

Government instruments for the monitoring and
enforcement of equal pay

Summary for the Federal Office of Justice (FOJ) and the Federal Office for
Gender Equality (FOGE)

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SUMMARY

Background

The average wage difference between women and men in the private sector is 23.6 percent (2010).¹ 37.6 percent of this figure cannot be explained on objective grounds and so is discriminatory in origin. In other words, wage discrimination amounts to a median 8.7 percent. This pay gap has narrowed only slightly over the last few years.

The principle that women and men have the right to equal pay for work of equal value has been enshrined in Switzerland's Federal Constitution since 1981. Enacted in 1996, the Swiss Gender Equality Act (GEA) is intended to facilitate enforcement of the right to equal pay (Art. 5 GEA). Today, enforcement of equal pay hinges on whether victims of wage discrimination or the associations representing them are prepared to go to court. While a number of "pilot lawsuits" have had a positive impact, these were largely initiated against employers in the public sector. Despite affording protection against unfair dismissal, relaxing the burden of proof and adopting inquisitorial procedure above all in cases of wage discrimination by employers in the private sector, the current system is regarded as unsatisfactory. It is proving only a moderate deterrent to the private sector; companies have too little incentive to create non-discriminatory pay structures. Enforcement rests solely on the shoulders of the victims of wage discrimination, who frequently choose not to press charges. Apart from in the public procurement sector, there is no authority in Switzerland with powers to monitor and enforce equal pay legislation.

The present study shows which instruments could be used by government to monitor and enforce the principle of equal pay in Switzerland. Consistent with the mandate, the study focuses on private-sector employment conditions. An additional in-depth analysis would need to be made to ascertain in which form the proposed measures could be transferred to the public sector (Confederation, cantons and municipalities).

Our analysis comprised firstly collating data on Swiss enforcement instruments outside the context of equal pay. The four case studies look at price supervision, the Federal Gaming Board, the enforcement of support measures to ensure the free movement of persons, as well as anti-money laundering mechanisms. Secondly, government instruments already in place in Sweden, Austria and Ontario to enforce equal pay regulations were examined. In addition to an analysis of available documentation, the case studies also entailed interviews with experts. As far as possible, we endeavour to establish the effectiveness of the examined models on the basis of measurable indicators (data on the number and nature of adjustments made by companies in response to monitoring measures). However, due to the fragmentary availability of such quantitative data, as a rule we had to rely on estimates and qualitative evaluations from the interviewed experts. In a final stage, the findings were synthesized and model variants were constructed for government monitoring and enforcement of equal pay for women and men in employment relationships in Switzerland's private sector.

¹ Federal Office for Gender Equality (2013): On the way to equal pay. Facts and trends, Bern.

Swiss cases studies

In Switzerland, government monitoring and enforcement models are in place in various areas. Four such models were examined in closer detail in the present study, namely the Office of the Price Supervisor, the Federal Gaming Board (FGB), support measures to ensure the free movement of persons in Canton Basel-Stadt, and anti-money laundering mechanisms.

In two of the four models examined, federal legislation is enforced by a federal body (Office of the Price Supervisor, FGB); implementation of the support measures model to ensure the free movement of persons is the responsibility of the cantonal authorities together with their social partners (i.e. companies and employee organizations); and the anti-money laundering model is predominantly a system of statutorily and officially controlled self-regulation under which a large part of the companies are supervised by one of the twelve FINMA-recognized self-regulatory organizations (e.g. for fiduciaries, investment advisers, notaries).

Investigations and checks conducted by the Office of the Price Supervisor, by the FGB or as part of support measures to ensure the free movement of persons are instigated *ex officio* or on receipt of information. Random checks are carried out under both the Price Supervisor and the support measures models. Under the latter model, responsibility is allocated to one of two bodies: Sectors with no generally binding collective employment agreements fall under the purview of the cantonal tripartite commissions, while sectors with such agreements come under the authority of the parity commissions. Responsibility for carrying out checks is sometimes outsourced to labour market monitoring associations under service level agreements. The FGB, on the other hand, is a very close-meshed, comparatively exhaustive statutorily regulated control system which entails automatic annual inspections (in some cases with the involvement of the cantonal authorities) at *all* casinos. It is also empowered to enforce a legal requirement to provide declarations and to undergo audits by specialized audit companies. As part of Switzerland's anti-money laundering mechanisms, the self-regulatory organization (SRO) model relies on self-checks by the industries themselves. The SROs are, in turn, subject to approval and supervision by the federal authorities. The SROs issue rules specifying members' obligations and also monitor compliance (as a rule once a year). Financial intermediaries are also subject to an annual audit by recognized external audit firms.

The Price Supervisor model, the FGB model, and the support measures model in sectors with generally binding collective employment agreements give the authorities far-reaching powers to monitor and enforce. Under the Price Supervisor model, if a mutually agreed solution cannot be found, the Office can decree that prices be reduced or not be increased. Appeals must be lodged with the Federal Administrative Court; the companies concerned are eligible to appeal, as are consumer organizations. Fear of reputational damage means that it very rarely comes to the issuance of a decree. Due in part to the fact that the model has an active PR element entailing publication of mutually agreed solutions as well as decrees, it generally has a strong preventive effect. Powers of enforcement under the FGB model range from specific decrees (e.g. changes to the selection of games on offer) to revocation of the licence. The extensive controls afforded under the model make it effective, but its narrow purview (21 companies)

limits its potential for use in other sectors. The model also entails high costs. In sectors with generally binding collective employment agreements, the support measures model is dualistic in that it relies on processes of civil as well as administrative law: Here the competent authority can impose administrative sanctions for violations of minimum wage provisions. However, it cannot order back pay awards, but has to file a suit before a civil court in accordance with the mechanisms stipulated in the collective employment agreements. By contrast, in sectors with no generally binding collective employment agreements, the relevant authority has only limited powers of enforcement. It is merely empowered to request companies to follow the local pay conditions customary in the respective sector. Under the anti-money laundering model, the self-regulatory organizations can instigate sanction proceedings and appoint investigators. The sanctions that the SROs can impose on a financial intermediary include a reprimand, fine or exclusion; disputes are usually settled by a court of arbitration. The SROs themselves are supervised by FINMA. Where there are reasonable grounds for suspecting a violation of anti-money laundering legislation, FINMA and the SROs will file a report with the Money Laundering Reporting Office. The system of self-regulation to monitor compliance with anti-money laundering legislation is well accepted among financial intermediaries, in part because the SROs are *au fait* with the specifics of the industry. This solution offers the benefit of proximity to the industry; what is more, the costs for primary control can be externalized.

Foreign case studies

We examined three models – in Ontario, Austria and Sweden – all using government instruments to enforce equal pay for women and men. While the Swedish and Austrian models are designed to ensure equal pay both for equal work and for work of equal value (but with differing assessments of what constitutes work of equal value), in the case of Ontario – owing to the historically evolved distinction made between equal pay and pay equity – we focused on the aspect of work of the same value.

A common feature of all three models is that they require certain employers (usually contingent on the number of employees) to analyse payrolls for discriminatory differences between women and men and to report the findings (duty to conduct an in-house analysis). This transparency is of key significance in establishing to what extent women are receiving lower pay in the respective organizations and how far this is attributable to gender. In Ontario and Sweden, the respective government agencies (Pay Equity Office, Equality Ombudsman) are also vested with *ex officio* powers to carry out inspections at companies to check whether they are complying with their statutory obligations. Not least, this has a preventive effect, which, however, hinges very much on how rigorously government agencies exercise their powers and on the possible sanctions that employers face.

All told, the legal basis and the scope of the agency's enforcement mandate are strongest in Ontario. Here – unlike in Sweden and Austria – agency powers go beyond enforcing the duties of declaration, surrender and cooperation. The agency in Ontario has the power of disposition to enforce equal pay and redress wage discrimination. Sweden is in the middle of the league. In addition to powers to order employers to conduct in-house analyses and cooperate in inspections, the Office of the Equality Ombudsman can – subject to the approval of the employees affected – itself bring a

complaint before a labour tribunal if a solution could not be agreed on. Austria is the least progressive of the three models under comparison. Here the onus is on the unions to take legal action if employers fail to comply with official requests to eliminate wage discrimination. The disadvantage of the Austrian system is that the burden of enforcing claims ultimately rests with the victims of discrimination and is usually on a case-by-case basis. The Ontario model is therefore also recognizably the most efficient in terms of eliminating the gender pay gap. There too, however, it is essentially not possible to show beyond doubt whether and to what extent a narrowing of the pay gap is attributable to enforcement instruments used by the government.

In addition to proactive commitments from employers and the use of official powers of monitoring and enforcement, soft factors play a role in reducing gender-based wage discrimination in all three case studies. One common such factor is constructive cooperation between employers/government agencies and employers. All three countries have been successful in raising awareness about the issue of equal pay both through the measures actually enforced as well as through collateral activities (briefing and counselling, development of wage analysis tools/guidelines) organized by the government agencies.

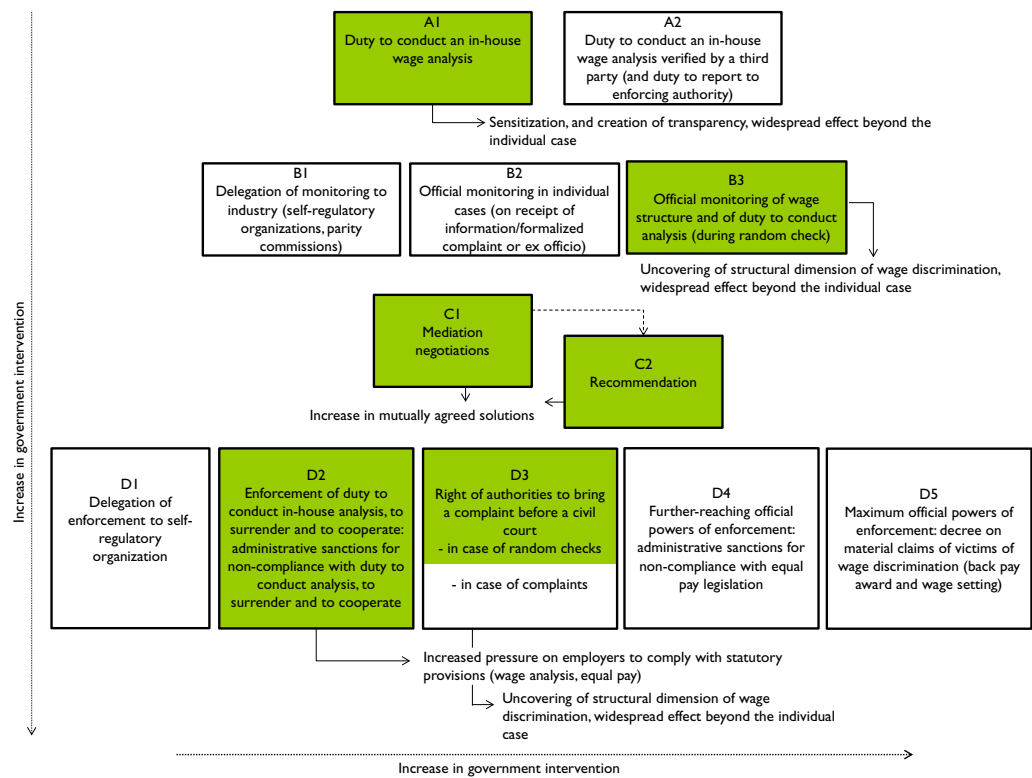
Synthesis and recommendations

The Swiss and foreign case studies were subjected to synthesis. It should be pointed out that, in all three foreign case studies, the countries investigated continue to face the problem of non-compliance with equal pay legislation. There is no “ideal” model to present showing how to achieve equal pay. That being said, all three models feature (tried and tested) aspects that could play a role in preventing, identifying and eliminating wage discrimination in Switzerland too. The Swiss case studies also reveal some interesting aspects. However, the difficulty here is that, with the exception of the sanction regime under the support measures model for sectors with generally binding collective employment agreements, none of these case studies entails the enforcement of the rights of victims of wage discrimination. As such, they are of only limited comparability with equal pay enforcement models and have little transfer potential.

When developing the synthesis, we distinguished between various stages on the way to monitoring and enforcing equal pay: Upstream from actual government monitoring and enforcement, we define the aspect of the in-house analysis (A), requiring companies to take proactive measures. We view the official monitoring measures (B) as the second aspect. Following on from this is the aspect of official mediation negotiations and recommendation (C) and, ultimately, the aspect of enforcement (D).

The individual elements with variants are shown in the following diagram. The variants recommended by us are marked in green, including the expected impact (arrows).

Overview of conceptional variants



Green: recommended variants, arrows: expected impact.

On the basis of the case studies examined and Switzerland's legal framework, we formulated *six recommendations* for structuring a Swiss model for the monitoring and enforcement of equal pay. In principle, individual variants can also be implemented, but this would diminish the impact.

In essence, we recommend limiting the administrative authority's powers of monitoring, mediation and enforcement to *random checks* and not to extend them to include the handling of complaints from individual persons. This would, for instance, enable the administrative authority to inspect specific sectors and, in so doing, investigate a company's overall pay structure on the basis of the wage analyses that firms will be required to draw up. It also avoids any overlapping with civil suits filed by individual claimants and with upstream conciliation proceedings. The random check approach shifts the focus away from individual cases of discrimination and towards uncovering and eliminating structural problems leading to discriminatory practices.

In compliance with our mandate, the recommendations relate primarily to the enforcement of equal pay in companies in the private sector. Applying them to the public sector would require an additional in-depth analysis.

1 *Introduction of a duty on companies to conduct an in-house wage analysis:* Figures on the discriminatory wage gap in Switzerland, which for years have shown only little change, suggest that employees as well as employers often fail to recognize concrete cases of wage discrimination. Seen from this viewpoint, the introduc-

tion of a duty on companies to conduct an in-house wage analysis appears to be a crucial prerequisite for sensitizing companies and creating transparency (variant A1 in diagram above). It is also the principal strength of this proactive measure. However, the foreign case studies that we looked at all show substantial shortcomings in enforcing this duty. This means that when introducing a duty to conduct in-house wage analyses, monitoring measures must also be put in place (see recommendation 2) as well as sanctions for failure to comply. Companies with 50 or more employees should be required, on the basis of clearly defined legal provisions (see recommendation 6), to review wages at regular intervals (e.g. every 3 years), draw up an internal report and, where necessary, take appropriate measures to ensure equal pay.

- 2 *Introduction of official random checks:* The current legal basis provides for equal pay for women and men at all companies in Switzerland – in other words, legislation is not merely restricted to a (small) selection of firms or to specific sectors. Viewed from this perspective, official random checks would appear to be the appropriate route (variant B3 in diagram above). The case studies showed that companies prove very cooperative when it comes to official checks and themselves frequently follow up with measures to meet their statutory obligations. This is especially true of models incorporating follow-on instruments of enforcement. Random checks should be directed at compliance with the duty to draw up wage analyses and with equal pay legislation. The duty to cooperate incumbent on companies and the monitoring powers vested in the relevant authority must be established in law. The authority must be given the powers to impose sanctions on companies failing to comply with their duty of declaration.
- 3 *Focus on counselling and mediation:* Our equal pay analysis – notably also of the foreign case studies – showed that, in many instances, solutions could be agreed between the parties (either between employers and employees or between employers and the administrative authority), with actual enforcement measures and administrative execution procedures rarely being applied. Accordingly, the authority should be mandated and empowered to advise companies and, concomitant with the random checks, to conjointly seek a solution with employers to redress any wage discrimination (variant C1 in diagram above). A further measure would be to mandate the authority, in cases where random checks are carried out, to conduct negotiations on *back pay awards*. Employers should be required to participate in these mediation negotiations.
- 4 *Official recommendation and the right of authorities to bring a complaint:* Where mediation negotiations fail to produce a mutually agreed solution, the authority can – in an initial step – be *empowered to issue a recommendation* to the company to eliminate the wage discrimination (variant C2 in the above diagram). Analogous to the above-mentioned proposal regarding counselling and mediation, this recommendation could also extend to back pay awards for a maximum period of five years. The recommendation would then correspond materially to the maximum claim that victims of wage discrimination can bring before a civil court. Any employee representatives at the company should be notified when a recommendation is issued.

To improve the enforcement of wage entitlements across a broader base, the authority should be given further powers: Since pay demands and back pay awards are, in principle, civil claims between private parties, purely taking recourse to administrative law to impose wage levels and back pay awards by decree – as is the case in Ontario – would be in contravention of the Swiss legal system. The right of authorities to bring a complaint – as in the Swedish case study and along similar lines to the Swiss Federal Unfair Competition Act (UCA) – is therefore fundamentally preferable in cases where random checks are performed (variant D3 in the above diagram). As the case studies we examined show, vesting the authorities with the right to bring a complaint increases the incentive to agree on a solution and also heightens the motivation to follow recommendations. We therefore propose that the right of authorities to bring a complaint be accorded in cases where random checks are being carried out. This right would not replace the right to sue currently enjoyed by victims of wage discrimination and by organizations/unions, but *supplement* it: Victims of wage discrimination would still be free to bring a complaint in accordance with Art. 5 GEA. Furthermore, organizations/unions could still, in their own names, have a finding of discrimination declared if the probable outcome of proceedings will have an effect on a considerable number of jobs (see Art. 7 GEA).

- 5 *Establishment of a commission model at federal level:* Since larger companies in Switzerland tend to have places of business located beyond cantonal boundaries, we recommend establishing a federal body to carry out the random checks. Bundling competences at federal level would also serve to standardize enforcement in the context of random check procedures. It might also prove both practical and pragmatic to integrate the secretariat into an existing body such as the Federal Office for Gender Equality (FOGE) and so provide the latter with a commission. Essentially, two models are conceivable: One possible option is to have social partners (companies and employee organizations) represented in the commission. We find social partnership commissions in all three foreign case studies examined by us as well as in the cantonal arbitration bodies established under the Gender Equality Act. However, in each individual case of wage discrimination the focus must be on the objective aspects; it is less a matter for political negotiation. This, in turn, would militate more in favour of setting up a commission comprising experts not affiliated to companies or employee organizations.
- 6 *Amendment of the legal basis:* Both the introduction of the duty to conduct an in-house analysis and the widening of official powers require a legal basis in the formal sense. We recommend that the legal basis, viz. the Gender Equality Act, be amended accordingly.

PUBLICATION DETAILS

FURTHER INFORMATION

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