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Delegations will find attached document COM(2021) 93 final.

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EUROPEAN
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COM(2021) 93 final

2021/0050 (COD)

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**

{SEC(2021) 101 final} - {SWD(2021) 41 final} - {SWD(2021) 42 final}

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

• Reasons for the proposal

The right to equal pay between women and men for equal work or work of equal value is one of the EU's founding principles enshrined in the Treaty of Rome. The requirement to ensure equal pay is set out in Directive 2006/54/EC (the 'Recast Directive')¹ as complemented in 2014 by a Commission Recommendation on pay transparency (the '2014 Recommendation')². Despite this legal framework, the effective implementation and enforcement of this principle in practice remains a challenge in the EU. Lack of pay transparency has been identified as one of the key obstacles³. The gender pay gap⁴ in the EU remains around 14%. The pay gap has long-term impact on the quality of women's life, their increased risk of exposure to poverty and on the persisting pension pay gap, which is 33% in the EU⁵. The Covid-19 pandemic and its economic and social consequences makes it even more pressing to tackle this issue, given that the crisis has hit female workers especially hard⁶.

The European Parliament has repeatedly called for more action at EU level to enhance the application of the equal pay provisions. The Council has called for action from both the Member States and the Commission. In June 2019, it asked the Commission to develop concrete measures to improve pay transparency⁷.

The European Pillar of Social Rights includes gender equality and the right to equal pay among its 20 principles⁸. In its 2017-2019 action plan on tackling the gender pay gap⁹, the Commission assessed the need for further legal measures to improve the enforcement of the principle of equal pay and opportunities for improving pay transparency. In her political

¹ Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (OJ L 204, 26.7.2006, p. 23). The Directive consolidated the existing directives on gender equality in the field of employment, incorporating case law of the Court of Justice of the European Union, i.e. Directive 75/117/EEC on equal pay, Directive 86/378/EEC (as amended by Directive 96/97/EC) on equal treatment in occupational social security schemes, Directive 76/207/EEC (amended by Directive 2002/73/EC) on equal treatment of men and women, and Directive 97/80/EC (amended by Directive 98/52/EC) on the burden of proof in cases of discrimination based on sex.

² Commission Recommendation 2014/124/EU of 7 March 2014 on strengthening the principle of equal pay between men and women through transparency (OJ L 69, 8.3.2014, p. 112).

³ See the Commission evaluations and implementation reports respectively [SWD\(2020\)50](#) and [COM\(2013\) 861 final](#).

⁴ The gender pay gap indicator measures the difference between the average gross hourly earnings of male and female paid employees as a percentage of average gross hourly earnings of male paid employees, Eurostat, [sdg_05_20](#).

⁵ <https://ec.europa.eu/eurostat/web/products-eurostat-news/-/DDN-20200207-1>

⁶ <https://www.eurofound.europa.eu/publications/policy-brief/2020/women-and-labour-market-equality-has-covid-19-rolled-back-recent-gains>

⁷ EPSCO Conclusions, June 2019 (doc. 10349/19).

⁸ The Pillar of Social Rights is about delivering new and more effective rights for citizens, built upon 20 key Principles, See more: https://ec.europa.eu/commission/priorities/deeper-and-fairer-economic-and-monetary-union/european-pillar-social-rights/european-pillar-social-rights-20-principles_en

⁹ COM(2017) 678 final, see also the related [implementation report \(COM\(2020\) 101 final\)](#).

guidelines¹⁰, President von der Leyen announced that the Commission would bring forward new binding pay transparency measures. This commitment was reaffirmed in the gender equality strategy 2020-2025¹¹.

This initiative follows the Commission's retrospective evaluation¹² of the relevant legal provisions (the '2020 evaluation') and several other reports on the matter¹³. Those assessments concluded that the right to equal pay is not adequately applied nor enforced in practice and that pay transparency is lacking in many Member States.

Objectives of the proposal

The initiative aims at tackling the persisting inadequate enforcement of the fundamental right to equal pay and ensuring that this right is upheld across the EU, by establishing pay transparency standards to empower workers to claim their right to equal pay.

The proposed directive pursues these objectives by:

- establishing pay transparency within organisations;
- facilitating the application of the key concepts relating to equal pay, including 'pay' and 'work of equal value'; and
- strengthening enforcement mechanisms.

Pay transparency allows workers to detect and prove possible discrimination based on sex. It also shines light on gender bias in pay systems and job grading that do not value the work of women and men equally and in a gender-neutral way, or that fail to value certain occupational skills that are mostly seen as female qualities. Since such bias is often unconscious, pay transparency can help raise awareness of the issue among employers and help them identify discriminatory gender-based pay differences that cannot be explained by valid discretionary factors and are often unintentional. Pay transparency is thus an essential tool for dispelling doubts on equal pay between men and women and for supporting the elimination of gender bias in pay practices. It can also foster change in attitudes towards women's pay by raising awareness and stimulating debate around the reasons for structural gender pay differences. Beyond the simple compliance with the principle of equal pay, it may also constitute a trigger for reviewing gender equality policies more generally at company level, and promote closer cooperation between employers and workers' representatives.

¹⁰ https://ec.europa.eu/commission/sites/beta-political/files/political-guidelines-next-commission_en.pdf

¹¹ COM(2020)152 final.

¹² SWD(2020)50.

¹³ Implementation report on Directive 2006/54/EC (SWD (2013) 512 final); impact assessment accompanying the Pay Transparency Recommendation (SWD (2014) 59 final); report on the implementation of the Commission Recommendation on strengthening the principle of equal pay between men and women through transparency (COM(2017) 671 final).

- **Consistency with existing policy provisions in the policy area**

Building on the Recast Directive and the 2014 Recommendation, this proposal introduces new and more detailed rules to ensure compliance with the principle of equal pay between men and women for equal work or work of equal value.

The European Pillar of Social Rights and its 20 principles are the EU's compass to build a fairer Europe and to promote better living and working conditions for all. On 3 March 2021, the Commission put forward an ambitious Action Plan to ensure its implementation across the EU.

This proposed directive is part of a broader package of measures and initiatives addressing the root causes of the gender pay gap and economic empowerment of women. Pay discrimination and bias in pay structures are only one of the root causes of this gender pay gap of 14%, besides other causes and factors, such as horizontal and vertical labour market segregation, full time versus part-time work as well as unpaid care-related constraints. Even without these causes and factors, there is still a so-called “unexplained” gender pay gap, which accounts for two thirds of the gender pay gap in the EU Member States, and which this initiative aims to tackle. It is also important to note that the employment history, including the gender pay gap, together with the design of the pension system, affects the gender pension gap.

This initiative is part of a multipronged approach, including, among others, the Work-Life Balance Directive¹⁴, sectoral initiatives to fight stereotypes and improve gender balance, and a proposed directive on improving gender balance on the boards of large EU listed companies¹⁵.

The proposed Directive is fully in line with the EU's commitment to the UN 2030 agenda and contributes to the implementation of the UN Sustainable Developments Goals (SDG), in particular SDG 5 on achieving gender equality and empowering all women and girls¹⁶.

- **Consistency with other Union policies**

This proposal is coherent with the initiative aimed at increasing companies' reporting of relevant non-financial information¹⁷. It is consistent with and supported by the EU minimum wage initiative¹⁸ and the upcoming sustainable corporate governance initiative¹⁹.

¹⁴ Directive (EU) 2019/1158 of the European Parliament and of the Council of 20 June 2019 on work-life balance for parents and carers and repealing Council Directive 2010/18/EU (OJ L 188, 12.7.2019, p. 79).

¹⁵ <https://eur-lex.europa.eu/legal-content/GA/TXT/?uri=CELEX:52012PC0614>

¹⁶ https://ec.europa.eu/info/strategy/international-strategies/sustainable-development-goals_en

¹⁷ <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12129-Revision-of-Non-Financial-reporting-directive>

¹⁸ COM(2020) 682 final.

¹⁹ <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12548-Sustainable-corporate-governance>

2. LEGAL BASIS, SUBSIDIARITY AND PROPORTIONALITY

• Legal basis

The proposed directive is based on Article 157(3) of the Treaty on the Functioning of the European Union (TFEU), which provides for the EU to adopt measures to ensure the application of the principle of ‘equal opportunities and equal treatment of men and women in matters of employment and occupation, including the principle of equal pay for equal work or work of equal value’.

Article 157(3) TFEU is the legal basis for the Recast Directive and the 2014 Recommendation. It therefore also serves as the legal basis for the binding pay transparency measures under this initiative, which support the implementation and better enforcement of the principle of equal pay under Article 157 TFEU and the Recast Directive.

• Subsidiarity

The implementation of the EU principle of equal pay was established at EU level already in the 1957 Treaty establishing the European Economic Community (Article 119 EEC Treaty, then Article 141 EC and now Article 157 TFEU), which shows its status as a fundamental EU value. Initially, the principle had a primarily economic function, in that the aim was to avoid distortions of competition. In 1976, however, the Court of Justice of the European Union recognised the social objective of Article 119 EEC and its horizontal direct effect²⁰. Later, the Court added that ‘the economic aim pursued by Article 119 of the Treaty, namely the elimination of distortions of competition between undertakings established in different Member States, is secondary to the social aim pursued by the same provision, which constitutes the expression of a fundamental human right’²¹.

As demonstrated in the 2020 evaluation, comparable efforts throughout the EU to promote equal pay are not likely to materialise without an initiative at EU level. There is a need for a coordinated approach, the lack of which jeopardises the attainment at national level of pay equality between men and women, pursuant to Article 157(1) TFEU.

The fact that national pay transparency measures are fragmented and scarce increases the risk of competition being distorted by having different levels of social standards. There is a risk of businesses competing on an uneven playing field, which would hamper the operation of the internal market. Action at EU level is needed in order to ensure a similar level of protection for workers across the EU and a level playing field for operators in the internal market.

The proposed directive is based on minimal harmonisation of Member States’ systems and allows them to set higher standards should they decide to. It explicitly allows them to entrust implementation to social partners, provided they are at all times able to guarantee delivery of the required outcomes required by this directive. This combined approach, allowing to implement the mix of substantive rights and obligations set out in this Directive by collective agreement, respects different features of national social dialogue and collective bargaining systems and the autonomy of social partners.

²⁰ Case 43/75, *Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena* (Defrenne II) ; Case 43/75, ECLI:EU:C:1976:56, paragraphs 8-10.

²¹ Case 50/96, *Deutsche Telekom AG v Lilli Schröder*, ECLI:EU:C:2000:72, p. 57.

- **Proportionality**

Article 5(4) of the Treaty on European Union provides that ‘[u]nder the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties’.

The 2014 Recommendation has not achieved the objective of more effective implementation of the equal pay principle through pay transparency; this is due to its non-binding nature and resulting limited implementation by Member States²². The Recast Directive should therefore be complemented and supported by the proposed directive. The adoption of binding legal measures is a proportionate response to the clear need for practical action to uphold the equal pay principle and does not go beyond what is necessary to achieve this goal.

The proportionality principle is fully respected as the pay transparency and enforcement mechanisms’ measures are designed in such a way as to achieve the objective of strengthening the application of the principle of equal pay between women and men. On the one hand, the proposal ensures that workers have the right to information on the basis of which they can detect gender-based pay discrimination and defend their right to equal pay and, on the other hand, it takes account of possible costs and burdens for employers, especially micro, small and medium-sized companies.

As indicated in the accompanying impact assessment, the associated costs are expected to be moderate²³. They are justified in the light of the accrued, longer-term benefits: the main benefit is the full protection of a fundamental EU value. In addition, it contributes to the EU’s wider social ambitions as set out in the European Pillar of Social Rights. Moreover, further benefits may come from more secure employment, workforce retention and more productive workers and firms. Therefore, it will have a positive impact on business profitability and the functioning of the internal market.

The proposal leaves the Member States the option of keeping or setting more favourable standards for workers through more proactive provision of pay information and reporting. It also takes account of the diversity of labour market models across the EU and it allows Member States to entrust the social partners with the implementation of the directive.

In the light of the above, since the objective of improving pay transparency cannot be sufficiently achieved by the Member States, but can (by reason of the need to establish common minimum requirements) be better achieved at EU level, the EU may adopt measures, in accordance with the principles of subsidiarity and proportionality (set out in Articles 5(3) and 5(4) TFEU).

²² SWD(2020)50.

²³ The impact assessment’s estimated cost related to the individual right of information was 20 EUR per single request (the total cost per company thus depending on number of requests), while the overall cost for employers’ pay reporting would amount to between a minimum of 379-508 EUR and a maximum of 721-890 EUR per employer depending on the size. Depending on actual pay differences requiring a joint pay assessment, the average cost per employer to carry out such assessment was estimated between a minimum of 1,180-1,724 EUR and a maximum of 1,911 and 2,266 EUR. See SWD (2021) 41, p. 74.

- **Choice of instrument**

A legal instrument in the form of a directive laying down a framework to enhance the application of the equal pay principle through pay transparency and strengthened enforcement mechanisms is considered as the appropriate instrument. It makes it possible to strengthen existing provisions while leaving Member States discretion as to how to implement the new rights and obligations taking into account their national context. This approach is in line with that taken in regard to other matters in EU law on employment and discrimination²⁴.

It was decided not to amend or replace the Recast Directive due to its wider scope to combat sex-based discrimination in employment and occupation; a self-standing chapter concerning pay transparency and related enforcement provisions would not fit the existing structure of that directive and would be disproportionate in relation to the provisions of the Recast Directive regulating other aspects of equal treatment of women and men in employment and occupation matters.

3. RESULTS OF EX-POST EVALUATIONS, STAKEHOLDER CONSULTATIONS AND IMPACT ASSESSMENTS

- **Ex-post evaluations/fitness checks of existing legislation**

The 2020 evaluation of the legal framework on equal pay, in particular the relevant parts of the Recast Directive and the 2014 Recommendation, concluded that the Recast Directive is considered relevant by all stakeholders and that compliance with it in Member States and across sectors is medium to high. However, the effective implementation of the principle of equal pay and the enforcement of this principle in practice remains a challenge. It could be more effective if the legal concepts of ‘pay’ and ‘work of equal value’ were to be clarified on the basis of the case law of the Court of Justice of the European Union. These concepts are not defined uniformly across national legislations and uncertainties of interpretation and application remain. The availability of clear criteria across the EU would contribute to the effective application of the equal pay principle.

As regards efficiency, the 2020 evaluation did not find evidence of significant administrative burden linked to the implementation of the Recast Directive and the 2014 Recommendation. The pay transparency measures proposed in the 2014 Recommendation involved only limited costs for employers. Intangible costs could arise from possible dissatisfaction (and hence lower productivity) among workers who become aware of large wage differences between men and women, while it may also have a positive impact on job satisfaction and worker engagement, increasing employer attractiveness. The lack of pay transparency impaired individuals’ ability to detect and challenge gender pay discrimination. In addition, workers filing a pay discrimination complaint faced several obstacles to access to justice and ran the risk of stigmatisation and retaliation by the employer.

²⁴ For example, Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System (OJ L 159, 28.5.2014, p. 1) and Directive 2014/54/EU of the European Parliament and of the Council of 16 April 2014 on measures facilitating the exercise of rights conferred on workers in the context of freedom of movement for workers (OJ L 128, 30.4.2014, p. 8).

The 2020 evaluation confirmed that the Recast Directive brings clear EU added value, generating action that would otherwise not have been taken to promote the equal pay principle in Member States. However, the EU added value was limited by insufficient and diverse implementation of the directive and confusion (especially in the courts and among employers and workers) around legal concepts central to the implementation of equal pay measures.

- **Stakeholder consultations**

- (a) Advisory Committee on equal opportunities for women and men²⁵

In an opinion adopted in December 2017²⁶, the Advisory Committee pointed to greater transparency on wages as the first step in ensuring the application of the equal pay principle. It highlighted a lack of transparency at three levels:

- companies rarely publish salary scales and the criteria for setting wages remain unclear;
- there is no clear legal enforcement of pay transparency; and
- the monitoring of the application of national measures is incomplete.

The Committee called for action to improve pay transparency by establishing an individual right to request and obtain information on both individual and aggregated pay levels, so as to prevent the creation of adversarial workplaces. This right could also be given to local union representatives or other worker's representatives.

- (b) Public consultations and targeted surveys

A public consultation²⁷ was carried out from 11 January through 5 April 2019, in order to collect information, views and experiences on problems appearing from gaps and weaknesses of national and EU pay transparency measures. It also sought evidence on the extent to which the 2014 Recommendation had helped to reinforce the implementation of the equal pay principle enshrined in Article 157 TFEU and the Recast Directive. Finally, the respondents replied to forward-looking questions on relevant aspects of the transparency initiative, including the need for further EU-level action to address gender-based pay discrimination²⁸.

In response to the subsequent public consultation (5 March to 28 May 2020), national authorities, trade unions, employers' organisations, business associations, non-governmental organisations and private individuals gave their views on gender-based pay discrimination,

²⁵ The Advisory Committee was established under Commission Decision 2008/590/EC setting up an Advisory Committee on Equal Opportunities for Women and Men. It assists the Commission in formulating and implementing EU activities aimed at promoting equal opportunities for women and men. It also fosters ongoing exchanges of relevant experience, policies and practices between the Member States and the various parties involved.

²⁶ https://ec.europa.eu/info/sites/info/files/adopted_opinion_gpg.pdf

²⁷ <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/1839-Evaluation-of-the-provisions-in-the-Directive-2006-54-EC-implementing-the-Treaty-principle-on-equal-pay-/public-consultation>

²⁸ For a summary of the responses, see Annex 2 to the 2020 evaluation report.

pay transparency and challenges relating to the enforcement of the right to equal pay for the same work or work of equal value²⁹.

Finally, the Commission organised three targeted surveys of Member States, social partners and employers³⁰.

- **Impact assessment**

The impact assessment report accompanying this proposal³¹:

- describes the problems arising from the implementation of the current legal framework and its enforcement;
- sets out policy options for addressing these problems; and
- assesses the social and economic impact of the policy options.

The policy options involve creating transparency at the level of individual workers, creating transparency at employers' level and facilitating the implementation and enforcement of the existing legal framework. The options provide differentiated scenarios ranging from maximum intervention (in terms of coverage of the workforce and organisations) to minimum intervention (balancing workers' fundamental right to equal pay with the possible burden and costs of the envisaged measures for employers).

The impact assessment concluded that the combination of measures proposed here was the most proportionate and coherent in the light of the general and specific objectives of this initiative.

The specific national impacts will depend on a number of factors, including the extent of the necessary legislative adjustments and the broader socioeconomic context. Overall, benefits can be expected in terms of greater awareness among employers, of workers being empowered through better enforcement of their right to equal pay for the same work or work of equal value, a reduction of gender bias in pay structures, addressing the systemic undervaluation of women's work, and ultimately a reduction in the share of the gender pay gap possibly due to pay discrimination. Effects at macroeconomic level could also be expected though they cannot be estimated with precision, as the precise size of pay discrimination (and therefore its contribution to the gender pay gap) is not available. Greater pay equality could boost total gross earnings at EU level and reduce market income inequality in all Member States. Furthermore, the 'at risk of poverty' rate is expected to decrease, with the risk of poverty mostly reduced for single parent households (of which women represent 85%). Overall, the initiative could lead to a rise in government revenues from direct taxes and social contributions and a rise in aggregate demand following the increase in total gross earnings.

²⁹ For a summary of the responses, see Annex 2 to the impact assessment report accompanying this proposal.

³⁰ For a summary of the responses, see Annex 2 to the impact assessment report accompanying this proposal.

³¹ SWD (2021) 41.

Eliminating gender bias in employers' pay setting practices will have a positive effect on job satisfaction and worker engagement, both crucial in a post-crisis context. In turn, it may benefit employers through better retention of talent, improved reputation and consequently potential higher profits. Enhanced enforcement measures will improve access to justice and the enforcement of rights granted under EU law. Clearer rules will promote the understanding and awareness of the legal framework and enhance consistency in its application.

The draft impact assessment was endorsed by the Regulatory Scrutiny Board (RSB) on 27 January 2021. The opinions of the Board, the final impact assessment and its executive summary are published together with this proposal.

- **Regulatory fitness and simplification**

The Commission has looked at ways of simplifying and reducing burdens, in particular for smaller companies. The measures in this proposal, which are based on national practices in the EU and elsewhere, are designed to strengthen the right to equal pay while limiting possible costs and burdens and taking account of the difficult economic situation in the EU as a result of the COVID-19 pandemic. The proposal thus takes account of the principle of proportionality. In particular, given the potential effort required to extract and report on pay information, the reporting obligation applies only to employers with at least 250 workers. The joint pay assessment will apply only to those employers in respect to which, following their annual report, there is a strong reason to believe that problems of gender pay inequalities may exist. The analysis shows that the measures proposed in this directive involve modest costs and no evidence was presented of cheaper ways of achieving the same objectives with the same effectiveness.

- **Fundamental rights**

The objectives of this proposal are in line with the Charter of Fundamental Rights of the European Union, in particular Article 23, which provides that 'equality between women and men must be ensured in all areas, including employment, work and pay', and Article 31, which provides that 'every worker has the right to working conditions which respect his or her health, safety and dignity'.

Furthermore, Article 27 of the Charter stipulates that 'workers or their representatives must, at the appropriate levels, be guaranteed information and consultation in good time in the cases and under the conditions provided for by Union law and national laws and practices'.

4. BUDGETARY IMPLICATIONS

The proposal does not require additional resources from the EU budget.

5. OTHER ELEMENTS

- **Monitoring, evaluation and reporting arrangements**

Member States must transpose this directive within 2 years of its adoption and communicate their transposition measures to the Commission. In line with Article 30 of the directive, they may entrust the social partners with the transposition through collective agreements.

To assess how effectively this initiative achieves its general and specific objectives, Member States will report on its application after 8 years. The Commission will adopt a report on that basis.

- **Detailed explanation of the specific provisions of the proposal**

Chapter I – General provisions

Article 1 – Purpose and subject matter

This provision specifies the purpose and subject matter of the Directive. The Directive aims at laying down minimum requirements strengthening the application of the principle of equal pay between men and women and the prohibition of discrimination on grounds of sex through pay transparency and reinforced enforcement mechanisms.

Article 2 – Scope

This provision defines the personal scope of the Directive, i.e. persons entitled to benefit from the rights provided by this Directive.

Article 3 – Definitions

This provision defines the terms and concepts, clarifying upfront how they should be understood in the context of the Directive.

These terms and concepts include the relevant existing definitions of the Recast Directive (pay, direct discrimination, indirect discrimination) but also new concepts specifically related to the right of equal pay, such as pay levels, pay gap, median pay, median pay gap, quartile pay band, and categories of workers.

The concept of ‘pay’ includes salary and any other consideration, whether in cash or in kind, which the workers receive directly or indirectly (‘complementary or variable components’), in respect of their employment from their employer. This includes any additional benefits such as bonuses, overtime compensation, travel facilities (including cars provided by the employer and travel cards), housing allowances, compensation for attending training, payments in case of dismissal, statutory sick pay, statutory required compensation and occupational pensions. It should include all elements of remuneration due by law or collective agreement.

Gender-based pay discrimination may involve an intersection of various axes of discrimination: on the basis of sex on the one hand, and racial or ethnic origin, religion or belief, disability, age or sexual orientation (as protected under Directive 2000/43/EC or Directive 2000/78/EC) on the other hand. A new definition aims at clarifying that, in the context of gender pay discrimination, such combination should be taken into account, thus removing any doubt that may exist in this regard under the existing legal framework. This will ensure that the courts or other competent authorities take due account of any situation of disadvantage arising from intersectional discrimination, in particular for substantive and procedural purposes, including to recognise the existence of discrimination, to decide on the appropriate comparator, to assess the proportionality, and to determine, where relevant, the level of compensation awarded or penalties imposed. One particular case of such intersectionality refers to the situation of migrant women who may risk multiple forms of discrimination based on their sex, racial or ethnic origin, or religion or belief.

Article 4 – Equal work and work of equal value

Respect for the right to equal pay between women and men, enshrined in the Treaty, requires employers to have pay structures ensuring that women and men are paid equally for the same work or work of equal value. In order to allow workers and employers to assess what constitutes work of equal value, this provision requires Member States to establish tools or methodologies to assess and compare the value of work in line with a set of objective criteria which include educational, professional and training requirements, skills, effort and responsibility, work undertaken and the nature of the tasks involved. This provides the basis to assess whether workers are considered to be in a comparable situation performing work of equal value and will help employers to better categorize and remunerate job positions based on objective, gender-neutral criteria.

The availability of clear criteria at national level will help workers to establish a valid comparator and assess whether they are treated less favourably than the comparator performing the same work or work of equal value.

This provision further incorporates two clarifications established in the case law of the Court of Justice of the European Union. Firstly, the Court has clarified³² that in order to determine whether workers are in a comparable situation, the comparison is not necessarily limited to situations in which men and women work for the same employer. Workers may be in a comparable situation even when they do not work for the same employer, whenever the pay conditions can be attributed to a single source setting those conditions (e.g. arising from statutory provisions, collective labour agreements relating to pay applicable to several companies, or when the terms and conditions of employment are laid down centrally for more than one company within a holding corporation or conglomerate). The Court also clarified that the comparison is not limited to workers employed at the same time as the claimant.³³ The incorporation of these clarifications will improve the application in practice of the principle of equal pay.

Furthermore, in case no real-life comparator exists, a comparison with a hypothetical comparator or using other evidence (statistical or other available information) allowing to presume alleged discrimination should be permitted. The possibility to use a hypothetical comparator will allow a worker to show that they have not been treated in the same way as a hypothetical comparator of another sex would have been treated.

Finally, this provision recalls the requirement set out in Article 4, paragraph 2 of the Recast Directive, that where job evaluation and classification systems are used for determining pay, they should be based on the same gender-neutral criteria for both men and women to exclude any discrimination on grounds of sex. This means that the criteria to evaluate the value of a job or position must be described and defined in a way applicable to both men's and women's jobs in an objective and neutral way.

Chapter II – Pay transparency

Article 5 – Pay transparency prior to employment

³² Case C-320/00 *Lawrence*, ECLI:EU:C:2002:498.

³³ Case 129/79 *Macarthys*, ECLI: ECLI:EU:C:1980:103.

So far, no minimum standards on pay transparency prior to employment exist at EU level. This provision requires that employers indicate the initial pay level or its range (based on objective and gender-neutral criteria) to be paid to the future worker for a specific position or job. Such information may be provided in a job vacancy notice or otherwise prior to the job interview without the applicant having to request it (for instance, in the invitation to the interview or directly by the social partners).

In addition, it prohibits employers to ask prospective workers about their pay history of their former employment relationship.

The aim of this provision is to ensure that workers have the necessary information to engage in balanced and fair negotiations regarding their salaries when they enter into an employment relationship. It would also ensure that existing pay discrimination and bias is not perpetuated over time, especially when workers change jobs. This does not limit the employer's, worker's or social partners' bargaining power to negotiate a salary outside the indicated range. This transparency measure would also address intersectional discrimination where non-transparent pay settings allow for discriminatory practices on several discrimination grounds.

Article 6 – Transparency of pay setting and career progression policy

In order to ensure the gender-neutrality of pay setting and career progression, this provision requires employers to make accessible to workers a description of the gender-neutral criteria used to define their pay and career progression. Where appropriate, to avoid unreasonable burden on micro and small enterprises, an employer may have flexibility in the way it complies with this obligation taking into account its size, based on the number of employees.

Article 7 – Right to information

This provision aims at providing workers with the necessary information to assess whether they are paid in a non-discriminatory manner compared to other workers in the same organisation carrying out equal work or work of equal value, and to enforce their right to equal pay if needed.

This provision is based on the existing 2014 Commission's Recommendation on pay transparency. It provides the right to workers to request information from their employer on their individual pay level and on the average pay levels, broken down by sex, for categories of workers doing the same work or work of equal value.

The employer is obliged to inform all workers, on an annual basis, of their right to receive such information and provide the requested information within a reasonable period of time and in accessible formats for workers with disabilities upon their request.

To address possible reprisals or a fear of reprisals by the employer on the part of workers, the provision allows them to request the information through their representatives or through an equality body.

In order to further assist possible victims of gender pay discrimination, the provision prohibits confidentiality clauses insofar as the disclosure of pay information aims at enforcing the right of equal pay between men and women for equal work or work of equal value. On the other

hand, employers may request that the use of any information obtained remains limited to the enforcement of the right to equal pay.

Article 8 – Reporting on pay gap between female and male workers

This provision requires employers with at least 250 workers to make publicly available and accessible certain information such as the pay gap between female and male workers in their organisation, also in complementary or variable components (see explanation of Article 3 above), beyond the ordinary basic salary.

The information provided under letters (a) to (f) in paragraph 1 of this Article is based on information that is readily available within an organisation and gives an overall picture of gender differences in pay in the organisation, e.g. the distribution of workers by gender in the quartile pay bands informs on the proportion of women in the highest/lowest paid positions. The publication of this information allows for a certain comparison between employers, which creates incentives for employers to prevent potential pay gaps, stimulates debate around pay equality and triggers action.

The information referred to under letter (g) in paragraph 1 of this Article, on the pay gap between female and male workers by categories of workers doing the same work or work of equal value, is employer-specific and more sensitive than overall pay gap figures. The categorization of workers performing work of equal value is based on a combination and weight of criteria, which are relevant to the specific employer concerned. The differences in pay by category are therefore not comparable across employers, which is the reason why this information should not be made public. Employers should provide such information to all workers and their representatives, and labour inspectorate and equality bodies should be able to obtain the information upon request. Information on the pay gap between female and male workers by categories of workers will be instrumental to reinforce a self-regulatory approach by employers and enable workers and their representatives to require compliance with the principle of equal pay. This information also serves as a trigger to launch a joint pay assessment as set out in Article 9.

As an alternative measure to pay reporting by employers, especially to limit the possible burden pay reporting may entail, Member States can choose to entrust an existing body to compile the required information on the basis of administrative data, such as data provided by employers to the tax or social security authorities, and make the information available instead of employers. The provision further requires the monitoring body designated pursuant to Article 26 to collect the data received from employers, ensuring wide access allowing a comparison of the data of individual employers, sectors and regions within the Member State concerned.

Based on the information provided, workers and their representatives, labour inspectorates and equality bodies have the right to ask the employer for clarifications and details regarding such information, including explanations concerning any gender pay differences. The employer is required to respond to such requests within a reasonable time by providing a substantiated reply. In case gender pay differences are not justified by objective and gender-neutral factors, the employer is required to remedy the situation in close cooperation with the workers' representatives, the labour inspectorate and/or the equality body.

Article 9 – Joint pay assessment

Where the pay reporting conducted in accordance with Article 8 demonstrates a difference of average pay between female and male workers in the organisation of at least 5 per cent in any category of workers doing the same work or work of equal value, which has not been justified by objective and gender-neutral factors, the employer concerned shall be obliged to carry out

a pay assessment. The employer is required to justify any pay difference in any category of workers, including differences below 5 per cent, by objective and gender-neutral factors and remedy the situation pursuant to Article 8 paragraph 7.

The joint pay assessment should be conducted by employers in cooperation with workers' representatives. If formal workers' representatives are absent in the organisation, the employer should designate one or more workers for this purpose.

The requirement of a joint pay assessment aims at triggering mandatory action on the part of employers to look into their pay setting practices and address any potential gender bias in pay structures infringing the equal pay principle. The cooperation between employers and workers' representatives ensures a supported approach and leads to common action.

Differences in average pay levels between female and male workers in each category of worker doing the same work or work of equal value must be objectively justified, as established jointly by workers' representatives and the employer. Where the differences cannot be justified by objective factors, the employer must take remedial measures; where previous assessments took place, the employer must include a report on the effectiveness of any measures taken pursuant to such assessments. The measures should be taken in close cooperation with workers' representatives, the labour inspectorate, and/or the equality body and should include the establishment of gender-neutral job evaluation and classification to ensure that any direct or indirect pay discrimination on grounds of sex is excluded.

Article 10 – Data protection

The provision prescribes that the potential processing and/or disclosure of personal data pursuant to the pay transparency measures under this Directive should be carried out in accordance with the General Data Protection Regulation (EU) 2016/679 (GDPR)³⁴.

It specifies that any personal data collected by employers pursuant to Articles 7, 8 or 9, shall not be used for any other purpose than to implement the principle of equal pay for the equal work or work of equal value.

An additional safeguard is foreseen in case the disclosure of information pursuant to Articles 7, 8 and 9 would lead to the disclosure, either directly or indirectly, of the pay of an identifiable co-worker. Member States may decide that in such case, accessibility of the information shall be limited to the workers' representatives or to the equality body. These will advise the worker regarding a possible claim, without disclosing actual pay levels of individual workers doing the same work or work of equal value. As certain information about pay levels may already be publicly available, for instance in the public sector, Member States shall be allowed to implement this safeguard in accordance with national practice.

Article 11 – Social dialogue

The involvement of social partners in advancing gender equality in employment relations is important. They are best placed to detect the strengths and weaknesses of action at national, regional, and local level to prevent and combat pay discrimination based on sex. They play a

³⁴ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC, OJ L 119, 4.5.2016, p. 1.

key role, for instance, in setting up gender-neutral job evaluation and classification methods. Therefore, this article requires Member States, without prejudice to the autonomy of social partners and in accordance with national law and practice, to ensure that the rights and obligations under this Directive are discussed with social partners. This could be achieved through different policy measures aimed at developing active social partnership.

Chapter III – Remedies and enforcement

Article 12 – Defence of rights

Building on Article 17 of the Recast Directive, this provision requires Member States to ensure the availability of judicial procedures for the enforcement of the rights and obligations under this Directive. It strengthens access to justice by clarifying that prior recourse to non-judicial proceedings may consist of conciliation or proceedings before an equality body. In any event, access to justice should not be hindered by mandatory intermediate administrative proceedings.

Article 13 – Procedures on behalf or in support of workers

This provision requires that associations, organisations, equality bodies and workers' representatives or other legal entities with an interest in ensuring equality between men and women can engage in judicial or administrative procedure for the enforcement of the obligations under this proposal. Such entities should have the right to act on behalf or in support of a worker, with the worker's approval, in such procedures. Especially equality bodies do not currently have the right to bring claims in court in all the Member States.

In addition, this provision also introduces the right for equality bodies and workers' representatives to bring claims on behalf of more than one worker, with the workers' approval. This aims at overcoming the procedural and cost-related obstacles that victims of gender pay discrimination face when seeking to enforce their right to equal pay and to enforce the transparency measures under this proposal. The possibility to bring collective claims is limited to recognised bodies, i.e. equality bodies and workers' representatives.

Article 14 – Right to compensation

A strengthened requirement to compensation will provide incentives for victims of gender pay discrimination to seek justice and uphold their right to equal pay. This provision requires Member States to ensure that any worker who has suffered harm caused by an infringement of any right or obligation related to the principle of equal pay has the right to claim and to obtain full compensation for the harm caused in a way, which is dissuasive and proportionate to the damage suffered.

Building on Article 18 of the Recast Directive, this provision requires, in line with the Court of Justice's case law, the discriminated worker to be placed in the position in which that person would have been if no discrimination had occurred. This includes the full recovery of back pay and related bonuses or payments in kind, compensation for lost opportunities and moral prejudice. It finally provides that compensation or reparation may not be restricted by setting a prior ceiling.

Article 15 – Other remedies

In order to step up enforcement of the right to equal pay this provision ensures that courts or competent authorities can issue injunction orders establishing an infringement of any right or

obligation relating to the principle of equal pay between men and women for equal work or work of equal value and to stop such infringement. Furthermore, courts or competent authorities must be able to require the defendant to take structural or organisational measures to comply with its obligations relating to equal pay.

In order to ensure swift compliance, the courts or competent authorities may impose a recurring penalty payment.

Article 16 – Shift of burden of proof

As already set out in Article 19 of the Recast Directive, this provision requires that in cases of *prima facie* discrimination, it is for the defendant to prove that there has been no breach of the principle of equal pay. In addition, in legal or administrative proceedings concerning direct or indirect discrimination, and in line with the existing case law³⁵, this Directive strengthens the position of the worker: in case the employer did not comply with the pay transparency obligations set out by the Directive, the burden of proof should be shifted to the defendant without requiring the worker to establish even a *prima facie* case of discrimination.

The strengthening of the shift of the burden of proof will not only facilitate enforcement of their right to equal pay by workers but also provide an additional incentive for employers to comply with their transparency obligations under this Directive.

Article 17 – Access to evidence

This article provides that national courts or other competent authorities be able to order the defendant to disclose relevant evidence lying in their control, during proceedings concerning a gender pay discrimination claim. In particular, national courts shall have the power to order the disclosure of evidence containing confidential information where they consider it relevant to the claim while having effective measures to protect such information. Confidential information could take the form of legal advice given to the management, a protocol of a shareholders' meeting, personal data etc. necessary for the exercise or defence of legal gender pay discrimination claims.

Article 18 – Limitation periods

Short limitation periods and related procedural obstacles were identified as one of the barriers preventing victims of pay discrimination from enforcing their equal pay right. This is why this Directive establishes common standards on limitation periods for bringing gender pay discrimination claims.

It provides that the limitation period for bringing claims under this proposal must be at least three years and should not begin to run before the violation of the equal pay principle or any infringement of the rights or obligations under this Directive has ceased and the claimant knows about the violation. Furthermore, a limitation period should be suspended or interrupted as soon as a claimant undertakes action by lodging a claim or bringing the claim to the attention of the employer, the workers' representatives, labour inspectorate or equality body.

³⁵ Case C-109/88, *Handels- og Kontorfunktionærernes Forbund I Danmark v Dansk Arbejdsgiverforening, acting on behalf of Danfoss*, ECLI:EU:C:1989:383.

Article 19 – Legal and judicial costs

The costs of litigation constitute a key procedural obstacle creating a serious disincentive for victims of gender pay discrimination to claim their right to equal pay, leading to insufficient protection and enforcement of the right to equal pay. In order to ensure a greater access to justice and to incentivise workers to enforce their right, this provision ensures that claimants who prevail on a pay discrimination claim have the right to recover legal and experts' fees and costs from the defendant. It specifies, on the other hand, that defendants who prevail on a pay discrimination claim shall not have a similar right, i.e. to recover any legal and experts' fees and costs from the claimant(s), except where the claim was brought in bad faith, was frivolous or where the non-recovery is considered unreasonable under the specific circumstances of the case (e.g. in the case of micro-enterprises with a weak financial situation).

Article 20 – Penalties

This provision strengthens the existing minimum standards on penalties to apply to any infringement of the rights and obligations relating to equal pay between men and women for the same work or work of equal value by furthering the deterrence effect for employers engaging in illegal behaviour. At the same time, meaningful penalties have a preventive effect in stimulating employers to comply pro-actively with their obligations.

Any penalties set in Member States should include fines, the amount of which must take into account a number of aggravating elements such as the gravity and duration of the infringement as well as any intent or serious negligence on the part of the employer.

This Article also requires Member States to establish specific penalties applied to repeated infringements of the rights and obligations related to the principle of equal pay between men and women for equal work or work of equal value. Such penalties could include, for instance, the revocation of public benefits or the exclusion, for a certain period of time, from any further award of financial or credit inducements.

Article 21 – Equal pay matters in public contracts or concessions

In accordance with Directive 2014/23/EU³⁶, Directive 2014/24/EU³⁷, and Directive 2014/25/EU³⁸, Member States should take appropriate measures to ensure that, in the performance of public contracts or concessions, economic operators (including the

³⁶ Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts, OJ L 94, 28.3.2014, p. 1.

³⁷ Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, OJ L 94, 28.3.2014, p. 65.

³⁸ Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC, OJ L 94, 28.3.2014, p. 243.

subcontracting chain thereafter) comply with the obligations relating to equal pay between men and women. This means that they should in particular ensure that economic operators have pay setting mechanisms that do not lead to a pay gap between female and male workers that cannot be justified by gender-neutral factors in any category of workers carrying out equal work or work of equal value.

Furthermore, in implementation of these obligations, Member States should consider for contracting authorities to introduce, as appropriate, penalties and termination conditions ensuring compliance with the principle of equal pay in the performance of public contracts and concessions. This provision also clarifies that the existing optional exclusion grounds under Directive 2014/23/EU, Directive 2014/24/EU, and Directive 2014/25/EU can be used to exclude an operator violating the principle of equal pay.

The obligations set in this provision fall within applicable obligations in the field of social and labour law set in Articles 18(2) and 71(1) of Directive 2014/24/EU on public procurement, Articles 36(2) and 88(1) of Directive 2014/25/EU on procurement by entities operating in the water, energy, transport and postal services sectors and Articles 30(3) and 42(1) of Directive 2014/23/EU on the award of concession contracts. Clarifying and explicitly referring to the above provisions is intended to support and strengthen their implementation in regard to the right to equal pay.

Article 22 – Victimisation and protection against less favourable treatment

Workers and their representatives should not be treated less favourably after having exercised their right to equal pay or any right provided for in this directive. Member States should introduce, at national level, measures to protect workers, including workers' representatives, against dismissal or any other adverse treatment by employers following a complaint or following legal proceedings aimed at enforcing compliance with the any right or obligation relating to equal pay for the same work or work of equal value.

Article 23 – Relationship with Directive 2006/54/EC

This provision clarifies the relationship with Directive 2006/54/EC in regard to enforcement measures. The enforcement measures of this Directive shall apply to proceedings concerning any right or obligation related to the principle of equal pay between men and women for equal work or work of equal value set out in Article 4 of Directive 2006/54/EC instead of Articles 17, 18, 19, 24 and 25 of that Directive.

CHAPTER IV - Horizontal provisions

Article 24 – Level of protection

This is a standard provision allowing Member States to provide a higher level of protection than that guaranteed by the Directive. It also precludes Member States in reducing the level of protection in regard to the matter of equal pay between men and women for the same work or work of equal value.

Article 25 – Equality bodies

National equality bodies play a crucial role in enforcing anti-discrimination and equality legislation in the European Union. The Recast Directive already provides that Member States should designate a body or bodies for the promotion, analysis, monitoring and support of equal treatment of all persons without discrimination on grounds of sex, including in regard to pay. This provision establishes that national equality bodies should equally be competent with regard to matters falling within the scope of this Directive. It further requires Member States to take active measures to ensure close cooperation and coordination between the national equality bodies and labour inspectorates and to ensure that equality bodies are duly resourced to carry out their functions in regard to the respect for the right to equal pay. In doing so, Member States should consider allocating amounts recovered as fines pursuant to Article 20 to the equality bodies for that purpose.

Article 26 – Monitoring and awareness-raising

In order to ensure proper monitoring of the implementation of the right to equal pay between men and women for the same work or work of equal value, Member States should set up a dedicated monitoring body. This body, which may be part of an existing body pursuing similar objectives, should have specific tasks in relation to the implementation of the pay transparency measures foreseen in this Directive and gather certain data to monitor pay inequalities and the impact of the pay transparency measures. Member States will have to make the necessary arrangements for the proper functioning of such body.

The main functions of the monitoring body should be to aggregate the data and reports produced pursuant to the pay transparency measures foreseen in this Directive and, where relevant, ensure their publication in a user-friendly manner. It should also tackle causes of the pay gap between female and male workers and provide tools to analyse and assess pay inequalities. Moreover, it should be in charge of providing the Commission with annual data on the number and types of pay discrimination cases brought before the courts and complaints brought before the competent public authorities, including equality bodies. Finally, its task should be to raise awareness among public and private undertakings and organisations, social partners and the general public to promote the principle of equal pay for equal work or work of equal value and pay transparency.

Article 27 – Collective bargaining and action

This Directive acknowledges the diversity of labour market models across the EU, including the role of social partners in different Member States with regard to matters related to the subject matter of this Directive. This provision therefore reaffirms that the Directive does not affect in any way the right of social partners to negotiate, conclude and enforce collective agreements, as well as to take collective action.

Article 28 – Statistics

Council Regulation (EC) No 530/1999³⁹ requires Member States to compile four-yearly structural earnings statistics (SES) at micro level that provide harmonized data for the calculation of the gender pay gap. In the four yearly interval between two SES, Member States transmit, on a voluntary basis, annual gender pay gap data broken down by gender,

³⁹ Council Regulation (EC) No 530/1999 of 9 March 1999 concerning structural statistics on earnings and on labour costs (*OJ L 63, 12.3.1999, p. 6*).

economic sector, working time (full-time/part-time), economic control (public/private ownership) and age. Even if pay discrimination is only one component of the gender pay gap, improving the frequency of the available data is needed to allow for an annual monitoring. This provision therefore makes the compilation of annual gender pay gap data mandatory to ensure a complete set of data every year.

Article 29 – Dissemination of information

This provision aims at ensuring awareness-raising in Member States on the rights granted by this Directive, as well as other already existing rights in the same field.

Article 30 – Implementation

This article provides that, taking into account the diversity of labour market models across the EU and the level of involvement of the social partners in some Member States with regard to laying down rules relevant to matters covered by this Directive, Member States may entrust the social partners with the implementation of relevant provisions of the Directive, provided that the results sought by this Directive are guaranteed at all times.

Article 31 – Transposition

This provision establishes the maximum period that Member States have in order to transpose the Directive into national law and communicate the relevant texts to the Commission. This period is set at two years from entry into force of this directive.

Article 32 – Reporting and review

This provision establishes an obligation for Member States to communicate to the Commission all information concerning the application of the Directive at the latest eight years after the entry into force, allowing the Commission to review the application of the Directive.

Article 33 – Entry into force

This is a standard provision stipulating that the Directive is to enter into force on the twentieth day following its publication in the Official Journal.

Article 34 – Addressees

This is a standard provision on addressees, making clear that the Directive is addressed to the Member States.

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**

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 157(3) thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Economic and Social Committee⁴⁰,

Acting in accordance with the ordinary legislative procedure,

Whereas:

- (1) Articles 2 and 3(3) of the Treaty on European Union enshrine the right to equality between women and men as one of the essential values and tasks of the Union.
- (2) Articles 8 and 10 of the Treaty on the Functioning of the European Union ('TFEU') provide that the Union shall aim to eliminate inequalities, to promote equality between men and women and to combat discrimination based on sex in all its activities.
- (3) Article 157(1) of the TFEU obliges each Member State to ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied.
- (4) Article 23 of the Charter of Fundamental Rights of the European Union provides that equality between women and men must be ensured in all areas, including employment, work and pay.
- (5) The European Pillar of Social Rights⁴¹, jointly proclaimed by the European Parliament, the Council, and the Commission, incorporates among its principles

⁴⁰ OJ C , p.

⁴¹ https://ec.europa.eu/commission/priorities/deeper-and-fairer-economic-and-monetary-union/european-pillar-social-rights/european-pillar-social-rights-20-principles_en

equality of treatment and opportunities between women and men, and the right to equal pay for work of equal value.

- (6) Directive 2006/54/EC of the European Parliament and of the Council⁴² provides that for the same work or for work of equal value, direct and indirect discrimination on grounds of sex with regard to all aspects and conditions of remuneration is to be eliminated. In particular, where a job classification system is used for determining pay, it should be based on the same criteria for both men and women and should be drawn up so as to exclude any discrimination on grounds of sex.
- (7) The 2020 evaluation⁴³ found that the implementation of the equal pay principle is hindered by a lack of transparency in pay systems, a lack of legal certainty on the concept of ‘work of equal value’, and by procedural obstacles faced by victims of discrimination. Workers lack the necessary information to make a successful equal pay claim and in particular information about the pay levels for categories of workers who perform the same work or work of equal value. The report found that increased transparency would allow revealing gender bias and discrimination in the pay structures of an undertaking or organisation. It would also enable workers, employers and social partners to take appropriate action to enforce the right to equal pay.
- (8) Following a thorough evaluation of the existing framework on equal pay for equal work or work of equal value⁴⁴ and a wide-ranging and inclusive consultation process⁴⁵, the gender equality strategy 2020-2025⁴⁶ announced binding measures on pay transparency.
- (9) The gender pay gap is caused by various factors, part of which can be attributed to direct and indirect gender pay discrimination. A general lack of transparency about pay levels within organisations maintains a situation where gender-based pay discrimination and bias can go undetected or, where suspected, are difficult to prove. Binding measures are therefore needed to improve pay transparency, encourage organisations to review their pay structures to ensure equal pay for women and men doing the same work or work of equal value, and enable victims of discrimination to enforce their right to equal pay. This needs to be complemented by provisions clarifying existing legal concepts (such as the concept of ‘pay’ and ‘work of equal value’) and measures improving enforcement mechanisms and access to justice.
- (10) The application of the principle of equal pay between men and women should be enhanced by eliminating direct and indirect pay discrimination. This does not preclude

⁴² Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (OJ L 204, 26.7.2006, p. 23).

⁴³ [SWD\(2020\)50](#). See also the 2013 Report on the implementation of Directive 2006/54/EC to the European Parliament and the Council, COM (2013)861 final.

⁴⁴ Evaluation of the relevant provision in Directive 2006/54/EC implementing the Treaty principle on ‘equal pay for equal work or work of equal value’, SWD(2020)50; Report on the implementation of the EU Action Plan 2017-2019 on tackling the gender pay gap, COM(2020)101.

⁴⁵ https://ec.europa.eu/info/law/better-regulation/initiatives/ares-2020-33490_en

⁴⁶ Communication from the Commission ‘A Union of Equality: Gender Equality Strategy 2020-2025’ of 5 March 2020, COM(2020)152 final.

employers to pay differently workers doing the same work or work of equal value on the basis of objective, gender-neutral and bias-free criteria such as performance and competence.

- (11) This Directive should apply to all workers, including part-time workers, fixed-term contract workers or persons with a contract of employment or employment relationship with a temporary agency, who have an employment contract or employment relationship as defined by the law, collective agreements and/or practice in force in each Member State, taking into account the case-law of the Court of Justice of the European Union ('the Court'). In its case law, the Court established criteria for determining the status of a worker⁴⁷. Provided that they fulfil those criteria, domestic workers, on-demand workers, intermittent workers, voucher based-workers, platform workers, trainees and apprentices should fall within the scope of this Directive. The determination of the existence of an employment relationship should be guided by the facts relating to the actual performance of the work and not by the parties' description of the relationship.
- (12) In order to remove obstacles for victims of gender pay discrimination to enforce their right to equal pay and guide employers in ensuring respect of this right, the core concepts related to equal pay, such as 'pay' and 'work of equal value', should be clarified in line with the case law of the Court. This should facilitate the application of these concepts, especially for small and medium-sized enterprises.
- (13) The principle of equal pay for equal work or work of equal value for women and men should be respected with regard to wage or salary and any other consideration, whether in cash or in kind, which the workers receive directly or indirectly, in respect of their employment from their employer. In line with the case-law of the Court⁴⁸, the concept of 'pay' should comprise not only salary, but also additional benefits such as bonuses, overtime compensation, travel facilities (including cars provided by the employer and travel cards), housing allowances, compensation for attending training, payments in case of dismissal, statutory sick pay, statutory required compensation and occupational pensions. It should include all elements of remuneration due by law or collective agreement.
- (14) Article 10 of the Treaty on the Functioning of the European Union provides that, in defining and implementing its policies and activities, the Union shall aim to combat

⁴⁷ Case C-66/85, *Deborah Lawrie-Blum v Land Baden-Württemberg*, ECLI:EU:C:1986:284; Case C-428/09, *Union Syndicale Solidaires Isère v Premier ministre and Others*, ECLI:EU:C:2010:612; Case C-229/14, *Ender Balkaya v Kiesel Abbruch- und Recycling Technik GmbH*, ECLI:EU:C:2015:455; Case C-413/13, *FNV Kunsten Informatie en Media v Staat der Nederlanden*, ECLI:EU:C:2014:2411; Case C-216/15, *Betriebsrat der Ruhrlandklinik gGmbH v Ruhrlandklinik gGmbH*, ECLI:EU:C:2016:883; Case C-658/18, *UX v Governo della Repubblica italiana*, ECLI:EU:C:2020:572.

⁴⁸ For example, Case C-58/81, *Commission of the European Communities v Grand Duchy of Luxembourg*, ECLI:EU:C:1982:215; Case C-171/88 *Rinner-Kulhn v FWW Spezial-Gebaudereinigung GmbH*, ECLI:EU:C:1989:328; Case C-147/02 *Alabaster v Woolwich plc and Secretary of State for Social Security*, ECLI:EU:C:2004:192; Case C-342/93 - *Gillespie and Others* ECLI:EU:C:1996:46; Case C-278/93 *Freers and Speckmann v Deutsche Bundespost*, ECLI:EU:C:1996:83; Case C-12/81, *Eileen Garland v British Rail Engineering Limited*, ECLI:EU:C:1982:44; Case C-360/90, *Arbeiterwohlfahrt der Stadt Berlin e.V. v Monika Bötzel*, ECLI:EU:C:1992:246; Case C-33/89, *Maria Kowalska v Freie und Hansestadt Hamburg*, ECLI:EU:C:1990:265.

discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. Article 4 of Directive 2006/54/EC provides that there shall be no direct or indirect discrimination on grounds of sex, notably in relation to pay. Gender-based pay discrimination where a victim's sex plays a crucial role can take many different forms in practice. It may involve an intersection of various axes of discrimination or inequality where the worker is a member of one or several groups protected against discrimination on the basis of sex, on the one hand, and racial or ethnic origin, religion or belief, disability, age or sexual orientation (as protected under Directive 2000/43/EC or Directive 2000/78/EC), on the other hand. Migrant women are among groups who face such multiple forms of discrimination. This directive should therefore clarify that, in the context of gender-based pay discrimination, such a combination should be taken into account, thus removing any doubt that may exist in this regard under the existing legal framework. This should ensure that the courts or other competent authorities take due account of any situation of disadvantage arising from intersectional discrimination, in particular for substantive and procedural purposes, including to recognise the existence of discrimination, to decide on the appropriate comparator, to assess the proportionality, and to determine, where relevant, the level of compensation awarded or penalties imposed.

- (15) In order to respect the right to equal pay between men and women, employers must have pay setting mechanisms or pay structures in place ensuring that there are no pay differences between male and female workers doing the same work or work of equal value that are not justified by objective and gender-neutral factors. Such pay structures should allow for the comparison of the value of different jobs within the same organisational structure. In line with the case law of the Court, the value of work should be assessed and compared based on objective criteria, such as educational, professional and training requirements, skills, effort and responsibility, work undertaken and the nature of the tasks involved.⁴⁹
- (16) The identification of a valid comparator is an important parameter in determining whether work may be considered of equal value. It enables the worker to show that they were treated less favourably than the comparator of a different sex performing equal work or work of equal value. In situations where no real-life comparator exists, the use of a hypothetical comparator should be allowed, allowing a worker to show that they have not been treated in the same way as a hypothetical comparator of another sex would have been treated. This would lift an important obstacle for potential victims of gender pay discrimination, especially in highly gender-segregated employment markets where a requirement of finding a comparator of the opposite sex makes it almost impossible to bring an equal pay claim. In addition, workers should not be prevented from using other facts from which an alleged discrimination can be presumed, such as statistics or other available information. This would allow gender-based pay inequalities to be more effectively addressed in gender-segregated sectors and professions.

⁴⁹ For example, Case C-400/93, Royal Copenhagen, ECLI:EU:C:1995:155; Case C-309/97, Angestelltenbetriebsrat der Wiener Gebietskrankenkasse, ECLI:EU:C:1999:241; Case C-381/99, Brunnhofer, ECLI:EU:C:2001:358; Case C-427/11, Margaret Kenny and Others v Minister for Justice, Equality and Law Reform and Others [2013] ECLI:EU:C:2013:122, paragraph 28.

- (17) The Court has clarified⁵⁰ that in order to compare whether workers are in a comparable situation, the comparison is not necessarily limited to situations in which men and women work for the same employer. Workers may be in a comparable situation even when they do not work for the same employer whenever the pay conditions can be attributed to a single source setting up those conditions. This may be the case when pay conditions are regulated by statutory provisions or collective labour agreements relating to pay applicable to several companies, or when such conditions are laid down centrally for more than one organisation or business within a holding company or conglomerate. Furthermore, the Court clarified that the comparison is not limited to workers employed at the same time as the claimant.⁵¹
- (18) Member States should develop specific tools and methodologies to support and guide the assessment of what constitutes work of equal value. This should facilitate the application of this concept, especially for small and medium-sized enterprises.
- (19) Job classification and evaluation systems may, if not used in a gender-neutral manner, in particular when they assume traditional gender stereotypes, result in gender-based pay discrimination. In such case, they contribute to and perpetuate the pay gap by evaluating male and female dominated jobs differently in situations where the worth of the work performed is of equal value. Where gender-neutral job evaluation and classification systems are used, however, they are effective in establishing a transparent pay system and are instrumental to ensure that direct or indirect discrimination on grounds of sex is excluded. They detect indirect pay discrimination related to the undervaluation of jobs typically done by women. They do so by measuring and comparing jobs whose content is different but of equal value and so support the principle of work of equal value.
- (20) The lack of information on the envisaged pay range of a job position creates an information asymmetry which limits the bargaining power of applicants. Ensuring transparency should enable prospective workers to make an informed decision about the expected salary without limiting in any way the employer's or worker's bargaining power to negotiate a salary even outside the indicated range. It would also ensure an explicit and non-gender biased basis for pay setting and would disrupt the undervaluation of pay compared to skills and experience. This transparency measure would also address intersectional discrimination where non-transparent pay settings allow for discriminatory practices on several discrimination grounds. The information to be provided to applicants prior to employment, if not published in a job vacancy notice, could be provided to the applicant prior to the job interview by the employer or in a different manner, for instance by the social partners.
- (21) In order to disrupt the perpetuation of a pay gap between female and male workers affecting individual workers over time, employers should not be allowed to enquire about the prior pay history of the applicant for a job.
- (22) Pay transparency measures should protect workers' right to equal pay while limiting as much as possible costs and burden for employers, paying specific attention to micro

⁵⁰ Case C-320/00 *Lawrence*, ECLI:EU:C:2002:498.

⁵¹ Case 129/79 *Macarthys*, ECLI:EU:C:1980:103.

and small enterprises. Where appropriate, measures should be tailored to the size of employers taking into account employers' headcount.

- (23) Employers should make accessible to workers a description of the criteria used to determine pay levels and career progression. The employer should have flexibility in the way it complies with this obligation taking into account the size of the organisation.
- (24) All workers should have the right to obtain information, upon their request, on their pay and on the pay level, broken down by sex, for the category of workers doing the same work or work of equal value. Employers must inform workers of this right on an annual basis. Employers may also, on their own initiative, opt for providing such information without workers needing to request it.
- (25) Employers with at least 250 workers should regularly report on pay, in a suitable and transparent manner, such as including the information in their management report. Companies subject to the requirements of Directive 2013/34/EU of the European Parliament and of the Council⁵² may also choose to report on pay alongside other worker-related matters in their management report.
- (26) Pay reporting should allow employers to evaluate and monitor their pay structures and policies, allowing them to proactively comply with the principle of equal pay. At the same time, the gender-disaggregated data should assist competent public authorities, workers' representatives and other stakeholders to monitor the gender pay gap across sectors (horizontal segregation) and functions (vertical segregation). Employers may wish to accompany the published data by an explanation of any gender pay differences or gaps. In cases where differences in average pay for the same work or work of equal value between female and male workers cannot be justified by objective and gender-neutral factors, the employer should take measures to remove the inequalities.
- (27) To reduce the burden on employers, Member States could decide to gather and interlink the necessary data through their national administrations allowing for a computation of the pay gap between female and male workers per employer. Such data gathering may require interlinking data from several public administrations (such as tax inspectorates and social security offices) and would be possible if administrative data matching employers' (company/organisational level) to workers' (individual level) data, including benefits in cash and in-kind, are available. Member States could decide to gather this information not only for those employers covered by the pay reporting obligation under this Directive, but also with regard to small and medium-sized enterprises. The publication of the required information by Member States should replace the obligation of pay reporting on those employers covered by the administrative data provided that the result intended by the reporting obligation is achieved.

⁵² Directive 2013/34/EU, as amended by Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 as regards disclosure of non-financial and diversity information by certain large undertakings and groups (OJ L 330, 15.11.2014, p. 1).

- (28) In order to make the information on the pay gap between female and male workers at organisational level widely available, Member States should entrust the monitoring body designated pursuant to this Directive to aggregate the data on the pay gap received from employers without putting additional burden on the latter. The monitoring body should make these data public, allowing to compare the data of individual employers, sectors and regions of the Member State concerned.
- (29) Joint pay assessments should trigger the review and revision of pay structures in organisations with at least 250 workers that show pay inequalities. The joint pay assessment should be carried out by employers in cooperation with workers' representatives; if workers' representatives are absent, they should be designated for this purpose. Joint pay assessments should lead to the elimination of gender discrimination in pay.
- (30) Any processing or publication of information under this Directive should comply with Regulation (EU) 2016/679 of the European Parliament and of the Council⁵³. Specific safeguards should be added to prevent the direct or indirect disclosure of information of an identifiable co-worker. On the other hand, workers should not be prevented from voluntarily disclosing their pay for the purpose of enforcing the principle of equal pay between men and women for equal work or work to which equal value is attributed.
- (31) It is important that social partners discuss and give particular attention to matters of equal pay in collective bargaining. 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 should be respected. Therefore, Member States, in accordance with their national system and practices, should take appropriate measures, such as programmes supporting social partners, practical guidance as well as an active participation of the government in a social dialogue at national level. Such measures should encourage social partners to pay due attention to equal pay matters, including discussions at the appropriate level of collective bargaining and the development of gender-neutral job evaluation and classification systems.
- (32) Workers should have the necessary procedures at their disposal to facilitate the exercise of their right to access justice. National legislation making use of conciliation or the intervention of an equality body compulsory or subject to incentives or penalties should not prevent parties from exercising their right of access to court.
- (33) Involving equality bodies, besides other stakeholders, is instrumental in effectively applying the principle of equal pay. The powers and mandates of the national equality bodies should therefore be adequate to fully cover gender pay discrimination, including any pay transparency or any other rights and obligations laid down in this Directive. In order to overcome the procedural and cost-related obstacles that workers who believe to be discriminated against face when they seek to enforce their right to equal pay, equality bodies, as well as associations, organisations, bodies and workers'

⁵³ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) OJ L 119, 4.5.2016, p. 1.

representatives or other legal entities with an interest in ensuring equality between men and women, should be able to represent individuals. They should be able to decide to assist workers on their behalf or in their support, which would allow workers who have suffered discrimination to effectively claim their rights and the principle of equal pay to be enforced.

- (34) Equality bodies and workers' representatives should also be able to represent one or several workers who believe to be discriminated against based on sex in violation of the principle of equal pay for the same work or work of equal value. Bringing claims on behalf of or supporting several workers is a way to facilitate proceedings that would not have been brought otherwise because of procedural and financial barriers or a fear of victimisation and also when workers are facing discrimination on multiple grounds which can be difficult to disentangle. Collective claims have the potential to uncover systemic discrimination and create visibility of equal pay and gender equality in society as a whole. The possibility of collective redress would motivate pro-active compliance with pay transparency measures, creating peer pressure and increasing employers' awareness and willingness to act preventively.
- (35) Member States should ensure the allocation of sufficient resources to equality bodies for the effective and adequate performance of their tasks related to pay discrimination based on sex. Where the tasks are allocated to more than one body, Member States should ensure that they are adequately coordinated.
- (36) Compensation should cover in full the loss and damage sustained as a result of gender pay discrimination⁵⁴. It should include full recovery of back pay and related bonuses or payments in kind, compensation for lost opportunities and moral prejudice. No prior fixed upper limit for such compensation should be allowed.
- (37) In addition to compensation, other remedies should be provided. Courts should, for instance, be able to require an employer to take structural or organisational measures to comply with its obligations regarding equal pay. Such measures may include, for instance, an obligation to review the pay setting mechanism based on a gender-neutral evaluation and classification; to set up an action plan to eliminate the discrepancies discovered and to reduce any unjustified gaps in pay; to provide information and raise workers' awareness about their right to equal pay; to establish a mandatory training for human resources staff on equal pay and gender-neutral job evaluation and classification.
- (38) Following the case law of the Court⁵⁵, Directive 2006/54/EC established provisions to ensure that the burden of proof shifts to the defendant when there is a *prima facie* case of discrimination. Member States should not be prevented from introducing, at any appropriate stage of the proceedings, rules of evidence which are more favourable to workers making a claim. In any legal or administrative proceedings concerning direct or indirect discrimination, in case the employer did not comply with the pay

⁵⁴ Case C-407/14, *María Auxiliadora Arjona Camacho v Securitas Seguridad España SA*, ECLI:EU:C:2015:831, para. 45.

⁵⁵ Case C-109/88, *Handels- og Kontorfunktionærernes Forbund I Danmark v Dansk Arbejdsgiverforening, acting on behalf of Danfoss*, ECLI:EU:C:1989:383.

transparency obligations set out by the Directive, the burden of proof should be automatically shifted to the defendant, irrespective of the worker showing a *prima facie* case of pay discrimination.

- (39) Although it is necessary only to establish a presumption of discrimination before the burden of proof shifts to the employer, it is not always easy for victims and courts to know how to establish even that presumption. Pay transparency measures have the potential to support the use of the reversal of the burden of proof, by helping workers determine the average pay levels for women and men performing the same work or work of equal value. Enabling workers to provide *prima facie* evidence which allows discrimination to be presumed would swiftly trigger the reverse burden of proof to the benefit of the worker.
- (40) In accordance with the case-law of the Court, national rules on time limits for the enforcement of rights under this Directive should be such that they cannot be regarded as capable of rendering virtually impossible or excessively difficult the exercise of those rights. Limitation periods create specific obstacles for victims of gender pay discrimination. For that purpose, common minimum standards should be established. Those standards should determine when the limitation period begins to run, the duration thereof and the circumstances under which it is interrupted or suspended and provide that the limitation period for bringing claims is at least three years.
- (41) Litigation costs create a serious disincentive for victims of gender pay discrimination to claim their right to equal pay, leading to insufficient protection and enforcement of the right to equal pay. In order to remove this strong procedural obstacle to justice, successful claimants should be allowed to recover their procedural costs from the defendant. On the other hand, claimants should not be liable for successful defendant's proceedings costs unless the claim was brought in bad faith, was clearly frivolous or if the non-recovery by the defendant would be considered unreasonable by the courts or other competent authorities under the specific circumstances of the case, for instance having regard to the financial situation of micro-enterprises.
- (42) Member States should provide for effective, proportionate and dissuasive penalties in the event of infringements of national provisions adopted pursuant to this Directive or national provisions that are already in force on the date of entry into force of this Directive and that relate to the right to equal pay between men and women for the same work or work of equal value. Such penalties should include fines, which should be set at a minimum level having due regard to the gravity and duration of the infringement, to any possible intent to discriminate or serious negligence, and to any other aggravating or mitigating factors that may apply in the circumstances of the case, for instance, where pay discrimination based on sex intersects with other grounds of discrimination. Member States should consider allocating amounts recovered as fines to the equality bodies for the purpose of effectively carrying out their functions in regard to the enforcement of the right to equal pay, including to bring pay discrimination claims or assist and support victims in bringing such claims.
- (43) Member States should establish specific penalties for repeated infringements of any right or obligation relating to equal pay between men and women for the same work or work of equal value, to reflect the severity of the act and further deter such infringements. Such penalties may include different types of financial disincentives

such as the revocation of public benefits or the exclusion, for a certain period of time, from any further award of financial inducements or from any public tender procedure.

- (44) Obligations on employers stemming from this Directive are part of the applicable obligations in the fields of environmental, social and labour law whose compliance Member States have to ensure under Directive 2014/23/EU of the European Parliament and of the Council⁵⁶, Directive 2014/24/EU of the European Parliament and of the Council⁵⁷, Directive 2014/25/EU of the European Parliament and of the Council⁵⁸ in regard to participation in public procurement procedures. In order to comply with these obligations as far as the right to equal pay is concerned, Member States should in particular ensure that economic operators, in the performance of a public contract or concession, have pay setting mechanisms that do not lead to a pay gap between female and male workers that cannot be justified by gender-neutral factors in any category of workers carrying out equal work or work of equal value. In addition, Member States should consider for contracting authorities to introduce, as appropriate, penalties and termination conditions ensuring compliance with the principle of equal pay in the performance of public contracts and concessions. They may also take into account non-compliance with the principle of equal pay by the bidder or one of his subcontractors when considering the application of exclusion grounds or a decision not to award a contract to the tenderer submitting the most economically advantageous tender.
- (45) The effective implementation of the right to equal pay requires adequate judicial and administrative protection against any adverse treatment as a reaction to an attempt to exercise workers' rights relating to equal pay between men and women, to any complaint to the employer or to any legal or administrative proceedings aimed at enforcing compliance with the right to equal pay.
- (46) In order to improve the enforcement of the equal pay principle, this Directive should strengthen the existing enforcement tools and procedures in regard to the rights and obligations laid down in this Directive and the equal pay provisions set out in Directive 2006/54/EC.
- (47) This Directive lays down minimum requirements, thus respecting the Member States' prerogative to introduce and maintain more favourable provisions. Rights acquired under the existing legal framework should continue to apply, unless more favourable provisions are introduced by this Directive. The implementation of this Directive cannot be used to reduce existing rights set out in existing Union or national law in this field, nor can it constitute valid grounds for reducing the rights of workers in regard to equal pay between men and women for the same work or work of equal value.

⁵⁶ Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts, OJ L 94, 28.3.2014, p. 1.

⁵⁷ Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, OJ L 94, 28.3.2014, p. 65.

⁵⁸ Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC, OJ L 94, 28.3.2014, p. 243.

- (48) In order to ensure proper monitoring of the implementation of the right to equal pay between men and women for the same work or work of equal value, Member States should set up or designate a dedicated monitoring body. This body, which may be part of an existing body pursuing similar objectives, should have specific tasks in relation to the implementation of the pay transparency measures foreseen in this Directive and gather certain data to monitor pay inequalities and the impact of the pay transparency measures.
- (49) Compiling wage statistics broken down by gender and providing the Commission (Eurostat) with accurate and complete statistics is essential for analysing and monitoring changes in the gender pay gap at Union level. Council Regulation (EC) No 530/1999⁵⁹ requires Member States to compile four-yearly structural earnings statistics at micro level that provide harmonized data for the calculation of the gender pay gap. Annual high-quality statistics could increase transparency and enhance monitoring and awareness of gender pay inequality. The availability and comparability of such data is instrumental for assessing developments both at national level and throughout the Union.
- (50) This Directive aims at a better and more effective implementation of the principle of equal pay for equal work or work to which equal value is attributed between men and women through the establishment of common minimum requirements which should apply to all undertakings and organisations across the European Union. Since this objective cannot be sufficiently achieved by the Member States and should therefore be achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality as set out in that Article, this Directive, which limits itself to setting minimum standards, does not go beyond what is necessary in order to achieve that objective.
- (51) The role of social partners is of key importance in designing the way pay transparency measures are implemented in Member States, especially in those with high collective bargaining coverage. Member States should therefore have the possibility to entrust the social partners with the implementation of all or part of this Directive, provided that they take all the necessary steps to ensure that the results sought by this Directive are guaranteed at all times.
- (52) In implementing this Directive Member States should avoid imposing administrative, financial and legal constraints in a way which would hold back the creation and development of micro, small and medium-sized enterprises. Member States are therefore invited to assess the impact of their transposition act, on small and medium-sized enterprises in order to ensure that they are not disproportionately affected, giving specific attention to micro-enterprises, to alleviate the administrative burden, and to publish the results of such assessments.

⁵⁹ Council Regulation (EC) No 530/1999 of 9 March 1999 concerning structural statistics on earnings and on labour costs (OJ L 63, 12.3.1999, p. 6).

- (53) The European Data Protection Supervisor was consulted in accordance with Article 42 of Regulation (EU) 2018/1725⁶⁰ and delivered an opinion on **XX XXXX**.

HAVE ADOPTED THIS DIRECTIVE:

CHAPTER I

General provisions

Article 1

Subject matter

This Directive lays down minimum requirements to strengthen the application of the principle of equal pay between men and women for equal work or work of equal value enshrined in Article 157 TFEU and the prohibition of discrimination laid down in Article 4 of Directive 2006/54/EC, in particular through pay transparency and reinforced enforcement mechanisms.

Article 2

Scope

1. This Directive applies to employers in the public and private sectors.
2. This Directive applies to all workers who have an employment contract or employment relationship as 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.

Article 3

Definitions

1. For the purposes of this Directive, the following definitions apply:
 - (a) ‘pay’ means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind which the worker receives directly or indirectly (‘complementary or variable components’), in respect of his/her employment from his/her employer;
 - (b) ‘pay level’ means gross annual pay and the corresponding gross hourly pay;

⁶⁰ Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC (OJ L 295, 21.11.2018, p. 39).

- (c) ‘pay gap’ means the difference of average pay levels between female and male workers of the employer, expressed as percentage of the average pay level of male workers;
- (d) ‘median pay level’ means the pay of the worker that would have half of the workers earn more and half less than they do;
- (e) ‘median pay gap’ means the difference between the median pay level of female and median pay level of male workers expressed as percentage of the median pay level of male workers;
- (f) ‘quartile pay band’ means each of four equal groups of workers into which they are divided according to their pay levels – from the lowest to the highest;
- (g) ‘category of workers’ means workers performing the same work or work of equal value grouped by the workers’ employer based on criteria as laid down in Article 4 of this Directive and specified by the employer concerned;
- (h) ‘direct discrimination’ means the situation where one person is treated less favourably on grounds of sex than another person is, has been or would be treated in a comparable situation;
- (i) ‘indirect discrimination’ means the situation where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary;
- (j) ‘equality body’ means the body or bodies designated pursuant to Article 20 of Directive 2006/54/EC, for the promotion, analysis, monitoring and support of equal treatment of all persons without discrimination on grounds of sex;
- (k) ‘labour inspectorate’ means the national body or bodies that have an inspection function on the labour market in a Member State.

2. For the purposes of this Directive, discrimination includes:

- (a) harassment and sexual harassment, within the meaning of Article 2(2) of Directive 2006/54/EC, as well as any less favourable treatment based on a person's rejection of or submission to such conduct, when such harassment or treatment relates to or results from the exercise of the rights provided for in this Directive;
- (b) instruction to discriminate against persons on grounds of sex;

- (c) any less favourable treatment of a woman related to pregnancy or maternity leave within the meaning of Council Directive 92/85/EEC⁶¹.
3. Pay discrimination under this Directive includes 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.

Article 4

Equal work and work of equal value

1. Member States shall take the necessary measures to ensure that employers have pay structures in place ensuring that women and men are paid equally for the same work or work of equal value.
2. Member States shall take the necessary measures ensuring that tools or methodologies are established to assess and compare the value of work in line with the criteria set out in this Article. These tools or methodologies may include gender-neutral job evaluation and classification systems.
3. The tools or methodologies shall allow assessing, in regard to the value of work, whether workers are in a comparable situation, on the basis of objective criteria which shall include educational, professional and training requirements, skills, effort and responsibility, work undertaken and the nature of the tasks involved. They shall not contain or be based on criteria which are based, whether directly or indirectly, on workers' sex.
4. Whenever differences in pay can be attributed to a single source establishing the pay conditions, the assessment whether workers are carrying out the same work or work of equal value shall not be limited to situations in which female and male workers work for the same employer but may be extended to that single source. The assessment shall also not be limited to workers employed at the same time as the worker concerned. Where no real comparator can be established, a comparison with a hypothetical comparator or the use of other evidence allowing to presume alleged discrimination shall be permitted.
5. Where a job evaluation and classification system is used for determining pay, it shall be based on the same criteria for both men and women and drawn up so as to exclude any discrimination on grounds of sex.

CHAPTER II

Pay transparency

⁶¹ Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC) (OJ L 348, 28.11.1992, p. 1).

Article 5

Pay transparency prior to employment

1. Applicants for employment shall have the right to receive from the prospective employer information about the initial pay level or its range, based on objective, gender-neutral criteria, to be attributed for the position concerned. Such information shall be indicated in a published job vacancy notice or otherwise provided to the applicant prior to the job interview without the applicant having to request it.
2. An employer shall not, orally or in writing, personally or through a representative, ask applicants about their pay history during their previous employment relationships.

Article 6

Transparency of pay setting and career progression policy

The employer shall make easily accessible to its workers a description of the criteria used to determine pay levels and career progression for workers. These criteria shall be gender-neutral.

Article 7

Right to information

1. Workers shall have the right to receive information on their individual pay level and the average pay levels, broken down by sex, for categories of workers doing the same work as them or work of equal value to theirs, in accordance with paragraphs 3 and 4.
2. Employers shall inform all workers, on an annual basis, of their right to receive the information referred to in paragraph 1.
3. Employers shall provide the information referred to in paragraph 1 within a reasonable period of time upon a worker's request. The information shall be provided in accessible formats for workers with disabilities upon their request.
4. Workers shall have the possibility to request the information referred to in paragraph 1 through their representatives or an equality body.
5. Workers shall not be prevented from disclosing their pay for the purpose of enforcing the principle of equal pay between men and women for equal work or work of equal value.
6. Employers may require that any worker having obtained information pursuant to this Article shall not use that information 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.

Article 8

Reporting on pay gap between female and male workers

1. Employers with at least 250 workers shall provide the following information concerning their organisation, in accordance with paragraphs 2, 3, and 5:
 - (a) the pay gap between all female and male workers;
 - (b) the pay gap between all female and male workers in complementary or variable components;
 - (c) the median pay gap between all female and male workers;
 - (d) the median pay gap between all female and male workers in complementary or variable components;
 - (e) the proportion of female and male workers receiving complementary or variable components;
 - (f) the proportion of female and male workers in each quartile pay band;
 - (g) the pay gap between female and male workers by categories of workers broken down by ordinary basic salary and complementary or variable components.
2. The accuracy of the information shall be confirmed by the employer's management.
3. The employer shall publish the information referred to in paragraph 1, points (a) to (f) on an annual basis in a user-friendly way on its website or shall otherwise make it publicly available. The information from the previous four years, if available, shall also be accessible upon request. In addition, the employer shall share this information with the monitoring body referred to in paragraph 6.
4. Member States may decide to compile the information set out in paragraph 1, points (a) to (f) themselves, on the basis of administrative data such as data provided by employers to the tax or social security authorities. This information shall be made public in accordance with paragraph 6.
5. The employer shall provide the information referred to in paragraph 1, point (g) to all workers and their representatives, as well as to the monitoring body referred to in paragraph 6. It shall provide it to the labour inspectorate and the equality body upon their request. The information from the previous four years, if available, shall also be provided upon request.
6. Member States shall entrust the monitoring body designated pursuant to Article 26 to collect the data received from employers pursuant to paragraph 1, points (a) to (f) and to ensure that this data is public and allows a comparison between employers, sectors and regions of the Member State concerned in a user-friendly way.
7. Workers and their representatives, labour inspectorates and equality bodies shall have the right to ask the employer for additional clarifications and details regarding any of the data provided, including explanations concerning any gender pay differences. The employer shall respond to such request within a reasonable time by

providing a substantiated reply. Where gender pay differences are not justified by objective and gender-neutral factors, the employer shall remedy the situation in close cooperation with the workers' representatives, the labour inspectorate and/or the equality body.

Article 9

Joint pay assessment

1. Member States shall take appropriate measures to ensure that employers with at least 250 workers conduct, in cooperation with their workers' representatives, a joint pay assessment where both of the following conditions are met:
 - (a) the pay reporting conducted in accordance with Article 8 demonstrates a difference of average pay level between female and male workers of at least 5 per cent in any category of workers;
 - (b) the employer has not justified such difference in average pay level by objective and gender-neutral factors.
2. The joint pay assessment shall include the following:
 - (a) an analysis of the proportion of female and male workers in each category of workers;
 - (b) detailed information on average female and male workers' pay levels and complementary or variable components for each category of workers;
 - (c) identification of any differences in pay levels between female and male workers in each category of workers;
 - (d) the reasons for such differences in pay levels and objective, gender-neutral justifications, if any, as established jointly by workers' representatives and the employer;
 - (e) measures to address such differences if they are not justified on the basis of objective and gender-neutral criteria;
 - (f) a report on the effectiveness of any measures mentioned in previous joint pay assessments.
3. Employers shall make the joint pay assessments available to workers, workers' representatives, the monitoring body designated pursuant to Article 26, the equality body and the labour inspectorate.
4. If the joint pay assessment reveals differences in average pay for equal work or work of equal value between female and male workers which cannot be justified by objective and gender-neutral criteria, the employer shall remedy the situation, in close cooperation with the workers' representatives, labour inspectorate, and/or equality body. Such action shall include the establishment of gender-neutral job evaluation and classification to ensure that any direct or indirect pay discrimination on grounds of sex is excluded.

Article 10

Data protection

1. To the extent that any information provided pursuant to measures taken under Articles 7, 8, and 9 involves the processing of personal data, it shall be provided in accordance with Regulation (EU) 2016/679.
2. Any personal data collected by employers pursuant to Articles 7, 8 or 9, shall not be used for any other purpose than to implement the principle of equal pay for equal work or work of equal value.
3. Member States may decide that, where the disclosure of information pursuant to Articles 7, 8 and 9 would lead to the disclosure, either directly or indirectly, of the pay of an identifiable co-worker, only the workers' representatives or the equality body shall have access to that information. The representatives or equality body shall advise workers regarding a possible claim under this Directive without disclosing actual pay levels of individual workers doing the same work or work of equal value. The monitoring body referred to in Article 26 shall have access to the information without restriction.

Article 11

Social dialogue

Without prejudice to the autonomy of social partners and in accordance with national law and practice, Member States shall ensure that the rights and obligations under this Directive are discussed with social partners.

CHAPTER III

Remedies and enforcement

Article 12

Defence of rights

Member States shall ensure that, after possible recourse to conciliation, judicial procedures for the enforcement of rights and obligations related to the principle of equal pay between men and women for equal work or work of equal value are available to all workers who consider themselves wronged by a failure to apply the principle of equal pay for equal work or work of equal value. Such procedures shall be easily accessible to workers and to those who act on their behalf, even after the labour relationship in which the discrimination is alleged to have occurred has ended.

Article 13

Procedures on behalf or in support of workers

1. Member States shall ensure that associations, organisations, equality bodies and workers' representatives or other legal entities which have, in accordance with the criteria laid down by national law, a legitimate interest in ensuring equality between

men and women, may engage in any judicial or administrative procedure to enforce any of the rights or obligations related to the principle of equal pay between men and women for equal work or work of equal value. They may act on behalf or in support of a worker who is victim of an infringement of any right or obligation related to the principle of equal pay between men and women for equal work or work of equal value, with the latter's approval.

2. Equality bodies and workers' representatives shall also have the right to act on behalf or in support of several workers, with the latter's approval.

Article 14

Right to compensation

1. Member States shall ensure that any worker who has suffered harm as a result of an infringement of any right or obligation related to the principle of equal pay between men and women for equal work or work of equal value shall have the right to claim and to obtain full compensation or reparation, as determined by the Member State, for that harm.
2. The compensation or reparation referred to in paragraph 1 shall ensure real and effective compensation for the loss and damage sustained, in a way which is dissuasive and proportionate to the damage suffered.
3. The compensation shall place the worker who has suffered harm in the position in which that person would have been if he or she had not been discriminated based on sex or if no infringement of any of the rights or obligations relating to equal pay between men and women for equal work or work of equal value had occurred. It shall include full recovery of back pay and related bonuses or payments in kind, compensation for lost opportunities and moral prejudice. It shall also include the right to interest on arrears.
4. The compensation or reparation may not be restricted by the fixing of a prior upper limit.

Article 15

Other remedies

Member States shall ensure that, in legal proceedings aimed at ensuring the enforcement of any right or obligation related to the principle of equal pay between men and women for equal work or work of equal value, the courts or other competent authorities may order, at the request of the claimant and at the expense of the defendant:

- (a) an injunction order establishing an infringement of any right or obligation related to the principle of equal pay between men and women for equal work or work of equal value and stopping the infringement;
- (b) an injunction order ordering the defendant to take structural or organisational measures to comply with any right or obligation related to the principle of

equal pay between men and women for equal work or work of equal value or to stop an infringement thereof.

Non-compliance with any of these orders shall, where appropriate, be subject to a recurring penalty payment, with a view to ensuring compliance.

Article 16

Shift of burden of proof

1. Member States shall take the appropriate measures, in accordance with their national judicial systems, to ensure that, when workers who consider themselves wronged because the principle of equal pay has not been applied to them, establish before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the defendant to prove that there has been no direct or indirect discrimination in relation to pay.
2. Member States shall ensure that, in any legal or administrative proceedings concerning direct or indirect discrimination, where an employer failed to comply with any of the rights or obligations related to pay transparency set out in Articles 5 through 9 of this Directive, it shall be for the employer to prove that there has been no such discrimination.
3. The claimant shall benefit from any doubt that might remain.
4. This Directive does not prevent Member States from introducing evidential rules which are more favourable to the claimant in proceedings instituted to enforce any of the rights or obligations relating to equal pay between men and women for equal work or work of equal value.
5. Member States need not apply paragraph 1 to proceedings in which it is for the court or competent body to investigate the facts of the case.
6. This Article shall not apply to criminal procedures, unless otherwise provided by national law.

Article 17

Access to evidence

1. Member States shall ensure that in proceedings concerning a claim regarding equal pay between men and women for equal work or work of equal value, national courts or competent authorities are able to order the defendant to disclose any relevant evidence which lies in their control.
2. Member States shall ensure that national courts have the power to order the disclosure of evidence containing confidential information where they consider it relevant to the claim. They shall ensure that, when ordering the disclosure of such information, national courts have at their disposal effective measures to protect such information.

3. This Article shall not prevent Member States from maintaining or introducing rules which are more favourable to claimants.

Article 18

Limitation periods

1. Member States shall lay down rules applicable to limitation periods for bringing claims regarding equal pay between men and women for equal work or work of equal value. Those rules shall determine when the limitation period begins to run, the duration thereof and the circumstances under which it is interrupted or suspended.
2. Limitation periods shall not begin to run before the violation of the principle of equal pay between men and women for equal work or for work of equal value or infringement of the rights or obligations under this Directive has ceased and the claimant knows, or can reasonably be expected to know, about the violation or infringement.
3. Member States shall ensure that the limitation periods for bringing claims are set at three years at least.
4. Member States shall ensure that a limitation period is suspended or, depending on national law, interrupted, as soon as a claimant undertakes action by lodging a claim or bringing the claim to the attention of the employer, workers' representatives, labour inspectorate or equality body.

Article 19

Legal and judicial costs

Claimants who prevail on a pay discrimination claim shall have the right to recover from the defendant, in addition to any other damages, reasonable legal and experts' fees and costs. Defendants who prevail on a pay discrimination claim shall not have the right to recover any legal and experts' fees from the claimant(s) and costs, unless the claim was brought in bad faith, was clearly frivolous or where such non-recovery is considered manifestly unreasonable under the specific circumstances of the case.

Article 20

Penalties

1. Member States shall lay down the rules on penalties applicable to infringements of national provisions adopted pursuant to this Directive and shall take all measures necessary to ensure that they are implemented. The penalties provided for shall be effective, proportionate and dissuasive. Member States shall, without delay, notify the Commission of those rules and of those measures and of any subsequent amendment affecting them.
2. Member States shall ensure that fines are applied to infringements of the rights and obligations relating to equal pay for the same work or work of equal value. They

shall set a minimum level for such fines ensuring real deterrent effect. The level of the fines shall take into account:

- (a) the gravity and duration of the infringement;
 - (b) any intent or serious negligence on the part of the employer;
 - (c) any other aggravating or mitigating factor applicable to the circumstances of the case.
3. Member States shall establish specific penalties to be imposed in case of repeated infringements of the rights and obligations relating to equal pay between men and women, such as the revocation of public benefits or the exclusion, for a certain period of time, from any award of financial inducements.
4. Member States shall take all measures necessary to ensure that the penalties provided for are effectively applied in practice.

Article 21

Equal pay matters in public contracts and concessions

1. The appropriate measures that the Member States take in accordance with Article 30(3) of Directive 2014/23/EU, Article 18(2) of Directive 2014/24/EU and Article 36(2) of Directive 2014/25/EU, shall include measures to ensure that, in the performance of public contracts or concessions, economic operators comply with the obligations relating to equal pay between men and women for equal work or work of equal value.
2. Member States shall consider for contracting authorities to introduce, as appropriate, penalties and termination conditions ensuring compliance with the principle of equal pay in the performance of public contracts and concessions. Where Member States' authorities act in accordance with Article 38(7)(a) of Directive 2014/23/EU, Article 57(4)(a) of Directive 2014/24/EU, or Article 80(1) of Directive 2014/25/EU in conjunction with Article 57(4)(a) of Directive 2014/24/EU, they may exclude or may be required by Member States to exclude any economic operator from participation in a public procurement procedure where they can demonstrate by any appropriate means the infringement of the obligations referred to in paragraph 1, related either to a failure to comply with pay transparency obligations or a pay gap of more than 5 per cent in any category of workers which is not justified by the employer on the basis of objective, gender-neutral criteria. This is without prejudice to any other rights or obligations set out in Directive 2014/23/EU, Directive 2014/24/EU or Directive 2014/25/EU.

Article 22

Victimisation and protection against less favourable treatment

1. Workers and their representatives shall not be treated less favourably on the ground that they have exercised their rights relating to equal pay between men and women.

2. Member States shall introduce in their national legal systems such measures as necessary to protect workers, including those who are workers' representatives as provided for by national law and/or practice, against dismissal or other adverse treatment by the employer as a reaction to a complaint within the undertaking or to any legal proceedings aimed at enforcing compliance with any rights or obligations relating to equal pay between men and women.

Article 23

Relationship with Directive 2006/54/EC

Chapter III of this Directive shall apply to proceedings concerning any right or obligation related to the principle of equal pay between men and women for equal work or work of equal value set out in Article 4 of Directive 2006/54/EC.

CHAPTER IV

Horizontal provisions

Article 24

Level of protection

1. Member States may introduce or maintain provisions that are more favourable to workers than those laid down in this Directive.
2. Implementation of this Directive shall under no circumstances constitute grounds for reducing the level of protection in the fields covered by this Directive.

Article 25

Equality bodies

1. Without prejudice to the competence of labour inspectorates or other bodies that enforce the rights of workers, including the social partners, national equality bodies established in accordance with Directive 2006/54/EC shall be competent with regard to matters falling within the scope of this Directive.
2. Member States shall take active measures to ensure close cooperation and coordination between the national equality bodies and other national bodies that have an inspection function in the labour market.
3. Member States shall provide equality bodies with the adequate resources necessary for effectively carrying out their functions with regard to the respect for the right to equal pay between men and women for the same work or work of equal value. Member States shall consider allocating amounts recovered as fines pursuant to Article 20 to the equality bodies for that purpose.

Article 26

Monitoring and awareness-raising

1. Member States shall ensure the consistent monitoring of the implementation of the principle of equal pay between women and men for equal work or for work of equal value and the enforcement of all available remedies.
2. Each Member State shall designate a body ('monitoring body') for the monitoring and support of the implementation of national legal provisions implementing this Directive and shall make the necessary arrangements for the proper functioning of such body. The monitoring body may be part of existing bodies or structures at national level.
3. Member States shall ensure that the tasks of the monitoring body include the following:
 - (a) to raise awareness among public and private undertakings and organisations, social partners and the general public to promote the principle of equal pay and the right to pay transparency;
 - (b) to tackle the causes of the gender pay gap and devise tools to help analyse and assess pay inequalities;
 - (c) to aggregate data received from employers pursuant to Article 8(6), and publish this data in a user-friendly manner;
 - (d) to collect the joint pay assessment reports pursuant to Article 9(3);
 - (e) to aggregate data on the number and types of pay discrimination claims brought before the courts and complaints brought before the competent public authorities, including equality bodies.
4. Member States shall provide the Commission with the data referred to in paragraph 3, points (c), (d), and (e) to the Commission annually.

Article 27

Collective bargaining and action

This Directive shall not affect in any way the right to negotiate, conclude and enforce collective agreements and to take collective action in accordance with national law or practice.

Article 28

Statistics

Member States shall provide the Commission (Eurostat) with up-to-date gender pay gap data annually and in a timely manner. These statistics shall be broken down by gender, economic

sector, working time (full-time/part-time), economic control (public/private ownership) and age and be calculated on an annual basis.

Article 29

Dissemination of information

Member States shall take active measures to ensure that the provisions they adopt pursuant to this Directive, together with the relevant provisions already in force, are brought by all appropriate means to the attention of the persons concerned throughout their territory.

Article 30

Implementation

Member States may entrust the social partners with the implementation of this Directive, where the social partners jointly request to do so, provided that Member States take all the necessary steps to ensure that the results sought by this Directive are guaranteed at all times.

Article 31

Transposition

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by [two years after the entry into force]. They shall immediately inform the Commission thereof.
2. When informing the Commission, Member States shall also accompany it with a summary of the results of their assessment regarding the impact of their transposition act on small and medium-sized enterprises and a reference to where such assessment is published.
3. When Member States adopt those provisions, they shall contain a reference to this Directive or shall be accompanied by such a reference on the occasion of their official publication. The methods of making such reference shall be laid down by shall be laid down by Member States.

Article 32

Reporting and review

1. By [*eight years after the entry into force*] Member States shall communicate to the Commission all information on how this Directive has been applied and what has been its impact in practice.
2. On the basis of the information provided by Member States, the Commission shall submit a report to the European Parliament and the Council on the implementation of this Directive and propose, where appropriate, legislative amendments.

Article 33

Entry into force

The Directive shall enter into force on the twentieth day following its publication in the *Official Journal of the European Union*.

Article 34

Addressees

This Directive is addressed to the Member States.

Done at Brussels,

For the European Parliament
The President

For the Council
The President