
European and International Law



**Considerations on the Contribution of the
UE Court of Justice¹ related to the Uniform
Application of the Community Regulations
on the Principle of Equal Remuneration for
Equal Work Irrespective of Sex**

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Abstract: The Court of Justice of the European Union is the community institution that, through its jurisprudence, has formulated principles that have directly influenced the social relations between the member states of the Union concerning the transposition into practice of community regulations, even determining modifications in the national legislation or in the community legislation. This paper aims at offering the interested readers a systematization of the main opinions with law principle value, formulated by the Court and consecrated as a fact in its decisions regarding the principle of equal pay for equal work of employees, irrespective of sex

Keywords: equal pay; equal work; jurisprudence; the Court of Justice of the European Union

1. Introducing Considerations on the Lisbon Treaty and Nondiscrimination

The European Union is a pattern of social organization which is experimented aiming to reach, at some point, the materialization of the ideal that each citizen of a member state of the European Union has the possibility to make use of the principle of equal opportunities in every aspect of the social life. The entering into force of the Lisbon Treaty on December 1st 2009, after a long and sinuous way between the moment of the signature of the Treaty and the moment of its approval

¹ The present paper uses the current denomination of the institution, even if in the text it is mentioned the jurisprudence of the Court in the period when it was called the Court of Justice of the European Communities.

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by all the signatory states, represents a new point of reference in the history of the European Union.

Among the remarkable amendments brought by the Lisbon Treaty the following have to be mentioned: 1. grant of the judicial personality to the European Union; 2. inclusion of the principle of supremacy in the community law, consecrated until this regulation only on jurisprudential grounds; 3. consolidate the role of the citizens (one million citizens from a significant number of member state can request the Court to forward a proposal in a sector in which he considers an action of the Union as being necessary); 4. grant of the mandatory judicial state to the Charter of Fundamental Rights, the Charter being a real comprisal of the rights the citizens benefit from in relation to the European legislation, such as the right to integrity, the prohibition of torture or inhuman or degrading treatments, the right to liberty, the respect of private and family life, the right to education, the right to property, nondiscrimination, equality between sexes, cultural, religious and linguistic diversity; 5. include a solidarity clause between the member states for a series of threats, such as terrorism, human or natural catastrophe or difficulties in the energetic sector; 6. the Treaty offers a legal frame to the establishment of privileged relations between the Union and the proximity states, for the first time in the history of the European construction, the importance of the proximity relations of the Union being consecrated at Treaty level; 7. a series of dispositions enhance a more flexible and consolidated action of the Union in what regards the space of liberty, security and justice, ensuring answers for the European citizens in areas such as migration, security and justice, fight against organized crime or terrorism.

In what concerns the equality and nondiscrimination, this is one of the principles consecrated in the Consolidated Version¹ of the Treaty on the European Union, in Part I- Principles²- being mentioned that “In all its actions, the Union seeks to eliminate inequalities and promote equality between men and women” and “*In the definition and application of its policies and actions, the Union seeks to fight any discrimination based on sex, race or ethnicity, religion or beliefs, handicap, age or sexual orientation*”³. More than that, the Treaty has attributed a separate part to nondiscrimination⁴ in which it is expressly mentioned that¹ “*In the scope of*

¹Consolidated Version of the Treaty on the European Union, Published in the Official Journal C326 on 26.10.2012, www.eur_lex.ro

² Title II, “General application dispositions”, article 8

³ Article 10, consolidated version of the Treaty on the European Union, Published in the Official Journal C326 on 26.10.2012, www.eur_lex.ro.

⁴ Part II, “Nondiscrimination and citizenship of the Union”

application of the treaties and without touching the special dispositions, it is forbidden any type of discrimination exerted on grounds of citizenship or nationality” and as instruments for fighting against discrimination the following are established: the regulation² by the Parliament and Council and initiation of specific measures by the Council, with the approval of the Parliament³. The institution of the citizenship of the Union⁴ itself is an instrument of high level exploitation of the rights listed in the Charter of the Fundamental Rights of the European Union. This document has also an entire title⁵ consecrated to equality and nondiscrimination, stating that *“People are equal in front of the law”*⁶ and that *“Discrimination of any type is forbidden, based on grounds such as sex, race, color, ethnicity or social background, genetic features, religion or convictions, political or any other opinions, national minorities, fortune, birth, handicap, age, sexual orientation”*⁷ and *“In the scope of application of the treaties and without breaching its special dispositions, it is forbidden any discrimination on the grounds of citizenship”*.⁸

Equality between men and women is expressly regulated⁹ being mentioned that *“it must be ensured in all sectors, including in what concerns employment, work and remuneration”* but *“the principle of equality does not exclude the maintenance or adoption of measures that would foresee specific advantages in favor of the underrepresented sex”*¹⁰.

The principle of equal remuneration between men and women for the same work performed has been regulated since 1957 in article 119 of the Treaty establishing the European Union¹¹ its form being kept in the Treaty on the European Union

¹ Article 18, Title 1, Consolidated version of the Treaty on the European Union, Published in the Official Journal C326 on 26.10.2012, www.eur_lex.ro

² Article 18, Title 2, consolidated version of the Treaty on the European Union: “European Parliament and Council, ruling in respect to the ordinary legislative procedure, can adopt any norms in order to prohibit these discriminations”.

³ Article 19, consolidated version of the Treaty on the European Union.

⁴ Article 20, consolidated version of the Treaty on the European Union.

⁵ Charter of the fundamental rights of the European Union, Title III, “Equality”, Published in the Official Journal C326 on 26.10.2012, www.eur_lex.ro

⁶ Article 20, Charter of the fundamental rights of the European Union.

⁷ Article 21, paragraph 1, Charter of the fundamental rights of the European Union .

⁸ Article 21, paragraph 2, Charter of the fundamental rights of the European Union .

⁹ Article 23, title 1, Charter of the fundamental rights of the European Union.

¹⁰ Article 23, title 2, consolidated version of the Treaty on the European Union.

¹¹ Article 119: *“Each member state ensures in the first stage and subsequently maintains the application of equal remuneration for the male and female workers for the same work. In the meaning of the present article, “remuneration” represents the salary or the regular net or minimum amount, as well as all the other paid salary rights, direct or indirect, in cash or in nature, by the employer to the employee according to the work performed.*

from 1992 and was not amended until the Lisbon Treaty¹. The Treaty on the European Union in its consolidated form also regulates the principle of equal remuneration between men and women for the same work, with the observation that the phrasing was completed with the expression “*or for a work of the same value*”², defining the term remuneration and conditions for equal remuneration.

This form of the legal frame of the European Union regarding equality and non discrimination is the result of the concerted action of a sum of factors, among which the jurisprudence of the Court of Justice of the European Union is one of the most important factors, all the more so as decisions in the matters have been ruled since the beginning of the activity of the Court. For example, the addendum “*or for a work of the same value*” is the result of the point of view expressed even since 1981 by the Court in the ruling on March 11, 1981, *Worringham v. Humphreys/Lloyds Bank*.³

Equal remuneration, without discrimination on grounds of sex, entails that: a) remuneration granted for the same work has to be in accordance with the same measurement unit; b) the remuneration granted to a worker paid hourly to be the same for equivalent working places”.

¹ Article 2, paragraph 105 in the Lisbon Treaty states that: “Article 119 is amended as follows: - at paragraph 1, the wording “making the object of derogation” are completed after “of a member state” in the first paragraph and respectively after “a member state” in the second paragraph and the word “gradually” in the first paragraph is eliminated. At paragraph 2, a, after “the member states” the words “making the object of a derogation” are introduced, also in paragraph b, after “a member state” and the word “gradually” in the first paragraph is eliminated. At paragraph 3, the words “the Commission authorizes the state in difficulty” are replaced with “The Commission authorizes the member state object of a derogation, in difficulty”.

² Article 157 (former 141 TEC): 1. Each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied. 2. For the purpose of this Article, “pay” means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his employment, from his employer. Equal pay without discrimination based on sex means: (a) that pay for the same work at piece rates shall be calculated on the basis of the same unit of measurement; (b) that pay for work at time rates shall be the same for the same job. 3. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, and after consulting the Economic and Social Committee, shall adopt measures to ensure the application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, including the principle of equal pay for equal work or work of equal value. 4. With a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the underrepresented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers.”

³ Decision on March 31, 1981, Cause 96/80, *J.P. Jenkins v. Kingsgate (Clothing Productions) Ltd.*, Jurisprudence Corpus 1981, page 00911.

2. Principles Formulated by the Court of Justice of the European Union on the Equal Remuneration Between Female and Male Workers

The Court has stated that¹ the principle of equal remuneration between female and male workers is part of the fundamental elements the European Union is based on and can be invoked in front of the national courts and the latter have the duty to ensure the protection of the rights stemming from this legal principle, especially in case of the discrimination that have as direct source the legal dispositions or the employment contracts, in the case of the remuneration applied unequally to the workers male compared to the female workers, although the work is the same both as tasks to fulfill as well as working place (company or service, public or private). Also the Court has ruled in 1981² that for the instance to establish the breach of the principle of equal remuneration between men and women, it has to have the establishment of the fact if there is a difference of treatment between workers male and female when fulfilling the same work in the same period of time, in the same establishment or service as “decisive criteria”.

Also, the jurisprudence has stated³ that the provisions in article 119 in the Treaty of the European Economic community (currently article 157 in the Consolidated version of the Treaty on the European Union) “*apply directly to all the forms of discrimination susceptible to be observed as having as sole criteria the work identity and equal remuneration, without the community pr national measures determining these criteria to be necessary for the application of these criteria*”. The Court has admitted that difference of treatment can be verified, as well as the different moments in time in certain cases, such as the case in which the female was employed on a position previously occupied by a male and who is given a smaller salary at the moment of employment.

The Court of Justice of the European Union has asserted that a share for a pension fund paid by an employer in the name of the employees as a complementary way of increasing the gross salary, which effectively contributes to the increase of the gross salary, represents “a remuneration” in the meaning of article 119, paragraph 2

¹ Decision on April 8, 1976, cause 43-75, Gabrielle Defrenne / Belgian anonimus society for air navigation Sabena, Jurisprudence Corpus 1976, page 00455.

² Decision on March 27, 1980, cause 129/79, Macarthy's Ltd v. Wendy Smith, Jurisprudence Corpus 1980, page 01275.

³ Cause Worringham and Margaret Humphreys v. Lloyds Bank Limited, Cause 69/80, Jurisprudence Corpus 1981, page 00767; Decision on March 31, 1981, Cause 96/80, J.P. Jenkins v. Kingsgate (Clothing Productions) Ltd., Jurisprudence Corpus 1981, page 00911.

in the Treaty of the European Economic Community¹. Consequently, it is a breach of the principle of equal remuneration between the employees male and female for equal work and value, performed in the same establishment or service, private or public, to register the obligation of the employer to pay, in the name of the employee, a share for the pension fund, only in the working contracts of male employees, with the purpose of slightly increasing their gross salary.²

The Court also asserted that in the sector where the legal text which regulated the principle of equal remuneration between men and women for equal work (at the moment of ruling of article 119 in the Treaty of the European Economic Community, currently article 157 in the Treaty on the European Union) would not produce a direct effect, the exclusive competence of the national legislator to regulate the application of the principle is not reserved, but its application can result, as long as it is necessary, from the correlated application of the community and national dispositions. The Court has drawn the attention³ on the fact that this principle represents a special judicial norm related to remuneration, whose application cannot be extended to other work conditions applicable to the two working categories. The same decision held that nondiscrimination on grounds of sex is a principle of community law related to a fundamental human right but that it is not the obligation of the Union to impose the respect of this principle when talking about a work relation subordinated exclusively to the national law.

The jurisprudence of the Court of Justice of the European Union contains also the legal truth⁴ that the granting, for paid work per time unit, of a different remuneration per hour of work, according to the number of worked hours worked per week does not breach the principle of equal remuneration listed in article 119 in the Treaty of Economic European Community, still the difference of remuneration between the half-time work and full-time work is explained by the intervention of the objectively factors and without any type of discrimination based on sex. It is the competence of the national judge to assert, in each cause, if, taking into account the circumstances, priors and reasons of the employer, a salary practice, although

¹ Decision on March 11, 1981, Cause Worringham and Margaret Humphreys v. Lloyds Bank Limited, Cause 69/80, Jurisprudence Corpus 1981, page 00767 (paragraph 17).

² *Idem*, paragraphs 23-24.

³ Decision on June 15, 1978, cause 149/77, Gabrielle Defrenne / Belgian anonymous society for air navigation Sabena, Jurisprudence Corpus 1978, page 01365

⁴ Decision on March 31, 1981, Cause 96/80, J.P. Jenkins v. Kingsgate (Clothing Productions) Ltd., Jurisprudence Corpus 1981, page 00911

presented as a differentiation depending on the weekly time of work, really represents or not a discrimination based on the sex of the worker.

Based on this reasoning, the conclusion is that a difference of remuneration between the full time workers and the half time workers does not represent a discrimination forbidden by article 119 in the Treaty, unless it is proven that it is actually an indirect way to reduce the level of remuneration of the workers by half time on the grounds of the fact that that group of workers is composed, exclusively or preponderantly, from female workers. The national instances can observe, with the aid of the criteria of identity in work or equal remuneration and without the intervention of the community or national measures, that there are discriminations based on sex represented by the unequal remuneration of workers male and female for the same work, fulfilled in the same establishment or service, public or private, namely that the remuneration per hour was offered for a half time work, inferior from that granted for a full time work.

Another variety of the discrimination on the grounds of sex in the matter of remuneration was identified by the Court of Justice of the European Union.¹ Thus, the latter has asserted that in the cases in which the national judge can recognize, with the aid of the criteria of identity of work and equal remuneration and without the intervention of certain national or community measures, the action of an employer to grant certain special advantages for transportation only to the retired male employees represents an act of discrimination on the grounds of sex and the dispositions in article 119 of the Treaty apply directly in such a situation. In the meaning of article 119 in the Treaty, such a situation is considered as discrimination between the male and female retired workers that do not benefit from the same advantage. Regarding the retirement, the Court has asserted² that the decision on a minimum retirement age different between male and female workers, within the social security measures, does not represent an act of discrimination forbidden by the community law.

¹ Decision on February 9, 1982, Cause 12/81, Eileen Garland v. British Rail Engineering Limited, Jurisprudence Corpus 1982, page 00359

² Decision on February 16, 1982, Arthur Burton v. British Railways Board, Jurisprudence Corpus 1982, page 00554.

3. The Influence of the Regulations of the European Union and Jurisprudence of the Court of Justice of The European Union on the Romanian Legislative Frame in the Matter of Equal Remuneration for Men and Women in Case of Equal Work or Equal Work Value

In the Romanian Constitution in 1991 as well as in the republished version of the Constitution in 2003 the principles of equality and non discrimination have been consecrated in article 16. The Romanian Constitution in 1991¹ and republished version in 2003² consecrate in article 16 the principle of equality and nondiscrimination. For the application of this principle, in 2000 was adopted the Ordinance 137³ on the sanctioning of all the form of discrimination but the specialization was also present in the matter of enactment.

Thus, the direct influence of the regulations of the European Union on the Romanian legislation in this matter results even more visibly from the fact that the Romanian legislator has adopted Law 202/2002 on the equal opportunities between men and women⁴ law whose declared objective is to regulate *“the measures to promote equal opportunities and equal treatment between men and women, for the elimination of all forms of discrimination based on sex, in the entire scope of public life in Romania”*⁵, with the observation that the legal definition on the concept of equality of opportunities is *“In the meaning of the present law, the equality of opportunities represents taking into consideration all the capacities, necessities and aspirations of men and women and the equal treatment of the latter”*.⁶

Starting from the principle of equal remuneration for equal work and equal value, the Romanian legislator has introduced, among the legal definitions, the one of *“work of equal value”*⁷ mentioning the meaning of the concept as follows: *“the work of equal value represents the remunerated activity which, after comparison,*

¹ Article 16, paragraph 1: “Citizens are equal in front of the law and public authorities, without privileges and without discrimination”

² Published in the Official Monitor no. 767 on October 31, 2003

³ Published in the Official Monitor, Part I, no. 431 on September 2, 2000 and republished in the Official Monitor, Part I, no. 99 on February 8, 2007.

⁴ Published in the Official Monitor of Romania, Part I and republished in the Official Monitor of Romania, Part I, no. 150 on March 1, 2007 and amended by Emergency Ordinance no. 83 on December 4, 2012 on the amendment and completion of law no. 202/2002 on the equality of opportunity and treatment between men and women.

⁵ Article 1, paragraph 1

⁶ Article 2, paragraph 2

⁷ Article 4, paragraph f

based on the same indicators and the same measuring units to another activity, reflects the use of similar or equal professional knowledge and skills with similar or equal quantities of intellectual and/ or physic efforts”.

Chapter II of the law is exclusively dedicated to nondiscrimination in the labor sector, being entitled “*Equality of opportunities and treatment between men and women in labor*” in article 7 stating that the equality of opportunities and treatment between men and women in work relations also includes the non-discriminated access to¹ “equal income for equal work value”. Also, it is expressly underlined the fact that “*It is forbidden the discrimination by the use of the employer of practices that disadvantage people of a certain sex in relation to work regarding: (...) d) determining the remuneration*”.

As indicated in chapter 2 of the present paper, the Court of Justice has determined, through its jurisprudence, the improvement of the legislation of the European Union which implicitly has influenced the Romanian regulations in this matter.

4. Conclusion

Romania, state which during its entire history² has been connected to the highest spiritual values of Europe in particular and the world in general and has contributed to the maintenance³ and development of its international cultural patrimony, proves also in the matters of application of the principle of equal remuneration for work of equal value a social practice at the level of the standards imposed by the European Union, standards to the definition of which the Court of Justice of the European Union has substantially contributed.

¹ Article 7, paragraph 1.c.

² Beginning with the birth of the Romanian people from the interlacing of the social and cultural traditions of the Romans and Dacians, continuing with remarkable cultural personalities formed at European schools, among which we remind the encyclopedia personality Dimitrie Cantemir, with the phenomenon of training the Romanian youth in rich families in Paris and raising children in rich families in Romania under the supervision of western European states and taking over French cultural patterns, which made possible for Bucharest to be called the “Little Paris” in the period between the two world wars.

³ See the Romanian people under the ruling of its lords (among which we remind a few, on the criteria of the notoriety of their military victories: Mircea cel Batran, Matei Basarab, Vlad Tepes, Mihai Viteazul, Stefan cel Mare) to the prevention of the Turkish expansion.

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