



Council of the
European Union

Brussels, 19 December 2022
(OR. en)

**Interinstitutional File:
2021/0050(COD)**

15997/1/22
REV 1

LIMITE

**SOC 689
ANTIDISCRIM 123
GENDER 203
CODEC 2005
IA 221**

REPORT

From:	General Secretariat of the Council
To:	Permanent Representatives Committee (Part 1)
Subject:	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 <i>- Analysis of the final compromise text with a view to agreement</i>

I. INTRODUCTION

1. The Commission submitted its proposal for a "Directive on strengthening 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" on 4 March 2021, responding to the Council's call of June 2019 to develop concrete measures to increase pay transparency.
2. The aim of the Directive is to promote strengthening the transparency of pay systems and enhancing the enforcement of the rights and obligations relating to equal pay.
3. The proposed legal basis is Article 157(3) TFEU, which requires that the European Parliament and the Council act in accordance with the ordinary legislative procedure.

4. The European Economic and Social Committee adopted its opinion at its plenary session on 9 June 2021.
5. The first trilogue took place on 30 June under the French Presidency, followed by four trilogues under the Czech presidency on 6 and 27 October, 30 November and 15 December.
6. In its meeting on 25 November, Coreper approved a package deal of trade-offs the aim of which was to encompass the proposal in its entirety covering all the sensitive issues for both co-legislators¹. In the fourth trilogue on 30 November, the Council and the Parliament could agree on all elements of the package.
7. On 13 December, Coreper approved a second revised mandate in order to enable the Czech Presidency to continue negotiations with the Parliament.
8. At the fifth trilogue, on 15 December 2022, the negotiating teams of the Council and the Parliament reached a provisional agreement, the main elements of which are outlined below.

II. ELEMENTS OF THE PROVISIONAL AGREEMENT

1. Scope and Definitions

Applicants for employment were included in the scope of this Directive for the purposes of Article 5. Two more definitions have been added in Article 3, namely the definition of "*work of equal value*" and "*workers' representatives*". Furthermore, it was clarified that, for the purpose of the Directive, discrimination includes any less favourable treatment of a worker based on sex within the meaning of the Council Directive (EU) 2019/1158 and any discrimination based on a combination of sex and any other ground or grounds of discrimination protected under Directive 2000/43/EC or Directive 2000/78/EC (intersectional discrimination).

¹ Doc. 14805/22

2. Assessing work of equal value

Assessment of whether workers are in a comparable situation with regard to the value of work shall be done based on objective, gender-neutral criteria which include at least skills, effort, responsibility and working conditions. The Commission may update union-wide guidelines on evaluation and classification system, in consultation with the European Institute for Gender Equality (EIGE).

3. Information to applicants for employment

Applicants for employment will have the right to receive from the prospective employer information about the initial pay or its range, including parts of collective agreements, where applicable, that contain such information. Such information will be provided in such a manner as to ensure an informed and transparent negotiation on pay.

4. Right to information

The employer will make a description of the objective and gender neutral criteria which are used to determine pay and career progression easily accessible to its workers. What is more, workers will have the right to request and receive information on their individual pay level and the average pay levels of workers doing the same work as them.

5. Reporting and Joint Pay Assessment

Employers with at least 250 workers will annually provide information on pay and pay gap between male and female worker within their organisation, on pay and pay gap between male and female workers. Employers with 150 up to 249 workers will report every three years. Two years following the expiry of transposition period, the reporting obligations will be extended to employers with at least 100 workers. The Parliament showed greater flexibility than initially required and agreed that employers with 100 to 149 workers have five years after the date of transposition to submit their first report.

As this Directive sets minimum standards, it does not prevent Member States to set lower threshold on the number of workers which triggers the reporting obligations for an employer or to set an increased reporting frequency.

The Joint Pay Assessment will be conducted by employers who fall under reporting obligations and whose report will indicate a pay gap bigger than 5% which cannot be justified by objective, gender neutral criteria. In case where the employer remedies such unjustified difference within six months from the submission of the report, the obligation for a Joint Pay Assessment is lifted.

6. Accessibility for Persons with Disabilities

The Directive includes a horizontal provision ensuring that personal information is shared with workers or applicants for employment in a format which takes into account particular needs of workers with disabilities.

7. Support to SMEs

In order to limit the costs and administrative burden for employers, Member states are to provide technical assistance and training to employers with less than 250 workers and to workers' representatives, to comply with the obligations laid down in this Directive.

8. Role of Social Partners

Where applicable and upon their request, social partners are to be effectively involved, through discussing the rights and obligations under this Directive. Member States may entrust the social partners with the implementation of this Directive, in accordance with national law and/or practice, provided that the results sought by this Directive are guaranteed at all times.

9. Shift of burden of proof

It is up to the employer to prove that there has not been discrimination. The burden of proof rests on the employer also in case where the obligations related to pay transparency have been infringed, unless the employer proves that the infringement was manifestly unintentional and of a minor character.

10. Proof of equal work or work of equal value

The assessment of whether workers are in a comparable situation will not be limited to situations in which female and male workers work for the same employer but it will be extended to a single source establishing the pay conditions. Where no real comparator can be established, it is allowed to use any other evidence to prove alleged pay discrimination, including a comparison of how a worker would be treated in a comparable situation.

11. Legal and judicial costs

The court may order that the losing claimant does not have to bear the costs in cases where the losing claimant had reasonable grounds for bringing the claim to court.

12. Penalties

Penalties for infringements of the rights and obligations relating to the principle of equal pay will be effective, proportionate and dissuasive. They will include fines.

13. Monitoring

The Directive stipulates that monitoring and analysis will be done by a single body. Member States can designate several bodies for the specific purpose of awareness-raising and data collection.

14. Transpositoin

The transposition is set to three years after the entry into force of the Directive.

15. Review

The Commission, after assessing information submitted by the Member States, will submit a report to the European Parliament and the Council on the application of this Directive, including on the thresholds in Articles 8 and 9 as well as the 5% trigger for the Joint Pay Assessment.

III. CONCLUSION

1. The Permanent Representatives Committee is thus invited to:

- endorse the compromise text provisionally agreed in the trilogue, as set out in the Addendum to this Note, and
 - mandate the Presidency to inform the European Parliament that, should the European Parliament adopt its position at first reading, in accordance with Article 294 paragraph 3 of the Treaty, in the form set out in the compromise package contained in the Addendum to this document (subject to revision by the legal linguists of both institutions), the Council would, in accordance with Article 294, paragraph 4 of the Treaty, approve the European Parliament's position and the act shall be adopted in the wording which corresponds to the European Parliament's position.
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