



# Equal pay for work of equal value: EU legal framework and CJEU case law

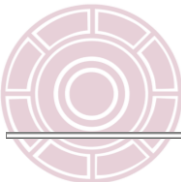
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Austrian equal treatment service  
24/10/2017



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GLEICHBEHANDLUNGSANWALTSCHAFT ÖSTERREICH



## Outline

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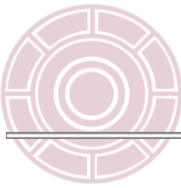
- Presentation
- The gender pay gap in the EU and EU measures
- European legal basis for the equal pay principle
- CJEU case law
- Summary



## 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

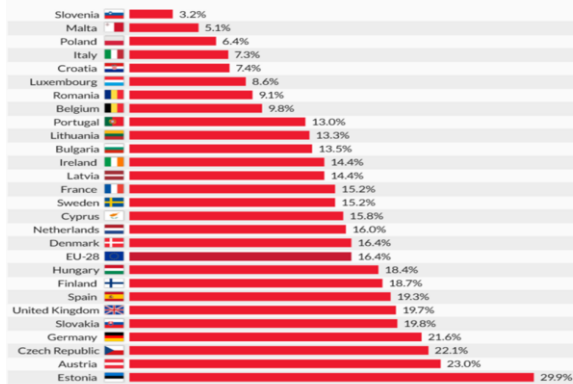
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## Gender pay gap in the EU 2015

### 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  
© StatistaCharts Source: Eurostat

100 THE INDEPENDENT statista

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## Gender pay gap

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- Gender pay gap: EU average 16,4%
- Pay gap is slowly closing
- Data adjusted for factors such as working time, education, sector, age, and seniority
- "Adjustment factors": discriminatory, can be addressed legally only to some extent, e.g. discriminatory aspects of part-time work
- Adjusted statistics nonetheless lead to an "unexplained remainder" of more than half of the GPG

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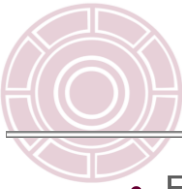


## Causes of the gender pay gap

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- 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)

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## Report on the application of Directive 2006/54/EC

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- Effective application of equal pay may be hindered by:
  - The lack of clarity and legal certainty on the concept of work of equal value
  - The lack of transparency in pay systems
  - Procedural obstacles

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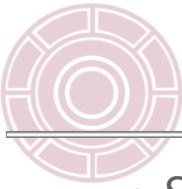


## EU measures

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- EC Recommendation of 7 March 2014 on strengthening the principle of equal pay between men and women through transparency, 2014/124/EU
- European Commission action plan to combat the gender pay gap for 2018 – 2019 in planning as part of the of the European Commission's Strategic Engagement for Gender Equality 2016-2019
  - Strengthen the role of equality bodies
  - Fight against structural segregation
  - Gender neutral job evaluation

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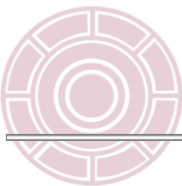


## Gender strategy

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- Strategic Engagement for Gender Equality 2016-2019 - European Commission
- “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

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- 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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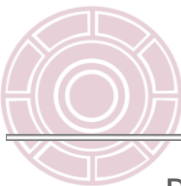


## Art. 157 TFEU: Equal pay principle

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- 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*
- Positive measure: specific expression of the general principle of equality

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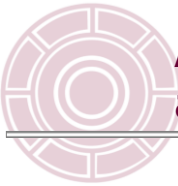


## Art. 157 TFEU: Equal pay principle

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- Performance-related pay systems
  - Pay for the same work at piece rates shall be calculated on the basis of the same unit of measurement
- Time-based pay systems
  - Pay for work at time rates shall be the same for the same job

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## Art. 157 TFEU: Equal pay principle and the CJEU

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- 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

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Article 4 sentence 1:

- For the same work or for work to which equal value is attributed
- direct and indirect discrimination on grounds of sex
- with regard to all aspects and conditions of remuneration shall be eliminated

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## Concrete form in Directive 2006/54/EC

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Article 4 sentence 2:

- In particular, where a job classification system is used for determining pay
- it shall be based on the same criteria for both men and women and
- so drawn up as to exclude any discrimination on grounds of sex

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## Concrete form in Directive 2006/54/EC

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Recital 9 of Directive 2006/54:

Equal value if

- workers are in a comparable situation
  - nature of the work
  - training
  - working conditions

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## CJEU case law

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Extensive CJEU case law since 1970 on pay discrimination on the grounds of gender – many requests for interpretation and clarification

- 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”?

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- 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*)
- For example:
  - allowances
  - overtime pay
  - bonuses
  - special payments
  - rewards
  - sick pay
  - interim payments during unemployment
  - occupational pensions

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## CJEU case law: Scope of application

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- Concept of “worker” in European law (CJEU *Lawrie Blum*)
- Public service employment (CJEU *Gerstner*)
- Employers: pay differentials must relate to the same source. Consistency is required for those responsible to be able to restore equality. (CJEU *Lawrence, Allonby*)

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

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- **Equal work:** identical working activities can be carried out by another person
- “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 can be an indicator for equality of value (CJEU *Brunnhofer*)
- 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?

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

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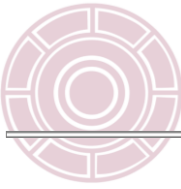


## CJEU: What is equal work or work of equal value?

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- Different vocational training can be considered to justify indirect discrimination, when examining whether work is of equal value (CJEU *Kenny*)
- Presuming equal value between the work of midwives and that of clinical technicians, indirect discrimination then arises, if more women than men are active as midwives (CJEU *JämO*)

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

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- It is for the national court to assess whether work is of equal value
- 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*)

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## CJEU case law: Direct discrimination

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Constituent elements:

- Discrimination
- On grounds of sex
- In a comparable situation

Justified only if:

- No comparable situation
- Positive action

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## CJEU case law: Direct discrimination

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Discriminatory connection to pregnancy and maternity leave certainly constitutes direct discrimination

- No need for comparator!

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## CJEU case law: Indirect discrimination

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- 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 case law: Indirect discrimination

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- Seemingly neutral provisions, criteria
- Disadvantageous impact for one sex
- Can be justified under certain conditions
- Must be proportionate

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## CJEU case law: Indirect discrimination

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- 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 case law: Indirect discrimination

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- 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 *Bötel, Lewark, Freers*)

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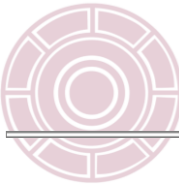


## CJEU case law: Indirect discrimination

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- The payment of overtime supplements only when exceeding full-time working hours is not indirect discrimination, as long as the same pay is received for each hour up to the normal working hours and an overtime supplement is paid to both for hours in excess of that (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 on the matter is significant (CJEU *Enderby*)

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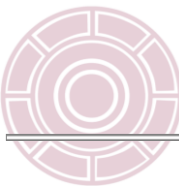


## CJEU: Justification for indirect discrimination

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- “she has not been in the company very long”
- “she is less productive”
- “she does not work longer hours as often”
- “she has not been in employment as long”
- “she had a shorter education”
- “he was our preferred candidate”
- “the company needs to make savings”

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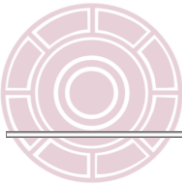
## CJEU: Possible reasons for justification

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- CJEU *Danfoss, Cadman, Nimz*: seniority/professional experience
- CJEU *Brunnhofer*: performance
- CJEU *Danfoss, Bilka, Enderby*: flexibility
- CJEU *WGKK, Kenny*: education
- CJEU *Enderby*: market value
- CJEU *Hill and Stapleton*: economic aspects

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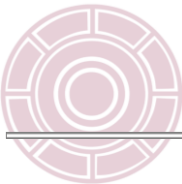


“she has not been in the company very long”  
“she has not been in employment as long”

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- 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”

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- 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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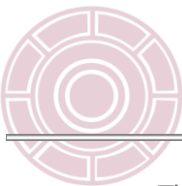


## “she does not work longer hours as often”

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- 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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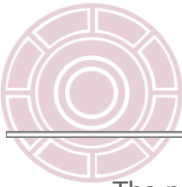


## “she had a shorter education”

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- 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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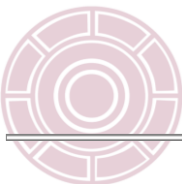


## “he was our preferred candidate” “he would not have accepted otherwise”

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- The neutral criterion in question is the strong individual bargaining position (market value) in recruitment negotiations for this particular case
- It is arguable that 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 (there is a lack of case law), probably only within 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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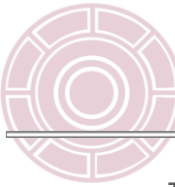


## “the company needs to make savings”

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- 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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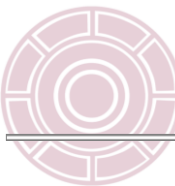
## CJEU: general points on admissibility of justification

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- 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 - no undermining of the principle of equal pay)

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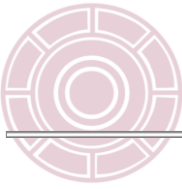
## CJEU: burden of proof

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- If an employee becomes a *prima facie* victim of discrimination, the burden of proof is reversed and the employer must show that different treatment is justified by objective factors unrelated to gender discrimination (CJEU *Enderby, Danfoss*, etc.)
- The directives contain no requirement for the publication of application documentation. Refusal of information could compromise the objective of the directive; for clarification national court must, if enough indications exist, take all circumstances of the individual case into account (CJEU *Kelly, Meister*)

Dir. 2006/54/EC, Art. 19: “when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court ..., facts from which it may be presumed that there has been ... discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.”

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## Initiativen

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- eg-check (Germany) anti-discrimination body
- Income reports (Austria)
  - Toolbox, testimonials and body of arguments
  - Equal treatment advocacy
- "Equal Pay: How to build a Case" (Equinet)

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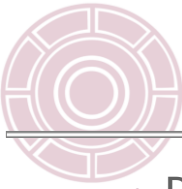


## Summary

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- Very broad interpretation of the term "pay" by CJEU
- Development of legal structures for equal treatment law as a whole
- Still much room for interpretation (e.g. definition of work of equal value)
- Assessment of the facts in MS

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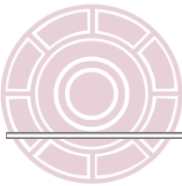


## Summary

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- Pay gap is reducing only very slowly
- Combating discriminatory structures by bringing legal action is possible to a limited extent only
- High risk of litigation
- Additional active positive measures are necessary

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## For further information

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[www.gleichbehandlungsanwaltschaft.at](http://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

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