

research article

Can failure be useful in policymaking? The case of EU equal pay policy

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Although equal pay for equal work between women and men is a founding principle of the European Union, enshrined in the Treaties since 1957, the gender pay gap stands at 12.7 per cent in 2021 and has only changed minimally for two decades. This article explores a policymaking paradox: the EU equal pay policy seems unaffected by failure, on the contrary, failure seems to contribute to the legitimisation of the policy. The article asks how and why a policy implementation failure framing has been developed in the field of EU equal pay promotion? What is the political function of this framing and what is its impact on the EU policymaking process? Over the years, the EU equal pay policy has been associated with a repeated experience of implementation failure. This failure framing has been particularly present in the debates over the implementation of the 2006 Recast Directive, especially since this frame has been impelled by the quantitative and symbolic strength of the gender pay gap's percentage. The article shows that this framing performed important functions. From a policymaking perspective, the implementation failure framing allowed the gender equality policy community to keep the issue firmly on the EU agenda and to ride out the dismantling storm. The article also shows that the analytical definition of what constitutes a policy failure should be more nuanced. To conclude, the article asks if this type of failure framing can continue to produce results in an increasingly polarised context such as that of gender equality.

Keywords agenda-setting • equal pay • European Union • gender equality policy • gender pay gap • policy implementation • policy failure • policy framing

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Introduction

Equal pay for equal work between women and men is one of the founding principles of the European Union (EU), enshrined in the European treaties since 1957. EU member states must eliminate discrimination on grounds of sex regarding all aspects and conditions of wage or salary 'for equal work or work of equal value' (article 157 TFEU). However, in the EU, in 2021, the gender pay gap stands at 12.7 per cent (Eurostat, 2022), which means that women are hourly paid 12.7 per cent less than men on average, almost two months less in salary. This percentage has only changed minimally over the previous decade (15.8 per cent in 2010).

Why does the elimination of gender-based discrimination concerning pay appear unreachable? Many factors have been put forward to explain the persistence of pay differentials between women and men (Sielska, 2023). In a general manner, ‘progress towards equal pay is elusive’ (Rubery and Grimshaw, 2015: 319): not only does the equal pay goal appear unreachable, but the remedies for gender pay equality, the levers for reducing the pay gap, and the policy targets are constantly changing and regularly redefined. At the EU level, the outcomes of the equal pay policy are also affected by the effects of the system of multi-level governance. Supranational and domestic ‘filters’ constitute obstacles to compliance, especially in the field of gender equality. Almost 30 years ago, Ilona Ostner and Jane Lewis (1995) developed the idea that the efficiency of the implementation of EU gender equality norms and policies is hampered by domestic ‘needles’ eyes’. More recently, analysing the implementation of the 2019 Work–Life Balance Directive in three member states, Pircher, de la Porte and Szelewa (2023) demonstrate that differentiated policy implementation is at work at the national level, driven by the interplay of two main factors: costs and values. With regard to the enforcement of the principle of equal pay, a report published in 2017 by the European Equality Law Network (EELN) confirms that, even though legislation has been in force since 1975, there exists a wide differentiation of implementation, starting with the very definition of equal pay: ‘not all citizens of the EU and EEA are equally clear on what is to be understood by “pay”, “equal work”, “work of equal value”, “indirect discrimination”, “justification”, etc. That may highly impact on enforcement’ (EELN, 2017: 8). The elusiveness inherent to equal pay as a policy domain on the one side, and the effects of differentiated implementation inherent to the EU multi-level political system on the other side are two main hurdles which contribute to explaining the difficulties met by the EU in tackling the recurring problem of pay inequality between women and men.

This article takes a different path to the analysis of the EU equal pay policy. Its main aim is not to address the question of the causes of the gender pay gap or of the lack of compliance regarding equal pay legislation. Rather, it focuses on the following paradox: given its outcomes, the EU equal pay policy could be assessed as a failure and its existence questioned, but this is not the case. On the contrary, the EU equal pay policy seems unaffected by failure. Recently, the von der Leyen Commission has put equal pay at the heart of the Union of Equality programme, and has proposed a Directive on pay transparency, which was adopted on 10 May 2023 by the European Parliament (EP) and the Council of the EU.¹ This article is less concerned with the assessment of the actual results of EU action than with the consequences of an ever-eluding policy objective. At the heart of the puzzle is not so much the fact that the equal pay for equal work principle is still not met in the EU after more than 60 years, but rather the fact that, despite failure, the EU equal pay policy is still up and running.

To tackle this paradox, I first suggest building on the Gender Equality Policy in Practice Approach developed by Isabelle Engeli and Amy Mazur and concentrating the analysis on the post-adoption stage to best capture ‘the long-term effectiveness of gender equality policies that have been on the books for over 40 years’ (Engeli and Mazur, 2018: 113). Consequently, this article examines the implementation of an essential piece of EU legislation which has directly addressed the question of the application of the principle of equal pay, that is the 2006 Recast Directive.² Putting the analytical focus on the monitoring, evaluation, assessment, and revision stage during which policies continue to be negotiated, debated, contested, and supported

contributes to 'identify the conditions under which policies are likely to contribute to the dismantling of gender and sexual hierarchies of power and achieve gender transformation' (Engeli and Mazur, 2018: 112). Second, I suggest building on the analysis of EU policy failure by Ariadna Ripoll Servent (2019) in the field of EU's asylum policy. In this article on the EU's refugee 'crisis', she examines 'how 'failure' has been used by political actors, who have framed the causes of the crisis as exogenous or endogenous to the EU, thereby affecting where blame is principally attributed' (Ripoll Servent, 2019: 179). Focusing on framing mechanisms and strategies by policymakers allows the link between problem-definition and policy change to be studied at the EU level. In line with these two analytical frameworks, this article focuses on the politics of EU equal pay implementation and asks the following research questions: How and why has a policy implementation failure framing been developed and used in the field of EU equal pay promotion? What is the political function of this framing and what is its impact on the EU policymaking process?

To explore these questions, I have gathered a mix of data aimed at covering both the long-term diachronic analysis of the mechanisms of frame elaboration and transformation in the domain of the EU equal pay policy, and the specific case study of the implementation stage of the Recast Directive. Regarding long-term frame analysis, the aim is to engage in a process of re-analysis of pre-existing data which have been gathered in the context of a previous research on the emergence and evolution of the EU gender equality policy (Jacquot, 2015). While secondary analysis of quantitative data is well-established, it is much less common in the case of qualitative research, even though it allows the investigation of new research questions by using existing data (Bishop, 2007; Bishop and Kuula-Luumi, 2017). In this case, interviews and primary sources are looked at in a new light, focusing specifically on the issue of equal pay. Regarding the Recast Directive case study, the period of analysis starts with its adoption in July 2006 and runs until the tabling of a proposal for a Directive on pay transparency in March 2021. The dataset gathers a corpus of documents (N = 123) which have been produced in relation to the implementation and evaluation of Directive 2006/54/EC. This empirical material includes legislative texts, as well as opinions, resolutions, conclusions, parliamentary reports, and other types of institutional documents, but also evaluation and different types of experts' reports, impact assessments, policy briefs, position papers, studies and literature reviews, public opinion surveys, case law analysis, press releases, and so on (see online Appendix 1). These documents have been gathered from the largest range possible of actors participating in the public debate and policy process concerning equal pay and gender equality at the EU level. Contextual information is also drawn from a series of interviews with key policy stakeholders (N = 12) in the European Commission, the European Parliament, and civil society organisations during Spring 2023 (see online Appendix 2). All but two of the interviews were recorded and transcribed, as well as anonymised. Based on these data, I have carried out a qualitative process-tracing analysis of the implementation and evaluation of the Recast Directive at the EU level, especially to understand its various sequences, the main arguments and representations, as well as the different resources and strategies deployed by the actors during this sequence.

The article is divided into three parts. The first part takes on a long-term approach. It analyses the progressive framing of the EU equal pay policy as a policy suffering from application and enforcement shortcomings and shows how it became a defining

feature of this policy, regularly redefined but always central. The second part focuses on the case study of the Recast Directive. It considers the politics of implementation at play during the 15 years that followed its adoption in 2006 and how it shaped EU action in the field of equal pay promotion. The third part of the article discusses the multiple roles of the implementation failure framing and its uses by strategic actors during the policy process. It also tackles the analytical function of policy failure from the point of view of EU policymaking. Finally, the conclusion questions the policy efficiency of the failure framing in times of increased politicisation and polarisation of gender equality issues at the EU level.

Failure as the hallmark of equal pay regulation at the EU level

The issue of equal pay is not just a legal or policy principle at the European level. It comes under the domain of identity. It progressively became an important part of what the EU is, what its values are, and how it wants to be seen. At the same time, the existence of the gender pay gap is for the EU ‘a continuing source of sorrow’ (EELN, 2010: 1). This part underlines how much the idea of policy implementation failure is entrenched at the EU level. It is a long-term leitmotiv of the EU equal pay policy, which has emerged out of the difficulty of ensuring the application of the principle set in the founding treaties. Policy failure is a defining frame which has been and is present every step of the way, but which has also evolved: from a discourse in the 1960s on the incapacity to apply the principle of equal pay, to the nowadays omnipresent reference to the persistence of the gender pay gap.

Implementation failure as justification for EU action in the field of equal pay

The close relationship between European integration and equal pay for women and men began at the very outset with the inclusion of Article 119 EEC (now Article 157 TFEU)³ in the Treaty of Rome in 1957. As the literature and archive records show, the introduction of this principle in the treaty was highly confrontational. However, French demands for social harmonisation as ‘compensations’ for lowering trade barriers, including the recognition of the principle of equal pay, were finally accepted by the other negotiators (Van der Vleuten, 2007: 40–50). The first version of the article was written in October 1956 and, later, a group of experts in the social domain was asked to produce a text compatible with Convention 100 of the International Labour Organisation. The final text retained strong wording, which puts the question of enforcement at the heart of the article: ‘Each Member State shall in the course of the first stage ensure and subsequently maintain the application of the principle of equal pay for equal work between men and women workers’. The term ‘salary’ was replaced by that of ‘pay’ which is broader and includes ‘all advantages paid directly or indirectly, in money or in kind’. However, the formulation ‘work of equal value’, which is found in Convention 100, and which allows for the comparison of men’s and women’s pay in different activities was removed.

Article 119 of the treaty of Rome was initially supposed to take effect at the end of the first stage of the Common Market, on 31 December 1961 at the latest. However, after the adoption of the treaty in 1957 it remained dormant, essentially ignored and non-implemented by the Member States (Warner, 1984). As early as

May 1960, the Council of Ministers became aware that the harmonisation of pay between women and men had come to naught. The European Commission then took the initiative to develop a programme for the application of Article 119 and put out a recommendation to ask Member States to communicate, before June 1961, the measures they had taken on this issue at the national level. This request remained unanswered, however. An Article 119 Working Group was established, made up of representatives from the Commission and Member States, as well as legal scholars and statisticians to address these implementation problems. As the deadline of 31 December 1961 drew closer, France refused the passage to the second stage of the Common Market if the engagements of Article 119 were not met – a passage which was formally prohibited by the treaty itself if the obligations of Article 119 were not respected. An emergency political solution was found on the last day of 1961. The Council adopted an intergovernmental resolution on equal pay with objectives to be reached and a calendar for action over the next three years (Hoskyns, 1996: 60–5). This resolution enabled the passage to the second stage of the creation of the Common Market, already establishing a link between equal pay and difficulties in implementation.

In the following decade, it is again the problem of the (non-)application of equal pay which will allow the adoption of the very first piece of legislation on gender equality: Directive 75/117/EEC *on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women*. The very title of the Directive directs the focus on the definition of the problem to be tackled. The recitals state that the legislative text is justified because ‘differences continue to exist in the various Member States despite the efforts made to apply the resolution of the conference of the Member States of 30 December 1961 on equal pay for men and women’. The Commission decided to use a constraining policy instrument and to propose a Directive because, as explained in its implementation reports, the application of Article 119 had reached an impasse (Van der Vleuten, 2007: 78–9). The main aim was to set enforcement and monitoring mechanisms to ensure effective implementation, even though the negotiations ended up with the introduction of a large degree of flexibility for the member states.

As a consequence, the equal pay policy has emerged and developed based on the equation that equal pay in practice is synonymous with shortcomings, difficulties and repeated failure. As an example, the fact that the issue of equal pay is one of the most developed corpora of EU case law in the social domain is regularly interpreted as a consequence of the specific difficulties of the effective application of equal pay provisions by employers and social partners in the context of pay systems and collective agreements (see European Commission, 2019). The jurisprudence of the Court of Justice of the European Union (CJEU) has contributed to the clarification and development of the interpretation and scope of the principle of equal pay. Since *Defrenne I* in 1971, the CJEU passed judgments that tackle three main categories of issues: the definition of pay and its scope;⁴ the meaning of the concept of equal value – which implies comparing and assessing the value of different types of work;⁵ the classification and evaluation of jobs – so as to determine the hierarchy of jobs and thus explain the pay system in an organisation.⁶

Beyond judicial enforcement, equal pay for women and men is also a domain of intensive soft regulation and the frame of implementation failure has also been omnipresent there in the last 20 years. Since 2006, four Commission’s strategies

have followed one another, always including equal pay for equal work and work of equal value and the elimination or the reduction of the gender pay gap among their priority areas.⁷ The level of commitment and constraint has varied according to the period, ranging from supporting instruments such as equality labels or charters in the workplace to favouring the European Social Dialogue or proposing binding measures on pay transparency. What nevertheless remains constant is the contrast between the long-term existence of the principle of equal pay enshrined in the EU Treaties, and the continuing difficulties in obtaining policy results in terms of pay and earnings.

From the non-application of the principle of equal pay to the persistence of the gender pay gap

The implementation failure frame was present at the outset of the EU equal pay policy and is still present today. However, the precise content of this frame has evolved, and its focus has been slightly modified. Over the years, the difficulty in bringing the principle of equal pay into practice started to be summed up and even subsumed in the phenomenon of the ‘persistence’ of the gender pay gap. One among a countless number of examples of this discourse which irrigates the entire process of implementation at the EU level can be found on the webpage of the European Commission dedicated to equal pay for women and men which opens with the following statement: ‘In spite of more than 30 years of equal pay legislation the gender pay gap has remained persistent across all Member States regardless of the overall level of women’s employment, national welfare models or equality legislation’.⁸

The collection of comparable data on wage differences between women and men workers started with the Article 119 Working Group in the 1960s. The publication of this first statistical information underlined the very limited effect of Article 119: ‘statistical data clearly showed the discrepancy between the approval of the principle and its implementation’ (Van der Vleuten, 2007: 57), and contributed to paving the way for the adoption of a piece of secondary legislation. It is in the mid-1990s that the ‘gender pay gap’ started to be developed as a stabilised indicator aimed at ensuring ‘that there are no discriminatory pay differentials between women and men’ (Council of the European Union, 2010: par. 27) in relationship with the European Employment Strategy. The first version was approved by the Council in December 2001, and then it was included, with a different definition, as one of the targets for assessing progress in the framework of the Lisbon Strategy in March 2003 (Peruzzi, 2015). Starting from 2017, it is considered a secondary indicator within the revised scoreboard of the European Pillar of Social Rights. The definition of the gender pay gap has been amended since 2001 (Foubert, 2011: 25), and the current definition of the indicator is the following: ‘The unadjusted gender pay gap represents the difference between average gross hourly earnings of male paid employees and of female paid employees as a percentage of average gross hourly earnings of male paid employees’.⁹ The indicator has been defined as ‘unadjusted’ since it is not ‘adjusted’ according to individual, job and firm characteristics that may explain part of the earning differential.¹⁰ These characteristics can reflect objective differences in productivity, incentives, opportunity costs or individual choices for job and firms’ specificities, but they can also be the outcome of indirect or direct discrimination (European Commission, 2007: 15–17). This implies that the ‘unadjusted gender pay

gap' comprises both pay differences resulting from labour market characteristics and from indirect and direct pay discrimination. Academics have underlined the limitations of the gender pay gap (see [Oelz et al, 2013](#); [Christofides et al, 2010](#); [Rubery and Koukiadaki, 2016](#)), but the main critics came from the employers at the European level which have launched a controversy on its interpretation and use. According to the employers, the gender pay gap should not be interpreted as a measure or as a proof of discrimination of pay systems, but rather has a consequence of gender segregation of the labour markets because of gender stereotypes and different educational and career choices by women and men: 'it is important to avoid equating the gender pay gap with pay discrimination' ([SME United, 2021](#): 1; see also [BusinessEurope, 2019](#); [2021](#); [SGI Europe, 2021](#)). The discussion concerning the relevancy of the indicator by the employers is mainly a way to fight the discursive equation which is regularly found at the EU level between the level of the gender pay gap and the necessity to develop new legally binding implementation instruments:

Many believe that the statistical gender pay gap is linked to the principle of equal pay for work of equal value [...]. This has led to confusion in the political debate, and the term 'gender pay gap' is sometimes abused, leaving room for uninformed speculation and extreme or controversial views. The European Parliament has repeatedly asked for a comprehensive review of EU legislation based on the lack of progress in bridging the gap. Even when equal pay for equal value work is the norm, a significant gender pay gap can exist.' ([BusinessEurope, 2015](#): 3)

Starting in 2018, Eurostat has developed another synthetic indicator, the 'gender overall earnings gap' which measures the combination of three factors – average hourly earnings, monthly average of the number of hours paid, and the employment rate of women compared to men – and is intended to give a more comprehensive view of the level of economic independence and labour market opportunities of women and men ([EIGE, 2019](#): 8). Beyond the technical question of the statistical definition of the gender pay gap, there is an important political question linked to the acknowledgement of the role of indirect and direct discrimination in wage differentials between women and men on the labour market. Despite the intensive lobbying from the employers, the gender pay gap has not been seriously questioned as a legitimate indicator, and debates have rather focused on how best to complement it. What is also important is that the percentage into which this indicator is expressed, and its limited and slow variations, gradually came to symbolise the existence of a persisting public problem despite the existence of public policy measures aimed at addressing this problem. The fetishisation of the gender pay gap as an indicator signals not only the political dimension of statistics ([Mügge, 2020](#)), but also a failure in the implementation stage of the policy process which allows policy stakeholders to question the existing measures and suggest alternative and/or complementary solutions.

Implementing equal pay and the Recast Directive (2006–2021): under the shadow of policy failure

The Recast Directive adopted on 5 July 2006 aims to simplify, modernise and clarify the main existing provisions in matters of gender equality, employment and

occupation in order to increase EU legislation effectiveness and accessibility for a broader public. It appears that with this text, ‘the Commission had no intention of including substantive changes [...] or at least no *considerable* substantive changes’ (EELN, 2011: 8). Once again, the main concern of this piece of legislation has to do with gender equality in practice and the necessity to provide new instruments for effective implementation, especially regarding equal pay. The Explanatory memorandum of the Recast Directive gives the tone: ‘Despite this legal framework, the effective implementation and enforcement of [the equal pay] principle in practice remains a challenge in the EU’ (EP and Council of the EU, 2006: 1). The main objective is thus to develop policy measures aimed at ensuring better application of equal pay and ‘to make further provision for its implementation’ (recital 8), signalling that the main problem to be tackled 49 years after the Treaty of Rome still concerns the promotion of equal pay in practice.

Despite its modest ambition, the adoption of the Recast Directive opened a process of implementation and evaluation characterised by its long duration and its conflictual dimension, a process also marked by the shadow of a recurring policy failure framing. In order to analyse this process, I focus on its degree of policy density and intensity. Policy density and policy intensity offer interesting indicators to help describe and capture the transformation of a given policy field or subfield. The notions of policy density and policy intensity have been elaborated by Michael W. Bauer and Christoph Knill: ‘Policy *density* describes the extent to which a certain policy area is addressed by governmental activity’ (Bauer and Knill, 2012: 34). It can be seized by looking at the number of policy instruments within this policy area. ‘While policy density describes the breadth of legislative activity in a given policy field, policy *intensity* provides a basis for measuring the relative strictness and/or generosity of policies’ (Bauer and Knill, 2012: 34).

A high level of policy density

The implementation process of the Recast Directive over the period 2006–21 displays a high level of policy density: legal instruments are adopted, reports, studies and assessments are published, and debates and hearings are held on a regular basis (see online Appendix 3). This high level of policy density, fuelled and dramatised by the implementation failure frame, allows the issue of equal pay to be present on the EU formal agenda almost every year for 15 years.

The first stage of implementation of the Recast Directive is marked, as soon as 2007, by a Communication entitled *Tackling the pay gap between women and men* in which the Commission aims at ‘exploring ways to improve the legislative framework and its implementation’, ‘encouraging employers to respect equal pay’, or ‘supporting the exchanges of good practice’ (European Commission, 2007: 5 ff). Just one year after the adoption of the Directive, this Communication constitutes the first acknowledgement of implementation problems, but it mainly aims at taking stock. After a series of interventions by the EP and the Council (resolutions of the EP in 2008, 2011 and 2013, conclusions of the Council in 2010), the Commission published a report on the application of the Recast Directive in 2013. It mainly points to a lack of effective access to justice for victims of pay discrimination and puts the emphasis on the ‘correct transposition’ (European Commission, 2013: 10) of the novelties contained in the

Recast Directive. Infringement proceedings are mentioned but only ‘if necessary’ (European Commission, 2013: 10). A *Recommendation on strengthening the principle of equal pay between men and women through transparency* is issued by the Commission the next year, in 2014, as an answer to the demands for a revision of the Recast Directive. The focus is on the ‘effective implementation’ (European Commission, 2014: 3) of the existing instruments, and the main tools put forward concern improving statistics availability, clarifying the concept of work of equal value in national legislation, or promoting awareness-raising activities. The Commission is supposed to monitor the measures taken by the Member States, and the social partners when relevant, and to draw a report on the progress, but with no date specified.

With the Juncker Commission, the issue of equal pay moved up the political priority list, but this remained limited in number and in substance (Ahrens and van derVleuten, 2020), and was conducted in parallel to post-crisis gender-blind austerity policies. A report on the implementation of the 2014 Recommendation is finally provided in 2017. It warned that the Recommendation has not achieved the necessary changes to tackle the persisting inadequate implementation and enforcement of the principle of equal pay. This evaluation explains that in 2017 the Commission also presented an Action Plan entitled *Tackling the Gender Pay Gap*, which offers a more comprehensive vision of equal pay and makes a first step towards the possibility of targeted amendments to the Recast Directive, including improving sanctions and compensation to victims. The Action Plan also mentions a will to pursue infringement procedures against Member States not complying with EU obligations, to directly engage dialogue with the social partners on classification systems, and to develop a series of activities against stereotypes, in favour of awareness-raising and data-gathering. After this Action Plan, the Commission launched a public consultation on the implementation of the principle of equal pay (2019) and submitted another evaluation of the Recast Directive and of the 2017–19 Action Plan (2020). The results of this new round of evaluation point to the same conclusion: ‘areas remain, where further actions would be necessary to address the gender pay gap in a meaningful way’ (European Commission, 2020a: 11). This conclusion is backed both by the EP and the Council which call on the Commission to step up the efforts and use ‘all available measures’ (Council of the European Union, 2020:17).

In her Political Guidelines published before her election in 2019, Ursula von der Leyen gave the issue of equal pay a higher profile by committing to introducing binding pay-transparency measures. In the context of the pandemic, she exerted constrained leadership and ‘placed long overdue reforms from Juncker’s Action Plan on the priority list for her first 100 days, including pay transparency’ (Abels and Mushaben, 2020: 125). The new Commission finally tabled the proposal for a directive in March 2021. With this text, the Commission clearly positions its initiative in the continuity of the implementation and evaluation process which repeatedly insisted on policy failure and on the shortcomings of equal pay in practice, considering that effective implementation and enforcement ‘remains a challenge in the EU’ (European Commission, 2021a: 1).

A tug of war over policy intensity

Between 2006 and 2021, the main question driving debate about equal pay at the EU level is the revision of the Recast Directive and the adoption by the

Commission of a proposal for a new piece of legislation. During most of the period, the Commission acknowledges implementation shortcomings, but it refuses to support it via any binding instrument and systematically uses evaluation measures to cast away the debate about implementation and enforcement – a position which the EP denounces: ‘impact assessments have been done in abundance; now the conclusions need to be drawn coherently and vigorously’ ([European Parliament, 2015: 21](#)). The long process of implementation and evaluation of the Recast Directive is a tug of war over the substantial and formal intensity of the EU equal pay policy: (non-)binding character of the measures, scope of organisations concerned by pay audits, role given to equality bodies, room of manoeuvre about possible sanctions, and so on.

During the two mandates of the Barroso Commission (2004–09, 2010–14), the formal and substantial means and resources for implementation show a much lower degree of policy intensity in comparison with the two other Commissions that will follow. So much so that, in 2012, Mark Smith noted that ‘[since the mid-1970s] the appetite for new regulation has weakened [and that] the Commission has placed considerable emphasis on soft mechanisms’ ([Smith, 2012: 365](#)). Mandated to examine the transposition of the Recast Directive in 2009, the [EELN \(2009\)](#) found that the text’s impact on the Member States’ national law remains limited. This limited impact prompted the reflection on the necessity of a ‘strengthening’ of the principle of equal pay. However, the strengthening initiatives of the following years, such as the 2014 Recommendation, did not imply more constraining instruments. As expressed by the [European Economic and Social Committee \(2021: 6\)](#): ‘The experience with the 2014 Recommendation on pay transparency has shown that non-binding measures are unlikely to achieve the desired result, which is to ensure the effective application of the principle of equal pay in practice, at the required pace’. This focus on command-and-control instruments contributes to explaining the emergence and progressive concentration of the debate on pay transparency, which is presented as an issue which can be legislated upon. This potential legally binding dimension gradually transformed pay transparency into an appropriate, almost magical solution, or at least an essential part of the solution to the problem of the gender pay gap and implementation failure. The implementation failure frame supports the demands for increasing policy intensity and the level of constraint of some instruments (annual reporting obligation for employers, use of gender-neutral criteria for salaries comparison). However, paradoxically, the definition of the problem of equal pay as repeated implementation failure does not induce paradigmatic change, but rather continuity regarding the content of policy options: the range of policy solutions remains identical.

The many functions of policy failure

Whether seen from a long-term or a shorter-term perspective, the implementation failure frame systematically characterises the EU equal pay policy. Rather than being dismissed, considered as a symptom of contextual elements, or only assessed as the result of an ill-designed policy, I argue that the existence of this recurring frame should be taken into account and that it has political functions that are worth exploring. More precisely, the implementation failure frame has a strategic and policymaking function for the actors, and it also has analytical and evaluation functions for policy scholars which need to be considered.

The strategic relationship between policy failure and policy change

The framing of equal pay as an implementation failure fulfils an essential policymaking function and has been instrumental in facilitating policy change. It appears as a means for strategic actors to keep the debate on the promotion of equal pay in practice alive, and the issue on the EU formal agenda for 15 years.

The failure framing is inherent to the EU equal pay policy and is almost as old as Article 119 in the Treaty of Rome, but what becomes even more striking with the period which opened with the Recast Directive is that policy failure is accepted. Failure to reduce the gender pay gap is not trumpeted, but it is not swept under the carpet; it is acknowledged, as can be read in the impact assessment presented by the European Commission in 2021: 'The problem tackled in this initiative is the failure to realise in the European Union the fundamental right to equal pay for the same work or work of equal value [...]. The information and data presented [here] show that this failure persists' (European Commission, 2021b: 6). In a briefing note to the MEPs, the European Parliamentary Research Service presents the failure diagnosis as a direct result of the process of evaluation and its different steps, especially the impact assessment (IA) exercise: 'the IA identifies two key problem drivers: the existence of a market failure, caused by information asymmetry, and a regulatory failure' (European Parliament, 2021: 2). Not only is policy failure not hidden or downplayed in public discourse, on the contrary, it reinforces the idea of policy failure as a motivation for action, as a driver for going further. Framing the implementation process of the Recast Directive as a policy failure and even embracing it appears for the EU policymakers as a strategy to keep the issue of equal pay on the agenda. Defining the problem of equal pay as a problem of policy failure has a direct link with policy change. The issue is not settled, solutions need to continue to be examined and debate is opened as to the level of constraint to be applied. Underlining the inadequacies of past actions is a means to insist on the necessity of new initiatives to remedy these inadequacies (Palier, 2005). More precisely, the failures which are pointed out at the implementation stage allow policymakers to question the existing measures and suggest alternative solutions, such as pay transparency. This finding is intriguing since it is not totally in accordance with the results put forward by Ariadna Ripoll Servent (2019). When analysing the 2015 refugee 'crisis', she shows that the failure framing and the potential use of such a framing is deeply connected to different strategies of blame avoidance and blame attribution by the political actors. The failure framing is endorsed differently according to 'who is to blame'. The decisive element is certainly the 'crisis' situation. In 2015, the asylum policy is confronted with extraordinary events which actors can transform into a situation of opportunity for change, especially if they can strategically attribute blame and frame the existing policy as being a failure. In contrast, the implementation of the equal pay policy corresponds to a more traditional situation of routine policymaking in which blame attribution is not so acute, framing mechanisms are less conflictual and can be more easily shared. Therefore, heated debates can unfold concerning the detailed policy measures, their prioritisation or level of constraint, but in a situation of consensus over the principle of equal pay, it is difficult, even by the actors who are the most opposed to the revision of the Recast Directive, such as the employers (Elomäki and Kantola, 2022), to challenge the failure framing. Consequently, it is all the more instrumental and efficient for the gender equality policy community in terms of agenda-setting and legitimacy to support new policy initiatives because of the failure of past measures.

Analysing the complex relationship between policy success and policy failure

If policy actors strategically embrace policy failure and use the implementation failure framing, the case of EU equal pay policy also encourages analysts to endorse a more nuanced definition of what constitutes policy failure and how it should be considered.

First, from an analytical point of view, the assessment of the implementation of the Recast Directive as policy failure should be questioned. Indeed, the period of implementation of the Recast Directive coincides almost perfectly with the economic and Eurozone crisis and the development of gendered austerity policies that followed (Kantola and Lombardo, 2017), and with a conservative Commission and the sidelining of gender equality issues from the agenda of the EU (Hubert and Stratigaki, 2016; Hartlapp et al, 2021). Policy initiatives are limited, budgetary programmes and specialised structures rationalised, and the political priorities are mainly refocused towards female genital mutilation and the participation of women in corporate boards. The issue of equal pay has progressively vanished from the EU economic governance during this period (Plomien, 2018; Cavaghan and Elomäki, 2021; Scheele, 2021). Based on a narrow understanding of economic growth, Country Specific Recommendations (CSRs) have mainly focused on austerity since the 2008 economic crisis and failed to integrate a gender perspective (Addabo et al, 2018; Guerrina, 2020). Looking at CSRs issued by the Commission and the Council during the annual European Semester cycle, the question of equal pay for women and men appears almost invisible. European Commission officials consider that the European Semester process has been useful in highlighting some of the root causes of pay inequalities in the Member States (that is, lack of investment in childcare, fiscal disincentives to the participation in the labour market of second earners). However, the gender pay gap has been addressed in only a small minority of the country reports in 2018 and 2019,¹¹ and it has been the object of only one CSR in each of these years (European Commission, 2020b: 9). The period of implementation of the Recast Directive corresponds almost perfectly with the sequence that opened for the EU gender equality policy around the signature of the Lisbon treaty and up until the mid-2010s: a period of intensified policy dismantling (Jacquot, 2015). It is only at the end of the decade that some gender issues move up the EU's agenda again. First, with the emphasis on work-life balance during the Juncker's Commission's term, and second with the renewed commitment to gender equality by the von der Leyen's Commission since 2019 (Abels and Mushaben, 2020). In a difficult context for the EU gender equality policy, the equal pay implementation process cannot *only* be described as an example of policy failure. What can rather be defined as a form of policy success is the maintaining of the issue of equal pay on the EU agenda during the entire period. The EU gender equality policy community, and especially the European Parliament, has been able to ensure its almost continuous salience, especially thanks to the evaluative dimension of the process which implied regular expertise reports and analyses and allowed the question not to disappear completely and always remain, at least, in the background. This continuous presence enabled the issue to be taken over by the new president of the Commission when she came to power, to integrate it into her 2019–24 political guidelines, and to commit to putting a legislative proposal on the table. Without this continuing presence, it is possible to imagine that another, more politically attractive, flagship initiative could have come to the front and concentrated both attention and means or that no specific gender

equality-related issue would have emerged. Under this (dim) light, the instrumental use of the failure framing has reached its goal, and the continuous presence of the issue on the EU agenda can thus be considered as one of the multiple shades of policy success.

Second, from the point of view of outcomes, the focus on the failure framing overshadows the major inconsistency which characterises and hampers the implementation of the EU equal pay policy. As mentioned above, the gender dimension included in the process of macro-economic coordination has been reduced to a minimum in the last two decades, even though this process has a direct impact on the fixation of economic priorities and wage formation at the domestic level. Policy choices favour moves towards increased decentralisation and individualisation of wage-setting as well as restructuration of the public sector, which have negative gender effects (Rubery et al, 2005). Consequently, there is a 'substantive contradiction' (Peruzzi, 2015: 456) between the policy targets set in the field of EU economic governance and the objectives aimed at reducing the gender pay gap set in the field of gender equality. In this context of structural imbalance and incoherence, equal pay in practice can hardly be significantly successful when it comes to the fight against gendered wage differentials.

Conclusion

In this article, I show that characterising the EU equal pay policy as exceptionally difficult to apply in practice is almost as old as the policy itself. It may even be its most defining feature. Over the years, a specific frame has been constructed which associates equal pay with a repeated experience of policy implementation failure. This failure framing has been particularly present in the debates over the implementation of the 2006 Recast Directive, especially since this frame has been impelled during the same period by the quantitative and symbolic strength of the gender pay gap's percentage. I argue that this framing performed important political and analytical functions. From a policymaking perspective, building on the idea of the failure of the implementation of equal pay allowed the gender equality policy community to keep the issue firmly on the EU agenda, and to ride out the dismantling storm up until the tabling of a new legislative proposal on pay transparency by the von der Leyen Commission. From an analytical perspective, the definition of what constitutes a policy failure – and success – should also be more nuanced. Framing the EU equal pay policy as a failure was instrumental in terms of policy change and legitimisation. The focus on implementation failure also implied that the structural imbalance between the gender equality policy on the one side, and macro-economic policies which do not take gendered wage differentials into account on the other side, remained in the shadow of the debate.

This article underlines that a policy failure frame can prove extremely useful, whether in times of low politics – such as with equal pay – or high politics – such as during the refugee 'crisis' (Ripoll Servent, 2019). Acknowledging failure and building on past inadequacies to promote new solutions is surely an efficient path in the world of EU policymaking, where highly technical issues are at stake. However, for all its efficiency, one can wonder how long this type of failure framing will bear its expert and technocratic fruits, and at what point in time efficiency will collapse in front of (contested) legitimacy. This strategy which bets on the acknowledgement of failure as an

incentive for continuous action will certainly be increasingly put to the test in a world where EU decision-making is increasingly politicised, where ‘public support cannot be taken for granted [and] rather has to be earned’ (Rauh, 2023: 684). In this regard, equal pay and gender-related issues more generally constitute an interesting stress test considering that they are becoming increasingly polarised, under the constant scrutiny of anti-gender governments, Members of the EP, and civil society groups. Will the failure framing continue to be rewarding from a policymaking point of view if equal pay loses its consensual nature as a European common value and principle and if the supporting policy community loses power and cohesion? This question opens a new research agenda which would compare ‘failing’ EU policies which are in different situations in terms of their level of polarisation, salience, and mobilisation of their policy communities.

Notes

- ¹ Its full title is the following: *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 for equal work or work of equal value between men and women through pay transparency and enforcement mechanisms*.
- ² This legislative text is commonly referred to as ‘Directive 2006/54/EC’ or as the ‘Recast Directive’. Its full title is the following: *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)*.
- ³ Article 119 EEC became Article 141 EC when the founding treaties were renumbered for the first time in 1997 with the Amsterdam Treaty. With the Lisbon Treaty, which entered into force on 1 December 2009, the article has been renumbered again and the principle of equal pay for women and men is now part of Article 157 of the Treaty on the Functioning of the European Union (TFEU).
- ⁴ Basic and additional pay, benefits, social security benefits, occupational social security schemes.
- ⁵ Nature of work, scope of comparison, source of pay conditions, shifting of the burden of proof, role of collective agreements, objective justification, and so on.
- ⁶ Role and nature of job evaluation and classification systems, provision of guiding principles for the establishment of a job classification system.
- ⁷ *Roadmap for equality between women and men (2006–2010)*; *Strategy for equality between women and men (2010–2015)*; *Strategic engagement for gender equality (2016–2019)*; *Gender equality strategy (2020–2025)*.
- ⁸ https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/gender-equality/equal-pay/eu-action-equal-pay_en#equal-pay-for-equal-work.
- ⁹ See Eurostat metadata: https://ec.europa.eu/eurostat/cache/metadata/en/earn_grpgg2_esms.htm.
- ¹⁰ According to the European Commission, these factors include personal characteristics, job and firm characteristics, gender segregation by occupation or sector, institutional characteristics, and social norms.
- ¹¹ The gender pay gap has been addressed in the country reports of eight Member States in 2018 and of 11 Member States in 2019.

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Conflict of interest

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