



# Real steps towards a level playing field

**Roland Erne** of UCD College of Business unpacks the evolution of equal pay directives in Europe and outlines how the new EU law strengthens pay equality

**T**he right to equal pay for work of equal value has been in place for years. Despite this, women in Europe still earn much less than men; in 2018 it was 14.4% across the EU and 18.3% in Switzerland.

According to a 2021 report by Eurostat, only a small part of this wage discrimination can be explained by structural factors such as age, education, occupation, work experience, type of employment contract, sector, company size, company owner or

company location. Even after taking these factors into account, women in the EU still earned 11.2% and Swiss women 12.5% less than men. Why do existing laws fail so miserably when it comes to wage protection for women? The answer lies in the existing laws themselves.

Women are forced to take their employers to court if they want to enforce their rights. Such lawsuits are not easy to win, as companies can keep their wages

secret. In addition, plaintiffs must also reckon with revenge actions by their employers.

Between 1996 and 2007, there were only 31 equal pay lawsuits in Germany, 16 in France, and only one in Poland. Hence, adopting labour laws that make equal pay principals legally binding are not sufficient for actually achieving equal pay. More important are the legal and extra-legal enforcement mechanisms, which enable workers to get equal pay. Especially in work and employment, having a right and getting it implemented are two very different pairs of shoes.

My 2015 paper 'Equal Pay by Gender and by Nationality', co-authored by Natalie Imboden, offers an excellent illustration for the limits of legal and the strength of extra-legal enforcement mechanism in Switzerland. In the 1990s, the very same government, parliament, and people enshrined the equal pay principle in two parallel laws. In 1996, Swiss lawmakers enshrined the principle of equal pay for work of equal value for men and women in the Gender Equality Act. In 1999, they also attached a package of accompanying measures to the Agreement on the Free Movement of Persons with the European Union, which ended an era of unequal legal treatment of workers of different national origins on the Swiss labour market.

Whereas both sets of new labour regulations enshrined the equal pay principle for women and migrant workers respectively in law, they contained very different enforcement mechanisms. As elsewhere in Europe, the enforcement of equal pay for men and women principle of the Swiss Gender Equality Act relies on litigation. This means that remedies must be sought by individual plaintiffs through the court system, which is difficult as Swiss law provides only scant protections against unjust dismissals.

In contrast, the enforcement of the equal pay for work at the same place principle for mobile workers does not rely on court proceedings. Instead, the measures that Swiss lawmakers adopted to accompany the Switzerland-EU agreement of the Free Movement of Persons gave commissions of trade unions, employer associations, and regional authorities the right to conduct mandatory audits of a company's payroll account. These bi- and tri-partite bodies also have the right to issue conventional penalties outside the court system or to exclude non-compliant companies from public tenders if they fail to compensate its mobile workers according to the local standards. This allows mobile workers that are victims of pay discrimination to alert a union, or the bi- and tri-partite commission, directly about any pay discriminations, without having to fear any reprisals from their employers.

Unions can indeed request an audit of the suspected company's payroll accounts by the competent commission, without revealing the name of its informants. Likewise, companies can also

suggest an examination of a competitor's payroll account to ensure a level playing field in a given economic sector.

### **The need for new enforcement measures**

These two parallel equal pay enforcement regimes produced very different results. Whereas the Swiss social partners, and regional authorities check the payroll accounts of several 10,000 companies every year to enforce the equal pay by nationality principle, the Swiss courts examine only around 100 gender-related pay discrimination cases per year. As a result, tens of thousands of mobile workers were able to enforce their right for equal pay as local workers, whereas the liberal, court-based enforcement regime right for equal pay for work of equal value proved to be very ineffective to advance equal pay.

Accordingly, a Swiss governmental expert group criticised the latter regime as ineffective and suggested new enforcement measures, including mandatory audits of companies' payroll accounts, as in the former equal pay by nationality case. This led to a revised Swiss Gender Equality Act, which forces companies since 2020 to analyse their gender pay gap by an independent body and to communicate the result to their employees.

Under pressure from trade unions and feminist movements, the EU went even further than Switzerland in this respect. In May 2023, the European Parliament and Council adopted a new EU directive, the Gender Pay Transparency Directive "to strengthen the application of the principle of equal pay for men and women for equal work or work of equal value."

The new EU law forces EU member states to adjust their national pay equality laws in turn. It strengthens pay transparency and the enforcement of equal pay. In the future, every employee will have the right to know the average wage of all employees doing equivalent work in the same company. Every company with more than 100 employees will be required to report regularly on the gender pay gap. In addition, EU member states will also be allowed to compile and publish company-specific wage information themselves in the future, based on data provided by employers to the tax and social security authorities.

If the wage gap is more than 5% and cannot be objectively justified, the company must agree on remedial measures with its trade union or another employee representative body. In addition, the awarding of public contracts can, in future, also be made dependent on the enforcement of equal pay. Other measures such as easing the burden of proof or better protection against acts of revenge for complainants also strengthen wage protection for women and equal pay. ■



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