



EUROPEAN COMMISSION
DIRECTORATE-GENERAL JUSTICE AND CONSUMERS

Directorate D: Equality and Union citizenship
Unit D.2: Gender equality

BACKGROUND NOTE FOR THE ATTENTION OF THE SOCIAL PARTNERS

DEDICATED HEARING ON THE "PAY TRANSPARENCY INITIATIVE"

1. GENERAL POLICY FRAMEWORK

Equal pay between women and men has been a founding principle of the European Union since the Treaty of Rome in 1957. In 2006, a number of existing directives on gender equality in the field of employment were ‘recast’ and consolidated, together with case-law of the Court of Justice of the European Union, into a single Directive 2006/54 (the Recast Directive). The Recast Directive provides the right to equal pay for the same work or work of equal value, i.e. the comparison between different occupations of equal value. The Directive was complemented in 2014 by a Commission Recommendation on Pay Transparency (2014/124/EU).

Considering the persistent gender pay gap in the EU (still 14.8 % for the EU-27 in 2018), and based on the Commission’s evaluation of the provisions in the Recast Directive presented in March 2020¹, we can conclude that there has been limited progress on enforcing the right to equal pay and increasing pay transparency by Member States. The European Parliament has consistently called for more action at the EU level to enhance the application of the equal pay provisions. In June 2019, the Council² called on the European Commission to actively follow-up on the Commission’s 2020 evaluation through concrete measures to increase pay transparency. The Commission’s Action Plan for 2017-2019 on tackling the gender pay gap³ specified that the Commission will assess the opportunities for improving pay transparency.

In her political guidelines⁴, European Commission President von der Leyen announced as one of the flagship initiatives of the new Commission mandate that she will ‘[...] table measures to introduce binding pay transparency measures’. This is reaffirmed in the

¹ https://ec.europa.eu/info/law/better-regulation/initiatives/ares-2018-3415794_en

² EPSCO Conclusions from June 2019, doc. 10349/19

³ Commission's Action Plan 2017-2019: tackling the gender pay gap, adopted on 20 November 2017, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52017DC0678>. See also the related implementation report available at https://ec.europa.eu/info/sites/info/files/com-2020-101_en.pdf

⁴ https://ec.europa.eu/commission/sites/beta-political/files/political-guidelines-next-commission_en.pdf

Commission Work Programme 2020 (and confirmed in the revised Work Programme following the pandemic on 27 May 2020).

The forthcoming initiative will thus build on previous work by the Commission⁵ that has consistently highlighted problems with the enforcement of the equal pay principle across the EU. It will complement other Commission initiatives focused on tackling the root causes of the gender pay gap, such as the adoption and implementation of the Work-Life Balance Directive 2019/1158, sectoral initiatives fighting stereotypes and ensuring better gender balance and the proposed Directive on improving gender balance on company boards of the large EU listed companies.

2. PROBLEM TO BE ADDRESSED BY THE INITIATIVE

At aggregate level, there is ample evidence of the existence of a persisting structural difference in the average remuneration between women and men (the so-called ‘unadjusted gender pay gap’⁶). This difference is linked to many factors (e.g. horizontal and vertical segregation, care penalty, gender bias, etc), including **gender-based pay discrimination** as such⁷. Although it is unclear what exact share of the gender pay gap can be attributed to pay discrimination, suggestive evidence as well as perception at company level, supported by surveys⁸ and opinion polls, point to at least a non-negligible share.

There are different reasons why pay transparency measures can be a necessary condition to support the enforcement of the principle of equal pay between women and men.

First, in broad terms, a number of factors contribute to **increasing pressure for pay transparency**⁹. Companies are increasingly compelled to consider pay transparency in their management standards. This demand for transparency about pay structures and pay levels is seen as a tool to enable employees to detect possible pay discrimination (gender-based or other grounds). The broader social debate about unfairness of pay and gender equality indirectly contributes to companies adopting diversity policies. This can also become a reputational issue for companies to attract and motivate staff and reflects a change of attitudes towards cultural norms about pay confidentiality: the sharing of information via social media and relevant platforms¹⁰, particularly from younger generations are also encouraging change and growing the momentum. Almost two thirds of Europeans are in favour of the publication of average wages by job type and gender at their company¹¹.

Beyond pay transparency measures, other important policy areas that would improve the enforcement of the right to equal pay between men and women are a better **understanding of legal concepts** such as “pay”, “same work” or “equal value” and **reducing the barriers to practical enforcement** of the equal pay right, as there are difficulties with access to justice for victims of discrimination, e.g. one could address

⁵ In addition to recent measures mentioned above, see also implementation report on Directive 2006/54/EC (SWD(2013) 512 final); Impact Assessment accompanying the Pay Transparency Recommendation (SWD(2014) 59 final); Report on the implementation of Commission Recommendation on strengthening the principle of equal pay between men and women through transparency (COM(2017) 671 final).

⁶ https://ec.europa.eu/eurostat/statistics-explained/index.php/Gender_pay_gap_statistics

⁷ https://ec.europa.eu/eurostat/web/products-statistical-working-papers/product/-/asset_publisher/DuuxBAj0uSCB/content/KS-TC-18-003

⁸ See for instance the Special Eurobarometer 465 (2017), Gender Equality 2017.

⁹ <https://www.sciencedirect.com/science/article/pii/S0007681317300356>

¹⁰ Glassdoor.com, Salary.com, Payscale.com, Salaryscout.com, Salaryexpert.com

¹¹ Special Eurobarometer 465 (2017), Gender Equality 2017.

rules on evidence, costs of proceedings, collective redress, ensuring effective sanctions and proportionate calculation of compensation, prevention of detrimental treatment as a result of having used pay transparency rights, strengthening role of equality bodies and/or labour inspectorates,.... Though these issues are, at least to some extent, related to the broader limitations of judicial systems, strengthening the judicial protection of the right to equal pay can nevertheless contribute to better enforcement of the equal pay principle.

3. ANALYSIS OF THE MAIN ISSUES TO ADDRESS

The 2020 Evaluation of the provisions in the Recast Directive¹² highlighted a number of shortcomings of the current legal provisions on equal pay:

- **Difficulties at individual level to detect pay discrimination**

Differences in pay often go undetected due to the lack of pay transparency. The evaluation shows that even when suspected, without accessible information about pay levels within organisations, individual employees will not be aware of potential pay discrimination. The evaluation suggests that binding pay transparency measures could also improve awareness for employers. A better understanding of the reasons behind these differences could trigger organisations to review their pay structures, not necessarily as a consequence of legal actions started by employees¹³. Finally, pay transparency would provide objective evidence to enable victims of discrimination to bring claims successfully.

- **Difficulties to prove and enforce the right of equal pay in case of complaint**

It is difficult for employees to establish in court that discrimination has taken place without the backing of facts. The findings of the evaluation point to the difficulties experienced by the individual to establish the facts from which it may be presumed that there has been discrimination (*prima facie* case), which would shift the burden of proof to the employer. It is also difficult for victims and for courts to know what is the level of proof required to establish such facts. Binding pay transparency measures would enable employees to access evidence from which discrimination can be presumed and swiftly trigger the reversed burden of proof. The evaluation also found that it was difficult for victims of pay discrimination to bring claims to court without legal representation or support and that the levels of fines and compensation are generally not sufficiently dissuasive.

- **Issues with the lack of gender neutrality in job classification/evaluation**

The current provision of the Recast Directive requires job classification systems to be gender neutral but only when they already exist. According to the evaluation, this requirement is too weak to support an effective enforcement of the equal pay principle. The evaluation suggests increasing the transparency of the mechanisms to compare different occupations by introducing overall gender neutral job titles and job descriptions.

¹² The details of the initiative are available [here](#); See in particular the [Staff working document](#)

¹³ Following the introduction of pay audits in Sweden, over 40 % of (surveyed) companies identified and corrected unjustified wage differences between women and men. See [The Million Study \(Miljongsningen\)](#)

- **Lack of awareness**

Lack of awareness about equal pay rights and rights not to be victimized for bringing a claim mean that situations of injustice are more likely to continue. The evaluation therefore suggests implementing awareness-raising action regarding these rights. Training and exchange of good practices on building gender-based pay discrimination cases could also facilitate access to justice. These activities could build on existing examples such as the handbook developed by the European Network of Equality Bodies (Equinet)¹⁴ that provides concrete insights into how to build a case on equal pay.

4. PURPOSE AND SCOPE OF THE INITIATIVE

The overall objective of the pay transparency initiative is to address the problems that persist in the implementation of the principle of equal pay for equal work or for work of equal value. It will contain a combination of legislative and non-legislative measures.

The first aspect to tackle is a **lack of information at company level** on pay levels broken down by gender for employees doing the same work, or work of equal value. By remedying this lack of information on comparative pay levels, pay transparency makes it possible to detect instances of pay discrimination. It allows employees to decide whether and how to raise the issue of equal pay with their employer or even to bring a claim. Increased transparency can also more broadly reveal a gender bias in the pay structures of an undertaking or organisation. It enables employees, employers and social partners to take appropriate action to ensure a better implementation of the equal pay principle.

The second aspect to address, identified in the evaluation, is the **lack of legal clarity**. As mentioned above, and also showed by European Court of Justice case law, the Member States do not apply the same definitions of concepts such as ‘pay’ and ‘equal work for equal value’ which may hinder the enforcement of the right to equal pay across the Union.

The third aspect to address is **the lack of practical enforcement due to difficulties for victims of discrimination to access justice**, i.e. remedial, procedural and other enforcement obstacles.

The Commission is currently working on an impact assessment, which is analysing the three main aspects outlined above. Along these lines, the initiative could cover the following three strands:

Strand A: transparency measures (e.g. right of employees to information on pay levels, pay reporting obligations for employers, obligation to publish pay range with vacancies pay ads, pay auditing, inclusion of equal pay matters in collective bargaining, promotion of gender-neutral job classifications/ evaluations);

Strand B: better understanding of legal concepts on equal pay (e.g. definitions of pay, equal work and work of equal value, the use of comparators, including those working for different employers);

Strand C: strengthened enforcement and protection of the right to equal pay (e.g. ensuring effective remedies and procedures such as shift of burden of proof,

¹⁴ The handbook is available on Equinet website at <https://equineteurope.org/2016/equinet-handbook-how-to-build-a-case-on-equal-pay/>

compensation and support for victims, collective redress, ensuring effective sanctions, prevention of detrimental treatment as a result of having used pay transparency rights, strengthening role of equality bodies and or labour inspectorates).

The impact assessment will analyse several combination of measures, both legislative and non-legislative (ranging from low to high level of intervention). This will take into account companies' specificities, namely their size. Legislative measures will be included in a proposal for a Directive, whereas a Commission Communication will cover policy actions.

5. QUESTIONS

This consultation aims at collecting social partner's views and experience on the measures of the three strands mentioned above: binding pay transparency measures, the better understanding of legal concepts and the improvement of enforcement provisions.

Social partners are asked to share their views on the following questions.

1. Do you share the above analysis of the most significant challenges to the enforcement of the right to equal pay for equal work or work of equal value?
2. Do you agree that employers' better awareness of potential pay gaps between women and men would encourage them to take actions to enforce better the principle of equal pay for work of equal value?
3. What are the main challenges social partners experience in ensuring a gender-balanced pay structure or supporting people who think they are discriminated against?
4. What are the essential features of the possible initiative you would like to see implemented, taking into account the company size and costs and benefits for employers and employees, for the three strands mentioned above? Do you have experience of measures that have/have not worked well?
5. What additional measures do you think would be necessary?