



Mutual Learning Programme

DG Employment, Social Affairs and Inclusion

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Path dependency of forerunner in pay transparency policies

Peer Review on “Reducing the gender pay gap through pay transparency - legislative measures and digital tools targeted at employers”

Online, 15-16 April 2021



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1 Introduction

This paper has been prepared for the Peer Review on "Reducing the gender pay gap through pay transparency: legislative measures and digital tools targeted at employers" within the framework of the Mutual Learning Programme. It provides a comparative overview and assessment of the policy situation in Finland relative to that in the host country (Estonia). For further information on the host country policy example, please refer to the Host Country Discussion Paper.

Equal pay for equal work under European Union (EU) law requires equal remuneration for the same work as well as for *work of equal value*.¹ Secondary EU law² prohibits *direct and indirect discrimination* on the grounds of sex, with regard to *all aspects and conditions* of remuneration. The Court of Justice of the EU has also given in its caselaw a set of guidelines as to how 'work of equal value' should be assessed. The Commission Recommendation on strengthening the principle of equal pay between men and women through transparency (2014/124/EU) aimed at improving the implementation of the equal pay principle and the prohibition of pay discrimination. Despite the above, the effective implementation and enforcement of the equal pay principle in practice remains a major challenge in the EU. The Commission's proposal for a new Directive on pay transparency and enforcement mechanisms (COM(2021)93 final) aims to overcome two obstacles to the equal pay principle: that the provision on equal pay for work of equal value is poorly implemented, and that the victim's right to effective remedy against discrimination is not *de facto* guaranteed. The Commission's pay transparency policy thus stresses discriminatory patterns behind the gender pay gap. Alternative measures to combat pay discrimination show limited success, which is also why the current Finnish government policy stresses legislative rather than 'soft' means to combat pay discrimination. The era of social partner cooperation in equal pay policies seems to be weakening.³

2 Labour market and social policy situation in Finland

The gender pay gap in Finland (16.6% in 2019 according to Eurostat) is wider than the EU-27 average⁴. Finnish women have a stronger presence in the labour market than women in the EU on average. In 2019, 71.8 % of women and 73.3 % of men were employed. Women enjoy a higher level of education than men. The labour market is deeply gender segregated, and women bear the main responsibility for childcare. The Finnish and Estonian labour markets are rather similar in these respects.

Finland differs from Estonia by the traditionally high rate of trade union membership, the important role of collective agreements and role of social partners in labour market related reforms. Many collective agreements are binding *erga omnes*⁵. The rate of organised employees has decreased over the years (73.3% in 1995, 64.6% in 2013 and 55.1% in 2017), with women being more organised than men throughout this period.⁶ Finnish equal pay policies and the preparation of equal pay legislation have been heavily dominated by the social partners. For example, the amendments made to the Act on Equality between Women and Men (609/1986) in 2005 and 2014, which introduced pay transparency measures, were prepared in tripartite (government and social partners)

¹ Article 157 of the Treaty of the Functioning of the European Union.

² Article 4, Directive 2006/54/EU.

³ In the past decades, employer unions found security against wild strikes in comprehensive nationwide collective agreements. Strong social partners had an impact on economics, income distribution and social policies through tripartite income policy agreements, which covered not only pay but taxation, social security and labour law. Such centralised agreements aimed at binding these policies to the growth of the gross national product (GNP) by providing a general framework for pay rises. In 2017, the Confederation of Finnish Industries announced it will no longer be party to centralised agreements.

⁴ Eurostat statistics explained: Gender pay gap statistics.

⁵ Collective agreements that are considered general, covering more than half of the employees in the field in question, bind even employers who are not parties to the collective agreement.

⁶ The figures are from studies carried out by Statistics Finland, presented in Ahtiainen 2017, pp. 46-47.

working groups. Employer unions have traditionally opposed equal pay policies, and trade unions may be unwilling to criticize collective agreements they have concluded⁷. Like in Estonia, there is considerable pay transparency in the public sector, motivated by public interest. Disagreements on pay transparency measures in Finland often involve arguments concerning the right to privacy versus the right to equal pay, or right to non-discrimination.

The Finnish Institute for Health and Welfare, which gathers information on gender equality, lists several reasons for the Finnish gender pay gap: strong gender segregation of the Finnish labour market, related educational choices, women's extensive use of family leaves (*Perhevapaat*), and an 'unexplained pay differential' between women and men with a similar educational background who work in similar fields and at similar tasks. Based on detailed official occupational statistics, this 'unexplained pay differential' is estimated at 6.7%. A survey on attitudes to gender equality among the public⁸ shows that men tend to consider that gender equality is already achieved, while women believe that men are privileged over women. More than 90% of the respondents expect employers and social partners to act more actively to remove unexplained gender pay differentials.

Since the 1980s, the Finnish gender pay gap has narrowed from 20% to 17%. There are different ways of measuring the gender pay gap. Statistics Finland measures gender pay gap using the average monthly pay of full-time employees for regular pay, which does not include overtime or part time earnings.⁹ The employment gap between women and men is at its broadest in the age group 25-34 years (73.5% for women and 82.5% for men), which is explained by an unequal use of family leaves. Women work part-time more often than men (22% vs 10%) and have different reasons for doing so. Female part-time workers often cannot find full-time work, and almost all persons working part-time due to family reasons are women, while men often work part-time due to studies. More women than men (19% vs 13%) work under fixed-term contracts while men on average work longer weekly hours than women (38 hours vs 32 hours per week).¹⁰

The Finnish labour market certainly is profoundly gender segregated. In 2019, fields with majority female employees included health and social services (86% women), education (68% women) and catering (68% women), whereas fields with male majority included construction work (91% men), transport and storage (80% men), industry and provision of electricity, gas, water and waste management (75% men). Less than 10% of employees work in occupations with balanced gender participation.¹¹ Men tend to work in the private sector and women in the public sector. However, work condition surveys show that men and women at workplaces now perform more often similar tasks. In 1984, 48% of women employees and 53% of male employees responded that only employees of the same sex performed similar tasks as the respondent. In 2018 the figures were 23% of women and 29% of men.¹² The pay gap is broader in the private than in the public sector. Finnish women are more highly educated than men, but educational choices of both women and men reflect gender-biased or "gendered" labour markets. Men and women with similar education receive different earnings already at the beginning of their careers. Women's careers are slower to develop, and more seldom lead to managerial positions, and even so in fields where majority of employees are women. Top positions are gendered, so men tend to hold leading positions in business, whereas women lead activities such as personnel management, communications and

⁷ Koskinen-Sandberg 2019, p. 68.

⁸ *Tasa-arvobarometri* 2017. Surveys on attitudes to gender equality have been published regularly under 20 years.

⁹ Wage and salary earners earnings for regular working hours, Statistics Finland.

¹⁰ Finnish institute for health and welfare *Työllisyys ja työsuhteet sukupuolittain ..*

¹¹ Center for equality information *Sukupuolten palkkaero*.

¹² Sutela et al. (2019), pp. 181-182.

legal affairs.¹³ In higher pay level occupations, the pay gap is broader than in low level occupations.

It is thus generally accepted that the gender pay gap in Finland has many causes, many of them similar with the causes found in Estonia. *Discrimination* is seldom named as a reason for the gap. However, discrimination has an impact on the pay gap in many ways. Pay differentials related to the vertical segregation of the labour market may involve discrimination related to access to employment, and gendered patterns of parenting provide incentives for discrimination based on pregnancy and childcare. The Finnish debate on the gender pay gap focuses on 'unexplained pay differentials' and follows *economist* rather than *legal* arguments. Participants refer to studies which show that when comparisons of women's and men's pay are carried out on persons performing exactly similar jobs in the same sector, pay differentials are narrow or non-existing. When pay discrimination is assumed to coincide with 'unexplained pay differentials', the question of *equal pay for work of equal value* falls outside the frame of study, and indirect discrimination may also fall out of focus. Problems met in comparing work carried out under different collective agreements are often highlighted in the Finnish discussion. Job evaluation and classification is also often bound up with the system of collective agreements.

3 Legislative and policy measures to support equal pay

The strong presence of social partners in Finnish equal pay policies differentiates Finland from the Estonian situation. Legislative pay transparency measures have been in place in Finland since 2005 and thus precede those introduced by the EU. Finnish policy shows a *strong path dependency*, as new policies are based on old ones.

Since the 1990s, Finnish governments' gender equality action plans have paid attention to pay equity. National gender equality policies are delegated to the Ministry of Social Affairs and Health. Women's organisations have stressed equal pay, while activists for men claim that women's lower pay merely reflects their shorter working hours.¹⁴ Social partners have a strong say in determining pay levels through collective agreements. Employers often apply several collective agreements which reflect gender segregated labour market conditions, and value male occupations higher than female. Social partners also have a say on legislative reforms and amendments connected to working life, as well as on other gender equality measures¹⁵. Lately, employer unions have preferred local rather than centralised collective agreements and are less committed to nation-wide policies. The corporatist practices in the context of gendered pay formation are criticized by many researchers.¹⁶

Tripartite¹⁷ action plans for pay equity started in 2006 with the aim to reduce the gender pay gap to 12% by 2015. The action plans have been criticized for their lack of impact on collective agreements or pay negotiations.¹⁸ At the time when central labour market organisations concluded national collective agreements (so-called income policy agreements), the parties often agreed on channeling some of the overall pay sum to low-pay sectors, in which employees tended to be women. That possibility was lost when the employer side withdrew from centralised collective agreements. Reducing labour market gender segregation is a recurrent policy aim in social partners' plan for equal pay. The tripartite action plans have made possible research and development programmes and studies on pay structures, pay audits and women's working careers. The impact especially on the pay gap between the male and female sectors of work has

¹³ Center for equality information *Johtamisen ja urakehityksen tasa-arvokysymyksiä*.

¹⁴ Saari (2015), pp. 49-50.

¹⁵ Saari (2015), p. 32.

¹⁶ Koskinen-Sandberg (2016, 2019), Nummijärvi (2004, 2005, 2019), Saari (2016).

¹⁷ Tripartite policies involve the Government as well as the employer and employee central organisations.

¹⁸ NGO shadow report (2008).

been limited.¹⁹ Assessments of the tripartite action plans by external experts have recommended use of more effective measures.²⁰ At the workplace level, the present policies are not very visible. According to surveys on working conditions, 20-30% of employees were aware of policies for reducing the pay gap at their workplace.²¹

Surveys, studies and statistics related to equal pay have been provided by Statistics Finland and both academic and administrative research. Nevertheless, much less attention than in Estonia seems to have been paid to statistical applications that would help employers to define the gender pay gap and detect possible pay discrimination among persons in their service.

Two Finnish legal measures recommended by the European Commission precede the Commission's 2014 pay transparency recommendation: i) an *employer duty to carry out pay audits*; and ii) right to *access to comparator's pay information*.

3.1 Employer pay audit duty

Pay audit (*palkkakartoitus*) duty is a positive gender equality measure, based on the Act on Equality between Women and Men. It was adopted as a response to the persistent pay gap, following the Swedish example. Since 1995 employers of more than 30 employees are obligated to take measures for promoting gender equality. In 2005 pay audits became an obligatory part of equality planning²². The audit is in principle premised on the legal criteria of pay discrimination, as the aim is to enhance comparisons of equal work and work of equal value among employees to decrease the pay gap and prevent pay discrimination. All employers have a duty to promote equality in working conditions, particularly in terms of pay (Section 6(2)3 of the Act), and to prevent discrimination (Section 6(2)6)). Employers with 30 employees or more must prepare an equality plan every second year (Section 6a). The plan is not submitted to an authority, but the Equality Ombudsman may monitor equality plans, and does so usually by going through one sector of employment at the time. The plan must be drafted in cooperation with an employee representative and made public in the workplace.

The Parliament Employment and Equality Committee had required in 2010 better guidelines for comparing work of equal value in pay audits, and an explicit provision that comparisons should be made across collective agreement lines.²³ Provisions on pay audit were made more explicit by an amendment of the Act on Equality in 2014. The pay audit process is explained in more detail under Section 6b of the Act, added in the 2014 amendment. The aim of the amendment was to make sure that the audit brings to light 'pay differentials that have no acceptable ground'. The amendment did not introduce requirements, which would have challenged the status quo of pay structures.²⁴ Pay audits often do not compare groups of employees whose pay is defined under different collective agreements, especially if the comparison tries to establish that the groups in question do work of equal value. The preparatory works to the Act on Equality explain that in establishing whether equal work or work of equal value is in question, attention should be paid to the quality and contents of the job requirements and the conditions under which the job is performed. Attention shall be paid to job classifications used in the relevant collective agreement provided the classification is not discriminatory.²⁵ There is no legal clarification as to how such classifications should be assessed. The issue of job assessments remains a contested issue among the social partners.

¹⁹ Viitamaa-Tervonen (2019), pp. 21.

²⁰ Salenius (2011), Lonka (2015), Suoma (2018).

²¹ Sutela et al. (2019), 179-180.

²² Nummijärvi (2019), pp. 36-38.

²³ Parliament Employment and Equality Committee 6/2010 vp.

²⁴ Saari (2015), 46, Koskinen-Sandberg (2016), Nummijärvi (2019).

²⁵ Government Bill HE 57/1985, 19.

In 2018, the Equality Ombudsman was nominated to report on pay transparency. The report²⁶ contains an analysis on the legal prerequisites of pay transparency and on how the requirements of the equal pay principle, right to privacy and data protection should be balanced.²⁷ The Ombudsman's report stresses the need for further legislative action. According to the report, audits are at present often carried out only on part of the employees, to avoid disclosure of individual wages, and all pay components are not taken under consideration. Practices vary as to which groups' pay is disclosed to employee representatives.²⁸ Even public sector employers were unwilling to disclose pay data, despite pay data in the public sector being public. As individual pay data was not to be disclosed, many employees were omitted from the comparison²⁹ The Ombudsman proposed that employer and employee representatives should be able to consider pay data at individual level, under a secrecy provision if needed. Different pay components should be taken into consideration from the start, and all employees considered across collective agreement lines. The employer should publish equality plans and pay audits, but not disclose individual wage data.

A new Pay Transparency Working Group published its report in April 2019.³⁰ Debated issues involved access to individual pay data. The trade union representatives supported it but the employer organisations rejected most amendments suggested by the Equality Ombudsman. Government representatives, experts and trade union representatives held that victims of pay discrimination do not have the means to detect discrimination, or effective remedies against it without further legal provisions, while employer organisations stressed that individual pay data cannot be disclosed, due to the General Data Protection Regulation (GDPR) and constitutional provisions. As the government resigned before the final report of the working group was published, no political conclusions were drawn. The current government's programme promises that pay differentials and pay discrimination shall be combated by increasing pay transparency by means of legislation. Provisions will be introduced on the right of staff, staff representatives and individual employees to access pay information and to address pay discrimination more effectively.³¹ A new tripartite working group is currently drafting the amendment. The main employers' representative EK³² left the working group in November 2020. EK explained that the Government had not started from an empty table but brought its own proposals to the discussion from the beginning. The Government's position is that the amendment should be drafted on the basis of former working group conclusions and other reports.

3.2 Victim's access to individual comparator pay data

The second pay transparency provision of the Act on Equality on access to comparator pay data allows the victim to ask for pay information from the employer, who 'must give the employee an explanation on the grounds of his or her pay that are necessary for determining whether pay discrimination has taken place' (Section 10 (3) of the Act) but does not provide access to comparator pay. The Act on Equality provides two possibilities for obtaining such pay information. First, a representative of the employees has access to certain individual and group pay information, but to individual pay information only by the consent of the person in question, and to information on a group of employees according to what has been agreed in the collective agreement. The employee representative is bound by secrecy concerning such information (Section 10 (4) of the Act on Equality). Alleged victim's access to comparator's pay information thus depends on the consent of the comparator, and assistance of an employee

²⁶ Maarianvaara (2018).

²⁷ Nousiainen (2018)

²⁸ See even Nummijärvi (2019), pp. 43-44.

²⁹ Saari (2016) refers to a 'problem of empty slots' in pay audits.

³⁰ *Palkka-avoimuustyöryhmän loppuraportti* (Final report of the Pay Transparency Working Group), Ministry of Social Affairs and Health, Helsinki 2019.

³¹ Government Programme 2019, <https://valtioneuvosto.fi/en/marin/government-programme/finland-built-on-trust-and-labour-market-equality>, Section 3.5.

³² Elinkeinoelämän keskusliitto (EK), Confederation of Finnish Industries.

representative. Access to group level information depends on collective agreement conditions. The provision offers no clarification for cases where the groups of employees to be compared work under different collective agreements. Second, the Act on Equality provides an additional possibility for receiving comparator pay information when the comparator refuses disclosure. The employee representative may ask the Equality Ombudsman to provide the information when there are grounds to suspect discrimination (Section 17 (3) of the Act) and pass it to the employees' representative. In practice, the procedure of getting pay information via the Equality Ombudsman is a "dead letter". The victim's lack of access to comparator's pay information, which is a *condition sine qua non* for a pay discrimination claim, limits severely the victim's right to effective remedy. This has been one of the issues under debate in the Finnish law amendment. A person's right to disclose his or her own pay is not in doubt, however, and to my knowledge 'gag rules' in employment contracts to prevent such disclosure are not in use.

The planned amendments to the pay audit duty are well in line with what the Commission's Directive proposal stresses as the type of information that is necessary for better enforcement of the equal pay principle. The Commission's Directive proposal does not provide a right to comparator pay data, but the right to average pay levels, broken down by sex, for categories of workers doing the same work or work of equal value, as defined by the Directive. The Commission's proposed Directive also stresses better access to justice for victims of pay discrimination (Chapter III of the proposal).

Like most EU Member States³³, Finland follows an 'individual legal strategy' in providing a legal remedy for pay discrimination. Like in Estonia, access to justice and compensation for pay discrimination seems limited in Finland, as few cases reach the courts. A victim of pay discrimination may bring a compensation claim to a court, but at the risk of paying prohibitively high legal costs in case discrimination is not proved. Without access to comparator pay data it is risky to raise a claim before the court. Pay audit is conceived as a means to avoid costly litigation. Any disagreements concerning collective agreements are decided by the Labour Court, to which only social partners have access. There is no individual right to bring gender discrimination cases to the Non-Discrimination and Equality Board. The victim's right to effective remedy and effective, dissuasive and proportionate compensation under Finnish law may well be questioned.

The Finnish transparency measures do not focus on pay transparency prior to employment, or on career progression. As noted above, there has been less attention than in Estonia on developing analytical tools that could help employers to recognise problematic pay structures.

4 Considerations for future policies and initiatives

The two Finnish pay transparency measures (access to individual pay information and pay audit duty) that are prescribed by law go further than what would be required by the 2014 Commission Recommendation or the new Directive proposed by the Commission. Pay audits are required in Finland from much smaller-sized employers than what is proposed by the Commission (employers of 30 vs 250 employees). Effective audits in small workplaces require disclosure of individual pay data. In order to detect discriminatory pay structures, pay audits need to allow for comparison of jobs of equal value. Such comparisons are often impossible without access to individual pay.

The measures differ considerably from the ones under discussion in Estonia, and their transferability is doubtful, as they are premised on a strong presence of social partners in the labour market. However, there are signs that the strong corporatist tradition in

³³ European network of legal experts in gender equality and non-discrimination (2017).

Finnish society is disintegrating. Pay transparency policies in the future may depend more on political will than social partner cooperation.

The Finnish experience implies that where the gender segregated labour market is an important cause for gender pay inequity, pay transparency may be helpful only if it allows comparison of gendered pay structures across occupational and collective agreement lines. The experience also shows that it is difficult to introduce pay audits that effectively do that. There is also considerable resistance to such pay audits.

The Commission's Directive proposal would not require access to individual pay data. The Finnish experience shows that without access to such data, persons suspecting pay discrimination have no effective remedy against discrimination through courts. As the Commission's Directive proposal requires, courts have the mandate to order individual pay data to be disclosed. However, when a case has been brought to a court, the alleged victim already has risked facing considerable costs.

The Estonian Host Country Discussion Paper discusses the Commission's recommendation to pay transparency and covers more options than the Finnish policies do. Most measures proposed by the recommendation were to my knowledge never under consideration in Finland, which has continued on its chosen path of measures. The Commission's proposed Directive focuses on what should become mandatory measures, and Member States will probably concentrate more on these in the future. Many measures such as pay statistics differentiated by gender and gender sensitive job evaluation have long been on the table in Finland. If anything, the Finnish experience shows how difficult it is to use such tools effectively.

5 Questions

- How do employees consent on making salary-related information available for everyone? Is there as formal procedure for this?
- Is there experience on gender sensitive job evaluation introduced by collective bargaining?
- Both Estonia and Finland seem to suffer from poor access to justice in pay discrimination cases. Do you have any proposals for better access to justice/effective remedies?

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Annex 1 Summary table

The main points covered by the paper are summarised below.

Situation in the peer country

- The gender pay gap in Finland (16.6 %) is wider than the EU-27 average....
- The labour market is deeply gender segregated....
- Gender segregation of education and labour market is usually pointed out as the causes for the pay gap, and women's choices blamed for the outcome....
- Economists analyse 'the unexplained pay gap' between persons doing similar jobs, while a legal analysis of pay discrimination would concentrate on equal pay for work of equal value. ...
- Comparing jobs of equal value, and across collective agreements is challenging.

Legislative and policy measures to support equal pay

- In Finland, there is a legally prescribed Employer Pay Audit Duty.
- Victim's access to individual comparator pay data is also legally prescribed.
- Tripartite action plans with various policies have been developed and implemented. Some have been more concrete than others.
- Gender segregated labour markets are often seen as the cause of the pay gap, and a popular policy suggestion is to persuade girls and women choose 'male' education and occupation – so far, with little success.

Considerations for future policies and initiatives

- The two legislative measures now in place go further than proposed EU measures.
- To make pay audits effective, comparisons should be made across collective agreements, comparing work of equal value, and allow disclosure of individual pay data at need.
- Effective pay audits would help access to justice for victims of pay discrimination.

Questions

- How do employees consent on making salary-related information available for everyone? Is there a formal procedure for this?
- Is there experience on gender sensitive job evaluation introduced by collective bargaining?
- Both Estonia and Finland seem to suffer from poor access to justice in pay discrimination cases. Do you have any proposals for better access to justice/effective remedies?

Annex 2 Example of relevant practice

Name of the practice:	Employer pay audit duty for employers of minimum 30 employees
Year of implementation:	2005, amended 2014
Coordinating authority:	No coordinating authority, Equality Ombudsman monitors
Objectives:	Reduce pay discrimination, facilitate access to justice, help pay negotiations
Main activities:	Pay audit in the context of equality plan to be made in cooperation with employee representative, comparing pay of women and men doing equal work or work of equal value. If comparison shows differentials which cannot be justified, employer must correct the situation.
Results so far:	Not recognised by pay statistics.

