

PAY TRANSPARENCY DIRECTIVE

AFEP MAIN COMMENTS ON THE COMMISSION'S PROPOSAL

On 4 March 2021, the European Commission presented a directive proposal on pay transparency to strengthen the application of the principle of equal pay for equal work or work of equal value between men and women.

AFEP **fully agrees on the need to reduce the gender pay gap and fight pay discrimination**. Paying men and women differently for performing the same work or work of equal value is already prohibited by existing EU and national legislation and should remain illegal. French large companies are committed to promote equal pay and fight all forms of discrimination at the workplace.

It is the full responsibility of companies to ensure respect for the right to professional equality, in the context of their **dialogue with employee representatives**. They are responsible for implementing the tools and methods that are most relevant to their organizations and their workforce.

The possibility of seizing a court to establish possible discrimination exists independently of any public mechanism. The potential improvement of this right through indicators and tools as envisaged by the directive proposal has not been demonstrated at all.

The proposal does not, as asserted by the Commission, provide for “minimal harmonisation of Member State systems”. The text should not be too prescriptive and should leave adequate discretion to Member States to implement it in a way that **takes account of their national context, social dialogue, collective bargaining and existing measures on pay transparency**, such as the French Equality Index, and that avoids additional reporting burden on companies.

The directive proposal is also too prescriptive on the data that can be communicated to employees and employee representatives of the same entity. Applying the principle of equal pay for equal work implies making comparisons within the same category of employees. However, when these categories are too small, the results are not significant and no objective interpretation can be associated with them. Sectors and geographical specificities should also be taken into account in the setting up of worker categories, and **criteria should allow for flexibility and be non-exhaustive**.

Moreover, the proposed directive may constitute an **invasion of the protection of privacy** even with a limitation of the disclosure of information allowing the identification of an individual worker to worker representatives. The dissemination of personal information to persons belonging to the same entity constitutes an infringement of the right to privacy.

Finally, AFEP is not convinced that this proposal alone will be the most efficient tool to enforce the principle of equal pay for equal work or work of equal value or will bring to light cases of discrimination.

The situation needs to be assessed objectively, looking at the **multifactorial causes of gender inequality and the gender pay gap** : it may occur due to many different factors, including above all gender segregation on labour markets, as well as gender stereotypes and unequal distribution of household and care duties.

ABOUT AFEP

Since 1982, AFEP brings together large companies operating in France. The Association, based in Paris and Brussels, aims to foster a business-friendly environment and to present the company members' vision to French public authorities, European institutions and international organisations. Restoring business competitiveness to achieve growth and sustainable employment in Europe and tackle the challenges of globalisation is AFEP's core priority. AFEP has around 110 members. More than 8 million people are employed by AFEP companies and their annual combined turnover amounts to €2,600 billion.

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ANNEX: AFEP'S PROPOSALS

■ Chapter I:

Commission's proposal	AFEP's proposal
<p>Article 3 Definitions</p> <p>1. For the purposes of this Directive, the following definitions apply:</p> <p>(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;</p> <p>(b) 'pay level' means gross annual pay and the corresponding gross hourly pay;</p> <p><i>(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;</i></p> <p>(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;</p> <p>(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;</p> <p>(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;</p>	<p>Article 3 Definitions</p> <p>1. For the purposes of this Directive, the following definitions apply:</p> <p>(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;</p> <p>(b) 'pay level' means gross annual pay and the corresponding gross hourly pay;</p> <p>(c) 'median pay level' means the pay of the worker that would have half of the workers earn more and half less than they do;</p> <p>(d) '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;</p> <p>(e) '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;</p> <p>(f) '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;</p>

<p>(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;</p> <p>(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;</p> <p>(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;</p> <p>(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;</p> <p>(k)'labour inspectorate' means the national body or bodies that have an inspection function on the labour market in a Member State.</p> <p>2.For the purposes of this Directive, discrimination includes:</p> <p>(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;</p> <p>(b)instruction to discriminate against persons on grounds of sex;</p> <p>(c)any less favourable treatment of a woman related to pregnancy or maternity leave within the meaning of Council Directive 92/85/EEC</p> <p>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</p>	<p>(g)'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;</p> <p>(h)'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;</p> <p>(i)'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;</p> <p>(j)'labour inspectorate' means the national body or bodies that have an inspection function on the labour market in a Member State.</p> <p>2.For the purposes of this Directive, discrimination includes:</p> <p>(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;</p> <p>(b)instruction to discriminate against persons on grounds of sex;</p> <p>(c)any less favourable treatment of a woman related to pregnancy or maternity leave within the meaning of Council Directive 92/85/EEC .</p> <p>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.</p>
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Justification:

The definition of the pay gap is deleted as it is too broad and general and involves a comparison between the entire female and male workers population of the employer, without context. It is important that pay gaps concern comparable populations.

<p>Article 4 Equal work and work of equal value</p>	<p>Article 4 Equal work and work of equal value</p>
<p><i>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.</i></p> <p>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.</p> <p>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 <i>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.</i></p> <p>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. <i>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.</i></p> <p>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.</p>	<p><i>1. The development of pay structures in compliance with social dialogue guarantees the principle that remunerations between women and men are equal for the same work or work of the same value</i></p> <p>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.</p> <p>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.</p> <p>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.</p> <p>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.</p>

Justification

It is important to remember that respect for the principle of equal pay in pay structures is the responsibility of social partners.

The text is too restrictive and it should be up to Member States to set the methodology and criteria they wish to put in place in agreement with social partners and within the framework of social dialogue. The exhaustive list of criteria is therefore deleted. The possibility of comparing the situation of workers who are not employed at the same time is also removed as it is too imprecise and makes the comparison irrelevant. The notion of a hypothetical comparator introduces too much subjectivity into the comparisons.

<p>Article 6 Transparency of pay setting and career progression policy</p> <p>The employer shall make easily accessible to its workers a description of the criteria used to determine pay levels <i>and career progression for workers</i>. These criteria shall be gender-neutral.</p>	<p>Article 6 Transparency of pay setting and career progression policy</p> <p>The employer shall make easily accessible to its workers <i>representatives</i> a description of the criteria used to determine pay levels. These criteria shall be gender-neutral.</p>
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Justification

Employee representatives are responsible for defending workers, it is their responsibility to receive this information.

<p>Article 7 Right to information</p> <p>1. <i>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.</i></p> <p>2. Employers shall inform all workers, on an annual basis, of their right to receive the information referred to in paragraph 1.</p> <p>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.</p>	<p>Article 7 Right to information</p> <p>1. <i>Workers shall have the right to receive information relating to professional equality between women and men, in particular on indicators for measuring pay gaps.</i></p> <p>2. Employers shall inform all workers, on an annual basis, of their right to receive the information referred to in paragraph 1.</p> <p>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.</p>
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<p>4.Workers shall have the possibility to request the information referred to in paragraph 1 through their representatives or an equality body.</p> <p>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.</p> <p>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.</p>	<p>4.Workers shall have the possibility to request the information referred to in paragraph 1 through their representatives or an equality body.</p> <p>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.</p> <p>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.</p>
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Justification

The indicators defined by the text are too strictly defined : it is up to Member States in agreement with social partners and within the framework of social dialogue to determine what information can be communicated to employees and their representatives, allowing them to ensure that there is no discrimination. The disclosure of too precise information on small categories of workers entails a risk of identifying individuals. The right to protection of privacy must not be called into question. It is proposed to establish the principle of a right to information on equality between men and women based on indicators.

Article 8 Reporting on pay gap between female and male workers	Article 8 Reporting on pay gap between female and male workers
<p>1.Employers with at least 250 workers shall provide <i>the following information concerning their organisation, in accordance with paragraphs 2, 3, and 5:</i></p> <p><i>(a)the pay gap between all female and male workers;</i></p> <p><i>(b)the pay gap between all female and male workers in complementary or variable components;</i></p> <p><i>(c)the median pay gap between all female and male workers;</i></p> <p><i>(d)the median pay gap between all female and male workers in complementary or variable components;</i></p> <p><i>(e)the proportion of female and male workers receiving complementary or variable components;</i></p>	<p>1. Employers with at least 250 workers shall provide <i>information on professional equality between women and men concerning their organization by using indicators to measure pay gaps.</i></p> <p>2. The employer shall publish the information referred to in paragraph 1 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.</p> <p>3. Member States may decide to compile the information set out in paragraph 1 themselves, on the basis of administrative data such as data provided by employers to the</p>

<p><i>(f) the proportion of female and male workers in each quartile pay band;</i> <i>(g) the pay gap between female and male workers by categories of workers broken down by ordinary basic salary and complementary or variable components.</i></p> <p>2. The accuracy of the information shall be confirmed by the employer's management.</p> <p>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.</p> <p>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.</p> <p>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.</p> <p>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.</p> <p>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</p>	<p>tax or social security authorities. This information shall be made public in accordance with paragraph 6.</p> <p>4. The employer shall provide the information referred to in paragraph 1 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.</p> <p>5. Member States shall entrust the monitoring body designated pursuant to Article 26 to collect the data received from employers pursuant to paragraph 1 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.</p> <p>6. 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.</p>
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Justification

The indicators defined by Article 8 should not be exhaustive : there are several statistical methodologies to assess the pay gaps between men and women and to detect possible discrimination. The choice of tools should be left to the discretion of the Member States in agreement with social partners and within the framework of social dialogue. Moreover, the method chosen here, which consists in globally comparing the remuneration of the female and male populations of a company, has statistical biases. In particular, it does not make it possible to compare the remuneration of employees doing the same job or work of the same value, although this is the legal basis for the proposed directive.

<p>Article 9 <i>Joint pay assessment</i></p>	<p>Article 9 <i>Pay analysis</i></p>
<p>1. Member States shall take appropriate measures to ensure that employers with at least 250 workers conduct, in cooperation with their workers' representatives, <i>a joint pay assessment</i> where both of the following conditions are met:</p> <ul style="list-style-type: none"> (a) the <i>pay</i> reporting conducted in accordance with Article 8 demonstrates a difference of average pay level between female and male workers <i>of at least 5 per cent in any category of workers</i>; (b) the employer has not justified such difference in average pay level by objective and gender-neutral factors. <p>2. <i>The joint pay assessment shall include the following:</i></p> <ul style="list-style-type: none"> (a) <i>an analysis of the proportion of female and male workers in each category of workers</i>; (b) <i>detailed information on average female and male workers' pay levels and complementary or variable components for each category of workers</i>; (c) <i>identification of any differences in pay levels between female and male workers in each category of workers</i>; (d) <i>the reasons for such differences in pay levels and objective, gender-neutral justifications, if any, as established jointly by workers' representatives and the employer</i>; (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. 	<p>1. Member States shall take appropriate measures to ensure that employers with at least 250 workers conduct, in cooperation with their workers' representatives, <i>an analysis</i> of the situation where both of the following conditions are met:</p> <ul style="list-style-type: none"> (a) the <i>information</i> reporting conducted in accordance with Article 8 demonstrates a difference of average pay level between female and male workers. (b) the employer has not justified such difference in average pay level by objective and gender-neutral factors. <p>1. <i>The analysis shall include:</i></p> <ul style="list-style-type: none"> (a) measures to address such differences if they are not justified on the basis of objective and gender-neutral criteria; (b) a report on the effectiveness of any measures mentioned in previous joint pay assessments. <p>3. Employers shall make the <i>analysis</i> available to workers, workers' representatives, the monitoring body designated pursuant to Article 26, the equality body and the labour inspectorate.</p> <p>4. If the <i>analysis</i> 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</p>

<p>3. Employers shall make the <i>joint pay assessments</i> available to workers, workers' representatives, the monitoring body designated pursuant to Article 26, the equality body and the labour inspectorate.</p> <p>4. If the <i>joint pay assessment</i> 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.</p>	<p>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.</p>
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Justification

The measures provided for in Article 9 are too detailed and do not respect the autonomy of Member States and their social dialogue. It is proposed to remove the 5 % gap as it does not allow for sectoral variations and specificities. Member States should be able to determine the maximum gap themselves so to foresee variations according to the sectors. The joint assessment is too detailed and the method too prescriptive, it is proposed to provide for an analysis of the causes of the discrepancies observed.

<p>Article 10 Data protection</p>	<p>Article 10 Data protection</p>
<p>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.</p> <p>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.</p> <p>3. Member States <i>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.</i> The representatives or equality body shall advise workers regarding a possible claim under this Directive without disclosing actual pay</p>	<p>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.</p> <p>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.</p> <p>3. Member States <i>may impose restrictions where disclosure of information pursuant to Articles 7, 8 and 9 would directly or indirectly lead to the disclosure of the pay of an identifiable co-worker.</i> 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.</p>

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.	
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Justification

The possibility opened up by the text is an invasion of privacy in that it allows the communication of personal data relating to the remuneration of an individual to employee representatives who may belong to the same company. Member States should be allowed to take restrictive measures to protect the privacy of employees.