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The Gender Pay Gap, and Multiple Forms of Discrimination Against Female Migrant Workers: Anti-Discrimination Legislation in Slovakia, and the Current EU Approach

ABSTRACT: *The migration of workers is inextricably linked with today's increasingly globalised environment. Ensuring their equal and non-discriminatory status should be a prerequisite for their participation in the labour market. This particularly concerns their pay equality. The principle of equal pay for men and women has been part of the EU legal framework since the beginning of the integration processes. However, despite decades of efforts, gender pay equality has still not been achieved. A particular challenge in the field of effective implementation and real enforcement of equal pay is the position of female migrant workers. They face multiple forms of discrimination, both as women and as migrants. Legislation at the European and national level should therefore take into account all the discriminatory factors they face. However, the sustainable achievement of pay equality requires joint, mutually coordinated, and targeted solutions.*

KEYWORDS: *gender pay gap, gender discrimination, migrant workers, from Slovakian anti-discrimination legislation to Slovak anti-discrimination legislation.*

1. Introduction

The EU is based on a set of values and principles: the principle of equal pay for equal work is just one of them. It is an important part of a fairly set and efficiently functioning internal market. The internal market is a key element of the EU, and the primary purpose of economic integration.¹ The free movement of workers is one of the cornerstones of the internal market, enshrined in Article 45 of the Treaty on the Functioning of the European Union (hereafter 'TFEU'). The free movement of

1 Craig and De Burca, 2015, p. 607

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workers includes the abolition of any discrimination against workers in the member states, with respect to employment, remuneration and other working conditions.² The right to equal treatment of workers is formulated quite broadly, and covers not only the right to employment but also other areas closely linked to the residence of workers and their families in another EU member state.³ Equal treatment and related anti-discrimination legislation is the subject of intense interest in the EU. Achieving equality without discrimination of any kind has been one of the EU's objectives for decades. Despite the existing legal framework, the actual implementation and enforcement of equal treatment remains an ongoing challenge.

Violations of the principle of equal treatment can occur for a number of reasons. These often include sex, racial or ethnic origin, language, religion or belief. Female migrant workers have a special position in this context, facing multiple forms of discrimination as both women and migrants at once. Thus, there may be a combination of grounds on which the principle of equal treatment is violated and different axes of discrimination intersect. Most often in a combination of gender and other reasons such as language, race or ethnicity. The principle of equal treatment is of particular importance in terms of equal pay: female migrants are in a particularly vulnerable position in this respect, given the intersectional discrimination.

The principle of equal pay for equal work has been an integral part of primary law since the beginning of integration processes. Equal pay regardless of sex was already provided for in the Treaty Establishing the European Economic Community (hereafter the 'EEC Treaty', or 'EEC'). The main idea behind the EEC Treaty was to achieve economic objectives through the creation of a common market consisting of the free movement of goods, services and factors of production in the form of labour and capital.⁴ Above all, it was about integration and economic growth through the removal of trade and other barriers. Article 119 of the EEC was part of a broader definition of social provisions in which member states set themselves the objective of promoting the improvement of working conditions and the raising of workers' living standards in such a way that these conditions could be reconciled while maintaining the level achieved. The legal basis in the current legal framework in the field of EU primary law is, in particular, Article 157 of the TFEU. It is the duty of each member state to ensure that the principle of equal pay for men and women for equal work or work of equal value is applied. Equality between men and women is thus one of the EU's objectives,⁵

2 Article 45(2) of the Treaty on the Functioning of the European Union.

3 Equinet, 2021, p. 5.

4 Barnard, 2012, p. 4.

5 European Parliament, 2021, p. 1. See also: European Commission, 2020, p. 4.

and the principle of equal pay for equal work has the status of its fundamental value.⁶ The continuous development of this principle has extended its application to work of equal value. In the field of secondary EU law, anti-discrimination legislation is concentrated in a number of directives. With regard to the principle of equal pay, these are in particular Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, and Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation. The principle of equal pay has evolved over time: the initially economic dimension of this principle was systematically extended to include anti-discrimination and human rights aspects. The main objective in relation to pay has been for each member state to ensure that the principle of equal pay for equal work is applied and further respected.

2.

Discriminatory Factors in the Pay of Female Migrant Workers

Female migrant workers belong to a special group facing multiple forms of discrimination, with several related factors. This inequality is based on two basic premises:

6 Explanatory Memorandum to the Proposal for a Directive of the European Parliament and of the Council to strengthen the application of the principle of equal pay for equal work or work of equal value between men and women through pay transparency and enforcement mechanisms, 2021, p. 4.

that they are women, and that they are migrants.⁷ They are discriminated against on the grounds of sex, racial or ethnic origin, religion or belief, but this inequality is particularly pronounced in the area of pay. The EU has been working for decades to strengthen and equalise the position of women in employment relations, with an emphasis on their pay. Nevertheless, despite these efforts, gender pay gaps persist across the EU. Unequal treatment, including pay inequalities, occurs despite the existence of a legal framework aimed at promoting equality – as well as ongoing initiatives to eliminate inequalities between men and women. The principle of equal pay for equal work or work of equal value (hereafter: ‘the principle of equal pay’) is also enshrined in the preamble of the Constitution of the International Labour Organisation (hereafter ‘ILO’). It requires ratifying states to ensure that migrant workers are equal in remuneration with nationals. Nevertheless, the ILO has repeatedly noted the violation of this commitment by a number of states and, consequently, the persistence of inequalities in the remuneration of migrant workers. It should be stressed that the purpose of the principle of equal pay is not only to protect migrant workers, but also to protect the labour market.⁸

The pay gap of migrant workers may also be based on objective factors, including education, experience or language skills. Without knowledge of the local language, the position of migrant workers is significantly hindered.⁹ On the other hand, their status is also affected by the mismatch between their skills and the labour market requirements of the host country. The transfer of work skills and experience, and their adaptation to host country conditions, is also problematic. This is mainly due

7 This paper uses the term ‘migrant worker’ in line with the definition of ‘third-country worker’ in several existing EU laws to refer to a third-country national who has been admitted to, is legally resident in and may work in the territory of an EU Member State under a valid legal relationship under national law. In this context, see, for example, Directive 2011/98/EU of the European Parliament and of the Council of 13 December 2011 on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State. As Fox-Ruhs and Ruhs point out in this context, in accordance with EU terminology, the term ‘migrant workers’ refers to workers who are not nationals of countries of the European Economic Area, as the principle of free movement of workers applies. They further state that, in line with the EU’s preferred terminology, EU citizens who reside and work in another EU Member State are referred to as mobile workers rather than migrant workers. For more details see: Fox-Ruhs and Ruhs, 2022, p. 11. In this context, see also: European Commission, 2016 or also Fasani and Mazza, 2020. In a broader context (not only within the scope of the definition of EU law), the term ‘migrant’ in this paper refers to a third-country national who, for whatever reasons, has changed his or her country of permanent or habitual residence and has moved from his or her home country to another country. However, for the purposes of ILO references and outputs, the term ‘migrant workers’ also includes workers from other EU Member States. Thus, references to ILO outputs include both migrant workers as well as mobile workers.

8 International Labour Organisation, 2020, p. 3.

9 Reid et al., 2022, p. 3.

to the lack of adequate systems for the recognition of qualifications and differences in the skills and competences required in different countries. A significant part of the pay gap remains unexplained, even after accounting for objective factors and the characteristics of migrant workers, their education and practical experience. As much as 10% of the overall 12.6% pay gap between migrant workers and nationals remains unexplained by labour market characteristics. This may point to discrimination against migrant workers in terms of their remuneration. As the ILO report notes, if the unexplained part of the pay gap were eliminated, the pay gap between migrant workers and nationals would almost disappear. Moreover, if remuneration were determined on the basis of objective factors such as education and experience, the pay gap between migrant workers would remain very low in many countries – and in some countries there might even be a shift in the ratio in favour of migrant workers. This would particularly affect the status of female migrants.¹⁰

The income status of female migrant workers differs depending on whether they are in high-income countries or middle- and low-income countries. While migrant workers earn on average 12.6% less in a high-income country compared to nationals, in middle- and low-income countries migrant workers earn on average 17.3% more than nationals. The reason for this difference is the high proportion of highly skilled migrant workers in the total number of migrant workers in middle- and low-income countries, which also increases their average remuneration. Assumptions about the rationale for discrimination against female migrant workers are confirmed by data comparing their pay to men who are nationals of the given country. The pay gap between female migrant workers and male nationals is 20.9% in high-income countries. However, the average pay gap between male and female nationals is 16.2%.¹¹ Migrant care workers in high-income countries are a special group: the vast majority are women, and the pay gap for this group is 19.6%. When compared with the average pay gap between migrant workers and nationals at 12.6%, it is again possible to observe a multiple disadvantage for female migrant workers.¹² The above data clearly justifies the urgent interest in eliminating pay inequalities between men and women - and in particular female migrant workers – as these, in addition to discrimination, distort the overall labour market.

10 International Labour Organisation, 2020, pp. 1-2. On the unexplained part of the pay gap between men and women migrant workers, see also: Reid et al., 2022, p. 4.

11 Based on the average hourly wage.

12 International Labour Organisation, 2020. p. 1.

3.

Equal Treatment in Slovak Law

3.3. Introduction to Anti-Discrimination Law in Labour Relations in Slovakia

In line with the overall development within the EU, anti-discrimination law in Slovakia is also evolving.¹³ Equal pay without discrimination is an integral part of this area of legislation. The fundamental pillar is the Constitution of the Slovak Republic, guaranteeing equality for all in dignity and rights. In accordance with Article 12(1) of the Constitution of the Slovak Republic, fundamental rights and freedoms are inviolable, inalienable, imprescriptible, and inderogable. In the field of labour law, the legal regulation is mainly concentrated in Act No. 311/2001 Coll., the Labour Code, as amended (hereafter the 'Labour Code'). In accordance with Section 13 of the Labour Code, employers are obliged to apply the principle of equal treatment in labour relations – which applies to both employees and job applicants.¹⁴ Any discrimination against employees is prohibited, including discrimination on the basis of sex, race, language, origin or ethnic group. The Labour Code provides for a number of rights on the part of the employee in this area, in turn matched by the employer's obligations. An employee has the right to lodge a complaint with respect to a breach of the employer's obligation to comply with the principle of equal treatment. Upon receipt of an employee's complaint, the employer shall respond to it in writing without undue delay. It shall also be obliged to remedy the situation, to refrain from the conduct violating the principle of equal treatment, and to eliminate the consequences of such conduct. However, in addition to the right to lodge a complaint with the employer, the employee has the right to apply to the competent court for legal protection. The Labour Code thus provides the employee with more legal tools to protect him or her against violations of the principle of equal treatment by the employer.

In addition to the Labour Code, other legislation contains legal provisions aimed at protecting against discrimination in labour relations. Slovak anti-discrimination legislation is primarily concentrated in Act No. 365/2004 Coll. on equal treatment in certain areas and protection against discrimination and on amendment and supplementation of certain acts (the Anti-Discrimination Act), as amended (hereafter the 'Anti-Discrimination Act'). The Anti-Discrimination Act is the general legal basis for anti-discrimination law in Slovakia. The prohibition of discrimination provided for in the Labour Code is in the position of *lex specialis* in relation to the

13 Barancová, 2019, p. 118.

14 National Labour Inspectorate, 2023, p. 2.

anti-discrimination law.¹⁵ The principle of equal treatment in employment relations is contained in Section 6 of the Anti-Discrimination Act. According to this provision, discrimination against persons on the grounds referred to in Section 2(1) – which includes discrimination on the grounds of sex, race, language, or ethnic origin – is prohibited. The principle of equal treatment under Section 6(1) also applies in the field of remuneration in employment.

3.4. Prohibition Against Discrimination in Labour Relations Under Slovak Law

The general prohibition against discrimination in Slovak labour law stems from Article 1 of the Fundamental Principles of the Labour Code, and the provisions of Section 13 of the Labour Code.¹⁶ Under Article 1 of the Fundamental Principles, natural persons have the right to work; to free choice of employment; to working conditions that are fair, satisfactory, transparent and predictable; and to protection against arbitrary dismissal. These rights are to be in accordance with the principle of equal treatment in labour relations laid down in the Anti-Discrimination Act. Equality in access to employment, pay and promotion, training and working conditions – in accordance with the principle of equal treatment without discrimination on grounds of sex – is laid down in Article 6 of the Fundamental Principles.

Anti-discrimination legislation has been subject to gradual development. The prohibition against discrimination was already part of the original wording of the Labour Code. The wording of Section 13 was based on Article 1 of the Fundamental Principles and Article 12 of the Constitution of the Slovak Republic.¹⁷ The legislation adopted was in line with Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, and Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex.¹⁸ Under Section 13, employees are entitled to rights arising from employment relationships without direct or indirect discrimination. The prohibition of discrimination under the original wording of section 13 included discrimination on grounds of sex, race, language, or ethnic origin. However, an exception was made where the law so provided – or where there was a substantive reason

15 Barancová, 2019, p. 117.

16 *Ibid.*, p. 118.

17 According to Article 12 of the Constitution of the Slovak Republic, fundamental rights and freedoms in the territory of the Slovak Republic are guaranteed to “everyone, regardless of sex, race, colour, language, belief and religion, political or other opinion, national or social origin, membership of a nationality or ethnic group, property, birth or other status”.

18 Explanatory Memorandum - Special Part to the Draft Labour Code, 2001, p. 112.

for the performance of the work, consisting in the prerequisites or requirements, as well as in the nature of the work to be performed by the employee. For the purposes of the principle of equal treatment, indirect discrimination was an outwardly neutral instruction, decision or practice which disadvantaged a substantially larger group of individuals, where such instruction, decision or practice was not appropriate and necessary and could not be justified by objective facts. According to the original wording of the Labour Code, an employee also had the right to file a complaint with the employer in connection with a violation of rights and obligations in the area of prohibition of discrimination, and the employer was obliged to respond to such a complaint without undue delay, to remedy the situation, to refrain from such conduct and to eliminate the consequences of such conduct. At the same time, if the employee felt aggrieved as a result of the failure to comply with the conditions relating to the prohibition of discrimination, they could pursue their rights before the competent court. It was for the employer to prove that there had been no breach of the principle of equal treatment. The exercise of a right arising out of the employment relationship could not be grounds for the employer to penalise or disadvantage the employee.¹⁹

The provision of Section 13 of the Labour Code has been amended several times. A more extensive modification of its wording occurred with the adoption of the Anti-Discrimination Act in 2004. The exception contained in Section 13(1) of the original version of the Labour Code – which consisted in narrowing the scope of restrictions and direct or indirect discrimination in cases where the law so provided, or where there was a substantive reason for the performance of the work, consisting in prerequisites or requirements, as well as in the nature of the work to be performed by the employee – was removed. However, the exception in question remained in Article 1 of the Fundamental Principles of the Labour Code. This amendment to the Labour Code removed the title of Section 13 (Prohibition of discrimination) and introduced a reference to the principle of equal treatment in employment relations in accordance with the Anti-Discrimination Act. The wording of Article 1 of the Fundamental Principles was amended by Act No. 48/2011 Coll., amending Act No. 311/2001 Coll., the Labour Code, as amended, and supplementing certain acts. According to the amended wording of the exemption, differential treatment is justified by the nature of the activities performed in the employment or the circumstances in which these activities are performed. This reason is intended to constitute a genuine and decisive requirement for employment, and the legitimacy of the aim and the reasonableness of the requirement are a condition.

Act No. 376/2018 Coll., amending Act No. 5/2004 Coll. on Employment Services and on Amendments and Supplements to Certain Acts, as amended, and amending and supplementing certain acts, brought a significant change. Under Section 13

19 For more details see the promulgated version of the Labour Code of 2 July 2001.

of the Labour Code, a new paragraph 5 introduced a prohibition against obligating an employee to maintain confidentiality about the employee's working conditions, including wage terms and conditions of employment. At the same time, the provisions of an employment contract or other agreement between the employer and the employee which would impose an obligation on the employee to maintain confidentiality about his or her working conditions, including wage terms and conditions of employment, are null and void. The above provisions, albeit in a slightly modified form, are part of the currently valid and effective version of the Labour Code. The introduction of these provisions in the Labour Code was highlighted by the UN Committee on the Elimination of Discrimination against Women in its Concluding Observations on the Seventh Periodic Report of Slovakia published in 2023.²⁰

The principle of equal treatment in labour relations is also regulated in Act No. 5/2004 Coll. on Employment Services and on Amendments and Supplements to Certain Acts, as amended, (hereafter the 'Act on Employment Services'). In accordance with the principle of equal treatment laid down in the Anti-Discrimination Act, pursuant to Section 14(2) of the Act on Employment Services, a citizen has the right to access to employment without any restrictions. Any discrimination on grounds of language or origin is also prohibited. In case of violation of rights and obligations in connection with violation of the principle of equal treatment, a citizen has the right to lodge a complaint with the Office of Labour, Social Matters and Family, which is obliged to respond to such a complaint without undue delay, to remedy the situation, to refrain from the conduct in question, and to eliminate the consequences of such conduct. At the same time, in such cases, the citizen has the right to seek legal protection before the competent court. The Act on Employment Services links the principle of equal treatment to the right of access to employment of a citizen of the Slovak Republic. Pursuant to Section 2(2) of the Act on Employment Services, a citizen of an EU member state, a family member of a citizen of an EU member state, and a family member of a citizen of the Slovak Republic who are nationals of a third country and who have legal residence in the territory of the Slovak Republic – as well as nationals of the United Kingdom of Great Britain and Northern Ireland and members of their family who are nationals of a third country, nationals of a third country who have been granted asylum or subsidiary protection and nationals of a third country who have been granted residence in the Slovak Republic as third-country nationals who have been granted EU long-term resident status – have the same status as a citizen of the Slovak Republic in legal relations arising under this act. With regard to the above categories of persons, migrant workers – insofar as they are third-country nationals – may not fall under the above provisions of the Act on Employment Services in any case. On the other hand, mobile workers from other EU member states have the same

20 Committee on the Elimination of Discrimination Against Women, 2023, p. 2.

status as citizens of the Slovak Republic for the purposes of access to employment, and thus without any restrictions in accordance with the principle of equal treatment in labour relations.

The impetus for the adoption of the Anti-Discrimination Act into the Slovak legal system was primarily the obligation to transpose EU directives. The explanatory memorandum to the Anti-Discrimination Act shows that the aim of its adoption was to complete the transposition of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (hereafter 'Directive 2000/43/EC') and Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (hereafter 'Directive 2000/78/EC').²¹ These directives do not provide for the concept of multiple discrimination, however they do not exclude situations in which multiple forms of discrimination would occur. In practice, there are often combinations of multiple grounds of discrimination. In the field of labour law, the consequences of multiple discrimination on an employee should be expressed in a different form of moral or pecuniary compensation, since it causes more serious consequences for the injured party.²² In August 2023, preliminary information was published according to which the text of the Anti-Discrimination Act should be amended in the coming period. One of the main objectives of this amendment is to define the concept of multiple discrimination.²³ The proposed text of this amendment is not currently available. However, the very intention of introducing this concept into Slovak law can be evaluated positively, especially in the case of female migrant workers, since in practice multiple discrimination often occurs especially in relation to women.²⁴

4.

Equal Pay Principle Under the Labour Code

The right to remuneration of employees for work performed is enshrined in Article 36 of the Constitution of the Slovak Republic. The principle of equal treatment in the field of remuneration is based on Article 6 of the Fundamental Principles of the Labour Code. According to this, both women and men have the right to equal treatment in relation to employment, remuneration and promotion, training and working

21 Explanatory memorandum to the draft act on equal treatment in certain areas and protection against discrimination and on amendment and supplementation of certain acts (the Anti-discrimination Act), 2004.

22 Barancová, 2019, p. 121.

23 For more details see: Preliminary information PI/2023/255.

24 Barancová, 2019, p. 121.

conditions. The principle that women and men have the right to equal pay is covered by the provisions of Section 119a of the Labour Code. Remuneration conditions must be agreed without any discrimination based on sex. Remuneration includes any remuneration for work as well as other remuneration paid in connection with employment. Equal work or work of equal value is defined under Section 119a (2) as work of equal or comparable complexity, responsibility and exertion. It is performed under the same or comparable working conditions and with the same or comparable performance and results of work. At the same time, such work is performed in the course of employment with the same employer. The provision of Section 119a was added to the Labour Code by Act No. 348/2007 Coll., amending Act No. 311/2001 Coll., the Labour Code, as amended, and supplementing certain acts. This was a rather extensive amendment to the Labour Code, which primarily harmonised Slovak labour law with EU law.²⁵ The principle of equal pay has been added to the employer's basic obligations by this amendment to the Labour Code. According to the added provision of Section 82(c), managers are obliged to ensure that employees are remunerated in accordance with the relevant legislation, collective agreements and employment contracts, and at the same time to comply with the principle of equal pay under Section 119a. As stated in the explanatory memorandum to Act No. 348/2007 Coll., amending Act No. 311/2001 Coll., the Labour Code, as amended, and amending certain acts in its specific part, the principle of equal pay is one of the basic requirements of the EU. It is part of EU primary law and is also the subject of several directives in the field of EU secondary law.²⁶ This principle is also enshrined in the International Labour Organisation's Convention concerning Equal Remuneration for Men and Women Workers for Work of Equal Value, No. 100 of 1951. As further stated in the explanatory memorandum in this context, according to the relevant EU directives the principle of equal pay implies the elimination of any discrimination on grounds of sex, in relation to all aspects and conditions of pay. As the 2004 assessment of the Committee of Experts on the Application of Conventions and Recommendations of the International Labour Organisation shows, the principle of equal pay has not been sufficiently and unambiguously expressed in the previous wording of the Labour Code. These conclusions were drawn despite the adoption of the Anti-Discrimination Act and the application of the complexity and hardship criteria to ensure equality in

25 Explanatory memorandum - General part to Act No. 348/2007 Coll., amending and supplementing Act No. 311/2001 Coll., the Labour Code, as amended, and amending and supplementing certain acts, 2007, p. 1.

26 In this context, see Article 141 of the Treaty establishing the European Economic Community, Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women, and Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast).

relation to women's and men's entitlement to remuneration. One of the objectives of this amendment to the Labour Code was to incorporate the requirement to add the obligation to ensure equal pay conditions for women and men also in the case of comparable work, i.e. work of equal value. The amendment also responded to the conclusions of the CJEU concerning the conceptual definition of remuneration. The principle of equal pay is to apply not only to all types of remuneration for work, but also to all remuneration provided to employees in connection with their employment, even if it is not regarded as wage under the relevant provisions of the Labour Code. The amendment has also introduced a modification reflecting the conclusions of the CJEU, where the scope of the principle of equal treatment also applies to employees of the same sex if they perform the same work or work of equal value. The amendment also modified the system of occupational classification used to determine the level of pay. This system must be based on the same criteria, irrespective of sex and excluding any discrimination.²⁷

5.

Current EU initiatives on equal pay

Despite the existing EU legal framework, there is still a gender pay gap.²⁸ Effective implementation and enforcement of the principle of equal pay in practice remains a challenge. The relevance of the topic is underpinned by the still relatively high and persistent gender pay gap in the EU. It currently stands at around 13%.²⁹ The primary factors are, in particular, the lack of pay transparency and the related lack of evidence of pay differentials, the inconsistency of applicable national case law, the lack of specific criteria in relation to application of the principle of equal pay, as well as sophisticated and hidden forms of discrimination.³⁰ In March 2020, the Commission adopted the Gender Equality Strategy 2020-2025, setting out the basic framework for efforts to advance gender equality in Europe and beyond. As one of the first outputs of the Gender Equality Strategy 2020-2025, the Commission proposed binding measures on pay transparency in 2021. It submitted a proposal for a Directive of the European Parliament and of the Council to strengthen the application of the principle of equal pay between men and women through pay transparency and enforcement mechanisms (hereafter the 'Draft Directive'). It aims to address the persistent lack of

27 Explanatory memorandum - Special Part to Act No. 348/2007 Coll., amending and supplementing Act No. 311/2001 Coll., the Labour Code, as amended, and amending and supplementing certain acts, point 86, 2007, p. 14.

28 See for example: Polachek, 2019, p. 1 or Foubert, 2017, p. 88.

29 Eurostat, 2022, p. 2.

30 Burri, 2019, pp. 38-40.

enforcement of the fundamental right to equal pay and to ensure its respect across the EU by setting standards in pay transparency and strengthening their effective application.³¹

A particular challenge in the implementation and effective enforcement of equal pay is the position of migrants in the labour markets of individual member states. The migration of workers is inextricably linked to today's increasingly globalised environment. Migration can contribute to stabilising the labour market. However, it is essential to ensure that the rights to which migrants are entitled in the context of legal migration are effectively defined and enforced, both at EU and national level. In line with the European Parliament resolution of 20 May 2021 on new avenues for legal labour migration, Article 79 TFEU provides for the management of legal migration at EU level and commits member states to the development of a common immigration policy, including common rules on the entry and residence of third-country nationals and the definition of the rights to which they are entitled.³² In relation to remuneration, this includes the principle of equal pay.

The Draft Directive has recently been approved by the EU institutions. The process of adopting the final text took two years. The Commission presented the Draft Directive to the Council on 4 March 2021. The European Economic and Social Committee subsequently delivered its opinion on 9 June 2021. On 30 March 2023 the European Parliament adopted its first reading position. Finally, on 24 April 2023 the Council adopted the final text of the Draft Directive. As stated by the General Secretariat of the Council, the outcome of the European Parliament's vote reflects a compromise agreement reached between the relevant EU institutions.³³ However, not all member states voted in favour of the adoption of the Draft Directive. Some member states attached statements justifying their decision to vote against the Draft Directive or to abstain from voting. Bulgaria, Hungary and Sweden were against the Draft Directive. Germany and Latvia abstained. Member states have highlighted some problematic parts from their point of view. It is clear from the statements of some member states that the interpretation of the term 'gender' has been particularly problematic.³⁴ The statements of Germany and Austria show the problematic nature of the use of the term 'racial origin'. In this context, they assumed that the clarification of the use of the term 'racial origin' in the recitals of Directive 2000/43/EC also applies to the

31 European Parliament, 2021, p. 3. See also: Explanatory Memorandum to the Proposal for a Directive of the European Parliament and of the Council to strengthen the application of the principle of equal pay for equal work or work of equal value between men and women through pay transparency and enforcement mechanisms, 2021, p. 2.

32 European Parliament. 2021b, p. 4.

33 For more details see: General Secretariat of the Council, 2023, pp. 1-2.

34 In this context, see the statements by Bulgaria and Hungary: General Secretariat of the Council, 2023b, pp. 2-3.

Directive (EU) 2023/970 of the European Parliament and of the Council of 10 May 2023 to strengthen the application of the principle of equal pay between men and women through pay transparency and enforcement mechanisms (hereafter the 'Pay Transparency Directive'). In addition, member states have warned in statements of the burden that the new obligations will impose on employers. The original text of the Draft Directive has therefore been modified. Employers will be obliged to provide information on the gender pay gap, depending on the number of employees, from differently defined periods. In Bulgaria's view, the inclusion of intersectional discrimination in the operative part would create legal uncertainty in view of the legal basis for the adoption of the Pay Transparency Directive, which is Article 157(3) TFEU. This article, as the statement goes on to say, only applies to the protection of equality between men and women on grounds of sex, but not to protection on other grounds or a combination of such grounds.³⁵ In the context of the statement in question, it seems useful to highlight the objective of the Draft Directive, which is to address the persistent lack of enforcement of the fundamental right to equal pay. It can be assumed, however, that the failure to include intersectional discrimination in the operative text of the Pay Transparency Directive may result in the non-coverage of multiple forms of discrimination against female migrant workers, which will contribute to the persistence of the pay gap.

6. Conclusion

The principle of equal pay is part of both the European and national legal framework. Nevertheless, gender pay inequalities persist. Female migrant workers are at a particular disadvantage in this respect, facing discrimination as both women and migrants at the same time. Legal instruments to ensure equal treatment are contained in a number of acts in Slovak law. From this perspective, the legal environment is based on defined rules in relation to the rights of employees and the obligations of employers. However, multiple discrimination is not clearly defined. The position of female migrant workers is thus insufficiently enshrined in law. At the same time, the factors causing their unequal status are largely linked to their multiple forms of discrimination. A new Slovak legislation that clearly defines multiple discrimination and clearly defines the determining factors for its elimination could bring about change. At EU level, the driving force could be the newly adopted Pay Transparency Directive,

35 On this point see: General Secretariat of the Council, 2023b, pp. 1-3. According to the recitals of Directive 2000/43/EC "The European Union rejects theories which attempt to determine the existence of separate human races. The use of the term 'racial origin' in this Directive does not imply an acceptance of such theories."

which aims to ensure equal pay for men and women through pay transparency and enforcement mechanisms.

Equal pay has received attention for decades. However, attention to pay equality for migrant workers, particularly women, has lagged far behind the attention paid to the gender pay gap at large. The adopted text of the Pay Transparency Directive confirms these considerations. The obligations on employers in relation to intersectional discrimination were deliberately excluded from the scope of the Pay Transparency Directive in the process of adopting the final text. Discrimination under Article 3(2) formally includes intersectional discrimination in combination with any other ground or grounds of discrimination, but under Article 3(3), there are no additional obligations on employers to collect the data set out in the Pay Transparency Directive relating to protected grounds other than sex discrimination. Those grounds are precisely those on the basis of which female migrant workers face multiple forms of pay discrimination. Member states have an obligation to transpose the Pay Transparency Directive within a three-year period. In this respect, the Commission has stated that this is a compromise that has been reached and that the deviation from the standard two-year period should not act as a precedent for the future.³⁶

In accordance with Article 1 of the Pay Transparency Directive, the Directive sets minimum requirements to reinforce the application of the principle of equal pay. However, this is without prejudice to the adoption of more comprehensive legislation that is sufficiently targeted and specifically addresses also the aspect of multiple forms of pay discrimination of female migrant workers. In this context, a broader conceptual coverage of the area of equal pay and the grounds on which migrant workers – particularly women – face discrimination would be very beneficial. The transposition of the Pay Transparency Directive appears to be a specific instrument for achieving the EU's long-term objective of equal pay without discrimination. Otherwise, there may be insufficient coverage of the factors that cause the unequal position of female migrant workers, and thus a missed opportunity to adopt effective legal instruments aimed at ensuring equal treatment in all areas in the current period.

36 On the Commission's statement see: General Secretariat of the Council, 2023b, p. 5.

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