

**Discussion paper
on the discrimination potential from a legal
perspective, of individual explanatory factors
used to measure wage equality
between women and men**

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individual explanatory factors used to measure wage equality between
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for the attention of

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Executive summary

Wage differences between women and men can be statistically determined on the basis of the Swiss Earnings Structure Survey (ESS). Drawing on a series of factors, the special evaluation of wage equality divides the gender-specific wage differential into an explainable and an unexplainable component. These findings are integrated into **legal policy** and **legal practice**. The present study examines the **discrimination potential** of these **factors** from a **legal perspective**. An entire cluster of legal bases under **federal and international law** prohibit **wage discrimination** between genders (litigable level) and also require all government agencies to take the necessary measures to eliminate inequalities (programmatic level). The legal obligation to collect and analyse the pertinent data is founded in gender equality law and in the constitutional duty to **monitor the effectiveness of measures enacted by the state**. The capture, evaluation and analysis of statistical data must be free from discrimination. The authorities are dependent on **reliable data** if they are to effectively combat wage discrimination. Accordingly, it is strongly recommended that the ESS and the special evaluation of wage equality be continued (**Recommendation 1**).

Conducted from the perspective of anti-discrimination legislation, the appraisal of newly proposed factors and those used under the existing analysis model is based on whether or not an **explicit legal norm or court rulings** allow this factor to serve as a basis in individual equal pay proceedings. The **appraisal** also considers wage equality at the **programmatic level**. The evaluation made using the above verification scheme led to the **finding** that, owing to explicit evidence of discrimination in legislation and court rulings, the factors “Marital status”, “Hours worked” and “Wage categories” should be **eliminated from the analysis model (Recommendation 2a)**. On legal grounds, it is also recommended **not to include the newly proposed factors** “Actual professional experience”, “Working time models” and “Physical and mental stress” (**Recommendation 2b**). Inclusion of the last named factor is only recommended where a **discrimination-free survey** is feasible (**Recommendation 2c**). In the interest of ensuring that findings are comparable, previous evaluations must be **retropolated** using the new model (without the factors “Marital status”, “Hours worked” and “Wage categories” (**Recommendation 3**)).

The factors “Residence status”, “Region”, “Highest educational qualification”, “Potential employment experience”, “Years of service”, “Sector”, “Professional position”, “Skills level”, “Occupation practised” and “Company size” provide no clear **legal indicators** (explicit legal norms or pertinent court rulings) which **would justify excluding the variables**. Nevertheless, the wage differences defined as explainable by the factors “Professional position” and “Skills level” within the parameters of the national statistics analysis model may to some extent be inherently due to **employment discrimination** or possibly also to **discrimination in accessing the labour market**. This needs to be taken into consideration when interpreting the findings (**Recommendation 4**). Finally, **courts** are recommended to exercise constraint when referencing data from the analysis model since the ESS and the analysis model pursue a statistical and not a case-specific objective (**Recommendation 5**).

Summary

A. Context, questions addressed and methodology

Wage differences between women and men can be statistically determined on the basis of the Swiss Earnings Structure Survey (ESS). The special evaluation of wage equality (national statistics analysis model) relies on sociodemographic factors (Marital status, Residence status, Region), factors which characterise human capital prior and subsequent to entering into working life (Highest educational qualification, Potential earning experience, Years of service) and workplace-specific factors (Hours worked, Sector, Professional position, Skills level, Occupation practised, Company size, Wage categories¹). Using these factors, the gender-specific wage differential is divided into an explainable and an unexplainable component. Unexplainable wage differences are sometimes cited in political debate as evidence of wage discrimination against women. However, from both a **scientific** and, above all, a **political point of view** it is a **matter of contention** whether the unexplainable aspects of wage differences necessarily indicate that the unexplainable wage differences are discriminatory. There is also disagreement over the question of whether the factors relied on to explain the wage differences are sufficient. While some postulate that unexplainable wage differences would automatically be reduced if more factors were included in the analysis of wage differences, others argue that the factors – or at least some of them – taken into consideration to explain the wage differences are themselves discriminatory. **Regardless** of the dispute over the accuracy of the findings from the analysis model, **courts** – for instance when determining damages for loss of earnings – rely on the de facto figures for women's and men's salaries.

On 18 November 2015, the Federal Council adopted its report on the Noser postulate (14.3388 "Survey on wage equality. Improving validity"). The report is based on the findings of an **economic study** by FELFE/TRAGESER/ITEN into the suitability of the national statistics analysis model (Special evaluation of wage equality, FSO) and the federal standard analysis model for monitoring equal pay at company level (FOGE) in terms of explaining the wage differences between women and men at national level and identifying wage discrimination at company level. The aim of the present **legal study** is to analyse the discrimination potential of the factors used in the national statistics analysis model and of the factors proposed in the FELFE/TRAGESER/ITEN STUDY for inclusion (Actual professional experience, Working time models, Physical and mental stress).

The **legal definition of wage discrimination** differs from the **definition used in an economic context**: From an economic perspective, wage differences between men and women who possess identical characteristics with regard to their relevance for the labour market and productivity constitute wage discrimination. Such differences may be based on non-identical human capital factors. The legal definition, however, goes further. It is based on the principle of "equal pay for work of equal value". Wage differences which are due to gender-related circumstances and cannot be justified by the work per se

¹ In the present report, the term "Wage categories" refers summarily to the factors "Wage category", "Wage agreement", "Form of wage" and "Additional wage components".

constitute unlawful wage discrimination. In contrast to the economic definition, different wages for jobs within one and the same company which have equal requirements **cannot** be **legally** justified on the basis of **characteristics that are relevant purely in labour market terms**. Frequently based on **stereotypes**, the undervaluation of jobs typically associated with women can also only be considered from the vantage point of a legal **definition of wage equality**.

As for the methodology, national and international legal sources, doctrine and court rulings on wage equality will be consulted to address the questions under discussion, and the individual factors of the analysis model will subsequently be systematically verified in the light of the findings. The starting point for the legal analyses is, on the one hand, the **constitutional** right to **wage equality** and the sovereign obligation to ensure **actual equality** pursuant to Art. 8 para. 3 of the Federal Constitution of the Swiss Confederation (FC) and, on the other, the **authority to compile statistical data** under Art. 65 FC as well as the duty laid down in Art. 170 FC to **evaluate the effectiveness** of federal measures. The study will also look at **international conventions** compatible with the Federal Constitution and – for the purpose of legal comparison – also consider the corresponding legal situation in the European Union (EU). Furthermore, the still fledgling legal debate on “**statistical discrimination as a problem of law**” is taken up, as is the question of how far **statistical surveys** are a legally necessary **basis** for **anti-discrimination** measures.

B. Legal basis of discrimination-free statistics

Art. 8 para 3 FC lays down the right to equality between men and women in three sentences. The first sentence prohibits discrimination, the second sentence establishes a **legislative mandate** and the third sentence entrenches the right to **wage equality**, which according to the Swiss Federal Supreme Court’s rulings and doctrine is **also** directly applicable to **employment relationships under private law**. The constitutional mandate to ensure gender equality was enacted through the Federal Act on Gender Equality (Gender Equality Act, GEA). Pursuant to Art. 3 para. 1 and 2 in conjunction with Art. 5 para. 1d GEA and Art. 8 para. 3 sentence 3 FC, the prohibition of direct or indirect discrimination on the basis of sex (also) applies to pay. The prohibition of discrimination on the basis of sex is also enshrined in numerous **international human rights conventions**, notable among which is the UN Convention on the Elimination of all Forms of Discrimination against Women (CEDAW), which contains concrete obligations to ensure equality in various areas of life, in particular a guarantee of equal pay for work of equal value. Accordingly, wage discrimination on the basis of sex is unlawful under the Swiss constitution as well as under international law, which is binding on Switzerland. Persons concretely affected have an irrevocable right to the elimination of wage discrimination by means of appropriate legal remedies.

Pursuant to Art. 35 para. 1 FC, **fundamental rights** must be upheld **throughout the legal system**. This applies to the entitlement to gender equality protected by fundamental and human rights as well as to the specific entitlement to equal pay. The fundamental right to equality and, in particular, to discrimination-free remuneration as established in Art. 8 para. 3 FC has both a **litigable** and a **programmatic** level. In programmatic terms, the fundamental right to gender equality places government agencies under obligation to take measures to ensure wage equality both at company level and at the level of society as a whole. **Stereotyping** needs to be **combated** and **discriminatory structures overcome**.

In its landmark equality policy decision BGE 137 I 305, Switzerland's Federal Supreme Court ruled that "specific measures are necessary to eliminate stereotyped role models and socially institutionalised behaviour patterns along with the concomitant disadvantages, as well as to bring about a change of mindset in society".

The authorities (in addition to stakeholders in the private sector) are dependent on **reliable data** if they are to **effectively combat** wage discrimination. The corresponding legal obligation is founded in gender equality law and in the general duty, as anchored in the constitution, to monitor the effectiveness of measures enacted by the state. It is crucial that the **capture, evaluation and analysis of statistical data** is **discrimination-free**. Decisions grounded on statistical empirical values may perpetuate stereotypes and are therefore problematic from the perspective of anti-discrimination law. The same also applies to explanatory factors that are based on statistical empirical values.

Statistics form a **basis** for **effectively combating discrimination** and as such are also necessary from the standpoint of anti-discrimination law. At the same time, statistics also inherently harbour **potential for discrimination**. Court decisions reached for specific issues on the basis of statistical empirical values may perpetuate stereotypes and so pose a problem in terms of anti-discrimination law. This finding also has ramifications for statistical wage surveys and the analysis of the data collected. When discussing and evaluating the findings from the analysis model, it must be borne in mind that, from a legal perspective, the explainable components of wage inequality may not simply be taken as grounds to tolerate these wage inequalities, because the factors explaining wage equality may themselves also be discriminatory in origin.

C. Legal appraisal of the factors used for the analysis model and recommendations

Any discussion of wage discrimination must distinguish between individual level, company level and national statistics level (national analysis model). The **present study** assesses the discrimination potential of the factors used in the special evaluation of wage equality (**national statistics analysis model**).

In order to determine whether the use of the existing and newly proposed factors in the national statistics analysis model is admissible from the standpoint of anti-discrimination legislation, it is necessary to briefly reiterate the key points of entitlement to equal pay. **Entitlement to equal pay** can be asserted if a person of one sex receives lower remuneration for **equal work or work of equal value** than a person of the other sex. The prohibition of wage inequality pursuant to Art. 3 GEA is formulated in **gender-neutral terms**. In practice, however, wage inequality largely manifests itself such that women are paid less than men for equal work or work of equal value. Wage discrimination may also be the result of a general classification of specific functions, i.e. when **typical female occupations are paid worse** than typical male occupations despite comparable requirements. Not only **direct, but also indirect gender-specific wage discrimination** is unlawful. A technically gender-neutral arrangement which, for no objective reason, ultimately disadvantages significantly more – or predominantly – members of one sex compared with the other constitutes indirect discrimination. The courts permit wage differences between the sexes for equal work or work of equal value under certain conditions. Age, years

of service, education and, to a very limited degree, the economic environment qualify as such **legal justifications**. Factors which in the concrete case of an **individual wage dispute** would justify a court ruling of gender-specific wage inequality may **not be adopted unquestioningly in the national statistics analysis model** for the purpose of presenting wage differences between the sexes as explainable and interpreting them as non-discriminatory. On the contrary, the **comprehensive mandate to eliminate gender stereotypes** calls for a more nuanced analysis. Where an explanatory factor proves to be discriminatory or has sufficient discriminatory potential, this speaks against its continued use in the analysis model.

Verification scheme and findings

The factors used in the existing model as well as the new factors under discussion were verified according to the following scheme:

- With regard to the factor, is there an explicit legal norm which prohibits direct or indirect discrimination?
- Is the factor characterised in court rulings as directly or indirectly discriminatory, or is the factor admitted as a legal justification for wage inequality on the basis of sex or not?
- What are the ramifications of the programmatic nature of gender equality law in terms of appraising the factor?

It should be noted that it is not feasible from a legal perspective to **quantify the discrimination potential** of a factor. In effect, statements about the discrimination potential of a factor and the resulting consequences for (further) use or non-use in the national statistics analysis model constitute an **assessment** made on the basis of a normative framework.

The evaluation conducted according to the above verification scheme led to the **finding** that the factors **“Residence status”, “Region”, “Highest educational qualification”, “Potential earning experience”, “Years of service”, “Sector”, “Professional position”, “Skills level”, “Occupation practised” and “Company size”** can still be used. **None** of these factors provide clear legal **indicators** (explicit legal norms or pertinent court rulings) which **would justify excluding the variables**. Nevertheless, the wage differences defined as explainable by the factors “Professional position”, “Sector”, “Occupation practised” and “Skills level” within the parameters of the national statistics analysis model may to some extent be inherently due to **employment discrimination** or possibly also to **discrimination in accessing the labour market**. The actual existence of such forms of discrimination cannot be determined using the analysis model. However, the programmatic perspective of the constitutional mandate to ensure gender equality dictates that considerable **caution be exercised when interpreting** the component of gender wage inequality deemed explainable by these factors and, in particular, that **attention be paid to possible employment discrimination**.

The factors **“Marital status”, “Hours worked” and “Wage categories”** furnish manifest evidence in legislation and court rulings of discrimination. Art. 3 para. 1 GEA prohibits any discrimination on the basis of sex and stipulates that gender-specific disadvantages connected to marital status, for instance, also constitute discrimination. Court rulings show that the citing of **hours worked** as a reason for the gender-specific unequal treatment of employees constitutes **unlawful indirect discrimination** on the basis of sex. The right to **equal pay** is, ultimately, **comprehensive**, i.e. all benefits in kind provided in

remuneration for work done must be taken into consideration. According to doctrine and court rulings, **supplementary wage benefits of any nature** count towards the wage entitlement for equal work and work of equal value done.

From a legal standpoint, the **Federal Court** ruling that **giving unduly high consideration to professional experience** is a cause of **indirect discrimination** speaks **against** inclusion of the newly proposed factor **“Actual professional experience”**. This factor would disadvantage women, who on average are more likely to interrupt their careers to care for children. Nevertheless, in an individual rights suit, actual professional experience as grounds for justifying gender-specific wage inequality is **not inadmissible in every case**. If, however, an “Actual professional experience” variable were to be introduced to the analysis model at the national statistics level, this could contribute to a (further) component of wage differences being defined as explainable despite a concrete incidence of wage discrimination.

It is not recommended to include a **“Working time models”** factor. There is a danger of working time models being evaluated on a non-gender-neutral basis. Moreover, even given an inherently gender-neutral evaluation, the prevalent division of family roles tends to result in mainly women choosing “family-compatible” (and generally less well-paid) models. The proposal to include “Physical and mental stress” in the analysis model produces a differentiated assessment. Federal Supreme Court rulings allow for such requirements to be taken into consideration for a job evaluation. The **physical and mental stress** attached to an activity may, therefore, be **recognised as objective grounds for a wage differential**. A **precondition** of this, however, is that evaluation of the work is **not** based on **gender-stereotyped, discriminatory characteristics**. Consequently, it is recommended not to include “physical and mental stress factors” in the analysis model at the present time. It is, however, deemed expedient to conduct suitable investigations into whether and in what form a discrimination-free survey of the relevant data is feasible. The findings are to serve as a basis for re-assessing whether to include these factors.

Recommendations

Based on the findings reached during the individual stages of the investigation, the following recommendations are made to the competent federal authorities:

1. An effective wage equality policy requires a statistical basis. The special evaluation of equal pay is to be continued.
2. From a legal perspective, the following changes are to be made to this model:
 - a. The factors “Marital status”, “Hours worked” and “Wage categories” must be excluded.
 - b. The new factors “Level of employment in the professional career (actual professional experience)” and “Working time models” under debate are not to be included.
 - c. For the inclusion of physical and mental work stress, the evaluation of a stereotype-free assessment system is recommended.
3. Previous evaluations must be retropolated using the new model (without the factors “Marital status”, “Hours worked” and “Wage categories”).

4. The identified discrimination potential of those factors remaining in the analysis model (“Residence status”, “Highest educational qualification”, “Years of service”, “Sector”, “Professional position”, “Skills level”, “Occupation practised”) is to be taken into account when interpreting and communicating findings.
5. Courts and administrative authorities must be made aware that data from the ESS and the analysis model must not be used unquestioningly as a basis for reaching decisions since the objectives which govern statistics and individual cases differ.

