European Added Value
of EU measures on the application of the
principle of Equal Pay

ANNEX III

Legal Aspects

Research paper
by Cultura Lavoro srl

Abstract
This research paper provides an overview of the situation with respect
to equal pay for men and women in seven Member States. It describes
the existing framework for combating the gender pay gap and
consolidates the legal, social and political arguments for delivering
equal pay. In particular, it analyse the selected labour/industrial
relations and legal systems and focuses on three recommendations
proposed in the Bauer report (recommendations 1, 4 and 8).

It goes on to ascertain the extent to which further legislative action (as
opposed to non-binding measures) at EU level is necessary in order to
obtain progress in closing the gender pay gap.
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Chapter 1

I. Background and general assumptions

In May 2012, the European Parliament adopted a legislative initiative report on Equal pay (hereinafter also the Bauer Report and/or the Report), calling on the Commission, among others, to review 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, before February 2013.

In its official response to this report, the Commission has indicated that it does not intend to review the Directive to address the specificity of the causes for the current gender pay gap within this deadline, but will instead draw up a report to be presented in the first half of 2013, reviewing the practical implementation of this Directive at national level.

Our Researcher Team (“RT”) was requested to carry out the assessment of the potential effects that can be expected from further EU measures on the application of the principle of equal pay.

In light of the above, the RT decided to investigate the Labour/Industrial Relations Legal Systems with reference to antidiscrimination law of the following EU Member States:

ITALY, FRANCE, GERMANY, THE NETHERLANDS, FINLAND, ROMANIA, SPAIN
(hereinafter also the “selected Labour/Industrial Relations Systems”)

Our investigation was aimed at ascertaining the need, if any, for and the added value deriving from further legislative action on equal pay.

This should be deemed a preliminary and general investigation on Gender Pay Gaps (“GPG”) in the selected Labour/Industrial Relations Systems and the relevant antidiscrimination law.

We consider GPG as the difference between men’s and women’s hourly pay divided by men’s hourly pay. The most shared way to measure the difference between men’s and women’s average earnings is related to gross hourly payments. This is because gross or unadjusted pay captures differences in reward independently of any impact of national systems of taxation.

Here we will not describe in depth the legal issues related to net payments. We will exclusively highlight the relevant application in each selected Labour/Industrial Relations Systems.

GPG have been declining in most industrialized countries over the last four decades. In accordance to significant studies (Blau and Kahn 2007), the most important elements to understand the GPG are:
antidiscrimination law,
- higher levels of educational attainment among women,
- increased participation of women in non-traditional professional occupations.

As a consequence, we could sketch out the more recent initiatives aimed at promoting gender equality against GPG in the EU/Member States labour market (i.e. antidiscrimination law in the selected Labour/Industrial Relations Systems), we should at least indicate three main areas:

- **Discrimination Remedies for Pay** - legislation that is directed at wage disparities arising from the lower pay of women’s jobs with respect to comparably valued men’s jobs within a specific workplace.

- **Discrimination Remedies for Employment** - legislation that aims to remove barriers that limit women’s representation in male-dominated occupations for reasons unrelated to qualifications and/or ability.

- **Family-friendly policies** (such as job-protected maternity leave, flexible work hours and/or subsidized day care) that aim at balancing work-family commitments and encourages the labour market participation of women with young children.

This is to stress the key theory we have in mind: EU Member States are generally tackling with a comprehensive strategy against GPG. Therefore, we believe that studying one or two of these areas in Labour/Industrial Relations Legal System does not allow to suitably understand the problem. One needs to investigate and encompass all the matters.

Here, for specific purposes of this research, we will deal with one of those areas (i.e. pay) and we will limit our understanding to define some interactions among those areas.

### II. Assumptions, objectives and method

The Bauer Report, although analytical and deeply branched, does not tackle two crucial issues that in this Report are also deemed legal assumptions:

(i) Firstly, the necessity to commonly recognize a horizontal direct effect to at least some of the provisions of the referred Directive which shall be considered self-executing, with regard to the principles included therein. Expressly, the European Court of Justice, in the early 70’s, had already held that article 119 of the EU Treaty (read Article 157 TFEU) was of such a character as to have “horizontal direct effect”, and therefore enforceable not merely between individuals and the government, but also between private parties (see Judgment of the Court of 8 April 1976, Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena – Case 43-75). The Court has also, already, stated that the principle of equal remuneration between female and male workers, as 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 male workers 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) (see Decision on March 31, 1981, Cause 96/80, J.P. Jenkins v. Kingsgate (Clothing Productions) Ltd., Jurisprudence Corpus 1981, page 00911). The direct effect of any principles of the Treaty together with the recognized horizontal direct effect of the same principles are, therefore, of such a nature that they automatically confer a consistent locus standi to every single employee, without any intermediate national legislative intervention. Focusing on this aspect is a compelling way to quicken any concrete solutions, both at a European and at a national level. An immediate consequence of the “horizontal direct effect key issue” is, in fact, the right to compensation, for the employee, in case of breach of the equal pay principle. In this regard, Article 18 of the Directive looks, prima facie, to be inconsistent. Article 18 of the Directive, while assigning to the single Member States the obligation to introduce the necessary measures on order to grant remuneration and/or compensation in case of discrimination, requires these measures to be “concrete, effective and dissuasive”. It is not a hazard to understand that Article 18 implies the right for remuneration/compensation to be already in force (it is self executing in this respect) and asks the Member State to rule only on the compensation and remuneration criteria (see also what argued under Recommendation n. 8 – Sanctions). This approach would be, therefore, absolutely in line with the principle of subsidiarity.

(ii) Secondly, the national courts should hold on the basis of GPG evidences. GPG evidences should be related to systemic disparate treatment of discrimination that occurs when an employer simply treats some people less favorably than others because of their sex. Disparate treatment claims can be based on individual or systemic disparate treatment. The antidiscrimination law at EU and national level should fix the principle to demonstrate the three analytical steps in a systemic disparate treatment are the following:

- **The actual treatment** of the plaintiff group/person must be determined (e.g. how is the GPG for “those” women employed in “that” firm”);

- **The ideal treatment** of the plaintiff group/person must be determined (i.e. the treatment one would expect in the absence of discrimination).

- The actual and ideal treatment must be compared to determine whether any difference is large enough to determine an inference of discrimination/GPG.

In order to analyze such legal assumptions, we have examined the following issues/objectives with reference to the selected Labour/Industrial Relations Systems (i.e. ITALY, FRANCE, GERMANY, THE NETHERLANDS, FINLAND, ROMANIA, SPAIN), by following a survey method based on peer review of lawyers and experts living/operating in the selected Labour/Industrial Relations Systems. The survey/template is described below:
1. OVERVIEW OF NATIONAL SITUATION WITH RESPECT TO EQUAL PAY FOR MEN AND WOMEN

Description of the current overall framework related to gender pay gap (also with the estimation of the scale of the persisting gender pay gap)

Explanation of the legal and social arguments for delivering equal pay (social justice, implementation of an area of security and justice in the EU, implementation of the EU2020 strategy, etc.)

2. THE MEASURES PROPOSED IN THE BAUER REPORT IN THE NATIONAL LEGAL SYSTEM - we focus on three Recommendations (No. 1, 4 and 8):

Recommendation 1:
Directive 2006/54/EC contains a definition of equal pay, by copying the provisions of Directive 75/117/EEC. We are wondering whether a more precise legal categorization is useful for dealing with the Gender Pay Gap (GPG). In particular, in the national legal system, we checked how/if the following legal concepts were introduced:
- GPG (The definition must cover not only gross hourly pay; please check if there is a “net” gender pay gap)
- Direct and indirect pay discrimination;
- Remuneration;
- Pension gap;
- Work treated as equal;
- Work of the same value;
- Employer;
- Professions and collective agreements.

Recommendation 4:
Equality national bodies/agencies and legal remedies.
“Equality promotion and monitoring bodies should play a greater role in diminishing GPG. The bodies should be empowered to monitor, report, and, where possible, enforce gender equality legislation more effectively and more independently while they should be adequately funded. Article 20 of Directive 2006/54/EC could be revised so as to enhance the bodies’ mandate by:
- supporting and advising victims of pay discrimination;
- providing independent surveys concerning the pay gap;
- publishing independent reports and making recommendations on any issue relating to pay discrimination;
- legal powers to initiate their own investigation;
- legal powers to impose sanctions in cases of breaching the principle of equal pay for equal work and/or to bring wage discrimination cases to court;
- providing special training for the social partners and for lawyers, judges and ombudsmen based on a toolbox of analytical instruments and targeted measures to be used either when drawing up contracts or when checking whether rules and policies to address the pay gap are being implemented, as well as providing training courses and training materials on non-discriminatory job evaluation for employers”.

In light of the above and focusing on the national legal system, we analyzed the following issues:
Research paper on legal aspects

- How accessible to women are legal remedies against breach of the principle of equal pay? What is the role of equality bodies in this respect? Do you have best practices? Do you have any significant case law?
- To what extent can enhancing the mandate of equality public bodies/agencies, namely by reinforcing their legal powers to initiate investigations and impose sanctions, contribute to providing women with more efficient (i.e. more accessible and at a lower cost) legal remedies? (Do you have best practices? Do you have any significant case law?)
- What could be the impact strengthening the accessibility of collective redress on the accessibility of legal remedies for women? What could be the role of equality bodies in this respect?

**Recommendation 8:**
Sanctions Under Directive 2006/54/EC, Member States are already obliged to introduce measures to provide compensation or reparation (art. 18), as well as penalties (art 25). “The legislation in this field is for different reasons evidently less effective and, bearing in mind that the whole problem cannot be solved by legislation alone, the Commission and Member States should reinforce the existing legislation with appropriate types of effective, proportionate and dissuasive sanctions. It is important that Member States take the necessary measures to ensure that infringement of the principle of equal pay for work of equal value is subject to appropriate sanctions according to the legal provisions in force. 8.3. In spite of the existing legislation, inspections and punitive action are often woefully inadequate where the principle of equal pay is concerned. These matters need to be treated as a priority, and the agencies and bodies responsible for them must be provided with the necessary technical and financial resources. 8.4. It is recalled that under Directive 2006/54/EC, Member States are already obliged to provide compensation or reparation (Article 18), as well as penalties (Article 25). However, these provisions are not sufficient to avoid infringement of the equal pay principle. For this reason, it is proposed to conduct a study on the feasibility, effectiveness and impact of launching possible sanctions such as:

- penalties, which must include the payment of compensation to the victim;
- administrative fines (for example in the event of failure of notification or of compulsory communication or unavailability of analysis and evaluation of wage statistics disaggregated by gender (according to Recommendation 2)) requested by labour inspectorates or the competent equality bodies;
- disqualification from public benefits, subsidies (including EU funding managed by Member States) and public procurement procedures, as already provided for by Directives 2004/17/EC and 2004/18/EC concerning the procurement procedure;
- identification of offenders, which should be made public.”

In light of the above and focusing on the national legal system, we analyzed the following items:

- In what way, to what extent and using which modalities this requirement has been implemented in your legal system. Based on examples and case studies.
- Indication of sanctions for equal pay, comparing to voluntary schemes, in terms of encouraging employers to effectively tackle the gender pay gap
3. ASCERTAINING THE EXTENT TO WHICH FURTHER LEGISLATIVE ACTION (AS OPPOSED TO NON-BINDING MEASURES) AT EU LEVEL IS NECESSARY IN ORDER TO OBTAIN PROGRESS IN CLOSING THE GENDER PAY GAP

Could an intervention in your legal system be more successful, coherent and relevant because it is carried out at the EU level?

To what extent is the proposed revision of directive 2006/54/EC necessary in order to achieve the objectives satisfactorily in your legal system?

III. Executive summary. Preliminary remarks on Bauer’s recommendations

The main factors strengthening male and female wages disparities are the following:

- Horizontal segregation and stereotyping confine women and men to different parts of the labour market with different rewards, often undervaluing of women’s work (Ledwith and Colgan, 1996; Robinson, 1998).
- Vertical segregation within organizational hierarchies, often involving discriminatory processes, limits women’s career progression (Clarke et al., 2005; Dex et al., 2000).
- The irregular division of domestic labour on the ability of women and men to devote time to careers and labour market work underlines pay gaps. As a result both part-time work and time out of the labour market affect current and lifetime earnings (Meurs et al., 2010).
- Women’s concentration in non-standard jobs further reduces pay and weakens career prospects (Smithson et al., 2004); while innovations such as individualized pay systems reduce transparency and may leave women at a disadvantage (Huffman, 2004).

The presence of trade unions does help narrow the earnings differentials for women and men, and wage dispersion is lower in highly organized sectors (Hayter and Weinberg, 2011; Ponzellini et al., 2010).

Three critical points should be highlighted in the selected Labour/Industrial Relations Systems (Fredman, 2010):

- Firstly, reliance on an individual complainant to bring an action in court puts excessive strain on the victim both in terms of resources and personal energy. Litigation is lengthy and costly.
- Secondly, victim-initiated litigation means that the courts’ intervention is random and ad hoc. Many individuals, particularly non-unionized ones, are unable to pursue their claim. The result is that a large number of cases of discrimination go unresolved.
Thirdly, it is necessary to identify a perpetrator and prove a breach of anti-discrimination law. Yet it is now recognized that much inequality is institutional and not the fault of any one person. This means that the impact of equality legislation is likely to be patchy: structural discrimination cannot be addressed if there is no identifiable perpetrator, and cases of unlawful discrimination go unresolved if no victim is willing and able to come forward.

In light of the above, analyzing the selected Labour/Industrial Relations Legal Systems and focusing the Bauer Report’s recommendations, we deem that:

**Recommendation 1: Legal Concepts** - The Bauer Report properly indicates the difficulties with antidiscrimination laws and its relevant legal concepts (net salary, equal value, equal work, remunerations, etc.). However, also on the basis of the RT (Research Team) survey method, the root difficulty is that the Bauer Report maintains that a qualified norm of GPG (Gender Pay Gaps), and the related elements (remunerations, equal pay, equal value, equal work, etc.), is better than a strong norm of calculation formula for determining a systematic disparate treatment case. In other words, it is still held the principle stating that whatever conduct can determine GPG (i.e. who and what), without defining the method and/or the criteria aimed at assessing the GPG (i.e. how and when).

**Directive - Article 8 Exclusions** - It also should be noted that the Bauer Report does not take into consideration the vagueness of Article 8 – Exclusions. In this respect, national legislation would play a fundamental and necessary role. Labour Law legislation is radically changed as far as employment contracts are concerned and the Directive is not adequate to cover such changes and to lead to a concrete implementation.

**Recommendation 4: Equality Bodies and Legal Remedy** - The Bauer Report correctly calls for regular pay audits, as well as for the publication of their results; however, it does not highlight that the only benefit of such an approach would be achieved only if pay audits would be brought into the work place and be managed by internal equality bodies. Moreover, it should be noted that the lack of information issued is crucial for a correct application of the burden of proof. In this respect, the Bauer Report does not supply any solution on the need of a specific employer’s procedure ruling the (preliminary) activity of internal equality bodies and the (consequent) eventual judicial action of the employee who bears to have been discriminated.

- In relation to Equality Bodies, public or private, local or national – They determine affirmative actions that are mainly of symbolic significance. Powers and inspections, with the relevant procedures, are crucial for the equal pay principle but too much time has gone by, too many reasonable expectations have been built upon it to change courses.

- In relation to Legal Remedy – Discrimination remedies can be thought of as mechanisms for shifting losses from injured parties to parties legally responsible for the losses. For this loss-shifting model to apply suitably, one needs to be able
to (i) identify the injured party, (ii) quantify the loss, (iii) identify the responsible party to whom the loss should be shifted. Remedies in discrimination, and mostly in Gender Pay Gaps (GPG) at European/National legislation, are not properly defined. In fact, it is not uncommon for one or more of the elements needed to apply to loss-shifting model to be missing.

**Recommendation 8: Sanctions** - The Bauer Report urges upon the acknowledgment of adequate actions ranging from penalties, which should include the payment of compensation to the victim, to administrative fines requested either by labour inspectorates or by competent equality bodies and even to disqualification from public benefits etc. The Report does not make clear which are the addresses of the so-called “sanctions” and which should be the bodies in charge of putting into effect such measures. It is not disputable that Article 17 of the Directive places jurisdictional procedures before any other administrative procedures stared by a public or a private body. None of these aspects, especially with regard to the priority recognized to judicial procedures directly started by the employee, is clearly considered.

- **Directive - Article 19 - Burden of Proof.** There is one aspect not tackled at all: this is the burden of proof. The way the Article 19 of the Directive has been drafted has lead to a common misrepresentation of the burden of proof; mainly, it has been acknowledged that Article 19 creates an inversion of the burden of proof. This is not perfectly true. It should be borne in mind that the outset that, in accordance with the normal rules of evidence, it is, in principle, for the worker who believes himself to be the victim of sex discrimination in pay to establish before the national court that the conditions giving rise to a presumption that there is unequal pay prohibited by Article 141 EC and Directive 75/117 are fulfilled (see, to that effect, Case C 381/99 Brunnhofer [2001] ECR I 4961, paragraphs 52, 53 and 57). And yet, Directive 2006/54 does not change the framework. It is accordingly for that worker to prove by any form of allowable evidence that the pay he/she receives from his/her employer is less than that of his chosen comparators, and that he/she does the same work or work of equal value, comparable to that performed by his/her comparators, so that prima facie he/she is the victim of discrimination which can be explained only by the difference in sex (see Brunnhofer, paragraph 58). If the worker adduced evidence to show that the criteria for establishing the existence of a difference in pay between a woman and a man and for identifying comparable work are satisfied, a prima facie case of discrimination would exist. It would then be for the employer to prove that there was no breach of the principle of equal pay by establishing by any legal means, inter alia, that the activities actually performed by the two employees were not in fact comparable or by justifying the difference in pay by objective factors unrelated to any discrimination based on sex (see, to that effect, Brunnhofer, paragraphs 59 to 62). It is on this grounds, that, on the 28th of February 2013, the ECJ (Third Chamber) has ruled: “Article 141 EC 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 must be interpreted as follows: - 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.” The Decision, although very expansive, contains important hints for the EU and the national legislators. It confirms that Article 19 does not create any proper inversion of the burden of proof, but, simultaneously, states that it is up to the employer to prove an “objective justification” for the difference in pay. If a complete inversion of the burden of proof could be considered not beneficial due to the need of a proper balance between the worker and the employer, it is also true that the objective justification criterion has not been properly acknowledged yet. Moreover, the ECJ calls for “valid statistics” and to “comparators” as part of the objective justification, implicitly confirming the necessity of pay audits. What is also evident is that the ECJ considers some of the provisions of the Directive directly applicable when it says that 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.

The EU Formula against systemic disparate treatment - Further legislative action (as opposed to non-binding measures) at EU level is necessary in order to obtain progress in closing the gender pay gap – The Bauer Report focuses on whom and what determine GPG. In fact, further EU legislation action should be aimed at stating an “EU Formula” useful for courts, collective bargaining, inspectorate, equality bodies, etc., to get what is probative of discriminatory intent. The GPG evidence should be based on systemic disparate treatment of discrimination. The three analytical steps in a systemic disparate treatment are the following (i) the actual treatment of the plaintiff group/person must be determined (e.g. how is the GPG for “those” women employed in “that” firm”) (ii) The ideal treatment of the plaintiff group/person must be determined (i.e. the treatment one would expect in the absence of discrimination), (iii) The actual and ideal treatment must be compared to determine whether any difference is large enough to determine an inference of discrimination/GPG. The EU Formula should allow to verify how often one would expect to see the actual treatment if random selections were made from the ideal treatment pool. The less probable the actual treatment, the more likely it resulted from discrimination. Such EU Formula should be based on a binomial distribution. The two or
three standard deviations rule announced by the court means that the difference between actual and ideal treatment will be recognized as probative of GPG if the actual treatment would be seen less than X% to X% of the time. A model could be pulled out from the US Supreme Court case law.

\[ Z = \frac{A - NP}{\sqrt{NP(1-P)}} \]

Where, \( Z \) is the number of standard deviations, \( A \) is the actual treatment, \( N \) as times, \( P \) is the ideal treatment.

A similar formula is not applied in anyone of the EU Member States.

IV. The need for and the added value deriving from further legislative action on equal pay

In light of the above, we can confirm that there is the need for and the added value deriving from further legislative action on equal pay.

Further legislative action could be shaped as:

1. The need to change the traditional approach that has been to rely on an individual complaints model of adjudication. A range of new approaches can arise, which aim at institutional change through proactive measures to promote equality. This leads to class actions, whereby a group of victims, also by means of unions, can litigate the same claim together. A further step would be to permit an equality body to bring a case without an identified victim, engaging patterns or practices of discrimination on a more collective level. Several jurisdictions have attempted to establish specialist equality bodies which do not have the power to issue binding decisions, but instead function as mediating and conciliating between the parties. There are several examples of this kind of equality bodies such as the “Office of the commissioner for administration (ombudsman)” in Cyprus, the “Ombudsman for Equality” in Finland, “The Greek Ombudsman” in Greece, the “Equal Treatment Authority” in Hungary, the “Office of equal opportunities Ombudsperson” in Lithuania, the “National Council for combating discrimination” in Romania. In evaluating the results of this method, we have to consider that employees often commence legal actions before courts, due to the impossibility to issue binding decision of these equality bodies. We can not consider these results in line with the recommendations proposed in the Bauer report. The report suggests to introduce new measures to ensure the infringements of the principal of equal pay. In particular, recommendation 8 suggests to conduct a study on the feasibility, effectiveness and impact of sanctions such us the payment of compensation to the victim, administrative fines, disqualification from public benefits and the identification of offenders that should be made public. The Equality Bodies would not have the power to impose this kind of sanctions.
2. The need to implement proactive measures in order to prevent inequality arising in the first place. A key means is to require decision makers to assess new measures/procedures at firm level also bargained with unions, to determine impact on gender and to adjust them if necessary. Responsibility for impact assessment lies with the equality body in several Member States, whereas in a number of other Member States this responsibility lies with Government and the executive (e.g. in Belgium, the Gender Mainstreaming Act of 12 January 2007 designed a complete system for ex-ante assessment of impact on gender). This is not enough. The impact assessment should be carried out and checked/monitored at firm level in order to prevent GPG. The model of Family Audit in Italy/Trentino Alto Adige could be a model (see http://www.trentino.familyaudit.org/). In addition, family-friendly measures constitute a further proactive measure to promoting equality. One of the key causes of gender inequality is the fact that women remain primarily responsible for child-care and housework. To be effective, it is therefore essential to include proactive measures which both facilitate women’s involvement in the paid workforce, and enhance men’s ability to participate in child-care responsibilities.

3. The need to state an “EU Formula” useful for courts, collective bargaining, inspectorate, equality bodies, etc. to get what is probative of discriminatory intent. The GPG evidence should be based on systemic disparate treatment of discrimination. The three analytical steps in a systemic disparate treatment are the following (i) the actual treatment of the plaintiff group/person must be determined (e.g. how is the GPG for “those” women employed in “that” firm?) (ii) The ideal treatment of the plaintiff group/person must be determined (i.e. the treatment one would expect in the absence of discrimination), (iii) The actual and ideal treatment must be compared to determine whether any difference is large enough to determine an inference of discrimination/GPG.
Chapter 2

I. Gender Pay Gaps in EU Law

Key findings

Gender Pay Gaps have been declining in most industrialized countries over the last four decades.

The EU has been a key player in promoting pay equality.

The current EU approach towards gender inequalities cannot be separated from the greater reliance on soft law approaches in the field of employment and social policy. This is in sharp contrast to the more mandatory approach adopted in the field of macroeconomic policy and competition.

Gender Pay Gaps (GPG) have been declining in most industrialized countries over the last four decades.

At the EU level, the GPG is defined as the relative difference in the average gross hourly earnings of women and men within the economy as a whole.

This indicator has been defined as unadjusted, as it has not been adjusted according to individual characteristics that may explain part of the earnings difference. Such individual characteristics relate, among other things, to traditions in the education and career choices of men and women; to a gender imbalance in the sharing of family responsibilities; to the fact that men and women still tend to work in different sectors; to part-time work, which is often highly feminized, etc. Very often these characteristics are seen as the result of the free choice of individuals. The above implies that the unadjusted gender pay gap – also referred to as the absolute gender pay gap – comprises both potential pay discrimination and pay discrepancies based on factors that have nothing to do with discrimination as such, but which may at least explain part of the difference. The net pay gap, by contrast, corresponds to the portion of the pay gap that cannot be explained, and that, for an important part, is assumingly caused by pay discrimination.

The introduction of antidiscrimination law, higher levels of educational attainment among women, increased participation of women in non-traditional professional occupations, and more choices being made available to men and women both inside and outside the labour market strengthen the legal models against the GPG.

The EU has been a key player in promoting pay equality.
The 1975 Equal Pay Directive established the principle of equal pay for work of equal value, which permits comparisons of pay rates across sex-segregated occupations.

This has been followed by a series of other directives on gender equality. As with most legislation, implementation has been shaped by systems of national rules and norms and in this process some dilution and country variation takes place.

In practice, implementation has required the evaluation of women’s and men’s jobs by systems that have not necessarily avoided bias and thus may have inhibited progress against pay gaps.

The current EU approach towards gender inequalities cannot be separated from the greater reliance on soft law approaches in the field of employment and social policy (Mosher and Trubek, 2003). This is in sharp contrast to the more mandatory approach adopted in the field of macroeconomic policy and competition (van Apeldoorn, 2009). Soft law approaches might bring greater flexibility in developing policies that fit the varied institutional and socio-economic arrangements across the EU; in the case of gender equality, there is unlikely to be a one-size-fits-all policy solution (Pascal and Lewis, 2004).

These coming decades are for consolidation rather than radical developments and new Directives. This approach can be seen as building upon the recast equality Directive of 2006 that requires Member States to take adequate measures to promote social dialogue between the social partners with a view to fostering equal treatment, including, for example, through the monitoring of practices in the workplace, in access to employment, vocational training and promotion, as well as through the monitoring of collective agreements, codes of conduct, research or exchange of experience and good practice.

In 2008 a European Parliament Resolution on the Pay Gap, noted that the gender pay gap did not show any sign of significantly narrowing, and called for wider action with a focus beyond hourly pay and equal pay for the same work.

In March 2009 the Commission piloted an information campaign about the gender pay gap across the EU, extended to all Member States in 2010 and continued in 2011. In the light of its limited capacity to introduce new hard law, the Commission advocated the sharing of good practices and the engagement of other actors in the fight against pay inequalities, notably the social partners.

With the Strategy for Equality between women and men for 2010–2015, the European Commission has identified the following issues that require specific attention in future policies of the European Union in the field of gender equality. In the first place, the importance of equal economic independence of women and men is stressed and paid work is seen as the main way to reach this. The labour market participation of women and men in the EU on average should reach 75% according to the objective set in Europe 2020 (it is now 62.5%). Key actions involve, for example, the promotion of female entrepreneurship and the assessment of gaps in family-related leave such as paternity and care leave and the consultation of social partners on further measures. Further objectives mentioned in this Strategy for equality between women and men for 2010–2015 are a reduction of the gender pay gap, an enhanced representation of women in decision-making, measures to combat gender-based violence and to further gender equality in external actions.
II. **Substantial legal approaches**

Equal pay for men and women for work of equal value was included in the original EEC Treaty, and is currently embodied in Article 157 of the Treaty on the Functioning of the European Union (TFEU). Throughout the previous decades, the principle has been brought into practice by directives and also the Court of Justice’s case law has boosted its importance. In particular, the ECJ’s findings in the 1970s that the Article is directly effective in both vertical (private person versus public authority) and horizontal (private person versus private person) relations proved to be a powerful instrument for enforcing the principle in national courts, doubtless also with considerable preventive effects (Foubert, 2011).


At the national level, the principle of equal pay is, in general, also fully reflected in the legislation of the 27 EU Member States and the 3 countries of the European Economic Area (EEA): Iceland, Liechtenstein and Norway. Three non EU countries, Croatia, FYR of Macedonia and Turkey have also adapted their legislation to EU standards. Most EU Member States have adopted legislative provisions aimed at tackling the gender pay gap, often because of the requirements of EU legislation in the field. In accordance with the results of our research, many of the Member States have introduced some legal measures in order to tackle the GPG since the 1970s, so many years before the adoption of the Directive 54/2006. As to the main actors in the context of GPG, looking at the selected Labour/Industrial Relations Systems, we can sum up that:

A. Unions must comply with those legislative provisions. That is probably the reason why most collective agreements today do not contain provisions which are directly discriminatory. However, many collective bargaining agreements continue to contain provisions with an indirect discriminatory impact on female employees’ pay. Such indirectly discriminatory provisions include job evaluation and pay systems that are neutral on their face value, but appear to "structurally" disadvantage female workers. To explain the way by which a provision can indirectly discriminate women, we can for instance refer to cases where collective bargaining agreements, also at firm level, could fix performance based wages linked to the actual attendance at work, without considering maternity/family leaves. Some countries have established a monitoring system, implying that collective bargaining agreements are analyzed to detect discriminatory provisions. Most EU Member States do not have legal measures in place that induce or oblige the social partners to actively address GPG in collective agreements. In a very limited number of countries the social partners are encouraged by law to adopt measures to tackle pay discrimination. A notable exception is the French Génisson law of 9 May 2001, which has introduced an obligation for the social partners to negotiate on occupational gender equality.
B. Employers are also obliged to comply with the legislative provisions aimed at tackling GPG. This obligation serves as an indirect way to realize equal pay for men and women in the workplace. After all, the threat of legal action by individuals and the prospect of significant periods of back pay in the event that they succeed may incite employers to scrutinize their pay policies on their own initiative. Some countries have also adopted legislative instruments that specifically oblige/encourage employers to address the issue of the gender pay gap in a more active way. Such instruments include the compulsory delivery of gender-specific pay statistics. Another example is the compulsory delivery by employers of an (anonymous) report showing salaries paid to both women and men, but often also enumerating other elements like the placement of women and men in different jobs, an analysis of the job classification system, and pay and pay differentials of women’s and men’s jobs. Such reports may be examined by a monitoring body, and must sometimes be published and/or delivered to workers’ representatives as well. In Finland, France, and Italy, such reporting systems have already been introduced. Sometimes large employers are obliged by law to adopt policy instruments that define how gender equality, including pay equality, will be achieved in the company. Such instruments are known by different names like ‘pay mapping’ (Finland) or ‘equal opportunity plans’. In accordance with our investigation, that is aimed at highlighting law and case law, we have not found statistical evidences of the direct impact of these measures in tackling the GPG.

C. Procedures before national equality bodies appear to be a good alternative to bringing the case before the ordinary courts. Those procedures are generally free of charge and bringing the claim is usually straightforward and not formalistic. Sometimes the claim can even be brought on behalf of the employee, e.g. by the ombudsperson. Moreover, the national equality bodies have substantial know-how in discrimination matters, which makes them particularly well-equipped institutions to deal with cases of pay discrimination on the basis of sex.

D. The scope of comparison in pay discrimination claims (what is work of equal value?) is not laid down in statutory law and, therefore, is problematic. Most countries, for example, do not accept a hypothetical comparator and only allow comparisons within the same company. Finding a real-life comparator, as opposed to the mere hypothetical comparator, proves to be particularly difficult in highly segregated occupations, where fellow workers of the opposite sex are rare or even non-existent. In France, however, the Cour de Cassation stated in 2009 that the existence of discrimination does not necessarily imply a comparison with other workers, thus admitting a very broad scope of comparison, possibly also with a hypothetical comparator.
Chapter 3

I. Gender Pay Gaps and National Legal Systems

We will base our analysis upon an overview of seven Members States (Italy, France, Germany, the Netherlands, Finland, Romania, and Spain) provisions transporting EU Directives dealing with GPG and discrimination.

Key findings

The low reported gaps in countries with low female employment rates, such as Italy, reverberate a selection effect whereby employed women are more likely to be highly educated and with strong attachment to the labour market. These low pay gaps may increase as more women enter low paid service jobs.

The newest data on the unadjusted gender pay gap in 2011 (Eurostat 2013) show that in EU the gender pay gap is 16.2; in Italy 5.8; in France 14.7; in Germany 22.2; in The Netherlands 17.9; in Finland 18.2; in Romania 12.1; and in Spain 16.2.

The EU (27) provisional value in 2009 being 17.1 %, the differences among the countries studied are large, varying from a reported gender pay gap of around 10 % in, e.g., Poland and Portugal, to a pay gap of around 26 % in, e.g., the Czech Republic. It is interesting to note here, however, that low national gender pay gap levels do not necessarily mirror a good position of women workers in the national labour market concerned. In Turkey, for example, the negative gender pay gap of - 2.2 % in 2010 could be explained by the fact that female participation in the labour market is still extremely low in this country. Similar situations are reported in, e.g., the FYR of Macedonia, Malta and Poland. These countries tend to focus on policies to encourage women to enter the labour market, rather than on policies to address the gender pay gap. A number of countries (including Cyprus, Romania and Spain) show a gradual downward trend in the gender pay gap over the last few years. In Cyprus and Romania, such a trend has allegedly been triggered by the introduction of national minimum wages or the increase of such minimum wages, which is said to be to the advantage of occupational categories in which women are overrepresented (Foubert, 2011).

We chose these Members State because of the peculiarities of their gender pay gap in the period 2002-2010:

- Italy (lowest reported gaps 5.5 in 2010 – low female employment rates ),
- France and Spain (medium reported gaps 16.0 and 16.7 in 2010),
- the Netherlands and Finland (high reported gaps 18.5 and 19.4 in 2010) two countries with a long tradition in developing measures to ensure equal pay;
- Germany (gender pay gap: 23.1 in 2010) and
- Romania (former Communist state) with a reported gap of 12.5 in 2010.
This analysis is based on the following data (Smith 2012):

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<tr>
<td>Italy</td>
<td>In 2006 4.4; in 2007 5.1; in 2008 4.9; in 2009 5.5; in 2010 5.5; in 2011 5.8</td>
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<tr>
<td>France</td>
<td>In 2006 15.4; in 2007 16.9; in 2008 17.1; in 2009 15.5; in 2010 16.0; in 2011 14.7</td>
</tr>
<tr>
<td>Germany</td>
<td>In 2006 22.7; in 2007 23.0; in 2008 23.2; in 2009 23.1; in 2010 23.1; in 2011 22.2</td>
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<tr>
<td>The Netherlands</td>
<td>In 2006 23.6; in 2007 23.6; in 2008 19.6; in 2009 19.2; in 2010 18.5; in 2011 17.9</td>
</tr>
<tr>
<td>Finland</td>
<td>In 2006 21.3; in 2007 20.0; in 2008 20.0; in 2009 20.1; in 2010 19.4; in 2011 18.2</td>
</tr>
<tr>
<td>Romania</td>
<td>In 2006 7.8; in 2007 12.7; in 2008 9.0; in 2009 8.1; in 2010 12.5; in 2011 12.1</td>
</tr>
<tr>
<td>Spain</td>
<td>In 2006 17.9; in 2007 17.1; in 2008 16.1; in 2009 16.7; in 2010 16.7; in 2011 16.2</td>
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Several studies have been conducted on the national level to try to find out the main reasons for the gender pay gap. Such explanations reduce the ‘unadjusted’ gender pay gap to the ‘corrected’ gender pay gap. What is left is allegedly partly due to discrimination. An overview of explanations for GPG is below (Foubert, 2011).

A. Taking into account the gross salary per hour, a considerable pay gap can be observed between part-time and full-time employees. Such a pay gap, however, is not necessarily the result of directly discriminatory wages, but often a consequence of the fact that part-time jobs are more frequent in low-paid and highly feminized sectors, like e.g. the healthcare and cleaning sectors. Among part-time workers, the gender pay gap is reportedly smaller than when part-timers are compared to full-timers. Part of the gender pay gap can also be explained by the use of fixed-term contracts (with low pay rates), which often seem to be entered into by (young) women.

B. Shorter periods of accumulated professional experience by women, caused by more frequent interruptions to their career paths due to family-related leave, also contribute to the gender pay gap. The number of children would clearly increase the gender pay gap in each sector, occupation and level. The financial disadvantage women suffer is double. First, during such interruption or leave a
woman feels the direct impact as she receives no wages, a lower wage, or a (low) social security benefit during this period. Second, her choice may also produce an indirect consequence: she may be excluded from benefits related to employment, for instance, benefits related to the lack of absence despite justification, or be disadvantaged regarding entitlement to social security benefits.

C. Women and men tend to predominate in different sectors (i.e. horizontal or sectorial segregation). Women often work in sectors where their work is valued lower and is consequently lower paid than those dominated by men. Recurrent examples are the healthcare, education and public administration sectors.

D. Within the same sector or company, women predominate in lower valued and lower paid occupations (i.e. vertical or occupational segregation, to be connected with the ‘glass ceiling’). Women are frequently employed as administrative assistants, shop assistants or low-skilled or unskilled workers. Many women work in low-paying occupations, for example, cleaning and care work. Women are underrepresented in managerial and senior positions.

II. National antidiscrimination law regimes

Focusing on national Labour/Industrial Relations Legal Systems, we found the following outcomes. In general, as a preliminary note, we did not find a formula useful for courts, collective bargaining, inspectorate, equality bodies, etc. to be probative of discriminatory intent.

The three analytical steps in a systemic disparate treatment [i.e. (i) the actual treatment of the plaintiff group/person must be determined (e.g. how is the GPG for “those” women employed in “that” firm?) (ii) The ideal treatment of the plaintiff group/person must be determined (i.e. the treatment one would expect in the absence of discrimination), (iii) The actual and ideal treatment must be compared to determine whether any difference is large enough to determine an inference of discrimination/GPG] are not used by courts and/or private/public authorities.

Italy

The general legal framework regarding gender equality includes the Constitution, the Workers Fundamental Rights Code (i.e. Statuto dei lavoratori) and the Law no. 198/2006 regarding equal opportunities for men and women (i.e. “Codice delle pari opportunità tra uomo e donna”). This frame will be hereinafter labelled as “the legal frame.”

The legal frame states the gender equality related to employment, pay equality principle, remedies/sanctions against discrimination.

Equal pay is a direct consequence of Article 37 of the Italian Constitution and of the EU Directives implemented at national level. The Law no. 198/2006 is the code regulating equal opportunities and equal treatment applicable in the public and private sector, in labour, education, health, culture, politics, decision making, access to goods and services and any other independent activity.
No significant case law can be analyzed in GPG viewpoint.

In particular, with reference to THE MEASURES PROPOSED IN THE BAUER REPORT- we focused on three Recommendations (No. 1, 4 and 8):

1. **The definition of GPG** - This is not fixed as such in the Italian legislation. The concept of discriminatory treatment is defined and includes not only the differences, exclusions, restrictions or preferences aimed at affecting equal rights but also any active or passive treatment which generates, favours or differentiates without justification or protects an unjust or degrading treatment of a person, group of persons or community. As such, it may be argued that GPG represents an indirect consequence of a discriminatory treatment and is sanctioned accordingly. The legal frame establishes the equal opportunities and treatment for men and women and include non-discriminatory access to equal income for equally valued work. No distinction is made between gross and net incomes. The Italian Supreme Court held that a firm level collective bargaining could states salary items on the top of minimum salary exclusively limited to women (Supreme Court no. 1444 of March 5, 1986).

2. **Direct and indirect pay discrimination** – The legal frame states the definitions of direct and indirect discrimination. It is in line with EU directives. The legal frame expressly states that any discriminatory treatment, either direct or indirect, based on gender, in relation to the establishment and the award of salary is strictly forbidden. No significant case law regarding direct and indirect pay discrimination is publicly available because no legal action has been sued for direct and indirect pay discrimination.

3. **Remuneration** - The collective bargaining fixes salary to be the consideration of the work performed by the employee based on its job level. Salary includes base salary, indemnities, bonuses and any similar additional payments. In this regard no discrimination principle is widely held by case law.

4. **Pension gap** – The gap was related to the old age pension scheme, given that women could get pension at the age of 50. The Commission considered such treatment not in line with EU legal frame. Case C 46/07 Commission [2008], states that by “maintaining provisions under which the age at which officials [i.e. civil servants] have the right to receive the old-age pension varies according to whether they are men or women, the Italian Republic has failed to fulfil its obligations under Article 141 EC.” The Italian pension scheme for civil servants and other public sector workers provides for a normal retirement age of 60 years for women and 65 years for men. Taking the view that the scheme is in fact discriminatory on grounds of sex, as far as the right to receive the old-age pension at different ages is concerned, the Commission initiated proceedings for failure to fulfil obligations against Italy for infringement of Article 141. EC, which provides that each Member State is to ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied. The Commission’s action having been brought before it, the Court
considered whether the old-age pension constitutes pay within the meaning of Article 141 EC. The first subparagraph of Article 141(2) provides that pay means the ordinary basic or minimum wage 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. First of all, the Court held that civil servants who benefit from the pension scheme at issue constitute a specific category of workers, owing to their employment relationship with the State, other bodies or public employers. In addition, the pension paid under that scheme is directly linked to the worker’s length of service and its amount is calculated on the basis of the worker’s final salary. The Court concluded from this that the entitlement in question is to be regarded as pay within the meaning of Article 141 EC. The Court pointed out that Article 141 EC prohibits any discrimination between men and women in relation to pay, whatever the arrangements giving rise to such inequality. Imposing an age condition which differs according to the sex of the person concerned in respect of the grant of a pension constituting pay is therefore contrary to that provision. The Court went on to reject the justification put forward by Italy. Although Article 141 EC allows the Member States to maintain or adopt measures providing for specific advantages intended to prevent or compensate for disadvantages in professional careers in order to ensure full equality between men and women in working life, it cannot be inferred from this that that provision permits the imposition of such an age condition which differs according to the sex of the person concerned. The national measures covered by that provision must contribute to helping women to carry on their professional life on an equal footing with men. However, the imposition of an age condition which differs according to the sex of the person concerned in relation to retirement is not capable of compensating for disadvantages to which the careers of female civil servants are exposed by helping women in their professional life or by making up for the problems which they may face in their professional career.

5. **Work treated as equal** – The legal frame establishes that equal opportunities and equal treatment for men and women include non-discriminatory access to equal income for equally valued work. Significant case law held this principle.

6. **Work of the same value** – The legal frame that work of the same value represents a remunerated activity which, by comparison with a different activity, based on the same indicators and measurement units, reflects using similar or equal knowledge and professional skills and an equal or similar volume of intellectual and/or physical effort. No significant case law is available, because no legal action has been commenced for this kind of discrimination.

7. **Employer** - The payer of the salary, normally the employer, is in general also liable for arising inequalities.

8. **Professions and collective agreements** - Professions and occupations are fixed by collective bargaining at national level. Different guidelines regarding the relation between professions and collective agreements may be included in codes
of ethics. Significant case law is available in relation to the guidelines or manner in which different jobs are compared in court.

9. **Accessibility to women of legal remedies against breach of the principle of equal pay. The role of equality bodies in this respect.** - The legal frame states the remedies available to employees in case of a gender discrimination (addressing the employer, competent labour inspectorate, equality body or competent court). This attribute is available to all employees, either men or women so the same degree of accessibility to antidiscrimination remedies is provided both to men and women. With respect to equality public bodies, the National Council for Equal Treatment (the “NCET”) is the national independent body established with the purpose of protecting against discrimination. The NCET has also branches at local/regional level. The NCET has the power to activate inspection. Any person who considers itself discriminated has the option to address the NCET which shall investigate the case and pronounce a decision. As to remedies, the damages compensation in favor of injured person may be connected to three different actions: (i) the NCET may commence an action before the competent court, (ii) as well as unions may file action before the competent court, (iii) the injured worker in any case can file action before the competent court. No significant case law is publicly available, because the NCET has not commenced any legal action regarding gender discrimination.

10. **The mandate of equality public bodies/agencies and the reinforcement of their legal powers to initiate investigations and impose sanctions for more efficiency of legal remedies** - the NCET has powers to perform investigations and address discrimination issues. As such, the NCET has the power to propose initiation of actions and special means for protection of discriminated persons, to propose the adoption of legal norms in the field of discrimination, to give notice on normative acts, to collaborate with public authorities, legal and natural persons in view of ensuring the prevention, sanctioning and elimination of discrimination, to supervise the application and observance by stakeholders of legal norms related to discrimination and to receive and solve petitions filed by discriminated persons. The procedure of filling a petition before the NCET is not mandatory, discriminated person having the option to address the claim directly to the courts of law or to the labour inspectorate. Procedures before NCET or labour inspectorate are not subject to any tax.

11. **The impact strengthening the accessibility of collective redress on the accessibility of legal remedies for women** - Unions and associations can commence action and file petition against any forms of discrimination. See above. In Trentino Alto Adige a new form preventive action was established - http://www.trentino.familyaudit.org/- it is related to measures/procedures that allow employers to be continuously checked as employers in line with antidiscrimination law.

12. **Sanctions** - The legal frame states that the breach of the provisions regarding anti-discrimination triggers disciplinary, material, civil or criminal liability, as the
case may be. As mentioned above, labour inspectorates are competent to acknowledge the breach of non-discrimination principles in the area of employment and to apply sanctions. However, we are not aware of any investigation performed by the labour inspectorates with respect to gender pay gap because no case of infringement of the non-discrimination principles has been detected. The persons considering that have been discriminated can also file a claim in court for payment of damages. Sanctions for discriminatory treatment include fines up to Euro 50,000 plus imprisonment (max 6 months).

13. **Intervention carried out at the EU level** - The EU Formula could allow unions and associations to better protect against workplace discrimination.

**Romania**


The above legal norms state gender equality upon employment and no discriminatory treatment in relation to work related matters. In practice, generally, equal working conditions are remunerated with same salaries both for men and women. However, as per a report issued by the National Institute of Statistics ("NIS") in 2008, gap salaries between men and women are determined by different levels of qualification and hierarchical positions. As per the same report, there has been a decrease in the gender gap pay in the latest years from 24% in 1996, to 17.6% in 2003 and to 11.1% in 2007. (Source: National Institute of Statistics – Romania in numbers, Statistic breviary, May 2008, www.insse.ro).

Further on, as per NIS Statistic Year Book for 2011, the average gross and net nominal monthly earnings, by sex, was in 2005: gross 1,037 Lei (men) and 891 Lei (women) and net 796 Lei (men) and 689 Lei (women); in 2010: gross 2,007 Lei (men) and 1,786 Lei (women) and net 1,466 Lei (men) and 1,308 Lei (women) (Source: National Institute of Statistics – Statistic Year Book for 2011, Chapter 4 – Population income, expenditure and consumption, www.insse.ro).

In addition to the above, please note that, as per public available information quoting Mercer Salary Study (2012), based on a general average, the gender pay gap was of almost 11% in favour of men for 2012.

Equal pay is a consequence of implementing non-discriminatory measures for citizens. It derives from the core values of Romania, including rule of law, dignity of the human being, guaranteed rights and liberties for citizens and free development of personality. Equal opportunities and equal treatment should be applied in public and private sector,
in labour, education, health, culture, politics, decision making, access to goods and services and any other independent activity.

In particular, with reference to THE MEASURES PROPOSED IN THE BAUER REPORT— we focused on three Recommendations (No. 1, 4 and 8).

1. **The definition of GPG** - This is not fixed as such in the Romanian legislation. The concept of discriminatory treatment is defined and includes not only the differences, exclusions, restrictions or preferences aimed at affecting equal rights but also any active or passive treatment which generates, favours or differentiates without justification or protects an unjust or degrading treatment of a person, group of persons or community. As such, it may be argued that GPG represents an indirect consequence of a discriminatory treatment and is sanctioned accordingly. Law no. 202/2002 establishes the equal opportunities and treatment for men and women and includes non-discriminatory access to equal income for equally valued work. No distinction is made between gross and net incomes.

2. **Direct and indirect pay discrimination** - Law no. 202/2002 states the definitions of direct and indirect discrimination. It is in line with EU directives. The Labour Code expressly states that any discriminatory treatment, either direct or indirect, based on gender, in relation to the establishment and the award of salary is strictly forbidden. No significant case law regarding direct and indirect pay discrimination is publicly available because no legal action regarding direct and indirect pay discrimination has been commenced before Romanian courts.

3. **Remuneration** - The Labour Code defines salary to be the consideration of the work performed by the employee based on its employment agreement. Salary includes base salary, indemnities, bonuses and any similar additional payments. Thus, the benefits in cash and in kind are also assimilated to salary income. The employer must award a gross monthly salary at least equal to the minimum base monthly salary established at the level of Romania (currently set at RON 750, which will be increased at RON 800 starting with 1 July 2013). No significant case law is publicly available.

4. **Pension gap** - No GPG statistics are currently available free of charge. Currently, the retirement age is differentiated between men and women. Thus, the standard retirement age is of 65 years for men and 63 years for women. After retirement, individuals can voluntarily conclude pension insurance under the mandatory social security system, so that they can continue to contribute in the Romanian system for pension benefits. There are 3 pension pillars in Romania as follows: 1st Pillar - Public pension system; 2nd Pillar – Privately administrated pension fund system. The goal is to provide a private pension, aside and supplementary to the pension provided by the public system pension, on the basis of collecting and investing, for the participants, a percentage of the individual contribution to the social insurance. The 2nd Pillar is mandatory for persons up to 35 years and voluntary for persons between 35 – 45 years old. 3rd Pillar – Private pension system.
5. **Work treated as equal** - Law no. 202/2002 establishes that equal opportunities and equal treatment for men and women include non-discriminatory access to equal income for equally valued work. No significant case law is publicly available, because no legal action has been commenced for this kind of discrimination.

6. **Work of the same value** - Law no. 202/2002 states that work of the same value represents a remunerated activity which, by comparison with a different activity, based on the same indicators and measurement units, reflects using similar or equal knowledge and professional skills and an equal or similar volume of intellectual and/or physical effort. No significant case law is publicly available because no legal action has been commenced for this kind of discrimination.

7. **Employer** - The Labour Code defines the employer as any individual or legal entity which is able, as per the law, to employ personnel based on an employment agreement. A legal entity may enter into employment agreements as of the moment of its incorporation. In order to prevent and eliminate any discriminatory behaviours based on gender employers are under the obligation to fix in their internal rulebooks and policies provisions prohibiting discrimination and sanctions addressing discriminatory actions. Also, the employer is responsible to set up the remuneration structure and level of salary package. According to the Romanian law, the Romanian employer has the obligation to pay the salary income and to withhold, wire and pay all the related tax and social contributions liabilities due from both employee and employer. No significant case law is publicly available, because no legal action concerning the breach of these obligations has been commenced.

8. **Professions and collective agreements** - Professions and occupations are established based on the Romanian Classification of Occupations. In compliance with Romanian legislation, collective agreements are not concluded based on the specificity of a profession, but by taking into consideration the main economic activity performed by an entity. As such, collective agreements are concluded at the level of the unit, groups of units and sectors of activity. Different guidelines regarding the relation between professions and collective agreements may be included in codes of ethics. No significant case law is publicly available in relation to the guidelines or manner in which different jobs are compared in court, because no legal action has been commenced for this kind of discrimination.

9. **Accessibility to women of legal remedies against breach of the principle of equal pay. The role of equality bodies in this respect.** - Law no. 202/2002 provides the remedies available to employees in case of a gender discrimination (addressing the employer, competent labour inspectorate, equality body or competent court). This attribute is available to all employees, either men or women so the same degree of accessibility to antidiscrimination remedies is provided both to men and women. Law no. 202/2002 provides that any claims before the courts of law by persons invoking discrimination issues, including
women, are exempted from payment of judicial stamp fee. Employers’ breach of obligations established by applicable legislation in order to avoid gender discrimination in the area of employment is acknowledged by the labour inspectorates who are authorized to apply sanctions. With respect to equality public bodies, the National Council against Discrimination (the “NCD”) is the national independent body established with the purpose of implementing equality amongst citizens. Any person who considers itself discriminated has the option to address the NCD which shall investigate the case and pronounce a decision. If the claimant is not satisfied with the results of the NCD investigation, he or she may file action before the competent court. No significant case law is publicly available, because the NCD, like the others European Equality Bodies, do not have the power to issue binding decisions.

10. The mandate of equality public bodies/agencies and the reinforcement of their legal powers to initiate investigations and impose sanctions for more efficiency of legal remedies - Based on the current legislative framework, the NCD already has the required powers to perform investigations and address discrimination issues. As such, the NCD has the power to propose initiation of actions and special means for protection of discriminated persons, to propose the adoption of legal norms in the field of discrimination, to give notice on normative acts, to collaborate with public authorities, legal and natural persons in view of ensuring the prevention, sanctioning and elimination of discrimination, to supervise the application and observance by stakeholders of legal norms related to discrimination and to receive and solve petitions filed by discriminated persons. The procedure of filling a petition before the NCD is not mandatory, discriminated person having the option to address the claim directly to the courts of law or to the labour inspectorate. Procedures before NCD or labour inspectorate are not subject to any tax. More efficiency would be provided to the procedures available for counteracting discriminatory behaviours if the role of NCD would be stressed and its presence would be made more visible in Romanian society. No significant case law is publicly available because the NCD, like the others European Equality Bodies, do not have the power to issue binding decisions.

11. The impact strengthening the accessibility of collective redress on the accessibility of legal remedies for women - Romania has implemented the European legal framework for the fight against discrimination and women have free access to the remedies against discriminatory behaviour. However, the available remedies in this field are not advertised to the large public. Regardless of the effect that the accessibility of collective redress would have, it is recommended to stress their existence via mass media and raise awareness of the means available for women against gender discrimination. It is also indicated that equality bodies’ involvement in independent investigations increases.

12. Sanctions - Law no. 202/2002 provides that the breach of the provisions regarding anti-discrimination triggers disciplinary, material, civil or criminal liability, as the case may be. As mentioned above, labour inspectorates are
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competent to acknowledge the breach of non-discrimination principles in the area of employment and to apply sanctions. However, we are not aware of any investigation performed by the labour inspectorates with respect to gender pay gap. The persons considering that have been discriminated can also file a claim in court for payment of damages. Under Romanian laws, sanctions for discriminatory treatment include fines up to RON 100,000 (approx. EUR 22,000). Increase of fines for employers could have an increased prevention effect on their treatment of gender pay gap. However, since salaries are confidential proof of gender discrimination regarding salary is difficult.

13. **Intervention carried out at the EU level** - Romania has implemented the general European legal framework aiming to decrease gender discrimination. As such, Romania ensures a various range of measures to tackle with discrimination issues. Further legislative action at EU level would increase the confidence of Romanian citizens in the means available against discrimination, provided that these amendments address current existing difficulties. Such difficulties in legislation consist mainly in the lack of information on salary gap and public awareness of the existing rights.

**Germany**

The general legal framework regarding gender equality includes the General Equal Treatment Act [referred to as “GETA” in the following] (Allgemeines Gleichbehandlungs-gesetz). It deals with the issue of equal gender pay. Under its sections 7 and 1 generally any discrimination due to a person’s gender is prohibited. This does according to section 2 also include payment conditions. However, despite these provisions there is still a gender pay gap of approximately 22 % gross and 8 % net. There are several causes that justify the persistent GPG, such as the large number of women who work part-time, the fact that women often enter lower-paying fields. As a result, in May 2012 some political parties brought in a proposal for new legislation promoting equal pay of women. However, no new legislation has been enacted since the necessary number of votes was not achieved. Accordingly, for the time being the above mentioned provisions remain the relevant regulations when dealing with the question of equal pay.

In particular, with reference to THE MEASURES PROPOSED IN THE BAUER REPORT,-we focused on three Recommendations (No. 1, 4 and 8).

1. **The definition of GPG - GPG**, when translated into German, is a common term to the public conscience in Germany. In the field of law, the term cannot be found to describe a concept. It is rather a statistical value referred to in the public discussion especially by lobbyists. A difference between gross and net GPG does not apply in regard to public contributions or taxes. Rather, in Germany these terms are used to describe different forms of pay gaps. The gross GPG states the pay differences between men and women in general. The net GPG also states pay differences but is calculated on another basis since structural differences that inherently lead to pay differences are considered, e.g. comparability of positions, qualification, periods of unemployment and professional experience/
background, so that the resulting pay difference is lower (than the one resulting under the gross GPG approach).

2. **Direct and indirect pay discrimination** - Direct and indirect pay discrimination is a familiar concept to German legislature and in general also prohibited under the GETA.

3. **Remuneration** - The GETA approaches any kind of measurable unequal treatment at work so that work-related financial and other benefits are covered.

4. **Pension gap** - The pension gap between men and women is an issue of specific legal relevance. In recognition of the actual extent of the difference, legal provisions have been put on to balance women’s drawbacks in pension benefits due to lower contributions.

5. **Work treated as equal** - There shall be no difference between the same tasks when executed by men or women. Any gender-based discrimination to this regard may be subject to a claim for compensation.

6. **Work of the same value** - Work of the same value is a prerequisite to assess whether there is an unequal treatment since the positions in question must be comparable.

7. **Employer** - The payer of the salary, normally the employer, is in general also liable for arising inequalities.

8. **Professions and collective agreements** - To determine whether discrimination exists, the circumstances in question must be comparable. As long as this is the case, also other collective agreements/professions could be used.

9. **Accessibility to women of legal remedies against breach of the principle of equal pay. The role of equality bodies in this respect**. - The remedies are provided by law and equally accessible to men and women. Possible claims could be based on these remedies. Equality bodies provide help to this end, not only in the case of proceeding but also to avoid claims by finding a common solution.

10. **The mandate of equality public bodies/agencies and the reinforcement of their legal powers to initiate investigations and impose sanctions for more efficiency of legal remedies** - The effects of enhancing the powers of equality bodies cannot easily be foreseen. Concerning the legal remedies there could be the effect that women would take advantage of that instrument more often. As for now, the function of the equality bodies is limited to advisory activities for the main part. Investigational competences could significantly increase effectiveness when proceeding against unequal treatment. So far, specific sanctions beyond compensation do not exist at all in the field of unequal treatment. The body’s authority to impose sanctions would highly raise
European Added Value of applying the principle of equal pay

11. **The impact strengthening the accessibility of collective redress on the accessibility of legal remedies for women** - The possible impact can hardly be predicted. The role of equality bodies could be to inform about redress and remedies and provide more extensive help and guidance on that issue.

12. **Sanctions** - Under the GETA compensation to the victim is provided. The equality bodies offer support to this end, also in the case of claims. However, no provisions concerning penalties exist. Moreover, although there has been legislative effort, no obligation for the employer exists to analyze or evaluate wage statistics disaggregated by gender. Failure of which does not lead to administrative liability. Presently, there are no penalties for failing to grant equal pay.

13. **Intervention carried out at the EU level** - In general, the existing provisions are sufficient to ensure equal pay but lack adequate proficiency to help overcome social biases in the field of employment. In 2008, the Commission started proceeding against Germany for an insufficient implementation of the corresponding directives. A broader approach on EU level could, however, lead to the introduction of penalties. Most provisions of the Directive have already been adopted under German law. However, since penalties and administrative fines do not exist they could be affected by a revision of the directive.

**Finland**

The general legal framework regarding gender equality includes the Finnish Employment Contracts Act (55/2001, as amended), the Finnish Equality Act (609/1986, as amended) and the Finnish Constitution. This frame will be hereinafter labelled as “the legal frame.”

The legal frame states the gender equality related to employment, pay equality principle, remedies/sanctions against discrimination.

The Finnish Equality Act prohibits pay discrimination on the basis of sex or gender. The Act mostly deals with differences in pay between people working for the same employer. Some of these differences may be acceptable under the Finnish Equality Act, others may be unfounded and therefore in violation of the Act. According to the Finnish Equality Act, employers may be found guilty of discrimination if they apply pay or other terms and conditions of employment in such a way that results in one or more employees finding themselves in a less favourable position than one or more other employees of the opposite sex while performing the same work or work of equal value for the same employer. This provision can be found in Section 8(1)(3) of the Finnish Equality Act.

Equal pay is a direct consequence of Article 6 of the Finnish Constitution and of the EU Directives implemented at national level. The Non-Discrimination Act (21/2004, as amended) is the code regulating equal opportunities and equal treatment applicable in
public and private sector, in labour, education, health, culture, politics, decision making, access to goods and services and any other independent activity.

The average difference between men’s and women’s pay in Finland is around 20 percent. There are many reasons that explain the persistence of GPG in Finland: the fewer number of women in leadership positions; the responsibility of children unevenly distributed in families, the fact that women often work in positions that are lower paid than men. This figure is based on the average monthly earnings of men and women for regular working hours. The difference in pay is not the same as pay discrimination under equality legislation. The objective of the equal pay policy ratified by the Cabinet of Prime Minister Matti Vanhanen in February 2006 is to reduce the 20% difference in pay to 15 % by 2015. In the most recent round of agreements, Prime Minister Vanhanen’s second Government provided local authorities with an increased central government transfer to remedy the shortfall in the pay occupational groups where women were the majority. This raise was targeted at skilled occupational groups with a majority of women whose pay did not correspond to the demands of their jobs. Another aim is to support women’s career paths and to increase the number of woman as managers. The Government has also included the gender equality policy in some programmes, aimed at improving the quality of working life.

No significant case law can be analysed in GPG viewpoint.

In particular, with reference to THE MEASURES PROPOSED IN THE BAUER REPORT,- we focused on three Recommendations (No. 1, 4 and 8).

1. **The definition of GPG** - This is not fixed as such in the Finnish legislation. The concept of discriminatory treatment is defined and includes not only the differences, exclusions, restrictions or preferences aimed at affecting equal rights but also any active or passive treatment which generates, favours or differentiates without justification or protects an unjust or degrading treatment of a person, group of persons or community. As such, it may be argued that GPG represents an indirect consequence of a discriminatory treatment and is sanctioned accordingly. The legal frame establishes the equal opportunities and treatment for men and women and includes non-discriminatory access to equal income for equally valued work. No distinction is made between gross and net incomes.

2. **Direct and indirect pay discrimination** – The legal frame states the definitions of direct and indirect discrimination. It is in line with EU directives. The legal frame expressly states that any discriminatory treatment, either direct or indirect, based on gender, in relation to the establishment and the award of salary is strictly forbidden. No significant case law regarding direct and indirect pay discrimination is available.

3. **Remuneration** - The collective bargaining fixes salary to be the consideration of the work performed by the employee based on i.e. its job level. Salary includes base salary, indemnities, and any similar additional payments. In this regard no discrimination principle is widely held by case law.
4. **Pension gap** – Pension gap follows the principles of the salary gap between the genders.

5. **Work treated as equal** – The legal frame establishes that equal opportunities and equal treatment for men and women include non-discriminatory access to equal income for equally valued work. Significant case law held this principle. There are a couple of preliminary rulings of the Finnish Supreme Court on the work of same value. The case 2009:78 is about the renewal of the salary classes of the judges. Four judges (three men and one woman) claimed that they were discriminated against because of their gender as they were placed in a lower salary class, whereas some judges of an opposite gender and with less experience were placed in the higher salary class. The Supreme Court ruled that the assumption of discrimination did not exist. In case 1992:18 the employees doing the same work were differently paid. The employer was bound to a collective agreement which was applicable to the employment agreement of the better paid employee. The Supreme Court ruled that it was not reasonable to require that the employer correct the gap quickly. The difference between the salaries was due to a reason not related to gender.

6. **Work of the same value** – The legal frame that work of the same value represents a remunerated activity which, by comparison with a different activity, based on the same indicators and measurement units, reflects using similar or equal knowledge and professional skills and an equal or similar volume of intellectual and/or physical effort. See above for case law.

7. **Employer** – The payer of the salary, normally the employer, is in general also liable for arising inequalities.

8. **Professions and collective agreements** - Professions and occupations are fixed by collective bargaining at national level. Different guidelines regarding the relation between professions and collective agreements may be included in codes of ethics. Significant case law is available in relation to the guidelines or manner in which different jobs are compared in court. Many collective agreements include provisions on promotion of equal salaries. In the companies with at least 30 employees it is required to draft a gender equality plan, which shall be handled in the industrial co-operation procedure.

9. **Accessibility to women of legal remedies against breach of the principle of equal pay. The role of equality bodies in this respect.** – The legal frame states the remedies available to employees in case of a gender discrimination (addressing the employer, competent labour inspectorate, equality body or competent court). This attribute is available to all employees, either men or women so the same degree of accessibility to antidiscrimination remedies is provided both to men and women. With respect to equality public bodies, the National Authority for Equal Treatment (the “NAET” – Ombudsman for Equality) is the national independent body established with the purpose of protecting against discrimination. The NAET has the power to activate...
inspection. Any person who considers itself discriminated against has the option to address the NAET which shall investigate the case and pronounce a decision. As to remedies, the damages compensation in favour of injured person may be connected to two different actions: (i) unions may file action before the competent court, (ii) the injured worker in any case can file action before the competent court. No significant case law is publicly available. In Finland, the “NAET” does not normally start the actual proceedings before court, but investigated the matter within the employer. The ombudsman and the central organisations of the unions are entitled to take the inequality question before equality board, but the individual employee normally seeks for compensation from the court.

10. **The mandate of equality public bodies/agencies and the reinforcement of their legal powers to initiate investigations and impose sanctions for more efficiency of legal remedies** – The Finnish Equality Board can prohibit anyone who has violated the anti-discrimination provisions of the Finnish Equality Act from continuing or repeating the discriminatory practice. If necessary, the Finnish Equality Board can reinforce the prohibition by imposing a conditional fine. Individuals cannot bring cases to the Finnish Equality Board but must consult the Finnish Ombudsman for Equality instead. The Finnish Ombudsman for Equality can refer cases involving violations of the anti-discrimination provisions of the Finnish Equality Act to the Finnish Equality Board. Confederations of labour market organisations also have the right to bring cases. In order to get compensation, the injured party must take the matter to a court. Compensation is awarded against a claim. Claims for compensation must be lodged with a district court in the place of general jurisdiction of the employer, educational institution, labour market organization or goods or service provider. Claims for compensation must be brought within two years of the violation, except in recruitment cases, where the right to claim compensation expires after one year. The claimant must demonstrate that the employer, goods or service provider, educational institution or labour market organization has violated the prohibition of discrimination as laid down in the Finnish Equality Act. This establishes a so-called presumption of discrimination. In order to refute the presumption of discrimination, the defendant must prove that the prohibition of discrimination on the basis of sex or gender has not been violated and that the action in question was attributable to a justifiable factor not connected to sex or gender. When an action for compensation on the basis of discrimination has been brought and more than one person is entitled to demand compensation on the grounds of the same act or omission, all claims for compensation must be dealt with in the same proceedings whenever possible. The right to claim compensation is not lost just because another party has already brought a claim to a court (Finnish Equality Act, Section 12, Claims for compensation).

11. **The impact strengthening the accessibility of collective redress on the accessibility of legal remedies for women** – Unions and associations can commence action and file petition against any forms of discrimination. See above.
12. **Sanctions** - The legal frame states that the breach of the provisions regarding anti-discrimination triggers disciplinary, material, civil or criminal liability, as the case may be. As mentioned above, labour inspectorates are competent to acknowledge the breach of non-discrimination principles in the area of employment and to apply sanctions. However, we are not aware of any investigation performed by the labour inspectorates with respect to gender pay gap. The persons considering that have been discriminated can also file a claim in court for payment of damages. Individuals are entitled to compensation if they have been victims of discrimination in the workplace, in educational institutions, in the activities of labour market organizations, or regarding the availability and provision of goods and services. The minimum amount of compensation is Euro 3,240. The minimum amount of compensation may in certain circumstances be reduced, and in some cases it may be waived altogether. The maximum compensation payable in recruitment cases is Euro 16,210. The maximum amount of compensation may be exceeded if this is considered justified in view of the severity of discrimination, for example (Finnish Equality Act, Section 11, Compensation)

**Spain**

The general legal framework regarding gender equality includes laws and constitutional rules. This frame will be hereinafter labelled as “the legal frame”.

The legal frame states the gender equality related to employment, pay equality principle, remedies/sanctions against discrimination.

A recent study from INE (Spanish National Statistics Institute) has concluded that men earn 22.25% more in annual average than women for jobs of same value. The gender pay gap is increasing mainly due to the fact that the Government and the social partners, in the context of the current economic crisis, are paying little attention to the gender pay gap. This means that women earn Euro 5,574,00 less than men in a yearly basis.

No significant case law can be analysed in GPG viewpoint. This means that it is likely that lawful indirect forms of GPG, difficult to be probated, occur.

In particular, with reference to THE MEASURES PROPOSED IN THE BAUER REPORT,- we focused on three Recommendations (No. 1, 4 and 8).

1. **The definition of GPG** - This is not fixed as such in the Spanish legislation. The concept of discriminatory treatment is defined and includes not only the differences, exclusions, restrictions or preferences aimed at affecting equal rights but also any active or passive treatment which generates, favors or differentiates without justification or protects an unjust or degrading treatment of a person, group of persons or community. As such, it may be argued that GPG represents an indirect consequence of a discriminatory treatment and is sanctioned accordingly. The legal frame establishes the equal opportunities and treatment
for men and women and includes non-discriminatory access to equal income for equally valued work. No distinction is made between gross and net incomes.

2. **Direct and indirect pay discrimination** – The legal frame states the definitions of direct and indirect discrimination. It is in line with EU directives. The legal frame expressly states that any discriminatory treatment, either direct or indirect, based on gender, in relation to the establishment and the award of salary is strictly forbidden. No significant case law regarding direct and indirect pay discrimination is publicly available, because no legal action has been commenced before Spanish courts.

3. **Remuneration** - The collective bargaining fixes salary to be the consideration of the work performed by the employee based on its job level. Salary includes base salary, indemnities, bonuses and any similar additional payments. In this regard no discrimination principle is widely held by case law.

4. **Work treated as equal** – The employer must establish an equal retribution for a job of same value, directly or indirectly paid to the employees, both salary or benefits. No discrimination in salary can be made among employees for gender reasons, in any of its elements or conditions. The prohibition of discrimination for men and women means not only direct discrimination, this means different or adverse treatment for a person for gender causes, but also indirect discrimination. This indirect discrimination takes place when a negative impact for a determined gender of employees is derived from a treatment that is formally neutral or non-discriminatory. In this sense, in order to justify an infringement of the principle of equal pay, Spanish case law fixes two requirements that must be taken into account: (i) services effectively rendered, and (ii) existence of objective circumstances not related to gender reasons. Remuneration does not only need to be equal for works in which the same tasks are executed; it must also be equal among works of same value. The Spanish Constitutional Court in its ruling from July, 4 2005 (RTC 2005\182), states that the protection of maternity and female employee’s health must be compatible with her professional rights. In this case, an employee who had been on maternity leave is afterwards evaluated by the company with a lower evaluation than male employees. The court considered that such woman should be evaluated as if never having been on maternity leave. In this sense, there is case law from the Spanish Constitutional Court (October 30, 2010 number 250/2000, rec. 2075/1996), in which the salary distribution in the CBA for food industries was claimed by a specific Trade Union. The salary distribution made a different value for the physical effort made by men and women in works of the same real value. The Court’s ruling understands that no constitutional principle has been infringed upon, as this specific case the two requirements that case law fixes to establish different salaries for works of same value, are met. Physical effort is taken into account for the definition of salaries in the CBA as an exception, as this factor is essential in this specific task, but it must be taken into account combined with other neutral factors. A Supreme Court ruling from March 27, 1996 (EDJ 1722) understands that it is not discriminatory if different salaries exist among
professional categories defined as masculine or feminine, as the works are not considered of same value. In this case, in men the activity is material and of physical effort whereas for women it is a care but light activity. Discrimination occurs when a company does not pay a responsibility extra payment to an employee who has been in maternity leave during the year of the payment, (Superior Court of Justice of Cataluña, form September 13, 2005, ruling number nº 6836/2005). Another case of discrimination was solved by the Superior Court of Justice of Comunidad Valenciana from June 5, 2007, (EDJ 126027). In this case a company did not pay the December extra pay, which was related to the work performance if each worker, to an employee that had been in maternity leave.

5. **Work of the same value** – The legal frame that work of the same value represents a remunerated activity which, by comparison with a different activity, based on the same indicators and measurement units, reflects using similar or equal knowledge and professional skills and an equal or similar volume of intellectual and/or physical effort. See above for case law.

6. **Employer** - The payer of the salary, normally the employer, is in general also liable for arising inequalities.

7. **Professions and collective agreements** - Collective bargaining agreements (CBA) are an example of collective autonomy and have normative force for the signing parties. CBA’s are negotiated among the worker’s representatives (most of the times Trade Unions) and a selection of representatives of employers of the company sector. In this regard, every condition established in the CBA, including salary conditions, is decided by both parties and applied to the companies of the sector in the region applicable. Differences in salary distribution negotiated in the CBA are not automatically an infringement of the principle of equal pay, as each case much be examined and determined as justified or reasonable in the employment sector to be applied. In Spain, apart from the negotiation of CBAs depending on activities, CBAs can be also negotiated and so applicable in every province, autonomous community or for a national application. Even, apart from these, the CBAs can be negotiated by any company with its employees. In this sense, there is no case law regarding different salaries in different CBAs, as every agreement applies to a different sector of activity or region.

8. **Accessibility to women of legal remedies against breach of the principle of equal pay. The role of equality bodies in this respect.** – Spanish Organic Law 3/2007 “Law for the effective equal treatment for men and women”, Article 46 fixes the obligation for employers to state an equality program (i.e. “They are a set of measures, adopted after making a diagnosis of the situation, taken by the company in order to establish the equality of treatment and opportunities for men and women, and designed to eliminate discrimination for gender reasons”). In case of employers with more than 250 employees there is an obligation to draw up an equality program, for the purpose to achieve an equal treatment and equal opportunities between women and men. The equality program must contain the steps to be taken by the employer so that women who find their principle of equality infringed can claim against this. If there isn’t this equality program or it
exists but is not wide enough for fulfilling with the legal requirements, the LISOS (Law of Infringements and Sanctions in Labour) will apply.

9. **The mandate of equality public bodies/agencies and the reinforcement of their legal powers to initiate investigations and impose sanctions for more efficiency of legal remedies** – The Spanish Equality Board can prohibit anyone who has violated the anti-discrimination provisions of the Spanish Equality Act from continuing or repeating the discriminatory practice. If necessary, the Spanish Equality Board can reinforce the prohibition by imposing penalty of a fine.

10. **The impact strengthening the accessibility of collective redress on the accessibility of legal remedies for women** – Unions and associations can commence action and file petition against any forms of discrimination. See above.

11. **Sanctions** – There is an inspection and control system established in the Organic Law 3/2007, LISOS (Law of Infringements and Sanctions in Labour Matters). The LISOS (art. 8.17) fixes a very serious infringement for not drawing up or not implementing the mandatory equality program. Article 40 punishes these infractions with monetary fines: in its minimum degree, from 6,251 to 25,000 Euro; in its medium degree from 25,001 to 100,005 Euro; in its maximum degree from 100,006 to 187,515 Euro. Additionally, any employee who considers that she/he has suffered discrimination can claim before court a request of compensation for damages. The amount will be determined by the judge in any specific case depending on the specific circumstances.

**France**

The general legal framework regarding gender equality includes the laws and the Constitution. This frame will be hereinafter labelled as “the legal frame.”

The legal frame states the gender equality related to employment, pay equality principle, remedies/sanctions against discrimination.

No significant case law can be analyzed in GPG viewpoint, because no legal action concerning gender pay discrimination has been commenced before French Courts. This means that it is likely that awful indirect forms of GPG, difficult to be probated, occur.

In 2008, the Cour de cassation seemed to adopt a restrictive approach to the application of the principle of equal pay for equal work. In this case, the Cour de cassation appeared to refuse to compare women’s work with men’s work when their jobs were not the same. In a decision of July 2010, 39 the Cour de cassation clarified its position. The Cour de cassation held that if the jobs of the workers are different, it is necessary to consider if the jobs are similar (in terms of responsibilities, work, etc.). If they are, then workers of both genders should be paid the same. This decision has been interpreted as reinforcing women’s rights and could lead to better control of the gender pay gap. Another recent decision of the Cour de cassation shows the influence of European legislation (here Directive 92/85) on the interpretation of French rules. The case concerned the dismissal
of a woman just after the end of her maternity leave (two days after) and the name of her successor had already appeared in the organisation chart of the company. For the Cour de cassation, a dismissal during maternity leave is forbidden and an act preparatory to dismissal is also prohibited during maternity leave, and it is necessary to check if the hiring of a worker during this period was aimed at replacing the pregnant woman. This case law relates to gender discrimination in general, but we can consider it in order to evaluate the influence of the EU legislation on the interpretation of the gender equality principles in French legal order.

In particular, with reference to THE MEASURES PROPOSED IN THE BAUER REPORT, we focused on three Recommendations (No. 1, 4 and 8).

1. **The definition of GPG** - This is not fixed as such in the French legislation. The concept of discriminatory treatment is defined and includes not only the differences, exclusions, restrictions or preferences aimed at affecting equal rights but also any active or passive treatment which generates, favours or differentiates without justification or protects an unjust or degrading treatment of a person, group of persons or community. As such, it may be argued that GPG represents an indirect consequence of a discriminatory treatment and is sanctioned accordingly. The legal frame establishes the equal opportunities and treatment for men and women and includes non-discriminatory access to equal income for equally valued work. No distinction is made between gross and net incomes.

2. **Direct and indirect pay discrimination** - The legal frame states the definitions of direct and indirect discrimination. It is in line with EU directives. The legal frame expressly states that any discriminatory treatment, either direct or indirect, based on gender, in relation to the establishment and the award of salary is strictly forbidden. No significant case law regarding direct and indirect pay discrimination is publicly available because no legal action has been commenced before French courts.

3. **Remuneration** - The collective bargaining fixes salary to be the consideration of the work performed by the employee based on its job level. Salary includes base salary, indemnities, bonuses and any similar additional payments.

4. **Pension gap** - The general reform of pensions, aiming to lower the financial burden of pensions, has finally been adopted. The main provision of the reform is the extension of the statutory age for entitlement to an old age pension from 60 to 62, a stage that will be reached gradually. The legal age is when one is able to claim pension, whether all the contributions have been met or not and it is a legal right. The minimum years of contribution which give the right to a full pension are also increased from 40.5 years to 41 in 2012 and to 42 thereafter. The age of entitlement to a full pension (that is, a pension without deductions) will also be progressively raised to 67 from 65. It is obvious that the law will have negative consequences for women. As women are usually working and contributing less than men because of part-time work and because of interruptions to their careers, the increase of the minimum years of contribution will automatically affect
women more than men. However, there are only three measures in the law taking into account the specific situation of women and they are not sufficient to improve the pension situation of women, while the reform could threaten their already inadequate pension rights. First, the daily maternity allowance received by women when they are on maternity leave will be taken into account when calculating their pension rights. Second, the age of entitlement to a full pension will stay at 65 for the parents, born between 1 July and 31 December 1955, of three children. This specific right will be granted to the parent who has interrupted or reduced her/his career to raise their children. A similar rule will apply to the parents of a disabled child.

5. **Work treated as equal** – The idea is that a stricter policy on the gender pay gap will contribute to the reduction of wage differences and thus will have positive consequences on the level of women’s pensions. The labour code already provides an obligation to negotiate on sex equality and equal pay at enterprise level. Thus every year, at company level, the employer has a duty to negotiate with trade unions in order to define the objectives concerning equality between men and women in the enterprise and to design the measures to be implemented in order to attain these objectives. If an agreement is reached, the obligation to negotiate will only apply every three years. The employer must also give information to workers’ representatives on equality. Employers in enterprises with at least 50 employees must present to the works council, each year, a written report on the comparative situation of men and women in the enterprise. The report must contain a comparative analysis between men and women in terms of recruitment, training, qualification, pay, working conditions and balance between professional and private life. The new law on pensions provides that the report must now contain an ‘action plan’ to insure occupational equality between women and men. This plan must be based on clear, precise and operational criteria and must define the objectives for the year to come and the necessary actions to reach these objectives. The most important measure of the pension law is that sanctions are now prescribed for when enterprises employing at least 50 employees have not concluded any agreement on sex equality or have not produced an ‘action plan’.

6. **Work of the same value** – The legal frame that work of the same value represents a remunerated activity which, by comparison with a different activity, based on the same indicators and measurement units, reflects using similar or equal knowledge and professional skills and an equal or similar volume of intellectual and/or physical effort. See above.

7. **Employer** - The payer of the salary, normally the employer, is in general also liable for arising inequalities.

8. **Professions and collective agreements** - Professions and occupations are fixed by collective bargaining at national level. Different guidelines regarding the relation between professions and collective agreements may be included in codes of ethics. Significant case law is available in relation to the guidelines or manner
in which different jobs are compared in court. Many collective agreements include provisions on promotion of equal salaries. In the companies with at least 30 employees it is required to draft a gender equality plan, which shall be handled in the industrial co-operation procedure.

9. Accessibility to women of legal remedies against breach of the principle of equal pay. The role of equality bodies in this respect. – see below

10. The mandate of equality public bodies/agencies and the reinforcement of their legal powers to initiate investigations and impose sanctions for more efficiency of legal remedies – the High Authority against discrimination and for equality (Haute Autorité de Lutte contre les Discriminations et pour l’Egalité (HALDE)). The HALDE is an independent administrative body and it has already demonstrated its capacity to play a very active role in the fight against discrimination. The mandate of the HALDE covers all forms of direct and indirect discrimination prohibited by French legislation or in international agreements ratified by France. It plays an important role in supporting individual claims. It may, at its own initiative, investigate cases of discrimination brought to its knowledge without identifying a concrete victim. It assists any and all individuals who turn to it in identifying discriminatory practices and countering them. It holds investigative powers to enquire into cases. It may demand documents and proof which the victim was unable to obtain; ascertain facts on site; and take evidence from witnesses. It provides advice on legal options and helps establish proof of discrimination. It has the power to refer cases to the court system itself on any discriminatory practice brought to its knowledge.

11. The impact strengthening the accessibility of collective redress on the accessibility of legal remedies for women – Unions are entitled to be informed and consulted on antidiscrimination actions at firm level.

12. Sanctions – The sanction provided by the law is a fine of a maximum of 1 % of the wages due to the workers during the period when an agreement should have applied. A decree must now be adopted to determine more precisely the sanction that will take into account the efforts made by the enterprise to reach equality objectives in terms of GPG and the reasons why no agreement or action plan have been concluded.

**The Netherlands**

The general legal framework regarding gender equality includes the laws also at constitutional level. This frame will be hereinafter labelled as “the legal frame”.

The legal frame states the gender equality related to employment, pay equality principle, remedies/sanctions against discrimination.
No significant case law can be analyzed in GPG viewpoint, because no legal action has been commenced before Dutch courts.

In particular, with reference to THE MEASURES PROPOSED IN THE BAUER REPORT,- we focused on three Recommendations (No. 1, 4 and 8).

1. The definition of GPG - The Gender Pay Gap in the Netherlands is used to express the gross hourly wage of women as a percentage of the gross hourly wage of men.

2. Direct and indirect pay discrimination – The definitions of Direct and indirect discrimination are included in Article 7:646 paragraph 5 of the Dutch Civil Code. The definitions are as follows:
   a. Direct discrimination: if a person is, has been or would be treated differently on grounds of gender than another person in a comparable situation, it being understood that direct discrimination will include discrimination on the grounds of pregnancy, confinement and motherhood.
   b. Indirect discrimination: if an ostensibly neutral provision, criterion or conduct will particularly affect persons of a specific gender in comparison with other persons.

The Equal Treatment Act (Algemene Wet Gelijke Behandeling) and The Equal Treatment (Men and Woman) Act (Wet gelijke behandeling van mannen en vrouwen) contain also both definitions.

3. Remuneration - The term Remuneration has to be interpreted broadly. Case law shows that remuneration includes primary elements of remuneration as wages and secondary elements as holidays, pension and expenses.

4. Pension gap – Pursuant to Article 12a of the Equal Treatment (Men and Woman) Act, employers cannot discriminate between men and women when deciding to participate in a pension scheme, the content of the pension scheme or the way in which the pension scheme is implemented. Please note, that the Dutch Pension System is rather complex. Full description goes beyond this request.

5. Work treated as equal – This concept is not introduced, but the Articles 5 and 6 of the Equal Treatment (Men and Woman) Act contain provisions with regard to positive discrimination of women. Positive discrimination of women is only permitted if the aim of the discrimination is to place women in a privileged position in order to eliminate or reduce existing inequalities and the discrimination is in reasonable proportion to that aim.

6. Work of the same value – Article 7 up to and including article 12 of the Equal Treatment (Men and Woman) Act contain provisions with regard to work of the
same value. The basis for comparing the terms and conditions of employment shall be, as far as pay is concerned, the pay normally received by a worker of the other sex for work of equal value or, in the absence of such work, for work of approximately equal value, in the undertaking where the worker on whose behalf the comparison is made is employed. The work has to be assessed in accordance with a reliable system of job evaluation, adhering as far as possible to the system customary at the undertaking where the employee concerned works. In the absence of such a system, the work shall be fairly assessed in the light of the available information. The pay received by the employee concerned shall be deemed to be equal to the pay that a worker of the other sex normally receives for work of equal value if it is calculated on the basis of equivalent criteria. Non-cash salary components shall be taken into account as pay at the market value that can be assigned to them.

7. **Employer** - The payer of the salary, normally the employer, is in general also liable for arising inequalities.

8. **Professions and collective agreements** - As far as we know, there are no jobs related to different collective agreements and different professions compared in court.

9. **Accessibility to women of legal remedies against breach of the principle of equal pay. The role of equality bodies in this respect**. – If a woman feels that she has been discriminated against, she can contact the Netherlands Institute for Human Rights (Het College voor Rechten van de Mens) to request advice. This Institute explains, monitors and protects human rights, promotes respect for human rights (including equal treatment). It is also possible to start a procedure at the Institute. After submitting a complaint the Institute gives an assessment within six months and explains whether or not the Institute is of the opinion that discrimination has actually occurred. In the assessment the Institute may also make a recommendation on how to prevent discrimination in the future. The procedure is free of charge, but in the event that the complainant wishes to engage a lawyer however, costs will apply.

10. **The mandate of equality public bodies/agencies and the reinforcement of their legal powers to initiate investigations and impose sanctions for more efficiency of legal remedies** – Please see above

11. **The impact strengthening the accessibility of collective redress on the accessibility of legal remedies for women** – Indication of sanctions for equal pay, comparing to voluntary schemes, in terms of encouraging employers to effectively tackle the gender pay gap. The Minister of Social Affairs and Employment may arrange an investigation In the event of non-compliance with the Equal Treatment (Men and Woman) Act and article 7:646 of the Dutch Civil Code. If an investigation reveals that discrimination as referred has taken or is taking place, the Minister shall notify the natural person, legal person or competent authority that has discriminated or is discriminating and, the relevant works council or comparable employee participation body, and, as appropriate, the relevant employers’, employees’, professional or civil service organization. If
damage is caused by the discrimination, the woman can institute an action on the basis of a wrongful act.

12. **Sanctions** – There is an inspection and control system established in the Organic Law 3/2007, LISOS (Law of Infringements and Sanctions in Labour Matters). The LISOS (art. 8.17) fixes a very serious infringement for not drawing up or not implementing the mandatory equality program. Article 40 punishes these infractions with monetary fines: in its minimum degree, from 6,251 to 25,000 Euro; in its medium degree from 25,001 to 100,005 Euro; in its maximum degree from 100,006 to 187,515 Euro. Additionally, any employee that considers that she/he has suffered discrimination can claim before court a request a compensation for damages. The amount will be determined by the judge in any specific case depending on the specific circumstances.
Main conclusions - Added value proposals

The need for and the added value deriving from further legislative action on equal pay can be stressed also by means of this paper.

Further legislative action could be shaped as:

1. The need to change the traditional approach that has been to rely on an individual complaints model of adjudication.
   a. A range of new approaches can arise, which aim at institutional change through proactive measures to promote equality. This leads to class actions, whereby a group of victims, also by means of unions, can litigate the same claim together.
   b. A further step would be to permit an equality body to bring a case without an identified victim, engaging patterns or practices of discrimination on a more collective level.
   c. Several jurisdictions have attempted to establish specialist equality bodies which do not have the power to issue binding decisions, but instead function as mediating and conciliating between the parties.

2. The need to implement proactive measures in order to prevent inequality arising in the first place.
   a. A key means is to require decision makers to assess new measures/procedures at firm level, also bargained with unions, to determine impact on gender and to adjust them if necessary. Responsibility for impact assessment lies with the equality body in several Member States, whereas in a number of other Member States this responsibility lies with Government and the executive (e.g. in Belgium, the Gender Mainstreaming Act of 12 January 2007 designed a complete system for ex-ante assessment of impact on gender). This is not enough. The impact assessment should be carried out and checked/monitored at firm level in order to prevent GPG. The model of Family Audit in Italy/Trentino Alto Adige could be a model (see http://www.trentino.familyaudit.org/).
   b. In addition, family-friendly measures constitute a further proactive measure to promoting equality. One of the key causes of gender inequality is the fact that women remain primarily responsible for child-care and housework. To be effective, it is therefore essential to include proactive measures which both facilitate women’s involvement in the paid workforce, and enhance men’s ability to participate in child-care responsibilities.

3. The need to state an “EU Formula” useful for courts, collective bargaining, inspectorate, equality bodies, etc. to get what is probative of discriminatory intent.
a. The GPG evidence should be based on systemic disparate treatment of discrimination. The three analytical steps in a systemic disparate treatment are the following (i) the actual treatment of the plaintiff group/person must be determined (e.g. how is the GPG for “those” women employed in “that” firm?) (ii) The ideal treatment of the plaintiff group/person must be determined (i.e. the treatment one would expect in the absence of discrimination), (iii) The actual and ideal treatment must be compared to determine whether any difference is large enough to determine an inference of discrimination/GPG.
Bibliography


