Equal Value in the European Union: Fiction or Reality?

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I. INTRODUCTION

Council Directive 75/1171 interprets the principle of equal pay embodied in Article 119 of the Treaty of Rome to mean that for work to which equal value is attributed, men and women should receive equal pay. The equal value principle, adopted by the European Economic Community (EEC) in 1975, has been hailed by scholars and women's rights advocates as progressive and exemplary. It is widely believed to be the solution for eradicating wage discrimination and elevating the status of women in the workplace. Yet in the European Union today, a woman employed in the manual labor sector of the manufacturing industry still earns, an average 25% less per hour than her male counterparts. This statistic holds true in other industries as well. Although statistics vary among the twelve Member States, the salaries of women range from 60 to 85% of that of men, and the gap widens proportionally with age.


1 1975 J.O. (L. 45) 19 (legislation of the European Community).
3 See 1975 J. O.(L. 4) 19, art. 1.
5 EUROPE SOCIALE 3/91, at 30; see also David Grubb, Statistics of Annual Earnings in OECD Countries, OECD LABOUR MARKET AND SOCIAL POLICY OCCASIONAL PAPERS (No. 4) (Paris 1990).
Women's work is segregated, with the majority of women being concentrated in a few, low-paying professions. Furthermore, a greater percentage of women compared to men work in temporary or part-time jobs which hold little or no promise for advancement. Finally, both short and long term unemployment affect women by a much higher percentage than men, thereby perpetuating the cycle of women accepting low-paying, dead-end jobs whenever the opportunity presents itself.

The situation of women has improved to a certain extent in some Member countries in the past two decades. This improvement can be attributed to a degree of sociological evolution: women are not only generally more educated and have more professional training and qualifications, but the decrease in the number of children they have, the smaller age difference between their children, and the fact that childrearing no longer necessarily keeps women away from their professions for extended periods, have all contributed to a greater and firmer presence on the job market. Yet incontestably, the gap between men's and women's earnings still exists, and is even widening in some Member States. Although the equal value laws that Europe have had on its books since 1975 have perhaps succeeded in creating a dialogue about the situation of women in the labor market, they have failed to eradicate discrimination. In some instances, the fact that every Member State has introduced the equal value principle in its national legislation has allowed it to "rest on its laurels," so to speak. It is one thing to have good laws, but it is quite another to apply them.

This paper argues that the concept of equal value is one which implicates important economic, social and structural changes to which West Europe has thus far had a questionable commitment. The steps necessary to give equal value legislation its full worth require long term strategizing, a tight coordination of social and economic policies between Member States, and a great deal of legal and administrative efficiency.

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6 EUROPE SOCIALE, supra note 5, at 25.
7 Id. at 30, 31.
8 Id. at 26.
In view of the economic crisis faced by European nations today, it would be unrealistic to expect a great commitment to social and economic restructuring. Nonetheless, in the wake of post-Maastricht Europe, women represent an important resource in the European labor market and their needs cannot be ignored. Thus, while it is crucial to work within a realistic economic framework, it is not advisable to wait for better economic times to undertake some of the reforms necessary to narrow the gap between men's and women's wages. Since in Europe, the legal groundwork already exists to achieve this goal, it is now only a question of extracting these laws from the theoretical world of scholarly debate and putting them to the grind of practical utility for which they were created in the first place.

The analysis begins with a definitional section aimed at clarifying the concept of equal value and its mechanism. In Part III, the history of the adoption and implementation of the Equal Value Directive is traced, while in Part IV, the economic, social, administrative and legal problems involved in applying the principle of equal value are analyzed. Finally, Part V concludes by attempting to propose solutions which would facilitate the future implementation of the equal value principle.

II. DEFINITIONS AND EXAMPLES

Article 119 of the Treaty of Rome requires that each Member State "ensure and subsequently maintain the application of the principle that men and women should receive equal pay for equal work." The Article further defines "pay" as "the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives, directly or indirectly, in respect of his employment from his employer." Furthermore, "equal pay without discrimination based on sex" means "(a) that pay for the same work at piece meal rates [should be] calculated on the basis of the same unit of measurement" and "(b) that pay

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10 Alan Friedman, Cure is Clear, but Europeans Dislike the Medicine, INT'L HERALD TRIB. Mar. 11, 1994, at 1, 4.
11 EUROPE SOCIALE, supra note 5, at 23.
12 Treaty of Rome, supra note 2.
13 Id.
for work at time rates shall be the same for the same job."

In other words, Article 119 requires that a woman employed in the same capacity as a man should receive the same pay as he does. The primary aim of the equal pay principle is to eradicate straightforward wage discrimination in mixed labor environments. In its widest sense, this principle can also be an effective tool for eliminating indirect wage discrimination. It has, however, no potential for addressing earnings differentials between men and women employed in segregated professions.

Council Directive 75/117 expanded the meaning of Article 119 by stating, in Article 1, that "[t]he principle of equal pay for men and women outlined in Article 119 of the Treaty . . . means, for the same work or for work to which equal value is attributed, the elimination of all discrimination on grounds of sex with regard to all aspects and conditions of remuneration." Thus, equal remuneration must be applied not only with respect to mixed functions in which either direct or indirect discrimination can be found, but also to exclusively feminine professions. Although it does not mandate a job classification system, Article 1 states that if such a system "is used for determining pay, it must be based on the same criteria for both men and women and so drawn up as to exclude any discrimination on grounds of sex." In subsequent articles, the Directive offers no further definitions of the concepts embodied within it.

In the equal value principle, the value of work is of paramount importance, thereby necessitating a revision of the qualifications of workers, and a precise definition of their various functions. The most widespread methods for evaluating work include rating, job classifications and paired comparisons. In the "points method" of factor analysis, for instance, the evaluator breaks down each job into factors, most commonly including skill, responsibility, working conditions, and physical and mental demands. Points or grades are then awarded for each significant factor involved in a certain job, and the aggregate number of points determines the comparative value of the job.

14 Id.
15 Directive 75/117/EEC, supra note 1, art. 1 (emphasis added).
16 Id.
17 McCrudden, supra note 4.
Widely dissimilar jobs have been compared using these methods. Three English cases illustrate these comparisons. In one case, a female cook's job was evaluated against the jobs of three male workers in the same company — a painter, a thermal insulation engineer, and a joiner. The analysis was performed on the basis of the following factors: physical demands, work conditions, decision making, skills and knowledge, and responsibility for tools, equipment and materials. As a result of this comparison, the applicant's work was judged to be of equal value to that of all three of her male comparators, and her wages were, therefore, increased.

In another case, the jobs of female fish packers were compared with those of a male manual laborer, leading to an increase in all the women's salaries. Finally, in a more recent case, three women speech therapists demanded an evaluation of their work against those of male clinical psychologists and pharmacists employed by regional health authorities in England and Wales.

Many definitional problems remain unresolved in the sphere of the equal value principle. It is not only necessary to give clearer definitions to concepts such as "value," "pay," "equality," and "discrimination," but it is also crucial to define the economic and social parameters within which these concepts will evolve. Community institutions and Member States have thus far had a weak commitment to tackling the complex issues surrounding equal value. It is perhaps for this reason that the European Union has had, as demonstrated in the following section, questionable success in its implementation of the concept ever since its inception.

III. THE ADOPTION AND EVOLUTION OF THE EQUAL VALUE CONCEPT

A. The "Equal Work" Standard of Article 119

19 Wells v. F. Smales & Son (Fish Merchants) Ltd., 2 EQ. OPP. REV. 24 (Indus. Tribunal 1985).
20 Regina v. Secretary of State for Social Services and others ex parte Elizabeth Ann Clarke and others, 1988 C.M.L.R. 279.
The EEC was created in 1957 as a customs union whose purpose was to promote free trade and establish a free labor market among the Member States. Initial Member States who already had pay equity laws in their legislations feared that they would be at a competitive disadvantage to potential future Member States without such laws.\textsuperscript{21} It was, therefore, in an economic spirit of cooperation that they included Article 119 in the Treaty of Rome, thereby making the equal pay principle a Community legal requirement.

Article 119 required Members States to comply with its provisions by the first stage of implementation of the Treaty -- December 31, 1961.\textsuperscript{22} It is important to note that at that time, Member States were not yet inclined to adopt the provisions of the International Labor Organization's (ILO) Convention No. 100, which spoke in terms of "equal pay for work of equal value." They apprehended difficulties of interpretation that this higher standard would create.\textsuperscript{23}

In May 1960, conscious of the fact that little effort was being made to achieve the aim of equal pay for equal work, and anxious to hasten the implementation of certain social policy goals, the Council of Ministers of the EEC requested that the European Commission prepare a detailed report on how best to achieve compliance with Article 119.\textsuperscript{24} The Commission's report included a proposal that Member States implement Article 119 by the end of June 1961, "by taking action to exclude any discrimination based on sex so far as the remuneration of workers is concerned."\textsuperscript{25} This was, in effect, a reiteration of the goals already stated in Article 119.

\textsuperscript{22} Treaty of Rome, supra note 2, at art. 119, art. 8.
\textsuperscript{23} Collins, supra note 21, at 84.
\textsuperscript{24} EUR. ECON. COMM. COMM'N, THIRD GENERAL REPORT ON THE ACTIVITIES OF THE COMMUNITY 195 (1960). The Council of Ministers is a body of representatives of Member State governments that has law making powers conferred to it by Article 145 of the Treaty of Rome. The European Commission is the policy-making body and secretariat of the Community.
\textsuperscript{25} Recommendations by the Commission to the Member States Relating to Article 119 of the Treaty, BULL. EUR. ECON. COMM. Nos. 6 & 7, Aug./Sept. 1960, at 46.
But implementation hit a standstill. In some Member States little would be done to achieve compliance with the equal pay principle by the first stage of implementation, and others declared their unwillingness to move to a second stage in any other area of Community activity without progress in all Member States to achieve equal pay. Agreements among these nations concerning the principles embodied in Article 119 were perceived as "form[ing] part of the 'package deal'." As was provided in Article 8(3) of the Treaty of Rome, "[t]ransition from the first to the second stage shall be conditional upon a finding that the objectives specifically laid down in this Treaty for the first stage have in fact be attained in substance and that . . . the obligations have been fulfilled." Based on these provisions, at the end of 1961, the governments agreed "that the progressive implementation of the principle of equal remuneration for men and women workers is intended to abolish all discrimination in the fixing of wages. . . ." They further resolved "that any practices of systematic downgrading of women workers shall be incompatible with the principle of equal remuneration when . . . criteria in job evaluations for the classification of workers are used which are not related to the objective conditions in which the work is done." They then devised a new timetable for the elimination of wage discrimination by the end of 1964. Despite this apparent goodwill, the Community again did not adhere to their deadlines. However, the Commission and the individual Member States chose to remain silent on the issue.

B. The "Equal Value" Standard of Directive 75/117

In the 1970's, the equal pay standard of the EEC began to develop more rapidly. One impetus for this movement was that the Community did

27 Treaty of Rome, supra note 2.
28 Equal Remuneration for Equal Work as Between Men and Women Workers, BULL. EUR. ECON. COMM. No. 11, Jan. 1962, at 8.
29 Id.
not want to develop its image as solely an economic institution.\textsuperscript{30} This consciousness gave rise to certain encouraging developments.

A 1972 report on the employment of women in the EEC indicated that there was widespread sex discrimination in all Member States.\textsuperscript{31} Subsequently, in 1973, the European Commission indicated, for the first time, its intention to use Article 169 of the Treaty\textsuperscript{32} to initiate infringement proceedings against Member States that had breached their obligation to implement Article 119.\textsuperscript{33} However, little action was taken to substantiate this threat.

After 1971, the European Court of Justice (ECJ) was called to give its interpretation on an increasing number of preliminary references by the national courts. This indicates an increase in the number of cases arising out of Article 119 in domestic courts. Initially, the ECJ was cautious in its interpretation of Article 119. For instance, in the first of three cases brought by Ms. Defrenne, a Belgian citizen, under Article 119,\textsuperscript{34} the ECJ ruled that differential pension rights did not contravene the provisions of the Article. Despite this holding, the Advocate General implied that in some circumstances, individuals could rely on Article 119 in national courts.\textsuperscript{35} In subsequent cases, the ECJ became increasingly forceful in its interpretation of the equal pay principle. By 1976, in the second and most


\textsuperscript{32} Treaty of Rome, \textit{supra} note 2.

\textsuperscript{33} 1973 EUR. ECON. COMM. DOC. (No. 3000 final) pt. 248 (July 18, 1973). A report on the new members of the European Community was given in 1974 EUR. ECON. COMM. DOC. (No. 742 final) (July 17, 1974.)

\textsuperscript{34} Defrenne v. Belgian State, 1971 E. COMM. CT. J. REP. (Preliminary Ruling).

\textsuperscript{35} \textit{Id.} at 454-62.
famous *Defrenne* case, the ECJ held that Article 119 was in part directly effective, thereby allowing a woman to claim her right to equal pay directly in any national court. In the same decision, the ECJ also explained that because Article 119 was now directly effective, the right to equal pay was enforceable against both private and public employees. In practical terms, this meant that private citizens could no longer invoke Article 119 as EEC legislation directly in their courts, since its provisions now formed part of national legislation.

Meanwhile, in January 1974, the Council adopted a Social Action Program containing recommendations on how to achieve "equality between men and women as regards access to employment and vocational training and advancement and as regards working conditions, including pay. . . " At the same time, in March 1974, the Economic and Social Committee of the European Parliament finally approved an amended version of a proposal for a Council Directive on the further development of Article 119's principle of equal pay made by the European Commission in November 1973. This amended Commission proposal was presented to the Council of Ministers in July 1974. On February 10, 1975, the Council approved and adopted the version of the proposal amended by the Economic and Social Committee as Directive no. 75/117.

The aim of this Directive was to reinforce the equal pay standard of Article 119. Although Article 119 spoke of "equal pay for equal work," the new standard echoed the provisions of the ILO Convention No. 100, which had by then been ratified by all the Member States. Thus,

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37 1974 O. J. (C1 3/1, 1 3/3) 17.
38 1973 O. J. (C1 14/46) 16 (communications and information) (proposal of the European Commission); 1974 J.O. (C8 8/6) 8 (approval by the European Parliament).
39 1974 EUR. ECON. COMM. DOC. (No. 1010 final) (July 1974).
41 The ILO Convention No. 100 (Equal Remuneration Principle) was ratified by the EEC Member States in this order: France (1953); Federal Republic of Germany (1956); Italy (1956); Denmark (1960); Belgium (1962); Luxembourg
the concept of "equal pay for work of equal value" was introduced as a Community legal requirement in the form of a Directive.

Interestingly, the final definition contained in the Directive had been included neither in the European Commission's initial 1973 proposal, nor in the later amended proposals. Thus, it was the first time that Article 119 had been defined to encompass the notion of equal value. This was due to several developments. First, during parliamentary debates, it had been argued that pay for work of equal value should be equalized, and that discrimination in job evaluation schemes should be eliminated. Indeed, a resolution of the European Parliament states that "discrimination continues in job evaluation with less importance attached to skill, speed and concentration than to muscle power although more equitable methods have been known for many years." Another important factor influencing the decision of the Council to adopt the equal value language had been the opinion of the Economic and Social Committee on the same issue. The Committee's argument that Article 119 should not be interpreted narrowly rested on two observations: the passage of the initial resolution of December 30, 1961, and the ratification of the ILO Convention No. 100 by nine Member States. The Committee further argued that the equal treatment requirement of Article 119 should be enlarged to include conditions of remuneration. It recommended that equal pay should be defined as "equal treatment of men and women, without discrimination on the grounds of sex, in respect of


42 See 1974 O.J. (L. 17) 177, 177-78 (remarks of Mr. Van den Gun); see id. at 180 (remarks of Lady Elles).

43 Resolution of European Parliament During Debates on Art. 119, id. at point 2.

44 See supra notes 28-29 and accompanying text.

45 See supra note 41.
their conditions of remuneration, including assessment criteria."\textsuperscript{46} The Commission also recommended that the term "equal work" be replaced by "equivalent work," because this would "stop the practice of classifying women who do equivalent work to men in 'low-wage groups'."\textsuperscript{47}

C. The Implementation of Directive 75/117

After the adoption of the equal value standard by the EEC, the issue became one of enforcement of Directive 75/117. By the mid-1970s, the commitment of the EEC to social policies was no longer shared by Member States. Indeed, during that period, Europe was facing increasing economic problems which contributed to a turnabout in economic and political priorities. Governments could no longer assume that their economies would grow. They planned, instead, for high levels of long-term unemployment. Thus, Member States rejected the European Commission's social proposals and resisted to incorporating the provisions of the Equal Value Directive in their national legislations.\textsuperscript{48}

Surprisingly, this resistance did not discourage the Commission, which, by 1978, began to prepare for enforcement actions against Member States that had failed to implement the Directive. This resolution may have been sparked by the explicit criticisms of the Commission by the ECJ and the European Parliament. Indeed, in \textit{Deferenne II},\textsuperscript{49} the ECJ noted that the absence of infringement actions against Member States by the Commission was likely to reinforce the impression that Article 119

\textsuperscript{46} 1974 J. O. (L. C8 8/8) 17.
\textsuperscript{47} Id.
\textsuperscript{48} In Ireland, for instance, a bill was introduced in the Parliament in December 1975, whose purpose was to amend the Anti-Discrimination (Pay) Act that was passed in 1974. 1974 \textit{ACTS OF THE OIREACHTAS} 211 (Republic of Ireland). The purpose of the bill was to postpone until Dec. 31, 1977, the implementation of the equal pay provisions of the Act in the private sector which was experiencing difficulties. The Irish government petitioned the European Commission on February 5, 1976, to derogate from implementing Directive 75/117 on the basis of Article 135 of the Treaty of Accession. The Commission acknowledged the economic difficulties experienced by Ireland, but did not, on the grounds of principle, comply with the request. The bill was therefore withdrawn.
\textsuperscript{49} \textit{Deferenne v. Sabena}, 1976 \textit{E. COMM. CT. J. REP.} 455.
was in fact a limited provision. Similarly, the European Parliament had "deplore[d] the lack of urgency with which [the European Commission] appear[ed] to be encouraging the Member States to respond to Article 119." Consequently, in January 1979, the Commission published a report containing ways in which the principle of equal value should be implemented and threatening to institute proceedings against Members States which disregarded the Directive. In contrast to its inaction in 1973, after this threat, the Commission did initiate infringement proceedings.

Belgium, Denmark, Germany, France, Luxembourg, the Netherlands, and the United Kingdom received formal notices of failure to implement the Directive. Only Italy and Ireland satisfied the requirements of the Directive. Actions against France and the Netherlands were not pursued because these countries took immediate legislative actions to correct their discriminatory laws. In May 1978, France repealed discriminatory provisions which provided for accommodation allowances limited to the "head of household," and the Dutch legislation

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50 Id. at 481.
52 1978 EUR. COMMISSION DOC. (No. 711 final) para. 6.1.79, at 144.
55 The French law has been largely amended since then. See Act No. 83-635 to Amend the Labour Code and the Penal Code as to Equality in Employment Between Women and Men, 1983 JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J. O.] 2176, reprinted in 2 ILO LEGIS. SERIES, at Fr. 2 (1984). This Act was supplemented by Circular of 2 May 1984 on the Application of
extended equal pay rights to the public service in July 1980. The case against Belgium was withdrawn following legislative changes. Thus, the Commission pursued infringement proceedings against Denmark, Germany, Luxembourg and the United Kingdom.

1. Commission of the European Community v. Denmark. The Commission alleged that Denmark had failed to incorporate the principle of equal pay for work of equal value into its domestic legislation. The Danish Act 32 of 4 February 1976 provided that:

Every person who employs men and women to work must pay them the same salary for the same work [samme arbejde] under this Act if he is not already required to do so pursuant to a collective agreement.

The Danish government argued that in Danish, the term "samme arbejde" meant both equal pay for same work, and for work of equal value. The argument rested on the fact that the Act of 1976 was "only a subsidiary guarantee of the principle of equal pay, in cases where observance of that principle is not already ensured under collective agreements." Indeed, in Denmark, most employment relationships are governed by collective agreements which, it was maintained, uphold the principle of equal value. This interpretation was based on "the 1971 agreement concluded by the main organizations on the labor market, which provides expressly that "equal pay means that the same salary is to be paid for work of the same


See Act of 2 July 1980 (Equal Treatment of Men and Women in the Civil Service Act), which supplements the primary Act to Lay Down Rules for the Entitlement of Workers to a Wage that is Equal to the Wage Earned by Workers of the Other Sex for Work of Equal Value, 129 STAATSBLAD VOOR HET KONINKRIJK DER NEDERLANDEN [STB.] 1975 (Netherlands), reprinted in 2 ILO LEGIS. SERIES, at Neth. 1 (1975).


Id. (emphasis added).

Id. at 50.
value regardless of sex."\textsuperscript{60} This practice is further confirmed by the decision of 8 December 1977, of the Chairman of the National Industrial Conciliation Board, who "applied the principle of equal pay to work 'of the same value to and in production at the place of work'."\textsuperscript{61}

The ECJ held\textit{ a priori} that Member States were free to implement Directives by means appropriate to their domestic situations. Thus, Denmark could leave the implementation of Directive 75/117 to collective bargaining representatives. However, this method was not found to be, by itself, sufficient to protect the rights of all workers. Indeed, it did not cover the rights of workers who were not represented by unions, nor did it protect the rights of workers in sectors not included in the agreements. Moreover, it was not certain that all collective agreements contained the principle of equal pay.

The Court therefore ruled that the State was obligated to lay down the principle of equal pay "in unequivocal wording." This would allow individuals to have a clear comprehension of the extent of their rights, and direct courts to safeguard those rights in every instance. Thus, the ECJ declared that the Danish legislation failed to fulfill its obligations under Directive 75/117.

2.\textit{ Commission of the European Community v. Germany.}\textsuperscript{62} The Commission argued that Germany had not fulfilled its obligation to implement the Equal Value Directive fully with regard to employees in the public sector. At issue were Article 3 of the German Constitution, which states that "no one may be prejudiced or favored because of his sex,"\textsuperscript{63} and section 612(3) of the Civil Code, which provides that "a contract of employment may not provide, in the case of the same work or work of equal value, for the payment to an employee of remuneration that is lower,

\textsuperscript{60} Id.
\textsuperscript{61} Id.
\textsuperscript{62} Case 248/83, Commission of the European Community v. Germany, 1986 C.M.L.R. 588 [hereinafter Commission v. Germany]. This case concerned the implementation both of Directive 75/117 and of Directive 76/207 on Equal Treatment. We are only concerned with the aspects of the case dealing with equal pay.
\textsuperscript{63} Id. at 595.
on grounds of sex, than that paid to an employee of the opposite sex... \textsuperscript{64}

German constitutional provisions bind "the legislature, influence the approach by the courts, and are directly binding on the public authorities,"\textsuperscript{65} but they do not confer rights to private citizens which can be asserted in German courts. For that reason, section 612(3) was inserted into the Civil Code. However, it was argued by the Advocate General that certain public sector employees -- those recruited by a public service contract -- are not covered by Section 612(3). Thus, in so far as public authorities are governed by constitutional rules and not the Civil Code, such employees were not effectively guaranteed the right to equal pay. In other words, the Commission maintained that "German law lacks a rule of general validity which clearly imposes an obligation not to discriminate between men and women with regard to remuneration."\textsuperscript{66}

The ECJ, taking a practical stance, rejected the opinion of the Advocate General. It found compelling the argument of the German government that remuneration of public servants is based exclusively on post and grade. According to the Court, the Commission had not produced sufficient evidence of sex discrimination in the remuneration of public servants. It, therefore, ruled that the objective of Directive 75/117 "had already been achieved in the Federal Republic of Germany at the time when that Directive entered into force, with the result that no specific measure was required for its implementation."\textsuperscript{67} The case against Germany was therefore dismissed.

It is surprising that in this case, the Court took such a weak stance. Indeed, its ruling rests on the observation that the principle of equal pay is protected so long as constitutional provisions are taken together with correct administrative practices. If those administrative practices are changed, however, the constitutional provisions by themselves would not be sufficient to ensure pay equity. The Advocate General correctly observed that the ECJ itself had ruled, in previous decisions, that the implementation of Directives required "clarity and

\textsuperscript{64} Id.
\textsuperscript{65} Id.
\textsuperscript{66} Id. at 601.
\textsuperscript{67} Id. at 617.
certainty in legal situations" and that the measures adopted must be fully effective. As regards to Article 6 of Directive 75/117, the Court had previously stated that each state must provide a guarantee of the principle of equal pay for work of equal value which "must cover all cases where effective protection is not ensured." Yet, the German constitutional provisions did not fulfill this obligation. Despite these arguments, the Court chose to adhere to the observation that in practice, the German system appeared to work. This leaves open the possibility of future cases against Germany, if the Commission finds clear proof that administrative procedures are insufficient to insure pay equity.

3. Commission of the European Community v. Luxembourg. This case was brought as a result of Luxembourg's failure to eliminate discrimination in the conditions for the grant of head of household allowances to civil servants by February 12, 1976, the period prescribed by Article 8(1) of Directive 75/117. At issue was the Law of 22 June 1963 regarding the remuneration of civil servants which stated:

1. A civil servant having the status of head of household shall be granted a head of household allowance.
2. The following shall be regarded as heads of household:
   (a) a male married civil servant and also a female married civil servant whose husband is subject to an infirmity or serious illness rendering him incapable of providing for the household expenses or whose husband receives an income lower than the minimum wage.

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69 See Case 143/83, Commission v. Denmark, 1986 C.M.L.R. 44, 60. [Advocate General Mancini's emphasis].
71 Id. at 2177.
As provided by Article 169 of the Treaty of Rome, the Commission informed Luxembourg of its intention to initiate proceedings by a letter dated April 3, 1979, and gave the government 60 days in which to reply. In a letter dated June 6, 1979, Luxembourg acknowledged that these provisions, as well as any similar provisions contained in collective agreements, were discriminatory and assured the Commission that a draft amendment was being prepared. The government further stated that in the future, it would refuse to confer the force of law to collective agreements which contained discriminatory provisions.

On May 8, 1980, noting that progress was slow on this matter, the Commission issued a reasoned opinion pointing to the fact that amending legislation had not yet been adopted. Luxembourg's reply that progress had been made and that "both sides of industry had formally undertaken to eliminate the discrimination . . . on renewal of [collective] agreements" did not suffice, and the Commission filed an application to the ECJ on March 16, 1981.

The Court rejected Luxembourg's arguments that it had faced legislative difficulties in obtaining amendments to the discriminatory provisions at issue. It was, therefore, declared that "the grand Duchy of Luxembourg has failed to fulfill its obligations under the EEC Treaty." It should be noted that as one of the six original members of the Community, Luxembourg was to have secured the implementation of Article 119 by January 1, 1962. As was pointed out by the Advocate General, this time limit was not affected by the adoption of the Directive. The ECJ chose to ignore this fact and instead based its judgment on the time limit laid down by the Directive. In either case, a basic tenet of the Community is that States should abide by their Community obligations, and do so in a timely manner. Luxembourg had clearly failed its obligations in this respect. Thus, following this case, Luxembourg amended the legislation in question to bring it in compliance with Directive 75/117.

72 Id. at 2178.
73 Id. at 2181.
75 See Act of April 20, 1983.
4. Commission of the European Community v. United Kingdom. The case against England is more complex, in that it dealt with the substance of the notion of equal value. A brief background on the British Equal Pay legislation is helpful to understand the case. The United Kingdom adopted its Equal Pay Act of 1970, partly in anticipation of future membership in the European Community. The 1970 Act, as supplemented by the Sex Discrimination Act of 1975, was a compromise between what the UK perceived as two extremes: the "equal work" standard of Article 119 of the Treaty of Rome, and the "equal value" standard of the ILO Convention No. 100. Britain thus chose to adopt standards of "like work" and "work rated as equivalent." Whenever a woman's work fell into either one of these two categories, equal pay had to be accorded, unless the employer successfully proved that any variation between a man's and a woman's pay in the contract of employment was "genuinely due to a material difference other than the difference of sex."

In the Equal Pay Act, "like work" is defined as work that is "the same" or of a "broadly similar nature," where the differences "are not of practical importance in relation to terms and conditions of employment." Furthermore, a woman's work is to be rated as "equivalent" to a man's work if "her job and [his] job have been given an equal value, in terms of the demand made on a worker under various headings (for instance effort, skill, decision)," by a study undertaken to evaluate those demands. However, job evaluations are not compulsory under the Act, and they cannot be undertaken without the employer's consent. Thus, while these provisions went beyond what was thought necessary for the purposes of Article 119, they did not go so far as to mandate the equal value standard.

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76 Case 61/81, Commission of the European Community v. United Kingdom, 1982 E.C.R 2601 [hereinafter Commission v. UK].
78 Id. § 1(3).
79 Id. § 1(4).
80 Id. § 1(5).
The Commission argued that the Equal Pay Act failed to protect the right of women employed in work that was not the same but of equal value to those of their male counterparts, except in those instances where job evaluation studies had been undertaken. Since these evaluations could only be introduced upon consent of the employer, the rights of many employees were left unprotected.

The United Kingdom advanced three arguments to defend its legislation. First, it noted that during the debates of the Council of Ministers preceding the adoption of Directive 75/117, the UK had asserted its opinion that its legislation adhered to the principle of equal pay for work of equal value. Indeed, it covered situations similar to those aimed at by the Directive, and included provisions for situations in which pay was fixed on the basis of job evaluation studies. Since the Commission was fully aware of those discussions, it could not now object to the British interpretation of the Directive. Second, the UK government maintained that Article 119 and Directive 75/117 read as unit did not require job evaluation studies, and there is no other way of comparing jobs. Finally, it raised practical considerations, pointing in particular to the cost of job evaluation schemes.

The Commission rejected the UK's arguments point-by-point. As to the first, the fact that a country stated its interpretation of certain legal provisions during debates preceding the adoption of a legal instrument did not excuse it of its legal obligations with respect to that instrument after its adoption. Second, the Commission argued that compulsory job evaluation schemes were not the only method of introducing the equal value principle into national legislation. It pointed out that other Member States had adopted various methods of achieving the same end. And lastly, the Commission noted that the advantages of the Directive clearly would outweigh any practical difficulties encountered during its implementation.

Upon request by the ECJ, the Commission presented the laws of other Member States with regard to equal value, and explained other methods besides compulsory job evaluations which could be used to implement the principles of Directive 75/117:

In Belgium, France, Italy and Luxembourg, as also in the Federal Republic of Germany, many problems are resolved by works
inspectorates, and where a question fails to be resolved by the courts, the latter are not necessarily bound by the results of job evaluation schemes. In the Netherlands the question whether work is of equal value is assessed on the basis of a reliable system of job evaluation. Under the Irish legislation any dispute on the subject of equal pay may be referred to one of the three Equality Officers who, after investigating the matter, will issue a recommendation. Since such recommendations are not legally binding, it is ultimately for the Court to decide the matters referred to them.\(^8\)

Following this exposé of methods adopted by other Member States, the UK replied that "where Directives are concerned, Member States are free to adapt their legislation by whatever means are most appropriate to their own legal systems."\(^8\)\(^2\) In other words, methods that have proven effective in other states would not necessarily work in the UK. There is some strength to this argument. For example, the British legal system is quite inflexible in that judicial policy-making and judicial review are unknown concepts, since traditionally, judges were simply expected to apply strict legal provisions to cases before them. Thus, giving to courts the responsibility of adjudicating complex equal value claims which require a great degree of subjectivity in their analysis and interpretation would presuppose important reforms in the British judicial system. The UK was not then, and is not now, ready to undertake such reforms on the account of Community membership, especially in so far as social policies are concerned.\(^8\)\(^3\)

\(^{81}\) Commission v. U. K, 1982 E.C.R. 2601, 2613. Interestingly, in the Netherlands, value may be assessed on an equity basis if job classification schemes are absent.

\(^{82}\) Id. at 2610.

\(^{83}\) During the political debates surrounding the British vote on the Maastricht Treaty, Prime Minister John Major adamantly voiced his opposition to the Social Chapter of the Treaty on European Union, maintaining that it "is a socialist chapter, and [Britain] will have nothing of it." Prime Minister's Questions of July 20, 1993, Live Television Broadcast on Bravo (July 20, 1993).
As a counterpoint to the Commission's laudatory report of methods adopted by other Member States, the UK responded, "in response to the Commission's point that other Member States have reproduced the objective of Directive facility, the United Kingdom refers to the extract from the European Industrial Relations Review No. 90 of July 1981, which speaks of the "modest impact" of the Netherlands law on equal pay." In other words, the UK rejected the purported success of other Member State's approaches, and maintained that it was preferable to adapt Community rules to suit domestic situations rather than vice-versa, unless the objective was to enforce the principle of equal value only formally, albeit ineffectively. This argument would have been convincing if the situation in Britain had been markedly better than that of other Member States, but that certainly was not the case.

The ECJ rejected the arguments advanced by the UK. According to the Court, these arguments were "a denial of the very existence of a right to equal pay for work of equal value where no classification has been made." It was further explained:

> It follows that where there is disagreement as to the application of that concept a worker must be entitled to claim before an appropriate authority that his work has the same value as other work and, if that is found to be the case, to have his rights under the Treaty and the Directive acknowledged by a binding decision. Any method which excludes that option prevents the aims of the Directive from being achieved. . . .

> The implementation of the Directive implies that the assessment of the "equal value" to be "attributed" to particular work, may be effected notwithstanding the employer's wishes, if necessary in the context of adversary proceedings. The Member states must endow an authority with the requisite jurisdiction to decide whether work has the same value as other work, after obtaining such information as may be required.  

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85 Id. at 2615.
86 Id.
In effect, the Court disregarded the UK's concerns about the nature of its judicial system, and ruled that an authority, including a judge, should have the power to make equal value assessments. It also indicated that the assessment may be subject to judicial review. Accordingly, the Court ruled that:

By failing to introduce into its national legal system in implementation of the provisions of Council Directive 75/117/EEC of 10 February 1975 such measures as are necessary to enable all employees who consider themselves wronged by failure to apply the principle of equal pay for men and women for work to which equal value is attributed and for which no system of job classification exists to obtain recognition of such equivalence, the United Kingdom has failed to fulfill its obligations under the Treaty.  

Following this ruling, the United Kingdom adopted an amendment to the Equal Pay Act, the Equal Pay Regulation of 1983, which instituted an extremely cumbersome procedure for bringing equal value claims. However, the equal value provisions of the Act are only a residual claim. According to the Equal Opportunities Commission of the UK, "the operation of the Equal Pay Act as amended has become significantly more complicated and protracted." The procedures "are far from helpful in practice in giving women an opportunity to make an equal value claim and may well, in the long term, hamper attempts to rectify the acute imbalances in pay which exist in the UK."  

The outcome of this case illustrates perfectly how easily an unwilling Member State can avoid its Community legal obligations by adopting legislation and procedures which comply only in form, but not in

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87 Id. at 2616-17.
89 Equal Opportunities Commission, Legislating for Change (Manchester, EOC, 1986) 5.
90 GENDER DISCRIMINATION LAW OF THE EUROPEAN COMMUNITY, supra note 30, at 94
substance, with the objectives of a given Community Directive. Whether purposefully, for lack of strong commitment, or because of genuine difficulties encountered in the process of implementation, Member States have not carried out the objectives of the Equal Value Directive -- eradicating wage discrimination. In the next section, we will analyze the possible reasons for this failure.

IV. ISSUES IN THE IMPLEMENTATION OF THE EQUAL VALUE PRINCIPLE

The proper implementation of the equal value principle requires an honest confrontation with complex economic, social, administrative, and legal issues. The history of the adoption and the implementation of the Equal Value Directive demonstrates a wavering commitment to social issues on the part of both individual Member States and the European Union as an entity. Unless these complex issues are tackled, the equal value laws that each Member State has in its books, no matter how "adequate" they are from a Community legislative standpoint, are only pure futility.

A. Economic Issues

Unemployment is the greatest threat to the successful implementation of the equal value principle. Between 1985 -- the year during which there was an increase in job creation in Europe -- and 1989, two-thirds of newly created jobs were occupied by women. The participation of women in employment in the European Union increased from 35% in 1975, to 41% in the present day. Thus, there is a direct correlation between job creation and increase in women's employment. This is a crucial factor because there exists a further relation between the increased participation of women in the workforce and the reduction of wage differentials. According to the Organization for Economic Cooperation and Development (OECD), several factors could explain this

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91 EUROPE SOCIALE, supra note 5, at 24.
92 Id.
relationship: the increased pressure exerted from women's lobbies on governments; the economic advantages in improving labor market flexibility and widening the skills base; the higher skills/status levels associated with women's return to the workforce; a growing interest on the part of unions to represent women by addressing their specific employment concerns; and generally, an expansion in employment opportunities.\textsuperscript{94}

It is important to note, however, that the increase in women's workforce participation in Europe was primarily due to the growth of the service sector, where almost 75\% of women are employed.\textsuperscript{95} Between 1970 and 1992, seven million new jobs were created in the European public sector, compared with only four million in the private sector.\textsuperscript{96} This development is not particularly encouraging, given that the public service sector, while it has provided needed jobs to women, is at the same time the least secure from the standpoint of long-term employment. We need only observe the current situation in Europe to prove this. In the face of growing unemployment,\textsuperscript{97} European political leaders agree that their continent's bloated public sector and its costly social safety net must be dramatically cut.\textsuperscript{98} According to Padraig Flynn, Europe's employment commissioner, in order to resolve the economic crisis, Europe must tackle its "entitlement culture" through wage moderation and attrition.\textsuperscript{99}

For women, this means job losses and lower salaries. Indeed, in 1990, the percentage of unemployed women was almost double that of

\textsuperscript{94} Id.
\textsuperscript{95} EUROPE SOCIALE, supra note 5, at 25. Conversely, only 20\% of women are employed in the industrial sector, which demonstrates the enormous sectorial segregation between men's and women's work. Id.
\textsuperscript{96} Friedman, supra note 10, at 4.
\textsuperscript{97} The unemployment figure for France is 3.3 million; this figure rises to 4 million for Germany. Id. at 1.
\textsuperscript{98} Id.
\textsuperscript{99} Id. at 4.
men. Equally important, women are more affected by long-term unemployment than men. These statistics hide another disturbing fact: given that women are more touched by unemployment, they tend to accept short term jobs more readily, thereby automatically reducing the time period spent searching for profitable employment. This means that they are often employed in professions which require lower qualification levels than they possess. By affecting the quality of jobs held by women, long-term unemployment is, therefore, also responsible for the women's weak position in the labor market.

Given the economic crisis faced by Europe, political and economic priorities have once again clearly shifted away from social policies. European leaders are attempting to cut back on social spending and are putting the emphasis on labor market flexibility. In view of the fact that women are losing jobs because of cuts in the public service sectors, demands for wage increases, job training plans, and other programs necessary for the improvement of women's position in the labor market seem illusory. Quite contrarily, in times of high unemployment, there seems to be an increase in discrimination against women. It has been observed that both public employment agencies and employers openly give preference to male unemployed applicants. In such unfavorable circumstances, it is unrealistic to assume that courts or legislators will be willing to increase the salaries of women who are employed in jobs of equal value to those of men.

100 11.1% of women were unemployed as opposed to 6.5% of men. These figures vary from country to country. In Spain, for instance, the unemployment rate for women is four times that of Great Britain. In seven countries -- Spain, Ireland, Italy, Belgium, the Netherlands, Greece and France -- this rate is above the Community average, which was 11.1% in 1990. But in all Member States, unemployment affects a greater percentage of women than men. EUROPE SOCIALE, supra note 5, at 26.

101 On average, 55% of unemployed women in the European Union are long-term unemployed. This average increases to 69% in Spain 69.5% in Italy, 70% in Greece, and 78.5% in Belgium. Id. at 28.

102 This is an instance of history repeating itself. See supra note 48 and accompanying text.

B. Social Issues

An inherent problem exists with the concept of equal value which is largely ignored by its advocates: in attempting to evaluate the work done by women against men's work, the equal value principle in effect upholds an assimilationist standpoint. In other words, it holds the message that if a woman behaves like a man in the labor market, she deserves equal pay. This stance ignores the undeniable fact that few women behave like men in the labor market.

A common argument among employers justifying the lower wages paid to female workers is that they are less productive, less flexible, less motivated, and absent more often than male workers. Because of their reproductive function and their traditional role within the family and the home, women often have to bear a double burden. It is true that in most European countries today, women have fewer children, and do not usually put their careers on hold for long periods on the account of childrearing responsibilities. Nonetheless, this evolution has not changed the role of women as primary caretakers of young children and the elderly. On the contrary, the fact that the percentage of single, separated, or divorced women has increased means that they have to bear their familial and professional responsibilities alone.

To reconcile these important responsibilities, women often are forced to accept part-time, temporary, or shift work. Women who have full-time jobs and who decide to work part-time for family reasons or for lack of adequate day-care facilities have to change jobs, and even sectors of employment. In general, jobs that allow these flexible arrangements are limited to unskilled work categories, and offer a separate status below that of full-time employment, especially as far as social security benefits are concerned. Thus, although these alternative employment arrangements

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104 Fertility rates range between 1.3 and 2.2 children per woman. OECD Observer, supra note 9, at 6.
105 In the European Union in 1991, the percentage of female participation in part-time employment was as follows: Belgium, 89.3%; Denmark, 75.5%; France, 84%; Germany, 89.6%; Greece, 62.9%; Ireland, 71.6%; Italy, 65.4%; Luxembourg, 83.3%; the Netherlands, 70.1%; Portugal, 66.7%; Spain 78%; United Kingdom, 86.1%. Id. at 10.
make a contribution to women's employment, they, in fact, add another dimension to gender-based employment segregation.

Another common assertion among employers is that women bring lower qualification and skill levels to the job market. In many European countries, women stay in school longer than do men. But there is a strong differentiation between them as far as the choice of subject matters and career paths. Women are attracted to humanities and social sciences, which are traditionally not considered highly marketable skills. Yet increasingly, in post-industrial societies, the aptitudes acquired in the educational system are given a higher value. Thus, abstract reasoning, oral and written communication skills, and qualities traditionally referred to as "female traits" such as organizational and interpersonal skills, are likely to be in greater demand. It is not, therefore, so much a question of lower skills or qualifications, but of different types of aptitudes, which in the comparative world of equal value, are not yet "valued" as highly as they otherwise should be.

High unemployment may be a secondary reason for the lower skills brought by women to the labor market in that a large percentage of unemployed women are not registered in unemployment bureaus. Yet in all European countries except Germany, registration is a prerequisite to access to courses and professional training programs organized for unemployed persons.

A third factor affecting the evaluation of women's work against that of men is employment segregation. Women in Europe are predominantly concentrated in a few, lower-paid sectors of employment. Women's work seems to be systematically undervalued by employers, which indicates discrimination. In these circumstances, comparing women's work to men's cannot by itself yield satisfactory results. It is more important is to uncover the reasons for the sharp occupational segregation and the undervaluation of women's professions, and provide remedies for these inequalities.

106 Id. at 7.
107 EUROPE SOCIALE, supra note 5, at 28-29. There are various reasons for this: methods of job search, types of work sought, familial status (single mothers), insurance or social security schemes during unemployment. Id.
108 In Spain and Greece, registration is not mandatory, although it does offer a better chance of qualifying for training programs. Id.
In sum, family responsibilities, differing educational choices, lower participation in professional training programs, and employment segregation, affect women's role in the labor market. These are social issues that can only be dealt with by a strong commitment to social reorganization: finding solutions to the problem of reconciling family responsibilities and professional demands; acknowledging the differences in the skills brought by women to the labor market and making proper use of them; and correcting occupational segregation at its source, perhaps by eradicating sex discrimination as a first important step. Without the willingness to question the existing social and labor market structures, the principle of equal value can only exacerbate the inequalities between men and women. Indeed, it can only reinforce the misconception that women should only be paid as much as men if they behave similarly in the labor market.

C. Administrative Issues

Beyond the far-reaching economic and social problems related to the principle of equal value, there are several concrete difficulties marking its implementation: the definition of the concept of pay; the choice and range of comparators; and the methodology of comparing work as far as job evaluation schemes and the definition of what constitutes work of equal value are concerned.

1. The Concept of Pay. The issue of pay has become an increasingly complex one in modern employment relationships. Pay is no longer defined simply as hard cash payments, but encompasses other forms of contributions such as fringe benefits, paid holiday entitlements, occupational insurance schemes, and even possibly contingent or potential rights such as sick pay.109 The widening of the concept of pay has proven useful to employers trying to attract labor in times of shortages or when wage restraints are in place. But it has added a new dimension to the concept of equal pay beyond wage structures and salary rates.

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Article 119 of the Treaty of Rome gives a broad definition of pay as "the ordinary basic or minimum wage or salary or any other consideration, whether in cash or in kind, which the worker receives, directly or indirectly, in respect of his employment from his employer."\textsuperscript{110} In \textit{Defrenne}, the ECJ interpreted this to cover "all emoluments in cash or kind or payable, on condition they are paid, even indirectly, by the employer, as a result of the employment."\textsuperscript{111} Later, in \textit{Garland v. British Railways Engineering} \textsuperscript{112} the Court went further to include benefits for the family of the worker received after termination of the employment and not granted pursuant to any contractual entitlement. This interpretation gives a wide scope to the issue of fringe benefits attached to employment.

Despite the interpretation of the ECJ, there exists no commonly accepted definition of "pay" among Members States, and the scope given to the concept of remuneration varies.\textsuperscript{113} The British case \textit{Hayward v. Cammell Laird} \textsuperscript{114} illustrates the difficulties involved in assessing equal value given the uncertain scope of the concept of pay. In that case, the Court of Appeals confirmed the interpretation given by the Employment Appeals Tribunal that equal value is achieved if the overall terms and conditions of the woman's employment are not less favorable than those of male comparators. The applicant had argued that the British Equal Pay Act of 1970 allowed a woman to complain about any term which is less favorable than a corresponding term in a man's contract.\textsuperscript{115} The tribunal rejected this argument, fearing an increase in wage claims. It stated:

\begin{quote}
[F]ar from being as well off as they are, she could, in fact, be better off. The corollary to that is not, of course, hard to see. There would, if the matter is, in fact, properly viewed in that way, and so dealt with, almost inevitably be a leap-frogging effect leading to consequential claims from the other involved in the situation.\textsuperscript{116}
\end{quote}

\begin{footnotes}
\item\textsuperscript{110} Treaty of Rome, \textit{supra} note 2.
\item\textsuperscript{111} Case 80/70, Defrenne v. Belgian State, 1974 E.C.R. 445, at para 6.
\item\textsuperscript{112} Case 12/81, Garland v. British Railways Engineering, 1982 E.C.R 359.
\item\textsuperscript{113} McCrudden, \textit{supra} note 4, at 19.
\item\textsuperscript{114} Hayward v. Cammell, 1986 \textit{INDUS. REL. L. REP.} 287.
\item\textsuperscript{115} \textit{Id.}
\item\textsuperscript{116} \textit{Id.}
\end{footnotes}
This case may be referred to the ECJ for further determination. Indeed, on the basis of ECJ jurisprudence so far, there is no evidence that the obligation contained in Article 119 is satisfied if the overall employment package is equal.117

2. The Choice and Range of Comparators. One of the major difficulties in reducing the male/female wage differentials is the segregation of men and women into different sectors. Because of this segregation, it is often very difficult for a woman to find a comparable man doing work which could be judged of equal value. It is not strictly necessary for a woman to choose a male comparator who is contemporaneously employed, since references have been made to predecessors and successors.118

The scope of Article 119 is not precisely defined. In Defrenne,119 the ECJ spoke in terms which could implicate a wide scope:

It is impossible not to recognize that the complete implementation of the aim pursued by Article 119, by means of the elimination of all discrimination, direct or indirect, between men and women workers, not only as regards individual undertakings but also entire branches of industry and even the economic system as a whole, may in certain cases involve the elaboration of criteria whose implementation necessitates the taking of appropriate measures at Community or national level.120

Yet in Macarthys v. Smith,121 the potentially wide scope of Article 119 was limited by the rejection of the possibility of using a "hypothetical" male comparator, since this would require comparative studies of entire branches of industry, which would necessitate further implementing

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120 Id. at para. 18.
procedures at Community and national levels. Instead, comparisons were to be limited to "parallels which may be drawn on the basis of concrete appraisals of the work actually performed by employees of different sex within the same establishments or service."\(^{122}\)

As for Directive 75/117, there is some indication that wider comparisons may be necessary for its proper implementation.\(^{123}\) Yet the scope of comparisons under the Directive has not been judicially determined. In the *Commission v. United Kingdom*, the ECJ ambiguously stated that "a worker must be entitled to claim before an appropriate authority that his work has the same value as other work."\(^{124}\) Similarly, in the infringement proceeding against Denmark, the issue was touched as to the application of equal pay to the same work "at the same place of work."\(^{125}\) But the Commission failed to formally raise the issue, and the ECJ did not consider it. There is, therefore, great uncertainty as to the choice and range of comparators allowed under Article 119 and the Equal Pay Directive, which must be clarified before the principle of equal value can be properly implemented.


(a) Job Evaluation Schemes: The ECJ's judgment in *Commission v. United Kingdom*\(^{126}\) indicates that evaluation schemes are not

\(^{122}\) *Id.* at para. 15.

\(^{123}\) In *Commission v. UK*, 1982 E.C.R. 2601, the Commission endorsed the system contained in the Netherlands Equal Wage Act of 1975, which states, in section (2) that "where no work of equal or approximately equal value is done by a worker of the other sex in the undertaking where the worker concerned is employed, the basis shall be the wage that a worker of the other sex normally receives, in an undertaking of as nearly as possible the same kind in the same section [of industry]." This endorsement of the Dutch law was repeated in the Commission's implementation review of the Directive. Report of the Commission to the Council on the Application as at 12 Feb. 1978 on the Principle of Equal Pay for Men and Women, COM (78) 711 final, Brussels (16 Jan. 1979) at 140. *See also* Commission v. Denmark, 1986 C.M.L.R. 47 (opinion of Advocate General Ver Loren Thermaat).


\(^{125}\) Commission v. Denmark, 1986 C.M.L.R. 44, 47.

\(^{126}\) Commission v. UK, 1982 E.C.R. 2601; *see supra* note 76 and accompanying text.
compulsory under EC law. Thus, the methods by which comparisons between male and female jobs are to be made are not clearly defined. In Article 1 of Directive 75/117, it is stated that job evaluations must use sex-neutral criteria.\textsuperscript{127} Exactly what this provision entails is not clear. However, it is certain that in the absence of vigilance, job evaluations schemes could disguise and reinforce discrimination while giving the appearance of objectivity. \textit{Bilka-Kaufhaus GmbH v. Von Hartz}\textsuperscript{128} ruled that in a discrimination claim, an employer must show that there is a causal connection between any differences between employees and a genuine objective pursued by the firm, and that these differences are necessary to carry out the stated purpose. Thus, in the event that an employee challenges the choice and weighing of factors in a job evaluation scheme, the ruling in \textit{Bilka} would apply.

In \textit{Rummier v. Dato-Druck GmbH},\textsuperscript{129} the ECJ held that Directive 75/117 does not preclude, in job evaluations, the use of factors which favor one sex, provided that the scheme does not discriminate overall on the grounds of sex. There is the possibility of challenging an evaluation scheme if the choice of factors is not representative of the tasks undertaken by both sexes, or on the other hand, pays disproportionate attention to gender-related attributes such as physical strength or manual dexterity. This requires a careful balancing act, however, because in order to avoid discrimination, a job evaluation scheme must use criteria which can measure particular aptitudes on the part of workers of each sex. It seems necessary, therefore, to have clearer directions on the part of the Court of European Commission as to the exact methodology to be used to compare jobs, and possible technics to ensure the 'sex-neutrality' of job evaluation schemes.

(b) Work of Equal Value: Community Law offers little guidance as to how equal pay for work of value should be assessed. In the case of the \textit{Commission v. United Kingdom}, the Court imposed the obligation upon Member States to "endow an authority with the requisite jurisdiction

\textsuperscript{127} Directive 75/117/EEC, \textit{supra} note 1, at art. 1.
to decide whether work has the same value as other work, after obtaining such information as may be required.\textsuperscript{130} Thus, the emphasis was on the procedural aspect of the claims of equal value. No indications were given, however, on which factors should be weighed, measured and compared, and in what manner.

The British cases which we spoke of above\textsuperscript{131} illustrate the lack of uniformity in the approaches taken to compare jobs. In \textit{Hayward v. Cammell Laird Shipbuilders Ltd.},\textsuperscript{132} in which a female cook's job was compared with that of a joiner, a painter, and a thermal insulation engineer, the jobs under consideration were rated according to a number of key demands placed upon those who performed them. A decision was made about the value of several factors having a relationship to job difficulty, and rated as "low," "moderate" or "high." The evaluator found that the cook spent 80% of her time preparing meals, 15% cleaning or serving, and another 5% on miscellaneous duties. The employer challenged this method as being "so simple as to be crude and lacking in precision." This opinion was not shared by the Industrial Tribunal who stated that there was "nowhere to be found a requirement to adopt any particular method of assessment."

In \textit{Wells v. Smales & Sons (Fish Merchants) Ltd.},\textsuperscript{133} the case in which fourteen female fish packers claimed that their job was of equal value to that of a male laborer paid six pounds more per week, a "broad brush" approach was used. The expert divided the jobs of the workers into a range of tasks performed and looked at the content of each individual task. A series of calculations related to the time spent on each task were undertaken, to arrive to a total score for each applicant and the comparator. The result was that nine applicants had higher scores than the comparator, while the scores of the other five applicants ranged from 79% to 95% of the comparator. The expert concluded that only those applicants who scored higher were engaged in work of equal value to that of the male comparator. Interestingly, the Industrial Tribunal found that the scores of all the applicants were so close that they deserved equal pay regardless of the differences.

\begin{footnotes}
\item[131] See supra Part II, notes 18-20 and accompanying text.
\end{footnotes}
These two cases demonstrate the lack of guidance that courts have in assessing claims of equal value. While a certain degree of flexibility is necessary, a total lack of uniformity may ultimately prove to be disadvantageous to the correct implementation of equal value claims. Indeed, fixed patterns of wage determination do not allow for the fluctuations inherent in a widely flexible system of value assessment. Furthermore, the more open-ended the assessments are, the less likely it is that indirect discrimination will be detected in those assessments. A series of fixed requirements would therefore be favorable both to employers attempting to set wages, and employees threatened by indirect discrimination.

D. Legal Issues

1. Employers' Defenses and Burdens of Proof. The most important legal issue in the implementation of the equal pay principle is that of the employers' defenses. In fact, the issue of defenses can be characterized as the other angle through which the whole concept of equal value can be viewed. The justifications for inequalities between the sexes which are legally acceptable, and the way the law assigns the burden of proof, play a crucial role in elucidating which factors are perceived as legitimate "objective" or "economic" reasons for these differences.

There are two principal issues in the employers' defenses concerning pay differentials: the first treats the extent to which economic or market forces defenses are admissible; the second concerns how closely those defenses will be scrutinized for sex discrimination. An important factor encompassing these two issues is the degree to which courts and tribunals are familiar, if at all, with gender issues when applying the employer's defenses to the cases before them.

The treatment of defenses by tribunals has differed from state to state. In most Member States, the defense of paying a higher wage to a man because that was the only way to make him accept the job has been rejected. In the British case of Fletcher v. Clay Cross, the Court of Appeals stated that a successful defense should relate to personal factors

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134 For a thorough analysis of the issue of employers' defenses, see McCrudden, supra note 4.

such as length of service, age, skill or productivity, instead of extrinsic market factors. This approach made it difficult for employers to rely on market forces arguments. On the other hand, by advocating a strict reliance on personal factors, the court barred the way to an inquiry into economic, social and historical factors which perpetuate the differences between men's and women's employment.

The analysis in *Jenkins v. Kingstate*\(^{136}\) and its application by the Employment Appeals Tribunal were more rigorous. In that case, it was held that it was not enough for the employer to show a lack of intention to discriminate; it was further required that the pay policy be proven reasonably necessary to achieve this objective (other than a sex-related objective), and that the policy actually achieve that objective. In *Bilka*,\(^{137}\) the ECJ devised a three-tiered test for national courts to follow:

> If the national court finds that the means chosen by Bilka meet a genuine need of the enterprise, that they are suitable for obtaining the objective pursued by the enterprise and are necessary for that purpose, the fact that the measures in question affect a much greater number of women than men is not sufficient to conclude that they involve a breach of Article 119.\(^{138}\)

The *Jenkins* and *Bilka* rulings were applied to a market forces defense in *Rainey v. Greater Glasgow Health Authority*.\(^{139}\) In this case, the House of Lords replaced the personal factors analysis applied in *Clay Cross* with an "objectively justified" standard. This presumably allowed employers to meet market forces problems (skill shortages, for instance) by allowing them to pay higher wages to male employees, but did not permit women's work to be undervalued because of market forces. The test in *Rainey* is stringent in that it places the burden on the employers to explain pay policies, and thereby allows greater scrutiny into possible indirect discrimination. Yet it ignores many of the issues we have already

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\(^{138}\) *Id.*

\(^{139}\) Rainey v. Greater Glasgow Health Authority, 1987 IND. REL. L. REP. 26 (House of Lords).
spoken of, such as why women are predominantly concentrated in the public sector, and whether they have the same opportunities in the private sector. In sum, according to existing case law, a practice which perpetuates blatant discrimination would be barred by courts, but more subtle forms of indirect discrimination, in the areas of part-time work and in segregated sectors for instance, would pass without strong scrutiny.

2. Sanctions and Remedies. A final issue that must be raised in this analysis is that of the availability of adequate and appropriate sanctions. The ECJ has correctly observed that it "is impossible to establish real equality of opportunity without an appropriate system of sanctions," and has ruled that Member States must take all appropriate measures to ensure the fulfillment of their Treaty obligations.\footnote{Case 14/83, Von Colson & Kamann v. Nordrhein-Westfalen 1984 E.C.R. 1891, 1908.} This means that a remedy must be effective and deter the employer from further misconduct. Thus, compensation must be adequate in relation to the damage sustained, and must consist of more than mere nominal compensation.\footnote{Id. at 1909.}

One important problem that is raised by the issue of remedies concerns collective agreements. The only effective means of supervising discriminatory clauses in collective agreements (which are usually determinative)\footnote{But note that in Ireland and the United Kingdom, collective agreements are not legally binding.} in order to eliminate discrimination from employment contracts or relationships, may be through a collective enforcement mechanism. Indeed, discriminatory terms in collective conventions can have a "chilling effect" on individuals who hesitate to bring complaints when the agreement applies to them. Moreover, tribunals may be more deferent to the terms of a collective agreement than to individual rights.\footnote{For instance, collective agreements could be used as a material factor defense in equal pay claims. See Christopher Docksey, The European Community and the Promotion of Equality, in WOMEN, EMPLOYMENT AND EUROPEAN EQUALITY LAW, supra note 30, at 12.}
The ECJ recognized these problems when it held that collective agreements, even if they are not legally binding, may have "important de facto consequences for the employment relationships to which they refer, particularly in so far as they determine the rights of workers." Thus, any clauses in such agreements which contravene Community legal requirements may be rendered inoperative, eliminated, or amended "by appropriate means." The question remains as to what constitutes "appropriate means." Thus, once again, a crucial issue, that of appropriate legal redress, has been left undefined in the scheme of equal pay claims. Future cases will have to clarify this issue further if the equal value principle is to have any objectivity in its application by Member States courts.

V. CONCLUSION

Christopher McCrudden concluded his article on the equal value principle by observing that "to do justice [to equal value], one should have a thorough grounding in industrial relations and organization theory, labor economics, psychology, statistics, feminist theory, and law, preferably both labor and employment discrimination law." This conclusion goes to the heart of the problems that Europe has had with the concept of equal value. It is indeed not enough to state that equal value is a legal principle in the European Union. The steps that must be taken in order to insure its proper functioning involve complex economic, social, legal, structural reevaluations.

It is true that the case law of the European Court of Justice and the actions of the Commission at certain times have created a dialogue on at least some of those complex issues. But the European Union has not gone far enough to prove its commitment to the improvement of women's situation in the labor market. The extremely disappointing wage and unemployment statistics cited prove this.

Pretending to come up with workable "solutions" to the problem of equal value in the context of this analysis would be unrealistic.

145 Id.
146 McCrudden, supra note 4, at 23.
McCrudden's admonition about the expertise required to tackle the concept of equal value certainly applies here. However, based on the analysis of the problems faced by Europe in its implementation of the Directive, we can point to a certain number of actions that must be taken if equal value is to be more than a mere exercise in futility.

First, the range of occupational choices available to women must be broadened. To end gender segregation in employment, an essential step is to actively combat stereotypes. This can be done through curriculum reforms that encourage both men and women to choose a wide variety of subject matters and contemplate career paths other than the traditional ones. Labor market measures, such as schemes designed to bring women into traditionally male occupations may be another solution, although affirmative action programs have understandably generated a hot debate of their own. Another way to achieve the same objective would be to facilitate the self-employment of women by encouraging them to set up their own businesses. Finally, continuing education programs which are geared towards women's specific needs and situations are indispensable, so long as they emphasize rather than discourage the development of skills and qualifications which are proper to women.

It is also necessary to upgrade women's occupations. This can be achieved by encouraging men to enter typically female fields, identifying and recognizing the skills and abilities required in "female" jobs, and, whenever economically feasible, increasing the wages in those professions. Of course, a prerequisite to the latter step is to establish clear wage statistics highlighting gender differentials, and making wage-setting systems as transparent as possible to exclude any indirect discrimination. In this context, strict legal enforcement of anti-discrimination laws is indispensable.

Finally and perhaps most importantly, it is necessary to make professional and familial responsibilities more compatible. This should not be viewed solely in terms of a female problem, because it is a problem that affects men equally. Viewed simply in terms of a female demand, it could become a pretext for discrimination against women, or lead to increased employment segregation. It is important to encourage a sharing

147 In the UK and France for instance, the introduction of a core national curriculum ensures that until the age of sixteen at least, students acquire qualifications in the same subjects. Helsinki Report, supra note 103, at 6.
of domestic and family responsibilities, in effect redefining the traditional male and female roles. The importance of improving the availability and quality of childcare services cannot be ignored in this context.\textsuperscript{148}

Moreover, leave entitlements for both men and women, as well as increased flexibility in the workplace are important elements in achieving the goal of balancing professional and family commitments.

The crucial issue of whether undertaking such important changes is possible or even desirable in times of economic crisis remains. It is important to keep in mind that equality can only work if it is combined with efficiency. Although some of the solutions given above concern raising wages and improving social programs, which may be difficult to undertake during periods of recession, many others involve changing societal attitudes, confronting discrimination and questioning traditional gender roles. As the history of the Equal Value Directive shows, economically prosperous times do offer a more propitious stage for undertaking social reforms. Yet translating equality solely to economic feasibility is ignoring the depth and scope of the changes that must be undertaken in order to make the equal value a reality.

\textsuperscript{148} In the Helsinki Conference on Women and Structural Change, it was argued that two factors justify public provisions of childcare services: first, society's direct responsibility for 'its' children; and second, the fact that social services are an integral part of the infrastructure needed for the successful operation and growth of the economy. \textit{Id.} at 9.