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MEZI—SOUDY

# Equal pay for work of equal value

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before the European Court of Human Rights



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ERA: EU Gender Equality Law

Prague, 11 March 2024

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## Outline

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  - Pay Transparency Directive

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## 1. Gender Pay Gap: basic facts

### Gender pay gap in the EU

On average, women are paid **13% less per hour than men**



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## Gender pay gap – basic facts

- an indicator of the position of women and men in the labour market
- it captures:
  - the extent to which women are disadvantaged in working conditions
  - their chances for career advancement

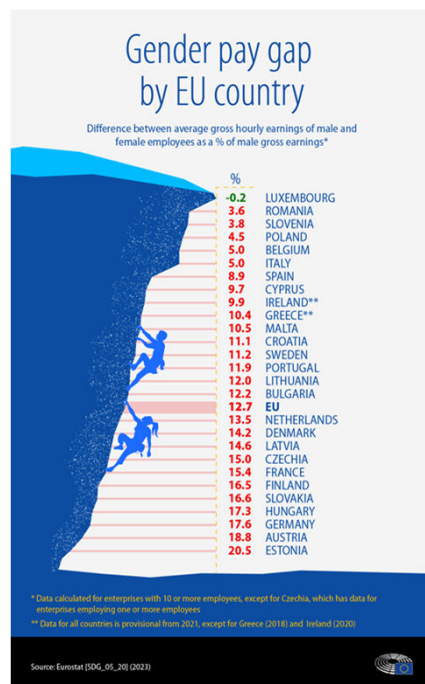
*Gender pay gap – a difference in average pay levels between female and male workers of an employer expressed as a percentage of the average pay level of male workers*

- gender pay gap  $\neq$  unequal pay
- unadjusted gender pay gap
- adjusted gender pay gap
  - removing the part “explained” by objective factors:
    - industry, company size, full/part time, length of experience, age or education
  - remaining number - „unexplained” part of GPG
    - the unexplained part of the gender pay gap is close to pay discrimination

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## Gender pay gap - statistics

- gender pay gap in EU: 12,7 % (2021)
  - lowering very slowly
- gender pension gap in EU: 27,1 % (2021)
- impact of the covid-19 pandemic
  - Czech Republic 2021: 15 %
  - Czech Republic 2022: 17,7 % - increase
  - highlighted long-standing challenges related to the participation of women in the labour market



## Gender pay gap - context

- causes:
  - horizontal gender segregation of the labour market - feminised jobs are systematically undervalued
  - vertical gender segregation - glass ceiling
  - women's more difficult position in salary negotiations
  - stereotypical attitudes of employers - undervaluing women's work
  - family and household care
  - direct and indirect pay discrimination
- consequences:
  - lower pensions
  - women more affected by poverty
  - strengthening the asymmetrical roles of men and women in society

## How to reduce gender pay gap?

- complex problem – complex reaction needed
- reactions of EU:
  - European care strategy for caregivers and care receivers
    - high-quality, affordable and accessible care services
  - Work-life balance directive 2019/1158
  - Women on boards directive 2022/2381
    - on improving the gender balance among directors of listed companies and related measures
  - Pay transparency directive 2023/970
  - Directive on adequate minimum wages 2022/2041

## 2. Equal pay in Treaty

## Equal pay in Treaty

### Art. 157

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.**

- since 1957 (Art. 119 EEC)
  - economic reasons for inclusion into Treaty
- extensive and intensive interpretation by CJEU
- Case 43/75 *Defrenne v. SABENA*
  - **horizontal direct effect**
  - individuals can rely on it before national courts

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

- dual aim of the provision: economic and social

## Notion of pay

### Art. 157

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..**

- CJEU – extensive interpretation
  - included benefits paid after the termination of the contract
- examples:
  - fare discount for family members (12/81 Garland)
  - redundancy benefits (C-262/88 Barber)
  - Christmas benefits (C-281/97 Krüger)
  - compensation for attendance of training courses of staff councils (C-360/90 Bötzel)
  - maternity benefits (C-342/93 Gillepsie)
  - sickness payment paid by employer ( 171/88 Rinner-Kühn)
- equal pay vs. equal treatment
- Is pension a pay?

## Equal work and work of equal value I.

### C-624/19, Tesco Stores Ltd

- action of 6000 workers against its employer **Tesco Stores Ltd**
  - workers of its stores (mostly women)
  - workers of distribution centres in UK (mostly men)
- demand of equal pay for men and women based on Art. 157 TFEU
- request of the Watford Employment tribunal for preliminary ruling under Article 267 TFEU



## Equal work and work of equal value II.

### C-624/19, Tesco Stores Ltd

- CJEU:
  - direct effect of Article 157 TFEU - not limited to situations of 'equal work',
  - direct effect applies also to the 'work of equal value'
  - 'work of equal value'? – decision of national court based on the facts
- Article 157 TFEU applicable before national courts in proceedings concerning work of equal value if:
  - work of equal value is carried out by workers of different sex
  - having the same employer and in different establishments of that employer
  - single source

### 3. Recast Directive 2006/54 of 5 July 2006

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## Recast Directive – 2006/54 of 5 July 2006

*Directive on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (Recast)*

- consolidated and replaced older directives in the field of employment

**Recital 9 of Recast directive** : “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”

- requires the implementation of the prohibition of direct and indirect sex discrimination, harassment and sexual harassment in pay

**Direct discrimination Art. 2 (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

**Indirect discrimination and Justifications Art. 2(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;

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## Recast Directive – 2006/54 of 5 July 2006

*Directive on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (Recast)*

### **Prohibition of discrimination Article 4**

*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.*

## 4. Pay transparency



## Why pay transparency?

- nowadays:
  - lack of proper assessment of the reasons for pay inequalities
  - low awareness of the discrimination at work
  - victims of pay discrimination have difficulties in asserting their right to equal pay
- with pay transparency:
  - society better informed about pay systems and job grading
  - employees are empowered to enforce their right to equal pay
  - increased awareness about gender-based pay discrimination
  - elimination of gender bias in pay

## Pay Transparency Directive 2023/970

*Directive (EU) 2023/970 of the European Parliament and of the Council of 10 May 2023 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*

### · Recommendation on Pay Transparency (2014)

- insufficient, non-binding nature, limited implementation by member states
- equal pay remains a challenge for the EU
- significant instrument in the antidiscrimination law
  - establishing pay transparency within organizations
  - facilitating the application of the key concepts of equal pay, including 'pay' and 'work of equal value'
  - strengthening enforcement mechanisms
- effective: June 2023, transposition period until: June 2026

## Pay Transparency Directive 2023/97

- **applies to:**
  - public and private sector employers
  - all workers with an employment contract or employment relationship defined by law, collective agreement and/or practice
  - other stakeholders:
    - associations, organisations, equality bodies, and unions that have a legitimate interest (including collective claims):
- **Structure of the Directive**
  - Pay structures: equal value work
  - Pay transparency
  - Reporting obligation
  - Pay assessment
  - Remedies and enforcement
  - Stakeholders and awareness

## Pay transparency prior to employment – right to information of a job applicant (Art. 5)

- right to obtain **initial pay or its range**
  - prior to the job interview (job vacancy notice)
- **prohibition** to ask the applicant about **their pay history**
- employers shall ensure that:
  - job vacancy notices and job titles are gender neutral
  - recruitment processes are led in a non-discriminatory manner

## Transparency of pay setting and pay progression policy (Art. 6)

- criteria used to determine workers' pay, pay levels and pay progression
  - easily **accessible** to their workers
  - **objective and gender neutral**

## (Worker's) right to information (Art. 7)

- **right of workers to request** information on:
  - their individual pay level
  - average pay levels, broken down by sex, for categories of workers performing the same work as them or work of equal value to theirs
  - possibility to obtain the information **through workers' representatives and equality body**
- **obligation** of employer to inform all workers annually of the right
- **prohibition** to prevent workers from disclosing their pay
  - prohibition of confidentiality clauses (problem of the Czech labour market)

## Gender pay gap reporting: obligation of an employer (Art. 9)

- employers obliged to provide information concerning their organisation on:
  - gender pay gap (also in complementary and variable components)
  - median pay gap
  - proportion of female and male workers receiving complementary or variable components;
  - proportion of female and male workers in each quartile pay band
- different obligation for different size of companies:
  - 250 and bigger (2027, yearly), 150-249 (2027, 3-yearly),
  - 100-149 (2031, 3-yearly), smaller than 100 (optional),
- information provided to a monitoring body, to workers/unions, and to equality bodies and labour inspectorate upon request

## Joint pay assessment: obligation of employer (Art. 10)

- action required when gaps are detected
- obligation of pay assessment in cooperation with workers' representatives if:
  - pay reporting: GPG at least 5 % in any category of workers
  - employer has not justified such a difference in the average pay level on the basis of objective, gender-neutral criteria
  - no remedy of an unjustified difference within 6 months
- in order to identify, remedy and prevent differences in pay between female and male workers which are not justified on the basis of objective, gender-neutral criteria
- compulsory steps

## Remedies and enforcement

- access to justice (Art. 14)
  - procedures on behalf or in support of workers (Art. 15)
  - procedural personality of associations, organisations, equality bodies and workers' representatives or other legal entities
- right to full compensation and reparation with no upper limit (Art.16)
  - real and effective compensation or reparation
  - dissuasive and proportionate manner
- injunctive relief to end infringement (Art. 17)
  - possibility of recurring penalty payment
- shift of burden of proof (Art. 18)
  - if worker establishes even a prima facie case of discrimination
  - if the employer did not comply with the pay transparency obligations
- access to evidence (Art. 17)

## Conclusion

- Gender pay gap remains challenge for the EU
  - number of negative consequences
- EU presented already massive regulation
  - Equal pay for work of equal value (1957)
  - Insufficient
  - Pay transparency directive – significant instrument, resistance of employers might be expected
- impacts of pay transparency:
  - future will show...
  - more attention for the topic of remuneration
  - available pay schemes
  - more court disputes on pay discrimination
  - closing the pay gap
    - lowering overall pay levels, because male or top earning pay is not increased



# Thank you for your attention

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