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Time to close the gender pay gap: the need for an EU Directive on pay transparency

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Policy recommendations

- The Covid-19 pandemic has affected women disproportionately and is likely to have adverse effects on gender equality. It is essential that efforts to promote gender equality be increased in order to ensure that hard-won progress in this area is not reversed.
- As part of this effort, the European Commission should table a proposal on binding pay transparency measures strengthening the principle of equal pay between men and women, in accordance with the Gender Equality Strategy 2020–2025.
- In doing so, it should take stock of the reality that the pandemic has revealed in terms of inequalities between men and women in the labour market, including the cultural undervaluation of work typically performed by women, such as care work.
- The proposal should take as a starting point the Commission Recommendation on pay transparency from 2014, but go beyond it, for example by providing more detail on the criteria used to determine the value of work, introducing a possibility for hypothetical comparison and ensuring that trade unions can bargain collectively on the issue of equal pay.

Introduction

The principle that men and women should receive the same remuneration for the same work or for work of equal value (hereafter, the principle of equal pay) is one of the fundamental principles of the European Union, first set out in Article 119 of the Treaty of Rome 1957. The principle is implemented by Article 4 of Directive 2006/54/EC¹ (Gender Equality Directive), which prohibits discrimination based on gender as regards remuneration. This is one of the factors contributing to the gender pay gap. While this legislative framework has made a significant contribution to eliminating pay discrimination, in recent years a number of challenges to its effectiveness have been identified (European Commission 2013a, 2020a). Among these is the fact that a lack of transparency concerning pay makes it difficult to identify pay discrimination and constitutes a significant obstacle to workers who wish to bring equal pay claims.

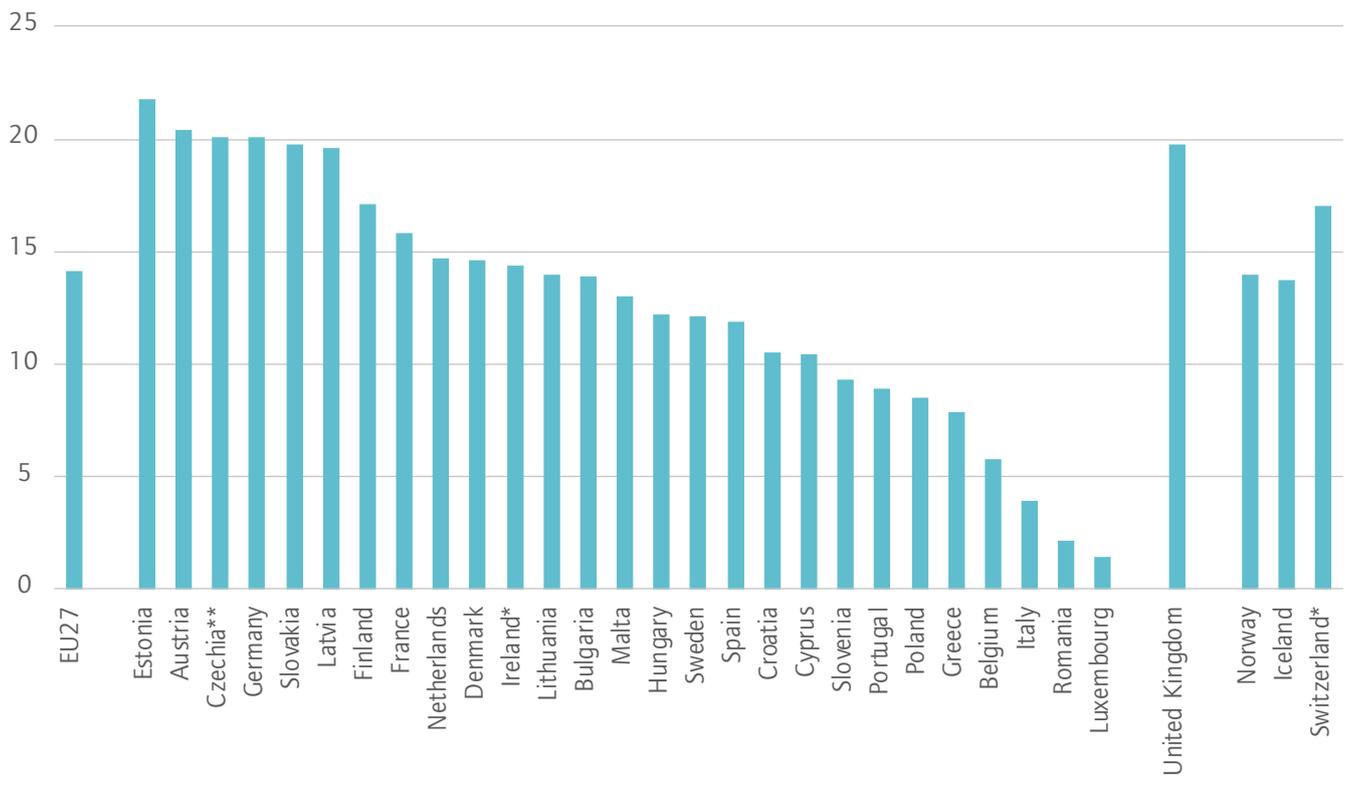
In her political guidelines, President von der Leyen committed to proposing binding pay transparency measures in the first 100 days of her mandate. A commitment by the European Commission to

table such measures by the end of 2020 appeared also in the Gender Equality Strategy 2020–2025 (European Commission 2020b). After being postponed once, the initiative disappeared altogether from the Commission legislative calendar for the end of 2020 (ETUC 2020b).

Among other workers' organisations, the European Trade Union Confederation (ETUC) has repeatedly urged the Commission to publish a proposal (ETUC 2020a, 2020b). It has also issued its own model proposal for a pay transparency directive (ETUC 2020b). The future of the initiative on pay transparency measures – which are strongly opposed by employers (BusinessEurope 2018: 3) – is, however, uncertain at the time of writing.

¹ Directive 2006/54/EC of the European Parliament and of the Council of July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation.

Figure 1 The unadjusted gender pay gap, 2018



Notes: Difference between average gross hourly earnings of male and female employees as a percentage of male gross earnings. The figures for the EU27, Ireland, Greece and Italy are provisional at the time of writing. * There is no Eurostat data for 2018 at the time of writing. The graph indicates the data for 2017. ** Definition differs. Source: Eurostat 2020a (sdg_05_20).

This policy brief provides an overview of the policy and legal context for the pay transparency initiative, and of the impact of Covid-19 on gender equality. It argues that the Covid-19 crisis has made the need for measures to strengthen the principle of equal pay both more evident and more pressing, and that the European Commission should table such measures without further delay. It makes some suggestions concerning the kinds of provisions that should be included in a future proposal in order to address the shortcomings of the current equal pay framework effectively.

The gender pay gap in the EU

According to the most recent Eurostat statistics,² in 2018 the gender pay gap stood at 14.1 per cent across the EU27, with Luxembourg recording the lowest gender pay gap, at 1.4 per cent, and Estonia the widest, at 21.8 per cent.

What this means is that women earn, on average across the EU, 14.1 per cent less than men per hour, although the gap is much greater in certain sectors. The gap has closed by less than two percentage points over the past eight years (Eurostat 2020a), suggesting a need for further efforts to address the underlying causes. In addition, more women tend to work part-time and have career breaks, which results in a much wider gap in overall annual

earnings and pensions. Data from 2014 across the EU28 (that is, including the United Kingdom) show a 39.6 per cent difference in annual earnings between men and women (Eurostat 2020b), whereas data from 2018 indicate a 30.1 per cent pension gap (Eurostat 2020c).

The gender pay gap is a complex phenomenon underpinned by various factors. This includes the fact that women on average take more time off to care for children (Oelz et al. 2013: 16); more women than men work part-time and in temporary jobs, which are associated with lower hourly pay, in part to accommodate care responsibilities (EIGE 2020: 31); women tend to occupy lower-level positions (vertical occupational segregation) and tend to work in a lower-paying range of occupations and sectors than men (horizontal occupational segregation) (Oelz et al. 2013: 17–18; European Commission 2020a: 9). Another factor is pay discrimination based on gender, direct and indirect (Oelz et al. 2013: 18–20).

A significant issue that contributes to pay differences in a more indirect way is the historical cultural undervaluation of work predominantly performed by women; that is, the ‘insufficient recognition, appreciation and remuneration of the skills and tasks related to the work performed in female-dominated occupations’ (Müller 2019: 6). This phenomenon is reflected in and entrenched by the use of gender-biased job evaluation schemes (Müller 2019: 21), which determine and compare the value of work and the relative position of one job to another on a salary scale. Such

² Last updated on 29 October 2020.

schemes are gender-biased if they overlook or undervalue skills and characteristics associated with work typically performed by women, such as care work. These include, for example, manual dexterity, responsibility for supervising staff and providing emotional support (Oelz et al. 2013: 40–41).

As a consequence, women tend to be paid less because they are ranked lower on the salary scale (Oelz et al. 2013: 20). This means that in female-dominated sectors and occupations, workers receive lower pay for work of equal value to that performed by workers in male-dominated sectors and occupations. Evidence suggests that the degree of feminisation within an enterprise is correlated with lower pay (ILO 2018: 75); that is, the higher the proportion of women in the workplace, the lower the pay.

Covid-19, equal pay and gender equality

The Covid-19 pandemic feeds into these issues in various ways. For one thing, the pandemic has brought to light the undervaluation of work performed predominantly by women. A majority of frontline, lower-paid and precarious workers, such as nurses, carers or cleaners, are women (Azcona et al. 2020; EIGE 2020).³ These occupations typically involve the kinds of skills and characteristics associated with unpaid work traditionally performed by women in the household, which tend to be systematically undervalued (Oelz et al. 2013: 40). That is, workers in professions that are absolutely essential to society are paid less because their work is considered to be ‘women’s work’.

For example, a study by Müller shows that, in particular, lower-skilled health and social care assistants across the EU earn considerably less than the national average wage in their country (Müller 2019: 15). In most Member States studied, 80–90 per cent of these workers are women (Müller 2019: 14). The study also shows that both skilled and less-skilled care workers have a lower relative income, on average, where the proportion of female workers in these occupations is higher (Müller 2019: 16).

Furthermore, the pandemic is likely to have significant negative consequences for gender equality in general (Azcona et al. 2020; Wenham 2020). It appears that women are more likely than men to lose their jobs or have their hours reduced, not least because some of the sectors hit hardest by the pandemic are feminised sectors, such as accommodation, food services and tourism (Wenham 2020: 51). As women are overrepresented among frontline workers, they are more exposed to the risk of infection (Azcona et al. 2020: 4; EIGE 2020). At home, they may also be exposed to an increased incidence of domestic violence (Azcona et al. 2020: 10) and bear a greater burden of increased domestic responsibilities than men, even when they continue working (Azcona et al. 2020: 8).

These effects are likely to compromise progress on gender equality, and some of them – such as reduced working hours, economic

pressure to take up lower-paid and precarious jobs, or effects on performance because of increased care responsibilities – could lead to a widening of the gender pay gap. In this context, the need to increase efforts to tackle the gap and to promote gender equality is even more evident and more pressing.

Barriers to the effectiveness of the current EU equal pay framework

One of the ways in which the gender pay gap is addressed at EU level is through the EU equal pay legal framework, which seeks to ensure that women and men are paid the same when they perform the same work, or where the work they perform is different but is determined to be of equal value.⁴ This is mandated by the principle of equal pay for female and male workers, now contained in Article 157(1) of the Treaty on the Functioning of the European Union.⁵

Article 4 of the Gender Equality Directive prohibits direct and indirect discrimination with regard to all aspects and conditions of remuneration, for the same work or work to which equal value is attributed. It also requires that job evaluation and classification systems, where they are used, be non-discriminatory, although it does not require that they be used. There is a wealth of well-known and long-standing case law of the Court of Justice of the EU (CJEU) in the context of equal pay.⁶ The principle of equal pay has been a well-established feature of the *acquis communautaire* for many decades, contributing to the elimination of pay discrimination by requiring Member States to lay down national provisions on equal pay and enabling workers to bring equal pay claims against their employer.

Despite this, the figures cited above show that equality in pay between women and men is still a long way from being attained in almost all Member States. Of course, pay discrimination, including the undervaluation of work performed predominantly by women, is not the only factor contributing to the persistence of the gender pay gap. Reports suggest, however, that equal pay legislation is not achieving its full potential because of a number of barriers to implementation and enforcement (European Commission 2013a, 2017, 2020a; Foubert 2017).

The principal challenges include the following. First, there is a lack of clarity concerning the concept of ‘work of equal value’. While the CJEU has clarified this concept to some extent in its case law,⁷ it is not defined as such in the Directive and often not defined in national law (Foubert 2017: 44). This makes it difficult for victims to bring equal pay claims, because it is not clear how to determine whether work is of ‘equal value’ in the first place.

3 For example, the European Institute for Gender Equality (EIGE) reports that women make up around 76 per cent of health-care workers in the EU (EIGE 2020).

4 There are EU measures that address other factors underpinning the gap, such as the Work-Life Balance Directive 2019/1158/EU.
5 Also recognised by the International Labour Organization Equal Remuneration Convention (No 100), and Article 4(3) of the (Revised) European Social Charter.
6 For example, Case 43-75 *Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena (Defrenne II)* [1976] ECR 455.
7 For example, C-381/99 *Susanna Brunnhofer v Bank der österreichischen Postsparkasse AG* [2001] ECR I-4961, para 43.

Second, there is a lack of transparency in pay systems, which makes it difficult to identify and take action against pay discrimination and gender bias (European Commission 2013a: 8). Information on pay levels for different workers, broken down by gender, can be difficult to access, whether by victims or unions seeking to support victims of discrimination or address the issue of equal pay in collective bargaining. Such information, where available, could potentially constitute facts from which it can be presumed that there has been direct or indirect pay discrimination, shifting the burden of proof to the employer, in accordance with Article 19 of the Gender Equality Directive, the aim of which is to ensure that the principle of equal treatment is enforced more effectively.

Third, in many Member States victims of pay discrimination face other procedural obstacles, such as lengthy and costly judicial proceedings, or the lack of effective sanctions and sufficient compensation (European Commission 2013a: 9). Another issue that receives less attention in the Commission reports is the difficulty women face in highly gender-segregated labour markets in finding a male worker – a comparator – with whom to compare themselves in order to demonstrate the presence of pay discrimination (Foubert 2017: 43).

In 2014, the Commission issued a Recommendation on pay transparency, which was intended to address some of these issues (European Commission 2014b). The Recommendation suggests, among other things, that Member States should provide for a right of workers and their representatives to request information on pay levels, broken down by gender and category of worker; oblige employers with more than 50 workers to produce pay reports on such information, and employers with more than 250 workers to produce pay audits; clarify the concept of 'work of equal value'; promote the development and use of gender-neutral job-evaluation schemes; ensure that equal pay be discussed at the appropriate level of collective bargaining; and enable equality bodies to represent individuals in court (European Commission 2014b). The Recommendation has had limited uptake and success, however (European Commission 2017; European Commission 2020a).

The need for binding pay transparency measures

It is not clear why the Commission initiative on binding pay transparency measures continues to be delayed. It is possible that it was postponed in light of the opinion of the Regulatory Scrutiny Board on the Impact Assessment accompanying the proposal, which was due to be considered in September. There might also be some hesitation to introduce measures that impose additional administrative burdens on businesses amidst the Covid-19 crisis, which was suggested by a leaked Commission work programme in spring (ETUC 2020a). More generally, the need to respond to the Covid-19-crisis may have shifted this initiative further down the Commission's priority list.

This initiative should be seen as part of the response to the Covid-19-pandemic, however, as well as being important and necessary for its own sake. While the effects of the pandemic might give rise

to concerns about additional burdens on businesses,⁸ they also justify action to ensure that hard-won progress on gender equality, including on equal pay, not be compromised. The pandemic shows the need to address low pay in female-dominated sectors that are essential to the functioning of society. This would not only ensure that workers in these sectors receive fair remuneration but would also make these jobs – many of which are likely to become even more crucial given the challenges of an aging population and climate change – more attractive.

As non-binding measures have not achieved the desired result, binding measures are needed (European Economic and Social Committee 2020). They should be carefully designed to address the challenges outlined above effectively. A robust proposal should take the Recommendation as a starting point but should go beyond it in various respects.

Among other things, it would be desirable to see a provision clarifying the concept of 'work of equal value' and the criteria used to determine the value of work that is somewhat more detailed than the Recommendation.⁹ This could be achieved by setting out additional criteria¹⁰ organised around the main factors of 'skill, effort, responsibility and working conditions'. These factors, which can be broken down into sub-factors, are frequently identified as being essential to evaluating work in a non-gender biased way (Oelz et al. 2013; European Commission 2013b). The proposal should also provide for further guidance to be produced at EU and national levels on the criteria and methods used in determining the value of work and the design of gender-neutral job evaluation schemes.

Together with a provision requiring Member States to promote the development and use of job evaluation schemes free from gender-bias and based on these objective criteria, this would be an important step towards tackling the undervaluation of work predominantly performed by women. A provision requiring that Member States make hypothetical comparison possible where there is no actual comparator would make it easier for workers in highly gender-segregated labour markets – often those who might be most affected by pay differences related to gender – to bring equal pay claims.

The proposal should make provision for follow-up mechanisms, which ensure that reports and audits are not a mere box-ticking exercise but prompt employers to eliminate gender-bias in pay scales and reflect on the causes of pay disparities between men and women (see, for example, Fawcett Society 2020: 30). It would be useful to clarify also how information, reporting and auditing obligations apply to employers in the gig economy, especially in cases where pay rates and remuneration scales are determined by algorithms (Kullmann 2018: 19–20).

8 The Impact Assessment accompanying the 2014 Recommendation concluded that the benefits of binding pay transparency measures clearly outweigh the costs (European Commission 2014a: 48).

9 Recommendation 10 provides that '[t]he value of work should be assessed and compared based on objective criteria, such as educational, professional and training requirements, skills, effort and responsibility, work undertaken and the nature of tasks involved'.

10 Such as interpersonal skills, mental and psycho-social effort, responsibility for people, psychological and emotional environment (examples from Oelz et al. 2013: 40–41 and European Commission 2013b; see ETUC 2020b).

It has been shown that collective bargaining can have a beneficial role in reducing pay inequalities (Pillinger 2014).¹¹ It would therefore be desirable to see a provision on collective bargaining that requires Member States to ensure not only that the issue of equal pay is 'discussed', as the 2014 Recommendation provides, but also that trade unions can bargain collectively on equal pay matters. The proposal should seek also to increase the involvement of equality bodies – which must be established by Member States, under Article 20 of the Gender Equality Directive – labour inspectorates and trade unions in the monitoring and enforcement of the legislation.

Many of the above suggestions are reflected in the model proposal for a Directive on pay transparency published by the ETUC (ETUC 2020b), to which the author of this brief contributed. It contains further, more detailed examples of the kinds of measures that could contribute to strengthening the principle of equal pay.

Conclusion

The Covid-19 pandemic has shown that much more needs to be done to guarantee fair remuneration and working conditions for essential workers, a majority of whom are women in certain sectors and occupations. It has had disproportionate adverse effects on women, reflecting existing inequalities between men and women in the labour market and in the domestic sphere. This policy brief has argued that, especially against this background, it is essential that the European Commission persist with its plans to introduce binding pay transparency measures to strengthen the principle of equal pay between women and men.

Of course, this initiative is one small part of the action that the EU and Member States should take to ensure that progress on gender equality is not reversed as a result of the Covid-19 pandemic. Further action is necessary, in particular, to address the fact that women still bear a greater proportion of care responsibilities at home. As pay transparency measures are already on the agenda, however, the Commission should take the opportunity to produce a robust proposal that takes stock of the reality revealed by the pandemic. Alongside measures to make information on pay more readily available and to improve enforcement, such a proposal must contain measures that help to address the insufficient recognition and remuneration of work performed predominantly by women.

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