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Equal pay for work of equal value

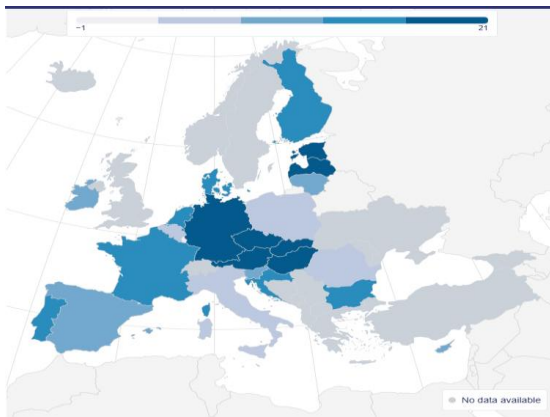
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Gender pay gap



Source: Eurostat
Note: No data available for Greece.
Access the data



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*data for Greece is from 2014, for Ireland and Italy from 2017

** all employees working in firms with >= 10 employees

Source: Eurostat (2016)



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Gender pay gap

Factors that may influence the data:

- Individual characteristics (age, education, qualifications, performance)
- Part-time or flexible work
- Horizontal segregation of the labour market
- Vertical segregation of the labour market
- Asymmetrical distribution of unpaid work, family care

- ... adjusted x unadjusted gender pay gap



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Primary EU law

- Art. 157 TFEU (ex-Art. 141 TEC): 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.

- C-43/75 Defrenne II – economic and social aim of the union (continued in C-50/96 Schröder: economic aim is secondary to the social aim – fundamental human right)
 - Direct vertical and horizontal effect!



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Secondary EU law

Directive 2006/54/EC of the European Parliament and of the Council 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):

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.



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Direct discrimination

- See Art. 2 Recast Directive: where one person is treated less favourably on grounds of sex than another is, has been or would be treated in a comparable situation
- + gender is the reason (but check your national law for other non-discrimination grounds / broader equality principle)
- See C-43/75 Defrenne II



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Indirect discrimination

- See Art. 2 Recast Directive: 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
- Test of indirect discrimination:
 - Is there a legitimate aim? (No = discrimination)
 - Is the means of achieving that aim appropriate and necessary? (No = discrimination)



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Indirect discrimination

- C-96/80 Jenkins: lower hourly wages of part-time employees (predominantly women)
- C-170/84 Bilka: pension program advantaging employees working full-time for at least 15 years within a 20 years service
- C-109/88 Danfoss: criteria of adaptability, training and seniority; effect: women paid less



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The concept of pay

- Art. 157 (2) TFEU: ,‘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.
- To be interpreted very broadly, key criteria – paid in connection with the employment relationship (i.e. not wages paid for work)



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The concept of pay

- Benefits paid in connection with termination of employment (C-109/91 Ten Oever)
- Severance pay set by law, CLA (C-33/89 Kowalska)
- Salary compensation during sickness absence (C-171/88 Rinner-Kühn)
- Salary paid during trainings (C-360/90 Bötzel)
- Salary paid during works council activities (C-278/93 Freers Speckmann)
- Maternity pay provided by employers (C-342/93 Gillespie)
- Salary indexation during maternity pay (C-147/02 Alabaster)
- Travel allowances (C-12/81 Garland)
- Christmas bonuses (C-281/97 Krueger)



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Pay in PTD

- Recital 21: The concept of pay should comprise 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.



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The same work?

- C-43/75 Defrenne II – air hostess vs cabin steward
- C-129/79 Macarthy – male and female warehouse stockroom manager
- C-381/99 Brunnhofer – foreign/legal department of a bank



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Work of equal value?

- C-236/98 JämO – midwife and clinical technician
- C-127/92 Enderby – speech therapist vs clinical psychologist and principal pharmacist
- C-157/86 Murphy – work of lower value can't be paid better!



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Building a legal case...

- Obtain sufficient information about remuneration
- Focus broadly on pay, not just basic salary
- Determine a comparator – need not be a current colleague in the same establishment (PTD – single source)
- Focus on the actual content of work, not the job title or collective agreement category



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Building a legal case...

- Establish a prima facie case – e.g. through statistical evidence showing a predominantly female group earns less than a predominantly male group performing work of equal value
- Once established, the burden of proof shifts to the employer (C-109/88 Danfoss, C-127/92 Enderby) – the employer must show the difference is justified by objective factors unrelated to sex, and that the means are appropriate and necessary
- Anticipate the employer's defences – market forces, seniority, qualifications – and prepare arguments as to why these do not objectively justify the differential in the specific case



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Case study

- A large retail company operates both stores and distribution centres in your country. Approximately 80% of the store-based employees (cashiers, shelf-stackers, customer service assistants) are women. Most distribution centre workers (warehouse operatives, logistics staff) are men. Store workers earn on average 15% less per hour than distribution centre workers.
- A group of female store workers contacts you, arguing that their work is of equal value to that of the distribution centre staff, and that the pay gap constitutes sex discrimination under Art. 157 TFEU and the Recast Directive.



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Case study

- C-624/19 K and Others v Tesco Stores Ltd
- Art. 157 TFEU – horizontal direct effect for work of equal value
- What is and what is not a work of equal value remains a complex question – a national court is, however, likely to actively search for an answer!
- Employers cannot shield themselves from equal pay claims simply by organising work across different sites or divisions



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Thank you for your attention!

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