

Equal pay between women and men

The most important legislative initiatives at European and national level

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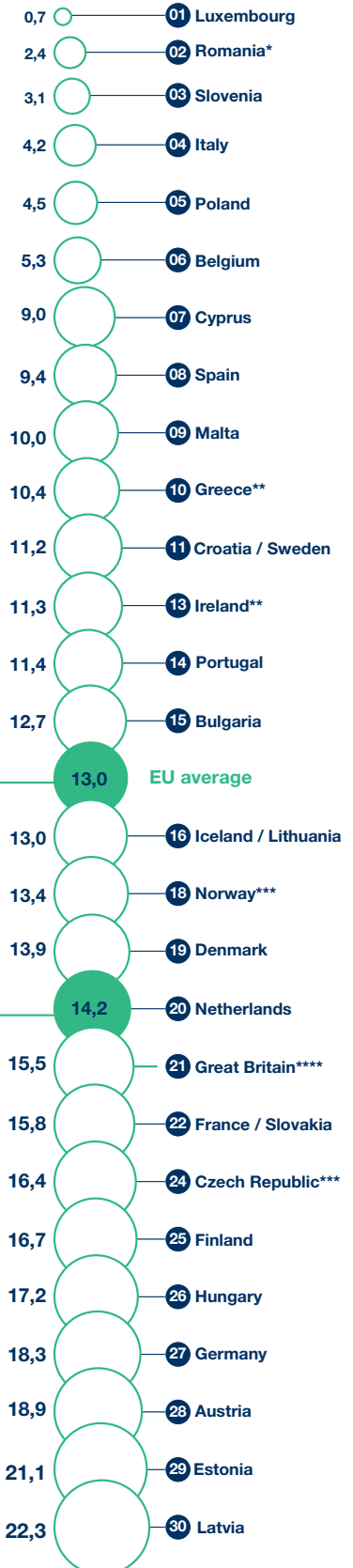
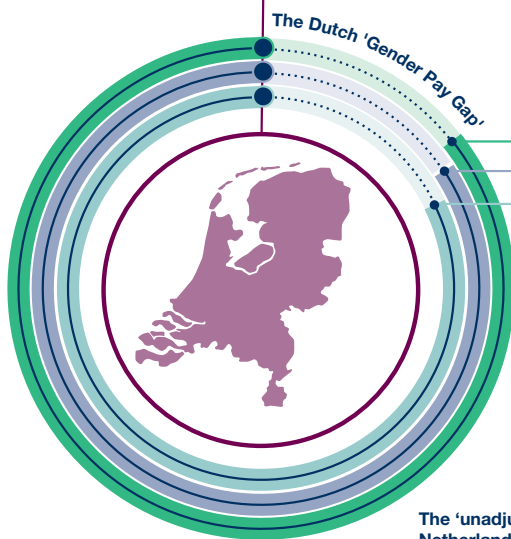
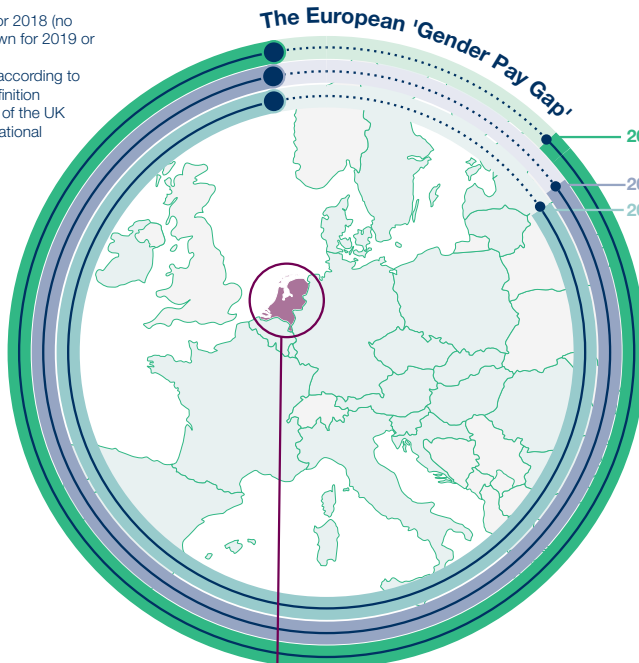
The unadjusted gender pay gap for the 27 countries of the European Union, plus Great Britain, Iceland, Norway, 2019 in %

*Projected figures for 2020

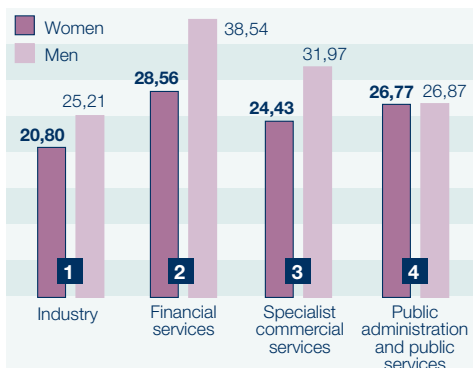
** Figures for 2018 (no figures known for 2019 or 2020)

*** Figures according to different definition

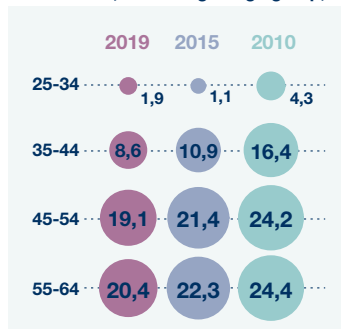
**** Figures of the UK Office for National Statistics



Average Dutch hourly pay according to branch of industry, in euros, 2019



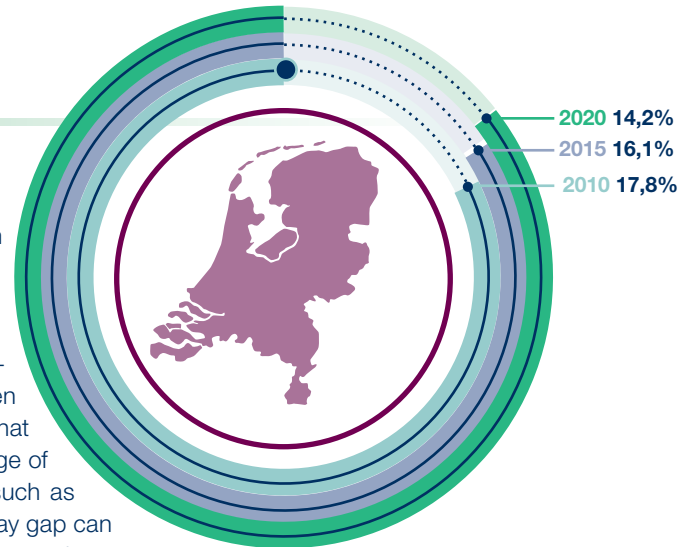
The 'unadjusted' gender pay gap for the Netherlands, according to age group, in %



Figures: Eurostat, EGEI, CBS

Introduction

The difference in pay between men and women is a problem that has been high on the agenda of the European and national legislators for years. Although the right to equal pay of men and women has long been enshrined in anti-discrimination law, there is still a difference that cannot be justified or explained by objective factors. In 2020, the **difference in pay** between men and women in the Netherlands was 14.2%, which means that the Netherlands is doing worse than the European Union average of 13%. Even if this difference is adjusted for objective factors, such as working experience and education, a large part of the gender pay gap can still not be explained. Moreover, the figures show that the difference increases with women's age, which means that the gender pay gap follows women throughout their careers. As the desired improvement is not forthcoming, closing the gender pay gap has been getting more and more attention over the past few years. Equal pay day was created to raise more awareness for the gender pay gap; employers and organisations are increasingly paying attention to this issue.




So, the right to equal pay has the attention of the legislator. Both at European and at national level, several legislative initiatives have been submitted to promote equal pay between men and women. Two very recent and important initiatives are: (1) the initiative bill aiming at the introduction of a certificate to prove that men and women receive equal pay for work of equal value ("**Bill on Equal Pay**") and (2) the Proposal for a Directive of the European Commission on strengthening the principle of equal pay between men and women ("**Proposed Directive on Equal Pay**").


A common denominator of these proposals is that they serve to increase pay transparency. The basic principle is that any unjustifiable differences in pay will come to light sooner if employers are forced to become more transparent. In this respect, the works council will have an important role to play. In this publication, on the occasion of International Women's Day, we will address these initiatives and their consequences for employers.


Bill on Equal Pay


On 7 March 2019, the [Bill on Equal Pay](#) was submitted to the House of Representatives. This bill aims at the introduction of a certificate to prove that men and women receive equal pay for work of equal value. The Bill on Equal Pay follows the recommendations made in 2014 by the European Commission to the Member States “to assist them in a better and more effective implementation of the equal pay principle in order to combat pay discrimination and to contribute to tackling the persistent gender pay gap”. According to the [Explanatory Memorandum](#) to the Bill on Equal Pay, the current legislation does not provide sufficient tools to combat gender pay discrimination. The focus is thereby too much on the employee, making gender pay discrimination an individual problem rather than a problem of the company or society as a whole.


The Bill on Equal Pay purports to adjust the Equal Treatment (Men and Women) Act (“**WGBMV**”), introducing several tools to combat gender pay discrimination and shifting responsibility more towards the employer. Below, we will discuss the five key tools from the Bill on Equal Pay.

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A certification duty for large employers with 250 employees or more.
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An increased burden of proof on employers with 250 employees or more that, contrary to the rules, do not hold a certificate.
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A duty to provide information to the works council and in the management report for employers with 50 employees or more.
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A right of access for employees to the pay details of co-workers.
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A complaints procedure.



Certification duty

Based on a certificate, to be re-obtained every three years, employers must demonstrate that their companies provide equal pay for equal work. The introduction of a certification duty will shift the burden of proof of equal pay from the employee to the employer. According to the bill, the proposed certification duty will apply to employers with 250 employees or more. According to the [Explanatory Memorandum](#), the duty will, thus, apply to some 3,285 companies. The initiators had previously proposed to introduce this duty for employers with 50 employees or more, but the Council of State indicated in its advice that this would impose a disproportional burden on small employers. Therefore, the [amended bill](#) has increased the threshold to 250 employees.

The Dutch Labour Inspectorate will be responsible for supervision. Violation of the obligations set forth in the bill may expose the company to an administrative fine up to the fifth category¹, subject to a possible increase in the event of repeated violations. If employers satisfy the standard developed by the certification body, they will obtain the certificate. The employers will have access to the assessment, so that they know what the points for improvement are. The website of the certification body will publish which companies hold a certificate. Furthermore, there will be a public register in which the granting, denial, suspension and revocation of the certificates will be entered. A certificate may also voluntarily be applied for by an employer with fewer than 250 employees. In the event of denial of a certificate, the employer may lodge an objection with the certification body, which is yet to be designated.

¹ As per 1 January 2022, a fine of the fifth category within the meaning of Article 23(4) of the Dutch Criminal Code amounts to a maximum of EUR 90,000. If a company violates the obligations for a second time in a period of five years, the amount of the fine will be increased by 100%. In the event of a third violation within five years, the fine will be increased by 200%. If the violation continues beyond the time at which the fine becomes irrevocable, the violation will, from then on, qualify as a new violation. Consequently, the company cannot simply pay the fine once and allow the violation to continue unpunished.

2 Evidentiary presumption of gender pay discrimination



If employers do not hold a certificate while they are subject to the certification duty, gender pay discrimination will be presumed. That way, the initiators want to make it easier for individual employees to demonstrate gender pay discrimination, so that they can start legal proceedings against their employers. Under the Dutch Civil Code and the WGBMV, the employee must furnish facts leading to a presumption of gender pay discrimination. The initiators, however, believe it is the employer's responsibility to ensure that the company does not engage in gender pay discrimination. For that reason, it is up to the employer to demonstrate that this is not the case. This increased burden of proof does not apply to employers with fewer than 250 employees that do not hold a certificate.

3 Duty to provide information



At least once a year, the works council must be provided with information specifically relating to the gender pay gap within the company and the actions that are being taken to combat that gap. The works council can use that information to verify the correctness of the information included in the annual report. The duty to inform the works council has been established for companies with 50 employees or more, as a certification duty would impose a disproportional burden on small(er) companies.

4 Right of access to pay details of co-workers



Furthermore, the Bill proposes a duty for the employer to provide information. The employer is under the obligation, at an employee's request, to grant access to the anonymised pay details of other employees performing the same, or virtually the same, work within the company.

5 Complaints procedure



If an employee establishes, either after having been given access or otherwise, that there are any unexplained differences in the amount of the pay, the employee may file a complaint with the employer. The employer must immediately notify the works council of any such complaint, and handle the complaint within two months. If the complaint is not, or not properly, handled, the employee may subsequently file a complaint with the Netherlands Institute for Human Rights ("**CRM**").

In order to facilitate continued political pressure as well, the Minister of Social Affairs and Employment ("**SZW**") will be given the statutory duty to inform parliament every two years about the gender pay gap developments in the Netherlands, the projections, and the policy developed in this area in order to reduce that gap. Within five years of the Bill coming into effect, the Minister of SZW will prepare a report on the effectiveness and the effects of the new law in actual practice.

On 2 February 2021, the Bill on Equal Pay was debated in the House of Representatives. The continuation of the plenary hearing of the Bill is yet to be scheduled.




Proposal for a Directive on Equal Pay

On 4 March 2021, the European Commission presented the [Proposal for a Directive on Equal Pay](#). The Proposed Directive on Equal Pay was presented following calls from European Parliament and the Council for the European Commission to take concrete measures to improve the application of the standards of equal pay and pay transparency. The reason for those calls was that evaluations and studies by, among others, the European Commission, had shown that the right to equal pay is not adequately applied and enforced in actual practice, and that the pay transparency in many Member States left a lot to be desired.

The Proposed Directive on Equal Pay is part of a broader set of measures intended to tackle the problems surrounding the gender pay gap. Other initiatives in that set of measures are the [Directive on work-life balance](#) and the proposed [Directive on improving the gender balance among non-executive directors of companies listed on stock exchanges in the European Union](#). Where the gender balance among executive and non-executive directors is concerned, the Netherlands is ahead with the [Act on improving the gender balance among executive and non-executive directors](#).

Objective of the Proposed Directive on Equal Pay

The [Proposed Directive on Equal Pay](#) aims at ensuring that the fundamental right to equal pay is upheld across the European Union, by establishing pay transparency standards. The rationale behind the proposed directive is that increased pay transparency can help employees trace and demonstrate possible gender pay discrimination and make the employer aware of differences in pay that cannot be explained by justified factors. Therefore, the Proposed Directive on Equal Pay establishes minimum requirements intended to strengthen the application of the principle of equal pay and the prohibition on gender-based pay discrimination. The [Proposed Directive on Equal Pay](#) intends to do so in three ways.

 <p>1</p> <p>Promoting pay transparency within organisations.</p>	 <p>2</p> <p>Simplifying the application of key concepts in connection with equal pay, such as 'pay' and 'work of equal value'.</p>	 <p>3</p> <p>Strengthening enforcement mechanisms.</p>
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Below, we will address the consequences that the new rules on pay transparency (1) and strengthened enforcement-mechanisms (3) will have for employers.

1



Pay transparency

Chapter II of the [Proposed Directive on Equal Pay](#) contains provisions to promote pay transparency. For employers, it provides, first of all, specific standards to be taken into account as early as the job application phase (Article 5). Before the interview, they must proactively state the initial pay level or its range for the job. The employer can provide this information, e.g., in the vacancy or in the invitation to the job interview. Furthermore, the employer is not permitted to ask applicants about their pay history of their former employment relationships. The aim of this provision is to ensure that workers have the necessary information to engage in balanced and fair negotiations regarding their salaries and that existing pay discrimination is not perpetuated over time because the former salary forms the starting point for the negotiations. The latter is relevant, because the figures show that the gender pay gap increases with the employees' age. Furthermore, employers must continue to be transparent during the employment relationship and give their employees access to a description of the gender-neutral criteria used to define the pay and career progression of employees (Article 6).

In addition, the [Proposed Directive on Equal Pay](#) introduces reporting duties for employees with at least 250 employees (Article 8). These employers are required annually to publish information on the pay gap between female and male workers in their organisation. In addition to the basic salary, this also includes possible differences in variable components, such as bonuses. The publication of this information is to encourage employers to prevent pay gaps and to stimulate the debate on equal pay. The external reporting duty only regards information giving an overall picture of the gender differences in pay, without having to specify it according to categories of employees performing equal work or work of equal value. The latter information is not comparable across employers, so that this needs to be reported internally only, to the employees and their representatives. The Dutch Labour Inspectorate and supervisory bodies such as CRM can request this information and ask the employer to clarify the information provided and explain any differences in pay (Article 8(7)).

Employers must be able to justify any differences in pay based on objective and gender-neutral factors. If, in any category of employees performing equal work or work of equal value, the pay report reveals a pay gap of at least 5%, which cannot be justified, the employer must conduct a joint pay assessment in cooperation with the employees' representatives and take corrective measures (Article 9). Looking at the [figures](#) in the Netherlands for 2020, which show an unadjusted gender pay gap of 14.2%, large employers having to conduct a pay assessment is not likely to be the exception to the rule.

In addition to the transparency obligations for employers, Chapter II of the Proposed Directive on Equal Pay also grants employees a right to information, which enables access to gender pay gaps (Article 7). This right to information is to equip employees better to assess whether they are paid in a discriminatory manner and to enforce their right to equal pay. The employer must inform all the employees of their right to such information on an annual basis.

3













Remedies and enforcement

In addition to promoting pay transparency, the Proposed Directive on Equal Pay also aims at ensuring better access to the court for gender pay gap claims. This is necessary because individuals are easily confronted with problems of evidence and other procedural complications if they wish to enforce their right to equal pay.

Chapter III of the **Proposed Directive on Equal Pay** addresses a number of these problems, by requiring Member States, among other things, to ensure the availability of judicial procedures for the enforcement of the right to equal pay that are easily accessible (Article 12). In addition, the Proposed Directive on Equal Pay provides that employees who have suffered damage as a result of the gender pay gap, are entitled to full compensation of such damage (Article 14). This is to encourage victims to seek justice and uphold their right to equal pay. Other relevant measures are a shift of the burden of proof (Article 16), the introduction of a limitation period of at least three years (Article 18), and the introduction of minimum standards on penalties for infringements of the right to equal pay (Article 20). And, last but not least, the right to access to evidence (Article 17). Based on this provision, a court or a competent authority, such as CRM, can order the employer, during proceedings, to disclose relevant evidence lying in their control.

Conclusion

The measures in the Bill on Equal Pay and the Proposed Directive on Equal Pay to improve pay transparency and enforcement of the right to equal pay follow a broad set of existing measures. For example, Dutch law already provides for specific evidence rules to make it easier for victims of discrimination to invoke their rights, such as the evidentiary presumption of Article 10 of the Equal Treatment Act. The works council already has rights and powers in respect of the supervision of equal pay and combating the gender pay gap as well.² However, both legislative initiatives will have concrete consequences for employers: both provide for a greater role for the works council where the tackling of unjustified differences in pay is concerned. Moreover, they require large employers to obtain a certificate, every three years, to demonstrate that their companies offer equal pay for equal work, and these employers will, in the future, be required to publish information on gender pay gaps. There are already obligations to report on pay, but their scope is limited and they apply specifically, e.g., to regulated financial companies. The Proposed Directive on Equal Pay will change this, as it will impose a general reporting duty for employers with at least 250 employees.

Initiative	Certification	Evidentiary presumption of gender pay discrimination	Duty to provide information	Right of access to pay details of co-workers	Complaints procedure	Pay transparency	Strengthening the enforcement mechanism
Number of employees Less than 50 	 Not compulsory	 No increased burden of proof	 Not compulsory	 Not compulsory	 Not compulsory	 Establishment of specific standards	 Duty to give access to relevant evidence at the request of the court
50 - 250 	Not compulsory	No increased burden of proof	Compulsory	Compulsory	Compulsory	Establishment of specific standards	
At least 250 	Compulsory	Increased burden of proof for the employer	Compulsory	Compulsory	Compulsory	Establishment of specific standards & reporting duty	

² For example, the right to information on schemes under the terms of employment pursuant to Article 31d of the Dutch Works Councils Act.

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