

EVELYN REGNER



Information for opinion leaders

Pay transparency - we are closing the pay gap in the European Union

Equal pay

Since 1957, it has been enshrined in the Treaties of the European Union that there should be equal pay for equal work or work of equal value between women and men. The original idea came mainly from the significant wage differences between France and Germany, which was to be equalized for the creation of a common internal market. This principle has been consolidated as well as interpreted several times by European Court of Justice (ECJ) decisions and non-binding acts of the Union.

In 2021, the gender pay gap nevertheless remained at **12.7% on average in the EU, with Austria** still one of the worst performers at **18.8%** - namely in second-to-last place. Currently, **Luxembourg** is in 1st place with **-0.2%**. In Luxembourg, a pay transparency law has been in place for several years, which provides for high penalties and therefore obliges companies to act in order to close the gap. According to EU Commission figures from 2018, at **least 66% of the difference cannot be explained by objective criteria**, such as seniority, etc. They are therefore pure discrimination against women. The gap runs through all industries, whether "typical" male or female occupations, no matter what type of employment - from supermarket cashiers to office workers and managers. They all earn less in comparison to their male colleagues with the same job.¹

And even if the tasks are not identical but very similar, like cleaning the streets compared to cleaning offices, more compensation is given for the jobs men do (street sweeping/garbage collection) than for those women do (cleaning inside). Allowances for handling harmful chemicals while cleaning, early or late working hours are usually not leading to higher pay for women. Women are paid less because they are women - and if they are employed in the "typically" female professions, even less, because this type of work is

¹ https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Gender_pay_gap_statistics

assigned a lower value per se. Yet, in terms of society as a whole, cleaning in hospitals is the most important job. Tax consultants the most harmful.

This inequality then continues into retirement and women in particular, who look back on many years of maternity leave or part-time work due to raising children, are even worse off. The **pension gap** in the EU is therefore **30%**. Here, too, **Austria** is last with just about **36%**. This gap is closing even more slowly than the gender pay gap, and women are consequently particularly at risk of poverty in old age.²

The reasons for this lie not only in the lifelong pay gap, but also above all in the so-called "gender care gap," i.e. the fact that women still do most of the unpaid care work every single day. As Käthe Leichter put it, "For women, coming home is just a shift change." That is still true 100 years later. Women usually work two or more hours more a day than their male partners do. Childcare is the biggest aspect here, but household chores per se - cooking, washing, cleaning - are still a woman's job. This extra burden makes it harder for women at work, and at the same time, it takes the pressure off their partners, who then have a starting advantage that women can no longer catch up with. Because if no one does the shopping, the washing, nor the cooking, no one can go to work at all, because we do not have clean clothes, we do not have a full stomach: so the basic prerequisites for being able to do paid work at all is missing if this reproductive work does not happen at home.

The supposed solution: part-time work. However, this is currently a vicious circle: women often work part-time because of this extra work, which is why they earn less and end up with a smaller pension. In Austria, 48% of all employed women (compared to 8% of men³) worked part-time in 2021. That is 92% of all part-time workers.

So what is the EU doing?

- ▶ It takes a long time to fill these particularly big gaps, so we need to build bridges over them to get to the same level more quickly. These bridges are symbolic of the many measures we are calling for and working on at the European level - binding, legislative measures!
- ▶ The 2022 Commission's minimum wage proposal already aims to close the gender pay gap. After all, 60% of minimum wage earners are women. If the minimum wage is higher, the gap can be reduced (by up to 5% depending on the Member

² <https://www.equalpayday.be/europa/>

³ https://www.wifo.ac.at/jart/prj3/wifo/resources/person_dokument/person_dokument.jart?publikationsid=70674&mime_type=application/pdf

State). At the same time, we know that industries with collective agreements can often create a better situation for women. Therefore, the minimum wage directive is actually at the same time one of strengthening collective agreements, as all Member States are supposed to achieve 80% coverage - with action plans if necessary. For this to have a positive impact on women's wages, collective agreements must actively name and address the pay gap. Many are already doing this, but not all yet.

- ▶ The biggest step, however, is the directive on pay transparency signed on May 10, 2023. Evelyn Regner (S&D, Austria) and Marc Angel (S&D, Luxembourg) were the responsible negotiators for the Socialist Group and were able to introduce significant improvements.

Content of the Directive

Main points:

- ▶ The directive focuses on improving transparency when it comes to pay. The prohibition of discrimination because of gender is the basis here. This also includes harassment and sexual harassment, instructions to discriminate, less favourable treatment of pregnancy and maternity leave.
- ▶ All workers - regardless of the size of the company - should therefore have the **right to information on pay**, about which employers must inform them annually.
- ▶ Companies with more than 100 workers must also **report** regularly and, depending on the size of their pay gap (5% difference or more), must also take **follow-up action** to close the gap on a sustained basis.
- ▶ In principle, rules that are more favourable for those affected will remain in place and can be introduced at a later stage. The directive therefore creates a minimum harmonization and must be implemented by **mid-2026**. In 2033, the European Commission will carry out an evaluation of the directive, which will primarily scrutinize the scope and obligations. If the measures of the directive have not been sufficient, the European Commission is to propose a review with subsequent strengthening.
- ▶ The **understanding of the directive** is clear: **women are given more tools to better defend themselves** against pay discrimination **in court**. However, at the same time, it also addresses the **systematic aspect** of the gender pay gap and, above all, creates a binding obligation. For if companies or Member States do not comply, there will be hefty **finances**. This directive is therefore also an **important piece of the puzzle, so that we can finally achieve equality**.

Details on the content of the directive & need for implementation in Austria

► Definition of the terms "equal work" and "work of equal value"

- For the first time, the term "work of equal value" is legally defined, based on the existing, very comprehensive and good guidelines of the Commission. **Forms of work**, especially **hours of work**, will not affect the determination of equivalence, i.e., **part-time workers shall not be disadvantaged**.
- This definition is closely related to that of "equal work". The goal in both cases is to create objective criteria. **Educational, training and professional requirements, qualifications, skills, effort, responsibility, working conditions, work performed and the nature of the tasks performed** naturally play an important role. These criteria for pay structures must be agreed **jointly with workers' representatives** and can be weighted. However, they must be **gender-neutral, objective and transparent**.
- This **clarification** of the term "work of equal value", which has been called for for some time, would also have to be formulated in Austria.

► Accessing Information

- **All workers in all companies**, regardless of size or number of workers, have the **right to receive annual information** on the **level of pay** of workers performing the same or equivalent work, **the gender pay gap** in the company, and the **median** gender pay gap.
- The **workers' representatives** and **equality bodies** should also be able to receive this information on behalf of the workers and to make inquiries.
- This information will be provided in writing to workers and their representatives as well as to equality bodies upon request. If necessary, clarifications and additional information may be requested. In doing so, the company must provide a reasoned response.
- What is understood as "pay"? Everything that workers receive, i.e. the **classic wage, including all allowances, special and other payments** as well as the free provision of e.g. work clothes, company car, etc. To ensure that part-time workers are not disadvantaged, the **gross hourly wage** must also be reported and not just the **gross annual wage**.
- In Austria, only the Ombud for Equal Treatment (equality body) currently has special rights to information. The adaptation to the directive would therefore create a competent, independent right to information for **workers and their representatives**.

► **Reporting and action obligation** with company thresholds:

- Companies with more than 100 workers must **report regularly** and take **follow-up action through a joint pay assessment** depending on the size of their gender pay gap. As S&D, we wanted all companies to be included, but have now at least been able to lower the threshold significantly. This originally applied to companies with 250 or more workers and now already applies to **companies with 100 or more workers**. In addition, voluntary reporting for companies below the proposed threshold and a review clause to extend the scope of these two articles are included. The rest of the directive applies to all employers.
- This data must be reported to the **national monitoring body**, which must then publish it - at least on an easily accessible website. Companies themselves can also publish the reports if they are not already obliged to do so by other legal acts (e.g. in management reports).
- These reports must be prepared at regular intervals depending on the size of the company:
 - Employers with 250+ workers annually for the previous year from 2027
 - Employers with 150-249 workers every 3 years for the previous year from 2027
 - Employers with 100-149 workers every 3 years for the previous year from 2031
 - All with 99 workers or fewer only on a voluntary basis, unless the Member State lowers this threshold in the implementation.
- In Austria there is currently an obligation for employers with more than 150 workers to create an income report every two years. Here the scope of application is extended by the directive.
- In order to encourage companies below the thresholds to share their data and exchange best practices, it is **proposed** to keep a **certification or labelling system** as in Luxembourg or to create as in Portugal. In addition, Member States can choose to lower the threshold.
- When reports show a **pay gap of 5%** or more, companies must act. The 5% threshold is the standard threshold used in existing models, e.g. in Switzerland, to detect possible pay discrimination. Above this threshold, companies must take **mandatory measures** to ensure that the pay gap falls below 5%. Unfortunately, despite intensive efforts during the negotiations, there was too much resistance to lowering this threshold.
- If workers or their representatives see no objectively comprehensible reason for the pay difference and the company can neither justify it nor close it within 6 months, workers or their representatives can demand **internal measures**.

- The obligation for companies with more than 100 workers to take action in the future if the report shows a gender pay gap of more than 5% is new in Austria. Here it is particularly important that the implementation of the directive is taken seriously nationally, because this obligation to take action is the key point in systematically closing the unjustified gender pay gap.

▶ **Small and medium-sized companies**

- Some special arrangements for SMEs are granted for certain obligations, e.g. by longer deadlines for the achievement of all the objectives of the directive. At the same time, however, at least an incentive and support system for SMEs to implement the directive will be created. In a future revision of the directive, a close look must be taken to see whether the pay gap has also improved in SMEs.

▶ **Monitoring bodies**

- Member States must also monitor implementation and set up their own bodies to do so. A central demand of the Social Democrats was that the elimination of the pay gap should not (only) rest on the shoulders of (individual) women. Since this is a **systemic problem**, it needs to be addressed as such.
- The aim is to raise awareness, eliminate the causes of the pay gap, develop instruments and, above all, collect, process and publish data from companies with reporting obligations. The idea is that the body collects, aggregates and publishes all data, including cross-sectoral data. That would also be a first step to enable a **cross-sectoral comparison**. It will also give workers a better understanding of the actual average wages in their industries, regions and employers. They also publish the number and type of complaints.
- Member States will also be obliged to submit **data on the gender pay gap** in unadjusted form broken down **by gender, sector, working hours, economic control of the company and age** to Eurostat annually from **31 January 2028** and starting in 2026. Therefore, we finally will have comparable data from all countries. And all data collected by the monitoring body must be sent to the European Commission every 2 years from 2028 for EU-wide reporting and evaluation.
- Such a body would have to be set up in Austria. In the future, the data to be collected will give us much better information about the situation of women in the labour market and which further legislative measures still need to be taken.

▶ **The hypothetical comparator**

- is an important tool for comparing equal work and work of equal value if there is no real comparator for claimants. While not named as such in the text, the

idea is retained in the Directive with some minor modifications and moved to the remedies chapter of the Directive.

- This hypothetical comparator is intended to enable workers to show that they are not receiving the pay to which they are entitled, but have been discriminated against because of their sex. Especially in jobs that have hardly any male or female workers, this can simplify the procedures for example with statistical data (like those of the monitoring body on the different sectors).
- From now on, former colleagues may also be used as comparators to prove the discrimination.

▶ Penalties

- As Social Democrats, we have managed not only to maintain the effective, proportionate and dissuasive penalties in the text, but also to secure mandatory fines. These penalties will be crucial to ensure that companies really adapt their pay structures to objective, gender-neutral criteria.
- In court proceedings, injunctions are provided to establish the violation and against the defendant to take action. Fines are possible if they are not complied with. Claimants can get compensation or reparation as well as compensation for lost opportunities and non-material damage.
- The Austrian Federal Equal Treatment Act does not currently provide for any administrative penalties in the event of non-preparation or refusal to publish the income report, but only a right to sue, which is why an adjustment is necessary here.

▶ Shift of the burden of proof

- Despite fierce resistance, we as social democrats were able to leave the reversal of the burden of proof in the text with some slight changes that the Council insisted on. This will be an important point for workers in court cases to prove pay discrimination and receive their fair wages.
- Whenever *prima facie* it is made credible that the facts suggest direct or indirect discrimination, the complainant's doubts are upheld. This is particularly the case when the existing pay-setting system is not transparent or when information is not provided to which workers are entitled under this directive.
- If someone files a lawsuit but ends up losing it, the claimant can be exempted from reimbursement of costs for the employer being sued if there were legitimate reasons to assert the claim, in particular if the employer was not complying with their transparency obligations. In other words: if the known circumstances seemed to justify a lawsuit, but it was ultimately unsuccessful, the claimant should not automatically have to bear the costs of the superior side. This should reduce the hurdle of costs.

- The Austrian Equal Treatment Act would have to be adapted a bit here, but it is already going in a good direction.

▶ **Limitation periods**

- The extension to 5 years proposed by us Social Democrats could not be maintained, so we have returned to the Commission's position of at least **3 years**. There is some **leeway as to when the time limit starts to run**, as this is only the case when workers have knowledge of the fact - or could have knowledge of the fact - that they are being discriminated against. In any case, Member States can stipulate that the period does not start to run before the employment contract ends or as long as the discrimination continues. This point would be particularly important because many of those affected can only actually claim their rights after the end of the employment relationship.
- The limitation period is suspended/interrupted in any case if the claimant takes action, e.g. lodges a complaint with the employer or files a lawsuit (himself or represented).
- In Austria, therefore, the question of when the 3-year period begins must be given particular attention during implementation. Because in Austria, too, workers often only assert claims after the end of their employment relationship for fear of retaliation.

▶ **Class Actions et Representation**

- In many Member States, workers' representatives and equality bodies can represent a group of workers or support them in court proceedings. The judicial support (participation) by organizations with a legitimate interest (e.g. Chamber of Labour) must now be ensured. They should be able to act on behalf of or in support of those affected.
- The possibility of class action lawsuits has been completely removed from the draft due to opposition from Member States. Nevertheless, it is stipulated that the protection of colleagues from retaliation must also be interpreted broadly.

▶ **End of continuing pay discrimination**

- In the application process, companies may no longer request **information** from potential workers **about their previous pay**. At the same time, they must inform the applicants transparently about **pay and career opportunities**.
- The former can already take place in the context of the advertisement, as is already the case in Austria (indication of the range that applicants can expect).

▶ **Prohibition of confidentiality clauses**

- All workers can and may **pass on information about their pay internally** (e.g. with colleagues) and **externally** (e.g. with workers' representatives and equality bodies). We could even add that Member States must ensure that contract clauses that prohibit workers from disclosing wage are prohibited. This

means that we **effectively prohibit pay secrecy**. This point is not only an important addition compared to the Commission's original proposal, but was also a main point for us Social Democrats in the negotiations.

- This ban on confidentiality clauses does not currently exist in Austria. Breaking the silence is usually the first step to discovering inequalities in the first place. In the end, not talking about your own wage only helps employers, who can underpay some of their workers without them noticing.
- ▶ The role of the **social partners**
 - The social partners are involved in both the internal rule design and the implementation of the Directive. The instruments and methods for job evaluation are to be developed with the participation of the social partners. **Unions' rights to collective bargaining** are explicitly included in the main provisions.
- ▶ **Definition of "gender"**
 - For the first time in EU legislation, non-binary people are included. While we retain the term "sex" instead of "gender" due to opposition from Member States, with the exception of the use of the term "gender pay gap", the recitals clarify, thanks to socialist amendments that this Directive applies to all workers in all their diversity.
 - It is explained that since 1957 there has been a change in the concepts of "man and woman" and that these are understood linearly instead of binary. This is also based on ECJ decisions that defined trans-people as being covered by this protection against discrimination after an operation. It is also stated that Member States that have a third gender could also include this in the implementation of the directive.
 - We address the pay gap between women and men, but also provide an opportunity to address pay discrimination against people who do not identify as male or female and trans-people.
- ▶ **Intersectionality**
 - In legal proceedings, workers can, under this policy, combine pay discrimination based on gender with other discrimination grounds listed in the treaties (e.g. age, ethnic background, disability, etc.), i.e. also claims of intersectional discrimination. This is also anchored in a Directive for the first time, thanks to the social-democratic wording.
 - Courts must take into account this combination of multiple forms of discrimination and should impose higher fines in such cases.
- ▶ **Equality Bodies**
 - The role of the equality bodies will be strengthened (more on this with the legislative proposal of 07.12.2022). They should not only be able to **support** those affected **in court**, but also receive **data** and can also request it. In addition,

they should be provided with sufficient resources to be able to carry out these tasks well.

► **Public contracts**

- The criterion should be added here that companies must comply with the obligation of pay transparency in order to be awarded a public contract or concession.

What's left to do

Binding pay transparency, as will now be standard in the EU, is an important measure to close the gender pay gap. However, it is not the only necessary one. For example, it does not help enough with differences that arise due to career progression, interruptions due to childcare times and differences in the industry. Above all, horizontal segregation must be addressed separately. In a few years, we will have comparable figures for the first time thanks to this directive. Based on that, we can then evaluate what needs to be done next.

Of course, a lot is also about the work-life balance, i.e. about parental care time (maternity leave), care obligations, household chores and, above all, the part-time quota. Part-time work is a big issue in gender equality, especially in Germany and Austria, because the backpack of unpaid work at home weighs heavily on women, and even more so since the Covid crisis. This has a direct impact not only on paid employment (many young women are currently leaving the labour market when their first child is born), but also on the pay. Despite the EU's work-life balance directive from 2019, (here some Member States are late in implementing it - including Austria) there is still a lot to be done.

Fair pay in the EU is a goal that we will only achieve if we work hard: we still have a long way to go. The Covid crisis has shown us once again how important women are: they carry society! The nurses, the supermarket cashiers, the cleaners, the mothers, the teachers and the doctors. Women exercise 75% of the system-maintaining professions and at the same time, they run the household and take care of the children. This can be our chance to finally assert ourselves with a fair social model!