

The EU Pay Transparency Directive

In March 2021, the European Commission published a proposal for a Directive to strengthen the application of the principle of equal pay for equal work or work of equal value between men and women through pay transparency and enforcement mechanisms.

Background

The European Commission claims that adequate enforcement is required to ensure that the right of equal pay between woman and men for equal work or work of equal value is ensured. This is set out in the Recast Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation. It is further complemented by a 2014 Commission Recommendation on pay transparency, which is the basis of this proposal for a Directive.

The Commission considers that the effective implementation and enforcement of equal pay for equal work or work of equal value between women and men remains a challenge in practice and that lack of transparency is one of the key obstacles.

Pay discrimination is also identified as one of the causes of the gender pay gap, currently estimated to be around 14%, although it is acknowledged that there are other root causes to the gender pay gap, such as horizontal and vertical labour market segregation. Even without these causes, there would still be an estimated two thirds of gender pay gap that is unexplained.

The EU Pay Transparency Directive is presented in the context of the European Pillar of Social Rights, which covers gender equality and the right to equal pay among its 20 principles. This was confirmed in the Commission's Gender Equality Strategy for 2020-2025 and has become more pressing due to the economic and social consequences of Covid-19.

This Commission proposal therefore looks at establishing pay transparency within organisations, facilitates the application of the concept of equal pay for equal work and work of equal value, and strengthens enforcement mechanisms.

Reactions by the Malta Business Bureau

The Malta Business Bureau believes in gender equality primarily as a matter of social justice but also to meet the economy's full potential. This and other underlying issues such as the gender-pay gap, the pension gap, and harassment at the place of work, among others, must be addressed

as a priority both nationally and at a European level. It is understood that horizontal solutions are required to target both the labour market as well as societal and cultural practices.

Equality can be achieved if every person has access to the same opportunities and is treated fairly, such as at the workplace, while making career choices that are free of stereotypical pressures, more balance in the share of time dedicated to family care and household work, and opportunity for career progression. The MBB therefore in principle welcomes any initiative that strives to meet these objectives.

The MBB underlines that pay discrimination based on gender has no place at work and this is in fact already an illegal practice. The question is therefore how to root out such abusive behaviour of a very small segment without creating unnecessary burdens on companies on one hand, and without creating a framework that paves way for abuse by claimants.

After reviewing this Commission proposal for a Directive, the MBB is unsure how far the pay transparency measures proposed will enforce the principle of equal pay for equal work or work of equal value, for reasons that will be explained throughout this paper. While discrimination could possibly exist in some cases, in the great majority differences in pay are a result of employers paying workers differently due to objective elements that may include aspects of skills, education, experience or performance. This is somewhat acknowledged by the Commission in the proposed Directive, although the list of situations justifying a difference in pay is not exhaustive.

Overall, the MBB fears that this directive will result in disproportionate obligations for companies, with many different layers of requirements, which can be either very complicated to put in place and making human resources management more difficult and costly, or possibly have little effect on the end goal.

Specific comments

Article 5 – Pay transparency prior to employment

The MBB finds this requirement to fall outside the scope of this Directive, considering that Article 2 states that this Directive applies to all workers who have an employment contract or employment relationship. Therefore, this makes it in conflict with Article 5 which addresses pay transparency prior to employment.

More specifically about the issue, the suggestion to add the starting salary or the expected salary range or the criteria on which this is based in job advertisements would mean that companies risk making sensitive commercial and human resources information public. They should not be

put in this position. Positively, the proposal provides an alternative solution to provide such information directly to the applicants, however even this option is not without fault.

Making it a mandatory requirement to provide pay information to candidates at the interview stage takes away the flexibility for employers to set the wage level according to the experience, competences, and skills of candidates. Furthermore, salary negotiation that is not part of collective bargaining is a matter between two private parties and it therefore does not make sense that one side must disclose the information beforehand. Flexibility is important for employers particularly for certain senior and technical posts or if they are lacking a good pool of appropriate applicants.

Article 7 – Right to information

Several companies have established pay scales either through collective bargaining or a voluntary policy. In such cases, there is no issue. However, not the same can be said for other companies, particularly small and medium enterprises, where persons doing the same work or work considered of equal value may be limited to few individuals, particularly when broken down by sex.

The right for workers to request information on average pay levels of ‘categories of workers doing work of equal value to theirs’ will not be able to capture the many objective reasons whereby an individual is paid more or less than the average salary. As stated earlier, this could be based on aspects related to the level of education, experience, skills, length of service or performance. One must also distinguish between salary and overall remuneration, which may include other benefits such as commissions attributed to different worker categories. These may be considered of equal value, but in fact would require different skills sets and thus makes it difficult to compare.

On a practical level, justified reasons for difference in pay may still not be sufficient to change people’s perceptions or individual attitudes and this may lead to an adversary culture at workplaces.

Finally on this note, where there is a scarcity of a particular gender as comparator in the same job category, which can be common in some sectors or more broadly in smaller enterprises, there is a real risk that information on average pay levels unfolds real information about individuals’ salaries. This would go against the General Data Protection Regulation (GDPR) and the risks are not sufficiently addressed in Article 10 of this Directive.

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

The prescriptive requirements of information that needs compiling is administratively burdensome and costly even for large companies (Article 8(1)(a-g)). We find the cost estimation by the European Commission in the impact assessment for the compilation of this complex data to be grossly underestimated. In many instances, human resources units within companies could still be relatively small despite employing more than 250 people overall. As outlined earlier in this paper, comparisons of employees doing the same work or work of equal value can be interpreted in different ways, particularly when it covers different work categories of employees assigned different tasks.

The MBB disagrees that the gender pay gap report should be published (Article 8(3)). As mentioned, the information requested to be compiled is subject to many variable factors and different interpretations. This could be easily misinterpreted in the public domain or used unfairly to tarnish the reputation of companies. Positively, the Directive provides member states the option to gather data from companies instead, and this would be a better practice. Having said this, considering the same variable factors referred to above, the MBB has reservations on the added value of aggregate reporting by member states making comparison between employers, sectors and regions (Article 8(6)), which is very hard to compare as they operate considering the diverse setting of the economy and regions.

Article 16 – Shift of burden of proof

The MBB fears that this directive could lead to increased litigation and court cases, even though as explained throughout this paper, differences in pay could be based on objective factors. However, the shift of burden of proof onto employers to disprove that discrimination has occurred, puts companies implicitly at fault.

Conclusion

The MBB believes that the directive should allow more flexibility to member states to adopt different options according to the national situation.

For instance, to reduce the administrative burden and costs, member states could be allowed to set a higher threshold for the reporting obligations (Articles 8 and 9) to apply to larger companies that possess more resources for such actions (e.g., companies with more than 500 workers).

Another option would be to allow member states to apply the obligations only in those cases where more than a certain number of persons occupy the same position in the company (figure

be determined at national level). Otherwise, as explained earlier there would be risks related to pay privacy and GDPR.

Finally, another solution to relieve administrative burden could be to have less frequent reporting obligations, to be determined at national level.

For questions or more detailed information please contact EU Affairs Manager Daniel Debono and Senior Advisor Mark Seychell from the Malta Business Bureau's Brussels Representative Office on infobrussels@mbb.org.mt

