. Such situation led to privileged situations of some employees, a significant pay gap and resulted in unequal pay for the same or similar work. A simulation game played by the management helped them to realise this. In order to eliminate this unfair situation it was first considered to develop a job classification scheme, based on analytical evaluations of work and the subject performing it. However, taking into account the complexity of such valuation, the final decision was to settle for reorganising the tariffs system and the wage tables. The first step was to build a hierarchical list of positions, according to the complexity of work. The next step was to design wage tables divided into 8 categories, depending on length of service. The most important and most frequently used form of promotion was the motivation bonus. The whole process of reforming the system took 3 years and was conducted with active participation of social partners. The annual assessment of every individual employee provided. All wages are monitored and analysed on a yearly basis.

<sup>560</sup> [www.pszk.org.pl/binary/dok/wydarzenia/70genderindex.pdf](http://www.pszk.org.pl/binary/dok/wydarzenia/70genderindex.pdf), accessed 20 March 2010. The project, financed from the EQUAL Initiative, was conducted by the UNDP with participation of *Lewiatan*, academics and women's NGOs.

<sup>561</sup> The test was produced as part of the project 'Gender mainstreaming, the tool of change', which is part of the Progress Programme. In the Ministry, the wages of women constituted 96 % of the wages of men. However, although the gender pay gap seemed to be small, in the subjective assessment of one out of four interviewed ministry employees, sex-related wage discrimination did occur. Such inconsistency evidences the lack of transparency with respect to remuneration policy. Compare I. Kotowska & B. Kajcińska *Równe traktowanie kobiet i mężczyzn w Ministerstwie Pracy i Polityki Społecznej. Wyniki badania dotyczącego realizacji perspektywy równości płci* (Equal treatment of women and men in the Ministry of Labour and Social Policy. Results of research on the implementation of gender mainstreaming), unpublished, p.14.

<sup>562</sup> *Przewodnik dobrych praktyk. Firma równych szans* (The Guide of Good Practices. The firm of Equal Opportunities) Warszawa, *EQUAL*, UNDP, 2007, p.71.

<sup>563</sup> The recommendations of the National Plan of Action for Employment, prepared by the Ministry of Labour and Social Policy, do not contain any explicit reference to the necessity of eliminating the gender pay gap, but only generally mentions the need of eliminating the difference between women and men in employment; <http://www.mpips.gov.pl/index.php?gid=1293>, accessed 18 March 2010.



## 1. General situation

In Portugal there are still differences between general pay levels of men and women, although there has been some improvement in the past ten years. The available statistic data on this issue<sup>564</sup> are not very much up to date, but they allow to compare the value of the *average monthly salary* paid to men and women and the value of the *average monthly earning capacity* of men and women. It is important to take into consideration these two levels of comparison, since the first one only shows the differences in wages in a strict sense, while the second one takes into account not only the salary but also the complementary advantages that go along with the salary, thus referring to the broader concept of remuneration.

When comparing the data regarding these two topics, the situation is the following: between 1995 and 2005, the *average monthly salary* between men and women showed a gap that developed from 23 % to 21.7 % (in favour of men) in 2005. However, when comparing the *average monthly earning capacity* of men and women in that same period, the gap is larger, increasing to 22.6 % (against women) in 2005. These data show that the pay gap arises both from the differences in salary and from the related complementary advantages.

The public statistic data related to this issue are of a general nature and it was not possible to gain access to more detailed information.

However, other statistical data regarding differences in the situation of men and women in relation to employment must also be looked into, because they can explain the gender pay gap to a certain extent. These data regard the representation of men and women in better qualified jobs and in less qualified jobs, the representation of men and women in precarious employment, the representation of men and women in certain professions or economic activities and finally the distribution of care responsibilities between men and women. These data are the following:

a) The representation of men and women in highly qualified jobs is very different in favour of men, in two respects. On the one hand, women represent only 37.6 % of highly qualified jobs and only 43.6 % of medium qualified jobs. On the other hand, the gender pay gap is larger in high-level jobs (up to 29.4 % of the average monthly salary, and up to 30 % of the average monthly earning capacity, in favour of men). These data show that women have more difficulty in reaching the top of their career, and that even when they arrive there they earn much less than their male colleagues.

b) The representation of men and women in precarious jobs is also unbalanced, since precarious jobs are more frequent among women (for instance, 21.7 % of women have a fixed-term contract, and only 19.5 % of men have a fixed-term contract). Given the fact that fixed-term workers are often paid less or do not have the same benefits as other workers, this can also explain the salary gap between men and women.

c) The representation of men and women in certain professions or economic activities is also unbalanced, with women taking the lead in areas like health and care services (81.9 %), education (75.7 %), or hotels and restaurant services (61.4 %), and also in intellectual and academic/scientific professions (57.2 %). Since some of these

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<sup>564</sup> All data mentioned in this Report are published by the *Instituto Nacional de Estatística* (National Institute of Statistical Data), and by the *CITE - Comissão para a Igualdade no Trabalho e no Emprego* (Commission for Equality at Work and in Employment, which is a public agency); [www.cit.gov.pt](http://www.cit.gov.pt), accessed 15 March 2010.

activities and professions are traditionally less well-paid, this unbalanced distribution also contributes to the pay gap.

d) Finally, the gender stereotype that sees care responsibilities as a duty of women is still very strong in Portugal and as a result, women dedicate more time to unpaid work in their homes, to parenthood tasks and to care tasks in general. The result of this stereotype is that women work an average of three hours more than men per day (taking into account the time in employment and the unpaid work at home or for care tasks). This factor is also important to explain the gender pay gap, since the dedication of women to other tasks may, in some cases, exclude them from benefits related to employment (for instance, benefits related to the lack of absence despite justification) and in general this situation makes women's careers more difficult.

## **2. The legal framework**

In Portugal, a general right to equal pay for equal work is established in the Constitution (Article 59 No. 1a)) as a fundamental right of workers and employees. The same general principle is established in the Labour Code<sup>565</sup> (Article 270), and the Code applies this principle both to non-discrimination in general (Article 24 No. 2c)) and to gender equality in employment (Article 31).

Gender equal pay issues were formerly covered by the Equality Act of 1979 (for private workers) and by the Equality Act from 1988 (for civil servants),<sup>566</sup> and afterwards by the Labour Code of 2003 and its complementary legislation (the Labour Regulation Act, of 2004), which established general rules for this purpose, applicable both to the private sector and to civil servants. These rules are now integrated in the new Labour Code (LC), but civil servants now have their own rules on this subject (Law No. 59/2008 of 11 September 2009, Articles 13 *et seq.*, whose rules are identical to the Labour Code, for most subjects).

Independent workers that economically depend on another contractor (for instance, homeworkers) are also protected by these rules (Article 11° of the LC).

In the LC, Article 24 No. 1b) redresses the principle of equal pay in reference to all grounds of discrimination and Article 31 No. 1 and No. 2 redresses this principle in relation to gender equality.

In developing this principle, the LC also establishes the following rules regarding gender equality:

- Article 23 No. 1 defines direct and indirect discrimination, equal work and work of equal value; these notions are compatible with European law.
- Article 24 No. 2c) and Article 31 No. 2 establish the concept of remuneration, which is defined in a wide sense, for the purposes of the equal pay rule. Regarding these rules, some development is noticeable. In fact, the former Labour Code had some difficulties in meeting the communitarian notion of discrimination for the purposes of equal pay between men and women, since it adopted the common (and more strict) concept of salary<sup>567</sup> also for the purpose of equal pay

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<sup>565</sup> There is a new Labour Code, which was approved by Law No. 7/2009 of 12 February. This Code has replaced the former Labour Code of 2003 (approved by Law No. 99/2003 of 27 August 2003) and the Labour Regulation Act (LRA) of 2004 (approved by Law No. 35/2004 of 29 July 2004), which was complementary legislation of the first LC and which dealt more extensively with discrimination issues. In the area of equality, most of the provisions that were in the LRA are now in the new Labour Code.

<sup>566</sup> Decree-Law No. 392/79 of 20 September 1979, and Decree-Law No. 426/88 of 18 November 1988.

<sup>567</sup> In Portuguese labour law, there is a difference between the concept of 'salary' and the concept of 'remuneration'. The first concept refers to the salary in a strict sense, meaning what the employee earns in relation to the work performed. In contrast, the concept of remuneration integrates not only

- and gender. However, the new LC already establishes the notion of remuneration in a broader way, making it compatible with European law.
- Article 31 No. 3 and No. 4 allows objective criteria for the assessment of work that justify differences in pay, such as quality, productivity, seniority, lack of absence; however, this Article considers that the exercise of parenthood rights cannot justify different remuneration.
  - Article 31 No. 5 establishes that job description and evaluation must rely on objective criteria, common to men and women.
  - Article 26 No. 2, regarding equal pay and gender in collective agreements, establishes a specific remedy to sanction discriminatory clauses regarding remuneration on collective agreements. According to this rule, when collective agreements establish different remuneration level for men and women for equal work or work of the same value, the higher remuneration automatically replaces the lower one and is automatically applied to workers of both sexes.
  - Article 479, regarding the content of collective agreements and discrimination, establishes the duty of the *CITE (Comissão para a Igualdade no Trabalho e no Emprego* – Public Agency for Equality in Employment) to check on all collective agreements just after their publication in order to find discriminatory clauses. If that is the case, the Agency can present the case before the public attorney, who can take it to court in order to have these clauses declared null and void. This rule is a novelty of the new Labour Code.

### 3. Instruments of social partners

Collective agreements often establish the principle of equal pay for equal work or for work of equal value in a formal way, but, in fact, many have discriminatory clauses regarding pay alongside that principle. Discriminatory practices/clauses are common in three areas: in the definition of the professional categories in the agreements, where it is frequent that the very same job corresponds to two different categories, each one of them with a different salary, but the category with a lower salary is mostly female, while the other one is mostly done by men<sup>568</sup>; remuneration complements fixed in collective agreements quite often depend on criteria that have an unbalanced effect on workers of each sex (such as seniority or lack of absence, regardless the reason); finally, in the area of maternity, paternity and care issues, many collective agreements still treat these issues as a problem of female workers.

In the Labour Code, several measures aim at inducing the social partners to include the issue of equal pay in collective and other agreements:

- Article 492 No. 2d) of the LC establishes that collective agreements should integrate clauses that promote gender equality in general (equal pay included).

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the strict salary but all other financial benefits given to the employee, on account of his labour contract (for instance, bonuses attached to productivity, lack of absence or results, payments regarding expenses, extra payments to compensate for overtime, night work, shifts, allowances of several kinds paid by the employer, and so on and so forth). Given the fact that ‘salary’ (meaning salary in the strict sense) is heavily protected by the law, for several purposes (mainly, it cannot not be cut by the employer), this distinction is very important. In the former Labour Code, the fact that the Code referred to pay discrimination on sex grounds using the concept of ‘salary’ meant in practice that the protection granted would only cover the salary of the worker, and this situation was not consistent with the broad notion of remuneration in European law.

<sup>568</sup> A comprehensive analysis of this situation was made some years ago by a public commission called *Observatório para a Igualdade nas Convenções Coletivas* (Observatory for Gender Equality in Collective Agreements), which analysed the content of collective agreements, in order to tackle gender discrimination clauses.

However, this provision is considered as a recommendation, since in the mandatory content of collective agreements, as established by law (Article 492 of the LC), gender equality issues are not mentioned.

- With respect to the clauses regarding professions and professional categories, Article 26 No. 1 of the LC establishes that any profession established in collective agreements as exclusively female or male is to be considered as extended to both men and women; this rule has obvious consequences on pay.
- With respect to clauses of collective agreements or company rules that establish different pay for men and women when performing the same work or a work of equal value, the rule that we have mentioned above in Article 26 No. 2 of the LC, stating that these clauses are to be considered automatically replaced by the most favourable salary established, which is applicable both to men and women, also contributes to the above-mentioned goal.
- Finally, the new competence of the public Agency for Equality in the analysis of collective agreements, in order to find discriminatory clauses, that we have mentioned above (Article 479 of the LC), also contributes to this goal.

With respect to non-legal practices related to this issue, we underline the work of the Observatory for Gender Equality in Collective Agreements, which was created some years ago in order to monitor gender equality issues in collective bargaining and to promote the effectiveness of gender equality rules in this field. This Commission, that has been active for some time now, has members from trade unions and from employers' associations, alongside representatives of the public Agency for Equality in Employment as well as representatives of the Labour Ministry, and several independent experts.

Some of the discriminatory situations described above have been investigated by this Commission, in collective agreements from different professional areas, and the Commission made several proposals to the trade unions and to the employers' associations involved in order to change the discriminatory clauses in the process of revising their collective agreements.

This kind of initiative is very positive, since they directly involve the social partners in the process of putting into practice the rules regarding equal pay.

#### **4. Instruments specifically aimed at employers**

We have no knowledge of trade unions or employers unions' initiatives targeted at employers with the scope objective of promoting the effectiveness of equal pay in collective agreements.

We also have no knowledge of initiatives in the area of public procurement powers related to the activities of firms in the area of pay gap, as a condition to contract in the public sector.

Finally, we would like to stress here that the effectiveness of the legal instruments in this area is low, since the follow-up of these instruments by the Labour Inspection Services is not very strict. The same conclusion applies to non-legal measures, such as the ones described above, since they are not binding.

#### **5. Other instruments to close the pay gap**

The right to equal pay for equal work or work of the same value is a fundamental right, therefore its implementation is granted in a vigorous way, both by the Constitution and by the law.

As a constitutional fundamental right, this right is binding both for public and for private institutions and persons (Article 18 of the Constitutional) and any limitations imposed by the law on its content must be minimal and must keep intact the fundamental content of the right itself.

From a legal point of view, the right to equal pay is binding for all employers, and allows the alleged discriminated employee to follow two kinds of procedures: on the one hand he or she can file a complaint directly with the Labour Inspection Services and/or with the Agency for Equality in Employment (*CITE*); on the other hand he or she can start judicial proceedings against the employer, either directly or through the unions, and claim damage compensation (Article 28 of the LC). In this action, the claimant benefits from the reversal of the burden of proof attached to non-discrimination issues in the LC (Article 25 No. 5).

With respects to instruments regarding job evaluation in collective agreements, we underline the above-mentioned activities of the Agency for Equality in Employment, scrutinising the content of collective agreements in order to find discriminatory clauses (Article 479 of the LC), as well as the competence of trade unions to start judicial proceedings in order to have discriminatory clauses of a collective agreement declared null and void. However, these activities are rare.

## **6. Problems of enforcement and how to tackle them by good practices**

The enforcement of equal pay rules in Portugal is theoretically easy, since the instruments to promote such enforcement are in the law. The alleged discriminated employee can file a complaint directly with the Labour Inspection Services and/or with the Agency for Equality in Employment (*CITE*), and he or she can start judicial proceedings against the employer, either directly or through the unions, and claim damage compensation (Article 28 of the LC).

However, in practice the enforcement of equal pay rules is very difficult. In my opinion, this difficulty has three grounds.

First, most discriminatory practices in this area are not caused by different salaries in the strict sense, but by complementary payments, or they are a consequence of the definition of professional categories in collective agreements. With respect to the complementary benefits, since they are based on variable justifications, which are more difficult to trace and may seem gender neutral at first glance, the tackle of pay discrimination gets difficult in practice. Also, the definition of professions and professional categories in collective agreements is often based on technical terms that make it more difficult to reach the conclusion that the work performed is, in practice, the same or has the same value. In short, these factors make discriminatory practices difficult to grasp.

Second, the technical notions related to pay discrimination (like direct and indirect discrimination and, especially, work of equal value) are still unclear, to inspection services, to judges and even to employers. This also makes the implementation of the principle more difficult.

Third, Labour Inspection activities in this area (which could be very effective, since they can end in a fine) are not frequent and judicial actions in this area are also rare, since workers seldom bring their employers to justice while the labour contract is still in effect. This being the case, we also have no data on how the comparison between work is done by the courts.

The role of trade unions in this respect would be very important but they seem to have other priorities, so we are a bit sceptical about their activities in this field. Of course, this situation would end if equal pay rules or even the establishment of an

equal pay plan at branch level or at company level was to be considered as a mandatory part of the content of collective agreements, but this is not the case in Portugal.

## **7. Relationship between the gender pay gap and other parts of labour law**

There is a relation between the gender pay gap and other parts of labour law.

In my opinion, the more relevant connections to be noticed here are with schemes regarding working hours, with atypical labour contracts (such as part-time work, fixed-term contracts or teleworking), and with the issue of maternity and, more broadly, reconciliation of work and family life, since in all these areas the gender factor may induce different treatment of men and women that can result in different pay.

Working hours is a very important issue here, since women are more strongly affected by modern schemes like flexible working hours or shifts. Since most of the tasks related to care and to the reconciliation of work and family life are performed by women, they have more difficulty to cope with flexible working hours schemes and thus they are often left out of the complementary benefits which tend to be attached to these schemes.

Atypical labour contracts are also important in this perspective, since they mostly apply to women and frequently the labour conditions under these contracts are less favourable, despite the general legal rule that imposes the principle of non-discrimination between these workers and other workers (for instance, Article 146 of the LC, regarding non-discrimination between fixed-term workers and other workers, and Article 154 No. 2 of the LC, regarding non-discrimination between part-time workers and other workers). These kind of contracts should then be addressed accordingly.

Finally, maternity rules have direct or indirect impact on the pay gap issue, primarily due to the leaves (not only maternity leaves but also other leaves related to parenthood), since despite the fact that these leaves are also granted to men, they are much more frequently used by women, and this extended use may reflect on future promotions. Also, other protective measures that apply to pregnant women may have a negative impact on pay. For instance, if a pregnant woman worker during the night and asks the employer to be transferred to day-time work due to pregnancy, the employer can refuse, and the labour contract is suspended. During the suspension period, the woman has the right to a public allowance from social security but this allowance is lower than her salary. The same goes with other care leaves, that are not paid at all: since these leaves are not paid but there is a pay gap against women, the common situation is that the woman takes the leave instead of the man because they lose less money with that option. The result of this option is however that women tend to have shorter careers and they often lose promotions related to merit, since they are absent for longer periods.

Finally, the fact is that many more women than men sacrifice working hours to attend to care issues (for instance, they take up leave to accompany a child to the doctor or to attend a parent meeting at school) and the negative consequences of this behaviour (for instance, losing a benefit related to lack of absence or to overtime) naturally tend to fall mostly on women.

## **8. Final assessment of good practices**

In my opinion, the gender pay gap should be addressed in a very pragmatic way and in several areas at the same time.

In the legal area, some measures could still be taken in this respect: legal reinforcement of the role of the father in reconciliation tasks, in order to fight the gender stereotype that involves reconciliation (this reinforcement could be achieved by positive actions in favour of the fathers); integration of pay gap issues in collective agreements, as a part of its mandatory content (for instance, demanding that these agreements contemplate a plan to equalize salaries at branch level or at company level).

For the practical implementation of the legal rules in this area, we emphasize the necessity to reinforce the powers given to public authorities in this area, such as Labour Inspection Services and equality agencies.

Finally, also for the practical implementation of equal pay rules, we emphasize the need to promote training in this area, addressed to all subjects involved: trade unions, employers and their associations, inspectors, judges and public attorneys and lawyers. This training is essential to make clarify the technical notions involved here and to increase the awareness of these institutions and persons of discriminatory practices.

## ROMANIA – *Roxana Teșiu*

### 1. General situation

The most recent data released by the National Statistics Institute with regard to the employment rate in Romania is for 2008. The overall employment rate in Romania was 59 %, 11 % lower than the 2010 Lisbon objective. Women's occupation rate for 2008 was 52.5 %, being 7.5 % lower than the 2010 Lisbon objective.

With regard to the average gross monthly salary earned by women and men in Romania throughout the economy, expressed as a percentage of the gross monthly salary earned by women compared to men, there is a positive trend:<sup>569</sup> the percentage grew from 87 % in 2005, to 90.1 % in 2006, 88.9 % in 2007 and 92.2 % in 2008.<sup>570</sup> Official data on pay differences of women and men in the public and private sector is not available.

### 2. The legal framework

The equal pay principle is laid down in the Constitution. Section 41(4) stipulates that 'for performing work equal to the work performed by men, women shall get equal pay'. As legally formulated, the equal pay principle retains men's work as a point of reference and is thus in conflict with the equality spirit intended to be addressed.

The concept of 'gender pay gap' is not used in Romanian legislation or associated practice. However, this concept is used in the research of various social actors (placed mainly at the level of academic and non-governmental organisations).

Furthermore, the Equal Opportunities Act (Act no. 202 of 19 April 2002) is the only legislation in Romania that expressly provides the principle of equal pay for

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<sup>569</sup> The percentage developed as follows: 87 % in 2005, 90.1 % in 2006, 88.9 % in 2007 and 92.2 % in 2008. Data provided by the National Statistics Institute, *Romania in Numbers*, Bucharest, May 2009, available on <http://www.insse.ro/cms/rw/pages/romania%20in%20cifre.ro.do;jsessionid=0a02458c30d516712cbe88e048ba9f15cfce3e125c52.e38QbxeSahyTbi0LaxqLe0>, accessed 20 March 2010.

<sup>570</sup> National Statistics Institute *Romania in Numbers*, Bucharest, May 2009, available on <http://www.insse.ro/cms/rw/pages/romania%20in%20cifre.ro.do;jsessionid=0a02458c30d516712cbe88e048ba9f15cfce3e125c52.e38QbxeSahyTbi0LaxqLe0>, accessed 20 March 2010.



work of equal value. It is defined in Section 4(f) as ‘paid activity that shows, when compared with another activity using the same indicators and units of measurement, that similar or equal knowledge and professional skills were used and that similar amounts of intellectual and/or physical effort were exerted.’ Section 9(1d) of the 2002 Equal Opportunities Act provides that sex-based discrimination within labour relations in relation to pay determination is prohibited. The 2003 Labour Code does not explicitly contain the equal pay principle. However, Section 154(3) of the Labour Code provides that ‘in determining and granting pay, any sex-based discrimination shall be prohibited’.

In addition to the provisions of the 2002 Equal Opportunities Act, in the legal provisions of Article 2(4) of the National Collective Bargaining Agreement concluded for 2007-2010, the principle of equal pay for the same work or for work of equal value implies the elimination of any discrimination based on sex, regarding all elements and conditions of remuneration.<sup>571</sup>

Related to its scope, the provisions of the 2007-2010 National Collective Bargaining Agreement apply to all employees and all employers throughout the country, irrespective of the type of social capital of the employee (state or private, Romanian or foreign, mixed). For employees of public institutions, Article 9(1) of the 2007-2010 National Collective Bargaining Agreement stipulates that pay and other rights awarded according to the Agreement to the personnel of public institutions financed from the state budget will be established by Ministers and trade unions, after consulting the representatives of the Government regarding the personnel pay system, before adopting the state budget, as well as pending its negotiation. Furthermore, Article 9(2) prescribes that the contracting parties must negotiate to include the respective rights in the legal documents that stipulate such rights, according to the approved budget provisions or other resources for covering supplementary expenses. The parties must negotiate the using of the funds, on the basis of their approval as provided in Paragraph (1), in order to establish pay levels for the public institutions’ staff.

With regard to part-time work, the 2003 Labour Code as well as the provisions of the 2007-2010 National Collective Bargaining Agreement stipulate that part-time workers benefit from the same rights as full-time workers and no form of discrimination is allowed based on working hours. The same applies to employees hired based on a fixed-term individual labour contract.

### **3. Instruments of social partners**

There is a very well-established and functional structure for ensuring that the provisions of the 2007-2010 National Collective Bargaining Agreement are included in the individual labour contract. In this regard, four elements are important: the 2007-2010 National Collective Bargaining Agreement is complemented by a Branch Collective Bargaining Agreement, which is then followed by a Unit Collective Bargaining Agreement, and finally the individual labour contract is to be agreed upon. In the whole cycle, the role and bargaining power of the trade unions is very strong.

The most important principle sustaining the functioning of the three mentioned types of collective labour agreements is that the most favourable provision for the employee prevails. In conclusion, the explicit presence of the principle of equal pay for work of equal value in the 2007-2010 National Collective Bargaining Agreement

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<sup>571</sup> Collective Labour Agreement no. 2895 of 21 December 2006, concluded at National Level for the period 2007-2010, according to the provisions of Articles 10 and 11 of Law no. 130 of 1996, as republished and registered with the Ministry of Labour, Social Solidarity and Family.

is a vital condition for ensuring that this principle is actively brought down to the level of the individual labour contract.

According to the legal provisions of Article 14 of the 2002 Equal Opportunities Act, in order to prevent gender-based discrimination in the labour field, contracting parties in the negotiation of the collective labour agreements must introduce clauses aimed at forbidding discriminatory activities. Apart from such very general recommendation, there is no specific legislation in Romania aimed at inducing social partners to include the equal pay principle in collective or other agreements. Equally, there are no examples available of collective agreements that explicitly aim at reducing the gender pay gap.

However, it is to be noted that the social partners and bargaining systems play an important role in determining the nature of the gender pay gap at a more general level, in that they have an influence on general pay compression, through the legislation on minimum pay and part-time work. The introduction of the national minimum pay in Romania has particularly benefited low-paid female workers and has contributed to a reduced gender pay gap.

No particular policies or measures have been promoted by the social partners with regard to tackling or reducing the gender pay gap.

#### **4. Instruments specifically aimed at employers**

As per the legal provisions of the Article 8 of the 2002 Equal Opportunities Act, employers have the obligation to ensure equal opportunities and equal treatment to all employees, women and men, within labour relations of any kind. Employers are obliged to introduce in the in-service rules and regulations provisions that forbid sex-based discrimination.

Employers also have the obligation to regularly inform employees, including by posters in visible places, on their rights to the observance of equal opportunities and equal treatment between women and men in labour relations. However, it is not common practice in Romania for employers to proactively look at internal manpower data from the perspective of gender and, more specifically, from the perspective of pay.

While the employers have the legal obligation to introduce in the internal rules and regulations the provisions that forbid sex-based discrimination, there is no specific legal provision aimed at inducing employers to include the equal pay principle in their internal rules and regulations. It is not a common practice in Romania for employers to look at internal manpower data from the perspective of gender and, more specifically, from the perspective of pay.

The European Commission's recommendation for public procurement schemes requiring the companies that they contract with to address the gender pay gap is not currently followed in Romania.

With regard to the public services sector, equal pay theoretically exists because women and men earn the same pay when working in the same grades. However, when the surface of pay grading is scratched there is a range of factors that impact a gender pay gap. This includes unequal pay resulting from unequal distribution of bonuses, performance-related pay and non-pay benefits that tend to reward jobs predominantly held by men.

## **5. Other instruments to close the pay gap**

According to the recent amendments to the 1999 Law on Labour Inspection,<sup>572</sup> the Labour Inspection has three main sets of responsibilities: in the field of establishing work relations, including the establishment and the granting of salary payments, in the field of health and work security, and in the field of granting social allowances. However, with respect to the Labour Inspection's tasks in the field of establishing work relations, the law does not contain any explicit reference to the equal pay for work of equal value principle.

Therefore, it is very difficult to assess to which extent this principle is practically applied by the labour inspectors and, if it is applied, what tools are used for determining whether this principle is adhered to or not. In this regard, it must be mentioned in relation to the Labour Inspectorates' task of establishing work relations that the only non-discrimination clause provided for by the law focuses on discrimination-free access of all persons to the labour market.

During February 2010, based on the mandate granted by legal provisions, the Labour Inspection, through the local Labour Inspectorates, conducted an extensive monitoring and checking round that targeted a number of 9942 employers throughout the country.<sup>573</sup> The inspection's central theme included a chapter dedicated to monitoring the legal provisions of special laws, such as, *inter alia*, the 2002 Equal Opportunities Law. No specific information with regard to sanctions imposed or any other measures taken by the involved labour inspectorates has been disclosed in the inspection round's report. Apart from the fact that 459 employers were sanctioned and 540 written warnings were issued, no other information is available.

Apart from mentioning the Labour Inspectorate in the introductory chapters of the main legal Acts that regulate labour relations in Romania and in order for the principle of equal pay to receive a basis for implementation, the inspectorate should receive specific attributions by law as regards the monitoring of the equal pay principle, as well as available training opportunities for its personnel in order to use appropriate tools for monitoring the implementation of this principle. Except for the public sector, information on the amount of performance-related bonuses and benefits is not public, as they are negotiated on an individual basis. The same type of minimal information is disclosed with regard to the inspection round by the Labour Inspection for the previous months (January 2010 and December 2009).

Monitoring the extent to which potential gender-based discrimination is addressed with regard to the labour market does not obviously represent a substantial objective on the monitoring agenda of the Labour Inspection. The main focus remains on the traditional areas of interest, such as the structure of individual labour contracts in contrast with the legal provisions in force, overtime being declared, registered and paid as per the legal requirements, and the black market labour force.

## **6. Problems of enforcement and how to tackle them by good practices**

So far, there have not been any court judgments on gender discrimination based on unequal pay.

According to provisions of Article 27(1) of the 2000 Anti-discrimination Law, the person discriminated against may file a civil complaint for civil damages with a court

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<sup>572</sup> Government Decision no. 1377 of 18 November 2009 on the Regulation of the organisation and functioning of the Labour Inspection, published in Official Gazette no. 802 of 25 November 2009.

<sup>573</sup> Information available on the website of the Labour Inspection, <http://www.inspectmun.ro/index.html>, accessed 21 March 2010.

of law.<sup>574</sup> Individuals discriminated against will be entitled to claim damages, proportionally with the prejudice, as well as to the re-establishment of the situation prior to the discrimination<sup>575</sup> or to the annulment of the situation created by discrimination. The claim for damages shall be exempted from judicial taxes. The period for submitting the damage claim is 3 years from the act of discrimination or from the date on which the victim becomes aware of it. The procedure before the civil courts includes several modifications, as the Anti-discrimination Law introduces the concept of sharing the burden of proof.<sup>576</sup> Following the 2006 amendment of the Anti-discrimination Law, this means that proof for acts of discrimination may also include any type of evidence, including audio and video recordings, as well as statistical data.

Specifically with regard to cases of sex-based discrimination in the employment field, Article 39(1) of the 2002 Equal Opportunities Law stipulates that employees are entitled, whenever they consider themselves to be discriminated against based on gender, to file notifications or complaints to the employer. The same Article provides that employees who consider themselves to be discriminated against based on gender are also entitled to request the support of the trade union or the employees' representatives in the company to settle their situation at the workplace. If such notification/complaint is not settled at company level through mediation, the employee who submits factual elements that lead to the assumption of direct or indirect gender-based discrimination in the field of labour is entitled to file a complaint with the qualified court of law,<sup>577</sup> not later than one year as from the fact. The person who submits factual elements that lead to the assumption of direct or indirect gender-based discrimination in other fields than the labour field is entitled to file a complaint to the qualified court of law. The employee considering himself/herself to be discriminated against based on gender is entitled to request material and/or moral compensation and/or the removal of the consequences of discriminatory acts from the perpetrator.

## **7. Relationship between the gender pay gap and other parts of labour law**

Due to the absence of official data, no such relationship can be established between, on the one hand, unequal pay between men and women and, on the other hand, rules governing various aspects of professional life. No specific analysis has been made so far by the public authorities with regard to the black labour market phenomenon. Statements of various independent experts or professionals mark the suspected existence of a significant black labour market. Such considerations are presented on the occasion of various conferences or seminars dedicated to the analysis of the labour market in Romania. However, there are no official data or statistics offering a comprehensive view on the topic.

Part-time employees are granted by law the same rights as full-time employees. No relationship can be established between the gender pay gap and daily working hours. Data available for 2005 show that the number of part-timers in Romania was approximately equal for women and men.

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<sup>574</sup> If the discriminatory behaviour triggers criminal liability, provisions of the Criminal Code shall apply accordingly.

<sup>575</sup> *Status quo antes*.

<sup>576</sup> The interested party has the obligation to prove the existence of facts which allow the existence of direct or indirect discrimination to be presumed, and the party against whom a complaint is filed has the duty to prove that the facts do not amount to discrimination.

<sup>577</sup> Complaints can be filed with departments specialized in labour conflicts and litigation or with social insurance departments responsible for the area in which the employer or the perpetrator carry out their activity or, as the case may be, with contentious administrative courts.

## 8. Final assessment of good practices

Collective bargaining mechanisms at national level are set up for five-year periods and involve a tripartite body, structured based on representatives of Government, employers' units and trade union units. Promoting collective bargaining on pay will provide for a practical solution with respect to monitoring the implementation of the equal pay principle through the bargaining mechanism. Specific resources and guidelines could be developed to help support these activities. An equal pay negotiator's checklist would be a useful tool that could be developed to support the promotion of the collective bargaining process.

The representation of women in collective bargaining teams should be improved, either through quotas or other mechanisms and policies to support the improved representation of women in the negotiation process.

### Recent relevant literature

No recent literature is available in Romania on the gender pay gap. The information available on the website of the main institutions in Romania in charge of promoting gender equality, equal opportunities and antidiscrimination policies does not show relevant studies or research conducted recently in any gender equality related area. As a general trend, apart from the studies and research carried out by the state institutions, it is also to be noted that there is a decreased focus within the non-governmental actors on promoting studies and research in the gender equality area. Such a reality may be partially explained by the fact that the focus of social policies is being shifted to cross-cutting themes such as poverty, life quality, economic and social development or human capital.

## SLOVAKIA – Zuzana Magurová

### 1. General situation

The gender pay gap in Slovakia is one of the most significant in the EU Member States. While in the past decade the European average of the gender pay gap has shown a decreasing trend, in Slovakia the gender pay gap is increasing.

In 2007, the Statistical Office<sup>578</sup> issued the first report aimed at the differentiation of pay of women and men: *Development of structure and differentiation of wages in the years 1997 – 2006*. In 1997, women earned 21.5 % less than men, in 2006 the difference had increased to 27 %. The dynamics of men's income increase had been stronger than the dynamics of women's income increase. While from 1997 to 2006, men's average income before taxes increased by 51 %, in the same period women's average income increased only by 47 %.

In the same year, the study *Equal pay for equal work? Aspects of the gender pay gap*,<sup>579</sup> conducted by the private organisation 'Aspekt', focused on the measurement of the 'depth' of the gender gap in remuneration, which 'reflects among other things the different status of women and men in the world of paid work'. According to the study, statistical data for the year 2006 show that women made on average 26.9 % less

<sup>578</sup> In Slovakia there are two institutions providing data about the gender pay gap: The Statistical Office of the Slovak Republic and Trexima ltd.

<sup>579</sup> The publication presents results of analyses carried out as part of the project 'Gender Pay Differences as an Important Aspect of Gender Equality Discourse – the Analysis of the Current Situation in Slovakia', [http://www.aspekt.sk/download/summary\\_web\\_new.pdf](http://www.aspekt.sk/download/summary_web_new.pdf), accessed 22 March 2010.

than men and women's pay was lower than men's pay in all age groups, professions and education categories. The gender pay gap is caused by several factors, such as segregation of industries and jobs; differences in the evaluation of personal and professional characteristics of women and men; and differences in the behaviour of women and men on the labour market and at the workplace.

The study presents quantitative data structured by various criteria:

- Monthly and hourly earnings: the gender pay gap in monthly earnings is larger than in hourly earnings. The data provided by TREXIMA Ltd.,<sup>580</sup> in the third quarter of 2006, show that the difference in hourly earnings between men and women was 23.3 % and in monthly income it was 26.2 %.<sup>581</sup> Gender difference in remuneration varies according to various components of the income.
- Public and private sector: the gender pay gap is much larger in the private sector.
- Horizontal and vertical segregation: the gender pay gap is present not only between sectors but also within individual sectors. Most female-dominated sectors are characterised by pay lower than the Slovak average. When looking at differences within particular sectors, we can see that the gap is largest in those with the highest earnings. It means that even if women do work in sectors with high earnings, this advantage does not concern them as much as men. Increase of the educational level does not automatically mean that women get better positions, and better pay.

The study also pays attention to career breaks or the assignment to work involving lower responsibility, which is experienced more frequently by women, because they are expected to perform unpaid work in the area of the so-called 'care economy'. Part-time work is used only to a small extent, but more often by women.

Finally, it proposes specific steps in the processing of statistical surveys and their publication, as well as in the area of research practice. It underlines that the gender pay gap is a part of a wider group of problems. It is not just a matter of remuneration, but it is also related to choice and opportunities impacting the income. Therefore, it is necessary to work with aspects such as equality of opportunities in the labour market and in reconciliation of work and family life.

According to the labour inspection,<sup>582</sup> the pay gap between women and men may be caused by direct discrimination as well as by structural inequalities such as segregation in industries, professions and established working patterns. The segregation of professions persists particularly in trade, services and the educational system.

## 2. The legal framework

The principle of equal pay for men and women is generally guaranteed by the Constitution,<sup>583</sup> and the Anti-discrimination Act.<sup>584</sup> According to Section 6 of the

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<sup>580</sup> Trexima Ltd. is a specialized statistical and advisory-consulting private research company in the field of sample surveys on occupational positions, labour market, earnings and labour costs, etc.

<sup>581</sup> [http://www.aspekt.sk/download/summary\\_web\\_new.pdf](http://www.aspekt.sk/download/summary_web_new.pdf), accessed 22 March 2010, p. 81 (available in English).

<sup>582</sup> Report on results of labour inspection in the area *Strengthening of Equal Opportunities – Equal Remuneration of Women and Men for Equal Work and for Work with Equal Value* for the year 2009.

<sup>583</sup> Act no. 460/1992 Coll. Constitution of the Slovak Republic, as amended, effective from 1 October 1992. Section 12 states that people are free and equal in dignity and rights. According to Section 36 all employees have the right to fair and satisfactory conditions at work, in particular the right to remuneration for the work performed and the right of collective bargaining.

Labour Code,<sup>585</sup> women and men have the right to equal treatment with regard to access to employment and remuneration. Article 13 contains a general prohibition of discrimination.

The amendment<sup>586</sup> of the Labour Code, effective from 1 September 2007, was an essential reform by which the principle of equal remuneration for equal work and for work of equal value was laid down in the new Section 119a. Within the meaning of this provision, pay conditions must be agreed without any discrimination on ground of sex.

In view of the decision by the European Court of Justice of the European Communities regarding the interpretation of the notion of 'remuneration' it was also provided that the principle of equal remuneration for men and women shall apply not only to all types of considerations provided for performed work but also to the considerations which are provided to employees in connection with employment but are not earnings for the work. The provision states that the principle applies to all remuneration for work and benefits that are paid or will be paid in relation to employment according to the other provisions of the Labour Code or special regulations.

The provision provides for a legal entitlement of women and men to equal pay for equal work, or work of equal value. Equal work or work of equal value is taken to mean work of equal or comparable complexity, responsibility and difficulty, which is performed in equal or comparable working conditions while achieving the same or comparable productivity and results of work in an employment relationship with the same employer.

The provision, in accordance with Article 4 of Directive 2006/54/EC of the European Parliament and of the Council on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, provides that where the employer implements a system of job classification for determining pay, it shall be based on the same criteria for both men and women without any discrimination on ground of sex.

### **3. Instruments of social partners**

According to the available information (collective agreements are not published) in general social partners still pay little attention to equal pay. Collective agreements either at sector or at company level do not contain specific provisions regarding equal pay for equal work, or work of equal value. Collective agreements usually contain provisions on pay increases, working hours, remuneration based on work performance, paid leave, redundancy payments, payments of special bonuses, supplementary pension contributions and payment of a 13<sup>th</sup> and 14<sup>th</sup> month's pay.

There is no specific legislation or regulation aiming at inducing social partners to include the issue of equal pay in collective and other agreements. Trade unions primarily try to negotiate the highest possible increase in pay and greatest job security for employees.

According to the information provided by the trade unions, the trade union negotiators tried to include the issues of gender equality at work, including equal pay

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<sup>584</sup> Act no. 365/2004 Coll. on Equal Treatment in Certain Areas and on Protection against Discrimination, Amending and Supplementing Certain Other Laws, as amended, effective from 1 July 2004. Article 6(2) provides that the principle of equal treatment applies to employment relations, including to remuneration.

<sup>585</sup> Act no. 311/2001 Coll. Labour Code, as amended, effective from 1 April 2002.

<sup>586</sup> Act No. 348/2007 Coll. amending Act no. 311/2001 Coll. Labour Code.



for equal work or work of equal value, in the collective bargaining, but the employers showed little interest and argued that the issue is sufficiently covered by the provisions of the Labour Code.

#### **4. Instruments specifically aimed at employers**

There is no specific other legislative or voluntary instrument requiring employers to address the issue of equal pay.

The labour inspection<sup>587</sup> revealed that some of the employers, especially those with more than 50 employees, have their pay policy detailed in internal pay regulations, even in organizations without trade union. On the other hand, from weaknesses identified by the labour inspectors in practice, it is clear that employers forget to properly familiarize their employees with the provisions on principles of equal treatment and to draw up their own internal regulations to ensure the observance of the principle of equal treatment and equal remuneration.

#### **5. Other instruments to close the pay gap**

The Slovak Government in its 7<sup>th</sup> National Report on the implementation of the European Social Charter for the period 2005-2008 argued that special measures such as administrative arrangements, programmes or action plans are not applied, because the legal framework unequivocally provides for entitlements of men and women to equal pay for equal work or for work of equal value. In the event of non-compliance with this principle, the male employees or the female employees have the possibility to request inspection from the competent labour inspectorate.

The Labour Code, in Article 150, states that the labour inspection shall be carried out according to a special law.<sup>588</sup> The National Labour Inspectorate and 8 regional labour inspectorates supervise the observance of labour legislation, pay conditions and working conditions of employees, including working conditions of women, as well as obligations arising from collective agreements.

The National Labour Inspectorate has been monitoring the implementation of equal pay since the year 2002. The labour inspectorates in their labour inspection activities verify among other things the equal remuneration of women and men for equal work and for work with equal value in accordance with Government Resolution No. 232 from March 2001 and provisions of Section 119a of the Labour Code.

In the years 2006 and 2007, the all-Slovak reviews were conducted in the framework of the task 'Determinants of Gender Equality in Industrial Relations' (a part of the IS EQUAL project). In 2009, no all-Slovak review with special focus on the equality of remuneration was planned, but this review was conducted as part of the general inspection and the results were summarized in the *Report on results of labour inspection in the area 'Strengthening of Equal Opportunities – Equal Remuneration of Women and Men for Equal Work and for Work with Equal Value' for the year 2009* (hereafter referred to as „Report”).

In November 2009, the inspection focused on the verification of the compliance with the provisions of the Labour Code, relating to discrimination. It only detected

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<sup>587</sup> Report on results of labour inspection in the area *Strengthening of Equal Opportunities – Equal Remuneration of Women and Men for Equal Work and for Work with Equal Value* for the year 2009.

<sup>588</sup> Act no. 125/2006 Coll. on Labour Inspection and on the amendment of the Act no. 82/2005 Coll. on Illegal work and Illegal Employment and on the amendment of certain acts, effective from 1 July 2006.

two violations of the provision on equal pay,<sup>589</sup> of which only one involved gender discrimination. The second finding concerned the non-observance of the principle of the same pay for work of the same complexity to two female employees, i.e. the non-observance of general equality of remuneration (not the gender aspect).

The complaints of discrimination in remuneration against other employees examined by the inspectors were regarded by the complainants as a consequence of bossing. All complaints were lodged by civil servants, especially in the educational system. Rather than complaining about the determination of salaries on the basis of different basic pay, the complaints pointed out the fact that the manager had not applied the same approach to the evaluation and determination of remuneration and different merit pays.

The breach of equality of remuneration between men and women in the public sector and state administration occurs only sporadically, because the determination of basic pay components is given by the law and the employer has little option of deviation. In the business sector the situation is quite different, because the option of arranging contract salaries with employees exists there.

## **6. Problems of enforcement and how to tackle them by good practices**

Although the amendment to the Labour Code concerning equal remuneration for equal work and for work of equal value was adopted already in 2007, there are no known cases dealing with equal pay.

The inspectors<sup>590</sup> explain the small number of lodged complaints in the area of inequality of remuneration of men and women among other things by the fact that the employee is unable to learn how much other employees earn, because the pay policy issues are often concealed by the employer. The provisions of the employment contract in the area of agreed pay conditions are usually designated as confidential information and the employee upon signature of the employment contract undertakes to maintain confidentiality of this information.

Another reason is the fact that the identified pay gap between men and women was hidden in a pay component such as bonus or merit pay. The conditions of provision of bonuses, under which these were provided, always contained an evaluation criterion such as quality of work, speed, reliability, etc. Such defined criteria allow the application of subjective judgment of the evaluating manager and the labour inspector is unable to decide whether the principle of equality was or was not breached. Many entrepreneurs justified the different amount of pay for work with comparable complexity, responsibility and difficulty, performed in comparable working conditions, by factors such as qualification, length of experience, knowledge of foreign languages, software and other skills, which contribute to the performance of work, but are not necessary for performance of the given type of work; they also mentioned flexibility, analytical thinking, proficiency, adaptability to changes, etc. From the examination of complaints of individuals and from other reviews it results that employees expect difficulties with demonstration of discrimination before courts and even do not dare to attempt to prove it.

Finally, the inspectors at the end of their Report state that inequality of remuneration is very difficult to establish, let alone prove. According to Section 119a of the Labour Code, there are at least six criteria for the same work that the inspector

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<sup>589</sup> See the explanation of inspectors mentioned in Section 6 of this country report.

<sup>590</sup> Report on results of labour inspection in the area *Strengthening of Equal Opportunities – Equal Remuneration of Women and Men for Equal Work and for Work with Equal Value* for the year 2009.

has to verify, and if just a single one of these criteria is not fulfilled, inequality of remuneration cannot be established.

The Report underlines that the labour inspectorate has little competence in the area of inequality of remuneration (full-time employees refuse to provide information, the labour inspector has to conceal the identity of the complainant, the reversed burden of proof for the employer does not apply to complaints handled by the inspectorates, etc.).

## **7. Relationship between the gender pay gap and other parts of labour law**

According to women NGOs, one of the causes of the gender pay gap is the absence of an Act on Equal Pay. The general regulation in the Labour Code is not sufficient. The Labour Inspection Act lacks the regulation of the reversed burden of proof, so the competencies of inspectors are very weak.

In Slovakia no separate labour courts exist, so labour disputes are dealt with by civil courts, whose workload is very high and the litigation time of lawsuits is usually very long.

The factor of part-time work has no crucial impact on the pay gap, as very few employees take advantage of part-time work. Nevertheless, it is usually women who tend to work part time. In 2006, 4.6 % of women worked part time compared to 1.3 % of men.<sup>591</sup>

More important is that it is usually women who interrupt their careers or take a job with less responsibility. Women carry the biggest share of responsibility for the children, household and dependent family members. It starts with the parental leave. Parents in Slovakia can enjoy one of the longest paid parental leaves in Europe. The law permits parents, usually it is the mother, to stay at home and take care of children up to the age of three, with their pay partially compensated by a state (parental) benefit. Given the situation that there are not enough nurseries and kindergartens available in most municipalities (or they are very expensive) and the opportunity to reconcile work and childcare responsibilities is close to none, many women prefer to take full-time care of their children, often until the child is three years old. Returning to work after a longer absence has effects on women's specific job positions and on promotion prospects, and thereby a better paid work position.

## **8. Final assessment of good practices**

According to the National Strategy of Gender Equality for the Years 2009 – 2013,<sup>592</sup> adopted by the Government in April 2009, in the area of the economy, work, social affairs and healthcare, it is necessary to strengthen mechanisms to eliminate horizontal and vertical segregation in sectors, industries and occupations, to adopt measures to reduce the pay gap between women and men, which in Slovakia is one of the largest in the EU. The concept of gender pay gap is not directly defined in the Strategy. The National Action Plan of Gender Equality for the Years 2010 – 2013 is based on the Strategy and intervenes in four areas<sup>593</sup> defined by the Strategy. Various non-governmental organizations also participated in the formulation of the specific

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<sup>591</sup> J. Filadelfiová 'The Gender Gap. What statistical and research data (do not) tell us about women's and men's earnings', (Gender issues 2007), p. 87.

<sup>592</sup> *National Strategy of Gender Equality for the Years 2009 – 2013*, <http://www.gender.gov.sk/index.php?id=670>, <http://www.gender.gov.sk/index.php?id=671>.

<sup>593</sup> 1. Economic and social areas and healthcare; 2. Families and state policy on families; 3. Political and public life, participation and representation; and 4. Research, education, schools, media and culture.

operational aims in the framework of the working seminar with representatives of the public administration in November 2009.

Unfortunately, some of the recommendations made by the working groups, concerning the elimination of the pay gap, were not included in the final wording of the draft NAP. They particularly concerned the institutional reinforcement of labour inspections, setting up of departments specializing in the area of equal treatment, including equal remuneration, development of the methodology of inspections, amendment of the Labour Inspection Act, consisting in stipulating the reversed burden of proof, adoption of a separate Equal Pay Act, etc.

## **SLOVENIA – Tanja Koderman Sever**

### **1. General situation**

According to the Slovene Statistical Office, Slovenia is 15th among the 27 EU Member States and 34th in the world in terms of gender empowerment measures. Although every fifth woman in Slovenia has completed a higher education programme or university, the absolute gender pay gap still amounts to 8 %. Since the average gross monthly pay of women in 2008 amounted to EUR 1 369 and of men to EUR 1 481, the gross pay of women was approximately EUR 110 lower than the gross pay of men. Of course, these are averages and differences occur due to different educational levels, age and occupational structure of employees. The difference between men's and women's pay was the highest in financial and insurance activities. The gross pay of women employed in financial and insurance activities was 33 % lower than men's. About the same difference was observed in healthcare and social work activities, where women earned on average 30 % less than their male colleagues. Average female and male pay differed the least in transportation and storage. In this activity, women's pay was on average EUR 88 higher than men's. However, women represented only about one fifth of persons employed in this activity and they performed better paid jobs. The gross pay of women was higher than the gross pay of men in three fields of activity: in construction (by 21 %), in water supply, sewerage, waste management and remediation activities (by 13 %) and in transport (by 6 %). There is no data on differences between the public and private sector.

### **2. The legal framework**

The equal pay principle is part of the constitutional gender equality clause embedded in Article 14 of the Constitution of the Republic of Slovenia.<sup>594</sup> Article 14 contains provisions on equality before the law and guarantees equal human rights and fundamental freedoms, irrespective of sex, to everyone. It deals with equal pay indirectly. There are some other provisions in the Employment Relationship Act<sup>595</sup> (hereafter the ERA), the Act on Equal Opportunities for Women and Men<sup>596</sup> (hereafter the AEOWM) and the Act Implementing the Principle of Equal

<sup>594</sup> *Ustava Republike Slovenije* (URS, *Uradni list RS*, Nos 33/91-I, 42/97, 66/2000, 24/03, 69/04 and 68/06), <http://www.us-rs.si/o-sodiscu/pravna-podlaga/ustava/?lang=1>, accessed 22 March 2010.

<sup>595</sup> *Zakon o delovnih razmerjih* (ZDR, *Uradni list RS*, Nos 42/2002, 103/2007), [http://www.mddsz.gov.si/si/zakonodaja\\_in\\_dokumenti/veljavni\\_predpisi/zakon\\_o\\_delovnih\\_razmerjih/](http://www.mddsz.gov.si/si/zakonodaja_in_dokumenti/veljavni_predpisi/zakon_o_delovnih_razmerjih/), accessed 22 March 2010.

<sup>596</sup> *Zakon o enakih možnostih žensk in moških* (ZEMŽM, *Uradni list RS*, Nos 59/2002, 61/2007), [http://zakonodaja.gov.si/rpsi/r08/predpis\\_ZAKO3418.html](http://zakonodaja.gov.si/rpsi/r08/predpis_ZAKO3418.html), accessed 22 March 2010.

Treatment<sup>597</sup> (hereafter the AIPET) which indirectly regulate the principle of equal pay when prohibiting discrimination on grounds of gender with general provisions. The principle of equal pay is furthermore directly applied in the ERA and the Act on the System of Salaries in the Public Sector<sup>598</sup> (hereafter the ASSPS). According to Article 133 of the ERA, workers must be paid equally for equal work and for work of equal value regardless of their sex; any provisions in individual employment contracts or collective agreements or any acts by the employer that violate this principle are void. Article 1 of the ASSPS lays down the principle of equal pay for male and female workers for work in comparable posts, titles and functions in the public sector. In addition, Article 38 provides a legal basis for the publication of salaries in the public sector. Data on work positions, titles or functions, basic salaries, bonuses and performance-related bonuses must be available to the public, with the exception of the length-of-service bonus. The concept of pay in Slovene legislation is broad, though not as broad as the ECJ's. It covers salary which must always be in cash and other payments, not necessarily in cash, if stipulated in the collective agreement (like accommodation, food, the use of a car for personal purposes, other bonuses, goods and services etc.). The salary is composed of a minimum salary, salary on the basis of work efficiency and other bonuses.

The Resolution on the National Programme for Equal Opportunities for Women and Men for the period from 2005 to 2013<sup>599</sup> (hereafter 'the Resolution') is a strategic document, whose basic purpose is to define general priorities in order to improve the position of women and to ensure sustainable development of gender equality. It concerns both the public and the private sector. The Resolution states that Slovenian legislation on equal opportunities for men and women in the labour market is a good example of the incorporation of gender mainstreaming in legislation, and that in the future the emphasis will be on its implementation. In order to diminish discrimination based on sex in the labour market, vertical and horizontal segregation and the pay gap, some special goals are defined. One of them is also analysis of the causes of the gender pay gap and taking measures for their elimination. Under the Resolution, the second Periodic Plan for the Implementation of the National Programme for Equal Opportunities for Women and Men for the period from 2008 to 2009<sup>600</sup> was adopted. It defines principle policy orientations of the equal opportunities policy in all key areas of social life. One of its specific goals is to reduce vertical and horizontal segregation and the pay gap between women and men, which is to be achieved by encouraging women and men to get involved in education and training and to seek employment in those fields where either women or men are underrepresented.

### 3. Instruments of social partners

Since collective agreements are the key instruments for determining base rate salaries for tariff groups, performance-related bonuses and other bonuses, compensation payments, jubilee awards, retirement payment, solidarity assistance, profit sharing etc., all of which can cause pay discrimination, collective bargaining in Slovenia plays a significant role in the area of equal pay and is therefore of great importance.

<sup>597</sup> *Zakon o uresničevanju načela enakega obravnavanja (ZUNEO-UPB1, Uradni list RS, No. 93/2007)*, [http://zakonodaja.gov.si/rpsi/r08/predpis\\_ZAKO3908.html](http://zakonodaja.gov.si/rpsi/r08/predpis_ZAKO3908.html), accessed 22 March 2010.

<sup>598</sup> *Zakon o sistemu plač v javnem sektorju (ZSPJS-UPB7, Uradni list RS, Nos. 95/2007, 69/2008, 107/2009)*, [http://zakonodaja.gov.si/rpsi/r09/predpis\\_ZAKO5249.html](http://zakonodaja.gov.si/rpsi/r09/predpis_ZAKO5249.html), accessed 22 March 2010.

<sup>599</sup> [http://zakonodaja.gov.si/rpsi/r09/predpis\\_RESO29.html](http://zakonodaja.gov.si/rpsi/r09/predpis_RESO29.html), accessed 22 March 2010.

<sup>600</sup> <http://www.uem.gov.si/fileadmin/uem.gov.si/pageuploads/NPDrugiPeriodicni.pdf>, accessed 22 March 2010.

Unfortunately the issue of equal pay, due to the relatively small pay gap in Slovenia, insolvency problems of companies because of the economic crisis and the issue of salaries that are too low, has never been a priority issue. Social partners have some obligations according to the above-mentioned legislation and below-mentioned Social Agreement more or less because of international and European obligations. These provisions are very general and do not include any particular measures, practices, actions etc. to be performed in order to tackle the pay gap.

The Social Agreement for the period from 2007 to 2009<sup>601</sup> is a strategic document signed by the Slovenian Government and social partners (representative employers' organisations and representative trade unions' organisations) which sets the general direction for economic and social development for the years 2007 to 2009 and defines the tasks of the signatories. In the equal opportunities chapter it was emphasised that everyone must be guaranteed equal opportunities in payment and other income arising from the employment relationship, irrespective of sex. Social partners agreed on the following tasks:

- the Government, among other tasks, was to develop measures to reduce segregation and pay inequality; implement the legislation on equal opportunities for women and men; adopt positive actions provided as a tool to achieve gender equality and eliminate the hidden discrimination and provide accurate and detailed statistics on salaries of different categories of workers with regard to gender, age and form of the employment contract;
- trade unions should protect workers who were discriminated; identify all forms of discrimination and act against it; and
- employers should comply with the legislation on equal opportunities for women and men and actively tackle the causes of unjustified differences in pay between men and women.

#### **4. Instruments specifically aimed at employers**

Apart from the above-mentioned legislation (the ERA, the AEOWM, the AIPET and the ASSPS) which contains general provisions on equal pay and prohibition of discrimination and the very general obligations for employers in the Social Agreement to comply with the legislation on equal opportunities for women and men and actively tackle the causes of unjustified differences in pay between men and women, there are no other special instruments, obligations or strategies aiming to reduce the pay gap. Since employers are more interested in diminishing workers' rights than in equality issues, especially in this time of recession, voluntary instruments to reduce the pay gap are neither planned nor used.

#### **5. Other instruments to close the pay gap**

There are no special tools developed to establish pay discrimination or gender-neutral job evaluation schemes, pay systems etc. Collective agreements are not monitored either.

#### **6. Problems of enforcement and how to tackle them by good practices**

Unfortunately I cannot report on problems of enforcement, since there are no decided or pending cases related to the gender pay gap before the Slovene courts.

Since the legislation on equal pay consists of only few provisions and is very general, it will be up to court practice to develop criteria to evaluate work of equal value and

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<sup>601</sup> <http://www.uradni-list.si/1/content?id=82593>, accessed 22 March 2010.

define how far they can go in the determination of the amount of compensation. In addition, it would be necessary to adopt a more effective equal pay policy and maybe even additional legislation in order to stimulate discriminated individuals to start legal proceedings.

The Slovene equality body and trade unions are not competent to file a lawsuit for a victim of discrimination but they can help victims of pay discrimination by giving legal advice. Most trade unions have a well-developed system of free legal aid and the Equal Opportunity Office employs the Advocate for Equal Opportunities for Women and Men (hereafter the Advocate) who hears cases of alleged discrimination. After hearing a case, the Advocate issues a written opinion in which he/she states his or her findings and an assessment of the circumstances of the case, to determine the existence of unequal treatment of women and men and informs both parties about it. In the opinion the Advocate may draw attention to irregularities found and may recommend how these should be rectified and may also call on the opposing party to notify him/her of its measures within a fixed time limit. This procedure is informal and free of charge and runs independently of other procedures. The opinion is not binding, but the activities of the Advocate are public. This means that each year the Advocate must prepare a report on his/her activities which is then submitted to the Government for adoption. In 2008 the Advocate dealt with 47 cases of alleged discrimination on various grounds (gender, age, sexual orientation, disability, national origin, religious belief etc.) out of which only 9 cases were gender discrimination cases. In 2009 the Advocate dealt with 74 cases of alleged discrimination on various grounds out of which 16 were gender discrimination cases. In 2008 and 2009 there were no cases in relation with equal pay.

## **7. Relationship between the gender pay gap and other parts of labour law**

Parental leave and family responsibilities represent another group of causes for earning differences between women and men and encompasses a wide range of issues. Since women's family responsibilities are at their greatest during a crucial period of their working lives, women are often faced with a 'double burden' of paid work and unpaid work (domestic duties), while men usually only have the burden of paid work. In addition, men are still often expected to be the main monetary provider of the family. One of the possible choices for women therefore is part-time work, unpaid leave or even a temporary career break and, in contrast, for men there is the possibility of overtime. Both of these choices may affect promotion, one from the positive and the other from the negative point of view as regards differences in pay. There is a number of cases in Slovenia (which have not been brought before court yet) where women after a long maternity and parental leave were not treated equally with their male co-workers as regards promotion and rewards for their work using the stimulation benefit.

In addition, women working in predominantly female occupations often receive lower pay rates than men, which is especially the case when women work part time. Another relationship between the gender pay gap and other labour law rules concerns the posting of workers, since it is mostly women who decide to temporarily quit their current career or job and join their husbands in the foreign country, which affects their pay when they return.

Furthermore, benefits such as the seniority benefit, performance benefit (for which flexibility is one of the criteria in evaluation) etc. indirectly contribute to the gender pay gap since they depend on the basic salary. In relation to the pay gap atypical work arrangements such as fixed-term contracts need to be mentioned as



well, since a lot of young women and mothers after maternity and parental leave are fixed-term employees and sometimes are not treated the same as comparable permanent employees with regard to promotion, basic salary and other benefits such as the stimulation benefit. It needs to be emphasized that this type of working arrangement is too often improperly used in Slovenia and therefore places employees (very often women) in an inferior position as regards negotiations for pay and other bonuses, because in the event of disagreement with an employer the contract would not be concluded or renewed. A relationship with the gender pay gap can also be established for special arrangements to fight unemployment, e.g.:

- the implementation of a horizontal policy of equal opportunities for women and men within the framework of the active employment policy. As part of active employment policy, special programmes, including at least 50 % of women, should be introduced;
- programmes that encourage women and men to get involved in education and training and to seek employment in those fields where either women or men are underrepresented; and
- the implementation of and support to special programmes for the promotion of employment and work activities of women, and promotion of self-employment of women and women's entrepreneurship in predominantly male occupations.

Regarding the relationship between the gender pay gap and other parts of civil law, a relationship between the protection of privacy and the gender pay gap can be established. There is some conflict between the right to equality before the law and the protection of privacy of workers, which has an impact on the widening of the gender pay gap. I would say the same for the impossibility for trade unions to represent their members in court. In contrast, I do not see any relevant relationship between the gender pay gap and party autonomy in contract law.

## **8. Final assessment of good practices**

The gender pay gap in Slovenia is considered as an important problem with regard to equal opportunities, but unfortunately it seems that other issues are far more important. Therefore, apart from the very general legislation and few very general provisions in the Resolution and the Social Agreement, there are no other special instruments, obligations or strategies aiming to reduce the pay gap.

## **SPAIN – Berta Valdés de la Vega**

### **1. General situation**

Organic Law 3/2007 on real equality between men and women (*LOI*)<sup>602</sup> contains instruments for reducing the pay gap,<sup>603</sup> although the results of applying these instruments have yet to be verified. The latest official survey carried out by the National Statistics Institute on pay structure, published on the Institute's website,<sup>604</sup> dates from September 2009, and presents results from 2007. From this survey it can be seen that the average annual pay for women in 2007 (EUR 16 943.89) was 74.4 % of the pay for men (EUR 22 780.29). This represents a gradual narrowing of the pay

<sup>602</sup> *Ley Orgánica 3/2007, de 22 de marzo, para la igualdad efectiva de mujeres y hombres (BOE 23 de marzo 2007).*

<sup>603</sup> For example, provisions in Articles 5, 14, 43, 46 and 63 *LOI*.

<sup>604</sup> <http://www.ine.es/prensa/np568.pdf>, accessed 19 March 2010.

gap, as in 2006 the average annual salary for women stood at 73.7 % of that of men, in 2005 it was 72.5 %, and in 2004, 71.3 %.

More specific data can be provided on pay inequality between men and women: in 2007, 20.2 % of women earned a pay that was less than or equal to the guaranteed minimum pay (GMP), whereas only 7.0 % of men were in the same situation. On the other hand, if we analyse the highest pay brackets, 16.7 % of men received income four times greater than the GMP, compared with 7.4 % of women. One explanation for these differences can be found in the higher proportion of women than men in part-time jobs, bringing down the level of their annual pay. Indeed, one of the most important variables when analysing pay level differences is the type of working hours contract. Generally speaking, more men than women work part time: in the last quarter of 2007, 80.4 % of part-time workers were women.

The economic activity with the highest average annual salary (90.6 % above the national average) was financial intermediation (average salary per worker per year: EUR 38 870.30). The second highest average annual salary (67.2 % higher than the national average) was found in the production and distribution of electrical energy, gas and water industry (average salary EUR 34 100.97). At the other end of the scale, the lowest salaries were found in the hospitality industry (with an average salary of EUR 14 000.12) and commerce (with an average salary of EUR 17 473.77), with annual average salaries standing at 31.3 % and 14.3 % below average, respectively. With regard to pay inequalities according to gender and economic activity, it can be seen that women's pay was lower than that of men in all these economic activities. The average annual salary levels for women were the same as for men, meaning that financial intermediation was the activity with the highest salary, both for men and women, and the hospitality industry registered the lowest salaries.

If a distinction is made between job and sex, the highest-paid jobs were the same for men and for women, and the lowest-paid jobs were also very similar. Nevertheless, in the case of men, the lowest-paid jobs were those of workers in the agricultural, fishing, construction, manufacturing and transport industries, while the lowest-paid jobs for women were those not included in the classification of services.

Duration of the employment contract is also a crucial factor in pay differences. Men with a contract for an indefinite period of time received a salary 22.4 % higher than the average annual salary, while the earnings of workers with a fixed-term contract were 21.1 % lower than average. In the case of women, pay was always lower than the national average. Particularly significant were those with a fixed-term contract, for whom the difference with respect to the average annual salary was 35.1 %. In 2007, women with a contract for an indefinite period of time accounted for 42.5 % of the total number of this type of contract for both sexes, and this rose to 43.6 % the following year.

## **2. The legal framework**

According to the Spanish Constitution of 1978, Article 35 'All Spaniards (...) have the right to a sufficient salary to satisfy their personal needs and those of their family, without any discrimination on grounds of sex'. The general principle of equality and the prohibition of discrimination on grounds of sex, among other things, are recognized in Article 14 of the Constitution. In a more precise way, Article 28 of the Workers' Statute<sup>605</sup> states that 'the employer is obliged to pay the same amount for work of equal value, rendered directly or indirectly, whichever is its nature, salary or

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<sup>605</sup> *RD Legislativo 1/95 de 24 de marzo, BOE 29 marzo*, as modified by the *LOI*.

different from salary, without discrimination on grounds of sex or for any other reason, element or condition in this work relationship'. Prohibition of discrimination in labour relations is also stated in Article 17 of the Workers' Statute, indicating that any rule, individual clause, clause of collective agreements or unilateral decisions of the enterprise containing direct or indirect discriminations on grounds of (...) sex related to salary will be null and void.

The pay gap is linked to the classification systems which in Spain are fixed in the collective agreements for each sector or enterprise. In this respect, the use of common rules for both sexes and neutral criteria to elaborate the different categories and groups integrating the classification systems is stated in Article 22 of the Workers' Statute. The same rule is applied to the promotion scales in Article 24 of the Workers' Statute.

The principle of equality of treatment and opportunities between women and men should be guaranteed both in private and public employment referring to all working conditions, including remuneration (Article 5 *LOI*). In order to achieve effective equality, Articles 45 to 49 *LOI* regulate equality plans in enterprises, which could include measures to combat the pay gap, and Articles 51, 52, 53, 54 *LOI* regulate a balanced presence of men and women in public administration, among some other measures. In fact, positive actions to achieve effective equality and to avoid discrimination between women and men can be included in collective agreements (Article 43 *LOI*), specifically measures to give preference in access for the sex that is under-represented in a group within the classification system (Article 17.4 Workers' Statute). There is an 'obligation to negotiate' (*deber de negociar*) measures to promote equal treatment in working conditions in all collective agreements, although this does not mean an obligation to agree upon such measures (Article 85.1 Workers' Statute).

### 3. Instruments of social partners

The need felt by social partners to implement equality policies in the job market first emerged in collective agreements in the 1980s. At this time, commissions for equality started to take shape in collective agreements, and in the 1990s anti-discrimination procedures were gradually developed. Nevertheless, in 1999 only 20 % of the agreements contained some kind of clause alluding to equal opportunities between men and women.<sup>606</sup> Since 2002, particular attention has been paid to non-discrimination for reasons of sex in successive Interconfederal Agreements on Collective Bargaining (*AINC*) signed between the *UGT* and *CCOO*<sup>607</sup> trade unions and *CEOE*<sup>608</sup> and *CEPYME*<sup>609</sup> employers' associations. These inter-confederal agreements are particularly relevant as the signatories (the two largest trade unions in Spain and the two main employers' associations) undertake to apply the directives established in all collective agreement negotiations in which they take part.

The *AINC* of 2003 included the results of a survey analysing potential barriers on the path towards equal opportunities for women and men. As a result, a number of criteria, guidelines and recommendations to be effected in collective bargaining were included. The *AINC*s of 2007 and 2008 also included criteria on equal treatment and opportunities for women and men in collective bargaining. These criteria included the

<sup>606</sup> Report *Los planes de igualdad entre mujeres y hombres en la negociación colectiva* Madrid, Instituto de la Mujer 2009.

<sup>607</sup> Unión General de Trabajadores (*UGT*) y Comisiones Obreras (*CCOO*).

<sup>608</sup> Confederación Española de Organizaciones Empresariales.

<sup>609</sup> Confederación Española de la pequeña y mediana empresa.

need to avoid pay differences that could arise due to incorrect application of the principle of equal pay for the same job.

The latest *AINC*, signed on 9 February 2010 and applicable in 2010-2012, aims to stimulate the Spanish economy with a balanced and lasting model for economic growth based on improving competitiveness. Among the fundamental objectives that should be included in collective agreements (to be negotiated in 2010-2012) are compliance with the principle of equal treatment and non-discrimination in jobs and working conditions, and promotion of equal opportunities for women and men. It can be seen from the last *AINC* that less attention has been given to job equality issues. One reason for this, no doubt, is the partners' focus on the economic crisis, although another reason could be the legal imperative for companies to include equality plans or policies. That is, the equality-promoting role of the recommendations included in preceding *AINC*s has now been taken over, and intensified, by the provisions of the *LOI*.

Indeed, the *LOI* makes it compulsory for companies to respect equal treatment and opportunities in jobs, and to this end establishes a series of instruments to foster equality and endeavour to avoid discrimination. Some of these instruments are aimed only at employers, others should be adopted together by employers and workers' representatives or unions by reaching agreement in the process of collective negotiation. One of the most important of these last instruments is the option of establishing positive measures to ensure effective application of equal working conditions in collective agreements between employers and workers' representatives or unions. Social partners can negotiate these measures in any kind of collective agreement (e.g. state, autonomous community) in order to eliminate pay discrimination.

Other instruments to be adopted jointly by employers and workers' representatives or unions are the equality plans which in some cases are obligatory. These plans are drawn up and implemented in stages, starting with an analysis of the labour conditions within the company. This analysis detects inequalities and discrimination, which the measures included in the equality plan will aim to eradicate. The plans should be negotiated with social partners, and are compulsory in many cases, particularly for companies with more than 250 employees. The *LOI* recommends that these plans should include the adoption of measures applied to, for example, professional hierarchy and pay that directly and indirectly affect pay differences between women and men. In order to ensure real implementation of equality plans, the Ministry of Equality created the Advisory Service for the design and implementation of equality plans.<sup>610</sup> The service offers companies expertise and methods for implementing equal treatment and opportunities for women and men through equality plans, and provides them with the material needed to make an analysis of the situation with regard to sex equality. Guidance will also be given on how to evaluate and monitor equality plans. The Service is aimed at both public and private companies, public bodies, business and trade union organisations, equality commissions, and companies and professionals engaged in activities related to implementing equality plans.

Major trade unions periodically draw up directives or criteria to guide their equality-focussed actions. The document entitled 'Criteria for Collective Bargaining and Trade Union Action'<sup>611</sup> stresses that selection, recruitment and assignment of

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<sup>610</sup> This Service was created in March 2010.

<sup>611</sup> Approved by the Executive Commission of the *CCOO* Trade Union Confederation on 17 November 2009.

duties, the exclusive responsibility of private enterprises, is the first and foremost means of establishing segregation and job discrimination against women. Measures to be included in collective agreements have been put forward that further eliminate discriminatory pay differences. These include: eliminating double pay scales,<sup>612</sup> abolition of limits imposed on payment of pay supplements determined by the type of contract or the date of incorporation in the company, further efforts to overcome occupational segregation and achieve pay equality for equivalent functions and duties, and finally, eliminating sexist designations of categories, functions and duties by applying neutral terminology.

#### **4. Instruments specifically aimed at employers**

The *LOI* (Article 45) makes it compulsory for companies to respect equal treatment and opportunities and to take measures to avoid any kind of job discrimination between women and men. Compliance with this obligation involves drawing up equality plans, which are compulsory in the following cases: companies with over 250 employees, any company subject to collective agreements establishing the obligation of drawing up said equality plans, and finally, if the employment authorities sanction the company with the obligation of preparing an equality plan.

Other companies may voluntarily implement an equality plan, and to this end grants can be obtained by small and medium-sized enterprises from the General Secretariat for Equality Policies (Article 49, *LOI*). The latest grant programme<sup>613</sup> was aimed at small and medium-sized companies and organisations of between 30 and 250 employees, on the condition that workers' representatives or the workers themselves take part in drawing up the plan and taking actions forward in certain areas of work, particularly that of access to jobs (equal access to any job within the organisation) and working conditions (professional hierarchies and equal pay).

Application for the equality label granted to companies (Article 50, *LOI*), an indirect means of potentially reducing the pay gap, is also voluntary.<sup>614</sup> For a company to be eligible for this label it must have implemented an equality plan or specific equality policies. Assessment is made of the measures put in place, including the implementation and evaluation of positive measures to combat discrimination, and the application of pay and professional classification systems and criteria that enable direct or indirect situations of discrimination to be eliminated and prevented.

In addition to corporate decisions or collective agreements on measures to promote job equality, companies can take other kinds of action (economic, commercial, assistance, etc.), which will be considered part of their social accountability. Corporate social accountability on equality is included in the *LOI* (Articles 73 and 74), being voluntary but not unilateral. Such measures must be agreed with the social partners involved (consumer organisations, trade unions, equality organisations, etc.) and must be aimed at promoting equality in society or within the company. In this way, measures can be agreed with social partners that affect the social environment and have an indirect bearing on factors that could partly

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<sup>612</sup> 'Double pay scales' means two different pay levels for the same work depending on the date of contract, with new employees receiving lower pay. Case law considers that this measure is not in violation of the law (principle of equality) as long as there is a reason for this difference, the compromise being, for example, not having to dismiss workers during economic difficulties or to create new employment in the company. The problem arises when there is a lack of compromise in the collective agreement, or the compromise is not finally fulfilled.

<sup>613</sup> Published in the *BOE* of 22 February 2010.

<sup>614</sup> The first call to obtain the equality label was started on 10 April 2010, so at the moment no companies have received it yet.

explain pay differences. One of the aims of companies implementing social accountability measures is naturally to use these actions for advertising purposes, although any claims made must be true. The use of misleading publicity on social accountability could give the *Instituto de la Mujer* grounds to take legal action against the company.<sup>615</sup>

Article 75 *LOI* encourages large companies to gradually place women on their boards, until an even number of male and female members is achieved.<sup>616</sup> These companies should, within eight years, gradually modify the composition of their boards to a proportion of between 40 % and 60 % is achieved. This measure has no direct effect on the pay structure of the company, although it does affect the so-called 'glass ceiling' linked to pay inequalities.

Public authorities are in a position to stimulate corporate equality policies, as the terms and conditions of general state administration contracts must contain measures to promote effective equality between women and men. Other government bodies can also foster equality by means of the contracts they sign or the public subsidies they offer. The equality conditions to be established in procurement contracts or when granting subsidies have not been legally defined, although no doubt the absence of pay discrimination could be one such condition. In fact, companies with a positive equality record could find themselves in a more advantageous position in these cases. The implementation of a corporate equality plan, from the point of view of the pay gap, could be highly valued in the future by the procurement bodies of public offices. Indeed, information on pay paid by a company should be carefully scrutinised when diagnosing equalities in companies that should, or wish to, implement an equality plan. For pay policies to comply at this stage all staff pay should be analysed based on gender and the characteristics of the corporation's pay policy. The aim of this analysis is to detect inequalities and differences between pay paid to men and women, and to identify obstacles on the path to equality.

## **5. Other instruments to close the pay gap**

Professional hierarchy systems and the methods used to assess some pay supplements are closely linked to pay differences between women and men. Collective agreements have traditionally included discriminatory assessments of jobs or of professional hierarchy systems. Changes to collective agreements and pay structures have often been merely formal, that is, collective agreements include the legal clause referring to equal pay for equal work, often literally, but fail to change the job hierarchy and assessment system.<sup>617</sup> Joint collective agreement negotiating commissions are charged with interpreting and applying agreements and could review these systems if they are given powers to do so.

When a company has implemented an equality plan containing measures to reduce the pay gap, the control and verification mechanisms are more comprehensive. First, the *LOI* (Article 47) demands transparency in the implementation of plans, and require that individual workers or their representative have full access to all information relating to the plan and its application. Secondly, effective systems for

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<sup>615</sup> In general, legal action against misleading publicity can be taken by any person or legal entity that is affected by it and anyone who has a right or a legitimate interest (Article 33 Law 3/1991 of unlawful competition).

<sup>616</sup> It is a recommendation and there is no sanction for failure to comply with these obligations.

<sup>617</sup> An analysis of the wording of collective agreements between 2006 and 2007 is in F. Lousada Arochena *El principio de igualdad en la negociación colectiva*, Madrid, Ministry of Employment 2008.

monitoring and assessing the objectives of the equality plan must be put in place. No specific verification procedure is established by law; this is established in the plan by social partners. Economic and human resources must be available, i.e. people in charge of monitoring and assessment, and also technical resources. In addition, an assessment procedure and indicators to evaluate achievement of targets must also be established.

The Labour and Social Security Inspectorate (*ITSS*) is largely responsible for ensuring that companies comply with the law. After approval of the *LOI*, the *ITSS* drew up a programme, valid until 2010, for supervising real corporate equality between women and men. For this purpose, the *ITSS* has itself drawn up equality guidelines for the Labour and Social Security Inspectorate to follow, the aim being to provide a methodology by which a complete external analysis can be made of issues affecting equal treatment of men and women in the company. The Inspectorate is empowered to automatically apply administrative penalties to companies engaging in discriminatory behaviour with regard to their staff. The Law of social order infringements and penalties classifies failure to comply with obligations regarding equality plans as a serious or very serious administrative offence.

The Cabinet Council has approved<sup>618</sup> an institutional declaration proposing that 22 February be called 'International Equal Pay Day'. The idea will be promoted in international organisations and a series of activities will be organised to mark the day.

## **6. Problems of enforcement and how to tackle them by good practices**

The judicial protection of fundamental rights, and in particular the right not to be discriminated on the grounds of gender, is performed through proceedings before the ordinary courts and the Constitutional Court. The effective protection before the courts is regulated by different procedural laws pertaining to the various jurisdictional orders of civil, administrative, labour and criminal law. These are special procedures based on the principles of preferential and summary judgment, although the protection of fundamental rights may also be sought through ordinary procedures. When no further ordinary appeal is possible, victims of gender discrimination may file an *amparo* action (procedure for the protection of fundamental rights) before the Constitutional Court. The principle of equality and the prohibition of discrimination stated in Article 14 of the Constitution are directly applicable, as means of special guarantee of fundamental rights, so any citizen may bring a complaint of gender discrimination to the Constitutional Court. This is even possible once the relationship in which the discrimination has taken place has already ended.

The adequate comparison to determine the existence of pay discrimination is a job of equal value. This would include job equivalence based on shared characteristics and working conditions. To determine whether one job is the same as another it is not necessary for both to be included in the same professional group or professional category. Equivalence is a value that can be established using criteria which must be neutral, such as the degree of initiative, autonomy, experience, training, responsibility, etc. Normally, comparison is made based on the company's professional hierarchy system, and this is usually recorded in national, autonomous community, regional or sectoral collective agreements, or in some corporate collective agreements.<sup>619</sup>

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<sup>618</sup> 26 February 2010.

<sup>619</sup> Comparisons are made within the collective agreement which is applied in a specific company, and this can be a national or regional collective agreement, for example, which will be applied to all companies included in the sector and territory of the collective agreement. Comparison with other



## 7. Relationship between the gender pay gap and other parts of labour law

The pay gap is closely linked to part-time work and temporary contracts, and in both cases the number of women involved is greater than the number of men, who are usually employed under full-time contracts for an indefinite period of time (see Section 1 of this country report). Over the past two years, probably as a result of the economic crisis, the underground economy in sectors mainly occupied by women, including cleaning, domestic service and retail outlets, has grown.

## 8. Final assessment of good practices

The actual pay gap in Spain is not caused by an insufficient legal framework but more probably by a former inefficient one. The new rules introduced by the *LOI* will bring some changes, mainly by diagnosing the pay situation in each enterprise and the equality plans (and its monitoring system), the different positive actions and some other complementary measures linked to the pay gap. Social actors are relevant in all these changes as well as the centralized national collective bargaining structure through which voluntary sector-wide equality plans can become obligatory.

In Spain, the pay gap is especially related to social practices and the distribution of roles between men and women. Facilitating reconciliation of family and work life through the legal measures has been important but will be incomplete if no good practices are introduced in enterprises aiming to persuade men to use the legal instruments.

# SWEDEN – Ann Numhauser-Henning

## 1. General situation

According to the 2009 annual report of the National Mediation Office<sup>620</sup> (*Medlingsinstitutet*) the average pay gap between women and men in 2008 amounted to 15.8 % on an overall basis, or, women earned 84.2 % of men's pay. This gap was fairly stable for the period of 1992-2008 but differs between the different sectors of the Swedish labour market. In the private sector the average pay gap is slightly lower than in the public sector: 14.1 % as compared to 15.9 %. Within the private sector the pay gap is clearly lower among blue-collar workers (10.9 %) than among salaried employees (21.9 %). Also within the public sector the differences strongly vary. The smallest pay gap is in the municipality sector (7.7 %) as compared to the State (12.4 %) and county sectors (27.3 %). These figures all concern the *absolute* pay gap.

The *corrected (net)* pay gap is 6.6 % overall, statistics being corrected with regard to profession, sector, education, working hours and age. Now the public sector looks better than the private sector, the pay gap being 3.4 % as compared to 7.1 %. Within the private sector the pay gap is still considerably larger among salaried employees than blue-collar workers: 10 % as compared to 4.6 %. Within the public sector the differences in the pay gap between State and county employees almost disappeared (6.3 % as compared to 5.4 %) and it can be said that in the municipality sector there is practically no pay gap at all, with women's pay being 99.2 % of men's.

Swedish official statistics offer yet another corrected (net) pay gap figure, based on regression analysis. The average net pay gap is then still slightly lower: 5.6 % on

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companies that have a different collective agreement (whatever the territory or sector is), is not possible.

<sup>620</sup> Available on [www.medlingsinstitutet.se](http://www.medlingsinstitutet.se), accessed 10 March 2010. The wage statistics presented here are based on this report: *Avtalsrörelsen och lönebildningen 2009*.

an overall basis. Regression analysis is based on more individualised information such as actual age, not only 'age group', etc. Professional segregation is what best explains pay differences among the sexes, according to official statistics.

Generally speaking, pay differentials are bigger among men than women despite area, whereas the pay differentials *among* women are highest in the private sector and lowest in the municipality sector. Areas dominated by women (>60 %) have the lowest average pay. It is also notable, that the pay gap is smaller among blue-collar workers in the private sector and the rather low-paid employees in the municipal sector (compare above).

## **2. The legal framework**

The ban on pay discrimination on grounds of e.g. gender is found in the (2008:567) Discrimination Act that entered into force on 1 January 2009 and then replaced (among other acts) the former Equal Opportunities Between Men and Women Act.

The 2008 Discrimination Act is a 'single non-discrimination act' and covers seven different grounds of differential treatment, among them gender, in all areas of society. The ban on discrimination in working life is contained in Chapter 2 Section 1 of the Act. It is a general prohibition for employers to discriminate against employees, applicants, trainees and temporary agency workers on any ground covering – in a tacit way – all kinds of employers' decisions including pay in the broadest sense according to the ECJ (occupational pension schemes inclusive).

The general permissive rule on positive action 'to promote equality between women and men' contained in Chapter 2 Section 2.2 expressly does not cover pay or other terms of employment.

Moreover, Chapter 3 on active measures contains special rules on pay. According to Chapter 3 Section 2 'employers and employees are in particular to endeavour to equalise and prevent differences in pay and other terms of employment between women and men who perform work which is to be regarded as equal or of equal value. They are also to promote equal pay growth opportunities for women and men'. According to the second paragraph 'work is to be regarded as of equal value to other work, if, on an overall assessment of the requirements and nature of the work, it can be deemed to be equal in value to the other work. The assessment of the requirements of the work is to take into account criteria such as knowledge and skills, responsibility and effort. In assessing the nature of the work, particular account is to be taken of working conditions.'

Chapter 3 Sections 10-12 contain further rules monitoring equal pay practices. Every three years employers who employ 25 employees or more are to draw up an action plan for equal pay. Such an action plan must report the results of the employer obligations to survey and analyse pay practices, also concerning work of equal value, from a gender perspective, indicate 'the pay adjustments and other measures that need to be taken to bring about equal pay for work that is to be regarded as equal or of equal value' including a cost estimate and a time plan not exceeding three years, and, subsequently, report on the implementation and its results. It is worth mentioning, however, that these requirements were weakened by the introduction of the 2008 Act. Now plans are required every three years as compared to every year and the threshold as regards the number of employees has increased from ten to 25 employees. There is a right for employee representatives of organisations bound by a collective agreement towards the employer in question to obtain 'the information needed' to be able to cooperate in the survey, analysis and drawing up of an action plan for equal pay. If related to an individual employee, such information is confidential.

### 3. Instruments of social partners

According to the rules on active measures in Chapter 3 Section 1 of the Discrimination Act, employers and employees are to cooperate on active measures to bring about equal rights and opportunities in working life regardless of (among other things) sex. As was already indicated under the heading 'Legal framework', employee organisations are supposed to cooperate in the process of drawing up an action plan for equal pay, but the obligation to do so rests with the employer.

Pay regulation as such is an issue that rests entirely with the social partners and collective bargaining in the Swedish system, however. Since it must not be discriminatory, there is an implicit duty on the social partners to consider equal pay practices when bargaining, etc. There are no explicit rules on this except for the general ban on discrimination, however.

Historically speaking, there have been particular policies among trade unions to come to terms with the gender pay gap throughout the years, varying among the specific trade unions and branches. Lately, the Trade Union Confederation (*LO, Landsorganisationen*) has advocated a special gender pay equality strategy both in the collective bargaining period of 2007 and now in the upcoming 2010 bargaining period. The 2010 strategy is launched at central organisation, *LO*, level but is targeted towards groups with low average earnings, i.e. typically women-dominated sectors. In such sectors, apart from the general demand on pay increases based on an additional EUR 62 approximately (SEK 620) per month and individual, there is a request for another additional EUR 12.5 (SEK 125). The distribution of the centrally negotiated pay increases as a lump sum is negotiated at local and individual level later on in the process!

It is really difficult to assess the Swedish wage-setting system, based on the social partners' autonomy as it is. No doubt, collective bargaining and its results are of major importance as regards the gender pay gap in Sweden. The Swedish labour market is highly organised and collective agreements cover most of the labour market. The labour market is also highly gender-segregated. As we have seen, profession is the single most important explanatory factor for the gender pay gap. The general pay level nation-wide for a profession/branch of industry is by and large set by the collective agreement at industrial level of that profession/branch. At the same time, trade unions are united in a few trade union confederations with, at least in theory, the possibility to coordinate pay policies. Segments of the labour market dominated by women are often enough paid at lower levels than other, male-dominated sections. Despite the, in principle, 'individualised' wage-setting practices in all areas of the labour market the function of collective bargaining and 'level setting' by nation-wide general agreements for the area at issue cannot be overestimated. Coordinated equality strategies at central organisation level are necessary to come to terms with such differences among branches of industry and sectors. To some extent such employee initiatives have, historically speaking, proven some efficiency in bridging the gender pay gap. This is especially evident if we look into pay development within the municipality sector (compare Section 1 of this country report). However, pay levels between sectors have, generally speaking, proven to be quite stable for the period 1992-2008.

#### **4. Instruments specifically aimed at employers**

##### ***Legislative instruments***

As was already indicated above under ‘Legal framework’, Chapter 3 of the 2008 Discrimination Act on active measures contains special rules monitoring equal pay practices. Every three years employers who employ 25 employees or more are to draw up an action plan for equal pay, reporting on the results of the employer obligations to survey and analyse pay practices from a gender perspective, indicating the pay adjustments and other measures that need to be taken, and, subsequently, on the implementation and its results.

##### ***Voluntary instruments***

Offered by the Equality Ombudsman (*Diskrimineringsombudsmannen*), see below in Section 5 of this country report.

##### ***Duty to release information***

Employee representatives of organisations bound by a collective agreement towards the employer in question have a right to ‘the information needed’ to be able to cooperate in the survey, analysis and drawing up of an action plan for equal pay according to Chapter 3 Section 12 of the Discrimination Act. If related to an individual employee such information is confidential. The duties on the employer include the obligation to also provide specific aggregate pay information concerning groups of women and men performing work that is to be regarded as equal and concerning groups of employees performing work that is dominated by women as compared to work of equal value not considered to be dominated by women.

##### ***Public procurement***

There is a special ordinance (2006:260) on the possibility and duty to integrate contract requirements on non-discrimination in public procurement. The ordinance applies to certain state authorities only and concerns contracts for periods of at least 8 months, amounting to approximately EUR 75 000 (SEK 750 000) .

I would say that the rules on pay monitoring in the 2008 Discrimination Act and earlier legislation introduced in 2001 are potentially efficient. The gender pay gap certainly attains more interest and efforts at workplace level. It is, to my opinion, presumably so that this attention also leads to less discriminatory pay, see for instance what is said about the Equality Ombudsman under Section 5 below (but also about remedies in Section 6).

#### **5. Other instruments to close the pay gap**

The Swedish Equality Ombudsman (*Diskrimineringsombudsmannen*) has the competence to monitor the rules on active measures in the 2008 Discrimination Act, including those on an action plan for equal pay. The former Equal Opportunities Ombudsman (*Jämställdhetsombudsmannen*) was also known to have done so according to former but in the main parallel rules in the Equal Opportunities Act (*Jämställdhetslagen*) in its biggest monitoring project ever, ‘*Miljongranskningen*’, 2006-2008. The action started out with an informative campaign and the presentation of web-based tools (see further below) to assist employers in their obligations. The analysis of how employers met the legal requirements involved 1 245 private and public employers with a total of one million employees. According to the results, only close to 50 % of the employers met the legal requirements on having an action plan

for equal pay, 44.2 % identified unjustified pay differences and corrections amounted to approximately EUR 7 200 000 (SEK 72 million) or approximately EUR 112 (SEK 1 120) per month and individual.

The Equality Ombudsman also provides specific tools that may assist in establishing gender-neutral job evaluation schemes, pay systems etc.<sup>621</sup> There is the pay evaluation scheme '*Analys Lönelots*' and a more general tool for gender equality analysis of pay, '*Jämställdhetsanalys av löner – steg för steg*'.

There is also the National Mediation Office (*Medlingsinstitutet*) that according to its instructions not only mediates in labour disputes on the Swedish labour market but is also part of the wage formation system in Sweden promoting an efficient wage formation process meeting public objectives of various sorts. Among its tasks is to handle the official pay statistics in Sweden. In its annual report(s) special attention is given to gender equality in pay.<sup>622</sup>

## **6. Problems of enforcement and how to tackle them by good practices**

The 2008 Discrimination Act both provides a ban on pay discrimination and stipulates employer obligations on active measures.

*The ban on pay discrimination* is of the traditional individual and complaint-based structure. An individual employee (or various) must be identified as potentially discriminated against, which requires a relevant comparator of the opposite sex, etc. The very Discrimination Act also gives some criteria as to work of equal value, see in Section 2 above. Such a comparator must be found at the same employer, otherwise there is no comparable situation (*Allonby*). An individual complainant can turn to his/her trade union or to the Equality Ombudsman for help. A trade union has a right to represent its member in court proceedings. The Equality Ombudsman has a subsidiary right to represent a complainant who consents to this but the Ombudsman may also do so on her own initiative. A trade union and the Equality Ombudsman representing an individual – following negotiations – go directly to the Swedish (Supreme) Labour Court for proceedings. An individual claimant not supported by her trade union or the Equality Ombudsman must bring her claim to a local court within the ordinary court system, the Labour Court acting as an appeal court.

The – rather few – pay discrimination claims brought before the Swedish Labour Court throughout the years have been presented both by trade unions and the former Equal Opportunities Ombudsman. I will not go into any details here, but whereas pay discrimination is seldom – if ever – found<sup>623</sup> there are some more positive experiences with regard to the possibility of proving different work to be of equal value.<sup>624</sup>

Should a case of pay discrimination be proven there is a right to both punitive and economic damages. The time limits for presenting a pay discrimination claim are regulated in Chapter 6 Section 4 of the 2008 Discrimination Act by referring to the rules on time limits set out in the (1976:580) Co-Determination Act. These rules are quite complex regulating time limits for negotiations *and* legal proceedings in the case of the individual claimant being represented by his/her trade union and

<sup>621</sup> The tools mentioned in the following are available on the Equality Ombudsman website, [www.do.se](http://www.do.se), accessed 10 March 2010; only in Swedish.

<sup>622</sup> The annual report is available on [www.medlingsinstitutet.se](http://www.medlingsinstitutet.se), accessed 10 March 2010.

<sup>623</sup> Compare Labour Court cases 1983 no. 140, 1991 no. 62, 1996 no. 41, 1997 no. 68, 2001 no. 13, 2001 no. 51 and 2001 no. 76. It has been argued that the Swedish Labour Court has too willingly accepted 'the market argument' made by employers as an excuse for pay differentials and thereby failed to live up to the standards of Community equality law. In Labour Court case 1995 no. 158, however, pay discrimination was found.

<sup>624</sup> See Labour Court cases 2001 no. 13 and 2001 no. 76.

complementary rules when this is not the case (and the individual is bringing his/her case to court him/herself or through the Equality Ombudsman). Calling for negotiations for damages must be done within four months from discovering the discriminatory act and within a maximum of two years from the act itself. With regard to pay, this is a 'continuously' committed act of discrimination, however. An action must then be brought to court within three months from finalising the negotiations. If the trade union does not (call for negotiations or) bring the claim to court there is an additional time limit of one month for the individual – or Equality Ombudsman – to do so.

The remedies when an employer fails to meet the legal requirements on *active measures* are not very swift or efficient. The Equality Ombudsman thus has a general duty to monitor compliance of the 2008 Discrimination Act, but preferably on a voluntary basis. There is, however, an obligation on any natural or legal person concerned to provide the information required by the Equality Ombudsman to this end and should such a person not fulfil his or her obligations concerning active measures under Chapter 3, he/she may be ordered to fulfil them subject to a financial penalty. Such orders are issued by a special Board against Discrimination on application from the Equality Ombudsman. A trade union to which the employer in question is bound by a collective agreement may also approach the Board concerning the lack of active measures.

## **7. Relationship between the gender pay gap and other parts of labour law**

According to the official pay statistics,<sup>625</sup> differences regarding age, education, sector, branch, company size and working hours explain 22.9 % of the *absolute* gender pay gap. The single most important factor is, however, profession explaining 55.7 % of the absolute gender pay gap.

There is therefore no information available to me on the specific importance of working hours, age, part-time work, posting, etc. *per se*, but each of these factors can be supposed to be of some minor importance for the gender pay gap. Generally speaking, there is no tradition to make any difference between part-time and full-time employees, for instance, on the Swedish labour market. Part-time employment was always more frequent in women-dominated branches, also being the low-paid, however. Women are also over-represented in other types of flexible work arrangements. Only one case concerning the (2002:293) Act concerning a ban against discrimination of part-time and fixed-term work employees implementing the non-discrimination provisions of the Part-time Work and Fixed-term Work Directives, respectively, has been brought before the Labour Court so far (case 2008 no. 32). The case concerned whether two women working part time and another woman on a fixed-term contract at a publisher were the victims of pay discrimination. This was not found to be the case. Other employees at the workplace were both men and women working full time and/or on a permanent basis and wages were individually set. No comparators were found to be equally situated as the alleged victims of discrimination and there was therefore no *prima facie* case of discrimination.

Economic disadvantages of transfer due to pregnancy may also potentially amount to discrimination. One case to illustrate this is Labour Court case 2008 no. 14. The case at stake was whether shortened hours due to shift work were to be regarded

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<sup>625</sup> Information based on the National Mediation Office's *Annual report 2009, Avtalsrörelsen och lönebildningen 2009*.

as such ‘working conditions’ which should not be deteriorated in the case of transfer on the grounds of pregnancy?

Three female police officers were transferred from front office to back office duties during the later part of their pregnancy. They were allowed to keep their additional pay from back office duties, being organised in shifts also during ‘inconvenient’ hours, but they were not allowed to keep the related shorter number of total working hours. The Labour Court found shorter hours to be a working condition comparable to pay or extra holidays, which on former occasions had been regarded as a working condition in the sense of Sections 18 and 19 of the Parental Leave Act. Apart from indemnifications for economic loss (the extra hours worked) the employer was ordered to pay approximately EUR 3 000 (SEK 30 000) to each of the women. The judgment can be said to imply an ‘extensive’ interpretation of the concept of working conditions (in parallel with the case law in other fields until now, such as that of the trade union representatives), giving preference to the purpose of the rule in Section 18 – to promote and guarantee/protect the use of (in this case) ‘pregnancy rights’ – over the principle of ‘non-favourable treatment’ in comparison with other workers in the same line of duty.

The judgments of other, parental-leave related cases are less positive, however. Labour Court case *2009 no. 13* concerned whether reduced gratification on the grounds of parental leave/maternity leave amounted to discrimination. An employer decided to pay a gratification for the year 2006 in relation to the hours worked that year. Among employees who only received a reduced gratification were three employees who had been on parental/maternity leave during 2006. The reduction was calculated in relation to the reduced working hours due to the leave in question. The Court found no detrimental treatment/sex discrimination. The gratification was found to constitute pay *ex post*. That the pay gratification was paid in accordance with the quantity of hours worked (and thus reduced) was found to be ‘a natural consequence’ of the parental leave and thus in compliance with Section 16 of the 1995 Parental Leave Act. Nor did the Court find the reduced pay gratification to be in conflict with Article 2.7 of the Equal Treatment Directive or Article 11.2 of Directive 92/85/EEC. The Labour Court more precisely referred to the ECJ’s case *Lewen* C-333/97. Since there is no general right to pay *during* parental leave the outcome seems to be in accordance with Community law.

Another Labour Court case, *2009 No. 15*, concerned alleged discrimination on the grounds of maternity leave/parental leave. An employer (1) did not pay an employee, due to inability to perform her work duties during pregnancy, any additional sick pay according to a collective agreement and (2) did not make the customary pension premium reservations during her parental leave. The Court found no sex discrimination. Reference was made to the design of the Swedish sick benefits scheme making a difference between sickness benefits due to inability to work for medical reasons and pregnancy benefits (*havandeskapspenning*) due to inability to perform certain tasks due to pregnancy. The Court made a ‘similar/comparable situation test’ and found a person on sick leave and a person on pregnancy leave not to be similarly situated. There was therefore no case of sex discrimination, either according to national law or to Community law. Nor did the Court find the non-payment of pension premiums during the employee’s parental leave to be detrimental treatment according to Section 16 of the 1995 Parental Leave Act. Pension premiums are by nature indirect ‘pay’ and the non-payment is a ‘natural consequence’ of parental leave and as such a justified detrimental treatment under the 1995 Act. For issue (1), the Labour Court more precisely referred to the ECJ’s case law and cases such as *Høj Pedersen*



Case C-66/96, *Boyle* C-411/96 and *McKenna* C-191/03. It is a delicate question whether pregnancy problems amount to ‘ordinary’ sickness (*McKenna*, *Høj Pedersen*) or whether it is in other ways ‘naturally’ related to sex (*Boyle*). As regards issue (2): since there is no general right to pay *during* parental leave the outcome seems to be in accordance with Community law.

Finally, what about the more general issue of the importance of ‘the Swedish Model’ in relation to the gender pay gap? It has already been touched upon above in Section 3 of this country report as one of the most important factors for the differences in pay level between different occupations and branches. Here, however, discrimination in a legal sense is hard or impossible to prove since there are no relevant comparisons between separate employers and branches to help us. At the same time, overall union strategies may show to be (the only) efficient means to come to terms with such sector-gendered pay practices.

Interesting discoveries were made, however, in a doctoral thesis dealing with collective agreement-based parental pay – supplementary to the main social security parental benefits scheme.<sup>626</sup> Men being paid more (compare the absolute pay gap) are known to use only a minor part (about 20 %) of the parental leave days provided by the national parental benefits scheme. Moreover, there is ‘a ceiling’ to the benefits paid and it is to the detriment of the family economic situation when the better-paid parent stays at home. This drawback in the construction of the Swedish parental benefits scheme was reinforced by how the social partners used their bargaining power to supplement the national scheme. The most favourable collective agreements on supplementary parental pay were thus found in the public sector, employing 50 % women, whereas the benefits were typically lower and highly varied in the private sector, employing 80 % men. The contents regarding parental pay rights in collective agreements thus reflected ‘the need’ of the typical member in the relevant area of the labour market, reinforcing gender segregation in labour markets (making women prefer the public sector) and the gender-biased ‘parental-leave behaviour’. Still, there is no discrimination in the legal sense, considering the gender-neutral rules in different sectors and branches of the labour market.

## 8. Final assessment of good practices

To my opinion, the Discrimination Act rules on active measures, and more precisely the rules on an action plan for equal pay, are an example of good legal practices. The role for the employee organisation in co-operation with the employer in this endeavour is of course important. However, also the supervisory powers of the Equality Ombudsman are crucial to make the legal regulation efficient.

On a highly gender-segregated labour market like the Swedish one, ‘centralised’ union gender equality strategies prove important. The fact that the (net) pay gap is largest among salaried employees in typically better-paid quality jobs is quite depressive, however. Individualised wage setting among qualified workers seems to reflect gendered preferences, also the backbone of sex discrimination!

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<sup>626</sup> L. Carlson *Searching for Equality, Sex Discrimination, Parental Leave and the Swedish Model with Comparisons to EU, UK and US Law* Uppsala, Iustus Förlag 2007.

## TURKEY – Nurhan Süral

### 1. General situation

Turkey has one of the lowest overall employment rates, particularly for women, in the OECD.<sup>627</sup> As stated in *Female Labour Force Participation in Turkey: Trends, Determinants, and Policy Framework*, a report prepared jointly by Turkey's State Planning Organization and the World Bank,<sup>628</sup> the share of women holding or looking for jobs in 2008 was below 22 % as compared to an average of 62 % in OECD countries and to an average of 33 % in a group of selected comparison countries with similar levels of economic development. Of the working population, 15 598 000 are men and 5 595 000 are women.<sup>629</sup>

The share of women having or seeking jobs has been decreasing. Urbanization and decline in agricultural employment are the two main factors in this decrease. However, this decrease is misleading, because the great drop in the number of unpaid agricultural workers is pulling down the general rate of female participation. Despite the decrease in the rate of unpaid agricultural workers, there is a rise in the share of wage-earning women. In the 1980s, the majority of working women were unpaid family workers in the agricultural sector. Today, unpaid employment among women is below 38 % while the share of wage-earning women is approximately 43 % (almost twice as much as in the 1980s).<sup>630</sup>

The gender pay gap is an important issue in gender inequalities in the labour market but in Turkey, segregation and exclusion of women from the labour market are deemed much more important. The prioritised need to promote women's employment and the thorough establishment of the principle of equal wage for work of equal value in the formal sector, especially in the public sector, make this gender differential almost invisible. The gender pay gap is a negligibly minor part of the bigger problem. The general belief is that where under-participation is reversed, this gender differential will lessen or become non-existent. Raising awareness is necessary for the recognition of the gender pay gap.

There are no official surveys or statistics on the gender pay gap. Existing individual quantitative studies for academic purposes differ as regards their findings. This is due to inconsistencies in the usage of terminology and the differences in the choice of data used as the source. In many of these studies, the 'gender pay gap' is considered as the relative difference in the average gross earnings of women and men in the national economy as a whole without making a distinction between an absolute and a net wage gap. Before 2003, data was scarce, making it too difficult for researchers to conduct a survey. Early researchers tried to develop their own statistics.

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<sup>627</sup> OECD *Economic Surveys Turkey*, Vol. 2008/14 (July 2008).

<sup>628</sup> T.R. Prime Ministry, State Planning Organization and World Bank Human Development Sector Unit Europe and Central Asia Region *Female Labour Force Participation in Turkey: Trends, Determinants and Policy Framework*, Report No. 48508-TR, 23 November 2009, <http://www.worldbank.org.tr>, accessed 3 March 2010.

<sup>629</sup> Statement by Selma Kavaf, Minister of State responsible for women and family, at the closing session of the Strategy Development for Enhancement of Female Labour Project on 25 February 2010.

<sup>630</sup> For this and other reasons for low female participation of women and for figures, see: T.R. Prime Ministry, State Planning Organization and World Bank Human Development Sector Unit Europe and Central Asia Region *Female Labour Force Participation in Turkey: Trends, Determinants and Policy Framework*, Report No. 48508-TR, 23 November 2009, <http://www.worldbank.org.tr>, accessed 3 March 2010; and the unpublished background paper 'Determinants of and Trends in Labour Force Participation of Women in Turkey' by M. Dayıoğlu & M. Kırdar.

Today, nation-wide household labour force surveys, household income distribution and expenditure surveys, and workplace employment and wage structure surveys and, as from 2003, household budget surveys provide data on wages in Turkey. The assessments of the wage gap by individual researchers vary substantially depending on the source of data and the year.

Earlier studies<sup>631</sup> reveal a strikingly low gender pay differential, whereas later studies reveal a higher gender pay differential. Here, reference will be made only to two recent studies.

E. Cudeville and L.Y. Gürbüzer (2007), in their working paper on ‘Gender Wage Discrimination in the Turkish labour market’<sup>632</sup> propose an assessment of the wage discrimination in Turkey relying on different decompositions of the gender wage differential. The data set used is the 2003 Turkish Household Budget Survey. The researchers find that in Turkey, the observed average gender pay gap is about 25.2 % in favour of men for the salaried population, and around 60 % of it may be attributed to discrimination. When Turkey is considered in relation to the EU countries in terms of gender pay discrimination, Cudeville and Gürbüzer come up with an observed pay gap close to those observed in France and Italy, and a discrimination component close to the ones found in Spain and Greece with comparable methods, concluding that Turkey happens to be doing not so badly. Their analysis confirms that pay discrimination is on average relatively moderate in countries where selectivity into work is high for women. In Turkey, women do not participate much in the labour market, they are on average less educated than men, and they are more often in precarious jobs and in the informal sector. Salaried women are even scarcer – the probability to obtain salaried employment is much lower for women than for men – they are mainly urban, much better educated than the women’s average and form the majority of the high educated wage earners. Compared to men, they are more likely to occupy high-status occupations. These characteristics may indicate a high selectivity for women into salaried employment, the process of selection setting them higher standards in terms of educational achievement. The figures reveal striking differences in the way men and women are distributed in employment, across occupations and sectors, and suggest that the mechanisms of selection into work and into salaried work are likely to be gender specific in Turkey, the selection process being potentially tainted with segregation. Those differences would have to be taken into account in the authors’ analysis of discrimination.<sup>633</sup> Moreover, the analysis reveals that

<sup>631</sup> See studies by R. Anker (‘Theories of Occupational Segregation by Sex: An Overview’, *International Labour Review* 136(3) (1997) pp. 1–25); M. Dayıoğlu & Z. Kasnaçoğlu (‘Kentsel Kesimde Kadın ve Erkeklerin İsgücüne Katılımları ve Kazanç Farklılıkları (Women’s Labour Force Participation and Earnings Differentials between Genders in Turkey)’, *METU Studies* 24(3) (1997) pp. 329–361); A. Tansel (‘Public–Private Employment Choice, Wage Differentials and Gender in Turkey’, *Economic Development and Cultural Change* 53(2) (2005) pp. 453–477); M. Dayıoğlu & İ. Tunalı *Falling Behind While Catching Up: Changes in the Female–Male Differential in Urban Turkey, 1988 to 1994*, EALE/SOLE 2005, unpublished paper; and O. Kara ‘Occupational gender wage discrimination in Turkey’, *Journal of Economic Studies* Vol. 33, No. 2, (2006) pp. 130–143.

<sup>632</sup> E. Cudeville & L.Y. Gürbüzer ‘Gender Wage Discrimination in the Turkish labour market’, Paper presented at the JMA, Fribourg, June 2007 and the ECINEQ Conference, Berlin (July 2007); <http://halshs.archives-ouvertes.fr/docs/00/18/87/45/PDF/Bla07067.pdf>, accessed 3 March 2010.

<sup>633</sup> Selectivity bias is a problem that arises when the sample used is not randomly selected. Therefore the authors follow the works of M. Beblo., D. Beninger, A. Heinze and F. Laisney, ‘Measuring Selectivity-Corrected Gender Wage Gaps in the EU’, *ZEW Discussion Paper* No. 03-74 and S. Neuman & R. Oaxaca, (1998), ‘Estimating labour market discrimination with selectivity-corrected wage equations: methodological considerations and an illustration from Israel’, *CEPR Discussion Paper Series*, No. 1915.

discrimination in Turkey mainly concerns the lower wages, revealing a phenomenon of sticky floor, although the glass ceiling phenomenon seems to be very limited, probably because of the high selectivity for highly educated women. Moderate pay discrimination and high selectivity probably go hand in hand and it is likely that pay discrimination increases when more women enter the Turkish labour market.

Ipek Ilkcaracan and Raziye Selim (2007),<sup>634</sup> in contrast to earlier studies on Turkey, are able to show that a substantial portion of the gender pay gap is attributable to the occupational and industrial gender segregation plus male–female differences in a number of labour market affiliations such as the type of firm, sector, and collective labour bargain status. In formal sector firms with 10 or more workers in the three manufacturing industries (electricity, gas & water; and mining & quarrying) they find a 70.6 % female-to-male wage ratio. The gender pay gap is reduced to 85.2 % when they monitor for human capital variables, and further to 91.2 % when they monitor for all types of other industry, occupation, sector, and firm characteristics. Given two workers, one male and one female, with exactly the same wage-enhancing characteristics (education, experience, tenure, occupation, industry, sector, and firm characteristics), the male worker still earns 10 % more on average than the female worker. The systematically lower human capital endowments of women, as well as the systematic allocation of female workers into lower-paying private-sector jobs not covered by collective bargaining agreements, and their heavy concentration in only a few occupations and industries are indicative of different forms of gender discrimination operating at both the labour supply and labour demand levels. Even when monitoring for all these different variables affecting wage determination, however, they find that there still remains an ‘unexplained’ portion of the pay gap as high as 22 %. In other words, this is the part of the pay gap that is due to different rates of return for male versus female workers on various productivity-enhancing characteristics or on various labour market affiliations. This ‘unexplained’ portion can be said to be due to ‘outright discrimination’ in the labour market, a pay differential that occurs neither as a result of different productivity levels nor as a result of the location of the job or type of workplace, but merely due to the sex of the worker.

The findings of M. Dayioğlu and M. Kırdar (2009)<sup>635</sup> reveal the changes in the monthly and hourly wages of highly skilled women (those with secondary school education and more) and unskilled women (those with less than secondary school education) over the 2002 to 2006 period.<sup>636</sup>

The wage data available from the Household Labour Force Survey (HLFS) 2002 and onwards show that low-skilled women indeed receive lower wages compared to their male counterparts. Measured on the basis of monthly earnings from their main job, women’s earnings (wage workers only) were equal to 71 % of men’s earnings in 2006. When corrected for hours of work, women’s earnings were equal to 80.6 % of men’s earnings. These figures increased from 65.6 % and 71.4 %, respectively, in 2002. There is thus a gradual closing of the discrepancy in the earnings of low-skilled

<sup>634</sup> İ. Ilkcaracan & R. Selim ‘The Gender pay gap in the Turkish Labour Market’, *LABOUR: Review of Labour Economics and Industrial Relations*, 2007, Vol. 21, No. 2 (2007) pp. 563-93.

<sup>635</sup> M. Dayioğlu & M. Kırdar ‘Determinants of and Trends in Labour Force Participation of Women in Turkey’ unpublished background paper prepared for the SPO-WB report ‘Female Labour Force Participation in Turkey: Trends, Determinants and Policy Framework’ (February 2009).

<sup>636</sup> Primary education is compulsory 8-year education, and is followed by secondary education (secondary school) of 4 years. Secondary education is the education between primary (compulsory) education and tertiary (university) education.

men and women in urban areas. In 2006, 77 % of low-skilled women as opposed to 47 % of men had monthly earnings that were below the minimum wage. Joining the labour force becomes even less likely if low-skilled women are offered wages lower than those of their male counterparts. Lower wages (for the same skills level) may be caused by women being pushed into segments of the labour market where lower wages prevail or their limited access to better-paying jobs, or simply due to pay discrimination.

On the basis of all these studies, the causes of the gender pay gap may be specified as follows:

1. low participation of women in the labour market;
2. industrial and occupational gender segregation (about three quarters of women are in the manufacturing industry: textiles, food, and metal goods and machinery manufacturing);
3. balancing work and private life;
4. experience (women's interrupted or intermittent careers due to traditional domestic responsibilities);
5. allocation of female workers into lower-paying private-sector jobs;
6. workplace characteristics such as firm size, sector, industry, occupation, and coverage by collective labour bargaining; and
7. the informal sector.

## **2. The legal framework**

Legislation is the major initiative that has been introduced to tackle the gender pay gap. Article 10 of the Turkish Constitution<sup>637</sup> on equality before the law states that men and women have equal rights and that it is the State that has the obligation to ensure that this equality exists in practice. Article 55 is on the guarantee of fair wage. However, 'fair wage' has not been defined.

The principle of equal pay is reflected in labour law; there is no specific anti-discrimination legislation. Article 5 of the 2003 Labour Act<sup>638</sup> is the most extensive provision on prohibition of discrimination at work. This Article regulates the principle of equal treatment including pay. The principle of 'equal pay for equal work or work of equal value' and the fact that application of certain protective measures on the basis of sex must not justify payment of a lower wage are openly expressed in Article 5. No legal criteria for establishing the 'equal value' of the work performed is provided in the Article. There are no exceptions to the equal-pay principle based, for example, on the size of a company, on reasons linked to the health and safety of workers, on national security, on religion, or on benefits under statutory social security schemes. However, this Article does not prohibit payment of wages at lower rates to one sex for equal work when the wage differential is based on a justifiable ground such as seniority or quantity or quality of production.

The national concept of remuneration is broad. 'Pay' includes basic wage that has to be paid in cash and that cannot be lower than the minimum wage and fringe benefits, in cash or in kind.

## **3. Instruments of social partners**

On the basis of Article 5 of the Labour Act, the equal pay principle is peremptory, as a result of which individual or collective agreements cannot violate it. A provision in

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<sup>637</sup> *TC Anayasası*, Law no. 2709, Official Gazette 9 November 1982, no. 17863bis.

<sup>638</sup> *İş Kanunu*, Law no. 4857, Official Gazette 10 June 2003, no. 25134.

the agreement contrary to the principle of equal pay shall be deemed ineffective. So far, the social partners have never been concerned with the equal pay principle, most probably due to the general understanding that there are no application problems. This is not a principle cited in collective agreements nor is it made an issue in studies, inquiries or projects carried out by social partners.

#### **4. Instruments specifically aimed at employers**

There are no instruments specifically aimed at employers as regards the gender pay gap. The emphasis is on promoting employers to hire more women. In this context, it is argued that barriers for businesses to hire women have to be lifted. Law no. 5763 of May 2008, the so-called 'employment package', tries to ameliorate the adverse effects of the global crisis on employment and eases some of the unduly burdens on the employers, inter alia lifting the legal obligation of establishing pre-school classes and providing the option of outsourcing childcare. The establishment of day care depends on the number of female workers and not on the total number of workers, creating an asymmetry in the cost of employing female and male workers. Law no. 5763 also provides incentives such as lifted or lowered social security contributions (premiums) for employers to promote employment of youth and women. These incentives, applicable until 30 June 2010, cover males aged between 18-29 and females over 18 without an upper age limit (Article 20). The Government is to subsidize employers' social security contributions for newly hired women during up to five years. About 700 000 jobs were created between November 2008 and November 2009 and about 500 000 of these jobs were filled by women.<sup>639</sup>

#### **5. Other instruments to close the pay gap**

Here, it has to be stated again that the emphasis and instruments are on reversing under-employment of women but not on closing the gender pay gap.

#### **6. Problems of enforcement and how to tackle them by good practices**

In the formal sector, a working woman who considers that the equal pay principle has been violated may file a complaint with the labour court. However, there has not been any such application so far.

In Turkey, there is a substantial informal sector, typical of most developing countries. In the informal sector, women and youth are assumed to be paid considerably less than men doing the same or similar work. There are various initiatives including a comprehensive action plan and strategy to combat the informal economy 2008-2010,<sup>640</sup> in order to establish an open and non-discriminatory business environment. The hot line *ALO 170* to register reports was established on 28 May 2008 to operate on 24/7 basis for the elimination and evaluation of informal employment. There is also *ALO Maliye 189*, a hot line established in 2003 for reports and complaints, to strengthen the audit capacity of the Minister of Finance. Complaints may also be made online or by post.

#### **7. Relationship between the gender pay gap and other parts of labour law**

There is no such relationship.

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<sup>639</sup> Statement by Ömer Dinçer, Minister for Labour and Social Security, at the closing session of the Strategy Development for Enhancement of Female Labour Project on 25 February 2010.

<sup>640</sup> *Kayıt Dışı Ekonomiyle Mücadele Stratejisi Eylem Planı 2008-2010*, Official Gazette 5 February 2009, no. 27132. For the text in English: [http://www.gib.gov.tr/fileadmin/beyannamerehberi/Kayit\\_disi\\_2009.pdf](http://www.gib.gov.tr/fileadmin/beyannamerehberi/Kayit_disi_2009.pdf), accessed 15 February 2010.

## **8. Final assessment of good practices**

Gender pay equality among public-sector employees served and still serves as a good leading model for the private sector.

So far, there has not been a plan/programme/project specifically addressing the gender pay gap, but various initiatives on gender equality in general, promotion of female labour, and downsizing the informal sector have been implemented.

## **THE UNITED KINGDOM – *Aileen McColgan***

### **1. General situation**

In April 2009 median gross weekly earnings for male full-time workers were EUR 589 (£531) and EUR 473 (£426) for female full-time workers. Median hourly earnings (excluding overtime) for full-time men and full-time women respectively were EUR 14.40 and EUR 12.64 (£12.97 and £11.39). The gender pay gap, accordingly, was 20 % (weekly) and 12 % (hourly) for full-time employees. 41 % of women who work, however, work part-time. Part-time female workers earn EUR 8.72 per hour (£7.86, again excluding overtime), resulting in a gender pay gap in median hourly earnings of over 39 %, a figure which has barely changed for 40 years. That part-time male earnings are even lower (EUR 8.56 or £7.71) does not indicate that the pay gap between full-time men and part-time women is untainted by sex. The proportion of men working part time is only 11 %, and many such men are students. They are not comparable to women working part time whose earnings are held down by the over-supply of women whose family and other responsibilities mean that they cannot work the long and inflexible hours (see further below) which characterise full-time employment in the UK.

The average figures disclose some even greater pay gaps than the median rates. Full-time men earned an average EUR 17.84 (£16.07) an hour to full-time women's EUR 14.91 (£13.43) and part-time women's EUR 11.54 (£10.40), with part-time men earning an average EUR 13.30 (£11.98) per hour. These figures translate to gender pay gaps between full-time men and women and full-time men and part-time women of 16 % and 35 % respectively.

Women's earnings in the bottom 10 % grew more slowly than those of men between 2008 and 2009 (3.9 % and 4 % respectively) while those in the top 10 % outstripped men by 4.7 % to 2.9 %. Girls aged 16-17 working full time earned 12.6 % more than their male counterparts, those working part time 1.3 % less than part-time boys and the largest gender pay gaps by age were in the 40-49 age group in which full-time female workers earned 18.4 % less per hour than men. The gender pay gap is bigger in the private than in the public sector (the median gap for full-time workers standing at 20.8 % and 11.6 % respectively). The widest gaps were in the skilled trades at between 22.7 % and 31.2 %, the narrowest in the professions. The gap is at its largest (20.2 % median hourly earnings for full-timers) among earners in the top decile and smallest in the bottom decile.

### **2. The legal framework**

The basic implementing legislation regarding equal pay remains the Equal Pay Act passed in 1970, which came into effect in 1975 (and, in Northern Ireland, the



materially identical Equal Pay Act (Northern Ireland) 1970).<sup>641</sup> Both Acts have been extensively amended over the years to give effect to decisions of the Court of Justice of the European Union. The Equal Pay Acts cover all contractual terms and conditions whether or not they concern 'pay', any non-contractual benefits which amount to 'pay' for the purposes of Article 157 TFEU (ex Article 141 TEC) falling instead within the Sex Discrimination Act 1970 and the equivalent Northern Ireland Order. The Equal Pay Acts provide, inter alia, that an entitlement to equal pay arises (subject to any defence available to the employer) where a woman is engaged in work which 'is, in terms of the demands made on her (for instance under such headings as effort, skill and decision), of equal value to that of a man in the same employment'. Codes of Practice are published by the Equality and Human Rights Commission and the Equality Commission for Northern Ireland (formerly by the Equal Opportunities Commission and Northern Ireland Equal Opportunities Commission) which provide practical advice for employers.

Since April 2007 public authorities have been under a duty to pay due regard to the need, inter alia, to promote equality between men and women, including in the area of pay. Many public employers must develop and publish a policy on developing equal pay arrangements between women and men including measures to promote equal pay, to ensure fair promotion and to develop opportunities and tackle occupational segregation. The Equality Bill 2009/2010,<sup>642</sup> which is currently before Parliament, is likely to become law in 2010 and is likely to be implemented in October 2010, does not make any very significant changes to the law relating to equal pay, which will be incorporated within the single Equality Act. The main exceptions to this statement concern the possibility of using a hypothetical comparator for equal pay cases in which direct discrimination is alleged (which are comparatively rare). In addition, employers will be prohibited from imposing pay secrecy clauses on employees and may in future be required to publish some (probably limited) statistics on pay rates within their organizations.

### **3. Instruments of social partners**

The social partners are not as a general rule required to bargain on equal pay, although the gender equality duty which is imposed on public authorities requires them to have 'due regard' to the need to eliminate unlawful discrimination and harassment, and to promote equality of opportunity between men and women. Specific duties imposed on many public authorities require them, inter alia, to set out their overall objectives for meeting the gender equality duty, including any pay objectives; the action to be taken to assess the impact of existing and new policies and practices on gender equality; and the steps the employer will take to consult relevant employees, service users and others, including trade unions.

Many public sector employers are engaged in active equal pay bargaining with trade unions, and equal pay forms a central underpinning principle of initiatives in the university and healthcare sectors, among others. Public sector unions such as UNISON have taken effective action to counter the downward pressure on (predominantly female) wage rates which has characterised the contracting-out of public service functions. Examples of such action include the Newcastle City Schools PFI (Private Finance Initiative) Project in which the local branch secured the right to

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<sup>641</sup> C.41 and F1. The current versions are available on [www.equalityhumanrights.com/uploaded\\_files/equal\\_payact1970.pdf](http://www.equalityhumanrights.com/uploaded_files/equal_payact1970.pdf), accessed 7 May 2010 and [www.opsi.gov.uk/RevisedStatutes/Acts/apni/1970/capni\\_19700032\\_en\\_1](http://www.opsi.gov.uk/RevisedStatutes/Acts/apni/1970/capni_19700032_en_1), accessed 7 May 2010.

<sup>642</sup> C.15, [www.opsi.gov.uk/acts/acts2010/pdf/ukpga\\_20100015\\_en.pdf](http://www.opsi.gov.uk/acts/acts2010/pdf/ukpga_20100015_en.pdf), accessed 7 May 2010.

review tender documents and interview contract bidders as well as a commitment from the Council to apply TUPE (which implements the Acquired Rights Directive in GB) to all staff involved whether transferred or taken on by the contractors in the lifetime of the contract, and to apply improvements in the nationally negotiated rates to them. The significance of this is that contracting-out has been one of the most significant downward drivers of female pay in the broader public sector with contractors undercutting public sector rates either for all staff (prior to the application of TUPE to this area) or new recruits (prior to the implementation of a 'Single Tier Workforce Agreement' negotiated between trade unions and central government).

Having said this, the squeeze on public sector pay, the absence of legislation relating to collective pay equality measures and the reluctance of central government to make available the necessary funding to overcome centuries of gender pay inequality means that progress is slow.

#### **4. Instruments specifically aimed at employers**

There are no obligations placed by law on employers to scrutinise their pay systems for gender pay inequality, much less to take active steps to remedy the inequalities which exist. The only threat to employers is the threat of legal action by individuals and the prospect for significant periods of back pay in the event that these succeed.

Many public sector employers are required as a matter of government policy to conduct pay reviews for the purposes of ascertaining whether a gender pay gap exists within their organisations and with a view to remedying any such gap. Compliance with this policy is, however, patchy. The EOC, predecessor to the EHRC, was active in trying to persuade employers to engage in voluntary pay reviews with a view to eradicating pay inequality. The EHRC has also been vocal in its support for pay reviews, and recently stated that it would provide limited immunity from investigations to employers which voluntarily reported on their gender pay gaps.<sup>643</sup> A significant difficulty which stands in the way of such review, even if employers were otherwise minded to engage in them, is that equal pay crystallises at the point at which a woman's job is accepted as being of equivalent value to that done by a man. This acts as a disincentive to employers who fear providing 'hostages to fortune' and opening themselves to the likelihood of successful pay claims with the potential for backdated pay resulting from voluntary pay reviews.

Prior to any changes wrought by the Equality Bill 2009, if it becomes law, employers are entitled to bind individuals to secrecy on their pay and are not generally themselves obliged to publish information on pay. Individuals contemplating litigation may use equal pay questionnaires to seek information about potential comparators and their rates of pay. Employers are not obliged to answer such questionnaires and frequently rely on data protection arguments to refuse to do so, but unreasonable refusals to answer or the provision of evasive answers may result in a tribunal drawing inferences adverse to the employer.

The Government has been very slow to use public procurement powers to deal with unequal pay in the private sector, although it has indicated that the gender pay duty provides some impetus for public sector employers to take steps in this area. There is a great deal of uncertainty as to the limitations placed by EU law on public procurement. The Equality Bill 2009 will, if it is enacted, result in a clarification of the role of public procurement in this area. The Government's 'Equality Bill: Making

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<sup>643</sup> <http://www.equalityhumanrights.com/media-centre/2010/january/voluntary-measures-proposed-for-publishing-pay-gaps/>, accessed 7 May 2010.

it work Policy proposals for specific duties Policy Statement’,<sup>644</sup> published in January 2010, stated (Paragraph 5.1) that ‘Although public bodies should already be taking equality into consideration as part of their procurement processes under the existing public sector equality duties, we do not believe this happens as frequently or consistently as it could’. The Government proposed the adoption of specific duties on public bodies involved in contracting over the threshold levels set out in the Public Sector Directives to:

- when setting out their equality objectives and the steps they intend to take to achieve them, state how they will ensure that equality factors are considered as part of their public procurement activities to help contribute to the delivery of those objectives;
- consider using equality-related award criteria, where they are relevant to the subject matter of the contract and are proportionate; and
- consider incorporating equality-related contract conditions where they relate to the performance of the contract and are proportionate.

In making these proposals the Government acknowledged (Paragraph 5.11) ‘the need for clear guidance to enable procurement practitioners to understand the specific duties, what was required of them and how they may go about complying (...) concise and clear guidance will be essential to get the most out of these duties and we will ensure that procurement is covered effectively in the planned guidance.’ It stated that a non-legislative approach would be taken to regulatory measures aimed at suppliers which breached discrimination law (Paragraph 5.17) but (Paragraph 5.18) that ‘poor equality performers should not benefit from public sector procurement and (...) this explicit message should be made clear to public authorities when considering who to invite to bid for contracts and to potential suppliers when considering bidding’.

## 5. Other instruments to close the pay gap

The equal pay questionnaire has been mentioned above. It is a useful mechanism by which to gather information for the purposes of an equal pay claim. In addition, the normal rules apply in the Employment Tribunals as to the production of documents relevant to a claim. The duty of disclosure, as it is called, trumps most arguments about confidentiality of material to be used for the purposes of litigation.

The EHRC, like the EOC before it, publishes material intended to assist employers to carry out equal pay reviews for the purposes of scrutinising their pay systems for evidence of discrimination. ‘Equal pay in practice’ consists of a series of checklists for employers which are aimed at dealing with the more common causes of unequal pay in the workplace and helping identify potential vulnerability to equal pay claims.<sup>645</sup> In addition, ‘toolkits’ on equal pay audits for employers and small (under 50 employees) employers provide advice on good equal pay practice, how to carry out equality impact assessments and to eliminate gender pay gaps.<sup>646</sup>

There is no monitoring of collective agreements or pay structures in line with gender equality considerations. Nor is there a labour inspectorate system in the UK. The EHRC can take legal action in cases of discrimination, including in the case of discriminatory pay systems, by way of a claim for judicial review (where what is at

<sup>644</sup> [http://www.equalities.gov.uk/PDF/psdresp\\_GEO\\_MakingItWork\\_acc.pdf](http://www.equalities.gov.uk/PDF/psdresp_GEO_MakingItWork_acc.pdf), accessed 7 May 2010.

<sup>645</sup> [www.equalityhumanrights.com/advice-and-guidance/information-for-employers/equal-pay-resources-and-audit-toolkit/checklists-equal-pay-in-practice](http://www.equalityhumanrights.com/advice-and-guidance/information-for-employers/equal-pay-resources-and-audit-toolkit/checklists-equal-pay-in-practice), accessed 7 May 2010.

<sup>646</sup> [www.equalityhumanrights.com/advice-and-guidance/information-for-employers/equal-pay-resources-and-audit-toolkit/equal-pay-audit-kit-for-small-businesses](http://www.equalityhumanrights.com/advice-and-guidance/information-for-employers/equal-pay-resources-and-audit-toolkit/equal-pay-audit-kit-for-small-businesses), accessed 7 May 2010.

stake is public decision making by public authorities), or by supporting individual claimants. In addition, it has powers to investigate organisations, sectors etc. for evidence of discriminatory practices. These powers of investigation give rise to difficulties in practice, the courts historically having been very hostile to these commissions<sup>647</sup> with the effect that the commissions have had to adopt very elaborate procedural safeguards to withstand intensive judicial review, but they can be a useful mechanism at least by which to expose disparately impacting pay practices.

## **6. Problems of enforcement and how to tackle them by good practices**

The legislative response to pay inequality remains firmly focused on the individual claimant, and equal pay awards are specific to individual litigants. Unions in the public sector have been effective at litigation strategy in the area of equal pay, there having been many claims with thousands of individual claimants represented together. Success in such claims often provokes comprehensive pay settlements. The law in this area is, however, notoriously difficult and many cases last for many years. Equal pay claims are brought before employment tribunals by individuals who may fund and manage their own cases, or who may be represented by trade unions (in which case the claims are likely to involve multiple claimants) or other bodies such as the EHRC. Time limits are very tight (six months from the end of the employment contract in respect of which complaint is made, in the majority of cases).<sup>648</sup> The law is notoriously complex and, because the stakes may be very high for employers seeking multiple claims, litigation often becomes sprawling and involves numerous pieces of ‘satellite’ litigation whose effect (if not purpose) is to cause delay and stress to claimants.

Comparisons have to be made between claimants and persons of the opposite sex engaged in comparable work (‘like’ work, work which has been rated as equivalent in a Job Evaluation Scheme or work of equal value) who are employed by the same employer (or an associated employer – the test for this is a corporate one which requires the employer companies to have the same ownership), and work in the same workplace or at workplaces at which terms and conditions are similar. The scope for comparison is very narrow, although the domestic courts would also apply the ECJ’s ‘single source’ approach in suitable cases to the extent that this is a little broader (where, for example, one employer had control over the payment practices of another).

Remedies on an equal pay claim are limited to the inclusion within the contract, going forward, of an ‘equality clause’ which pegs the claimant’s pay to that of her comparator and an award of back pay (for a maximum of six years in the case of a claimant who can establish underpayment for this or a longer period) to compensate for the differential payment in the past. No sum may be awarded for injury to feelings or other losses arising from the underpayment. Missed contributions to pension schemes would be included as an element of pay.

## **7. Relationship between the gender pay gap and other parts of labour law**

### ***Working hours/part-time work***

Full-time working hours across the UK are relatively long. In 2009, according to the official figures, full-time male employees worked an average 40.1 hours a week and

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<sup>647</sup> See for example the decisions in *In re Prestige Group plc* [1984] ICR 473, House of Lords.

<sup>648</sup> Most employment cases have time limits of three months but with a discretion to extend.

full-time women 37.4 hours a week. Part-time men and women employees worked, on average, 17.6 and 18.4 hours a week respectively. Such is the difference in the proportion of men and women working part-time, however (women account for 80 % of part-time workers, and part-timers for half of women workers), that all male and all female employees averaged 37.3 and 29.4 hours weekly respectively. The disproportionate concentration of women in part-time work, which in turn is associated with the very long working hours typical of full-time employees in the UK, has a significant impact on their pay levels. (As noted above in Section 1 of this country report, the pay gap between women's part-time hourly rate and that of full-time male workers is much higher than is the case for full-time female workers. It could be argued that the proper comparator for female part-time rates is male part-time rates (and note that there is, if anything, a gap in women's favour if this comparison is used). But because many women, and very few men, work part time, and part-time rates are held down by the ready supply of women seeking 'flexible' work, it is much more instructive to compare full- and part-time women's hourly rates against those of full-time male workers. In 2009, 22.5 % of full-time male and 12.9 % of full-time female workers worked overtime (averaging 1.5 and 0.6 hours per week respectively). For part-time workers the figures were 17.2 % men (1.1 hours) and 17 % women (0.7 hours). (Discrimination in terms of pay between part-time and full-time workers doing the same job for the same employer is prohibited by law, subject to a justification defence (the Part-time Workers Regulations 2000) but much of the gap between part-time and full-time wages results from the concentration of workers in different jobs, rather than this cruder form of pay discrimination.)

***Age, age limits, seniority issues, posting of workers, special arrangements to fight unemployment***

Women typically have shorter periods of continuous service than do men, so the reward of service impacts negatively on women's pay. The gender pay gap increases with age until age 50 before declining thereafter, and the proportion working full-time and part-time (with the resulting impact on hourly rates) varies over women's lifecycle. No statistical information is available as to the impact of age limits on the gender pay gap and I have no information as to the impact of posting or special arrangements to fight unemployment.

***Atypical work arrangements***

A significant aim of the provision to employees of the right to request flexible working hours is to keep women in their own jobs if and when childcare responsibilities make them unwilling or unable to work full time, rather than allowing them to fall out of the (generally better quality) full-time work market and into the part-time work market. Since the introduction of the right to request flexible working hours, the gender-pay gap for full-time workers has continued to decrease gradually but little if any difference has been seen in the case of part-time workers. The introduction of increasingly generous periods of maternity leave, in particular, is intended to keep women in the labour market while allowing them significant periods to devote to childcare. It is arguable, however, that the emphasis on the female caring role serves further to entrench gender stereotyping which in turn serves to hold down women's wages, whereas encouraging men to take leave in order to engage in childcare would have the opposite effect.

### ***Glass ceilings***

It is certainly the case that part of the gender pay gap is attributable to women's concentration at the lower levels of occupational hierarchies. The Sex Discrimination Act 1975 prohibits direct and indirect sex discrimination and harassment and, if adhered to in full, would do much to counter the gender pay gap. It overrides the concept of contractual autonomy. As is the case with equal pay claims, however, sex discrimination claims are risky to bring and difficult to win and much occupational sex discrimination goes unchecked.

### **8. Final assessment of good practices**

It is difficult to point to good practice in the UK in the area of the gender pay gap since progress is so slow, particularly in the case of part-time workers, and litigation is so complex and time-consuming. The imposition of positive obligations on public authorities is one potentially valuable contribution, although it will take some years to establish the potential this has in the context of pay inequality in particular and much will turn on the changes to be made to the positive duties by the Equality Bill 2009, should it become law, and on the guidance to be provided as regards public procurement.

## Annex I

### European Network of Legal Experts in the Field of Gender Equality Report on the Gender Pay Gap

#### Questionnaire

##### Background and purpose

In Europe the gender pay gap still amounts to 17 %.<sup>715</sup> In some countries, the gender pay gap is widening again. Many policy and legislative initiatives are taken at national level in order to combat the gender pay gap. In 2007, the Gender Network published a report on the gender pay gap, entitled ‘Legal Aspects of the Gender Pay Gap’.<sup>716</sup>

Since equal pay remains one of the most important priorities of the European Commission, there is a need for a new report. This new report, with the simple provisional title ‘Gender Pay Gap’, should partially draw on the previous report from 2007 and, in particular, update the information provided therein. Additionally, the new report should also further develop the 2007 report, in particular in the following two respects:

- It should expand on the policies, initiatives and legal instruments aimed at tackling the gender pay gap in practice.
- It should explore the potential links between equal pay and other labour law provisions, in particular those labour law provisions which may have a disproportionate negative impact on women and – directly or indirectly – contribute to the pay gap.

Although, as we have seen in the 2007 report, in some countries, occupational pension schemes are taken on board when discussing the problems of the gender pay gap, in the present report occupational pensions are not included, most importantly because there will be another report on old-age pensions in 2010.

In the 2007 report we defined the gender pay gap as the difference between the average pay level of male and female employees, respectively. Furthermore, a distinction was made between the absolute pay gap and the corrected (net) pay gap.<sup>717</sup> The absolute 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 explain at least part of the difference. They relate to traditions in the career choices of men and women; to the fact that men, more often than women, are given overtime duties, with corresponding higher rates of pay; to gender imbalance in the sharing of family responsibilities; to glass ceilings; to part-time work, which is often highly feminised; to job segregation; etc. The corrected (net) pay gap corresponds with the pay gap that for an important part can be explained by pay discrimination in the strict legal sense. For the purposes of this report, we will indeed, as a *legal* network, concentrate on the

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<sup>715</sup> European Commission, *Report on Equality between Men and Women 2009*, p. 8, available on <http://ec.europa.eu/social/main.jsp?catId=738&langId=en&pubId=86&furtherPubs=yes>, accessed 8 February 2010.

<sup>716</sup> Available on: <http://ec.europa.eu/social/main.jsp?catId=641&langId=en>, accessed 26 January 2010.

<sup>717</sup> Cf. point 3 of the Executive Summary.



net pay gap. However, some side steps into broader issues will be necessary as well, in particular since the report aims at investigating the possible links with other parts of labour law or otherwise (e.g. administrative law concerning the position for civil servants, or general issues of civil law).

## **Questions/guidelines for the national reports**

### ***1. General situation in your country***

Please describe briefly the situation as to the gender pay gap in your country (the difference in general pay level; gaps in various sectors of occupations and industry, where available; differences in private and public sector; the gap when taking into account the age of the working population). If available, please present figures.

### ***2. The legal framework***

Please describe briefly and – where necessary – update the legal framework of equal pay (see also Paragraph 1 of the 2007 Report). Please provide a concise reference to all laws and regulations dealing with equal pay, taking into account the wide definition of pay that the Court of Justice of the European Union has given to the concept of pay.

### ***3. Instruments to close the gap 1: social partners***

Please provide information on:

- legislative or other provisions inducing/obliging social partners to include the issue of equal pay in collective and other agreements;
- other practices of the social partners (in or outside the context of collective agreements) aimed at tackling the gap; and
- policies/measures of trade unions.

Please give a brief assessment of the effectiveness of the instruments.

### ***4. Instruments to close the gap 2: instruments specifically aimed at employers***

Please provide information on:

- legislative or other instruments that oblige the employers to address the issue of equal pay;
- other voluntary instruments that are or might be used by the employers;
- strategies, if any, that your country has adopted to require the release of information about pay to individuals about other individuals in the firm, and about the publication of aggregate pay information broken down by gender and by firm; and
- public procurement: in several publications, the Commission has encouraged States to use their public procurement powers to require firms that they contract to address the pay gap; has that recommendation been taken up by your country, and what have been the results?; if your country has not done so, why not?

Please give a brief assessment of the effectiveness of the instruments.

### ***5. Instruments to close the gap 3: other***

Please provide information on:

- tools that may assist individuals in establishing pay discrimination;
- tools that may assist in establishing gender-neutral job evaluation schemes, pay systems etc.;
- whether collective agreements, job evaluation schemes etc. are monitored / scrutinized and by whom;
- possible role of labour inspectorates and equality bodies in addressing the pay gap; and
- other.

Please give a brief assessment of the effectiveness of the instruments.

### ***6. Problems of enforcement and how to tackle them by good practices***

Please provide information on the enforcement of equal pay rules, the problems occurring in this respect and the way they are/may be resolved:

- through court proceedings (please also pay specific attention to time limits);
- please specify how broad the scope of comparison can be in case of a complaint. Is this scope limited to the same employer or organisations? Are comparisons with other employers in the same sector possible?
- the sanctions (compensation, what is the maximum period that might be taken into account for calculating the amount of compensation, consequences for pay in the future and the build-up of pensions, etc.); and
- other.

Please also discuss in this context the possible role of trade unions or equality bodies (or other).

### ***7. Relationship between the gender pay gap and other parts of labour law***

Please indicate whether a relationship can be established between, on the one hand, unequal pay between men and women and, on the other hand, rules (or absence of rules) governing, inter alia, the following aspects of professional life:

- working hours;
- age, age limits, seniority issues etc.;
- part-time work;
- posting of workers;
- atypical work arrangements (including flexible application of fixed-term contracts);
- special arrangements to fight unemployment;
- other issues related to the reconciliation of family life and work (e.g. leaves); and
- promotion (e.g. how to break glass ceilings).

Other, more general issues that could be looked into include:

- party autonomy in contract law;
- protection of private life/confidentiality (of salary etc.); and
- other aspects of civil law or civil procedure (e.g. possibility for trade unions to represent their members in court).

### ***8. Final assessment of good practices***

Please summarize which are good practices in your view.



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