



SOC/678
Binding pay transparency measures

OPINION

European Economic and Social Committee

Proposal for a directive of the European Parliament and of the Council to strengthen the application of the principle of equal pay for equal work or work of equal value between men and women through pay transparency and enforcement mechanisms

[COM(2021)93 final – 2021-50 (COD)]

Rapporteur: **Pekka Ristolä**

Referral	European Parliament, 11/03/2021 Council, 15/03/2021
Legal basis	Article 304 of the Treaty on the Functioning of the European Union
Section responsible	Employment, Social Affairs and Citizenship
Adopted in section	26/05/2021
Adopted at plenary	09/06/2021
Plenary session No	561
Outcome of vote (for/against/abstentions)	147/87/11

1. **Conclusions and recommendations**

- 1.1 The EESC welcomes the Commission's proposal, which aims to make it easier for workers to enforce the principle of equal pay where they consider that they have been the victims of pay discrimination, to contribute to greater transparency in pay structures and to strengthen the role of national bodies in enforcing this principle.
- 1.2 The EESC notes that the proposed Directive is wide in scope, applying to all workers in both public and private sectors, and that it recognises intersectional aspects of discrimination.
- 1.3 However, the EESC considers that the proposal should be strengthened in various respects, particularly regarding the criteria to be used to determine the value of work, the coverage of some of the key transparency obligations, and the role of the social partners and collective bargaining in the implementation of the principle of equal pay.
- 1.4 The EESC considers that more detailed guidance could be provided regarding the objective criteria to be used to determine the value of work in a gender-neutral way. Such criteria should include skills and characteristics of work typically performed by women, which are otherwise often overlooked or undervalued when assessing the value of work, such as people-centred skills. These criteria should be developed with the involvement of, or by, the social partners, and formulated in a way that leaves space for further specification by them.
- 1.5 While the proposal is rightly sensitive to concerns about additional burdens on SMEs, the EESC does not find a complete exemption of all employers with fewer than 250 workers justified. Special rules for SMEs could, however, be appropriate. Member States should also be required to provide support, training and technical assistance to employers, particularly SMEs, with their pay transparency obligations.
- 1.6 The EESC considers that measures should be taken to promote collective bargaining on equal pay and other measures aimed at closing the gender pay gap, without prejudice to the autonomy of the social partners. Collective bargaining can have a significant, beneficial role in promoting equal pay and gender equality systematically at company, sectoral, regional or national levels.
- 1.7 The EESC points out that the measures contained in the proposal are only some of the steps necessary to address the structural issues underpinning the gender pay gap. A holistic approach that includes furthering and strengthening enforcement, will be necessary to ensure equal pay in practice. This should include further efforts to tackle labour market segregation, gender stereotypes and the undervaluation of work performed predominantly by women; adequate and accessible childcare services, as well as adequate provisions for leave for partners; and initiatives to raise awareness of pay gaps, promote career opportunities for women and ensure better representation of women in decision-making positions; and eliminating tax-related disincentives to women's employment.

2. Introduction

- 2.1 Equal pay for men and women for equal work or work of equal value is one of the fundamental rights and principles of both the EU¹ and international and European human rights instruments². It was reiterated most recently in Principle 2 of the European Pillar of Social Rights. It is also expressed in Article 4 of the Gender Equality Directive³, which prohibits direct and indirect sex discrimination with respect to pay for the same work or for work of equal value.
- 2.2 The EU equal pay framework has been in place for many decades⁴ and has contributed towards addressing pay discrimination and gender bias in pay structures. According to EIGE, 9 % (out of 14.1%) of the gender pay gap (the ‘unexplained’ part) is attributed to unobserved worker characteristics not captured by the model, as well as discrimination⁵. Other causes of the gender pay gap are, for example, the fact that women bear a greater share of unpaid care responsibilities, which affects their participation in the labour market such as working part-time, and horizontal and vertical occupational segregation. Some of this is addressed by other aspects of Union law and policy⁶.
- 2.3 These measures have led to progress on closing the gender pay gap in the EU. Nevertheless, the average EU full-time pay gap still stands at 14.1%, with very little progress made over the last decade. Developments vary between the Member States, with some of them even showing increasing pay gaps⁷. The fact that women, on average, still earn less per hour than men contributes to the gender gaps in overall annual earnings (36.7%⁸) and pensions (30%⁹) - although it is not the only factor contributing to these gaps. In particular, the gender gap in overall earnings is largely explained by the fact that women spend fewer hours in paid work, to a large extent in order to accommodate unpaid care responsibilities¹⁰. Working full time has a great impact on earnings and career opportunities, and giving this opportunity to both women and men requires support structures such as care services, shared family responsibilities and eliminating tax-related disincentives to women's employment.
- 2.4 The case law of monitoring bodies of international and European human rights instruments clearly demonstrates that there is still much room for improvement in most Member States, in

¹ Laid down in Article 119 of the Treaty of Rome (1957) and now contained in Article 157(1) of the Treaty on the Functioning of the EU. Article 23 of the Charter of Fundamental Rights of the EU provides that equality between women and men must be ensured in all areas, including pay.

² See in particular: Article 7(a)(i) of the UN International Covenant on Economic, Social and Cultural Rights (ICECSR), ILO Convention No. 100 (1951) and Article 4(3) of the Council of Europe's European Social Charter (1961, revised 1996).

³ [OJ L 204, 26.7.2006, p. 23.](#)

⁴ [Equal pay Directive.](#)

⁵ EIGE (2020) [Gender inequalities in care and consequences for the labour market](#), page 26.

⁶ [OJ L 188, 12.7.2019, p. 79; COM\(2020\) 152 final, 5.3.2020](#) and [COM\(2017\) 678 final, 20.11.2017.](#)

⁷ Eurostat data from 2019, [Gender pay gap statistics.](#)

⁸ Eurostat data from 2016, [Gender overall earnings gap.](#)

⁹ Eurostat data from 2018, [Closing the gender pension gap?.](#)

¹⁰ Eurostat (2019b) [Why do people work part-time?](#)

both law and practice, in ensuring and enforcing the right to equal pay, including regarding pay transparency¹¹.

- 2.5 The COVID-19 pandemic has had severe effects on society, the economy, workers, entrepreneurs and businesses. Importantly, the pandemic has underscored the fact that women still receive lower pay than men, and that the work performed in many female-dominated, essential jobs is still undervalued. The pandemic has also disproportionately affected women, at the workplace and beyond, and, without decisive action, is likely to have negative repercussions on gender equality¹².
- 2.6 The EC's proposal for a Directive to strengthen the application of the principle of equal pay for equal work or work of equal value between men and women through pay transparency and enforcement mechanisms (2021/0050 (COD), "the proposal") recognises the urgency of taking action to promote equal pay for men and women in this context. The proposal aims to address some of the main obstacles to the effective implementation and enforcement of the EU equal pay framework in practice, which has remained a challenge¹³. The Commission considers a reduction of 3 percentage points in the unexplained gender pay gap to be a reasonable estimate of the impact of the proposed measures, although the lack of precise data on the extent of pay discrimination makes the impact of the proposed measures difficult to assess¹⁴.
- 2.7 The Commission has identified three main sets of challenges in this regard: a lack of clarity over key legal concepts, such as "work of equal value", a lack of transparency in pay systems, and a range of procedural obstacles, such as high legal costs or a lack of sufficient compensation¹⁵. In 2014, it published a Recommendation on strengthening the principle of equal pay between men and women through pay transparency ("the Recommendation"), aimed at addressing some of these issues¹⁶. The Recommendation has had little uptake in Member States¹⁷, though some already have various pay transparency measures in place, which differ in their design and coverage¹⁸.

¹¹ See e.g. the case law of the [ILO Committee of Experts on the Application of Conventions and Recommendations \(CEACR\) on Convention No. 100 Equal Remuneration Convention \(1951\)](#), the [decisions adopted by the Council of Europe's European Committee of Social Rights \(ECSR\) on the collective complaints submitted by the University of Women Europe \(UWE\) against 15 EU Member States](#) and the [ECSR's conclusions on non-conformity with Article 4\(3\) of the European Social Charter under the normal reporting procedure](#).

¹² Wenham C (2020) *The gendered impact of the COVID-19 crisis and post-crisis period*, European Parliament; Eurofound (2020) *Women and labour market equality: Has COVID-19 rolled back recent gains?*; European Commission, *2021 report on gender equality in the EU*.

¹³ According to the European Commission Report on the application of Directive 2006/54/EC, COM(2013) 861 final, and the 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](#).

¹⁴ Impact Assessment accompanying the proposal, page 116.

¹⁵ [COM/2013/861 final](#); [SWD/2020/50 final](#).

¹⁶ [OJ L 69, 8.3.2014, p.112](#).

¹⁷ [COM/2017/671 final](#).

¹⁸ Veldman A (2017) *Pay Transparency in the EU: A legal analysis of the situation in the EU Member States, Iceland, Liechtenstein and Norway*, Luxembourg, Publications Office of the European Union.

2.8 At the start of her term of office, EC President Ursula von der Leyen identified the principle of equal pay for equal work as the founding principle of a new European Gender Strategy and binding pay transparency measures as one of her political priorities. The Commission subsequently included the introduction of binding pay transparency measures in the EU Gender Equality Strategy 2020–2025. The European Parliament has expressed support for the introduction of such measures in its resolutions on the gender pay gap¹⁹ and on the Gender Equality Strategy²⁰. The EESC has also called on the Commission to act in this area to address situations where work typically performed by women is undervalued, including by introducing binding pay transparency measures, but also measures to ensure equal opportunities for women and men in the labour market and to tackle horizontal and vertical gender segregation by occupation²¹.

3. General comments

3.1 The EESC has previously stated that binding measures are necessary to strengthen the principle of equal pay between men and women²². The experience with the 2014 Recommendation on pay transparency has shown that non-binding measures are unlikely to achieve the desired result, which is to ensure the effective application of the principle of equal pay in practice, at the required pace.

3.2 The EESC welcomes the Commission's proposal, which aims to make it easier for workers to enforce the principle of equal pay where they consider that they have been the victims of pay discrimination, to contribute to greater transparency in pay structures and to strengthen the role of national bodies in enforcing this principle.

3.3 However, the EESC considers that the proposal should be strengthened in various respects, particularly regarding the criteria to be used to determine the value of work and the coverage of some of the key transparency obligations, but also the role of the social partners and collective bargaining in the implementation of the principle of equal pay, the social partners being best placed to reassess the value of skills and occupations²³. It is concerned that, otherwise, the benefits of the proposed measures will be limited for many workers, and the measures will not contribute sufficiently to the systemic changes required to eliminate pay discrimination and gender bias in pay structures.

3.4 The EESC points out that the measures contained in the proposal are only some of the steps needed to address the structural issues underpinning the gender pay gap. A holistic approach including further measures, as well as strengthening enforcement, will be necessary to ensure equal pay in practice. These should include further efforts to tackle labour market segregation,

19 [EP Resolution, 30.01.2020.](#)

20 [EP Resolution, 21.01.2021.](#)

21 [OJ C 110, 22.3.2019, p. 26, OJ C 240, 16.7.2019, p. 3, OJ C 364, 28.10.2020, p. 77.](#)

22 [OJ C 364, 28.10.2020, p. 77.](#)

23 [OJ C 110, 22.3.2019, p. 26.](#)

gender stereotypes and the undervaluation of work performed predominantly by women; adequate and accessible childcare services, as well as adequate provisions for leave for partners; and initiatives to raise awareness of pay gaps, promote career opportunities for women and ensure better representation of women in decision-making positions; and eliminating tax-related disincentives to women's employment.

4. **Specific comments**

4.1 Scope and definitions

4.1.1 The EESC notes that the proposed Directive is wide in scope (Article 2), applying to both the public and private sectors, and to all workers who have an employment contract or employment relationship, where the determination of the existence of such a relationship is guided by facts relating to the performance of the work. This includes workers in non-standard employment, such as on-demand or platform work, where the facts relating to the performance of the work indicate that these criteria are satisfied²⁴. The existence of an employment contract or employment relationship is defined by law, collective agreements and/or practice in force in each Member State, with consideration to the case-law of the Court of Justice.

4.1.2 The definition of "categories of workers" in Article 3 provides that these should be specified by the employer. It is crucial that there are mechanisms in place to ensure that categories of workers are determined in a gender-neutral way, such as by ensuring that these are drawn up with the involvement of trade union/workers' representatives, in accordance with national law and practice.

4.1.3 The EESC welcomes the fact that the definition of pay discrimination includes discrimination based on a combination of sex and any other ground for discrimination²⁵, recognising intersectional aspects of discrimination. The Commission should provide further guidance to ensure that cases in which pay discrimination arises from a combination of sex and another protected characteristic can be identified and addressed as such.

4.1.4 The EESC notes that, throughout the proposal, responsibilities are allocated to "workers' representatives" without the term being defined. Its explanatory memorandum states that "if formal workers' representatives are absent in the organisation, the employer should designate one or more workers for this purpose". In order not to risk undue interference with national systems for industrial relations, as well as to avoid trade union rights and prerogatives being bypassed by workers' representatives chosen by the employer²⁶, the proposal should guarantee that legitimate workers' representatives are always designated by workers. It needs to be stated that this is to be done in accordance with the relevant conventions and case-law of the

²⁴ Recital 11 of the proposal.

²⁵ [Directive 2000/43/EC](#) and [Directive 2000/78/EC](#).

²⁶ The case law of the ILO Committee on Freedom of Association (CFA) and the Committee of Experts on the Application of Conventions and Recommendations (CEACR) is clear that the prerogatives of trade unions cannot be by-passed or opened to other organisations, associations or (groupings of) individual workers (chosen by the employer). See in particular ILO CFA Digest of case law (§§ 1214, 1222-1230, 1234, 1342-1349) and the CEACR General Survey of 2012, pp. 96-97.

International Labour Organization on the freedom of association, the right to organise and the right to collective bargaining.

4.2 Equal pay and work of equal value

- 4.2.1 In Article 4(3), the proposal clarifies some of the objective criteria to be used in determining the value of work, in accordance with CJEU case law, and requires that Member States take measures to ensure that tools and methodologies are established to determine the value of work. These provisions will assist workers seeking to enforce their rights in identifying an appropriate comparator, and ensure that the value of work is determined more consistently between Member States. It will assist the social partners in designing pay structures in a gender-neutral way and in determining which categories of workers perform work of equal value, which is essential for the application of other provisions in the proposed Directive.
- 4.2.2 However, the proposed provision lists only a few, general criteria. It would be desirable to provide more detail on the objective criteria to be used to determine the value of work, whereby particular effort should be made to ensure that the requisite skills and characteristics of work typically performed by women are not overlooked. Where such skills and characteristics are overlooked, the assessment of the value of work is not gender-neutral. For example, the proposed criteria should specify further sub-criteria to be taken into account, which include people-centred skills typical of work performed in many female-dominated jobs, such as care work²⁷. Providing more detail would contribute to ensuring that work typically performed by women is not undervalued. These criteria should be formulated in a way that leaves space for further specification by the social partners.
- 4.2.3 The social partners are best placed to assess the value of skills and occupations. The gender-neutral criteria, and the tools and methodologies to determine the value of work referred to in Article 4(2), must be developed by them or at least with their involvement, without prejudice to their autonomy. Social dialogue and collective bargaining are instrumental in reaching the desired objectives and in addressing the gender pay gap.
- 4.2.4 The EESC welcomes the introduction of the option of using a hypothetical comparator or other evidence allowing alleged discrimination to be presumed, where no real comparator can be established. This will assist workers in highly sex-segregated workplaces to show discrimination where this exists, even if there is no real comparator. It is particularly important to ensure that women workers in highly sex-segregated workplaces can bring equal pay claims, since evidence suggests that there is a correlation between the degree of feminisation of a workplace and lower pay - that is, the higher the proportion of women, the lower the pay²⁸.

²⁷ For example, it could be specified that "skills" include inter-personal skills, "effort" includes not only physical, but also mental and psychosocial effort, or that "nature of the tasks" includes emotional support. More detailed guidance on the kinds of criteria and sub-criteria to be used to determine the value of work is provided in the Commission Staff Working Document accompanying the document to the Report from the Commission to the Council and the European Parliament on the application of Directive 2006/54/EC, SWD(2013) 512 final, 16 December 2013.

²⁸ ILO (2018) Global wage report 2018/2019: what lies behind gender pay gaps, Geneva, ILO, page 75.

4.3 Pay transparency

- 4.3.1 The EESC takes note of the proposed measures in Articles 5-9 aimed at enhancing the availability of information on pay, including prior to employment, and transparency in pay structures, but notes the need to accommodate national industrial relations models. These can contribute to addressing one of the major challenges in identifying and challenging pay discrimination, as well as pay disparities caused by gender differences in initial salary negotiations, which tend to disadvantage women²⁹. The EESC notes that the proposal recognises that Article 5 does not limit the ability of employers, workers, and social partners to negotiate a salary outside the indicated range.
- 4.3.2 These measures could prompt employers to identify and address pay gaps in their organisation. Reporting and joint assessments can contribute to raising awareness of pay discrimination and gender bias in pay structures and addressing them in a more systemic and effective way, benefitting all workers in the organisation without the need for workers to bring an equal pay claim. At the same time, it is important to improve employees' knowledge of what the pay and salary consists of and how it can be influenced. Awareness-raising activities on gender issues in workplaces would also greatly contribute to tackling the pay gap. More pay transparency can have beneficial effects also on workforce satisfaction, retention and productivity³⁰.
- 4.3.3 The wording of the proposed Article 7(5) suggests that workers may be prevented from speaking freely about their pay to others beyond the specific circumstances of enforcing the principle of equal pay. The EESC points out that, to ensure greater transparency, it should be made clear that workers should not be prevented from disclosing their pay to colleagues and others, particularly their trade union. The ability to discuss pay freely with others enables workers to identify that the principle of equal pay has been breached.
- 4.3.4 Furthermore, employers should not be able to prevent workers from disclosing to their trade union information regarding pay levels for categories of workers that is obtained on request and that could indicate pay discrimination (Article 7(6)). The recipient could be required to treat the information confidentially, other than for the purposes of enforcing the principle of equal pay.
- 4.3.5 The limitation of the requirement to report on pay gaps within the organisation to employers with at least 250 workers (Article 8(1)), which exempts all small and medium-sized enterprises (SMEs), will mean that only about a third of all workers in the EU can benefit from this measure³¹. Furthermore, women are overrepresented³² in small firms³², which means that an even

²⁹ Evidence suggests that, for example, women tend to avoid salary negotiations and that men are more successful than women in negotiating labour market outcomes. See M Recalde and L Vesterlund, *Gender Differences in Negotiation and Policy for Improvement*, a working paper from the US National Bureau for Economic Research (at <https://www.nber.org/papers/w28183>); A Leibbrandt and JA List, *Do Women Avoid Salary Negotiations? Evidence from a Large Scale, Natural Field Experiment*, a working paper from the US National Bureau for Economic Research (at <https://www.nber.org/papers/w18511>).

³⁰ See Impact Assessment, pages 17-18 and, e.g.; Chamberlain, A., *Is Salary Transparency More Than a Trend?*, Glassdoor Economic Research Report, 2015; Wall, A., *Pay openness movement: Is it merited? Does it influence more desirable employee outcomes than pay secrecy?*, *Organization Management Journal*, 2018.

³¹ SMEs account for around two thirds of employment in the EU, and 99.8% of all enterprises, [Statistics on small and medium-sized enterprises](#).

³² EIGE (2020) *Gender inequalities in care and consequences for the labour market*, page 29.

smaller proportion of women workers will benefit from this measure. This threshold is a step back from the Commission's 2014 Recommendation, which suggests reporting requirements for employers with at least 50 employees³³.

- 4.3.6 The EESC recognises that SMEs may have more limited resources to comply with their obligations under the proposed Directive. The proposal should be sensitive to concerns about additional burdens on SMEs, particularly given the significance that these may have in the post-pandemic recovery process, which may be on-going after entry into force of the proposed Directive. Nevertheless, the Commission estimates that the costs of producing reports will be moderate³⁴. A complete exemption of all employers with fewer than 250 workers is therefore not justified, but special rules for SMEs could be appropriate.
- 4.3.7 Special rules reducing the required frequency of reporting for smaller enterprises would reduce costs, whilst requiring employers to identify and eliminate pay gaps for the benefit of workers. The threshold for reporting obligations should be no higher than 50 workers, but the frequency of reporting for enterprises with more than 50 but fewer than 250 workers could be reduced.
- 4.3.8 A similar concern arises with respect to the limitation of the requirement to conduct a joint assessment to employers with at least 250 workers (Article 9). The costs for producing a joint assessment are estimated to be somewhat higher than for reports³⁵, but they still do not justify a complete exemption for employers with fewer than 250 employees. Special rules for SMEs could be justified.
- 4.3.9 Member States should be required to provide support, training and technical assistance to employers, particularly SMEs, to comply with their pay transparency obligations, including by developing tools and methodologies for calculating pay gaps. Member States should, wherever possible and appropriate, also make use of the possibility in Article 8(4) to compile information on pay gaps across organisations themselves, particularly in respect of small and medium sized enterprises.
- 4.3.10 The EESC notes that the proposal differs from the Recommendation in that it requires that employers report only on pay gaps between male and female workers by category of worker and across the organisation. To ensure more transparency and accountability, trade union/workers' representatives should be able to verify the method used by the employer to calculate pay gaps and whether calculations are accurate, with due regard for national law and practice. In line with the Recommendation, reporting obligations should extend to average pay levels of male and female workers by category of worker. This allows workers and other bodies to assess the actual differences in pay across categories of workers, which is essential to ensuring the effective enforcement of the principle of equal pay.

33 Recommendation 4.

34 The Commission Impact Assessment suggests additional average costs of between a minimum of EUR 379-508 and a maximum of EUR 721-890 for the first year, with costs decreasing for the following years: Impact Assessment, [SWD\(2021\) 41 final, page 59](#). See also Eurofound (2020), Measures to promote gender pay transparency in companies: How much do they cost and what are their benefits and opportunities? Eurofound working paper, WPEF20021.

35 An average cost of between a minimum of EUR 1,180-1,724 and a maximum of EUR 1,911-2,266, expected to decrease with any subsequent assessments: Impact Assessment, [SWB\(2021\) 41 final, page 61](#).

4.3.11 The EESC points out that the proposal does not specify how frequently employers should provide information relating to pay for different categories of workers (Article 8(1)(g)). This information should be made available on an annual basis, like other types of information. Special provisions regarding frequency could be made for SMEs, as suggested in point 4.3.7.

4.3.12 The EESC supports the proposal to oblige employers to remedy the situation, in cooperation with trade union/workers' representatives and other bodies, and the requirement to include measures to address any differences identified and report on the effectiveness of such measures in the joint assessment (Article 8(7), Articles 9(2) and 9(3)). These provisions are key to ensuring that reporting and joint assessment obligations are effective in promoting the principle of equal pay.

4.3.13 Article 10(1) provides that information provided pursuant to the above-mentioned requirements which involves the processing of personal data must be provided in accordance with General Data Protection Regulation (GDPR) 2016/679. It should be specified that the GDPR should not be used by employers as a reason to deny information necessary to identify pay discrimination. Article 10(3) contains adequate protections for an individual worker's privacy, requiring that where an individual worker is identifiable, the relevant information should be made available to trade union/workers' representatives or the equality body only. These should then advise the worker on whether there are grounds for an equal pay claim.

4.4 Collective bargaining and social dialogue on equal pay

4.4.1 The proposal recognises the importance of the social partners giving particular attention to equal pay in collective bargaining and provides that Member States take measures to encourage social partners to pay due attention to equal pay matters, including at the appropriate level of collective bargaining³⁶. It also provides that the different features of national social dialogue and collective bargaining systems across the Union and the autonomy and contractual freedom of social partners, as well as their capacity as representatives of workers and employers, be respected³⁷. However, unlike the 2014 Recommendation, the proposal does not include a provision ensuring that the issue of equal pay can be discussed at the appropriate level of collective bargaining.

4.4.2 Article 11 provides only that the rights and obligations under the Directive should be discussed with the social partners. It should be further specified what this entails. In particular, it is important to ensure, specifically, that measures are taken to promote collective bargaining on equal pay and other measures aimed at closing the gender pay gap, without prejudice to the autonomy of the social partners. Collective bargaining can have a significant, beneficial role in promoting equal pay and gender equality in a systemic manner at company, sectoral or national levels.

³⁶ Proposal, Recital 31.

³⁷ Recital 31 of the proposal.

4.4.3 In addition, other measures that promote social dialogue, the discussion of equal pay and the development of gender-neutral job evaluation schemes by the social partners, awareness of equal pay issues among them, and sharing of best practices should be encouraged.

4.4.4 The ability of trade union/workers' representatives to act on behalf of workers should be strengthened, including by giving trade union/workers' representatives the right to request information on pay levels, broken down by gender, for categories of workers. Such information would enable trade union/workers' representatives to identify pay discrimination and act to address it, including through collective bargaining.

4.4.5 The EESC points out that trade union/workers' representatives must have the necessary technical knowledge and training to fulfil their function of identifying pay discrimination, and advising and representing workers with respect to the relevant issues. It should be clarified that trade unions have a right to represent their members.

4.5 Remedies and enforcement

4.5.1 The EESC takes note of the proposed provisions seeking to address procedural barriers faced by workers seeking to bring an equal pay claim, such as high legal costs, inadequate compensation and limitation periods. In this regard, it acknowledges the varying legal traditions when it comes to the Member States' rules of procedures. The EESC points to the need for flexibility in order to respect both national judicial systems and the different features of national social dialogue and collective bargaining systems across the Union and the autonomy and contractual freedom of social partners, as well as their capacity as representatives of workers and employers.

4.5.2 The EESC supports the proposal to ensure that various entities can act on behalf of or in support of a worker or group of workers, with their explicit approval, and that equality bodies and workers' representatives can do so on behalf of several workers (Article 13). The possibility of class action at the national level could also be considered, as it is expected to have a substantial impact on enforcement³⁸. The EESC points to the need for flexibility in order to respect varying legal traditions and national judicial systems.

4.5.3 The EESC notes that Article 19 regarding legal and judicial costs could give rise to financial difficulties for micro-businesses and some small businesses as defendants in the procedure. Where legal costs are so significant as to threaten the operation of the business, non-recovery should be considered to be manifestly unreasonable.

4.5.4 The EESC notes that the proposed limitation period of three years in Article 18 could require significant changes entailing challenges to existing dispute resolution mechanisms in some Member States. Where this is the case, it should be possible for Member States to accommodate their judicial systems and legal traditions, without compromising the objective of Article 18, which is to ensure that short limitation periods are not a barrier preventing victims of pay discrimination from enforcing their right to equal pay.

³⁸ [Foubert P \(2017\)](#). See also [Benedi Lahuerta S \(2018\)](#).

4.6 Equality and monitoring bodies

- 4.6.1 The EESC welcomes the proposal to strengthen the role of equality bodies in enforcing the principle of equal pay and ensure cooperation between equality bodies and other bodies with an inspection function (Article 25). In addition, provision should be made to ensure close cooperation between equality bodies and the social partners, as well as the monitoring body, if separate from the equality body, with due regard to the autonomy of the social partners.
- 4.6.2 The EESC particularly welcomes the provision on adequate resources to enable equality bodies to perform their functions effectively (Article 25(3)). It also welcomes the proposed requirement to designate a monitoring body to support the implementation of the principle of equal pay (Article 26). To further strengthen the role of national bodies, however, the proposal should ensure that the monitoring body and labour inspectorates are provided with adequate resources to carry out their functions effectively.
- 4.6.3 The EESC considers that the composition of the monitoring body should include the social actors involved in the application of the principle of equal pay, in particular trade unions and employers' representatives, as well as civil society organisations promoting gender equality and equal pay.

4.7 Horizontal provisions

- 4.7.1 The EESC considers that the proposed non-regression clause (Article 24) could be further strengthened by adding that nothing in the Directive shall be interpreted as restricting or adversely affecting rights and principles as recognised, in their respective fields of application, by Union law or international law and by international agreements to which the Union or the Member States are party.
- 4.7.2 Article 27 seeks to ensure that the Directive will not affect the right of the social partners to negotiate, conclude and enforce collective agreements or take collective action in accordance with national law and practice. It should also be further specified that social partners can introduce provisions or apply collective agreements that are more favourable to workers than those laid down in the Directive.

4.7.3 The EESC notes that Article 30 allows for implementation of the Directive by the social partners where they jointly request to do so, provided that the results sought by the Directive are guaranteed at all times. This provision ensures that the Directive allows for different means of implementation across different national systems, whilst guaranteeing the same level of protection for workers.

Brussels, 9 June 2021

Christa Schweng
The president of the European Economic and Social Committee

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N.B.: Appendix overleaf.

APPENDIX to the OPINION
of the
European Economic and Social Committee

The following amendments, which received at least a quarter of the votes cast, were rejected in the course of the debate (Rule 43(2) of the Rules of Procedure):

New point 3.1

Add a new point before 3.1:

3.1 The European Economic and Social Committee (EESC) is a firm supporter of the principle of equal pay for men and women for equal work or work of equal value and recognises it as one of the fundamental rights and principles of the European Union. The EESC also supports the Commission's objective to close the gender pay gap and to further promote the principle of equal pay. However, in order to address the gender pay gap, the root causes of the gap must be carefully assessed and correctly identified. The EESC believes that the Commission proposal on the pay transparency directive³⁹ fails to properly recognize the principle factors behind the gender pay gap such as horizontal and vertical labour market segregation, following from individual educational and professional choices, full-time versus part-time work as well as unpaid care-related constraints as well the role of tax incentives. Therefore, instead of the proposed pay transparency measures, there are more efficient and proportionate measures than binding EU legislation to address these issues while at the same time ensuring that administrative burdens and costs for companies, in particular SMEs, are not increased. The EESC underlines that pay structures and wage setting are an essential part of collective bargaining and social dialogue that fall within the competence of Member States and social partners. The EESC finds that the proposed directive⁴⁰ fails to fully respect the national wage formation competences and to sufficiently take into account the diverse national social and industrial relations models or judicial systems and legal traditions in the Member States. Furthermore, no consideration is paid to the fact that wage formation is also shaped by the concurrent demand and supply of skills in the labour market as well as available resources. Therefore, the EESC concludes that the Commission proposal on pay transparency is disproportionate and runs counter to the principle of subsidiarity. The Commission should reconsider or rework its proposal and the co-legislators are invited to take into account and address these concerns in the next steps of the legislative process.

Outcome of the vote:

In favour: 90
Against: 109
Abstention: 18

³⁹ [\(COM\(2021\) 93 final\)](#)

⁴⁰ [\(COM\(2021\) 93 final\)](#)

Point 3.2

Amend as follows:

3.2" *The EESC recognises that ~~welcomes~~ the Commission's proposal, ~~which~~ aims to make it easier for workers to enforce the principle of equal pay where they consider that they have been the victims of pay discrimination, to contribute to greater transparency in pay structures and to strengthen the role of national bodies in enforcing this principle.*

Outcome of the vote:

In favour: 85
Against: 131
Abstention: 17

Point 3.3 (linked to point 1.3)

Amend as follows:

3.3 *However, the EESC considers that the proposal should ~~be strengthened~~ the possibility for Member States to accommodate their industrial relations models in various respects, particularly regarding the criteria to be used to determine the value of work and the coverage of some of the key transparency obligations, but also the role of the social partners and collective bargaining in the implementation of the principle of equal pay, the social partners being best placed to reassess the value of skills and occupations⁴¹. It is concerned that, otherwise, the benefits of the proposed measures will be limited for many workers, and the measures will not contribute sufficiently to the systemic changes required to eliminate pay discrimination and gender bias in pay structures.*

Outcome of the vote:

In favour: 90
Against: 138
Abstention: 17

Point 4.2.4

Amend as follows:

4.2.4 *The EESC is critical about and questions ~~welcomes~~ the introduction of the option of using a hypothetical comparator or other evidence allowing alleged discrimination to be*

41 [OJ C 110, 22.3.2019, p. 26.](#)

~~presumed, where no real comparator can be established. This will assist workers in highly sex-segregated workplaces to show discrimination where this exists, even if there is no real comparator. It is particularly important to ensure that women workers in highly sex-segregated workplaces can bring equal pay claims, since evidence suggests that there is a correlation between the degree of feminisation of a workplace and lower pay—that is, the higher the proportion of women, the lower the pay⁴². It is unclear how this would work in practice, and it would create legal uncertainty for companies. It also 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 and organisation, change constantly. The EESC believes that potential pay discrimination must always be assessed in relation to the employees in a single company in comparable positions. In addition, the EESC points out that wage formation is mostly a prerogative of (collective) bargaining and subject to detailed professional advice and should not be regulated. Wages are formed in the labour market, paying workers for the tasks performed, as well as reflecting objective elements and the performance of the worker. Wages are set as part of a contractual relationship between two private parties or through collective agreement. The directive should respect these aspects and wage setting structures.~~

Outcome of the vote:

In favour: 69
Against: 114
Abstention: 15

Point 4.3.5

Delete point:

~~4.3.5 The limitation of the requirement to report on pay gaps within the organisation to employers with at least 250 workers (Article 8(1)), which exempts all small and medium-sized enterprises (SMEs), will mean that only about a third of all workers in the EU can benefit from this measure⁴³. Furthermore, women are overrepresented in small firms⁴⁴, which means that an even smaller proportion of women workers will benefit from this measure. This threshold is a step back from the Commission's 2014 Recommendation, which suggests reporting requirements for employers with at least 50 employees⁴⁵.~~

Outcome of the vote:

In favour: 81

⁴² ILO (2018) Global wage report 2018/2019: what lies behind gender pay gaps, Geneva, ILO, page 75.

⁴³ SMEs account for around two thirds of employment in the EU, and 99.8% of all enterprises, [Statistics on small and medium-sized enterprises](#).

⁴⁴ EIGE (2020) Gender inequalities in care and consequences for the labour market, page 29.

⁴⁵ Recommendation 4.

Against: 125
Abstention: 13

Point 4.3.6 (linked to point 1.5)

Amend as follows:

4.3.6 The EESC recognises that SMEs may have more limited resources to comply with their new obligations as they often lack human resources personnel ~~under the proposed Directive~~. The proposal should be sensitive to concerns about additional burdens on SMEs, particularly given the significance that these may have in the post-pandemic recovery process, which may be on-going after entry into force of the proposed Directive. ~~Nevertheless,~~ ~~the~~ Commission estimates that the costs of producing reports will be moderate⁴⁶, however underestimating the overall financial consequences for employers. In fact, total costs cannot be assessed in advance, but will depend on the cost of producing new types of data and statistical compilations, the number of disputes, practical enforcement problems and effects on wage formation and collective agreements. A complete exemption of all employers with fewer than 250 workers is therefore to be supported~~not justified~~, but special rules at national level for SMEs could be appropriate. Therefore, Member States should be allowed to establish appropriate thresholds.

Outcome of the vote:

In favour: 90
Against: 121
Abstention: 13

Point 4.3.7

Delete point:

4.3.7 ~~Special rules reducing the required frequency of reporting for smaller enterprises would reduce costs, whilst requiring employers to identify and eliminate pay gaps for the benefit of workers. The threshold for reporting obligations should be no higher than 50 workers, but the frequency of reporting for enterprises with more than 50 but fewer than 250 workers could be reduced.~~

Outcome of the vote:

In favour: 82
Against: 127

⁴⁶ The Commission Impact Assessment suggests additional average costs of between a minimum of EUR 379-508 and a maximum of EUR 721-890 for the first year, with costs decreasing for the following years: Impact Assessment, [SWD\(2021\) 41 final, page 59](#). See also Eurofound (2020), Measures to promote gender pay transparency in companies: How much do they cost and what are their benefits and opportunities? Eurofound working paper, WPEF20021.

Abstention: 18

Point 4.3.8

Amend as follows:

4.3.8 ~~A similar concern arises with respect to~~ The EESC also welcomes the limitation of the requirement to conduct a joint assessment to employers with at least 250 workers (Article 9). The costs for producing a joint assessment are estimated to be ~~somewhat~~ slightly higher than for reports⁴⁷, therefore ~~but they still do not~~ justifying a complete exemption for employers with fewer than 250 employees. Special rules for SMEs at national level could be justified.

Outcome of the vote:

In favour: 82
Against: 130
Abstention: 20

Point 4.3.9

Amend as follows:

4.3.9 Member States should be required to provide support, training and technical assistance to employers, particularly SMEs, and to incentivize them to take up voluntary measures of ~~comply with their pay transparency obligations~~, including by developing tools and methodologies for calculating pay gaps. Member States should, wherever possible and appropriate, also make use of the possibility in Article 8(4) to compile information on pay gaps across organisations themselves, particularly in respect of small and medium sized enterprises.

Outcome of the vote:

In favour: 91
Against: 130
Abstention: 15

Point 4.4.4

Amend as follows:

⁴⁷ An average cost of between a minimum of EUR 1,180-1,724 and a maximum of EUR 1,911-2,266, expected to decrease with any subsequent assessments: Impact Assessment, [SWB\(2021\) 41 final, page 61](#).

4.4.4 The EESC welcomes that the proposal increases the possibilities for employees to enforce their rights regarding the principle of equal pay. The ability of trade union and workers' representatives to act on behalf of workers should always be conditional on a clear mandate from the worker and should take place in accordance with national law and practice as well as systems of industrial relations. The right to request information on pay levels, broken down by gender, for categories of workers should not be automatically granted, but should always case-specifically justified and mandated by the worker. The ability of trade union/workers' representatives to act on behalf of workers should be strengthened, including by giving trade union/workers' representatives the right to request information on pay levels, broken down by gender, for categories of workers. Such information would enable trade union/workers' representatives to identify pay discrimination and act to address it, including through collective bargaining.

Outcome of the vote:

In favour: 88
Against: 127
Abstention: 11

New Point 4.5.5

Add new point after 4.5.4:

4.5.5 The EESC underlines that any form of discrimination based on gender should be corrected. There is a concern, however, that the requirement of full compensation, as stated in Article 14, could cause both legal uncertainty and practical difficulties regarding, inter alia, the period for which such compensation would be paid. The specific conditions for claiming and obtaining such compensation or reparation should therefore be specified at national level.

Outcome of the vote:

In favour: 89
Against: 127
Abstention: 20

New Point 4.5.6

Add new point after new 4.5.5:

4.5.6 The EESC notes that the provision in Article 16(2) on additional circumstances in which the burden of proof shifts to the employer, namely where an employer has not complied with the transparency obligations set out in Articles 5-9, may have far-reaching consequences if applied strictly. It should therefore be left to the Member States to determine the appropriate evidential rules when such non-compliance amounts to negligence of the expected duty of care.

Outcome of the vote:

In favour: 91
Against: 145
Abstention: 13

Point 4.7.2

Amend as follows:

4.7.2 Article 27 seeks to ensure that the Directive will not affect the right of the social partners to negotiate, conclude and enforce collective agreements or take collective action in accordance with national law and practice. Their accords should be considered to guarantee the desired protection ~~It should also be further specified that social partners can introduce provisions or apply collective agreements that are more favourable to workers than those laid down in the Directive.~~

Outcome of the vote:

In favour: 95
Against: 134
Abstention: 12

Point 4.7.3

Amend as follows:

4.7.3 The EESC notes that Article 30 allows for implementation of the Directive by the social partners where they jointly request to do so, provided that the results sought by the Directive are guaranteed at all times. This provision ensures that the Directive allows for different means of implementation across different national systems, ~~whilst guaranteeing the same level of protection for workers.~~ In order to make this evidently clear it should be modelled on the directives on agency work and transparent and predictable working conditions which state that such implementation is allowed as long as the overall protection of workers is respected.

Outcome of the vote:

In favour: 86
Against: 142
Abstention: 9

Point 1.1 (linked to point 3.1 New)

Amend as follows:

1.1 The European Economic and Social Committee (EESC) firmly supports the principle of equal pay for men and women for equal work or work of equal value and recognises it as one of the fundamental rights and principles of the European Union. The EESC also supports the Commission's objective to close the gender pay gap and to further promote the principle of equal pay. However, in order to address the gender pay gap, the root causes of the gap must be carefully assessed and correctly identified. The EESC believes that the Commission proposal on the pay transparency directive⁴⁸ fails to properly recognize the principle factors behind the gender pay gap such as horizontal and vertical labour market segregation, following from individual educational and professional choices, full-time versus part-time work as well as unpaid care-related constraints as well the role of tax incentives. Therefore, instead of the proposed pay transparency measures, there are more efficient and proportionate measures than binding EU legislation to address these issues while at the same time ensuring that administrative burdens and costs for companies, in particular SMEs, are not increased. The EESC finds that the proposed directive⁴⁹ fails to fully respect the national wage formation competences and to sufficiently take into account the diverse national social and industrial relations models or judicial systems and legal traditions in the Member States. Furthermore, no consideration is paid to the fact that wage formation is also shaped by the concurrent demand and supply of skills in the labour market as well as available resources. Therefore, the EESC concludes that the Commission proposal on pay transparency is disproportionate and runs counter to the principle of subsidiarity. The Commission should reconsider or rework its proposal and the co-legislators are invited to take into account and address these concerns in the next steps of the legislative process. The EESC welcomes the Commission's proposal, which aims to make it easier for workers to enforce the principle of equal pay where they consider that they have been the victims of pay discrimination, to contribute to greater transparency in pay structures and to strengthen the role of national bodies in enforcing this principle.

Point 1.3 (linked to point 3.3)

Amend as follows:

1.3 However, the EESC considers that the proposal should ~~be strengthened~~ the possibility for Member States to accommodate their industrial relations models in various respects, particularly regarding the criteria to be used to determine the value of work, the coverage of some of the key transparency obligations, and the role of the social partners and collective bargaining in the implementation of the principle of equal pay.

Point 1.5 (linked to point 4.3.6)

48 [\(COM\(2021\) 93 final\).](#)

49 [\(COM\(2021\) 93 final\).](#)

Amend as follows:

1.5 ~~While~~ ~~the~~ ~~proposal~~ ~~is~~ ~~rightly~~ ~~sensitive~~ ~~to~~ ~~concerns~~ ~~about~~ ~~additional~~ ~~burdens~~ ~~on~~ ~~SMEs.~~ ~~The~~ ~~EESC~~ ~~supports~~ ~~the~~ ~~Commission's~~ ~~proposal~~ ~~to~~ ~~exempt~~ ~~does~~ ~~not~~ ~~find~~ ~~a~~ ~~complete~~ ~~exemption~~ ~~of~~ ~~all~~ ~~employers~~ ~~with~~ ~~fewer~~ ~~than~~ ~~250~~ ~~workers~~ ~~yet~~ ~~recognises~~ ~~that~~ ~~justified.~~ ~~Special~~ ~~rules~~ ~~at~~ ~~national~~ ~~level~~ ~~for~~ ~~SMEs~~ ~~might~~ ~~could,~~ ~~however,~~ ~~be~~ ~~appropriate.~~ ~~Therefore,~~ ~~Member~~ ~~States~~ ~~should~~ ~~also~~ ~~be~~ ~~required~~ ~~allowed~~ ~~to~~ ~~establish~~ ~~appropriate~~ ~~thresholds.~~ ~~Member~~ ~~States~~ ~~should~~ ~~also~~ ~~be~~ ~~required~~ ~~to~~ ~~provide~~ ~~support,~~ ~~training~~ ~~and~~ ~~technical~~ ~~assistance~~ ~~to~~ ~~employers,~~ ~~particularly~~ ~~SMEs,~~ ~~with~~ ~~their~~ ~~pay~~ ~~transparency~~ ~~obligations.~~
