

Model Proposal for a Directive on strengthening the principle of equal pay between women and men through pay transparency

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 157(1) thereof,

Whereas:

(1) Articles 2 and 3(3) of the Treaty on European Union identifies equality between women and men as one of the foundational values and objectives of the Union. Article 23 of the Charter of Fundamental Rights of the European Union provides that equality between women and men must be ensured in all areas, including employment, work and pay.

(2) Article 157(1) of the Treaty on the Functioning of the European Union lays down the principle of equal pay for male and female workers for equal work or work of equal value, which is an essential aspect of the principle of equal treatment between men and women.

(3) Article 4 of Directive 2006/54/EC of July 2006¹ implements the principle of equal pay in providing that, for the same work or for work to which equal value is attributed, direct and indirect discrimination on grounds of sex is prohibited in all aspects and conditions of remuneration.

(4) Principle 2 of the European Pillar of Social Rights states that equality of treatment and opportunities between women and men must be ensured and fostered in all areas, including regarding participation in the labour market, terms and conditions of employment and career progression, and that women and men have the right to equal pay for work of equal value.

(5) The right of men and women to equal pay for work of equal value is recognised also by the fundamental International Labour Organisation Equal Remuneration Convention of 1951 (No 100), and Article 4(3) of the Council of Europe (Revised) European Social Charter.

(6) Despite the provisions of Directive 2006/54/EC, significant disparities in the level of pay as between women and men persist across the European Union. The implementation of the principle of equal pay remains a significant challenge, reflected in the fact that the gender pay gap has changed only minimally over the last ten years and in 2019 stood at 16 % across the EU.²

(7) The Commission Report to the European Parliament and the Council Com(2013) 861 final³ identified a lack of transparency in pay systems, a lack of legal certainty on the concept of work of equal value and procedural obstacles as significant challenges to the implementation of the equal pay principle. The Commission Recommendation of 7 March 2014⁴ invited Member States to introduce pay transparency measures and clarify the concept of work of equal value in national law. The Commission

¹ Directive 2006/54/EC of the European Parliament and of the Council of July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (OJ L 204, 26.7.2006, p. 23)

² European Commission, Factsheet 'Equal Pay? Time to close the gap!'.

³ Report from the Commission to the European Parliament and the Council on the application of 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.

⁴ Commission Recommendation of 7 March 2014 on strengthening the principle of equal pay between men and women through transparency (OJ 69, 8.3.2014, p. 112)

Report on the implementation of the Recommendation COM(2017) 671 final⁵ notes that few Member States have reviewed their national legal systems to strengthen the principle of equal pay in response to the Recommendation. The Commission Evaluation of Directive 2006/54/EC SWD(2020) 50 final⁶ confirms that the impact of the Recommendation has been limited.

(8) The COVID-19 crisis has affected women disproportionately and is likely to lead to a widening of the gender pay gap over the next decade. Strengthening the implementation of the principle of equal pay through further measures is particularly important to ensure that the progress which has been made in addressing disparities in pay as between women and men is not compromised.

(9) The COVID-19 crisis has also brought to light the historical, cultural undervaluation of work predominantly carried out by women, such as care work. Occupational, sectoral and vertical segregation and the undervaluation of work predominantly carried out by women are structural issues, which significantly contribute to the gender pay gap. These phenomena pose some of the most complex challenges to the full realisation of the principle of equal pay.

(10) The undervaluation of work predominantly carried out by women can only be addressed if job evaluation systems free from gender bias and based on objective criteria are applied, which enable comparison of work as between female-dominated and male-dominated sectors. To be free from gender bias, job evaluation systems must not have the effect of putting women at a disadvantage, or overlook or undervalue characteristics and skills associated with typically 'female' jobs, such as those required in caring professions, in comparison with characteristics and skills associated with typically 'male' jobs, such as physical effort. Where work is not of equal value, a difference in pay which is disproportionate to the difference in value of the work suggests that the job evaluation or classification system is not free from gender bias.

(11) A definition of the concept of work to which equal value is attributed, or work of equal value, including an indication of the assessment criteria for comparing different jobs, is central to the implementation of the principle of equal pay and to tackling pay disparities arising from sectoral and occupational segregation and the undervaluation of work predominantly carried out by women. A lack of clarity over how to assess whether work is of equal value affects the ability of victims of pay discrimination to establish a comparator and thus to take successful legal action against employers. Clarification of this concept is a necessary pre-requisite for effective pay transparency measures, which require that information be provided on pay levels for categories of workers doing the same work or work of equal value.

(12) Guidelines on the definition of the concept of work of equal value are provided in the case-law of the CJEU, Recital 9 of Directive 2006/54/EC and the Recommendation on pay transparency. Despite this, Member States do not always define the concept in national legislation, and where the concept is defined this is often not done uniformly in Member States.⁷ This compromises the effectiveness of equal pay legislation, and points to the need for a clarification of the concept at Union level.

⁵ Report to the European Parliament, the Council and the European Social and Economic Committee on the implementation of Commission Recommendation on strengthening the principle of equal pay between men and women through transparency.

⁶ Commission Staff Working Document, Evaluation of the relevant provisions in the Directive 2006/54/EC implementing the Treaty principle on 'equal pay for equal work or work of equal value' SWD(2020) 50 final, Brussels 5.3.2020.

⁷ Commission Evaluation of Directive 2006/54/EC, p. 19 and P. Foubert, The enforcement of the principle of equal pay for equal work or work of equal value: A legal analysis of the situation in the EU Member States, Iceland, Liechtenstein and Norway, ELLN Report for the European Commission, 2017, p. 40.

(13) Women working in highly gender-segregated labour markets face further difficulties in bringing an equal pay claim, since it may not be possible to establish an actual comparator because there is no male worker with whom the relevant comparison could be made. To ensure the effective application of the principle of equal pay in such cases, there must be a possibility for a woman to compare her treatment with the treatment that a man would have received, had they been engaged in the same work or work of equal value, on the assumption that there is no material difference in circumstances between them. That is, there must be a possibility of hypothetical comparison.

(14) Pay transparency is essential to the effective implementation of the principle of equal pay.⁸ A lack of information on pay for different categories of workers, broken down by gender, makes it much more difficult for workers and trade unions to identify and take action against pay discrimination and the undervaluation of work predominantly carried out by women. Pay secrecy clauses and the lack of information on pay in vacancy notices further contribute to obscuring pay structures.

(15) Pay transparency measures, such as a right to request information on pay, pay reporting obligations and pay audits increase the chances of successful individual legal action against pay discrimination, constitute a basis for discussion between trade unions and employers in the implementation of the principle of equal pay and encourage employers to take action to eliminate gender discrimination in pay.

(16) Discussion and negotiation of equal pay matters with a view to eliminating gender pay discrimination by the social partners in collective bargaining, including the determination of criteria for job evaluation which are free from gender bias, is a key way of ensuring pay transparency and addressing the gender pay gap.

(17) Involving equality bodies is instrumental to the effective implementation of the principle of equal pay.⁹ The powers and mandates of national equality bodies should therefore be adequate to cover gender pay discrimination, including pay transparency obligations, and they should be involved in the enforcement of the relevant provisions. Enabling equality bodies to provide support to trade unions in representing workers in equal pay claims would further contribute to reducing obstacles faced by victims in bringing a claim and thus strengthening enforcement of the relevant provisions.

PROPOSES THE ADOPTION OF THIS DIRECTIVE:

Article 1
Subject matter

The purpose of this Directive is to strengthen the implementation of the principle of equal pay for female and male workers for equal work or work of equal value.

To that end, this Directive contains provisions relating to:

- (a) the concept of work of equal value;
- (b) the establishment of job evaluation and classification systems free from gender bias;
- (c) wage transparency;

⁸ This has been recognised by the European Committee of Social Rights in relation to the equal pay provisions of the European Social Charter, e.g. Collective Complaint No. 124/2016 University Women of Europe (UWE) v. Belgium, para 154.

⁹ The important role of equality bodies has been recognised by the European Committee of Social Rights in relation to the equal pay provisions of the European Social Charter, e.g. Collective Complaint No. 124/2016 University Women of Europe (UWE) v. Belgium, paras 167-168.

- (d) the right to collective bargaining on equal pay matters.

Article 2

Definitions

For the purposes of this Directive, the following definitions shall apply:

- (a) 'free from gender bias': not only apparently gender-neutral, but also does not have the effect of putting women at a disadvantage, and does not overlook or undervalue the characteristics and skills associated with work predominantly carried out by women.
- (b) 'pay': the entire remuneration package, which includes the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his/her employment from his/her employer.

Article 3

Concept of work of equal value

1. The value of work is assessed and compared by reference to objective criteria, including but not limited to:

- (a) skill, including education, training, experience, knowledge, interpersonal skills, problem solving, organisational skills;
- (b) effort, including physical, mental and psycho-social effort;
- (c) responsibility, including accountability, responsibility for people, goods and equipment, information or financial resources;
- (d) working conditions, including the nature of the tasks involved, organisational environment, physical, psychological or emotional environment.

Work to which equal value is attributed is work that is determined to be of equal value in accordance with such objective criteria. The assessment of the value of work must be free from gender bias, whereby particular care must be taken not to overlook or undervalue characteristics and skills associated with work predominantly carried out by women.

2. Member States shall clarify the concept of work of equal value in their national legislation in accordance with paragraph 1. Member States shall provide more detailed guidance on the objective criteria and method used to determine the value of work, having regard to the criteria set out in Annex I.

Article 4

Comparator

In relation to the prohibition of discrimination contrary to Article 4 of Directive 2006/54/EC, Member States shall ensure that it is possible for a woman to compare her treatment to the treatment that a man would have received had they been engaged in the same work or work to which equal value is attributed, subject to the assumption that no material difference in circumstances would have existed between such a person and the woman seeking to make such a comparison.

Article 5

Job evaluation and classification systems

1. Job evaluation and classification systems must be free from gender bias. They must be analytical and based on objective criteria for the assessment and comparison of the value of work in different jobs and sectors, as set out in Article 3(1).
2. Member States shall put in place appropriate measures to promote the development and use of job evaluation and classification systems free from gender bias, including in their capacity as employers in the public sector, to prevent or identify and address possible pay discrimination and the undervaluation of work predominantly carried out by women based on gender-biased pay scales.

Article 6

Right to request information

Member States shall take the necessary measures to ensure that workers and their trade unions can request from the employer clear and complete information on pay levels, broken down by gender, for categories of workers doing the same work or work of equal value. This information should include complementary or variable components beyond the fixed basic salary, such as payments in kind, performance-related payments and bonuses. It should include information on the job evaluation criteria used to determine pay for categories of workers doing the same work or work of equal value.

Article 7

Pay reports

Member States shall, in consultation with the social partners, put in place measures to ensure that employers in undertakings and organisations with at least 10 workers regularly, and at least twice per year, inform workers and their trade unions of the average remuneration by category of worker or position, broken down by gender, and of the number of workers per job title or category, broken down by gender. This should include information on the job evaluation criteria used to determine pay for different categories of workers or positions. The calculation should take into account complementary or variable components beyond the fixed basic salary, such as payments in kind, performance-related payments and bonuses.

Article 8

Pay audits

1. Member States shall, in consultation with the social partners, adopt measures which require that pay audits are conducted at least every two years in undertakings and organisations with at least 10 workers. These audits should include an analysis of the proportion of women and men in each category of worker or position, an analysis of the job evaluation and classification systems used and detailed information on pay and pay differentials on grounds of gender. These audits should be made available to workers and trade unions.
2. Member States shall adopt measures to ensure that on request of the trade union, where pay audits reveal a gender pay gap, employers are required to negotiate an appropriate annual action plan aimed at addressing the causes of the gap, such as pay discrimination, the undervaluation of work predominantly carried out by women, career breaks as a result of maternity leave or the fact that women tend to occupy lower-paid positions. The action plan should include proposals on ways to resolve pay differentials where work is not of equal value, but where the difference in pay is disproportionate to the difference in value of the work.

Article 9

Prohibition of pay secrecy clauses

Member States shall put in place measures to ensure that contractual terms which purport to restrict a worker from disclosing information about their pay, or to seek information from other workers on these workers' pay, are prohibited.

Article 10

Requirement to publish pay range in vacancy notice

Member States shall take the necessary measures to ensure that vacancy notices published by employers include the range of pay offered for the advertised position.

Article 11

Equal pay matters in collective bargaining

Without prejudice to the autonomy of the social partners, Member States shall take measures to guarantee that trade unions can collectively bargain, at the appropriate level, to close the gender pay gap, including on measures to address pay discrimination and the undervaluation of work predominantly carried out by women. Such measures shall include the development and use of job evaluation and classification systems free from gender bias with the involvement of trade unions.

Article 12

Right to redress and protection against adverse treatment

1. Member States shall ensure that, without prejudice to specific forms of redress and dispute resolution provided for, where applicable, in collective agreements, workers, including those whose employment relationship has ended and those who are trade union representatives, have access to effective and impartial dispute resolution and a right to redress, including adequate compensation, in the case of infringements of the obligations under this Directive.
2. Member States shall ensure that trade unions may engage, either on behalf or in support of a worker or group of workers, in any judicial and/or administrative procedure provided for the enforcement of the principle of equal pay and the obligations under this Directive.
3. Member States shall take the necessary measures to protect workers, including those who are trade union representatives, against dismissal or other adverse treatment by the employer for seeking to exercise rights under this Directive and as a reaction to a complaint or to any legal proceedings aimed at enforcing compliance with the obligations under this Directive.

Article 13

Equality Bodies

1. Member States shall take measures to ensure that their national equality bodies' powers and mandates cover issues related to gender pay discrimination, including pay transparency obligations. Member States shall ensure that equality bodies have the right to access the information and audits provided for in Articles 7 and 8.
2. Member States shall take measures to enable equality bodies to support trade unions representing workers in cases of pay discrimination.

Article 14

Penalties

Member States shall lay down the rules on penalties applicable to infringements of the national provisions adopted pursuant to this Directive, and shall take all measures necessary to ensure that they are applied. This includes measures to enable equality bodies to take action against employers in breach of the relevant national provisions. The penalties, which may comprise the payment of compensation to the victim, must be effective, proportionate and dissuasive.

Article 15

Non-regression and more favourable provisions

1. This Directive shall not constitute valid grounds for reducing the general level of protection already afforded to workers within Member States.
2. This Directive shall not affect Member States' prerogative to apply or to introduce laws, regulations or administrative provisions which are more favourable to workers or to encourage or permit the application of collective agreements which are more favourable to workers.
3. This Directive is without prejudice to any other rights conferred on workers by other legal acts of the Union.

Article 16

Implementation

Member States must involve the social partners in the implementation of this Directive. Member States shall ensure in-depth and timely consultation of the social partners on the effectiveness of the national measures implementing this Directive.

Article 17

Dissemination of information

Member States shall ensure that the national measures transposing this Directive, together with the relevant provisions already in force relating to the subject matter as set out in Article 1, are brought to the attention of workers and employers, including SMEs.

Article 18

Evaluation and review

The Commission shall conduct an evaluation of the Directive five years after the date of transposition. The Commission shall, after consultation with European social partners, submit thereafter a report to the European Parliament and the Council reviewing the implementation of the Directive and propose, where appropriate, legislative amendments.