
Gender pay gap and job evaluation.

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ERA –May 2023



Funded under the 'Citizens, Equality, Rights and Values programme 2021-2027' of the European Commission

Gender pay gap in Europe

- Average Pay gap in Europe: **12,7 %** (2021)
 - Pension Gap : **29 %** in 2019
 - Gender hourly base wage gap (based on occupied job) : **14%**
 - Gender annual gross remuneration gap in Latvia 22 %, Germany 17,6% and 15 % in France
 - Men and women do not occupy the same jobs
 - Men and women do not have the same careers
 - There are biases in the parameters used to attribute value to jobs and employees
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- These measures reflect the overall occupational differences between men and women:

- Diploma and type of work (horizontal)
- Type of firms
- Employment contract,
- Impact of maternity and family
- Working time
- Stereotypes and traditions
- Career and vertical positioning

- The gap increases with diploma and experience
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Decompose the wage gap into three components :

1. Structural Gap explained by differences in average individual characteristics or employment (diploma, job, activity sector, kind of firms ...): 24 %
 2. Lower pay "all things being equal " : 23 %
 3. Unexplained gap : 53 %
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International and European Texts

- **Article 2 ILO Convention no 100 of 1951**
- **Article 157 TFEU (119 EEC Treaty (1957) – Now 141 EC)**
- **Directive 75/117 relating to Equal Pay**
- **Directive 2006/54 of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast)**

Directive 2006/54 Recital 8:

The principle of equal pay for equal work or work of equal value as laid down by Article 141 of the Treaty and consistently upheld in the case-law of the Court of Justice constitutes an important aspect of the principle of equal treatment between men and women and an essential and indispensable part of the *acquis communautaire*, including the case-law of the Court concerning sex discrimination. It is therefore appropriate to make further provision for its implementation.

Concept of pay

Directive 2006/54

■ Article 2 par 1 e) :

'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/her employment from his/her employer;

Definition of direct discrimination:

Directive 2006/54

Article 2 par 1, a)

where one person is treated less favourably on grounds of sex than another is, has been or would be treated in a comparable situation;

Definition of indirect discrimination

Article 2 par 1, b)

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

Article 4 – Positive obligation

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.

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.

Directive 2006/54 Recital 9

- In accordance with settled case-law of the Court of Justice, in order to assess whether workers are performing the same work or work of equal value, it should be determined whether, having regard to a range of factors including the nature of the work and training and working conditions, those workers may be considered to be in a comparable situation.
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ECJ 8 April 1976 Defrenne C-43/ 75

- The principle of equality of remuneration of article 119 can be invoked before national jurisdictions and must be applied to sanction discrimination related to national law but also to collective agreements
 - Directive 75/117 provides precisions as to the material reach of article 119, but does not hinder the direct effect of article 119
 - The national legislator does not have exclusive competence to implement equal pay
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Levelling -up : Starjakob C-417/13

■ The Court States (par 46) :

That being said, according to settled case-law, where discrimination contrary to EU law has been established, as long as measures reinstating equal treatment have not been adopted, observance of the principle of equality can be ensured only by granting to persons within the disadvantaged category the same advantages as those enjoyed by persons within the favoured category, the latter arrangements, for want of the correct application of EU law, being the only valid point of reference remaining.

See: CJEU Jonkman C-231/06; Cresco Investigation C-193/17; Egenberger C-414/16; Milkova C-406/15

ECJ 17 October 1989, Danfoss C-109/88

- Collective agreement foresees salary by categories
- Scales can be increased by the employer on the basis of :
 - flexibility,
 - professional training, and
 - seniority
- The average salary of men is 6,85 % higher
- No information on how these rules are implemented

Danfoss

- A remuneration system characterised by a lack of transparency resulting in average inferior remuneration of women is presumed to be discriminatory
 - The lack of transparency precludes access to evidence
 - The employer has the burden to prove that his practice is not discriminatory
 - Must establish how the grounds were applied:
 - Objective
 - Non discriminatory
 - Proportionate
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Danfoss

□ Flexibility

- If it corresponds to an evaluation of **quality** that is not favourable to women, it is abusive
 - If it corresponds to **adaptability** to schedules and work places :
 - the employer must further establish
 - Its particular value to the specific work of the employee
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Danfoss

- Professional Training

- It can carry a value if the employer establishes that a particular training has a particular value for the execution of the employee's functions.
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ECJ, 27 October 1993, Enderby C-127/92

- Difference of remuneration between two jobs of comparable value related to salary levels and classifications in a public health collective agreement:
 - Speech Therapist (female)
 - Pharmacists (male)
 - Apparent discrimination on the basis of statistics of the presence of male and female in each job category given it is of Equal value
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Enderby – collective bargaining

- Employer must show that objective reasons justify the difference in remuneration
 - The fact that they are the result of collective bargaining is not a justification since collective agreements must respect the principle of equal treatment
 - The fact that each bargaining process did not take into account discriminatory considerations is not a justification either
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Enderby – Tensions on the labour market

- The insufficient number of professionals explaining their high value on the market cannot be presumed
 - The employer has the burden to justify the reality of the pressure of the labour market and the court must appreciate the proportionality of its impact in each situation
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ECJ, 17 June 1998, Hill & Stapelton
C-243/95

- In a case where part time workers faced slower career evolution, the majority of which were women, the court replied to the employer's economic argument that:
- The cost of implementing equal treatment, and economic considerations in general cannot be presented by the employer as a justification for maintaining unequal treatment

CJEU, 20 June 2019, Arostegui, C-72/18

- Equal treatment is a fundamental principle of EU Law
- Difference of remuneration based on employment status between a public civil servant and a contractual public agent effecting the same Work
- The difference of legal status and circumstances of entry in public employment cannot justify difference in remuneration and conditions of employment between two person effecting the same work.

CJEU, 26 June 2001, Brunnhofer C-381/99

- Plaintiff complains that a male colleague hired 1 year after her at the same level benefits from a higher premium, negotiated at the time of his employment.
 - She was dismissed after 4 years because of problems that had appeared before her male colleague was even hired
 - The bank invokes the quality of plaintiff's work
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Brunnhofer

- The Bank cannot invoke the quality of plaintiff's work or elements related to the performance of the employment contract to justify unequal pay fixed at the time of hire
 - The fact of being hired at the same level of classification is insufficient to establish that both employees execute comparable work.
 - Elements that are not taken into account by the collective agreement may be taken in consideration if they are objective, non discriminatory and proportionate
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Brunnhofer §43

- Definitions of comparable situations:

Test: taking into account of a number of factors such as the nature of the work, the training requirements and the working conditions, whether those persons can be considered to be in a comparable situation

ECJ 1st July 1986, Gisela Rummler C-237/85

- A classification system based on physical effort taking into account muscular fatigue and physical strain
 - Factors establishing the value of work related to the average work performance of employees of one sex, outside any general context, is a form of sex discrimination
 - To evaluate work, a classification system must be constructed in such a way as to take into account factors that reflect qualities that are common to workers of both sexes at every level.
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CJEU, 17 September 2002, Lawrence, C-320/00

- On the basis of a study on the evaluation of employment, the House of Lords decided that Plaintiff's jobs were comparable to those of their male colleagues who were gardeners...
- The Municipal Council externalised these functions to three different companies who re-hired some of the women, employed others, and lowered their salaries.
- Plaintiffs initiated a recourse claiming equal pay with the male employees still employed by the Council, who's jobs had been held to be comparable.
- The principle of equal pay can apply to situations where there is a multiplicity of employers, for example when there is a collective agreement, but they must be managed through a unique source in order to insure that a body is responsible for the salary scale, its inequality and could restore equal treatment. If not the situation is not comparable as provided by article 141.

EU Commission - Directive proposal to strengthen enforcement of equal pay and pay transparency

- Public consultation in 2019 to gather information, views and experiences from a broad range of stakeholders on pay transparency and enforcement measures:
 - public authorities and administrations, professional and business associations, trade unions and trade union associations, companies, women's associations, national equality bodies, labour inspectorates, other national bodies, citizens, civil society and non-governmental organisations, academics and research funding and performing organisations, including universities.
- In July 2019, a summary report of the findings was published:
 - 44 % of respondents feel that men and women are not paid equally for the same work or work of equal value in their countries,
 - 23 % of respondents believe that men and women are paid equally.
 - The lack of dissuasive penalties imposed on employers, lack of awareness among employees about equal pay rules and the lack of job evaluation systems and their effective application were identified as the main obstacles to effective implementation of the principle of equal pay for women and men.
 - Most respondents were of the opinion that greater pay transparency contributes to reducing the gender pay gap.
 - European Commission (2019), 'Evaluation of the EU legal framework on "equal pay for equal work or work of equal value" – public consultation', July 2019, available at: <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/1839-Evaluation-of-the-provisions-in-the-Directive-2006-54-EC-implementing-the-Treaty-principle-on-equal-pay/-public-consultation>
- Directive proposal on pay transparency presented by the Council presented for negotiation in April 2021

Directive proposal to strengthen enforcement of equal pay and pay transparency

■ Voted in EU Parliament 30 March 2023

- Covers intersectional discrimination (Art. 2^e)
- Article 4 : Work of equal value : pay structure and assessment
- Article 5 : Right to pay transparency prior to employment
- Article 6: Transparency of pay setting and progression policy
- Articles 7 and 8 : Right and access to information
- Article 9: Reporting on pay gap over 100 employees
- Article 10: Joint pay assessment and correction if difference 5 % and +
- Article 11: Support to employers of 250 and less employees
- Article 16: Full compensation
- Article 17: Injunctive relief
- Article 18: Transfer of burden of proof if Employer failed to implement pay transparency

Application

Examples

"Equal pay for work of comparable worth: Definition"

Article L. 3221 - 4 French Labour Code

- Are deemed of equal value, works that require a comparable set of professional knowledge, skills resulting from experience, responsibilities and types of physical or nervous loads ". (1972)

Aims to overcome the problems of occupational segregation.

Individual situation

Ms B.

Cass. Soc.6 July 2010

HR Manager and chief of legal services

vs

Financial, Commercial and Information
system Directors

Ms B.

Equivalent value of typically female jobs

Beyond title and market:

Job content analysis

Ms B.

Beyond “market value” or “title”

Level in the hierarchy (all director level)

Classification

Responsibilities (part of direction committee)

Importance (combines a number of strategic functions)

Capacity

Educational level

Experience

Seniority Contribution to working unit, and

Stress

5 female and male jobs

- For example between :
 - Nursing and technical leader in a hospital,
 - Assistant and maintenance technician,
 - IT Engineer and Commercial representative

Male jobs :

- strong professional culture,
- precise job description,
- important technical aspects,
- clear organization role,
- predefined careers,
- technical legitimacy
- strongly supported by unions values ...

Female jobs :

- ❑ one title for various contents (ex: administrative assistant),
- ❑ unclear definition, imprecise job description,
- ❑ more personalized content,
- ❑ invisible and non-prescribed skills,
- ❑ assistant job (with the patient, vulnerable people, superiors, colleagues...)
- ❑ skills poorly recognized as non-technical ...

Gendered bias in job evaluation criteria.

Definition of Multi-tasking :

Capacity to work on a number of different jobs (male jobs)

VS

Diversity of roles and expectations for the same job (female jobs).

Value of relational skills as professional skill

To solve a human problem (crisis with a patient or a client) is not only a relational quality, but a technical skill.

Responsibilities :

Responsibilities with a value that should be compensated are not just financial or economic,

What is the value of responsibilities with people, confidentiality, communication...

Contribution of the activity to the working unit

The value attributed to working conditions:

They must take in consideration:

- the emotional burden,
- the human environment of work ...

and not only be attributed a value in the context of industrial work.
