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

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Executive summary

1. Introduction

Equal pay for men and women for work of equal value has been a concern of the European Community from its very beginning. The principle was already laid down in the original EEC Treaty of 1957, in Article 119.[1] An important impetus for bringing this principle into practice was provided by Directive 75/117EEC (equal pay)[2] and by the case law of the ECJ. In particular, the ECJ's finding that Article 119 is directly effective[3] proved to be a powerful tool for enforcing this principle in national courts, doubtless also with considerable preventive effects. At the national level, the Community law principle of equal pay is, in general, also fully reflected in the legislation of the Member States and the EEA countries.

Despite all this, the difference between the remuneration of male and female employees remains one of the great concerns in the area of gender equality, and an important subject on the European social agenda. According to the European Commission's 'Report on equality between women and men 2006', women in the EU earn on average 15% less than men, and progress has been slow in closing the gender pay gap.[4] Not surprisingly, equal pay is a priority mentioned in the 'Roadmap for Gender Equality'. At an international conference - 'Closing the Gender Pay Gap' - organised by the Austrian presidency on 22 May 2006 in Brussels,[5] the Commission announced its intention to present a Communication on the gender pay gap in 2007.[6]

It is against this background of the growing political importance of equal pay that the Commission's *Network of legal experts in the fields of employment, social affairs and equality between men and women* has prepared the present report on 'Legal aspects of the gender pay gap'. The aim of the report was not so much to provide a detailed overview of the national equal pay legislation,[7] 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. In this respect, it is particularly important to clearly differentiate between pay discrimination on the one hand, and pay discrepancies based on factors that have nothing to do with discrimination on the other hand. The country reports aim to reflect where there is pay discrimination in the strictly legal sense and where pay discrepancies are based on other factors. The law is perhaps most effective in areas where pay discrimination exists. However, as other factors also contribute to pay differences, most of the reports also address broader - not necessarily lawmaking – strategies.[8]

2. Equal pay in national legislation and in collective agreements

As was already observed above, the Community law principle of equal pay is in general well-implemented in national legislation. It is often safeguarded at both Constitutional and legislative level, either as a part of general labour law or as a provision in specific anti-discrimination legislation. As a rule, both direct and indirect discrimination are explicitly covered. Similarly, the requirement of 'equal pay for similar work or work of equal value' is often laid down in the law. In brief, the 'letter of the law' is not the problem, but rather its application and enforcement, as will be discussed below.

In addition to legislation, in most European countries collective bargaining and the resulting collective agreements are an important - if not the major - source of rights and obligations in the employment relationship. As an exception to this rule, there are certain States in which collective bargaining seems to be on the decline or where collective bargaining, and therefore also collective agreements, play a very limited role. It seems that, particularly in some of the central and eastern European countries,

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[1] Now Article 141 EC Treaty.
[2] 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 [1975] L 45/19. This Directive has now been replaced by Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), OJ [2006] L204/23.
[3] Case 43/75 *Defrenne II* [1976] ECR 455.
[4] See at http://www.europa.eu.int/comm/employment_social/emplweb/news/news_en.cfm?id=129.
[5] See at http://www.bmgf.gv.at/cms/site/detail.htm?thema=CH0331&doc=CMS1149154836800.
[6] The Commission already issued a Communication in 1996, concerning 'A code of practice on the implementation of equal pay for work of equal value for women and men', COM(96) 336 final.
[7] A general overview was presented in the Network's Bulletin 1/2004, available at http://ec.europa.eu/employment_social/gender_equality/legislation/bulletin_en.html.
[8] The points that guided the drafting of the national reports are reproduced on page 97 of this report.

much emphasis is placed on individual freedom, including the freedom of contract, rather than on collective bargaining.

Since collective agreements are significant sources of labour law, they obviously also address the question of pay (and may even contain pay scales), and often combine this question with the issue of equal pay for men and women. In other cases, pay equality is considered to be adequately covered by the general provisions on gender equality in the collective agreement.

As a rule, collective agreements are concluded at various levels, such as sectoral (the level of the professional branch), plant or local. Agreements at sectoral level are generally the most important ones. In many countries, they can be declared generally applicable, i.e. valid also for those who are not party to the agreement as such, but who work in the sector concerned. The major collective agreements often must be registered with a certain national authority (e.g. courts, Ministry of Social Affairs, Ministry of Employment and Labour, Labour Inspectorates etc.) and are also published. This is often different for plant and local agreements, which are less easily accessible.

Given the central role that social partners play in labour relations, it is not surprising that Community gender equality directives refer explicitly to agreements between social partners as mechanisms to guarantee gender equality and as tools to promote it. However, it must be observed that the role that social partners and trade unions in particular play in the area of equal treatment of men and women, including equal pay, differs quite strongly from country to country. On the one hand, there are countries where gender equality and equal pay are no priority at all or a very low priority. In other countries, on the other hand, social partners take or are obliged to take measures that aim at the realisation of gender equality, including equal pay. In practice, many situations fall between these two extremes.

3. The concept of the gender pay gap

The gender pay gap is a rather loose concept, which has no specific meaning in some countries. In many countries, however, there exists an 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).

A further differentiation that is often made is that of distinguishing between the uncorrected (absolute) pay gap and the corrected (net) pay gap.

The absolute pay gap comprises both potential pay discrimination and pay discrepancies based on factors that have nothing to do with discrimination (in the technical sense of the term), but which may explain at least a 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. Interestingly, it would seem that women are more readily prepared to accept less pay and to take up lower-paid jobs than men are. All these factors are indeed interrelated.

It is also noteworthy that special categories of contracts, which may be created in order to fight unemployment, are often entered into by young workers and women. Yet those contracts may allow for special provisions and especially lower wages. The same holds true *mutatis mutandis* for a more flexible application of fixed-term contracts

As to the corrected pay gap, it is assumed that it may be explained partly by pay discrimination. It is difficult to find any explanation whatsoever for the remaining part of the gap.

4. Efforts to narrow down the pay gap: some good practices

Despite the provisions in legislation and the visible efforts in several collective agreements to provide for pay equality, the 'gender pay gap' is persistently present and, as was mentioned above, does not really appear to be diminishing – on the contrary, it seems to be widening again in certain respects. Parallel to the attention devoted to this matter in the context of the EU, the gender pay gap is also a matter of concern at national level for many Member States and for the EEA countries.

Above, it was already briefly pointed out that a considerable part of the pay gap can be explained by other factors than pure discrimination, and that these factors are closely related to the various roles women and men play or are supposed to play in society. Considered against that background, it is not difficult to understand that the question of how to reduce wage disparities between men and women goes hand in glove with another priority of both the European Commission and of many national governments or social partners, namely the issue of the reconciliation of family life and work through the adoption of flexible working conditions and parental arrangements. A special point for attention in this matter is the remuneration during and after maternity leave, and whether the time spent on leave – maternity or parental – is taken into account for the purposes of promotion and pay increases.

In relation to the question of how to reduce the gender pay gap at the level of pay as such, some examples of good practices, as developed in the countries involved in the present report, can be given. The practices relate to legislative measures that aim at inducing social partners to include the issue of equal pay in collective and other agreements, to collective or other agreements that aim at reducing the gender gap themselves, and to a few other practices as well. However, it must also be noted that in some countries, no good practices can be identified.

The legislator has laid down obligations for the social partners in a few countries. Collective agreements must at least include provisions on equal pay. In some cases, the obligation goes even further: the obligatory annual negotiation on wages must also include a chapter dealing with equality, and the social partners must find ways of reducing gender wage disparities.[9]

Another tool for promoting equal pay is the obligation for employers to monitor pay practices in the workplace and to prepare annual surveys, analysis and plans of action for equal pay. It would seem that obligations to prepare these pay structure surveys or to produce gender-specific wage statistics for the enterprise are particularly useful in discovering pay discrimination, and they are therefore obligatory; discrimination can be identified on the basis of these pay reviews, and policies to eliminate the pay gap can subsequently be developed. In some Member States, this is not obligatory, but equal pay reviews are carried out on a voluntary basis. The incentive for this can be, for instance, the label 'exemplar employer'. However, some experts do not believe in voluntary action. They suggest that only obliging employers to introduce and publish pay audits etc., together with plans for the reduction of the pay gaps in their workforce, can considerably improve the situation.

From the reports, it also transpires that employers or social partners who are willing to work to promote equal pay often need help in the analysis of the situation and subsequently in drawing up concrete goals and steps to reduce the gender pay gap. They can be assisted in their attempts in various respects.

In some countries, there exist rules, guidelines or other tools that provide criteria for a neutral assessment of the value of the work. More efficient and gender-neutral job evaluations may also be developed by the companies themselves, often through cooperating in a project. Once there are new and more objective criteria to assess the value of work, the work may be re-evaluated.

Action programmes for equal pay may also have interesting results, providing employers with tools for establishing whether the pay system is gender-neutral or with tools that help individual workers to establish potential discrimination in her or his case. In one Member State, the Netherlands, several ICT tools have been developed for these purposes.

In two Member States an 'equal pay force' was set up. Such a task force may, for instance, increase the awareness of equal pay problems, rules and tools, as well as stimulating the education of social

[9] This is one of the central features of the recent French Act on equal pay between men and women of 23 March 2006.

partners and members of work councils or doing independent research and making recommendations on how to close the pay gap.

Another option is to examine collective agreements more systematically for compliance with the principle of equal pay. Similarly, close scrutiny of widely used job evaluation schemes may help to eradicate (indirect) pay discrimination that still exists in them. This type of investigation may be done by the companies or branches themselves, but also by equality bodies or labour inspectorates. This last topic brings us to the next issue, namely whether law is of any use in tackling the gender pay gap.

5. The role of law

Most of the experts seem to agree that the gender pay gap is primarily a socio-economic problem that will by no means be resolved by legal rules only. However, the experts do envisage a role to be played by the law, primarily by providing a framework for all the actors involved. Indeed, by explicitly prohibiting direct and indirect pay discrimination and enforcing this prohibition effectively, and by imposing obligations concerning equal pay upon the social partners and employers in particular, law may be a useful tool.

As was explained above, such a legal framework already exists and, in the view of many experts, it is capable as such of being used to address the issue of pay discrimination. In certain aspects (and in certain countries), the legal framework might be further reinforced, for instance by laying down the obligation for employers to introduce and publish pay audits, together with plans for the reduction of the pay gaps in their workforce that are identified in such audits.

The main problem with law is not so much what it states at the abstract level but rather how it is put in practice. That means that there is a problem in detecting the discriminations and in effectively enforcing the equal pay rules. In other terms, there is another gap, one between the law in the books and law in everyday reality.

On the level of detection of non-compliance, it would seem that, while instances of direct discrimination in collective agreements have by now been almost entirely abolished, there still appear to be instances of indirect discrimination, in particular in the area of equal pay. Here, indirect discrimination often originates in - often rather opaque - job classification schemes or in the less favourable treatment of part-time workers and workers with other a-typical work arrangements. Another source of indirect discrimination seems to lie in extra payments/bonuses, from which male workers usually benefit more than female workers, for instance because female workers take leaves of absence more often. Further scrutiny of collective agreements and applicable pay scales and job evaluation schemes seems necessary.

There is, as a rule, no systematic and not even occasional monitoring or assessment of collective agreements by the public authorities, such monitoring or assessment being left to the social partners themselves. This lack of state supervision is directly connected with the deeply cherished and in some cases constitutionally protected autonomy of social partners. However, there is no doubt that collective agreements and social partners must also operate within the limits of the law[10] and cannot hide behind their autonomy.

A specific problem in the field of law is the individual nature of equal pay litigation. Only a few cases on equal pay are brought before the courts every year (and a few more before the competent equality bodies) in the majority of the countries involved. Although litigation as such can only contribute to diminishing the pay gap in a modest way, the fact is that a perception among employers that equal pay litigation is increasing may help to enforce compliance with the law.

There are a number of limitations or obstacles to equal pay claims as they can be brought in the Member States. One of them is the problem of proof, briefly discussed in the next Section. Another one, which is closely related, is that the alleged victim must often look for a comparison. The comparison is, in principle, restricted to the workplace or company where the individual employer works, or to the same collective agreement. A comparison across sectors and undertakings is, as a rule, not permitted.[11] There seems to be a tendency to use a broader scope of comparison for equal

[10] And also within the limits of Community law. On this, see Case 184/49 *Nimz* [1991] ECR I-291.
[11] See also Case C-320/00 *Lawrence* [2002] ECR I-7325 and Case C-256/01 *Allonby* [2004] ECR I-873 where the

pay purposes only in a few countries. Arguably, under Article 141 EC, the comparison should be broader and should not be restricted to, for instance, the same collective agreement. As the ECJ indicated in Case C-381/99 *Brunnhofer*, "the general indications provided in the collective agreement must in any event be corroborated by precise and concrete factors based on the activities actually performed by the employees concerned" and it is for the national court "to determine whether, in the light of the *actual nature of the activities* carried out by those concerned, equal value can be attributed to them"[12] (emphasis added). Problems of comparison are also reinforced by job segregation and the existence of trade unions consisting of only or mainly women, and therefore the existence of separate collective agreements in which pay is set.

In any case, it is suggested that we need a mechanism that may help to bridge the existing pay gap between male and female employment, that does not only concern individual cases. This would require, *inter alia*, a more 'collective approach' to pay differences and - structural - discrimination practices. Here the - more or less autonomous - role played by equality bodies and labour inspectorates could be further enhanced, enabling them to monitor and, where possible, enforce more effectively and more independently the application of gender equality legislation. Similarly, much could be gained by allowing social partners and, preferably, independent actors to apply for a declaratory judgement in case of discriminatory clauses in a collective agreement. In this context, the role to be played by associations and organisations that may act on behalf of the alleged (group of) victims or at least support them in their claims is indeed vital. Unfortunately, such mechanisms are still rather exceptional.[13]

6. Proof of unequal pay

Insofar as a part of the pay gap can be explained by pay discrimination, which can be tackled by using the law, such discrimination has to be established first. This is where a number of problems arise. One of the problematic issues is the composition of pay: pay systems consist of several different components of remuneration. In particular, collective agreements often lay down the minimum or basic salary, but the rest of the pay components is negotiated on an individual basis or is a matter left to the assessment of the employer; an assessment that may be rather discretionary.

Obviously, all the components of pay, i.e. the job- and task-specific components, the components based on the assessment of individual performance and competence, and the result-based components, must be equal for women and men. However, there is often no transparency in this respect and it is therefore difficult to check whether discrimination occurs. It would seem that in the majority of the countries concerned, individual income is treated as being confidential.

A shift in the burden of proof may help in this respect. For instance, it is a well-established matter of Community law that adjustments to national rules on the burden of proof may be required in special cases, where such adjustments are necessary for the effective implementation of the principle of equality. Thus, where an undertaking applies a system of pay that is totally lacking in transparency, and a female worker establishes, in relation to a relatively large number of employees, that the average pay for women is less than that for men, it is then for the employer to prove that his practice in the matter of wages is not discriminatory.[14]

However, it is often difficult to establish even a *prima facie* case. Interestingly, the involvement of equality bodies or labour inspectorates may help in this respect, as they may oblige the employer to submit data that are otherwise not accessible to the employees. A device that also may be useful is the questionnaire procedure provided for under the Equal Pay Act in the United Kingdom: the

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ECJ decided that, for the purposes of application of Article 141 EC in individual litigation, the alleged discrimination must have its origin in one single source.

[12] Case C-381/99 *Brunnhofer* [2001] ECR I-4961.

[13] See, however, on defence of rights by associations having a legitimate interest that also explicitly applies in the area of equal pay, Article 17 (2) 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 [2006] L204/23.

[14] Case 109/88 *Danfoss* [1998] ECJ 3199. On proof see also Case C-127/92 *Enderby* [1993] ECR I-5535 and Case C-400/93 *Royal Copenhagen* [1995] ECR I-1275. Cf. on proof Directive 97/80/EC on the burden of proof in cases of discrimination based on sex, OJ [1998] L 14/20. The rules on the burden of proof are now included in Article 19 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 [2006] L204/23.

employees may ask the employer questions about various aspects of their pay whenever they feel underpaid and believe that they are discriminated against. The employer is under an obligation to provide answers within eight days.

Another method that might alleviate these problems is the introduction of gender-specific wage statistics, upon which an individual claimant may rely. Not only is the collection of data for the purposes of these statistics vital, but employers should also be required to disclose those gender-specific wage statistics in order to make this information available for purposes of comparison and evidence.

A final remark of this summary concerns the following: all the observations and suggestions made above, in relation to the obligations of the employers and social partners; the pay reviews, equality plans, the monitoring and enforcement of the law, also apply in the public sector, where the remuneration of employees is often regulated in different ways, such as by specific legal acts. Although the pay gap in the public sector is often more narrow, the situation there is also still far from perfect.

Reports from the Member States and EEA countries

AUSTRIA
Anna Sporrer

1. Legal framework
In accordance with the constitutional principle of the division of legislative competences between the federal state and the regions, the provisions concerning equal pay for women and men performing equal and equivalent work are enshrined within two main acts at the federal level and in different acts at the level of the nine regions. As regards the private sector, the principle of equal pay is regulated in the Equal Treatment Act:[15] § 3(2) contains the prohibition of discrimination on grounds of sex in the field of remuneration and according to § 11, job classification systems on plant level as well as collective agreements have to take into account the principle of equal pay for equal and equivalent work. They may not contain different criteria for women and men, as this constitutes discrimination. For the public sector, equivalent provisions are laid down in § 4 and § 6 of the Federal Equal Treatment Act.[16] 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 for women and men. Occupational social security schemes, in particular occupational pension schemes, are not explicitly mentioned in these acts, but they are included in the concept of pay through legal interpretation.

2. Collective bargaining and equal remuneration
In Austria, the most important collective agreements are valid for the different sectors and branches of the economy. Collective agreements on plant level (*Betriebsvereinbarungen*) have a lower position within the ranking of the applicable rules and do not regulate general conditions of work.
In general, collective bargaining traditionally plays an important role in the area of the regulation of salaries. As regards the principle of equal pay for equal or equivalent work for women and men, awareness has primarily been raised through campaigns and projects. One of these projects was an in-depth examination 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. This study came to the conclusion that there were still gender discriminatory provisions, in particular those amounting to indirect discrimination of female employees.
Although much-needed efforts are being made in order to improve the existing collective agreements and to bring them into line with the principle of equal pay, one has to take into consideration that collective agreements merely create minimum standards for salaries in general and that individual salaries are often negotiated far above that bottom line. Furthermore, one has to bear in mind that there are parts of the workforce in Austria that are not covered by collective agreements. Due to these reasons, the question of equal pay cannot be dealt with on the level of collective agreements only.
In some sectors, in which collective agreements do not exist (e.g. housekeepers, agricultural workers), 'basic-income-tariffs' (*Mindeslohntarife*) may be regulated by the Federal Agreement Board (*Bundeseinigungsamt*), which is part of the Ministry of Economy and Labour.
In Austria, collective agreements have to be open for inspection in all enterprises concerned, and employees have to be informed of the existence of these agreements. Apart from these stipulations, collective agreements are not publicly available to 'outsiders'.

3. The concept of the gender pay gap
The term 'gender pay gap' is used by politicians and the media, often without any clear reference to what is meant by this term. In general, the term 'gender pay gap' refers to the difference between the average income of women on the one hand and men on the other hand. Recent information has been published on the fact that young women earn 15% less than men of the same age and in the same position, with the gap widening to up to 40% during their working life. According to 'Statistic Austria', in the year 2003 a female employee earned around 15,380 euros per year on average, whereas a man in the same position earned 25,830 euros per year.

4. Good practices in tackling the gender pay gap
In addition to the legal provisions regulating the principle of equal pay, there are two provisions contained in the Works Constitution Act (*Arbeitsverfassungsgesetz*) that are aimed at inducing social partners to include the issue of equal opportunities in their work and in collective or other agreements:

[15] Official journal I 66/2004.
[16] Official journal 100/1993, as amended in official journal I 65/2004.

according to § 69 of the Works Constitution Act, the works council may install a committee on questions of equal opportunities, and according to § 97(1)25, specific collective agreements on plant level may be concluded on matters of affirmative action in favour of women and on the reconciliation of work and family life.
One example, which may be regarded as 'good practice' for the promotion of gender equality, is a collective agreement in the Bank Sector (*Sparkassenkollektivvertrag*), which came into force on 1 January 2005. This collective agreement contains an explicit paragraph on equal opportunities of women and men and tackles the gender pay gap in at least three respects:

- terms of parental leave count as terms of employment for a regular promotion to a higher wage-level
- additional qualifications (languages or social skills) are remunerated and must be considered in the case of job promotion
- the collective agreement provides for better remuneration for beginners and better chances of promotion to higher positions

The union for private employees (*Gewerkschaft der Privatangestellten*) also issued a model for collective agreements on plant level, which also contains explicit rules on gender equality and equal pay.

5. The legal dimension of the gender pay gap

The legislator has always been reluctant to involve himself directly in the negotiation of collective agreements and the question of salaries. In Austria, there traditionally exists a strong 'social partnership' between industry and labour, and the freedom of social partners to conclude collective agreements (*Kollektivvertragsfreiheit*) constitutes one of the basic principles of the Works Constitution Act.
Within the existing legal system in Austria, the gender pay gap can be tackled individually by proceedings before the Equal Treatment Commission and/or the Labour Courts. In general, the plaintiff has to claim her/his rights by her-/himself: individuals can claim the rights deriving from their labour contract in labour courts and may challenge discriminatory provisions in collective agreements by insisting that these provisions are not to be applied in their case. These acts focus on equality rights of individuals, but do not contribute much to preventative measures or systematic strategies against discrimination.
Nevertheless, directly discriminatory clauses concerning wage groups within collective agreements have been eliminated by the social partners after the Equal Treatment Commission detected several discriminatory provisions in collective agreements.
Furthermore, according to § 54 (2) Labour Court Act, the collective bargaining partners are entitled to bring a motion for a declaratory judgement to the Supreme Court on the question of the existence or absence of rights. This question has to deal with labour law matters and has to be of interest to at least three employees or three employers. These rights may derive from the application or non-application of a collective agreement provision, which might be illegal under equality law. The Court may declare the provision to be invalid.
In the field of equality between women and men, there has been an important Supreme Court decision based on a claim that was filed by the Unions under the abovementioned § 54(2) Labour Court Act. In this decision, the Court declared a discriminatory group classification within a wages' scheme to be invalid (14.9.1994, ObA 801/94).
Apart from this, there are not many court's decisions in the field of equal pay. Some recent Supreme Courts' decisions all concern preliminary rulings of the EJC (on occupational pensions, Supreme Court 23.4.2003, 9ObA 256/02z, on a form of a termination salary, Supreme Court 20.12.2001, 8ObA 250/02z; on equal pay for psychotherapists, Supreme Court 26.1.2000, 9ObA291/99f).
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.

6. Problems of proof of unequal pay

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 the unequal remuneration of women and men. Discriminatory clauses in individual contracts may be challenged by the person who feels discriminated against through a labour court proceeding, in which the burden of proof is shifted to the opponent in the process, usually the employer.

BELGIUM
Jean Jacqmain

1. Legal framework
The following instruments are available to enforce the principle of equal pay:
- The general provision (Article 10) of the Belgian Constitution on equality under the law, which has included an explicit affirmation of equality of men and women since 2002;
- Collective Agreement no. 25 on equal pay for male and female employees, adopted within the National Labour Council (N.L.C.) on 15 October 1975 and made generally binding by a Royal Decree of 9 December 1975: this was adopted specifically to implement Directive 75/117/EEC, but only applies to the private sector;
- Heading V of the Economic Reorientation Act of 4 August 1978, aimed at implementing Directive 76/207/EEC, but in which pay was mentioned as a working condition in order to implement Directive 75/117/EEC for the public sector as well;
- The Act of 7 May 1999 on Equal Treatment of Men and Women in Working Conditions, aimed at replacing Heading V of the Act of 4 August 1978 and implementing Directive 86/378/EEC as amended by Directive 96/97/EC, as well as Directive 97/80/EC. However, given the transformation of Belgium into a federal State, the substitution only applies within the federal parliament's jurisdiction. Consequently, Heading V of the Act of 4 August 1978 is deemed to remain in force within the respective jurisdictions of the federate authorities (i.e. regarding pay for the tenured staff members of their services), unless they replaced it with their own instruments, which so far only the Flemish Community has done with its *décret* of 8 May 2002;
- Finally, the Act of 28 April 2003 on occupational pension schemes (which in Belgium may only supplement the statutory scheme);
- Section III of Chapter III of the Act of 7 May 1999 is aimed at implementing Directive 86/378/EEC, as amended by Directive 96/97/EC. Unfortunately, more than six years later, those provisions remain hardly usable, as an R.D. was needed to define which occupational social security schemes came within the scope of the Act, and that R.D. is still missing;
- The Act of 28 April 2003 deals with occupational pension schemes for paid workers under employment contracts. It has been brought into line with Directives 86/378/EEC and 96/97/EC, but does not include any reference to Community law, except to the 'Barber protocol' under Article 141 EC;
- As to pensions for tenured staff members of the public services, they are organised by an extensive set of legislation, based on the Act of 21 July 1844. Although (to the best of our knowledge) that legislation has been purged of all direct discriminations (including those in survivors' benefits), it does not include any reference to European law.

2. Collective bargaining and equal remuneration
A crucial distinction must be mentioned between the private and the public sectors.

In the *private sector*, determining pay scales is essentially a matter of collective bargaining; public authorities are not supposed to intervene (e.g. minimum wages are fixed by way of a collective agreement of the National Labour Council, not by a statute), unless the social partners require them to do so. Consequently, it is the social partners' responsibility to make sure that the principle of equal pay is enforced.
Collective agreements may be struck at various levels: within a single enterprise, within a joint sector committee (or one of its subcommittees, when applicable) or within the National Labour Council. When a collective agreement is made generally binding by a Royal Decree, it is published (now in electronic form only) in the *Moniteur belge/Belgisch Staatsblad*. Otherwise, a collective agreement registered with the Federal Ministry of Labour is available for consultation (electronically as well). However, there is no general scheme to make publicity of collective agreements compulsory, and it is doubtful that a non-unionised employee will have easy access to those collective agreements which concern him/her. By way of exception, Collective Agreement no. 25 itself must be attached to the working rules of each enterprise, of which every employee must receive a copy under the Act of 8 April 1965.

In the *public sector*, pay schemes, like any other aspect of the working conditions, must be established by a decision of the competent authority (usually a decree). The draft of such a decision must first be negotiated with the representatives of the workforce, i.e. the unions. Thus there is also a shared responsibility concerning the observance of the principle of equal pay, but the final decision rests with the authority (which may take no heed of the unions' opposition to the draft).

All decrees of central authorities (State, Regions and Communities) are published in the *Moniteur belge/Belgisch Staatsblad*, but decisions of local councils are not always made available to the public.

3. The concept of the gender pay gap

According to a statistical computation[17] released in 2006, but based on the figures of 2004, the pay gap can be described in the following way: women represent 43% of all paid jobs and 40% of all paid working days, for which they receive 36% of all remuneration.

The explanation of the pay gap can hardly be called original:
In the *private sector*, the habitually quoted causes are the remaining vertical and horizontal segregation of the labour market, the persistence of stereotypes in the choice of educational orientations, the opacity of pay systems beyond the minimum scales imposed by collective bargaining, and the continued gender imbalance in the sharing of family responsibilities. Singly or in combination, those causes result in undiscovered direct discriminations; glass-ceiling practices; relative absence of women from activity sectors with higher pay scales, teamwork or night work bonuses, overtime pay and occupational social security schemes; and an overwhelming majority of women in all forms of part-time occupation.

In the *public sector*, some phenomena remain unexplained (and the authorities show no intention of investigating their causes), such as the apparent reluctance of women to take part in selection examinations and their constantly inferior rates of success in those examinations, while women are more numerous than men in contractual appointments that normally (but see below, Section 6) do not give access to promotion in pay. The principle of equality under the law should exclude any possibility of discrimination in pay, but the recent introduction of new pay systems based on criteria such as 'availability' induces a risk of indirect discrimination. Obviously, family responsibilities have the same influence as in the private sector, although this takes the form of 'voluntary' reduction of the individual working time rather than recruitment in part-time jobs.

4. Good practices in tackling the gender pay gap

There is no known example of legislation or regulation aimed at inducing social partners to reduce the pay gap. On the contrary, certain legislative measures intended to achieve laudable purposes may be regarded as resulting in an indirect reinforcement of the gap. For instance, the successive Acts of 6 April 1995 and 28 April 2003 were meant to provide a stable legal framework to occupational pension schemes, but such schemes are mainly to be found in activity sectors with a predominantly male workforce, or are reserved to essentially male categories of employees. And again: at the social partners' request, an Act of 3 July 2005 has recently reduced the income tax on extra pay due for the first (yearly) 65 hours of overtime; but only sectors with a mainly male workforce usually resort to overtime.

The single recent innovation adopted by the social partners is Collective Agreement no. 25bis of 19 December 2001, which amended Collective Agreement no. 25 with the purpose of raising awareness within the joint sector committees as to the necessity of adopting gender neutral systems of job evaluations. This may be regarded as a result of the EVA project, through which the authorities (first the federal Ministry of Labour, then the Institute for Equality of Women and Men) have been training delegates from the social partners in gender-neutral job evaluation.

On 31 March 2006 the federal government presented its programme in favour of equal pay for women and men, along the following lines:[18]

- The federal Ministry of Employment and the Institute for Equality of Women and Men will jointly compile and publish a yearly statistical report on the salary gap in every sector of activity, for the public services as well as for private enterprises.
- The ministers of Employment and Equal Opportunities will provide the social partners with the necessary instruments to develop gender-neutral job evaluation systems; those instruments will be usable in the public services as well. At the same time, the minister of Employment will stimulate the adoption of gender-neutral job classification schemes; all existing schemes should be reviewed within the next five years, and all future collective agreements should be screened systematically for gender discriminations.

[17] *Femmes et hommes en Belgique* at http://www.iefh.fgov.be; *Vrouwen en mannen in België*, http://www.igvm.fgov.be.
[18] More information: Ermeline.Gosselin@p.o.be.

- The Institute will evaluate the effectiveness of the Equal Treatment Act of 7 May 1999 and its ancillary royal decrees, and propose amendments if necessary. A similar effort will be expected from the social partners, especially concerning Collective Agreement no. 25 on equal pay.
- The ministers of Employment and Equal Opportunities will examine how to provide enterprises with technical and financial support in order to help them to develop equal opportunities programmes.

A research will be conducted on the cause of the salary gap between full-time and part-time work, and on the impact of part-time work on social security rights.

5. The legal dimension of the gender pay gap

Regrettably, the social partners (in Collective Agreement no. 25) and the legislators only went through the motions in order to implement Community law, but afterwards the attention given to gender equality in pay was haphazard in the best of cases. For instance: a direct discrimination in the pay scales for male and female apprentices in the textile industry was not challenged before 1988; and in the joint sector committee for retail stores with multiple branches, as late as 1996 the social partners resisted amending their definition of a full-time manager, which induced indirect discrimination against women. Moreover, both in the private sector and in the public services, there are numerous and sometimes quite recent examples of collective agreements or regulations on various allowances or bonuses, which fail to eliminate adverse effects due to absences related to maternity.

Instances such as the ones pointed out above, in the beginning of Section 3, also suggest that there is no mainstreaming approach of potentially adverse effects of new legislation. High hopes now rest upon the new Institute for Equality of Women and Men, whose main tasks are to promote gender mainstreaming, and to take judicial action in order to challenge discriminations, even when they result from new collective agreements or regulations. However, it should be reported that in the public sector, one trade union has repeatedly undertaken such litigation.

6. Problems of proof of unequal pay

The pay scales provided by collective agreements are minima; improved pay conditions may be settled in individual employment contracts, which are not normally brought to the knowledge of other employees. Besides, collective agreements are not usually applicable to executive positions. Absence of publicity also occurs in the public services, when the authorities use employment contracts in order to evade the uniform rules applicable to tenured staff members.

Consequently, it may be very difficult for victims of gender discrimination in pay even to build up a *prima facie* case as required by Directive 97/80/EC and the domestic legislation.

BULGARIA

Genoveva Tisheva

1. Legal framework

The principle of equal pay is currently regulated in the Labour Code (LC) and in the Law on Protection against Discrimination. Article 243 LC (introduced in State Gazette [SG] no. 25/2001) declares that women and men shall be entitled to equal remuneration for the same or equivalent labour, which shall apply to all payments made under the employment relationship. A more general provision on equal pay for all is laid down in Article 14 of the Law on Protection against Discrimination (in force since 1 January 2004): the employer shall ensure equal remuneration for equal work and equivalent work. This principle shall apply to all remuneration, paid directly or indirectly, in cash or in kind. Additionally, the assessment criteria for determining the labour remuneration and the assessment of the work performance shall be equal for all employees. They shall be determined by collective labour agreements or by internal administrative rules regarding the salaries, or by a legal procedure for the assessment of civil servants in the state administration. Therefore, the equal pay provisions of the Law on Protection against Discrimination are also applicable to civil servants. The equal pay provision of the Labour Code is focused on equal pay for men and women in labour relations. Both laws prohibit direct and indirect discrimination, including discrimination based on sex.

With the amendments to Chapter 6 of the Labour Code, a new Section 2 on 'General Rules for Information and Consultation' was introduced in 1 July 2006 with a view to harmonising the social dialogue regulations with EU standards. This is an additional opportunity to make equal pay in some enterprises an issue in the course of the procedure of information and consultation of the employees.

2. Collective bargaining and equal remuneration

It is not clear whether collective agreements in Bulgaria have included the principle of equal pay. This is a matter for a separate study. Collective agreements are registered by the General Labour Inspectorate, but they are not published. Accessing the registered agreements is difficult. At present, no concrete information could be provided about trade unions' initiatives to include equal pay issues in the agreements. Despite the lack of public information on this issue, the information available to the expert shows that collective bargaining and the respective agreements currently do not play a role in promoting the principle of equal pay in Bulgaria.

Trade unions are also key players in the procedure of information and consultation of the employees, briefly mentioned above, but this procedure has not been sufficiently used so far.

3. The concept of the gender pay gap

In Bulgaria, there is no specific notion of or debate on the concept of the 'gender pay gap'. This conclusion can be drawn from governmental reports and data, from the comments and observations of international agencies such as the Committee of Experts on the European Social Charter (Revised), as well as from the direct requests and individual observations of the ILO Committee of Experts on the Application of Conventions and Recommendations on the issue of equal pay.

According to the Government's data, the gender pay gap in the average annual remuneration has decreased from 27.2% in the public sector and 24.8% in the private sector in 2001 to 23.6% in the public sector and 21.2% in the private sector in 2002, while the overall average annual remuneration of women continued to increase in the public sector. However, according to longer-term figures, the gender remuneration gap substantially widened in the private sector between 2001 and 2002. There are no specific measures taken by the government to target and address the gender pay gap.

The opinion of the government, as expressed in various reports, is indicative of the notion of the gender pay gap and coincides with the opinion held by the Bulgarian Industrial Association (BIA). The essence of this opinion is that the gender pay gap in average annual remuneration does not mean that there was pay discrimination on the basis of sex, but that higher salaries are paid in industries and enterprises where the conditions of work are 'not attractive to women'. It is true that direct pay discrimination against women is not often the sole cause of the overall gender remuneration gap. However, the fact that women do not have equal access to jobs and occupations and the fact that jobs traditionally considered to be 'attractive to women' may in fact be undervalued is highly relevant to the application of the EU principle of equal pay.

According to the ILO Committee of Experts on the Application of Conventions and Recommendations on the issue of equal pay, it is therefore essential for the government to gather and make available statistical information that would allow for an in-depth analysis of the existing gender remuneration gap as a basis for designing and implementing measures leading to its reduction, for example through measures such as promoting women's access to higher-level posts, and objectively evaluating remuneration levels in female-dominated occupations. In this respect, the concept of both direct and indirect discrimination in the pay of men and women should be considered. Furthermore, the rates of remuneration should be established by a method that ensures the application of the principle of equal remuneration for men and women workers to all workers for work of equal value.

4. Good practices in tackling the gender pay gap

One example of relevant legislation is Article 14 (3) of the Law on Protection against Discrimination (mentioned above), which refers, *inter alia*, to the collective agreements for the elaboration of equal assessment criteria in determining the labour remuneration and the assessment of the work performance. Furthermore, Article 18 of the same law stipulates that the employer, in cooperation with the trade unions, is obliged to take efficient measures to prevent any form of discrimination in the workplace. Although more general than Article 14, this provision contains an obligation for the trade unions to promote the principle of equal pay as well. Unfortunately, these obligations of the trade unions have not yet been implemented in Bulgaria. There are no specific obligations for the employers' organisations. In the expert's view, a more specific obligation to include the issue of equal pay in the collective agreements should be stipulated with respective sanctions in case of non-compliance.

As regards collective or other agreements, it must be concluded for the time-being that there are no provisions known which explicitly aim at reducing the gender gap.

5. The legal dimension of the gender pay gap

In addition to the considerations expressed above, it is essential to mention the important role that legislation plays in implementing the principle of equal pay. More specifically, the definition of equal

pay should be understood as going beyond 'same or equivalent work' and extended to work 'of comparable value', which requires a broader comparison of jobs. In this respect, the formulation of the principle in the Labour Code and the Law on Protection against Discrimination needs a broader interpretation. Otherwise, the legislation will contribute to widening the gender pay gap. Instead, it should ensure that women who undertake different work than men but work that is of equal value are remunerated equally, based on objective job appraisals using criteria such as responsibility, skill, effort and working conditions.
Besides through legal provisions, the equal pay principle can also be promoted through regulatory provisions, specific methods for job assessment and strategies for ensuring equal pay.
The law can ensure the application of the principle of equal pay and can also reduce the gender pay gap through the effective work of the respective administrative and judicial bodies.

6. Problems of proof of unequal pay
The shift of the burden of proof provided in the Law on Protection against Discrimination can also be applied in cases of unequal pay.

CYPRUS
Lia Georgiades

1. 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)[19].
The Supreme Court recognises that the constitutional principle of equality guarantees substantive equality. Ever since 1962, the Court has accepted a broad meaning of the term remuneration,[20] which corresponds to Article 141 of the EC Treaty. Provisions that are relevant for safeguarding the principle of equal pay for men and women can also be found in the laws relating to the Protection of Maternity,[21] Parental Leave and Leave due to Higher Needs Law.[22] However, the most important piece of legislation is the recent Law on Equal Pay for men and women for similar work or work of equal value of 2002[23] and the Law on Equal treatment of men and women in employment and vocational training of 2002.[24] Both laws were adopted within the framework of the harmonisation of Cyprus legislation with the *acquis communautaire*.

The Law on Equal Pay for men and women of 2002 amended the Equal Pay Law of 1989. The objective of the new Law is to ensure that the principle of equal pay for men and women for equal work or work of equal value is applied (Article 3). It applies to all employees, for all activities related to employment (Article 4). Every employer must provide equal pay for men and women for the same work or for work to which equal value is attributed, irrespective of the employee's sex. The provisions of the Law prevent the application of any other conflicting provisions. The maximum rights enjoyed by one sex shall also apply to the other sex. The competent authority, which is the Minister of Labour and Social Affairs, has the power to revoke any individual or regulatory administrative act or to amend it accordingly. Any collective agreement or individual contract of employment that is contrary to the provisions of the Law is repealed. The competent authority has invited employers' organisations and trade unions to examine the existing provisions of collective agreements for discriminatory provisions and to amend these. The social partners (government, employers' organisations and trade unions) subsequently cooperated in examining the over 600 collective agreements in force for provisions resulting in direct or indirect discrimination and amended these. So far, no complaints have been brought before the competent authority yet, nor has any case been brought before the Industrial Disputes Court concerning discrimination on grounds of sex. After the amendment of Law

[19] Nitsa and Georgia Zoukof v. Republic of Cyprus, 25 July 1990 case no. 912/89; Zoe Nikolaides v. Republic of Cyprus, 19 January 1999, Appeal no. 2148; Marina Christophorou v. The Republic, 1985 3 CLR30tr 1868, 23 October 1985; Pelagia Eglezaki v. G. Attorney of Republic, 1992 1 A.A.D 697.
[20] Xinari V Republic of Cyprus 1962 3 CLR p. 98.
[21] N 100(I)/1997 as amended by Law 64(I)/2002 The Maternity Protection (Amendment) Law of 2002 and Rules Administrative Regulations 255/2002.
[22] N 69(I)/2002 The Parental Leave and Time Off Work on grounds of Force Majeure Law of 2002.
[23] N177(I)/2002 The Equal Pay between Men and Women for the Same Work or for Work to which Equal Value is Attributed Law of 2002 as amended by Law N193(I)/2004.
[24] N205(I)/2002 The Equal Treatment for Men and Women as regards Access to Employment and Vocational Training Law of 2002 as amended by Law N191(I)/2004, 40(I)/2006.

no.177(I)/2002 by Law N.193(I)/2004, every person has the right to file a complaint with the Ombudsman, which has acted as a Gender Equality Body since the amendment of 2004. According to the expert, the Ombudsman, acting as the Gender Equality Body, is the most efficient institution for the protection of gender equality and has the power to investigate any complaint in a short time. In short, the Law on Equal Pay for men and women of 2002 abolished all direct or indirect discrimination between men and women that appeared in legislation, collective agreements or individual contracts of employment.[25]

The Law of Equal Treatment for Men and Women in Employment and Vocational Training safeguards the implementation of the principle of equal treatment between men and women in relation to vocational guidance, education and training, access to employment, terms and condition of employment, terms and conditions of dismissal from any job position as well as access to self-employed jobs and the exercise of the duties involved with self-employed jobs. It also safeguards the protection of women from any direct or indirect discrimination due to pregnancy, delivery, breastfeeding, maternity, or sickness resulting from pregnancy or delivery. Furthermore, it criminalises sexual harassment and provides for judicial and extra-judicial protection in case of a violation of the provisions of the law.

2. Collective bargaining and equal remuneration

Since 1960, the system of collective bargaining has developed on the basis of two key principles: voluntarism and tripartite cooperation between the government, employers' organisations and trade (workers') unions. At a practical level, this cooperation is achieved through the operation of technical committees and other bodies of tripartite representation, but mainly through representation of the social partners in the Labour Advisory Body. Collective agreements have traditionally played a primary role in regulating industrial relations, with the law playing a secondary regulatory role.

The Industrial Relations Code (IRC) is a gentlemen's agreement signed by the social partners in 1977 (not legally binding), which lays down in detail the procedure for resolving conflicts.

The IRC code covers, *inter alia*, conflict resolution in the private and semi-public sector, as well as conflict resolution concerning equal pay between men and women in the public sector. The social partners currently abide by the IRC.

On 16 March 2004, the agreement for the Process related to the solution of Labour Differences in Essential Services was signed and has been in force since then. Essential services are the electricity department, water suppliers, telecommunication, air transport and air control, hospitals, prisons, the police force, the army force, the fire force and harbour traffic.

The collective agreements can play a role in the area of equal pay, despite the fact that the existing agreements do not appear to have taken gender into account by laying down appropriate rules and regulations for employment.

Collective agreements are not published, but the social partners make them available upon request and distribute information in the leaflets that they circulate, in their newspaper and on their websites. The Labour Ministry has begun to post information on its website http://www.mlsi.gov.cy.

3. The concept of the gender pay gap

The position of women in the Cypriot labour market is clearly worse than that of men. The Strategic Development Plan 2004-2006 points out that equality between the sexes needs to be promoted and the pay gap between the sexes decreased.

The gender pay gap is, according to the expert, the difference in the salary paid to men and women for similar work or work of equal value. The Law on Equal Pay for men and women for similar work or work of equal value of 2002 provides that work of equal value means work, carried out by men and women, that is identical or has a materially identical nature or to which equal value is attributed based on objective criteria such as: a) the nature of the duties, b) the degree of responsibility, c) the qualifications, skills and seniority necessary, d) the requirements relating to physical or mental qualifications, e) the conditions under which the work is carried out.

At present, no study has been done in Cyprus concerning the factors that create the wage gap between men and women. However, according to indications, the National Statistical Service attributes part of the wage gap to the differences in qualification between the two genders, to the length of service, professional duties, the field of work and possible discrimination in certain occupations.

[25] However, see below, section 4.

4. Good practices in tackling the gender pay gap
In June 2005, the Ministry of Labour and Social Insurance communicated a circular to the social partners on the furtherance and immediate implementation of the provisions on equal pay for men and women for similar work or work of equal value. The employers' union and trade union were called on to examine, before 31 October 2005, the existing provisions of the collective agreements that they had concluded and to amend them in such a way as to repeal any provision involving direct or indirect discrimination on grounds of sex. The social partners had to inform the Labour ministry about measures that they intended to take. Consequently, the social partners have abolished any discrimination between men and women from collective agreements.
On the basis of the laws briefly discussed above, the social partners have abolished discrimination between male-female positions from the collective agreements and contracts.
Unfortunately, the social partners have not as yet performed any analysis of job descriptions and have not proceeded with an evaluation of every profession or position for the purposes of defining same work or work of equal value. In collective agreements, they still refer to levels of job-categories A and B, which practically comes down to placing women in the lower level and men in the higher level. In this way, in everyday practice, employers may indirectly discriminate against women employees without in essence violating the law.

In the Public Service, employees are covered by the Law concerning Public Service Commission.[26] For every position in the Public Service, there is a service scheme plan as well as the relevant remuneration. In the Public Sector, there is equal pay between men and women if they hold positions that belong to the same salary level, according to the service plan. The principle of equal pay is also maintained in semi-state organisations, local authorities, banks and in the tourism sector.

5. The legal dimension of the gender pay gap
The two laws of 2002, briefly discussed above, have laid out a framework, within which the social partners are obliged to operate. With regard to the gender wage gap in 2001, men were paid on average 34.9% more than women, 33.5% in 2002 and the pay gap today is 23.8%. In December 2005, 208 collective agreements expired in all sectors, and social partners are currently negotiating new terms. They are using the provisions of the expired agreements until they reach a new agreement. The expert hopes that they will also negotiate for equal pay for similar work or work of equal value in a way that will no longer hide discrimination between the sexes. If the criteria, the qualifications and the duties that constitute similar work or work of equal value are not agreed, it will be a long time before equal pay between men and women becomes a reality.

6. Problems of proof of unequal pay
According to the Law on Equal Pay for men and women for similar work or work of equal value of 2002, any worker who deems to have suffered detrimental effects due to a contravention of the Law has the judicial right to petition the Industrial Disputes Court, and the burden of proof that there has been no contravention of the Law is on the employer's side.

CZECH REPUBLIC
Kristina Koldinská

1. Legal framework
Until 31 December 2006, the issue of remuneration for work in the Czech Republic was primarily regulated by Act no. 1/1992 Coll. on pay, remuneration for overtime work, and average income, and by Act no. 143/1991 Coll. on pay and remuneration for overtime work in civil service employment and in a few other organisations and bodies.
The Czech Republic transposed the rules of Directive 75/117/EC into its legislation through amendment no. 217/2000 Coll. to both acts mentioned above.
According to § 4a of Act no. 1/1992 Coll. "Conditions for providing wages must be the same for men and women. Employees who carry out equal work or work of equal value are entitled to equal pay." The act further defined the meaning of equal work and work of equal value as being equally or comparatively complex, responsible and demanding work carried out under the same or comparable

[26] N1/1990, 71/1991, 211/1991, 27(I)/1994, 83(I)/1995, 60(I)/1996, 109(I)/1996, 69(I)/2000, 156(I)/2000, 4(I)/2001, 94(I)/2003, 128(I)/2003, 183(I)/2003.

conditions, requiring the same or comparable abilities and qualifications and with the same or comparable efficiency and results, in an employment relationship with the same employer.[27]
The principle of equality of men and women was introduced in almost the same way in Act 143/1991 Coll. Respect for the principle of equality was guaranteed to a certain extent within the system established by this act, which specifies some objective criteria for determining a wage rate that is the same for men and women.
From 1 January 2007, the legal framework changed radically, as both abovementioned acts were then incorporated into the new labour code - Act no. 262/2006 Coll. part 6 of the labour code deals with remuneration. This part retains two definitions, namely wages provided in the private sphere and pay provided in the public sphere. For the pay in the public sphere there is a certain ceiling, as that pay is financed from the state budget. The labour code took over almost all the 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 anymore. Section 110 § 1 states: "For equal work of equal value, equal pay shall be provided to all employees of the employer."
As regards equal pay in occupational pensions, no concrete information can be provided. There is still no law on occupational pensions in the Czech Republic, although some aspects of occupational pensions are dealt with in Act no. 42/1994 on supplementary pensions with State contribution. According to Article 27 § 5, an employer may contribute to the supplementary pension of his employee. There is no regulation regarding the obligation of the employer to respect the equality between men and women when contributing to the pension of his employees. However, if a case were to be brought before the court, unequal pay could be argued, probably with success.
According to the Summary Report on Fulfilment of Government Priorities and Procedures for the Enforcement of the Equality of Men and Women in 2004,[28] "the Czech market is noted for its high employment rate of women but also for the fact that women are often exposed to discriminatory treatment on the part of the employer, while it is often actually women who agree to take up a lower-paid job under less favourable conditions."
Particular findings of the Labour Offices, cited in the above mentioned report were:

- the occurrence of an alleged act of discrimination could not be evidenced in many cases;
- many Labour Offices did not impose any fines on the grounds of discrimination - no non-compliance was found;
- where discrimination was established, the aspect of unequal remuneration for work of equal value was the most frequent type of non-compliance with the prohibition against discrimination;
- the entitlement to a job was only rarely withheld on the grounds of gender.

Further reports on the fulfilment of government priorities do not specifically tackle the issue of equal pay.

2. Collective bargaining and equal remuneration

Collective bargaining plays a certain role in the area of equal pay, at least at the level of sectoral collective agreements. The Czech-Moravian Confederation of Trade Unions (the biggest country-wide organisation of trade unions), the Confederation of Industry (the biggest country-wide employers' organisation) and especially the Council of Economic and Social Agreement (the tri-partite country-wide organ for collective bargaining) are involved. The issues of women's and men's equality has also been supported by the work of the Union of Employer Unions and by the Confederation of Employers' and Entrepreneurs' Associations of the Czech Republic, who also cooperate with non-governmental not-for-profit organisations.
The Czech-Moravian Confederation of Trade Unions and the Confederation of Industry were recently actively involved in the Action Framework 2003-2005 regarding Equal Opportunities for Men and Women, which focused on removing gender stereotypes, supporting women in decision-making, harmonising family and working life and putting an end to unequal pay for men and women.

[27] The complexity, responsibility and difficulty of the work are evaluated according to the level of education, the extent of further education and the practical knowledge and skills necessary for the performance of this work, according to the complexity of the subject of the work and the activity, etc. Working conditions are evaluated according to the difficulty of working schedules arising from the structure of working hours (for example shifts, days off work, work at night or work overtime), according to the harmfulness, health risks or difficulty of work arising from negative effects of the working environment, and according to the risk level of the working environment. Professional abilities and skills of an employee are evaluated according to professional and mental ability, or physical fitness for carrying out the particular work. Efficiency is evaluated according to the intensity and quality of the work carried out and results are evaluated according to the amount and quality of the work.
[28] To be found at http://www.mpsv.cz/files/clanky/2015/report_2004a.pdf.

The issue of promoting equal opportunities for women and men, relating to remuneration and working conditions in particular, was included in numerous discussions of the Council of Economic and Social Agreement, attended by representatives of the Ministry of Finance.
However, the abovementioned entities are involved more in conceptual work and in expressing their positions than in exerting a concrete influence on collective bargaining and its emphasis on equal opportunities for men and women, including the issue of equal pay.

3. The concept of the gender pay gap
The gender pay gap is understood primarily in the narrow sense of the word. Remuneration is understood as income from economic activity and not as any other type of income, such as income from social benefits. Thus, the pay gap is meant as a gap between incomes from economic activities. However, there is no specific definition of the gender pay gap and this term is not even used or discussed very often by politicians or in the media. The only study on this issue was published in Czech in 2002, arguing that the average wage for women in the Czech Republic is 73.3% of the average wage for men.[29]

4. Good practices in tackling the gender pay gap
In the Czech Republic, there is no specific legislation or regulation aimed at inducing social partners to include the issue of equal pay in collective and other agreements.
There are not even any details of collective or other agreements that aim explicitly at reducing the gender gap and that are known for doing that.

5. The legal dimension of the gender pay gap
Until people get used to claiming their rights before courts and until the whole of Czech society frees itself from gender stereotypes, including the idea of the woman being the only possible carer, it will be very difficult to ensure better application of the Czech legislation. Legislation including instruments to fight discrimination is in place; the problem lies in the application. On the one hand, many employers have improved their attitudes to this problem, but others have not.

6. Problems of proof of unequal pay
Of course, a big problem in proving unequal pay is the lack of information available. There is hardly any information in relation to pay rates, unless payment is provided in the public sphere.
Wage rates in the public sector[30] are regulated, so there are 16 wage groups, each with a certain range of pay, defined by the law.
However, the concrete amount of wages or pay is always negotiated on an individual basis and employees do not have a chance to find out what the actual wage of their colleague is, or what their own wage should objectively be. An employee can only claim a higher wage if he/she is, for example, in the 13th category but receives an amount corresponding to the 12th category, or if an employee has been included in, for example, the 10th category and feels he/she should be included in the 11th or 12th category.

Among further activities of the government that aim at improving the situation in the field of equal pay, some seminars, organised in 2004 and 2005, should be mentioned. The seminars, which were mostly organised by the Ministry of Labour and Social Affairs, dealt with themes like: the protection of women's rights and promotion of the equality of men and women as part of a middle management training programme, training on human rights and their maintenance, etc. Furthermore, seminars were organised on the fundamentals of labour law and remuneration of employees, and specifically focused on the topics of equal rights for men and women, prohibition of discrimination, equal treatment guarantees etc. There have also been some projects that focused on the promotion of gender equality (e.g. PHARE Twinning Light Project Gender Equality Promotion Focused on Social Partners - Adopting Equal Treatment on Workplace).

[29] D. Fischlová, Analysis of Differences in the Wages of Men and Women. Proposal of a Model Procedure for Determining the Proportion of Discrimination, (RILSA 2002).
[30] Regulated by the abovementioned act no. 143/1991 Coll.

DENMARK
Ruth Nielsen

1. 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. It has been amended several times. The currently applicable provisions can be found in the consolidation Act no. 906 of 27 August 2006.[31]
The principle of equal treatment for men and women in occupational social security schemes, in practice particularly occupational pension schemes, is governed in Denmark by the Act on equal treatment of men and women in occupational social security schemes (*lov om ligebehandling af mænd og kvinder inden for de erhvervstilknyttede sikringsordninger*), consolidated in Act no. 775 of 29 August 2001.[32]

2. Collective bargaining and equal remuneration
Collective bargaining is of paramount importance on all wage issues in Denmark. All Danish collective agreements on wages are interpreted as providing for equal pay for men and women unless the opposite is expressly stated. Respect for the equal pay principle is regarded as an implied term in a collective agreement. This interpretation is supported by a mediation agreement from 28 March 1973, which abolished different pay rates for men and women in collective agreements between members of LO, the Danish Confederation of Trade Unions, and DA, the Confederation of Danish Employers, which have been the two main organisations since 1 April 1973 (i.e. three months after Article 141 EC - then Article 119 EEC - became directly applicable in Denmark due to the *Defrenne-II* judgement).

In practice, there are neither express unequal pay clauses nor express equal pay clauses in Danish collective agreements. If gender equality is not mentioned in a collective agreement explicitly, the agreement is interpreted as - tacitly - providing for equal pay. This implicit way of regulating the issue does not contribute to a better understanding of the notion of pay.

Collective agreements in Denmark are private contracts, hence, in principle, a matter for the contracting parties. There is no central registration of all collective agreements. Generally, however, it is easy to get a copy of a collective agreement.

3. The concept of the gender pay gap
The Danish Confederation of Trade Unions (LO) and the Confederation of Danish Employers (DA) published a joint analysis of gender wage differences in 2003. The report (in English) is available at LO's homepage.[33]

A comparison of women's and men's average wages in the DA/LO-covered area shows considerable differences in wage levels. Among blue-collar workers, men earn an average of 14-15% more than women, and among white-collar workers, men earn an average of 19-20% more.

The analysis shows that the most important cause of the observed wage differences between women and men is the gender-segregated labour market, i.e. the fact that women and men are employed in different sectors and, to a great extent, have different occupations. Thus, men are more often employed as unskilled workers or craftsmen in the building and construction sector, while women tend to be employed as cleaning assistants or unskilled/skilled retail clerks in the service sector.
Among blue-collar workers, the gender-segregated labour market can be used to explain half of the observed wage difference, while among white-collar workers it is the explanation for about 25% of the total wage difference.
Beyond this, the differences in women's and men's educational levels and choices also help explain the wage differences. Over the past 20 years, women have achieved a higher educational level, but they have still not fully reached the level of men. At the same time, women continue to dominate within retail and clerical educations, while men to a greater extent complete educations within the craft trades and technology.

[31] Available in Danish at http://www.retsinfo.dk/_LINK_0/0&ACCN/A20060090629.
[32] Available in Danish at http://www.retsinfo.dk/_LINK_0/0&ACCN/A20010077529.
[33] http://www.lo.dk/smmedia/Ligel°n_Engelsk_031003_saml.pdf?mb_GUID=DEA91AC7-1D89-458C-B7F5-C535C1001E78.pdf.

The gender wage differences are also affected by the number of years that women and men have been part of the labour market. Generally, men have been in the labour market for a longer time, inasmuch as women are more often absent for periods of time due to e.g. maternity leave. Differences in labour market experience are more significant among white-collar workers, while for blue-collar workers the wage profile remains relatively flat throughout life.

4. Good practices in tackling the gender pay gap

There is no Danish legislation which aims at inducing the social partners to include the issue of equal pay in collective and other agreements.

Different wage systems are used in Denmark. It is often believed that the normal wage system is better for equal pay than the minimum wage system. In the normal wage system, the workers receive the rates laid down in the collective agreement, and nothing else. In the minimum-wage system, the collective agreement lays down the minimum wage. Most workers or employees receive increments based on a very wide variety of criteria. There is no doubt that both the rates laid down in the collective agreements and the increments that complements the minimum-wage system are forms of pay that must comply with the equal pay principle. However, a complicated issue is to what extent the criteria for receiving increments are indirectly discriminatory and to what extent the burden of proof should be on the employer. This is a vital question, particularly in situations where the employer uses the often non-transparent minimum-wage system plus increments. The general pattern is that male-dominated groups get more extra payments than predominantly female groups - a fact that makes it likely that this wage system serves as a cover for indirect discrimination.

5. The legal dimension of the gender pay gap

In my view, it is not likely that the law in itself contributes to the gender pay gap. Stricter rules on gender pay statistics may help,[34] as could more emphasis on the prohibition against indirect discrimination.

6. Problems of proof of unequal pay

In the spring of 2001, the then social democratic government proposed an amendment of the Danish Equal Pay Act with an aim to introduce a duty for employers with more than 10 employees to – upon request - produce gender-specific wage statistics for the enterprise. The Act was passed in June 2001, but it was provided that the provisions on a duty to provide gender-specific information should not come into force until 1 July 2002 in order to give the employers a possibility to prepare for fulfilling the duty. The present liberal-conservative government, which took office in November 2001, amended the Equal Pay Act. It was left to the discretion of the Minister for Employment to decide when (and if) the provision should come into force. It was never put into force in the form it had in that year, however.

On 7 December 2005, the Minister for Employment submitted a proposal to Parliament to amend the Equal Pay Act. The proposal was adopted by Act no. 562 of 9 June 2006, thus amending the Equal Pay Act. The new provisions came into force on 1 January 2007. They require employers with 35 employees or more and at least 10 of each sex to disclose gender-specific wage statistics. There is already a duty on the part of the employers to report their wages to Denmark's Statistical Bureau for statistical purposes, partly because of Denmark's duty to provide statistical information to the EU. If the employer so wishes, the Statistical Bureau will process the data and deliver a gender-specific statistic 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 the employer can obtain the gender-specific wage statistics, which he/she has to disclose to his/her employees free of charge. According to government estimates, the new 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, the employers already produced more detailed gender-segregated wage statistics than required by the new provision in the Equal Pay Act. That means that in particular the approximately 300,000 persons in the private sector may benefit from it.

[34] See below, section 6.

ESTONIA
Anneli Albi

1. Legal framework

In Estonia, the principle of equal pay was first clearly stipulated in the Wages Act 1994. Article 5 of this Act prohibits the increase or reduction of wages on grounds of gender, as well as the reduction of wages on the grounds of marital status or family obligations. In 2001, this provision was complemented by Article 5, which harmonised the Wages Act with Directive 75/117/EEC. The new Article 5(1) prohibits paying employees of a different sex different wages for the same work or for work of equal value. At the request of an employee, the employer is obliged to prove that this principle has been adhered to, and that any preferences given were based on objective circumstances unrelated to gender. Employees have the right to request explanations concerning the grounds for calculating their salary. They can request equal payment for the same work or for work of equal value, and a redress of damages caused by a violation of the principle of equal remuneration. The employer is obliged to inform the employee about the legislation concerning equal remuneration at the time of the appointment. In 2004, Article 10 was amended to prohibit discrimination in remuneration of work on grounds of gender, as well as direct and indirect discrimination. The Gender Equality Act (GEA), adopted on 7 April 2004, further implements Directive 75/117/EEC. It repeats the principles established in Article 5 of the Wages Act (cf. Article 6(2), 7(2) and (3) of the GEA), as well as introducing some new provisions.[35]

In terms of case law, very few equal pay claims (if any) have been brought to the courts in Estonia. However, the Gender Equality Commissioner, whose remit includes issuing opinions on applications in which individuals claim discriminatory treatment, has recently addressed some equal pay issues. In one such case, a female job applicant had initially been offered, in an oral conversation, the post of a specialist, with a salary of 13,000 EEK (833 euros) per month. However, after her prospective employer heard that she was pregnant, she was instead offered the post of assistant, with a salary of just 5,500 EEK (353 euros) per month. The Gender Equality Commissioner held that such conduct constituted discriminatory treatment.[36] In another application, the person had been excluded from any overtime work on the assumption that she had family obligations. The Commissioner held that an employer is not allowed to presume that the employee would not consent to work overtime; the employee should be consulted about whether she needs special protection due to family obligations. Otherwise, the employer's knowledge of an employee's family obligations might become an obstruction to free self-fulfilment and contravene equal treatment.[37]

2. Collective bargaining and equal remuneration

As in the other Central and Eastern European countries, the role of trade unions and collective bargaining is relatively weak in comparison with the old Member States, and trade union membership is low. In 2004, only 14% of the employees in Estonia belonged to a trade union, and 164 collective agreements were registered by the Ministry of Social Affairs. As Manfred Weiss has pointed out, "the ideology of pure individualism and anti-collectivism remains (…) very widespread" in the new Member States.[38] This is the result of the swing from a centralised wage system and labour relations, which were dominant during the Communist period, to the glorification of the freedom of contract. In addition, trade unions used to be associated with the totalitarian regime.

Against this background, collective bargaining has not played a significant role in the field of equal pay, if indeed it has played one at all. Indeed, a survey conducted by Saar Poll shows that collective agreements mainly deal with occupational safety and working time, whilst wages, annual leave and the duration of the employment contract are predominantly negotiated between each employee and employer individually.[39] However, the promotion of gender equality and family-friendly work arrangements has recently become one of the activities of the umbrella organisation of trade unions.

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[35] Cf. Section 6 of this report for further details.
[36] "*Tööandja takistas raseda karjääri*" [An Employer obstructed the career of a pregnant woman], *Eesti Päevaleht Online*, 22.01.07, http://www.epl.ee.
[37] Summaries of the Gender Equality Commissioner's opinions will be made available at the website http://www.svv.ee.
[38] Weiss, M. "The Institutional Conditions for Effective Labour Law in the New Member States", in Bermann, G. and Pistor, K. (eds.), *Law and Governance in an Enlarged European Union* (Oxford: Hart Publishing. 2004), p. 243. See also *Kollonay Lehoczky*, C., "European Enlargement: A Comparative View of Hungarian Labour Law", in the same volume, p. 209ff.
[39] See "Survey examines social partnership in enterprises", http://www.eiro.eurofound.eu.int/2006/02/feature/ee0602102f.html (visited on 21 March 2006).

TALO, the Confederation of Estonian Employees' Unions, mentions in its Action Plan for 2005-2009 that its future activities will include observance of "the principle of equal pay for equal work for men and women", and it will give consideration to "flexible work relations, working at home, flexible working hours".[40]

3. The concept of the gender pay gap

A 2004 study by PRAXIS (a leading Estonian centre of political analysis), which has been widely reported in the Estonian media, defined the pay gap as a difference in pay, deriving from differences in the human capital and work of women and men.[41] The study distinguishes between an 'unjustified pay gap' and a 'justified pay gap'. The latter can be explained by discernible factors such as differences in education and productivity; the former may be attributed to different personality traits and labour market behaviour as well as potential discrimination. The PRAXIS calculations, based on 1998-2000 data, show that women's salaries amounted on average to 72.7% of those of men. Of this gap, approximately 8-9% can be attributed to differences in the structure of the labour force; the remaining 20-21% appears to be unjustified. The pay gap is relatively high, despite the fact that women have a higher level of education in Estonia than men and only 11.5% of women work part-time. The report also points out that Estonia's pay gap is higher than elsewhere in Central and Eastern Europe. The study draws attention to the fact that women tend to ask for a lower salary and look for (new) jobs less actively than men. The former point is also frequently highlighted by the Estonian media when addressing the issue of the pay gap: it often appears to be the women's lower requests rather than discrimination that lead to the pay gap. This is confirmed by a survey conducted by polling agency Saar Poll and the Department of Social Sciences of the University of Tartu at the request of the Ministry of Social Affairs, which aimed to map gender equality-related views in Estonian society.[42] The study found that although they support the idea of an equal salary, women express willingness to work for a lower salary than men: while almost half of the male respondents would not accept a new job with a net salary lower than 7000 EEK (~450 euros), only every fifth woman would not accept such a job. In general, 75% of the respondents were of the opinion that men do not agree to work for as low a salary as women do. The authors of the survey suggest that the reasons may lie in the vertical and horizontal segregation of the labour market; additionally, women tend to value themselves less than men, and are likely to be more modest in asking for a salary increase. In January 2007, the Gender Equality Commissioner Margit Sarv also pointed out in a daily business newspaper's online interview that according to studies, women ask for a lower salary than men do.[43]

4. Good practices in tackling the gender pay gap

No relevant legislation or collective agreements exist yet in Estonia.

5. The legal dimension of the gender pay gap

As mentioned in Section 1, Parliament has established a sufficient legislative framework with regard to equal pay. The recent adoption of the legislation that prohibits discrimination in pay has made a crucial contribution towards the emergence of a wider public debate and awareness of the pay gap. This has brought about a change in the traditional gender stereotypes and has led to efforts in various parts of society to reduce the pay gap.

6. Problems of proof of unequal pay

Under the Gender Equality Act, an employee is granted the right to obtain any relevant information that makes it possible to decide whether there has been discrimination in pay or in other conditions (Article 7(3)). An employer must provide a written explanation to the person who claims that such discrimination has occurred, within 15 working days (Article 7(2)). Article 4 of the GEA facilitates the proof of discrimination, providing that once the person has submitted an application describing the facts of the alleged discrimination to a competent body, "the person against whom the application is submitted shall, at the request of the competent body, explain the reasons and motives of his or her

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[40] The document is available in English at http://www.talo.ee.

[41] T. Rõõm, E. Kallaste, "*Naised-mehed Eesti tööturul: palgaerinevuste hinnang*" ["Women-men in Estonian labour market: an assessment of the pay differences"], *Poliitikauuringute Keskuse Praxis Väljaanne Poliitikaanalüüs*, 2004/8, http://www.praxis.ee.

[42] BNS, 2 May 2006; the full study is available in Estonian at http://www.sm.ee/est/HtmlPages/toimetised_20061/$file/toimetised_20061.pdf.

[43] "*Võrdõiguslikkuse volinik: naised küsivadki vähem palka* [The Gender Equality Commissioner: Women indeed ask a lower salary]", http://www.tarbija24.ee, 25 January 2007; the article refers to an interview with Ms. Margit Sarv in *Äripäev* online version 24 January 07 at http://www.ap3.ee.

behaviour or decision"; if the person fails to do so or refuses to give an explanation, this refusal shall be deemed to be equal to an acknowledgement of discrimination by that person. Furthermore, under Article 11(2), an employer shall collect statistical employment-related data that are based on gender and allow, if necessary, the relevant institutions to monitor and assess his/her compliance with the principle of equal treatment in employment relationships. The procedure for the collection of data and the list of data shall be established by a regulation of the Government. The Ministry of Social Affairs has prepared the draft regulation on collecting employment-related statistical data by the employers. The draft regulation requires that the companies and state offices collect data regarding female and male employers, in order to enable the monitoring of gender equality in the labour market. The data to be collected concerns the number of male and female employees, wage differences, promotions, working conditions, training courses, etc. The following institutions would be entitled to request the data: the Gender Equality Commissioner, Chancellor of Justice, labour unions, labour inspectors, and representatives of employees.

FINLAND
Kevät Nousiainen

1. Legal framework
The Finnish Constitution, 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 Act referred to is the Act on Equality between Women and Men. Under Section 8, Subsection 1 (3) of the said act, the action of an employer shall be deemed to constitute prohibited discrimination, if 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 employer has the obligation to promote equality of women and men as regards terms of employment, especially those concerning pay, under Section 6, Subsection 2 (3). Under Section 6a, Subsection 1, an employer of 30 persons or more must promote equality according to a plan concerning pay and other terms of employment; the plan is to be drawn up every year, but it can be included in other plans, such as a personnel plan. Under Subsection 2, the plan made in cooperation with employees' representatives is to contain an analysis of the equality situation of the workplace, including an analysis of the placement of women and men in different jobs and an analysis of the classification, pay and pay differentials of women's and men's jobs. The plan is also to contain measures for achieving equal pay.
The Act on Equality between Women and Men does not mention pensions in Section 8, which prohibits pay discrimination. The more general prohibition of discrimination under Section 7 of the Act covers pensions, but this prohibition does not incur sanctions. However, according to Section 25, subsection 4, pension schemes that an employer had established before the Act came into force in the beginning of 1987 remained valid even if they contained discriminatory conditions. In 1997, the said provision was repealed, and the various additional pension schemes that still contained differential treatment were to be equalised by giving the insured person a choice between the alternative conditions.[44] In its preliminary ruling in Case C-351/00 *Niemi* the European Court of Justice found that the Finnish pension scheme under the State Pensions Law 1966/280 satisfied the criteria held to be decisive for characterising benefits provided under a retirement scheme for civil servants, and fell within the scope of Article 141 of the EC Treaty. *Vakuutusoikeus* (Insurance Court) decided that under national legislation, even though a female employee of the military forces was not entitled to a pension at the same age as her male comparators were, Article 141 EC had direct effect.[45] Thus, the female employee was entitled to the lower retirement age of male employees. Various Finnish laws on occupational pensions, which have a similar structure to State Pensions Law 1966/280, should similarly fall within the scope of the Community principle of equal pay. Any optional pension schemes an employer has for the employees would naturally likewise be within the scope of the said provision.
There is no provision on minimum pay in Finnish law. The collective agreement system sets the acceptable minimum pay in most cases, but such protection is lacking in certain typically female jobs, for example in services.

[44] See Government Bill 174/1997.
[45] Decision 25.2.2003/2276:96.

2. Collective bargaining and equal remuneration

A comprehensive description of plant and/or sectoral level cannot be given here. Approximately 90% of all employees work under some kind of collective agreement.[46] In 2004, women were more often organised in labour unions than men (73% v. 69.4%), and the majority of the organised employees were women (53.1%)[47].

The present 'income policy agreement'[48] of 29 November 2004, concerning the years 2005-2007, contains equal pay provisions. Provision 2.2.7 on gender equality refers to an 'equality component'. According to the provision, collective agreements must contain a component of pay, the amount of which depends on the proportion of women under the agreement and the proportion of persons working for low pay. The proportion of women is to be multiplied by 0.45, and to this figure is to be added the proportion of persons earning less than 10.67 euros an hour or 1782 euros a month multiplied by 0.15. The component is to be divided among employees according to an agreement in each field. Follow-ups on previous similar agreements has shown that the 'equality components' within various fields have not been used to promote equal pay within the field, but have often been given to all employees regardless of sex.[49] At the moment, the 'equality component' provision is probably the most important binding collective agreement provision on equal pay. The 'income policy agreement' for 2003-2004 included a recommendation that the member organisations should begin to assess gender impacts of collective agreements. The issue was discussed in lower-level negotiations, and the agreement led to some follow-up agreements. Negotiations seem to have concentrated more on other issues than pay differentials.[50] Some collective agreements refer to the Act on Equality or to equality plans. Such references are often abstract.[51]

The Finnish central organisations set up a follow-up group, the so-called TASE group for job assessment systems, ten years ago. The TASE-group has played a central role in the development of job assessment methods. In the Finnish wage structure, ca. 60-80% of the pay is determined by the requirements of the job in question. Both state and municipalities are committed to analytic job assessment. When the new pay system of the state was finalised in the beginning of 2006, all employees had undergone an assessment based not on uniform but on similar assessment criteria. Several collective agreements concerning municipalities set similar criteria for job assessment. In the private sector, the analytic job assessment is seen as only one possibility among several, and national collective agreements do not set criteria for it. The particular form of job assessments is negotiated at the sectoral or even enterprise level. The remaining part of pay is determined by a component reflecting personal competence and performance. There are no general qualifications or criteria for the latter parts of pay. Some collective agreements include a model to be used for assessing personal competence; others give examples and define the maximum and minimum levels of this pay component. The model is usually set on the enterprise or institution level. In the public sector, the competence of the employee has been traditionally used as a pay component, taking into account such criteria as years in office. Both the municipal sector and the state are presently replacing such formal criteria by a pay component based on competence and performance, assessed by superiors. Results-based pay has also become an important pay component, especially in (predominantly male)

[46] There are ca. 200 national private sector collective agreements; these are usually sector-based. The state is bound by ca. 100 civil servant collective agreements and ca. 60 ordinary collective agreements; these concern either a certain line of work or an institution. The municipalities are bound by five national collective agreements. The public sector employers' organisations represent both national and sectoral levels, which makes it easier to pursue uniform provisions on job classification and other issues relevant for equal pay.[46] Local agreements are numerous. Ca. 150 collective agreements are declared as 'generally applicable'. This means that they apply also to employment contracts between non-organised employers and employees in the field in question.

[47] Ahtiainen, Lasse, *Palkansaajien järjestäytyminen Suomessa vuonna 2004*. *Työpoliittinen tutkimus 298, Työministeriö 2006*.

[48] There is a tradition of so-called 'income policy agreements' between the social partners, related to government policies.

[49] Petäjäniemi,Tuulikki (2004), *Selvitys hallituksen samapalkkaisuusohjelman rakentamisen edellytyksistä yhdessä työmarkkinaosapuolten kanssa, Selvityshenkilön raportti. Helsinki, Sosiaali- ja terveysministeriön työryhmämuistioita* 2004:13, 50.

[50] *Petäjäniemi*, op.cit. 50.

[51] For example, the agreement for the technology and metal industry of 15 December 2004 stresses that promotion of equality pursuant to the obligations and measures set by the Act on Equality is considered important by the parties.

private industries since the 1990s. In the public sector, where most women work, result-based pay is seldom used.[52] This pay component has received little attention in collective agreements.

3. The concept of the gender pay gap

The pay differentials of the Finnish labour market cannot be explained by using characteristics like a deficit of education or experience of the female labour force. It is generally agreed that the deep segregation of the labour market into male and female branches has an impact on the differentials. According to several studies, the differentials have remained at a rather fixed level of ca. 20% for the last decades. One of the studies made it clear that by using the Oaxaca decomposition method, the unexplained wage gap can be reduced by half by including job classifications and sector information.[53] In the same sectors and in the same occupations, the pay differentials are considerably lower than 20%.[54] A study on wage differentials per unit in industry and services showed that the enterprises that employ mainly women pay lower wages than those that employ mainly men. Even the gender compositions of the units within the enterprise had an impact on the pay.[55]

Gender pay differentials are given two conflicting interpretations. The differentials certainly indicate that male and female jobs are evaluated differently. Women's organisations and several employees' organisations allege that the general pay gap is a consequence of discrimination. The employers' organisations claim that pay discrimination only exists to a very limited extent, because in an enterprise-based decomposition by occupation only a small part of the differential remains 'unexplained'. The disagreements about the pay differentials also reflect different statistics and studies, and agreeing on the statistics is a step towards agreeing on differentials. It would also be easier to analyse the differentials if the job-related and the personal, performance-related pay components could be separated in the statistics.[56] At the moment, the statistics vary by field. In many fields, the requirements of various jobs have not been defined.[57] The so-called value discrimination seems to be a grey area in the legal sense. Comparisons surpassing occupational titles, based on non-discriminative job and performance assessment in fields where the pay has a 'single source', may reveal whether such 'value discrimination' is legally prohibited. A significant part of the pay differentials seems to be the result not of, strictly speaking, pay discrimination, but of an uneven pattern of recruitment and promotion, which in itself could possibly be discriminatory sometimes.

4. Good practices in tackling the gender pay gap

Under the Government equality programme, a working group was assigned to prepare a programme to promote equal pay for women and men in the total labour market. The social partners proposed measures that would reduce both horizontal and vertical segregation of the labour market, as well as measures concerning women's career development, fixed time working contracts, equality plans, pay systems, development of statistics and other issues. The general objective is to reduce the pay gap by 5% by 2015.[58] The social partners monitor the pay systems closely. Helsinki University of Technology is carrying out a research project on equal pay funded by the European Social Fund, in cooperation with a number of organisations representing various fields and occupations.

The 'equality component', already briefly mentioned above in Section 2, in centralised 'income policy agreements' goes back to the 1970s, although the component has been called 'equality component' only since 1990.[59] The 'equality component' within each sector has not necessarily been distributed taking gender pay differentials into account. Thus, the policy has tended to reduce pay differentials in general, but this does not necessarily concern only the gender pay gap. Under the present 'income policy agreement', the parties to each agreement should aim at an increase of the pay of women who perform work that does not correspond to the demands of the job and their level of education. The

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[52] *Tilastokeskus*, 23.5.2004, http://www.stat.fi/tup/tietoaika/tilaajat/ta_05_04_tulospalkkaus.html.
[53] Vartiainen, Juhana (2001), *Sukupuolten palkkaeron tilastointi ja analyysi*. Helsinki, *Tasa-arvojulkaisuja* 2001:7, 26.
[54] *Petäjäniemi,* note 6, at 17.
[55] Ossi Korkeamäki, Tomi Kyyrä, Explaining gender wage differentials: Findings from a random effects model. *Keskustelualoitteita 320, Valtion Taloudellinen tutkimuskeskus VATT*.
[56] *Petäjäniemi*, note 6, at 55.
[57] I wish to thank Carita Lahti from the Helsinki University for Technology for this information, received in her pro-memoria dated 15 November 2005.
[58] Working Group Memorandums of the Ministry of Social Affairs and Health 2005:7, Working group proposal for a programme to promote equal pay for women and men.
[59] For a history of such pay components in 'income policy agreements', see *Petäjäniemi*, note 6, at 49.

employers' central organisation has been critical of the policy, claiming that it aggravates the competitive problems in certain sectors.

Of the employees' organisations, *Akava*, representing employees with an academic education, has repeatedly criticised the policy for not being helpful in reducing the pay differentials in the highest income groups. The pay differentials are the largest among the highly educated and highest earning employees. It is evident, however, that the policy of reducing wage differentials effectively reduces the gender pay gap, because women form the majority in the lowest income groups.

If the pay structure surveys required to be carried out under Section 6 a, Act on Equality, are conducted in an appropriate manner, they should provide information on the basis of which discrimination can be detected. Much depends on the models followed when making the analyses required by the provision. The central labour market organisations, in cooperation with equality authorities, have prepared a recommendation on the outlines the analyses pursuant to Section 6, Act on Equality, should follow. The outlines are not uniform for all employers. The different components of the pay are to be identified in the analysis, however. It is the employer's responsibility to have the analysis conducted.

5. The legal dimension of the gender pay gap

Equal pay cases rarely appear in the Finnish courts. Depending on the issue, they can be brought either before the Labour Court or before the ordinary courts. The Labour Court decides cases on the validity or interpretation of collective agreements. In a case decided in 1998, the claimant, an employees' organisation representing municipal employees, claimed that a collective agreement was invalid as to the conditions concerning the addition to pay on the basis of experience, because parental leave was not included as time taken into account as experience, while certain absences for work typical for men were taken into account. Thus, the pay system set by the collective agreement discriminated women indirectly. The Court decided in favour of the claimant.[60] The collective agreement was based on the proposal of the state conciliator, and the claimant stated that already when the agreement was signed she did not consider herself bound by the term under dispute. Otherwise, a claim that a term of a collective agreement should be considered discriminatory and thus void is not easily made by the parties to the agreement. However, at the same time, the parties to the agreement are the only claimants recognised by the Labour Court.

In cases decided in 2002, four judges of first instance with the same job classification had been placed in the lowest classification as a result of a change of the pay system. However, other judges, with the same tasks were moved to higher job classifications. The employer argued that the placement into various classifications was made according to the collective agreement on the basis of years in office, and was necessary as lack of resources prevented the placement of all judges in similar jobs in higher classifications. The Labour Court accepted neither justification and considered the placement of judges with the same tasks under different classifications discriminatory.[61]

In ordinary courts, cases based on Section 8, 1 (3) on wage discrimination are rare. In a case decided in 1992, the Supreme Court held that a considerable pay differential between a male and a female employee, admittedly doing work of equal value, was not to be considered discrimination, because the male comparator's pay was based on a collective agreement under which the achieved level of pay could not be reduced due to the Act of Equality coming into force; the case was brought to a court of first instance in 1988, two years after the law was adopted. The Supreme Court decided that the employer could not be expected to reduce pay differentials so soon.[62] The decision preceded adoption of EC law; at the time, the view that the employer could justify pay differentials by referring to different collective agreements was common among lawyers.

In 2002, the Appellate Court of Helsinki decided that an employer was justified in paying a woman lower wages than a man, irrespective of the fact that they mainly did similar work. The man's job was somewhat more demanding, and the employer had the right to divide work between the two in an appropriate manner. When the man was hired, there had been a lack of competent persons in the field, and that also justified higher pay.[63] At present, a case is pending in a lower court, which has

[60] TT 1998-34.
[61] TT 2002-7, 2002-8, 2002-9 and 2002-10.
[62] KKO 1992:18.
[63] *Helsingin* HO 547/2002.

required an interpretation by the Equality board on a pay discrimination case. The problems involved have to do with the choice of comparator.[64]

Neither ordinary nor labour lawyers are very familiar with the Act on Equality. The prohibition on pay discrimination poses some specific impediments for the claimant. Under Section 10, 3 of Act on Equality, the employer has an obligation to give the employee "the necessary information on the grounds of his/her pay on the basis of which it can be assessed whether the prohibition of pay discrimination has been violated". The employee has no right to receive information about a comparator's pay from the employer, however. In the public sector the pay information is public, and available even for purposes of comparison. The employees' representative has the right to receive pay information concerning an individual comparator only if the comparator consents to giving the information. Otherwise, according to Section 17 (3), the employees' representative has to ask the Equality ombudsman to provide it. The Equality ombudsman has the right to receive the information from the employer provided that there is 'cause to suspect pay discrimination'. In case the Equality ombudsman refuses to provide the information, the employees' representative may bring the case to the Equality Board. The procedure is cumbersome. When an individual comparator refuses the use of his/her pay information in the private sector, the only way to receive the information can be slow and can involve a procedure that could easily be turned into an open conflict. The pay component based on personal performance may be based on subjective assessment, and the criteria used are not very transparent. After the amendment of Section 11 of the Act on Equality on compensation, the economic incentive to bring pay discrimination cases to court may have increased.

6. Problems of proof of unequal pay

Information used as the basis for statistics is collected from the employers, but the statistics for different fields lack information that is differentiated by a pay component. Directions from the Ministry of Finances for state institutions demand information that includes information listed by sex, education, age, experience and job classification, as well as pay component. The analysis of the pay differentials in the workplace imposed by the amended Act of Equality, Section 6 Subsection 2, requires statistics and other means of collecting data in the workplace. The Act does not require comparisons across collective agreements or between employers/workplaces. However, according to the directions given by the equality authorities in coordination with the social partners, the analysis of pay differentials should be given separately for each pay component. The analysis must be done in a way that ensures that no information on any individual employee is revealed, and it may therefore not be helpful in cases of individually contracted pay or for persons in higher pay categories, although pay differentials are greatest in the higher pay groups.

FRANCE

Hélène Masse-Dessen[65]

1. Legal framework

The principle of equal pay for men and women has a long history in legislation in France. The law of 11 February 1950 included this principle in the mandatory provisions that have to be inserted in collective agreements. Before 1982, Article L 133-5 of the Labour Code referred to women in particular; since that article referred to a general principle of equal pay, including gender equality. Having ratified the ILO Convention 100 in 1952, France has strongly advocated the introduction of Article 119 in the EEC for reasons of economic competitiveness. Although the ILO Convention was directly applicable in national law, France adopted legislation reiterating the terms of the convention on 22 December 1972, in order to give full effect to its clauses. The Labour Code provisions were amended by the law of 13 July 1983, implementing Directive 76/207/EEC.The law of 9 May 2001 added new mandatory provisions in relation to collective bargaining and on information for workers' representatives. Recently, the law of 23 March 2006 on Equal Pay between Men and Women has profoundly modernised the relevant rules. No special provision deals with occupational pensions, which fall under the laws mentioned above.

Equal pay in the *private sector* is mainly governed by the *Labour Code*. Article L 140-2 provides for equal pay for men and women "for the same job or a job of equal value"; it also gives a definition of

[64] Information received from the secretary of the Equality Board, Karoliina Ahtela.
[65] This report has been written with the contribution of Elsa PESKINE and Marie-Therese LANQUETIN.

remuneration, including all the elements of the definition in the ILO convention nr. 100 and of Article 141 of the EC Treaty. According to Article L 140-3, pay must be established according to the same rules; categories and classification must be established using the same criteria, etc.
Labour inspectors play an important role. They must check whether these provisions are applied, and they must be given all necessary information and documents (Articles L 140-6 and R 140-1).
At sectoral level and in enterprises where collective bargaining has to take place annually, collective bargaining must also concern remuneration. In order to ensure the effectiveness of the compulsory negotiations, special information must be provided (Articles L 132-12, L.132-27, L 432-3-1 D 432-3-1): the information relates to the situation of male and female workers and involves a comparison between them. There is a whole range of indicators, which are listed in Article D 432-1 of the Labour Code.[66]

The new *Law no. 2006-340 of 23 March 2006 on Equal Pay between Men and Women* aims to reduce the wage disparities between men and women. Indeed, it specifies that the gap must disappear before 31 December 2010 and refers to collective bargaining for the accomplishment of that aim (see below). It contains a broad definition of discrimination,[67] including sex, familial situation, sexual orientation and pregnancy. Many provisions relate to maternity and to the wages received by employees after this period. According to the law, the wages must be increased after the maternity leave, in order to follow the general pay increases as well as the average individual increase received during the period by the employees of the same category.[68] This provision is the transposition of Directive 2002/73/EC. Other clauses relate to the paid leaves of the employees after maternity leave (cf. Case C-342/01 *Gomez*) and to the compensation by social security for the additional maternity leave granted in the case of premature birth that requires the hospitalisation of the newborn baby. These provisions have also been implemented for self-employed workers.[69] The law also deals with the issue of combining work and family life and lays down a new rule: companies, through collective bargaining, have to take this problem into account in their staff management. Lastly, some provisions concerned the representation of women within deliberative and jurisdictional boards and laid down targets as to their representation. However, these provisions were cancelled by the Constitutional Council, for reasons of irregularity in the proceedings in Parliament.

As regards the *public sector*, Articles L 140 2 to L 140-4 of the Labour Code are also mandatory for workers in the public sector. Article 6 of the General Statute of Civil Service grants equal pay for civil servants. As a principle, collective bargaining is not possible in the case of civil servants. However, discussions do occur, which are taken into account by the State regulation.

In relation to these main rules governing employment relationships, it is to be noted that in recent years, a sort of special contract emerged that derogates from common labour law. The objective of these contracts is said to be to facilitate the access to employment. These contracts provide lower pay and less protection than normal contracts, or barely grant their holders the possibility of claiming equal treatment; they are mainly entered into by young workers and women.

2. Collective bargaining and equal remuneration
Collective agreements are a very important source of mandatory regulations concerning equal pay. Rules resulting from collective bargaining are diverse. They come from national inter-professional negotiation (which is mandatory for all enterprises of the private sector) and from all other levels. For example, a very important inter-professional national agreement was concluded on 1 March 2004 between national organisations of employers and trade unions, in order to promote professional equality between men and women. It contains commitments to make information available and to reduce differences in salary.[70]

The law of 13 July 1983 provides that professional equality schemes must be negotiated at plant level, within enterprises. The new law of 23 March 2006 on Equal Pay between Men and Women considerably increases the role of collective bargaining in fighting the pay gap and realising equal pay. According to some provisions of the law, parties to collective bargaining have to find the means to

[66] For reasons of convenience, this Article is annexed to the present report. See Annex II.
[67] Labour code, Article L. 122-45.
[68] Labour code, Article L 122-26.
[69] Decree no. 2006-1008 of 10 August 2006 for the application of Article 15-I of the law no. 2006-340 and Decree n° 2006-1011 of 10 August 2006.
[70] At http://www.lexisnexis.fr/pdf/DO/mixite.pdf.

reduce wage disparities. The provisions do not impose obligations as such, but aim at inducing the social partners to find the means to reduce wage disparities.

As regards the suppression of the pay gap, the law aims at a certain result: the gap must disappear before 31 December 2010. It has to be done through collective bargaining by branch or in companies. More precisely, this problem must be debated within the framework of the obligatory annual negotiation on wages. In fact, since the law of 9 May 2001,[71] each branch had to take measures to ensure equality at work between men and women. Now, this obligation is made more specific and is reinforced. The action taken must be founded on precise, pertinent measures and a precise analysis of the gap between remuneration of men and women. Various instruments structure the negotiation. For example, a trade union can require the discussions to start within 15 days. The Minister may convene a Joint Committee in a branch. However, no other incentive or sanction is laid down. The sanction that had been envisaged (contribution to be paid by employers, if no sincere and effective negotiations have taken place) was outvoted in the Parliament.
However this may be, a collective agreement must, from now on, be made mandatory for all employers and consequently all employees in the professional branch, and it must deal with the topic of the "reduction of the gap in the remuneration between women and men."[72] The difficulty is to determine what can be negotiated. Pure - direct - discrimination (about 5 to 10% according to recent studies) cannot be the subject of a compromise. Only the consequences of various classifications, specialisations, structural differences etc. can be negotiated.

Until now, only a few agreements have been signed, but they did improve the situation of some women. For many women, the system has not yet brought any improvement, being too theoretical.

Before the new law was voted on, several reports evaluated the situation of collective bargaining. An inquiry of the *Sénat* shows that 72% of companies (57% of the big companies) did not open negotiations concerning gender equality.[73]

Most agreements only compare the minimum wages paid to workers performing equivalent work and do not take other items into account, such as seniority in the company. Only a few agreements deal with other elements, such as individual and collective premiums, promotion etc. One may wonder whether the notion of pay as established by Community law is really known to negotiators. The principle of equal pay for equal work is difficult to establish in practice without proceeding to an analysis of the criteria of evaluation in the definition of functions. No company or professional branch has taken such a step. Finally, an analysis of the salary disparities should take into account the effects of career developments and seniority. This type of analysis is not common in equal pay cases. It is more frequently done in trade union discrimination cases. The worker discriminated against can be given the promotion and career he would normally have had in case of non-discrimination. However, such an approach seems more difficult when the case is about pay discrimination: the comparison is difficult because of differences in classifications.

3. The concept of the gender pay gap

According to the terms of the Inter-professional National Agreement of 1 March 2004, the main cause of wage disparities has been identified: women are more numerous in professions and professional sectors with lower remunerations. The INSEE (national institute of economic statistics) estimates that the residual difference of 5%, which cannot be explained away by this (and various other) effect, appears to be due to discrimination.
There is no common legal definition of the gender pay gap. As mentioned above, it is even questionable whether the notion of equal pay in the meaning of Community law is really known to negotiators and legislators.

4. Good practices in tackling the gender pay gap

The debate about combating discrimination in general also fueled the discussions about gender equality and equal pay. A number of positive steps that have been taken can be brought to the fore.
For example, national administrations in charge of labour and temporary employment agencies are involved in European 'equality' programs, and they try to deal with problems of discrimination. In

[71] Law 9 May 2001, n°2001-397.
[72] Labour Code, Article L 133-5.
[73] Cf.http://www.senat.fr/rap/r04-429/r04-429_mono.html.

addition, the debate about the new legislation gave rise to several studies, which were in turn debated in conferences and widely reported in the press to make social partners sensitive to various aspects of the gender pay gap. The figures published showed the persistent obstinacy of the pay differences.
Similarly, lively discussions about pensions are ongoing. The Pensions Orientation Council, a public body for reflection and propositions on the pensions' reform, decided to dedicate its next report to the equality between men and women in pensions and have already organised a conference on this subject.
The French government has also created an 'equality label', to be given to companies for a period of three years when they satisfy 18 quality criteria, such as: actions that promote equality, that stress the importance of management and human resources, and that pay attention to the situation of parents and to the reconciliation of professional and family life. The first label has been given to the group PAS-PEUGEOT-CITROEN. An agreement signed on 4 November 2003 and another one signed on 8 September 2004 create an obligation for PSA to recruit the same proportion of men and women, to try to achieve a balanced remuneration for men and women and to improve working conditions for women.
The results of the new law on Equal Pay between Men and Women in the area of collective bargaining must be awaited. In any case, new incentives are there.

According to Article 13 of the Inter-professional National Agreement, if an average wage difference between men and women is objectively established, the professional branches and the companies have to make its reduction a priority. In addition to the application of the provisions listed in titles I and V of the agreement (evolution of mentalities, training, orientation, recruitment, professional training), specific progressive steps, which are limited in time, can also be taken for that purpose. This means that negotiators accepted the idea of specific and temporary direct actions for the amelioration of the position of women (direct wage amelioration, a kind of 'positive discrimination', but only for a limited period). In the professional branches, the realisation of this objective must be re-examined every five years, at the time of the compulsory re-examination of classifications and of the evaluation criteria retained in the definition of the various jobs, in order to track and correct those classifications and criteria likely to create discrimination between men and women. For example, efforts are made to safeguard women's rights that they would have obtained if they had not left their employment during parental leave.

Unfortunately, all these efforts concentrated in collective agreements, do not mean much for women working in small enterprises, where collective bargaining is rare, and to those under precarious employment contracts. The situation of self-employed women and wives of self-employed men does not fall under these rules, either.

5. The legal dimension of the gender pay gap
Apart from imposing obligations on social partners through legislation, as discussed above, law may also be a useful tool in fighting the pay gap through litigation.
The first important point to note is that there has been a major change in perception of the tension that traditionally exists in labour law between the principle of equality and the freedom of the employer. In the mid-90s, the *Cour de cassation* abandoned the theory that had hitherto prevailed, whereby the employer was the sole judge. Henceforth, the judge is the sole judge and the employer must justify the measures taken.
The principle of equality has undergone many modifications since the Social Chamber of the *Cour de cassation* ruled in 1996 that pay equality between male and female workers is the application of the more general principle of equal pay to all employees, provided that they are in the same circumstances. Litigation has significantly increased since this case, with varying degrees of success.
Concerning the principles of gender equality, we note a net progress among lawyers (defenders and judges, at all levels) of the understanding of these concepts and of the rules of proof. The difficulty essentially lies in proof (see below, section 6). Another difficulty lies in the list of reasons considered as sufficient for justifying unequal pay. Legal differences (such as a difference of classification) or 'economic' reasons seem to be sufficient to explain differences in remuneration.[74]

[74] The *Cour de cassation* has recently decided that pay can differ without infringing the equal pay principle when the legal situation also differs. In the case in question, it decided that a freelance worker in the entertainment industry is allowed to receive a higher fee than entertainers under a permanent contract. (Cass. Soc. 28 April 2006 *Sté DEMD*). It also held that a collective agreement may lawfully take into account the careers of workers to justify differences in the calculation of their pay. For this reason, employees in the same job whose pay is calculated differently as a result of having been promoted at different times cannot successfully rely on the

Moreover, collective disputes relating to classifications and to career developments are still rare. They have only recently started to develop. Litigation about unequal pay, when workers are under different legal regimes (public and private, different collective agreement etc.), is much more complicated and rare.
Tables of comparison to help analysis of equal work, professional training and popularisation of concepts are powerful tools in litigation. However, the employment situation and the new contracts that provide less protection are a handicap to judicial actions.

6. Problems of proof of unequal pay
The main difficulty in enforcing equal pay lies in the constitution of the reference group: many disputes begin without a real preliminary study and do not succeed, mainly for that reason. Experience demonstrates that, apart from a few exceptions, individual litigation is very difficult. An employee has great difficulties in providing the necessary proof, unless he or she obtains help from employees' representatives in putting his/her file together. As a consequence, disputes entered into in small firms, after the termination of the labour contract, are rarely successful because of the absence of information about payment structures.

However, there are some positive notes: the HALDE (High Authority against Discrimination and for Equality) is increasingly active in the area of equal pay, and this authority could be of great help when it becomes more widely known. Similarly, the new list of indicators (to be found in the annex) that is to be communicated to social partners, as discussed above, may also be of help. The problem here is notably that the pay gap is considerable in small enterprises without workers' representatives.

GERMANY
Dagmar Schiek

1. Legal framework
General overview and history
Up to the present day, the problem of the gender pay gap has not been addressed by specific legislation in Germany. This does not mean, however, that pay discrimination is legal or that there are no means for redress in equal pay issues.

First of all, the equal pay principle is part of the constitutional gender equality clause embedded in Article 3 § 2, 3 *Grundgesetz* (GG, German Constitution). As early as 1955, the Federal Labour Court considered that this clause had direct horizontal effect insofar as the parties to collective labour agreements were bound by it. This pivotal judgement on the legal character of the collective agreement was actually made in a case relating to equal pay.[75] However, the same decision exposed a reluctance of German courts to tackle gender discrimination in social reality. The Federal Labour Court advised parties to collective agreements to replace special wage groups for women by wage groups for 'light work', as this gender-neutral differentiation would not violate Article 3 § 2, 3 GG. Unsurprisingly, the concept of indirect pay discrimination was alien to German doctrine, and it was only accepted reluctantly following influences of European law.[76]

In the 1970s, while EEC Directive 75/117/EEC obliged Member States to introduce effective means to enforce the equal pay principle, Germany did not create new legislation on the issue. Developments in equal pay law were achieved by judicial campaigning through unions. Women working at the "*Heinze*" firm, a small enterprise in the photographic sector[77] campaigned before the courts for the equal pay principle. This principle was threatened in particular by the system of 'light wage groups'. These wage groups were created to replace special wage groups for women. Instead of simply saying 'women

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principle of equal pay. (Cass. Soc. 3 May 2006 *Cramif*). Other restrictions of a similar nature had already been accepted in case law,[74] for example the fact that collective agreements signed for different local branches of the same company can result in pay differences.[74]
Some authors have wondered whether the Court is simply satisfied with any objective reason adduced for pay differences, without questioning whether it is legitimate or proportionate by weighing the adopted measure against the principle of equality or considering the actual use of the principle. This is undoubtedly a rather pessimistic view, but vigilance is necessary nonetheless.
[75] BAG 1. *Senat, Urteil vom* 15.01.1955 - 1 AZR 305/54, AP no.. 4 zu Article 3 GG.
[76] See Dieterich, *Erfurter Kommentar zum Arbeitsrecht*, 7th ed. Munich 2007, Article 3 GG no. 88.
[77] For a short report see http://agenda21.gelsenkirchen.de/aGEnda21_frauen/g_heinzefrauen.htm.

receive x percent of men's wages', the collective agreement would add to a wage group 2, comprising semi-skilled workers, a wage group 02, comprising semi-skilled workers whose work only required medium or low levels of muscle power. This wage group would be accorded a wage of x percent of wage group 2. The *Heinze* case focused on a different system of unequal pay. In the relevant firm, men and women were categorised in the same wage group, but all male employees received additional supplements, while only some of the female employees received supplements, which were considerably lower than those paid to men. The male and female employees had different jobs, but these were categorised in the same wage group and were thus treated as being of equal value by the Federal Labour Court in its final judgement.[78] The question was whether women's work was correctly categorised as only requiring medium levels of muscle power. The same problem was addressed under the key word of indirect pay discrimination in the *Rummler* case, which was referred to the ECJ by the Labour Court of Oldenburg and decided in 1986.[79]

As late as 1980, the German legislator passed a norm explicitly acknowledging the equal pay principle. § 612 paragraph 3 Civil Code (BGB) was inserted in the 'Act of Adjustment of Employment Law to EC law (Act on Equal Treatment of Men and Women at Workplace and on Acquired Rights of Workers in case of a Transfer of Undertakings)' of 1980.[80] Where there is an employment relationship, this provision prohibited agreeing to a lower remuneration than the remuneration of an employee of the opposite sex for equal work or work of equal value on grounds of the employee's sex. It specified that the existence of specific protective legislation on grounds of an employees' sex does not justify lower remuneration (§ 612 paragraph 3 second sentence). In addition, the rule on burden of proof as provided in § 611 a paragraph 1 third sentence applied to the equal pay norm as well (§ 612 paragraph 3 third sentence). That rule provided that, where an employee substantiates by *prima facie* evidence facts from which it may be presumed that there has been detrimental treatment[81] on grounds of sex, it shall be for the employer to prove that this detrimental treatment was justified by objective reasons other than sex.

The law as it stands today
While § 611 a BGB was changed several times, § 612 paragraph 3 BGB remained unaltered until it was replaced by the *Allgemeine Gleichbehandlungsgesetz* (General Equal Treatment Act – AGG) in August 2006.[82] This piece of legislation has the purpose of implementing, *inter alia*, Directive 76/207/EEC as amended by Directive 2002/73/EC. The content of the equal pay prohibition was not changed explicitly. § 7 AGG prohibits unequal treatment within any employment relationship. This prohibition comprises the equal pay principle, as is clarified by § 8 paragraph 2 AGG. According to this provision, any contractual agreement for a lower remuneration on grounds of sex (and other traits covered by the AGG) cannot be justified by the existence of protective legislation. While the provisions of the AGG in §§ 7 and 8 are not spectacular, there is some progress discernible in the fact that German law explicitly defines indirect discrimination for the first time in § 3 AGG. This definition is taken literally from Directives 2000/43/EC, 2000/78/EC and 76/207/EEC as amended by Directive 2002/73/EC, with slight adaptations to the multi-ground conception of the AGG. The provisions of the AGG apply to public servants accordingly (§ 24 AGG).

There is some complementing legislation in relation to "*Betriebsvereinbarungen*" (works agreements). These may cover matters that are regarded as pay under the case law of the ECJ. A works agreement is concluded between the works council, a body elected by all employees of a firm in accordance with the provisions of the works council act, and the employer. Although the "*Betriebsverfassungsgesetz*" (Works Council Act) prohibits any works agreement in any area that is covered by collective agreement, a collective agreement may authorise the regulation of specific matters by a works agreement. This is used especially for occupational pensions. According to § 75 Works Council Act, the employer and the works council have to respect the prohibition against discrimination on grounds

[78] BAG 5. *Senat, Urteil vom* 09.09.1981 - 5 AZR 1182/79, AP no. 117 zu Article 3 GG.
[79] ECJ 237/85 (Rummler v Dato Druck), [1986] ECR 2101.
[80] BGBl 1980 I, 1308.
[81] German statutes are careful to avoid the term discrimination when creating rules outlawing discrimination of persons on grounds of sex or other specific criteria, although the term is used in statutes concerning other areas of law, such as competition law.
[82] *Allgemeines Gleichbehandlungsgesetz* of 14 August 2006, BGBl. I-1897, last changes by Article 8 § 1 Act of Parliament of 2 December 2006, BGBl. I-2742. Article 3 § 14 of the AGG repeals §§ 611 a BGB, 611 b BGB and 612 § 3 BGB.

of sex. Thus a specific implementation of Directive 75/117/EC was not considered necessary in the area of works councils.[83]

As regards occupational pensions, these are considered as part and parcel of remuneration in line with the ECJ case law on equal pay for women and men. Accordingly, § 7 AGG applies to any individual contract on occupational pensions, § 75 BetrVG applies to any works council agreement on occupational pensions, and Article 3 GG applies to any collective agreement on occupational pensions. Specific regulation of occupational pensions is to be found in the occupational pensions act (*Gesetz über die Betriebliche Altersversorgung - BetrAVG*)[84]. This piece of legislation does not refer explicitly to the gender equality clause, but the norms cited in the beginning of this Section, i.e. §: 7 AGG and § 75 BetrVG, apply to any contracts on occupational pensions based on the BetraAVG.

Enforcing the law
German law evidently lacks legal provisions that specifically implement the equal pay principle. The AGG, as the most recent legislative development in the field, does not change this significantly.

In contrast to other Member States, which used the opportunity of implementing the directives on non-discrimination law to empower associations as legal actors, the German legislator restricted itself to the barest minimum of implementing the relevant provisions, e.g. Article 6 (3) Directive 76/207/EEC as amended by Directive 2002/73/EC and Article 17 Directive 2006/54/EC.[85]

The same applies to the provisions on independent bodies supervising the implementing legislation. Again, the German implementation merely fulfils the minimum requirements.[86]

This legislation has not been used to establish specific mechanisms to implement the equal pay principle. Accordingly, there are no effective means available to ensure that the principle of equal pay is observed (Article 6 Directive 75/117/EEC), and employees are not practically able to pursue their equal pay claims in an effective way (Article 4 Directive 75/117/EEC). What is missing in the opinion of this expert is an independent institution that has the competence (including the necessary resources) to carry out an assessment of wage schemes in the light of the equal pay principle. In addition, in order to enable those suffering from discrimination to effectively pursue any claims, collective actions should be possible in this field. Although trade unions are among those actors most active in Germany in terms of implementing the equal pay principle, other actors that are independent from the drafting of collective wage agreements should be empowered as well.

2. Collective bargaining and equal remuneration
Collective bargaining is still decisive for the majority of employment relationships in Germany. The number of employment contracts that are covered by a collective agreement directly, because both employer and employee are members of the concluding parties, has been on the decline for more than ten years. However, many employers apply collective agreements to all their employees, whether they are union members or not. In addition, there are collective agreements that are generally binding. There is a list of generally binding collective agreements.[87] There is no federal public register of all collective agreements. However, the state of North Rhine Westphalia still operates such a register.[88]

There is no tradition of collective bargaining specifically for equal pay. Presently, unions are advocating gender mainstreaming for this purpose. Possibly the principle of equal pay will be used for a major overhaul of wages in the public sector

[83] Cf. Case 248/83 Commission v. Germany.
[84] BetrAVG of 19 December 1974, BGBl. I 3610, last changed through the act of 2 December 2006, BGBl. I 2742.
[85] See Kocher, commentary on § 23 AGG, no. 3-5, in: Schiek (editor) *Allgemeines Gleichbehandlungsgesetz – ein Kommentar in europäischer Perspektive*, 2007.
[86] See Laskowski, Commentary to § 25 AGG, no. 4, questioning whether the sub-department of the Ministry for Family Affairs is sufficiently independent in the light of the directives, Comments preceding § 25 AGG for a comparative overview (in: Schiek (editor), as above note 12).
[87] At http://www.bmwa.bund.de/Redaktion/Inhalte/Pdf/A/allgemeinverbindlich-erklaerte-tarifvertraege-oktober-2005,property=pdf,bereich=,sprache=de,rwb=true.pdf.
[88] At http://www.tarifregister.nrw.de/index.html.

The trade union VER.DI[89] has used the refurbishment of the general collective agreement for white-collar workers with public services, the *Bundesangestelltentarifvertrag* (BAT), for a gender mainstreaming check of its wage groups. The BAT had a long history, going back to the "*Allgemeine Tarifordnung*" that was created between 1933 and 1945. This wage system was a mixture between wage groups naming specific activities (e.g. "*Das Brunnenmädchen in Heilbädern*" – the fountain girl in medical baths) and describing activities with progressing degrees of difficulty. The very complex system resulted in overrating typically male work. Now the BAT has been replaced by the *Tarifvertrag für den öffentlichen Dienst* (TVöD), for which a new wage group system shall be established by the end of 2007. VER.DI has commissioned studies to analyse its collective agreements with a view to equal pay.[90] Establishing the new wage groups system for employees with public employers will be a first practice test of how extensively these sophisticated criteria for eliminating the hidden gender bias will be applied.

3. The concept of the gender pay gap

The concept 'gender pay gap' is used by trade unions (see above), but not by official institutions in Germany. The German term "*Entgeltunterschiede zwischen Männern und Frauen*", or just "*Lohnungleichheit*" which would roughly translate to 'gender pay gap', is also used by politicians (see for example, Irmingard Schewe-Gerigk, in her contribution to the parliamentary debate on the CEDAW report)[91]. The term refers to statistically relevant differences in pay between women and men that are not necessarily attributable to gender discrimination. For example, the DGB (German Trade Union Congress) has commissioned a study by Birgit Tonndorf on the relevance of the prohibition of indirect discrimination in the area of pay, which was delivered in 2003. On pages 6-8 of this report, the author relates the gross earnings of women and men occupying full-time positions from 1977 to 1997 in Western Germany and from 1993 to 1997 in Eastern Germany. The difference between these earnings is considered the gender pay gap. It amounted to 28% in Western Germany in 1977, to 25.3% in Western Germany in 1997, to 8% in Eastern Germany in 1993 and to 6.1% in Eastern Germany in 1997. In that report, the gender pay gap is attributed to structural disadvantages, e.g. lower qualifications, as well as to gender discrimination. New numbers seem to indicate that the gender pay gap has narrowed a little (see above under 3). While the exact contribution of the reasons named above to the gender pay gap has still not been fully analysed, most unions and some politicians share the analysis that the gender pay gap is partly caused by illegal discrimination.

4. Good practices in tackling the gender pay gap

Despite there being no legislation requiring specific measures to overcome pay discrimination, activity in this sector is not totally absent.

A recent example of good practices is an ongoing campaign for equal pay, which was commissioned by the Institute for Economic and Social Research (*WSI – Wirtschafts- und Sozialwissenschaftliches Institut*), which is founded by the unions. The aim is to inspire as many women as possible to compare their earnings with those of male colleagues. An interim assessment has already achieved some consolidated results. According to these, the gender pay gap still stands at 22.9% in Germany.[92]

5. The legal dimension of the gender pay gap

The gender pay gap is caused by socio-economic factors entirely. The 'legal dimension' can only refer to analytic instruments that enable legislators and judicial campaigners to use legal redress as a way of reducing the gender pay gap.

As has been said, there is no specific legislation in Germany providing special procedures to investigate pay discrimination. Thus, legislation contributes less than would be possible to reducing the gender pay gap.

6. Problems of proof of unequal pay

In Germany, there is no specific legislation providing for a procedure for job evaluation in claims for equal pay for work of equal value. There is no institution that is explicitly charged with establishing equal pay in social reality. Many of the shortcomings of the limited legislative provisions cited above have been addressed by the ECJ, especially in the area of occupational pensions. Despite the fact

[89] The abbreviation of this trade union's name stands for "*Vereinigte Dienstleistungsgewerkschaft*" (united service union).
[90] See http://entgeltgleichheit.verdi.de.
[91] At http://www.gruene-bundestag.de/index.html.
[92] See at http://www.frauenlohnspiegel.de/main/Lohncheck/Paygap.

that the equal pay principle has been acknowledged for such a long time now in Germany, the gender pay gap is still considerable. There is presently no specific activity of the German government to address the gap between legal norms and social reality in this field.

GREECE
Sophia Koukoulis-Spiliotopoulos

1. Legal framework
Article 22(1)(b) of the Greek Constitution (Const.) reads: "All workers, irrespective of sex or other distinctions, shall be entitled to equal pay for work of equal value." This provision is wider in scope than Article 141 EC in that it prohibits discrimination on any ground whatsoever, including sex, thus requiring equal pay for work of equal value even for persons of the same sex. The Supreme Special Court (SSC) has ruled that this article applies only to employment under private law, not to employment under public law.[93] Thus, Article 22(1)(b) can be invoked against individual employers or private undertakings. It can also be invoked 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 is applied by the courts to employment under public law (i.e. regarding civil servants of the State, local authorities and other legal entities governed by public law). Greek courts do not apply Article 22(1)(b) to occupational pensions. They apply Article 4(2) to all pension schemes, without distinction. The fact that Article 4(2) only refers to Greeks does not seem to create any problems regarding Union citizens.

Directives 75/117/EEC and 76/207/EEC were transposed by Act 1414/1984, which applied to persons employed under a private law contract subject to the employer's control (*travail subordonné de droit privé*), to persons employed under a contract of independent services and to the liberal professions. Article 4(1) of this Act proclaimed the right of men and women to equal pay for work of equal value. Article 4(2) defined '*pay*' as "the salary and any other additional consideration paid by the employer to the worker, directly or indirectly, in cash or in kind, in return for the work performed". This definition fell short of the Article 141 EC definition, since, instead of the expression "in respect of his employment" it used the more restrictive expression "in return for the work performed". Article 4(3) of Act 1414 called for sex-neutral job classification but neither this Act nor any other piece of legislation provided criteria for this. Moreover, Act 1414 prohibited indirect discrimination regarding access to employment only.

Act 3488/2006, which transposed Directive 2002/73/EC and replaced Act 1414, has a much wider scope. Thus, its equal pay provisions cover 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. in-company lawyers), as well as the liberal professions and professional trainees. This Act brought the equal pay provisions into line with Article 141 EC and Directive 75/115/EEC; it adapted the definition of 'pay' to that of Article 141 EC and replaced the provision relating to job evaluation as follows: "a) where a professional classification system is used for determining pay, it must be based on common criteria for men and women and applied so as to exclude discrimination on grounds of sex; b) where systems of personnel evaluation related to pay rises are drawn up and applied, the equal treatment principle shall apply and no discrimination on grounds of sex or family status shall be allowed".[94] Moreover, Act 3488 prohibits "any form of direct or indirect discrimination on grounds of sex, by reference in particular to family status, in all areas included in the scope of application of this Act". There are still no legal criteria for job evaluation and classification.

Neither Act 1414 nor Act 3488 deal with occupational pensions. Pensions are governed by specific social security legislation. In two Greek cases,[95] the ECJ reaffirmed the criteria distinguishing occupational schemes. In the second case, it found that Greece was infringing EC law. Presidential Decree 87/2002, which aims at implementing Directives 96/97/EC and 86/378/EEC, neither lists occupational schemes nor sets out criteria for identifying them. It just copies the provisions of the directive. Thus, although there are many occupational schemes (for the civil service, public corporations, banks etc.)[96], there is a widespread impression that there are very few of them and sex

[93] SSC no. 16/1983, settling a controversy between Supreme Courts (Article 100 Const.).
[94] Article 7 (2) and (3) of Act 3488/2006.
[95] Cases C-147/95 *Evrenopoulos* [1997] ECR I-2057, and C-457/98 *Commission v. Greece* [2000] ECR I-11481).
[96] See Petroglou A. (2004), 'Occupational Schemes and ECJ Case-law', in Greek Society for Labour Law and

discrimination in such schemes is not addressed by the legislator. The European Commission has intervened in this matter.

All Greek courts review the conformity of statutes to the Constitution, EC law and ratified treaties, and disapply those they consider contrary thereto. Administrative acts of general applicability (*actes règlementaires*), including acts fixing pay for employment under public law and extending collective agreements, may be challenged for annulment before the Supreme Administrative Court (Council of State, CS). Individual administrative acts (including acts relating to pay) may be challenged for annulment or modification before the lower administrative courts, which also hear pay claims of persons employed under public law. Pay claims of persons employed under private law are heard by civil courts, with the Supreme Civil Court (SCC) ruling as the last resort. The sanction for discrimination, as applied by the courts, is levelling-up.[97]

In principle, the courts interpret constitutional and legislative provisions in the light of EC law,[98] but levels of gender equality litigation are very low, in spite of indications of discrimination in practice (direct and indirect in the private sector, indirect in the public sector). There is very limited awareness of the concepts of equal value and indirect discrimination; thus, such gender equality cases do not reach the courts. Moreover, the wider constitutional equal pay norm is applied in a restrictive way; the SCC holds that it requires equal pay for workers having the same qualifications and performing the same work under the same conditions for the same employer; even where these criteria are fulfilled, it allows derogations on grounds of general social interest, e.g. where the workers are covered by different agreements or are under different legal relationships (e.g. under public – private law)[99]. A recent preliminary reference to the ECJ concerned, *inter alia*, direct and indirect gender discrimination in pay. The ECJ found no such discrimination, but it found direct discrimination within the meaning of Directive 76/207/EEC and a probability of indirect discrimination within the meaning of this Directive, unless the employer could give an objective justification.[100]

2. Collective bargaining and equal remuneration

There is a long tradition of collective agreements covering workers under private law. Their scope, content and legal effects are currently regulated by Act 1876/1990. They are made in writing, after collective bargaining between unions and employers' organisations or individual employers. They may cover workers employed under private law subject to employer's control, agricultural workers and home-workers. There are no unions for the latter two categories; hence no professional or branch agreements for them. All these agreements may deal with any terms and conditions of employment and social security, except pensions; in practice, their main subject is minimum (monthly and daily) wages.

There are five categories of collective agreements: (i) national general agreements (ngca), concluded by the Greek General Confederation of Labour and by employers' national level organisations, which fix minimum wages for all workers of the above categories; (ii) branch agreements (covering several undertakings which produce the same or similar products in a certain town or region or in the whole country); (iii) undertaking agreements (covering an undertaking); (iv) national professional agreements (covering a certain profession); (v) local professional agreements (covering a profession in a certain town or region).

The above-mentioned agreements are registered with the Ministry of Labour. Copies thereof are available to anybody. Most of them are published in specialised law reviews. They are legally binding and legally enforceable against employers bound by them. Workers who do not receive the amount of pay to which they are entitled under an agreement may bring an equal pay claim to the labour court. Workers who are victims of discrimination stemming from an agreement may bring an equal pay claim to the same court. Such claims may also be brought by the aggrieved worker's union, unless the worker objects; unions can also intervene for their members in any trial the latter have started in the labour court.[101] Agreements extended by ministerial decision[102] may be challenged for annulment

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Social Security, *Occupational Social Security Schemes,* A.Sakkoulas, p. 73 s.; Koukoulis-Spiliotopoulos S. (2007), Article 4(2), in *Pararas-Corpus, Commentary of the Constitution,* A. Sakkoulas.

[97] A recent alarming exception: SCC (Plen.) no. 21/2006, which applied levelling-down.

[98] E.g. SCC (Plen.) no. 3/1995 and judgments in notes 18 and 19.

[99] SCC 1451/2003, 453/2002 (not sex discrimination cases).

[100] Case C-196/02 *Nikoloudi* [2005] ECR I-1789.

[101] Article 669 of the Code of Civil Procedure.

before the CS *via* the ministerial decision. Employers who do not pay minimum wages fixed by an agreement are liable to penal sanctions, i.e. fines or imprisonment up to three months, after a complaint of the aggrieved worker, his/her union, the labour inspectorate or the police.[103]

The potential of collective bargaining regarding gender equality is very important. However, while collective bargaining has contributed to the promotion of measures for the reconciliation of family and work, gender equality in pay does not seem to be an union priority, and the potential of collective bargaining is insufficiently used in this respect. Thus, while most masculine/feminine professional denominations were replaced by denominations covering both sexes, and while direct discrimination in basic minimum wages was eradicated, gender discrimination in respect of additional considerations, in particular family allowances paid by the employer at a percentage of the basic salary, was continued in several agreements. The SCC had found this to be contrary to Article 119 EC and Article 21(1)(b) Const.[104] The ECJ, recalling that it is the responsibility of Member States to abolish discrimination in agreements by legislative measures, and that this, moreover, should be done retroactively as from the moment Article 119 entered into force, found that Greece was in breach of EC law.[105] Moreover, even where direct discrimination in pay was eradicated, professional classification has not changed; thus, under-classification of formerly 'female' (and in practice still female) categories persists. No study of agreements in search of indirect discrimination has ever been undertaken, while job classification is still done according to felt-fair traditional, non-transparent criteria.

The pay of workers employed under public law is fixed by special legislation (Act 3205/2003). No study of legislation in this area in search of indirect discrimination has been undertaken.

3. The concept of the gender pay gap

In Greece, as in other Member States, the pay gap consists in the difference between the average pay of men and women. Its extent differs according to the branch or sector. Although in the last two decades this gap has decreased, official data show that it still is 25% in the services and 29% in industry.[106]

4. Good practices in tackling the gender pay gap

There are no collective or other agreements explicitly seeking to reduce the gender gap. Low unionisation of women must be a reason for this. There is no legislation or regulation aimed at inducing social partners to include the issue of equal pay in collective and other agreements. However, there are some branch agreements which prohibit, by general clauses, gender discrimination regarding conditions of employment.[107]

Article 18 of Act 3488/2006 merely provides that "the State encourages the dialogue between social partners with a view to promoting the principle of equal treatment between men and women in employment and occupation, in accordance with this Act", without introducing any measures to this effect. Article 8 of Act 3491/2006 set up a "National Commission for Equality between Women and Men", under the chairmanship of the Minister of the Interior, Public Administration and Decentralisation, to be composed of representatives of ministries, local authorities, social partners and NGOs. This body "shall conduct the social dialogue and the dialogue with civil society, with a view to the elaboration of policies promoting gender equality in all areas, in accordance with the international and EC *acquis*, to present proposals and measures for their implementation and to assess their results". It seems that this body is established with a view to implementing Article 8b(1) of Directive 2002/73/EC. Let us hope that it will contribute to, *inter alia,* equal pay and the reduction of the pay gap.

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[102] An agreement that binds employers employing at least 51% of the workers of a branch or profession can be extended by decision of the Minister of Labour to the whole branch or profession, at the request of the competent union or employers' organisation.

[103] Act 690/1945.

[104] SCC (Plen.) no. 3/1995.

[105] Case C-187/98 *Commission v. Greece* [1999] ECR I-7713.

[106] See Karamessini, M. (2002) 'The Gender Pay Gap in Greece', European Commission Expert Group on Gender and Employment, http://www.umist.ac.uk/management/ewerc/egge/egge-publications; KETHI (2003), "Equal Pay – Mind the Gap", http://www.kethi.gr.

[107] Such a clause has been included e.g. in the agreement covering bank personnel since 1981.

The General Secretariat of Equality (GSE), a public service under the Ministry of the Interior: i) is running a project "Positive Action in favour of Women in Medium-Small & Big Enterprises" providing financial incentives to undertakings for training women, setting up childcare centres and imparting information on gender equality, with a view to encouraging the promotion of women to high posts. The response of undertakings to this project was very favourable. ii) signed a Memorandum of Cooperation with the Hellenic Network for Corporate Social Responsibility (HNCSR) for promoting gender equality through specific policies or practices. The GSE will award an 'Equality Prize' to undertakings excelling in positive action. iii) signed a Protocol of Cooperation with the largest federations of employers' organisations and the HNCSR for the promotion of equal opportunities for women and men in undertakings. These measures seem to be able to promote gender equality in practice and to reduce the pay gap.

5. The legal dimension of the gender pay gap

Legal rules (including collective agreements) contribute to the gender pay gap to the extent that they may contain indirect discrimination regarding pay or other terms and conditions of employment, e.g. promotion or dismissal. Indeed, there seems to be a glass ceiling to the detriment of women in both the private and the public sector,[108] but neither the social partners nor the legislature have ever looked into this matter.

Experience and the *Nikoloudi* case show that indirect discrimination is often justified on budgetary grounds and by mere generalisations. Moreover, statutory provisions allowing the dismissal of women at an earlier age than men, i.e. when they reach pension age (which is lower for them than for men)[109], have not been formally repealed, in spite of the SCC having found them directly discriminatory in 1995.[110] More recent cases show that such provisions are still applied.[111] The role of unions in this respect is rather negative: where such provisions are included in internal regulations adopted by collective agreement, unions do not pursue their repeal.[112] Earlier dismissal and a lower pension age deprive women of possibilities of promotion and/or higher pay.

Examples of measures that may promote the effective application of the equal pay principle: i) the express prohibition of indirect discrimination in pay and other employment conditions included in Act 3488/2006; ii) the introduction of equal value criteria; iii) the re-examination of the criterion of seniority, which the ECJ considered 'suspect' and which is widely used as a factor in determining pay increases.

As women are reluctant to bring cases to court, for fear of victimisation and lack of evidence, Article 6(3) of Directive 2002/73/EC, which requires the *locus standi* of organisations, must be widely and teleologically applied, so that effective judicial protection, which is its purpose, can be achieved. However, Act 3488/2006, which transposed the Directive, grants standing to organisations only for recourse to administrative authorities and for intervention in support of workers who have already brought their claims to court. It does not entitle organisations to bring workers' claims to court themselves (only trade unions may bring claims to court, but only for their members, only to labour courts and only if the claim stems from an agreement). This is not sufficient to ensure judicial protection of victims of discrimination.

The Labour Inspectorate (LI) must be strengthened in personnel and means, in order to be able to monitor the application of gender equality legislation more often and more effectively. The weakness of the LI prevented the effective operation of the gender equality bureaus, whose establishment in every LI across the country was required by Act 1414. As became clear from LI annual reports,[113] criminal sanctions and fines provided for breaches of gender equality rules are seldom if ever applied. This means that the LI seldom discharge their duty of bringing criminal charges or inflicting fines, although in practice women receive lower pay, in particular where pay higher than the minimum fixed by agreements is negotiated. Act 3488/2006 has given the LI more tasks. In response to concerns voiced during the parliamentary debate on this Act, the Minister of Employment promised to strengthen the LI.[114]

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[108] Centre for Research on Equality Issues (KETHI), Equal Andromeda Project, http://www.kethi.gr.
[109] Article 8(b) of Act 3198/1955, as amended by Article 5(1) of Act 435/1976.
[110] SCC no. 85/1995, no. 266/1999, no. 1785/2001.
[111] SCC no. 1429/2004.
[112] This is the case e.g. with the internal regulation of the Commercial Bank of Greece.
[113] See http://www.ypakp.gr (Ministry of Employment and Social Protection, SEPE).
[114] Parliament (Plenum), 11th Period, Session B, 22 and 23 August 2006, http://www.parliament.gr.

Last, but not least, the designation of the Ombudsman (an agency of constitutionally guaranteed independence that has proved its efficiency), as the body that will monitor the application of gender equality, including matters of pay, is very pertinent.

6. Problems of proof of unequal pay

Minimum pay rates fixed by collective bargaining or by law are known. However, pay higher than this minimum (i.e. a higher basic salary or additional considerations, such as bonuses or benefits in kind) is negotiated on an individual basis, in particular in the private sector, and is not known to other workers. It is common knowledge that this results in direct discrimination against women. The burden of proof directive (Directive 97/80/EC) has been inadequately transposed. Although a modification of the Codes of civil and administrative procedure was necessary, as the CS had recommended in its Opinion on the legality of the draft decree transposing the directive,[115] that decree (105/2003) simply repeated the Directive's provisions, with the result that this directive and the rule it contains are virtually unknown to lawyers and judges. It is characteristic of this situation that in *Nikoloudi*, where one of the preliminary questions regarded the burden of proof, all those intervening except for the Greek claimant invoked the Directive.[116] The lack of awareness of the burden of proof rule was also shown by the surprised reactions of certain MPs (even lawyers) on hearing of it during the parliamentary debate on the bill transposing Directive 2002/73/EC,[117] which became Act 3488/2006; this Act unfortunately applied the same method regarding that rule.

HUNGARY

Csilla Kollonay Lehoczky

1. Legal framework

In Hungarian legislation, equal pay is guaranteed in several ways. The Constitution guarantees non-discrimination in general (Article 70/A) and the right to equal pay for equal work in particular (Article 70/B, § 2). Besides 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 Article 66, § 1.

Hungary adopted a general anti-discrimination act in 2003; it has no special legislative act on gender discrimination. Act CXXV of 2003 on Equal Treatment and Equal Opportunities (the 'Equality Act', hereafter EA), while establishing a general prohibition of discrimination – on all possible grounds that might come up in an EU member state[118] – pays special attention to employment and social security. Article 21 lists those employers' actions that are considered a particular violation of the principle of equal treatment. These are – among others – disparate treatment in respect of determining and providing working conditions as well as in establishing and providing benefits, especially in establishing and providing wages.[119] The prohibition of discrimination extends to any training before or during the work, as well as to the promotion system and therefore to any payment connected to training and promotion.

Exemptions from the prohibition of equal treatment, of which there are otherwise a significantly greater number than under the EU *acquis,*[120] are not permitted in the case of the violation of equal pay on the grounds of sex, race, colour, nationality or ethnicity.[121]

Act XXII of 1992 on the Labour Code contains a special 'equal pay article', 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 work of equal

[115] CS Opinion no. 348/2003.

[116] See AG Chr. Six-Hackl in this case, § 66 (decree 105/2003 was already adopted at the time of the reference, but it seems that the claimant still ignored both the decree and the directive even at the time of the hearing before the ECJ).

[117] See Parliament (Plenum), *loc. cit.*

[118] Article 8 enumerates 19 grounds (besides the traditional grounds, where sex is a separate ground from motherhood - the latter is still merged with pregnancy): fatherhood, family status, part-time and fixed-term employment are also included; the whole list concludes with a twentieth, 'other attribute'.

[119] Article 21, sections a, d, e, f, h.

[120] An "objective and reasonable ground" or the "inexorable case of the protection of another fundamental right, if the limitation is reasonable and proportionate" is an available defence. Such a defence cannot be used in cases of discrimination on the grounds of race, colour, nationality or ethnicity, but can be used in cases of sex discrimination.

[121] Article 22 (2) of the EA as amended from 1 January 2007.

value.[122] 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 141 of the EC Treaty, 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.[123]
Article 24 of the EA requires equal treatment in claiming and providing social security benefits, and the laws on private pension funds (in part corresponding to the occupational pension schemes) also require equal treatment.

2. Collective bargaining and equal remuneration
In principle, collective bargaining may regulate any issue of employment, including wages and all kinds of benefits. Nevertheless, it does not play a role of importance in the area of equal pay, since the parties refrain from regulating the issue of equal pay. Collective agreements are not, as a rule, publicly available. The very few sectoral agreements that have been extended to the whole industry and have more publicity were concluded in male-dominated industries such as bakery, construction and electric energy. They contain no provisions on equal pay. Some individual or sectoral collective agreements have been made public (predominantly concluded in public service, mainly by educational institutions). Sectoral and extended sectoral agreements are an effective instrument in the fight against unreported incomes. The agreements set mandatory minimal wages that are higher than the national minimal wage, thereby forcing employers not only to pay more than the national minimal wage, but also to report these wages for the purposes of social security. This 'formalisation' of wages prevents hidden discrimination through differentiating between men and women in the payment of the non-reported parts of the salaries, which is an important obstacle in the way of achieving equal pay.[124] Business employers and industries prefer to keep collective agreements or other internal regulations on wages and other benefits closed to the public. No provisions promoting equal pay were found by the expert; where conditions for qualifying for a job category are given, they repeat the general old routine-like, non-specific criteria that easily permit discrimination. Job catalogues are also unspecific, based on traditional categories that may well conceal gender-discriminatory remuneration policies.

3. The concept of the gender pay gap
There is no official definition of the concept of the wage gap in Hungary. It is normally used to indicate the difference between the average wage of men and of women within a given group (industry, profession, region etc.) or within the total labour force. The discrepancy between the wages may originate from many reasons; for instance, from individual arbitrary measures or from 'objective' attributes of the employees.[125] Differentials resulting from occupational segregation seem to play a smaller role today than in the past, especially in the socialist era.[126] The wage gap is relatively modest in Hungary. In 2005, the total average gross wage of women was 87.1% of that of men.[127] This may reassure both government and trade union leaders. However, due to the widespread informal (or semi-formal, 'grey') economy, the real difference is supposed to be greater. This is because of the wide-spread practice across industries of formally hiring employees (and reporting for taxation and social security) at minimum wage, while the bulk of their real remuneration comes from the employer 'informally' (unrecorded and unreported). In this part of the wages, there are supposedly huge gender differences.[128] That presumption might be corroborated by the fact that the wage-gap is the lowest among the lowest categories of workers.[129]

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[122] Article 142/A, § (1). The somewhat redundant text (especially the words "acknowledged as"), adding a twist to the words of Article 141 of the Treaty, expresses the general cautiousness of the drafters, which is also reflected in many other ways, hindering the effective implementation of the law.
[123] See 3.a. below for more on the legal provisions.
[124] See below, section 5.
[125] Although differences in training, length of service, period of experience in a certain position, working in low-paid feminised occupations etc. might be considered 'objective' bases of pay differentials, they still cannot be separated from discrimination.
[126] See: Csillag, M.: *„Női munka" és a nemek szerinti kereseti különbségek a szocializmustól napjainkig* („Female labour and the gender pay gaps from the socialist era to the present day.") in: *Munkaerőpiaci Tükör* (Labour Market Mirror, 2006., p. 105.)
[127] The average was HUF 168,390 and HUF 146,740 respectively, while the total average was HUF 157,770. See: *Munkaerőpiaci Tükör* (Labour Market Mirror) 2006, p. 202.
[128] Anecdotal reports, e.g. of female and male skilled workers that perform the same work, both reported for the 230 euros minimal wage, while women receive 400 euros at the end of the month and men receive 700 euros, are not infrequent. Since a rule of silence surrounds the (illegal) practice, complaint and litigation or any public record

4. Good practices in tackling the gender pay gap

As regards legislation inducing social partners to include the issue of equal pay in their agreements, two relevant provisions aimed at promoting the voluntary regulation of equal opportunities by the parties should be mentioned. One is the so-called Equal Opportunity Plan (EOP). According to the Labour Code, an EOP may be adopted by the employer and the trade union, or sometimes by the works council, in order to eliminate the inequalities in employment of the traditionally discriminated or vulnerable groups, including women. Wages are specifically mentioned among the subjects of the plan of action (including analysis of the situation, indication of goals and instruments)[130]. While the adoption of an EOP is optional for most employers, it is mandatory for employers financed from the public budget and for private employers if the State owns the majority of their shares.

Under Hungarian law – in a somewhat complicated system - there are three categories of employers: 1. 'private', (covered by the Labour Code); 2. 'public employers' (covered by Act XXXIII of 1992); and 3. 'public administration offices' (covered by Act XXIII of 1992). Employers that are operating as business enterprises "regardless of who owns the enterprise or who owns shares in the enterprise" are considered 'private' and are covered by the Labour Code (e.g. the Hungarian Television, the Hungarian Railways, or the Hungarian Mail Service, which are all, in that sense, treated as 'private undertakings', just like churches, non-profit and civil organisations.)

Publicly financed institutions providing public services, such as hospitals, schools, museums and social institutions are 'public employers', employing 'public employees'. The third category of employers comprises the offices of the public administration of the State and the municipal offices (ministries, governmental offices, the administration of the municipalities, and central and local institutions of various sectoral administrative organs). Their employees are called 'public office holders', i.e. 'public servants' or civil servants (similar to the German *Beamte*). (The system is confusing and inconsistent, and proposals are constantly made for a clearer new legislation.)

Since many employers failed to comply with the obligation to adopt an EOP, the Equal Opportunity Authority (a specific law enforcement agency established by the Equality Act) is authorised from 1 January 2007 to launch procedures and apply sanctions for non-compliance with the duty to adopt an Equal Opportunity Plan.[131]

The second provision that could induce an analysis and improvement is the Decree of the Minister of Labour no. 6/1992 (VI.27). The Decree lays down a national classification system of all occupations. Employers are obliged to classify all jobs at the workplace (both intellectual and manual) and to assign a wage to each job-heading. In principle, such classifications should be based on a thorough job-analysis. However, in practice employers assign wage tariffs without such an analysis (frequently at or around the national minimal wage), hiding *de facto* wage differentials. Collective agreements, by setting up real tariff-systems, could rely on job-content analysis and pay attention to gender-biased job requirements. The mandatory information to be sent to the Ministry of Social and Employment Affairs on concluded collective agreements has to contain detailed information (prepared on the basis of an exhaustive questionnaire), including the gender divide of the persons covered under the various headings. Unfortunately, the data and information submitted to the Ministry do not reflect any changes or effort made to close the gender pay gap by a detailed job-analysis. One of the reasons is the relative lack of interest, on the part of the social partners, in gender equality issues. The Labour Code covers only private employment. Public employees and public servants are covered by separate laws that, in principle, guarantee equal pay through the mandatory wage system. The system is based on the job category, educational level and the length of service of the worker. The possible gender bias of these elements of the public service wage systems has never been examined.

Collective agreements – insofar as they address the gender wage gap at all – generally repeat the usual generalities, declarations of intent to improve the situation etc.; concrete provisions aimed at closing the gap are lacking. Indeed, in some cases, provisions (requiring a certain length of seniority, extra-availability or vague conditions, such as 'exceptional knowledge' or 'exceptional personal attributes') seem to confirm or maintain existing gender wage gaps. If there is anything explicit on the promotion of equal pay in the agreements between the industrial partners, these are rather general declarations, mainly in the new EOPs. As an example of something more 'concrete', a relatively frequent provision in collective agreements or EOPs stipulates the duty of the management to raise

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of the violations, let alone evidence, is practically impossible.

[129] The female/male earning ratio is 102.8 among those with less than general school education, 87.00 among those with a completed general school and 96.2 among those with a basic vocational training (Labour Market Mirror, p.203).

[130] LC, Article 70/A. (2).

[131] EA, Article 3, § 1a., Article 6, § (5).

the wages of employees returning from maternity or paternity leave in correspondence to the pay rises that took place during their absence. However, the employer already has this duty on the basis of the Labour Code. Therefore, the company level provision adds nothing to the existing statutory right of the employee.[132] The significance of such collective agreement provisions – especially if they lay down the duty of the employer to regularly notify the absent employee of pay rises – is that they facilitate the enforcement of the right that otherwise frequently needs a determined and courageous investigation on the part of the employee.

5. The legal dimension of the gender pay gap

On the one hand, the Ministerial Decree 6/1992 on the catalogue of job qualifications, mentioned above, needs an update on the basis of the EU requirements. In the light of these requirements it is quite obsolete: the categories are not specific, and, with respect to categories of physical work, it differentiates between 'normal' and 'strenuous' work on the basis of physical effort alone (defining the borderline in kilojoules). This may necessitate the introduction of a more equalised qualification. On the other hand, even this vague categorisation, focusing mainly on traditional male-standards in work, is not implemented. Private employers fail to comply with it, and it is not enforced either by the labour inspection or by the trade unions; more attention from the law enforcement and interest representative organisations might give an impetus to its implementation.

Another major problem is the widespread abuse of contractual freedom: firstly, the widespread use of civil law contracts and secondly the total freedom of the employer to set wages as long as the minimal wage is observed. Both practices undermine any control over the fairness and equality of remunerations.

As to the shift from labour law to civil law contracts, although the EA emphasises that equal treatment with respect to pay and other benefits should be guaranteed not only in the employment relationship but also in other relationships related to work (Article 19, f), no efforts whatsoever have been made to enforce gender equality in that respect.[133] Furthermore, the only obligation (to comply with the national minimal wage) undermines the significance of any wage categorisation when the employer is not covered by a collective agreement. The proposal of the trade unions to establish a more differentiated minimal wage regulation for 2006, based on the level of education, failed at the tripartite negotiations. However, even if detailed wage categories would exist, the freedom of the employer to differentiate between employees makes wage-policies a matter of voluntary fairness.

6. Problems of proof of unequal pay

To obtain evidence of unequal pay is extremely difficult. Wages are mainly individually negotiated and are surrounded with an atmosphere of over-emphasised privacy. Employees are frequently prohibited by the employer from revealing their salary to others. This is aggravated by the presence of the illegal informal ways of employment and payment, which are surrounded by even more silence and secrecy. Thus, employees are in a helpless situation if they want to know whether they are discriminated against. Female employees frequently get false information repeatedly and misleading explanations if they accidentally learn about wage differences.

Employee representatives' organisations are entitled by the Labour Code to be informed regularly, at least every six months, by the employer. Furthermore, trade unions may request information from the employer on any issue regarding the economic and social interest of the workers in respect of their employment relationship, and they are also entitled to control the compliance with labour regulations. Still, in overall practice, this right to information is not understood to include individual salaries, and even if the employer reveals such information to the representative, the latter must also respect the privacy of the data.

The courtroom is the only place where, upon the order of the judge, employers must reveal the comparator's wages. Due to the strong reluctance of aggrieved employees to go to court, the issue of proof remains relevant in the context of convincing management and prompting it to voluntarily eliminate the wage difference.

A novelty in the Labour Code, as amended on 1 January 2007,[134] is that the Equal Opportunity Plan also has to establish procedures for the enforcement of equal treatment. Such procedures, if rightly

[132] Labour Code, Article 84, guarantees them a rise in accordance with the average annual pay rise for employees in the same position and with the same experience, and, in the absence of such employees, in accordance with the average pay rise given by the employer.

[133] Although labour and tax inspectors investigate whether the conclusion of a civil law contract was permitted in a given case, they do not examine the observance of equal treatment rules.

[134] Article 70/A, § (4) b.

designed, may promote the resolution of the procedural and evidence problems that currently prevent the enforcement of equal pay.

ICELAND

Herdís Thorgeirsdóttir

1. Legal framework

Extensive amendments were made to the human rights provisions of the Icelandic Constitution in 1995 with a view to taking into account Iceland's obligations under relevant international instruments. The right to equality before the law and in the enjoyment of human rights, irrespective of sex and various other factors, has since then been enshrined in Article 65 § 1.[135] Although discrimination on grounds of sex is prohibited in this provision, a second paragraph was added to Article 65, emphasising the need to eliminate gender-based discrimination.

The Gender Equality Act, hereinafter the GEA (Act no. 96/2000), replaced the previous law on gender equality no. 287/1991. The objective of the new act was to reinforce legislation in gender equality matters because of the slow progress in achieving equality.[136] The preparation of the new act took into account the obligations Icelandic authorities had undertaken on the basis of the European Economic Area Agreement (1993), e.g. Article 69, which entails the principle of equal pay for men and women for work of equal value. Article 69 EEA is equivalent to Article 141 EC. This principle is implemented in Act no. 96/2000. It establishes that women and men working for the same employer shall receive equal pay and enjoy equal terms for equal value and comparable work. The term 'pay' is broadly defined as 'general remuneration' and thus includes any kind of further fees, direct or indirect, whether made through benefit payments or in another manner, which an employer pays his employee for his work. Equal pay means that the benchmark that is used for determining pay must be based on the same criteria for both men and women and must be drawn up so as to exclude any discrimination on grounds of sex.[137] Terms, in addition to pay, cover pensions, vacation pay, sick leave, maternity leave[138] and any other benefit that may be given monetary value.

Act no. 96/2000 prohibits the waiving of rights and therefore restricts the freedom of contract. Employees may not waive their rights in a contract, by verbal agreement or in any other manner.[139] Acceptance of an offer without any objections may not be interpreted as 'tacit consent' if the contract in question is not legal. This provision not only protects employees who are about to conclude a contract, but must also be interpreted as protecting employees under existing contracts. The provision is unconditional in particular when negotiating pay, as the aim is to protect the employees in concluding contracts with their employers.[140]

2. Collective bargaining and equal remuneration

Trade unions are strong in Iceland, and the proportion of membership among the highest in the world.[141] Although women are in a majority in trade unions, they are far from having the power and influence that would be proportionate to their numbers.[142] Various improvements in collective agreements came about with the EEA agreement, which took effect in 1994 and led to the incorporation of, *inter alia*, Community gender equality directives.

It is the responsibility of trade unions under the GEA to actively support the adoption of gender equality measures.[143] A collective agreement may not entail provisions incompatible with the GEA. Both workers

[135] Law no. 97/1995, Article 3. The principle of equality was considered to be a general principle of Icelandic law yet was not enshrined in the Constitution before that time.
[136] Explanatory report to draft law on equal status of men and women, Parl. Doc. 373, no. 272.
[137] The law is interpreted as placing the duty upon employers to use benchmarks that are compatible with the characteristics of each sex when determining pay. See Complaints Committee on Equal Status no. 4/1999. Supreme Court no. 240/2002.
[138] Complaints Committee on Equal Status no. 10/2003.
[139] Explanatory report (Alþt. 1999-2000, *A-deild*, p. 2545).
[140] Parliament Ombudsman's conclusion, case no. 3837/2003.
[141] 85.4%.
[142] Lilja Mósesdóttir, Andrea G. Dofradóttir, Þorgerður Einarsdóttir, Kristjana Stella Blöndal, Einar Már Þórðarson and Sigurbjörg Ásgeirsdóttir: *Evaluating Equal Pay in the Nordic Countries*, 2006, p. 162.
[143] Act no. 96/2000, Article 13.

and employers are bound by law no. 55/1980 to respect applicable collective agreements, regardless of whether they themselves are members of the unions or associations of employers that concluded the applicable collective agreements. Law no. 80/1938 on trade unions and industrial disputes stipulates that the public mediator shall follow the progress in collective bargaining and factors affecting industrial relations, and keep a record of collective agreements, including those made by employers outside trade unions. Collective bargaining plays an important role in the public sector (public sector amounts to 24% of the labour market) and most employees are paid in accordance with the collective agreements. The private sector regards collective agreements as a benchmark for basic payments and terms. Payments in the private sector usually exceed the ordinary basic or minimum wage or salary. Employees in the private sector are not necessarily encouraged by their employers to join trade unions, and individual pay settings are becoming more widespread in the wake of privatisation. The labour movement has been weak in the wage determination system, and a double pay system has developed in the labour market, involving on the one hand negotiated wage rates and on the other hand fringe benefits and/or additional payments paid by employers to raise the pay of qualified workers above the standard wage rates negotiated by the trade unions.[144]

The gender pay gap has been dealt with in collective agreements at the local level. The system of job evaluation was adopted in 2001 in Reykjavík, the largest municipality. It was considered necessary to reconstruct the collective bargaining system, as wage differentials continued to exist despite special pay increases to women, mainly due to additional payments, overtime payments, bonuses and car benefits that men were more likely to receive than women.[145] A job evaluation scheme was created as a part of the collective bargaining system with the aim of creating a comprehensive, sound and gender-neutral pay system. All municipalities have been using job evaluation methods for three decades as a step in ensuring pay equality in collective agreements. It is considered important to link payments with job evaluation,[146] although it has rendered limited results.

The GEA does not include direct instructions on how to achieve pay equality and the law is now under revision due to the deficiencies that need to be addressed. The law needs to be set more explicitly in the context of the working environment and collective agreements. Guidance on what constitutes objective benchmarks would improve the situation, e.g. biological age, service age, work age, education, the ability to cope with pressure, capability, achievement, performance etc.[147]
The collective agreements are accessible to the public, usually on the Internet homepages of the trade unions, employers' associations, municipalities and the Ministry of Finance.

3. The concept of the gender pay gap
The gender pay gap is still present in Iceland and not decreasing at all. Two factors are mainly at work here; firstly, the gender-segregated labour market and secondly, discrimination where the pay rolls are gender-biased. At about 80%, the female employment rate in Iceland is the highest in Europe, and the relatively large share of unskilled women in the Icelandic labour market is an important factor, contributing to the relatively large gender pay gap. Other important factors are the low pay of female-dominated as compared with male-dominated jobs, and the long hours' culture.[148] Men are more likely to work overtime than women, which may explain why the gender pay gap is larger in the private sector in Iceland than in other Nordic countries and also larger than in the public sector.[149]

Surveys on wage determination and the pay gap take into account on the one hand the unadjusted wage gap and on the other hand the adjusted wage gap. The method of these surveys has been disputed, for example the premises that they are based on, which factors are included and the ways of interpreting the results.[150]
To begin with, the focus is usually on the unadjusted wage gap as it appears in the tax records, which indicated in 2004 that women earned 64% of total revenues.[151] A government-initiated survey

[144] *Lilja Mósesdóttir*, *supra note* 8, p. 165.
[145] *Cf.*, *ibid*, p. 172.
[146] *Cf.,* Supreme Court case no. 258/2004.
[147] Interview with Sigurður Ó. Kolbeinsson, head of division at the Association of Local Authorities in Iceland, in 2006.
[148] *Lilja Mósesdóttir*, *supra note* 8, p. 72.
[149] *Ibid*, p. 57 and p. 73.
[150] A team of Nordic experts has recently come up with suggestions about indicators to measure the unadjusted gender pay gap (*Lilja Mósesdóttir et al*: Evaluating Equal Pay in the Nordic countries, 2006).
[151] Icelandic Bureau of Statistics shows 62% in 2003.

on the gender pay gap in February 2001 shows that women receive 72% of men's salaries for the same amount of working hours. Different kinds of work, education and working arrangements 'explain' 21%-24% of the difference. This leaves 7.5% to 11% of the pay gap that cannot be adjusted to any of the previous factors and is hence attributed to the fact that women shoulder more of the responsibilities of marriage and child-rearing, a factor which works to the advantage of men in general, as surveys show that the fixed amount of pay for men is 4.5% higher if they are married, while co-habitation has little impact on the salaries of women.
The findings of a survey conducted for the Ministry of Social Affairs in 2006[152] as part of the 2006 government policy in equality matters show that various changes have occurred since 1994, yet the pay gap remains the same as it was in 1994.[153] The working hours of both sexes working full-time have decreased. The number of women working full-time has increased. Nevertheless, the survey shows that the adjusted pay gap has only decreased by 0.3% since 1994 and is now on average 15.7%.

4. Good practices in tackling the gender pay gap
Measures considered to have a positive impact on the gender pay gap must begin with the legislation itself, in particular the provisions of the GEA on equality action plans. Employers with over 25 employees must take measures to improve gender equality within their businesses or institutions and undo the classification of 'female' or 'male' jobs. Equal rights policies, stating aims and measures to be taken in order to achieve the equal pay objective, are also obligatory. There is no requirement regarding the frequency with which equality plans must be developed, nor are there sanctions for not having one. Neither is there supervision over implementation. The government is responsible for providing an equal rights policy; the present one dating back to 2004 with the aim of eradicating the gender pay gap. As part of this policy, a survey on the gender-based pay gap was conducted in 2006.[154] The Minister of Social Affairs set an example of good practice in 2005 by tackling the pay scheme in the ministry with the aim of eradicating all tangible pay differences based on gender. As a result, a programme for checking equal pay is in the process of being implemented with the aim of publicly crediting institutions and businesses where no such difference is found. The collective agreement systems and job evaluations should also be mentioned as good practices. Job evaluation schemes create discussions about wages and have an impact on the traditional views about 'female' jobs. Advertising campaigns by trade unions are effective, as well as any coherent discussion in the media intended to draw attention to the problems of gender discrimination. The Commercial Workers' Union[155] (VR) conducts publicity campaigns in the media to draw attention to various problems in the work place, such as gender-based wage discrimination, and assists, if necessary, individual claimants in court cases.

5. The legal dimension of the gender pay gap
The law is criticised for being too weak in respect of the rights and duties of employers to equalise the status of the sexes in the labour market. There is no surveillance mechanism on the question of whether and how this is done, and wage concealment is widespread in the private sector while not allowed in the public sector.[156] The 'culture of secrecy' over salary levels prevents victims of pay discrimination from seeking redress, as it is almost impossible for women employees to find out how much male colleagues are earning. This culture does not encourage women to take initiatives to improve their situation if they have 'not shown enough toughness' in the first place when demanding equal pay.[157] No official measures have been taken to ensure the access of unions or union representatives to pay information in individual pay settings. When the rather shocking results of a gender pay gap survey conducted for the Ministry of Social Affairs in 2006 were made public, it was emphasised that the environment of wage concealment was *inter alia* to blame for the gender pay gap, as it enabled employers to intentionally discriminate, while such conditions should, on the contrary, remind employers of their enhanced responsibility in guaranteeing the right to equal pay. In this respect, it was emphasised that it was not a relevant justification to allude to the toughness of men in negotiating their salaries as opposed to the faltering of

[152] Ministry of Social Affairs, A survey on the gender-based pay gap by Capacent Gallup, October 2006. The survey shows that the adjusted pay gap has only decreased by 0.3% since 1994 and is now on average 15.7%.
[153] Capacent Gallup survey on wage formation and the gender pay gap, October 2006. A similar survey had been conducted in 1994 by the then bureau of gender equality, directed both at public and private companies.
[154] This survey shows that the gender-based pay gap remains the same as it was in a survey conducted by the office of equality in 1994 (15%).
[155] VR, the largest trade union in Iceland, embraces over 20,000 members in more than 100 occupations.
[156] Information Act no.50/1996. See: http://eng.forsaetisraduneyti.is/acts-of-law/nr/15.
[157] As many employers maintained in the survey conducted by Capacent Gallup in 2006.

women in this area.[158] The survey also indicated that the gender pay gap was wider where wage concealment was company policy.
The law strictly prohibits employers from discriminating against employees on the basis of their sex as regards pay and other terms. Employers who deliberately or through negligence violate the law shall be liable to pay compensation for non-financial loss, in addition to any financial loss, to the person subjected to damages, if applicable. Violations may also be liable to fines, to be paid to the State Treasury (Article 29 GEA), which is unusual in Icelandic law given the often private law nature of the relations at issue,[159] although the law applies to all sectors, public and private.

Now that the law is under revision, the focus is on the monitoring role of the Centre of Gender Equality. Its monitoring role over the implementation of the GEA and its data-collecting and investigation powers need to be much more efficient.

6. Problems of proof of unequal pay
The GEA shifts the burden of proof[160] so that in all cases brought before the Complaints Committee on Gender Equality and before the courts, the burden of proof lies with the employer, who must show that the treatment or decision complained of is based on grounds other than sex. Establishing a *prima facie* case may, however, be difficult, as data is not easily accessible and information on the wages of others can be of a confidential nature. Trade unions do not consider that they have a right to request information from the private sector on the basis of the Information Act no. 50/1996, as the act applies to state and municipal administration only. Members of the opposition in the Althing (Parliament) proposed an amendment to the GEA in 2003/2004, which would grant the Centre of Gender Equality the right to request information from employers within a certain time framework and which would give the Complaints Committee the right to demand that the Centre of Gender Equality be given all relevant information during proceedings of a case.[161]
The Supreme Court has confirmed that, when assessing the question whether certain work is of equal value, it is sufficient that the work is substantially equal. The objective of equal pay will not be achieved if the principle is only applicable to individuals within the exact same class of work, as certain differences do not necessarily render the work incomparable. Certain aspects, such as for example that the type of work requires different educational backgrounds, do not necessarily count for this purpose.[162] The Court held that equal value and comparable work applied to jobs across sectors in the case of a woman who was head of the department of social affairs in the town municipality, and who was paid less than a man heading the technical department. The Court held that the authorities could not prove that the market value of the man's job was an objective and sufficient reason to pay him more.[163] Different types of employment contracts are not objectively valid criteria. The employer must prove that other payments provided under the contract, such as travel concessions and fixed pay for overwork, are not direct pay compensation and that any such difference is based on objective and legitimate reasons.[164]

IRELAND
Frances Meenan

1. Legal framework
Directive 75/117/EEC was implemented by the Anti – Discrimination (Pay) Act, 1974[165], which came into operation on 31 December 1975. This Act has since been repealed and re-enacted under the Employment Equality Acts 1998 – 2004. These Acts *inter alia* provide that there cannot be direct or indirect pay discrimination in relation to employment on the grounds of gender. 'Remuneration', in

[158] Ministry of Social Affairs: http://www.felagsmalaraduneyti.is/media/acrobat-skjol/Launamunur_og_kynbundinn_launamunur_2006.pdf.
[159] The draft law with the provision stipulating that violations of the act may be liable to fines to be paid to the State Treasury met with much resistance from the Employer's Association.
[160] *Cf.,* Council Directive 97/80/EC is implemented in Article 23 of the GEA.
[161] *Cf.,* 130. Althing session, 2003–2004. Parl. Doc. 844 - 565.
[162] Supreme Court no. 11/2000.
[163] Supreme Court no.11/2000, District Court, North Eastern district 27. February, 2001, Supreme Court no. 258/2004, Complaints Committee cases 5/2000 and 1/2001.
[164] Supreme Court no. 11/2000.
[165] The 1974 Act originally included pensions in the definition of remuneration. The 1998 Act came into operation on 18 October 1998. Equal treatment in occupational benefit schemes is now covered by the Pensions Act 1990 (Part VII) as now inserted in the Social Welfare (Miscellaneous Provisions) Act 2004.

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 complainant 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[166] and this means in practice that women in all-female employment may not claim a so-called male rate for a job that could be considered to be 'like work'.[167] 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.[168]

2. Collective bargaining and equal remuneration

For the last twenty years, Ireland has had a system of centralised pay bargaining based on partnership between the Social Partners. 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*. The partnership agreement *Programme for Prosperity and Fairness 2000-2002* provided that a consultative group chaired by the Department of Justice, Equality and Law Reform will oversee the finalisation of the Economic and Social Research Institute Report on Male/Female Differentials, undertaken following a commitment in the earlier agreement *Partnership* 2000, and will consider its recommendations, including the case for a sectoral analysis in both the public and private sectors, and develop proposals for action.[169] The agreement *Sustaining Progress – Social Partnership Agreement 2003 – 2005* provided specifically for equality issues to include gender equality; section 10 covered prospective employment legislation; section 11 covered the gender pay gap, noting that work will continue on male/female differentials; section 11 dealt with work/life balance programmes and section 13 with equal opportunities. *Towards 2016* takes the life-cycle approach with requirements for different stages in life to include provisions for equality of opportunity for every person, irrespective of gender and background.[170] These agreements[171] are, in principle, not legally enforceable on pay. 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.[172] Certain agreements are enforceable where, for example, a collective agreement is registered in the Labour Court.[173] In June 2002, the Public Service Benchmarking Body reported and carried out a detailed examination into the jobs, pay and conditions of service of public servants as compared with jobs in the private sector.[174]

The recent case of *Collins and Ors. v Department of Finance*[175] concerned a complaint that the collective agreement for the civil service, the Programme for Prosperity and Fairness[176] encompassing

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[166] In *Brides v Minister for Agriculture* [1998] 4 I.R. 250 at p. 270 Budd, J. said a that claimant must be able to point to '*an actual concrete real life comparator of the other sex'* performing like work.

[167] See Kerr, Anthony, Ed., Irish Employment Legislation, L-169 March 2001, Round Hall Sweet & Maxwell Dublin.

[168] 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.

[169] See below, section 6.

[170] Section 31.1 and 31.7 (Equality – Equal opportunities).

[171] http://www.irlgov.ie – Department of the Taoiseach.

[172] See Equal Opportunities and Collective Bargaining in the EU, April 1997, at http://eurofound.europa.eu/eiro/1997/04/study/tn9704201s.html. It was noted that collective bargaining and equal opportunities are rarely linked. However, successive national agreements since 1987 have made provisions on equality issues, e.g. training opportunities, positive action, low pay and childcare. In lower-level bargaining, progress on equal opportunities issues, such as equal pay, has been slow or non-existent.

[173] Collective bargaining is conducted on a voluntary basis except for certain issues e.g. collective redundancies, health and safety. See *Working within the Law*, Meenan, F., chapter 5, Oak Tree Press, Dublin 1999.

[174] Stationery Office, Dublin.

[175] DEC – E2005 – 046 and ADE /05/24.

the Benchmarking Review Body Report, should be declared null and void in that it contains discriminatory provisions, as the pay outcome differed substantially between male and female civil servants. The Labour Court dismissed the claimants' appeal, noting that the social partnership agreements could not be classified as collective agreements and that even if the pay provisions in both agreements could be regarded as collective agreements, there were no provisions that could be construed as contravening an equal remuneration term in the complainants' contracts of employment.

3. The concept of the gender pay gap

The 'gender pay gap' is defined as average gross hourly earnings of female paid employees as a percentage of average gross hourly earnings of male paid employees. The population consists of all paid employees aged 16 – 64 who work 15 or more hours per week.[177] The gender pay gap in Ireland in 2004 was 11% of male earnings, which was below the EU average of 15% of male earnings. A Report in 2000[178] stated that the male/female wage gap in Ireland has been decreasing since 1987 and stood at 14.7% in 2000, but it must be noted that the reduction in this gap has slowed down between 1997 and 2000. A breakdown of men and women's hourly earnings by different personal characteristics shows that the male/female pay gap widens as age increases and is the narrowest in the lowest age category, under 25. The gap is narrowest for those with a university degree and widest for those with no secondary qualifications. However, even among those with degrees, women earn 15% less than men.

4. Good practices in tackling the gender pay gap

The Irish Congress of Trade Unions published a Report on its Fourth Gender Equality Programme 1999 – 2004.[179] Priority Three concerned the gender pay gap. For this project, Congress developed a tool kit and training programme for negotiators, covering pay audits, job evaluations free of bias, and gender proofing for existing agreements, together with an impact assessment of proposed agreements, recruitment and selection guidelines and performance-related pay. It was also noted that women are underrepresented in the collective bargaining process and therefore a survey of women's involvement was to take place to increase female participation. Unions were also asked to identify from their experience the main causes of lower pay for women and they identified, *inter alia*, gender segregation, discrimination, lack of promotion, part-time work due to lack of childcare, shorter service due to family responsibilities, lifetime working patterns and maintenance of existing differentials. During this time, nine unions had reviewed all existing collective agreements to ensure compliance with equality legislation; seven unions had reviewed negotiated priorities to ensure that these do not reinforce or enhance the gender pay differential. All the unions surveyed have conducted reviews of the reasons given for existing pay structures/practices to check whether or not they are objectively justified and non-discriminatory. The Fifth programme also prioritises the gender pay gap and key actions to tackle the inclusion of the conduct of equality audits, gender-neutral job evaluation, gender proofing agreements and gender impact assessment of proposed actions in employment, and prioritises improving the percentage of women in the Irish workforce with adequate pension cover.

5. The legal dimension of the gender pay gap

An equal pay claim is founded on the individual contract of employment. There must be a claimant and a comparator of the opposite sex who are doing 'like work'. Section 9 of the 1998 Act provides that if there is discrimination in a collective agreement, such an agreement shall be null and void. Section 86 provides for references of such agreements to the Director of Equality Investigations, where if the agreement is discriminatory, the Director may provide guidance as to how to make the offending provisions lawful.

The Equality Authority may carry out equality reviews and prepare action plans in relation to a particular business (which has fifty or more employees), a group of businesses or a sector. An equality review is an audit of the level of equality of opportunity which exists in a particular business. If an employer fails to carry out any part of an action plan, the Authority can serve a substantive notice on the employer; such a notice can be appealed to the Labour Court and can be enforced by the Circuit

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[176] Predecessor to *Sustaining Progress* and the body charged with reviewing public service pay.

[177] See Appendix 1 Notes and definitions Women and Men in Ireland, December 2006 Central Statistics Office (http://www.cso.ie).

[178] Impact Evaluation of the European Employment Strategy in Ireland, Section 4 – Equal Opportunities between Men and Women, The Male/Female Gap in Ireland, Helen Russell and Brenda Gannon of the ESRI, Department of Enterprise, Trade and Employment, Dublin, 2000.

[179] At http://www.ictu.ie.

or High Courts. A study from 2002[180] looked at a number of sectors and recommended *inter alia* equality reviews, plans and gender audits, programmes to encourage women seeking senior management positions, higher qualifications and family-friendly policies.

The Minister for Justice, Equality and Law Reform also published a report in June 2004,[181] aimed at providing practical recommendations for narrowing male/female wage differentials. The report stated that it was too early to reach definitive conclusions as to the efficacy of the anti-discrimination legislation in addressing some of the issues that give rise to this pay gap.

6. Problems of proof of unequal pay

Section 76 (1)[182] 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 information may be provided, to include information concerning 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). An applicant has to rely on the burden of proof provisions to find out information from the employer. The Equality Tribunal and the Labour Court 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.[183] At the Labour Court appeal stage, there is a provision for the appointment of technical assessors and the summoning of witnesses etc. If a gender equal pay claim is referred in the first instance 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, especially in employments where there is a long history of collective bargaining and complicated pay rates. 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.

ITALY

Gisella De Simone and Anna Rivara

1. Legal framework

Article 36 of the Italian Constitution provides a general principle, according to which "the worker shall be entitled to remuneration in proportion to the quantity and quality of his work and in every case sufficient to enable him and his family to live a free and decent life". As a consequence, workers can apply to courts to claim proportional and sufficient pay. Courts generally use the standard pay established by the collective agreement signed for the specific industry as a concrete reference.

Article 37, § 1, of the Constitution states that "a working woman shall have the same rights and, for equal work, the same remuneration as a male worker".

In order to comply with Directive 75/117/EEC, the constitutional principle of 'equal pay for equal work' (Article 37) was reworded and clarified by Article 2 of Act no. 903/1977:[184] "a female worker shall be entitled to the same remuneration as a male worker where the services required are equal or of equal value. Occupational classification systems, applied for the purpose of determining remuneration, shall adopt common criteria for men and women."

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[180] *A Study of the Gender Pay Gap at Sectoral Level in Ireland,* prepared by INDECON December 2002 and available at http://www.justice.ie.

[181] *Indicator Research Based on 'The Development of Mechanisms to Monitor Progress in Achieving Gender Equality in Ireland'* NDP gender equality unit, Department of Justice, Equality and Law Reform, Final Report June 2004, Fitzpatrick and Associates Economic Consultants.

[182] As amended by s. 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.

[183] At http://www.equalitytribunal.ie.

[184] Act no. 903 of 9 December 1993, on Equal Treatment between male and female workers, gazetted on no. 343 of 17 December 1977.

No new statute law has been enacted in the field of equal pay. Nor does Act no. 125/1991[185] on positive actions (even as amended by Decree no. 196/2000)[186] include any provision that expressly refers to equal pay; nonetheless, the extensive definition of direct and indirect discrimination given by Act no. 125/1991 can be of great importance in this field, as Article 4 of Act no. 125/1991 provides for a partial reversal of the burden of proof.[187] These are at least the abstract rules. As very few cases are brought to courts, it is difficult to say how the rules operate in practice.
The concept of 'equal pay' is not defined by Act no. 903/1977. In the application of Article 2 of Act no. 903/1977, the legal concept of pay has been very widely construed by Italian Courts; it includes any economic benefit in cash or in kind directly and indirectly paid on the grounds of the employment relationship.[188] As a consequence, even though Act no. 903/1977 does not make any explicit reference to pensions, occupational pensions fall within the scope of the principle of equal pay.[189]
All this basic implementing legislation regarding equal pay applies to all 'employees', regardless of the kind of labour contract, in the private as well as in the public sector.

2. Collective bargaining and equal remuneration

Interconfederal agreements and industry-wide agreements are not officially published (in the Official Journal); however, they are usually published in many law reviews and by the trade unions press, as well as on the website of the CNEL (National Committee of Labour and Economy)[190]. Local and enterprise agreements are not easily available and are seldom published, either on the websites or as a hard copy. This is the main reason why it is difficult to say which role collective bargaining plays in the area of equal pay. In fact, the Interconfederal Agreement signed on 23 July 1993 between the Government and the Social Parties on Labour Cost[191] provides two main levels of bargaining for the private sector: 1) industry-wide agreements for each branch; 2) local agreements or, alternatively, company agreements. This second level of bargaining must deal with different subjects than those already defined by the first-level agreements, and may only deal with them within the framework established by the former. As far as remuneration is concerned, there is a rigid division of competences between national, enterprise and local negotiating levels. Industry-wide agreements provide minimum wages, while pay increases are bargained at enterprise level. The latter are, in turn, linked to the implementation of programmes intended to increase the productivity of the enterprise and the quality of production (collective merit pay increase, e.g. performance-linked bonuses, in terms of quality, productiveness and competitiveness).
Hence, monthly remuneration is usually the result of both the minimum provided by industry-wide contracts on the basis of neutral job classification schemes (a scale of 7 or 8 grades, ranking different jobs of equal value, except for managers, who enjoy a separate classification) and of a reward for the productivity at enterprise level, in addition to possible sums given on the basis of individual bargaining (so-called *superminimo individuale*).
As regards the minimum provided by industry-wide agreements, different job classifications on the grounds of sex were abolished from the sixties onwards. According to the Constitutional Court,[192]

[185] Act no. 125 of 10 April 1991 on Equal Opportunities and Positive Actions, gazetted on no. 88 of 15 April 1991.
[186] Decree no. 196 of 23 May 2000 on the Activity of Equality Advisers and Positive Actions, gazetted on no. 166 of 18 July 2000, http://www.parlamento.it/leggi/deleghe/dlattleg.htm#2000.
[187] This means that, where the employee proves the pay gap (in comparison with another employee who does the same work or work of equal value: see *retro*) it is up to the employer to prove that the pay gap is genuinely due to a factor other than gender.
[188] In the Italian legal system, an all-embracing legal definition of pay is not available: Article 36 of the Constitution only provides a general principle on how pay should be calculated (sufficiency, proportionality to the quantity and quality of the work); statutory law lays down different definitions of what 'remuneration' actually is, i.e. which rewards are included in the different concepts of pay that serve different purposes, such as the calculation of the contribution made by the employer to the statutory social security system; the calculation of the allowance due to the employee at the expiration of the employment relationship etc.
According to a widespread scholarly opinion, shared by the Court of Cassation, no statutory rules supplying a universal and omni-comprehensive definition of remuneration are available to be enforced, except for in cases where a definition is explicitly laid down by a specific provision, so the issue of what the legal definition of remuneration is, is still largely disputed.
[189] It must be noted that in Italy, occupational pensions schemes are not yet widespread in the private sector, and are not yet provided in the public sector. Occupational pensions have been recently re-regulated in the framework of the social security system (second pillar), by specific acts that do not explicitly refer to any gender equality clause, but the general principle of equal pay and equal treatment (grounded on Article 37 of the Constitution) applies to any occupational pensions scheme linked to any employment contract.
[190] http://www.cnel.it/archivio/contratti_lavoro/BDCL.asp.
[191] http://www.cnel.it/archivio/contratti_lavoro/accgov.asp.
[192] Judgment no 103/1989, at

differential treatment in matters of job classifications and wages provided either by the employer or by collective agreements is lawful insofar as it is 'objectively justified'. Such a stipulation does not amount to an absolute principle of equal treatment; the employer may therefore legitimately treat employees working in different establishments differently, insofar as he is able to demonstrate that such treatment is justified by business-related reasons. This occurs particularly when the activities are different and different collective agreements apply. By contrast, whenever the applicable collective agreement is the same, any differential treatment could hardly be justified.
Taking the Constitutional Court's rulings into account, Italian courts are now prepared to scrutinise the criteria adopted by collective agreements in job classification and pay scale settlements. Such an approach - bitterly criticised by scholars - could lead Courts to make a cross-industry comparison in order to evaluate whether the existing differential treatments between different branches are reasonable or not.
On the other hand, it is well-established case law of the Court of Cassation (the first ruling on this point was judgment no. 6030/1993) that Italian law does not provide a general principle of equal pay. As a general rule, according to this Court, differentiations in job classifications and pay either by the employer or by collective agreements are lawful, as long as a precise mandatory rule does not prohibit treating workers doing the same or comparable work differently (in fact, and somewhat paradoxically, precise mandatory rules prohibit differential treatment on the grounds of sex). According to the Court, the rule of equal pay would amount to a limit to the employers' freedom of initiative as well as to 'collective autonomy' (i.e. the power of social partners to evaluate collective interests). Hence, such a rule could be enacted only by the legislature, and not by a court.
Often pay discrimination can be easily hidden, both in additional wages bargained at local or enterprise level and in the so-called *superminimo individuale.* Unfortunately, no recent and specific studies or case law can be recorded on this matter.

3. The concept of the gender pay gap
This is primarily a question to be answered by an economist or by a sociologist, rather than by a lawyer. For many years, studies carried out by labour economists gave statistical evidence of job segregation that affected female employment. Moreover, research on collective bargaining confirmed that indirect discrimination (and segregation) persists.
The 'gender pay gap' is broadly understood as the *de facto* difference between the average pay received by men and women in the labour market. It can be mainly the result of: a) job segregation b) segregation in lower levels of job classification c) 'contract segregation'. This was confirmed during the Conference on the Gender Pay Gap promoted by ISFOL (an important institute for research and professional training)[193] in December 2005 in Rome. In particular, the reports of the economists underlined the fact that the pay gap tends to increase in direct proportion to certain factors, such as age and level of education of the worker and the dimension of the undertaking. Moreover, it is higher in the richer and more productive regions. This shows how the gender pay gap increases where environmental conditions are more dynamic and where there are more chances for a career.

Job segregation remains remarkably persistent; it still arises, at least in part, from girls' school choices. The initiatives in professional training adopted in the last years, together with the increasing presence of women in secondary school and university, have slightly improved the situation.
According to the last report (drafted in November 2004) by ISFOL, recent professional training initiatives had a great and positive impact on the 'placement' of women (mostly on younger women between 20-29 years of age). However, even if the female approach to jobs is completely changing, women mainly keep on looking for professional training for jobs of a low level, with low remuneration and no perspective of improvement in the level of responsibility.
The analysis of access to jobs shows deep gender differences: the social and educational sector still plays a central role for women; together with the sector of 'other public services of care (both for the community and for the person)', it employs about 30% of working women. In these sectors, pay rates are usually lower than in other sectors. In general, women keep on suffering from lower remuneration than men and from the lower social status of 'their jobs'.

Notwithstanding the fact that under Article 2 of Act 903/1977 "job classification systems applied for the purpose of determining remuneration shall adopt common criteria for men and women", the neutral definition of the occupational categories and/or of the jobs sometimes hides a *de facto* discrimination between men and women in the assignment of jobs and grades. Job classifications and pay scales

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http://www.cortecostituzionale.it/ita/attivitacorte/pronunceemassime/pronunce/Elenco.asp.
[193] http://www.isfol.it/BASIS/web/prod/document/DDD/newrap2004.htm.

indicate a concentration of women in the lowest-paid jobs in each sector analysed. As a general rule, the inferior earning position of women is not justified by inferior skills. On the contrary, the job classification system seems to preserve an implied bias in the classification criteria whereby certain kinds of female-dominated jobs are in fact underrated. A great impact on actual wages could result from supplementary benefits, such as overtime and night shift bonuses (such bonuses mostly benefit men, also in the female-dominated sectors). As regards careers, women are almost absent in management positions. One of the most important factors of female job segregation is deemed to be the lack of mobility (professional and territorial: e.g. readiness to transfer is a requisite for promotion, especially for promotion to positions of responsibility).

It seems that the reform of the fixed-term contract (in 2001)[194], which made the application of fixed-term contracts more flexible, together with the recent reform of the labour market and atypical jobs (in 2003)[195], (slightly) increased the number of employed women, but also increased the influx of young people (primarily women) in the labour market through precarious jobs. The latter are not 'good jobs' as pay rates are low and opportunities to change to a qualified and well-remunerated job are definitely few. This leads to a new form of segregation that we can call 'contractual segregation'.

4. Good practices in tackling the gender pay gap

There are no data available on legislation or regulations that aim at inducing social partners to include the issue of equal pay in collective and other agreements.
Similarly, there are no data available on collective or other agreements that explicitly aim at reducing the gender gap and which are known for doing that.

5. The legal dimension of the gender pay gap

Broadly speaking, the problem of women's job segregation cannot be adequately dealt with through legal means. Furthermore, no formalised job evaluation and job analysis systems are available in our legal and industrial relationships systems. Implied factors of job evaluation may be found in job classification systems settled by collective agreements. According to a widespread scholarly opinion, the biased factors most frequently utilised by collective agreements are the following: (i) professional skills and qualifications, to the extent that women's access may be deemed to be segregated so far; (ii) seniority requirements, to the extent that as a general rule women's careers are shorter than men's as well as more often interrupted; (iii) professional experience and capability, for all the reasons mentioned above.

6. Problems of proof of unequal pay

It is difficult to deliver proof of unequal pay as there is no transparency in the payment of 'personal' benefits. The latter are bargained or simply awarded on an individual basis and are added, by the employer, to the pay fixed by collective agreements.
Some data are available through information given to trade unions on the grounds of collective agreements, but they are usually divided according to gender (in the best case scenario) and not according to the kind of labour contract, its length, the workers' length of service or the workers' kind of job. Moreover, no data are available as regards pay negotiated on an individual basis.
Better enforcement of Article 9 of Act 125/1991 could be helpful here. According to this Article, every two years, public and private companies employing more than 100 employees must prepare and present a report to Equality Advisers and Unions, concerning the situation of male and female employees in all the jobs existing in a company, in relation to appointments, training, professional promotion, levels, transfers between categories and grades, other mobility aspects, redundancy funds, dismissals, early retirements and retirements, and remuneration actually paid. This might enable Equality Advisers to play a more incisive role. Other changes might also be advisable for this purpose, such as extending the personal scope of Article 9 to Public Administration and small enterprises, and charging, for instance, the Regional or National Equality Adviser or the Department for Equal Opportunities[196] with gathering and analysing all data in order to enhance positive actions to fight the gender pay gap.

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[194] Decree no. 368 of 6 September 2001, on Fixed-Term Contracts, implementing EC Directive 1999/70/EC, gazetted on no. 235 of 9 October 2001, http://www.parlamento.it/leggi/deleghe/03276dl.htm.
[195] Decree no. 276 of July 2003.
[196] Which is located at the Prime Minister's Office, and managed by the Minister for Equal Opportunities under Decree no. 226 of 31 July 2003, published in OJ 17 June 2003, no. 138, gazetted on no. 158 of 8 July 2002, http://gazzette.comune.jesi.an.it/2002/158/2.htm.

LATVIA
Lîga Biksiniece

1. Legal framework
The right to equal remuneration is guaranteed at the Constitutional level. Article 107 of the *Satversme* (Constitution of Republic of Latvia), provides that every person shall have a right to receive appropriate remuneration for work performed. Article 91 lays down the general principle of equality before the law. The Constitutional Court of Latvia has developed the principle that constitutional norms should be interpreted in accordance with international law and human rights standards. The term 'appropriate remuneration' has been interpreted as fair remuneration, which also includes equal pay.
A general anti-discrimination principle is laid down in Section 29 of the Labour Code: "Differential treatment based on the gender of an employee is prohibited when establishing employment relationships, as well as during the period of existence of the employment relationships, in particular when promoting an employee, determining working conditions, work remuneration or occupational training, as well as when giving notice of termination of an employment contract." The law defines and prohibits both indirect and direct discrimination, as well as harassment and instructions to discriminate. Employers do not have to provide the same pay and benefits for equal work, if they can prove that the difference in pay is genuinely due to a factor other than the difference in sex.
Article 60 of the Labour Code contains a special and explicit provision concerning equal remuneration, 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."
As regards equality in occupational pensions, it is stated in Article 2 of the Social Security Act[197] that the prohibition of different treatment is one of the principles of the social security system in Latvia. On 1 December 2005, the Social Security Act was amended: Article 2 (1) lays down a comprehensive definition of the prohibition of different treatment and discrimination. Although the anti-discrimination provisions are not included in the Act on State Pensions,[198] it is clear, according to the jurisprudence of the Constitutional Court, that principles of equality and anti-discrimination are also applicable to the occupational pensions system.

2. Collective bargaining and equal remuneration
There is neither enough evidence nor are there enough facts available to evaluate the role of collective bargaining in the area of equal pay yet. Effective social dialogue is still at an early stage of development in Latvia and less than 50% of employment relations are covered by collective agreements. Collective agreements do not contain discriminatory norms, but at the same time they usually do not address the issue of equal pay with sufficient precision, hence also not giving real effect to the legal norms of the Labour Code.

3. The concept of the gender pay gap
The point of departure for the discussion on the gender pay gap in Latvia is usually the fact that, according to the information provided by the Central Bureau of Statistics of Latvia, women receive on average about 82% of men's average wage.

Two main aspects of this difference have usually been discussed:
The gender segregation of the labour market, the division of employment into the so-called male and female industries. Women are mostly employed in such industries as education, health care and social care, and their average remuneration as well as opportunities of career promotion are lower than in industries where men dominate. Women make up 84% of the labour force in the health protection and social sphere, 79% in hotels and public catering and 61% in retail and wholesale.
Different pay for a job of equal value in the same area of employment. An occupational survey of legal units – enterprises, business companies and organisations[199] - shows that women do not receive the same pay for the same job in all 10 major groups, i.e. the groups in which occupations are divided. For instance, discrimination regarding remuneration is evident in the occupational groups where women are more strongly represented than men, such as clerks and service workers. Women working as clerks receive 18% less than men. Women working as service workers and shop and market sales

[197] The umbrella law for all kinds of social security, including occupational pensions, adopted on 7 September 1995.
[198] The special law, regulating state pensions, adopted on 2 November 1995.
[199] Labour Force in Latvia, survey of the CSB, 2004.

workers are paid 32% less than men. There is a comparatively low number of female employers, namely only 29.1% of all employers.[200]

4. Good practices in tackling the gender pay gap

The requirement to regulate remuneration (but not specifically – equal pay) in collective agreements is included in Section 17 of the Labour Code: "parties to a collective agreement shall reach an agreement on the provisions regulating the content of employment relationships, in particular the organisation of work remuneration and labour protection, establishment and termination of employment relationships, improvement of qualifications, work procedures, social security of employees and other issues related to employment relationships, and shall determine mutual rights and duties." There is also a reference to collective agreements in Section 62 of the Labour Code, regulating the organisation of work remuneration: "an employer shall organise a time salary system or a piecework salary system in the undertaking, and a system of supplements and bonuses in conformity with regulatory enactments and the collective agreement."

As to agreements that aim explicitly at reducing the gender gap and which are known for doing that, it must be noted that there is a very limited amount of information available on the content of concrete collective agreements in Latvia. Collective agreements are not made public; they can only be consulted if one of the parties to the agreement allows it. The Free Trade Union Confederation of Latvia published "Recommendations for the drafting of collective agreements" in 2005. These recommend addressing the principle of equal pay in the process of collective bargaining and including it in the text of the collective agreement. Practice of trade unions shows that the general principle of equal pay deriving from the Labour Code has usually been copied in such agreements without any specification. Sometimes it is not mentioned at all.

5. The legal dimension of the gender pay gap

The provisions of the EC Treaty and relevant directives and the ECJ case law have been basically implemented into the Labour Code of Latvia. However, according to statistics, the gender social balance has not been achieved. Women still have less chance of receiving equal remuneration in the labour market.

There are several legislative acts in Latvia that regulate the basic methodology for the evaluation of intellectual as well as physical work of officials and employees of the public administration. In these cases, remuneration for employees is established depending on the position held and the category of qualification. Each of these legal acts ensures compliance with the principle of equal pay for work of equal value. However, taking into consideration the fact that the remuneration for employees working at various institutions, financed from the national budget, is regulated by specific legal acts for each institution, the said principle is not always followed and there are differences in remuneration for work of equal value at various institutions. There are very low levels of salaries stated in some areas of employment, for example in medical care institutions, stipulated by 'Regulation on the remuneration system for employees working in medical care institutions, financed from the national budget', adopted on 28 September 2004. Mostly women work as medical personnel and social workers in these institutions where the level of salaries, under the government Regulations, is low. By amending this regulation and increasing salaries in these sectors, the government could diminish segregation in the labour market. On average, pay in the private sector is higher than in the public sector.

According to the Labour Code, if an employer has violated the principle of equal pay, the employee has the right to request the remuneration that the employer normally pays for the same work or for work of equal value. An employee may bring the action to court within a one-month period from the day he or she has learned or should have learned of the violation. According to the legislative amendments of 22 April 2004, the victim could be paid moral compensation if the court establishes the fact of discrimination.

When the employer fails to comply with the legal acts in force, administrative sanctions may also be imposed on the employer in accordance with Article 41 of the Latvian Code of Administrative Offences.

[200] Labour Force in Latvia, survey of the CSB, 2004.

6. Problem of proof of unequal pay

The lack of a uniform employment assessment encourages wage differences between people employed in different sectors. At present, the reform of remuneration for officers and employees of public administration agencies is being implemented. In accordance with the remuneration system, the remuneration for civil servants and employees of the public administration will be established, taking into account the qualification categories of positions that will be determined by assessing the position according to the job assessment methodology and the qualification category of employees. The new remuneration system also respects the principle of gender equality. More attention should also be paid to employment assessment, transparency and equal pay implementation in the private sphere.

Furthermore, in Latvia, it is extremely difficult to get information regarding pay in private establishments. Often it is stipulated in the employment agreement that remuneration is confidential and may not be revealed to colleagues or any other person. A serious problem in the area of effective protection of the right to equal pay is formed by the so-called 'envelope salaries' (unofficial income without tax deducted) in the private sector. This means that equal pay claims can practically be brought only against a small percentage of employers in Latvia. Therefore, in order to help effectively enforce the right to equal pay in Latvia, it is for the national court to accept rumours and suspicions expressed by the employee as a reason to shift the burden of proof to the employer.

LIECHTENSTEIN

Nicole Mathé

1. Legal framework

Basic legislation concerning equal pay is the Equality Act 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 (*Allgemeines Bürgerliches Gesetzbuch,* abbreviated *ABGB*), which entered into force on 1 May 1995.

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 from the date of instituting proceedings to five years before and after that date, until the termination of the employment contract.

The obligation to pay equal salaries 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 work then became possible on an individual basis.

Equal treatment for men and women in matters of social security and occupational social security schemes is not explicitly mentioned in the *GLG*. Nevertheless, since 1996, Liechtenstein has been examining the need to amend various rules in social security legislation (e.g. the Old Age and Survivor's Pension Act, *Gesetz über Alters- und Hinterlassenenversicherung,* abbreviated *AHVG*)[201] in order to eliminate provisions resulting in discrimination on grounds of sex. The first equality report from 1997, as well as the second from 2000, deals with this matter in great detail. As a positive result in the only very recent history of equality policy in Liechtenstein, it can be mentioned that equality legislation was created especially concerning the following issues: the equalisation of pension ages (to 64) and, as a consequence, contribution periods (Section 55 *AHVG*), the reduction and abolition of additional pensions for female spouses (Section 4 *AHVG*)[202], equalisation of the pension schemes for widowers and widows (Sections 58 and 67 *AHVG*), individual benefits and an individual obligation to contribute for both male and female spouses, abolition of what was known as the maximum pension for married couples, introduction of crediting periods for the education of children without regard to their sex, and the gender-neutral calculation of pensions.

2. Collective bargaining and equal remuneration

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

[201] LGBl. 1996 no. 192.
[202] LGBl. 1996 no. 192 and LGBl. 2000 no. 204.

that override the individual labour contract, and partly reiterates the rules of the law. It can also apply to third parties. The *GAV* is mutually agreed and signed by the representative of the employees (trade union, *LANV)*[203] and by the representative of the employers (*GWK*)[204]. 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.[205] In principle, collective bargaining agreements are publicly available and can be bought at the representative organisation of the employees.

3. The concept of the gender pay gap

In Liechtenstein, it is recognised as a central goal of gender equality to minimise and eventually eliminate the wage differential between men and women. On the one hand, women earn on average less than men because women are on average less highly educated and therefore occupy inferior posts and are classified in inferior wage scales. However, the fact that women are paid lower salaries for equal or equivalent work is also criticised. In that respect, no reliable figures are available for Liechtenstein except for those mentioned in two reports, one of 2004 and the other of 2006,[206] however, these reports refer to Swiss statistics. We cannot exclude the possibility (indeed, it is rather to be expected) that women with the same level of education are discriminated against in favour of men, with respect to both their professional career and the salary for the same work. The author of the report of 2004 cited Swiss statistics, where the gender specific wage differential in 2002 was 21% in the private sector and about 11% in the federal administration. This could be an indicator for figures in Liechtenstein. The report of 2006 also cites Swiss statistics, which show that the difference between women's and men's salaries increases with higher education. In jobs with the highest profile, women earn 27.8% less than men; in jobs with the lowest profile, women earn 20.1% less than men.

4. Good practices in tackling the gender pay gap

The obligation to pay equal salaries to men and women in Section 1173a Article 9, § 3 *ABGB* has to be applied to all labour contracts, including *GAVs* agreed upon by the social partners. The social partners are thus legally bound by the *ABGB* when determining salaries in collective agreements. As mentioned above, under point 2, some of the collective agreements even contain explicit provisions that aim at promoting equal pay for men and women. As far as detailed information is available, such provisions of collective agreements generally reproduce legislation.

Representatives of both employees and employers installed a specific section for women in their respective institutions that is active in enhancing equal chances between men and women.

5. The legal dimension of the gender pay gap

The existence of the gender pay gap was already known before gender legislation was passed. It was even the main fact that led to gender equality laws aiming at the elimination of the wage differential. However, experience has shown, also in Liechtenstein (where the only case[207] (not published) concerning gender equality before the administrative high court dealt with unequal pay), that legislation itself 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 laws. This includes, moreover, promotional and sensitisation work with regard to the aims of gender equality laws, which has to be done on a regular, structured basis by addressing all of the persons involved.

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[203] http://www.lanv.li *Liechtensteinischer ArbeitnehmerInnenverband.*
[204] http://www.gwk.li *Gewerbe- und Wirtschaftskammer für das Fürstentum Liechtenstein.*
[205] Information given by the LANV.
[206] Liechtenstein Institut, Wilfried Marxer, *20 Jahre Frauenstimmrecht - Eine kritische Bilanz, Beiträge no. 19/2004*, p. 60. In May 2006, the governmental office for equal opportunities published a report called "facts and figures: women and men in Liechtenstein" that reaffirms that no statistics concerning salaries of women and men exist. The authors therefore refer to Swiss statistics.
[207] VBI 2002/107 from 18 June 2003.

6. Problems of proof of unequal pay

Experience over 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[208] is the improved protection against unfair dismissal and the possibility for group actions. In addition, the procedure was amended in order to facilitate the proof. Section 7 *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 the legal action is brought by the organisation and if it will 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.

Another reason that victims of discrimination do not go to court is the specific demographic situation of Liechtenstein. It is a very small country where employers are integrated in a kind of network and everybody knows each other. Since equal opportunities for men and women are still considered to be a delicate matter for employers as well as for employees, both sides have an interest in settling conflicts concerning these matters in an informal way. Consequently, potential cases are not being brought to court. Similarly, the risk of losing their job or not finding another one is a very important factor in the Liechtenstein context. Therefore, employers and employees run the risk of not completely eliminating the gender pay gap that very probably still exists in Liechtenstein. In the light of these aspects, the legislator has now changed the GLG so that organisations can act on behalf of individual persons who have been discriminated against, in order to render the formal process more anonymous for the person concerned, whilst eliminating the discrimination. For the same reasons, the gender equality institutions in Liechtenstein are emphasising the preventive character of the GLG and want to promote it more widely by organising information campaigns on how to tackle gender equality issues by good practices.[209]

LITHUANIA

Tomas Davulis

1. Legal framework

The principle of equal pay shall be regarded as a specific implementation of the constitutional principle of non-discrimination (Section 29 of the Constitution of the Republic of Lithuania)[210] and of the general principle of non-discrimination against employees in the field of labour and employment relations (Section 2 (1), p. 4, Labour Code of 4 June 2002)[211]. The principle of equal pay is mainly covered in the Labour Code of 4 June 2002[212] and in the Equal Opportunities of Women and Men Act of 1 December 1999.[213]
The Labour Code defines the concept of 'pay' in Section 186 (1): "Pay shall comprise the basic salary and all additional payments directly[214] 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 designed in such a way as to avoid any discrimination on the grounds of sex (Section 188 (3), Labour Code).

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[208] LGBl. 2006 no. 152.
[209] For instance, Fathers Day, Equal Opportunities award, *LänderGender* – interregional project with Austria and Switzerland, public information campaign to promote the GLG started in 2007 "*Gleichstellung lohnt sich*". For more details see http://www.llv.li/amtsstellen/llv-scg-gleichstellung-veranstaltungen.htm.
[210] *Valstybės žinios* [Official Gazette], 1992, no. 33–1014.
[211] Official Gazette, 2002, no. 64-2569.
[212] Official Gazette, 2002, no. 64-2569.
[213] Official Gazette, 1998, no. 112-3100.
[214] Thus the indirect payment, goods or services provided by a third party to the employee directly (nourishment, tickets, discounts etc.) do not fall under the notion of 'pay' of the Labour Code.

The Equal Opportunities of Women and Men Act 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, p. 3), to provide equal working conditions and equal benefits (Section 5, p. 2) and to apply equal criteria in assessing the quality of work (Section 5, p. 3). The application of less or more favourable terms of employment or payment for work to an employee is considered a 'violation of equal rights for women and men' by the norm of Section 6, p. 1 of the Act. Violations are punished according to the rules of Administrative Law (the Administrative Penalties Act, imposing administrative fines between approximately 35 - 1,100 euros, should be applied)[215].

There are no other explicit provisions on the implementation of the principle of equal pay in other areas of employment, such as public service or self-employed persons. The concept of pay is not given a broader definition in other areas of national legislation.

The Equal Opportunities of Women and Men Act makes it clear only that the different pension age for men and women under the state social security system shall not be considered as discrimination, thus different retirement age in occupational pension schemes is prohibited. However, the occupational social security schemes at enterprise level and in the private sector are definitely the exception to the rule in Lithuania. As far as the public sector is concerned, the principle of equal treatment for men and women in occupational social security schemes is not reflected in any of several special laws governing the pensions paid by the State to specific categories of former civil servants, scholars etc. Generally speaking, there is no explicit rule on non-discrimination that would clearly cover occupational pension schemes or state pensions – it is universally accepted that the gender-based discrimination in this sphere is practically banned by the consolidation of the exhaustive list of eligibility criteria and formulas for the calculation of the amount of the pension. However, almost in all cases the right of civil servants or their dependants to a state pension has been made dependant on the reached pension age under the state social security system, which is different for both genders.

2. Collective bargaining and equal remuneration

The impact of the national enterprise-oriented collective bargaining system in promoting equal opportunities and implementing the principle of equal pay is not very significant. Firstly, collective bargaining as a way to determine salary and other working conditions through reaching a compromise does not play an important role in the Lithuanian system of industrial relations. 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 state itself tries to 'escape' from the collective bargaining in the public sector (i.e. civil servants, public service employees or employees in public institutions or enterprises providing public services), avoiding any collective bargaining. The increase of wages by unilateral administrative regulation and without touching other aspects of employment is prevalent, especially under the threat of strikes by employees of one particular profession or sector. When the party to the collective bargaining on the employees' side (trade union or works council) manages to enter into negotiation with the employer (in very rare cases, the employers' organisation), the question of the increase of wages is discussed but with no reference to the issues of gender equality. It seems that the inclusion of those issues on the agenda of collective bargaining is not realised by either party. It is more desirable to have at least a collective agreement on wages or other conditions of work than to consider gender equality issues which are, according to the parties, seen as a task of state authorities or as not being relevant for the parties.

3. The concept of the gender pay gap

There is no legal definition of the 'gender pay gap'. The 'gender pay gap' is determined by calculating women's overall average pay (gross pay) as a percentage of men's overall average pay. Monthly average wages are calculated according to the provisions established by the Governmental Decree no. 650 of 27 May 2003 on the basis of the method of calculation of the monthly average wage of an employee and a public servant.[216]

4. Good practices in tackling the gender pay gap

Although in Lithuania there are certain openings for good practices, they have not been used for the purposes of gender equality until now. The national legal framework of collective bargaining provides the opportunities to conclude two sorts of collective agreements that have a normative effect: enterprise level agreements and agreements on a level higher than enterprise level (sectoral, regional or national). The Labour Code ensures the freedom of bargaining with regard to questions to be

[215] Official Gazette, 1985, no. 1-1.
[216] Official Gazette, 2003, no. 52-2326.

regulated by the agreement, though it provides some guidelines for the parties. Section 50 of the Labour Code includes the non-obligatory list of conditions specified in the national, sectoral or territorial level agreements (e.g. terms and conditions of remuneration for work, working and rest time, safety and health of the employees, the 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 level collective agreement, giving a sample-list of conditions and excluding any gender-related issue. In addition, the national 'official' transposition legislation, the Equal Opportunities of Women and Men Act, contains no clause on the role of the parties in collective bargaining in this regard.
Collective agreements are not publicly available except for national, sectoral and territorial agreements, which all are 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 few agreements have been concluded.[217] Enterprise-level agreements that are almost absolutely dominant in Lithuanian practice are not registered or monitored by state authorities. National trade unions' confederations or unifications are sometimes in a position to follow a number of those agreements and to observe their content, but they do not pay particular attention to gender equality issues by monitoring or supporting collective bargaining conducted by their affiliates.
There are two other types of agreements in the national framework of social dialogue. The Law on Works Councils of 26 October 2004[218] allows the elected work council to conclude 'agreements' with the employer. It is questionable whether those agreements with no normative effect may be of particular importance for gender equality, but such agreements are unknown so far. As an outcome of a social partnership at the national level, another type of agreement (agreements on tripartite cooperation) emerged a decade ago. Those agreements concluded by the Government and inter-sectoral trade union confederations and employers' organisations are regarded as national 'social pacts' without a normative effect. Until recently, the social pacts did not pay any particular attention to the implementation of the principle of equality. The last Agreement on Tripartite Cooperation of 13 June 2005[219] recites seventeen priorities of cooperation of the parties, among which (no. 8) the "creation of equal opportunities in the labour market" is to be found. However, the parties did not attempt to explain or develop this concept in the agreement. No particular measures or actions have been taken in this regard. The parties failed to include a clause encouraging their affiliates to tackle the pay gap through collective bargaining.

5. The legal dimension of the gender pay gap

It may be observed that the legislation establishes the principle on gender pay equality in a rather declaratory way; the mechanisms of their practical enforcement are still lacking.
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 wage 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, such factors as the employees' qualifications, experience, professional skills,[220] length of service and productivity are not taken into account. Until now, there have been no attempts by an unsatisfied employee to challenge in any way the level of wages negotiated on an individual or collective basis. Thus the meaning and limits of the application of the said provision remain obscure.
There are no legal grounds justifying the pay gap between women working part-time and men working full-time. According to Section 146 (3) of the Labour Code, part-time work shall not result in a limitation when setting the duration of the annual leave, calculating the length of service, promoting an employee or upgrading professional qualifications. Nor shall it limit other labour rights of the employee. The employees shall receive remuneration in proportion to their working hours or to the results of the work.

[217] 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 apart from the repetition of statutory regulations, it did not encompass any significant stipulations on pay or other working conditions.
[218] Official Gazette, 2004, no. 164-5972.
[219] Official Gazette, 2005, no. 75-2726.
[220] Note 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.

Section 188 (3) of the Labour Code 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 developed in such a way as to avoid any discrimination on the grounds of sex. However, since the said provision is relatively new, there is still a lack of knowledge and experience of how to use it in practice.

6. Problems of proof of unequal pay

As prescribed by law, conditions for determining the wage, rates, tariffs and qualification requirements for professions and positions, work quotas, and the procedure of setting tariffs for work and the employees shall be laid down in collective agreements. Individual hourly pay rates, monthly wages, other forms and conditions of remuneration for work, and work requirements shall be laid down in collective agreements and employment contracts (Sections 188 (1) - 188 (2), Labour Code). Employees have to be duly informed about the terms of employment. The problem is that collective bargaining agreements on wages are rare (according to several sources, collective agreements are concluded in 5-10% of enterprises, but even these numbers seem to be an overestimation), and the setting of pay rates and the evaluation of workplaces for the purposes of remuneration are the exception. Individually negotiated wages and their periodic adjustment based on non-transparent criteria have become the most common practice.

Legal acts do not provide a supporting framework for comparing the pay of men and women and for proving unequal pay. The information about individual wages of a particular employee is basically regarded as confidential personal information. Section 208 (1) of the Labour Code states that information about wages shall be made available or made public only in cases specified by the law or upon the employee's consent. An exception is made for wages of public servants, highest officials, judges and other civil servants and employees paid by the state or from municipal budgets (Governmental Decree No. 1215 of 19 July 2002)[221]; however, it still remains unclear whether the said disclosure rule is still applicable with regard to employees, as the legal norm allowing the Government to adopt the enactment of the procedure of the disclosure of employees' (not servants') wages has already been displaced by the new Labour Code.

The court practice considers wages to be information of a personal nature that should be strictly protected from disclosure and/or unlawful use. This leads to the rule that the information may be disclosed without the employee's consent only in cases specified by the law. It means that authorised state institutions (a court, the State Labour Inspectorate, the Equal Opportunities ombudsman etc.) may require the employer to submit information on the wages of a particular employee or a group of employees. In addition, the employer may include this type of information in the list of enterprise confidential information, thus reinforcing the level of protection.

Trade unions and works councils are not expressly allowed to have a look at the wages of employees. It has not been finally clarified but remains rather doubtful whether this entitlement can follow from the general right of trade unions (Section 16, Trade Unions Act of 21 November 1991)[222] and works councils (Section 19 (5), Law on Works Councils of 26 October 2004)[223] to receive the information necessary from the employer for the performance of their statutory tasks of representation and protection of employees.

LUXEMBOURG

Viviane Ecker

1. Legal framework

There is no reference to the principle of equal pay or to the prohibition against discrimination on grounds of sex in the Constitution of Luxembourg. The basic legislation regarding equal pay is the *règlement grand-ducal* of 10 July 1974, which anticipated Directive 75/117/EEC.

According to this piece of legislation, equal pay must be awarded for equal work or work of equal value. Equal pay is understood as including all additional benefits and special bonuses (profit shares, discounts, premiums, rent-free housing, etc.). Any provision in a contract, a collective agreement or in the company rules resulting in lower pay for women is invalid and has to be automatically replaced by one providing the higher remuneration granted to men. Equal pay is required when men and women

[221] Official Gazette, 2002, no. 75-3232.

[222] Official Gazette, 1991, no. 34-933. Section 17 of the Trade Unions Act guarantees the right of trade unions to information on the working conditions of its members.

[223] Official Gazette, 2004, no. 164-5972.

perform 'similar' work and it is up to the labour tribunals and courts to rule what type of work is of equal value.
The legislation also covers indirect sex discrimination.
The principle of equal pay has been reaffirmed by legislation on the legal status of civil servants (the Civil Servants Legal Status Act of 22 June 1963, most recently amended in May 2003). It is also emphasised by the Minimum Wage Act (*loi modifiée du 12 mars 1973 portant réforme du salaire social minimum*) and by the Collective Agreements Act (*loi modifiée du 12 juin 1965 concernant les conventions collectives*), most recently amended in July 2004.
The *règlement* of 10 July 1974 designates the Labour and Mines Inspectorate (*Inspection du Travail et des Mines*) as the public agency that is to monitor and enforce compliance by employers with the provisions regarding equal pay. In accordance with the Works Councils Act of 7 July 1998, a representative with special responsibility in the field of equality between men and women (*délégué à l'égalité*) has the task of monitoring the enforcement of equality law, and especially the principle of equal pay, within the company concerned.
A provision on equal treatment in social security had been introduced in the legislation by a law of 15 December 1986 (*Loi du 15 décembre 1986 relative à la mise en oeuvre progressive de l'égalité de traitement entre hommes et femmes en matière de sécurité sociale*). Equal benefits for women and men have to be provided by the occupational social security legislation. Article 16 of the Act of 8 June 1999 on supplementary pensions (*loi relative aux régimes de pension complémentaires*) contains a detailed provision on equal treatment, especially on prohibited practices that might cause direct or indirect discrimination based on gender. For example, it is prohibited to fix different levels for benefits, but elements of actuarial calculation, which are different for the two sexes in the system based on contributions, can be taken into account (insofar as this is necessary).

2. Collective bargaining and equal remuneration
The law of 12 February 1999, containing the legislative interventions necessary for the implementation of the measures contained in the national Action plan in favour of employment for 1998, introduced the obligation to mention the principle of equal pay in collective agreements. The law of 12 June 1965 on collective agreements has been substantially reformed by a law of 30 June 2004, mainly as regards the representative function of trade unions, the signing of collective agreements and as regards the treatment of collective litigation by improving and accelerating the procedures of the National Office of Conciliation. The role of social partners is important, as they have the possibility of concluding agreements as regards inter-professional and national social dialogue and may be a substitute for the legislator in some fields. The law distinguishes between two types of collective agreements: ordinary collective agreements and collective agreements declared to be generally binding. Either the employer (or a group of companies that he belongs to) negotiates and signs a convention with a trade union organisation, or the employer is a member of an organisation, which represents him and negotiates these conventions for a particular sphere of activity in his place. These agreements can be declared to be generally binding for all of the employers and the workers of the profession for which they were concluded. The declaration that the agreement is generally binding is done in the form of a "*règlement grand-ducal*" published in the 'Memorial'. The collective agreement has to be made known to the workers. Therefore, Article 13 of the law of 30 June 2004 rules how the agreement has to be distributed within the company so that the workers are properly informed of its content. Furthermore, the whole text of the agreement has to be sent to the worker at his request.

3. The concept of the gender pay gap
A study by the CEPS/Instead, based on results for 2000 of the survey carried out each year within the context of the panel study of income dynamics (the socio-economic panel *Liewen zu Lëtzebuerg*, so-called PSELL), revealed that the structural differences in female and male employment (profession, experience, seniority, training, etc.) have an impact of around 15%, and that more than 10% of this discrepancy is 'unexplained'. It could be assumed that this unexplained discrepancy is due to gender discrimination, pure and simple. As far as the pay gap caused by structural factors is concerned, over 40% is attributable to the job or profession occupied, one-third to the difference in length of career (cf. career breaks for women), 7% to seniority in the firm, 6% to a difference in training levels and 4% to the different employment conditions in the private sector or the public sector. The remainder of the discrepancy of structural origin results from factors such as overtime, the size of the company, etc.[224]

[224] *Ministère de la Promotion Féminine projet L'Egalité de salaire entre femmes et hommes, défi du développement démocratique et économique*, 2002.

4. Good practices in tackling the gender pay gap
Under the new law (Article 20 (3)), which reinforces the text of the law of 12 February 1999 concerning the national Action plan in favour of employment, collective agreements have to include a provision concerning the implementation of the principle of equal pay for men and women; in this context, the agreement has to include the result of the collective negotiations, which must involve considerations concerning the establishment of an equality plan dealing with employment and pay, as well as with the access of workers who have interrupted their career (e.g. after a maternity leave) to employment and to training. When analysing some of the agreements concluded after August 2004, we noticed that the new collective agreements now tend to make a reference to equal pay and to specify that all terms of the agreements related to the access to employment and to pay guarantee equal treatment between men and women.[225] We found that only one of the newer agreements makes a specific reference to an equality plan to be established after consultation with the union representatives or works committees.[226] Women's organisations continue to fight hard to introduce a provision in the law that will make the establishment of equality action plans obligatory.[227]

5. The legal dimension of the gender pay gap
The legal framework concerning collective bargaining can be a tool to reduce discrimination in wages as the negotiators have to address gender pay issues specifically. They have the possibility not only of recognising the principle of equal pay in the agreement, but also of tackling payment structures and payment systems and of achieving more transparency. However, if women's interests are not well-represented in the negotiations and if their bargaining power is low, there is a risk that the pay differences will be institutionalised by collective agreements.

6. Problems of proof of unequal pay
To a certain extent, a collective agreement has to show some transparency as regards the pay system. According to Article 20 of the law of 30 June 2004, a collective agreement has to mention the system of remuneration as well as the elements of wages in each professional category. Additional rates have to be fixed for night work and laborious, dangerous and insalubrious tasks. However, bonuses that are paid for individual performances are not mentioned in the collective agreement. According to a report on equal pay in 2002,[228] the absence of a detailed job description and an evaluation of the tasks is often a hindrance to transparency and makes it impossible to check whether the basic salary is correct and justified.

MALTA
Peter G. Xuereb

1. Legal framework
The main legislative provision on equal pay is found in the Employment and Industrial Relations Act 2002 (Act XXII of 2002, hereinafter called EIRA). This is supplemented by the provisions of the Equality of Men and Women Act of 2003 (Act 1 of 2003, henceforth EMWA). Legal Notice 317 of 2005, which came into force in October 2005, now governs equal treatment in Occupational Security Schemes.
Article 26 (1) EIRA prohibits discrimination in conditions of employment. Article 26 (2) expressly prohibits "terms of payment (…) that are less favourable than those applied to an employee in the same work or work of equal value, on the basis of discriminatory treatment". Article 27 requires that the same rate of remuneration be applied to employees in the same class of employment for work of

[225] I.e. *règlement grand-ducal du 29 octobre 2004 portant déclaration d'obligation générale de l'avenant de la convention collective applicable aux ouvriers et employés des entreprises de travail intérimaire; règlement grand-ducal du 29 octobre 2004 portant déclaration d'obligation générale de l'avenant à la convention collective de travail du 14 décembre 1999 pour les entreprises de nettoyage de bâtiments; règlement grand-ducal du 25 juillet 2005 portant déclaration d'obligation générale de la convention collective de travail applicable aux ouvriers des Brasseries Luxembourgeoises*.
[226] *Règlement grand-ducal du 25 juillet 2005 portant déclaration d'obligation générale la convention collective de travail des employés de banque*.
[227] Cf. *rapport alternatif Beijing¦10, Conseil national des femmes luxembourgeoises*.
[228] "*Egalité de salaire, étude qualitative concernant la fixation de salaires des entreprises du secteur privé*", C*entre d'Etudes de Populations, de Pauvreté et de Politiques Socio-Economiques*/International Networks for Studies in Technology, Environment, Alternatives, Development (Ceps/Instead), Claudia Hartmann-Hirsch, *septembre* 2002.

equal value. Article 28 provides for redress, including the cancellation of offending contractual clauses and the payment of reasonable compensation. The EMWA supplements this by prohibiting discrimination based on sex or family responsibilities, especially in Article 4 relating to employment. The provisions of this Act apply without prejudice to the EIRA, and the effect is to make the other provisions of EMWA (e.g. investigations by the National Commission set up by EMWA, the remedies provision in Article 18 and the provision shifting the burden of proof, i.e. Article 19) applicable in the area of equal pay. Maltese social security legislation has not as yet been fully amended with the *acquis* in view. Pensions are not dealt with by any equal pay legislation, and the pensions situation is under review as part of the review of the Social Security Act and pensions reform.

2. Collective bargaining and equal remuneration

The latest public service collective agreement was signed in October 2005. Like the previous agreement but with much heightened impetus, it makes new provisions for addressing the issue of the work/family balance and will therefore reduce the gender pay gap, including, for example, by making new provisions related to career breaks. The family-friendly provisions in the Public Service Agreement are being extended throughout the public sector in line with a recent instruction from the head of the public service. In the private sector, collective agreements are as a rule concluded at enterprise level. Agreements can deal with: career breaks and progression, leave of all relevant kinds, compressed hours or annualised hours, job-sharing, flexitime, shift working, shift swapping, time-off in lieu, and self-rostering. Collective agreements vary as to their attention to such strategies and there is no comprehensive study as regards trends in this matter across the board [but see Montebello. Trends in Collective Bargaining in Malta 1998-2003, Workers' Development Centre, University of Malta, 2003]. One would expect teleworking to feature in future social partner discussions. Studies have shown low teleworking usage in Maltese enterprises. Collective agreements are not readily available to the public.

3. The concept of the gender pay gap

To the National Statistics Office[229] 'gender pay gap' appears to mean the statistically ascertainable difference in earning position between the mean for men and the mean for women, as regards self-employment or employment. The National Statistics Office has in the past adopted the following definition: the difference between men's and women's average gross hourly earnings as a percentage of men's average gross hourly earnings (for paid employees who work 15 hours or more). Statistics were closely scrutinised in 2005/2006 as, while the World Economic Forum survey of 2005 (*Women's' Empowerment: Measuring the Global Gender Gap*) showed Malta to be low in the table on relevant data, our own National Statistics Office showed the gender pay gap to be somewhere around 3.7% in 2005, one of the lowest in the Union. The causes of this gap, insofar as it exists, are generally regarded as being due principally to the 'inability' of women to work full-time, and the career choices made by women; especially mothers or women bearing other (non-child) family care responsibilities. Therefore, women are more likely (a) to have disrupted or interrupted working lives (b) to work part-time or on reduced hours (c) to do less overtime than men (d) to work in the informal economy rather than the formal economy. All this does not necessarily involve pay discrimination, and the law protects all employees, including part-time employees, from pay discrimination and accords proportionate rights (at least to those working 20 hours or more per week). The fact is that many more women are part-time employees, or work in lower-paid professions and occupations. The latter is the career choice factor: women work predominantly in the care sector or the personal service sector. Also, women often work less than 20 hours per week and thus form part of the informal economy or labour force. The main causes of the gender pay gap among those in work thus appear to be career choice and part-time employment (sometimes combined), rather than pay discrimination.[230]

To this, one may add that it is relatively easy to adopt stratagems in the private sector to circumvent equal pay (for example by using slightly different job descriptions, with associated differences in pay or perks); it is practically impossible to employ such stratagems in the public sector.

4. Good practices in tackling the gender pay gap

The courts have had occasion to enforce the provisions of collective agreements on overtime rights, in the context of non-discrimination and equal pay. One case has led to damages being awarded for

[229] See http://www.nso.gov.mt.

[230] Cf. on this Baldacchino G. et al., *Factors affecting Women's Formal Participation in the Malta Labour Market*, Workers' Participation Development Centre, University of Malta, 2003, and Rizzo S., *Work-Life Balance with Focus on Family Life*, Workers' Participation Development Centre, University of Malta with Malta Employers' Association, 2004.

discriminatory treatment in the allocation of overtime (*Margaret Camilleri et. v. Cargo Handling Co. Ltd*, 3 October 2003 and October 2004). Another case was due for hearing in October 2005 but was settled out of court in December 2006. The cases arose from an identical set of facts, involving a breach of the relevant collective agreement. The National Commission for the Promotion of Equality between Men and Women does not appear to have been a player in the latest litigation, while the defendant company (the Cargo Handling Co. Ltd) is owned and controlled by one of the largest unions.

Statistics on cases not taken to court are not available, but the National Commission for the Promotion of Equality between Men and Women (NCPE), which started operating in January of 2004 and has produced two reports so far, says that it is monitoring the situation and will be reporting on it.

The NCPE has conducted a project, ESF no. 23 'Gender Mainstreaming - The Way Forward', one component of which involves a Gender Pay Review. This aspect of the project focuses on a qualitative analysis of employee posts and salaries, thus seeking to identify any barriers to equal opportunities and equal pay.[231] The third NCPE Annual Report, relating to calendar year 2006, was published on 9 February 2007,[232] but the results of Project no. 23 have not as yet been published. In 2005, the NCPE revised the so-called Gender Equality Clause, which is a clause to be inserted in every tender document issued by the Department of Contracts in the course of public procurement. It provides, *inter alia*, that "the principle of equal pay for the same work or work of equal value shall apply".
As is well known, one of the causes of the pay gap is the female employment pattern. In this respect, it should be noticed that the National Statistics Office is currently carrying out a study on the informal economy.
The NGOs have been pushing hard for family-friendly measures, including measures that will allow women to take up full-time employment in better paid jobs, such as the facilitation of childcare facilities, for example. Formal childcare can be expected to relieve the penalties associated with motherhood for many workers (at a financial cost to them). The government has been responding to calls for family-friendly government policies, for example in the National Budgets for 2005-2006, 2006-2007, and in the latest public service collective agreement. It is too early to assess the reactions of the relevant NGOs to these measures. The opposition Labour Party is in the process, in a general conference in February 2007, of agreeing a number of Policy Papers relating, *inter alia*, to gender equality and work/family life.[233]
In the area of pensions and social security, it must be noted that the Social Security Act in general adopts a male breadwinner model, and its revision is tied in with the pending Pensions Reform. Various organisations, such as the Employment and Training Corporation (ETC), have made recommendations to the government relating to the national insurance/pension position of part-timers and occasional workers with a view to coaxing these out of the informal economy. In the private sector, industrial relations and recruitment practices need monitoring and review.

5. The legal dimension of the gender pay gap

It is perhaps difficult to say that Malta offers a model, or is following any one particular model, to fight the gender pay gap. However, the current government would argue that it is working on many fronts to encourage the participation of the entire population of working age, and especially vulnerable groups, to train, retrain or pursue higher education studies as part of the Lisbon Agenda National Action Plan; measures include proposed revision of curricula, facilitation of evening study or home study, flexible entry requirements to educational and training courses, etc. Hence, education and training are a central pillar in 're-skilling' the workforce, in particular in heightening the 'human capital' (a phrase that has become part of government jargon) of women, and in attracting women in particular back into the workforce.
Apart from the legislation and measures referred to above, the National Action Plan for Employment and the Malta National Action Plan Against Poverty and Social Exclusion 2004-2006 included, as does its follow-up, a number of measures intended to increase women's participation in work, to reduce the gender pay gap, and to ensure a sustainable and adequate social protection system.[234]

[231] NCPE Annual Report 2005, p.34.
[232] NCPE Annual Report 2005, p.34.
[233] See http://www.mlp.org.mt.
[234] See website of the Ministry of the Family and Social Solidarity: http://www.mfss.gov.mt.

6. Problems of proof of unequal pay
There is no general provision in Maltese law akin to an instrument like the Equal Pay Questionnaires in the UK, entitling employees, directly or indirectly, to access information about the terms or conditions of fellow employees. However, some legislative provisions assist in the provision of information (e.g. Regulation 7 of Legal Notice 317 of 2005, giving effect to Directive 86/378/EEC as amended by Directive 96/97/EC). All the usual difficulties regarding proof by reference to a suitable comparator need to be addressed.

THE NETHERLANDS
Ina Sjerps

1. Legal framework
The norm of equality of pay between men and women is written down in Article 7:646 of the Civil Code (*Burgerlijk wetboek*). The equal pay principle is further defined in the *Wet gelijke behandeling van mannen en vrouwen* (Equal Treatment Act, ETA). 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 (…)".
§ 2 (Article 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. Equal treatment as regards pensions is also covered in the ETA. § 3 of the ETA deals with special provisions with respect to pensions.
The definition of pay is as wide as the jurisprudence of the ECJ, and does not pose substantial problems in Dutch case law.

2. Collective bargaining and equal remuneration
Collective agreements apply to almost all Dutch employees. Collective agreements generally contain pay scales. Until the 1970's, many collective agreements had different pay scales for men and for women. The pay scales for men were up to 30% higher. This practice has been completely abolished. Pay scales are the same for men and women. Job evaluation generally defines which pay scale applies to which job. Education and/or seniority rules generally define which position the worker gets in the applicable pay scale. Most pay systems give employers a wide margin of discretion to decide which place in the applicable pay scale an individual worker gets. This assessment begins when the employee is new, and negotiates on the conditions for his/her job. His/her negotiating skills are important. The same goes for further steps up the pay scale. It is often possible to move up the pay scale more quickly when you perform well. The evaluation of the worker's performance generally depends on personal judgments of the employer/manager. These aspects (negotiating skills, personal judgments) are tenacious problems when trying to reduce the pay gap between men and women.
Collective bargaining is bargaining at the sector level, or at the company level. Collective agreements rarely contain pay discrimination between men and women. If they do, it is indirect pay discrimination. They sometimes contain special provisions in which the social partners at sector level urge employers/managers to apply the equal pay principle, or to apply special procedures.

3. The concept of the gender pay gap
The most recent data and information on this topic are from 2004. The data were published in 2006 by the Labour Inspectorate in the report *"De arbeidsmarktpositie van werknemers in 2004*" (a summary of this report is published in TK 27099 no. 16). In this report, the Labour Inspectorate analyses the pay gap between men and women, between people from different ethnic backgrounds, between full-timers and part-timers, and between people working on a normal or on a temporary contract.
The Labour Inspectorate distinguishes between the uncorrected and the corrected pay difference. As regards the gender pay gap: the *uncorrected* pay gap is 21% in the private sector. Women earn 21% less than men. Part of this pay gap can be attributed to different characteristics such as age, working part-time and job level. Part of the pay gap cannot be attributed to any special characteristic (unexplained). The Labour Inspectorate concludes therefore that the *corrected* pay gap in the private sector is 7%. Female government employees are better off: women earn 14% less than men (*uncorrected* pay gap), the *corrected* pay gap is 4%. The Labour Inspectorate points out that the corrected pay gap is not necessarily the result of discrimination, and that certain characteristics themselves give rise to the presumption of discrimination on other grounds (working part-time).

4. Good practices in tackling the gender pay gap

In 2000, the Minister for Social Affairs, also responsible for women's emancipation, started an action programme promoting equal pay for men and women, part-timers and full-timers, and people of different kinds of ethnic backgrounds (*Plan van aanpak gelijke beloning, Tweede Kamer 27099*, no. 1 and following)[235]. In the Sixth Progress Report, the Minister gives an overview of the results and his new initiatives (*Zesde voortgangsrapportage gelijke beloning, 30-10-2006; Tweede Kamer 27099,* no. 16). In the first years of the action programme, a number of instruments have been developed. These are the following:

- An *equal pay checklist*, made by the national representatives of the social partners 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.
- *An Equal Pay Quick Scan*. This software programme has been 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 a 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 will be developed 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*. This guide has been 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.
- Lastly, the *Wage Indicator* (*Loonwijzer*)[236]. 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 (level) and with the same education and years of job experience. It also gives advice on how to negotiate for a higher wage.

After a first evaluation in 2004, the Minister proved to be unsatisfied with the results of his policies (*Vierde voortgangsbrief gelijke beloning, 3-12-2004; Tweede Kamer 27099,* no. 11). The pay gap had not decreased sufficiently since 2000. In view of that, the Minister announced new initiatives: an equal pay investigation of several sectors by the Labour Inspectorate in 2005 and the establishment of an Equal Pay Force (EPF, *Werkgroep 'Gelijke beloning, dat werkt!'*). Representatives of social partners and the ETC, supported by representatives of the Ministry of Social Affairs, were invited to participate in this EPF. 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.

In a letter of 2006, which is a part of the Sixth Progress Report, the Minister gives an overview of the activities of the EPF and of the impact of the various instruments that have been developed. Research done by the Labour Inspectorate does not show a closing of the pay gap. The Minister is not satisfied with the results. He refers to the EPF, whose conclusions will be published in March 2007.

5. The legal dimension of the gender pay gap

Equal pay legislation is an important safeguard to prevent discrimination in the labour market. It does not, however, solve all problems. The equal pay norm is well known in the Netherlands, and is generally accepted. Job evaluation schemes and pay systems will not be directly discriminatory and indirect discrimination has been considerably reduced over the past years. The main reason for the uncorrected pay gap is the difference in job levels between men and women, in combination with the fact that the overwhelming majority of Dutch women work part-time. Men have careers, women work part-time (and not only when they have small children). Whether or not this is what (all) women want is a point of endless debate. Dutch society still disapproves of families with two full-time working parents. Childcare facilities are expensive; school hours are not adapted to working parents. The ideology used to be that mothers should stay at home with their children. The general opinion now is that at least one

[235] These official documents can be found at http://www.overheid.nl.
[236] At http://www.loonwijzer.nl.

of the parents should work part-time in order to look after the children. The result is a society in which most women work in half-time jobs, and men in full-time jobs. On top of this, the Dutch have a strong preference for time off, as a result of which women also work part-time when they do not have small children. This pattern hampers their careers. As for the unexplained pay difference: this can probably to a large extent be explained by negotiating skills. On average, women are less tough in negotiating their wages. The Wage Indicator can be helpful in this process, as it gives pay averages for different jobs/job levels/sectors/expertise.

6. Problems of proof of unequal pay

Collective agreements, including pay scales, pay systems and job evaluation schemes, are generally public knowledge. All collective agreements can be found on http://www.overheid.nl and on other websites. The Wage Indicator, discussed above, is very helpful in comparing your wage with the average of what comparable workers get. Most of the larger companies publish annual social reports, in which they give information on an aggregate level on their employees, divided by age group, sex, part-time/full-time, job level etc. Individual pay decisions, however, are confidential. The equal pay legislation requires employers to fully co-operate with the ETC in case of an investigation, so as soon as the ETC investigates a case, the employer has to hand over all relevant data. In one of his reports, the Minister of Social Affairs points out an upcoming problem: the Dutch pay systems, especially those in the public sector, are ruled by a strong ideology of equality, transparency and predictability. This has proved beneficial for women, as is illustrated by the fact that the corrected pay gap between male and female civil servants is 3%, compared to 7% in the private sector. However, policy makers and economists have been pushing for the introduction in the public sector of pay systems rewarding individual performance. Such a pay policy is believed to enhance the overall performance of civil servants. Under the present pay system, their wage is influenced less by their performance than by their seniority. As 'performance pay' depends on the personal judgment of the manager, individual characteristics and negotiating skills may influence wage decisions. The Minister points out that the introduction in the public sector of 'performance pay' could lead to a larger pay gap between men and women.

NORWAY

Helga Aune

1. 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 the Directives 75/117/EEC, 79/7/EEC, 86/378/EEC and 96/97/EC, as means of ensuring the principle of equal pay. The directives are made a part of Norwegian law through implementation in the Gender Equality Act (GEA) of 1978, sections 5 and 3. Section 3 states that direct or indirect differential treatment of men and women is not permitted. Section 5 of the GEA 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. Section 3 and 5 also cover occupational pension schemes. The rule on the shared burden of proof applies also to equal pay for equal value, section 16.

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. Or the employees' organisation may file a complaint before the Labour Disputes Court. The latter has sole competence on questions regarding the validity of collective agreements.

During the last 25 years, up to October 2003, the Labour Court has only handled eight cases regarding equal pay/equal treatment legislation, while the court has only decided the cases under the equal pay legislation in three of these cases.[237] 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. No equal pay cases have been dealt with by the ordinary courts. 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.

[237] The figures are from a survey I did in 2003. Since then, the number of cases has not risen significantly.

In legal writing[238] the 'closed' system, i.e. the collective parties' control over their agreements, has been criticised. 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 Dispute Court and claim that the very agreements they have negotiated themselves are in breach of the principle of equal pay. The small amount of equal pay cases indicates that the critics may have a point. If the Labour Dispute Court finds that the equal pay rule has been violated, the clause is found to be invalid and the employees are entitled to be economically compensated on equal terms, with interest, as those who have not been discriminated.

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 Gender Equality and Anti-Discrimination 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, but it 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 bring an ordinary complaint before the courts. According the GEA section 18, anyone who wilfully or negligently contravenes an administrative decision by the Gender Equality and Anti-Discrimination Tribunal shall be liable to a fine. However, this section has never been invoked. The very low 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 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 breach of the principle of equal pay. It may also be a matter for concern that the level of compensations paid according to private agreements, following the reccommendation of the Ombud, is not known to the public in most cases. As a side effect, the level of compensation for breach of the principle is not known to lawyers and the public in general.

2. Collective bargaining and equal remuneration

Collective agreements play an important role in the area of pay. The agreements are publicly available in most cases. The challenge is, in my opinion, not that different groups are being paid differently for work of equal value on purpose, but that the parties negotiating the agreements do not have the necessary awareness of how the negotiations need to be conducted in order to satisfy the rules on equal pay. This means that the parties do not always consider whether it is a matter of work of equal value. Moreover, there is sometimes a misconception that as long as the agreement is negotiated within the parties' own 'freedom' to rule over their own agreements and as part of the 'give and take of negotiations', some groups will necessarily come out worse than others; this is believed to have nothing to do with the equal pay principle. The Board of Appeals case no. 8/2000 is illustrative: two male-dominated groups of employees were given a pay rise during the local negotiations. Later on, the local employees' organisation questioned the fact that the female-dominated employee group had not been given a pay rise and wanted to know if this fact was a violation of the GEA section 3. In this case, it was the employees' organisation that had performed the negotiations itself, which later brought up the case.

The gender-segregated labour market in Norway constitutes another major challenge. Women and men choose different careers and jobs and somehow, according to the statistics, fields with a majority of women tend to be paid less than those jobs that are more typically men's domain. A lot of women are employed by the public sector. The different groups of employees have different organisations negotiating their collective agreements. In addition, 43% of all working women work part-time, which in turn affects their income and pensions.

The level of employees being organised varies tremendously from sector to sector. Where there are no collective agreements, the matter of pay is solved through direct negotiations between employer and employee.

[238] See for instance: Vigerust, Elisabeth: *Kollektiv avtalefrihet og retten til likelønn*. *Likestillingsloven og internasjonale forpliktelser*. Inst. of Public Law, University of Oslo, Norway, *skriftserien*, 4/2003.

3. The concept of the gender pay gap
The phrase 'gender pay gap' is on the front pages of the main newspapers every year, in particular when the statistics on the average income for men and women are presented, covering the various fields of careers. The conclusion is always that women earn, on average, less than men. For 2004, the findings were that women's gross income in Norway was on average 36% less than that of men. On average, a woman's annual income is 16% less than that of a man. In the private sector, women's income is 84% of that of men and in the public sector women's income is 87% of that of men. In 2006, statistics reveal that a woman earns on average 84.7% per month of what a man earns. Bonuses and other extras reinforce this difference.[239]

These figures, presenting the total average numbers, reveal that there is definitely a difference in pay. The explanations as to why this is so are complex. A few of them are: 1) the gender-divided work market, where women choose one type of job and men other types of jobs, and for some reason the women's jobs are paid less well than the men's jobs; 2) part-time work is almost the norm for working women as 43% of all working women work part-time; 3) women's working pattern mirrors the traditional lifestyle choices, where children are the main responsibility of mothers; 4) mothers tend to be out of the work market for close to a year in relation to maternity/parental leave. If these employees on leave are left out from the annual pay negotiations, the pay gap originating from that year may follow the employee for years.

Arguably, the varied reasons behind the pay gap call for a varied and multi-layered approach.

4. Good practices in tackling the gender pay gap
The rule stating a reporting-duty on activities aimed at promoting gender equality was included in the GEA by the Act of 14 June 2002, no. 21, Section 1a. Employers are required to make active, targeted and systematic efforts to promote gender equality within their enterprise. Employees' and employers' organisations have a corresponding duty to make these efforts in their spheres of activity. In the said report, enterprises that are subject to a statutory duty to prepare an annual report must give an account of the actual state of affairs as regards gender equality in their enterprise. An account must also be given of measures that have been implemented and of the planned implementation of other measures in order to promote gender equality and to prevent differential treatment in contravention of the GEA. Public authorities and public enterprises that are not obliged to prepare an annual report are required to give a corresponding account in their annual budget. The aim of section 1a is to force people to become aware of the gender status in the enterprises and of the mechanisms that either preserve the gender patterns or promote gender equality. Pay statistics may be a natural part of the reports.

Most collective agreements include sections with special agreements regarding the rule on equal pay for work of equal value. See, for example, Hovedavtalen LO/NHO, Special Agreement on Equal Treatment in the Employment Market and Special Agreement on Work Evaluation, as a tool for pay fixation.

Other easily accessible information is also vital. The Ministry of Children and Equal Treatment has general information on equal pay on its Internet pages, as well as a set of Guidelines for Work Evaluation as a Tool for Pay Fixation.[240] The Ombud also has information on equal pay on her homepage.[241]

Finally, the government appointed a commission on equal pay in 2006. The Commission is to present its recommendations on possible measures to tackle the pay gap by 1 March 2008.

5. The legal dimension of the gender pay gap
Legislation is a powerful tool to help fight the pay gap. Companies are trained to conduct their businesses within the limits of the law.[242] Breaking down traditional perspectives of, for instance, the evaluation of the value of different jobs, will in my opinion only be realised if requirements by law are attached, with sanctions threatening in case of non-compliance. A tool such as a job evaluation

[239] See the web pages of the Gender Equality and Anti-Discrimination Ombud: http://www.ldo.no.
[240] http://odin.dep.no/bfd/norsk/dok/andre_dok/veiledninger/004005-990223/dok-bn.html.
[241] http://www.likestillingsombudet.no/fremme or see http://www.ldo.no.
[242] See for instance Company legislation with requirements on equal representation of both genders on company boards.

system may be offered through public authorities, organisations or the Ombud. Systematic use of work evaluation systems may be introduced as an effective tool to define what jobs are of equal value. Job evaluation systems may be introduced as a mandatory tool for the organisations negotiating the collective agreements locally. Transparency of pay is another tool.

The rule stating a reporting-duty on activities aimed at promoting gender equality, such as section 1a of the GEA, is another example of forcing companies and organisations to become more aware of the issue.

Changing the traditional work patterns of men and women as regards their choice of profession and part-time work is more difficult to do through legal means alone. However, there is a trend of more men sharing parental leave with the mothers, and this does affect men's and women's working patterns. Also, a better coverage of kindergartens is another factor that may affect the parent's career choices.

6. Problems of proof of unequal pay

In the public sector as well as in enterprises covered by collective agreements, the pay systems are reasonably transparent. In the private sector with no collective agreements, salaries are not so openly talked about amongst the employees. There is often an understanding that this is a matter between the employer and the employee, and talking about one's salary might be seen as disloyal to one's employer. However, transparency of pay is a precondition in order to be able to compare pay.

If any complaints are brought to the Ombud, the GEA section 15 provides extended rights to information, which the Ombud or the Tribunal find necessary to fulfil their work. This may indeed help to collect evidence.

POLAND

Eleonora Zielińska

1. Legal framework

In Poland, the principle of equal pay for women and men is laid down both in the Constitution[243] and in the Labour Code (LC)[244]. Section 33 of the Constitution of 1997 refers directly to equal pay by stipulating in Subsection 1 that men and women shall have equal rights in, amongst others, social and economic life. Subsection 2 of this Section specifies that this principle applies also to employment, and that it particularly guarantees equal rights of men and women to equal pay for work of equal value.[245] Since 2001,[246] the principle of equal pay for men and women is also laid down in section 11^2 of the LC, which provides that employees shall have equal rights arising from the equal performance of the same obligations; this applies in particular to the equal treatment of men and women in employment.[247] This rule is considered as a fundamental principle of labour law, which means, among other things, that other provisions of labour law and their interpretation must be compatible with this principle. Furthermore, section 18 3c LC (introduced in 2001 by the Act mentioned above and amended in 2003)[248] states that employees are entitled to equal remuneration for equal work or for work of equal value (subsection 1). Remuneration is understood to include all possible components, irrespective of their description or nature, as well as other benefits related to employment that are granted to workers as payment either in money or in kind (subsection 2)[249]. Work of equal value is work that requires comparable professional skills and qualifications from the employees, certified by the documents

[243] Act of 2 April 1997, Journal of Laws of the Republic of Poland (hereinafter referred to as the 'JoL') 1997, no. 78, item 48.
[244] Labour Code (hereinafter referred to as the 'LC') of 26 June 1974 as amended, JoL 1994, no. 11, item 38; consolidated text in JoL 1998, no. 21, item 92, with amendments.
[245] The same provision was also included in the Constitution of 1952, which was previously in force.
[246] Act of 24 August 2001, JoL 2001, no. 128, item 1405. These provisions entered into force on 1 January 2002.
[247] Until the effective date of the Act in 2001, this provision used the narrower term 'at work' instead of 'in employment'. In the literature on the subject, it was accepted that the term 'work' used in previous versions of this provision refers to all its aspects, including remuneration. Cf. L. Florek, Equal treatment of men and women, in: Equality of the rights of women and men, Texts and commentaries, Centre for Women's Rights, Warsaw 2000, p. 134.
[248] Act of 14 November 2003, JoL 2003, no. 213, item 1081.
[249] According to the case law of the Supreme Court, the notion of remuneration also means the reimbursement of the travel costs. Judgment of 23 June 2005 (II PK 295/04).

stipulated in separate regulations or by practice and professional experience, as well as comparable responsibility and effort (subsection 3).
In prevailing scholarly opinion, equal work should be understood as identical or the same work.[250] It should be added that according to section 9(4) LC,[251] provisions of collective bargaining agreements and other agreements based on an employment relationship that infringe the principle of equal treatment of women and men in employment, are considered invalid.[252] Section 18(3) LC provides a similar rule concerning provisions of employment contracts and all acts through which an employment relationship arises, stating that they are invalid if they infringe the principle of equal treatment. In the event of a breach of the principle of equal treatment, including equal pay, the injured party may bring legal proceedings (section18 3d LC) and is entitled to compensation of an amount no less than the minimum remuneration for work established every year in a separate regulation. The reversed burden of proof in litigation concerning unequal pay applies (section 18 3b LC). In addition, protection is provided against dismissal of the employee in retaliation for bringing proceedings. The relevant provision reads as follows: the exercise of rights by an employee arising from an infringement of the principle of equal treatment in employment cannot constitute a basis for justifying the employer's termination of the employment relationship or its termination without notice (Section 18 3e LC).
The provisions of the Labour Code presented above demonstrate that the legal rules concerning equal pay comply in principle with the requirements of Directive 75/117/EEC, although one mechanism is still lacking. Poland does not have a general system of occupational classifications for the purpose of determining remuneration and also lacks a universal system for evaluating work, and well-established criteria that would permit a comparison of various kinds of work. In addition, the provision making the remuneration dependent on the length of employment, regardless of the type of work, may be criticised as being contradictory to EC case law, in particular Case C–184/89 *Nimz*. On the other hand, the provision dealing with the burden of proof goes beyond the requirements of Directive 97/80/EC. Some positive developments in case law may be observed. For example, the Supreme Court in its decision of 3 June 2003[253] underlined the practical importance of the reversed burden of proof in equal pay discrimination cases, stating, on the one hand, that the provision of an enterprise collective labour agreement that provides 8 substantially different salary categories and classifies legal advisers in the position of main specialist, is admissible. On the other hand, however, in cases when this provision in practice leads to a difference in remuneration of employees working in the same positions, without the employer being able to prove that this difference resulted from applying rational and objective criteria, then the employee may claim compensation for the violation of equal treatment and non-discrimination principles before the labour court.[254]

2. Collective bargaining and equal remuneration

Pursuant to part XI of the LC (Article 238-241), two kinds of collective agreements (collective labour agreements) may be distinguished: those concluded at the level of an individual enterprise (328 such agreements were concluded in 2004) and at the supra-enterprise level (165 such agreements have been registered up to June 2005, plus 178 additional protocols). Every collective labour agreement

[250] It is not enough that both jobs have a comparable character. M. Gersdorf, K. Rączka, J. Skoczyński. Labour Code. Commentary. Lexinexis. Warsaw 2004 p. 71.
[251] Subsection 4 of Section 9 LC was added by the Act of 24 August 2001 (see footnote 246) and amended by the Act of 14 November 2003 (see footnote 248).
[252] The Supreme Court explained that the notion 'invalid' in this context means that the employee who was treated worse may claim the benefits awarded to the employee who was treated better, and not that the latter is deprived of the benefits (Judgment of 12 September (I PK 87/06)).
The Supreme Court in its judgment of 11 October 2005 (I PK 42/05) decided that the exclusion of all employees employed on the basis of manager's contracts from the collective agreements, should not be considered as a violation of the principle of equal treatment provided for in Article 183b § 2 pkt 1 LC. However, the situation may be different if the claimant could prove that the contract has been named 'manager's contract' in order to deprive the claimant of some benefits guaranteed by the collective agreement.
[253] I PK 171/02, OSNP 2004/15/258.
[254] In 2004, there were more than 100 court claims for compensation for the infringement of the principle of equal treatment in employment. The court statistics available at the Ministry of Justice, however, do not specify how many of those claims dealt specifically with sex discrimination, or with pay discrimination based on gender. There is no information in official statistics as to the levels of compensation agreed upon on the basis of Article 18 (3d) LC. In the period of 1 January 2004 to 31 December 2004, 94 individual claims of sex discrimination at work were submitted to the State Employment Inspection (SEI) (Act of 6 March 1981 on State Employment Inspection JoL. 2001 no.124, item 1362 – consolidated text with amendments), among which 20 were considered justified. Most of them concerned pay discrimination based on gender. See http://www.pip.gov.pl/html/pl/doc/07010007.pdf.

must be registered and is available to the public.[255] An analysis of the enterprise collective labour agreements, made by the State Employment Inspection[256] as well as by independent researchers,[257] indicated that the agreements very seldom included regulations more favourable for employees than the minimum stipulated in the provisions of the LC. This trend is coupled with an increased frequency of cases where the parties to collective labour agreements suspend application of the entire agreement or a part of it. The scope of regulation of these agreements primarily includes remuneration issues, working hours and working conditions, and leaves. However, there are clear indications derived from the analysis of selected collective labour agreements and interviews given by parties[258] who have participated in a lot of collective bargaining, that the problem of reducing the gender pay gap is of limited, if any, importance in the process of negotiation of the collective labour agreements.

3. The concept of the gender pay gap

The disparity of remuneration of women and men has a number of underlying reasons, including segregation of occupations and sectors of work for women and men, the way in which jobs are classified and valued, differences in education and professional training, interruptions of careers, and gender stereotypes. The gender pay gap is measured by comparing the average remuneration of women and men. The *absolute* and *net* gender pay gap should be distinguished. The latter remains after the elimination of rational and justified differences and proves the existence of discrimination.[259]

4. Good practices in tackling the gender pay gap

There is no specific legislation that aims at inducing social partners to include the issue of equal pay in the collective and other agreements. Nevertheless, the provisions of the Labour Code dealing with equal treatment (cited above) have been reproduced in most of the recent collective agreements in an unchanged form. However, taking into account the fact that the elimination of the gender pay gap is not a priority for Polish trade unions, it may be assumed that the collective labour agreements, even if they repeat the equal treatment provisions contained in the Labour Code, in reality contribute to the preservation of the existing pay differences between women and men rather than to their elimination.

5. The legal dimension of the gender pay gap

In Poland, the implementation of the EC directives has not resulted in a change in the structure of employment and in the level of pay as yet. The observed reduction of the gender pay gap in the late 1990s (in comparison with former decades) was a result of the expulsion of the women with the lowest remunerations from the labour market, due to employment reductions and unemployment, rather than a consequence of the amendments of legal rules. It may be assumed that it may contribute to a reduction of the gender pay gap to oblige every employer to compare the remuneration of women and men for equal work or work of equal value, to monitor the dynamic of the gender pay gap, if one exists, and to analyse its causes.

6. Problems of proof of unequal pay

The problems of proof of unequal pay differ in the public and private sectors due to differentiated access to information. In the public sector, the information concerning pay rates is available, since there are stable pay criteria. In the private sector, the pay rates and bonuses are negotiated on an individual basis and information concerning them is not available to the public. However, since 1996, an employer employing more than five persons (not covered by a collective agreement) must set transparent rules which allow trade unions to get information about individual employees' remuneration for work.[260] The proof of unequal pay was also clarified by the Supreme Court. The latter

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[255] So far, the supra-enterprise collective labour agreements were concluded almost exclusively in the State Budget enterprises and in most cases concerned heavy industry. Since those branches of industry have been under an ongoing process of restructuring since 1989, the agreements mainly reflect such issues as social expectations of employees and different kinds of compensations kits. Compare: *Zatrudnienie 2005* (Employment 2005) Report of the Ministry of Economics http://www.mgip.gov.pl/NR/rdonlyres/435C53F6-461D-42C8-9C01-EB853C4E6FEC/14499/zatrudnienie2005rok.pdf, p.177. It is worth emphasising that this report, while characterising the employment of women and men, does not raise the issue of equal (or unequal) pay.

[256] At http://www.pip.bip.ornak.pl/pl/bip/sprawozd_pip_2004.

[257] J. Czarzasty, Collective Labour Agreements in Poland in 2002 *Szkoła Główna Handlowa* (SGH) *i Instytut Spraw Publicznych* (ISP), at http://www.eiro.eurofound.eu.int/2003/08/word/pl0308104npl.doc.

[258] Cf. the answers to the questionnaires that the author of this report has addressed to the biggest Polish Trade Unions '*Solidarność*' and 'OPZZ'.

[259] Cf. Henryk Domański. *Zadowolony niewolnik idzie do pracy* (Satisfied slave goes to work). IFiS PAN, Warsaw 1999.

[260] Cf. Resolution of Supreme Court from 16 July 1993 r., IPZP 28/93, OSNCP 1994, no. 1 idem 2.

held that an employee claiming unequal pay and therefore seeking compensation on the basis of art. 18[3d] LC should prove that he/she has performed the same work or work of equal value as the employee receiving higher remuneration. It is then up to the employer to prove that the difference in wages results from applying objectively justified criteria.[261]

PORTUGAL
Maria Do Rosário Palma Ramalho

1. Legal framework[262]
In Portugal, a general right to equal pay for equal work is laid down in the Constitution (Article 59º no. 1 a), as a fundamental right of workers and employees. The same general principle is reiterated in the Labour Code.
With respect to the legal developments of this principle in the gender area, gender equal pay issues were formerly covered by the Equality Act of 1979 (for private workers) and by the Equality Act of 1988 (for civil servants)[263]. Now, these matters are covered by the Labour Code (LC) (which was approved by Law no. 99/2003 on 27 August 2003 and which entered into force on 1 December 2003). This Code is further developed in a Regulation Act (LRA) (Law no. 35/2004, which was approved on 29 July 2004 and entered into force on 29 August 2004). These rules are directly applicable to the private sector but also to civil servants, as expressly mentioned in the Law that approved the LC (Article 5º a) of L. no. 99/2003)[264]. Independent workers that depend economically on another contractor (for instance, home-workers) are also protected by these rules (Article 13º of the LC and Article 30º no. 2 of the LRA).
In the LC, Article 28º states the principle of equal pay in a general way. The further elaboration of this principle in the LRA can be found in the following rules regarding gender equality: Article 32º no. 2 (definitions of direct and indirect discrimination, equal work and work of equal value); Article 33º no. 1 c) (the equal pay principle is, in a general way, reaffirmed and is applicable to all grounds of discrimination); Article 37º (development of the equal pay principle regarding gender), and Article 39º no. 2 (regarding the issue of equal pay in collective agreements).
With respect to pensions, the gender equality principle is established as a general principle in the main legislation concerning social security (L. no. 32/2002, approved on 20 December 2002, Article 8º). This general principle applies both to legal pensions and to occupational pensions. Labour law only deals with this issue in an indirect way, stating that the worker's periods of leave for reasons related to maternity or paternity must be considered as corresponding to periods of effective work when determining the total number of years of work, for the purpose of access to old age or to invalidity pensions.

2. Collective bargaining and equal remuneration
Collective agreements[265] and collective bargaining do indeed play a role in the area of equal pay, since the professions, the professional categories of workers and employees, and the wages are all generally fixed in those agreements.
Often, the principle of equal pay for equal work or for work of equal value is established in those agreements, but in fact, many collective agreements have discriminatory clauses regarding pay alongside the statement of equal pay. The discriminatory practices/clauses can be found especially in three areas:

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[261] Cf. Judgment of Supreme Court of 15 September 2006 (I PK 97/06).
[262] For an overview of the situation concerning equal pay, see M.ROSÁRIO PALMA RAMALHO, *Garantir a Igualdade Remuneratória entre Mulheres e Homens na União Europeia,* Lisbon, 2003 (translated into English under the title "Garanteeing Equal Pay between Women and Men in the European Union"), and for a more detailed analysis of the Portuguese situation on the subject, M.ROSÁRIO PALMA RAMALHO, *Igualdade de tratamento entre trabalhadores e trabalhadoras em matéria remuneratória: a aplicação da Directiva 75/117/CE Em Portugal, in Estudos de Direito do Trabalho* I, Coimbra, 2003, 179-193, and M.ROSÁRIO PALMA RAMALHO, *Direito do Trabalho II,* Coimbra, 2006, 556 ss.
[263] Decree-Law no. 392/79, approved on 20 September 1979, and Decree-Law no. 426/88, approved on 18 November 1988.
[264] However, since the LC has expressly derogated only the Equality Act of 1979 and not the Equality Act of 1988 (Article 21º no. 2 c) of L. nº 99/2003), there might still be some doubts about the ruling applicable to civil servants in this area. In our view, due to the broad scope of these rules, as determined in Article 5º a) of L. no. 99/2003, the Equality Act regarding civil servants is to be considered as implicitly derogated.
[265] Collective agreements are published in an official bulletin regarding labour issues (the *Boletim para o Trabalho e o Emprego*), which is available to the general public. They are also available to the workers at the company level through the workers' representatives.

- in the definition of the professional categories in the agreements, it quite frequently so happens that the very same job corresponds to two different categories, each one of them with a different salary; the category with a lower salary is mostly feminine, while mostly men are engaged in the other category;[266]
- remuneration complements determined in collective agreements quite often depend on criteria that have an unbalanced effect on workers of each sex (such as seniority or lack of absences, regardless of the reason);
- in the area of maternity, paternity and care issues, many collective agreements still treat these issues as a problem of women workers.

3. The concept of the gender pay gap

In Portugal, the concept of the gender pay gap is somewhat narrow, since discriminatory practices are still mainly identified at an individual level (meaning a man and a woman performing the same work or work of equal value for the same employer and being paid differently) and not at a group level or at a professional level (meaning the comparison between professions or professional categories that are predominantly 'male' or 'female' and their respective wages).

4. Good practices in tackling the gender pay gap

In the area of legislation that aims at inducing social partners to include the issue of equal pay in collective and other agreements, Article 31º no. 2 of the LC should be mentioned. This Article establishes that collective agreements should contain clauses that promote gender equality in general (equal pay included). However, this provision is considered a recommendation, since gender equality issues are not mentioned in the mandatory content of collective agreements, as established by law (Article 541º of the LC).

Two other legal measures that concern equal pay should be indicated:

- in relation to clauses regarding professions and professional categories, Article 31º no. 1 of the LC provides that any profession established in collective agreements as exclusively feminine or masculine is to be considered applicable to both men and women; this rule has obvious repercussions on pay;
- as regards clauses of collective agreements or of company rules that establish different pay for men and women performing the same work or work of equal value, these clauses are to be considered automatically replaced by the most favourable salary established, which is to apply to both men and women (Article 39º no. 2 and 3 of the LRA).

Furthermore, some non-legal practices can also be briefly mentioned. Some years ago, a special commission was created to monitor gender equality issues in collective bargaining in order to promote the effectiveness of gender equality rules in this field. This commission (called the National Observatory for Gender Equality in Collective Bargaining) is composed of members of trade unions and of employers' associations, as well as of representatives of the public Commission for Equality at Work and in Employment, representatives of the Labour Minister, and several independent experts.

The situations described above, in Section 2, such as the definition of the professional categories in the agreements, the examination as to whether the same job corresponds to the same or to two different categories with different salaries, or whether remuneration complements are based on the criteria that have a balanced or unbalanced effect on workers of each sex, have been investigated by this Commission in several professional areas, and the Commission also made several proposals to the trade unions and to the employers' associations in order to change the discriminatory clauses in the process of revising their collective agreements.

We find that these kinds of initiatives are very positive, since they involve the social partners in the process of putting the rules regarding equal pay into practice.

For the rest, there is no information on collective or other agreements that aim explicitly at reducing the gender gap.

5. The legal dimension of the gender pay gap

In our system, legal rules could contribute to fighting the gender pay gap if these rules make the issue more visible and if they would impose more obligations on collective bargaining, which is, in our view, the key point in this issue.

Unfortunately, under more recent law, the legal rules (meaning the LC and the LRA) contribute more to maintaining the gender pay gap (unlike the previous Equality Acts) than to eliminating it, especially

[266] A broad analysis of this situation was made some years ago by a public commission.

given the fact that neither the LC nor the LRA define remuneration for gender equality pay purposes (unlike the former Equality Act, which defined that concept in a broad sense in accordance with Community law). In fact, the LC does not develop the concept of remuneration for this purpose and the LRA only establishes a certain clarification of the criteria that must be taken into account in the definition of the salary, for equal work or work of equal value: if the remuneration is fixed according to the number of hours worked, the salary must be the same; when the remuneration is flexible, it must be fixed according to the same unit of measurement (Article 37º), which does not clarify the extent of the concept itself.
Also, the gender equality principle in relation to wages is not mentioned in the section of the LC that deals with remuneration, nor is it mentioned in the section regarding collective agreements, which makes this principle less visible.

6. Problems of proof of unequal pay
Regarding problems of evidence, two legal rules can be brought to the fore as a good solution to fight these problems:
Firstly, the general rule of Article 23º of the LC, regarding the burden of proof in discrimination cases: under this rule, the worker who is discriminated against is only obliged to state the discriminatory practice and to indicate the comparator in relation to whom he/she is allegedly being discriminated. It is the employer's task to prove that the difference in treatment has an objective ground. This rule also applies in pay discrimination practices;
Secondly, the rule of Article 39º of the LRA regarding collective agreements and internal rules of the employer concerning wages: the provision imposes the automatic replacement of the clauses describing a certain job and the correspondent salary that are applicable exclusively to workers of one sex, by the higher value fixed in another clause for equal work or work of equal value (even if this work is classified under a different name), which is applicable to workers of the other sex. In our view, this system goes beyond the requirements of Community law, since the replacement is automatic and can prove to be very efficient in the active promotion of equal pay.

On the other hand, there is often no information regarding pay rates, in particular no information regarding pay rates, bonuses, etc. that are negotiated on an individual basis.

ROMANIA
Roxana Teşiu

1. 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 wages'. 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. A neutral formulation would have been "for equal work, men and women get equal salaries". 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 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 wage determination is prohibited. The 2003 Labour Code does not explicitly contain the equal pay principle. However, under the Wage System Title, Section 154(3) provides that 'in determining and granting wages, any sex-based discrimination shall be prohibited'.

2. Collective bargaining and equal remuneration
The 2005-2006 National Collective Bargaining Agreement[267] is publicly available. Section 14 of the 2002 Equal Opportunities Act provides that in order to prevent sex-based discrimination in the labour field, contracting parties shall introduce clauses prohibiting discrimination during the negotiation of the national collective bargaining agreement, as well as during the negotiation of the collective bargaining agreement at unit level. Consequently, the 2005-2006 National Collective Bargaining Agreement includes in Chapter 1, Section 1(3) the principle of equal treatment in employment and when

[267] Registered at the Ministry of Labour, Social Solidarity and Family under the number 20.01/31 January 2005 and published in the Official Gazette no. 1 of 22 February 2005.

determining the individual labour-related rights for all employees, without any direct or indirect sex-based discrimination. However, the equal pay principle is not specifically referred to in the 2005-2006 National Collective Bargaining Agreement. As a step back in comparison to the 2003 National Collective Bargaining Agreement, the 2005-2006 National Collective Bargaining Agreement no longer specifically includes the monitoring of the implementation of the principle of equal pay for work of equal value by trade union representatives.
There is a very well-established and functional structure for ensuring that the provisions of the National Collective Bargaining Agreement are included in the individual labour contract. In this regard, four elements are important: the 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 above-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 National Collective Bargaining Agreement is a vital condition for ensuring that this principle is actively brought down to the level of the individual labour contract. Moreover, as trade unions are actively involved in negotiating the pay schemes at branch or unit level, the explicit mention of the principle of equal pay in the National Collective Bargaining Agreement is complemented by the active task of the trade unions in monitoring whether pay schemes are based on the equal pay for equal work principle.

3. The concept of the gender pay gap
The concept of the 'gender pay gap' is not used in Romanian legislation or associated practice. This concept is used in the research of various social actors (placed mainly at the level of academic and non-governmental organisations). The 2004 research of the National Institute for Statistics on "Women and Men – Partners in Labour and Private Life" indicates and describes, in the chapter on wages, the "disparities between women's and men's salaries for equal work", without defining and/or analysing the concept of the gender pay gap. Data gathered reveal that women's salaries are the same as men's salaries as regards basic wages. Disparities are triggered by differences at the qualifications level and by the hierarchical structure of the work place. Thus, these differences in women's salaries vary from 70% of men's salary in the overall industry to 92% of men's salary in education. The last data are more significant, as the number of women employed in the education system is 268,000, while there are 115,000 men. The percentage of women is higher in all groups of small and average salaries, while the men's percentage is higher in the above average salary group.

4. Good practices in tackling the gender pay gap
There is no legislation in Romania aimed at inducing social partners to include the equal pay principle in collective or other agreements. The recently proposed 2005 National Strategy on Equal Opportunities for Women and Men, as well as the 2005-2007 General Action Plan for Implementing the National Strategy on Equal Opportunities for Women and Men, do not make any specific reference to the objective of reducing the gender pay gap or to related measures and indicators for implementation. Equally, there are no examples available of collective agreements that aim explicitly at reducing the gender pay gap.

5. The legal dimension of the gender pay gap
As the concept of the 'gender pay gap' is not used in Romanian legislation and/or associated practice, the direct assumption that can be made is that the issue of the gender pay gap is not perceived as a problem that needs to be addressed. As the data gathered by the National Institute for Statistics confirm that the discrepancies between women's and men's salaries are a social problem that is not specifically addressed in legislation, this implies that the Romanian legislator does not treat the problem as a significant aspect of gender inequality in the Romanian labour market. Rather, the pay gap is considered to be a part of the general problem of equal treatment of women and men in the labour market.

6. Problems of proof of unequal pay
According to the 1999 Law on Labour Inspectorate, the Labour Inspectorate has two main sets of responsibilities: in the field of establishing work relations, including the establishment and the granting of salary payments, and in the field of health and work security. However, with respect to the Labour Inspectorate'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 Inspectorate's task of establishing work relations that the only non-discrimination clause provided for by the law focuses on access without discrimination of all persons to the labour market. 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. According to the 2003 Labour Code, the payment aspects are treated in a separate chapter, which includes in its general provisions a clause of non-discrimination in establishing and granting the salary. However, again, no mention is made of the application of the gender equal pay principle in establishing the salary.
Except for in the public sector, information on the amount of performance-related bonuses and benefits is not public, as they are negotiated on an individual basis. According to the 2003 Labour Code, the salaries system for the public sector is established by law and is based on consultation with the representative trade unions. So far, there has not been a court judgment on discrimination based on unequal pay.

SLOVAKIA
Zuzana Magurová

1. Legal framework
The principle of equal pay for men and women is generally guaranteed under Section 12 of the Slovak *Constitution*,[268] which states that people are free and equal in dignity and rights. On the basis of these reasons, no one may be damaged, given advantages, or disadvantaged. According to Section 36 of the Constitution, 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.
The principle of equal pay can also be deduced from the *Anti-Discrimination Act*.[269] Article 6(2) of the Anti-Discrimination Act provides that the principle of equal treatment applies to employment relations, including to remuneration.
According to Section 6 of the *Labour Code*,[270] 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 general principle of equal pay for equal work is laid down in Article 119(3) of the Labour Code. This provision states that: "Wage conditions must be equal for both men and women without any discrimination on grounds of sex. Women and men shall be entitled to equal wages for work of an equal level of complexity, responsibility and difficulty, performed under the same working conditions and upon achieving the same efficiency and work results." There is no other legislation with more detailed rules of what equal work or work of equal value means. There are no detailed provisions on job classification, and remuneration is based on collective or individual agreements.
Article 119(2) of the Labour Code states that wage conditions are agreed in a(n):
a) collective agreement – by the employer and competent trade union body,
b) employment contract – by the employer and employee.
According to Article 119(1), wages must not be lower than the minimum wage determined by a special regulation. Where remuneration of employees is not concluded in the collective agreement, an employer is obliged to provide employees with a wage of at least the amount of the minimum wage determined for the degree of work difficulty pursuant to the pertinent work post. The only classification that could be considered as job classification is the annex to the Labour Code named "Ratings of degrees of difficulty of work posts," which specifies six degrees of work difficulty according to the following criteria: complexity, responsibility and physical/mental efforts.

The Labour Code subsidiary also applies to labour-law relations of employees in the public service department (public servants), unless stipulated otherwise by a special regulation. Examples of such special regulations are the *Act on Performing Work in the Public Interest*,[271] the *Act on Rewarding*

[268] Act no. 460/1992 Coll. Constitution of the Slovak Republic, as amended, effective from 1 October 1992.
[269] 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.
[270] Act no. 311/2001 Coll. Labour Code, as amended, effective from 1 April 2002.
[271] Act no. 552/2003 Coll. on Works Performed in Public Interest, as amended, effective from 1 January 2004.

Some Employees when Performing Work in the Public Interest[272] and *Government Regulation on Catalogues of Jobs to be performed in the Public Interest*.[273]
The Act on Performing Work in the Public Interest governs the employment relations of public servants with their employers. These employers are state administration bodies (except those falling under the state service), municipalities, regional bodies, etc.
The Government Regulation on Catalogues of Jobs to be performed in the Public Interest contains the details of all activities that are covered by the individual job classes. They are divided according to whether mental or physical work prevails in each particular job.
The Act on Rewarding Some Employees when Performing Work in the Public Interest regulates the salaries of public servants, their ranking in salary classes and in salary degrees. For each salary class within the public service, there are specific rules relating to the qualifications required and work difficulty, which are determined through criteria such as complexity, responsibility and physical/mental efforts. The ranking of public servants in salary degrees depends on the length of their experience.
According to Article 10, a public servant may be awarded a personal bonus that can reach up to 100% of his/her tariff salary to reward extraordinary personal skills, results achieved in his/her performance of public service, or work performed beyond the requirements of a particular job.

Pay and employment conditions of civil servants are covered only by one law. The *Act on State Service*[274] also contains the remuneration of civil servants. This Act does not govern the employment conditions of policemen, members of the armed forces, customs officers and specific groups of civil servants such as judges, prosecutors, members of the parliament, etc., which are regulated in separate laws.
According to the position to which civil servants are appointed and the function to which they are assigned, they receive a tariff salary based on the relevant salary class. The salary class is specified according to the most demanding activity to be performed in the relevant civil service employment post, in compliance with Annex 1, which contains the description of particular salary classes.
In a similar way to the Act on Rewarding Some Employees when Performing Work in the Public Interest, the Act on State Service contains a provision (Article 85) concerning the personal bonus. Civil servants may be awarded a personal bonus of up to 100% of their tariff salary for the purpose of rewarding them for special results in their performance of civil service.
Both provisions concerning the personal bonus contained in The Act on Rewarding Some Employees when Performing Work in the Public and in the Act on State Service, create a space for potential sex discrimination in remuneration based on subjective individual assessments of employees´ job performance by their employers.

2. Collective bargaining and equal remuneration
In general, collective agreements either at sector or at company level do not contain specific provisions regarding equal pay for equal work. Collective agreements usually contain provisions on pay increases, working time, remuneration based on work performance, paid leave, redundancy payments, payments of special bonuses, supplementary pension contributions and payment of a 13th and 14th month's wage.
According to Article 4(2, a) of the Act on Collective Bargaining,[275] a collective agreement is invalid insofar as a part of it contravenes generally binding legal regulations, including the provision concerning equal pay contained in the Labour Code and in acts regulating public and civil service.

3. The concept of the gender pay gap
The gender pay gap issue in Slovakia still does not exist as a 'concept' or as an important issue on the political agenda of the Slovak government. According to the 'first official' wage survey carried out in 2002 (published in 2003) by the Statistical Office of the Slovak Republic, the pay gap in all age and education categories is increasing. While the average income of women was 77% of the average income of men in 1998, this was only 72% in the year 2002.

[272] Act no. 553/2003 Coll. on Rewarding Some Employees when Performing Work in the Public Interest, as amended, effective from 1 January 2004.
[273] Government Regulation no. 341/2004 Coll. on Catalogues of Jobs to be Performed in the Public Interest, effective from 1 June 2004.
[274] Act no. 312/2001, on State Service, as amended, effective from 1 April 2002.
[275] Act no. 2/1991 Coll. on Collective Bargaining, as amended, effective from 1 February 1991.

Among the most important national documents on the issue of gender equality are the National Action Plan for Women (1997), the Concept of Equal Opportunities for Men and Women (2001) and the National Action Plan on Employment (NAPE 2003, NAPE 2004-2006).
The NAPE 2003 contained 18 detailed guidelines within the four-pillar structure. The aim of one of the guidelines in the fourth pillar (which involves strengthening equal opportunities policies for women and men) was to eliminate gender discrimination in the labour market and in remuneration. It also contained measures that reflect the need to monitor implementation of gender analysis of incomes in practice. The respective ministries are currently in the process of enlarging the statistical research on gender segregation in relevant policy areas. According to guideline no. 6: Gender equality of the NAPE 2004-2006, the following measures are, *inter alia*, planned to increase gender equality:

- the implementation of a representative survey of how the principle of equal treatment is applied in the working process with regard to gender issues,
- a legal analysis of the implementation of Directive 75/117/EEC on equal pay for women and men in Slovak legislation,
- more effective control and more effective indicators for detecting gender discrimination, particularly in the areas of tariff and non-tariff remuneration.

The concept of the gender pay gap has not yet been defined either by researchers or academics, or by the government. Some researchers have started to publish studies and analyses with concrete proposals of gender indicators for statistical surveys, such as Margita Barošová from the Institute for Labour and Family Research, which could be helpful in reducing gender differences in remuneration.

4. Good practices in tackling the gender pay gap

There is no specific legislation or regulation aiming at inducing social partners to include the issue of equal pay in collective and other agreements in Slovakia.
Trade unions primarily try to negotiate the highest possible increase in wages and greatest job security for employees. Equal opportunities issues that have been included in collective agreements mostly dealt with the working conditions of pregnant women and employees taking care of young children.
Social partners still pay little attention to equal pay. This is the reason why the Confederation of Trade Unions has prepared and implemented a project on “Equal opportunities policy for women and men in trade unions.” One of the aims of this project is to enforce the gender equality principles at all levels of the collective bargaining process. According to the available texts of the collective agreements concluded at sector level for the year 2007 (registered by the Ministry of Labour, Social Affairs and Family), no progress has been known to be made, and ‘examples of good practices’ are still missing.

5. The legal dimension of the gender pay gap

The Labour Code contains only a general principle banning gender wage discrimination. In practice there continue to be gender differences in the remuneration of women and men. The work performed by women is often considered less valuable in the public sector as well as in the private sector. The differences in pay between women and men are caused by several factors, such as the traditional stereotypical division of feminine and masculine jobs, over-feminisation of certain work branches (exclusively those with the lowest average wage), the different percentage of representatives of individual sexes in different income categories of occupations and employment sectors, the concept of the ‘glass ceiling’, the division of family responsibilities and the low representation of women in top managerial positions.
It is not sufficient to adopt the legislation for elimination of unjustified wage differentials between men and women. What is needed is to create an institutional control machinery in order to monitor practical implementation of the equal pay principle.

6. Problems of proof of unequal pay

The Labour Code, in Article 150, states that the labour inspection shall be carried out according to a special law.[276] The National Labour Inspectorate and labour inspectorates supervise the observance of labour legislation, wage conditions and working conditions of employees, including working conditions for women, as well as obligations arising from collective agreements.
Previously, equal pay was not a prime target of inspection. The National Labour Inspectorate has been monitoring the implementation of equal pay since the year 2002. Its report indicates that no substantial progress has been made in reducing the gender pay gap. According to its controls, there

[276] 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.

were only five breaches of the principle of equal pay in the year 2002, identified in three companies (out of 46 companies in total); the breaches concerned Article 13(3) (age discrimination) and Article 119(3) (gender discrimination) of the Labour Code.[277] Individual employees did not submit complaints concerning discrimination or unequal treatment to labour inspectorates.
Other special surveys or regular reports regarding pay, pay rates and bonuses are not available. The only available information is mentioned as a partial issue in general surveys or reports (as, for instance, in the annual report "SLOVAKIA Global report on the State and Society" published by IVO – Institute for public affairs)[278], statistics of TREXIMA ltd,[279] or studies of the Institute for Labour and Family Research,[280] which are prepared in accordance with the concrete requirements of the Ministry of Labour, Social Affairs and Family of the Slovak Republic.
According to Article 239 of the Labour Code, employees' representatives shall control compliance with labour regulations, including wage regulations and obligations stemming from collective agreements. This provision also applies to relations under the Act on Performing Work in the Public Interest. The Act on State Service contains a similar provision. But as is mentioned in point 3, in practice, the trade unions still do not pay adequate attention to the issue of equal pay. Therefore, the conclusion is that there are hardly any data available for those persons who want to bring a case.

SLOVENIA

Tanja Koderman Sever

1. Legal framework

Article 14 of the Constitution of the Republic of Slovenia[281] 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.

The Equal Opportunities Act (hereinafter the EOA)[282] introduces an integral approach, creating equal opportunities and encouraging gender equality. The EOA is a general Act that provides a framework for more detailed legislation in specific fields of law. Besides defining general legal notions, such as sex equality, equal opportunities, equal treatment and direct or indirect discrimination on grounds of sex, it also provides general and individual measures that can be taken into consideration to promote equal opportunities for men and women, especially to combat existing inequalities.
The EOA also determines which bodies are responsible for the enforcement of the EOA and for ensuring equal opportunities, promoting sex equality, etc. These are the National Assembly, the Government, Ministries, the Equal Opportunities Office, the Equal Opportunities Advocate within the Equal Opportunities Office, local communities, political parties and the Human Rights Ombudsman.
Finally, the EOA contains general provisions that prohibit discrimination on grounds of sex. These provisions refer indirectly to the application of the principle of equal pay for male and female workers for equal work or work of equal value.

In the Labour Code,[283] several articles are relevant:

- Article 6, which in § 1 not only prohibits discrimination in general (on various grounds), but also in § 2 explicitly prohibits discrimination on grounds of sex with regard to all aspects and conditions of remuneration. § 3 regulates both direct and indirect discrimination on different grounds, including gender;
- Article 89, which lists grounds for unfair dismissal, including filing a complaint or instituting proceedings before the competent authorities against an employer who has acted in breach of the Labour Code. This indirectly includes non-compliance with the principle of equal pay as well;
- Article 112, which includes unequal treatment of men and women among the grounds for exceptional termination of the employment contract by the employee;
- Article 133, which lays down the principle of equal pay for men and women for equal work or work of equal value and declares void any provisions in individual employment contracts or collective

[277] See http://www.icop.safework.gov.sk/nipspravy/sprava2002.htm.
[278] At http://www.ivo.sk.
[279] At http://www.trexima.sk.
[280] At http://www.vupsvr.gov.sk.
[281] *Ustava Republike Slovenije* (URS, *Uradni list RS*, st. /91-I, 42/97, 66/2000, 24/03).
[282] *Zakon o enakih možnostih žensk in moških* (ZEMŽM, *Uradni list RS*, st. 59/2002).
[283] *Zakon o delovnih razmerjih* (ZDR, *Uradni list RS*, st. 42/2002).

agreements or any acts by the employer that go against this principle. The concept of work of equal value is not further defined;
- Article 229, which authorises the Labour Inspectorate (operating within the Ministry of Labour, Family and Social Affairs) to fine employers who are guilty of unequal treatment under Article 6 of the Labour Code.

In addition, there is the Act on the Implementation of the Principle of Equal Treatment,[284] a general Act, which provides for the equal treatment of all persons in the assertion of their rights in various fields of social life, particularly in employment, working relations, education, social security, etc.
Two articles of the Act on the System of Salaries in the Public Sector[285] should be mentioned as well:
- Article 1, which lays down the principle of equal pay for male and female workers for work in comparable posts, titles and functions among the common principles of the salary system in the public sector;
- Article 38, which gives a legal basis for the publicity of salaries in the public sector. Data on working positions, titles or functions, basic salaries, bonuses and performance-related bonuses are available to the public, with the exception of the length of service bonus.

The principle of equal treatment for men and women in occupational pension schemes is governed by the Pension and Disability Insurance Act.[286] Article 294/2 states that the conditions for the acquisition of rights under voluntary supplementary insurance schemes shall not differ in respect of the sex of the insured person.

2. Collective bargaining and equal remuneration
In Slovenia, collective bargaining is of great importance because trade unions are influential. Collective agreements and bargaining are governed by the Law on Collective Agreements, which is based on the principle of a voluntary system of collective bargaining and does not define the obligatory content of collective agreements or types of collective agreements that can be concluded. Under this law, a collective agreement is valid only for the parties that concluded it, with a possibility for general and extended validity if certain special conditions are fulfilled.

The content of a collective agreement comprises normative and obligatory clauses. Obligatory clauses include all provisions determining the rights and duties of the parties of such an agreement; normative clauses may include provisions on salaries and other types of remuneration, which must be observed in individual employment contracts.

In Slovenia, there are collective agreements concluded at the national level (general, branch/sectoral collective agreements) and collective agreements concluded at the enterprise level. Until recently there were two general collective agreements, one for the public and another for the commercial sector, which dealt with issues common to all branches. Now, only the Collective Agreement for the Non-Commercial Sector in the Republic of Slovenia[287] is still valid, while the General Collective Agreement for the Commercial Sector[288] was cancelled on 30 September 2005 by the employers. Besides the above-mentioned general collective agreements, there are two valid collective agreements concerning individual occupations and approximately 33 valid branch/sectoral collective agreements,[289] which became the most important ones after the adoption of the Labour Code. They are all registered at the Ministry of Labour, Family and Social Affairs. Finally, there are several collective agreements at the enterprise level, which are, as a rule, not published. The other, more important collective agreements are available to the public, in the Official Gazette, on the Internet, in trade unions, books, etc.

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,

[284] *Zakon o uresničevanju načela enakega obravnavanja* (ZUNEO, *Uradni list RS*, st. 50-2295/2004).
[285] *Zakon o sistemu plač v javnem sektorju* (ZSPJS, *Uradni list RS*, št. 56/2002, 72/2003, 126/2003, 70/2004, 53/2005 - upb4).
[286] *Zakon o pokojninskem in invalidskem zavarovanju* (ZPIZ-1-UPB3, *Uradni list RS, št. 104/2005*: http://www.uradni-list.si/1/main.cp2?view=2&urlid=2005104).
[287] *Kolektivna pogodba za negospodarske dejavnosti v Republiki Sloveniji* (KPND, *Uradni list RS*, št. 18-682/1991).
[288] *Splošna kolektivna pogodba za gospodarske dejavnosti* (SKPGD, *Uradni list RS*, št. 40-2205/1997).
[289] http://www.ius-software.si/Baze/REGI/92.htm.

retirement payment, solidarity assistance, profit sharing etc., all of which can cause pay discrimination, collective bargaining in Slovenia does play a significant role in the area of equal pay.

3. The concept of the gender pay gap

The gender pay gap refers to the following phenomena:

- differences in pay between men and women for the same work or work of equal value;
- differences in pay between men and women on the grounds of their different levels of professional experience and education;
- differences between men and women in sick pay, redundancy payments, travel costs, etc. as a consequence of the two above-mentioned differences, because the former - sick pay etc. - depend on the basic salary;
- differences between men and women in performance-related bonuses (because women's skills are often undervalued) and other bonuses, promotion (especially in cases of women after returning from maternity leave), and other benefits connected with the basic salary; especially in the private sector, where data concerning these differences is not public;
- job segregation based on gender, which results in differences in pay, because women working in predominantly female occupations in the public administration, education, healthcare and social services etc. are consistently paid lower wages than men.

4. Good practices in tackling the gender pay gap

As regards measures that aim at inducing social partners to include the issue of equal pay in collective and other agreements, the following are worth mentioning, apart from the Labour Code, the Equal Opportunities Act and other above-mentioned legislation with which considerable progress has been made in Slovenia at the legislative level in ensuring gender equality:

The Social Agreement for 2003-2005,[290] a strategic document signed in April 2003 by the Slovenian government and social partners (representative employers' organisations and representative trade unions organisations), set the general direction for economic and social development for the years 2003-2005 and defined the tasks of the signatories.

In the equal opportunities chapter, it was agreed that the government would, among other tasks, develop measures for preventing, detecting and eliminating discrimination against women on the labour market and adopt a number of special support measures for women - such as promoting women's education/training, reducing segregation and pay inequality, and implementing the legislation on equal opportunities for women and men.

Under this agreement, trade unions were obliged to monitor the situation in the working environment, to warn employers of discriminatory situations and to raise awareness about workers who face actual or potential discrimination. Employers were obliged to adopt measures to use examples of good practice in order to enforce equal opportunities for women and men.

One of the 16 chapters of the draft starting points for negotiations on the Social Agreement for the period 2006-2009, which were adopted by the Government at its session on 21 July 2005, refers to respect for equal opportunities and diversity. It has been emphasised that everyone shall be guaranteed equal opportunities in access to employment, vocational training, promotion, training, retraining, payment and other income arising from the employment relationship, absence from work, working conditions, working time, and termination of the employment contract irrespective of nationality, race, sex, religion, age, sexual orientation, disability or any other personal circumstances.

The National Programme for the Development of the Labour Market and Employment until the year 2006[291] (hereinafter ENP) stated that equal gender opportunities and reconciling work and private life would be ensured by the following measures: increasing equal opportunities as regards employment or work in all occupations and activities; reducing segregation in the labour market and the gender pay gap; developing measures for the prevention, uncovering and elimination of all forms of discrimination in job preservation and promotion, as well as ensuring access to the rights and benefits arising from employment.

The National Action Plan for Employment 2004/05[292] (hereinafter NAP) was based on the strategic objectives of the ENP and the European Employment Strategy. It stated that creating equal

[290] http://www.mddsz.gov.si/fileadmin/mddsz.gov.si/pageuploads/dokumenti__pdf/soc_sporazum_an.pdf.
[291] http://www.mddsz.gov.si/fileadmin/mddsz.gov.si/pageuploads/dokumenti__pdf/nacionalni_program_razvoja_trga_dela_in_zaposlovanja_do_leta.pdf.
[292] http://www.mddsz.gov.si/fileadmin/mddsz.gov.si/pageuploads/dokumenti__pdf/nap04_05_en.pdf.

opportunities is one of the pillars on which the planning, execution and financing of the employment policy depend. NAP also mentioned that in the future, special attention would have to be devoted to the prevention of vertical and horizontal segregation based on gender (men assume hierarchically higher positions than women, constituting the division into the so-called male and female occupations; the former are generally also better paid) and to decreasing and eliminating the pay gap for the same work. NAP also stated that the Ministry of Labour, Family and Social Affairs has developed a system of labour market indicators that are monitored with regard to gender, through which it will be possible to monitor disparities between the treatment of women and men in the labour market and to plan future measures for guaranteeing equal opportunities.
One of the responses of Slovenia in the framework of NAP was the preparation of The Community Initiative Programme EQUAL 2004-2006 for Slovenia[293] by the Ministry of Labour, Family and Social Affairs (as the state authority managing the EQUAL initiative), in agreement with the European Commission; and its adoption by the Government of the Republic of Slovenia (in April 2004). The main objectives of EQUAL CIP were to develop and test new solutions for combating discrimination in the labour market, through cooperation with partners, including trans-national partners. The programme was limited to four of the nine themes; one of them was "Reducing gender gaps in employment".

Finally, the Resolution on the National Programme for Equal Opportunities for Women and Men for the period from 2005 to 2013[294] (hereinafter 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. In the Resolution, it is stated 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, some special goals are defined. These are: performance of special programmes aiming to combat all forms of discrimination and inequalities in the labour market (for example EQUAL); the aim of the inspection services and its monitoring methods to focus on discrimination based on various grounds; analysing and researching the existence of discrimination based on sex in the labour market.
Under the Resolution, the first Periodic Plan for the Implementation of the National Programme for Equal Opportunities for Women and Men for the period from 2005 to 2007[295] was adopted by the Government in April 2006. It defines principal policy orientations of the equal opportunities policy in all key areas of social life. One of its specific goals is reducing vertical and horizontal segregation and the pay gap between women and men, which shall 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.

As to collective agreements and the like, there are no agreements that aim explicitly at reducing the gender pay gap. However, the same goal, in my opinion, can be achieved by respecting the explicit provisions of the Labour Code on equal pay, which provide that collective agreements must be in conformity with them.

5. The legal dimension of the gender pay gap
Although Slovenian legislation is in accordance with the principle of equal pay, women still earn less than men. That means that the law can help to reduce and eliminate the pay gap only to a certain extent. The pay gap is also due to a variety of factors that are not legal. However, as regards the legal dimension of the gender pay gap, I think collective agreements should contain some explicit provisions regarding equal pay in order to decrease the pay gap. These provisions may relate, for instance, to measures that employers will have to take to ensure equal treatment of women and men as regards equal pay, vocational training, and education. Similarly, the provisions may prescribe that reports are annually produced, in which employers will have to collect data on, for instance:
- basic salaries for specific tariff groups and according to gender;
- types of vocational training and the extent to which this is provided for at the workplace, according to the level of professional education and to gender;
- measures taken for reconciling work and private life.

[293] http://www.mddsz.gov.si/fileadmin/mddsz.gov.si/pageuploads/dokumenti__pdf/equal_prog_an.pdf.
[294] http://www.uem.gov.si/fileadmin/uem.gov.si/pageuploads/ReNPEMZM_EN.pdf
[295] http://www.uem.gov.si/fileadmin/uem.gov.si/pageuploads/PN_NPZEMZM.pdf.

6. Problems of proof of unequal pay

Until recently, there was a lack of regular statistics on the gender pay gap in earnings, but since February 2006, regular statistics exist. Regarding equal pay, the following information is available:[296]

- Structure of earning statistics by statistical regions and by sex from 1998-2002,
- Structure of earning statistics by activity, by level of professional attainment and by sex from 1998-2002,
- Data on average monthly gross wages of employed persons by activity, occupation and sex from 1998-2003,
- Data on average monthly gross wages of employed persons by activity, occupation and sex, Slovenia 2003 (First Release)[297].

Until 2002, the Statistical Office of the Republic of Slovenia monitored average monthly gross earnings of persons in paid employment by level of professional attainment, by level of school education and by working hours with the following surveys: Earnings by Level of Professional Skills, Average Monthly Gross Earnings for Certain Occupations and Report of Enterprises, and Companies and Organisations on Earnings and Working Hours. But since 2003, they calculate data from the existing sources with the yearly statistical survey called Structure of Earnings Statistics. The Statistical Office includes in this survey data about all employees, employed by legal and by natural persons, who worked full-time for the same employer for the whole year. Data on gross wages was obtained from the data on personal income tax, which are sent to the Statistical Office by the Tax Administration of the Republic of Slovenia. There are also statistics on wages in the public sector, but not by sex.[298]

Information on the amount of performance-related bonuses, other bonuses and benefits is not made public (with the exception of the public sector) and these are negotiated on an individual basis. Sometimes salaries are also paid in cash (which is illegal) in order to avoid paying taxes.

Victims of discrimination rarely use legal remedies before the competent authorities and the courts, so there are almost no indications of how the problems of evidence and the burden of proof are dealt with in litigation.

SPAIN

Adriana Lozada

1. Legal framework

According to the Spanish Constitution (SC), sections 14 and 35, and to section 28 of the Worker's Statute (WS), "the employer is obliged to pay the same amount for work of equal value, rendered directly or indirectly, whichever is its nature, salary or different from salary, without discrimination on grounds of sex or for any other reason, element or condition in this work relationship."[299] Furthermore, the WS recognises a limit to the lawfulness of work contracts, in the sense that these have to respect the principle of non-discrimination. The prohibition of retaliation against workers, due to complaints made by them regarding equal pay, as well as the basis of neutral categories and conditions at work, is also provided in the WS.[300] The Workers' Statute has adapted the classification systems by using common rules for both sexes; categories, groups and promotion scales take neutral criteria for workers of each sex into consideration, according to the particular aptitudes of women and men.[301] Equality is one of the principles contemplated in section 2 of the General Act of Social Security, which is the legislation that regulates occupational pensions.[302]

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[296] http://www.stat.si/tema_demografsko_trg_strstat.asp.
[297] http://www.stat.si/novice_poglej.asp?ID=926.
[298] http://www.ajpes.si/dokumenti/dokument.asp?id=634.
[299] As amended by Act 33/2002 of July 5. The principle of equal salary was substituted for the principle of equal pay (according to Article 141 of the EC Treaty and Directive 75/117/EEC), finally including all kinds of retributive income received in a direct/indirect way in exchange for work performed by men and women in the same job and in jobs of equal value. The Constitutional Court recognised the need to reform Article 28 WS in decision 145/1991, stating the obligation to pay the same amount of salary for an equal job, and issuing a warning about the possibility of an over-strict interpretation of the prohibition, thereby narrowing things down only to cases in which the work done was compared with work of a similar nature.
[300] Sections 4.2, 17.1, 22.4, and 24.2 WS.
[301] Section 22.4 and 24.2 WS and decision 250/2000, of October 30.
[302] Decree 2065/1974 and Royal Decree 36/1978, as modified by Royal Legislative Decree 1/1994.

2. Collective bargaining and equal remuneration

Report 2/2003 of the National Economic and Social Council on *Collective Bargaining as a Mechanism for the Promotion of Equality between Men and Women* judged the general balance of the inclusion of the gender perspective in collective agreements in Spain to be moderate. This report did, however, recognise some developments in the eradication of direct discrimination clauses in collective agreements and the need to go further in detecting and preventing indirect discrimination clauses.

Most of the initiatives regarding the elimination of pay discrimination come from the two main labour unions.[303] In 2003, the Inter-Confederate Agreement on Collective Bargaining (ANC) introduced several criteria relating to matters of equal pay: the adoption of anti-discrimination clauses in collective agreements; the adaptation of existing collective agreements to the national legal framework; and the revision of differences in pay that could originate in an inadequate application of the principle of equal pay for work of the same value. The same year, a guidebook was issued concerning *Wage Equality in Collective Bargaining, Final Report and Good Practice Guide*.[304] Later, in the 2004 and 2005 ANC Agreements, several positive action measures were incorporated, aiming to temporarily combat disadvantages in women's contracts. There has also been an increase in the presence of women in executive positions in labour unions during the last years; some unions have made their participation proportional to the number of female associates.[305] This has resulted in a wider and more permanent discussion of gender differences during collective bargaining. Nonetheless, the need to widen and strengthen the scope and capacity of collective bargainers, including better access to relevant and transparent information (e.g. total staff composition, job offers, job applicants, new contracts and average salaries), disaggregated by sex, is of fundamental importance.[306] This will have consequences for the true role social partners can play. In fact, on the one hand, labour unions have continuously demanded that the government legislate on the gender pay gap at a national level, publicly asking for the end of what they understand as a lack of willingness from the government.[307] On the other hand, officials from social bodies find that there is a lack of mechanisms to further develop collective bargaining from a gender perspective.[308]

The obligation to make all signed collective agreements public as a measure to guarantee their applicability exists in national legislation.[309] After registering them, the labour authority makes them publicly available in the Official State Bulletin (BOE), or in autonomous and local bulletins, depending on their territorial scope.

It has also been reiterated several times during discussions on the gender pay gap that there is another body to carry out central tasks along with the collective bargainers: the Labour Inspection. As recognised in the *Fourth Plan of Equal Opportunities to eradicate labour discrimination for sexual reasons between men and women* (2002-2006), there are certain tasks that are very difficult to implement with the current means that the Inspection has. If the Inspection wants to be able to develop these activities in a comprehensive way, it should have trained personnel to rigorously develop the actions on its mandate, as well as wider legitimacy and a wider scope of action.[310]

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[303] *Comisiones Obreras* (http://www.ccoo.es) and *Unión General de Trabajadores* (http://www.ugt.es/Mujer/mujer.html).

[304] This report (printed in Spain by UGT, 2003) was seen as the conclusion of a process in which - for the first time - employers' organisations not only came to the agreement to act against sexual discrimination at work, but also proposed a number of measures approved by a Commission of Development of ANC 2003.

[305] For example, UGT has adopted quota systems to guarantee a minimum presence of women (20%); this has led to a 46% representation of women in confederate directive positions (vs. 10% participation in 1993).

[306] Empowering unions so that they can act before courts during procedures in a more ample number of situations (other than collective cases and authorised individual cases) concerning the application of the principle of equality and non-discrimination at work, seems to be an indispensable element of the enforcement of women's rights.

[307] During the popular party's mandate in 2001, sex indicators were eliminated from annual salary revisions, arguing (before the EC) that this was due to an investigation into the causes of such differences in salary.

[308] *Panorama Sociolaboral de la mujer en España,* Consejo Económico y Social, Número 41, Tercer trimestre 2005.

[309] Section 90 WS obliges representatives to present collective agreements to the national labour authority for their registry (within 15 days after the date on which they were signed). They are then sent to the public organ of mediation, arbitrage and conciliation for their deposit.

[310] A specific mention of equal treatment as a priority objective in the Inspection's Plan of Action could really strengthen this organ's ability to handle the implementation of equal pay, and the existence of specific measures to widen the Inspection's capacities can make its work a lot more effective in this area.

3. The concept of the gender pay gap

As remarked above, legal references to the gender pay gap in national legislation are found in very general terms in the SC and WS. Until Act 11/1994, this principle referred only to 'similar work' and not to 'work of equal value'. Further developments in national case law have thrown some light on the gloomy scenario of national legislation.[311] According to the Constitutional Court, direct discrimination is different and negative treatment given to a person as a consequence of directly considering sex as an element. Studies from the main labour unions have defined discrimination in salary as the use of (non-neutral) criteria for the assessment of working positions and the way in which value was assigned to them. This framework eventually has a negative impact on everything: professional scales, evaluation, promotional schemes, and lastly, as regards the issue that concerns us, on equal pay, as shown by Constitutional case law.[312]

4. Good practices in tackling the gender pay gap

Despite the rather limited effectiveness of measures aiming to reduce the gender pay gap, the following can be identified as relevant proposals for social dialogue on labour participation of women and promotion of equality between men and women:[313]

- The establishment of Legal Plans of Equality that can serve as 'minimum standards' during collective bargaining. These Plans should carry a specific mention of the gender pay gap and equal pay, and should include all sectors of the economy. They should also include measures for the early detection and progressive elimination of the gender pay gap and specific deterrent measures to correct differences in salary;
- Another element is the establishment of neutral systems of selection, classification, promotion and training based on technical and objective criteria. This includes the elimination of sexist denominations from professional scales;
- Lastly, the implementation of legal and conventional measures to assure full transparency in the salary structure (variable salary percentages should be clearly differentiated from the total amount). This includes the definition and explanation of the conditions of all existing elements, as a preventive measure against discrimination.

At a national level, there is no legislation that induces the social partners to include the issue of equal pay in collective agreements. On the contrary, the guidelines mentioned above derive from the 2005 ANC (Inter-Confederate Agreement on Collective Bargaining). They therefore have a limited applicability, as they are only parameters agreed between labour unions as useful means for combating the gender pay gap. Legislation in these matters by the autonomous regions is highly irregular, since the regions have their own Equality Law (explicitly dedicating provisions to equal pay), which is applicable only in their territory and in respect to labour relations with the regional administration. A few examples of these Acts are: the Equal Opportunities Act in Galicia (7/2004), sections 39 and 40; the Act for Equality of Women and Men in Pais Vasco (4/2005), section 42; and the Act 9/2003 for Equality between Men and Women in Valencia, section 21.

5. The legal dimension of the gender pay gap

If the final objective is to put an end to salary differences between men and women, which may exist as a consequence of the inadequate application of the principle of equal pay, a change in the actual legislation concerning these matters would be necessary. The possibility of reforming collective bargaining terms through the future *Act on equality between men and women*[314] has been discussed in specialised forums, and it entails the creation of a program to eradicate the gender pay gap through certain clear measures:

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[311] National case law has accepted three basic rules in matters of pay discrimination: firstly, the obligation of transparency in the determination of payment criteria; secondly, the rule of equal value of work (not necessarily the same as identical obligations); and lastly, the obligation to use neutral evaluation criteria. Constitutional Court decisions 58/1994 and 147/1995 stated that when a job classification system is used for determining pay, it must be based on the same criteria for both men and women, drawn up so as to prevent any discrimination on grounds of sex, and is obliged to prove the neutrality of the criteria.

[312] On the implementation of European standards and case law regarding gender pay gap, see the following Constitutional Court Decisions (CCDD): *Gregorio Marañón* 145/1991 (indirect discrimination); *Antonio Puig S.A.* 58/1994 (discriminatory salary system, as of *Enderby,* ECJ of October 27, 1993*); Asunto Fontaneda* 286/1994 (work of equal value); and lastly, *Asunto Gomaytex* 147/1995 (non-direct and indirect discrimination in pay).

[313] ANC 2005.

[314] Draft Act, which is still under the elaboration of the national government and was postponed from the parliamentary agenda this autumn, arguing for a longer period of consultation with the employers' representatives.

- *Compulsory presentation of information* by all social agents, which entails that all official agencies collect information and statistic data disaggregated by sex. If there is no legal obligation for official organs to present information, it seems very difficult to demand that the employer present transparent data on salaries and professional scales. Without these elements of adequate and transparent information, there is not much space for investigating the pay gap or, last but not least, for the enforcement of rights. If this requirement is not reflected in national legislation, not much support from legal rules can be expected;
- *Annual assessment* of the application of collective clauses by a specialised Commission in matters of equal pay. The findings of this Commission can usefully serve as guidelines for future action. This Commission should also enhance the promotion of assessment systems and instruments of evaluation in order to promote non-discrimination in all sectors of employment;
- *Corrective measures* for the accomplishment of the objectives and the existence of adequate sanctions for existing discriminations. This shall lead to a plan to prevent further discrimination and, similarly, to a plan to remedy the possible failure in collective bargaining on the issue of equality; this may include compulsory negotiations on the gender pay gap; furthermore, indirect and direct sanctions should be developed for employers who breach the legal rules in these matters.

6. Problems of proof of unequal pay

Along the same lines, there is also an urgent need for the recognition of statistic proof and for imposing an obligation on judicial bodies to actively collect information from the competent institutions during procedures alleging gender discrimination in pay. This would require a reform of the Act of Labour Procedure, ALP*, inter alia*, in order to specify in clear terms which institutions, with specialised units on gender discrimination (such as research units in labour unions or research centres etc.), should submit the necessary data.

Several studies continue to show the growing tendency towards feminisation of unemployment in Spain and a larger pay gap between men and women;[315] nonetheless, official agencies (such as the Economic and Social National Council) have consistently declared that there is not enough information available in relation to pay scales, bonuses, etc.

SWEDEN

Ann Numhauser-Henning

1. Legal framework

The issue of equal pay is regulated in the 1991 (and current) *Equal Opportunities Act (*EOA*)*[316], introduced on 1 January 1992 and intended to correctly implement current EC law in the field of equality between men and women, including Directives 75/117/EEC and 86/378/EEC.[317] As regards the implementation of the Equal Pay Directive, a gradual adaptation of the law in Sweden may be observed in the form of consecutive legislative changes. In a major reform of the EOA, undertaken in the year 2000, the rules on pay discrimination were amended again in order to bring them into line with the new Article 141 EC and the ECJ's case law. This reform included a definition of the concept of 'work of equal value' in Section 2 of the EOA and new detailed rules on active measures to tackle pay discrimination.[318]

In its first part, the EOA contains rules on cooperation and active measures. Section 2 states that employers shall cooperate as regards active measures and in particular endeavour to equalise and prevent differences in pay and other conditions of employment. The second paragraph contains a definition of work of equal value, stating that 'work is to be regarded as having value equal to that of other work if, after an overall assessment of the requirements of the work and its nature, it may be deemed to be of equal value with that other work. The assessment of the requirements of the work shall include criteria such as knowledge and skills, responsibility and effort. When assessing the nature of the work, working conditions shall be particularly taken into account.' Sections 10-12 require employers (who did not employ less than ten employees at the end of the immediately preceding calendar year) to annually survey and analyse pay practices and differentials, and to prepare a plan of

[315] The main causes for this situation are - generally speaking - adduced to high levels of labour segregation by sex, temporality and non-flexible work conditions, and insufficient social services to attend to working women's needs.

[316] *Jämställdhetslag* (1991:433).

[317] See Prop. 1990/91:113.

[318] See Prop. 1999/2000:143. The amendments entered into force on 1 January 2001.

action for equal pay. The Act also addresses the transparency of pay by obliging employers – even private sector employers – to disclose any information necessary to make proper collaboration in the equal pay monitoring process possible to trade unions participating in a collective agreement. The second part of the EOA contains the prohibition of discrimination. Sections 15, 16 and 17 now regulate direct discrimination, indirect discrimination and the scope of the prohibition, which is in wording similar to the 'Article 13 Directives' and the amended Equal Treatment Directive. Among the areas covered is, according to Section 17, 'pay or other terms of employment for work that is regarded as equal or of equal value'. There is thus no definition of pay as a concept, but the rule is to be applied in accordance with Community law. The rule also clearly covers occupational pension schemes.

2. Collective bargaining and equal remuneration

Collective agreements have to be in writing, according to Swedish law. Collective bargaining in Sweden takes place mainly at the industrial level and at the local level. The collective agreements at the industrial level are easily accessible, but they often provide that a large part of the wage increase shall be decided in local agreements. No one has an overview of what happens at this stage. Even though legal provisions require transparency from the employers towards trade union representatives involved in equal pay monitoring, they in turn may be obliged to respect the confidential nature of such information. The parties to local collective agreements are at liberty to choose not to disclose such information to outsiders.

Collective bargaining and its results are without a doubt 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. The general pay level nation-wide for a profession/branch of industry is by and large set by the collective agreement at the industrial level of that profession/branch. At the same time, trade unions are gathered in a few trade union confederations with, at least in theory, the possibility of coordinating pay policies. Segments of the labour market dominated by women are often 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.

3. The concept of the gender pay gap

There is a lot of research on the gender pay gap in Sweden. The most general figures are calculated by SCB (Statistics Sweden). For the year 2004, women's wages amounted to 83% of men's wages.[319] We call this figure the raw wage gap (*rålönegapet*). It is based on hourly wages but it is not adjusted in any other way. The standard adjusted figure is 92%.[320] This figure is adjusted for age, education, occupational sector and working time. These factors are assumed to influence wages. Working conditions ought to affect wages too, but they are not accounted for. Adjusting for age overstates discrimination if age is used as a proxy for work experience, since men have more work experience than women of the same age. On the other hand, if one believes that childrearing is an activity that raises a person's competence in a way that is useful to employers, age is not a bad proxy for the combination of working experiences and childrearing experiences.

4. Good practices in tackling the gender pay gap

As regards the legal requirements of equality planning under the heading of 'Active Measures' in the EOA – both in general and as regards pay – Swedish legislation can be considered to go beyond Community law requirements. This part of the EOA starts in Section 2 with a requirement for employers' and employees' organisations to cooperate actively to achieve equality between the sexes. The issue of equalising and preventing differences in pay and other conditions of employment are explicitly addressed. The rules on the annual survey and analysis of pay practices in Sections 10-12 go into detail.

The Swedish Trade Union Confederation (LO) coordinated their collective bargaining at the industrial level in the bargaining round of 2004. The aim of this coordination was to allow higher wage increases by industrial unions representing big groups of poorly paid women, without this leading to high general wage increases.[321] This benefited the municipal workers in the care sector and the shop assistants.

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[319] http://www.scb.se/templates/tableOrChart_149083.asp, 2005.11.18.

[320] Ibid. This figure excludes the state sector due to a change of its occupational classification system. The figure for the state sector has been constant at 92% each year between 1997-2003. It is thus reasonable to assume that adding the state sector would not have changed anything.

[321] *Medlingsinstitutets årsrapport. Avtalsrörelsen och lönebildningen* 2004, s. 108f.

There are about 80 collective agreements covering 500,000 workers in the white-collar sector that specifically address parental leave, which is one important cause of wage inequality.[322]

5. The legal dimension of the gender pay gap

The basic cause of the gender pay gap is probably male and female stereotypes regarding the balance of family obligations and working obligations. To the degree that legislation facilitates one spouse specialising in labour market activities and another spouse specialising in non-market work (i.e. family obligations), this legislation will contribute to the gender pay gap. In Sweden, our parental leave legislation has been criticised for doing this. It allows the family to let one spouse of their own choice – which turns out to be the mother in about 85% of cases - take as much as 11 of the 13 months' leave with 80% of the wage covered.[323] Another main reason for the gender pay gap is the segregated Swedish labour market and the different outcome of collective bargaining for different segments of the labour market. Discriminatory wage practices demand that one and the same employer is held responsible for the groups/individuals compared.

Structural discrimination is in principle impossible to prove. Scientifically, we detect it as unexplained differences that remain when every other factor has been accounted for. Few people in Sweden would say that the wage discrimination amounts to a certain percentage. No matter which scientific report we discuss, we would not equate the unexplained percentage with discrimination. If Article 141 EC Treaty is to apply to indirect wage discrimination of this kind, the Courts must be willing to investigate the employer's reasons for paying normal wages to different groups and to treat the unexplained part as discrimination, i.e. equating the unexplained with discrimination.

6. Problems of proof of unequal pay

Section 12 of the EOA contains an obligation for employers to provide trade unions with whom they have a collective agreement with the information needed for them to take part in the annual survey and analysis preceding the annual 'plan of action for equal pay'. In Sweden, affiliation rates to trade unions are very high (about 80% of all employees) and most work-places are covered by collective agreements. To ensure the proper functioning of the EOA, the Equal Opportunities Ombudsperson (EOO)[324] was established (as far back as 1979). The EOO has the power to impose an administrative fine on employers who fail to submit the information, requested by the EOO, which is necessary for reviewing the employers' acts. The EOO may also submit requests to the Equal Opportunities Board for the imposition of a penalty on employers who do not observe the rules on 'active measures'. Cases concerning the rules on the pay monitoring process are now starting to arise.[325]

The consecutive changes of the prohibition of pay discrimination – and the rules monitoring the pay process as such – imply a significant impact of Community law on Swedish labour market practices and attitudes regarding pay. From being considered an area exclusively to be dealt with by collective bargaining between the social partners, (discriminatory) pay practices are now considered a separate field of law in Sweden, in line with the Community law view. This is, however, still the most hotly debated gender equality issue in the Swedish context. There has been intense discussion on pay issues as being best kept outside the court system, and also on the Swedish Labour Court (with its strong representation of the social partners) as not being the appropriate forum to deal with these claims.[326]

The gender equality cases brought to the Swedish Labour Court have been rather scarce in recent years. However, a number of these cases, drawing considerable public attention, have concerned pay discrimination.[327] The negative outcome of most of these cases[328] has been criticised. It is argued that the Swedish Labour Court has too willingly accepted 'the market argument' made by employers as an

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[322] *Medlingsinstitutets årsrapport. Avtalsrörelsen och lönebildningen* 2004, s. 128f.

[323] Up to a ceiling of approximately 3,600 euros per month.

[324] *Jämställdhetsombudsmannen* (*JämO*).

[325] See the Board's decisions nos. 4-03 and 3-03.

[326] See further the English version of this debate, *Legal Procedure in Discrimination Cases etc.,* Lag & Avtal, Stockholm 2002. A recent governmental investigations committee has proposed that the Labour Court in discrimination claims should be made up of three 'neutral' judges and only one representative of respectively the employer's and the employee's side – SOU 2006:22.

[327] One was brought to the ECJ, case C-236/98 (*Jämställdhetsombudsmannen v. Örebro Läns Landsting*), the Swedish Labour Court case 2001 no. 13.

[328] Including Labour Court cases 1996 no. 41, 2001 no. 13 and 2001 no. 76, all regarding equal pay for work of equal value in the health sector. The last two cases nevertheless reflect important progress as regards the possibilities of making legal claims based on the comparison of work of equal value within the Swedish setting.

excuse for pay differentials and has thereby failed to live up to the standards of Community equality law.[329]

UNITED KINGDOM

Christopher McCrudden

1. Legal framework

The basic implementing legislation regarding equal pay is the Equal Pay Act passed in 1970, taking effect in 1975 (there is separate but essentially equivalent legislation relating to Northern Ireland: i.e. the Equal Pay Act (Northern Ireland) 1970). This legislation has been extensively amended since that time, for example to incorporate amendments necessitated by adverse judgments of the ECJ against the UK, particularly regarding equal value. The Equal Opportunities Commission publishes a Code of Practice on Equal Pay that gives practical advice to employers.[330] A revised Code came into effect on 1 December 2003. The Equality Commission for Northern Ireland also publishes a Code of Practice. Equality in occupational pensions is required by the Pensions Act 1995. The Codes of Practice have been particularly important in the context of collective bargaining. From April 2007, a new public sector duty on gender equality will require public sector organisations positively to promote equality between men and women, including in the area of pay.[331]

2. Collective bargaining and equal remuneration

Collective bargaining plays a role in the area of equal pay in the United Kingdom. A recent audit of union activity by the Trades Union Congress found that measures to achieve equal pay, especially for women, were among unions' top equality bargaining priorities over the past two years. However, the survey also found that bargaining success in the area of equal pay was difficult to achieve, more difficult than some other equality issues, such as flexible working, with only 54% of the unions reporting that any improvements had been negotiated over the most recent two-year period.

There are certain features of collective bargaining in the UK that need to be appreciated in order to understand the significance of equal pay collective bargaining. Firstly, membership in trade unions has declined significantly in the UK in the past 30 years, and therefore the role of collective bargaining itself has also declined in significance.

Secondly, collective bargaining is increasingly decentralised, being conducted at local level, rather than nationally or industry-wide.

Thirdly, collective agreements are seldom legally binding, and therefore have an indirect legal status, being enforceable only where the terms of the agreements are regarded as implied into the individual contract of employment. Agreements are also subject to being, effectively, overturned as a result of individual litigation resulting in a finding that a more radical change is necessary to implement equal pay than that agreed by the social partners.

Finally, collective agreements are not usually publicly available; there is, for example, no central database of collective agreements. Nor is there any monitoring in most unions of the results of equal pay bargaining at the local level. Unions have seldom put in place systems for collecting such information, despite the importance of bargaining at the local level. Research that has been conducted, therefore, tends to be in the form of periodic surveys of samples of employers.

3. The concept of the gender pay gap

The 'gender pay gap' has various dimensions in the UK. In 2006, the pay gap for the median worker was 12.6%, down from 13% in 2005 and almost 18% in 1997. However, using the arithmetic means to calculate the gender pay gap, there is still a gap of 17.1% between the genders, with no improvement over 2005. Broad pay gap figures cover up significant differences, however. There are four main factors that particularly affect the gender pay gap: age, dependent children, part-time work and occupational segregation. Women with dependent children under 16 earn less than those without children, whereas men with children under 16 earn more than men without children. Part-time work

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[329] See further, for instance, *Norberg, Per, Marknadsbegreppet i konkurrensrätten och i jämställdhetsrätten – om hur olika marknadsbegrepp påverkar rättstillämpningen i lönediskrimineringsmål*, Iustus 2007.

[330] At http://www.eoc.org.uk.

[331] Gender equality duty: Code of Practice for England and Wales, can also be obtained at http://www.eoc.org.uk.

attracts lower pay than full-time work and women are more likely to work part-time. Women working part-time earn on average 38% less per hour than men working full-time. On the other hand, women under 30 working full-time were paid roughly the same as men. As regards membership in occupational pension schemes, only a third of part-time working women are members of a pension scheme. Research for the Government's Equalities Review showed that at the present rate of progress, the gender pay gap would not be closed until 2085.

4. Good practices in tackling the gender pay gap

There have been significant attempts over the past few years to induce the social partners to address the issue of equal pay. In October 1999 the Equal Opportunities Commission set up an Equal Pay Task Force to explore the issues of pay discrimination, to gather evidence and to make recommendations about how to close the gap. The Equal Pay Task Force's Report (Just Pay) made a number of recommendations for action by the social partners – government, employers and trade unions - to identify and tackle discrimination in pay systems. In response to the Task Force recommendations, the Government introduced a number of initiatives to assist the social partners in their efforts to close the pay gap. At the moment, it is encouraging a voluntary approach by employers and trade unions. In particular, the Government has called on all employers to carry out voluntary pay reviews to identify any pay discrimination that exists and to develop policies to eliminate the pay gap.

However, two research studies of equal pay reviews (EPRs) have recently been conducted for the Equal Opportunities Commission (EOC): a survey of GB employers, and case study research in selected organisations.[332] The key findings were that in 2004, 21% of organisations had completed an EPR, 5% were in the process of conducting one and 20% had plans to conduct one; most of those that had completed one EPR were currently repeating the process or planned to do so. The majority (68%) of organisations had not completed an EPR, had none in progress and did not plan to conduct one. Although the proportion of organisations that had completed an EPR increased from 15% in 2003 to 21% in 2004, the proportion with their first EPR planned fell from 15% to 9%. The proportion with no plans to conduct an EPR remained unchanged at 68%. Large organisations (with 500 or more employees) were most likely to have conducted an EPR. Small organisations (with 25-99 employees) were most likely to report that they had no EPR planned. Organisations in the public sector were more likely than those in the private services sector and the manufacturing sector to have completed an EPR. In around 70% of organisations in the manufacturing and private services sectors, compared with 55% of those in the public sector, no EPR activity had been either undertaken or was planned. Nearly three in four organisations in the survey that had conducted or were conducting an EPR planned to conduct repeat EPRs annually. Similarly, most case study organisations had plans to carry out future EPRs. The main reason given by organisations for conducting an EPR was that they wished to be seen as a good practice employer. The great majority of those that reported no EPR activity stated that this was because they believed that they already had equal pay. Large organisations in the survey were much more likely than small ones to have found pay gaps that could not be satisfactorily explained on grounds other than sex.

Examples of good practices in collective agreements include: (i) Local government: a national agreement to introduce single status pay and grading. A nationally agreed, jointly devised job evaluation scheme based on equal value principles was agreed. This is recommended to local employing authorities for implementation by March 2007. (ii) Higher Education: joint guidance on carrying out pay reviews and on job evaluation and role analysis was developed. Local employers are encouraged to carry out reviews. Agreement was reached on principles to underpin the modernisation of pay arrangements through the introduction of a new single pay spine and linked grading structures. (iii) Further Education: joint advice on equal pay audits and using the EOC Code of Practice on equal pay has been issued. A nationally agreed job evaluation scheme has been introduced. (iv) Environment Agency: a joint review of pay and grading was carried out, using the EOC Code of Practice on Equal Pay. It identified widespread discrimination. A new grading structure was agreed and introduced.

Nevertheless, the Trades Union Congress (TUC) expressed concern at a 'lack of interest' shown by other employers in conducting equal pay reviews, and continued to call for compulsory pay reviews. In

[332] Equal pay reviews survey 2004, Stefan Schäfer, Mark Winterbotham and Fiona McAndrew (IFF Research) and Equal pay reviews in practice, Fiona Neathey, Rebecca Willison, Karen Akroyd, Jo Regan and Darcy Hill (Institute for Employment Studies).

2004, the government agreed to fund a TUC equal pay experts panel designed to assist unions and employers in carrying out pay reviews. The government established the Women and Work Commission, which made recommendations in February 2006 on further measures for tackling the gender pay gap. The government responded in September 2006 with a Government Action Plan that announced several new initiatives, particularly in the area of training. The government also announced the production of new guidance on procurement to encourage public sector procurers to promote good practice in equal pay matters so that it becomes the norm, including through the use of contract documentation. Also as part of the response to the Women and Work Commission, a new initiative was launched in January 2007, under which more than 100 large employers signed up to be 'exemplar employers' under a government scheme to improve job opportunities for women. To become an exemplar employer, organisations must give a clear commitment to reduce the gender pay gap.

5. The legal dimension of the gender pay gap

The Equal Pay Act provides three ways for a claimant to show that their work is of equal value to that of the comparator. These are where the claimant and the comparator carry out work which is: 'like work', 'work rated as equivalent' under a voluntary job evaluation scheme, and 'work of equal value' under an independent assessment. The law can address the gender pay gap discussed above, particularly using the equal value provisions, but within considerable limits. These limits relate to the restriction that the claimant and the comparator work in the 'same employment', thus lessening the opportunities to address segregated workplaces, and that the claimant must show that her work is equal (in one form or another) with an actual comparator limited the claimant's ability to address discriminatory differentials in pay where jobs are not equal.

How far do the existing legal provisions affect the gender pay gap and can anything be achieved by further legislation? The first part of the question gets into issues of very considerable complexity that would require a sustained socio-legal, empirically-based analysis. In essence, the problem relates to (a) how far the causes of the gender pay gap arise from factors that are capable of being addressed under the existing UK legislation, and (b) how far those factors that are capable of being addressed under the existing legislation are in practice being addressed, in other words how effectively the legislation is being enforced. My opinion is that an undefined (greater than zero but less than 100%) contribution to gender pay disparities in the UK is due to factors that the existing legislation is capable of being used to address, but that there is a problem relating to enforcement.

A significant change in the way litigation is funded has resulted in greater risk to employers from equal pay litigation. 'No-win, no-fee' law firms, where lawyers agree to litigation for a proportion of the compensation if successful, appear to have led to a perception among employers that equal pay litigation is increasing, and that the employment culture is becoming more litigious. In April 2006, it was reported that 'no-win, no-fee' lawyers representing women with equal pay claims had won more than 100 million pounds sterling from eleven local authorities in the North East of England. It remains to be seen how far this development changes the face of equal pay enforcement more generally.

There are several issues that future legislation could usefully address. One clear way in which further legislation might improve the situation would be to address the problem of pay discrimination directly, for example by extending the hypothetical comparator to equal pay cases. A second important improvement would be to require all employers (not just public sector employers) to introduce and publish pay audits, together with plans for the reduction in pay gaps in their work force that were identified by this means. A third important initiative would be to require that public procurement contracts required contractors to provide equal pay, and to ensure that mechanisms for compliance were built into the contract.

6. Problems of proof of unequal pay

A questionnaire procedure is available under the Equal Pay Act to allow potential claimants who consider that they might have been underpaid, to ask questions of their employer. The questionnaire can include questions about the identity and pay of possible comparators, and may ask for explanations of any pay differences. If an employer fails to answer a questionnaire within eight weeks, a tribunal may use this fact to draw inferences of discrimination.

There is now extensive information regarding pay rates, etc. across the economy as a whole. The most recent government-sponsored New Earnings Survey (for 2003) is available at:

http://www.statistics.gov.uk/downloads/theme_labour/NES2003_GB/NES2003_Streamlined_analyses.pdf. This analyses differences between men's and women's pay by industry, sector, age, etc.

Annex I

Legal aspects of the gender pay gap

Guidelines for the report given by the Commission

1. Concise reference must be made to all laws and regulations dealing with equal pay, including under the aspect of the wide definition the court has given to it. This part will be a summarised version, where appropriate, of what was already included in Bulletin 1/2004 in order to give a legislative context to the report.
2. Brief outline of role of collective bargaining in the area of equal pay – does it play a role; are collective agreements publicly available; etc.
3. The following information should be provided with a view to identifying examples and good practices on how to tackle the pay gap:
   - details of legislation/regulation (if any) which aims at inducing social partners to include the issue of equal pay in collective and other agreements.
   - details of collective or other agreements which aim explicitly at reducing the gender gap and which are known for doing that.
4. A brief description of what is understood under the concept of the 'gender pay gap'.
5. A brief analysis of the legal dimension of the gender pay gap (e.g. how far do legal rules contribute to such a gap or in how far can law help to fight it).
6. Details of problems of proofs of unequal pay and what countries are doing about that (e.g. is information available within employments in relation to pay rates or are pay rates, bonuses, etc negotiated on an individual basis, etc.).

Annex II
(referred to in note 66)

Article D432-1 *Décret n° 2001-832 du 12 septembre 2001 art. 1 Journal Officiel du 15 septembre 2001)(Décret n° 2006-1270 du 18 octobre 2006 art. 1 Journal Officiel du 19 octobre 2006)*

Le rapport annuel mentionné à l'Article L. 432-3-1 comporte des indicateurs qui doivent permettre la réalisation d'une analyse de la situation comparée des femmes et des hommes dans l'entreprise et de son évolution ainsi que d'une analyse des conditions dans lesquelles s'articulent l'activité professionnelle et l'exercice de la responsabilité familiale des salariés;

Ces indicateurs comprennent des données chiffrées permettant de mesurer les écarts et, le cas échéant, des données explicatives sur les évolutions constatées ou à prévoir.

I. Les indicateurs relatifs à la situation comparée des femmes et des hommes dans l'entreprise sont les suivants:

1. ***Conditions générales d'emploi***
   Effectifs Données chiffrées par sexe*: - répartition par catégorie professionnelle selon les différents contrats de travail; - pyramide des âges par catégorie professionnelle.*
   Durée et organisation du travail Données chiffrées par sexe*: - répartition des effectifs selon la durée du travail: temps complet, temps partiel à 50% ou ou égal à 50%; - répartition des effectifs selon l'organisation du travail: travail posté, travail de nuit, horaires variables, travail atypique dont travail durant le week-end*
   Données sur les congés Données chiffrées par sexe*: - répartition par catégorie professionnelle selon: - le nombre et le type de congés dont la durée est supérieure à six mois: compte épargne temps, congé parental, congé sabbatique.*
   Données sur les embauches et les départs Données chiffrées par sexe*: - répartition des embauches par catégorie professionnelle et type de contrat de travail; - répartition des départs par catégorie professionnelle et motifs: retraite, démission, fin de contrat à durée déterminée, licenciement.*
   Positionnement dans l'entreprise Données chiffrées par sexe*: - répartition des effectifs selon les niveaux d'emplois définis par les grilles de classification au sens des conventions collectives.*
   Promotions; Données chiffrées par sexe: *- répartition des promotions au regard des effectifs de la catégorie professionnelle concernée; - nombre de promotions suite à une formation.*
2. ***Rémunérations Données chiffrées par sexe, et selon les catégories d'emplois occupés au sens des grilles de classification ou des filières/métiers:*** *- éventail des rémunérations; - rémunération moyenne mensuelle; - nombre de femmes dans les dix plus hautes rémunérations.*
3. ***Formation Données chiffrées par sexe:*** *- répartition par catégorie professionnelle selon: - la participation aux actions de formation; - la répartition par type d'action: formation d'adaptation, formation qualifiante, congé individuel de formation, formation en alternance; - le nombre moyen d'heures d'actions de formation.*
4. ***Conditions de travail Données générales par sexe:*** *- répartition par poste de travail selon: - l'exposition à des risques professionnels; - la pénibilité, dont le caractère répétitif des tâches.*

II. - Les indicateurs relatifs à l'articulation entre l'activité professionnelle et l'exercice de la responsabilité familiale sont les suivantes*:*

1. Congés:

Existence d'un complément de salaire versé par l'employeur pour le congé de paternité, le congé de maternité, le congé d'adoption.

Données chiffrées par catégorie professionnelle: - nombre de jours de congés de paternité réellement pris par le salarié par rapport au nombre de jours de congés théoriques.

2. Organisation du temps de travail dans l'entreprise:

Existence de formules d'organisation du travail facilitant l'articulation de la vie familiale et de la vie professionnelle.

Données chiffrées par sexe et par catégorie professionnelle: - nombre de salariés ayant accédé au temps partiel choisi; - nombre de salariés à temps partiel choisi ayant repris un travail à temps plein. Services de proximité:

- participation de l'entreprise aux modes d'accueil de la petite enfance; - évolution des dépenses éligibles au crédit d'impôt famille; - implication de l'entreprise dans un bureau des temps ou dans une structure territoriale de même nature