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EQUAL PAY

EU legal framework

CJEU case law

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GLEICHBEHANDLUNGSANWALTSCHAFT ÖSTERREICH



Summary

- Presentation
- Gender Pay Gap in the EU
- European legal basis for the equal pay principle
- CJEU case law
- Examples of national measures
- Summary



Austrian equal treatment service

- An equality body as defined by Dir. 2006/54/EC Art 20; Dir. 2000/43/EC Art 13; Dir. 2004/113/EC, Art 12 (bodies for the promotion of equal treatment)
- Independent advice and support for victims of discrimination
- Proceedings before the equal treatment commission
- Information work
- EQUINET international network

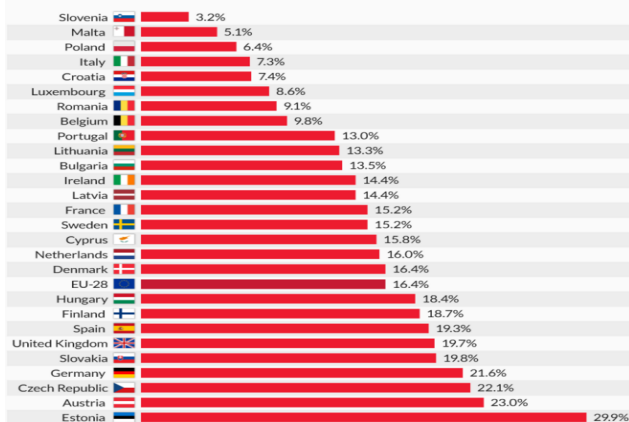
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Gender Pay Gap in the EU 2015

The EU's gender pay gap visualised

Estimated difference between average gross hourly earnings of men & women*



*% of male gross earnings
No data for Greece
Source: Eurostat

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The INDEPENDENT

statista



Gender Pay Gap

- Gender Pay Gap: EU average 16.4 %
- The pay gap is closing very slowly
- Adjustment: factors such as working time, training, sector, age, seniority,...
- "correction factors": only partially legitimately acceptable, e.g. discriminatory aspects of part-time work, otherwise political, e.g. sectoral pay
- Adjusted statistics => nonetheless an "unexplained remainder" of more than half of the pay gap


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Causes of the Gender Pay Gap

- history and culture
- hypotheses, stereotypes and generalising images of gender and their constant reproduction (socialisation)
- different career paths
- segregation in the labour market
- direct and indirect discrimination (wage systems, job evaluation, vertical segregation/glass ceiling)
- And further...

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Communication on the application of Directive 2006/54/EC

Effective application of equal pay is hindered by

- Lack of clarity and legal certainty regarding the concept of work of equal value
- Lack of transparency concerning pay systems
- Procedural obstacles

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European Commission Recommendation, 2014

- “Strengthening the principle of equal pay between men and women through transparency”, 2014/124/EU
- Aim: Increasing pay transparency by
 - introducing right to information on pay and salary levels,
 - regular reporting
 - pay audits
 - attention during collective bargaining
 - defining the concept of “work of equal value”
 - gender-neutral job evaluation systems

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Gender Strategy

- European Commission’s Strategic Engagement for Gender Equality 2016-2019
- “reducing the gender pay gap” is a major objective
 - strengthen transparency
 - strengthen access to the law for all through well-functioning equality bodies

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EU legislative framework

- Primary legal basis of the principle of equal pay for equal work from the beginning (1957) **Art 157 TFEU**
- Secondary law - minimum standards binding on MS **Directive 2006/54/EC**
- Since 2009 Charter of fundamental rights – part of primary legislation **Art. 23(1)**

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Art 157 TFEU: Equal pay principle

- Broader concept of pay:
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
- Performance-based pay and time-based pay systems recognised
- “Fundamental nature” of this provision

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Art 157 TFEU: Principle of equal pay and the CJEU

- Art 157 TFEU: Equal pay principle as **fundamental principle** of the Community – fulfils economic and social objectives (*CJEU Defrenne II*)
- Economic objective supports the social objective (*CJEU Schröder*)
- Direct applicability of Art 157 TFEU (*CJEU Defrenne II*) - legally enforceable for legislation, social partners and individuals (*CJEU Helmig*)
- Equality of pay must be guaranteed for **each individual element of pay** (*CJEU Barber and others*)

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Concrete form in Directive 2006/54/EC

Article 4, first sentence:

- indirect and direct gender discrimination
- same work or for work to which equal value is attributed
- with regard to all aspects and conditions of remuneration

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Concrete form in Directive 2006/54/EC

Article 4, second sentence:

- A job classification system used for determining pay
- must be based on the same criteria for both men and women
- must be so drawn up as to exclude any discrimination

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Concrete form in Directive 2006/54/EC

Recital 9 of Directive 2006/54/EC: Equal value, if

- workers may be considered to be in a comparable situation considering
 - nature of the work
 - training
 - working conditions

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CJEU case law

Extensive CJEU case law since 1970 on pay discrimination on the grounds of gender – many requests for clarification, but haphazardly

- What is covered by “pay”?
- Scope of application
- What is equal work or work of equal value?
- Direct/indirect discrimination
- Possible reasons for justification
- Burden of proof

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CJEU: What is covered by “pay”?

- All current or future remuneration paid in cash or in kind, provided that the employer pays it at least indirectly in return for the performance of a service (*CJEU Defrenne I*)
- e.g.
 - allowances
 - overtime pay
 - bonuses
 - special payments
 - rewards
 - sick pay
 - interim payments during unemployment
 - occupational pensions

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CJEU: Scope of application

- concept of employee under EU law (CJEU *Lawrie Blum*)
- also public law employment relationships (CJEU *Gerstner*)
- employers: differences in pay must have the same source. single source through which those required to do so can restore equal treatment (CJEU *Lawrence, Allonby*)

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CJEU: What is equal work or work of equal value?

- **Equal work:** identical duties. "Equal work" is a purely qualitative concept – it refers to the manner of working, the employment of the persons compared does not have to be contemporaneous (CJEU *Macarthys*)
- Classification in the same user group in a collective agreement may be an indicator for equality of value (CJEU *Brunnhöfer*)
- a comparison with persons who carry out work of lower value also falls within the scope of application (CJEU *Murphy*)

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CJEU: What is equal work or work of equal value?

- **Work of equal value:** Occupational classification systems must be considered and balanced in terms of the criteria applied – the use of criteria based on physical strength may indirectly discriminate against women (*CJEU Rummler*)
- Establish equal value by
 - comparing the nature of the activities which employees can be assigned
 - the educational requirements for performing them
 - the nature of the working conditions (*CJEU WGKK* and others)

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CJEU: What is equal work or work of equal value?

- Different vocational training can be considered to justify indirect discrimination, when examining whether work is of equal value (*CJEU Kenny*)
- for comparison of average pay all employees must be included in the comparator groups and these groups be relatively large in number, in order to exclude purely fortuitous or short-term factors (*CJEU Royal Copenhagen*)
- Equal value is to be tested by the national court

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CJEU: Direct discrimination

Actual facts

- comparable position
- disadvantage
- on the grounds of sex (even structurally)

“Justification” only, if:

- no comparable situation
- positive measure

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CJEU: Direct discrimination

Special case: discriminatory conduct
relates to pregnancy and maternity

=> no individual or group comparator
required!

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CJEU examples: direct discrimination

- Non-payment of a pay increase which was granted to others during the period of an employee's maternity leave is direct discrimination (CJEU Gillespie)
- Different qualifying ages for an occupational pension is direct discrimination (CJEU Smith)
- Regulation permitting female civil servants to take retirement on their husband's becoming disabled or incurably ill while this is not permitted for male civil servants is direct discrimination (CJEU Mouflin)
- Transfer of a pregnant employee to different duties for their protection must not lead to the withholding of allowances linked to her occupational status (managerial position, length of service, professional qualification) (CJEU Parviainen)

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CJEU: indirect discrimination

- seemingly neutral provisions, criteria
- disadvantageous impact for one sex
- can be justified under certain conditions
- must be proportionate

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CJEU: indirect discrimination

- Most frequent cases: different career paths, e.g. part-time employment
- evidence:
 - previously statistical
 - now also hypothetical comparison: it is a matter of whether seemingly neutral provisions or criteria can disadvantage women as a group in a particular manner

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CJEU: indirect discrimination

- Different rates of pay for part-time and full-time workers constitutes indirect discrimination if it cannot be justified by objective factors which have nothing to do with gender (*CJEU Jenkins*)
- Failure to provide an occupational pension to employees who have not completed 15 years full-time service constitutes indirect discrimination unless a permissible justification is possible (*CJEU Bilka*)
- Differing treatment of part time and full-time workers in the allocation of training sessions in working hours is indirect discrimination (*CJEU Bötzel, Lewark, Freers*)

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CJEU: indirect discrimination

- payment for overtime only when exceeding full-time working hours: not indirect discrimination, as long as the same pay is received for each hour up to the normal working hours, then overtime paid to all (*CJEU Helmig*)
- Lower pay scale classification of part time workers moving onto full time work is indirect discrimination (*CJEU Hill/Stapleton*)
- If lower pay is offered for one activity compared with another and if the former is almost exclusively performed by women and the latter primarily by men, then *prima facie* there is indirect discrimination on the basis of gender if the two activities are of equal value and the statistical data is significant (*CJEU Enderby*)

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CJEU: Justification for indirect discrimination

- "she has not been in the company very long"
- "she has not been in employment as long"
=> *CJEU Danfoss, Cadman, Nimz*
- "she is less productive" => *CJEU Brunnhofer*
- "she does not work longer hours as often" => *ECHR Danfoss, Bilka, Enderby*
- "she had a shorter education" => *CJEU WGKK, Kenny*
- "he was our preferred candidate" => *CJEU Enderby*
- "the company needs to make savings" => *CJEU Hill and Stapleton*

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“she has not been in the company very long” “she has not been in employment as long”

- Here the neutral criteria of seniority and professional experience are addressed
- In principle seniority is acceptable grounds for justification (*CJEU Danfoss*) since “professional experience tends to go with better working performance”, but ...
- if employee can make a credible case that seniority will not lead to any improved working performance, the employer must provide evidence for this (*CJEU Cadman*)
- NB: no longer probation period for part-time staff if the grounds for this rule are the broad notion that full time staff are faster to acquire the skills required for an activity (*CJEU Nimz*)

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“She is less productive”

- The neutral criterion in question is performance
- Criteria which can only be assessed after the start of employment cannot justify any difference that starts at the beginning of employment; on recruitment only the objective need for a given performance can be determined (*CJEU Brunnhofer*)
- the “performance” criterion may not be recompensed alone, but the actual added value received by the employer – proportionality must also be considered, to avoid “discrimination through the back door”

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“She does not work longer hours as often”

- The neutral criterion in question is flexibility
- permissible, if it relates to flexibility concerning various working times and locations, if this is important for the performance of duties (*CJEU Danfoss, Bilka, Enderby*)
- the “flexibility” criterion may not be recompensed alone, but the actual added value received by the employer – proportionality must also be considered, to avoid “discrimination through the back door”
- Exclusion of all women on the presumption that they are typically less flexible than men = direct discrimination

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“She had a shorter education”

- The neutral criterion in question is vocational training
- permissible, if the education is important for the performance of the tasks assigned
- the theoretical professional qualification must be relevant to the workplace, even if the employer has not previously required it (*CJEU WGKK*)
- Invoking the criterion is not permissible if it is not just practically but also theoretically inconsequential
- proportionality must also be considered, to avoid “discrimination through the back door”

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**“He was our preferred candidate”
“He would not have accepted
otherwise”**

- the neutral criterion in question is the strong individual bargaining position (market value) in recruitment negotiations
- This criterion is particularly liable to disadvantage women more than men, since women moving up the career ladder are very often disadvantaged which has an impact on their market
- The shortage of candidates for a job will in principle be considered as an objectively justified reason (*CJEU Enderby*)
- If considered as permissible justification, probably only within quite narrow limits and and only for a limited time – sustained unequal treatment cannot be consistent with real commercial needs
- If so, admissibility in an individual case remains subject to the principle of proportionality

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**“The company needs to make
savings”**

- The neutral criterion in question is the economic burden (additional costs)
- this is not in itself a permissible criterion, otherwise the application and scope of the fundamental principle of Community law of “equality of women and men” would be being applied differently in terms of space and time on the basis of the financial position of the company (*CJEU Hill and Stapleton*, inter alia)

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CJEU: general points on admissibility of justification

- Justification must always be tested against the individual situation in the company
- only grounds of significant importance are admissible, e.g. health, property, public safety, environmental protection
- Consideration of alternative ways of achieving the objective – “encroachment on the principle of equal treatment is only permissible in exceptional cases and only to the smallest possible extent” CJEU *Seymour-Smith* and others.

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CJEU: Burden of proof

Burden of proof rule from the equal treatment directive also holds for equal pay:

- If employees are *prima facie* subject to discrimination and can plausibly demonstrate this through facts, the burden of proof is reversed and the employer must show that different pay is justified by objective factors unrelated to gender discrimination (CJEU *Enderby*, *Danfoss*, etc.)

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National examples

- eg-check (Germany)
- “comparable worth” index (Germany)
- income reports (Austria)
- “Equal pay: how to build a case” (Equinet)
- Austrian case law examples

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Summary

- Gender Pay Gap: long-standing problem, but very difficult to overcome
- discriminatory structures are only partially opposable in law
- coordinated political and legal measures required
- problem is often generally recognised but too little is done in practice
- lack of transparency
- Also a concept which is inadequately defined in law, but which is central, e.g. work of equal value

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Further information

www.gleichbehandlungsanwaltschaft.at

- Information on the equal treatment service
- Legal
- Recommendations of the equal treatment service
- current "case of the month"
- electronic newsletter
- EQUINET brochures: Equal pay and how to build a case

Thank you for your attention