

# Equal pay for work of equal value

Directive 2006/54/EC - Landmark and recent CJEU case law - The new Pay Transparency Directive

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## Topics today

→ **Equal pay for men and women for work of equal value**

- Directive 54/2006 article 4
- TFEU article 157

→ **Recent caselaw**

- C-341/23 Air Nostrum
- C-624/19 Tesco Stores
- C-182/22 Kuratorium Dialyse

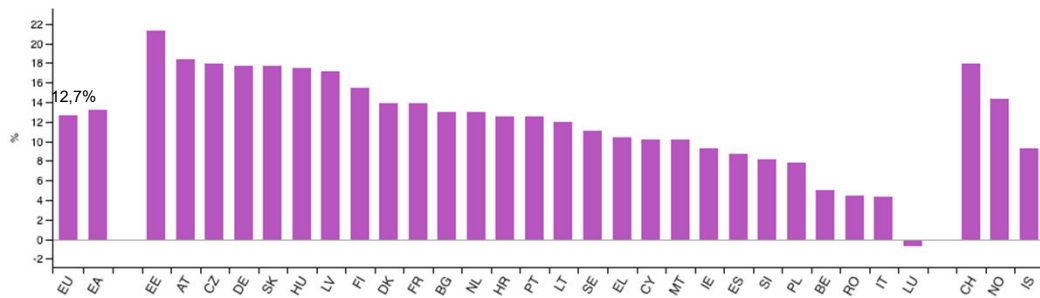
→ **The Pay Transparency Directive**

- New duties on employers, worker representatives, and Member States

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## Status on equal pay between men and women

The unadjusted gender pay gap, 2022 (difference between average gross hourly earnings of male and female employees as % of male gross earnings)



Source: Eurostat Gender Pay Statistics

[https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Gender\\_pay\\_gap\\_statistics](https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Gender_pay_gap_statistics)

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## TFEU ARTICLE 157: Equal pay

### Article 157 TFEU:

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.
2. For the purpose of this Article, 'pay' means ...
3. ...
4. ...

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# Directive 2006/54 – Article 4

## Article 4

### Prohibition of discrimination

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.



# Equal pay vs gender pay gap

## Structural causes for the gender pay gap (more than unequal pay)

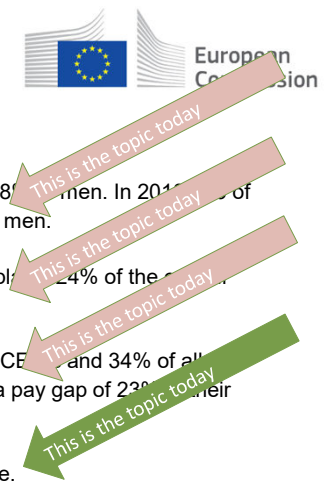
- source: European Parliament 2023, European Commission 2023

**Unequal share of unpaid work:** in 2020: 28% of women worked part-time compared to 8% of men. In 2019, 17% of employed women had work interruptions for child caring, compared to 1,3% of employed men.

**Gender-segregated job market:** overrepresentation of women in low-paying sectors explains 24% of the gender gap

**Glass ceiling: Fewer and lower paid female managers:** in 2020: 10% of top company CEOs and 34% of all managers were women (women represent 50% of employees). Female managers have a pay gap of 23% compared to their male colleagues.

**Pay discrimination:** Women earning less than men for equal work or work of equal value.



# Principle of equal pay

## Equal pay between men and women:

The equality principle in EU law: Equal should be treated equal, unequal should be treated unequal

- Unequal treatment of equal situations is in breach of the equality principle
- Equal treatment of unequal situations is in breach of the equality principle

# The mechanics

## Principle of equal pay between men and women

### A: Is the pay equal for men/women?

Is the pay less than?

Is a difference related to the workers' sex? (are groups comparable)

Is the work equal? (same – or of equal value)

Can someone fix it? (is the pay from the same source)

### B: If unequal: Next test

Are differences caused by objective reasons – unrelated to sex?

### C: If indirect: May be legitimate

If indirect unequal pay: Does the inequality pursue a legitimate aim, is it suitable and necessary?

If part-time: pro rata principle

# The principle has direct vertical and horizontal effect

## Direct horizontal effect of TFEU art 157 (and as expressed in Directive 54/2006)

### Equal pay for 'equal work': Case 43/75 *Defrenne II*:

- Identical jobs, performed simultaneously or at different times, performed in the same establishment or in different establishments if pay is attributed to a single source

### Equal pay for 'work of equal value': C-624/19 *Tesco Stores*

- Non-identical jobs of equal value, performed simultaneously or at different times, performed in the same establishment or in different establishments if pay is attributed to a single source

# The mechanics

## Principle of equal pay between men and women

### A: Is the pay equal?

These matters must be tested

Is the pay less than?

Is a difference related to the workers' sex? (are groups comparable)

Is the work equal? (same – or of equal value)

Can someone fix it? (is the pay from the same source)

### B: If unequal: Next test

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### C: If indirect: May be legitimate

If indirect unequal pay: Does the inequality pursue a legitimate aim, is it suitable and necessary?

If part-time: pro rata principle

## TFEU ARTICLE 157: equal pay

### Article 157 TFEU:

1. Each Member State shall ensure that the principle of equal pay for male workers for equal work or work of equal value is applied.
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.  
Equal pay without discrimination based on sex means:
  - (a) that pay for the same work at piece rates shall be calculated on the basis of the same unit of measurement;
  - (b) that pay for work at time rates shall be the same for the same job.

A right to the same in all matters concerning 'pay'  
Differences constitute unequal pay

#sdudk

## Equal pay - Concept of pay

### Art 157(2): A broad interpretation

- **Case 32/71 *Sabbatini v European Parliament***: Expatriation allowance (paid to wives, not to husbands) was pay, because 'closely linked to the employee's work'

### 2023: Preamble 21 in Pay Transparency Directive:

Wages, salaries or any other consideration, whether in cash or in kind, which workers receive directly or indirectly, in respect of their employment from their employer. Not only salary, but also complementary or variable components of the pay. Under complementary or variable components, any benefits in addition to the ordinary basic or minimum wage or salary, which the worker receives directly or indirectly, whether in cash or in kind, should be taken into account. Such complementary or variable components may include, but are not limited to, bonuses, overtime compensation, travel facilities, housing and food allowances, compensation for attending training, payments in the case of dismissal, statutory sick pay, statutory required compensation and occupational pensions.

The concept of pay should include all elements of remuneration due under law, collective agreements and/or practice in each Member State.

## Equal pay - Concept of pay

'In respect of his/her employment':

- **Case 12/81 Garland** : Concessionary **rail fares** - arises out of the worker's employment, not confined to payment for work actually done
- **Case 58/81 Commission v Luxembourg**: Head of **household allowance** (bonus payments)
- **C-342/93 Gillespie** : '...all consideration which workers receive directly or indirectly from their employers 'in respect of their employment'. The legal nature of such consideration is not important'. I.e., **maternity benefits** (employer paid) and pay rises during maternity leave **C-333/97 Lewen** and **C-281/97 Krüger: Christmas bonus** – even if paid voluntarily and as an incentive for future work
- **C-249/97 Gruber**: **Termination payments**
- **C-476/12 Österreichischer Gewerkschaftsbund: Child allowances**
- **C-649/22 Randstad** ? Compensation for total permanent incapacity resulting from an accident at work (Directive 2008/104 concept of 'pay' interpreted in light of art. 157)
- **C-841/19 Fogasa**: In the event of employer's insolvency: Outstanding wages and compensation for unfair dismissal (from the national agency).
- **C-486/18 Praxair**: **Deployment leave allowance**, dismissal compensation
- **C-312/17 Bedi**: **Bridging assistance** to former civilian members of the army
- **C-167/97 Seymour–Smith: Compensation for unfair dismissal** – a complaint about the unfair dismissal compensation was 'access to pay' and could be brought under art. 157.
- **C-262/88 Barber**: All forms of **redundancy payments**, whether contractual, statutory or ex gratia.
- **Case 69/80 Worringham**: Payments paid straight into **pension funds** - if included in the calculation of gross salaries for other purposes
- **Case 23/83 Liefing** : Employer contributions to social security schemes are not 'pay'. If social security payments (such as pension payments) are included in the calculation of gross salaries, then they are considered 'pay'.
- **Case 170/84 Bilka Kaufhaus** : **Occupational pension scheme**, partly funded by employer: An integral part of the employment contract. Negotiated either by the employee or by representatives. A contractual nature of the pension scheme.

## C-341/23 Air Nostrum

4. October 2024: Directive 2006/54 on equal treatment of men and women

**Facts:**

Air Nostrum employs ground staff and cabin crew, which are predominantly female (94%), and pilots, which are predominantly male (93,7%). The two groups are covered by two collective agreements. Each collective agreement provides for daily subsistence allowances, covering expenses related to travelling other than accommodation and transport.

The daily subsistence allowances for pilots is higher than the daily subsistence allowances for the cabin crew.

**First question:** Is daily subsistence allowance a 'working condition' under art 14 (1)(c)?

**Second question:** Is a difference in allowance indirect discrimination on grounds of gender?

# C-341/23 Air Nostrum

## Directive 54/2006

→ Article 14

→ **Prohibition of discrimination**

→ 1. *There shall be no direct or indirect discrimination on grounds of sex in the public or private sectors, including public bodies, in relation to:*

→ ...

→ (c) employment and working conditions, including dismissals, as well as pay as provided for in Article 141 of the Treaty;

→ ...

Two different forms of equal treatment

Article 4

**Prohibition of discrimination**

*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.*

# C-341/23 Air Nostrum

**First: Is daily subsistence allowance a 'working condition' under art 14 (1)(c)?**

**CJEU: Changes the question:**

**23:** The question is based on the premis, that daily subsistence allowance is a working condition under article 14(1)(c) Directive 2006/54 and not pay under TFEU article 157 and article 2 and 4 Directive 2006/54 (equal pay).

**25:** Article 14(1) of Directive 2006/54 prohibits any indirect discrimination on grounds of sex in employment and working conditions. Whereas Article 4 prohibits a difference in treatment in the remuneration of workers only in so far as it relates to the same work or work to which equal value is attributed.

If it is 'pay', then it is governed by article 4 and not by article 14.

## C-341/23 Air Nostrum

**First:** Is daily subsistence allowance a 'working condition' under art 14 (1)(c)?  
**First:** Does daily subsistence allowances form part of their 'pay' defined in article 2(1) ?

**CJEU:**

**28:** ....the concept of 'pay' defined in Article 2(1)(e) ... is **an autonomous concept of EU law** which must be given a **broad interpretation**

**29:** ...'pay' covers ....'**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**'.

**30:** Daily subsistence allowances ... constitute economic consideration paid in cash directly by the employer to the worker... intended to compensate for expenses incurred in the performance of work.

Article 2(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;

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## C-341/23 Air Nostrum

**First:** Does flat rate daily subsistence allowances form part of their 'pay' under article 2 ?

**CJEU cont'd:**

**31:** The fact that daily subsistence allowances **do not remunerate specific work** calculated per unit of time or per unit of work **is not sufficient to exclude** those daily subsistence allowances **from the scope of the concept of 'pay'**, within the meaning of Article 2(1)(e) of Directive 2006/54.

**32:** The provision does not require that the consideration received from the employer must remunerate specific work ... but ... 'in respect of the worker's employment'

**33:** the expenses are incurred because of travel in the context of the employment contract. That is 'in respect of their employment'

= > **The test is: Is it 'in respect of' the employment?**

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## C-341/23 Air Nostrum

**First:** Does flat rate daily subsistence allowances form part of their 'pay' under article 2 ?

**CJEU Cont'd:**

**34:** Caselaw on the Working Time Directive, C-155/10 *Williams and others*, states that subsistence allowance need not be included in the calculation of the sums to be paid to the employee during his/her annual leave. This is not relevant in the case of equal pay.

**36-37:** Caselaw on the Posting of Workers Directive, C-428/19 *Rapidspeed*, states that a daily allowance reimbursing various expenses incurred on account of the posting is not part of the minimum wage. This is not relevant in the case of equal pay. Also, the posted workers' reimbursements vary according to actual expenses, and is not a flat rate paid.

= > Even though, the allowances are **not paid in return for work done**, they constitute **a consideration granted by the employer to the workers in respect of their employment**.

## C-341/23 Air Nostrum

**Is this new ?** Pay/remuneration was always a wide concept (since *Defrenne II* in 76)

Not limited to payments for work performed:

**Case 12/81 *Garland*:** Free railway tickets... 'not necessarily confined to payment for the work actually done'

**Case 58/81 *Commission v Luxembourg*:** Head of household allowance (bonus payments)

**Case C-342/93 *Gillespie*:** Maternity leave paid by the employer

**Now clear in the Pay Transparency Directive 2023 preamble 21:**

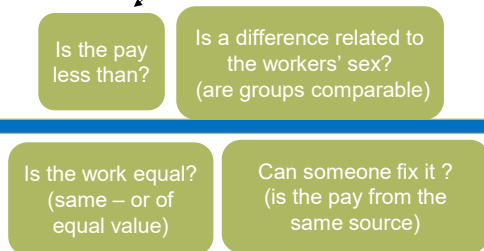
*...Not only salary, but also complementary or variable components of the pay. ... Such complementary or variable components may include, but are not limited to, bonuses, overtime compensation, travel facilities, housing and food allowances, compensation for attending training, payments in the case of dismissal, statutory sick pay, statutory required compensation and occupational pensions.*

# The mechanics

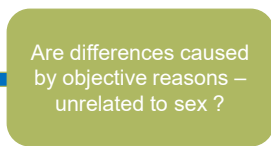
## Principle of equal pay between men and women

### A: Is the pay equal?

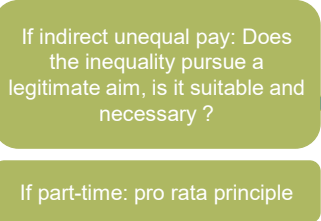
These matters must be tested



### B: If unequal: Next test



### C: If indirect: May be legitimate



# Equality in pay

**Indirect discrimination : the negative effect of a neutral rule/provision/practice on categories of workers of predominantly one sex.**

**Overtime rates for part-time workers : Should they be paid overtime for extra hours worked from part-time to full-time?**

- **1994: C-399/92 Helmig:** No, they all receive the same overall pay for the same hours worked. Not unequal pay
- **2004: C-285/02 Elsner Lakeberg:** Yes, even though the rate per hour is the same, the situations of part-time workers and fulltime workers are not the same. This is unequal pay.
- **2007: C-300/06 Voss:** Lower rates applicable from overtime hours – also for first hour above part-time. Unequal pay.

# C-182/22 Kfh Kuratorium für Dialyse

29. July 2024: Framework Agreement on part-time work clause 4 (non-discrimination), Directive 2006/54 on Equal treatment of men and women in employment (indirect)

**Facts:**

The company provides out-patient dialysis services throughout Germany. The company employs more than 5000 persons, 76,96% are women. The company's collective agreement prescribes, that overtime pay – an additional pay – is paid for overtime hours worked in excess of 38,5 hours per week (full-time).

The payment scheme applies equally to workers employed on full-time contract and worker employed on part-time contracts.

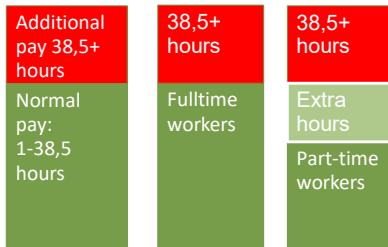
**First** : Is this overtime payment scheme 'less favourable' treatment of part-time workers. And if so, can it be justified ?

**Second** : If so, is it indirect discrimination on grounds of sex – even in a workplace where there are more women than men also among full-time workers ? If so, can it be justified ?

# C-182/22 Kuratorium Dialyse (pay)

First question: Is it 'less favourable'

Equal or unequal ? What do you compare ?



**Argument for equal (the objective):**  
The workers receive the same pay per hour worked (C-399/92 *Helmig*).

**Argument for unequal (the relative):** the part-time workers have to work extra hours before receiving additional pay, whereas the fulltime workers receive additional pay for the first extra hour of work (C-285/02 *Elsner Lakeberg*).

## Quick visit to: C-660/20 Lufthansa Cityline

### Pay supplements triggered by the same working hour thresholds: Unequal pay ?

→ **Remuneration for pilots** is calculated on the basis of flying duty hours per month (not 'overtime' per se). The 'trigger thresholds' for receiving additional hourly payments were 106, 121 and 136 flying duty hours per month. The trigger thresholds were the same for fulltime pilots and for part-time pilots.

→ **Is this 'less favourable'?**

→ **AG Emiliou** : Not less favourable: pay per hour worked is the same

Helmig – equal per hour

Elsner Lakeberg – unequal starting points, relative burden is higher for part-time workers

- **The Court**: maintaining the same trigger thresholds for part-time and full-time pilots is less favourable for part-time pilots, as **they are less likely to reach** the thresholds (par 47-49).
- Although the remuneration per flying hour for the two categories of workers appear to be the same, reaching the identical thresholds represent a **greater burden** for the parttime pilots compared to their normal working hours. This is 'less favourable'.

## Quick visit to: C-660/20 Lufthansa Cityline

### Pay supplements triggered by the same working hour thresholds: Unequal pay ?

**C-660/20 Lufthansa Cityline**: One pilot claiming equal treatment for part-time work (not unequal pay)

- **The Court**:
- Unless based on objective reasons (par 54), which meets a genuine need of the employer (par 58-61) – which was doubtful.
  - Must pursue a legitimate aim.
  - Must be appropriate and necessary (par 62).
  - **Necessary?** Uniform trigger thresholds **disregards** in principle, **the repercussions that workload have on individuals** and the particular pressures associated with flying. It is also tantamount to **failing to take into account the very reasons behind the introduction of part-time work, such as possible non-work-related burdens borne by the pilot concerned** (par 63)

A relative approach

## C-182/22 Kuratorium Dialyse (pay)

Additional pay 38,5+ hours	38,5+ hours	38,5+ hours
Normal pay: 1-38,5 hours	Fulltime workers	Extra hours Part-time workers

→ CJEU: Is this 'less favourable' ?

→ **40:** ... a person working as part-time carer **must work the same number of hours** as a person working as a full-time care assistant in order to receive the additional pay for overtime, **regardless of the normal working hours agreed individually in the employment contract** of that person working as a part-time care assistant, with the result that he or she cannot reach the number of hours of work required, or that he or she has **a significantly lower probability of doing so** than a person working as a full-time care assistant, the number of hours of work required in order to receive that additional pay.

→ = > Focus on **the relative individual burden**.

→ **44:** the number of hours worked for additional pay should be reduced **pro rata temporis**

→ = > A recipe for adjustment

## C-182/22 Kuratorium Dialyse (pay)

Additional pay 38,5+ hours	38,5+ hours	38,5+ hours
Normal pay: 1-38,5 hours	Fulltime workers	Extra hours Part-time workers

→ CJEU: Can it be justified by objective reasons ?

→ **49-50:** Does the system **deter requiring overtime work** ? **No**. The 'free' extra hours for part-time carers do not deter employers from requiring workers to work overtime, indeed, it encourages employers to require parttime workers to work overtime (they are cheaper).

→ **51:** Does the system **avoid discriminating full-time workers** ? **No**. If parttime workers are given additional pay for extra hours worked calculated on a *pro rata temporis principle*, full-time workers are treated in *the same way* as part time workers.

This unequal treatment is in line with **the equality principle**, as part-time workers and full-time workers are different – exactly concerning the working hours in the contract.

→ The CJEU approach takes a **material equality approach**: the full life situation of the workers, which is affected by the working hours in the contract (incl e.g. other commitments)

→ The GA approach takes a **formal equality approach**: workers are compared only concerning the hours at work.

# The mechanics

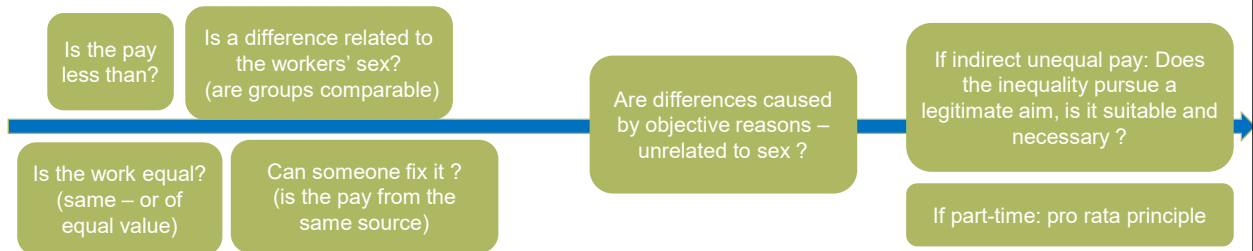
## Principle of equal pay between men and women

### A: Is the pay equal?

These matters must be tested

### B: If unequal: Next test

### C: If indirect: May be legitimate



# Comparison – between men and women

Comparison between groups ? Not arbitrarily defined to manipulate the salary levels:

**Case C-400/93 Royal Copenhagen:** Comparison of the pay of turners (mostly male) and painters (mostly female).

- A piece-rate system with a fixed element and an individual output element. The fixed elements varied across groups/subgroups.
- The subgroup of ornamental plate painters (A) earned an average of 116 DKK/hour,
- The subgroup of machine-operating turners (B) earned an average of 104 DKK/hour,
- The subgroup of blue-pattern painters (C) earned 91 DKK/hour.

- **The Court:** The comparison must cover **a relatively large number of workers** in order to ensure that the differences found are not due to **purely fortuitous** or **short-term factors** or to **differences in the individual output** of the workers concerned (par 34). The groups must not be formed arbitrarily with a view to obtain equal pay between groups of female workers (par 36), which is the case if the comparison is made not with the female subgroup closest to the training requirements of the male group (par 37).

## C-182/22 Kuratorium Dialyse (pay)

### Second question: Is it indirect discrimination on grounds of gender ?

- Generally, less favourable treatment of part-time workers affects more women than men, as more women than men work part-time, resulting in indirect discrimination of female workers.
- In the current case, the entire workforce was predominantly female (79%). Female workers are the majority in the full-time group (68%), as well as in the part-time group (85%).

### CJEU:

**62:** Does the less favourable treatment of part-time workers in this case put persons of one sex 'at a disadvantage' compared to the other sex ?

**65:** All data must be used, not limited to comparing groups. The purpose is to analyse **if there is** a 'disadvantage'. The purpose is not one or the other test. The purpose is to reveal disadvantages.

**66:** Of all male workers, approx 35% work part-time. Of all female workers, the percentage working part-time seems significantly higher. So, yes, this disadvantages female more than male workers.

= > **Women can be disadvantaged more than men, also in workplaces where the majority are female workers**

## Equal work – scope of comparison

### Comparison between groups ? Groups consisting of predominantly one sex

#### How about the (few) men in the female group – or vice versa?

- Are they proof, that there is no difference in pay based on sex ?
  - No, the statistical facts indicate unequal pay – it exists, but can be unintentional
- Are they excluded from claiming equal pay ?
  - No: discrimination 'by association' is protected – regardless of not being bearer themselves of the protected criterion
  - **C-83/14 CHEZ** (ethnic origin): Lady living in an area predominantly inhabited by people of Roma origin. Suffered the less favourable treatment (electric meters placed high) without possessing that ethnic origin herself.
  - **C-303/06 Coleman** (disability): Mother to a disabled child suffered harassment from her employer because of her child's disability. She was entitled to the protection against discrimination on grounds of disability.

# The mechanics

Principle of equal pay between men and women

**A: Is the pay equal?**  
These matters must be tested

**B: If unequal: Next test**

**C: If indirect: May be legitimate**



# Is the work equal ?

**Identical work - the easy comparison:**

**Case 43/75 Defrenne II :**

- two people performed **identical** jobs (male and female flight attendants)
- for the same employer
- in a single establishment
  
- Identical jobs for the same employer in different establishments (**Tesco Stores**)
- Identical jobs for different employers, if the pay difference can be attributed to a single source. E.g. the legislature (**Allonby** - access to pension schemes), a group of companies.

## Is the work equal ?

### Same work : Case C-381/99 *Brunnhöfer*

Is not sufficiently defined by a collective agreement classifying the job in the same job category. Collective agreements can in themselves be discriminatory, as in *Defrenne II*.

- Must be supported by 'precise and concrete factors' related to the performance of work:
  - Nature of activities
  - Training requirements
  - The working conditions

## Is the work equal ?

### Work of higher value ? Case 157/86 *Murphy* :

Women workers seeking equal pay for equal work were assessed to perform work of a higher value than that of their male comparators. Would it be against the principle of equal pay to grant equal pay, if the work of the female workers is of higher value ?

#### CJEU:

- The principle of equal pay applies to equal work and to work of equal value, but not to work of unequal value.
- Nevertheless, if that principle forbids workers of one sex to be paid a lower wage than workers of the opposite sex performing equal work, it *a fortiori* prohibits a difference in pay where the lower-paid category of workers is engaged in work of higher value.
- To adopt a contrary interpretation would be tantamount to rendering the principle of equal pay ineffective and nugatory.

## Is the work equal ?

### Work of equal value ...

#### Developed by the CJEU:

**Case 69/80 *Worringham*** : Article 1 of the (then Equal Pay) Directive explains that the concept of “same work”, contained in the first paragraph of (now) Article 157 of the Treaty, includes cases of ‘work to which equal value is attributed’.

**Case 96/80 *Jenkins*** : The provision in (now) art. 4 of the Recast Directive is designed to facilitate the practical application of the principle in the TFEU.

## Is the work equal ?

### How to compare ‘work of equal value’ – and what to compare: Different avenues:

1. **Value of jobs** in terms of their content and the demands on/requirements to workers
  - Risk of appraising certain skills (strength) over others (dexterity)
2. **Value of jobs to the employer** by means of measuring, for example, the benefits they bring to the business, or the cost that the employer would incur by buying in other services to replace the jobs in issue
  - Risk of maintaining a gender segregated job market with lower paid ‘women’s jobs’.
3. **Value of the worker** – by means of education, skills, seniority, personality, education/certificates, market value, age, abilities, family situation, military training ....
  - Risks of numerous appraisals/biases unrelated to the value of the ‘work’

## Equal pay – for work of equal value

### Case 129/79 *Macarthy* :

→ The decisive test lies in establishing whether there is a difference in treatment between a man and a woman performing 'equal work' within the meaning of Article 119. The scope of that concept . . . is entirely qualitative in character in that it is exclusively concerned with **the nature of the services** in question . . .

Door no 1 - the job, only

### Now in Recital 9 of the preamble to the Recast Directive:

→ 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. It follows that it does not, therefore, matter where or for whom equal work is performed. If the nature of the services is identical then it must be rewarded equally.

## Equal work/work of equal value

### Pay Transparency Directive Recital 26:

26) ... employers must have pay structures in place... Such pay structures should allow for the comparison of the value of different jobs within the same organisational structure...**the value of work should be assessed and compared** on the basis of objective criteria, including **educational, professional and training requirements, skills, effort, responsibility and working conditions**, irrespective of differences in working patterns.

To facilitate the application of the concept of **work of equal value**, especially for micro, **small and medium-sized enterprises**, the objective criteria to be used **should include four factors: skills, effort, responsibility and working conditions**. Those factors have been identified by the existing Union guidelines as being essential and sufficient for evaluating the tasks performed in an organisation regardless of to which economic sector the organisation belongs.

...each of the four factors **should be weighed by the employer** depending on the relevance of those criteria for the specific job or position concerned. **Additional criteria** may also be taken into account where relevant and justified.

## Equal work/work of equal value

### Pay Transparency Directive article 4(4):

Pay structures shall be such as to enable the assessment of whether workers are in a comparable situation in regard to the value of work on the basis of objective, gender-neutral criteria agreed with workers' representatives where such representatives exist.

Those criteria shall not be based directly or indirectly on workers' sex.

They shall include skills, effort, responsibility and working conditions, and, if appropriate, any other factors which are relevant to the specific job or position. They shall be applied in an objective gender-neutral manner, excluding any direct or indirect discrimination based on sex. In particular, relevant soft skills shall not be undervalued.

## Work of equal value

### Which facts are relevant to include in the comparison?

- It is a given, that the jobs are different.

**Objective factors:** Educational, professional and training requirements, skills, effort, responsibility and working conditions

- **Education:** the characteristics of the educations – length, academic elements, practical elements, difficulty – can be relevant in the comparison.
- **Working conditions:** working hours, shifts, flexibility, risk of injuries
- **Nature of the work:** degree of autonomy, repetitive or varying, physical demands, focus, monotonous/repetitive, human interaction, types of customers/patients/citizens, etc.)
  - If certain types of factors are more often present in male environments (e.g. noise, dust, strength, heavy lifting), this must be balanced with the inclusion of elements of a neutral character (e.g. dexterity, concentration, repetitive, mentally demanding)

## Equal pay – for work of equal value

**The test for work of equal value is a qualitative test based on the job performed.**

Intends to redress the undervaluing of certain jobs for historical, traditional reasons (segregated market). E.g. turners and painters, cleaners and gartners, midwives and technicians, etc.

= a legal review based on the factual characteristics of the work actually carried – objective, gender neutral criteria

**Tesco Stores:**

- the term 'work of equal value' is entirely qualitative in character, as it is exclusively concerned with the nature of the work actually performed (Tesco par 30)
- a factual assessment by the court - the court determines whether equal value can be attributed (Tesco par 30)

## C-624/19 Tesco stores

**C-624/19 Tesco Stores:** 6000 workers against Tesco Stores Ltd.

Female workers in the Tesco stores claimed that their work and that of the male workers in the Tesco distribution centers are of equal value. Further, that their work can be compared even though it is carried out in different establishments.

**The Court:**

- The wording imposes, clearly and precisely, an obligation to achieve a particular result and is not limited to situations where the workers of different sex who are compared perform 'equal work', to the exclusion of other situations (par 29)
- The court must make a factual assessment to determine whether in light of the nature of the activities carried out, equal value can be attributed to them (par 30)

Assessment is factual case-to-case – the obligation is clear, and precise

## C-624/19 Tesco stores

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Female workers in the Tesco stores claimed that their work and that of the male workers in the Tesco distribution centers are of equal value. Further, that their work can be compared even though it is carried out in different establishments.

**Question:** Does the concept 'work of equal value' have direct horizontal effect ? **YES**

- The case-to-case-assessment must be distinguished from the characterisation of the obligation resulting from Article 157 TFEU, which, as has been stated in paragraph 20 of the present judgment, imposes, clearly and precisely, an obligation to achieve a particular result (par 31)
- The objective of TFEU art 157 is to eliminate all discrimination on grounds of sex (par 32)
- The principle forms part of the foundations of the European Union (par 33)
- TEU art. 3(3)(2): The Union is to promote, inter alia, equality between men and women
- EU Charter art. 23: Equality between men and women must be ensured in all areas, including employment, work and pay (par 34)
- A distinction between the direct effect of equal pay for equal work and for work of equal value would compromise the effectiveness of the article and the objectives pursued (par 35).

Equality in result

## C-341/23 Air Nostrum

**Is the work of equal value ?**  
**- Pilots and cabin crew ?**

**CJEU:**

**(41-43):** The work is not the same. The work is not of equal value:

→ **42** .....Furthermore, in view of **the training required** to perform the work of a pilot and **the responsibilities associated with it**, the work of pilots **cannot be considered to be of equal value** to the work of cabin crew members, within the meaning of Article 4 of Directive 2006/54.

# Work of equal value

## Which facts are relevant to include?

- Even **objective factors** may embody discrimination:

**C-237/85 Rummler:** A company's job grading system, awarded 'muscular effort'. A female employee wanted to be upgraded, as lifting the same (20 kg) bags for her was 'heavy lifting'

- **The Court** : Calculating the amount of physical exertion needed based on the values of one sex risks resulting in discrimination.
- The entire scheme had to be overall considered, and had to include other criteria for which female workers might show 'particular aptitude'.

**C-400/93 Royal Copenhagen:** both muscular strength and dexterity was awarded.

# The mechanics

## Principle of equal pay between men and women

### A: Is the pay equal?

These matters must be tested

Is the pay less than?

Is a difference related to the workers' sex? (are groups comparable)

Is the work equal? (same – or of equal value)

Can someone fix it? (is the pay from the same source)

### B: If unequal: Next test

Are differences caused by objective reasons – unrelated to sex?

### C: If indirect: May be legitimate

If indirect unequal pay: Does the inequality pursue a legitimate aim, is it suitable and necessary?

If part-time: pro rata principle

## Equal pay - Single source

### **C-320/00 Lawrence and others: Situation after a transfer: No longer 'single source'**

Catering and cleaning services (mostly female) performed work of equal value to gardening staff (mostly male).

Catering and cleaning services were contracted out. The transferred workers' pay were reduced by the transferee. Was this a breach of the principle of equal pay ?

- Art 157 is not limited to situations, where the men and women work for the same employer (par 17).
- Where the differences identified in the pay cannot be attributed to a single source, 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. The work and the pay of those workers cannot therefore be compared on the basis of that provision (par 18)

### **Same in C-256/01 Allonby: Situation after outsourcing and insourcing : no single source**

## Equal pay - Single source

### **C-624/19 Tesco Stores: Situation of working at different establishments for the same employer**

#### **CJEU:**

- Decisive is, whether the pay conditions can be attributed to a single source. If so, the work can be compared even if performed in different establishments (par 17)
- Tesco Stores appears to constitute, in its capacity as employer, a single source to which the pay conditions of the workers performing their work in its stores and distribution centres may be attributed and which could be responsible for any discrimination prohibited pursuant to Article 157 TFEU (par 19)

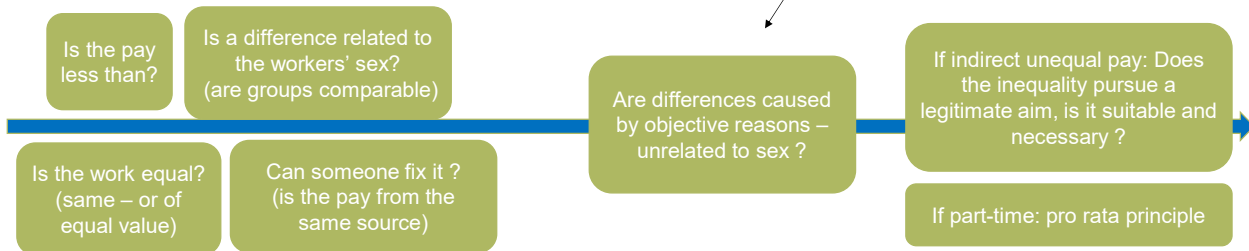
# The mechanics

## Principle of equal pay between men and women

**A: Is the pay equal?**  
These matters must be tested

**B: If unequal: Next test**

**C: If indirect: May be legitimate**



# Justification of unequal pay?

## 'Objective reasons' explaining a difference in pay for equal work/work of equal value

- A strict test: The grounds must correspond to a real need of the undertaking, be appropriate to achieving the objectives pursued and necessary to that end (Case 170/84 *Bilka* par 36)
- Reasons entirely unrelated to any discrimination based on sex (Case 381/99 *Brunnhofers* par 66)

## Objective reasons ?

- X asked for more
- X was willing to work for less
- X was paid more in his former job
- X negotiates better
- X receives better pay, as x was the only suitable applicant
- X provides for the family
- Full-time workers provide for the family (part-time workers do not)
- Part-time workers do not need severance pay

## Justification of unequal pay?

**'Objective reasons' explaining a difference in pay for equal work/work of equal value**

**Individual capacity:**

- Payment at piece rates - different individual outputs can be objective (**Royal Copenhagen** par 21)
- Payment at hourly rates – different individual capacity (effectiveness, quality of work) are not objective if the work performed is identical or of equal value (Case 381/99 **Brunnhofner** par 77)
  - Unless, as a result, the employees are conferred different duties, or have different career developments.

## Justification of unequal pay?

**Case 109/88 Danfoss.**

Neutral criteria for pay supplements, but women were systematically paid less.

Each criterion was tested:

**'Mobility'**

- Not limited to the willingness to work at different hours/places.
- The employer made an overall assessment of the quality of work carried out, taking into account the worker's enthusiasm, sense of initiative, and amount of work done
  - If quality of work: The criterion is neutral. It is inconceivable, that the quality of work done by women should generally be less good. If 'quality' is the reason for difference in pay, the employer must have misapplied the criterion. In this case, the employer cannot rely on quality as the objective reason, as it has been used systematically to the disadvantage of women.

## Justification of unequal pay?

**Mobility, vocational training, seniority as objective reasons for pay supplements. Case 109/88 Danfoss.**

Neutral criteria, but women were systematically paid less.

Each criterion was tested:

### 'Mobility'

- Not limited to the willingness to work at different hours/places.
- The employer made an overall assessment of the quality of work carried out, taking into account the worker's enthusiasm, sense of initiative, and amount of work done
  - If adaptability to various hours/places of work: Can work as a disadvantage to women as statistically more women than men have household and family duties rendering them less flexible. In that case, the employer must justify the importance of adaptability for the performance of specific tasks entrusted to the employee.

## Justification of unequal pay?

**Mobility, vocational training, seniority as objective reasons for pay supplements. Case 109/88 Danfoss.**

Neutral criteria, but women were systematically paid less.

Each criterion was tested:

### 'vocational training'

- May work to the disadvantage of women (less opportunity)
- May be justified, if evidenced the importance in relation to the performance of the specific tasks entrusted to the employee.

### 'seniority':

- May work to the disadvantage of women (more interruptions)
- Length of service goes hand in hand with experience, and experience generally enables the employee to perform the tasks better. No need for justification (in this case).

## Justification of unequal pay?

### 'seniority':

**C-109/88 Danfoss:** Seniority generally enables the employee to perform tasks better

**C-184/89 Nimz:** A collective agreement awarded an upgrade after working a certain number of years, but part-time workers only after twice as many years worked – do full-time workers acquire skills faster than part-time workers?

- **The Court:** Such considerations are no more than generalisations about certain categories of workers. They do not identify criteria which are objective and unrelated to any discrimination on grounds of sex. The **objectivity** of such a criterion depends on all the circumstances in a particular case, and in particular on the relationship between **the nature of the work performed** and **the experience gained** from the performance of that work upon completion of **a certain number of working hours**.

Repeated in **Case C-196/02 Nikoloudi**

## Justification of unequal pay?

### 'seniority':

**C-243/95 Hill and Stapleton:** When converting part-time work to full-time work, seniority was only awarded with 50%, which resulted in a pay decrease when working full-time.

- **The Court:** This is indirect discrimination (99,2% of part-time workers were women).
- Objective reason 'Crediting' only actual service ?
  - **The Court:** General assumption unsupported by objective criteria
- Objective reason: Maintaining staff motivation, commitment and morale?
  - **The Court:** Cannot be influenced by the job-sharing scheme (part-time work)
- Objective reason : Increased costs ?
  - **The Court:** Protection of women in their family life and working life, as for men, is a natural corollary of the principle of equal treatment.
- The seniority counted for part-time workers could not be justified by the reasons given.

## Justification of unequal pay?

### 'seniority':

**C-17/05 Cadman:** A full-time woman was paid less than a full-time male comparator on the same pay grade, but with longer seniority. Is seniority always an objective reason ?

- **The Court:** Sometimes the criterion **seniority must be justified specifically. In particular, when the claimant provides evidence giving rise to serious doubts as to whether seniority is appropriate to justify a pay differential.**
- In that case, **the employer must prove**, that which is true as a general rule – that the length of service goes hand in hand with experience and that **experience** enables the worker to perform the duties better – **is also true as regards the job in question (par 38)**
- **The assessment is objective:** If the jobs have been evaluated under a job classification scheme (or the employer lifts the burden of proof for the length of service and the performance of duties for the specific job), the employer does not have to prove, that the specific employee has gained the experience required, or performs his/her duties better. (par 39)

## Indirect discrimination

**Competitive market ? A problem:** it reproduces existing pay differences in the market.

**Case 127/92 Enderby:** Potential to justify.

- Differences in pay reflected the market, and it was hard-to-find candidates for certain jobs.
- **The Court:** It must be tested: A strict test:
  - Objectively pursuing a legitimate aim (the role of market forces determining rate of pay),
  - Appropriate, and
  - Does not go further than necessary (were the market forces sufficiently significant to justify part or all of the pay difference?).

# Justification of unequal pay?

**Rare or more valuable skills?** Can potentially be an objective reason.

The same potential to reproduce existing inequalities in the market:

- **'Rare skills' or 'more valuable skills' can be a proxy** for 'male' or 'dominant' notions of merit and qualifications.
- Must be entirely unrelated to any discrimination based on sex (Case 381/99 *Brunnhofer* par 66).
- **The justification test for 'valuable or rare skills' include:**
  - What is the genuine need for that specific skill
  - What is the evidence, that the skill is rare and more valuable
  - What is the background for the status of those skills as rare/valuable – have all groups in society had equal access to that training, or has access to training been hindered for some ?

# The mechanics

Principle of equal pay between men and women

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**B: If unequal: Next test**

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**C: If indirect: May be legitimate**

If indirect unequal pay: Does the inequality pursue a legitimate aim, is it suitable and necessary ?

If part-time: pro rata principle

## Legitimate unequal pay ?

→ unless it is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary

### C-182/22 Kuratorium Dialyse (pay)

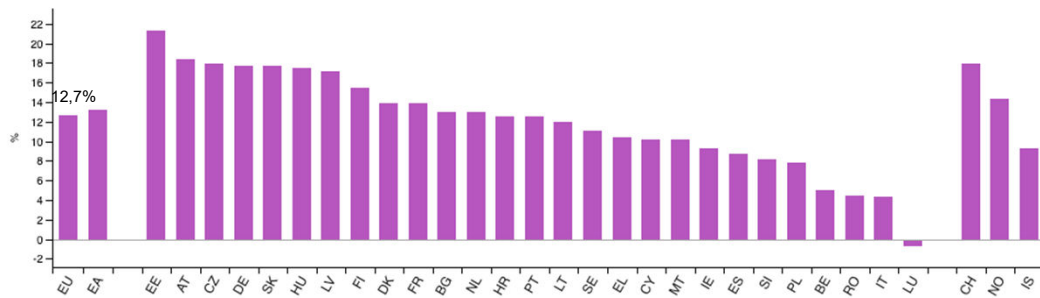
Additional pay 38,5+ hours	38,5+ hours	38,5+ hours
Normal pay: 1-38,5 hours	Fulltime workers	Extra hours Part-time workers

- CJEU: Can it be justified by objective reasons ?
  - 49-50: Does the system deter requiring overtime work ? No. The 'free' extra hours for part-time carers do not deter employers from requiring workers to work overtime, indeed, it encourages employers to require parttime workers to work overtime (they are cheaper).
  - 51: Does the system avoid discriminating full-time workers ? No. If parttime workers are given additional pay for extra hours worked calculated on a *pro rata temporis* principle, full-time workers are treated in the same way as part time workers.
- This unequal treatment is in line with the equality principle, as part-time workers and full-time workers are different – exactly concerning the working hours in the contract.
- The CJEU approach takes a **material equality approach**: the full life situation of the workers, which is affected by the working hours in the contract (incl e.g. other commitments)
  - The GA approach takes a **formal equality approach**: workers are compared only concerning the hours at work.

# The Pay Transparency Directive

## Status on equal pay between men and women

The unadjusted gender pay gap, 2022 (difference between average gross hourly earnings of male and female employees as % of male gross earnings)



Source: Eurostat Gender Pay Statistics

[https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Gender\\_pay\\_gap\\_statistics](https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Gender_pay_gap_statistics)

## Pay Transparency Directive 2023/970

Adopted 10. may 2023. Transposition date: 7 June 2026.

**The purpose is:** to strengthen the application of the principle of equal pay for equal work or work of equal value between men and women, cf. article 1

**The Directive does not provide new material rules on equal pay**

- The principle is the same, the requirements for paying equal pay is the same.

**The Directive introduces 'new' duties on all employers**



# Pay Transparency Directive 2023/970

Pay  
structure



## Pay structures - article 4:

Employers must have **pay structures** ensuring equal pay for equal work or work of equal value, cf. article 4(1)

### **Requirements to the pay structures, cf. article 4(4):**

- To enable the assessment of whether workers are in a comparable situation in regard to the value of work
- On the basis of objective, gender-neutral criteria - agreed with workers' representatives (if they exist)
  
- The criteria shall not be based directly or indirectly on workers' sex.
- They shall include skills, effort, responsibility and working conditions, and, if appropriate, any other factors which are relevant to the specific job or position.
- They shall be applied in an objective gender-neutral manner, excluding any direct or indirect discrimination based on sex.
- In particular, relevant soft skills shall not be undervalued

# Pay Transparency Directive 2023/970

Pay  
structure



## Pay transparency prior to employment - article 5:

**Before recruitment:** To ensure transparent negotiations on pay, applicants have the right to receive information about:

- the initial pay or pay range for the position concerned
- relevant provisions of the collective agreement applied by the employer in relation to the position
- E.g. in published job vacancy notice, prior to the job interview or otherwise.

### **During recruitment:**

- An employer shall not ask applicants about their pay history
- Job vacancy notices and job titles must be gender-neutral
- Recruitment processes must be led in a non-discriminatory manner, in order not to undermine the right to equal pay for equal work or work of equal value (the 'right to equal pay').

# Pay Transparency Directive 2023/970

Pay structure



## Pay transparency during employment – articles 6-8:

### General availability of criteria:

- The criteria that are used to determine workers' pay, pay levels and pay progression must be made available to workers.
- Member States can exempt employers with less than 50 employees

### Individual written information about pay level and comparisons:

- The individual worker can receive written information on their individual pay level and the average pay levels broken down by sex for categories of same work/work of equal value.
- Within a reasonable time (max 2 months)

### Non-disclosure clauses are not allowed:

- Workers must be allowed to disclose their own pay for the purpose of equal pay
- Non-disclosure clauses must be counteracted.

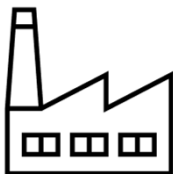
# Pay Transparency Directive 2023/970

Pay paid

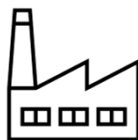


## Reporting on pay – article 9:

Public reports on actual payments, mandatory uniform contents:



**250+ employees**  
Each year  
First: 7. June 2027 for the calendar year 2026.



**150-249 employees**  
Every third year  
First: 7. June 2027 for the calendar year 2026.



**100-149 employees**  
Every third year  
Start: 7. June 2031 the calendar year 2030.



**<100 employees**  
MS can choose to exempt this group

# Pay Transparency Directive 2023/970

## Reporting on pay – article 9:

Public reports on actual payments, mandatory uniform contents:

Pay paid



sdu.dp  
#sdudk

### PROCES:

- Employer makes the report
- Alternatively: submits data so an authority can make the report
- Worker representatives are consulted about the accuracy, and must have access to methodologies used by the employer

### COMMUNICATED AND PUBLISHED:

- The report is sent to a national authority, which publishes the information to compare employers, sectors and regions.
- The report must be made available to workers and representatives
- Upon request – to a labour authority/equality body

# Pay Transparency Directive 2023/970

## Joint pay assessment – article 10:

Pay paid



### IF

- The report shows a pay difference of min 5% within a category (ikke samlet set)
- The difference cannot be attributed to objective, gender-neutral reasons
- The pay difference has not been alleviated within 6 months after the reporting

### PURPOSE

- Identify, remedy and prevent differences in pay between men and women, which are not justified.

### ONLY:

- Employers, who are reporting on pay (more than 100/150/250 employees)

# Pay Transparency Directive 2023/970



## Joint pay assessment – article 10:

Pay paid



### HOW:

- In collaboration with worker representatives

### MANDATORY DATA FOR ASSESSMENT, article 10(2) litra a)-g):

- The proportion of male and female workers in each category, average pay levels and variable components, etc. etc.

# Pay Transparency Directive 2023/970



## Joint pay assessment – article 10:

Pay paid



### REPORTING OF PAY ASSESSMENT:

- The assessment must be made available to workers, worker representatives, the national authority
- Upon request – to labour inspectorate and equality bodies

### MEASURES MUST BE IMPLEMENTED:

- Measures to remedy pay difference must be implemented within reasonable time
- Measures must be implemented in collaboration with worker representatives
- Measures must include analysis of the existing jobclassification system (pay structure) – or must introduce a system

## Pay Transparency Directive 2023/970



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#sdudk

### Enforcement – articles 18-20, 25:

**Individual remedy** : Right to full compensation or reparation, cf. article 16

#### **Burden of proof rules:**

**Shared burden of proof, article 18(1)**: When workers who consider themselves wronged .... establish ....facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no direct or indirect discrimination in relation to pay.

**Reversed burden of proof, article 18(2)** : If an employer has not implemented the measures in article 5, 6, 7, 9 og 10 the employer must prove there has been no direct or indirect discrimination in relation to pay, or the employer must prove, that the unequal pay was manifestly unintentional and of a minor character

- Not new: Already used in C-109/88 *Danfoss*: The burden of proof rested on the employer, as the pay system was too complex and lacked transparency.

## Pay Transparency Directive 2023/970



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### Enforcement – articles 18-20, 25:

#### **Other remedies:**

- Compliance and public supervision: Fines for breach of the duties (efficient, dissuasive, proportionate)
- Access to relevant documentation during proceedings,
- Protection against victimisation,
- Public supervision and control authority

# What if - not doing it ?

## Compliance and fines

- General supervision/reporting for +100 employees
- Purpose: Equal pay in practice
- Efficient, proportionate, dissuasive sanctions
- Must include fines
- Determined by MS

## Individual complaints

- Reversed burden of proof
- Compensation or damages
- Purpose: Full reparation for the individual employee. As if paid correctly, including payment of damages for costs incurred
- Incl. procedural costs
- A penal element – for the injustice suffered



# Equal pay vs gender pay gap

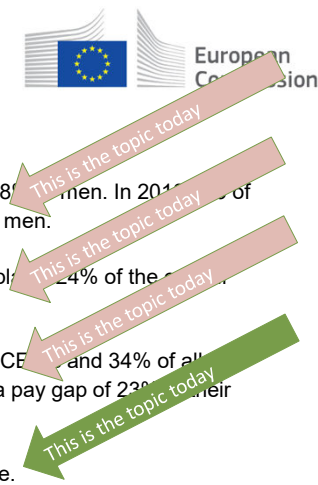
**Structural causes for the gender pay gap (more than unequal pay)**  
- source: European Parliament 2023, European Commission 2023

**Unequal share of unpaid work:** in 2020: 28% of women worked part-time compared to 8% of men. In 2019, 15% of employed women had work interruptions for child caring, compared to 1,3% of employed men.


**Gender-segregated job market:** overrepresentation of women in low-paying sectors explains 24% of the gender gap

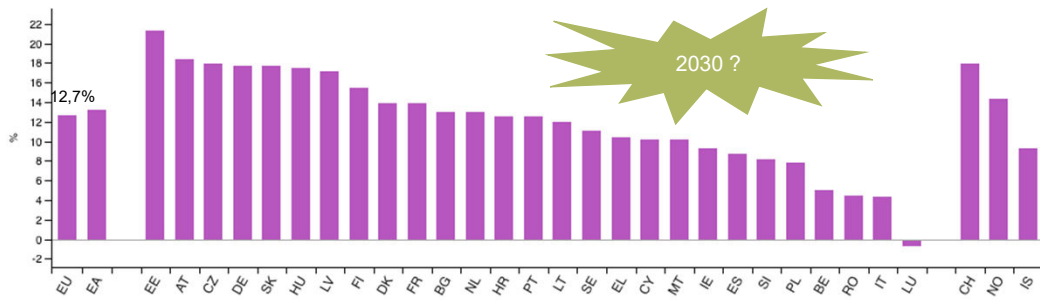
**Glass ceiling: Fewer and lower paid female managers:** in 2020: 10% of top company CEOs and 34% of all managers were women (women represent 50% of employees). Female managers have a pay gap of 23% compared to their male colleagues.

**Pay discrimination:** Women earning less than men for equal work or work of equal value.



# Status on equal pay between men and women

The unadjusted gender pay gap, 2022 (difference between average gross hourly earnings of male and female employees as % of male gross earnings) 



Source: Eurostat Gender Pay Statistics

[https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Gender\\_pay\\_gap\\_statistics](https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Gender_pay_gap_statistics)