

# EQUAL PAY FOR WORK OF EQUAL VALUE: EU LEGAL FRAMEWORK AND CJEU CASE-LAW

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1

## DEFINITIONS

01

### GENDER PAY GAP

A difference between the *average (economy wide)* pay level of male and female employees

A relative difference in the average gross hourly earnings of women and between within the economy as whole (EU COM)

$$\frac{\text{Mean (gross) hourly earnings of men} - \text{Mean (gross) hourly earnings of women}}{\text{Mean (gross) hourly earnings of men}^{(*)}}$$

02

### UNADJUSTED (Absolute) PAY GAP

A potential pay discrimination and pay discrepancies based on objective factors

03

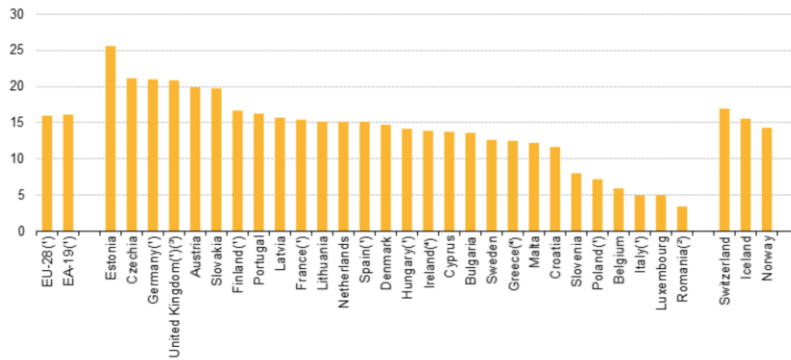
### ADJUSTED PAY GAP

A pay, adjusted according to individual characteristics that may explain part of the earnings difference

2

### The unadjusted gender pay gap, 2017

(difference between average gross hourly earnings of male and female employees as % of male gross earnings)



Note: For all the countries except Czechia and Iceland: data for enterprises employing 10 or more employees, NACE Rev. 2 B to S (-O); Czechia: data for enterprises employing 1 or more employees, NACE Rev. 2 B to S; Iceland: NACE Rev. 2 sections C to H, J, K, P, Q.

(\*) Provisional data.

(\*) Estimated data.

(\*) Estimated by Eurostat.

(\*) 2014 data.

Source: Eurostat (online data code: sdg\_05\_20)

eurostat

3

3

## INCOME DISPARITY

‘Explanations of differences’, ‘objective reasons’, etc.

- Differences between individuals (age, professional experience, education, carrier choices)
- Differences between private and public sectors
- Work pattern, eg. part-time work
- Concentration of one sex in certain economic activities (horizontal or ‘sectoral gender segregation’)
- Concentration of one sex in certain occupations (vertical or ‘occupational gender segregation’, ‘glass-ceiling’)
- Differences between companies (branch of industry, size of the company etc.)

4

4

**Table 3: Decomposition of the unadjusted GPG, 2014**  
(difference between male and female hourly earnings as % of male hourly earnings)

	Unadjusted GPG		Explained GPG										Unexplained adjusted GPG
	Overall explained gap	Age	Personal and job characteristics					Enterprise characteristics					
			Education	Occupation	Job experience	Employment contract	Working time	Economic activity	Enterprise size	Enterprise control			
<b>EU28</b>	<b>16.6</b>	<b>5.1</b>	<b>-0.1</b>	<b>-1.2</b>	<b>-0.4</b>	<b>0.1</b>	<b>-0.1</b>	<b>2.1</b>	<b>5.4</b>	<b>-0.8</b>	<b>0.0</b>	<b>0.0</b>	<b>11.5</b>
Belgium	6.6	4.1	0.1	1.3	-0.5	0.1	0.0	1.4	2.0	-0.4	0.1	2.5	
Bulgaria	14.2	-4.2	-0.5	-4.6	-2.2	-2.4	0.1	0.1	2.2	1.7	1.4	18.4	
Czech Republic	22.5	3.8	-0.6	-0.1	-0.4	0.0	0.3	0.2	4.8	0.0	-0.3	18.7	
Denmark	16	6.7	0.0	-0.5	0.9	-0.2	-0.4	-0.2	4.8	-0.9	3.2	9.3	
Germany	22.3	14.5	-0.2	1.0	1.3	0.5	-0.1	6.8	5.7	-0.6	0.1	7.8	
Estonia	28.1	8.0	0.7	-1.5	2.9	-0.6	0.0	0.8	6.6	-0.6	-0.2	20.1	
Ireland	13.9	-1.9	0.3	-0.6	1.2	0.7	0.0	0.2	-0.9	-2.0	-0.7	15.8	
Greece	12.5	4.0	1.3	-1.7	-1.3	-0.2	0.0	1.5	4.6	-0.2	0.1	8.5	
Spain	14.9	4.0	0.3	-1.2	0.5	1.1	0.1	0.6	4.1	-1.3	-0.2	10.9	
France	15.5	4.8	0.2	-0.9	-1.6	0.2	0.0	-0.3	7.9	-0.4	-0.2	10.7	
Croatia	8.7	-8.2	-1.0	-8.0	-1.2	-0.8	-0.1	-0.4	4.9	0.0	-1.5	16.9	
Italy	6.1	-6.0	-0.9	-3.1	-8.3	0.3	-0.1	-3.6	6.5	-0.9	-1.9	12.1	
Cyprus	14.2	2.0	-0.7	-0.7	4.1	-0.9	0.0	0.2	1.5	-1.5	0.0	12.2	
Latvia	17.3	1.0	0.9	-5.3	0.9	-2.7	0.2	0.0	11.9	-4.3	-0.6	16.3	
Lithuania	13.3	-10.9	-0.1	-3.8	-9.5	-4.1	-0.1	0.8	9.2	-3.4	0.0	24.2	
Luxembourg	5.4	-2.9	1.8	-0.8	-1.1	0.4	-0.2	0.7	0.0	-1.6	-2.2	8.3	
Hungary	15.1	-0.6	-0.8	-4.0	-3.9	-1.2	0.1	-3.2	12.4	-3.2	3.3	15.7	
Malta	10.6	-0.3	1.5	-1.9	1.1	0.9	0.0	0.3	-0.4	-0.8	-0.1	10.9	
Netherlands	15.1	7.6	1.8	-0.4	2.2	0.5	0.1	2.1	-4.5	-0.9	5.9	8.5	
Austria	22.2	12.8	0.0	0.3	3.4	1.8	-1.2	3.8	5.0	-0.2	0.0	9.4	
Poland	7.7	-9.1	-1.2	-6.7	-8.1	-0.9	-0.2	0.3	7.3	1.6	-1.2	16.8	
Portugal	14.9	1.6	0.1	-4.8	2.1	0.2	-0.2	-0.1	6.0	-1.5	-0.3	13.3	
Romania	4.5	-12.7	0.0	-6.7	-8.2	-1.9	0.0	0.4	9.7	-5.3	-0.8	17.2	
Slovenia	7	-8.5	-0.7	-6.1	-7.2	-1.7	-0.6	0.2	9.6	-0.4	-1.6	15.5	
Slovakia	19.7	1.7	-0.6	-1.0	-2.2	-0.5	0.0	0.8	4.3	0.2	0.8	18.0	
Finland	18.4	8.0	-0.4	-0.6	2.5	0.1	0.3	-0.2	5.9	-0.9	1.4	10.4	
Sweden	13.8	6.7	-0.2	-1.3	-0.8	-0.2	-0.1	0.3	8.0	-1.2	2.1	7.1	
United Kingdom	20.9	7.6	0.0	-0.1	4.4	0.3	-0.2	0.8	4.4	-0.8	-1.1	13.3	
Iceland	16.7	5.9	-1.1	-2.3	-5.7	-0.6	-0.2	1.7	6.7	0.8	6.5	10.8	
Norway	14.5	6.2	0.0	-1.2	-2.2	0.2	0.0	1.3	8.4	-0.8	0.4	8.3	
Switzerland	17.4	5.9	0.7	1.9	0.8	0.6	-0.1	-0.9	3.0	-0.2	0.1	11.5	

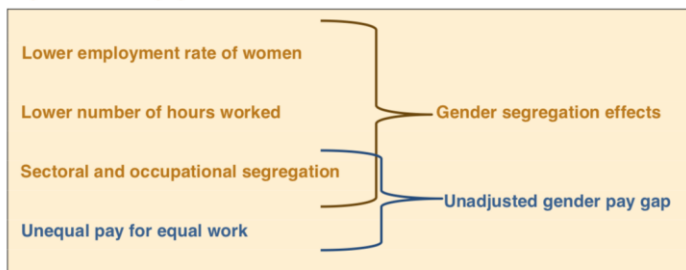
Note: The figures for the explanatory factor 'age' are the sums of the results for the variables 'age' and 'age squared'; the figures of the explanatory factor 'job experience' are the sums of the results for the variables 'job experience' and 'job experience squared'; for Romania, employees whose weights belong to the fifth highest percentile are excluded.

Source: Denis Leythienne, Piotr Ronkowski. A decomposition of the unadjusted gender pay gap using Structure of Earnings Survey data. Eurostat WP, 2018.

5

5

**Figure 4: Gender segregation effects**



Source: Denis Leythienne, Piotr Ronkowski. A decomposition of the unadjusted gender pay gap using Structure of Earnings Survey data. Eurostat WP, 2018.

What cannot be explained? (stereotypes, devaluation, discrimination)

Contribution of sex discrimination to the gender pay gap

- Unequal pay for the same work
- Unequal pay for the work of "equal value"

What is Law? And what is policy?

What is the level of response?

6

# LEGAL RESPONSES

## At global level

### International Labour Organisation

- Equal Remuneration Convention no 100 of 1951

### United Nations

- Convention on the Elimination of all Form of Discrimination against Women (CEDAW) 1979

## At regional level

### Council of Europe

- European Social Charter 1961
- European Convention on Human Rights 1950, Art. 14, Protocol 12

## At national level (UK 2017, Norway, Iceland 2017, etc.)

7

# EU LEVEL RESPONSES

## Primary legislation - TFEU

ex Art. 119 (1) EEC, ex 141 EC – now 157 (1) TFEU

Initially economic aim – interstate competition linked clause

### ROME (1957)

#### *Article 119*

Each Member State shall in the course of the first stage ensure and subsequently maintain the application of the principle of equal remuneration for equal work as between men and women workers.

### MAASTRICHT (1992)

**1. Each Member State shall ensure that the principle of equal pay for male and female workers for equal work is applied.**

### AMSTERDAM (1997)

#### *Article 119*

1. Each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied.

### AFTER LISBON

Article 157

(ex Article 141 TEC)

1. Each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied.

8

# ROLE OF THE COURT (CJEU)

## Extensive and intensive interpretation of the Art. 119 (1) EEC=157(1) TFEU

1. Direct effect

2. Direct horizontal effect

3. Ranking of the principle of the EU legal system

- *“equal pay for male and female workers for equal work principle forms part of the foundation of the European Community”*

↳ CJEU 43/75 *Defrenne II*

9

# ROLE OF THE COURT (CJEU)

## Extensive and intensive interpretation of the Art 119 (1) EEC=157(1) TFEU

4. Double purpose – economic and social

↳ CJEU 43/75 *Defrenne II*

5. Purpose more social

*“elimination of distortions of competition between undertakings established in different Member States, is secondary to the social aim pursued by the same provision, which constitutes the expression of a fundamental human right”*

↳ C-270/97 *Sievers u. Schrage*

10

# SECONDARY LEGISLATION

Directive 75/117/EEC on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women

- Basis – ex Art 100 EEC – economic-political competence
  - *'approximation of such laws, regulations or administrative provisions of the Member States as directly affect the establishment or functioning of the common market'*

Since 15.8.2009 – Art. 4 Directive 2006/54/EC (recast)

- Basis – Art 157 (3) TFEU (ex Art 141 (3) EC) social policy competence -
  - *'measures to ensure the application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, including the principle of equal pay for equal work or work of equal value'*

11

# IMPULSES FOR ENTIRE EU ANTI-DISCRIMINATION LAW

## 1. Rank of fundamental right

## 2. Recognition among the “new” fundamental rights

- CJEU jurisprudence
- EU fundamental rights documents  
(Art 23 EU Charter of Fundamental Rights 2000)

## 3. Secondary legislation on equality (eg.

### Directives 2000/78/EC, 2000/43/EC)

- “Directive does not add to the Treaty in terms of substance”  
(CJEU Jenkins)

12

# PRINCIPLE OF EQUAL TREATMENT

## Interplay of primary and secondary legislation

Art. 157 FEU (ex 141 EC)	Art. 4 Dir 2006/54/EC
<b>Basic provision</b>	
1. Each Member State shall ensure that the principle of <b>equal pay</b> for male and female workers for <b>equal work</b> or work of <b>equal value</b> is applied.	For the <b>same work</b> or for work to which <b>equal value is attributed, direct and indirect discrimination</b> on grounds of sex with regard to <b>all aspects and conditions of remuneration</b> shall be eliminated.
<b>Explanations</b>	
Equal pay without discrimination based on sex means: (a) that pay for the same work at <b>piece rates</b> shall be calculated on the basis of the same unit of measurement; (b) that pay for work at <b>time rates</b> shall be the same for the same job	In particular, where a job classification system is used for determining pay, it shall be based on the <b>same criteria</b> for both men and women and so drawn up as to exclude any discrimination on grounds of sex.
<b>Defintions</b>	
2. 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	

13

# SCOPE OF APPLICATION I

Article 157

(ex Article 141 TEC)

1. Each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied.

## 1. Addressees (Art. 157 TFEU)

### 1. Member States only?

- Legislator
- Other creators of normative acts (eg. sports federations)
- Parties to collective bargaining
  - CJEU C-284/02 *Sass*
- Employer? Yes
- Direct vertical and horizontal effect
  - Private and public employers

## 2. Addressees (Art. 4 D2006/54/EC)

14

# SCOPE OF APPLICATION II

Article 157

(ex Article 141 TEC)

1. Each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied.

## The concept of 'worker'

### 1. Community law meaning

- *"it cannot be defined by reference to the legislation of the Member States but has a Community meaning. Moreover, it cannot be interpreted restrictively"*  
+ CIEU C-256/01 *Allonby*

- *"a person who, for a certain period of time, performs services for and under the direction of another person in return for which he receives remuneration"*  
+ CIEU 66/85 *Lawrie-Blum*

### 2. Parallels with concept of free movement of workers (Art. 45 TFEU (ex 39 EC))

15

# SCOPE OF APPLICATION III

Article 157

(ex Article 141 TEC)

1. Each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied.

## The concept of 'worker'

### 3. Employees, incl. trainees

### 4. Public servants incl. military forces

### 5. Limits of coverage

- Quasi-employees?
- Self-employed?
  - Art. 157 TFEU (ex Art. 141 EC) – definitely not
  - Art. 4 Directive 2006/54/EC?
  
- Not national meaning of 'self-employed'

16

16



# SCOPE OF APPLICATION IV

Article 157

(ex Article 141 TEC)

1. Each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied.

## Territorial scope

1.If applicable law of Member State

2.Exceptions (mandatory provisions):

- Place of work in Member State
- Employer's domicile in Member State

17

17

# CONCEPT OF 'PAY'

Article 157

(ex Article 141 TEC)

1. Each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied.

## 1.Broad definition

Art. 157 TFEU (ex Art. 141 EC)

- 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

18

18

# CONCEPT OF 'PAY'

## Examples:

1. Usual salary and supplements
2. Travel benefits for workers and family members  
✦ CJEU 12/81 *Garland*
3. Continued payment of wages in the event of illness  
✦ CJEU 171/88 *Rinner-Kuehn*
4. Maternity benefit  
✦ CJEU C-218/98 *Abdoulaye*
5. Christmas bonus  
✦ CJEU C-281/97 *Krueger*
6. Compensation for attendance of training courses of staff councils  
✦ CJEU C-360/90 *Bötel*
7. Redundancy benefits  
✦ CJEU C-262/88 *Barber*
8. Survivors pension based on collective bargaining agreement  
✦ CJEU C-109/91 *Ten Oever*
9. Bridging allowance ('Überbrückungsgeld') provided for by a works agreement  
✦ CJEU C-19/02 *Hlozek*
10. Etc (company cars, company homes, shares, loans...

19

# CONCEPT OF 'PAY'

- The fact that certain benefits are paid after the termination of the employment relationship does not prevent them from being in the nature of pay within the meaning of the abovementioned provisions  
✦ CJEU C-262/88 *Barber*

- Not the differentiation between various types of pay, but division from other working conditions (Art. 14-16 D2006/54/EC)

11. Stimulation, gratification for loyalty?

12. The future performance - yes

✦ CJEU C-333/97 *Lewen*

13. Promotion to a higher the salary grade (upgrade based on the duration of employment) – no

- the real issue is the calculation of the qualifying period and the role, in this context, of the maternity leave

✦ CJEU C-284/02 *Sass*

20

# CONCEPT OF 'PAY'

## 14. Pension benefits = pay

- social security schemes or benefits directly governed by legislation without any element of agreement within the undertaking or the occupational branch concerned are not pay

✦ CJEU 23/83 *Liefting*

- occupational pension systems

- Contracted out retirement scheme - pay

✦ CJEU 69/80 *Worringham*

✦ CJEU C-262/88 *Barber* - *limited temporary effect*

- Occupational pension scheme – pay

✦ CJEU C-170/84 *Bilka*

- Pension of civil servants - pay

✦ CJEU C-7/93 *Beune*

Decisive: whether the retirement pension is paid to the worker by reason of the employment relationship between him and his former employer, that is to say, the criterion of employment

21

## Codification of CJEU case-law in Chapter 2 “Equal treatment in occupational social security schemes” of the Directive 2006/54/EC

- Principle of non-discrimination

- Limited personal scope

- Limitation of material scope

- exceptions

22

# EQUAL TREATMENT

Article 157

(ex Article 141 TEC)

1. Each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied.

## 1. Elimination of unequal treatment but **not faire remunerations** is required

But: the 'principle of equal pay presupposes that the men and women to whom it applies are in identical or comparable situations'

◆CJEU C-342/93 *Gillespie*

## 2. Equal pay for equal work or **work of equal value**

It is contrary to the principle of equal treatment to apply the same rule to objectively different situations

◆CJEU C-19/02 *Hlozek*

## 3. What is comparable must be treated equally and **what is not comparable must be treated differently**

◆CJEU 106/83 *Sermide*

23

23

# EQUAL TREATMENT

## 4. Equal treatment requires comparable situations

### 1. Equal work

- Identical work or to a great extent the same work with regard to the type of activity, work processes
- Decisive – nature of work
  - Interchangeable employees
- Nature of work rather than individual performance
- Training
- Working conditions
- Other?

24

# BUT ALSO:

## 2. Work of equal value

- work that might appear to be different but work is of equal value if the same high demands are made on work criteria – such as knowledge and skills, effort and stress, responsibility, conditions in the work environment
- Qualitative approach
  - ✦ CJEU 237/85 *Rummler*

Article 157

(ex Article 141 TEC)

1. Each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied.

Direct effect of TFEU 157 “equal value” *C-624/19 (Tesco Stores)*

25

25

# COMPARATOR

1. Individual or group of the other sex
2. The activity need not be performed at the same time
3. Comparison with activity of lower value

✦ CJEU C-429/08 *Murphy*

4. Not necessarily the same employer, but the **same source** (eg collective bargaining agreement)
  1. Doctrine of ‘same source’ (Lawrence, Allonby) – not in Directive
  2. “there is no body which is responsible for the inequality and which could restore equal treatment. Such a situation does not come within the scope of Article 141(1) EC”

26

# COMPARATOR

## 5. Burden of proof on employer

## 6. Statistics

The best approach to the comparison of statistics is to consider, on the one hand, the proportion of men in the workforce affected by the difference in treatment and, on the other, the proportion of women in the workforce who are so affected

♦ CJEU C-167/97 *Seymour-Smith and Perez*

27

# FORMS OF DISCRIMINATION

## 1. Direct discrimination

1. Different retirement ages for women and men in occupational pension systems
2. Women in maternity leave not benefiting from any improvement in working conditions
  - ♦ CJEU C-66/99 *Pedersen*
3. No justification allowed
4. Therefore the possibility to treat differently only in:
  - Lack of comparability of situations
    - ♦ CJEU C-218/98 *Abdulaye*
  - Possible positive action to offset the occupational disadvantages, if allowed

28

# FORMS OF DISCRIMINATION

## 2. Indirect discrimination

Criteria that in fact disadvantages one sex

- Part-time work pattern
- Differentiation on the ground of the length of service

29

# JUSTIFICATION OF INDIRECT DISCRIMINATION

## 1. Objective explanation

'if the undertaking is able to show that its pay practice may be explained by objectively justified factors unrelated to any discrimination on grounds of sex there is no breach of Article 119'

◆ CJEU 170-84 *Bilka*

## 2. Art. 2(2) b) Directive 2006/54/EC

"unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary".

30

# JUSTIFICATION OF INDIRECT DISCRIMINATION

## 3. Possible criteria for differentiation:

- needs of the company, state policies, labour market situations
- If this is of importance for performance of work

1. Flexibility (adaptability to variable hours and places of work)
2. Vocational training
3. Seniority?

◆CJEU C-17/05 *Cadman*

- Does not require ad-hoc justification, because length of service goes hand in hand with experience which generally enables the employee to perform his duties better
- Unless the worker not demonstrates facts which casts serious doubts on this conclusion

31

# REMEDIES

## 1. Burden of proof

## 2. Compensation of non-material damage

## 3. Levelling up or levelling down

– Levelling up as long as the criterion has not been changed; i.e. the same higher pay for the person/group that so far has been discriminated against

◆CJEU C-231/06 *Jonkman*

- When the criterion is changed, then both is possible: levelling up or levelling down, i.e. either higher pay for all or lower pay for all.

32



# NEW EC PROPOSAL FOR TRANSPARENCY AND ENFORCEMENT

Proposal for a  
DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL  
to strengthen the application of the principle of equal pay for equal work  
or work of equal value between men and women through  
pay transparency and enforcement mechanisms  
(SEC(2021) 101 final) - (SWD(2021) 41 final) - (SWD(2021) 42 final)

Brussels, 4.3.2021  
COM(2021) 93 final

2021/0050 (COD)

## Pay transparency measures:

- **Pay transparency for job-seekers** – Employers will have to provide information about the initial pay level or its range in the job vacancy notice or before the job interview. Employers will not be allowed to ask prospective workers about their pay history.
- **Right to information for employees** – Workers will have the right to request information from their employer on their individual pay level and on the average pay levels, broken down by sex, for categories of workers doing the same work or work of equal value.
- **Reporting on gender pay gap** – Employers with at least 250 employees must publish information on the pay gap between female and male workers in their organisation. For internal purposes, they should also provide information on the pay gap between female and male employees by categories of workers doing the same work or work of equal value.
- **Joint pay assessment** – Where pay reporting reveals a gender pay gap of at least 5% and when the employer cannot justify the gap on objective gender neutral factors, employers will have to carry out a pay assessment, in cooperation with workers' representatives.

## Better access to justice for victims of pay discrimination:

- **Compensation for workers** – workers who suffered gender pay discrimination can get compensation, including full recovery of back pay and related bonuses or payments in kind.
- **Burden of proof on employer** – it will be by default for the employer, not the worker, to prove that there was no discrimination in relation to pay.
- **Sanctions to include fines** – Member States should establish specific penalties for infringements of the equal pay rule, including a minimum level of fines.
- **Equality bodies and workers' representatives** may act in legal or administrative proceedings on behalf of workers as well as lead on **collective claims on equal pay**.

