Technical description of the pay specification used in the Confederation’s standard analysis model

A specification of pay that conforms with the law
Technical description of the pay specification used in the Confederation’s standard analysis model

Federal Office for Gender Equality (FOGE)

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Logib, the Confederation’s standard analysis tool for reviewing pay equality, was developed by the Federal Office for Gender Equality (FOGE) in the early 2000s and has been available to employers free of charge since 2004. Since 2006, Logib has also been used for state-run checks at the federal, cantonal and communal level with regard to compliance with the equal pay requirement in the public procurement and/or subsidies systems. Independent third parties have verified and confirmed that Logib is based on sound scientific methods and conforms to legal requirements; the FOGE will continue to repeat and update this validation process at regular intervals in the future. Logib was the subject of a 2015 survey conducted as part of a regulatory impact analysis, which showed that companies appreciated the method used, but were also very aware of the administrative time and effort involved. Logib’s merits and quality were recognised in 2018 when it received the UN Public Service Award.

Both the social and political environment and case law in relation to the issue of pay and defining what constitutes pay have been characterised by constant change in recent years. The federal administration’s efforts to continuously update the Logib model reflect these dynamics.

Thus, Logib is currently undergoing a major technical overhaul that will see a new web tool being launched in addition to the existing Excel application. The new technical platform is particularly intended to further reduce the time and effort required to carry out an equal pay analysis, and to make it even more user-friendly and secure. When the revised Gender Equality Act (GEA) comes into force on 1 July 2020, requiring employers with 100 or more employees to conduct an equal pay analysis by 1 July 2021, demand for a reliable tool for performing such analyses will rise yet again.

As well as the changes in the legal framework with regard to equal pay, case law concerning pay also continues to evolve. In this context, Swiss courts have had to grapple with the issue of just what is meant by the term ‘pay’ in various areas of the law such as tax law, social insurance law, the Code of Obligations and gender equality law. This study and legal opinion traces these developments and provides a comprehensive overview of the various types of ‘pay’. An assessment procedure has also been developed and used as a basis for drawing up legally sound recommendations on dealing with the various elements of remuneration under a definition of pay that conforms with the law for the purposes of conducting gender-based equal pay analyses.

This study must be seen in the context of the current technical overhaul of Logib, as it strives to establish maximum legal certainty and clarity regarding the treatment of individual salary components – for both the companies required to carry out an equal pay analysis in accordance with Art. 13 GEA and the auditors tasked with ensuring that these analyses have been conducted properly.

The FOGE will gradually incorporate the specific points raised by this report in the instruction manual for Logib and in the standard analysis tool’s technical design, without ever losing sight of the clear aim of reducing the administrative burden to the greatest extent possible while ensuring that the recommendations are as practical as possible to implement.

Sylvie Durrer, director of the Federal Office for Gender Equality FOGE
Technical description of the pay specification used in the Confederation’s standard analysis model

Phase 2

A specification of pay that conforms with the law

20 December 2019

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1 For ease of reading, this text alternates between masculine and feminine forms. Unless specifically noted otherwise, both genders are implied.
List of abbreviations

para. paragraph
FNIA Federal Act on Foreign Nationals and Integration (SR 142.20)
AJP Aktuelle juristische Praxis [Current legal practice]
OASI Old Age and Survivors’ Insurance
OASIA Federal Act on Old-Age and Survivors Insurance (SR 831.10)
OASIO Ordinance on Old-Age and Survivors Insurance (SR 831.101)
Art. Article
LPGA Federal Act on General Aspects of Social Security Law (SR 830.1)
BBI Federal Gazette
FSO Federal Statistical Office
BGE Decision of the Swiss Federal Supreme Court
BSK Basler Kommentar Obligationenrecht (Eds. Honsell Heinrich/Vogt Nedim Peter/Wiegand Wolfgang)
Cst. Federal Constitution of the Swiss Confederation (SR 101)
FSIO Federal Social Insurance Office
BVG Federal Act on Occupational Old Age, Survivors’ and Invalidity Pension Provision (SR 831.40)
BVV 2 Ordinance on Occupational Old Age, Survivors’ and Invalidity Pension Provision (SR 831.441.1)
PPA Swiss Federal Act on Public Procurement (SR 172.056.1)
DFTA Federal Act on Direct Federal Taxation (SR 642.11)
FOGE Federal Office for Gender Equality
FDHA Federal Department of Home Affairs
FTA Federal Tax Administration
EL supplementary benefits
ELM Swiss payroll standard
EO loss of earnings compensation
FZ Family allowances
CLA Collective labour agreement
GEA Federal Act on Gender Equality (Gender Equality Act, SR 151.1)
GIK Kommentar zum Gleichstellungsgesetz (Eds. Kaufmann Claudia/Steiger-Sackmann Sabine)
HWorkA Federal Act on Homeworking (SR 822.31)
IV Invalidity insurance
let. letter
ESS  Earnings Structure Survey
CO  Federal Act on the Amendment of the Swiss Civil Code (Part Five: The Code of Obligations) (SR 220)
PwC  PricewaterhouseCoopers AG
MN  margin note
SAMB  Confederation's standard analysis model
SGK  St. Galler Kommentar zur schweizerischen Bundesverfassung (Eds. Ehrenzeller Bernhard/Schindler Benjamin/Schweizer Rainer J./Vallender Klaus A.)
SR  Classified Compilation of Federal Legislation
SSK  Swiss Tax Conference
UVG  Federal Act on Accident Insurance (SR 832.20)
UVV  Ordinance on Accident Insurance (SR 832.202)
ERCO  Ordinance against Excessive Remuneration in Listed Companies Limited by Shares (SR 221.331)
 cf.  compare
PPO  Ordinance on Public Procurement (SR 172.056.11)
e.g.  for example
ZK  Zürcher Kommentar Obligationenrecht (Ed. Handschin Lukas)
Summary

The revised GEA requires employers with 100 or more employees to conduct an equal pay analysis within the company every four years. For the purposes of this equal pay analysis, PwC was tasked by the Federal Office for Gender Equality (FOGE) inter alia to come up with a general definition of ‘pay’, clarify questions relating to the frequency of payments and assess various specially chosen special cases (e.g. signing bonuses, severance allowances, tips) from a legal point of view. In addition, consideration was given to whether – and to what extent – each of the elements of remuneration identified in the first project phase should be taken into account for the purposes of the equal pay analysis.

The findings of our study can be summarised as follows:

- For the purposes of performing an equal pay analysis, all elements of remuneration which qualify as pay under the existing doctrine and case law on Art. 8 para. 3 Cst. and Art. 3 GEA should be taken into account if the relevant literature provides sound justification or current case law demonstrates a clear willingness to recognise the element of remuneration in question as pay. If there is any doubt as to whether an element of remuneration qualifies as pay within the meaning of Art. 8 para. 3 Cst. and Art. 3 GEA, it should be taken into account in the equal pay analysis if (i) it is recognised as pay in another area of law or is connected to the employment relationship, (ii) there is direct or indirect potential for discrimination and (iii) the employer is entitled to exercise discretion in allotting and/or measuring the element in question. In case of doubt, we believe that an element of remuneration should be included in the equal pay analysis. Questions of practicability in recording elements of remuneration were not the foremost concern of our study. Nevertheless, we have made a few observations on the subject (section II. 5.3).

- Furthermore, our consideration of the question of payment frequency from a legal viewpoint has shown that those elements of remuneration that are not realised until long after entitlement to them has arisen should be taken into account in the equal pay analysis on a ‘time of accrual’ basis. This observation is in keeping with the considerations in which we state that elements of remuneration should only be taken into account if the employer has some discretion in this respect and could exercise such discretion in a discriminatory manner.

- The results of our examination of individual special cases are presented under the subheadings “Inclusion in the equal pay analysis” and “Frequency”.

- The factors that qualify the elements of remuneration identified in the first project phase for use in equal pay analyses are listed individually in the Appendix.
Legal analysis

I. Task

The Federal Office for Gender Equality (FOGE) in Bern asked PricewaterhouseCoopers AG, Zurich (PwC) to produce a technical description of the pay specification used in the Confederation’s standard analysis model. The task can be divided into three phases:

- **Phase 1**: PwC compiled a list of potential pay components. In addition, the existing pay specification used in the standard analysis model was compared with the Swiss payroll standard (ELM).

- **Phase 2**: In the second project phase, which is currently under way, a legal definition of ‘pay’ is to be arrived at for the purposes of the equal pay analysis (section II.), questions relating to the frequency of payments to be taken into consideration are to be clarified (section III.) and specific elements of remuneration are to be assessed from a legal point of view (section IV). This work will be rounded out with an analysis and comments on the individual elements of remuneration identified in phase 1 (section V.).

- **Phase 3**: PwC will draw up a technical description of the pay specification used in the standard analysis model on the basis of the legal conclusions arrived at in phase 2.

This report presents the findings of phases 1 and 2.

II. Legal definitions of pay

1. Overview

In arriving at an authoritative definition of pay for the federal government’s standard analysis model, we begin by presenting the key elements of remuneration (section II.2) before examining the existing definitions of pay in section II.3 to gauge whether, and to what extent, these can be used for equal pay analysis purposes. To provide a better understanding of the specifics relevant to defining pay for equal pay analysis purposes, section II.4 then takes a closer look at the problems associated with pay discrimination. Lastly, section II.5 serves to present the authoritative definition of pay for equal pay analysis purposes.

2. Key elements of remuneration

To gain a differentiated understanding of the issues related to equal pay, it would make sense to take a look at the key elements that make up remuneration. Pay can roughly be divided into base pay (also known as ‘basic wage’ or ‘basic salary’), a performance-related (or ‘performance-based’) component and a profit-sharing (or ‘incentive’) component, plus various allowances.

- **Base pay**: As the name suggests, this forms the basis for – and is usually the largest component of – the total pay received. Base pay may include the following components: function-related pay, an experience-related portion and a differential portion. Function-related pay is a fixed amount paid in relation to a certain activity or position, regardless of who is performing the work. Entitlement to function-related pay generally increases for work that requires higher qualifications and experience and/or is more demanding. The experience-related portion, on the other hand, takes into account the person who is performing the work in the form of increments for experience and seniority. The differential portion applies when, due to market conditions, a person is hired on a basic
salary that appears excessive in comparison with other employees within the company.

- **Performance-related pay**: The performance-related component is flexible. A distinction can be made between direct and indirect performance-related pay. In the case of *direct performance-related pay*, performance is measured on the basis of key figures (e.g. quantity output, adherence to deadlines) and a bonus is paid in relation to certain performance targets or objectives. In the case of *indirect performance-related pay*, the employee’s personal performance is measured and assessed with reference to performance- and qualification-related and behavioural characteristics.

- **Profit-sharing component**: Profit-sharing is another flexible salary component. It allows employees to share in the company’s profits. The company’s net earnings are determined (usually on an annual basis) and a percentage of the profits is passed on to those entitled to a bonus.

- **Allowances**: Pay also includes various allowances that must be paid by law or on the basis of a collective labour agreement, or which may even take the form of voluntary payments by the company.

### 3. Definitions of pay in Swiss law

#### 3.1. Introduction

The meaning of the term ‘pay’ has been variously defined in legislation, case law and doctrine for a variety of purposes. As will be shown below, the definitions of ‘pay’ in use in the different areas of law do not always coincide. Thus the definition of relevant pay under employment law does not necessarily match that under tax or social insurance law. The term as used by the Federal Statistical Office (FSO) in the Swiss Earnings Structure Survey (ESS) need not always correspond to the respective legal definitions.

For the purposes of this study, the principles developed in respect of pay in accordance with Art. 8 para. 3 of the Federal Constitution (Cst.) and Art. 3 of the Federal Act on Gender Equality (GEA) take priority (section II.3.2/3.3). However, the question also arises as to what extent elements of remuneration that qualify as pay under employment law, social insurance or tax law (section II.3.4/3.5/3.6) should be included in the equal pay analysis. In addition, the principles applied by the Federal Statistical Office and the Confederation’s standard analysis model (SAMB) could also provide reference points for defining pay for use in equal pay analyses (section II.3.7/3.8).

#### 3.2. Art. 8 para. 3 Federal Constitution

A mandate to ensure gender pay equality has been enshrined in Art. 8 para. 3 of the Federal Constitution since 1981. This provision forms part of the catalogue of fundamental rights set out in the Federal Constitution and is worded as follows:

> Men and women have equal rights. The law shall ensure their equality, both in law and in practice, most particularly in the family, in education, and in the workplace. Men and women have the right to equal pay for work of equal value.

According to the Federal Supreme Court, ‘pay’ within the meaning of Art. 8 para. 3 constitutes all compensation for work performed by employees regardless of whether such compensation constitutes actual pay (remuneration of work/salary), components of pay such as family, local

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2 **SCHRÖDER, Instrumente, 19 f.**
and child allowances, bonuses, remuneration in kind or other. Only pensions and entitlements to occupational benefits are not classed as pay under the constitutional provision, even though they are dependent on salary.

Therefore, ‘pay’ within the meaning of Art. 8 para. 3 Cst. is “to be understood not only as cash wages in the narrower sense, but as the compensation received for the work performed.” This also includes “social salary components such as the right to pay during maternity leave and the right to family, child and seniority allowances” or remuneration in kind and bonuses. However, there must be a close connection between the payment/benefit and the work performed; this is why a widow’s pension, for example, does not qualify as pay within the meaning of Art. 8 para. 3 Cst.

The principle of equal pay as set out in Art. 8 para. 3, sentence 3 Cst. may give rise to “a directly applicable individual right that is capable of being adjudicated.” But, as with most of the fundamental rights, this is a regulation of principle whose wording is kept very general.

Although the constitutional provision and the associated practice of the Federal Supreme Court must be seen as binding for the definition of ‘pay’ in the equal pay analysis, the lack of precise wording means that they merely provide a rough framework.

3.3. Gender Equality Act

The Gender Equality Act (GEA) came into force on 1 July 1996 and is intended to facilitate enforcement of the constitutional right to equal pay for work of equal value (Art. 8 para. 3 Cst.). It prohibits gender-based discrimination in working life in general, while also specifically outlawing wage discrimination in Article 3.

In terms of defining what constitutes pay, from a substantive law viewpoint, Art. 3 GEA restates what is already set out in the Constitution. The fact that the term ‘pay’ has not been definitively defined in the Gender Equality Act or fleshed out more precisely in the accompanying literature or case law would appear to make it all the more necessary that we come up with our own definition.

3.4. Employment law

3.4.1. Primary and secondary obligations

According to Art. 319 para. 1 CO, the main duty of employees is to work in the service of the employer and the employer’s main duty is to pay them a salary. The obligation to pay a salary is thus an essential term in the employment contract. However, the Code of Obligations does not include any legal definition of ‘pay’. There is a reciprocal relationship between the two primary obligations under employment law (payment of salary and the performance of work). Therefore, as a rule, only those payments/benefits by the employer which serve solely, or at least predominantly, to remunerate employees for the work performed are to be considered as pay under employment law. On the other hand, MORF states that payments made by the

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3 BGE 126 I 265; 126 II 217 E. 8a; 109 Ib 81 E. 4c; Dispatch GEA 2017, 5512.
4 SGK BV-SCHWEIZER/BIGGELI-Eggerberger/Kägi-Diener, Art. 8 Cst. N 125; e.g. BGE 126 II 217 E. 8a, 223 ff.; 116 V 207; 109 Ib 81 E. 4c, 87.
5 BGE 126 II 217, 223; Biaggini, Art. 8 Cst. N 34.
6 BGE 116 V 198, E. 2a; Biaggini, Art. 8 BV N 34; Dispatch GEA 2017, 5512.
7 BGE 131 I 105, 108; vgl. BGE 142 II 49, 55 E. 5.1.; Biaggini, Art. 8 Cst. N 33.
8 BGE 124 II 409, 424; GLK-Freivogel, Art. 3 N 73.
9 Streiff/von Kaenel/Rudolph, Art. 322 CO N 2.
10 MORF, §4, N 237.
11 MORF, §4, N 252.
employer on the basis of the employment contract or in the context of the employment relationship are not to be regarded as pay under employment law if granted for a (main) reason or purpose other than compensation for the work performed. Whether or not the employer treats such payments (e.g. family allowances) partly as if they were pay is irrelevant. 12

Alongside these primary obligations, both parties have secondary obligations. 13 Having to reimburse employees for all expenses necessarily incurred in the performance of their work as required by Art. 327a para. 1 CO, for example, is a secondary obligation. However, reimbursing necessarily incurred expenses does not constitute pay, as it is not the performance of work by the employee that is being compensated. The reimbursement of expenses and pay are thus mutually exclusive from an employment law viewpoint. 14 Amounts paid by the employer to employees in the form of a fixed sum as reimbursement for expenses in accordance with Art. 327a para. 2 CO or a lump-sum advance against such expenses in accordance with Art. 327a para. 2 CO occupy the grey area between pay as a primary obligation and the reimbursement of expenses as a secondary obligation. If the employer knows in advance that this amount exceeds or could exceed the actual necessary expenses, but refrains from instructing the employee that any excess amount is to be used for future expenses or refunded to the employer, then this excess amount could be viewed as hidden pay. 15

3.4.2. Limitations to freedom of contract

Article 19 para. 1 CO states that the terms of a contract may be freely determined within the limits of the law. 16 This also applies to employment contract law. Thus, the parties are free to negotiate and determine the amount of salary provided there are no mandatory statutory provisions, standard employment contracts or collective labour agreements that impose restrictions. 17

However, the freedom of contract is limited not only with regard to labour protection 18, but also by ‘equitable pay’ regulations. These are norms that accord certain groups of employees the right to the same amount of pay as other employees receive for work of the same value. 19 Thus, employees who work from home are entitled to the same pay as those who work on the employer’s premises (Art. 4 para.1 and 2 Federal Act on Homeworking (HWorkA)), and foreign nationals to whom the Federal Act on Foreign Nationals and Integration (FNIA) applies may only be admitted to work in Switzerland if the salary and employment conditions customary for the location, profession and sector – in particular regarding pay – are satisfied in the employment contract (Art. 22 FNIA). 20 Over and above that, Art. 8 para. 3 Cst. and Art. 3 GEA provide that women and men should receive equal pay for work of equal value. 21 If a female employee is discriminated against by agreeing a lower salary, then Art. 5 GEA states that the higher salary is nevertheless due for payment. 22 It is not referring to a minimum wage, but to the customary salary. This chimes with the basic idea of Art. 322 para. 1 CO, which states that the customary salary is to be paid where no salary agreement has been made. 23

3.4.3. Conclusions
The crucial point with regard to this study is the recognition that, under employment contract law, the term ‘pay’ is largely determined by the parties themselves. It does not serve to create equal pay between women and men and thus does not give any consideration to the idea of gender-based pay discrimination. Instead, the term ‘pay’ as used in employment contracts is restricted in turn by the term ‘pay’ as defined for use in equal pay analyses. Therefore, although the term ‘pay’ as used in employment contracts provides a number of reference points for this study, merely adopting it 1:1 for use in equal pay analyses would not appear appropriate.

3.5. Social insurance law

The main idea and thus ratio legis underlying the Swiss social insurance system is to cover various social risks. Arrangements for dealing with the consequences of such a risk occurring are often based on the solidarity principle, as is reflected in the compulsory nature of the insurance and its broadly redistribution-based method of financing. Switzerland’s system of social security is based on the “three pillar system”, which is intended to provide comprehensive financial cover for the risks of death, disability and old age. Social security is mostly financed through income-based deductions from salary. These contributions are shared equally between employer and employees (cf. Art. 112 para. 3 Cst.).

3.5.1. OASI, IV and EO

Under social security law, ‘pay’ consists of monetary payments or benefits in kind, or a claim owing to a self-employed worker, as the case may be. In other words, in addition to the direct compensation received for the work performed, relevant earnings generally include any payment made to employees in connection with the employment relationship, regardless of whether that relationship is ongoing or has been terminated and whether the payments/benefits are owed or made voluntarily. The nature of the remuneration and not the name given to it by the employer is the decisive criterion in deciding whether it qualifies as relevant earnings.

Relevant earnings can be measured either on the basis of time (hourly, daily, weekly, monthly or annually) or the task performed (piecework, commission payments, gratuities and bonuses), or a combination of the two (fixed and variable compensation). Interest and compound interest on salaries paid late by the employer do not constitute remuneration from the viewpoint of social security law.

Art. 5 para. 1 of the Federal Act on Old-Age and Survivors Insurance (OASIA) names the income from paid employment (as an employee) that is subject to contributions as ‘relevant earnings’. Para. 2 states that this includes all remuneration for work performed as an employee for a fixed or indefinite period. Art. 5 para. 2 sentence 2 OASIA lists various components of income that fall into this category: cost-of-living and other allowances, commission payments, gratuities, benefits in kind, holiday pay and compensation for working on public holidays and similar payments, plus tips if these make up a significant part of the remuneration for work.

Lastly, Art. 7 of the Ordinance on Old-Age and Survivors Insurance (OASIO) lists the various forms of payment that qualify as relevant earnings:

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24 KIESER, p. 5.
25 EDI BSV, Rz. 1007.
26 EDI BSV, Rz. 1008.
28 EDI BSV, Rz. 1009.
29 EDI BSV, Rz. 1017.
30 LOCHER/GÄCHTER, §64 N 6.
- Time-based, piece work and bonus pay, including compensation for overtime, night work and deputising for colleagues;
- Local weighting and cost-of-living allowances;
- Gratuities, loyalty and performance bonuses,
- Pecuniary benefits from employee share-ownership plans;
- Remuneration of limited partners resulting from an employment relationship with the limited partnership;
- Shares in the employer’s earnings if these exceed the interest on any capital contribution;
- Tips if these form a significant part of the pay;
- Regular benefits in kind;
- Commission payments;
- Emoluments, fixed compensation and meeting fees for members of the Board of Directors and executive bodies;
- Income of members of federal, cantonal and municipal authorities;
- Emoluments and annual allowances for insured persons employed in the public service unless there are cantonal arrangements to the contrary;
- Fees of lecturers and teaching staff with similar pay arrangements;
- Continued payment of wages by the employer due to accident or illness;
- Continued payment of wages by the employer due to military service;
- Holiday pay and public holiday compensation payments;
- Employee contributions to the Old Age, Survivors and Invalidity insurance, loss of earnings compensation scheme and unemployment insurance paid by the employer; an exception is made for the payment of employee contributions on benefits in kind and on all-in earnings;
- Taxes paid by employers on behalf of employees;
- Benefits paid by the employer on termination of the employment relationship, unless excluded from the relevant salary under Article 8bis or 8ter OASIO; pensions are converted into a lump sum on the basis of the Federal Office’s conversion table.

On the other hand, according to Art. 8 OASIO, the following do not qualify as relevant earnings:
- Employer contributions made under pension plan rules to pension funds that qualify for tax exemption under the Federal Act on Direct Federal Taxation (DFTA);
- Employer contributions to employee health and accident insurance and to family compensation funds provided that all employees are treated equally;
- Benefits paid by the employer on the death of family members of employees or to their surviving dependants, in connection with company anniversaries, engagements, weddings or the passing of professional exams;
- Benefits paid by the employer for the cost of medical fees, medicines, hospital and spa treatment, provided that they are not covered by compulsory health insurance and that all employees are treated equally;

In addition, certain expenses do not constitute earnings. These are expenditures incurred by employees in the performance of their work, specifically:\(^{31}\)
- Travel costs (travel, board and lodging)
- Representation and business entertainment expenses;

\(^{31}\) EDI BSV, Rz. 3003 ff.
- Expenses for work tools and material or clothing;
- Cost of using premises, in so far as they are used for the purposes of gainful employment;
- Relocation compensation where employees are required to move because of their job;
- Grants for basic and advanced training that are closely related to the employee’s professional activities;
- Uniforms or work clothing provided by the employer and any cash in lieu of such benefits. However, regular compensation for travel to work from the employee’s place of residence to their habitual place of work, and regular compensation for the usual meals at their place of residence or habitual place of work do not count as expenses. With a few exceptions, these forms of compensation constitute relevant earnings in accordance with Art. 9 para. 2 OASIO.

3.5.2. **UVG**

The relevant earnings under OASI legislation also constitute ‘insured earnings’ under the Federal Act on Accident Insurance (UVG). However, Art. 22 para. 2 of the Accident Insurance Ordinance (UVV) sets out various deviations from this rule: 32

- Salaries not subject to OASI contributions because of the insured’s age also count as insured earnings;
- Family allowances paid in the form of child, vocational training or household allowances also constitute insured earnings provided they are customary for the region and particular sector;
- For family members working in the employer’s company, partners, shareholders and members of a cooperative, the customary rates of pay for the occupation and region in question apply as a minimum;
- Compensation for termination of the employment relationship, on closure of the business, merger or similar circumstances is not taken into account.

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32 **MAURER/SCARTAZZINI/HERZELER, §16 N 109.**
3.5.3. **BVG**

Under the Federal Law on the Occupational Old Age, Survivors’ and Invalidity Pension Provision (BVG), the ‘insured salary’ generally corresponds to the relevant earnings subject to OASI contributions. In this respect, we refer back to what was said in section II. 3.5.1. The relevant OASI salary thus generally also forms the basis for calculating the insured salary under the occupational pension scheme. In this regard, any bonus basically constitutes earnings subject to OASI, for example.

3.5.4. **Conclusions**

OASI/IV/EO pensions are intended to cover basic needs, while occupational pension provision, together with the Old-age, Survivors’ and Invalidity Insurance is meant to enable the insured persons to maintain their previous lifestyle in an appropriate manner (Art. 113 para. 2 let. a Cst.). These objectives differ fundamentally from those underlying an equal pay analysis. In this respect, whether or not a particular element of remuneration is taken into account within the scope of social insurance law provides a certain reference point for developing a definition of pay for the equal pay analysis. However, adopting the definition of pay that applies under social insurance law for equal pay analysis purposes would not appear meaningful.

3.6. **Tax law**

Swiss tax law is shaped by the principles of universality and uniformity of taxation as well as that of taxation according to ability to pay (Art. 127 para. 2 Cst.). Tax legislation must therefore perform a balancing act between maximising the tax base in the interests of mobilising as many resources as possible for the state and respecting the criteria set down in constitutional law.

Art. 16 DFTA states that all of the taxpayer’s income, whether recurrent or non-recurrent, is taxable; this includes all manner of benefits in kind. Art. 17 DFTA then goes on to say that supplementary income such as compensation for special work, commission, allowances, long-service awards and anniversary gifts, gratuities, tips, profit-sharing bonuses, non-monetary benefits from employee share-ownership plans and other non-monetary benefits are also taxable.

As indicated by the above, a number of objectives are pursued by the term ‘pay’ as defined in Swiss tax law. Guaranteeing equal pay as required by Art. 8 para. 3 Cst. and Art. 3 GEA is not one of them. There is therefore no reason to adopt the definition of pay that applies under tax law for equal pay analysis purposes.

3.7. **Swiss Earnings Structure Survey (ESS)**

The Swiss Earnings Structure Survey (ESS), a direct survey conducted by the Federal Statistical Office (FSO) every second October since 1994, shows the level and structure of earnings across all sectors of the national economy – i.e. across all enterprises. The model used to analyse these national statistics generally depicts and seeks to explain the gender pay gap at the national level.

The ESS takes the ‘standardised gross monthly earnings’ defined by the Federal Statistical
Office as its starting point. The amounts reported are converted into standardised monthly earnings, i.e. they are recalculated to reflect a standardised working time of 40 hours a week and 4\(\frac{2}{3}\) weeks a month (‘full-time equivalent’). These gross earnings consist of the gross earnings for the month of October before deduction of employee social security contributions (incl. benefits in kind), regularly paid bonuses, share of turnover or commissions, allowances for shift, night and Sunday work, 1/12 of 13th month’s earnings and 1/12 of special annual payments. Family and child benefits are not included in the calculation.\(^{38}\)

The non-standardised net monthly earnings, on the other hand, indicate the amount actually paid to employees, with no FTE conversion. Its components (not converted to FTE) are the same as those for gross earnings, plus overtime pay and minus mandatory social security contributions and other contributions paid over and above the minimum rate.\(^{39}\)

The principles adopted by the Federal Statistical Office in determining ‘earnings’ are not legally binding. The survey merely constitutes an analysis produced by the authorities for the purpose of compiling national statistics. However, as the Federal Supreme Court regularly refers to ESS statistics in its case law, these principles nevertheless enjoy increased legitimacy.

As the definition of ‘pay’ used in the context of the ESS does not primarily pursue the concept of protection enshrined in Art. 8 para. 3 Cst. / Art. 3 GEA, it alone cannot be taken as a basis for the equal pay analysis. This makes it all the more important to arrive at a separate definition of ‘pay’ with regard to equal pay analyses.

**3.7.1. Pay components in accordance with the Confederation’s standard analysis model**

Lastly, when considering aspects of pay equality, reference must also be made to the definition of ‘pay’ that underpins the federal government’s standard analysis model. The latter is used as part of the Confederation’s public procurement controls and serves to identify discrimination at company level.

The Federal Act of 16 December 1994 on Public Procurement (PPA) sets out the principles that must be adhered to in awarding public contracts. Art. 8 para. 1 letter c PPA states that public contracts will only be awarded to bidders who guarantee the equal treatment of men and women within their company in respect of salary. Failure to meet this obligation may lead to the contract being withdrawn and the bidder being excluded from the tender procedure (Art. 11 PPA), and to a penalty for non-fulfilment being imposed (Art. 6 para. 5 of the Ordinance of 11 December 1995 on Public Procurement (PPO)).

Under Art. 8 para. 2 PPA, the contracting authorities are entitled to verify compliance with the equal pay requirement or to arrange for it to be verified. Under Art. 6 para. 4 PPO, they may in particular ask the Federal Office for Gender Equality (FOGE) or its equivalent at the cantonal or municipal level to conduct such verifications. The federal government has been carrying out regular checks in this respect since 2006 – a task performed by the FOGE on behalf of the procurement offices. To ensure that all audited enterprises are uniformly assessed and thus treated in compliance with the law, the FOGE carries out these checks using the Confederation’s standard analysis model. The latter is based on regression analysis, which has been accepted by the Federal Supreme Court as a method of establishing whether gender-based pay inequality exists in cases of individual or multi-plaintiff actions or appeals regarding pay discrimination.\(^{40}\)

A tool by the name of Logib was developed in the early 2000s on behalf of the FOGE and the

\(^{38}\) ESS 2016, 32.

\(^{39}\) ESS 2016, 32.

\(^{40}\) BGE 130 III 145. E. 3.2.
Federal Procurement Conference. It is used to evaluate whether individual companies respect
the principle of equal pay. This tool allows companies with 50 or more employees to review
their pay practice for compliance with the gender-based equal pay requirement by performing
a ‘self-test’. On 21 June 2019, the National Council and Council of States unanimously approved
the total revision of the PPA. The referendum deadline expired on 10 October 2019 without
being used. In future, Art. 12 nPPA will also make equal pay for women and men a requirement
for the award of public contracts. According to the Dispatch on the total revision of the PPA,
evidence of equal pay can be obtained either by the contracting authority itself or by third
parties, e.g. by using the Logib tool. 41

The amendment to the GEA adopted by Parliament on 14 December 2018 also requires
employers with 100 or more employees to conduct an equal pay analysis within the company
every four years (Art. 13a nGEA), to have the analysis verified by an independent body (Art. 13d
nGEA) and to inform employees in writing about the findings (Art. 13g nGEA). The equal pay
analysis must be carried out “using a scientific method and in accordance with the law” (Art.
13c para. 1 nGEA). The federal government’s standard analysis model corresponds to such a
method.42

At present, the following pay components are taken into account in the federal government’s
standard analyses and control mechanisms for equal pay compliance in its public procurement
activities, with the pro rata amount for the reference month or one-twelfth of the annual amount
being entered: 43

- Basic wage (including regular wage components, including proportion of fringe benefits
  and participation rights)
- 13th monthly salary;
- Statutory allowances for night work and Sunday work and other extra pay for difficult
  working conditions (e.g. shift work, on-call service, other hardship allowances);
- Special payments which are paid irregularly.

On the other hand, the following are not taken into account when determining pay: 44

- Family and child allowances;
- Length-of-service awards, loyalty bonuses;
- Remuneration for overtime;
- Payments in respect of unused vacation time;
- Continuing education and training paid by the employer;
- Reimbursement of expenses;
- Severance pay;
- Marriage allowances;
- Contributions to relocation expenses;
- Compensation for short-time work paid by unemployment insurance.

Although the practice applied in the context of equal pay analyses to date provides certain
reference points for the definition of ‘pay’ to be arrived at in the present study, it naturally
cannot replace a separate definition.

3.8. **Interim conclusions**

41 Botsch. PPA 2017, 1940.
43 EBG LOGIB, 19.
44 EBG LOGIB, 19.
The points set out here in section II. lead to the following interim conclusions:

- Both the legislation and the accessible case law and literature provide only rudimentary rules for arriving at a definition of pay for use in the equal pay analysis that is consistent with Art. 8 para. 3 Cst. and Art. 3 GEA (section II.3.2/3.3). However, the guidelines developed thus far are binding on this study.

- There are further definitions of pay to be found in Swiss law. These are arrived at in consideration of the purpose of the area of law in question (employment, social insurance or tax law). None of the definitions of pay used in these areas of law can be used unchanged for equal pay analysis purposes.

- In assessing whether a certain element of pay should be taken into account in the equal pay analysis, the definitions used in other areas of law can serve as a reference point. Basically, it can be assumed that the element in question should be taken into account for equal pay analysis purposes if it qualifies as a component of pay in another area of law. On the other hand, the possibility that elements of remuneration which do not qualify as components of pay in other areas of law should nevertheless be taken into account in the equal pay analysis cannot be ruled out (e.g. ‘non-monetary benefits’).

- The criteria for determining pay developed by the Federal Statistical Office in connection with the Swiss Earnings Structure Survey (ESS) (section II.3.7) and the eligibility of components of pay under the Confederation’s standard analysis model (section II.3.8) can also be referred to for the purposes of this study, as the fact that they are recognised by the Federal Supreme Court increases their legitimacy.

- The existing definitions of pay – with the exception of Art. 8 para. 3 Cst. and Art. 3 GEA – fail to consider equal pay aspects. In particular, they fail to take note of the potential for discrimination – a criteria that is particularly relevant to our study. We will explore this in more detail in section II.4.

4. Pay discrimination

4.1. Equal pay for work of equal value

Art. 8 para. 3 of the Swiss Federal Constitution states that men and women have the right to equal pay for work of equal value. The principle of equal pay has been enshrined in the Constitution since 1981. It invariably applies to the male-female dichotomy and thus not to employees of the same sex.\textsuperscript{45} The Constitution gives \textit{individual} employees a direct, inalienable right to equal pay from their employer for work of equal value, regardless of whether their employment relationship is governed by public or private law. Any salary agreements to the contrary are null and void.\textsuperscript{46} In practical terms, (individual) actions are brought under the Gender Equality Act, which gives the right specific form.\textsuperscript{47} The equal pay requirement set out in the Constitution is an absolutely mandatory provision that must be observed and is not linked to any conditions.\textsuperscript{48} Consequently, the liability of the person or entity that is liable to pay salary or wages is a ‘no-fault’ liability.\textsuperscript{49} Both the motive of discrimination and the fact of whether or not the employer is aware of the discrimination are entirely irrelevant.\textsuperscript{50}

The Constitution expressly states that the right to equal pay exists not just for equal work but

\textsuperscript{45} GEISER/MÜLLER/PÄRLI, §2 N 384; GLK-FREIVOGEL, Art. 3 GIG N 98.
\textsuperscript{46} GEISER/MÜLLER/PÄRLI, §2 N 384.
\textsuperscript{47} SGK BV-SCHWEIZER/BIGLER-EGGENBERGER/KÄGI-DIENER, Art. 8 BV N 99.
\textsuperscript{48} GLK-FREIVOGEL, Art. 3 GIG N 78.
\textsuperscript{49} BGE 130 III 145 = Pra 2004 Nr. 132; BGE 124 II 416; GLK-FREIVOGEL, Art. 3 GIG N 84.
\textsuperscript{50} GLK-FREIVOGEL, Art. 3 GIG N 84.
also for work of equal value, not least as a means of addressing the problem of “typical female occupations”. This necessarily requires work to be valued. Work "of equal value" may also be "similar work". Equal value is determined on the basis of requirements, responsibility and performance in particular. Differences between these criteria are enough to justify differences in pay. Therefore, a difference in pay is permitted by law if it reflects the actual difference in the value of the work.

In practice, the comparability of pay is restricted to equal work or work of equal value at individual company level. Where a collective labour agreement sets uniform evaluation criteria, comparison within a sector is possible. Whether work or functions are of equal value must be determined in practice with the aid of an expert opinion. The Federal Supreme Court accepts various methods of job evaluation provided they themselves are not discriminatory. At present, two methods of analysis are to the fore:

- **The analytical job evaluation** method records and evaluates the functions, characteristics and (physical and intellectual) demands of a job in order to arrive at the function-related pay. This method has been examined and approved by the Federal Supreme Court.

- With the help of economic theories, **statistical pay analysis or regression analysis** on the other hand takes the human capital (education, knowledge, years of service) as its starting point and rounds this out with function-specific aspects such as the level of job requirements. This method has also been tried and tested in practice and approved by the Federal Supreme Court.

The factors currently used to explain gender-specific pay differences when analysing pay discrimination within a company are also scientifically recognised.

### 4.2. Discrimination

According to doctrine and case law, variations in pay are not discriminatory if they can be justified on objective grounds. These grounds in turn must not themselves discriminate between the sexes, either directly or indirectly. Objective criteria are non-gender-specific criteria that influence the value of the work, such as education, experience, job-related tasks, the demands of the job, age and labour market situation, etc. A distinction is made between pre-market discrimination and market discrimination:

- **Pre-market discrimination**: Pre-market inequality is an expression of the lack of actual equality within society. Factors include gender-specific occupational choices and the associated segregation on the labour market, as well as the fact that women are still overwhelmingly responsible for housework and family. This means that women are unable to integrate themselves in the labour market in the same way as men. These

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51 BGE 130 III 145 E. 3.1.2., 158 f.; SGK BV-SCHWEIZER/BIGLER-EGGENBERGER/KÄGIS-DIENER, Art. 8 BV N 126.
52 BIAGGINI, Art. 8 BV N 25.
53 SGK BV-SCHWEIZER/BIGLER-EGGENBERGER/KÄGIS-DIENER, Art. 8 BV N 126; STAUBER-MOSER, 1357.
54 BGE 130 III 145; 125 III 368; 124 II 409 E. 9a and b, 426 f.; 124 II 436 E. 7a, 440 f.; 124 II 529; 121 Ia 270 E. 2b, 272 ff.; SGK BV-SCHWEIZER/BIGLER-EGGENBERGER/KÄGIS-DIENER, Art. 8 BV N 126; GLK-FREIVOGEL, Art. 3 GEA N 96.
55 GEISER/MÜLLER/PÄRLI, § 2 N 386.
56 SGK BV-SCHWEIZER/BIGLER-EGGENBERGER/KÄGIS-DIENER, Art. 8 BV N 126.
57 SGK BV-SCHWEIZER/BIGLER-EGGENBERGER/KÄGIS-DIENER, Art. 8 BV N 127.
58 see e.g. BGE 125 1.385.
59 SGK BV-SCHWEIZER/BIGLER-EGGENBERGER/KÄGIS-DIENER, Art. 8 BV N 127; SCHÄR-MOSER/BAILOD, 1385 ff.; SCHMID SJEELA, 93 ff.
60 see e.g. BGE 130 III 145. E. 3.2.
62 SGK BV-SCHWEIZER/BIGLER-EGGENBERGER/KÄGIS-DIENER, Art. 8 BV N 128.
circumstances give rise to “objective factors” such as inequalities in education, training and professional experience, which partly explain the pay gap.

- Market discrimination: In contrast, inequality in the labour market manifests itself with regard to pay or employment opportunities.63

PÄRLI/OBERHAUSER argue that the right to equal treatment does not merely apply to inequality experienced once in the market, but especially also to discrimination experienced before joining the market (“pre-labour market discrimination”). Art. 8 para. 3 sentence 2 Cst. effectively calls on the law to “ensure [...] equality, both in law and in practice, most particularly in the family, in education, and in the workplace”. Therefore, unequal treatment of women and men constitutes discrimination within the meaning of the GEA regardless of whether it occurs before or after entering the labour market.64

4.2.1. Direct discrimination

When company regulations or collective labour agreements make direct reference to gender when measuring pay and allocating pay grades, this must be classed as open, direct discrimination. This would be the case, for example, where different rules apply within the same company to pay for women and men. However, this type of discrimination tends to be rare.65 Cases which do not make explicit reference to gender but in which women with the same qualifications and experience as their male colleagues earn less for the same work or for comparable positions/functions must also be classed as direct pay discrimination. In cases like this, a comparison with a person of the opposite sex is usually enough to substantiate discrimination by prima facie evidence. The pay structure within the company and the classification of the position in question are both irrelevant.66

4.2.2. Indirect discrimination

Indirect discrimination exists when a regulation formally treats women and men equally but does so on the basis of gender-discriminatory criteria, i.e. when formal gender-neutral benchmarks and criteria are decisive, but are applied in such a way that leads to one sex being treated less favourably than the other.67 This can happen, for example, if a criterion has a greater impact on women or men because of their gender, thus leading to their receiving lower compensation with no objective justification for the difference. Different treatment of part-time employees in respect of pay and allowances is one example; experience shows that women are much more likely to work part-time than men.68

4.3. Potential for discrimination of the various pay components

As a rule, all of the components that make up pay can be affected by discrimination:

- Base pay: A potential for discrimination can be found in all three components of base pay – function-related pay and the experience-related and differential portions (see section II.2). Companies without a structured pay system either determine function-related pay on the basis of empirical values or negotiations with the individual in question. This can lead to direct or indirect discrimination. Direct discrimination can result, for example, because women act more defensively than men when it comes to
negotiating their salary. Indirect discrimination can arise in the context of function-related pay if the value of the work being performed is not examined. 70

Most employers recognise employees’ specific experience in the pay awarded to them (experience-related portion). Women are disadvantaged by this practice whenever experience is measured in the form of seniority or professional experience over their entire life as, statistically, they tend to spend less time on average in a company or occupation because of household and family commitments. 71 The same problems arise with regard to the differential portion.

- Performance-related pay: Discrimination can affect the direct performance-related portions of pay if normal performance requirements vary in typical male and female areas of work. For example, if the conditions to be met are stricter and thus more difficult to satisfy. Indirect portions of pay determined on the basis of assessments (employee performance reviews) can be a potential source of discrimination in the adopted system and its application. Thus, for instance, characteristics that favour one sex over the other may be overrepresented in the system itself. This would be the case, for example, when characteristics that are more prevalent in typical male jobs or that can more easily be satisfied by men are given a relatively higher weighting. From a labour studies viewpoint, if the system used to measure indirect performance pay does not include any criteria for recording psychosocial factors (e.g. communication with customers, working under pressure of time), then women are likely to be disadvantaged as psychosocial aspects make up a significant part of the work typically carried out by women. 72

- Profit-sharing: Discriminatory factors are less obvious in relation to profit-sharing, as the factors used to measure the company’s financial success are linked to the company and not to the individual employees. However, gender-biased factors could be encountered in the allocation criteria.

- Allowances: Indirect discrimination in relation to allowances could occur, for example, if certain allowances are awarded to full-time employees only or if the rules governing eligibility for allowances are comparatively stricter in typical female occupations. 73

4.4. Conclusions

If it is to take due account of the specifics of the equal pay analysis, the definition of ‘pay’ for the purposes of Art. 8 para. 3 Cst. and Art. 3 GEA should give special weight to the potential for discrimination. Accordingly, particularly those elements of remuneration that have a certain potential for discrimination must be taken into account in the equal pay analysis.

5. The term ‘pay’ for equal pay analysis purposes

5.1. Assessment procedure

Given what has been said so far, the following procedure is suitable for assessing whether a certain element of remuneration should be taken into account in the equal pay analysis:

- The first step is to address the issue of whether doctrine or case law indicates that the element in question qualifies as pay for the purposes of the equal pay analysis (see section II. 3.2./3.3). If the literature referred to provides conclusive justification or if judicial
custom to date demonstrates a clear willingness to recognise an element of remuneration as pay within the meaning of Art. 8 para. 3 Cst. or Art. 3 GEA, there is no need for any further deliberation. The element in question should be taken into account for equal pay analysis purposes.

- If the question of whether an element of remuneration is to be taken into account for equal pay analysis purposes cannot be (clearly) answered on the basis of the somewhat rudimentary literature and case law on Art. 8 para. 3 Cst. and Art. 3 GEA, we use the following assessment procedure:

  - Is the element of remuneration in question covered by the definition of 'pay' in another area of law (see section II.3.4-3.8) or does it constitute another non-monetary benefit connected to the employment relationship? If the answer to both questions is ‘No’, the element of remuneration in question should be disregarded for equal pay analysis purposes. If the answer to one of the questions is ‘Yes’, we can move on to the next question.

  - Does the element of remuneration in question have an inherent potential for discrimination (see section II.4.4)? If the nature of the element of remuneration makes any potential for discrimination inconceivable, then it should not be taken into account for equal pay analysis purposes. If a potential for discrimination can be detected, the following question must be answered.

  - Is the employer entitled to exercise discretion in allotting and/or measuring the element of remuneration in question? If there is no discretion involved, the element should not be taken into consideration as it is not possible for the employer to apply any form of gender bias.

If all of the above questions are answered in the affirmative, the element of remuneration should be taken into account in the equal pay analysis. In our opinion, this also applies if a question cannot be answered clearly. This leads us to assume that the element should be taken into consideration as a component of pay for equal pay analysis purposes.

The following chart illustrates the procedure to be followed:
5.2. **Definition of ‘pay’**

Bearing these considerations in mind, we arrive at the following definition of ‘pay’ for the purposes of the equal pay analysis:

For the purposes of performing an equal pay analysis, all elements of remuneration which qualify as pay under the existing doctrine and case law on Art. 8 para. 3 Cst. and Art. 3 GEA should be taken into account if the relevant literature provides sound justification or current case law demonstrates a clear willingness to recognise the element of remuneration in question as pay. If there is any doubt as to whether an element of remuneration qualifies as pay within the meaning of Art. 8 para. 3 Cst. and Art. 3 GEA, it should be taken into account in the equal pay analysis if (i) it is recognised as pay in another area of law or is connected to the employment relationship, (ii) there is direct or indirect potential for discrimination and (iii) the employer is entitled to exercise discretion in allotting and/or measuring the element in question.

5.3. **Restrictions with regard to practicability**

This study concentrates on the legal appraisal of elements of remuneration. The assessment procedure allows us to determine whether or not a component of remuneration should be included in the equal pay analysis from a legal viewpoint. However, it does not enable us to assess whether including the element of remuneration in question in the survey is practicable or even makes sense in terms of the associated potential for discrimination.

The list in the Appendix shows which elements of remuneration from phase 1 are to be taken into account in the equal pay analysis from a legal perspective. Although the questions of practicability and relevance are not meant to be addressed until phase 3 of the project, we would like to point out here two factors that could potentially restrict the elements of remuneration to be taken into account.

5.3.1. **Standard employment agreements / Personnel regulations**

Many companies now have standard employment agreements or staff/personnel regulations that govern the details of the employment contract, among other things. An individual employment contract is concluded by means of a mutual expression of intent by an employee and employer, both of whom have the capacity to act. For standard employment agreements or personnel regulations to be binding on the employment relationship, this must be stated explicitly in the individual employment contract. In addition, they must be made available to the employees and be approved by them.74

Some elements on the list of ‘pay’ drawn up in phase 1, such as the right to a length-of-service award are usually governed by such standard employment contracts. As explained in sections II.4.2.1./4.2.2., in rare cases personnel regulations may contain arrangements that are directly or indirectly discriminatory. In general, however, personnel regulations are intended to ensure that all employees are treated equally. Due to their preventive nature, such regulations are meant to create legal certainty for employees and employers and prevent disputes from arising.
That is why we basically believe that elements of remuneration which are set out in personnel regulations in a binding manner for all female and male employees without distinction should be excluded from the equal pay analysis. However, as personnel regulations may give rise to indirect discrimination, they would have to be appraised by a legal expert beforehand. Whether this is practicable in relation to equal pay analyses remains to be seen.

5.3.2. Relevance / trivial pay components

Other elements on the list drawn up in phase 1 that are to be taken into account in the equal pay analysis in accordance with the definition of pay presented here in section II.5.1 may be low in value. Examples include gifts made to employees for (round) birthdays. Benefits of this kind may have a discriminatory effect on the result of the equal pay analysis, but that discrimination is not likely to be significant due to their low monetary value. Therefore, for practicability reasons, we recommend including these elements in the equal pay analysis only if they exceed a certain pre-defined amount.

III. Frequency

1. Relevant measurement period

Once it has been established that an element of remuneration is to be taken into account in the equal pay analysis on the basis of the assessment procedure described in section II.5, the next question that arises is that of the relevant measurement period. Equal pay analyses are to be carried out every four years;\textsuperscript{75} the relevant measurement period is twelve months.

The \textit{financial year} describes the time period for which a company’s operating profit or loss is ultimately determined. It begins with the opening balance sheet and ends with the closing balance sheet. It covers a period of twelve months and mostly (but not always) coincides with the calendar year. In contrast to the calendar and financial year, the \textit{people year} refers to that period of time during which no promotions or salary adjustments are normally made; it is usually set down in the personnel regulations. The \textit{people year} can (but doesn’t have to) be the same as the calendar or financial year.

We believe it makes sense to conduct the assessment for that period in which there are only slight changes, if any, to employees’ terms and conditions of pay and functions. Therefore, companies that use the \textit{people year} system should adopt this period in their equal pay analyses. The financial year would appear to be the most meaningful measurement period for all other companies. The pay of workers who join or leave the company during the year should be extrapolated over the relevant measurement period.

2. Frequency of payments

A distinction can be made between periodic and non-periodic remuneration payments; periodic payments are the rule.

2.1. Periodic payments

Periodic payments are made at regular intervals (e.g. basic annual, monthly, weekly or hourly pay). These constitute (non-variable) \textit{time-based pay}, where the right to payment is related to

\textsuperscript{75} Art. 13a nGEA.
the time spent at work regardless of the tasks performed or work produced. These elements of remuneration are generally easy to measure. There is no reason not to include them in the form of one-twelfth of the annual amount (financial or people year), as in the Confederation’s standard analyses of its public procurement activities to date.

2.2. Non-periodic payments

Measuring non-periodic elements paid in the form of variable compensation (e.g. gratuities, employee share-ownership plans) or one-time payments (e.g. signing bonuses, severance allowances) is more problematic. Two questions arise here: to what extent and at what time is a non-periodic payment to be taken into account in the equal pay analysis?

2.2.1. Scope

In the case of benefits which do not become payable until a period of more than 12 months has elapsed (“vesting period”) and whose measurement period thus deviates from that of the periodic payments in the equal pay analysis (e.g. signing bonuses or severance allowances), these must be assigned to the one-year measurement period of the periodic payments to enable a meaningful comparison. Therefore, the equivalent annual payment or monthly share (one twelfth) of these benefits is to be calculated.

2.2.2. Time

As far as non-periodic payments are concerned, there is an additional problem: a certain element of remuneration may not necessarily have been paid (yet) to the employee on the specific measurement date and therefore does not appear in the payroll data, e.g. a retention bonus awarded in the first year and due for payment in the third year.

Thus, non-periodic payments can often only be calculated once an underlying measurement period has elapsed. Bonus payments, in particular, are not usually paid until the financial year is over, most commonly around three to four months after it has ended. This means that a bonus payment always refers back to a previous time period. This fact should be taken into consideration in the equal pay analysis. If rights which accrue during the specific measurement period but are attributable to a past period are taken into account, this may distort the results. The equal pay analysis should thus not be carried out until a point in time at which all the elements of pay relevant to the defined measurement period are known.

2.3. Accrual vs realisation principle

In accordance with Art. 323 CO, employers must pay salaries at the end of each month unless shorter periods or other payment terms have been agreed or are customary, and unless otherwise provided by standard employment contract or collective labour agreement. In other words, employees have an obligation of advance performance but a right to receive their pay by the end of the month at the latest. In the case of most periodic payments, but also non-periodic elements of remuneration (such as signing bonuses or severance allowances), the time at which the right arises and time at which payment is made largely coincide.

However, there are certain components of pay for which the two differ. One example is employee share-ownership plans, where the two triggering events may lie several years apart. For equal pay analysis purposes, these can be taken into account either at the time of accrual or at the time of realisation. Today, the time of realisation is regularly adopted.
Arguments in favour of this practice include the fact that the economic benefits are only realised, i.e. payment of the element of remuneration only flows to the employee, at the time of realisation, and the actual value of the element in question is established. The fact that, as a rule, the employer no longer has any control over realisation and thus cannot influence the amount of the payment in any way is an argument against it. Instead, realisation relies on external circumstances and/or the determination of the employees (e.g. the exercise date and the share price that prevails). Including employee share-ownership benefits at the time of realisation can therefore distort the analysis if e.g. an employee's function changes between the time of accrual and realisation, so that the pay received refers to another (former) function.

For payments that are not realised at the same time as the right to them is accrued, we believe that the accrual date and not the time of realisation should be chosen for equal pay analysis purposes. This observation is also in keeping with the considerations set out above (section II.4.4/5.1), in which we state that elements of remuneration should only be taken into account if the employer has some discretion in this respect and could exercise such discretion in a discriminatory manner.

V. Eligibility of individual components of pay

To check whether individual components of pay qualify in accordance with the list drawn up in phase 1, please refer to Appendix 1.