

Axe 2: Europe sociale - Rethinking the European equal pay legal toolbox

Par Nathalie Meurens
e-legal, Volume n°3

Pour citer l'article :

Nathalie Meurens, « Axe 2: Europe sociale - Rethinking the European equal pay legal toolbox », in *e-legal*, *Revue de droit et de criminologie de l'ULB*, Volume n°3, avril 2019.

Adresse de l'article :

<http://e-legal.ulb.be/volume-n03/hommage-a-eliane-vogel-polsky/axe-2-europe-sociale-rethinking-the-european-equal-pay-legal-toolbox>

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Le droit à l'égalité des rémunérations entre les femmes et les hommes pour un même travail ou un travail de même valeur fut consacré dès le Traité de Rome. Malgré cette consécration, l'écart de salaire (horaire) entre les femmes et les hommes dans l'Union Européen est, près de soixante ans plus tard, de 16 % en moyenne. L'obligation de ne pas discriminer n'a pas concrétisé une promesse d'égalité de fait. Guidée par la réflexion d'Eliane Vogel-Polsky, cette contribution explore les causes de l'inégalité salariale en vue de comprendre dans quelle mesure le droit européen y répond adéquatement.

The right to equal pay between women and men for equal work or work of equal value has been recognised as early as the Treaty of Rome. Despite this recognition, the (hourly) pay gap between women and men in the European Union stands sixty years later at 16%. The obligation not to discriminate did not lead to full equality. Guided by Eliane Vogel-Polsky's vision, this contribution explores the root causes of the gender pay gap and in order to better understand whether the legal tools adopted at EU level are adequately tackling the gender pay inequality.

Introduction: Equal pay in Europe

§1 Equal pay has been recognised in the Treaty of Rome as far back as 1957 and is as such as a cornerstone principle of the European Union (EU). Equal pay was declared by the Court of Justice of the European Union (CJEU) as a fundamental right conferred to individuals in the famous *Defrenne II* case¹, championed by Eliane Vogel-Polsky. Despite longstanding dedication to the issue, the European equal pay legal toolbox has not resulted in full equality. This leads to reflect on whether the European tools adequately address the underlying causes of the pay gap and whether it is imperative to rethink them.

Indeed, in the EU, the unadjusted gender pay gap stood at 16% in 2017; the equivalent of women earning on average 84 cents for every euro a man makes per hour². The unadjusted gender pay gap varies widely across the EU; from 3.5% in Romania to 25.6% in Estonia. The unadjusted gender pay gap is calculated based on the difference between the average gross hourly earnings of men and women expressed as a percentage of the average gross hourly earnings of men. Gender gap in hourly earnings does not reflect the full picture of the overall gender gaps in earnings. Indeed, when looking at annual earnings, rather than hourly earnings, the gender pay gap can further widen. In Belgium, the annual gender pay gap reaches 22% as opposed to a 6 % gender pay gap based on hourly wages³. This is explained by the widespread use of part-time work by women, most often to take on caring responsibilities. This high percentage of part-time work by women leads to a gender pension gap, which translates in higher risk of poverty at old age. The EU gender pension gap reached 35.7 % in 2017⁴.

In the last decade, the unadjusted gender pay gap has slightly decreased in the EU; from 17.3% in 2008. While most countries have experienced a decrease in their gender pay gap, some countries (Bulgaria, Malta, Latvia and Slovenia) have in fact experienced an increase of as much as 7 percentage points (e.g. Portugal) since 2008⁵. The slight overall decrease in the gender pay gap cannot yet be flagged as a positive trend since other factors than improved gender equality have contributed to the narrowing of the gender pay gap. For instance, the decreased gender pay gap has been, at least in part, a result of decreases in men's wages rather than improvements in women's earnings.⁶

These modest improvements in the gender pay gap coincide with a context of increased female labour force participation over the last decades to reach 67% in 2018 (as compared to 62.9% in 2008)⁷. At the same time, higher educated women are entering the labour market, with 34.5% women aged 25-64 who have completed tertiary education in 2018, as compared to 30.1% of men⁸. Higher education and higher employment of women have not translated in full equality.

According to the European Commission, if the gender pay gap continues to evolve at the current rate, it will only close in the next millennium.⁹

§2 This paper will first explore the root causes of the gender pay gap in order to better understand whether the legal tools adopted at EU level are adequate to tackle the gender pay gap. The analysis of the EU policies aiming at tackling the pay gap will reflect on Eliane Vogel-Polsky's vision of EU law as a toolbox which can be used to further national action on equality of remuneration. To the extent possible, recent and EU focused literature is used to reflect on the state of play of the gender pay gap in the EU. The recent two decades have seen a change in labour force participation, education of women, employment dynamics and changes in gender roles in addition to a great recession. This contribution attempts to provide a picture that reflects those changes, while pointing out reflections from Eliane Vogel-Polsky which remain more than pertinent in today's context.

Root causes of inequality

§3 Gender pay gap data are usually categorised in two ways in order to present the overall picture of the gap: the adjusted and unadjusted gender pay gap. This categorisation stands from the distinction between the part of the gender pay gap that can be explained through observable characteristics in the employment of men and women, as well personal characteristics such as age, education and job experience, and the part of the gender pay gap that cannot be explained by these. Part of the differences in earnings can result from differences, e.g. in type of job, age, sector or type of enterprise, segregation in some economic sectors or education. The unadjusted gender pay gap encompasses both the explained and unexplained pay gap, while the adjusted gender pay gap only points to the unexplained part of the pay gap, where no observable factors or characteristic can explain or justify the difference in earnings¹⁰.

The explained part of the gender pay gap is estimated at a third of the overall EU gap¹¹. In other words, around 5 percentage points of the 16% unadjusted gender pay gap can be attributed to differences in average labour market and personal characteristics between women and men, resulting in women being paid less than men at the EU level. The explained part of the pay gap is driven by three key factors: sector of economic activity, occupation and education. For instance, in all EU Member States, except Ireland, Luxembourg, Malta and the Netherlands, men work, on average, in better paid economic sectors than women. On the other hand, in the Netherlands, the most important explicative factor is the higher proportion of men working in the private sector with higher earnings than in the public sector. Working time (full/part time) also drives the explained portion of the pay gap in Germany and, to a lesser extent, in Belgium, Greece, Italy, the Netherlands and Austria¹².

Arguably, the unexplained part of the gender pay gap results from factors such as discrimination and biases, but not solely. It also encompasses those characteristics of women and men, that cannot be measured through data such as total working experience and motivation¹³. This being said, explained and unexplained differences in labour market characteristics are not gender neutral. For instance, the low number of women in management positions influences women's earnings; similarly, the high number of women working part-time is, at least in part, the result of an unequal burden of care work and long-standing bias towards the role of women in society¹⁴. Hence, the unadjusted gender pay gap is often used to estimate the gender pay gap, because it provides a more complete overview of the inequalities¹⁵.

Understanding the various roots of the gender pay gap enables a better understanding of the adequacy of existing EU legal tools to tackle it.

Horizontal segregation

§4 Gender segregation refers to a high concentration of women or men in certain occupations or sectors (horizontal segregation) as well as at certain hierarchical positions (vertical segregation).

Recent data shows that 58% of men and 54% of women reported that their co-workers with the same job title are mostly of the same sex, with only 19% of men and 22% of women indicating that their workplace had an equal number of men and women working in a similar position¹⁶. An occupation is considered gender segregated where more than 60% of the employees is of one sex. Accordingly, gender-neutral occupations would result in a proportion of women and men workers between 40% and 60%¹⁷.

There is an overrepresentation of men in construction, transport, craft work, agricultural work and plant and machine operation, while women are overrepresented in health, education, clerks or service and sales occupations¹⁸. Data and studies also point to an overrepresentation of women in the public and non-profit sectors¹⁹. The domination of women in certain occupations or sectors affects their pay and contributes to the gender pay gap. Indeed, women are more likely to be employed in low-paid service-related jobs, while men dominate private sector and highly-paid technical professions²⁰.

Beyond the impact on pay and inequalities, gender segregation also leads to labour market inefficiency and rigidity, resulting in labour and skill shortages. The top five occupations with critical shortages across the EU are highly gender segregated: ICT; GPs and medical specialists; STEM; nurses and midwives; and teachers²¹.

§5 Horizontal gender segregation in the labour market is the result of various factors, including stereotypes on gender roles, gendered notions of certain fields and lack of accommodation of female workers. Education can partly explain horizontal segregation. As women have a higher level of education than men, women are working in fields requiring higher education (but unfortunately low-paid), such as teaching and nursing²².

Another key factor for the overrepresentation of women in a profession or sector is related to the work-life balance practices offered²³. Flexibility of working hours (such as part-time work and shorter workweeks) and access to child-care systems explain the overrepresentation of women in sectors known for offering such conditions such as the non-profit and public sectors²⁴. In fact, mothers of young children tend to be overrepresented in female-dominated occupations, while the under- or overrepresentation of fathers with young children is less marked as their

careers are not affected in the same way by the birth of a child or the presence of (small) children²⁵.

Inversely, segregation is also explained by the fact that men are more likely to work in better-paid jobs with organisational cultures offering less work-life balance opportunities²⁶. This has all to do with the prevailing gender culture and persisting stereotypes that discourage men from taking time off for care purposes, whereby women are expected to bear the burden of care work resulting in a narrowing of their employment options.

Stereotypes limit both men and women's employment choices. The underrepresentation of women in STEM careers is partly due to their supposed lower performance in science. Starting at an early age, the workings of such stereotyped beliefs influence both women's ability and attitude towards a career in science. In addition, careers in which women are overrepresented tend to be undervalued as are the associated skills and competences²⁷.

Studies show that the feminisation of an occupation, reaching more than 60% of women workers, is accompanied by a decline in wages. The associated decrease in pay is larger in the private sector, where employers' discretion in wage setting is greater. This points to a gender devaluation rather than differences in productivity, job-specific skills, or time investment²⁸.

Vertical segregation

§6 Vertical gender segregation refers to the underrepresentation of women in jobs located « at the top of an ordering based on « desirable » attributes (income, prestige, job stability, etc.) »²⁹. Vertical segregation is the result of the « glass ceiling » phenomenon, whereby women face barriers preventing them from moving beyond a certain level in the hierarchy³⁰.

In the EU overall, women take up a third (33 %) of management positions. The share of women in these positions varies from 47% in Latvia and 41% in Poland and Slovenia, to 18% in Luxembourg and 25% in the Czech Republic, the Netherlands and Greece³¹. At the very top, CEOs count less than 6% women in their ranks³².

Data show that female managers tend to supervise female workers and younger people, while male managers look over older workers. Progress in the representation of women in management position is clearer in large companies (of more than 250 employees), where 35% of the workers report having a female manager. Women managers can mostly be found in service and sales occupations (47%). Despite slow progress, men remain overrepresented in management positions « across the board »³³. In particular, small- and medium-sized companies, that dominate the economic market, tend not to be sensitised to the need for a gender-balanced representation on managerial board³⁴.

§7 Vertical gender segregation has several root causes. Sectors and occupations are related to the share of women in management positions, with more women in such positions in sectors or occupations that are predominantly female.

The full-time/part-time divide also reinforces segregation effects³⁵. Research has found that women make career decisions based on family constraints³⁶. They tend to select occupations with more flexible hours or where part-time work is an option. The reduction of their working hours ultimately leads to less upward career mobility or a stagnation during the period of time women work part-time. The lack of ability to reconcile work and family life discourages women with small children from taking up high management positions³⁷.

Beyond personal « choice », the stereotypical division of labour within a family is at stake, where women are expected to bear a higher burden of care. Stereotypes influence behaviour, making it difficult to separate genuine preferences from the expression of stereotypical social norms³⁸. « *The patriarchal structure of society, traditional perceptions, gender roles and stereotypes that want and place women in the private sphere as caretakers or guide them in the choice of education and profession, which reduces the support in society and family for women to be in*

high management positions »³⁹.

Vertical segregation can be the result of discrimination in promotion possibilities and procedures driven by prejudice of what is considered a « normal » family division of labour—the male breadwinner model. It can take the form of assigning jobs entailing longer hours to male workers assuming that they are the main breadwinners⁴⁰. Women can still be perceived as not strong or competent enough for management positions. Hiring decisions for management positions tend to be taken by men. The lack of clear selection criteria for such positions can contribute to prejudice-based decisions⁴¹. Despite legal frameworks prohibiting discrimination, covert biases still exist, often restricting career paths⁴². Research shows that women are not always trusted to take on leading roles due to stereotypical views of what should be men's and women's roles, with women allowed on company boards mostly in a crisis period⁴³.

Lastly, research identifies the uneven allocation of tasks to women and men, which impacts on women's career progression and leads to a gender bonus gap. Gender differences in terms of the shares of women and men receiving bonuses and the generosity of the bonuses are amongst the largest across different remuneration sources⁴⁴.

Part-time work

§8 In 2018, almost a third of women in employment (31%) in the EU worked part-time, compared with 9% of men. The highest share of women working part-time is observed in the Netherlands (76%), compared with men (28%) and the lowest share of both women and men working part-time is found in Bulgaria (2% for both women and men)⁴⁵. Part-time employment is clearly feminised.

The proportion of part-time workers in total employment shows an upward trend in the EU, having risen from 18% in 2005 to 20% in 2015⁴⁶.

The relationship between part-time employment and gender equality is ambiguous. Part-time work can both contribute and be a barrier to gender equality. Part-time employment enables women to enter or stay in the labour market while ensuring a balance between work and family life. Part-time employment is associated with higher female employment participation⁴⁷. On the other hand, part-time employment heavily contributes to the gender pay gap.

§9 The reasons for high female part-time employment are multiple: stereotypes, lack of available services, precarity whereby some low-skilled jobs are predominantly part-time, personal « choice » and the low uptake of paternity or parental leave by fathers.

The lack of affordable and available childcare weighs on the decision of women to opt for flexibility in working arrangements⁴⁸. While part-time employment for family responsibilities can be a personal choice, it is driven by constraints, such as the lack of affordable, available or suitable childcare. Women are more likely to opt for part-time employment because of family responsibilities in part attributed to them by societal norms. In the age group 25-49, 55 % of women report working part-time for care or other family reasons, compared with 12 % of men⁴⁹. The higher uptake of part-time work by women is also linked to a lower involvement of men in care.

Part-time employment is more prevalent in low-paid and low-qualified occupations⁵⁰. It may be involuntary, workers being unable to find full time employment, but it can also result from the characteristics of an occupation (i.e. cleaning services). Involuntary part-time employment is more prevalent for men: it concerns 51 % of men compared with 25 % of women in the age group 25-49⁵¹. However, « voluntary » part-time work often results from constraints imposed by gendered norms, a lesser involvement of men in care and lack of available suitable, flexible and diverse child care options addressing the families' various needs, it does not represent fully a genuine free choice.

Part-time workers score systematically lower than full-time workers on use of skills, creativity, access to training and career prospects⁵²; indicating a higher level of precarity. In fact, part-time workers account for 29% of those reporting job insecurity⁵³.

Working part-time is associated with lower economic independence due to lower earnings, lower access to social security benefits and it feeds into the gender pension gap⁵⁴.

The motherhood penalty and the unequal division of care

§10 Research found that the earnings of women and men tend to evolve similarly until parenthood. Parenthood results in a « large, immediate and persistent drop » in earnings for women, while the effects on men's earnings are small and short-term⁵⁵. The penalty for women remains in the long term, as ten years after the child birth, women have not recovered the loss in earnings.

Paternity leave across the EU tends to be short and thus has a minimal impact on employed fathers after the birth of a child. Similarly, parental leave schemes vary in length, compensation and form across the EU. About a third of EU28 Member States offer parental leave rights aiming at their uptake by fathers. Despite policy advances, significant barriers exist, preventing the uptake of parental and paternity leave by fathers, ranging from low paid leave to lack of support to fathers taking leave and social norms about gender roles in childcare⁵⁶. The result is that about « 90 % of fathers across the EU do not use parental leave entitlements »⁵⁷. Leave as an individual, non-transferable right and financial incentives to ensure the uptake by fathers can contribute to a more equal sharing of care responsibilities.

Family policies affect the employment and earnings of women mostly in the short-term and cannot explain by themselves the long-term penalty. Gender norms are found to influence the impact of the motherhood penalty, with countries with conservative gender views having larger child penalties⁵⁸. Facilitating men's involvement in childcare can partly help ease the long-term motherhood penalty. Eliane Vogel-Polsky suggests establishing financial compensation for the reproductive work mostly born by women⁵⁹. A Study commissioned by a company offering small services estimated that stay-at-home mothers' work tasks including cleaning, care of children, are valued at a net salary of EUR 6400 per month using the rates of the services the company offers corresponding to the stay-at-home tasks⁶⁰. While it is not clear how robust this estimate is, it offers an insight of the value of care work and the need for families, employers and society as a whole to reflect on the important contribution of care work.

Discrimination

§11 Despite the legal framework, discrimination at work remains a contributing factor to the gender pay gap. The 2017 Special Eurobarometer found that almost seven in ten (69%) women believe to be paid less than men. One third of respondents (33%) reports that women in equivalent positions in their company or organisation are paid less than men⁶¹.

National research provides a dimmer picture. In a survey in England and Wales 71% of young women and 56% of young men report that women face discrimination in the workplace⁶². In Belgium, a study found that three in four women workers have faced at least one form of discrimination, prejudice or issue at work in relation to their pregnancy or maternity; 12% having been discriminated in terms of pay or career⁶³. A survey conducted in Ireland⁶⁴ showed that « women are almost twice as likely as men to experience discrimination at work, in terms of pay and promotion »⁶⁵.

Pay transparency measures requiring companies to provide information on the average salary of women and men in the same position have shown that companies are unaware of the gender pay gap within their own organisations. The analysis of the data reported by UK companies of at least 250 employees indicates 78% of them pay on average men more than women⁶⁶. Direct or indirect discrimination drives at least in part such gap.

Prejudice, bias and stereotypes

§12 As hinted above, gender stereotypes play an important role in the position of women in the labour market and, as a result, in their pay. Despite advances in legislation and a higher participation of women in the labour force in the last decades, prejudice and stereotypes remain prevalent in obvious or subtle ways.

Women remain the main care takers and have a higher share of unpaid tasks, such as household activities, with a clear impact on their career and pay. Employed women spend on average 22 hours per week on unpaid care and household activities, while men spend on average nine hours per week⁶⁷.

The fact that women have a higher share of care and household work is not gender-neutral and stems from social and cultural expectations. A study on gender narratives puts forth that stereotypes on the specific roles of women and men are constantly reported by all generations. Women are depicted as responsible for childcare and household tasks, whereas men are portrayed as breadwinners and heads of households. « This traditional male portrait conveys a position of power at the expense of women's subordination, in which men usually are the ones who make the rules and who make the decisions »⁶⁸.

Those gender norms influence women's career decisions, while discouraging men to take up leave or flexible arrangements to participate in childcare. They are supported by policies and socio-economic factors that make it easier for women to scale back their career ambitions.

Prejudice also plays a key role in pay discrimination and related career advancement beyond the parenthood penalty⁶⁹. Research has found that differences in promotion between men and women cannot be explained by women's behaviour, but rather by how they are perceived and treated⁷⁰.

Unconscious bias is inherent to being human. Everyone has bias, the issue is how aware people are of their biases and whether the systems of hiring and promotion ensure that biases do not come into play in the decisions⁷¹. The Implicit Association Test developed by Harvard researchers test association between for instance, men and career or women and family. The test has been taken by more than one million individuals online. Data show that 75% of test takers correlated men more strongly with career and women more strongly with family. Prejudice and bias must thus be directly addressed by policies⁷².

Women's empowerment

§13 Gender stereotypes are embedded in women's upbringing and behaviour, leading them to be less assertive than men. Research found that the outcome of wage negotiations tends to be lower for women than for men, widening the gender pay gap⁷³. In a national survey, 75% of young women reported not being confident to ask for a pay rise as compared with 59% of young men⁷⁴. In the same survey, « 49% of young women reported not being confident challenging their employers about the gender pay gap as compared with 30% of young men »⁷⁵.

Interestingly, research found that when it is not explicitly clear that wages are negotiable, men are more likely to negotiate than women. However, when the possibility to negotiate wage is explicitly mentioned, this difference disappears⁷⁶. As a result, the gender gap has the potential to be more pronounced in companies or organisation that leave wage negotiation ambiguous.

Preliminary conclusions

§14 In reviewing the root causes of inequalities, four main themes can be identified. First, the importance of the sharing of the care burden and the need for stronger paternity and parental leaves in order to enable fathers to take their share of the care burden. The unequal sharing of care burden contributes to both the horizontal and vertical segregation, part-time work and motherhood penalty. Second, stereotypes, prejudice and biases, whether obvious or unconscious, still play a significant role in the position of women in the labour market, segregation, career progress and their pay. Thirdly, discrimination, whether direct or indirect, continues to contribute to the gender pay gap. Lastly, vertical and horizontal segregation of the labour market.

The current European legal toolbox

§15 Equal treatment on the ground of sex became the first protected ground of non-discrimination under EU legislation. Equal pay is a longstanding principle (and right) under EU law, which has been the subject of abundant case-law. This section reviews the main legal tools directly addressing equal pay and assesses whether they tackle directly one of the four main root causes identified as contributing to the gender pay gap: unequal sharing of care burden, stereotypes, segregation and (direct and indirect) discrimination.

Treaty Article 157

§16 The principle (and right) of equal pay for equal work is a fundamental principle of EU law, which has been established by the founding EU Treaty—the Treaty of Rome.⁷⁷ It is now reflected under Article 157 of the Treaty on the Functioning of the European Union (TFEU). The provision sets the obligation for each Member State to ensure « that the principle of equal pay for male and female workers for equal work or work of equal value is applied ». The provision is broad encompassing. The inclusion of « work of equal value » means that the equal pay principle has the potential to apply beyond the same employer and to tackle horizontal segregation. While the focus of the Treaty provision is on discrimination, it can form the legal basis for actions beyond discrimination. Considering that discrimination is only one of the causes of difference in pay, meaningful action in the area must go beyond addressing direct discrimination and tackle the other underlying cause of the gender pay gap.

As noted by Eliane Vogel-Polsky⁷⁸, the obligation set in the Treaty should have been implemented by Member States as early as in 1961. However, Member States showed resistance in its implementation. In particular, economic concerns for the implications for employers and the State of equalising pay, together with a lack of political commitment, made progress slow or impossible.

In fact, equal pay was not realised by the end of 1961, leading to what Eliane Vogel-Polsky coined as a « true coup » (« veritable coup de force »)⁷⁹. Member States adopted a resolution allowing to continue the realisation of EU economic integration despite the lack of implementation of the equal pay principle, which was further delayed. Eliane Vogel-Polsky qualified the resolution as a pure violation of the Treaty. It is not an understatement to conclude that the implementation of Article 157 (then 119) TFEU knew a difficult start.

Historically, Article 119(now Article 154) had been included in the Treaty of Rome to meet France's concerns about the competitive disadvantage for Member States implementing equal pay⁸⁰. The provision had thus a pure economic purpose. The CJEU recognised, in the famous case *Defrenne II*, championed by Eliane Vogel-Polsky, that Article 157 had a double aim: economic and social. According to the Court, the provision forms part of the social objectives of the EU to ensure social progress and improvement of living and working conditions⁸¹. In a later case, *the CJEU judged that the economic aim to eliminate distortions of competition is secondary to the social aim, « which constitutes the expression of a fundamental human right »*⁸².

*The Court has not only recognised the right to non-discrimination on the grounds of sex as a fundamental human right*⁸³, *but also ruled that fundamental rights take*

precedence over economic rationale.

At a time where economic arguments for gender equality⁸⁴ have to be made in order to be relevant on the EU policy agenda, the ruling of the CJEU serves as a reminder that economic arguments should not prevail over fundamental rights considerations.

*The CJEU further clarified in the *Defrenne II* case that « the complete implementation of the aim pursued by article 119, by means of the elimination of all discrimination, direct or indirect, between men and women workers, not only as regards individual undertakings but also entire branches of industry and even of the economic system as a whole, may in certain cases involve the elaboration of criteria whose implementation necessitates the taking of appropriate measures at community and national level »⁸⁵.*

*The Court appears to lean towards an obligation of results (*obligation de résultats*) to eliminate all forms of discrimination by taking all appropriate actions, beyond a mere obligation of conduct (*obligation de moyens*) to legally prohibit pay discrimination at employers' level.*

In the same case, the CJEU ruled that Article 157 TFEU had both a vertical and horizontal direct effect. As a result, individuals can rely upon the Treaty provision before national courts against both the State and private employers⁸⁶.

*The Treaty also allows Member States to maintain and adopt positive actions with « a view to ensuring full equality in practice between men and women in working life ». Positive measures aim to bring disadvantaged individuals to the same level as the main group in order to provide them with equal opportunities. It acknowledges that equality before law is not sufficient in order to ensure equality in practice. There is a need to provide specific advantages to redress gender imbalance and adopt measures to prevent or compensate for disadvantages originating from historical norms and stereotypes. While the Treaty allows for such measures, it does not prescribe nor encourage their adoption. To the regret of *Eliane Vogel-Polsky*, the Treaty does not include in the notion of the fundamental right to equality between women and men the adoption and implementation of positive actions aiming at correcting longstanding inequalities⁸⁷.*

The Treaty provision forms an important basis for adopting legislative or policy action to, in its own words, « ensuring full equality in practice between men and women in working life ». It can be used as legal basis for a wide range of measures. However, the provision falls short from a legal obligation to adopt positive action to address the longstanding inequality and would benefit from explicitly acknowledging other factors contributing to inequality beyond direct discrimination.

The EU Charter

§17 The Charter of Fundamental Rights of the European Union (EU Charter) establishes in Article 23(1) the duty to achieve equality between women and men « in all areas, including employment, work and pay ». In its second paragraph, Article 23 mirrors Article 157(4) TFEU in acknowledging that equality may require the « maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex ».

Article 23(1) establishes a positive obligation upon the EU itself and its Member States to ensure equality between women and men in all areas. The duty goes beyond a prohibition of sex discrimination, which is established in Article 21, and suggests an obligation of results. In particular, the wording « in all areas » points to an all-encompassing requirement of equality rather than de facto equal treatment in specific areas.

It is noteworthy that the Charter reversed the order of words to place « women » before « men », as opposed to the TFEU and secondary EU legislation, which opted for the equality of « men and women ». This symbolic ordering of words appears to hint towards a recognition that women are on the receiving end of inequality and that there is a need to place them first in the measures aiming at addressing inequality⁸⁸.

Article 23(2) allows for positive action in favour of the underrepresented sex. It applies to measures establishing preferences for women or men. The wording is modelled on Article 157(4) TFEU and the associated CJEU case-law, whereby women can only profit from a preferential treatment « if they were assessed as equally qualified with a man in a male-dominated environment »⁸⁹.

The EU Charter Article 23(2) specifically refers to « the principle of equality » rather than to a right to equality. This is also the case of Article TFEU which refers to « the principle of equal pay ». A principle, while giving rise to obligations upon the EU institutions and its Member States, is not directly enforceable as compared to a fundamental right⁹⁰. Indeed, Article 52(5) of the EU Charter specifies that principles are « judicially cognisable only in the interpretation of such acts and in the ruling on their legality ». This appears at odds with the CJEU having recognised equal pay as a fundamental right directly enforceable. EU law remains shy to fully recognise equal pay as a right, despite the CJEU case-law.

The EU Charter applies to the EU institutions, bodies, offices and agencies as well as to the Member States to the extent they are implementing EU law. The CJEU understands the scope of application of the EU Charter broadly, whereby it is sufficient that a national law aims at achieving the goals of a Directive in order to

qualify as implementing EU law. In such case, the Charter applies in horizontal relations between individuals⁹¹.

Beyond Article 23, the Charter also prohibits discrimination on the ground of sex, among others, (Article 21), guarantees the protection of the family (Articles 7 and 9), the right to protection from dismissal due to maternity and the right to paid maternity leave and to parental leave (Article 33).

European Pillar of Social Rights

§18 Gender equality is further reaffirmed in the European Pillar of Social Rights (EPSR). The EPSR, proclaimed on 17 November 2017, aims at guiding EU actions towards « delivering new and more effective rights for citizens »⁹². It is a soft-law instrument. While not legally binding, it forms part of legal standards to be drawn upon in interpreting EU law.

The EPSR not only reiterates the positive obligation to ensure gender equality, it also reaffirms the right to equal pay for work of equal value and establishes work-life balance rights.

In its second principle, in addition to requiring that equality between women and men must be ensured, the EPSR enjoins to also foster equality in all areas. Principle three, on equal treatment on the ground of gender, among others, states that equal opportunity of underrepresented groups must be fostered.

Principle two specifies that equality should be ensured and fostered in participation in the labour market, terms and conditions of employment as well as career progression, recognising the different facets of inequality.

Lastly, the EPSR principle nine affirms the right to leave, flexible working arrangements and access to care services. The EPSR acknowledges by this principle the role of the uneven distribution of care responsibilities in gender inequality by highlighting the need to ensure that both women and men access leaves to fulfil care responsibilities in a balanced manner.

In line with the EU Charter, the EPSR placed « women » first in its wording, acknowledging that women have predominantly suffered from socio-economic inequalities which needs to be specifically addressed and acknowledged. The EPSR addresses two of the main root causes: discrimination and unequal burden of care. The need to adopt measures and establish systems to tackle segregation and the role of stereotypes and biases remains yet to be explicitly acknowledged and addressed by this instrument.

The implementation of the EPSR principles relies on actions from the EU, Member States and other actors, such as social partners.

Directive 2006/54/EC

§19 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 occupation⁹³ has been adopted on the legal basis of Article 157. Directive 2006/54/EC replaced a number of pre-existing directives implementing equal pay and equal treatment (including Directive 75/117/EC, the first directive to address equal pay), in what is qualified as mostly a consolidation exercise rather than an innovative one⁹⁴.

The Directive contains provisions to implement the equality principle in relation to employment, working conditions, including pay and occupational social security schemes. The Directive aims to ensure both equal treatment and equal opportunities, thus going beyond the formal prohibition of discrimination.

Equal pay is established under Article 4 of the Directive, which requires the elimination of direct and indirect discrimination based on sex regarding all aspects and conditions of remuneration for the same work or work of equal value. In addition, the Directive provides that job classification systems must be gender-neutral, i.e. based on the same criteria for both women and men.

The Directive reflects various aspects dealt by the CJEU case-law, including the notion of equal pay for work of equal value, reversed burden of proof and the requirement for effective, proportionate and dissuasive sanctions. While the Directive encourages the promotion of social dialogues for the implementation of equal pay, the Directive provisions are directed mostly at the elimination of discrimination and providing victims with adequate access to justice.

A decade after its adoption, the Directive, while effectively transposed in national legislation, encountered difficulties in its implementation. A report on the enforcement of equal pay identified several aspects where judicial enforcement of equal pay was problematic across the EU: difficulties in producing evidence due to the lack of pay transparency; lack of clarity of what constitutes a sufficient indication of discrimination for the burden of proof to shift; too short limitation periods; inability to bring class action; costs of proceedings; lack of dissuasive sanctions; fear of victimisation and lack of sensitivity to gender pay discrimination from judicial actors⁹⁵.

This instrument only addresses one of the main causes of the gender pay gap: discrimination. While its Article 4 refers to equal pay for work of equal value, which guarantees equality beyond the same employer but also across professions or jobs engaging similar skills, education, level of responsibilities and so on. The Directive does not, however, provide any indication as to the implementation. The

principle of equal work for equal value could enable workers in segregated professions to use, for instance, a hypothetical comparator (a comparable worker of the opposite sex, who is paid better for doing equal work or work of equal value) or statistics to claim for the equal pay. However, the legislation does not set parameters to implement of the concept of work of equal value.

Recommendation 2014/124/EU on pay transparency

§20 In 2014, the Commission adopted a Recommendation⁹⁶ aiming at assisting Member States in a better and more effective implementation of the equal pay principle through four main possible actions: 1) a right of employees to obtain information on pay levels; 2) a pay reporting duty for employers with at least 50 employees to provide the average remuneration by category of employees or position, broken down by gender; 3) pay audits for companies with at least 250 employees to analyse the proportion of women and men in each position and pay differentials on the grounds of gender; 4) to ensure that equal pay, including pay audits, is discussed at the level of collective bargaining.

The Recommendation is a soft law instrument and thus not legally binding. While Member States are encouraged to take action based on the Recommendation and to report back to the Commission on its implementation, they are not required to do so. If they decide to implement the Recommendation, they can choose to implement one or more of the four measures. As a result, a consistent application across the EU was not to be expected. In addition, the measures contained in the instrument are broadly described, which, in practice, gives a wide margin of appreciation to Member States as to the form those measures may take.

In 2018, 12 out of 28 EU Member States had implemented at least one of the four pay transparency measures⁹⁷. The European network of legal experts on gender equality reports a diversity of actions and practices with various objectives⁹⁸. Pay reports have been successfully adopted in a number of countries. However, in practice, there is a risk that they become a formality between employers and works councils, without genuine assessment of the information they contain and without sufficient incentive for employers to act upon their findings⁹⁹.

Gender pay discrimination is driven by several factors, some of which are subtle and hidden mechanisms, in particular as to how biases comes into play in hiring or promotion decisions. Pay transparency measures aim at gathering the necessary information to identify pay discrimination patterns. However, in order to be effective, those measures require that pay structures and systems are already in place and that data is collected. If wage is set on an individual level rather than company or sectoral level, pay transparency measures may prove inefficient¹⁰⁰.

The Recommendation is an attempt at tackling the gender pay gap issue from a new angle. It seeks to address the difficulties to gain access to pay information, which is vital to identify pay discrimination, to sensitise employers to review their pay structure and to identify potential need for establishing systems that would prevent biases to play a role in decisions linked to pay. However, the instrument has a strong weakness in that it is not legally binding. As Eliane Vogel-Polsky

observed: « soft law, law that is not really law, [...] proposes some orientations to governments but without providing any guarantee or possibility of rigorously imposing the proposals »¹⁰¹. As a result of the soft-law approach, the implementation of the Recommendation is patchy across the EU and the effectiveness not yet clear.

Work-life balance package

§21 The European Commission adopted a so-called « work-life package » in recognition of the need to address the gender pay gap and women's underrepresentation in employment through measures directly addressing one of its causes: a better share of caring responsibilities¹⁰². The package comprises of a combination of policy and legal measures, which includes a Directive on work-life balance for parents and carers, which is currently discussed before the Council of the EU¹⁰³. The Directive introduces, among others, a paternity leave of at least 10 working days compensated at least at the level of sick pay; compensated parental leave of four months, including two months that are non-transferable two months as well as a right to request flexible working arrangements to all working parents. EU Members States must transpose the Directive by 2 August 2022.

The Directive represents a step forwards towards supporting women's labour participation as well as enabling men to take on a greater share of care responsibilities. This package represents a recognition that pure equality before the law is not sufficient to address the unbalance between women and men. This instrument recognises the role of men in promoting gender equality and acknowledges the different needs of women, i.e. flexible work arrangements. However, the Directive only grants 10 days paternity leave and does not guarantee that parental leave is compensated at least at the level of sick pay. Measures to enable the involvement of fathers in the care of their children are crucial to addressing the unequal burden of care. Research shows that paternal leave take up leads to a significant more equal share of family-related work with their partner¹⁰⁴.

Conclusion: Rethinking the legal toolbox

§22 The right to equal pay is a long-standing EU fundamental right. As described above, legal measures have been adopted to tackle the resulting gender pay gap, mostly based on the principle of equal treatment, equal opportunity and non-discrimination. Yet, the measures have yet to fully address the root causes of the pay gap, resulting from stereotypes, labour market segregation, unequal burden of care and discrimination.

Eliane Vogel-Polsky viewed the EU Treaty and its derived legal framework as an avenue to advance women's rights, which she successfully used in the *Defrenne* cases. She was also an advocate for the EU Treaty to go further in the recognition of an autonomous right to equality, which implied positive obligations upon Member States addressing indirect and subtle inequalities resulting from social gender relations¹⁰⁵.

While equal treatment and equal opportunities legislation forms a necessary basis for ensuring equal pay, the root causes of the gender pay gap are complex and result from a historical socio-economic imbalance between women and men, together with persistent underlying stereotypes and bias. Gender neutral rules do little to address those persistent social norms which contribute to the gender pay gap. The « negative » principle of non-discrimination cannot create the necessary positive force required to eliminate the indirect inequalities women face¹⁰⁶.

The CJEU has, in fact, recognised that « the mere fact that female and male candidates are equally qualified does not mean that they have the same chances »¹⁰⁷. De facto, egalitarian equality does not result in true equality.

This discrepancy between the recognition of equal pay as a fundamental right and the reality of the gender pay gap points to a failure of the European legal and policy arsenal in the area. There is a need to require from the EU and its Member States an obligation of results. As Eliane Vogel-Polsky stated, the equality of women and men « imposes an obligation of results upon all political and social institutions, i.e. it consists of an « obligation of conduct » under which public authorities (executive, administrative, legislative and judicial) are bound to adopt binding measures to achieve it »¹⁰⁸.

In recent years, EU law has attempted to adopt a new approach going beyond the non-discrimination framework, such as the Pay Transparency Recommendation. However, those attempts fall short of an obligation of results.

§23 Additional measures are needed to address the various roots of gender pay discrimination. Eliane Vogel-Polsky pointed to the need to combat the sources of

inequality through three dimensions « the political, the sociological and the legal—and act in accordance »¹⁰⁹.

The work-life balance Directive represents a first step aiming at correcting the disproportionate burden of care that falls on women and their underrepresentation. The provision of leave and flexible work arrangements are vital to support individuals « to navigate between changing needs over the life course [...] and improve gender equality at work and in life between men and women »¹¹⁰. European policies must be designed to support both women and men to better reconcile work and family life. Yet, EU policies must also aim at redressing the unequal position of women, recognising the specific barriers women face in the labour market which place them at a significant disadvantage.

As Eliane Vogel Polsky observed¹¹¹, equality must be contextual, as opposed to formal legal equality. « Equality of opportunities does not guarantee equality of results. On the contrary, it allows the justification of functional inequalities »¹¹². The EU must, thus, develop an arsenal of legal measures counteracting indirect and socially constructed inequalities.

The aim of those measures should not be the assimilation of women to men¹¹³. Rather, measures targeting the gender pay gap should aim « at enhancing women’s capability of governing their own lives in interrelation with others », rather than assimilating to men’s norms¹¹⁴. EU policies must acknowledge the different needs of women and men as well as the role of gender in society.

The EU equal pay legal toolbox must include measures targeting the specific inequalities women face, recognising the different needs women have. Positive actions should be central in those sets of measures, in particular to address the vertical and horizontal segregation of women workers. Positive actions towards eliminating the gender pay gap should recognise that half of the population is at disadvantage and that their position in society must be rectified.

The CJEU, while having ruled in favour of positive actions, has repeatedly considered positive action as a derogation to the principle of equal treatment, which can only be allowed in exceptional cases and should not infringe on the individual right to equal treatment of men¹¹⁵.

Yet, positive action should be considered as an instrument to eliminate inequalities, rather than a privilege or an advantage in favour of women. As observed by Eliane Vogel-Polsky, positive actions should be « a foundation on which democracy [...] is built » and address the inequalities and prejudices which have so far worked in favour of men¹¹⁶. This approach is in line with Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) requirement, whereby State Parties must adopt special measures aimed at

accelerating de facto equality between men and women¹¹⁷. Positive action measures are tools that can address some of the root causes of the gender pay gap, such as vertical and horizontal segregation and discrimination. Ensuring a minimum representation of women in various industries and management positions can help break stereotypes and biases by normalising having women in positions previously seen as attributed to men. To be effective, positive actions must be accompanied by sanctions and monitoring in order to be meaningful.

Addressing the gender pay gap inequalities also require establishing parameters to facilitating the recognition and implementation of the concept of 'equal pay for work of equal value'. EU law should not only adopt benchmarks for the implementation of the right, it should also make it possible for women to claim before courts through the use of hypothetical comparators and statistics that their pay is not equal as compared to work of equal value carried out under other employers or sectors. Such measures are essential to tackle horizontal segregation, but also to bring the Treaty rights into practice.

Directive 2019/1158/EU establishes an individual right to flexible working arrangements for workers who are parents, or carer of children up to at least eight years old. The duration of such flexible working arrangements may however be subject to a reasonable limitation. Flexibility such as remote work and flexible working hours are essential to ensure that parents can combine their work and care responsibilities. Women tend to choose careers in which flexible work arrangements are the norms in order to be able to combine their care responsibilities with work. Expanding the right to flexible care arrangements across sectors can not only make more careers and sectors attractive to women, but also enable fathers to be more involved in care activities.

Stereotypes and biases may be the root cause of equal pay which may appear less fit for EU law intervention. Yet, EU law can adopt requirements for the establishment of hiring and promotion mechanisms that lessen the risk for stereotypes and biases come into play. Those can include hiring and promotion decisions made by more than one person, use of anonymised application, criteria-based hiring and promotion, training on biases awareness, etc. Employers would be free to opt the systems which work best for their work environment but would be under the obligation to ensure such mechanisms are in place.

§24 In conclusion, the EU equal pay legal toolbox, while having established the foundation for addressing pay discrimination, is yet to develop a comprehensive arsenal required for addressing the various and complex underlying causes of the gender pay gap. In order to achieve this, a new approach is required. An approach which fully recognises the different positions of women and men in society and the need to go beyond an individual right to equality. As argued by Eliane Vogel-Polsky, the right to equality must be a collective right¹¹⁸. Only within the

understanding of equal pay as a collective right can effective positive actions be set up.

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