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REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL

Report on the application of 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 (recast)

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1. INTRODUCTION

On 5 July 2006, the European Parliament and the Council adopted 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 (recast) ('the Directive')[1]. This Directive consolidates and modernises the EU *acquis* in this area by merging previous Directives[2] and introducing some novel features. It is based on Article 157(3) of the Treaty on the Functioning of the European Union ('TFEU').

This report assesses Member States' transposition of the Directive's novel features and the effectiveness of its application and enforcement[3]. It is without prejudice to any infringement procedures on the transposition of the Directive.

The European Parliament has consistently called for more action to enhance the application of the equal pay provisions at European level and adopted resolutions to that effect in 2008[4] and 2012[5].

The Commission's Strategy for equality between women and men 2010-2015[6] set out ways to implement the principle of equal pay more effectively in practice and actions to reduce the persistent gender pay gap. The Commission launched a study assessing options to strengthen the application of this principle, such as improving the implementation and enforcement of existing obligations and measures aimed at enhancing the transparency of pay.

This report includes a section that assesses how equal pay provisions are applied in practice. In order to better promote and facilitate the application of equal pay provisions in practice, this report is accompanied by a Commission Staff Working Document that consists of four annexes: (1) a section on gender-neutral job evaluation and classification systems; (2) a summary of equal pay case law of the Court of Justice of the European Union ('CJEU'); (3) examples of the national case-law on equal pay; and (4) a description of the factors that cause the gender pay gap, the Commission's actions to tackle it and examples of national best practices.

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1 OJ L 204, 26.7.2006, p. 23-36.

2 Council Directive 75/117/EEC, OJ L 45, 19.2.1975, p. 19; Council Directive 76/207/EEC, OJ L 39, 14.2.1976, p. 40; Directive 2002/73/EC of the European Parliament and of the Council, OJ L 269, 5.102001, p. 15; Council Directive 86/378/EEC, OJ L 225, 12.8.1986, p. 40; Council Directive 96/97/EC, OJ L 46, 17.2.1997, p. 20; Council Directive 97/80/EC, OJ L14, 20.1.1998, p. 6; Council Directive 98/52/EC, OJ L 205, 22.7.1998, p. 66.

3 In line with Article 31 of the Directive.

4 P6_TA(2008)0544.

5 P7_TA-PROV(2012)0225.

6 COM(2010) 491.

2. STATE OF TRANSPOSITION AND INFRINGEMENT PROCEDURES

As a result of the Commission's conformity checks, questions were raised with 26 Member States on the conformity of their national legislation with the Directive's novelties[7]. In two Member States the transposition is sufficiently clear and compliant that no further information is required[8].

Some of the Directive's elements come from previous Directives, which have been repealed as a result of the recasting exercise. Transposition of these older elements of the Directive was already monitored as part of conformity checks on the previous Directives, most recently Directive 2002/73/EC[9]. Initially, infringement proceedings on the basis of non-conformity with Directive 2002/73/EC were launched in 2006 against 23 Member States. All these proceedings apart from one[10] have been closed, since the Member States have brought their national laws in conformity with EU law. The remaining case concerns the obligation to adequately protect the rights of employees on maternity, adoption or parental leave when they return to work. It was referred to the CJEU on 24 January 2013[11].

3. THE IMPACT OF THE DIRECTIVE

Since the Directive mainly consolidates EU law on equal treatment by bringing together, modernising and simplifying the provisions in previous Directives and incorporating case law of the CJEU, the obligation to transpose only applies to provisions that imply substantive changes[12]. These novelties concern:

(1) the definition of pay[13];

(2) the express extension of the application of equal treatment in occupational social security schemes to pension schemes for particular categories of workers, such as public servants[14];

(3) the express extension of the horizontal provisions (i.e. on defence of rights, compensation or reparation and burden of proof) to occupational social security schemes[15]; and

(4) the express reference to discrimination arising from gender reassignment[16].

In general, implementation in Member States did not specifically focus on these novelties. Some Member States have explicitly transposed the Directive either with new legislation or with substantive amendments to existing legislation[17]. In two Member States, the Directive

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7 These concerns were raised through the Commission's EU Pilot system, which is the process for exchanging administrative letters prior to any infringement proceedings under Article 258 TFEU.

8 NL, FR.

9 OJ L 269, 5.10.2002, p. 15.

10 NL

11 The case concerns the non-compliance by NL law with Article 2(7) of Directive 76/207/EEC as amended by Directive 2002/73/EC, specifying that employees coming back from maternity, adoption or parental leave are entitled to return to their job or to an equivalent post and to benefit from any improvement in working conditions to which they would have been entitled during their absence. NL legislation lacks the required express provisions on this matter which casts doubt over the degree of protection provided and makes it difficult for citizens to know and enforce their rights.

12 Article 33(3).

13 Article 2(1)(e).

14 Article 7(2).

15 Articles 17-19.

16 Recital 3.

17 CZ, DK, EE, EL, HR, IT, CY, LT, PT, SI, SK, SE, UK.

was transposed together with other non-discrimination directives[18]. In two other Member States, transposition was considered necessary only in relation to occupational social security schemes[19] and return from maternity leave[20].

Transposition was not considered necessary by some Member States because transposition of earlier directives was sufficient to comply with the requirements of the present Directive[21].

3.1. Definition of pay

Article 2(1)(e) of the Directive defines pay in the same terms as Article 157(2) TFEU, i.e. as '*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, in respect of his/her employment from his/her employer*'. In most Member States, the concept of pay is defined in national legislation and corresponds to this definition[22]. In others, the legal definition of pay is not identical to that in the Directive, but the overall effect appears to be the same[23] or national courts interpret the term 'pay' in line with the case law of the CJEU[24].

In some Member States, pay is not expressly defined in national legislation[25]. For example, one Member State's national legislation entitles women to equal treatment in contractual terms (including but not limited to pay) with appropriate male comparators[26].

3.2. Pension schemes for particular categories of workers, such as public servants

Article 7(2) incorporates some well-established CJEU case law and therefore clarifies that pension schemes for particular categories of workers, such as public servants, have to be considered as being occupational pension schemes and hence pay for the purpose of Article 157(2) TFEU, even though they form part of a general statutory scheme[27]. In the majority of Member States, this provision has been implemented either by express provision or implicitly where the national legislation does not distinguish between categories of workers[28]. In a significant number of Member States, transposition is lacking or unclear[29]. Of these: two Member States seem to have a different pensionable age for men and women in both the private and public sectors[30]; four Member States' national legislation on occupational social security schemes does not contain any provisions on equal treatment[31] and one Member State's provisions on equal treatment in occupational social security schemes do not extend to public servants[32].

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18 FR, PL.

19 RO, where legislation on such schemes is pending.

20 BG.

21 BE, DE, IE, ES, LV, LU, HU, MT, NL, AT, FI.

22 BE, BG, CZ, DK, IE, EL, ES, FR, HR, CY, LT, LU, HU, MT, PT, RO, SI, SK.

23 EE, PL. In EE an employer's activities are considered discriminatory if it establishes conditions for remuneration or benefits that are less favourable for an employee of one sex as compared with an employee of the opposite sex doing the same work or work of equal value.

24 NL. See Cases 80/70, 43/75, 12/81, C-262/88, C-360/90, C-200/91, C-400/93, C-281/97, C-366/99, available at http://curia.europa.eu/.

25 DE, IT, LV, AT, FI, SE, UK.

26 UK.

27 Cases C-7/93 and C-351/00.

28 BE, BG, CZ, DE, EE, IE, EL, FR, CY, LT, LU, NL, AT, FI, UK. In HU, legislation does not distinguish between categories of workers, but there are no specific pension schemes for public servants.

29 DK, EL, ES, HR, IT, LV, MT, PL, PT, RO, SI, SK, SE.

30 IT, SK.

31 LV, PL, PT, SE.

32 RO.

3.3. Extension of horizontal provisions to occupational social security schemes

One of the Directive's significant novelties is the extension of the horizontal provisions in Title III to occupational social security schemes[33]. The previous Directive on occupational social security schemes[34] did not expressly provide for these provisions, which encompass the defence of rights[35], compensation or reparation[36], burden of proof[37], equality bodies[38], social dialogue[39] and dialogue with non-governmental organisations[40]. Consolidating EU law on equal treatment in the Directive presented an opportunity to explicitly extend the application of these horizontal provisions to occupational social security schemes. In the majority of Member States, the horizontal provisions have been transposed into national legislation and apply to occupational social security schemes[41]. In four Member States, this does not appear to be the case for all the horizontal provisions in the Directive[42]. In one Member State it is unclear whether the equality body can act in the area of occupational social security schemes[43]. In another Member State, once the legislation on occupational pension schemes is in place, the anti-discrimination law framework, which incorporates the horizontal provisions, will apply[44]. In two Member States, the legislation on occupational social security schemes does not appear to contain any provisions on equal treatment[45]. In another Member State, where there are at present no occupational social security schemes, it is unclear whether the national legislation containing the relevant horizontal provisions would apply were such schemes to come into existence[46].

3.4. Gender reassignment

Recital 3 to the Directive refers to CJEU case law, which provides that the principle of equal treatment for men and women cannot be confined to the prohibition of discrimination based on the fact that a person is of one sex or the other, and that it also applies to discrimination arising from a person's gender reassignment[47]. Very few Member States have explicitly transposed this novelty[48]. Two Member States included 'sexual or gender identification'[49] and "gender identity"[50] in their grounds of discrimination. Two Member States' national legislation already provided for grounds of discrimination to include 'sexual identity'[51]. It seems that these terms include, but are not limited to, gender reassignment. In one Member State the Equality Ombudsman has issued guidelines providing that the grounds of discrimination cover all transgender people and not only those who have undergone gender

33 Although these schemes were not expressly mentioned in the horizontal rules, the CJEU's clarification that an occupational pension constitutes (deferred) pay implies that the pre-existing horizontal rules on equal pay and on working conditions (including pay) also apply to these schemes.
34 Council Directive 86/378/EEC.
35 Article 17.
36 Article 18.
37 Article 19.
38 Article 20.
39 Article 21.
40 Article 22.
41 BE, BG, CZ, EE, IE, EL, ES, FR, IT, CY, LV, LT, LU, HU, MT, NL, AT, SE, UK (with doubts remaining for Northern Ireland).
42 DE, SI, SK, FI.
43 DK
44 RO
45 PL, PT.
46 HR.
47 Cases C-13/94, C-117/01 and C-423/04.
48 BE (with what appears to be the exception of the Brussels region), CZ, EL, UK.
49 SK.
50 MT.
51 DE, HU.

reassignment[52]. In four Member States, where there are no specific implementing measures, national courts have interpreted domestic equal treatment legislation as prohibiting discrimination on the grounds of gender reassignment[53]. In three other Member States, where again there are no specific implementing measures, reliance is placed directly on the effect of CJEU case law in domestic law[54]. In several others, where this novelty has not been specifically transposed and where there is no pre-existing express reference in national equality legislation to prohibiting discrimination on grounds of gender reassignment, the existing prohibited grounds of discrimination may be sufficiently non-exhaustive to cover discrimination on grounds of gender reassignment. For example, in one Member State it is possible that discrimination on grounds of gender reassignment may be covered by discrimination on grounds of 'personal circumstances'[55]. However, most Member States have not taken the opportunity presented by the Directive to clearly include the right of people who are undergoing or who have undergone gender reassignment to not be discriminated against in their national legislation.

3.5. Overall assessment

Member States were only obliged to transpose the Directive's novelties. In general, they do not seem to have used this opportunity to more comprehensively review their national systems to simplify and modernise equal treatment legislation.

The Commission's services are currently asking detailed questions of 26 Member States concerning their transposition and implementation. The issues under discussion should be resolved as a matter of priority. The future challenge for all Member States will be to move from correctly transposing the Directive into national law to ensuring full application and enforcement of the rights established by the Directive in practice.

4. APPLICATION OF THE EQUAL PAY PROVISIONS IN PRACTICE

While the equal pay principle has been an integral part of the Treaties since the Treaty of Rome and has since been further developed in EU law and national laws of the Member States, problems with effectively applying it in practice remain.

Article 4 of the Directive establishes the principle of equal pay by providing that, for the same work or for work of equal value, direct and indirect discrimination on grounds of sex is prohibited in all aspects and conditions of remuneration. Where job classification systems are used to determine pay, the Directive states that they must be based on the same criteria for both men and women and drawn up to exclude any discrimination on the grounds of sex.

Member States implement the equal pay principle largely through equality legislation and labour codes. Several have embedded the principle in their constitutional provisions[56]. A few have passed laws specifically implementing the principle of equal pay[57] and some have transposed the provision by way of collective labour agreements[58].

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52 FI.

53 DK, IE, ES, FR.

54 CY, AT. In HR, the Gender Equality Act provides that its provisions shall not be interpreted or implemented in contradiction with EU law.

55 SI.

56 EL, ES, IT, HU, PL, PT, RO, SI, SK, FI.

57 DK, EL, CY.

58 BE, DK.

Most Member States' legislation explicitly prohibits pay discrimination[59]. However, despite the national legal frameworks prohibiting pay discrimination, application of the equal pay principle in practice remains problematic. This is illustrated by the persistent gender pay gap and the low number of pay discrimination cases being brought before the national courts in most Member States.

The gender pay gap currently stands at an average of 16.2% in the EU Member States[60]. Although estimates vary as to how much of the total gender pay gap arises from pay discrimination as prohibited by Article 157 TFEU and Article 4 of the Directive, it appears to be consensual that a considerable part of it can be traced back to discriminatory practices[61]. While direct discrimination in relation to the exact same job appears to have reduced in significance, there are substantial problems with evaluating work done predominantly by women or men, particularly where this evaluation is carried out in collective agreements.

The number of pay discrimination cases referred to national courts is low or very low in most Member States, with only few exceptions[62]. At the same time, when equal pay cases occur they are lengthy[63]. However, due to a lack of data and ineffective monitoring in many Member States, no comprehensive information on court or tribunal decisions on pay discrimination is available. This makes it challenging to fully assess and quantify pay discrimination between men and women[64].

The scarcity of national case law on equal pay may indicate a lack of effective access to justice for victims of gender pay discrimination. The effective application of the provisions on the equal pay principle in practice may be hindered by three factors: (i) the lack of clarity and legal certainty on the concept of work of equal value; (ii) the lack of transparency in pay systems; and (iii) procedural obstacles. These three obstacles are discussed below.

4.1. Definition and application of the 'work of equal value' concept and job evaluation systems used to determine pay

There is no EU-level definition of work of equal value or any clear assessment criteria for comparing different jobs. However, the CJEU has clarified the concept of equal pay on several occasions[65]. A full overview of the CJEU's case law is provided in Annex 2 of the Staff Working Document. Recital 9 of the Directive provides that, in accordance with CJEU case law, to assess whether workers are performing the same work or work of equal value, it should be determined whether they may be considered to be in a comparable situation, by taking into account a range of factors including the nature of work and training and working conditions.

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59 Several Member States (e.g. BE, DE, PL, SE) do not have such an explicit ban, but a general prohibition of sex discrimination also seems to cover pay discrimination.

60 Eurostat Online Database 2011, available at http://epp.eurostat.ec.europa.eu/tgm/table.do?tab=table&init=1&plugin=1&language=en&pcode=tsdsc340.

61 See for instance Belgian Presidency report 2010 'The gender pay gap in the Member States of the European Union: quantitative and qualitative indicators', available at: http://register.consilium.europa.eu/pdf/en/10/st16/st16516-ad02.en10.pdf.

62 E.g. IE, UK. In 2011, the UK impact assessment on legislative measures to promote equal pay estimated that there were 28 000 equal pay claims annually in employment tribunals.

63 This includes UK. The Annual Tribunal Statistics 2011-2012 indicates the equal pay cases to be the slowest of all categories, see http://www.justice.gov.uk/downloads/statistics/tribs-stats/ts-annual-stats-2011-12.pdf.

64 Several Member States lack specific statistics on the number and types of pay discrimination cases.

65 See Cases 237/85, C-262/88, C-400/93, C-381/99. See also Recital 9 of the Directive.

Most Member States' legislation does not explain what should be understood as work of equal value, leaving it to the interpretation of national courts. Twelve Member States[66] have introduced a definition of this concept in their legislation, indicating an analytical framework or the most important criteria for comparing the value of different jobs. In most of these cases, the legislation lists skills, effort, responsibility and working conditions as the main factors for assessing the value of work. Including such a definition in national laws could be a major asset for victims of pay discrimination, helping them to bring claims before national courts. Several Member States without specific provisions like these explained that the concept was developed by their national courts[67] or is provided in the commentary[68] or the preparatory work of legislation on equal pay[69].

One way of determining work of equal value is by using **gender neutral job evaluation and classification systems**. However, the Directive does not oblige Member States to put such systems in place and their availability at national level varies significantly. While some Member States' legislation explicitly ensures that job evaluation and classification systems used for determining pay are gender neutral[70], others do not have this explicitly reflected in their legal provisions[71]. In a few Member States, gender-neutral job evaluation is safeguarded by collective labour agreements[72]. Practical instruments designed to assist in establishing gender-neutral job evaluation and pay systems also vary by Member State. A few have established guides and checklists for job evaluation and classification which makes it possible to assess jobs in a more objective manner and avoid gender bias. These specific tools are mostly issued by Member States' gender equality bodies[73] or by national authorities[74]. Several Member States have training programmes to assist employers in implementing gender-neutral job classification systems[75].

Annex 1 of the Staff Working Document accompanying this Report, on gender-neutral job evaluation and classification systems, could contribute to better implementation of the equal pay principle in practice.

4.2. Transparency of pay

Increased transparency of wages can reveal a gender bias and discrimination in the pay structures of an undertaking or an industry and enable employees, employers or social partners to take appropriate action to ensure implementation of the equal pay principle. In line with Article 21(3) and (4) of the Directive, several Member States have put in place specific wage transparency measures. These can be divided into measures that disclose the pay of individual employees and measures that collectively disclose pay information for categories of employees. While measures that provide for individual disclosure of wages may help build individual cases and have a preventive effect, collective disclosure of wages may be the basis for more general measures to reduce the gender pay gap.

In cases of alleged pay discrimination, in some Member States the employer is obliged to provide the employee with information on pay, which helps to assess whether there has been

66 CZ, IE, FR, HR, CY, HU, PL, PT, RO, SK, SE, UK.
67 DK, DE, EL, ES, LV, AT.
68 AT.
69 FI.
70 E.g. EL, FR, IT, CY, LT, AT, SI.
71 E.g. BE, DE, EE, IE, HR, LV, LU, HU, PL, FI.
72 E.g. in BE.
73 E.g. BE, NL, PT, SE, UK.
74 E.g. BE, EE, LU, AT.
75 E.g. BE, EE, CY, SE.

discrimination[76]. In some Member States this information can be obtained by the employee's representative, with the consent of the employee[77]. If disclosure is refused, in some Member States it can be obtained via the courts[78]. Regulations in some Member States include an obligation to indicate the legal minimum wage when advertising jobs[79], or make it unlawful for an employer to prevent employees from disclosing their pay to others, where the purpose of such disclosure is to determine whether there are links to differences in pay and to a protected characteristic such as sex[80]. Several Member States' equality bodies are entitled to request information on pay[81], for example information on income figures for comparable employees from the social security institution[82]. However, information on pay is often considered confidential under national data protection and privacy legislation. Therefore, in many Member States such information cannot be released by employers. Employees may even be contractually prohibited from informing other employees about their pay. Disclosing pay information is usually more problematic in the private sector than in the public sector.

As far as collective measures are concerned, several Member States encourage the promotion of equality planning by obliging employers to regularly assess pay practices and pay differences and by drawing up an action plan for equal pay[83]. This obligation is usually placed on larger employers. Breaches of this obligation may be subject to pecuniary sanctions[84]. Some Member States also require employers to draw up pay surveys[85], while others require employers to gather employment-related statistical data based on gender[86]. In some Member States employers are obliged to periodically provide employees' representatives with a written report on the gender equality situation in the undertaking, including details of pay[87].

4.3. Procedural obstacles in equal pay cases

Victims of pay discrimination face certain obstacles to accessing justice, including: lengthy and costly judicial proceedings, time limits, lack of effective sanctions and sufficient compensation, and limited access to the information necessary to make an equal pay claim.

Individual employees usually have limited access to the information necessary to make a successful equal pay claim, such as information about the pay of people who perform the same work or work of equal value. This is an obstacle to the effective application of the **shifting of the burden of proof** rule, provided in Article 19 of the Directive, which requires the victim to first establish facts from which it can be presumed that there has been discrimination. An employer is only then obliged to prove that no discrimination took place. The application of the shift of the burden of proof rule remains problematic in some Member States where there seems to be a higher threshold than stipulated in the Directive to bring about the shift[88].

76 E.g. BG, EE, IE, SK, FI.
77 E.g. FI.
78 E.g. CZ, LV.
79 E.g. AT.
80 E.g. UK.
81 E.g. EE, SE.
82 E.g. AT.
83 E.g. BE, ES, FR, FI, SE.
84 This is the case in FR.
85 E.g. FI. SE.
86 E.g. DK, EE.
87 E.g. BE, DK, FR, IT, LU, AT.
88 E.g. CY, MT, BG. RO recently amended its legislation to remove that problem.

The costs of legal assistance and judicial proceedings are usually high and place a burden on a victim. Also, the compensation and reparation that can be obtained is often limited[89]. Therefore, the **active role of gender equality bodies and trade unions** in providing independent assistance to victims of discrimination would help them gain access to justice and ensure the effectiveness of the legal framework on equal pay. It could also reduce the litigation risk for individual employees and could be a possible solution to remedy the significant scarcity of equal pay cases. Therefore, involving gender equality bodies is instrumental for effectively applying the equal pay principle. However, the tasks and powers of national gender equality bodies are very diverse and it is only in some Member States that the role of equality bodies includes representing individuals in such claims[90]. Representation of individuals can be also exercised by trade unions[91] and NGOs.

The Directive requires Member States to take **preventive measures** related to breaches of the equal pay principle[92], again leaving the choice of measures up to them. Prevention measures could include conducting investigations that aim to prevent pay inequality, organising training for stakeholders, and awareness-raising activities.

5. CONCLUSIONS AND WAY FORWARD

The Directive introduced several important novelties that aim to make EU legislation in this area more coherent, to bring it into line with CJEU case law and, ultimately, to make the law more effective and accessible to practitioners and the general public.

With regard to the correct transposition of these novelties into national law, the Commission's services still have questions for most Member States. These remaining issues will be clarified as a matter of priority, if necessary through infringement proceedings. For the future, the main challenge for all Member States is the correct application and enforcement in practice of the rights in this Directive.

The practical application of equal pay provisions in Member States seems to be one of the Directive's most problematic areas. This is illustrated by the persistent gender pay gap, which could be caused in considerable part by pay discrimination and by the lack of challenges by individuals in national courts.

Member States should make use of the tools provided in the attached Staff Working Document to increase the effectiveness of the application of the equal pay principle and to tackle the persisting gender pay gap.

The Commission will continue to comprehensively monitor the application of the equal pay principle. In line with the Europe 2020 Strategy, in addition to awareness-raising activities and dissemination of best practice, the Commission will continue to put forward country-specific recommendations that address the causes of the gender pay gap during the annual European Semester exercise.

Moreover, the Commission is planning for 2014 to adopt a non-legislative initiative aiming to promote and facilitate effective application of the principle of equal pay in practice and assist

89 In most cases compensation is equal to lost earnings based on the wage difference between claimant and comparator. In some Member States immaterial damage suffered is also included. The national legal framework on sanctions differs significantly between Member States.

90 E.g. BE, BG, EE, IE, IT, HU, MT, AT, SK, FI, SE, UK.

91 E.g. in BE, DK, FR, SE, UK.

92 Article 26 of the Directive.

Member States in finding the right approaches to reduce the persisting gender pay gap[93]. This initiative is likely to focus on wage transparency.

[93] Commission Work Programme 2014, COM(2013) 739 final, available at http://ec.europa.eu/atwork/pdf/cwp_2014_annex_en.pdf.