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Impact of Community Acquis on Equal Pay in Ireland between National Economic Interests and Fundamental Rights of Women in the EEC

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1. Introduction

Since the beginning of the 21st century, historiography on European integration has shown that the Seventies represented a phase of advancement for the then European Economic Community (EEC), reporting in this way a new historiographical trend in comparison with the past. After all, the decisions taken by the heads of State and Government during the Hague Summit – held on December 1-2 1969 – marked the well-known “relaunch” of the Europe-building process1. A qualitative relaunch, given that after a ten-year-paralysis the decision was to follow the path to integration starting from the completion, which took the form of the financing of the Common Agricultural Policy. The other two elements were the enlargement, with which Britain, Ireland and Denmark were admitted into the EEC on January 1st 1973, and the deepening with which the action of the EEC was extended to new areas, i.e. monetary affairs and European political cooperation, environment and energy, regional and social matters2.

Thus, for the protagonists of the first enlargement, the acquisition of the membership suddenly coincided with a larger European transformative power of both their legal system and culture, a direct consequence of the renewed integration process. At stake were not only economic issues but also questions such as foreign policy coordination, the solidarity among the regions of Europe, the safeguard of the environment and the improvement of working and living conditions of everyone, men and women.

As for this last point, this paper focuses on the impact of the Irish accession to the EEC on the Irish women’s rights and more in general on the evolution of the local society. The adoption in the Irish Domestic Law of the *acquis communautaire*, specifically as far as equal pay is concerned, did not occur through a linear process but, instead was characterized by national oppositions. This episode highlighted on one hand, the difficulties even after the first enlargement – to really understand and respect the fundamental requirements deriving from European membership while on the other hand contributing to underlining the EEC’s role for the enhancement of Irish women’s *status*.

This paper is divided into two parts: the first one traces the path towards the recognition of the equal pay principle in the Treaty of Rome. The second analyses issues concerning the Irish reaction relative to the full respect of equal pay. It’s central role was confirmed by the 1975 approval of the first directive in the field of gender equality and the 1976 *Defrenne versus Sabena* judgement, by the Court of Justice of the European Communities.

2. The origins of the European Gender Equality Policy: the Article 119 of the Treaty of Rome

Equality between women and men is, to this day, one of the fundamental rights and common values of the European legal order and the gender equality policy is one of the so-called “horizontal policies” of the European Union (EU)\(^3\). Nevertheless, at the beginning of the European integration process, the principle of equality between the sexes was extremely limited. Indeed, the only existing legal provision was Article 119 of the Treaty of Rome according to which

> Each Member State shall during the first stage ensure and subsequently maintain the application of the principle that men and women should receive equal pay for equal work. For the purpose of this Article, “pay” means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives, directly or indirectly, in respect of his employment from his employer. Equal pay without discrimination based on sex means:

(a) that pay for the same work at piece rates shall be calculated on the basis of the same unit of measurement;
(b) that pay for work at time rates shall be the same for the same job.\(^4\)

The reasons behind the adoption of such a measure resided in the economic factors that aimed at preventing “social dumping” within the EEC. This dangerous form of unfair competition, still practiced in violation of workers’ rights, allows entrepreneurs to introduce highly competitive products into the market. In particular, it was France which insisted on the need to include a norm on equal pay, as well as on additional hours and paid leave. Compared with other European countries, such as Italy and the Netherlands, France had a higher number of female workers employed in industries and a much narrower – about 7% - wage gap between the sexes.\(^5\) It was not coincidental, if Article 119 was a mandatory one although it was included in the rather weak set of rules regarding the social dimension of the European Common Market (Articles 117-122).

We should recall, albeit briefly, that the female salary has historically been lower than the male one. Economists like Adam Smith (1723-1790) and Jean-Baptiste Say (1776-1832) affirmed that while the male salary was necessary to support an entire family, that of women would have to be kept below subsistence level because they could count on their fathers, brothers or husbands. Among other things, this disregarded single women or those who were the only source of income for their family. However, with the advent of the textile industry in the second half of the 18\(^{th}\) century, women and children increasingly became preferential manpower for employers exactly because they could be substantially underpaid.\(^6\)

At the beginning of the 19\(^{th}\) century, thanks to the first struggles of women workers and militant feminists as well as the new position of the labour movement, the principle of equal pay was included in the discussions on social justice. Among the several considerations, those highlighting how wage discrimination constituted a form of social dumping appeared decisive and were in line with the perspective of industrial groups. For this latter, indeed, it was fundamental to support fair competition among other things, through equality of working conditions in an increasingly transnational market. However, after the World War I – when women took men’s place in the family and in the work force – requests for equal pay had no


positive response within national legal systems, receiving instead a wide attention in the international arena, where the principle was for the first time codified. The clause concerning the “salaire égal pour un travail de valeur égal” was included among the “general principles” of the Constitution/Charter of the International Labour Organisation (ILO), established in the thirteenth section of the Peace Treaty of Versailles, signed on June 28 1919.

Despite some initiatives the ILO carried out in favour of equal pay in the interwar period, after World War II the action of this organization – which in the meantime had become one of the first specialized agencies of the United Nations – was sharper. Fundamental was the approval on June 29 1951 of the Equal Remuneration Convention (number 100), entered into force on May 23 1953. In addition, it is interesting to recall that after the World War II the principle of equal pay was also recognised by the most important international organisations, i.e. the United Nations and the Council of Europe.

At the European level, the negotiations on the Treaty of Rome were the first important moment for discussing the adoption of equal pay among the founding principles of the European Common Market. In these circumstances the French position, mentioned before, was contrasted by the German Federal Republic. Despite its economic boom, Germany would have liked to obtain competitive advantages thanks to lower women’s pay, considering the harmonization between male and female salaries as a spontaneous consequence of the functioning of the EEC. Nevertheless, after the entry into force of the Treaty of Rome, the founding States put the Article 119 in a tight corner.

The European institutions – in particular, the Commission and the Parliamentary Assembly – demonstrated, on the other hand, a special awareness towards the equal pay principle, well beyond the economic reasons leading to its introduction in the Treaty of Rome. It is worth mentioning the statement of socialist Léon-Eli Troclet – the father of social security in Belgium – during the first parliamentary debate on equal pay of October 1961:

l’article 119 constitue non seulement un engagement mutuel entre les Etats, mais un engagement à l’égard des travailleurs. Ce serait vraiment, pour les travailleurs, une grande déception de devoir enregistrer une carence dans un domaine social particulier, surtout lorsqu’il a fait l’objet d’un article précis du Traité de Rome. Cette grande déception aurait des conséquences politiques, car on doit bien se rendre compte qu’il n’y aura pas d’intégration réelle de l’Europe si les travailleurs n’y sont pas associés et s’ils ont à se plaindre de l’irrespect ou du non-respect d’une disposition qui constitue à leur égard un engagement au moins autant qu’un engagement des Etats entre eux.

Unfortunately, the incessant requests of the European institutions as well as of women themselves – the Herstal strike cannot help being cited\(^8\) – for the application of Article 119 were substantially neglected. The gender pay gap continued to exist in the “Little Europe of the Six” all the decade long; only at the end of the Sixties did a wider debate on the *status* of women workers in the EEC start spreading as a prelude to the important initiatives of the Seventies.

3. Equal pay: “irresponsible antics”?

During the Seventies, European institutions appeared to be overwhelmed by a sort of *common wave of feminism*. Given the economic nature of the EEC, the actions undertaken in the Community context were with no doubt less ample or radical than those taken by feminist movements which from the USA to Europe were shaping the so-called *second wave of feminism* and were limited to some aspects of women-working conditions\(^9\).

Following the Hague Summit, the Paris Summit – held on October 19-20 1972 – certainly represented a turning point for the social dimension of European integration, of which working women’s rights still represent one of the most important aspects. During this Summit, it was stated for the first time that

The Heads of State or Heads of Government emphasized that they attached as much importance to vigorous action in the social fields as to the achievement of the Economic and Monetary Union. They thought it essential to ensure the increasing involvement of labour and management in the economic and social decisions of the Community. They invited the Institutions, after consulting labour and management, to draw up, between now and 1 January, 1974, a programme of action providing for concrete measures and the corresponding resources particularly in the framework of the Social Fund, based on the suggestions made in the course of the Conference by Heads of State and Heads of Government and by the Commission\(^10\).

There is no doubt that this wider attention to the social aspects of the European integration process represented not only a positive answer to the protest movements of 1968 or to the new German chancellor, Social Democrat Willy Brandt, but also a need for the imminent enlargement of Europe.

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Approved by the Council of Ministers in January 1974, the *Social Action Programme* contained around 40 initiatives grouped under the three main objectives of full and better employment, improved living and working conditions and worker participation.

That was an important result for the European Commission which during the previous year had drawn up a draft of the programme. In particular, the first *Social Action Programme* was fine-tuned by the Directorate-General for Social Affairs, at the head of which was Patrick Hillery. Irish Minister of Foreign Affairs between 1969 and 1973, Hillery can be included with Seán Lemass and Jack Lynch among those who brought Ireland into the EEC\(^{11}\). Hillery was the first Irish European Commissioner from 1973 to 1976 – on December 3 1976 he was elected President of the Republic – and his name will always be linked to the birth of the European social policy. In the field of women’s rights, Hillery is remembered by Bruxelles officials and the public opinion of his time as a convinced feminist, undisputed protagonist of the struggle for equal pay.

During the Sixties, as previously mentioned, a wide gender pay gap remained in all member States, strengthen by the *non-executing* character of Article 119. In this way, the norm in question did not create any individual right and women did not claim to seek enforcement of their rights before national tribunals. For these reasons, it became increasingly evident in the eyes of Hillery, and of other European Commission’s officers – namely, British Michael Shanks and French Jean Boudard – as well as of the Commission’s legal service that legislation at the national level was needed to make up for gaps and inadequacies. To force governments to adopt such a legislation and ensure consistency would require an European Directive; after the passing of the *Social Action Programme*, this objective had become closer to be achieved\(^{12}\).

Already submitted by the European Commission on November 1973, the Directive on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women was approved on February 1975\(^{13}\). Its focal point was


Article 1, according to which the principle of equal pay meant the elimination of all discrimination on sexual grounds with regard to all aspects and conditions of remuneration. This applied not only to the same work, as established in Article 119, but also to work to which equal value is attributed, in this way taking a step towards a greater recognition of the principle.

As Hillery stated during a debate in plenary sitting of the European Parliament

This directive is the first legal important step and I should like to point out what it sets out to do. The main goals are, first, to generalise certain minimum protection standards, which will ensure that legal proceedings can be instituted so that the right to equal pay is respected. At the same time, any discrimination existing in the law affecting wages would be eliminated. We believe that it is also necessary […] to make ineffective any provision of agreement or contracts which are contrary to the principle of equal pay14.

To the success reached by Hillery, for whom “the most blatant and inexcusable discrimination is that a woman doing the same work as a man should be worse paid.”15 was opposed as an out-of-the-blue fact the Irish government’s official request for a temporary dispensation from the application of Article 119 and of the newly approved Directive on equal pay.

More precisely, Minister of Foreign Affairs Garret Fitzgerald justified the request on the grounds that women’s pay rise would have caused some economic sectors to suffer. After all, as the European Commission revealed in a detailed report on the application of Article 119, immediately before the entry into force of the Accession Treaty in the newcomers, the discriminatory provisions against women workers in the Republic of Ireland were still too many. The report reminded that gender-based different pay scales characterised the Irish teaching and public sectors, only opened to married women in July 1973. The approximately 20% gender pay gap was connected to the marital status, since married men received higher-paying salaries. Like in the private sector, wage discrimination against women was extremely common in the collective agreements of all work branches; since 1959, wage developments have shown that women’s wages have always increased less than men’s. Totally disregarding the human and social values related to the principle in matter, an Irish committee of experts underlined that especially the textile and clothing industries would have to pay 12 million

dollars more in the following two years in order to follow the EEC provisions. The European Commission judged the Irish government’s request unacceptable because it deprived Irish women of a fundamental right recognized in the EEC Treaty and confirmed by the approval of a specific Directive included in the first Social Action Programme.

At the same time, aware of the predicament of the Irish economy, the European Commission supported the research of suitable measures to overcome the crisis. The Commission accepted any suggestion from Ireland on the modalities with which Social, Regional and Agricultural Funds could be used in order to help the industrial sectors more “affected” by the implementation of equal pay legislation. Nevertheless, tensions originated in particular between Patrick Hillery and the Irish Minister for Finance Richie Ryan (1973-1977). Even if they were from the same country, they clearly bore different interests: the first, as a European Commissioner, represented the European interest, working in order to ensure that the *acquis communautaire* be fully respected by all Member States without exception for the country of origin and in independently from this. The second one instead obviously spoke on behalf of the Republic of Ireland. Ryan demonstrated his only partial understanding of the institutional functioning of the EEC his country had just entered in. He questioned the independence of Hillery, accusing him of damaging the reputation of Ireland and of not being interested in his own country. Finally, he labeled Hillery’s decisions concerning the strict application of legislation on equal pay as «irresponsible antics».

On the contrary, the European Commission’s negative answer to the Irish request should not be surprising. It could be explained with the factors leading to the introduction of the equal pay principle in the Treaty of Rome and the EEC’s efforts since the Hague Summit towards the improvement of living and working conditions. As a confirmation of the importance of Article 119 and in that spirit of “common wave of feminism” mentioned above, on April 8 1976, the Court of Justice of the European Communities pronounced an important judgment, establishing the direct effect of Article 119. The reference is to the *Defrenne versus Sabena* judgment where the Court underlined the economic and social aim of Article 119 so that the principle of equal pay it established is one of the very foundations of the Community.

16 EEC balks Irish on women’s pay, «International Herald Tribune», 06/03/1976, in Historical Archives of the European Commission (HAEC), BAC 154/80 n. 1329.
17 *Irish plea for equal pay delay rejected*, «The Times», 05/03/1976, in AHCE, BAC 154/80 n. 1329
According to the Court, the Community is “not merely an economic union, but is at the same time intended, by common action, to ensure social progress and seek the constant improvement of the living and working conditions of [the peoples of Europe], as emphasized by the Preamble to the Treaty”. More specifically, the Court considered that the social objective of Article 119 was stressed by its inclusion in a Chapter devoted to social policy. The preliminary provision of this Chapter, Article 117, showed “the need to promote working conditions and an improved standard of living for workers, so as to make possible their harmonization while the improvement is being maintained”\textsuperscript{19}. Hence, Article 119 could well be a ground for claims before national courts. Its enforcement was to take place in the founding States since the beginning of the second stage of the transition period (January 1, 1962) and in the new Member States since January 1, 1973. In this case as well the Republic of Ireland – together with the UK – took an opposite stand, questioning the direct effect of Article 119 and appearing to be particularly sensitive to the “cost of the operation”\textsuperscript{20}.

These events confirmed that, in the field of women’s rights, the EEC and Ireland were walking along two opposite directions: while the EEC was affirming the gender equality principle as a social and human right and not only as an anti-dumping measure, Ireland seemed to have a narrower view on this issue.

In fact, in the 1922 - 1970 period, despite some changes, this country held on to the pre-modern values, giving priority to Catholic religion, nationalism, authoritarianism and the dominion of agriculture in economy. The Irish seemed to be alienated from the State and the legal process, attributing this to the persisting influence of a peasant culture which traditionally gives priority to communal moral values over individualistic ones\textsuperscript{21}. Victims of an obviously patriarchal society, the Irish women of the beginning of the Seventies were in such a state of weakness and isolation to be prevented from any possibility of reaching important goals such as equal treatment in the labour market. After all, according to the Irish Constitution approved in 1937, “the State recognises that by her life within the home, woman gives to the State a support without which the common good cannot be achieved. The State shall, therefore, endeavour to ensure that mothers shall not be obliged by economic necessity to engage in labour to the neglect of their duties in the home.”\textsuperscript{22}

\textsuperscript{19} Report on the development of the social situation in the Communities, 1976, pp. 36-37.
\textsuperscript{20} Opinions of Mr Advocate-General Trabucchi delivered on 10 March 1976.
4. Conclusion

To everybody’s knowledge, thanks to its entry into the EEC and a process of economic opening and modernization as well as a less isolationist attitude, Ireland has gradually become the «Celtic tiger». At the same time, the acquisition of membership enabled Irish women to start claiming rights as part of a wider community and to challenge the thinking behind many of the normative assumptions which were dominating the Irish social policy and affecting women’s status. Nevertheless, despite several successes achieved in the economic realm, the same cannot be said for women’s rights, where, even with the passing of time, there still exists a gap with the EEC/EU’s rights and policies. Even though the acquis communautaire on equal pay and equal treatment has entered into the Irish national law, women discrimination remains a serious phenomenon. Thus, to a deepening interest of the EEC/EU toward gender equality hasn’t corresponded a greater commitment of the Republic of Ireland in this field. In a field where the EEC/EU still has a limited sovereignty in a field like gender equality where it cannot enforce the relevant legislation in the Member States. However, its increasingly stronger role is required to cope with any non application at national level in order to build a more inclusive, thus equal, European society.

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