

Combating the gender pay gap in European Social Law

La lucha contra la brecha salarial de género en el Derecho social europeo

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Abstract

Starting from the assumption that equal pay for female and male workers form parts of the foundations of European Social Law (both as an essential principle and a fundamental right), this essay reflects on two important challenges in order to face the gender wage gap: firstly, the role of social partners and relevant organisations of civil society in salary negotiations; and secondly, the extension of the scope of the valid comparator beyond the same undertaking to make easier the protective role of national judges (alongside other elements such as the assessment of the weight of statistics or the articulation of the proof burden). The author concludes that, in both aspects, the synergies between the European Union (in particular, the Court of Justice's classic case-law) and the Council of Europe (especially, the European Committee of Social Rights' innovative case-law) are essential.

Keywords

Equal work, equal remuneration, positive measures, evolved gender perspective, innovative European case law

Resumen

Adoptando como premisa que la igualdad salarial de trabajadoras y trabajadores forma parte integrante de los fundamentos del Derecho social europeo (como principio esencial y como derecho fundamental), el presente artículo reflexiona sobre dos importantes desafíos para afrontar la brecha salarial de género: de un lado, el papel de los interlocutores sociales y de las organizaciones pertinentes de la sociedad civil en las negociaciones salariales; y, de otro lado, la extensión del elemento válido de comparación más allá del ámbito de la misma empresa, con objeto de facilitar la función protectora de los órganos jurisdiccionales nacionales (además de otros elementos como la apreciación del peso de las estadísticas o la articulación de la carga de la prueba). El autor concluye que en ambos casos se revelan esenciales las sinergias entre la Unión Europea (en particular, la jurisprudencia clásica del Tribunal de Justicia) y el Consejo de Europa (especialmente, la jurisprudencia innovadora del Comité Europeo de Derechos Sociales).

Palabras clave

Igual trabajo, igual remuneración, medidas positivas, perspectiva evolutiva de género, jurisprudencia europea innovadora

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1. Equal pay between women and men in the European construction

The current European Union (EU) has, from its origins, put the emphasis on the protection against non-discrimination on grounds of sex in the field of wages. In particular, Art. 157 of the Treaty on the Functioning of the European Union (TFEU)¹ has its genesis in Art. 119 of the Treaty establishing the European Economic Community (TEEC), which already stated that “each Member State shall in the course of the first stage ensure and subsequently maintain the application of the principle of equal remuneration for equal work as between men and women workers”. Art. 119 TEEC included likewise the meaning of “remuneration”², as well as of the principle of “equal remuneration without discrimination based on sex” itself, that is to say: “(a) that remuneration for the same work at piece-rates shall be calculated on the basis of the same unit of measurement; and (b) that remuneration for work at time-rates shall be the same for the same job”.

Such content has practically remained unchanged in the first two paragraphs of Art. 157 TFEU. Then, the 1997 Amsterdam Treaty (Art. 141 of the Treaty establishing the European Community, TEC) added two other paragraphs on legislative procedure and positive measures which also practically coincide with current paragraphs 3 and 4 of Art. 157 TFEU after the entry into force of the Treaty of Lisbon³. In other words, the evolved gender perspective was a novelty introduced by the Amsterdam Treaty to provide a specific legal basis in the European Treaties in this field, which also aimed at overcoming the restrictive approach established by the Court of Justice (ECJ) in the Kalanke case⁴, which started to be reviewed in the Marschall case concerning a provision similar to that in Kalanke but containing a “saving clause”⁵.

Before the Kalanke case, the case-law of the ECJ was basically founded in two important legal acts adopted on the basis of Art. 119 TEEC: Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of

¹ Article 157 TFEU reads as follows: “1. Each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied. 2. For the purpose of this Article, ‘pay’ means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his employment, from his employer. Equal pay without discrimination based on sex means: (a) that pay for the same work at piece rates shall be calculated on the basis of the same unit of measurement; (b) that pay for work at time rates shall be the same for the same job. 3. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, and after consulting the Economic and Social Committee, shall adopt measures to ensure the application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, including the principle of equal pay for equal work or work of equal value. 4. With a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the underrepresented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers”.

² “Remuneration shall mean the ordinary basic or minimum wage or salary and any additional emoluments whatsoever payable directly or indirectly, whether in cash or in kind, by the employer to the worker and arising out of the workers’ employment”.

³ See also *Protocol (No. 33) concerning Art. 157 TFEU*.

⁴ ECJ, Judgment of 17 October 1995, Case C-450/93, *Kalanke*: “Art. 2(1) and (4) of Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions precludes national rules such as those in the present case which, where candidates of different sexes shortlisted for promotion are equally qualified, automatically give priority to women in sectors where they are underrepresented, under-representation being deemed to exist when women do not make up at least half of the staff in the individual pay brackets in the relevant personnel group or in the function levels provided for in the organization chart”.

⁵ ECJ, Judgment of 11 November 1997, Case C-409/95, *Marschall*: “A national rule which, in a case where there are fewer women than men at the level of the relevant post in a sector of the public service and both female and male candidates for the post are equally qualified in terms of their suitability, competence and professional performance, requires that priority be given to the promotion of female candidates unless reasons specific to an individual male candidate tilt the balance in his favour is not precluded by Art. 2(1) and (4) of Council Directive 76/207/EEC of 9 February 1976, on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, provided that: in each individual case the rule provides for male candidates who are equally as qualified as the female candidates a guarantee that the candidatures will be the subject of an objective assessment which will take account of all criteria specific to the candidates and will override the priority accorded to female candidates where one or more of those criteria tilts the balance in favour of the male candidate, and such criteria are not such as to discriminate against the female candidates”.

the Member States relating to the application of the principle of equal pay for men and women as well and Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions. Both Directives⁶ were then repealed by Directive 2006/54/EC⁷.

The latter defined the important notion of indirect discrimination⁸, which also matches the definitions set out in Art. 2(2) of Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex and in Art. 2(2) of Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 amending Council Directive 76/207/EEC. Indeed, the delimitation between direct and indirect discrimination is legally significant above all because the possibilities of justification differ according to whether unequal treatment is directly or indirectly linked to sex⁹. In this regard, as highlighted by Advocate General Kokott in her Opinion delivered on 16 September 2010 in Kleist (Case C-356/09), “the second indent of Art. 2(2) of Directive 76/207 sets out in a very general manner the possibilities of justifying indirect unequal treatment on the grounds of sex (‘objectively justified by a legitimate aim’), whereas direct unequal treatment on the grounds of sex can be justified only by special requirements specific to one sex [for example as regards pregnancy and maternity, Art. 2(7) of Directive 76/207] or by the objective of assisting the underrepresented sex [Art. 2(8) of Directive 76/207 in conjunction with Art. 141(4) EC, now Art. 157(4) TFEU]”¹⁰.

In any case, the Kalanke Judgment gave rise to a great deal of controversy throughout Europe because of the uncertainty it created in respect of the legitimacy of quotas and other forms of positive action aimed at increasing the number of women employed in certain sectors or at certain levels where they were under-represented. In this context, in a Communication adopted on 27 March 1996¹¹, the Commission took the view that the ECJ had only condemned the special feature of the Bremen law which automatically gave women an absolute and unconditional right to appointment or promotion over men in sectors where they were under-represented provided their qualifications were the same. The Commission considered that the only type of quota system which was unlawful was one which is completely rigid and does not leave open any possibility to take account of individual circumstances. Member States and employers would be thus free to have recourse to all other forms of positive action, including flexible quotas.

In that Communication, the Commission proposed to amend Art. 2 (4) of Directive 76/207/EEC (which specified that the measures envisaged by this provision included actions favouring the recruitment or promotion of one sex in circumstances where the latter were under-represented, on condition that the employer always has the possibility of taking account of the particular circumstances of a given case)¹² in order to specifically permit the kinds

⁶ A connecting legal act is Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security. In this respect, see ECJ, Judgment of 19 October 1995, Case C-137/94, Richardson: “Art. 7(l)(a) of Directive 79/7 does not allow a Member State which, pursuant to that provision, has set the pensionable age for women at 60 years and for men at 65 years also to provide that women are exempt from prescription charges at the age of 60 and men only at the age of 65”.

⁷ Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation.

⁸ By virtue of Art. 2(1)b of Directive 2006/54, indirect discrimination is defined for the purposes of the directive as “where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary”

⁹ The ECJ has held that there is direct –and not only indirect discrimination– based on sex where an employer’s actions are linked to the existence or absence of a pregnancy, as pregnancy is inseparably linked to a female employee’s sex: see Case C 177/88, Dekker, Judgment of 8 November 1990, paragraphs 12 and 17; Case C-179/88, Handels- og Kontorfunktionærernes Forbund, Judgment of 8 November 1990, paragraph 13; Case C 320/01, Busch, Judgment of 27 February 2003, paragraph 39; and Case C 116/06, Kiiski, Judgment of 20 September 2007, paragraph 55.

¹⁰ Point 33.

¹¹ *Communication from the Commission to the EP and the Council on the interpretation of the Judgment of the Court of Justice on 17 October 1995 in Case C-450/93, Kalanke v Freie Hansestadt Bremen*, Brussels, 27 March 1996, COM(96)88 final.

¹² According to its proposal, Art. 2 (4) of Directive 76/207/EEC is replaced as follows: “This Directive shall be without prejudice to measures to promote equal opportunity for men and women in particular by removing existing inequalities which affect the opportunities of the under-represented sex in the areas referred to in Art. 1 (1). Possible measures shall include the giving of preference, as regards access to employment or promotion, to a member of the under-represented sex, provided that such measures do not preclude the assessment of the particular circumstances of an individual case”.

of positive action which remained untouched by Kalanke. In the Commission's view, "such an amendment would make it clear that positive action measures short of rigid quotas are permitted by Community law and would ensure that the text of the Directive reflects more clearly the true legal position which results from the judgment of the ECJ".

On the other hand, in the annex to this Communication, the Commission included examples of the type of positive action measures which (according to it) remained untouched by the Kalanke judgment:

- Quotas linked to the qualifications required for the job, as long as they allow account to be taken of particular circumstances which might, in a given case, justify an exception to the principle of giving preference to the under-represented sex;
- Plans for promoting women, prescribing the proportions and the time limits within which the number of women should be increased but without imposing an automatic preference rule when individual decisions on recruitment and promotion are taken;
- An obligation of principle for an employer to recruit or promote by preference a person belonging to the under-represented sex; in such a case, no individual right to be preferred is conferred on any person;
- Reductions of social security contributions which are granted to firms when they recruit women who return to the labour market, to perform tasks in sectors where women are under-represented;
- State subventions granted to employers who recruit women in sectors where they are under-represented;
- Other positive action measures focusing on training, professional orientation, the reorganization of working time, child-care and so on.

Finally, that new approach introduced by the 1997 Amsterdam Treaty has been of course maintained in Art. 23 of the Charter of Fundamental Rights of the European Union (CFREU): "Equality between women and men must be ensured in all areas, including employment, work and pay. The principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex".

2. The specific principle of equal pay in a broader framework of equality between women and men as well as of tension between economic and social goals

It is obvious that the principle of equal pay is a specific manifestation of the principle of equal treatment between women and men and, more generally, of the principle of equality, which is always subject to the broad category of "objective justification"¹³. At the same time, in the famous Judgment of 8 April 1976, Case-43/75, *Defrenne v. Sabena (No 2)*, where the application of the principle of equal pay for women and men (set out in the former Art. 119 TEEC) was at stake¹⁴, the ECJ held that this provision pursued "a double aim, which is at once economic and social":

- first, "in the light of the different stages of the development of social legislation in the various member states, the aim of article 119 is to avoid a situation in which undertakings established in states which have actually implemented the principle of equal pay suffer a competitive disadvantage in intra-community competition as compared with undertakings established in states which have not yet eliminated discrimination against women workers as regards pay";

- and second, "this provision forms part of the social objectives of the community, which is not merely an economic union, but is at the same time intended, by common action, to ensure social progress and seek the constant improvement of the living and working conditions of their peoples, as is emphasized by the Preamble to the Treaty", and accentuated by the insertion of Art. 119 TEEC into the block devoted to social policy¹⁵.

In addition, the ECJ already held in *Defrenne (No 2)* that Art. 119 TEEC was of such a character as to have not only vertical effect (enforceable not merely between individuals and public authorities), but also a horizontal one

¹³ See, for example, Case C-236/09, *Association belge des Consommateurs Test-Achats and Others*, Judgment of 1 March 2011, paragraph 28.

¹⁴ In the background, a woman named Gabrielle Defrenne worked as a flight attendant for the Belgian national airline Sabena. Under Belgian law, female flight attendants were obliged to retire at the age of 40, unlike their male counterparts. Defrenne had been forced to retire from Sabena in 1968. Defrenne complained that the lower pension rights this entailed violated her right to equal treatment on grounds of gender under article 119 TEEC.

¹⁵ Paragraphs 9-12.

(between individuals, *Drittwirkung* approach)¹⁶, since “the prohibition on discrimination between men and women applies not only to the action of public authorities, but also extends to all agreements which are intended to regulate paid labour collectively, as well as to contracts between individuals”¹⁷. Of course, the EU’s action has also focused on the application of the principle of equal treatment between men and women engaged in a self-employed capacity, including the main original economic sector (agriculture)¹⁸; consequently, “it is beyond question that Member States are bound by the principle of equal treatment in the application and implementation of EU agricultural law”¹⁹.

Moreover, the tension between economic and social goals within the EU cannot be an obstacle to the collaboration of the Member States with the social partners in order to continue to address the problem of the continuing gender-based wage differentials and marked gender segregation on the labour market by means of flexible working time arrangements which enable both men and women to combine family and work commitments more successfully²⁰. In this sense, part-time work constitutes a kind of a pilot situation in order to verify, as foreseen in Art. 157(2) TFEU not only the specific “principle of equal pay for equal work or work of equal value” and, as a result, the combat against gender pay gap, but also a broader framework ensuring “the application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, including the principle of equal pay for equal work or work of equal value”.

From this perspective, the ECJ’s case-law has dealt with specific controversies concerning the interpretation and application of the European Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC on 6 June 1997²¹. In particular, one of the objectives of the agreement is “to provide for the removal of discrimination against part-time workers and to improve the quality of part-time work” [Clause 1(a)] and, consequently, it provides that “in respect of employment conditions, part-time workers shall not be treated in a less favourable manner than comparable full-time workers solely because they work part time unless different treatment is justified on objective grounds. Where appropriate, the principle of *pro rata temporis* shall apply” (Clause 4). Such application of different treatments implies to assess whether they take the form of “pay” or not and, on the other hand, they are justified or not under a non-discriminatory and gender perspective.

Concerning the first criterion, according to settled ECJ’s case-law, under Art. 157(2) TFEU “pay” means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his employment, from his employer. That concept covers any consideration, whether immediate or future, provided that the worker receives it, albeit indirectly, in respect of his employment, from his employer²². In that context, the ECJ has explained that the legal nature of that consideration is not important for the purposes of the application of Art. 157 TFEU provided that it is granted in respect of the employment²³. The ECJ has also held that, although it is true that many advantages granted by an employer also reflect considerations of social policy, the fact that a benefit is in the nature of pay cannot be called in question where the worker is entitled to receive the benefit in question from his employer by reason of the existence of the

¹⁶ See De Mol, M. (2011). “The Novel Approach of the CJEU on the Horizontal Direct Effect of the EU Principle of Non-Discrimination: (Unbridled) Expansionism of EU Law” in *Maastricht Journal of European and Comparative Law*, No. 18, p. 109-135: the author focus on the “sensitive issue” of the application of the EU principle of non-discrimination in private disputes (especially, *Mangold*, C-144/04, Judgment of 22 November 2005, and *Kücükdeveci*, C-555/07, Judgment of 19 January 2010).

¹⁷ Paragraph 39.

¹⁸ See Council Directive 86/613/EEC of 11 December 1986 on the application of the principle of equal treatment between men and women engaged in an activity, including agriculture, in a self-employed capacity, and on the protection of self-employed women during pregnancy and motherhood; it was repealed with effect from 5 August 2012 under Art. 17 of Directive 2010/41/EU of the European Parliament and of the Council of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC.

¹⁹ Opinion of Advocate General Jääskinen delivered on 23 October 2012 in *Blanka Soukupová*, Case C-401/11, Point 54.

²⁰ See San Martín Mazzucconi, C. (2016). “División sexual del trabajo: empleo y conciliación” in Álvarez Conde, E. et al. *Deontología, principios jurídicos básicos e igualdad*. Madrid, Tecnos, p. 444-455.

²¹ Annexed to Council Directive 97/81/EC of 15 December 1997 (amended by Council Directive 98/23/EC of 7 April 1998).

²² ECJ, *Hliddal*, Joined Cases C-216/12 and C-217/12, Judgment of 19 September 2013, paragraph 41.

²³ ECJ, *Krüger*, C-281/97, Judgment of 9 September 1999, paragraph 16.

employment relationship²⁴. By contrast, in other cases, the ECJ has classified other concepts not as “pay” but as “social security benefits” outside the scope of Art. 157 TFEU²⁵.

In respect of the second criterion, the ECJ has already applied the principle of *pro rata temporis* to other benefits payable by the employer and related to a part-time employment relationship. Thus, the ECJ has considered that, in the case of part-time employment, EU law does not preclude a retirement pension being calculated *pro rata temporis* in the case of part-time employment²⁶, nor does it preclude paid annual leave from being calculated in accordance with the same principle²⁷. In the cases giving rise to those judgments, taking account of the reduced working time as compared with that of a full-time worker constituted an objective criterion allowing a proportionate reduction of the rights of the workers concerned²⁸.

On the contrary, the ECJ has considered in breach of EU law the legislation of a Member State which requires a proportionally greater contribution period from part-time workers, the vast majority of whom are women, than from full-time workers for the former to qualify, if appropriate, for a contributory retirement pension in an amount reduced in proportion to the part-time nature of their work. In particular, in Judgment of 22 November 2012, *Elbal Moreno*, Case C-285/11, concluded that there was an indirect discrimination on grounds of sex, since the national measure at issue, albeit formulated in neutral terms, worked to the disadvantage of far more women than men²⁹. In such circumstances, it was an indisputable statistical fact that legislation such as that at issue affected women far more than men, given that, in Spain, at least 80% of part-time workers were women.

Only in exceptional cases, the principle of equal pay for male and female workers has been unduly broken in favour of women. This situation is illustrated by Case C-173/13, *Leone*, Judgment of 17 July 2014, concerning the interpretation of Art. 157 TFEU in relation to a claim brought by Mr and Mrs Leone against the French State for compensation for the loss incurred by them as a result of the refusal by the CNRACL³⁰ to grant Mr Leone early retirement with immediate payment of pension and a service credit for the purposes of calculating his pension. The fact is that, the apparent neutrality of the national measures at stake implied an indirect discrimination, since there were in practice advantages benefiting mainly female civil servants³¹.

²⁴ ECJ, *Barber*, C-262/88, Judgment of 17 May 1990, paragraph 18.

²⁵ Specifically, in relation to a career break allowance granted, subject to certain conditions, to a worker taking a break from his or her career using parental leave, the ECJ has held that that type of benefit must be treated as a family benefit (Judgment of 7 September 2004, Case C-469/02, *Commission v Belgium*, paragraph 16). Similarly, a parental leave allowance has not be classified as “pay” within the meaning of Art. 157 TFEU, but as a social security benefit with the characteristics of a ‘family benefit’ within the meaning of Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, which became applicable on 1 May 2010, the date from which Regulation No 1408/71/EEC was repealed (Judgment of 19 September 2013, Joined Cases C-216/12 and C-217/12, *Hliddal*, paragraph 59).

²⁶ ECJ, *Schönheit and Becker*, C-4/02 and C-5/02, Judgment of 23 October 2003, paragraphs 90 and 91.

²⁷ See, to that effect, ECJ, *Zentralbetriebsrat der Landeskrankenhäuser Tirols*, C-486/08, Judgment of 22 April 2010, paragraph 33, and *Heimann and Toltschin*, Joined cases C-229/11 and C-230/11, Judgment of 8 November 2012, paragraph 36.

²⁸ See also ECJ, *Österreichischer Gewerkschaftsbund*, Case-C476/12, Judgment of 5 November 2014, concerning the justification of a dependent child allowance paid on the basis of the collective agreement applicable to bank staff and bankers being calculated to part-time workers in accordance with the principle of *pro rata temporis*.

²⁹ According to the ECJ: “legislation such as that at issue in the main proceedings works to the disadvantage of part-time workers, such as Ms Elbal Moreno, who have worked part-time for a long time, since, in practice, such legislation excludes those workers from any possibility of obtaining a retirement pension because of the method used to calculate the requisite contribution period” (paragraph 30). See also Judgment of 14 April 2015, *Cachaldora Fernández*, Case C-527/13.

³⁰ *Caisse nationale de retraite des agents des collectivités locales* (National pension fund for local community civil servants).

³¹ Paragraphs 44-47: “It is common ground in that regard that both male civil servants and female civil servants may take career breaks as part of adoption leave, parental leave, parental care leave or leave in order to be available to bring up a child of less than 8 years of age. However, notwithstanding the appearance of neutrality, it is clear that the criterion used in Art. 15 of Decree No 2003-1306 leads to a situation where many more women than men receive the benefit of the advantage concerned. The fact that the service credit scheme for pension purposes at issue in the main proceedings includes maternity leave among the forms of career break allowed under the applicable rules and giving rise to entitlement to a service credit means, given the minimum duration and mandatory nature of that leave under French law, that female civil servants who are the biological parent of their child, are, in principle, the ones who are in a position to benefit from the service credit advantage. As regards male civil servants, on the other hand, a number of

3. Equal pay for male and female workers as both a principle of European Social Law and a Fundamental Right

In light of the precedent considerations, it is obvious that equal pay for male and female workers is a principle of European Social Law which is set out in Art. 157 TFEU as one that “forms part of the foundations of the Community”³² and has been defined as “the key employment law provision on equal treatment”³³. In parallel, it has been confirmed, under Title III of the CFREU (Art. 23), in the form of the right not to be discriminated against on grounds of sex in the area of pay³⁴.

From this double perspective (principle and fundamental right), the issue of indirect discrimination has improved the assessment of controversial situations under the “test of equality”. The ECJ’s case-law may be summarised by referring to Judgment of 28 February 2013, *Margaret Kenny and Others*, Case C-427/11³⁵. According to this ruling, the main interpretative criteria dealing with the principle of equal pay for men and women are the following:

- employees perform the same work or work to which equal value can be attributed if, taking account of a number of factors such as the nature of the work, the training requirements and the working conditions, those persons can be considered to be in a comparable situation, which it is a matter for the national court to ascertain;
- in relation to indirect pay discrimination, it is for the employer to establish objective justification for the difference in pay between the workers who consider that they have been discriminated against and the comparators;
- the employer's justification for the difference in pay, which is evidence of a prima facie case of gender discrimination, must relate to the comparators who, on account of the fact that their situation is described by valid statistics which cover enough individuals, do not illustrate purely fortuitous or short-term phenomena, and which, in general, appear to be significant, have been taken into account by the referring court in establishing that difference, and
- the interests of good industrial relations may be taken into consideration by the national court as one factor among others in its assessment of whether differences between the pay of two groups of workers are due to objective factors unrelated to any discrimination on grounds of sex and are compatible with the principle of proportionality.

In any case, one of the main difficulties in this field has to do, not only with the evidential value of statistics adduced in proceedings to demonstrate the existence of discrimination or the burden of persuasion that a discriminatory situation exists (within a complex structure of alternating the burden of proof)³⁶, but above all with the identification of a valid comparator demonstrating the existence of a group of persons who, in an equivalent situation, receive different treatment in terms of their rates of pay.

factors combine to reduce significantly the number of them who will actually be able to benefit from that advantage”. See also Judgment of 14 July 2016, *Ornano*, Case C-335/15 (concerning Directive 75/117/EEC of 10 February 1975 on equal pay for men and women and Directive 92/85/EEC of 19 October 1992 on the introduction of measures to improve the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding

³² ECJ, *Defrenne II*, Case-43/75, Judgment of 8 April 1976, paragraph 12.

³³ Krebber, S. (2011). “Art. 157, Rn. 1” in Callies, C. & Ruffert, M. (Eds.). *Das Verfassungsrecht der Europäischen Union mit Europäischer Grundrechtecharta Kommentar*. Munich: C.H. Beck (4th ed.), p. 1753.

³⁴ Opinion of Advocate General Cruz Villalón delivered on 29 November 2012 in Case C-427/11, *Margaret Kenny and Others*, Judgment of 28 February 2013.

³⁵ This judgment has its origin in a request for a preliminary ruling submitted by the High Court of Ireland concerning the interpretation of Art. 157 TFEU and Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women (replaced by Directive 2006/54/EC) focusing on the concept of objective justification in the context of apparent indirect discrimination between male and female workers within the civil service.

³⁶ In this respect, the Opinion delivered on 29 November 2012 by Advocate General Cruz Villalón in that case (*Margaret Kenny and Others*) recalls this complex structure (according to which the burden of proof remains in principle on the worker as regards liability, but it would be reasonable to shift the burden back to the employer once liability has been established) by referring to the previous ECJ’s case-law (*Brunnhöfer*, Case C-381/99, Judgment of 26 June 2001).

With such parameters and in accordance with the ECJ's case-law, it is true that these are questions that fall to the domestic courts to resolve. In other words, it is *prima facie* for domestic jurisdictions to assess the weight of statistics, the alternative articulation of shifts of a proof burden from one party to the other and the weight of the comparator in order to determine whether the principle of equal pay for male and female workers has been infringed³⁷.

Nonetheless, these European criteria are not still sufficient to palliate gender discrimination in pay, since from the ECJ's case-law the comparator seems to be circumscribed to the same undertaking. With such a limit, it will be difficult for the national court to reach the firm conviction that, in accordance with the applicable rules of evidence under national procedural law and in the light of the European case-law, there is an unequivocally representative number of male workers who perform (within the same undertaking) the same tasks as female workers and, nevertheless, the latter are paid at a lower rate.

For these reasons, one of the main challenges in this field is, from the European case-law perspective, to provide the national courts with more elements and tools to give full effect to the principle of equal pay for male and female workers³⁸. To this purpose, the impact of the "horizontal social clause" (Art. 9 TFEU) must be taken into account³⁹. With such a philosophy, the solution to the problematic gender inequality situation may be improved by adopting a broader social Europe approach, as analysed in the following section.

4. New challenges in a broader Social Europe

Alongside the major substantial challenge (which is not a new one, that is to say, the "traditional" existence of gender wage gap), it is necessary to face it –in conjunction– with other two important procedural challenges: firstly, the role of social partners and relevant organisations of civil society in salary negotiations; and secondly, the extension of the scope of the valid comparator beyond the same undertaking to make easier the protective role of national judges. In both aspects, the synergies between the EU and the Council of Europe in a broader social Europe are essential.

Concerning the first aspect, it implies greater involvement of social partners, since several studies have revealed the persistent disadvantage that women have at the bargaining table⁴⁰. In this sense, as argued by Advocate General Cruz Villalón in *Prigge and Others*⁴¹ and recalled in his Opinion in *Margaret Kenny and Others (supra)*, "autonomy in collective bargaining deserves proper protection at the EU level" and, "evidently, part of ensuring the proper levels of protection is respect for the principle of equality [and] the right not to be discriminated against on grounds of sex in the area of pay". In addition, he pointed out that "extensive case-law has held that collective agreements are not excluded from the scope of the provisions relating to the freedoms protected under the Treaty and, in particular, that the principle of non-discrimination between male and female workers in terms of pay, as set out in the Treaties (Art. 119 TEEC and then Art. 141 TEC, now Art. 157 TFEU) and in secondary legislation, applies to collective agreements because it is mandatory"⁴².

From this perspective, it has been criticised in doctrine that the European regulatory landscape has changed to one relying heavily on soft law approaches and with more limited ambitions in the field of gender equality

³⁷ On the obligations incumbent of Member States, including their courts, when discrimination infringing EU law has been found, see for example *Landtová*, Case C-399/09, Judgment of 22 June 2011, paragraph 51 and case-law cited. See also *Jonkman and Others*, Joined Cases C-231/06 to C-233/06, Judgment of 21 June 2007, paragraphs 36 to 40.

³⁸ See Pérez de las Heras, B. (2017). "The Charter of Fundamental Rights as a New Element of European Identity and Beyond" in Pérez de las Heras (Ed.). *Democratic Legitimacy in the European Union and Global Governance. Building a European Demos*. London: Palgrave Macmillan, in particular p. 121-125 ("Strengthening Interaction Between the Court of Justice and the National Courts").

³⁹ Vielle, P. (2012). "How the Horizontal Social Clause can be made to Work: The Lessons of Gender Mainstreaming" in Schöman, I., Lörcher, K. & Bruun, N. (Eds.). *The Lisbon Treaty and Social Europe*. Oxford: Hart Publishing, p. 105. According to this author, there will be numerous and regular opportunities to invoke the new horizontal social clause in the national courts and the ECJ in order to reiterate the social aims of the Treaty, including on those occasions when economic freedoms enshrined in this same Treaty are subject to examination.

⁴⁰ Another interesting issue under the gender perspective in Romero Ródenas, M.J. & Bogoni, M. (2009). "La negociación colectiva europea a través del Acuerdo marco europeo sobre la violencia de género" in *Revista de Derecho Social*, No. 47, p. 209-230. See also Ramos Hernández, P. (2016). "El femenino propio en los vocablos relacionados con cargos y profesiones" in Figueruelo Burrieza, A. & Del Pozo Pérez, M. (Dirs.). *Desigualdad y violencia de género en un contexto de crisis generalizada*. Granada: Comares, p. 251-256.

⁴¹ Case C-447/09, Opinion delivered on 19 May 2011.

⁴² Case C-427/11, Opinion delivered on 29 November 2012, Points 64-65.

than at the creation of the European Employment Strategy in 1997. In this environment the European Commission has placed greater emphasis on the role of social partners in addressing the gender pay gap⁴³. However, at the same time, the tensions within the EU's "governance architecture" concerning pay equality have shown, on the one hand, the inconsistencies between the architecture of the antidiscrimination framework (established following the EU's old governance-by-law approach) and the assessment of equal pay public policy measures (in the context of the EU's new governance-by-numbers approach). On the other hand, a second empirical field enables an assessment of the tensions within the EU's new governance system itself, specifically between the approach in the area of equal pay and in the area of economic policy, with specific regard to the participatory role of the social partners in tackling the gender pay gap⁴⁴.

In the same vein, such a perception is also somehow confirmed in the context of the Council of Europe if we take into account that the so-called "participatory status" (not a mere "consultative" one) of the organisations (social partners and NGOs) entitled to submit complaints collective complaints before the European Committee of Social Rights has been very recently activated in cases of gender pay gap⁴⁵.

In spite of (still) such passive role, the European Committee of Social Rights has recently developed (in December 2012)⁴⁶ a new case-law in this field in the framework of the reporting system which affects the 43 State Parties to the European Social Charter. In particular, it adopted a new interpretation under Art. 20 of the 1996 Revised Social Charter (equivalent to Art. 1 of the 1988 Additional Protocol) which enables national courts to make comparisons outside the same undertaking. According to this interpretation: *"equal treatment between women and men includes the issue of equal pay for work of equal value. Usually, pay comparisons are made between persons within the same undertaking/company. However, there may be situations where, in order to be meaningful this comparison can only be made across companies/undertakings. Therefore, the Committee requires that it be possible to make pay comparisons across companies. It notes that at the very least, legislation should require pay comparisons across companies in one or more of the following situations:*

- *cases in which statutory rules apply to the working and pay conditions in more than one company;*
- *cases in which several companies are covered by a collective works agreement or regulations governing the terms and conditions of employment;*
- *cases in which the terms and conditions of employment are laid down centrally for more than one company within a holding [company] or conglomerate".*

Of course, a positive *judicial will* in this direction from the ECJ would also be desirable in assuming these more favourable standards deriving from the European Social Charter, in consistency with the explicit reference, to this emblematic social rights treaty of the Council of Europe, in Art. 151 TFEU as well as in the Preamble and Explanations to the CFREU⁴⁷. It is worth recalling that the ECJ held a vanguard position in this field (since the famous

⁴³ See Smith, M. (2012). "Social regulation of the gender pay gap in the EU" in *European Journal of Industrial Relations*, No. 18(4), p. 365-380.

⁴⁴ See Peruzzi, M. (2015). "Contradictions and misalignments in the EU approach towards the gender pay gap" in *Cambridge Journal of Economics*, No. 39(2), p. 441-465. According to this author, if the role of the social partners is emphasised in several policy documents, the potentialities of their action are seriously jeopardised by the push for decentralisation of collective bargaining, aimed at anchoring wages to productivity, fostered by the EU's governance reforms responding to the crisis, in particular by the Euro Plus Pact and by the 'six-pack' regulations of 2011. He confirms a narrowing down of pay equality in the context of a EU flexibility-centred and neoliberalist political perspective.

⁴⁵ See the list of the collective complaints and of the organisations entitled to submit them in the official web site of the Council of Europe: www.coe.int/socialcharter. In particular, thirteen complaints (No. 124/2016 to No. 136/2016) were registered by "University Women of Europe" on 24 August 2016 (respectively, against Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Finland, France, Greece, Ireland, Italy, the Netherlands, Norway and Portugal). The complaints relate to Articles 1 (Right to work), 4§3 (Right to a fair remuneration - non-discrimination between women and men with respect to remuneration) and 20 (Right to equal opportunities and treatment in employment and occupation without sex discrimination) in conjunction with Article E (non-discrimination) of the Revised European Social Charter (or equivalent provisions of the 1961 Social Charter). The organisation complains that the respondent countries fail to observe the principle of equal pay for women and men for equal, similar or comparable work in breach of the above-mentioned provisions.

⁴⁶ Statement of interpretation on Article 20 of the 1996 Revised Social Charter/Article 1 of the 1988 Additional Protocol: equal pay comparisons, *Conclusions 2012* (published in January 2013).

⁴⁷ Spadaro, A. (2015). "La crisi, i diritti sociali e le risposte dell'Europa" in Carusso, B. & Fontana, G. (a cura di). *Lavoro e diritti sociali nella crisi europea*. Bologna: Il Mulino, p. 28-29.

case *Defrenne I*, Judgment of 25 May 1971), while the European Court of Human Rights proceeded to a “belated recognition” of gender equality issues⁴⁸.

In any case, without prejudice of “judicial solutions”, it is important to put the accent in the protection of equal pay for women and men as a transversal principle of EU law imposing a positive obligation to promote it in all EU’s activities in systematic accordance with other significant provisions of the Treaties and, as a result, as a *leitmotiv* of all EU’s actions and resources (including financial ones). From this point of view, Art. 157 is not only in close connection with the values and aims of respect for non-discrimination and equality between women and men set out in Art. 2 TEU and Art. 3.3 TEU [in conjunction with the EU’s competence establishes in Art. 153(1)i], but also with the existence of the European Social Fund (Title XI of the TFEU) and the other Structural Funds⁴⁹, the European Investment Bank and the other existing Financial Instruments (Title XVII of the TFEU on “Economic, Social and Territorial Cohesion”)⁵⁰.

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⁴⁸ Carmona Cuenca, E. (2015). “La igualdad de género en el Tribunal Europeo de Derechos Humanos: un reconocimiento tardío con relación al Tribunal de Justicia de la Unión Europea” in *Revista Española de Derecho Constitucional*, No. 104, p. 399. With the same philosophy, it has been proposed to further develop the debate on indirect discrimination and material equality through additional interpretative criteria that originate in categories such as structural discrimination and the intersectionality of discrimination: see Añón Roig, M.J. (2014). “The Antidiscrimination Principle and the Determination of Disadvantage”, in *The Age of Human Rights Journal*, No. 2, in particular p. 121-123, and Serra Cristóbal, R. (2015). “La discriminación múltiple, ¿un nuevo enfoque sobre la igualdad?” in Gimeno Sendra, J.V. & Regueiro García, M.T. (Coords.). *Nuevas tendencias en la interpretación de los derechos fundamentales*. Madrid: Universitas, p. 133-146.

⁴⁹ The Structural Funds include the European Regional Development Fund (ERDF), the European Social Fund (ESF), the European Agricultural Guidance and Guarantee Fund (EAGGF), Guidance Section, and the Financial Instrument for Fisheries Guidance (FIFG).

⁵⁰ In particular, Articles 175 and 177 TFEU. See also, in this regard, Art. 2 (5) of Council Regulation (EC) No 1260/1999 of 21 June 1999 laying down general provisions on the Structural Funds, which provides that “the Commission and the Member States shall ensure that the operations of the Funds are consistent with other Community policies and operations, in particular in the areas of employment, *equality between men and women*, social policy and vocational training (...)”, whereas Art. 12 provides that “operations financed by the Funds or receiving assistance from the European Investment Bank or from another financial instrument shall be in conformity with the provisions of the Treaty, with instruments adopted under it and with Community policies and actions, including the rules on competition, on the award of public contracts, on environmental protection and improvement and on the *elimination of inequalities and the promotion of equality between men and women*”.

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