POSITION PAPER

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

Key messages

SMEunited, as employers' representative, fully agrees to reduce the gender pay gap and to promote the equal pay principle. However, binding measures are not the adequate approach to tackle the gender pay gap in the world of work. Tackling horizontal and vertical segregation, gender stereotypes and provision of childcare and long-term care via specific policies interventions and funding is the most appropriate way to reduce the gender pay gap.

The current proposal creates legal uncertainty on 'equal work' and 'work of equal value'. It is the task of social partners to assess the value of work based on objective criteria such as educational, professional and training requirements, skills, efforts, responsibility, work undertaken, and the nature of tasks involved.

It is particularly difficult to compare 'equal work' and 'work of equal value' in micro- and small enterprises due to employees carrying out different tasks and often not having female/male comparators in the same company.

SMEunited appreciates the recognition by the European Commission of the difficulties of SMEs to comply with all the rules proposed in the current Directive. This is especially the case with reporting obligations for SMEs.

Employers should have the possibility to ask orally the pay history of the prospective applicant to adjust the pay level to the expectations.

On the right to information, SMEunited stresses the need to include the obligation of professional secrecy for employees on the received information, and that this information is not used for any other purpose than to defend their right to equal pay. Moreover, this

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article will create additional burdens for SMEs especially for micro and small enterprises. SMEunited asks to exempt SMEs from this provision.

General comments

SMEunited supports reducing the gender pay gap and promoting the equal pay principle. Closing the gender pay gap requires an overarching strategy which includes tackling gender stereotypes and horizontal and vertical segregation in the labour market, promoting early education and providing adequate childcare and long-term care. Reducing the gender pay gap and increasing the participation of women in the labour market are two essential objectives. Besides contributing to reaching the target of the Action Plan of the European Pillar of Social Rights[1] and the objectives of the Gender Equality Strategy 2020-2025, the higher participation of women in employment will contribute to avoid skills shortages and counterbalance the challenges related to demographic ageing.

Legislation in place at national and European level already provides an adequate legal framework to prevent, deter and condemn possible pay discrimination and to promote the principle of equal pay. Countries have transposed in national legislation 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. In these countries where legislation exists, there is no evidence that binding pay transparency measures have contributed to a significant reduction of the gender pay gap which in many of them persists due to other structural causes. Factors such as personal and family constraints to accept part-time jobs, the fact that women are more likely to work in lower-paid sectors or specific work organisation (e.g. taking up night shifts) play a role. These factors are not pay discrimination.

European binding measures on pay transparency are not the appropriate means to close the gender pay gap. The right way forward is tackling the root causes that lead to the gender pay gap. A more effective strategy to achieve equal pay will be fighting gender stereotypes, tackling horizontal and vertical segregation in the labour market and supporting women and men with care duties. These are the most relevant measures that SMEunited considers necessary to work on in the short and medium term to reduce the gender pay gap. The analysis provided by the EC does not give a sufficient focus on the underlying factors and puts too much emphasis on the role of pay transparency as the silver bullet to solve the gender pay gap. Social dialogue is an effective way to ensure balanced and non-discriminatory outcomes and plays a crucial role to reduce the gender pay gap including for small enterprises.

[1] At least 78% of the population aged 20 to 64 should be in employment by 2030 and at least halve the gender employment gap compared to 2019.

The proposal contains several detailed procedural rules that touch upon litigation, burden of proof, legal costs, compensation and limitation periods. These articles negatively interfere with the procedural autonomy of the Member states. In addition, SMEunited does not consider the Article 157(3) TFEU, about the application of the principle of 'equal opportunities and equal treatment of men and women in matters of employment and occupation', as an appropriate legal basis for such procedural rules.

The proposed directive will impose new administrative burdens and excessive additional costs on SMEs. The directive does not take sufficiently into consideration that SMEs and in particular micro-companies lack pay scales and fixed pay ranges. In addition, the application of these legal provisions in micro and small enterprises will be hampered by the lack of human resources services and will require hiring specialised staff or using external services.

Specific comments on the proposal for a Directive

Chapter I: General provisions

On Article 4: Equal work and work of equal value

For micro and small enterprises, it is particularly difficult to compare 'equal work' and 'work of equal value' due to the limited number of employees, each of them carrying out different tasks and often not having female or male comparators in the same company. When comparing 'equal work' and 'work of equal value' between different enterprises, productivity, added value, availability of certain qualifications and competences can differ substantially. Moreover, determining what 'equal work' is, in an individual case, cannot be achieved solely on the basis of a job evaluation system.

The European Commission should refrain to interfere with existing national legislations and well-established social dialogue on this matter. The proposal should fully respect the autonomy of social partners in collective bargaining and wage setting agreed on the basis of neutral classification criteria establishing equal pay. The value of work should be assessed and compared by national social partners based on objective criteria (educational, professional and training requirements, skills, efforts, responsibility, work undertaken, and the nature of tasks involved). The constant evolution of work (i.e. impact of digitalisation) will also impact the assessment of the value of work, and it is the role of social partners to define the right pay scale. In addition to these criteria, other general criteria should be taken into consideration by enterprises: location, position on the market, type of clients, etc...

Article 4.4 mentions the possibility to use a hypothetical comparator or other evidence allowing to presume alleged discrimination. SMEunited highlights that in micro and small enterprises, employees often perform different tasks therefore a comparison of tasks would never be able to mirror the reality. In some countries, classifications are available per sectors and are

negotiated among social partners taking into consideration the principle of non-discrimination between women and men. In addition, micro and small enterprises do not always have a human resources responsible who can implement personnel and salary structures and develop career progression policies.

Chapter II: Pay Transparency

SMEunited appreciates the recognition by the European Commission of the difficulties of SMEs to comply with all the rules proposed in the current Directive. This is especially the case with reporting obligations for SMEs included in Article 8 of the proposal.

The exemption for enterprises with less than 250 employees of reporting duties is highly necessary to reduce financial and administrative burdens on SMEs.

On Article 5: Pay transparency prior to employment

Pay should be the result of negotiations between the employer and the future employee. Employers should not be obliged to disclose sensitive commercial and employee-related information, and should be able to set pay levels based on candidates' experience, competence and skills. Employees should not be entitled to request information on pay levels other than through the existing rules on disclosure of collectively agreed pay structures through collective bargaining mechanisms at enterprise and/or branch level. Knowing the minimum level of pay for the position provides enough information to the potential employees and the possibility to negotiate prior to stipulating the job contract.

On article 5.2, employers should keep the possibility to ask orally applicants their pay history in order to adjust the level of the remuneration to the expectations of the applicant.

On Article 6: Transparency of pay setting and career progression policy

The provision of career development criteria will add new administrative burdens for SMEs, especially for micro-enterprises. Information available at sectoral or national level on wage levels agreed by social partners is sufficient to achieve the objective of this article.

On Article 7: Right to information

Article 7 also significantly increases the administrative burden and generates new costs for employers in SMEs. In case such a right of the employee is recognised, the provision should limit the frequency with which an employee can make such a request.

Moreover, SMEunited stresses the need to include the obligation of professional secrecy for employees on the received information, and that this information is not used for any other purpose than to defend their right to equal pay. An additional critical point for SMEs is to combine confidentiality and pay transparency. Due to the limited number of employees working in small companies (in average 4 to 5 employees), it is impossible to make individual wages

anonymised. In addition it is essential that further measures fully comply with the GDPR's provisions. Article 4 (1) considers wage as personal data ("one or more factors specific to the economic identity"). Article 25 (1) related to data protection by design and by default states that the controller shall implement 'appropriate technical and organisational measures, such as pseudonymisation, which are designed to implement data-protection principles, such as data minimisation'. In SMEs, access to information on wages cannot fulfil this requirement, since it can be easy to identify the individual(s) behind data. Moreover, in most Member States, there is a strong influence of the cultural approach where wages are considered as a private matter and disclosure of pay would not be welcomed. In addition to the cultural aspect.

Article 7 will create additional burdens for all SMEs but especially for micro and small enterprises. Therefore SMEunited asks to exempt SMEs from this provision.

Chapter III: Remedies and enforcement

The proposal contains several detailed procedural rules that touch upon litigation, burden of proof, legal costs, compensation and limitation periods. These articles negatively interfere with the procedural autonomy of the Member States and will have a significant impact on labour and industrial relations. It would be more efficient to encourage social partners to find most appropriate and tailor-made solutions for the different enterprise realities. Sanctions need to be proportionate and to be decided at national level.

On Article 13: Procedures on behalf or in support of workers

Procedures should be acted only and taken forward by a trade union or equality body with the consent or authorisation of the individual employee concerned.

On Article 14: Right to compensation

SMEunited disagrees and is seriously concerned with the provision included in Art 14.3 and 14.4. Full compensation for a time limit that is not fixed would cause a very high financial burden on SMEs. Furthermore, employees have the right to address the appropriate Court at national level in case they consider that they are receiving an unfair pay and compensation should be determined by the judge during the proceedings.

On Article 15: Other remedies

National authorities and courts already have sufficient powers to ensure the enforcement of equal pay.

On Article 18: Limitation periods

SMEunited considers that the limitation period of minimum 3 years as proposed in the directive for bringing claims, is not appropriate since it could lead to legal uncertainty for employers. The most suited limitation period should be decided by Member States.

On Article 19: Legal and judicial costs

The proposed revision is particularly harmful and problematic for small businesses. SMEunited does not consider it justified that an employee who raises an allegation of discrimination should not, in principle, bear any cost risk from the allegation he/she makes, except in exceptional cases. It should be noted that allegations made can pose a significant threat to small businesses and such provision puts the employer in a more vulnerable position in the event of a dispute.

On Article 20: Penalties

Art. 14 and 15 of the proposal for a Directive provide enough measures in case of pay discrimination.

Brussels, 24 June 2021