

The Pay Transparency Directive

The role of hypothetical comparators in determining equal pay for work of equal value

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Key points

- Collective bargaining has a critical role to play in closing and tackling the structural causes of the gender pay gap.
- The Pay Transparency Directive contains new possibilities for trade unions and employers to use hypothetical comparisons in addressing the undervaluing of jobs predominantly carried out by women where there are no actual comparator, and to include this in collective bargaining.
- Trade unions should ensure that hypothetical comparators are used to show that if a man was employed in a job of equal value in the same workplace, the jobs carried out by women would still be lower paid, unblocking a significant obstacle to women's pay.
- The longer-term challenge is for trade unions to facilitate cross-sectoral comparisons in their collective bargaining claims for equal pay for work of equal value.

Introduction

On 11 April 2023 the European Council adopted the Pay Transparency Directive. This was preceded by a long campaign by the ETUC and trade unions across Europe calling for greater pay transparency to address the underlying and structural causes of the gender pay gap and a strong role for trade unions and collective bargaining in ending pay inequalities between women and men.

A lack of pay transparency impacts the gender pay gap and makes it impossible to identify, for example, whether there is discrimination or undervaluing of women's work (Arabadjieva 2021). It is essential that unions have access to pay data in order to bargain effectively to close the gender pay gap (ILO 2022; Pillinger and Wintour 2019; Pillinger 2014). In the EU, it is estimated that 'a comprehensive approach to pay transparency and integrating equal pay in collective bargaining could reduce the gender pay gap by between 1.65 per cent and 4.33 per cent' (ILO 2022: 6).

This Policy Brief discusses the hypothetical comparator provision in the Pay Transparency Directive, which is complex and rarely used in Europe. It looks at how this could be transformative for trade union action in tackling the undervaluing of work carried out in predominantly female-dominated jobs, drawing on international examples of how this principle can be applied in practice. It finishes with a call to action to trade unions to use these provisions in collective bargaining and in claims for equal pay for work of equal value.

The undervaluing of work carried out in predominantly female-dominated jobs and sectors

Deeply rooted historical and structural gender pay inequalities, along with women's predominance in low paid and precarious work, account for a significant part of the gender pay gap. Women are overrepresented in certain occupations, such as care work, domestic work, administrative work, shop work and cleaning. Even when variables such as age, marital status, education, geographical location, industry and occupation are taken into account, the adjusted pay gap is still high. In the health and social care sector globally women earn on average 24 per cent less than men.

Data shows that the higher the proportion of women in an enterprise the lower their wages, compared with similar sectors with similar numbers of employees and coverage of collective pay agreements. When women exceed 65 per cent of the waged workforce their pay declines relative to more mixed workforces in similar enterprises, and it declines even further when women represent over 90 per cent of the workforce in an enterprise (ILO 2019). And it does not stop there. The more women enter a sector or profession, the more the men leave, leading to further gender segregation and devaluing of the work carried out in occupations as they become more feminised (Block 2023).

Addressing occupational segregation in the labour market and the undervaluing of work predominantly carried out by women is critical to closing

the gender pay gap, which in the EU is 12.7 per cent (Eurostat 2021). The pension pay gap is far wider, at 30 per cent, reflecting women's lower and interrupted earnings over their working lives. With limited progress in narrowing the pay gap in recent years, it is critical to tackle these structural causes and for unions to ensure they are part of their union bargaining claims and negotiating strategies.

Gender-neutral job evaluation and classification are useful tools for addressing the 'unexplained' elements of unequal pay, including the undervaluing of women's work and discriminatory assumptions and stereotypes leading to the undervaluing of predominantly female jobs with skills that women acquire through life experience.

The Pay Transparency Directive and provisions on the hypothetical comparator

The Pay Transparency Directive marks a major step in providing for pay transparency. Its provisions include obligations on employers to enable workers and their representatives to obtain transparent and clear information on pay by gender and for employers to report on the gender pay gap (Arabadjieva 2021). It provides a possibility to establish a hypothetical comparator in situations in which workers have no actual comparator, helping to unblock one of the problems in determining equal pay in Europe, notably that workers in female-dominated jobs and sectors do not have comparators.

The ETUC strongly supported a hypothetical comparator among other measures to guarantee that trade unions would be involved in job evaluation and to ensure the right of trade unions to bargain to close the pay gap (ETUC 2021). Research by the European Federation of Public Service Unions (EPSU) and the European Trade Union Institute (ETUI) (Pillinger 2021) similarly made a strong case for the Directive to include cross-sectoral, single-source and hypothetical comparisons as an essential part of pay transparency in the public services.

The Pay Transparency Directive states that comparisons of pay levels will have to be based on gender-neutral criteria and include gender-neutral job evaluation and classification systems. Member States will have to develop tools or methodologies to assess and compare the value of work using objective gender-neutral criteria covering educational, professional and training requirements, skills, effort and responsibility, work undertaken and the nature of the tasks involved. With the application of these criteria, workers should be able to demonstrate that they are treated less favourably than the comparator performing the same work or work of equal value. But what if there is no comparator? What happens when work is predominantly carried out in female dominated occupations where there are no comparators? This is where the hypothetical comparison principle becomes relevant.

The Commission's original proposal, supported by the Parliament, included a specific provision on a hypothetical comparator. This was not supported in the European Council and resulted in a compromise text whereby the hypothetical comparator is referred to only in Recital 28 of the Preamble, notably:

‘The identification of a valid comparator is an important parameter in determining whether work may be considered of equal value. It enables workers to show that they were treated less favourably than a comparator of a different sex performing equal work or work of equal value. Building on the developments brought by the definition of direct and indirect discrimination in Directive 2006/54/EC, in situations where no real-life comparator exists, the use of a hypothetical comparator should be allowed, to enable workers to show that they have not been treated in the same way as a hypothetical comparator of another sex would have been treated.’

A revised text in Article 19(3) of the Directive states that: ‘Where no real comparator can be established, any other evidence may be used to prove alleged pay discrimination, including statistics or a comparison of how a worker would be treated in a comparable situation.’ This means that Article 19 effectively includes the hypothetical comparator provision, even if not explicitly in the text of the Directive.

In practice, by permitting comparisons to be made with a hypothetical comparator, the Pay Transparency Directive enables workers to establish unequal pay based on how a worker ‘would’ have been treated in a comparable situation, if there is no actual comparator in the establishment. This potentially unblocks a significant barrier to the achievement of equal pay for work of equal value where workers in undervalued, low paid, female-dominated jobs are unable to claim equal pay because they have no comparator. This provision should enable unions to be proactive in making the case for gender-based pay inequalities to be addressed more effectively in gender-segregated sectors and professions, especially in female-dominated sectors such as care.

Precedents exist for hypothetical comparators in the EU

To date, hypothetical comparator arguments in equal pay cases have rarely been used in the EU, even though precedents exist. Hypothetical comparators are permitted in establishing direct discrimination under the EU anti-discrimination Directives (Directives 2000/43 and Directive 2000/78). In the case of pregnancy discrimination, for example, no comparator is required. Hypothetical comparators are permitted under the Agency Work Directive where working conditions of temporary agency workers shall be ‘at least those that would apply if they had been recruited directly by that undertaking to occupy the same job’.

In theory, the Recast Directive on gender equality (Directive 2006/54/EU), which requires Member States to provide protection against direct discrimination in relation to pay, can include a hypothetical comparator provision. As defined in Article 2(1)(a) of the Recast Directive, direct discrimination occurs ‘where one person is treated less favourably on grounds of sex than another is, has been or *would be* treated in a comparable situation’ (author’s emphasis). This definition suggests that a person who is treated less favourably should be compared with another person in a comparable (real or hypothetical) situation.

The European Court of Justice (ECJ) also established in the Lawrence case (Case C-320/00: ECLI:EU:C:2002:498) that in certain circumstances the principle of equal pay is not limited to situations in which men and women work for the same employer. In 2021, the ECJ confirmed the single source principle arising from a pre-Brexit UK equal pay case taken by 6,000 women workers in Tesco supermarkets (*K and others v Tesco Stores Ltd* C-624/19). In addition, some national courts have determined that a hypothetical comparator is acceptable (European Commission 2018). In these contexts the hypothetical comparator argument is justified because gender discrimination and segregation in the workplace has led to depressed wages in female-dominated jobs. Importantly, this provision has been included in the Pay Transparency Directive, notably that: 'A single source shall exist where it stipulates the elements of pay relevant for the comparison of workers' (Article 19(1)). While the application of equal pay for work of equal value is widened by allowing the possibility for hypothetical comparisons between male and female jobs in different establishments within a single source that establishes the pay and conditions of employment, it does not go as far as providing for cross-sectoral comparisons.

Union bargaining using cross-sectoral comparisons: examples from France and Belgium

Despite not providing for cross-sectoral comparisons, the hypothetical comparator provision remains a vitally important tool in addressing the limitations of job evaluation schemes when they are restricted to one organisation or sector and to support bargaining for equal pay for work of equal value. In Belgium, the restriction of the interpretation of the concept of work of equal value to the same establishment led the Institute for Equality between Women and Men (2021) to recommend the development of a tool to establish work of equal value across sectors.

Unions in France addressed this problem during the negotiation of the new job evaluation scheme in the hospital sector covering professional categories such as specialised nurses, physiotherapists and nursing assistants. A study by the CFDT (2019) compared pay levels across eight different sectors, including health and social care and seven male-dominated sectors in the private sector, such as building, glass and metallurgy. The study found that even though workers had equivalent years of training, health and social care workers had the lowest starting salaries, well below the other male-dominated sectors. The cross-sectoral study helped to reveal one of the problems in measuring the gender pay gap, and was instrumental in helping to strengthen negotiations for job reclassifications and higher pay in public and private health and social care sectors. These types of union initiatives point to ways that trade unions can go a step further by instigating wider cross-sectoral comparisons in collective bargaining and in claims for equal pay for work of equal value under the Pay Transparency Directive.

Pay equity legislation in Canada

In Canada the Pay Equity Acts in Ontario (public sector) and Quebec (public and private sectors) require employers to determine job classes, including the gender and pay of job classes for the purposes of equal value comparisons. Comparisons can then be carried out of the value of the job classes based on factors of skill, effort, responsibility and working conditions. This has been important for female-dominated sectors where there is no comparator in the same establishment as it provides for comparison of job classes of a different employer. Using this form of hypothetical comparator enables claimants to argue that a woman worker has been less favourably treated than a man would have been. New regulations applying to federal workplaces (public and private sectors) introduced in 2021, implementing the Canadian 2018 Federal equal pay legislation, spell out two types of hypothetical comparison that can be made with other organisations or sectors: the proxy method and fictional typical job classes. The 'proxy' method is based on the selection of three or more predominantly male job classes to compare jobs with reference to factors such as skill, effort, responsibility and working conditions. The 'typical job cases' method uses three fictional, predominantly male job classes (maintenance worker, technician and manager), and a job class is determined when there are 60 per cent female or male employees in a particular class. The regulation also set out criteria to ensure that the proxy workplace is similar to their own.

The presumption of the undervaluing of women's work in New Zealand

One of the innovations in New Zealand's system is that the male comparator is regarded as being both outdated and problematic, leading to an amendment in 2020 to the 1972 Pay Equity Act and a bargaining-centred approach to resolving equal pay claims, whereby unions and employers jointly negotiate a settlement. It was heavily influenced by the Terranova equal pay settlement (*Terranova Homes & Care Ltd v Service and Food Workers Union Nga Ringa Tota Inc* 2014), resulting in significant pay increases for 55,000 front line care workers in 2017. The arguments for pay increases were crafted around the hypothetical male worker and comparable work that was not limited to the same organisation or industry. This was subsequently applied to the job evaluation tools that were already in place. The Act provides for a clear pay equity process to test whether female-dominated occupations are free from sex-based undervaluation, putting much greater emphasis on measures to address the undervaluing of work predominantly carried out by women through a bargaining approach. A pay equity assessment process guide supports the bargaining process on gender-neutral work assessments of skills, responsibilities, conditions of work, effort, experience and other relevant work features required to perform the work.

Conclusion

A future challenge for trade unions is to ensure that comparisons for equal pay for work of equal value take place across sectors. As this Policy Brief has argued, the problem of unequal pay for work of equal value is structural and can be addressed only if feminised jobs can be compared with jobs in other higher paid sectors. For this reason it is critical that the provision of a hypothetical comparator in practice ensures valid cross-sectoral comparisons for jobs predominantly carried out by women, for example, in care, retail and cleaning work. As the ETUC (2021) has argued, while the Directive and EU case law recognise this in principle, it is essential that it not be left up to employers to decide which jobs can be selected for comparison.

A further important issue is to learn from the approach taken in New Zealand and Canada, working from an assumption that women's jobs are undervalued, by allowing for hypothetical or proxy comparators. There is a unique opportunity under the Pay Transparency Directive for unions to play a proactive role in implementing the hypothetical comparator principle, including in arguing for a threshold test to be carried out that asks whether there would be unequal pay if the comparator was hypothetically employed on the same or similar terms in the establishment of the complainant. Recognising that unequal pay between women and men is caused by structural factors and having the technical and legal tools, including the hypothetical comparator provision, will be one important step further towards addressing the undervaluing of women's work. The next step will be for unions to grasp the opportunity to advocate for cross-sectoral comparisons either through the national transposition of the Directive or when using the Directive in collective bargaining to interpret the Directive's provision on the hypothetical comparator in a broader sense by including cross-sectoral comparisons when there is no comparator.

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