Anti-discrimination law over pay: Italian and European solutions in comparison*

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1. Topics and goals

In this work the main focus will be on factors which marginalise the application of anti-discrimination law over pay.

First I will place attention on the lack of transparency on the wage structure and on the wages' amount, that prevents from verifying whether there is any discrimination. Secondly, the necessity to attribute differences in pay conditions to a "single source" – and the restricted interpretation of this notion given by the European Court of Justice – makes it difficult to apply the anti-discrimination law over pay in cases of contracting-out. Finally we will consider the difficulties of choosing the male employee ("the comparator") whose wage will be compared to that of female employee in sectors with high horizontal segregation. What are the answers given by the Italian legislation and by European Union to these cases?

Considering these weaknesses, the pay gap between men and women is still a problem also in Italy that, according to the European statistical data, is one of the most virtuous Country in Europe in this field. In fact the pay gap between men and women is in Italy attested only at 5.8% (Eurostat 2012)[1815].

This statistical index does not take into consideration data regarding female employment in the Country: in this sense, the gender pay gap is lower in Countries – such as Italy and Malta – that are featured by a low percentage of employed women (Smith, 2010). If we take into account that in Italy female employment rate is around 47.1% (Istat, 2013), the above mentioned statistical remark is not totally satisfactory: if the wage of involuntarily unemployed women was zero, the gender pay gap would have significantly been higher in countries like Italy (Villa, 2010; Gottardi, 2011; Foffano and Pace, 2011).

2. Brief considerations on European and Italian anti-discrimination law with regard to the problem of gender

The right of an individual worker not to suffer wage discrimination for reasons connected to his/her gender is firstly regulated by Art. 157 Treaty on the Functioning of the European Union[1816]. The latter provision states that each Member State shall ensure the principle of equal pay for male and female workers in case of equal work or work of equal value. Pay is defined "the 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". With directive n. 2006/54, the European Union implemented Art. 157 TFEU and collected in a single text all the regulations that were previously set off by several directives[1817]. Directive n. 2006/54

[1815] At the European level the gender pay gap is defined as the difference between men's and women's hourly pay divided by men's hourly pay.

[1816] Before the approval of TFEU the principle of equal pay for male and female was set off by Article 141 EC Treaty which, after Amsterdam Treaty, replaced the previous Article 119.

[1817] The 2006/54 Directive repealed Directives n. 75/117, 76/207, 2002/73, 86/378, 96/97, 97/80 and 98/52.

gave a definition of "pay" in regard to the anti-discriminatory legislation (art. 2, lett. e)[1818], and drew the concept of direct (art. 2, lett. a)[1819] and indirect (art. 2, lett. b)[1820] discrimination.

At the national level, the Italian legislation regulates gender pay discrimination with Art. 37 of the Constitution and with the Code of Equal Opportunity of 2006 (d.lgs. n. 198/2006) (Barbera, 2007; De Marzo, 2007).

Article 37 states that women and men that are employed in the same work[1821] shall receive equal pay. Although the general principle of equality stated in the Article 3 of the Italian Constitution could have been enough to guarantee equal pay for men and women, considering the wide gender wage gap during those times, the Constituent Assembly decided to specify this principle in an autonomous rule (i.e. the above mentioned Article 37 of the Italian Constitution). For a long period of time, Article 37 was not applied: according to the Italian Doctrine, it was a "programmatic" rule, which may be described as a provision needing a further implementation by a statutory provision in order to be applied. About ten year after the Constitution approval, the Doctrine recognised the direct applicability of Article 37 (Treu, 1979). This conclusion seems to be correct because - like other anti-discrimination laws –Article 37 does not require the Court to assess equity of female wages, but to make a comparison between female and male pays in order to verify the existence of a discrimination.

The 2006 Code of Equal Opportunity, which gathers together a discipline previously contained in different laws, is now the point of reference for anti-discriminatory regulation. The articles to be noticed in our case are: i) Article 25, which defines direct discrimination as "an act, agreement or conduct that produces a particular disadvantage, discriminating women or men for reasons connected to gender and that gives rise to a treatment proven to be unequal if compared to others practiced to another female or male worker in a comparable situation", and indirect discrimination as a "provision, criterion, practice, act, agreement or conduct apparently neutral that puts at a disadvantage or could put at a disadvantage a person in respect to someone of the other sex, unless that provision, criterion, practice, act, agreement or conduct is essential for the work"; ii) Article 28, which prohibits direct or indirect discrimination concerning "any aspect or condition of one's wage".

3. Wage structure and equal pay

In Courts, the claim of equal pay requires some evidence. In order to prove gender wage discrimination, a female worker has to compare her wage with the wage of a man with a similar job. Article 28 of the Italian Code of Equal Opportunity provides – according to the European legislation and to the case law of the European Court of Justice – a wide notion of wage, which implies

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[1818] This definition of pay is exactly the same as the one in art. 157 TFUE.

[1819] There is a direct discrimination in case one person is treated less favorably on grounds of sex than another is, has been or would be treated in a comparable situation.

[1820] There is an indirect discrimination where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary.

[1821] Article 37 of the Constitution recognized equal pay between man and woman only if they are employed in the "same work". It is difficult to give a precise translation of the expression used in the Constitution. Considering that this expression is rather general, at the beginning was considered by Courts as a synonymous of equal work, but after it has been allowed also a larger comparison between works of equal value.

the prohibition of any discrimination regarding "*each aspect or condition*" of pay. This notion includes various methods of payment, such as compensations based on seniority, compensations for heavy work, for extraordinary work, *ex gratia* payments, merit pay and other elements of the wage. Therefore, during a trial, the Court can verify not only if there are any differences in the basic wages, but also if the payments of the other voices of remuneration are due only to worker's gender.

In order to recognise gender wage discriminations, the employer should guarantee transparency on the wage structure and on the amount of wages. Until wages were mostly fixed by national collective agreements, in Italy female employees were able to verify the presence of a pay discrimination. This was due to the fact that collective agreements had free access: as a consequence, a female employee could attest if job tasks or positions which were hold mostly by women were less paid than jobs of equal value performed by men, or if men were receiving unjustified additional forms of remuneration. In recent years, as far as retributions are concerned, there has been a marked shift towards individuality, with an increase in the use of merit pay and systems of management by objectives (Gragnoli, 2012; Corso, 2012). Since employers usually do not release information about pays and systems of evaluation and thus, employees face substantial difficulties in gathering information regarding the salary of their colleagues, asserting the presence of a wage discrimination can be very complex.

In order to resolve this problem, and consequently, to reduce gender pay gap, Article 46 of the Code of Equal Opportunity[1822] includes a specific duty of transparency for firms with more than 100 employees which, every two years, obliges them to give a report on the situation of male and female employees and on the wages that have been effectively paid.

This duty of transparency represents an important instrument to identify wage discriminations; however it rises several issues that makes it inefficient in practice. First, since Italian industrial system is characterised mainly by medium and small-sized enterprises, a provision that provides the duty of transparency only for firms with more than 100 employees, implies that the most companies are not subject to this norm[1823]. Secondly, since it has been introduced in 1996[1824], the prospectus that has to be edited by the firms, is "outdated" because it does not take into consideration the changes occurred in the labour market since 1996. As a demonstration of this, it might be interesting to notice that companies are not obliged to give any information about agency work, although this information could be significant to attest the real pay gap between men and women.

The duty of pay transparency represents an important instrument that would allow employees to know more about wage structures and, possibly, to fight against gender wage discrimination, thus reducing the pay gap between men and women. However, the effectiveness of this duty could be improved. It should be extended to all the companies – or, at least, to the majority of them – and the information that the companies have to insert in the report should be updated according to the market changes. Nevertheless these duties imply costs for the employers, so it

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[1822] This provision transposed without any changes Article 9, l. n. 125/1991.

[1823] For example, in Emilia Romagna the firms that have the duty to prepare the report are covering only the 24,3% of the employees employed in that Region. See the report published on http://www.regione.emilia-romagna.it/consigliere-di-parita/documentazione/rapporti-biennali-sulla-situazione-delpersonale-maschile-e-femminile/rapporti/RAPPORTO_2006_2007.pdf, 31.

[1824] With 17.7.1996 Ministerial Decret.

might be therefore reasonable to discuss whether it is right or not that the firms pay for it in times of economic crisis.

4. The importance of comparison in anti-discrimination law over pay

A claim on gender pay discrimination implies a comparison between two situations: female worker's pay has to be compared to that of a male who is employed either in an equal work or in a work of equal value. The person to whom the female worker will compare her situation represents a fundamental aspect in pay discrimination claims. This problem concerns the criteria that will be used to choose the male employee ("the comparator") whose wage will be compared to the one of the female employee. This is one of the most complex issues in regard to gender pay discrimination (Foubert, 2010).

4.1. The necessity to identify a "single source" responsible for pay discrimination: how contracting-out marginalises equality law

In certain cases of contracting-out followed by in-sourcing, female employees, who have worked for long time side by side with other male colleagues (employed by a third company, operating in the same workplace), try to use the principle of equal pay for men and women to compare their wage with the salary one the male worker who has been employed by the same employer and has received higher pay for equal work or work of equal value. In these cases it is doubtful to asses whether the Article 157 TFUE could be invoked in order to ascertain the existence of a right of equal pay between female employees involved in contracting-out and male comparators who are still working for the previous employer. The European Court of Justice dealt with this issue in two decisions[1825].

The *Lawrence* case concerned the concept of contracting-out (by "Council"), after a competitive tendering process, of cleaning and catering services. The undertakings which have won catering and cleaning contracts, proceeded both to reemploy a number of female employees originally employed in the Council and to recruit new female employees. Female workers hired by these private firms found themselves employed at a lower pay level than previously in the Council, and even lower than the salary due by the Council to male employees employed in other areas, such as gardening, waste collection and drainage maintenance, all jobs that were previously considered to have the same value as catering and cleaning services (Barrett, 2006). The female employees asserted an entitlement – according to Article 141 EC Treaty (now Article 157 TFUE) – in order to be paid as male workers who were doing a work of equal value, but still employed by the Council.

The Court of Appeal of England and Wales asked the ECJ whether Article 141 EC Treaty enabled claimants employed by the private undertaking ("the specific employer") to compare their pay with those of men employed by the Council ("the general employer") who were performing a work of equal value.

The European Court of Justice ruled that nothing in Article 141 EC Treaty suggested that the applicability of this provision is limited to situations in which men and women work for the same

[1825] *A.G. Lawrence and others v. Regent Office Care Ltd, Commercial Catering Group, Mitie Secure Services Ltd,* Case C-320/00 [2002], ECR I-7325; *Allonby v. Accrington & Rossendale College,* Case C-256/01 [2004], IRLR 223 (ECJ).

employer, but differences in pay conditions always have to be attributed to a "single source" (law, collective agreement or establishment). Only in this way it is possible to identify a body which is responsible for the inequality and which could restore an equal treatment. In this case, therefore, the Court ruled that differences in pay condition cannot be attributed to a single source because employers ("general employer" and "specific employer") were separately responsible for terms and conditions of employment. For this reason, the wage of female workers employed by the "specific employer" cannot be compared with the salary paid to male workers employed by the County Council (the "general employer").

In *Allonby* the European Court of Justice's ruling was similar. The Allonby case concerned a College in which, in order to reduce costs, a part-time lecturer was dismissed. The administration of the College hired her again through the intermediation of an agency. The result was that her pay was significantly reduced. Ms Allonby claimed to receive a pay which was equal to the comparator who was a male lecturer employed in the College. The Court made the same decision as taken in *Lawrence* case: Ms Allonby "is not entitled to rely on the principle of equal pay using as basis for comparison the remuneration received for equal work or work of equal value by a man employed by the woman's previous employer"[1826].

Both in *Lawrence* and in *Allonby* cases, the Court of Justice ruled that Article 141 EC Treaty allowed to compare men and women pay even if they worked for different employers, but this could be possible only when pay conditions were determined by a legislative provisions, a collective labour agreement or in case a work was carried out in the same establishment. In these situations there is only a single source (the legislator, the trade union and the administrators of the firm) responsible for the inequality and in charge of restoring an equal treatment. In Allonby case the fact that the level of pay received by Ms Allonby was connected to the amount which the user pays to the Agency was not sufficient for the ECJ to conclude that the user and the agency constitute a single source (Ratti, 2009).

Despite the importance of these conclusions, the *Lawrence* and *Allonby* cases are "a clear representation of the extent to which the phenomenon of contracting-out threatens Article 141 EC with marginalization" (Barrett, 2006). In those cases, women were originally employed by an employer who, after contracting-out services where these female workers were employed, reacquired these services with agency work or work under procurement contracts signed using – at better conditions – also the work of female workers that were previously employed by him/her. These female employees were doing the same work or a work of equal value with respect to male workers employed by the woman's previous employer (the user or the general employer) and were employed in the same firms.

These decisions of the Court show, as Deakin and Morris properly underlined, that the right of equal pay for male and female workers "can be very easily evaded by the employers, as we have seen in these cases" (Deakin and Morris, 2009)[1827].

[1826] *Allonby v. Accrington & Rossendale College,* Case C-256/01 [2004], IRLR 223 (ECJ).

[1827] See also Borelli (2003) who wrote that the ECJ should have considered the employer who was applying the lower remuneration as responsible of the pay discrimination. On the contrary Barrett (2006), acknowledged that Court of Justice realized a serious limitation in the reach of Article 141 in the phenomenon of contracting-out, but observed also that the solutions to these difficulties had to be by means of statutory law. As highlighted in the next paragraph, the legislative answer evoked by Barret was realized in 2008 with the Agency Work Directive (Directive n. 2008/104).

4.1.1. Alternative instruments of protection provided by Italian legislation: the principle of equal pay and the "social clauses"

To overcome the above sketched limits and weaknesses in anti-discrimination law over pay, other instruments of protection provided by Italian legislation should be analyzed.

Allonby shows that comparing salary paid to a woman employed by an agency with those of a man who is employed by the user, even if they are performing the same job task or a work of equal value, is not possible. However, in Italy this weakness can be partially overcome by the reference to the general principle of equal treatment between agencies and users employees as stated in Article 23, d.lgs. n. 276/2003 (Ichino, 2004; Nicosia, 2007). This provision grants agency's employees, for the duration of the assignment, the right to have "basic working and employment conditions that are not lower than the one of the user's employees employed at the same level and doing an equivalent job"[1828].

In this way a woman is less protected than she would be through the application of anti-discrimination law in pay was applied, due to the following reasons.

Firstly, Article 23, d. lgs. n. 276/2003 provides a definition of wage which is narrower than the one stated in Article 28 of the Code of Equal Opportunity of 2006. As highlighted in previous paragraph 3, anti-discrimination law permits to compare not only basic wage, but also other compensations paid to female and male employees that are doing the same work or a work of equal value. Differently, Article 23, d.lgs. n. 276/2003 – modified by Article 7, d.lgs. n. 24/2012 – seems to permit only comparisons between basic wages paid to agencies' and users' employees. As a consequence, merit pay and other elements of pay, additional to basic wage, cannot be compared. This interpretation seems correct, in particular if we consider the changes introduced in Article 23 in 2012: earlier, the law granted the agency worker with the right to have "working and employment conditions not worse" than user's worker. After 2012, the law guarantees equal treatments only in regard to "basic working and employment condition".

Secondly, Article 23, d.lgs. n. 276/2003 allows the Court to make a comparison between agency and user workers' pay only if they are doing "jobs considered as equivalent". Since, according to Italian Courts, two jobs may be deemed equivalent only if they imply the use of the same skills, it may be easily observed that anti-discrimination law gives rise to a larger comparison because performing "works of equal values" does not necessary imply having the same skills (as debated in further paragraph § 4.2).

As above mentioned, in a situation similar to Allonby, the claimant would have had the right to be paid as a male worker employed by the user. Although Article 23, d.lgs. n. 276/2003 provides a protection which is lower than the one a female employee could have if the right not to be discriminated was applied, it guarantees an opportune protection: the right of equal pay, according to Article 23, is guaranteed only for the duration of the working collaboration between the woman worker and the user. This helps preventing the use of agency work from being an instrument that worsen female working conditions. In fact, until female employee works in the firm under her previous employer (the user), she will receive the same basic wage as male workers

[1828] The principle of equal treatment between temporary agency work and employees of the user is fixed also by art. 5, directive 2008/104. See Pantano (2009).

employed by the user that are performing an "equivalent job". In case the Agency sends the female employee to another user, her economic treatment has to be compared with the one the "new" user pays to his employees. Differently, according to Article 28 of the Code of Equal Opportunity, the Agency has to maintain the wage paid by the first user.

In addition, in cases like Allonby, the application of the non-discrimination principle to an Agency female employee's pay in order to recognise her a higher wage, would have produced the opposite effect of discriminating male employees of the same Agency. In such a case, according to the art. 28 of the Code of Equal Opportunity, the user's male employees wage would have been the term of comparison. The female employee would have received the same wage of the user's male worker, including some additional items to the basic pay as well. On the other hand, however, the Agency's male worker would have been entitled only to the same "basic pay" (without additional items) of the user's workers, due to the equal treatment principle of the Art. 23 d.lgs. n. 276/2003. Paradoxically, the Agency's male workers might complain for a pay discrimination grounded on gender, because of the difference between their own wage and the one received by a female employee employed by the same Agency.

In cases similar to Lawrence the solution is different: if a female worker is employed by a "specific employer" and is less paid than male workers employed by the "general employer" – where she was previously employed -, there is not a principle of equal pay that can be applied. This principle has been applied until 2003, because Article 3, l. n. 1369/1960, in case of work under procurement contract, has guaranteed equal pay to the "specific employer's" employees, using as a basis for comparison the remuneration received for equal work or work of equal value by the "general employer'" employees. This principle of equal treatment was only applied when the "specific employer's" employees were working in the firms of the "general employer". This principle was repealed in 2003 (Tosi, 2012; Chieco, 2004; Imberti, 2011).

"Social clauses"[1829], frequently included in national collective agreements, can replace the absence of a general principle of equal treatment between "general employer" and "specific employer's" employees. Through these clauses, collective agreements require the "general employer" to insert in the procurement contract a provision that force the "specific employer" to apply salary and working conditions that the "general employer" guarantees to his/her employees. This provisions are weak and usually unapplied: if the Parts (the "general employer" and the "specific employer") insert the principle of equal pay in the procurement contract, the "specific employer's" employees can claim the application of those principle. Usually, these "social clauses" remain only written in the collective agreement applied by the "general employer". Therefore those provisions do not bind the "specific employer" and its employees cannot claim the same pay received by the general employer's employees.

In a situation similar to Lawrence, even in Italy, the claimants would not have any form of protection. The solution would have been different only if the procurement contract – as a consequence of a "social clause" of the collective agreements –guaranteed the principle of equal pay to the

[1829] These clauses are usually provided by law and bind firms which won a public procurement contract to apply basic working and employment condition to his employees. These clauses are often contained also in the national collective agreements. See Ghera (2001).

employees of the "specific employer". However, the introduction of this rule depends on a free choice of the Parts.

4.1.2. Final considerations concerning equal pay and contracting-out

The effects of the above mentioned ECJ decisions cannot be under-estimated, in particular in view of the frequent use of agency work and work under procurement contract.

The general principle of equal treatment between agency and user employees, stated both in European and Italian legislation, prevents the use of agency work from being an instrument that worsen female working conditions and, broadly, a way for reducing work's cost.

Differently, no principle of equal treatment can be applied in case of work under procurement contract between "general employer" and "specific employer" employees. The outsourcing by work under procurement contract of a service performed only by women, could conceal gender discriminations[1830]. Nevertheless, under "Lawrence", female employees would have not a right not to be discriminated in this case. In order to provide for a higher level of protection, ECJ would have had recognise the two employers as a "single entity".

The lack of a general principle of equal treatment between "general employer's" and "specific employer's" employees causes also other problems, not only related to gender discrimination. In the field of the temporary Agency work, the anti-discrimination principle prevents the use of the Agency employees for the only reasons of reducing work's costs. While employers can more easily reach this aim by work under procurement contract, because such a principle is not granted to "specific employer's" employees. For this reason the extension of the anti-discrimination principle also to the cases involving work under procurement contract could prevent social dumping phenomena with negative effects on labour protection standards.

4.2. The extension of comparison and the problem of horizontal segregation

In Italy, during the 50's a different job classification system for men and women provided by collective agreements was not considered to be a problem at all. This system implied that women were systematically paid less than men without any comparison between their respective works.

The situation changed after the issuing of Article 37 of the Italian Constitution and Article 119 EC Treaty which, initially, recognised the right of men and women to receive the same wage if they were performing equal work. Although it had positive effects, this regulation was unsatisfactory because it did not imply any comparison between men and women pays' in case of female workers performing a different tasks for reasons connected to the horizontal segregation in the labour market. The value of jobs was not taken into account.

Considering these difficulties, both Italian[1831] and European[1832] legislations extended the basis of comparison also to the cases in which men and women were performing a "work of equal value". The answer of the Italian system at this legislative development can help to understand how

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[1830] Discrimination can also be related to union membership, race or political opinion, such as in case of outsourcing (and subsequent in-sourcing at inferior work's conditions) involving employees belonging all to the same union, the same racial group or the same political party.

[1831] At the beginning Article 2, l. n. 903/1977. After it was repealed by Article 2, l. n. 125/1991. Now the regulation is contained in Article 28 of the Code of Equal Opportunity of 2006.

[1832] Article 141 EC Treaty, now Article 157 TFEU. See also Article 4, Directive n. 2006/54.

difficult was imposing an anti-pay discrimination law: starting from that moment, the lower wages paid to women were justified because of a presumed lower performance of women compared to men. Only after judges intervention, it became clear that these criteria represented a typical case of indirect discrimination: if men's work is not measured on the basis of performance, it must be the same for women. On the contrary, if the employer had adopted performance as a criterion to evaluate the work, he should not presume that women's performance is automatically lower than men's one (Barbera, 1991; Ichino, 2003).

As mentioned above, the principle of equal pay between men and women is applied for equal work or work of equal value. Therefore, the problem lies in understanding when two works can be considered to be of equal value. Initially, judges transferred this evaluation to the collective agreements (Treu, 1979): two jobs were considered of equal value when they were inserted in the same classification level by collective agreements. However, there was no mention to the fact that usually collective agreements classified jobs performed by women in different categories. These jobs were usually undervalued with respect to those typically considered as male jobs. This complex situation pointed out that some changes were necessary both in law and collective agreements, as well as in social stereotypes, in order to solve the problem of gender wage discrimination.

The concept of "work of equal value" started to be fully understood when it became possible to compare also jobs classified in different levels within the collective agreements. Subsequently, it has been possible to overcome the barriers raised by occupational segregation against job comparison: in order to verify if two jobs are jobs of equal value, it is possible to compare also jobs of different type, i.e. jobs which require different practical and technical skills, but that can still be compared. In such regard, jobs are comparable if they require a similar level of knowledge, similar skills, efforts or responsibility. In this way, for instance, a cleaner's salary can be compared with the amount of pay due to a gardener.

A clarification may be helpful: in labour market segregation can be horizontal or vertical (Foubert, 2010). In case of horizontal segregation, both men and women predominate in different sectors[1833] or in different jobs[1834]. Vertical segregation implies that women are underrepresented in the highest positions (this kind of segregation is connected with the "glass ceiling" theory). To reduce the effect of this second kind of segregation, the extension of comparison is not the right solution because in this case men and women perform tasks of different value, that are not comparable. To reduce this kind of segregation, it might be useful to adopt specific legal tools, such as affirmative action or reserved quotas, in case women are underrepresented. On the contrary, the extension of the comparison can be useful in sectors and jobs affected by horizontal segregation: if the comparison is possible only between men and women doing exactly the same job, in sectors or jobs where the number of women is absolutely predominant, it might be very difficult – or impossible – to find a male term of comparison.

[1833] For example education, health services, social work are sectors highly feminized.

[1834] There are some jobs, like mechanic or driver that usually man do. Differently women are overrepresented in other jobs like weaver, teacher, cleaning etc.

In order to overcome this difficulty, the comparison was made not only extending it to the ideas of "equal work" and "work of equal value", but also taking into account the concepts of "space" and "time". The ECJ stated, in fact, that if the comparison had not been extended in that way, the principle of equal pay between men and women would have been deprived of any substance "by encouraging the segregation or concentration of workers of one sex in particular sectors and categories of employment"[1835].

The European Court authorised the comparison between the pay of a female worker and the salary of the male worker who was previously employed in the same work ("the predecessor")[1836]. This solution guarantees the possibility to recognize a wage discrimination also in those cases where in a firm there are no employed men, as long as in the past there has been at least one, employed in the same work or in a work of equal value with respect to the one performed by the female worker.

In order to identify possible pay-discriminations in sectors and jobs where women are predominant, it became possible to compare the salary of a female worker to the salary that would be paid to an hypothetical male worker performing the same job, even in case of total absence of a man who was having or previously had a similar job. In this case, the comparator is called "hypothetical male worker". This interpretation finds its roots in the definitions of direct and indirect discrimination given by Article 2, lett. a) and b) of Directive 2006/54. In particular, the use of conditional form in the definition of direct discrimination, described as "a situation in which one person is treated less favorably than another is, has been or would be treated in a comparable situation on gender basis", legitimates a comparison between the salary paid to a female to the income of a hypothetical male worker. In case of indirect discrimination it is possible to make a "virtual comparison". According to the Directive, it is enough that a provision, criterion or practice could put the female worker at a disadvantage.

The reasons suggested in order to consider a hypothetical comparison sufficient, have been rejected by the European Court of Justice that in case of discrimination (Article 141 EC, now 157 TFEU) asserted that the term of comparison could not be "hypothetical" but was to be a male worker that has currently or previously performed the same work or a work of equal value.

The Italian legislation does not use the same definition of direct and indirect discrimination that can be found in Directive n. 2006/54 (see § 2). If we start from a literary interpretation of the definition of direct and indirect discrimination provided by the Code of Equal Opportunity, it is clear that, according to the Italian statute law, the presence of a male worker (currently or previously employed) as a term of comparison is necessary. In the definition of direct discrimination we notice the absence of the conditional form (unlike 2006 Directive), whereas it is necessary that a treatment applied to a man or a woman is "less favourable if compared to others practiced to another female or male worker in a comparable situation". This definition implies the presence of a real – and not a hypothetical – comparator[1837]. It is possible to reach the same conclusion also considering the definition of indirect discrimination provided by the Italian legislator.

[1835] *Macarthys Ltd c. Wendy Smith,* Case C-129/79 [1980], ECR I-1275.

[1836] *Macarthys Ltd c. Wendy Smith,* Case C-129/79 [1980], ECR I-1275.

[1837] See the different opinion of Foubert (2010), who states that in the Italian legislation comparisons can be also merely hypothetical. See also Barbera (2002) and Lassandari (2010).

According to this definition, there must be a provision, a criterion etc. that puts at a disadvantage a person of one sex in respect to someone of the other sex.

Hypothetical comparison might seem to be a good solution especially in sectors where there is a high grade of horizontal segregation. However, an indiscriminate use of this criterion, as far as pay discrimination is concerned, could lead to "immense and alarming disasters" (Izzi, 2003). Generally accepting hypothetical comparisons would allow the Court to make decisions using discretionary criteria that would be very difficult to control (Izzi, 2003; De Simone, 2001)[1838]. In this way, the "heal" adopted to recognize wage discriminations between men and women in sectors or jobs with horizontal segregation, could be worse than the "disease", because it could make the result of an anti-discriminatory claim totally and randomly uncertain.

The issue of comparison concerning the concept of "space" is definitely more complicated. It is crucial to bear in mind that in Italy the collective bargaining system is centralised. Accordingly, the job classification system and the wages of employees belonging to the same "product category"[1839], despite the reduction of the role of national collective agreements in fixing wages, are normally negotiated at national level. In this system, the pay of a female worker can be compared with the one of a male worker who has a different employer, only if the two employers enact the same national collective agreement (Barbera, 1991). This extension of the comparison can be useful in order to find a term of comparison in case in the firm where the woman is employed there is not male worker performing a job of equal value. However, this extension does not fully convince. Firstly, the extension of comparison leads to an increase of the number of reasons that the employer may refer to in order to justify the differences between the wage of her/his female employees and the wage that another employer paid to his male employees with a job of equal value. There may be, reasons connected to the dimension of the firm, or linked to the place where the firm is located etc. which may justify this difference. Secondly, in the Italian industrial relations system, national collective agreements are usually integrated by a second level bargain products (usually a company level collective agreement), although the latter level of negotiation is not very common because most firms are small sized companies which look at second level of collective bargaining as a mere cost. Nevertheless, where this level is applied, it usually introduces – specifying or modifying the national collective agreement - a regulation in terms of wages and job classification. In these cases, different wages paid to men and women employed by different employers, even if they adopt the same national collective agreement, can be explained with differences introduced by the second level of collective bargaining. Consequently, these two categories of employees can no longer be compared.

The extension of comparison has positive effects: it gives the chance to find a comparator for a woman also in sectors or jobs with horizontal segregation. Moreover, when a male comparator is found, the anti-pay discrimination law guarantees to a woman employed in a mainly female job or sector the same wage of a male who, despite being employed in a different sector or job, is doing a job of equal value. Nevertheless, this extension does not totally solve the problem of horizontal segregation which still exists.

[1838] Otherwise Lassandari (2010) asserted that this opinion put too much emphasis on the risks that could derive from hypothetical comparison. This kind of comparison could be used only where could not be found "comparator" in present and past.
[1839] Categories are, for example, metalworking, chimics, textile etc.

5. A proposal to reduce the pay gap between men and women

The provision of a duty of transparency on wage structure and on the amount of wages paid by the employer represents a chance to discover possible differences in wage depending only on the worker's gender. This duty should be improved by providing an effective obligation to all firms in order to compel them to give specific information also on their agency work and work under procurement contracts. As far as this aspect is concerned, Labour law can play an important role, as we have seen in cases involving agency work and work under procurement contracts. The general principle of equal pay between agency and user workers, provided both by the Italian and the European legislation, can prevent cases like *Allonby*. Neither the Italian nor the European legislations introduce a principle of equal pay between "general employer's" and "specific employer's" employees working in the same firm.

Labour law is neither able to identify the real dimension of pay gap between men and women nor to solve the problem of female segregation in the labour market. In these cases, economic, statistical, human and social sciences can be useful.

Cavalla, a law philosopher, has explained that the truth shows different faces and different degrees. Rhetoric, science and philosophy can help to reach a certain degree of truth, but only with a virtuous integration of all their methods might it be possible to reach a more elevated level of truth. This theory was known also in the Middle Ages, when the seven liberal arts[1840] had a complementary relationship, because the search of truth was considered to have multidisciplinary aspects.

In our subject, the economic and statistic sciences, considering the specific situation of each labour market, can help to understand the existence and the importance of pay gap between men and women. Human and social sciences can help searching reasons of female segregation in the labour market. Labour law has to provide the normative instruments to reduce pay gap, taking into consideration the results achieved by the other disciplines and the changes occurring in the Labour market. Only in this way, Labour law can give effective explanations and help to consistently reduce gender pay gap.

Finally, we can affirm that also the solving of gender pay gap's problem requires – like the search of truth for philosophers – a multidisciplinary approach.

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[1840] Seven liberal arts are divided in arts of "trivio" (grammar, dialectic and rhetoric) and arts of "quadrivio" (arithmetic, geometry, music and astronomy).

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