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Equal Pay in the European Community: Practical and Philosophical Goals

Sara P. Crovitz†

The European Community ("EC") was established to promote free trade and a free labor market among its Member States and to create a unified economic and social policy. At the time of its inception, some Community founders feared that variances in national laws might place those Member States with equal pay laws at a competitive disadvantage. Industries in Member States without equal pay laws might take advantage of that fact by paying women less than comparably employed men. To correct for such disparities and ensure fair competition, the Community's founders included Article 119 in the Treaty of Rome. This Article guarantees to both men and women equal pay for equal work.

In the last 34 years, however, women have achieved neither equal pay for the same work, nor equal pay for work of equivalent value, despite enactment of subsequent Community legislation attempting to define, enforce, and extend the requirements of Article 119. At the very least, women will not achieve pay equality by December 1992, the date set for complete economic unification, unless major revisions are made to the wording and enforcement of Community law. In order to ensure free competition and gender equality within the common market, the EC should amend Community law to allocate burdens of proof in discrimination claims more equitably, to eliminate discriminatory standards, and to supplement the inadequate remedies currently available to victims of both direct and indirect pay discrimination.

This Comment focuses on these aspects of EC law and suggests alternative ways to structure equal pay and discrimination remedies. Part I describes the history and development of equality legislation and the case law interpreting Article 119. Part II discusses substantive problems with current legal remedies, specifi-
cally addressing plaintiffs' heavy burdens of proof, discriminatory Community legal standards, and the inadequate relief provisions enacted under Community law. Part III proposes some reform measures to redress the problems identified in part II. It concludes by suggesting that further Community legislation may be necessary in order to reconcile the goals of free competition and equal pay in employment.

I. Community Equal Pay Legislation and Case Law

A. Article 119 and the Equal Pay and Equal Treatment Directives

A concern for promoting free competition among its members animated the founders of the Community. More particularly, "[Article 119] was adopted purely and simply out of the fear that if women workers were underpaid, national industries would suffer a negative effect as regards their competitive position." The language of the equal pay provision thus reinforces the economic focus of the Article, and it is silent with respect to issues of social justice and equality. Indeed, Article 119 requires only that "men and women should receive equal pay for equal work."


During the drafting of the Community charter, France was worried that it would be at a competitive disadvantage because it already had equal pay laws in place. As a result, Germany acceded to French demands to include an equal pay provision in the founding Treaty. However, Germany conditioned its accedence on the express understanding that the Article would not be directly applicable—that is, it would not, in the absence of national implementing legislation, give individuals rights that they could enforce against the state—and that it would not displace the provisions of the German Constitution that already addressed equal pay issues. See Catherine Hoskyns, Give Us Equal Pay and We'll Open Our Own Doors—A Study of the Impact in the Federal Republic of Germany and the Republic of Ireland of the European Community's Policy on Women's Rights, in Mary Buckley and Malcolm Anderson, eds, Women, Equality and Europe 38, 78 (MacMillan Press, 1988).

* EEC, Art 119. The founders apparently settled on this language because Member States were unwilling to incorporate the broader phraseology of "equal pay for work of equal value," proposed by the International Labor Organization ("ILO"). See McCrudden, 11 Yale J Intl L at 399 (cited in note 4). Significantly, the ILO language would have allowed wider comparisons between jobs. Women would not have to compare themselves only to men doing the same job in the same place of work, but they could also compare themselves to men doing broadly similar work in an establishment run by the same employer.
Although the Commission required implementation of equal pay laws by 1961, the Community did not adhere to this schedule.\textsuperscript{7} The Member States set up a new timetable to eliminate wage discrimination by the end of 1964, and they agreed, in a resolution, “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[.].”\textsuperscript{8} However, the Member States also failed to adhere to this timetable. Moreover, in the early 1970s, the European Court of Justice (“ECJ”) also demonstrated its reluctance to aggressively implement Article 119.\textsuperscript{9}

As a result, the Commission submitted a proposal to the Council suggesting further development of Article 119’s principle of equal pay, and the Council passed this proposal as a directive in 1975.\textsuperscript{10} This directive, the Equal Pay Directive ("EPD"), sought to clarify Member State obligations under Article 119. Indeed, the Directive reintroduced language that the Community had previously discarded,\textsuperscript{11} and it defined “equal pay for equal work” as

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\text{[equal pay] for the same work or for work to which equal value is attributed. . . . In particular, where a job classification 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.}\textsuperscript{12}
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The Council also passed an Equal Treatment Directive ("ETD") that required Member States to eliminate discrimination in all aspects of hiring, employment, and retirement.\textsuperscript{13} Under the ETD, employers could exclude women from only those jobs where “by reason of their nature or the context in which they are carried


\textsuperscript{8} Equal Remuneration for Equal Work as Between Men and Women, Bull EEC (Jan 1962), quoted in McCrudden, 11 Yale J Intl L at 400 (cited in note 4).


\textsuperscript{11} See note 6.

\textsuperscript{12} Council Dir 75/117, 1975 OJ at L45:19 (cited in note 3). The EPD also requires Member States to introduce measures designed to give employees a means of enforcement in the courts as well as requiring Member States to oversee collective agreements to ensure equal pay.

out, the sex of the worker constitutes a determining factor."

Further, the ETD applies to both direct and indirect discrimination:

[T]he principle of equal treatment shall mean that there shall be no discrimination whatsoever on grounds of sex either directly or indirectly by reference in particular to marital or family status.

Thus, the ETD expressly prohibits direct discrimination, such as an employer advertising a job using language referring exclusively to men. It also expressly prohibits indirect discrimination, such as when employers use facially neutral practices that have a disparate impact on women. The EPD, in contrast, does not explicitly apply to indirect discrimination. Consequently, not all Member States have allowed plaintiffs to base their equal pay claims on indirect discrimination.

B. A Legacy of Failed Implementation

Despite Community efforts, the EPD and ETD have not ensured equal pay or equal treatment in all Member States. In fact, in 1979 the Commission had to institute (pursuant to Article 169 of the EEC Treaty) proceedings against several Member States for failures to conform national law to the requirements of Article 119,
the EPD, and the ETD. These proceedings demonstrated how Member States have attempted to bypass equal pay legislation in order to gain an economic advantage.

Although Commission victories in these proceedings required the losing Member States to enact new equal pay legislation, such results have not meaningfully reduced the incidence of pay discrimination in the Community. Recent reports indicate that in jobs where men and women perform the same tasks, disparities in pay of up to 23 percent remain. While most Member States have narrowed the wage gap between men and women, such reports also prove that women's wages have recently levelled off.

The reports also found that women were more likely to be unemployed than their male counterparts. Thus, while male unemployment in the European Community fell from 9.5 to 8.1 percent during the period from 1984 to 1988, female unemployment remained relatively steady at 12.9 percent. Moreover, such reports do not take into account the pay disparities caused by the disproportionate number of women who occupy low paying positions. For example, in 1982, sixty percent of all female manual workers were employed in catering, cleaning, hairdressing, or other, traditionally low-paying, service occupations.

17 McCrudden, 11 Yale J Intl L at 406-07 (cited in note 4). For example, the Commission brought and won cases before the ECJ against Luxembourg, Denmark, and the United Kingdom. See, respectively, Case 58/81, Commission v Luxembourg, 1982 ECR 2175, 1982:3 CMLR 482; Case 143/83, Commission v Kingdom of Denmark, 1985 ECR 427, 1986:1 CMLR 44; Case 61/81, Commission v United Kingdom, 1982 ECR 2601, 1982:3 CMLR 284.

18 For example, the Commission based its case against Denmark on the definition of “same work” in Danish law, which the Danish government claimed had wider application than the Commission gave it. Danish law implementing the directive stated that the principle of equal pay applied only to “the same work” and not to work of equal value. While the Danish government claimed that the principle of equal pay was already implemented in collective agreements, the ECJ held that unequivocal wording was necessary to give all workers a clear and precise understanding of their rights and obligations. Having a right is only helpful if workers know about and can enforce it. Further, without clear language in the national law, the ECJ doubted that Danish workers could effectively ascertain and vindicate their rights. See Case 143/83, Commission v Kingdom of Denmark, 1985 ECR 427, 435, 1986:1 CMLR 44.


21 Id at 85.

II. SUBSTANTIVE PROBLEMS WITH EXISTING EC LAW

Article 119 and existing Community equality legislation do not contain express standards by which to evaluate Member State adherence to equal pay provisions. Because of the nature of EC directives, Member States must devise their own legal procedures and remedies for victims of pay discrimination. These national systems vary in their effectiveness. However, all share common problems that impede free competition by allowing some Member States to pay women less for their work. These problems include heavy burdens of proof for plaintiffs, legal standards that are themselves discriminatory, and the inadequate relief afforded to successful plaintiffs.

A. Heavy Burdens of Proof

1. Direct discrimination claims.

A woman who seeks to bring an equal pay claim based on direct discrimination must prove that she has been paid less than a man working in a comparable job, and that she was paid less because she was a woman. Several problems arise for a woman trying to prove such claims.

First, she must find a "comparator," a man employed in a similarly-valued job. The EPD's language does not define the term "comparator" for equal pay purposes. It only states that equal pay shall be required for "the same work or for work to which equal value is attributed." Broadly understood, this language could allow a court to designate as a comparator any male who is or was doing work of the same value in any industry located in the Community. Some Member States currently employ such independent assessors. Thus, independent assessors may be provided by court order or may be part of national legislation. Their job is to provide an objective view of the value of the jobs that are being compared. However, their objectivity has not always been above reproach. See Part II B, below.
However, at present, only Italy has interpreted the EPD to allow the use of such cross-industry comparators. Most other Member States have interpreted the EPD's language more narrowly. For example, some national laws have allowed comparisons only between people doing similar work for the same employer, or at best between people working in different companies that are controlled by the same third party. Others have even refused to compare women and men that perform the same jobs in the same city.

These comparator identification problems have also encouraged businesses to keep women segregated. If women are segregated, potential plaintiffs may be unable to find an appropriate comparator, and thus they may be discouraged from pursuing their pay discrimination claims. Yet, despite its gravity, this problem has received adequate attention in only one Member State—the Netherlands.

Dutch law allows women to compare themselves to a hypothetical comparator:

[W]here 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].

However, because other Member States have been unwilling to define “comparators” as broadly, Dutch equal pay law may place that nation's industries at a competitive disadvantage. Dutch women will thus find it easier to bring their pay discrimination claims, but in so doing they will expose Dutch industries to greater liability. This increased exposure may in turn drive Dutch industries to relocate to other Member States with less vigorous equal pay laws, effectively nullifying any equal pay gains: Women would have

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29 For example, in the United Kingdom and Ireland, plaintiffs can only use comparators that work in the same establishment. See McCrudden, 11 Yale J Intl L at 417-18 (cited in note 4).
30 Id at 418-19.
gained rights to equal pay only at the cost of having fewer job opportunities.\textsuperscript{32}

Second, even if a woman overcomes comparator identification problems, the heavy burden of proof she must bear may still make recovery impossible. For example, Germany requires a woman to establish that a particular practice is discriminatory (that is, present her prima facie case) before it shifts the burden of proof to an employer.\textsuperscript{33} This may impose great hardships on plaintiffs because employers generally have all of the relevant, objective evidence in their possession. Under such laws, women are often left unable to establish their prima facie case—even for the most egregious violations.\textsuperscript{34}

Third, even if a woman is successful in presenting her prima facie case, many Member States’ laws give employers a variety of defenses that allow them to escape liability.\textsuperscript{35} For example, the United Kingdom, Ireland, and Germany have all passed laws that allow employers to justify persistent wage disparities if they are

\textsuperscript{32} Of course, such an argument may prove too much in that it suggests that Community industries will move elsewhere if Community laws expose them to too much liability and reduce their competitiveness vis-a-vis the rest of the world. However, the gains realized from trade within the Community would probably more than offset increased exposure to liability in most instances. Moreover, relocating to other continents might be significantly more costly and difficult for industries than relocating to elsewhere in Europe. Thus, until the costs to the industry of increased exposure to liability exceed this continental threshold, relocation would not be a viable option.

Additionally, such a one-dimensional approach oversimplifies the analysis in that industries consider a number of factors and costs in determining where to locate—only one of which is the cost of legal liability. Yet, assuming that the EC at least seeks—if it has not already attained—a common market in which there are no national barriers to the free movement of capital, goods, or people, then operating costs should become roughly equivalent in all countries. Hence, this relocation analysis proves most compelling when one assumes that all other costs of operation are roughly equal across the Community—an assumption with scant support at present.


\textsuperscript{34} Id. In this Commission report on the equality legislation, Prondzynski claims that in a recent case in France, the plaintiff failed to establish her equal pay claim because the employer had refused her access to the relevant information.

\textsuperscript{35} Employers have also tried to defend discriminatory pay practices by claiming that pay differentials must be evaluated in light of the total compensation package. Thus, if an employer could show that a woman’s aggregate benefits are the same as a man’s, even though the components of the package differ according to sex, then the employer should not be liable. However, the ECJ has refused to recognize such a defense, ruling in \textit{Barber v Guardian Royal Exchange Assurance} that equal pay implies equality at every level of remuneration. Case C-262/88, 1990:2 CMLR 513. Moreover, if the defense was recognized, courts would have to engage in complex factual analyses to determine if different benefits packages were of equal value—duties they are ill-equipped to discharge. Id at 557.
motivated by considerations other than gender. These laws favor employers because their justifications are generally not strictly scrutinized. In the past, for example, employers could avoid equal pay liability simply by changing a woman’s job description to “light” work. Thus, jobs in which women were overrepresented could be classified as “easier” jobs, regardless of their actual requirements.

2. Indirect discrimination claims.

Attempts to eradicate indirect discrimination may, for several reasons, require more complex measures. First, indirect discrimination is more difficult for courts to identify than direct discrimination. Although an indirectly discriminatory practice affects one group disproportionately, it may often appear gender neutral.

Second, EC legislation does not clearly define indirect discrimination. As a result, some Member States, such as the United Kingdom and Ireland, have attempted to define indirect discrimination in their national implementing statutes. These countries look to see if the job description contains a requirement that is not essential or justifiable and that disproportionately affects a particular gender or marital status group.

However, under these statutes, the burden of proof rests with the plaintiff and can be extremely onerous. Thus, in some cases, courts have required women to clearly establish the discriminatory effects of a particular practice through statistical evidence. Yet, because employers are not required to furnish employees with the relevant documents in their

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36 Specifically, the United Kingdom’s defense is based on a “genuine material factor which is not the difference of sex.” In Ireland, the defense is based on “grounds other than sex,” and in Germany, the defense is based on “material reasons unrelated to a particular sex.” See McCrudden, 11 Yale J Intl L at 420-21 (cited in note 4).

37 Tiziano Treu, Equal Pay and Comparable Worth: A View from Europe, 8 Comp Lab L J 1, 5 (1986).

38 A recent study indicates that this practice of renaming jobs to avoid liability persists. For example, in the city administration of Luxembourg, public sanitation employees are classified into job titles that are male or female (“Strassenreiniger” and “Arbeiterin im Reinigungsdienst”). Although both appear to do similar cleaning work, women are paid less. See Ferdinand von Prondzynski, Implementation of the Equality Directives at 20 (cited in note 14).

39 Because indirect discrimination was not expressly mentioned in the EPD, women must base such claims on the ETD. However, the ETD leaves national courts a great deal of discretion to determine what practices constitute indirect discrimination. See text of ETD, reproduced in text at note 15.

40 O’Donovan & Szyszczak, Equality and Sex Discrimination Law at 114 (cited in note 5).

possession, women may often find it impossible to establish such effects.

However, in indirect discrimination cases, the ECJ has at least been more willing to establish criteria by which to evaluate and limit employer defenses. In *Bilka-Kaufhaus GmbH v Weber von Hartz*, the court ruled that in evaluating a claim for indirect discrimination, a national court must determine whether a particular practice was based on objective grounds:

If the national court finds that the measures chosen by [the employer] correspond to a real need on the part of the undertaking, are appropriate with a view to achieving the objectives pursued by the enterprise and are necessary to that end, the fact that the measures affect a far greater number of women than men is not sufficient to show that they constitute an infringement of Article 119.

These criteria—"real need," "appropriate," and "necessary to that end"—thus place some limit on the defenses that an employer can raise in defense of indirectly discriminatory practices. They require more than just a plausible objective justification to uphold a particular practice.

B. Discriminatory Standards

Women seeking to recover on unequal pay claims must also overcome other obstacles. First, discriminatory standards are often employed to select an appropriate comparator, which may result in systematic undervaluation of women's work. Second, some Mem-
ber States have passed laws that give effect—intentionally or otherwise—to anachronistic and outdated stereotypes respecting women's biological abilities to perform various jobs. This contributes to the undervaluation of women's work, and it may effectively exclude them from certain professions altogether. Third, women must overcome attitudinal barriers that continue to impede their quest for equality.

1. **Comparator and other valuation problems.**

In order to compare different jobs and identify appropriate comparators, most Member States use a point system. Independent experts or commissions assess jobs and assign point values based on factors such as responsibility, skill, physical and mental requirements, and working conditions. However, measuring job value in this way may disadvantage working women in at least two ways.

First, problems arise when a woman's job is valued more highly in terms of demands, skill, and responsibility than a man's job, but she nonetheless receives less pay. The ECJ has held that in such circumstances, even though the woman's work was of higher value, her work should be regarded as "like work" so that she could get at least the same pay as the comparator received for the lower-valued, higher-paid work. The Court thus applied Article 119 to this situation to ensure that an employer could not "circumvent the principle [of equal pay] by assigning additional or more onerous duties to workers of a particular sex, who could then be paid a lower wage."48

Second, content-based job valuations also suffer from a more serious shortcoming that affects many valuation systems. Valuing jobs according to traditional, "objective" factors discriminates

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48 McCrudden, 11 Yale J Intl L at 411 (cited in note 4). In measuring what constitutes work of equal value, the EC had several standards from which to choose: (1) the market value of a job; (2) the marginal productivity or the value that the work adds to the enterprise's output; or (3) the job's content. The Member States have adopted the third approach, which prevents employers from paying women less by claiming that women are less productive than men.


47 Indeed, when faced with this problem, the Irish High Court doubted that a woman's claim could succeed, since her work was not "like work." Case 157/86, *Murphy v An Bord Telecom Eireann*, 1988 ECR 673, 1988:2 CMLR 879 (Irish High Court). The Irish High Court's reluctance to apply Article 119 to this situation exemplifies Member State reluctance to implement equality legislation.

48 1988 ECR at 690.
48 *Id.*
against women: if jobs are valued in terms of characteristics that men possess in greater quantity than women, then employers may often be justified in paying women less. For instance, if an assessor values physical strength more highly than other, equally important characteristics, then employers may legally pay stronger employees (mostly males) more for their work than those who possess less strength (mostly females), but also possess greater quantities of other attributes, such as manual dexterity. Thus, stronger employees (mostly men) are better compensated, despite the fact that their strength may not enable them to perform their tasks any better than weaker employees who possess greater skills in other areas (mostly women).

At least one Member State, the United Kingdom, has amended its Equal Pay Act of 1970 in an attempt to address such problems.\(^6^0\) The amendment requires assessors to value jobs according to the following terms:

A woman is to be regarded as employed on work rated as equivalent with that of any man if, but only if, her job and their job have been given an equal value, in terms of the demand made on a worker under various headings (for instance, effort, skill, decision), on a study undertaken with a view to evaluating in those terms the jobs to be done by all or any of the employees in an undertaking or group of undertakings, or would have been given an equal value but for the evaluation being made on a system setting different values for men and women on the same demand under any heading.\(^6^1\)

Such legislation, however, may not effectively remedy discriminatory valuation problems. Employment remains quite segregated throughout the EC, which makes it nearly impossible to create a job valuation system that does not favor one sex or the other. Moreover, judicial reluctance to aggressively enforce such legislation may undermine its effectiveness. For example, in the United Kingdom, courts require employers to justify advantages that a particular valuation may give to one sex or the other. However,

\(^6^0\) However, an adverse decision by the ECJ was largely responsible for the U.K.'s decision to amend its equal pay laws. See Case 61/81, Commission of the European Communities v United Kingdom, 1982 ECR 2601; 1982:3 CMLR 284.

Despite some initial promise, British courts have often undermined the effectiveness of this requirement by failing to hold employers to a strict standard. They have seldom required employers to prove that a particular discriminatory practice is strictly necessary. Instead, in *Ojutiku and Oburoni v Manpower Services Commission*, a British court held that employers must only show that a particular valuation that disadvantages women is "reasonably needed," defining "reasonable" as that which would be acceptable to "right-thinking people as sound and tolerable." In the EC country with the greatest wage gap between men and women, the judgment of "right-thinking people" simply cannot be trusted.

The ECJ has also addressed the issue of discriminatory job valuation schemes. Yet, its forays into this area have been equally unsatisfying. For example, in *Rummler v Dato-Druck Gmbh*, the ECJ ruled that the compensation scheme at issue was not necessarily discriminatory simply because it accorded greater value to attributes (namely strength) that men more frequently possess than women. However, in reaching its decision, the Court failed to examine other characteristics, such as manual dexterity, that might be equally important to job performance. It simply assumed that physical strength was appropriately valued in proportion to its effect on job performance; if manual dexterity were of equal importance, it would have been weighted more heavily in the initial assessment. Given the history of such discrimination, this approach

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62 Initially, however, British Courts suggested that they would hold employers to a strict standard of necessity in terms of the justifications that they would accept for a discriminatory practice. For example, in *Steel v Union of Post Office Workers*, the court held that:

[It is right to distinguish between a requirement or condition which is necessary and one which is merely convenient, and for this purpose it is relevant to consider whether the employer can find some other and non-discriminatory method of achieving his object.]


63 *Ojutiku and Oburoni v Manpower Services Commission*, 1982 IRLR 418, cited in Rubenstein, 7 Comp Labor L at 188-89.

64 The disparity in pay between men and women in the United Kingdom is eight to ten percent higher than that of any other Member State, even though women make up a higher proportion of its workforce than all other Member States except Denmark. Jackson, Press Association Newsfile (Sept 25, 1991) (cited in note 19).

65 *Case 237/85, Rummler v Dato-Druck Gmbh*, 1986 ECR 2101, 1987:3 CMLR 127. At issue in this case was a woman's equal pay claim. Her job consisted of working with heavy machines, adjusting smaller machines, and lifting paper stacks.

66 1986 ECR at 2115.
is simply inadequate. The ECJ cannot rely on "independent" assessors to neutrally weigh job characteristics in their valuation processes.

2. Member State and ECJ reliance on stereotypes.

Member States have compounded the discriminatory standards problem by incorporating outdated and often anachronistic stereotypes of women's physical abilities and limitations into their judicial and legislative judgments. In Germany, for example, although the Basic Law of 1949 provides that "men and women have equal rights," courts have allowed employers to pay women less when such a practice arises out of "natural" differences between men and women. German national courts have thus refused to critically assess the actual effect these biological differences have on a woman's ability to perform in the work place. Instead, the German courts have been content to rest their judgments on outdated stereotypes, and they have not hesitated to uphold legislative judgments that rest upon similar bases.

The ECJ has also contributed to the problems in this area by permitting employers to justify discriminatory practices on the basis of outdated, and often groundless, stereotypes. For example, the ECJ recently ruled that in the selection of head wardens, recruiting practices that discriminate against women do not run afoul of the ETD. In this case, the plaintiff challenged the practice of selecting head wardens from a pool of candidates—those presently employed as wardens—that rarely contained women. However, the Court did not question the state's assertion that sex is properly considered in determining eligibility for employment as a warden in the first instance. It simply assumed that one's gender

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87 Thus, employers may point to "natural" differences—such as menstruation, pregnancy, childbirth, and lack of physical strength—to justify paying women less. See Ruth Harvey, Equal Treatment of Men and Women in the Work Place: The Implementation of the European Community's Equal Treatment Legislation in the Federal Republic of Germany, 38 Amer J of Comp L 31, 41 (1990).

88 For example, German courts have consistently upheld legislation that forbids women blue collar workers, on the grounds of biological difference, from working at night. They have upheld such legislation despite the fact that it does not apply to white collar workers, and despite the fact that it does not apply to women employed in hospitals, restaurants, and cultural establishments—all industries employing a high percentage of women. Thus, such legislation does not protect female blue collar workers equally. Instead, it is more likely to exclude them from higher paying factory work altogether. See Judgment of 17 Dec 1980, 35 NJW 66 (1982), cited in Harvey, 38 Amer J Comp L at 42-43 (cited in note 57).

89 However, the ECJ did hold that such recruiting practices for policemen would violate the ETD. Case 318/86, Re Sex Discrimination in the Civil Service: Commission v France, 1988 ECR 3559, 1989:3 CMLR 663.
affects one's ability to discharge a warden's custodial duties. That such a questionable and uninformed assertion could form the basis of the ECJ's opinion suggests that cultural and social stereotypes may also impair the court's judgment.

Yet, according judicial notice to biological difference may sometimes benefit women. Indeed, women may occasionally require state intervention in order to achieve true equality: pregnant women may need State protection to prevent employers from discriminating against them. Unfortunately, Member States have often failed to enact such beneficial legislation, or they have enacted overbroad legislation that may actually harm women.

For example, British law prohibits employee dismissal based on pregnancy or reasons connected with pregnancy. The law allows employers to dismiss pregnant workers, however, if the pregnancy incapacitates the employee or if work conditions pose a risk to the woman's or her unborn child's health. While this appears quite reasonable in theory, in practice, neither British courts nor legislators have carefully scrutinized women's abilities to work during pregnancy. Unlike their American counterparts, which require employers to show by objective evidence that women must be excluded because there is no acceptable alternative, British courts only require employers to show that the job cannot reasonably be reorganized to minimize reproductive hazards. Again, discredited stereotypes undermine the effectiveness of measures designed to enhance workplace equality.

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40 Unfortunately, the ECJ has also evinced its unwillingness to critically examine such stereotypical assumptions in other contexts. For example, in Johnston v Chief Constable, an Irish police officer complained that a discriminatory policy forced her to take a low paying, part-time reassignment. Case 222/84, 1986 ECR 1651, 1986:3 CMLR 240. This reassignment was prompted by a policy change that required police officers to carry firearms as a result of a surge in police assassinations in Northern Ireland. However, the new policy declared that women should not be allowed to carry firearms, because armed women were more likely to become targets for assassination and were less likely to effectively discharge the duties to which they had traditionally been assigned—namely, social work requiring contact with families and children.

Although the ECJ held that women could not be excluded from a certain type of work merely "on the ground that public opinion demands that women be given greater protection than men against risks which affect men and women in the same way," it also ruled that where carrying firearms might create additional risks, Member States could consider the sex of the police officer in apportioning such risks among public employees. 1986 ECR at 1687-89. Thus, when the "derogations remain within the limits of what is appropriate and necessary for achieving the aim in view[,]" they may be upheld. Id at 1687. This vague test thus lacks the bite needed to effectively enforce equal pay guarantees.


42 See Griggs, 401 US at 424.
3. **Attitudinal barriers to change.**

Finally, and perhaps most insidiously, women are hindered in their quest for equality by societal attitudes that inform both the way men view women, and, more importantly, the way women view themselves. For example, in the EC, unemployment is higher for women than for men, despite the fact that two-thirds of women desire and seek paid employment. Both men and women, however, still believe that men are more entitled to employment than women. As long as attitudes like these persist, women will find it difficult to gain equal pay and equal employment.

C. Inadequate Penalties and Remedies

To date, very few equal pay cases have been brought before national tribunals. In part, heavy burdens of proof and discriminatory standards, such as those discussed above, may have discouraged women from seeking legal vindication of their rights. An equally significant detriment, however, has been the inadequate remedies Member States have made available to successful plaintiffs. For example, until recently, German plaintiffs were entitled to recover only the costs that they incurred in mailing their job applications or the costs that they incurred in traveling to job interviews. They could not obtain either injunctive or normal monetary relief.

Fortunately, the ECJ has held that such clearly inadequate remedial provisions violate Community law. Although Member States are free to enact whatever kinds of private remedies they see fit to ensure compliance with Community legislation, the reme-. 

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63 *Women and Men of Europe in 1983* 80 (Commission of the European Community, 1983).

64 For example, when asked whether they agreed with the statement, "Some say that in a period of high unemployment a man has a greater right to work than a woman," about 60 percent of both men and women answered that they either "agreed completely" or "somewhat" with this statement. Id at 96.

65 For instance, in 1976, the year the Equal Pay Act was passed in the U.K., women brought 1,742 applications. By 1983, that number had fallen to 26. O'Donovan & Szyszczak, *Equality and Sex Discrimination* at 215 (cited in note 5).

66 Harvey, 38 Amer J Comp L at 56 (cited in note 57).

67 Since most pay discrimination occurs in segregated occupations, women may need injunctive relief to force employers to desegregate such occupations. Yet, currently, the ECJ seems reluctant to wield its authority to dispense such relief. Thus, in *Von Colson and Kamann v Land Nordrhein-Westfalen*, the ECJ held that the equality directives do not require Member States to make available any particular kind of private remedy. Hence, Member States retain sufficient discretion to exclude injunctive relief from the list of private remedies that they make available to victims of discrimination. Case 14/83, 1984 ECR 1891, 1907, 1986:1 CMLR 430.
dies enacted must, at a minimum, adequately compensate victims and effectively deter future violations. However, many Member States’ remedies remain at or below this minimally adequate level.

III. **PROPOSED REFORMS**

In order to protect free competition among Member States, both direct and indirect pay and employment discrimination must be eliminated. Towards that end, the Community must make it easier for claimants to raise, pursue, and recover on their Article 119 claims. Some relatively simple measures would suffice.

A. **Removing Impediments to Judicial Vindication of Rights**

In order to encourage victims of discrimination to judicially vindicate their rights, the Community must establish a broader definition of comparators. Such a definition should allow both cross-industry and cross-national comparisons, as this may be the only effective way to force employers to desegregate certain occupations. Further, the Community should force Member States to allocate burdens of proof more equitably and liberalize discovery rules. This would make it both easier and cheaper for plaintiffs to pursue their discrimination claims. Moreover, the Community, building upon the standards enunciated in *Bilka*, should expressly limit and closely scrutinize the defenses available to employers. The ECJ should thus hold employers to a strict standard of necessity.

B. **Identifying and Revising Discriminatory Standards**

The ECJ should also carefully review Member State valuation systems to ensure that the factors considered are not weighted in a discriminatory manner. In order to overcome demonstrated Mem-

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**See id, 1984 ECR at 1908.**

**In fact, the Commission has considered and approved of many of these measures in a preparatory action. See Proposal for a Council Directive on the Burden of Proof in The Area of Equal Pay and Equal Treatment for Women and Men, 1988 OJ C176:5. Although it lacks binding effect, this proposed directive would address many of the equal pay problems women face, and thus it should be implemented as a directive. For example, article 3 of the proposed directive would place the burden of proof on an employer once a plaintiff has shown “a fact or a series of facts which would, if not rebutted, amount to direct or indirect discrimination.” Further, article 4 of the proposed directive would require the employer to disclose to women plaintiffs all relevant information reasonably obtainable. Noticeably absent from the proposed directive, however, is any attempt to define “comparators” for the purposes of equal pay claims. Thus, it is by no means a complete solution to present equal pay problems.**
ber State and judicial intransigence in this area, the ECJ must ensure that the Member States strictly observe their obligations under the Equal Treatment and Equal Pay Directives. Towards this end, the ECJ should place the burden of proof on employers to prove beyond a reasonable doubt that their discriminatory pay practices are essential and justified.\textsuperscript{70}

Further, the ECJ should carefully review both Member State laws and employer practices that are based on unproven stereotypes. It must force Member States to reevaluate paternalistic legislation, and it must hold employers to a high standard of proof when they seek to base an exclusionary practice on a purported concern for a woman's safety or health.\textsuperscript{71} However, the ECJ should also continue to distinguish between legislation that excludes women from jobs on the basis of stereotypes and legislation that is genuinely beneficial. Only the latter, equality-promoting legislation should be upheld and encouraged.

Moreover, the EC must combat attitudinal impediments by encouraging women to enter non-traditional professions. Towards this end, the EC should offer special training programs, publicize the nature and extent of the problem in order to educate community citizens, and establish affirmative action programs in some traditionally segregated industries. Such measures will assist equal pay advocates in winning the hearts and minds of both employers and employees.

C. Bolstering Compensatory and Punitive Remedies

Only by revising EC law to make private remedies more adequate—both in terms of the relief granted to successful plaintiffs and the penalties imposed on losing employers—will the above reforms work their intended effect. Private enforcement of rights

\textsuperscript{70} Here, the EC might learn from the United States' experience. Employers in the U.S. are prohibited from discriminating on the basis of gender under Title VII of the 1964 Civil Rights Act. See 42 USC §§ 2000e-2000e-17 (1988). The rules under Title VII are much more stringent than those under European law, and they require employers to bear the burden of proving, with scientific evidence, that excluding women from a particular occupation is absolutely necessary for health, safety, or other fundamental reasons. European courts simply cannot accept employer assertions that women, because of their physical constitution, are less able to perform certain duties. See O'Donovan & Szyszczak, \textit{Equality and Sex Discrimination Law} at 199-200 (cited in note 5).

\textsuperscript{71} The EC requires Member States to revise paternalistic laws when "the concern for protection which originally inspired them is no longer well founded." Council Dir 76/207, art 3, 1976 OJ at L39:40 (cited in note 3). However, the ECJ presently lacks the means (and the desire?) to determine when a Member State's paternalistic laws run afoul of the ETD.
thus depends not only upon the availability of remedies, but also upon their adequacy.

Member States should make presumed and punitive damages available to victims of discrimination. Presumed damages would relieve successful plaintiffs of the difficult burden of proving the actual harm they suffered as a result of an employer's failure to hire them. Such damages would, at the least, prevent courts from following the German example of measuring damages solely in terms of the actual costs incurred in applying for a job.

Moreover, punitive damages should be made available to victims of discrimination. Given limited state enforcement resources, such awards are perhaps the most effective way to encourage employer compliance with equal pay and employment legislation. Further, the prospect of recovering punitive damages would give victims of discrimination added incentive to pursue their claims.

D. Towards a Comprehensive Community Antidiscrimination Law

The EC should be wary of granting Member States too much discretion in crafting discrimination remedies. For example, if a Member State makes available injunctive relief to victims of discrimination, then its women may have greater incentives to bring suit against employers that discriminate. However, if other Member States do not allow injunctive relief, and overall have less adequate and effective discrimination remedies, then industries in such countries may gain a competitive advantage over rivals located in countries with more extensive discrimination remedies. Again, uneven exposure to legal liability across the Community will place some Member States' industries at a competitive disadvantage in terms of labor costs. Fair competition will therefore remain a distant Community goal until some measure of uniformity,

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[72] Such damages would be calculated by determining the monthly or yearly salary offered for the position in question, and multiplying this amount by an appropriate term of months or years. National legislatures would be responsible for determining the length of time to be used in such calculations, and they might vary such lengths according to the unique features of a particular industry or trade. However, the EC also may want to impose some floors here so that Member States do not undermine these reforms by selecting unreasonable brief periods of time.

[73] European discomfort with allowing plaintiffs to recover punitive damages—for fear of a surge in frivolous litigation—might be somewhat allayed by requiring plaintiffs to donate a portion of any punitive recovery to a public trust established for the benefit of other discrimination victims. Such a scheme could preserve the beneficial deterrent effects of punitive damages without strongly encouraging frivolous litigation.

[74] See note 32 and accompanying text.
with respect to the remedies made available to victims of pay and employment discrimination, is introduced. Further Community legislation remains the best way to achieve such uniformity.

CONCLUSION

Although the EC has attempted to guarantee pay and employment equality, it must enact the above reforms to make these guarantees a reality. However, enacting such reforms may be difficult for several reasons—not the least of which is the fact that the Community’s authority to legislate is largely confined to matters of trade and competition. Given the recent Community crisis, occasioned by Denmark’s refusal to ratify the Maastricht treaty, enlarging the Community’s competence to deal with non-economic issues may not be politically feasible at this time. Yet, at the very least, the above suggests that by focusing on competitive effects, EC antidiscrimination legislation has not been as effective as it might have been, especially in terms of combatting indirect discrimination. The Community must broaden its focus if it is to eliminate such discrimination. Only then will it possess the weapons that it needs to effectively combat discrimination in the workplace and beyond.

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75 Segregation of occupations by gender is only the most obvious example of this. Because the economic effects of excluding women from certain jobs are felt only within an industry, not in its relation to others, such practices have rarely been subjected to Community antidiscrimination laws.