

# Mind the Gap:

*A multidisciplinary analysis on the gender pay gap in the Netherlands*



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## Abstract

The gender pay gap is a well-established concept in the labour-economics literature and a ubiquitous phenomenon in all of the different Member States in the EU. Although, the way it is explained remains ambiguous, specifically regarding the interpretation of the adjusted gender pay gap: that is the gap in hourly wages between women and men with similar characteristics and in similar circumstances. This study aims to demystify this concept and explain the causes of the adjusted gender pay gap in the Netherlands. A theoretical and normative analysis on the implementation and enforcement mechanisms within the Dutch political, institutional, legal and judicial infrastructure, methodologically structures the research conducted in this thesis. It illustrates the macro, meso and micro enforcement levels; starting with enforcement by the government, followed by enforcement of institutions, and finally individual enforcement. Subsequently, the causes of the adjusted gender pay gap include a lack of pay transparency, gender-biased wage classification systems, insufficient protection in collective labour agreements and inadequate access to justice. The conclusions drawn from this study clarify how the one-dimensional enforcement approach of the Dutch Government relies predominantly on the individual to enforce her/his rights. Yet, the identified causes of the adjusted gender pay gap underline the necessity of a multi-dimensional enforcement approach, which should include the role of the macro and meso level institutions. On the basis of a normative evaluation of the Dutch legislative proposal on equal pay, recommendations are made on ways to enhance enforcement across all levels and ultimately close the gender pay gap.

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# 1. Introduction

In March 2021, the European Commission proposed a new directive aimed at enhancing and strengthening the application of the principle of equal pay for equal work. Despite the equal pay Directive 2006/54/EC and the Commission Recommendation on pay transparency (the ‘2014 Recommendation’), effective implementation and enforcement of equal pay between men and women appears to remain a significant challenge in the European Union (EU). In 2019, the gender pay gap is measured at an average of 14% in the EU-27 Member States (European Union: European Commission, 2021). According to the Commission’s assessment and evaluation of the 2006/54 Directive, some of the key obstacles to effective implementation of the equal pay principle, are lack of challenges by individuals in national courts, lack of transparency and lack of awareness and clarity (European Union: European Commission, 2020; European Union: European Commission, 2013). Moreover, EU action is limited by scope due to other ‘drivers’ of the gender pay gap, such as occupational segregation in the labour market, the constraints caused by domestic care responsibilities which are predominantly placed on women, and the fact that more women work part-time (Smith, 2012; Peruzzi, 2015; European Union: European Commission, 2020; European Union: European Commission, 2013). These drivers will be further explained later on in this thesis. The EU’s new proposed directive aims to address the implementation and enforcement deficits of the gender pay gap which have been identified in the evaluation and seeks the economic empowerment of women (European Union: European Commission, 2021).

In the context of the Covid-19 pandemic, and, more specifically, the consecutive economic crisis, the topic of equal pay requires added attention and consideration. This is because unequal pay results in women’s increased risk of being exposed to poverty, a persisting gap in pensions and overall long-term impact on quality of life (European Union: European Commission, 2021). It is premature to evaluate the long-term effect of the pandemic, but it is not unlikely that the economic crisis will only exacerbate these issues. What can be observed is that the Covid-19 crisis has exposed women’s economic vulnerability and the ingrained undervaluation of work predominantly performed by women. Thereby highlighting the social inferiority of what is considered women’s work and the increased financial vulnerability of women as a direct result from this. And women have been overrepresented as frontline workers (think about nurses, carers, cleaners, teachers) across the whole of the EU, experiencing added pressure at work while simultaneously being faced with an increased burden of domestic care

responsibilities, such as home-schooling children or caring for dependent family members (Arabadjieva, 2021). What is more, women are more likely to lose their jobs because they are employed under temporary or part-time contracts, and because some of the sectors hit the hardest by the pandemic are feminised sectors (e.g. tourism, hospitality, food services) (Wenham, 2020; Arabadjieva, 2021). In this context the newfound political saliency echoes the dire need for action. The Commission's proposal represents a political commitment to tackle the implementation and enforcement shortcomings. However, the elements contributing to the gender pay gap, aforementioned as 'drivers', tend to differ considerably per Member State (O'Reilly *et al.*, 2015; Boll, Lagemann, 2019). Therefore, a detailed analysis of the gender pay gap per Member State would be beneficial to create a better understanding of the country-specific characteristics regarding political and institutional structure, legal framework, socio-economic conditions, and labour market dynamics. Within the boundaries of this thesis, the focus of this study is on the case of the Netherlands and the analysis of political-institutional and legal- and judicial structures.

This topic gained increased (political) relevance in the Netherlands when earlier this year a bill was proposed to amend the Equal Treatment Act Men and Women by four members from opposition parties in the Dutch Parliament ("Tweede Kamer"). The bill (Ploumen *et al.*, 2021) is about equal pay for equal work or work of equal value for men and women, and it includes inter alia a duty for employers to demonstrate that in their company equal pay is given for equal work. Criticism from members of the coalition parties is largely targeted at this proposed duty<sup>1</sup> due to an expected increased administrative burden for the respective companies, but it also targets issues regarding privacy, proportionality and enforcement (Plenary Parliamentary debate ('Tweede Kamer debat'), 2021). The effectiveness and scope of the bill is questioned and there are worries regarding the burden of proof introduced by means of a certificate as well as the potential bureaucratic complexity and the measurability of equal work (Plenary Parliamentary debate ('Tweede Kamer debat'), 2021).

This thesis will focus on the two perceived gaps regarding the topic of equal pay for women and men. On the one hand, the obvious gap in pay received by women and men who perform equal work or work of equal value. On the other hand, the gap between judicial protection and legislation on equal pay and the actual implementation and enforcement. As will

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<sup>1</sup> This duty specifically means that companies with over 50 employees need to grant access to pay records when it is requested by an employee of that company and companies with over 250 employees need to obtain a certificate stating that equal pay for equal work is achieved within their company (Ploumen *et al.*, 2021).

become clear, these two gaps are closely interconnected and represent a micro- and macro-level perspectives on enforcement. The former gap concentrates on the notions of work of equal value, the effects of the pay gap on women's position in society, the obstacles related to equal pay, and the distinction between two different pay gaps identified in the literature. The latter gap focuses on the governance structures with which equal pay legislation is implemented, the causes of the observed gap in relation to legislation, effective implementation, judicial proceedings and enforcement. In the literature another distinction is made between two different types of the gender pay gap (GPG): the unadjusted GPG; and the adjusted GPG. More concretely, the unadjusted GPG reflects the pay gap attributable to varying personal or company characteristics, and the adjusted GPG reflects the pay gap that cannot be attributed to personal or company characteristics. How these two differ and what they mean exactly will be further elaborated on below. Interestingly, the literature primarily spotlights the unadjusted GPG and hardly attempts to unpack the adjusted GPG. Lack of general knowledge or information does not explain this hesitancy, since much has been written on the GPG in labour-economics literature. Connecting the key themes found in the literature on the GPG and using it as the basis for a country-specific analysis seeks to fill this observed research gap. The overarching goal of this research is to enhance our understanding of the noted shortcomings in equal pay legislation and the gaps in enforcement in the Netherlands. This is within the context of warranting the proper and effective application of the Commission's equal pay Directive 2006/54/EC. To this end, this thesis aims to contribute to closing the gender pay gap by offering recommendations based on the research conducted here.

What this thesis attempts to add to the existing compendium of academic research on this topic is a multidisciplinary analysis on why equal pay between women and men is not realised in the Netherlands, by looking explicitly at the Dutch legal and judicial configuration as well as the political and institutional governance. The disciplines addressed in this study include, law, governance, and to a lesser extent, economics. What inspired this study at first instance is a personal conviction of unfairness and injustice about the fact that women today are paid less than their male counterparts for equal work or work of equal value. And secondly, that despite the long-established equality norms, pay equality between women and men is not actualised in one single country in the EU. Considering this, the research question this thesis aims to answer is:

Why is the gender pay gap still prevalent in the case of the Netherlands, within the context of the EU, and how does the new Dutch legislative proposal try to remedy the implementation and enforcement gaps?

As such, there are essentially two research questions with the first part containing a theoretical dimension and the second a more normative one. In answering this question, this thesis is structured as follows. First, an analytical review of the relevant academic literature provides the theoretical framework upon which the main analysis is based. Alongside this, it outlines the key themes within the scholarly debate, identifies the research gap and justifies the first part of the research question. Next, the research design and methodology delineate the research methods and objectives of each chapter. Thereby, validating the decisions, selections, methods and processes made during the writing of this thesis. A recital of the relevant EU legislation and national legislation concerning equal pay accommodates the normative foundation necessary to answer the second part of the research question. Having established the theoretical- and normative framework as well as the applied methodology, the main analysis attempts to answer the research question by means of an in-depth case-study analysis of the Netherlands. This chapter will map the dynamics of the adjusted GPG in the Netherlands and assess the implementation and enforcement efforts, as well as evaluate the new legislative proposal on its legitimacy with regards to adopting effective action to close the GPG. In doing so, several sub-questions further structure the analysis. In consecutive order, they include: how is the GPG implemented and enforced in the Netherlands, and what are the key institutions in this context?; what are the causes of the adjusted GPG in the Netherlands?; and, does the Dutch legislative proposal address the causes of the GPG in the Netherlands and the subsequent enforcement deficits? Finally, based on the results of the analysis the last chapter will conclude with a brief summary of the acquired key insights and propose some recommendations on how to close the GPG directed at the Dutch Government. In spite of the study being targeted at the GPG in the Netherlands, the findings and subsequently deriving recommendations can have a broader meaning within the context of the EU.

## 2. Literature review

The objective of this literature review is to establish an understanding of the current debates and theories in the academic literature surrounding the GPG, its underlying causes, different distinctions and measuring methods. The following paragraphs will examine the research that surrounds this topic and will point out the respective gaps in the literature. In this light, it will become clear that little efforts have been made to attempt to explain the adjusted GPG. Additionally, the GPG differs not only between sectors (private vs public) and industries, it also differs significantly between EU countries. The EU's heterogeneity prevents making in-depth conclusions on the EU's GPG, since every country has a different institutional structure, legal framework and cultural values. Due to the differences between EU countries I have decided to focus my research solely on the Netherlands in order to fulfil an in-depth study on how implementation and enforcement is structured nationally. A country-specific analysis of the Netherlands will be outlined in chapter five. But first, this chapter will provide an analytical overview of the current academic context regarding the GPG, which will serve as the foundation of the analysis of this thesis.

### 2.1 Equal pay

Much research has been done on the GPG in the labour-economics literature, and its persistence in countries across the EU, though its existence has not been thoroughly explained despite more than 60 years of EU equal pay legislation. One of the main reasons why the GPG has remained quite stable over the past years is because women seem to be 'swimming upstream' (Plantenga, Remery, 2006; Smith, 2010). In other words, despite women's advancement in education and experience, they are now confronted with decentralised and individualised wage setting systems as well as a reduction of collectively agreed wages. The trend of a decentralised system and rise of performance-based pay structures may lead to more wage differences, which would in turn negatively impact the GPG.

There is a clear consensus in the literature regarding equal pay in the EU in that, despite there being little dispute on the perpetuating gendered differences in pay, there are still some parts that remain unexplained as to why a gap still exists and where this gap comes from. There are several personal and company characteristics to explain a pay gap which are considered 'observed' or 'explained', some include, but are not limited to, age, level of education, experience, previous career interruptions, bargaining skills and employment preference (Boll, Lagemann, 2019). This observed gap is also called 'the unadjusted gap'. According to a report

published by the European Commission (2016) and an article by Boll and Lagemann (2019), the majority of this observed gap is unexplained. In other words, the gap is due to something other than personal or company characteristics. Another frequently used term for this unexplained gap is ‘the adjusted gap’, because the personal and company characteristics are adjusted for and equalised, so that they do not account for the pay gap. Other ways the adjusted GPG is described in the literature are ‘the remuneration effect’ or ‘the effect of discrimination’. The adjusted gap essentially represents a difference in pay between men and women which cannot be accounted for through variations in education, employment status (part-time vs full-time), type of job, level of experience.

The fact that these characteristics provide justifiable differences in pay, does not mean they are void of (indirect) discrimination (Smith, 2012; Smith, 2010; Boll, Lagemann, 2019; Rubery, 2015; Rubery, Grimshaw, Figueiredo, 2005). Much like discrimination women are faced with many other disadvantages in the labour market specifically, which consequently impact their earnings. These should not be confused with the personal characteristics mentioned above. Rather, these disadvantages represent the more overarching difficulties women face in general in their professional lives, often caused by indirect discrimination, and are therefore worth mentioning here. They include low female employment rates, lower earnings and fewer hours of paid work (Landmesser, Orłowski, Rusek, 2020). Moreover, labour market segregation (horizontal and vertical), wage setting systems and undervaluation of female-dominated occupations constitute other disadvantages in the labour market which exacerbate the GPG (Arabadjieva, 2021; Peruzzi, 2015; Rubery, Grimshaw, Figueiredo, 2005). Before going into more detail on the disadvantages women face and how they impact gender-based pay differences, the following paragraphs will elaborate on the adjusted and unadjusted GPG.

## 2.2 Adjusted vs unadjusted pay gap

A distinction is made in the literature between the unadjusted GPG and the adjusted GPG. This distinction is, on the one hand, attributed to the different characteristics of men and women that lead to unequal pay (unadjusted). To clarify, the personal characteristics attained by women may be less profitable compared to men because they are shaped by gender-biased notions on work-family relations and care responsibilities. The adjusted GPG, on the other hand, represents the gap in pay between women and men in similar circumstances and with similar characteristics, which cannot be explained through personal or company-specific characteristics. To elaborate, “The general aim of adjusting the gender pay gap is to control for a range of personal characteristics which may differ between men and women and which may

therefore explain some of the differences in average pay between men and women” (Grimshaw, Rubery, 2002). In some Member States, these personal characteristics are quite similar between men and women. Yet, in other Member States they may vary considerably (Directorate Social Statistics, 2018). They may also vary significantly per sector.

The EU uses statistics provided by Eurostat which are based on data from the Structure of Earnings Survey (SES), measuring the unadjusted gap through calculating the difference between the average gross hourly earnings by women and men, as percentage of male gross earnings (Eurostat, 2020; Landmesser, Orłowski, Rusek, 2020). Despite the fact that the majority of studies on the GPG by academics as well as the EU itself are on the unadjusted gap, there are also some efforts aimed at calculating the adjusted gap. A common, well-established method used by many is the Oaxaca-Blinder decomposition method (Hedija, 2018; Leythienne, Ronkowski, 2018; Boll *et al.*, 2016; Landmesser, Orłowski, Rusek, 2020; Boll, Lagemann, 2018). This method divides the GPG in an unadjusted (explained) component and in an adjusted (unexplained) component (Hedija, 2018; Boll *et al.*, 2016). More specifically, a static decomposition is made of the gap that is explained by different characteristics of workers and of the gap that remains unexplained (Boll, Lagemann, 2018). The first component assesses the wage structure by displaying the relationship between the hourly earnings for each group separately and the observed average characteristics of women and men (Leythienne, Ronkowski, 2018). The difference in these measured characteristics between women and men, weighted by the male benchmark of earnings and wage structure, represents the explained gap (unadjusted GPG). The second component represents the unexplained gap and is further divided into two sub-components. The first sub-component measures the income of a female worker with average characteristics if she had been treated as a male worker, compared to what she actually earns now (Leythienne, Ronkowski, 2018; Landmesser, Orłowski, Rusek, 2020). Simply put, this is the difference in income of women and men with similar average characteristics. The second sub-component captures the effect of ‘statistically unobserved wage determinants’, such as institutional structure, negotiating skills and personal abilities (Boll, Lagemann, 2018).

In fact, Eurostat also uses the Oaxaca-Blinder method to calculate the adjusted GPG in the EU based on data from the SES (Directorate Social Statistics, 2018). The figure below illustrates how this translates into statistics based on SES data from 2014 and structures it according to the information on the differences between the unadjusted and adjusted GPG addressed in this sub-chapter. To elaborate, Eurostat’s calculated GPG represents the

unadjusted GPG which can in part be explained by personal- and company characteristics and in part by discrimination. The discrimination part is the same as the adjusted GPG which stands at 11.5% and is not further explained or decomposed, unlike the unadjusted gap (see Table 1). This essentially reflects the research gap. In order to clarify and visualise the decompositions used to explain the GPG by Boll and Lagemann (2018, Figure 3) as well as by the Oaxaca-Blinder method, I constructed the figure below based on the statistics from the Directorate Social Statistics (2018).

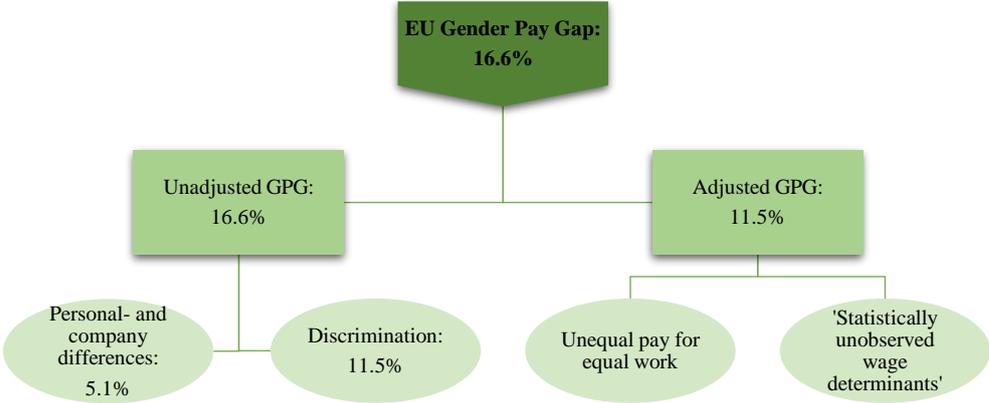


Figure 1: Gender Pay Gap decomposition using the Oaxaca-Blinder method based on data from 2014

	Unadjusted GPG	Explained GPG										Unexplained/adjusted GPG
		Overall explained gap	Personal and job characteristics						Enterprise characteristics			
			Age	Education	Occupation	Job experience	Employment contract	Working time	Economic activity	Enterprise size	Enterprise control	
<b>EU28</b>	<b>16.6</b>	<b>5.1</b>	<b>-0.1</b>	<b>-1.2</b>	<b>-0.4</b>	<b>0.1</b>	<b>-0.1</b>	<b>2.1</b>	<b>5.4</b>	<b>-0.8</b>	<b>0.0</b>	<b>11.5</b>

Table 1: Decomposition of the unadjusted GPG based on data from 2014 (source: Directorate Social Statistics, 2018)

A more elaborate decomposition of the unadjusted GPG is depicted in Table 1. Here it is illustrated that only 5.1% of the unadjusted GPG is attributable to personal- and company characteristics. These characteristics are measured through age, education, occupation, job experience, employment contract, working time, economic activity, enterprise size and enterprise control. When the differences in these characteristics are accounted for, 11.5% remains that is not explained. What can be drawn from this is that the difference between the calculated unadjusted and adjusted GPG is not so clear-cut. Rather, the 11.5% discrimination part of the unadjusted GPG is also used to indicate the adjusted GPG, as it represents

unexplainable gender-based wage differences. As such, this part of the wage gap is the subject of analysis in this study.

In the literature it is often assumed that wage differentiation is simply caused by gender-based discrimination, yet this assumption can be quite misleading. Since, despite the fact that the adjusted gap is often attributed to (wage) discrimination (see Figure 1, unequal pay for equal work) (Hedija, 2018), it is not the only factor which contributes to it. Think about negotiating skills, the size of the family (the number and age of children) and personal abilities which are also likely to influence the adjusted gap (see Figure 1, ‘Statistically unobserved wage determinants’) (Leythienne, Ronkowski, 2018). And while some include these factors in the Oaxaca-Blinder method (Boll, Lagemann, 2018; Directorate Social Statistics, 2018), others do not mention them in the way they implement this method (Leythienne, Ronkowski, 2018; Landmesser, Orłowski, Rusek, 2020). The inconsistency of methods used to measure the GPG – methods measuring the unadjusted vs methods measuring the unadjusted and adjusted GPG – blurs the debate. But it can also have deeper implications for society. Meaningfully, the way the GPG is measured or calculated is not only relevant for econometric accuracy and consistency, but also because the chosen structural indicator may have a significant impact on national and EU governance decisions, on follow-up strategies, or on the assessment of progress or regress (Peruzzi, 2015). The unadjusted GPG purely presents a simple indicator for inequalities between wages of women and men and is therefore widely used by policy-makers (Directorate Social Statistics, 2018). As it follows, the EU adopts the GPG in unadjusted form as a structural indicator for, e.g. the ‘follow-up of the European Strategy for growth and employment’ (Commission Communication, 2007). Moreover, this indicator is included in the European Pillar of Social Rights Indicators Scoreboard which monitors the performance of Member States on their implementation of the rights defined by the pillar, in this case, equal opportunities and access to the labour market. Claiming that the GPG in unadjusted form offers a general picture of ‘gender pay equality’ in order to legitimise its consistent use as a structural indicator while simultaneously acknowledging that more research is needed to identify ‘factors related to the GPG’ (Commission Communication, 2007), reveals the EU’s own lack of clarity and direction. The fact that this indicator does not resemble a calculation of the rough GPG (unadjusted and adjusted) makes it a questionable instrument to use for monitoring purposes, policy-making, assessment and governance decisions on strategies. This applies to EU level as well as Member State level.

Although, since the unadjusted GPG is not entirely excluded from discrimination this indicator does measure potential discrimination in the context of ‘unequal pay for equal work’ (Directorate Social Statistics, 2018). Nevertheless, this does not negate from the fact that the rough GPG is impacted by many other societal aspects relating to labour market characteristics, undervaluation of female-dominated occupations, role of social partners, collective bargaining, trade unionisation, collective labour agreements and wage-setting systems that still need to be unpacked. For example, in relation to wage-setting, one study showed that a general reduction in pay levels over time may eventually lead to a reduction of the GPG as well, however in reality this effect does not mean that women are better off (Amado, Santos, São José, 2018). Concretely, it is possible to observe a decrease in the GPG due to low pay levels of male workers, while women’s pay simultaneously remains unchanged and does not improve (Amado, Santos, São José, 2018; Smith, 2010). Evidently, the widespread use of the unadjusted GPG hinders obtaining a comprehensive understanding of the complexity and the dynamics of the rough GPG.

The EU’s persistent political use of the unadjusted GPG indicates a reluctance to analyse the more complex and institutional and political-sensitive variables which account for the adjusted GPG. A potential reason for this could be the lack of sufficient information about the factors related specifically to the adjusted GPG (Commission Communication, 2007), but this is merely speculative. In the case of the Eurostat data agency there is a similar reluctance. The reason for this is the fact that there is no scientific evidence, nor a consensus on which adjustment methods to use (Peruzzi, 2015). However, despite the fact that the majority of the GPG remains unexplained (Boll, Lagemann, 2019), there is little hesitancy among EU policy-makers and strategists to continue to use the unadjusted GPG. This is quite problematic for a number of reasons, one of which includes the fact that the unadjusted GPG has remained remarkably stable over the past approximately ten years, compared to the adjusted GPG which has shown a slight decrease (Boll, Lagemann, 2019). As a result, using the unadjusted GPG as the exclusive structural indicator gives a distorted view of the progress and development of gender pay equality since it does not offer a complete picture. Meaningfully, the GPG attributable to discrimination or ‘statistically unobserved wage determinants’ is slowly decreasing, which suggests it is more susceptible to changes in for instance law, policy or regulation. Again, for this reason, the adjusted GPG is an important subject of analysis. Another reason is because an analysis which disregards any assessment of personal characteristics of an employee leads to skewed results and is incompatible with the anti-discrimination with the EU’s legal framework

(Peruzzi, 2015). To elaborate on this, the EU's judicial protection system operates on the basis of a human rights-based approach, or 'individual rights-based approach'. In other words, because of the EU's focus on protecting the rights of individuals (EU Action Plan on Human Rights and Democracy 2020-2014), the European Court of Justice relies on a thorough assessment of an individual's situation for its judgement. The individual rights-based approach however imposes limits for victims to make effective claims for equal pay. Some ways in which this happens is because individuals consequently, due to lack of legal aid, need to rely on national equality bodies or trade unions to help them if they do not have the resources to pursue court action. Alternatively, uncertain outcomes, victimisation, lack of clarity of legal concepts, burden of proof and low compensation all characterise this system. While the law encourages individuals to achieve the rights enshrined in equal pay legislation, the judicial system essentially discourages this.

To briefly sum up, Eurostat measures the GPG as the difference in hourly pay. Despite it not being an accurate representation of the rough GPG, this does reflect a certain part of the adjusted GPG, as it indicates the pay discrimination women face regardless of the fact that more women work part-time and therefore have fewer annual earnings. However, in case of occupational segregation it lacks the necessary nuance to accurately measure the GPG because it does not take into consideration that female-dominated occupations are generally lower paid (Grimshaw, Rubery, 2007; Müller, 2019). And so, for example, men working in female-dominated occupations are generally lower paid, which may lead to the GPG being smaller compared to the situation if there was not an overrepresentation of women in that specific sector.

### 2.3 The gender pay gap in the EU

The gender pay gap is measured at 14% in the EU, yet the annual earnings of women compared to men present a much higher difference of 39.6% (Eurostat, 2020b). This is caused by the fact that more women work part-time and take more career breaks, which in turn translates into a bigger gap in annual earnings and pensions (Arabadijeva, 2021; Eurostat, 2020). As a consequence, women have a higher risk of falling into poverty. Lower earnings and observable gender differences in bargaining skills (Boll, Lagemann, 2019; Rubery, 2015) ultimately lead to a weak economic position.

Female employment rates have been consistently lower than men's over the past 20 years (Eurostat, 2021). Persisting gender norms and culturally appropriated gender roles have underpinned this, specifically by the 'male-breadwinner' model and the 'women being in

charge of the household' convictions. Following from this, women have been economically disincentivised to work because of national taxation systems where second earners would have a high tax on their salary due to the fact that they are subject to a marginal tax rate derived from their husband's income (Smith, 2010). In other words, women's income was taxed higher because it was considered an additional income of the (traditional) household consisting of a husband, being the highest-earner and primary breadwinner, and a wife, staying at home to take care of the children and the home. Furthermore, high costs of childcare and other care services also financially disincentivise women to work more, since they tend to bear the biggest burden of care responsibilities in the family (European Commission, 2016). Finally, the fact that women's wages are systematically lower is not encouraging them to join the labour market either.

In this light, it is important to examine how wages are determined and why women are disadvantaged by the used methods. Since, these methods can indirectly have a significant impact on the GPG as well as women's participation on the labour market. The EU's Trojka policies pushing towards linking wage to productivity and promoting decentralisation of collective bargaining (Conley, *et al.*, 2018) are unlikely to have had a positive effect on closing the GPG and are even in contradiction with the EU's policy goals in the area of equal pay (Peruzzi, 2015). In fact, companies which utilise these type of wage settings methods employ fewer women (Peruzzi, 2015). Additionally, detecting a gender pay gap in decentralised wage systems is more difficult because of the fact that negotiations will happen on company level and are therefore more prone to being guided by productivity and performance (Peruzzi, 2015; Rubery, Grimshaw, Figueiredo, 2005). Decentralisation has also been linked with increasing wage differences (Smith, 2012; Peruzzi, 2015; Rubery, Grimshaw, Figueiredo, 2005). Though, wages are not determined through universal market fluxes but rather through institutional processes, e.g. managerial action, statutory regulation, employment contracts (Rubery, Grimshaw, Figueiredo, 2005). Not surprisingly, studies have also shown, country-specific policies and institutions, especially wage-setting systems, may account for variation in the adjusted GPG across different EU countries (Hedija, 2017; Arulampalam, Booth, Bryan, 2007; Christofides, Polycarpou, Vrachimis, 2013). More specifically, from a governance perspective, national wage-setting systems (collective labour agreements, the role of social partners, trade unions and employer's associations) and national policies, for example childcare provisions, parental- and maternal leave and leave to take care of a dependent relative, shape the way a country addresses not only the GPG but also female labour market participation in general. The

fact that these policies and institutions are not gender-neutral needs to be acknowledged in order to resolve these gaps. Wage-setting systems in particular tend to be based on ‘male-biased criteria of assessment’ and reward the ‘male-model’ of continuity of employment (Grimshaw, Rubery, 2007). Moreover, pay structures are likely to be gender-biased because it is often men who have negotiated them, and men might not be fully aware of the inherent bias, which in turn allows for the continuation of pay discrimination of female work (Müller, 2019). Finally, often women’s skills (such as caring, nurturing, educating) are considered ‘natural’, rendering those skills invisible and not-considered in determining pay (Grimshaw, Rubery, 2007). This is closely connected to the undervaluation of women’s work.

Historically, work in female-dominated sectors has been undervalued, in part because of the above-mentioned wage-setting and job evaluation systems (Müller, 2019; Arabadjieva, 2021). Undervaluation here refers to the inadequate appreciation and recognition, as well as insufficient remuneration of the work performed in female-dominated jobs (Müller, 2019). One of the causes of undervaluation Müller (2019) addresses relates to the perceived lower status of women in society, making the work predominantly performed by women also inferior to work predominantly performed by men. Another factor related to this is the gender-stereotyping of characteristics with female-dominated occupations (Müller, 2019; Smith, 2012; Smith, 2010; Arabadjieva, 2021), i.e. the helping and caring character which is perceived to come naturally within women and is often associated with e.g. health and care work. Consequently, the skills involved in this type of work are not recognised or formally certified. Undervaluation is seen to have an impact on the wages of jobs in female-dominated sectors (Smith, 2010; Arabadjieva, 2021), but even in (formerly) male-dominated occupations where women have made considerable inroads, it was noted that this feminisation was paired with a decline in pay (in many cases also for men) (Grimshaw, Rubery, 2007; Arabadjieva, 2021). Müller (2019) argues that it is not only the occupational sector which is undervalued, but it is also women’s status in society as a whole; “without a change in the perception of female work more generally, undervaluation follows women to other sectors” (p. 39).

Differences in wages between men and women are reinforced in numerous ways. A well-known factor, as is mentioned briefly above, is the segregation within the labour market. On the one hand, there is horizontal segregation, where women and men are confined to different parts of the labour market due to stereotyping which often leads to women’s work being underpaid and undervalued (Smith, 2012). In this light, women are more likely to occupy positions in lower-paid sectors compared to men (Arabadjieva, 2021). On the other hand, there

is vertical segregation (or hierarchical segregation). This occurs when women tend to occupy more lower-level positions within the same sector and which limit women in their career advancements (Arabadjieva, 2021; Smith, 2012). An example of this is the underrepresentation of women in management boards or CEO positions.

Segregation can also be observed by sector. Larger disparities between wages of men and women are observed in the private sector, whereas in the public sector there are smaller disparities (Peruzzi, 2015; Hedija, 2017). Women's general occupational overrepresentation in the public sphere emphasises the negative effect of horizontal segregation on equal pay here. In any case, workers in female-dominated sectors or feminised sectors generally tend to have lower pay rates (O'Reilly *et al.*, 2015; Grimshaw, Rubery, 2007; Arabadjieva, 2021; Brynin, 2017). Think about (health) care and services, education, social work, hospitality as opposed to higher pay in male-dominated sectors, like finance, IT, engineering. The commonly acknowledged and widespread undervaluation of women's work can also be tied to sectoral segregation (O'Reilly *et al.*, 2015; Arabadjieva, 2021; Hedija, 2017). The historical and cultural roots of this phenomenon reflect a more indirect form of segregation leading to the exacerbation of pay discrimination as well as horizontal segregation (Arabadjieva, 2021).

Wage-setting systems, undervaluation and sectoral segregation undoubtedly retain pay differences between women and men and represent deep-rooted societal structures which are incompatible with the fundamental equality rights enshrined in the EU Treaties. Observations conclude that the GPG has remained rather stable in the EU (Smith, 2012, O'Reilly *et al.*, 2015; Boll, Lagemann, 2019). The relatively soft governance approach regarding issues of gender inequality is criticized due to the resilience of the pay gap (Smith, 2012). Comparisons to enforcement of laws and legislation in areas like monetary policy and financial markets present a stark difference between the relatively soft legal instruments of equal pay and the harder legal instruments of monetary and economic regulation (Börzel, 2021). Despite its commitment to equal pay, the EU has not managed to establish equal pay for equal work or work of equal value in a single Member State. One of the key obstacles identified in the literature to closing the GPG is transparency. Since a lack thereof prevents workers from bringing equal pay claims before courts and hinders the overall implementation of the directive by making it difficult to identify pay discrepancies (Arabadjieva, 2021). Other obstacles include, limited resources for victims of pay discrimination to bring an action before court, such as lack of legal aid, length and cost of proceedings, burden of proof, lack of trust, uncertain outcomes. Another obstacle is

the lack of clarity concerning the concept of 'equal work or work of equal value' (Arabadjieva, 2021; COM/2013/0861).

## 2.4 National conditions relating to the GPG

What can be concluded from the paragraphs above, is that quite a lot has been written on the causes of the GPG and the complexity of this topic has made the academic discussion somewhat turbid. More specifically, neglecting to differentiate between the unadjusted and adjusted GPG results in a vague comprehension of which type of definition or explanation of the GPG is actually under debate. Generally, the unadjusted GPG is on the political agenda of policy makers, while the adjusted GPG seemingly has more predictive value to pinpoint the causes of the GPG. Nevertheless, many efforts have managed to explain some of the causes of the GPG, yet, with regards to the adjusted GPG specifically, much remains intangible. It seems like tackling the mystery of the adjusted GPG is preferably avoided. There is no deficit when it comes to calculating and measuring the adjusted GPG, yet there is scarce literature on explaining and examining its causes. Moreover, the EU's heterogeneity prevents a concrete explanation on the causes of the rough GPG. Instead, a country-specific analysis which examines national institutions, laws, politics and agencies will provide a more concrete overview on why there still is a GPG and why it is so difficult to achieve pay equality. Consequently, the following paragraphs will examine the aforementioned national characteristics which impact the GPG. Specifically, the role of institutions. These represent some of the aspects related to the adjusted GPG and attempt to further illustrate the complexity of this issue.

### **Role of institutions**

Earlier in this chapter wage-setting institutions including trade union mobilisation, and collective labour agreements were addressed as national characteristics that correlate with the adjusted GPG. Additionally, the quality of law enforcement and legislation also impact the GPG. In the context of gender pay equality in this study, these aspects suggest a country's institutional framework. In the literature, the role of institutions is highlighted and emphasised as one of the most important formal structures in a Member State acting as a variable which affects the GPG (Hedija, 2018; Peruzzi, 2015; Hedija, 2017; Plantenga, Remery, 2006; Strich, Villadsen, 2018; Christofides, Polycarpou, Vrachimis, 2013; Blau, Kahn, 2003).

There is an important relationship between the GPG and a country's wage-setting systems and work-family reconciliation policies (Arulampalam, Booth, Bryan, 2007; Hedija, 2017; Hedija, 2018; Christofides, Polycarpou, Vrachimis, 2013). One example of this, is that

policies aimed at improving conditions for working mothers have a more positive effect on the GPG than policies like maternity leave (Redmond, McGuinness, 2019). Another example of this is the observed and increased level of women's wages in countries with "higher union density and wider collective bargaining coverage" (Grimshaw, Rubery, 2007, p. 137). It is also important to mention there are interconnected social norms and values in these circumstances, such as egalitarianism and solidarity. One study shows for instance, there are still widespread and ubiquitous gender-biases related to perspectives on work-family balance and childrearing: women are more likely to make a trade-off between favourable conditions on balancing work and family life and high pay (Redmond, McGuinness, 2019).

Continuing on this note, the role of informal institutions is highlighted; that is socio-cultural institutions. Social and cultural norms undeniably impact the GPG through the perceived inferior status of women's work and by shaping dominant gender-norms that are pervasive in society. In this light, Smith (2012) states that "soft law approaches might bring greater flexibility in developing policies that fit the varied institutional and socio-economic arrangements across the EU; in the case of gender equality, there is unlikely to be a one-size-fits all policy solution." (p. 368). Yet, despite the contrary it has also been noted that a progressive improvement of the rule of law tends to decrease gender pay disparities and lower the adjusted GPG specifically (Hedija, 2018). More effective enforcement and higher quality legislation leads to better compliance (Hedija, 2018).

Principally, the EU is not unaware of the dynamics between soft- and hard governance approaches and their respective effectiveness and potential trade-off. Peruzzi (2015) explains:

"The hybridisation of models in the EU approach towards equal pay is meant to enable a combination of a human rights perspective [...] and a pro-active model, aimed at addressing the structural causes of inequality collectively and institutionally. The latter is particularly relevant in the field of gender inequality, 'which affects individuals as a result of their group membership and where inequality is frequently a consequence of institutional arrangements for which no single actors is "to blame".'" (p. 442).

This view by Peruzzi represents a new approach to governance characterised by hybridisation of models, yet it could also provide inspiration for a more hybrid enforcement approach.

### **3. Research design and methodology**

#### **3.1 Research design**

The research design adopted in this thesis is qualitative in nature, as it is explanatory and descriptive and aims to analyse and explain the GPG (Lowhorn, 2007; Ochieng, 2009). This type of research design is inductive rather than deductive (Maxwell, 2012; Lowhorn, 2007; Ochieng, 2009). In other words, it does not involve a fixed and linear design model where an initial hypothesis is implemented and assessed through a strict sequence of steps, instead it applies a flexible research approach which allows for interaction, adaptation and reflection during every stage of the process (Maxwell, 2012). Unlike in a quantitative research design, in this thesis collection of data, the development of theory and the ‘elaborating or refocusing’ of the research question happens to a large extent simultaneously (Maxwell, 2012). The different components of the research conducted in this thesis are interconnected and integrated with one another. This type of research design allows for a “do-it-yourself” approach (Maxwell, 2012) which is one-of-a-kind and unique rather than fixed or a one-size-fits-all model. Nevertheless, the methodological steps undertaken in this study are explicitly described in order to fulfil the validity and legitimacy norms of research.

Following from this, the research design is comprised of three main components. Firstly, the literature review will explore the relevant literature and outline different perspectives. As a result, the key themes within the academic discourse will be highlighted. From this, a research gap is identified and the need for further research is concluded. Its primary purpose is to provide the necessary background information on the GPG in the EU before examining the topic in depth within the specific case-study of the Netherlands. This way the reader is not only equipped with a theoretical frame of reference but also with the respective jargon. Furthermore, the analysis conducted in this thesis touches upon political- and institutional- as well as predominantly legal and judicial structures and developments. Therefore, it is imperative to demarcate the legal framework within which the analysis is executed. For this purpose, national and EU legislation on equal pay and pay equity between women and men will be framed providing a clear overview of the existing legal instruments. This is relevant for the case-study analysis as well as the evaluative- and normative analysis for it sketches the status quo before examining why equal pay is currently not yet achieved and subsequently suggesting how it could be achieved in the future. In such a context, the legal framework complements the literature review, which establishes the broad theoretical framework, by constructing the normative framework which produces the basis for the evaluation or recommendation

(Taekema, 2018). Similar to the literature review, it is exploratory and descriptive and it distinguishes from the main analysis, which is evaluative and analytical.

The second phase consists of the case-study, i.e. the main analysis. This chapter analyses why a gender pay gap still exists in the Netherlands by looking at political and institutional causes and national legislative landscape. Adopting a case-study analysis will facilitate the thorough study of a single-unit “with an aim to generalise across a larger set of units” (Gerring, 2004). The primary reason for the choice of the single-case unit of the Netherlands is because it allows me to read primary sources, such as national laws, regulations, official documents and reports from national institutions, in my native language, given my own Dutch nationality. This would not have otherwise been possible had the case-study been France, for example. Moreover, the secondary reason is related to the legislative proposal on pay transparency that has been issued in March 2019 by members of the Dutch Parliament (‘Tweede Kamer’), awarding this topic with a newfound notion of saliency. Finally, the third reason for this choice is that while much has been written on the GPG in the labour-economics literature, case-study analysis on gender-based pay discrimination examining specifically the role of legislation and judicial efficiency in a country-specific context represents a research gap. In addition, as the previous chapter indicates, the GPG is a very complex societal phenomenon which correlates with aspects of the labour market, cultural norms and values (gender-roles), national policy and legislation, institutions and political government. Hence, an in-depth country-specific analysis is needed in order to draw concrete conclusions on the nature and causes of the GPG.

The case-study research design requires careful selection and consideration, taking full account of the methodological trade-offs, such as depth over breadth or exploratory rather than confirmatory research (Gerring, 2004). According to Gerring (2004), it is in fact in ‘selection’ and ‘definition’ where case-study research differentiates itself from other methods. He argues that a case is constructed from a single-unit whilst remaining mindful of inferences that extend beyond the official scope of research into other similar units. This is also in accordance with the ‘double function’ of case-studies, where on the one hand they study the single-unit and on the other hand they study a broader collection of units (Gerring, 2004). In the context of this thesis, the study of the Netherlands prioritises depth and exploration while simultaneously aiming to draw conclusions which can apply to the larger set of units, i.e. the EU.

Finally, the third phase is the evaluative- and normative analysis where the information accumulated in the previous chapters will be used to examine the Dutch legislative proposal. The observations from the case-study analysis will serve as a benchmark for the evaluation. In

other words, in this chapter the new Dutch legislative proposal will be evaluated in order to assess whether it addresses some of the previously observed root causes of the GPG. Subsequently, following the evaluation, recommendations suggesting additional measures in order to remedy gender-based pay inequality will be composed. The recommendations exhibit the measures that need to be taken in order to redress the GPG in the Netherlands. The primary purpose of these recommendations will be directed at the Dutch government, but like the previous paragraph has indicated they can also potentially apply to the EU.

### 3.2 Methodology

The first component of the research design is characterised as a literary analysis and is further specified by Wolfswinkel, Furtmueller and Wilderom's literature-review theory (2013). Gathering the necessary knowledge from the literature in order to fully grasp the complexity and ramifications of the gender pay gap, as well as establishing the theoretical foundation of this thesis, is presented in the literature review. This is to manifest a comprehensive body of knowledge based on existing academic research and will substantiate the research question of this thesis and the need for further research on this topic.

The method used for the literature review is consistent with Wolfswinkel, Furtmueller and Wilderom's (2013) 'Grounded Theory Literature-Review Method', consisting of five stages. Using Grounded Theory as the underlying rationale facilitates a relatively open review of the literature where key themes surface during, rather than before, the 'analytical process of substantive inquiry' (Wolfswinkel, Furtmueller, Wilderom, 2013).

Moreover, the five stages include 'define', 'search', 'select', 'analyse' and 'present'. As the first step in the define stage (step 1.1, see Table 1 Appendix), the criteria for inclusion or exclusion ought to be established. In practice, this means that literature covering the EU<sup>2</sup> and written during this century is selected for inclusion and consequently, literature covering areas outside the EU and written before the early 2000's are excluded. The logic behind this is because countries outside the EU do not fall under the EU's unique legal system. And literature written before the early 2000's is unable to include some important legal developments in the field of equal treatment and equal pay, such as Directive 2006/54/EC and the 2014 Commission Recommendation on pay transparency and the gender pay gap. The second step in the define stage (step 1.2) is to identify the appropriate field of research which, in the context of this thesis, is related to social sciences (political science and governance), legal analyses (law) and, to a

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<sup>2</sup> The only occasional exception made here is the UK.

small degree, labour-economics (economics). The third step in the define stage (step 1.3) is to determine the sources and databases. Selected here as the main sources are Google Scholar, JSTOR, WorldCat UU, and SAGE Journals. The final and fourth step in the define stage (step 1.4) decides on the specific search terms. For finding relevant articles I used the following search terms: equal pay, gender pay gap, equal pay legislation, EU, adjusted gender pay gap, wage discrimination, wage gap, wage inequality, equal pay for equal work, equal pay law. Next, the second stage ‘search’ (step 2.1) applies the information from the ‘define’ stage, i.e. it consists of the actual search through the determined sources and online databases. Constant refinement and adjustment of stage 1 during the search stage is inevitable. Followed by this is the third stage, ‘select’ (3.1), where the literature is selected for the review. Selection is done by filtering out doubles, filtering out the irrelevant articles by reading the titles and abstracts, refining the sample even further by reading the whole articles and backward and forward citations. The fourth ‘analyse’ stage is the heart of the literature review (Wolfswinkel, Furtmueller, Wilderom, 2013). The first step (step 4.1) of this stage is where the selected literature is examined and it has become evident what the core elements and key themes of the academic debate on gender pay equality are, specifically in relation to its causes, consequences and effects, relevant actors and specific characteristics. This is called ‘open coding’. Naturally following from this, is defining the interconnectedness and the deeper categorisation of the key themes in sub-categories, i.e. axial coding (step 4.2). The last step in stage four is ‘selective coding’ (step 4.3) and this is where the connections between the key themes as defined in the previous step are identified and developed. Hence, the theorisation and reasoning with which the phenomena of the GPG is explained is developed here. Consistent with Grounded Theory, the analysis stage attempts to draw from the literary research (data) a coherent theory explaining a particular phenomenon (Glaser, Strauss, 2017). Similar to the first and second stage, the three steps in the analysis are intertwined, leaving room for constant refinement of the concepts, categories and connections (Wolfswinkel, Furtmueller, Wilderom, 2013). Finally, the last stage is ‘present’ and firstly consists of presenting and structuring the content of the analysis (step 5.1). And secondly, it consists of structuring the literature review within the bigger paper (step 5.2). In step 5.1, the discovered insights and accumulated information is shared and structured, reflecting the knowledge in the specific area. Step 5.2 organises the literature review by positioning it within the broader outline of the paper, which usually becomes clear through an introduction, method section and conclusion. However, within the context of this thesis, the literature review is not the main analysis, making its position and function within this paper slightly different from Wolfswinkel, Furtmueller and Wilderom’s (2013) intention. The

intention of the literature review here is to establish the theoretical framework for the analysis by illuminating the key themes and main perspectives on the topic. In other words, rather than embodying the main analysis, the literature review acts as a tool for the main analysis.

The method used for the second component of the research design is an in-depth case-study analysis, guided by Gerring's (2004) case-study research theory. Using a single-unit case-study allows for a thorough, albeit demarcated, study of the Netherlands. Demarcating is necessary here due to limited space. Examining the whole of the Netherlands with all its history, socio-cultural landscape, historical background, labour market economics, traditions and norms and values would require several books worth of research. This would go beyond the scope of this thesis. Hence, the case-study analysis will focus primarily on the political-institutional and legal and judicial framework of the Netherlands. Effectively this means that political institutions as well as trade unions, employer's associations, work councils and equality bodies are identified and analysed, specifically concerning how they relate to the GPG. This involves researching the functioning and recent developments of these institutions and their role in progressing, stagnating or even regressing equal pay between women and men. Understanding the shortcomings of current equal pay enforcement efforts in the Netherlands and the workings of national institutions aids the ensuing evaluation of the Dutch legislative proposal.

The reason why the case-study analysis features well in this thesis is because it is not possible to examine the Dutch legal framework without taking into account the larger unit, the EU. This is because of the principles of direct effect and supremacy (or precedence), meaning that as a member state of the European Union, the Netherlands is to a large extent bounded by EU legislation, (treaty) provisions, directives and regulation. These principles were introduced in order to ensure the effective implementation of EU legislation. Direct effect<sup>3</sup> means that every EU citizen can invoke an EU provision before a national court, independent of whether that provision is adopted into national law. The supremacy (i.e. precedence) principle<sup>4</sup> ensures the superiority of EU legislation over national legislation. And it applies to all pieces of binding legislation. Accordingly, a clear overview of the relevant EU legislation is indispensable. Inherent to Gerring's case-study research design (2004) it is necessary to have some knowledge about the larger set of units in order to identify a unit for specific analysis and to be able to make 'plausible causal hypotheses' (Gerring, 2004). Though caution must be executed to

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<sup>3</sup> This principle has been enshrined by the European Court of Justice in the *NV Algemene Transporten Expeditie Onderneming van Gend en Loos v. Nederlandse Administratie der Belastingen* case (Case 26/62).

<sup>4</sup> Similar to the direct effect principle, this principle has also been enshrined by the European Court of Justice in the *Flaminio Costa v. ENEL* case (Case 6/64).

prevent methodological blurriness between the formal unit (the studied single case: the Netherlands) and the informal units (the larger set of units or additional units: the EU) (Gerring, 2004). Within the context of this thesis, blurriness between the units is unlikely. Yet, some attention must be paid to this nonetheless during the analysis of the Netherlands, where descriptive and explanatory analysis is combined with normative analysis. In an effort to prevent blurriness, these two analysis with each their respective methodology is divided into subchapters.

Lastly, the method for the evaluative- and normative analysis is guided by Taekema's (2018) theory on the frameworks for legal research. This chapter evaluates whether the new legislative proposal addresses and aims to resolve some of the current legal shortcomings. Through establishing the normative framework, critical points in the proposal are raised which ultimately lays the foundation for the concluding remarks, i.e. recommendations. Acting as guidelines are the normative questions regarding the positive and negative aspects of the law (evaluative) and subsequently determining what could be improved (normative). In order for this assessment to be logically substantiated it is important to have a clear overview of the current legislative framework to establish the basis for comparison. The next chapter is directed at this objective.

## 4. Legislative framework

The EU has a long history of equal treatment legislation and has even appropriated its merit to fundamental principles such as equality, solidarity and freedom. This chapter outlines the main pieces of legislation in the area of equal pay between women and men specifically. The first sections describe EU legislation, which is followed by an overview the relevant case law and Dutch legislation on equal pay. On the basis of the heretofore acquired information this chapter provides a bridge towards the main analysis by illustrating the relevant laws, directives, case law and national equality acts. The information presented in this chapter is necessary in order to understand the legal and judicial frame of reference that is assessed in the next chapter.

### 4.1 EU legislation

Dating back to the founding of the EU, equal pay has been a core European value enshrined in Article 157 of the Treaty on the Functioning of the European Union (TFEU) and Article 119 of the Treaty establishing the European Community (EEC). These treaties are the constitutional foundation of the European Union and assign the EU bodies with legal legitimacy. Every action by the EU is founded in the treaties. They designate the competences of the EU institutions and lay down the EU's objectives, fundamental principles and values, decision-making processes and relationship with its Member States. The treaties are complemented by other legislation, think about Directives, Regulations and Decisions. These alternative legally binding acts are set out to achieve the objectives of the treaties (Europa.eu). They are useful tools to enhance implementation, compliance and enforcement of the law.

Article 157 TFEU and Article 119 TEU lay down the fundamental right to equal pay for 'male and female workers' for equal work or work of equal value. Pay here is understood as the basic minimum wage and any other form of consideration (cash or in kind) received from the employer (European Union, TFEU, Article 157; European Union, EEC, Article 119). Equal pay without discrimination is further specified:

“(a) that pay for the same work at piece rates shall be calculated on the basis of the same unit of measurement;

(b) that pay for work at time rates shall be the same for the same job.”

Moreover, a minimum standard of application of the equal pay principle is enacted here while still leaving room for more progressive action from the Member States through for example measures establishing specific advantages for the underrepresented sex. Lastly, Article 157(3) expresses aims to create measures ensuring the effective application of the equal treatment

principle in the area of employment and occupation, which explicitly includes the equal pay for equal work or work of equal value principle.

In this light, the most prominent ‘measure’ the EU has adopted in pursuit of this objective is the 2006 Recast Directive on the implementation of the principle of equal opportunities and equal treatment of women and men in matters of employment and occupation (Directive 2006/54/EC). The recast directive repealed different Council Directives<sup>5</sup> and instead, for the sake of clarity, combined the main provisions and relevant case law in this area in a single text (Directive 2006/54/EC (1); Burri, 2015). With the aim of ensuring the implementation of equal treatment in matters of employment and occupation, the directive specifies the provisions prohibiting any discrimination (direct or indirect) on the grounds of sex with regards to pensions, occupational social security schemes and pay. As a result of EU case law<sup>6</sup>, the European Court of Justice (‘the Court’) has stimulated the adoption of a broad perspective on ‘pay’, which is reflected in this directive. With regards to equal pay specifically, Article 4 of the directive explains any discrimination is prohibited:

“For the same work or for work to which equal value is attributed, direct and indirect discrimination on grounds of sex with regard to all aspects and conditions of remuneration shall be eliminated.

In particular, where a job classification system is used for determining pay, it shall be based on the same criteria for both men and women and so drawn up as to exclude any discrimination on grounds of sex.”

The directive addresses matters of reparation and compensation, burden of proof, promotion through dialogue, compliance, prevention, dissemination. Yet, the responsibility to introduce measures to ensure the implementation and enforcement of the principles laid down in the directive is left up to the Member States. In other words, Member States must decide how it aims to guarantee the rights outlined in the provisions. Securing minimum standards and a basic understanding of equal treatment in the area of employment and occupation, the directive leaves quite some flexibility to Member States as to how they decide to achieve this principle. As a result, there are quite significant differences observed between Member States in the area of equal pay. When looking at the gender pay gap Eurostat statistics, the difference between the

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<sup>5</sup> Council Directive 75/117/EEC (1975) on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women.

Council Directive 76/207/EEC (1976) on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions.

Council Directive 86/378/EEC (1986) on the implementation of the principle of equal treatment of men and women in occupational social security schemes.

Council Directive 97/80/EC (1997) on the burden of proof in cases of discrimination based on sex.

<sup>6</sup> Case C-7/93; Case C-351/00; Case C-262/88.

highest GPG and the lowest GPG in the EU is a staggering 20.4%<sup>7</sup>. Though the Commission is not unaware of this. In fact, before she was appointed president, Ursula von der Leyen announced in her political guidelines that she would address the issue of pay inequality and propose binding pay-transparency measures within the first 100 days of her mandate (Von der Leyen, 2019, p. 11). A bit later than planned, a proposed directive on pay transparency was published by the Commission in March this year.

Earlier the Commission also published a Recommendation on strengthening the principle of equal pay between men and women through transparency. The 2014 Commission Recommendation represents a political commitment and aspiration to tackle the issue of pay inequality and discrimination. It addresses the flaws and obstacles the legal framework poses to victims of pay discrimination, specifically highlighting the problems relating to transparency (burden of proof), lack of legal clarity, procedural difficulties and gender-biased wage systems. Henceforth, the need for Union action is emphasised. It would provide Member States with the necessary toolbox to improve transparency in pay levels and wage systems through pay audits and social dialogue with social partners. Finally, improving legal clarity of ‘work of equal value’, establishing gender-neutral job evaluation- and wage systems and calling upon national equality bodies for implementation and enforcement are all proposed recommendations which would help close the GPG. Although the Recommendation is not legally binding it does raise awareness and promotes dissemination. Additionally, it suggests measures for Member States, social partners and employers to enhance transparency in order to strengthen the application of the equal pay principle (Burri, 2015). The Recommendation sheds light on the key issues of the GPG which in turn may act as an important stepping stone to future binding measures, e.g. 2021 Proposed Directive on pay transparency.

Lastly, the Charter of Fundamental Rights of the European Union (CFR, or ‘the Charter’), where the fundamental rights of EU citizens are enshrined, states that equality between women and men must be ensured in all areas (Article 23 CFR). This specifically includes employment, work and pay. The Charter addresses matters of EU bodies, agencies, offices and institutions, and it is interpreted by the ECJ and national courts. It was drafted in 2000 by the European Convention<sup>8</sup> but only gained legal status with the Treaty of Lisbon in 2009. Any new EU legislative proposals must comply with the rights and freedoms enshrined

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<sup>7</sup> Estonia: 21.7% vs Luxembourg: 1.3%.

<sup>8</sup> Composed of members of the European Parliament, members of national parliaments of the EU, members of the Council of the European Union and a representative of the Commission, the European Convention drafted the Charter in order to consolidate the fundamental rights of EU citizens at Union level.

in the Charter. In accordance with the principle of subsidiarity, the provisions of the Charter, such as the ones laid down in Article 23, can only be applied to national bodies or institutions when they are implementing EU law.

What characterises the equal pay principle in EU law is the strong emphasis on individual rights and non-discrimination, whereas the role of the social partners and collective labour agreements have a complementary function to the achievement of those rights. This is tied to the individual right-based approach that is inherent in the EU's legal and judicial system in this area of the law.

#### 4.2 Case law

There is generally a limited amount of case law on equal pay because the number of pay discrimination cases referred to national courts is low. Why access to justice appears to be lacking for victims of pay discrimination will be answered in the next chapter. For now, the landmark cases of the ECJ will be reviewed in order to uncover which lessons can be drawn from them and how they have impacted the legal landscape in the context of equal pay.

The most prominent and landmark case which cannot go unmentioned is the *Defrenne* case, which essentially lay down the foundation for the wave of gender equality legislation in the 1970s<sup>9</sup> (and onwards) and equal pay legislation specifically. The mere existence of legislation does not guarantee the application or implementation of rights however (Ellina, 2003), it still needs to be mobilised (Havinga, Hoevenaars, 2016). *Defrenne* was an example of this, and it is still relevant today. The Court ruled three times on the interpretation of Art 119 EEC: (1) in 1971, on the interpretation of the concept of pay and equal work; (2) in 1976, on the application of Art 119 EEC and how it can be relied upon in court; and (3) in 1978, on the scope of Art 119 EEC and how it applies only to matters of pay equality and not broader equality standards. Despite the economic undertone of Art 119, *Defrenne* also solidified equal pay as a fundamental social right. Moreover, it proved that equal pay law is not just a void or symbolic concept, but that it can actually enforce pay equality in the case of sex-based discrimination.

Not all cases underscore the positive rights of equal pay law though, some also expose its limits. A significant limitation in the application of the principle of equal pay can be found in case law when work is outsourced (*A. G. Lawrence and Others v Regent Office Care Ltd, Commercial Catering Group and Mitie Secure Services Ltd* [2002]). More specifically, in

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<sup>9</sup> Council Directive 75/117/EEC (Equal Pay Directive); Council Directive 76/207/EEC (Equal Treatment Directive); Council Directive 79/7/EEC (Social Security Directive); Council Directive 86/378/EEC (Occupational Social Security Directive); Council Directive 86/613/EEC (Self-employment Directive)

*Lawrence* the Court ruled that pay discrimination in equal work or work of equal value must be attributed to a single source. If there is no single body which is responsible for the inequality (*Lawrence*) or a body that could restore equal treatment it does not fall under that scope of Art 119 EEC. This resembles the limits of the application of the equal pay principle as is pointed out in case law (Burri, 2015). This is alarming given the fact that work is generally increasingly being outsourced (Corbett, 2004).

Questions regarding interpretation on the scope of the concept of pay has produced several cases in the 1990s and has consequently materialised a broad interpretation by the Court. Considering this, apart from basic salary, pay also includes occupational pension (*Barber*), bonuses (*Lewen*), termination payments (*Kowalska*), overtime supplements (*Voß*), travel allowance (*Garland*) and compensation for training courses (*Bötel*) (Foubert, Timmer, 2017). Another issue that is addressed in case law is on comparators with regards to the concept of equal work or work of equal value. The judgements concern the comparisons made between jobs that are considered 'equal' or 'of equal value', or not, in order to assess whether pay differences are justified, or not. In this respect, questions on the possibility to compare with former employees doing the same job (*Macarthy*), to compare with the same (*Allonby*) or a similar (*Lawrence*) job with a different employer and to compare with employees in lower-value jobs (*Murphy*) are ruled on by the Court.

The above-mentioned case law has not only changed the legislative landscape through monumental precedents but it has also contributed to the development of the key legislative tools present today. The Recast Directive has incorporated some of these Court rulings. For example, the ECJ has established that the equal pay principle is not limited to men and women working for the same employer in case a comparator is needed (this requirement differs per member state) (Directive 2006/54/EC (10)). Combining, 'modernising' and 'simplifying' EU case law and provisions from prior directives, the Recast Directive generates some novelties: the definition of pay (Art 2(1)(e); referring to discrimination arising from gender reassignment (Recital 3); extending the application of the equal treatment principle to pensions schemes (for public servants) and occupational security schemes (Art 7); and extending horizontal provisions (defence of rights (Art 17), compensation or reparation (Art 18) and burden of proof (Art 19)) (COM/2013/0861 final).

Despite relative few cases being referred to national courts, case law has had a profound impact on EU equal pay legislation. Some of the most noteworthy cases are addressed in this chapter and they reflect the legal journey of equal pay legislation to some extent, starting from

a stagnant and abstract legal principle with economic overtones to a tangible and enforceable fundamental right with a strong social meaning as well.

### 4.3 Dutch legislation

Equal pay legislation in the Netherlands is covered by the General Equal Treatment Act (GETA) ('Algemene Wet Gelijke Behandeling'), the Equal Treatment Act Men and Women in Employment (ETA) ('Wet Gelijke Behandeling mannen en vrouwen') and Article 7:646 of the Dutch Civil Code ('Burgerlijk Wetboek'). Unlike in some other Member States, the equal pay principle has not been transposed through constitutional provisions in the Netherlands (COM/2013/0861). Nevertheless, it is embedded through the above mentioned Civil Code and respective equality legislation.

Article 1 of the Dutch Constitution does enshrine the right to equal treatment (in equal circumstances), prohibiting any discrimination on the ground of race, sex, religion, belief, political opinion. Explicit mention of equal pay or clarification of discrimination (direct vs indirect) is not included. Neither does the GETA mention pay or remuneration in general. The use of the word 'discrimination' is also avoided in the GETA and the ETA, instead the word 'differentiate' is used instead. Effectively this means that discrimination is not prohibited as such by the ETA, only differential treatment based gender. In spite of this, direct and indirect 'differentiation' is established. Direct differentiation applies to situations of differentiation on the basis of religion, belief, political opinion, race, sex, nationality, sexual orientation or marital status in *equal* circumstances. Indirect differentiation applies to situations where a supposedly neutral provision causes differentiated treatment of other people.

Mention of pay first occurs in Article 7(2) of the ETA, clarifying pay as "the remuneration payable by the employer to the employee for the work performed by the latter". The same definition of pay is used in the Civil Code of Dutch labour law (Art 7:610, Civil Code). This definition is not as broad as the one used in Art 157 TFEU but it nonetheless means the same (Vegter, 2020; Foubert, Timmer, 2015). The ETA does provide clarifications on issues regarding job evaluation, comparator requirement and wage transparency. Job evaluation in the Netherlands must value work in a gender-neutral way, yet this assumption has been the subject of debate (Vegter, 2020). Additionally, Art 8 ETA states that "work shall be assessed in accordance with a reliable system of job evaluation". The idea behind this is that work evaluation should be made transparent. Moreover, comparators are required in the Netherlands when the salary of one person is compared with the salary of a person from the opposite sex. In case of high levels of labour market segregation this could potentially be problematic (Foubert,

Timmer, 2017), as a comparator from the opposite sex might not be available. Lastly, the right to pursue legal action on equal pay claims expires two years after the payment should have been made (Art 11, ETA).

Employment legislation relating to the principle of equal pay for women and men in equal work or work of equal value has been incorporated in the Civil Code. This is because the rules governing the employment relationship make up a specific subdivision of the Civil Code's chapter on 'special contracts' (Foubert, Timmer, 2017). Similar to the ETA, Art 7:646 of the Dutch Civil Code includes conditions for derogating from equal treatment and non-discrimination. On this note, differences in pay are permissible when they are not caused by discrimination, e.g. when gender-related characteristics are an essential professional requirement (Art 7:656(2); Vegter, 2020). Contrastingly, while Dutch law is apparently relatively lenient in allowing exceptions to non-discrimination provisions, EU law is very strict on this, only allowing a 'very limited number of narrowly described cases' to justify (direct) discrimination based on sex (Foubert, Timmer, 2017).

Finally, the Work Councils Act (Art 31d) obligates companies with at least 100 employees to provide information to the Work Council ('Ondernemingsraad') on equal treatment of women and men as well as data on the levels of benefits received by employees annually (Vegter, 2020). Reporting this information to the Work Councils aims to enhance transparency. Data on pay can also be obtained by the Netherlands Institute of Human Rights ('College van de Rechten van de Mens') in case an employee has a suspicion of pay discrimination (Vegter, 2020).

Regarding the transposition of the Recast Directive into national legislation, many Member States were questioned about issues of conformity and compliance. However, in France and the Netherlands the transposition was sufficient and no questions were raised concerning compliance (COM/2013/0861). This was also confirmed by the Dutch Government (Staatscourant, 2008; Burri, 2015). Notwithstanding, it is argued that the actual impact of the Recast Directive has been limited in the Netherlands (Burri, 2015). Coupled with the fact that improvement in the GPG happens very slowly – the GPG closes at the approximate speed of 0.5% per year (CBS, 2020) – questions about the effectiveness of implementation and enforcement of equal pay in the Netherlands remain.

## 5. Analysis

The previous chapters so far have established what has been said in the academic literature and which key themes shape the debate. It has also been established what the main pieces of legislation are regarding equal pay on EU level as well as on national level in the Netherlands. To specify, the second chapter reflects the theoretical framework by way of identifying the relationship between the existing theories and perspectives and justifying the research question, and the fourth chapter creates the normative framework which provides the standards for evaluation (Taekema, 2018). Since the research question is comprised of two dimensions, the analysis must be substantiated with the analytical basis for both respectively; the former being based in social sciences (analysing the political-institutional structures) and the latter in legal scholarship (analysing the legal and judicial structures). Providing the reader with the necessary conceptual basis in order to grasp the complexities, relations, developments, legal basis and judicial protection of pay inequality and gender-based pay discrimination is crucial for the main analysis of this thesis. An in-depth study of the political-institutional and legal- and judicial landscape of the Netherlands, examining how in this context equal pay is implemented and enforced follows in this chapter. Answering the research question “why is the gender pay gap still prevalent in the case of the Netherlands and how does the new Dutch legislative proposal try to remedy this?” is the main objective of the analysis. What is more, the analytical insights are the basis for the concluding remarks in the recommendation. The analysis powers the ensuing recommendation by debunking the abstract theories on the adjusted GPG through a case-study analysis of the Netherlands.

Logically, the first section briefly describes the current situation of the adjusted GPG in the Netherlands and examines how some key themes identified in the second chapter apply to the Dutch case. Next, an assessment of the implementation and enforcement mechanisms will reveal the main gaps and weaknesses in the Dutch legal-, judicial- and institutional structure. Subsequently, this section will also answer what the main causes of the GPG are in the Netherlands. The last section evaluates whether the Dutch legislative proposal addresses the previously identified gaps that represent some of the central causes of the GPG. Keeping in mind that it is too early to determine whether this equal pay act (if it gets passed) would actually be able to substantially reduce the GPG in the Netherlands. However, its pre-emptive effectiveness is tested by the extent in which its provisions manifest added value in reporting, monitoring, protecting, enforcing and preventing compared to the current state of affairs.

## 5.1 How is the GPG implemented and enforced in the Netherlands, and what are the key institutions in this context?

How does the Dutch Government tackle the gender pay gap? What institutions are responsible for monitoring and implementing the equal pay principle? To what extent is current equal pay legislation effective? How is judicial protection from gender-based discrimination ensured? These questions methodologically frame the content of the next few paragraphs and demarcate the analysis to the politics and workings of institutions, the law and the judiciary in the Netherlands.

To clarify, seeing that part of the unadjusted GPG and part of the adjusted GPG is attributed to discrimination, when mentioning the GPG it refers to the ‘statistically unobserved wage determinants’ (Figure 1). On account of the fact that this thesis analyses the political-institutional and legal and judicial factors of the GPG and not the socio-cultural or labour-economic ones, the GPG here refers to the wage determinants that have not yet been explained as such. That is not to say some of these determinants have not been observed at all; as the literature review demonstrates there are many various components that affect equal pay and they differ per country. By demystifying some of the causes of the adjusted GPG this thesis attempts to explain why there still is a GPG and goes beyond the ordinary notion that it is just because of discrimination. As discrimination can readily be interpreted from a micro-level (from person to person), especially in matters of pay, and it can fail to take into account the possibility of a law that may discriminate or national institutions that may discriminate (meso- and macro-level). Alternatively, by looking at all the different levels and not having a tunnel-vision on a single one, it is possible to gain a comprehensive overview of the governance processes, judicial proceedings and institutional biases that correlate with the GPG.

In 2019 Eurostat data showed that the GPG in the Netherlands stands at 14.6% (see Appendix 2). This percentage reflects, as previously mentioned, the average gross hourly wage difference between female and male paid employees as a percentage of the male average gross hourly wages (Eurostat, 2021). The EU Social Development Goals (SDG) use this indicator as an instrument to monitor progress of the fifth SDG: ‘Gender Equality’. This percentage typically resembles the calculated difference in wage between women and men based on their personal and company characteristics, i.e. an unadjusted GPG indicator. Nonetheless, in the literature review it is explained that the lines between the unadjusted and the adjusted GPG are somewhat blurred when it comes to interpreting the unexplained discrimination that occurs. As such, it is explained that the unadjusted GPG is not entirely void of discrimination. To elaborate,

the assumption is often that women make individual choices which may lead to developing less profitable personal characteristics compared to men. And whilst this is to some extent true, Figure 1 shows how the majority of the calculated GPG is actually generated by discrimination that is not attributable to individual choices. Moreover, even individual choices are to a large extent strongly influenced by exogenous socio-cultural conditions associated with traditional gender-roles, stereotyping and bias which are inherent in national institutions.

On this note, the next paragraphs outline main Dutch institutions, current efforts and tools aimed at closing the GPG in the Netherlands. By first looking at the **Dutch Government**, one is quickly able to conclude that a clear and consistent strategy for general emancipation of women has been lacking. The colour of the cabinet of the time and the commitment of the respective government officials and experts highly influence targeted nuances in social policy. Unsurprisingly, the Dutch's polarised political system hinders to a large extent the formation of a widespread and collectively agreed upon strategy to address the issue of gender inequality (Van Doorne-Huiskes *et al.*, 2017). Moreover, up until the 1990s the male-breadwinner model remained pervasive in Dutch society (Van Doorne-Huiskes *et al.*, 2017; Von Gleichen, Seeleib-Kaiser, 2018). Change came when policy strategies on women's emancipation shifted from thinking about how employment opportunities for women could be improved, to policy which broadly aimed to remove obstacles in the labour market for women and transforming the division of paid and unpaid care (Van Doorne-Huiskes *et al.*, 2017). Even leading to marketing campaigns<sup>10</sup> to stimulate young women to choose for a good education in order to attain a steady job to earn decent income and acquire economic independence. This development stems from a Social Benefits Act ('Toeslagenwet') which made it impossible to get social benefits ('bijstand') for youngsters under the age of 26 living communal household. Alongside this, increasing opportunities for part-time work and attaining higher education lead to higher employment rates of women (Van der Meer, 2008; Van Doorne-Huiskes *et al.*, 2017). It has been found women tend to increase labour market participation when wages increase, meaning that the observed positive relationship between these two aspects also suggests a decline in the GPG (Van der Meer, 2008). To clarify, depending on changes in men's wages, an increase in women's wages indicates a smaller GPG.

This is not to say the Dutch Government does not make any effort in this area. In spite of its rather passive approach to equality and non-discrimination matters, the government does

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<sup>10</sup> "Een slimme meid is op haar toekomst voorbereid".

indirectly contribute to awareness raising by funding research institutes in the area of gender equality and women's issues. Also, a tool worth mentioning here is the equal pay website<sup>11</sup>, subsidised by the government and created by the FNV trade union in cooperation with researchers. This website offers advice on how to obtain a good salary and it enables you to compare wages and identify wage gaps (Burri, 2019; Grünell, 2010). Originating from a lack of access to information about the labour market the website aims to create more transparency on wages. Also, in 2017 a new subsidy arrangement<sup>12</sup> for research institutes was introduced by the government, paving the way for some established gender equality institutions such as Atria, the Dutch Women's Council (Nederlandse Vrouwen Raad) and Women.Inc. (Van Doorne-Huiskes *et al.*, 2017). Infrastructure on emancipation and gender equality research and information is the result of these efforts, yet subsidies are becoming scarce due to a growing volume of societal organisations who are also looking to benefit from these subsidies (Van Doorne-Huiskes *et al.*, 2017). Nonetheless, in 2019 and 2021 the government funded a campaign by Women.Inc. directed at raising awareness on the GPG in the Netherlands (Rijksoverheid, BNC, Fiche 3, 2021).

European efforts in terms of research and legislation have been quite a significant driver for change in the Netherlands (Van Klaveren, Sprenger, Tijdens, 2007; Van Doorne-Huiskes *et al.*, 2017). Especially, the equal pay initiatives during the period of the 1970s till the 90s which were important tools to force compliance with the legal provisions through proper transposition into national law. On EU level these directives were used to put pressure on the Dutch Government to implement the provision, but also provided national activists and public figures with legitimate ways to put pressure on the government in case they experienced political pushback (Van Doorne-Huiskes *et al.*, 2017). Furthermore, upon reading Van Doorne-Huiskes' *et al.* (2017) book it is possible to observe that the government's policy approach to emancipation of women is quite fragmented and misses compelling direction and commitment. A common theme is that pressure and appeal from the feminist ideological discourse in society eventually were the main drivers for social change after being initially faced with resistance and hesitancy from politicians and policy-makers. Exogenous drivers have significantly shaped the government's policy direction and efforts. Instead of leading by example, the Dutch Government had the tendency to only act when there are distinct pleas for social change from the public sphere. A good example of external pressure is the plea of the network group named

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<sup>11</sup> [www.gelijkloon.nl](http://www.gelijkloon.nl) (part of [www.wageindicator.org](http://www.wageindicator.org))

<sup>12</sup> 'Subsidieregeling Gender- en LHBT-gelijkheid 2017-2021'.

Platform Future of Labour ('Platform Toekomst van Arbeid'), consisting of large employee organisations, to make day-care for children a right and thus free of charge for low-income families and income-dependent contribution by high-income families. It stimulates equal distribution of child care tasks among parents and gives recommendations to policy makers to combine work and having children for young parents.<sup>13</sup> This lobby group increases pressure upon the Dutch Government to enhance and improve the labour market position of women. One could say it is a Government leading, by following. This can still be said about the government today.

Though after many years of struggle, social and economic gender equality has become an established cultural norm and the government is not afraid to express its ambition to improve women's economic independence. Measures which make flexible working hours more common practice and provide subsidies for childcare would contribute to achieving this ambition (Rijksoverheid, *Vrouwen aan het werk*). The strategy adopted here is to increase working hours for women in order to improve their economic independence and strengthen their position in the labour market. Regarding pay specifically, the GPG is tackled through expansion of maternity leave for partners and lowering the cost of labour (Rijksoverheid, BNC, Fiche 3, 2021). Though here again, the focus is on the individual and is aimed at stimulating voluntary expansion of working hours of women. Whether these measures will close the GPG is uncertain. They in fact seem rather counterintuitive, because in a study by Van der Meer (2008) it is shown that effectively ensuring the application of equal pay would likely lead to an increase in female labour market participation. Contrastingly, the strategy of the government assumes that increasing women's working hours would help close the GPG. It is safe to say that primarily focusing on increasing female labour market participation and subsidizing childcare will unlikely be the driving force behind closing the GPG since there is no mention whatsoever of pay transparency, wage structures or collective labour agreements.

The focus on the flexibility of working hours as described by the government (Rijksoverheid, *Vrouwen aan het werk*; Rijksoverheid, BNC, Fiche 3, 2021) is contradicted by the 'research program' of the Ministry of Social Affairs and Employment where a reference is made to initiatives of labour market policy designed to disincentivise employers to offer mainly flexible contracts (Ministry of Social Affairs and Employment, 2018). Inconsistencies such as

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<sup>13</sup> <https://www.toekomstvanarbeid.nl/publicaties/investeren-in-mensen/>, p. 72-78.

this one exemplify a lack of clear direction and undoubtedly leads to confusion among employers.

Meaningfully, in terms of enforcement it is specified that the **Work Councils** have a legal obligation to foster equal treatment of women and men and in turn obligate employers to deliver reports on the social policy and equal treatment within their enterprise (Work Councils Act, Art 31d). These reports also inform the Work Council on employment arrangements and conditions of different groups employed within the company. However, the data in these reports are currently not broken down by gender (Burri, 2020). This neglects to recognise the potential gendered biases in the social policy of a company. The Work Councils are comprised of employees' representatives and speak for their interest as well as safeguard the proper functioning of the company. Work Councils or employers can also ask the National Institute for Human Rights (NIHR) ('College voor de Rechten van de Mens') to judge on a suspected equal pay infringement.

Within the **Ministry of Social Affairs and Employment** ('SZW') there is an investigatory and monitoring tool which is used as a supervisory body. The Inspectorate SZW ('Arbeidsinspectie') checks whether employers and employees act in compliance with the law and regulation of labour. Its main tasks involve supervision of compliance, investigation and detection (of fraud, exploitation or crime), monitoring and reporting. The Inspectorate SZW is relevant to mention in this context because of its enforcement powers. Every two years they monitor differences in pay between women and men across the private and public sector. If, according to the information gathered from the Work Councils or trade unions, there appear to be significant pay differences between women and men in work of equal value, the Inspectorate SZW can enforce employers to scrutinise the reasons for these pay inequalities and discuss the findings of the research with the Work Councils or trade unions (Ministry SZW, 2008). Interestingly, a 2019 inspection resulted in a demand for enforcement for 70% of the inspected cases. This demand was directed at the insufficient education and schooling for employees on discrimination and unequal treatment matters in employment (Ministry SZW, 2019). It appears that little attention is paid to discriminatory practices or unequal treatment of women and men specifically in recruitment and hiring processes. The focus of the Inspectorate SZW is consequently more on these processes and only implicitly on matters of equal pay during employment and in collective labour agreements.

Even so, **collective labour agreement instruments** (Wet CAO<sup>14</sup>) offer the possibility to make (equal) pay arrangements (Rijksoverheid, Fiche 3, 2021). The 2018-2021 Labour Market Discrimination Strategy (LMDS) drafted by the Dutch Parliament states that the Labour Foundation (‘Stichting van de Arbeid’) will update their equal pay checklist. The Labour Foundation is a consultative body aimed at the peaceful and balanced collaboration of trade unions and employer’s associations, particularly in relation to collective agreements. This checklist is a tool meant for those who develop, evaluate and apply wage systems, i.e. “trade unions, employers’ organisations, employers, HR managers and works councils” (Vegter, 2020). The LMDS also indicates how Women.Inc.’s campaigns on gender pay equality, aimed at raising awareness and activating employers and employees on addressing the GPG, can help improve equal pay between women and men. Finally, the LMDS refers to studies of the Central Bureau of Statistics (CBS) (‘Centraal Bureau voor de Statistiek’) which concludes that often gender-based pay discrimination happens subconsciously and not deliberately (Tweede-Kamer der Staten-Generaal, 2018). The government has a presupposed assumption that employers do not willingly discriminate but that they are just uninformed (Grünell, 2010).

The role of the biggest **Dutch trade union, the FNV** (‘Federatie Nederlandse Vakbeweging’) is to safeguard the interests of employees through collective labour agreements. They also assist and support individuals in matters of employment and pay. Unlike the NIHR, the FNV can pursue a collective action in accordance with Article 305a of the Dutch Civil Code (Art 3:305a, Civil Code), where they represent employees in case of a suspected infringement of rights. In the FNV’s 2021 terms of employment notice (‘arbeidsvoorwaardennota’) equal pay for equal work is a point of attention, particularly in the context of the economic crisis instigated by the Covid-19 pandemic. Advocating for tougher legislation on equal pay, the FNV deliberates with politicians and policy-makers on the importance of this topic. They also aim to include equal pay more in collective labour agreements. Their legal authority to pursue a collective action goes beyond that of collective labour agreements (Van den Bor, 2021; Art 3:305a, Civil Code).

Alternatively, the biggest **Dutch Employer’s Associations, the AWWN and VNO-NCW** (‘Algemene Werkgeversvereniging Nederland’ and ‘Verbond van Nederlandse Ondernemingen - Nederlands Christelijk Werkgeversverbond’) represent the interests of the employers by negotiating collective labour agreements. They also offers tailored advice as well

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<sup>14</sup> Law on collective labour agreements.

as access to general research and information. With regards to the topic of pay, the employer's associations aim to find a balance between pay and productivity of labour in order to maintain a certain level of competitiveness towards other companies. On occasion employer associations and trade unions negotiate on initiatives aimed at reducing the GPG. For example, when policy recommendations were drafted to increase wages in sectors such as healthcare and education in order to decrease wage differences the employers opposed it, on account of the fact that it would not address wage discrimination because women choose to work in these sectors (Grünell, 2007). Resulting from this, the recommendation was eventually abandoned. The employer's associations are sceptical about the Dutch legislative proposal as they fear it will cause an administrative burden, and they believe it does not address the real reason of the GPG, namely that women work considerably fewer hours than men (Vegter, 2020). There is some overlap here between the government's strategy to address the GPG by increasing working hours of women and the employer's association's argument.

The **National Institute on Human Rights** (also referred to as National Equality Body) protects, highlights and promotes human rights through doing research, formulating recommendations or opinions and schooling. Surveying equal treatment laws and legislation and judging individual cases on whether discrimination occurred at work, in education or as a consumer is one of the NIHR's core activities. Reports on the human rights situation in the Netherlands are published by the NIHR annually. As an independent body, the NIHR remains impartial to political ideologies or societal issues. It is operationalised by the Ministry of Justice and Security through funding. Additional tasks include structural collaboration with (national and international) social organisations and promote ratification, implementation and compliance with international treaties on human rights. Equipped with professionals from varying expertise, the NIHR aims to protect and promote human rights in the Netherlands. The 2012 NIHR Act founded the NIHR as it is currently known. Thereby, providing this body legitimacy although the opinions they provide are not legally binding. It does not mean that they are not impactful, as the opinions in individual cases have a high moral authority (Foubert, Timmer, 2017). Also, opinions are made public and in the majority of cases the defendant undertakes some type of action whether through changing organisational policy or through a formal apology. During the years 2014-2018 they published four opinions on equal pay cases (Case 2014-48; Case 2015-5; Case 2015-35; 2018-30). In all four cases the opinion stated that the difference in pay did not constitute discrimination because the employer had a valid reason for awarding the respective comparator a higher pay (Burri, 2019). The National Institute of

Human Rights is an important player in the enforcement of the equal pay principle in individual cases of discrimination as employees can consult them and ask for an opinion on a potential pay discrimination case. A job evaluation will be performed by an expert of the NIHR within the company after a complaint about pay discrimination for free. This way cases often appear at the NIHR before they go to court and it may also be part of the reason why there is scarce case law in the national courts on equal pay (Burri, 2019).

As the final national enforcement institutions, **the courts and the judiciary** act as final authority to interpret the law and ensure the proper protection of rights. In general, the Dutch judicial system has a high degree of ‘perceived judicial independence’ and continued efforts to improve the quality of justice are made (Commission, SWD, 2021). The national court system encompasses eleven district courts, four general courts of appeal, two specialised courts<sup>15</sup>, the Council of State and the Supreme Court. Distinctions are made between criminal, civil and administrative law within the courts. The district (or ordinary) courts render judgements and appeals to these judgements can be brought before the courts of appeal (Vegter, 2020). The highest court is the Dutch Supreme Court.

Several important cases on equal pay involve Supreme Court rulings on discrimination in: wage classification on the basis of the last received pay (*Pot*<sup>16</sup>); due to poor economic position (*Bouma/KLM*<sup>17</sup>); equal treatment for equal work (*Agfa-criterium*<sup>18</sup>); educational requirement for career opportunities (*Gerrits*<sup>19</sup>); other circumstances apart from the Agfa-criterium (*Parallel Entry/KLM*<sup>20</sup>). Other impactful judgements from the general courts of appeal include equal treatment (and pay) for new employees<sup>21</sup>, unequal pay due to personal pay rise of a colleague<sup>22</sup>, pay classification agreement with trade unions<sup>23</sup>, missing bonuses during pregnancy<sup>24</sup> and shifting the burden of proof<sup>25</sup> in case where outdated data on the comparator’s pay is applied<sup>26</sup>. Finally, three judgements of the district courts are also worth mentioning here. The first is on pay discrimination where wage classification (after a career interruption) is based

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<sup>15</sup> Namely, the Trade and Industry Appeals Tribunal and the Central Appeal Tribunal.

<sup>16</sup> Supreme Court 25 november 1988 (Pot), nr. 13346, NJ 1989, 730.

<sup>17</sup> Supreme Court 24 april 1992 (Bouma/KLM), nr. 14567, NJ 1992, 689.

<sup>18</sup> Supreme Court 8 april 1994, NJ 1994, 704.

<sup>19</sup> Supreme Court 3 januari 1997, RvdW 1997, 14 C.

<sup>20</sup> Supreme Court 30 januari 2004, nr. C02/176HR, NJ 2008, 536.

<sup>21</sup> ’s Gravenhage Court of Appeal, 4 februari 2005, JAR 2005/113.

<sup>22</sup> Gravenhage Court of Appeal 17 februari 2006, JAR 2006/97, [ECLI:NL:GHSGR:2006:AV4715](#).

<sup>23</sup> Amsterdam Court of Appeal 08-05-2008, [ECLI:NL:GHAMS:2008:BD8713](#).

<sup>24</sup> Amsterdam Court of Appeal 27-4-2010, [ECLI:NL:GHAMS:2010:BN2034](#) / JAR 2010/142.

<sup>25</sup> ’s-Hertogenbosch Court of Appeal 13-11-2012, interlocutory judgment [ECLI:NL:GHSHE:2012:BY3844](#).

<sup>26</sup> ’s-Hertogenbosch Court of Appeal 05-03-2013, [ECLI:NL:GHSHE:2013:BZ3454](#).

on the last received pay, which leads to indirect pay discrimination because women have more career interruptions than men<sup>27</sup>. Next, a judgement which states that relevant (work)experience gained outside of education must be taken into consideration for wage classification, even when this experience was acquired during a career interruption due to care responsibilities<sup>28</sup>. And finally, on the unlawful continuation of differentiation between employees who are privately insured and thus receive health insurance compensation, after a legislative amendment cancelled this differentiation<sup>29</sup>.

The role of the courts in interpreting equal pay legislation is quite substantial. Clarifying issues on the use of comparators, wage classification conditions (specifically after a career interruption and on the basis of the last received pay), unequal pay justifications, burden of proof (transparency), pay discrimination when hiring new employees and unequal pay due to pregnancy. These themes indicate some of the unclarities in Dutch equal pay legislation and they also reveal the weaknesses of implementation and enforcement of the equal pay principle in practice. Interestingly, the terms sex or gender are neither defined in case law, nor in equal pay legislation (Vegter, 2020). Moreover, pay differences are permitted if they are not caused by discrimination (e.g. in the *Parallel Entry* case). Because of this, case law on gender-based pay discrimination is relatively scarce (Foubert, Timmer, 2017). This is to a certain degree also because of the role of the NIHR. The scarcity is nonetheless not a sign that the issue of equal pay is not a serious problem (Foubert, Timmer, 2017). Other potential explanations for this scarcity will be discussed in the next subchapter.

Finally, it is also important to address some national research institutes because of their influence in policy-making. **The Emancipation Council** (EC) ('Emancipatieraad', formerly known as 'EmancipatieKommissie'), founded in 1974, was one of the first legally defined advisory body on emancipation issues. Ministers were now legally obligated to ask the Emancipation-Council for advice on policy-matters on emancipation of women. Economic independence was considered a very important matter by the EC and it also advised on judicial developments like the 1994 General Equal Treatment Act. This official duty for advice on emancipation issues was similar to **the Social-Economic Council's** (SER, 'Sociaal Economische Raad') duty for advice. The EC was abolished in the late 90s because of limited funding to have both a ER and a SER. Another argument was that emancipation policy needed

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<sup>27</sup> District Court of Amsterdam 10 december 1997, nr. H 96.1699.

<sup>28</sup> District Court of Amsterdam 24 november 1999 JAR 2000/25.

<sup>29</sup> District Court of Amsterdam 18-06-2008 [ECLI:NL:RBAMS:2008:LJN: BD4563](#).

to be integrated better into normal policy-making and policy-advising in order for it to be effective rather than be embodied by a separate council like the EC. The SER, founded in 1950, is comprised of representatives of employers, employees and independent experts. It is the primary advisory council for the government and the parliament on socio-economic issues, including matters of pay and equal treatment.

Furthermore, research institutes such as **the Social Cultural Bureau** (SCB, or ‘Sociaal Cultureel Planbureau’) and **the Central Bureau for Statistics** (CBS, or ‘Centraal Bureau voor de Statistiek’) provide substantial research and data on societal and cultural issues. This includes developments in the labour market regarding pay and equal treatment. Both institutes perform independent studies for the government in order to substantiate policy goals and strategies. The SCB is focused on assimilating information and scientific explorations which will eventually contribute to improve the implementation of social and cultural policies. The CBS differs in this instance as it aims to gather statistical insights into societal developments. By doing so, they cultivate public debate, policy change and decision-making and help improve wellbeing and welfare.

Traditionally, the state warrants the proper application of rights and legislation in society on a macro level. In practice, the policy domain and sectoral context operationalise compliance or non-compliance with these rules on a meso level. The meso level bridges the broad societal and political context characterised by the macro level with the individual experiences and frame of reference characterised by the micro level. Concrete enforcement through court action acts as a final means to achieve justice in case of infringement on micro level by imposing punishments and sanctions. This essentially represents the last stage for the fulfilment of a right, where a judge must rule on its proper application because compliance is not attained. When the social and institutional structures are so in contrast with the available means to fulfil your rights, the courts are used as a definitive measure. And when people go to court in the Netherlands, Dutch law is rather ambiguous when it comes to describing what is considered equal work or work of equal value. It is on the basis of a comparator that equal value of work is decided upon, albeit there is little case law on the use of a comparator (Vegter, 2020). This complicates things for victims of pay discrimination as they are quite poorly protected from a potential disingenuous employer and it allows comfortable space for the employer to make work non-comparable. However, even when work is comparable, employers are able to apply different pay to their employees. For example, in the judgement by The Hague Court of Appeal 2005/113 where it was judged that the employer was entitled to pay new employees less compared to old

employees because he/she introduced new regulations which eliminated certain benefits. It was allowed to differentiate pay between old and new employees as long as it did not constitute discrimination on the basis of sex, race, (religious) beliefs or sexuality.

The enforcement measures of the national institutions illustrated here are confined to the scope of their legal legitimacy and political power. This overview represents the institutional infrastructure in the Netherlands in the area of equal pay and non-discrimination of women and men. Variations in societal impact, moral authority and competence are noticeable. But how does the information gathered here translate into observations that can be made in relation to the causes of the adjusted GPG?

## 5.2 What are the causes of the adjusted GPG in the Netherlands?

Identifying the enforcement mechanisms and dynamics in the Netherlands helps to understand the state and situation of the GPG. For when enforcement is highly effective, the GPG should be low and vice versa. Considering that, according to the Eurostat data on the gender pay gap statistics (2021), roughly two thirds of the other EU Member States score better on equal pay than the Netherlands, it is evident that there are some enforcement deficits. These deficits suggest why there is a GPG and what the underlying statistically unobserved wage determinants are. Four key themes derive from the analysis, that is lack of pay transparency, gender-biased wage classification systems, insufficient protection in collective labour agreements and limited access to justice.

### Pay transparency

There is a broad consensus in the academic literature and among the evaluations<sup>30</sup> and assessments<sup>31</sup> published by the EU, as well as in the reports by the European Equality Law Network<sup>32</sup> on the enforcement and good practices of equal pay that greater transparency in pay

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<sup>30</sup> European Commission (2020) *Commission Staff Working Document – Evaluation of the relevant provisions in the Directive 2006/54/EC implementing the Treaty principle on ‘equal pay for equal work or work of equal value’*.

<sup>31</sup> European Commission (2021). Commission Staff Working Document – Impact assessment. Accompanying the document: proposal for a Directive of the European Parliament and of the Council to strengthen the application of the principle of equal pay for equal work and work of equal value between men and women through pay transparency and enforcement mechanisms.

Burri, S.D. (2015). Gender equality in employment and occupation. European Implementation Assessment. ANNEX I, Legal aspects and direct and indirect discrimination.

European Union: Report from the Commission to the European Parliament and the Council (2013) Report on the application of Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matter of employment and occupation (recast).

<sup>32</sup> Vegter, M. (2020). *Country report Gender Equality – How are EU rules transposed into national law?* Netherlands. European network of legal experts in gender equality and non-discrimination.

structures of companies would enhance the enforcement of equal pay. According to a public consultation from the Commission (2019), the majority of respondents (68%), that is inter alia professional and business associations, national equality bodies, companies, women's associations, labour inspectorates and trade unions, believes that higher pay transparency would contribute to reducing the GPG and boost image and reputation of the respective employers. Though, this view is only shared by companies and businesses in a small minority (13%-24%). The remainder has no view on this matter.

In the case of the Netherlands there are several mechanisms which provide insights into pay structures of companies and enterprises. Article 8 ETA states that work must be valued in a sound and fair way which holds the assumption that the reward system of an employer is accessible and available for the employee (Vegter, 2020). Whether this assumption is true in reality is questionable. Other mechanisms include the Art 31d of the Work Councils Act which obligates companies to report internally on their social policy and equal treatment efforts. This gives the Work Council of that company insight into the employment agreements and hence pay conditions of the employees. These reports are however only accessible to the Work Council and therefore lacks the necessary scope to reach employees who may suspect gender-based pay discrimination. And so, while the intention and the idea behind this obligation is to help improve pay transparency, in practice it fails to reach those people who could benefit from the available information. The consequences of this can be seen in a Court of Appeal<sup>33</sup> ruling where the employer was not able to provide clarity on why the male comparator received higher pay for equal work compared to the female employee (Vegter, 2020). In addition, the employer was also not able to justify why the male comparator received higher hourly pay after a reduction of working hours. Finally, due to a lack of transparency on the reasons and justifications of awarding the male colleague higher pay, the court ruled that the employer had discriminated against the female employee and that he should award her the same salary as the male comparator. A similar opinion was made by the NIHR<sup>34</sup> which ruled that due to a lack of transparency on the standards for valuing the work of employees, the employer discriminated against the female employee on the basis of sex. These two examples imply that rules on

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Böök, B., Senden, L., Timmer, A., Burri, S. (2021). *A comparative analysis of gender equality law in Europe 2020 - The 27 EU Member States, Albania, Iceland, Liechtenstein, Montenegro, North Macedonia, Norway, Serbia, Turkey and the United Kingdom compared*, European network of legal experts in gender equality and non-discrimination.

Burri, S.D. (2019). *National cases and good practices on equal pay*, European Network of legal experts in gender equality and non-discrimination.

<sup>33</sup> 's-Hertogenbosch Court of Appeal 05-03-2013, [ECLI:NL:GHSHE:2013:BZ3454](#).

<sup>34</sup> NIHR, Opinion 2012-142, 15 August 2012.

transparency of job evaluation and pay determination structures need to be introduced. A frame of reference to construct such rules could be the 2014 Recommendation on pay transparency, as it has not been explicitly mentioned in Dutch equal pay legislation (Vegter, 2020).

Subsequently, the equal pay website is an innovative tool which compares wages and obtains information on equal pay rules. This tool helps to give people an indication of the level of pay they should be receiving on the basis of inter alia education and experience. However, the effectiveness and widespread use of this tool is ambiguous seeing that Dutch case law signals how lack of information and lack of transparency, especially in the hiring and recruitment process, leads to unjustifiable pay discrimination based on gender. Transparency here remains an issue of concern. But, if it were to be improved, it could also enhance effective enforcement of the equal pay principle. In light of the earlier suggested unwillingness and subconsciousness of pay discrimination, increasing transparency would benefit not only employee but also employer. To elaborate, pay transparency would clarify and identify potential gender-based discrimination and so the employee could thereby resolve or remedy the inadvertent differences in pay before costly court action is pursued.

#### Wage classification systems

Following from the analysis, it is apparent that wage classification and job evaluation structures are not neutral, but rather contain a gender-bias. The above-mentioned NIHR opinion and Court of Appeal ruling are examples of that. In this context, the GPG can be explained by the observation that there is a different return for characteristics between women and men. And so, unequal pay is not so much attributable to different characteristics or different productivity levels of genders, but rather to the price and return differences of these characteristics which cause pay differences (Albrecht *et al.*, 2004; Van der Meer, 2008; SER Advies 14/03; Vegter, 2020). Dating back to the historical undervaluation of work performed predominantly by women, gender-biases in return for skills and characteristics exposes the underlying sexism that is still pervasive in Dutch society and the labour market specifically.

#### Collective labour agreements

Subsequently, the trade unions fail to sufficiently take into consideration these gender-biases in the drafting of collective labour agreements. While collective labour agreements do not prevent the implementation of the principle of equal pay for equal work (Van Klaveren, Sprenger, Tijdens, 2007), the scaling and negotiating of the agreements still appear to disadvantage women disproportionately. Also, the valuing of personal skills and characteristics appear to disadvantage women more than men (Van der Meer, 2008). An example of this is the fact that,

in the case of equal work or work of equal value, male dominated occupations are higher paid than female dominated occupations, as is characterised by horizontal segregation. This is also why increased female labour participation would not automatically decrease the GPG, because women are concentrated in lower paid jobs (horizontal) as well as lower paid positions (vertical segregation). At the crux of this is the undervaluation of women's work, which in turn translates into undervaluing female characteristics and finally, low and unequal pay.

The collective labour agreement instruments could safeguard the implementation of equal pay for equal work but fails to do so considering the GPG stands at 14.6% and decreases only very slowly each year. Two examples of good practices are Aegon, a Dutch life insurance, pensions and asset management company, and APG, a Dutch pension investment company mainly for government personnel, education and health care. In both cases, the companies committed in the collective labour agreement to execute an investigation on the equal pay situation in their company. Pay inequalities were discovered at Aegon due to the under-representation of women in management positions, and they declared that they will look for ways to remedy this together with the trade unions and Work Council (Vegter, 2020). As for APG, they discovered a 2.2% adjusted GPG and consequently decided to resolve this by increasing the pay of their female employees accordingly (Vegter, 2020). One reason for this may be because of limited knowledge on equal treatment and discrimination, as the Inspectorate SZW pointed out. Or perhaps it is the trade unions who, during the constructing of collective labour agreements, inadequately recognize and take into consideration the impact of gender and the corresponding discrimination. Or maybe they are aware of the gender bias but are not able to make a compelling enough case on applying pay equality clauses in the collective labour agreements during the deliberations with employer's associations. All of this demonstrates the missed opportunity to enforce equal pay and decrease the GPG through collective labour agreements.

#### Access to justice

Lastly, with regards to judicial protection, there are several limitations to the EU's judicial system as it is characterised by an individual rights-based approach. The system prevents individuals from acquiring the necessary resources and knowledge, due to inter alia legal aid being unaffordable or inaccessible (Burri, 2015). Judicial protection is not easily achieved due to legal unclarity, length and costs of court cases, burden of proof, low compensation and uncertain outcomes (think about victimisation). Consequently, access to justice is limited and

as a result, national cases on equal pay are scarce. As one of the main effective enforcement tools, court action should be accessible.

In the Netherlands, access to justice is limited due to three main factors. Firstly, there is unclarity regarding the concept ‘equal work’ or ‘work of equal value’ as it is established by means of a comparator. Strictly speaking, there are no parameters for measuring equal work in Dutch law (Vegter, 2020). Instead, a comparator is used to assess whether it is possible to speak of equal work. Though, the comparator needs to be an actual person of the opposite sex working within the company in order to properly examine whether there is an objective justification for the pay difference. Yet, the fact that no hypothetical comparator is allowed can complicate the claim to equal pay in situations concerning pregnant employees or in feminised sectors. This is because it would be very difficult to find a suitable comparator and hence make a legitimate claim.

The second factor is related to the access to courts and judicial protection. More specifically, there are concerns about inadequate funding to offer legal aid (Commission, SWD, 2021). Potential victims of pay discrimination may refrain from making an equal pay claim due to the fact that discrimination claims can be complicated and a specialist needs to be hired, which can be rather costly (Vegter, 2020). Despite the availability of subsidies for people with low incomes, legal costs and court fees can be quite high (Vegter, 2020; Rijksoverheid, Rule of Law Report, 2021) and thus disincentivise people to pursue court action. Furthermore, legal aid may be available if your annual income is below €27.300 for an individual or €38.000 for a household including other people (Vegter, 2020). Although, even then, a contribution ranging between €199 and €835 must be paid (Vegter, 2020). An alternative option would be going to the NIHR for an opinion, but they cannot give binding judgements. Moreover, the Netherlands scores relatively poor on standards of information about case progress (Commission, 2019 EU Justice Scoreboard). And lastly, there are often limits to time which require a complaint to be brought before a court within a certain time period, e.g. in civil law procedures and administrative procedures (European Union Agency for Fundamental Rights, 2011).

Finally, the third factor is on the minimal compensation options, for in the case of non-material damages this is seldom assigned in the Netherlands. On EU level, compensation or the level of penalties is also not clarified (Vegter, 2020). The Netherlands limit penalties to compensation awarded by courts. Also, the low amounts of damages awarded to victims may similarly prevent equal pay claims by making it difficult to take legal action. Introducing effective remedies or deterrent damages would reflect an attempt to bridge some of these

limitations (Burri, 2015). This is because in the Netherlands the burden of enforcement of the equal pay principle lies with the victim (European Commission, 2020). To sum up, access to justice may not seem like an obvious explanation for the GPG however, since the courts represent one of the most important instruments for enforcement of the equal pay principle in the Netherlands access to courts and justice constitutes an essential determinant.

### 5.3 Does the Dutch legislative proposal address the causes of the GPG in the Netherlands and the subsequent enforcement deficits?

In the previous section, some of the main causes of the GPG were identified and explained. These causes specifically relate to the political, institutional, legal and judicial processes in the Netherlands. They lay the foundation for the following paragraphs, the next legislative proposal on pay transparency is tested on the basis of these observations. In 2019, several members of the opposition in the Dutch parliament drafted a new legislative proposal for a law on equal treatment of women and men in relation to equal pay for equal work. While the proposal is yet to be adopted, it is relevant to assess its prospective and tentative effectiveness. This will test both the added value of the new proposed provisions and the applicability of the observations made in this chapter.

The proposal's explanation emphasises the need for government action in closing the GPG effectively (Tweede-Kamer der Staten-Generaal, Memorie van toelichting, 2019). It also mentions the causes of the GPG, including non-neutral wage classification and job evaluation standards as well as the burden of proof for the employee. The biggest differences in pay for equal work is due to wage-negotiations and wage-warranties (Tweede-Kamer der Staten-Generaal, Memorie van toelichting, 2019). What is expressly criticised is how it is entirely up to the individual to achieve the fulfilment of her/his right despite obvious barriers of information, resources and potentially compromising the relationship with your employer. The individualised nature of the problem of unequal pay is incompatible with the broad social and institutional gender-biases which sustain the GPG. Insofar, the writers of the legislative proposal believe that employers should bear legal accountability to show that they ensure equal pay, not the employee. This proposal with specific initiatives regarding certification and reporting (transparency measures) is inspired by good practices from inter alia Iceland and the UK. Shifting the burden of proof to the employer and allowing employees access to pay information of colleagues who perform work of equal value would effectively transform the issue of unequal pay into a collective problem rather than an individual one.

On the basis of the analysis in this chapter, the proposal is examined to see whether it addresses some of the main causes of the GPG in the Dutch context. Concretely, the new provisions will be tested on their effectiveness and efficacy. The observations made in the previous section act here as a frame of reference for this evaluation. There are four new leading provisions introduced in this proposal: a certification duty, a reporting duty to the Work Council, a reporting duty by means of a management-report ('bestuursverslag') and increased transparency by access to pay documents of colleagues who perform work of equal value if requested by the employee.

What stands out from this legislative proposal is the strong focus on enhancing transparency. There is a threefold approach to this. Firstly, by increasing insight for the public into the level of social responsibility concerning equal pay practices of employers by way of a certification system. Companies with more than 50 employees must acquire a certificate every three years on the basis of an independent assessment framework performed by an appointed certification institution (Art 10). The certification of employers will be recorded in a registry that is accessible and available to the general public (Art 11(1)). This registry will provide information regarding the granting, refusal, suspension and repeal of certificates of companies (Art 11(2)). Secondly, the employer must draft a management-report on the existing pay differences between employees who perform equal work or work of equal value (Art 11a(1)). In case there are pay differences between women and men, mention of this must be made in the report, as well as ways to resolve it (Art 11a(2)). The third approach is by means of providing access to pay structures of companies for employees (Art 11c). To elaborate, an employee can, if requested, gain access to anonymised pay information of her/his colleagues when it concerns equal work or work of equal value. If unequal pay is detected here, the employee can report this to the Work Council through a complaint. Subsequently, the Work Council has two months to review and settle the situation before the employee can submit a complaint with the NIHR. What is more, for companies with fewer than 50 employees who are not required to draft a management-report, a similar way document for reporting is available. This would also document the potential pay differences between women and men and illustrate how the company plans to address and solve them. The Work Council acts in this context as a supervisory body to monitor the pay policy and pay differences of a company (Art 11a). Finally, in order to warrant effective enforcement, the Inspectorate SZW, acting as the supervisory body (Art 11b), can impose administrative fines in case of noncompliance or infringement with the equal pay principle (Art 11f).

In essence, these measures addressed in the legislative proposal aim to improve enforcement of the equal pay principle through reporting duties and transparency obligations to employees. As an additional mechanism, the threat of a fine in case of a violation of the provisions may work to prevent pay discrimination practices and noncompliance. In view of this, the proposal introduces various ways to boost pay transparency which, as the previous section points out, is one of the main causes of the GPG in the Netherlands. The proposal thereby offers a positive prospect for issues of pay transparency.

Still, transparency is only one of four topics that manage to explain the GPG from a political, institutional, legal and judicial point of view in the Netherlands. Reference to gender-bias in wage classification systems is not made in the legislative proposal. Yet, it does require companies to report on the ratio of the base-salary of women and men per employee group or category. Gender specific information regarding work experience (in years), employment appointment (number of hours per week), education level and job level within the company are gathered. On the basis of this information, an overview of the gender-based pay differences in equal work or work of equal value can be constructed. The acquired data is anonymous and must be justified with the certification institution. But this essentially only reveals pay discrimination between women and men of the same employee group or job level. It does not however question or scrutinise the discrimination within this type of classification characteristics. Also, according to a SER report on discrimination in the labour market, one of the most important gender-biased classification characteristics is, inter alia work experience (SER Advies, 2014). Hence, in the proposed system, companies would presumably not be able to prevent pay discrimination on this aspect. With regards to the other aspects, this proposed system may at best identify pay discrimination, but follow-up action is required in order for it to also help combat discrimination.

There is little mention of ways to improve protection against pay discrimination through collective labour agreements. Even so, the legislative proposal does acknowledge that the primary source of significant pay differences can be found in salary negotiations. Nonetheless, no new provisions are established which would address this, leaving women largely unprotected from unequal treatment in the collective labour agreements. And lastly, the legislative proposal does not mention ways to enhance access to justice. In fact, it does not even address the problem of restricted access to justice in the Netherlands. Previously, the importance of case law in clarification and interpretation of legal concepts such as transparency was substantiated (*CASE?*). By failing to acknowledge the importance of access to justice through court action,

the proposal is undermined. Because even when transparency is effectively applied, when access to court is not available the provisions in this proposal lack impact. What can be concluded from this is that while appreciable attention is given to matters of transparency, and to a lesser degree wage classification systems, it is evident that more insight and recognition on the role of collective labour agreements and access to justice is needed to propose necessary action.

## 6. Recommendation

A gap can exist between many elements and entities. ‘Mind the gap’ is taken from the situation of public transport in the London Underground. The audible and visual warning phrase is directed at train passengers to take caution in crossing the spatial gap between the platform and the train. In this thesis the iconic logo of the English underground is symbolically used to create awareness of the gap in payment between women and men. But also to present ways to bridge this gap. So far, this thesis has observed that enforcement and protection are still primarily focused on individuals initiatives to bring an action before court. For as such, the reason why the GPG still exists is not because of varying individual characteristics or the fact that individual rights are not being actualised through court action. Instead, it still exists in the Netherlands due to the lack of effective enforcement of and the gender-bias in the institutional infrastructure. Though at the same time judicial enforcement cannot be underestimated, as access to justice is one of the main causes of the GPG in the Netherlands. To elaborate, if transparency of pay would be enhanced, but access to justice remains difficult then unequal pay between women and men remains. This particularly applies to the Netherlands, because of the high reliance on micro level enforcement through individual court action. And so, while it is necessary to focus on improving access to justice, this alone will not resolve the GPG.

The conclusions drawn from the analysis indicate the complexity of the relations, interests and competences of different national institutions. It nevertheless also illustrates the importance of their role with regards to enforcing and ensuring equal pay. For, the other main causes of the GPG identified in the Netherlands are the gender-biased wage classification systems, insufficient protection in collective labour agreements and deficient pay transparency measures. These aspects are determined and shaped by the trade union, the FVN, and employer’s associations, the AWVN and VNO-NCW, and are assisted and supported by the Labour Foundation. Additionally, the Inspectorate SZW monitors pay differences between women and men among employers and investigates whether compliance with the law is achieved. They can also enforce employers to examine the cause of gender-based pay discrimination in their company, which must in turn be discussed together with the Work Councils or trade unions. The role of the court in enforcing equal pay legislation is already emphasised in the previous paragraph. Interestingly, in the Netherlands, the meso and macro levels of enforcement are limited to the respective competences of the institutions. This is problematic considering the fact that most of the causes of the GPG are based in the institutions

on these levels. The following concluding remarks and recommendations below outline ways to address this problem.

Women have come a long way; exceeding men in education levels (Van der Meer, 2008) and making their way into the labour market in vast numbers, thereby solidifying their contribution to society. From doing simple and uneducated jobs, to working in high level jobs, acquiring income providing for their own economic independence. The Covid-19 crisis has exhibited the undeniable importance of women in the labour market in all levels of work, but at the same time has exposed their economic vulnerability. The implicit question of this thesis is, who is responsible for ensuring pay equality: the Dutch Government, the employers or the employees? The current situation in the Netherlands relies to a large extent on individuals to ensure pay equality. Through the case study in the main analysis it became clear that this decentralised enforcement system does not work because the main causes of the GPG do not lie in insufficient judicial protection. And so, while measures on transparency are also important, these still rely on the responsibility of the victim to get justice for pay discrimination. It should therefore not be the sole point.

Considering this, the evaluation of the Dutch legislative proposal highlighted the narrow scope of the new provisions. It fails to mention some of the main causes of the GPG, such as protection against gender-based pay discrimination through collective labour agreements. The proposal also does not acknowledge, given the important role of the court, how limited access to justice may retain pay differences between women and men. It does address three ways to improve transparency, e.g. by making reports on pay information available for employees. This contributes to raise awareness on the issue and provides the opportunity to identify pay differences and possibly resolve them. The same impact counts for the certificate requirement, which enhances transparency amongst the broader public. Nonetheless, the strong dependency on transparency in this legislative proposal signifies a continuation of the individual-based enforcement and judicial protection system. And so, while transparency is very important, it should not be the sole focus of new provisions aimed at closing the GPG.

The following recommendations describe ways on how the GPG in the Netherlands can be reduced on a macro, meso and micro level.

## **The Dutch Government:**

- **Recommendation 1: improve equal pay laws and legislation**

A clear definition of the concept ‘equal work or work of equal value’ is necessary for effective enforcement of equal pay. This renders more legal clarity and prompts victims to make an equal pay claim without needing to go through the process of finding a comparator.

Next, introducing accessible options for legal aid will contribute to improve equal pay laws because it will stimulate court action. This will increase case law and herewith strengthen the interpretation and application of the law, which is an essential part of the rule of law in a democracy.

Thereafter, including the possibility to sanction employers or impose punitive damages in case of an infringement of equal pay law offers effective enforcement tools. These consequently may internalise better behaviour among employers because of the threat of sanctions.

- **Recommendation 2: improve transparency of pay structures as well as enhance effective enforcement and internal protection of victims**

Through the Work Councils Act, employers need to report on the equal treatment of men and women to the Work Council. Yet, these reports are not broken down by gender. It is recommended to include a gender parameter into these reports, for this emphasises the potential gender-bias in employment, job evaluation and pay structures.

The Dutch legislative proposal already proposes measures on enhancing pay transparency but these may be complemented in order to increase compliance with equal pay laws. The introduction of a certificate and management-report on pay differences for employers with more than 50 employees and a similar monitoring report for employers with less than 50 employees, needs to be strengthened. Attaching a quota for employers, streamlining the steady and rapid decline of the GPG with every three years (consistent with the certification process), will probably serve as additional motivation to ensure the closing of the GPG.

Better protection of victims of pay discrimination internally will in my view contribute to decreasing the GPG by means of a neutral equal pay Ombudsman. The dependency and power relation between the employee and the employer may prevent victims to come forward to supervisors or managers of the company. Considering this, adopting a requirement for companies to appoint an independent and neutral Ombudsman will stimulate the resolution of

gender-based pay discrimination. Additionally, stimulating dialogue with HR-managers on matters of pay and employment will provide the opportunity and possibility to renegotiate pay in case of discrimination. Given the fact that pay discrimination often happens subconsciously and unwillingly this stimulates awareness and provides an option for harmonious and amicable resolution, so to avoid costs of legal proceedings for employer and employee.

Finally, better protection of whistle-blowers will help encourage victims to make equal pay claims. A new bill implementing the EU Whistle-blower Directive in 2021 revealed, after an evaluation of the Whistle-blower Authority Act in 2020, that there was too little data on facts and figures to properly determine the effectiveness of the Act. There is room for improvement on the legal protection of whistle-blowers (Rijksoverheid, Rule of Law Report, 2021) and so further research on the effectiveness of the Act is necessary.

- **Recommendation 3: including a gender-sensitive narrative in wage classification and raising awareness on the impact of gender-biases**

It has been concluded that in the Netherlands one of the main causes of the GPG is gender-bias in wage classification systems. In my view, a thorough assessment of price and return from characteristics in wage-setting systems will advance the application of gender-neutral parameters. Being able to detect and acknowledge the gender-bias in these systems that disadvantages women would in turn improve awareness of the problem. Following from this, trade unions and employer's associations need to be included in this assessment in order for them to apply more gender-neutral parameters. This will likely help to decrease the GPG in the Netherlands and also tackle horizontal occupation segregation.

Applying gender-neutral parameters for wage classification shifts the focus on the individual to the broader collective problem of the GPG and undervaluation of women's work. Redefining the way in which the Netherlands approaches the GPG gives a stronger emphasis on the fact that it is a collective problem and not just something the employers must ensure or individuals must enforce themselves.

The above-mentioned certification requirement for companies with more than 50 employees should be coupled with a strategy to raise awareness. By creating an equal pay scoreboard comprised of employers, who on the basis of their certificate rating score high or low, transparency into good practices (or bad practices) is provided and public awareness is raised. The threat of bad publicity or reputational damage generally stimulates corporate social

responsibility<sup>35</sup> and harnesses good practice on matters of equal pay. This can be effective in ensuring compliance, as can be learned from the experiences in the UK and France (European Commission, 2020). Although public naming and shaming is most powerful when there is a high level of public involvement. Therefore, this scoreboard needs introduction through a compelling campaign on the relevance of equal pay in order to raise awareness. The trade unions could play a role in creating and designing such a campaign.

#### **For the national institutions:**

- **Recommendation 4: improve the skillset for a better negotiation position**

Lack of information or schooling is one of the causes of unequal classification of pay in the hiring and selection procedures. This recommendation therefore includes increasing the availability of schooling and training in negotiation. The trade unions may play a role in offering this type of training. Informing employees on their rights will benefit the closing of the GPG because it will likely help to prevent gender-based pay discrimination.

And so, providing training programs for women, on how to improve their negotiating-skills and informing them about the steps they can take in case of suspected discrimination, may lead to more awareness. It is intended to equip women with the necessary skills to acquire equal pay for equal work or work of equal value.

- **Recommendation 5: enhancing the role of trade unions, employer's associations and Work Councils**

Including trade unions and employer's associations in drafting the management-reports, which are introduced in the Dutch legislative proposal, will allow them to gain insight into the employment and pay conditions of women and men. This will only be effective provided the reports include gender-specific parameters. And specifically, the inclusion of the trade unions and employer's associations in resolving pay inequalities offers them the crucial tools for understanding the causes of unequal pay in companies and ways to improve equal treatment. Providing guidance and support to the employer are potential means to achieve this.

Additional information about the discriminatory practices and unequal treatment in recruitment and hiring will benefit the Work Councils in their monitoring responsibilities. The Work

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<sup>35</sup> Corporate Social Responsibility: this benefits the employers because of the increased competitiveness of the labour market ('a good employer guarantees fair pay') (Van der Meer, 2008).

Councils can rely on the data gathered from the investigations of the Inspectorate SZW in order to develop a better understanding of pay discrimination during hiring processes.

**For the individual woman:**

- **Recommendation 6: inform and mobilise**

Improvement in enforcement on the micro level may not render the same results when the previously mentioned recommendations would not be realised. The reason for this is because, as this thesis has pointed out, the individual enforcement approach in the Netherlands is not optimal and adequate if it is not complemented with macro and meso enforcement.

For individual women it is recommended to join a trade union. In doing so, the interests of female labour market participants are represented in an organised manner. By deliberating with employer's associations, the trade unions can impact the implementation and enforcement of the equal pay for equal work or work of equal value principle substantially.

One of the main take-aways from this thesis is that efforts directed at closing the GPG need to be operationalised in a collective way and go beyond the enforcement scope of the current individual based approach. More research on this topic is needed in order to gain a better understanding of the different socio-cultural aspects of the GPG in the Netherlands. Finally, more research on EU equal pay legislation and governance will contribute to establish concrete statements on the causes of the GPG in the broader context of the EU.

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## 8. Appendix

### Appendix 1

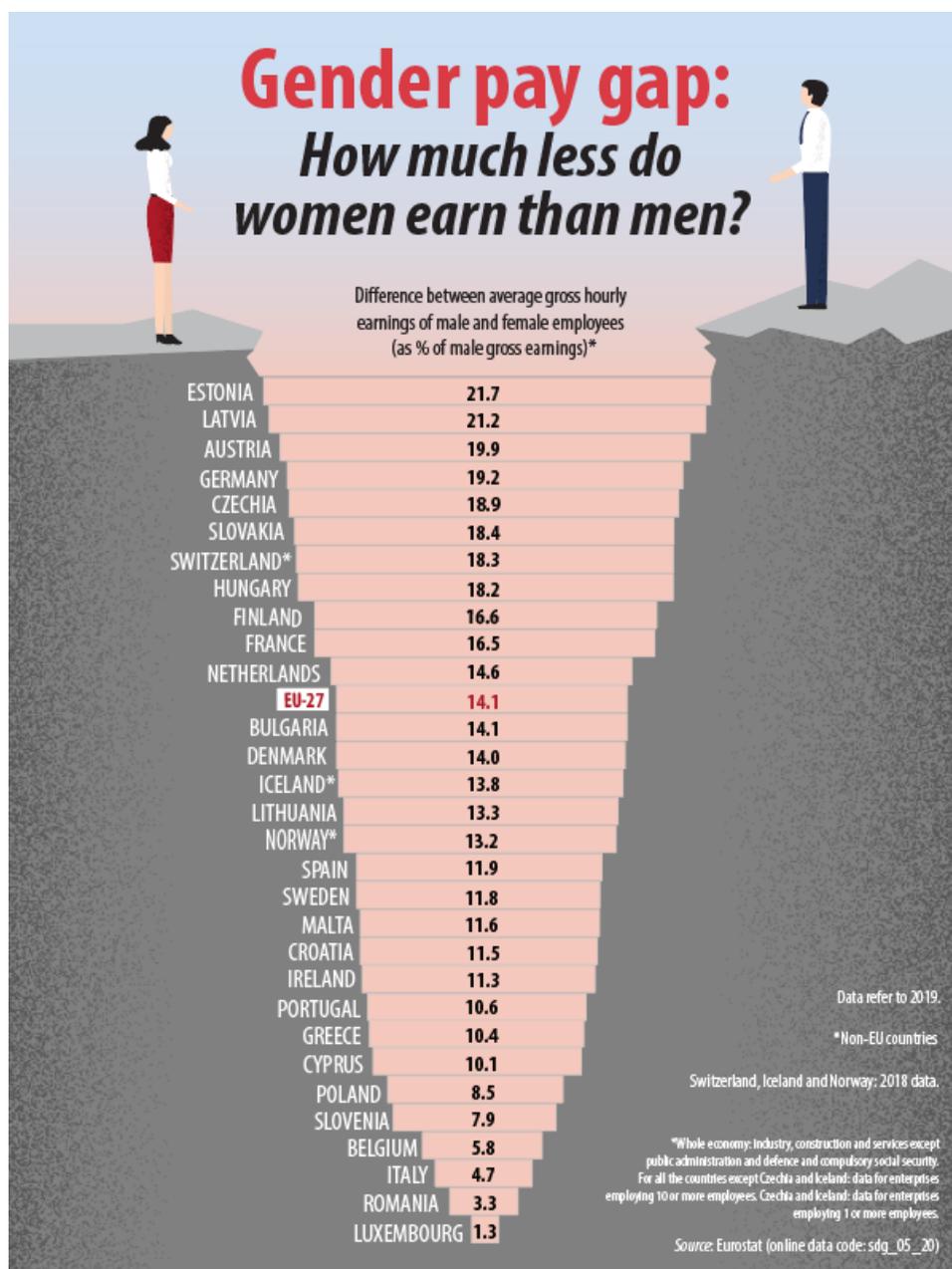
Wolfswinkel, Furtmueller, Wilderom's (2013) five-stage method for a literature review:

**Table 1 Five-stage grounded-theory method for reviewing the literature in an area: to be used in an iterative fashion**

<i>Number</i>	<i>Task</i>
1. DEFINE	
1.1	Define the criteria for inclusion/exclusion
1.2	Identify the fields of research
1.3	Determine the appropriate sources
1.4	Decide on the specific search terms
2. SEARCH	
2.1	Search
3. SELECT	
3.1	Refine the sample
4. ANALYZE	
4.1	Open coding
4.2	Axial coding
4.3	Selective coding
5. PRESENT	
5.1	Represent and structure the content
5.2	Structure the article

## Appendix 2

Eurostat SDG\_05\_20 (2021) Gender pay gap in unadjusted form:



[ec.europa.eu/eurostat](https://ec.europa.eu/eurostat)