BUSINESSEUROPE

POSITION PAPER

European Commission proposal for a directive on pay transparency

Executive summary

1. Having more women on the labour market is the key to fully unlocking women's potential and improving gender equality. All stakeholders and institutions need to promote a positive narrative in which both men and women can grasp economic opportunities. This is also crucial for employers, as we need access to a large pool of qualified, talented, competent and committed workers, irrespective of gender.

2. European employers are committed to work together, also as social partners, with policy makers, to ensure that societies, labour markets and education systems promote gender equality. As part of this effort, European employers fully agree on the need to reduce the gender pay gap. This is due to many different factors, including segregation on labour markets and in education, different career choices and employment patterns of men and women, gender stereotypes, lack of accessible childcare and other care infrastructures, and unequal distribution of household and care duties. We will only see real change if we address these root causes. We have already set forward a number of proposals to deal with the root of gender inequalities and find that the main focus should be here.

3. Employers fully recognise and comply with law, to ensure that men and women are not paid differently for performing the same work or work of equal value. Every EU member state must ensure that the principle of equal pay for equal work or work of equal value, as enshrined in the treaty is applied. We also agree on the need to fight pay discrimination where it may exist.

4. European employers agree that pay transparency, depending on how it is put in place, can shed some light on existing pay differences and be a tool to discuss wages and the value that the individual worker contributes within the company. However, pay transparency is no silver bullet and there is no guarantee that the measures proposed will in fact bring to light cases of discrimination or will actually help to enforce the principle of equal pay for equal work or work of equal value. The pay transparency initiative should therefore not be seen as the most suitable instrument and needs in any case to be adapted in order to better reach its purpose.

5. It is important not to mix up discrimination with the gender pay gap or to interpret it as a measure or proof of discrimination. The gender pay gap may occur due to many different factors, including above all gender segregation on labour markets, as well as gender stereotypes, unequal distribution of household and care duties. While discrimination may exist in some cases, this is not the same as employers paying workers differently, as objective elements related to the job, such as work tasks, and related to the individual, like skills, education and performance, can explain the difference in wage paid. This is justified and must not be hampered by this directive.

6. Neither problems regarding pay discrimination, nor data or studies have been adequately identified to justify the heavy and disproportionate obligations for

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companies included in this directive, which will create huge administrative burdens and costs for employers, possibly with little effect. We urge the EU institutions to amend the proposal to ensure that it is proportionate and reasonable.

7. Wages are a matter of market mechanisms, paying workers for the tasks performed, as well as reflecting objective elements and the performance of the worker. This is a fundamental basis for productivity and welfare in Europe and should be maintained. Also, wages are set as part of a contractual relationship between two private parties or through collective agreement. It is crucial that the directive, and in particular article 4, is amended to respect these aspects and these wage setting structures.

8. Due to the overly detailed and prescriptive nature of the directive, it does not leave adequate possibilities for member states to tailor implementation to their national context, including existing wage systems and the different size of enterprises. Also, the directive is likely to disrupt existing, well-functioning measures on pay transparency. More flexibility should be given to member states to choose those measures which are most appropriate for them.

9. The directive does not take account of diverse national social and industrial relations systems. By handing over power to the legislator and to courts to shape pay structures, which are an essential part of collectively bargained pay systems, it does not adequately respect national social partners' competences and prerogatives for wage-setting. Also, the specific nature of collective agreements, providing a balanced approach between workers and employers, also in terms of gender neutrality, is not adequately recognized. It is crucial that these aspects are corrected.

10. Also, the proposed directive promotes litigation and is likely to increase court cases, regardless of whether or not discrimination exists in that case. This could potentially create an adversary culture at workplaces and hamper existing systems based on consensus. This would be neither in the interest of employers nor workers. Sanctions, enforcement and other judicial measures should be left to the national level.

General remarks

1. European employers fully support the two objectives of tackling the gender pay gap and fighting pay discrimination. Paying men and women differently for performing the same work or work of equal value has been unlawful since 1970. This is enshrined in the EU treaty, in EU legislation, and in national legislation. In all member states, pay setting systems, whether determined by social partners or national law, are based on this solid legal frame, and must not be determined by gender.

2. Advancing gender equality requires tackling gender segregation and breaking down gender stereotypes. These factors may narrow women's career perspectives and thus contribute to inequalities in the income between men and women. Improving implementation of the equal pay principle is therefore best achieved by policy-makers and social partners working together to ensure that education systems promote gender equality, to raise public awareness regarding the impact of gender stereotypes, to provide better child and other care facilities, and to promote a positive narrative in which men and women can both grasp economic opportunities. An initiative on pay transparency is therefore not the best instrument to secure equal pay.

3. It is important not to mix up discrimination with the gender pay gap or to interpret it as a measure or proof of discrimination. Discrimination exists in some cases, however the gender pay gap may occur due to many different factors, including above all gender segregation on labour markets, as well as gender stereotypes, unequal distribution of household and care duties etc.

4. It is also important to be clear about what the gender pay gap shows, including distinguishing between the unadjusted gender pay gap (14% average in the EU)[1], the part of it that is 'explained' (around 5%) and the 'unexplained' part (around 9%)[2]. The unadjusted gender pay gap, even the unexplained part of it, cannot be taken as a direct measurement of discrimination, as this is impacted by people working in different companies and performing different tasks, differences in performance, talents and competences of individuals, as well as other factors.[3] This shows the limitations of using it (as highlighted by the example below).

5. A European comparative study by DIW (Deutsches Institut für Wirtschaftsforschung) shows that lower female employment rates tend to be associated with smaller unadjusted gender pay gaps (DIW, 2021). This shows that often the unadjusted gender pay gap gives a false picture of the overall situation in relation to gender equality, as it is in fact often smaller when female employment is

[1] The unadjusted GPG is the difference between the average gross hourly earnings of men and women expressed as a percentage of male earnings. It does not take into account education, age, hours worked or type of job.
[2] The explained part is the gap between male and female earnings which is due to the differences in the average characteristics (sector of activity, age, occupation, etc.) of male and female employees. The unexplained part measures the difference between the financial returns to men and women with the same characteristics.
[3] See: report-gender-pay-gap-eu-countries_october2018_en_0.pdf (europa.eu)

lower, whereas the aim is to get more women into employment. Furthermore, the Commission's calculation of the unadjusted gender pay gap is based on a general view of all-employees, without adequately taking account of objective factors like professional experience, type of activity, sector and qualification. After deduction of these structural causes, the adjusted pay gap in Germany, for example, is reduced to about 6 percent (State Federal Office 2018.)

6. Wages are a matter of market mechanisms, paying workers for the tasks performed, as well as reflecting objective elements and the performance of the worker. However, paying different wages according to objective elements, even for two people doing the same job, must be clearly distinguished from discrimination. In its current form, the directive shows very little appreciation for normal market principles such as the link between scarcity of qualifications and wages for workers with those qualifications. Also, the directive shows little appreciation for the link between wages and the economic value that the individual worker contributes to a company. The directive should be amended to secure that market mechanisms can also determine wages in the future.

7. We agree that pay discrimination, where it exists, must be rooted out and that reasonable and proportionate requirements on pay transparency, where they are deemed relevant at national, sectoral or company level, could play a role. However, it is no silver bullet and we should avoid that the EU creates the expectation that this will automatically lead to a reduction in the gender pay gap. The Commission in its own evaluation of the relevant provisions in Directive 2006/54/EC, in fact states that 'it is not possible to precisely identify the percentage of the gender pay gap resulting specifically from pay discrimination'. It rather notes that the occurrence of pay discrimination is based on perception, i.e. 'people believe women earn less than men'. Therefore, there is no guarantee that the measures proposed on pay transparency will in fact bring to light cases of discrimination or will actually help to enforce the principle of equal pay for equal work or work of equal value.

8. This makes it even more crucial that any measures put in place are proportionate, reasonable and at the appropriate levels. Unfortunately, the proposal of the Commission does not fulfil these conditions. It does not identify the problems regarding pay discrimination which justify the heavy obligations for companies and creates administrative obligations which are disproportionate to the aims pursued (particularly articles 7, 8 and 9). It includes many different layers of requirements, which will be very complicated to put in place and create cumulative burdens for employers, as well as making human resources management more difficult and costly. And all this, whilst potentially not making a real difference.

9. To measure the extent of the problem, the situation needs to be assessed objectively, looking at the multifactorial causes of gender inequality and the gender pay gap. Real change will only happen by addressing these root causes, including the different career choices and employment patterns of men and women, more frequent and prolonged family leaves for women, and work in different sectors. This means having more women in work, combating gender segregation on labour markets and in education and gender stereotypes in all parts of life, as well as a more equal distribution of household and care duties between men and women,

including through better provision of care infrastructures. We support the commitments the commission has made on a number of these issues both in the gender equality strategy, as well as in the action plan on the European Pillar of Social Rights, in particular the target for reducing the gender employment gap, the revision of the Barcelona targets on childcare and the campaign to combat gender stereotypes.

10. The proposal does not, as asserted by the commission, provide for 'minimal harmonisation of Member State systems.' The proposed directive is overly detailed and prescriptive and therefore does not leave adequate discretion to member states to implement it in a way which takes account of the national context, existing measures on pay transparency and national social and industrial relations systems. Also, the multi-layered and prescriptive nature of this directive will no doubt lead to many court cases, creating legal uncertainty for employers, workers and governments for many years to come. Furthermore, this proposal is not only related to transparency, but will have an impact in many areas, including potentially criminal law, court procedures and employment law. In particular, the sanctions and other judicial measures are not in line with the EU recast directive on equal pay, whereas this principle is supposed to the basis of the directive.

11. Such a prescriptive approach will also run counter to the dynamic changes in the world of work, whereas measures should be flexible enough to be adapted over time. A less prescriptive approach is also necessary to take account of the diverse situations in EU member states, and the fact that in many of them measures already exist, which would be disrupted by this proposal. Rather than putting many different requirements in one directive, different options should be available to member states, to be tailored at the national level.

12. We are particularly concerned that the proposed directive does not adequately respect national social partners' competences and prerogatives for wage-setting, by handing over power to the legislator and to courts to shape pay structures, which are an essential part of collectively bargained pay systems. Whilst there are various articles providing safeguards for social partners and possibility to implement the provisions (i.e. articles 11, 27, 30), the existence of a directive, which national governments have to implement (in particular article 4), means that there is no watertight guarantee that social partner prerogatives will be respected. There also seems to be a general lack of appreciation of wage setting mechanisms in collective agreements. Since collective agreements are negotiated by the social partners, they implicitly take into account employee and employer interests in a balanced way, irrespective of gender. The directive should refrain from defining a specific pay structure which all member states must impose. Instead, it should leave room for nationally defined pay structures, including pay structures defined by the social partners, as long as they fall within the equal pay requirement in the Treaty. It could also be considered that the directive provides the possibility at national level, depending on the industrial relations systems and practices, to not apply the provisions to companies and workers covered by collective agreement.

13. A one-size-fits-all approach is likely to upset the delicate balance of social partner negotiations on pay and not respect the diversity of national systems, including on

pay. And the directive also risks negatively impacting well-functioning systems of co-operation between management and workers representatives at company level, as well as potentially disrupting cooperative and trustful working environments.

14. We are also concerned that the proposed directive promotes litigation and is likely to increase court cases, thereby also potentially creating an adversary culture at workplaces. We do not believe this is in the interest of employers or workers. Furthermore, this will not promote closer cooperation between employers and workers' representatives, as suggested by the commission – on the contrary, it could lead to more disputes.

15. Reversing the burden of proof onto employers to disprove that discrimination has occurred, puts them implicitly at fault, whereas in the vast majority of cases differences in pay are not down to discrimination, rather to objective factors. The possibility for employers to justify differences in average pay level by objective and gender-neutral factors, must be fully guaranteed. However, key factors are missing, i.e. supply and demand for certain skills, individual performance, which is noted in the recitals, but not in the text of the directive, length of service, working conditions, and individual wage negotiation. Performance is also directly linked with bonuses and other benefits, (either individual or collective), which, depending on the national rules and company practices, may also be included in overall pay.

16. We recognise that during the COVID crisis many of the frontline workers in essential services, such as healthcare, social services, commerce, etc, are women. This is due to a predominance of women in these sectors. We do not believe that women are being undervalued in these sectors, compared to men who do the same job. Nor do we agree with the assertion that 'women's work is undervalued' overall. This is a more general problem in terms of the balance of men and women in different sectors. Whilst more transparency on different pay levels between sectors may raise awareness, actions to tackle gender segregation in our labour markets to have a better balance between men and women across the economy, would be a much more effective way to tackle gender pay gaps rather than mandatory transparency and reporting requirements for companies. It is also important to tackle the unequal repartition of care duties, as this is detrimental to close the gender pay gap. In Belgium, for example, parents had the possibility to take up a special COVID-19 parental leave of 5 months. 75% of parents who took this COVID-19 parental leave were women. This inevitably leads to a slowdown in the professional careers of those women, who are working or who would like to.

17. Whilst we agree that individual bias can have an impact on pay, we do not believe that more transparency will actually change people's perceptions or bias. These are often deeply rooted in culture, national approaches or individual attitudes. This would be better tackled by raising awareness and educating individuals, for example through targeted campaigns on gender stereotypes.

18. We do not agree with the analysis that not enough action has been taken at national level on this issue and that the 2014 EU Recommendation on pay transparency has not had an impact. Several member states already have mandatory measures either on pay reporting and/or pay audits or obligations (e.g.

Austria, France, Germany, Finland, Denmark, Sweden, Belgium, Spain). Also, many different approaches are taken at national level. Therefore, these requirements would come on top of existing national requirements, or contradict them, leading to further burdens for employers or lack of legal certainty. For example, in France, pay information has to be discussed with the economic and social committee, including social partners, whereas this proposal would make it obligatory for the information to be made public, therefore requiring a complete change in approach. In Spain, companies with at least 50 workers with pay differences of at least 25% already have to include in the pay record a justification that the difference is due to reasons not related to the sex of workers.

19. Whilst it is important that there is a level playing field across the EU regarding pay discrimination, this is already provided by the directive 2006/54/EC, which is effectively transposed across EU member states. Pay transparency measures, on the other hand, which have either a direct or indirect impact on national industrial relations systems, on collective bargaining and internal company systems, naturally differ from one country to another and must be based on full respect of national and social partner competences.

20. We believe that the Commission has greatly underestimated the potential administrative burden and costs of the proposed directive to business, taking into account the capacity of different companies to deal with extra administrative burdens. The fact that the 2020 evaluation of the implementation of the recast directive and 2014 recommendation on pay transparency did not find significant administrative burdens should not be taken as an example. Implementing the multiple obligatory measures included in the directive would have a much larger impact on companies. We do not agree that alternative, less costly and more proportionate options are not available, as the directive could at the very least have provided different options for member states, to be tailored to their national situation, rather than cumulative obligations for all.

21. Finally, the majority of the abovementioned comments and concerns have been expressed by BusinessEurope and its member federations on many occasions before the publication of the draft directive, including through the commission's public consultation, dedicated social partner hearing, and bilateral meetings with DG Justice. Unfortunately, our views have not been taken into account, whereas it is companies that will have to implement the provisions in this directive. And this is not to mention the important role of social partners, which has been highlighted consistently, which is not adequately respected with this proposal.

Remarks on specific articles

Article 1 – Subject matter

22. The Commission's report on directive 2006/54/EC indicates that in most member states legislation explicitly prohibits pay discrimination and that in others a general prohibition of sex discrimination covers pay discrimination. This shows that the principle of equal pay between men and women for equal work or work of equal value is well applied at national level. This also fits the assessment of our members that legislation in place at national and European level provides an adequate legal framework to prevent, deter and condemn possible pay discrimination.

23. We note that the Commission's 2020 evaluation of the legal framework on equal pay highlighted that effective implementation of the principle of equal pay and the enforcement of this principle in practice remains a challenge. There have also been a number of cases in national and EU courts on this topic. However, we do not believe that this is due to a lack of legislation, rather that the principle of equal pay for equal work or work of equal value, is in fact, often difficult to apply across countries, sectors, and even within companies. Where there is a lack of clarity of terminology or regarding how to apply and implement EU legislation and such principles at national level, this could be dealt with by other means than legislation on pay transparency, e.g. interpretative guidance.

24. We do not agree that this proposal will entail 'modest' costs. It is not appropriate to base the cost estimates on existing national legislation and practice, as the proposed directive in fact cumulates many different requirements from different member states. Also, it is likely that some of the obligations would in fact require companies to pay an external party, e.g. to conduct an assessment or audit, which would increase the costs. One option to reduce the administrative burden/cost would be to allow member states to set a higher threshold for some obligations (e.g. companies with more than 500 workers). Another option would be to allow member states to apply the obligations only in those cases where more than a certain number of persons are occupied in the same position in the company (figure be determined at national level). Another option would be to have less frequent reporting obligations, to be determined at national level, in accordance with national law and practice.

Article 2 - scope

25. We agree that any directive on pay transparency should cover both public and private employers, whilst taking into account and respecting the differences between them in terms of wage setting systems. It is important to avoid comparing public administration and the way in which wages are formed there, including job classification systems, with private companies operating on the open market, where they are impacted by business cycles and need to remain competitive. This can have an impact on the pay levels, however it should not be taken as an indicator of higher levels of pay discrimination in the private sector.

26. Another difference is that classification systems and pay scales in the public sector are often linked more to objective factors such as level of education and/or seniority

and less to performance, whereas this is a crucial aspect of private sector pay. Pay systems and moving up pay scales may also be more rigid or automatic in the public sector compared to more flexible approaches in the private sector to allow for performance to be taken into account. This should also be taken into account if comparing public and private sector pay.

27. It makes sense that the scope is workers who have an employment contract or employment relationship, as defined by law, collective agreements and/or practices in force in each member state. However, it would be important to clarify that these obligations apply at the level of the enterprise, rather than at group level, where the different situations would not allow for a meaningful comparison between workers. The same argument applies in the case of subcontracted workers.

Article 3 – Definitions

28. Whilst most of the definitions in Article 3 reflect existing EU law, the definition of "categories of workers" in article 3, paragraph 1 (g) is new. Such a category should be defined within the limits of existing wage statistics, e.g. ISCO (International Standard Classification of Occupations) codes. This is important in avoiding that a completely new system of wage statistics is necessary, which would create a disproportionate burden on companies. This would also allow for wage statistics to be based on comparable work, rather than hypothetically comparable situations, as is proposed in article 4.

Article 4 – Equal work and work of equal value

29. We fully agree that wage-setting systems must be gender neutral and that gender must never influence the assessments of individuals, on which wage setting is based. This is key to implementing the principle of equal pay for equal work or work of equal value. This is not only important for employees, but also for companies including in acquiring talent and motivating staff. This also means that any methodologies or tools which are used to assess the value of work cannot include criteria based on workers' sex.

30. It is important to respect national and social partner competences when it comes to wage-setting and diversity of national industrial relations systems. Proposing a directive which obliges member states to take measures to make sure employers have introduced certain pay structures contradicts and disrespects social partner autonomy. In those countries where social partners are responsible for wage setting either at national or sectoral level, this would hand over power to national governments to determine the content of pay structures, which are an essential aspect of collective bargaining-based pay systems. The existence of such a legally binding text also means that the European Court of Justice (ECJ) will acquire jurisdiction on purely national collective agreements and wage setting.

31. Furthermore, there is a lack of recognition of the fact that collective agreements contribute to equal pay between men and women. Remuneration according to collective agreements is related to the work activity and long-term stable criteria,

ensuring equal pay for equal work through a transparent pay system. Collective agreements therefore in fact have a levelling effect on wage differentials and in companies with collective bargaining agreements, differences are often lower. Unfortunately, this is not taken into account in the draft directive.

32. Furthermore, in many cases, social partners are responsible for determining the criteria for wage-setting systems, including ensuring that they are based on the principle of equal pay. It is important to respect their autonomy on this as well, including taking into account that collective bargaining on such issues often takes place not only at national, but also sectoral and local level or sometimes for specific professions. Social partners in the metal industry sector in Sweden, for example, collectively agree pay audits and further analysis. In Finland, there is a long history of gender-neutral wage setting systems. And in Denmark, collectively agreed equal pay boards secure a swift an efficient ruling if pay discrimination and therefore non-compliance with the principles of the relevant collective agreement is suspected. Furthermore, gender disaggregated pay statistics have to be discussed at company level. It is also important to note the diversity in this field. For example, in some cases, pay reporting and/or pay audits (where they exist) are not defined through collective agreement, rather through more informal tools developed jointly by social partners. For example, in the chemical industry in Sweden, there is a manual for companies on how to fulfil the legal requirements, including filling in the pay survey, which is agreed on between the national social partners in that sector. In Spain, pay audits have to be carried out at company level (from 50 workers and above) and incorporated into the company equality plan, which must be negotiated with workers' representatives. To facilitate this task, and the job evaluation, the standard provides for the development of a technical guide, with indications on how to carry out these pay audits, and a procedure to pursue with the job evaluation, in collaboration with the social partners.

33. Positively, the proposal recognises that objective factors such as education, professional and training requirements, skills, efforts, responsibility, work undertaken, and the nature of tasks involved, can justify a difference in pay levels. This means that there are clearly reasonable grounds why an individual worker may be paid more than another one, even if they are doing the same job. This recognition is essential in putting the focus on the few actual cases of discrimination, rather than putting in place burdensome requirements on companies which in the end show that differences in pay are objectively justifiable. However, some key issues are missing from this article. These include the recognition of employers' right to pay workers differently according to their performance – this is in fact included in recital 10 but not in very clear terms in article 4. Performance evaluation and pay may in fact vary significantly even within the same profession, e.g. sales. Paying according to performance is crucial in allowing employers to reward and motivate individual workers and is therefore also in their interest. Furthermore, supply and demand for workers with certain skills, especially in sectors with a lack of qualified workers, the need to use wages as a tool to attract workers for a specific job or at a specific point in time and in a specific market context, should be regarded as objective reasons for setting wages. Other elements that are missing are length of service and individual wage negotiation.

The issue of confidence is also very important for companies, in particular for high-level positions.

34. Another broad objective factor missing from this article is work organisation. Different kinds of work organisation, for example, the flexibility to work shifts, which has a market value and therefore an impact on the pay and, where applicable, special allowances or benefits, which are often negotiated collectively, are reflected in a gender-neutral way. Similarly, where there are more strenuous or dangerous working conditions, this can also be reflected in a gender-neutral way in the pay levels. For example, in the chemical and railway sectors, men often perform more night shifts than women and since such work is usually remunerated higher than day work, male employees often earn more than their female counterparts. Also, in the chemical sector, a hardship allowance is foreseen and calculated for working in difficult conditions. It is clear that the pay level is related to the working conditions and tasks, in a gender-neutral way. Such a directive will not change the way the courts, legislators in national countries have interpreted over the years the elements that are gender neutral.

35. Whilst some may see merit in the establishment of tools or methodologies to assess and compare the value of work and to see whether workers are in a comparable situation or not regarding objective criteria such as the work tasks, as well as education, performance etc, the true value of this must be assessed. This could be used to dispel some of the myths that pay differences are the result of discrimination. However, as highlighted above, this should not be made an obligation for member states, as this would not take account of the diversity of industrial relations systems and the fact that in some countries, social partners are responsible for wage setting, pay systems and the criteria for this. Therefore, we believe that this could only be developed at company or potentially sectoral level on a voluntary basis, i.e. where they deem it to be of value and relevance. This would take into account the specific context, including in terms of coverage by collective agreements. This is also important to avoid companies and employers' organisations being obliged to go through every collective agreement to check whether they are in line with a specific classification or evaluation system, as this would be a huge and costly task and potentially destabilising. It is important to learn lessons from national experiences. For example, in Sweden, a legislative tool was introduced to evaluate work of equal value. A study showed that it was not very effective, in particular due to the fact that it puts all personnel groups in the same evaluation system, although they have different pay systems, thereby not recognising the different contexts. The tool has now been removed.

36. We note positively that while gender neutral job evaluation and classification systems are mentioned, this is not an obligation and other tools could be used. This should be for companies to determine. Also, such tools should not be designed to support workers in proving alleged discrimination, rather in allowing for a better understanding of the objective criteria that determine pay in a company.

37. We note that there have been some ECJ court rulings (e.g. case C-320/00 Lawrence), which, according to the commission's reading, specify that workers may be in a comparable situation even when they do not work for the same employer,

but where the pay conditions can be attributed to a single source setting up those conditions (e.g. when regulated by statutory provisions or collective labour agreements applicable to several companies). We challenge the reading of this ruling. In this specific case, the court ruled that it was in fact not work of the same value, the proposed basis of the directive. In fact, it is often very difficult to assess what is equal work or work of equal value, particularly between different sectors, but even if this is considered in terms of two people working for the same employer. It depends on the work undertaken and the nature of tasks involved, but also all the objective criteria mentioned above. Also, it is not appropriate to use a single source for comparisons, as this does not allow for individual variations at local level, for example, or due to the economic climate /situation that another company is operating in.

38. Where there may be a lack of clarity regarding how to apply the principle of equal pay for equal work or work of equal value in concrete situations, we do not believe that a directive on pay transparency will actually improve the situation. This rather confirms the difficulty in practice of comparing the value of work and determining whether this is equal or not. This would be much better dealt with by organising exchanges and learning between member states on how they apply this principle in national legislation, in different sizes of companies, in different sectors, and how national/EU courts have dealt with this. This could be facilitated by the commission, jointly with social partners and member states. Another idea could be to develop toolkits for Human Resources professionals to help raise awareness and practical assistance in the implementation of this principle.

39. As explained by the Commission, determining whether work is equal or of equal value is even more difficult where there is a scarcity of male comparators in the same jobs, which can be common in some sectors in particular. In this respect, we are very concerned that where there is no comparator, a hypothetical one would be used or other evidence, statistics or available information. Using an ad-hoc manufactured hypothetical comparator would interfere in the assessment of evidence and would have no basis in reality. Also, it is completely unclear how this would work in practice, causing legal uncertainty for companies. We note that court rulings (e.g. Case 129/79 Macarthys) have allowed for comparison between workers not employed in the company at the same time as the claimant. However, we are concerned about the proposal to include this in the assessment, as this completely ignores the dynamic developments in a company, where aspects which impact on pay, such as the general economic situation (economic performance, competitiveness, productivity, demand), as well as work tasks etc, change constantly. Taking different parameters to the one that an individual is currently working in would give an unrealistic comparison.

40. Where there is gender segregation in sectors, this should rather be tackled at source, by efforts to achieve a better balance of men and women in different professions and positions.

41. As acknowledged by the commission, where there are no comparators, there is also a risk that the information of individuals' salaries will become known, as this

will be easy to determine from comparisons. This would be against pay privacy and GDPR. However, this is not safeguarded in the directive.

42. For the reasons set out above, measures should only be obligatory where there is a minimum number of comparators available at the same workplace. This minimum should be determined at national level.

Article 5 – Pay transparency prior to employment

43. We are not in favour of an obligation to add in job advertisements the starting salary or the expected salary range, nor the criteria on which this is based. This would oblige the employer to make public potentially sensitive commercial and human resources related information. We note positively the proposal for such information to be provided to the applicant in another way, however, in both cases this takes away an important flexibility for employers to set the wage level according to the experience, competences and skills of the candidate, which is crucial in making sure that they are paid in an appropriate way both in terms of the needs of the employer and employee. We do not agree that, as suggested by the commission, this article would not limit in any way the employer's or workers' bargaining power to negotiate a salary – on the contrary, this would be much more complicated with the salary range communicated beforehand. Salary negotiations are between two private parties and it therefore does not make sense that one side has to disclose the information beforehand. Having some flexibility is also important for employers, if they are lacking a good pool of appropriate applicants. We note that this is common practice in the public sector, however, this is a very different situation, as the salary is paid by tax-payers.

44. We have concerns about providing such information prior to the interview. Whilst some information on the candidate may be provided in the application process, e.g. by way of a CV and/or motivation letter, clarifications regarding the candidates' skills, education, experience etc are likely to be made during the interview, which would affect the pay offer. We also disagree that there is a need to 'disrupt the undervaluation of pay compared to skills and experience', as it is essential and completely justified that such aspects are taken into account when determining pay.

45. We do not agree that the objective criteria on which the starting salary or salary range is based, should be communicated to the worker before the interview. While some criteria, such as education level, may be easy to clarify beforehand, a more flexible approach is needed so that the employer can take into account the specific experience, knowledge, skills and other attributes of each candidate. Given that people are different, these may not be the same for each candidate, therefore, whilst the sex of the candidate should never be a criterion, all other criteria cannot necessarily be defined in a generic way.

46. The right to information before the interview must not undermine the principle of the General Data Protection Regulation (GDPR). In addition, it is necessary to respect the legitimate interests of confidentiality of a company. For example, it should not be possible for candidates to abuse their right to information in order to obtain sensitive (salary) information for a competitor.

47. This provision would also hamper the procedure of hiring people, which should be the decision of companies only, also bearing in mind that they carry the risks of hiring the people as well. It is also a matter of contractual relationship, where two parties agree on the terms of the relationship.

48. We understand that this article may be partly aimed at ensuring that starting salaries between men and women doing the same job, equal work or work or equal value, are aligned as far as possible, to avoid a gender pay gap from the start of the career. However, the commission's impact assessment shows that the gender pay gap is in fact generally lower when people first start work and widens afterwards, in particular since it is generally women who take the bulk of child caring duties. This issue needs to be tackled by combating gender stereotypes, encouraging dual earner households, and providing for more accessible and affordable childcare infrastructures.

49. Furthermore, this article does not seem to be in line with the overall scope of the directive, as laid down in article 2, as it applies to workers with an employment contractor or employment relationship, not to job candidates. Therefore, these obligations do not fit.

Article 6 – Transparency of pay setting and career progression policy

50. Where pay and criteria for wage setting follows from collective agreements it should – as is already recognized in the directive on transparent working conditions – be possible to fulfill this obligation by referring to the relevant collective agreement. Criteria on career progression go beyond the objective of a pay transparency instrument and should therefore not be part of it.

Article 7 – Right to information

51. Whilst we understand that some employees may want to know how their salary compares to average salaries for colleagues doing the same work as them, such information will not be able to capture the many objective reasons that an individual is paid more or less than the average salary (e.g. skills and in particular performance). It is also important to distinguish between salary and overall remuneration, which may include other benefits, according to the specific company, sectoral, national situation. This article is even more concerning, considering that it proposes giving a right for workers to information on average pay levels of 'categories of workers doing work of equal value to theirs'. As stated above, this is very difficult to determine, even in the same workplace and is simply too broad a comparison. It therefore would likely include workers who are doing different tasks or have different skills sets and are therefore not actually comparable. Given that the salary systems are different between personnel groups, such a comparison would be extremely difficult, if not impossible, or it risks providing information that is not useful due to the fact that salaries are not defined with the same criteria. This means that it may in fact provide misleading information and could even lead to an assumption on the part of an individual that he or she is being discriminated

against, whereas this is not the case. This would not be conducive to a cooperative and trustful working environment.

52. Whilst the information should not be provided automatically, but only upon a workers' request, this article still presupposes that a table of comparable positions is already in place. Whilst this may be the practice in some countries or companies, or through collective agreements, where this is not the case, it would entail high administrative burdens and costs for employers. For example, defining appropriate categories of workers or what constitutes equal work or work of equal value for each individual request would be time-consuming and tie up capacities. The costs not only include the statistical and information gathering work, but also, the discussions that this is likely to lead to at the workplace with employees and (where they exist) their representatives that are provided such information, when comparing their individual pay level with the average pay level. And in the majority of cases, these discussions will not even reflect pay discrimination. Existing systems for determining categories of workers, e.g. the concept of ISCO (International Standard Classification of Occupations) codes, should be looked at, to see whether they provide a more appropriate and useful framework.

53. Pay is a matter of privacy in terms of the contractual relationship between an employee and an employer, and remuneration falls within the category of personal data of the employee. The employer must safeguard that information and guarantee employees' right to confidentiality. There is a strong risk that providing information on average pay levels for workers doing the same tasks or work of equal value, would allow individual remunerations to be deduced by colleagues. This would be a breach of confidentiality and data protection rules. There must therefore be a possibility within the legislation for employers to not provide such information, i.e. a safe harbour clause, to protect individual salary information and confidentiality. Depending on the national context, systems and practices, member states should consider options like workers signing a confidentiality agreement – at least this should not be forbidden with this directive.

54. This article also fails to secure anonymity of individual pay information, thereby contradicting the safeguards in article 10. It is therefore necessary to make it possible at national level, either by law or social partner agreement, depending on the national industrial relations system, to make the provision of information conditional on thresholds, i.e. a minimum size group of employees and comparators. This is often the practice in the different national rules on disclosure of collectively agreed pay levels, including to protect the individual salary information (e.g. in Austria, Germany, France, Sweden, Finland, Belgium, Spain). In Germany, for example, an individual can only receive salary information if a group of at least six comparators is present in the company. A number of other conditions exist in national legislation. For example, in France, the right of employees to obtain information on pay comparators is done primarily through employee representatives and is not directly available to employees. In Spain, access to pay information depends on the presence of legal workers' representatives at the company. If there is a legal representative, access to the pay register must be provided to the workers through the legal representative and they have the right to know the full content of the register; on the other hand, if there is

no legal representation in the company, a worker can apply for the information but the information provided will be limited to the percentage differences in the average remuneration of men and women, disaggregated according to the remuneration and the applicable classification system.

55. We fully agree that any worker having obtained information would not be allowed to use it for any other purpose than to defend their right to equal pay for the same work or work of equal value and not disseminate the information otherwise. However, this should not only be a possibility for employers, rather an obligation on workers in the legislation. This should also apply to any worker representative or equality body that can ask for the information on their behalf, as is the case in article 10.

56. Giving external actors influence on internal company wage setting systems and information on pay) is completely unacceptable, as, depending on the national system, this is the sole prerogative of the employer or social partners and would inappropriately interfere and disrupt collective bargaining practices at different levels. Employees should only be entitled to request information on pay levels through the existing rules on disclosure of collectively agreed pay structures through collective bargaining mechanisms at company and/or branch level. Also, it is important to ensure that this does not violate data protection laws.

Article 8 - Reporting on pay gap between female and male workers and Article 9 – Joint pay assessment

57. Whilst gender pay discrimination may exist in some cases, it is not the main cause of differences in pay between men and women, either on a generic level, or in companies, where it is usually due to objective factors. Positively article 9 recognises that a pay gap at company level can be justified by objective gender-neutral factors. However, the burden is unfortunately on the employer to prove that this is the case. This gives an underlying assumption that discrimination has taken place, whereas this is only in a minority of cases.

58. Evidence from some countries shows that even where there have been pay surveys, these have in fact not highlighted a prevalence of unfair pay differences between men and women. For example, in a report published in June 2019, the Swedish National Audit Office assessed that while pay surveys, which are an obligation in Swedish legislation, are burdensome for employers to conduct, they have rarely led to the discovery of unfair pay differences between men and women. Therefore, the organisation recommended the Swedish government to simplify the legislation to decrease the workload created for enterprises.

59. Providing such information and justification would place a disproportionately and unjustifiably heavy burden on companies, in particular given that in the majority of cases it will simply show that the pay differences are a result of objective factors rather than discrimination. This would therefore not help to achieve the overall aim of the directive, which is to combat pay discrimination. Such a reporting exercise would require companies to gather disaggregated data on pay and set up what are likely to be extremely complex internal systems to undertake such a task. Given

that article 9 is triggered by evidence of a 5% pay gap in 'any category of workers', companies would also be obliged to put in place a system to clearly define different categories of worker, which would not only be burdensome, but also very complicated for HR managers, since this is very broad. If such a requirement exists, given the aim of the initiative is to better enforce the principle of equal pay for equal work or work of equal value, at the very most, it should compare those doing the same work and tasks and where this is not possible, employers should be exempted from this requirement. This would also avoid making false comparisons.

60. The burden also comes from the fact that the requirements are very detailed, including obligations in article 8 not only to report on the overall pay gap, but also the median and for each quartile pay band. This level of prescription is not in line with the very diverse national systems and company situations. The consideration of 'complementary or variable components' is important in taking into account what is provided to workers other than the basic salary, however, this is likely to lead to endless discussions and court cases about what is covered by this, as it differs not only between countries, but also between sectors and companies and depending on which collective agreement is in force.

61. Also, these requirements do not take into account the nature of collective agreements, including those covering wages, which are designed in accordance with the interests of the parties to the collective agreement (workers and employers) in a balanced way. Therefore, the directive should provide the option at national level, depending on national industrial relations systems and practices, to reduce the scope of the reporting obligations accordingly where collective agreements are applied.

62. In any case, we do not believe that it is possible for such information to allow for a comparison between employers, sectors and regions of the member state concerned, which is one of the aims of this article. There are many factors which can affect the levels of pay in different sectors, regions and within companies and it is not realistic to expect pay reporting to take this into account. At the very least, there should be a possibility at national level to only apply this provision in cases where a minimum threshold of workers are employed in each comparable position.

63. The administrative burdens are added to with the proposed obligation in article 8 for employers to provide additional information upon request. Providing a justification of gender pay differences not only to workers' representatives, but also labour inspectorate and/or the equality body, would be extremely burdensome, as it would require not only gathering data, but also an analysis of the reasons behind the difference. Also, the different groups may have different information needs, thus multiplying the work required by companies. It is also likely to lead to conflictual situations within the company about whether the differences are objectively justified or not. This would also take resources away from effective measures to support a balanced representation of men and women in the enterprise.

64. The administrative burden is further increased in article 9, as it is in fact much more than an assessment, also including an obligation to take measures and report on the effectiveness of them. This goes beyond pay transparency. Assessing the

effectiveness in some cases may not be possible in-house and therefore require an external auditor, leading to extra administrative burdens and costs. This is on top of existing reporting requirements for companies, in particular through the non-financial reporting directive, for which a proposal for revision is now on the table, newly named the corporate sustainability reporting directive. It is crucial to avoid adding to reporting requirements and duplicating existing or any new obligations.

65. Bearing in mind that the information would have to be provided publicly according to article 8, it could be the case that there is a perfectly justified pay gap in the company but not discrimination, whereas the publication of such information without any further explanation could be misinterpreted as representing discrimination or labelled as unfair. This could cause potentially irreparable reputational damage to the company, whereas this is a key asset for a company, built up over years of good work, but which can be damaged in minutes.

66. We therefore believe that the information should not be made public or there should at the very least be a safe harbour clause for companies to withhold confidential and business sensitive information. Also, where the information and transparency obligations included in the directive are already met by information provided by employees' legal representatives (e.g. on pay registers), according to national systems and practices, this should be an option for implementation at national level and the directive should not oblige creation of another system of transparency/information provision. Bearing in mind their knowledge of the company and its circumstances, they will be able to better assess the origin of pay differentials. This therefore provides a much more effective way of dealing with the issue and reduces the risk of reputational damage.

67. Workers and their representatives should only have a right to obtain such information, provided that they have the obligation to use it only for the purpose of defending their right to equal pay for the same work or work of equal value and not disseminate the information otherwise. This should also be the case for any equality body who receives the information upon request. It is crucial that the role of worker representatives is clearly distinguished from equality bodies, who are external actors to the company – it would be inappropriate to give them more competences in relation to the internal company systems. In addition, the data protection implications should be carefully considered.

68. We support the fact that these requirements would not apply to companies with 250 employees or less, as well as the possibility for member state public authorities to compile the information in article 8 themselves, e.g. based on administrative data. This recognises the important role of public authorities as a source of anonymised data and could also reduce the burden on enterprises. However, the objective comparability of the data must be guaranteed. At the same time, these aspects would not alleviate the problems highlighted above, which apply equally to larger companies and are irrespective of who is collecting the information.

69. More clarity is needed for companies that have very close to 250 employees, but for whom the number of employees often fluctuates. This is the case in particular for companies operating in more seasonal sectors, such as tourism, who boost staff

levels in the high season. In terms of legal certainty, it could be useful for article 8 only to apply to companies exceeding 250 employees for at least 2 years.

70. One option to reduce administrative burden, would be to have a progressive and stepped approach, as has been done in some national legislation (e.g. in Germany and in France, where for implementing the gender equality index, enterprises have 3 years in which to close the pay gap), to give adequate time to companies of differing sizes to adjust and to be ready before measures come into force.

71. Another option to ensure that the measures are simple, effective, and appropriate for all companies, is to discuss the requirements before with social partners and experts. In France, when establishing the pay gap index, social partners discussed for 4 months and two of the five indicators of the index were tested across all 40,000 of the companies concerned. The overall method has also been subject to real-life testing in 35 companies with over 50 employees, in partnership with the National Association of Human Resources Directors.

72. Whilst existing social dialogue and collective bargaining systems can be a useful frame for discussing such issues, this has to be done in full respect of national industrial relations systems and practices. Therefore, there cannot be an obligation at EU level for the joint assessment to be done in cooperation with workers' representatives, as this should be for the social partners themselves at national level to determine. This is important to avoid disrupting well-functioning collective bargaining on wages and safeguarding the delicate balance between employer and employee interests in wage negotiations. If a gender pay gap emerges, it should be sufficient for the employer to take appropriate measures to eliminate it and to involve workers' representatives where this is necessary in respect of national industrial relations systems and practices. For example, in some countries such issues are discussed in works councils (e.g. in Germany).

73. Also, we do not agree that where workers' representatives are absent, they should be designated for the purposes of this reporting. This goes against national and social partner prerogatives to determine how workers should be represented and cannot be obliged through EU legislation.

74. The requirement for the joint pay assessment (article 9, paragraph 2d) to include the objective, gender-neutral justifications, if any, for differences in pay, is superfluous, as evidence of such justifications means that the joint assessment is not necessary in the first place. This article also includes a requirement for employer and workers' representatives to jointly establish such justifications. This is not feasible given that they will differ from one individual to another and may change over time. Also, whether or not to jointly determine this, must be the decision of the social partners rather than being obliged through legislation and therefore interfering in social partner autonomy on wage-setting.

Article 10 – Data protection

75. We support the fact that the obligations of the proposed directive must be in line with the GDPR regulation and therefore that the disclosure of any information under

the directive cannot lead, either directly or indirectly, to the disclosure of the pay of an identifiable co-worker. This means that only aggregated data should be collected. However, this should not be an option for member states, rather an obligation in the EU directive itself, to ensure that the GDPR rules are fully applied. We are concerned that allowing this information to be provided to workers' representatives or the equality body is in fact a breach of the rules protecting individuals' data. Even if individual salaries could not be disclosed, it is difficult to see how they would be able to advise workers regarding a possible claim, without disclosing some information. This is especially relevant in relation to the obligations following article 7.

Article 13 - Procedures on behalf or in support of workers

76. It is important that individuals are able to seek redress where discrimination has taken place. There are already different national structures in place for this. Equality bodies, associations, organisations and workers' representatives play an important role in supporting workers regarding enforcement of their right to equal pay for equal work or work of equal value. It is important to distinguish between workers' representatives, who, depending on the national industrial relations systems, have a clearly defined and often legally enshrined role in the company, and other bodies, which are external actors. When it comes to their involvement in administrative or judicial procedures, or acting on behalf of a group of workers, this should be determined at national level, as it depends on the different national judicial systems and member state prerogatives. Furthermore, interference of external bodies in internal company management and social dialogue processes on wage setting must be avoided, as this goes against employers' prerogatives and social partner autonomy.

77. If such a possibility were to exist in EU legislation, it is crucial that the legitimate interest of the associations is clearly defined, as well as specifying procedural safeguards to prevent abusive litigation, which can have a detrimental impact on company reputation, whereas discrimination may not even have taken place. Representative entities would need to abide by certain rules, to avoid this leading to frivolous litigation or disproportionately high claims, supported by third party litigation funding, which will benefit neither companies nor workers. This will also not support a trust-based working environment in the company.

Article 14 – Right to compensation
Article 15 – Other remedies
Article 18 – Limitation periods
Article 19 – Legal and judicial costs
Article 20 - Penalties

78. It is important that victims of discrimination have access not only to justice, but also to compensation and/or other remedies. As part of this, alternative dispute resolution mechanisms should be considered. However, these aspects should be left to national level to decide, not EU level, bearing in mind that in many cases there are already adequate compensation measures in place. Furthermore, there is no need to include detailed provisions in these areas in this directive, as they are

already adequately covered in the EU recast directive on equal pay. For now, the measures on sanctions and enforcement are different to the recast directive, which would cause legal uncertainty. The directive should simply refer to the provisions of the recast directive on these aspects rather than introducing new ones.

79. The level of detail and prescriptive nature of the proposed directive does not adequately respect national competences regarding judicial systems, court proceedings and rules on compensation. The aspects regarding legal and judicial costs for example, which are very detailed (e.g. specifying what should be taken into account in fines), do not respect the national competences. Also, Article 15 gives certain powers to the courts, in particular in point b), allowing courts to order employers to take some structural or organisational measures. This is directly touching the legal procedures of member states and in some countries this is not part of the mandate of courts. The EU does not have competence to address these aspects. We also find it unacceptable that according to article 19, even if the employer wins a case concerning pay discrimination, they still have to pay their own judicial costs. Overall, we have concerns that there could be huge costs due to legal actions following articles 14-20.

80. We are not convinced that a limitation period of minimum 3 years (as proposed in article 18) for bringing claims, is appropriate. This could lead to legal uncertainty for employers. Also, if this is combined with the possibility to use a comparator such a long time after an individual has been employed in the company, the situation may no longer be comparable, therefore providing a false basis for a claim. This should be left to member states to determine, taking inspiration, for example from limitation periods for claims related to fundamental rights in the labour litigation system of each country.

81. In contrast to the commission, we believe that the lack of claims shows that the systems are in fact working well. National judicial bodies are already well equipped to address this and sanctions and compensation to victims exist. More transparency and accessible information from national authorities could however help support individuals on knowing how to claim their rights.

Article 16 – Shift of burden of proof

82. We note that in a prima facie case of discrimination, the EU acquis already provides that the burden of proof is on the employer, to prove that discrimination has not taken place. This results from the European Court of Justice Danfoss ruling (C 109/88 pr. 14-16). However, the proposed directive goes much further than this. If employers have not correctly implemented the obligations in articles 5-9 of the directive, in any legal or administrative proceedings concerning pay discrimination, even where there is no prima facie case, they would be obliged to prove that discrimination has not taken place. Given that the requirements are very detailed and prescriptive, it is possible that companies, in particular SMEs which are covered by some of these articles, may omit one small piece of information or make a small mistake and would thereby be assumed guilty of discrimination. It is not reasonable to generalise that any failure by the company to fulfil its obligations regarding wage transparency means that the company must prove that there was

no discrimination. This should depend on what type of breach is involved. Therefore, this provision is disproportionate. Furthermore, this could concern cases which have nothing to do with the transparency requirements of the directive, where an assumption of discrimination by the employer is therefore not based on the facts of the case, but rather an omission of information or suchlike. This is likely to lead to more court cases, without actually rooting out real discrimination.

Article 25 – Equality bodies

83. Equality bodies play an important role, depending on national systems and practices, in supporting efforts towards more gender equality in general and tackling discrimination. However, the proposed directive gives a disproportionate role for equality bodies inside companies, with the possibility to influence and possibly interfere with the internal workings of companies, employers' prerogatives and even more crucially collective bargaining and the cooperation with workers representatives at company level. It should be for member states to define the role of such bodies.

Article 28 – Statistics

84. It is useful to have reliable data, in terms of providing a solid evidence basis for policy-making. However, it is important to avoid putting further additional administrative burdens on companies, as they are likely to be confronted with providing such data to national authorities. It would be preferable to extract such data from existing sources, as long as they provide objectively comparable data.