



## **ECNI and NIHRC Briefing Paper:**

# **The EU Pay Transparency Directive: The UK Government's dynamic alignment obligations relating to Windsor Framework Article 2**

**March 2024**

# 1.0 Executive Summary

## *Background*

- 1.1. In Windsor Framework Article 2 (**WF Article 2**), the UK Government commits to ensuring that certain rights, safeguards and equality of opportunity protections in Northern Ireland are not diminished as a result of the UK leaving the EU. The Windsor Framework (WF) was formerly known as the Protocol on Ireland/Northern Ireland of the UK-EU Withdrawal Agreement.
- 1.2. The UK Government has also ‘dynamic alignment’ obligations arising out of WF Article 13 (3), relating to WF Article 2(1), in relation to the six Equality Directives in WF Annex 1.<sup>1</sup> Therefore, if the EU decides to amend or replace the rights in the Annex 1 Directives the law in Northern Ireland must also develop to take account of this. The UK Government has committed to introduce such changes where they ‘improve’ rights protections.<sup>2</sup> WF Article 13(2) also requires continued alignment with Court of Justice of the EU (CJEU) jurisprudence regarding EU measures listed in the WF, including the WF Annex 1 Equality Directives.<sup>3</sup>
- 1.3. The Directive 2006/54/EC on equal opportunities and equal treatment of women and men in employment and occupation (**‘Recast Directive’**)<sup>4</sup> is contained in WF Annex 1 and therefore clearly falls within the scope of the dynamic alignment requirements of WF Article 13(3) and engages the ‘keeping pace’ commitment. Of particular relevance is the fact that the Recast Directive (Article 4) includes provisions prohibiting direct and indirect discrimination on the grounds of sex for the same work or for work of equal value.<sup>5</sup>
- 1.4. The EU Pay Transparency Directive (**‘PTD’**), Directive 2023/970, 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

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<sup>1</sup> Article 13(3): “Notwithstanding Article 6(1) of the Withdrawal Agreement, and unless otherwise provided, where this Protocol makes reference to a Union act, that reference shall be read as referring to that Union act as amended or replaced.”

<sup>2</sup> NIO explainer 2020 Art 2.

<sup>3</sup> Article 13 (2) WF: “Notwithstanding Article 4(4) and (5) of the Withdrawal Agreement, the provisions of this Protocol referring to Union law or to concepts or provisions thereof shall in their implementation and application be interpreted in conformity with the relevant case law of the Court of Justice of the European Union.”

<sup>4</sup> Directive [2006/54/EC](#) of 5 July 2006 on equal opportunities and equal treatment of women and men in employment and occupation.

<sup>5</sup> Recast Directive, Article 4: Prohibition of discrimination: “For the same work or for work to which equal value is attributed, direct and indirect discrimination on grounds of sex with regard to all aspects and conditions of remuneration shall be eliminated. In particular, where a job classification system is used for determining pay, it shall be based on the same criteria for both men and women and so drawn up as to exclude any discrimination on grounds of sex.”



- 1.11. We therefore consider that the UK Government, further to its dynamic alignment obligations arising out of WF Article 13 (3),<sup>9</sup> **must** transpose these provisions of the PTD into NI law by 7 June 2026.
- 1.12. In assessing the degree to which the provisions of the PTD amend and/or replace provisions in the Recast Directive, the Commissions have taken into account a number of relevant factors including that:
- the legal basis for both the PTD and the Recast Directive is the same; namely Article 157(3) TFEU on equal pay for equal work;<sup>10</sup>
  - the PTD is aimed at strengthening the application of the principle of equal pay and the prohibition of discrimination set out in the Recast Directive, through both pay transparency and reinforced enforcement mechanisms, and this is clearly stated in the PTD;
  - the PTD makes clear that its provisions relating to remedies and enforcement “*apply to*” proceedings relating to any right or obligation relating to the principle of equal pay set out in the Recast Directive (Article 4);
  - there is a considerable degree of overlap on the substance of the rights and safeguards between the PTD and the Recast Directive; there are also references in the PTD to ‘*building on*’ the Recast Directive. In addition, the PTD clarifies a number of existing concepts in the Recast Directive, including core concepts related to equal pay for equal work or work of equal value. This includes in accordance with CJEU case law, and which strengthen rights for individuals facing pay discrimination and facilitate the application of those concepts.
- 1.13. It is therefore apparent from the above analysis that both the PTD and the provisions within the Recast Directive on equal pay are primarily aimed at strengthening the application and enforcement of the principle of equal pay and the prohibition of discrimination. In addition, provisions in the PTD build on and improve existing provisions in the Recast Directive in this area. Aligned to this, the Commissions have set out in section 4 their views on the specific provisions of the PTD in the context of these factors.
- 1.14. Further, in considering the extent to which the PTD ‘amends or replaces’ the Recast Directive, the Commissions consider that it is essential that the provisions of the PTD, and their applications, are considered in their entirety.
- 1.15. For example, in certain areas, the provisions on remedies and enforcement in PTD Chapter III cross reference and relate to provisions in other PTD Chapters.

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<sup>9</sup> Relating to WF Article 2(1).

<sup>10</sup> In [Article 157\(3\) of the TFEU](#), the EU undertakes 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”.

- 1.16. Further, some of the provisions on remedies and enforcement are complemented and supported by provisions in other PTD Chapters. Taking a piecemeal and limited approach to the transposition of the PTD, for example, by only transposing certain (and not all) of the provisions, would therefore weaken the overall effectiveness of these provisions, including on enforcement and remedies. As set out above, the Commissions consider that, apart from a small number of provisions of the PTD that are no longer relevant now that the UK has left the EU<sup>11</sup>, the UK Government's dynamic alignment obligations arising out of WF Article 13 (3)<sup>12</sup> apply to **all other provisions** of the PTD, as outlined below.
- 1.17. In addition, further to the UK Government's commitment arising out of WF Article 13 (3), to introduce such changes where they '*improve*' rights protections, the Commissions consider that the provisions of the PTD outlined below *improve* rights protections in Northern Ireland.

### *Recommendations*

- 1.18. The Commissions therefore **recommend** that the UK Government, the NI Executive, and the NI Department for Communities ensure that, apart from a small number of provisions of the PTD that are no longer relevant now that the UK has left the EU<sup>13</sup>, **all other provisions** of the PTD, as detailed below, are transposed into NI law by 7 June 2026. The timing of the transposition into NI law should therefore align with the transposition deadline for Member States in relation to the PTD.
- 1.19. The Commissions also **recommend** that the European Commission, further to its obligations under the Windsor Framework,<sup>14</sup> inform the Joint Consultative Working Group in a timely manner of the PTD as an EU measure that amends or replaces the Recast Directive in Annex 1 to the WF.
- 1.20. We stress that the requirements of the PTD should be considered minimum requirements and we would encourage government to adopt an approach when implementing the PTD that goes beyond these minimum standards where this reflects best practice, including international human rights best practice, and where it seeks to strengthen rights in this area. For example, the

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<sup>11</sup> For example, reporting requirements to the European Commission

<sup>12</sup> Relating to WF Article 2(1).

<sup>13</sup> For example, reporting requirements to the European Commission.

<sup>14</sup> WF Article 15 (3): Within the working group (a) the Union and the United Kingdom shall, in a timely manner, exchange information about planned, ongoing and final relevant implementation measures in relation to the Union acts listed in the Annexes to this Protocol; (b) the Union shall inform the United Kingdom about planned Union acts within the scope of this Protocol, including Union acts that amend or replace the Union acts listed in the Annexes to this Protocol.

ECNI has called for the power to bring discrimination cases in its own name (own motion powers) which is not envisaged under the PTD.<sup>15</sup>

- 1.21. Therefore, the Commissions **recommend** that the UK Government, the NI Executive and the NI Department for Communities, in the development of any legislation introducing requirements relating to strengthening the application of equal pay, ensure that, where necessary, this legislation goes beyond the minimum standards in the PTD, and reflects best practice, including international human rights best practice and standards, so as to ensure robust rights and protections. This should be in addition to ensuring law in NI is amended to keep pace with changes required pursuant to the UK Government's obligations relating to WF Article 2.

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<sup>15</sup> See ECNI [response](#) to TEO consultation on review of the Race Relations (NI) Order 1997, June 2023.

## 2.0 Introduction

### WF Article 2

- 2.1. Both the Equality Commission for Northern Ireland (ECNI) and the Northern Ireland Human Rights Commission (NIHRC) (the Commissions) were established following the Belfast (Good Friday) Agreement and pursuant to the Northern Ireland Act 1998. The Commissions are non-departmental public bodies. The NIHRC is a National Human Rights Institution with ‘A status’ accreditation from the United Nations.
- 2.2. The Commissions are mandated in accordance with Article 2(1) (**WF Article 2**) of the Windsor Framework (WF),<sup>16</sup> formerly known as the Protocol on Ireland/Northern Ireland of the UK-EU Withdrawal Agreement, to oversee the UK Government’s commitment to rights and equality in Northern Ireland after UK Withdrawal from the EU.
- 2.3. In addition, the Commissions exercise part of this mandate in partnership with the Irish Human Rights and Equality Commission in relation to those aspects of oversight of, and reporting on, rights and equalities issues falling within the scope of WF Article 2 which have an island of Ireland dimension.
- 2.4. WF Article 2 states:
  1. The United Kingdom shall ensure that no diminution of rights, safeguards or equality of opportunity, as set out in that part of the 1998 Agreement entitled Rights, Safeguards and Equality of Opportunity results from its withdrawal from the Union, including in the area of protection against discrimination, as enshrined in the provisions of Union law listed in Annex 1 to this Protocol, and shall implement this paragraph through dedicated mechanisms.
  2. The United Kingdom shall continue to facilitate the related work of the institutions and bodies set up pursuant to the 1998 Agreement, including the Northern Ireland Human Rights Commission, the Equality Commission for Northern Ireland and the Joint Committee of representatives of the Human Rights Commissions of Northern Ireland and Ireland, in upholding human rights and equality standards.

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<sup>16</sup> Decision No 1/2023 of the Joint Committee established by the Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community of 24 March 2023 laying down arrangements relating to the Windsor Framework.

- 2.5. The UK Government has ‘dynamic alignment’ obligations arising out of WF Article 13 (3), relating to WF Article 2(1) in relation to the six Equality Directives in WF Annex 1.<sup>17</sup>
- 2.6. Critically, WF Annex 1 includes Directive [2006/54/EC](#) of 5 July 2006 on equal opportunities and equal treatment of women and men in employment and occupation (**‘Recast Directive’**) and clearly falls within the scope of the dynamic alignment requirements of Article 13(3) and engages the ‘keeping pace’ commitment.<sup>18</sup> Of particular relevance is the fact that the Recast Directive (Article 4) includes provisions prohibiting direct and indirect discrimination on the grounds of sex for the same work or for work of equal value.<sup>19</sup>
- 2.7. This ‘dynamic alignment’ commitment was made by the UK Government to ensure that Northern Ireland did not fall behind minimum European standards in anti-discrimination law.<sup>20</sup>
- 2.8. Article 13(3) of the Windsor Framework requires that references to EU law in the Windsor Framework be read as referring to that law ‘as amended or replaced’, whenever that amendment or replacement takes place.<sup>21</sup> Article 13(3) is therefore open-ended and is not time limited. Further, this process has been described as ‘fully automatic; it requires neither the consent of the UK nor any formal process of updating the Protocol or its annexes’.<sup>22</sup>
- 2.9. Further, as made clear in paragraph 12 of the NIO [Explainer Document](#) on the Article 2 commitment (2020), the UK Government has stated that it has ‘committed to ensuring that, if the EU decides to amend or replace the substantive rights in those directives to improve the minimum levels of protection available, the corresponding substantive rights protections in Northern Ireland will also develop to take account of this’.
- 2.10. Whilst the Commissions are of the view that it is not necessarily the case that the dynamic alignment commitment arising out of WF Article 13 (3) applies only where rights protections are ‘improved’, they consider that the application

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<sup>17</sup> For further information on the scope of WF Article 2, see ECNI, NIHRC [Working Paper: The Scope of Article 2\(1\) of the Ireland/ Northern Ireland Protocol](#), (ECNI and NIHRC, December 2022).

<sup>18</sup> Directive [2006/54/EC](#) of 5 July 2006 on equal opportunities and equal treatment of women and men in employment and occupation.

<sup>19</sup> Recast Directive, Article 4: Prohibition of discrimination: “For the same work or for work to which equal value is attributed, direct and indirect discrimination on grounds of sex with regard to all aspects and conditions of remuneration shall be eliminated. In particular, where a job classification system is used for determining pay, it shall be based on the same criteria for both men and women and so drawn up as to exclude any discrimination on grounds of sex.”

<sup>20</sup> [Explainer: UK Government commitment to no diminution of rights, safeguards and equality of opportunity in Northern Ireland](#), 7 August 2020, para 7, para 12.

<sup>21</sup> Article 13(3): “Notwithstanding Article 6(1) of the Withdrawal Agreement, and unless otherwise provided, where this Protocol makes reference to a Union act, that reference shall be read as referring to that Union act as amended or replaced.”

<sup>22</sup> Thomas Liefländer, Commentary on Article 13, in Thomas Liefländer, Manuel Kellerbauer, and Eugenia Dumitriu-Segnana, *The EU-UK Withdrawal Agreement: A Commentary* (OUP, 2021), 8.155.

of this commitment should not under any circumstances result in a diminution of the rights protected under WF Article 2.

- 2.11. In addition, WF Article 13(2) requires continued alignment with Court of Justice of the EU (CJEU) jurisprudence regarding EU measures listed in the WF, including the Annex 1 Directives.<sup>23</sup>
- 2.12. Therefore the Commissions' view is that, in line with Article 13 (2) of the WF, the Annex 1 equality directives will continue to be informed by CJEU rulings and, to the extent that such rulings evolve general principles of EU law, the EU Charter of Fundamental Rights ('the Charter') and the relevant EU Treaty provisions, these will continue to have relevance in NI.

### **EU Pay Transparency Directive**

- 2.13. The EU Pay Transparency Directive ('PTD'), Directive 2023/970, 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, dated 10 May 2023 came into force on 6 June 2023.<sup>24</sup> The provisions of the PTD must be transposed by Member States by 7 June 2026.
- 2.14. As reflected in its title, the PTD aims 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.
- 2.15. Both the Recast Directive and the PTD were adopted pursuant to Article 157 TFEU<sup>25</sup> which obliges EU Member States to ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied. It also provides for the adoption by the EU of 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 (the 'principle of equal pay').

### **UK Government's views**

- 2.16. As regards the UK Government's views on how the proposed PTD interacted with WF Article 2, it will be noted that Minister Walker, NI Minister of State, responded in July 2021 to correspondence from the House of Commons European Scrutiny Committee<sup>26</sup> in which the Committee sought the

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<sup>23</sup> Article 13 (2) WF: "Notwithstanding Article 4(4) and (5) of the Withdrawal Agreement, the provisions of this Protocol referring to Union law or to concepts or provisions thereof shall in their implementation and application be interpreted in conformity with the relevant case law of the Court of Justice of the European Union."

<sup>24</sup> DIRECTIVE (EU) 2023/970, [Publications Office \(europa.eu\)](https://publications.europa.eu).

<sup>25</sup> Treaty of the Functioning of the EU, [Article 157 of the TFEU](#).

<sup>26</sup> [Letter](#) to European Scrutiny Committee, dated 15 July 2021.

Government's views on a range of matters relating to proposed PTD and Article 2(1).

- 2.17. The UK Government's response indicated that, whilst the Government remained committed to ensuring that matters of pay transparency are dealt with, it did 'not believe that there is any requirement to go further than the requirements to assess this already included in the Protocol'.
- 2.18. It is of note that there was no clear indication in that response that the UK Government was committed to ensuring that relevant protections in Northern Ireland's equality legislation relating to equal pay would be amended to keep pace with the provisions of the PTD, if introduced.
- 2.19. It will be noted that unlike in Great Britain and Ireland, there is currently no legislation in Northern Ireland requiring gender pay reporting by certain employers.<sup>27</sup>

### **Views of the European Commission**

- 2.20. The UK Government indicated in its letter of July 2021 to the House of Commons European Scrutiny Committee that it had not been notified by the European Commission, pursuant to Article 15(3)(b) of the WF, that the proposed PTD was within the scope of the Protocol, and/or that it was an EU law that amended or replaced any of the measures listed in Annex 1.
- 2.21. The European Commission has obligations under the Windsor Framework<sup>28</sup> to inform the Joint Consultative Working Group on the WF in a timely manner of proposed EU measures within the scope of the WF that amend or replace EU law in Annex 1 to the WF, as well as other Annexes to the WF.
- 2.22. We note that the European Commission had indicated in its explanatory memorandum on its proposal for the PTD in March 2021, that it "*was decided not to amend or replace*" the Recast Directive. The European Commission makes it clear that the reasons for this were due to the latter's wider scope to combat sex-based discrimination in employment and occupation, and that 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.

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<sup>27</sup> To date, Section 19 of the Employment Act (Northern Ireland) 2016 ('the Act') has not been brought into force. The Act provided for the introduction of a gender pay strategy and associated action plan, in tandem with the introduction of Gender Pay Gap Reporting Regulations in Northern Ireland.

<sup>28</sup> WF Article 15 (3): Within the working group (a) the Union and the United Kingdom shall, in a timely manner, exchange information about planned, ongoing and final relevant implementation measures in relation to the Union acts listed in the Annexes to this Protocol; (b) the Union shall inform the United Kingdom about planned Union acts within the scope of this Protocol, including Union acts that amend or replace the Union acts listed in the Annexes to this Protocol.

- 2.23. The reasons given by the European Commission therefore relate to the wide scope of the Recast Directive -namely, that it was not solely about pay discrimination-and for structural reasons. In the Commissions' view this indication by the European Commission in 2021 does not definitively mean that the PTD does not amend or replace the Recast Directive for the purposes of WF Article 13.
- 2.24. The Commissions therefore consider that the reference by the European Commission in its explanatory memorandum on its PTD proposal to the fact that it "*was decided not to amend or replace*" the Recast Directive could be considered as not reflecting the overall position in the context of assessing whether or not the PTD 'amends or replaces' the Recast Directive. This includes in light of the fact that the PTD makes clear that its provisions relating to remedies and enforcement "*apply to*" proceedings relating to any right or obligation relating to the principle of equal pay set out in the Recast Directive.
- 2.25. The Commissions understand that the European Commission is still giving consideration as to whether or not the PTD amends or replaces provisions in the Recast Directive, for the purposes of WF Article 13.

## 3.0 'Amend or Replace': Factors

### ***Relevant Factors***

- 3.1. The Commissions consider that there are a number of relevant factors to consider in assessing whether or not the PTD 'amends or replaces' the Recast Directive further to WF Article 13.
- 3.2. We have previously made clear that where a proposed EU measure explicitly states that it is replacing or 'recasting' an Annex 1 Directive, it is relatively straightforward to identify what measures will need to be updated in NI law.<sup>29</sup>
- 3.3. We had also indicated that where a new EU measure does not explicitly state that it is amending an Annex 1 equality directive, or where it is amending or updating part of such a directive, an assessment of the substance of the measure will be necessary to evaluate the extent to which it requires NI law to keep pace with this change.
- 3.4. Such an assessment would have to consider, for example, the legal basis for this new measure; the purpose of the new measure; the degree of overlap on the substance of the rights and safeguards between the new measure and the Annex 1 equality directive, and any relevant Court of Justice of the EU (CJEU)

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<sup>29</sup> See ECNI, NIHRC [Working Paper: The Scope of Article 2\(1\) of the Ireland/ Northern Ireland Protocol](#), (ECNI and NIHRC, December 2022).

case law; and the extent to which the new measure facilitates the implementation and/or enforcement of an Annex 1 equality directive.<sup>30</sup>

- 3.5. Aligned to the above, we have set out below our assessment of the degree to which we consider the PTD amends or replaces the Recast Directive.

#### *Same Legal Basis*

- 3.6. One relevant key factor is the degree to which the PTD has the same legal basis as the Recast Directive.

- 3.7. Critically, it is clear that the legal basis for both the PTD and the Recast Directive is the same, namely Article 157(3) TFEU in which the EU undertakes 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”.<sup>31</sup>

- 3.8. Specifically, the European Commission’s explanatory memorandum to the draft Directive (COM(2021)93) in 2021 states that: *‘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’*.<sup>32</sup>

- 3.9. It will be noted that some of the key concepts in both Directives are derived directly from Article 157 TFEU.<sup>33</sup>

#### *Facilitates implementation /application*

- 3.10. Another relevant key factor is the degree to which the PTD facilitates or strengthens the implementation and enforcement of the Recast Directive as regards the principle of equal pay.

- 3.11. The Commissions are of the view that a primary aim of the PTD is to facilitate the implementation and enforcement of the Recast Directive, as regards the principle of equal pay.

- 3.12. In particular, it is clear that the PTD is aimed at strengthening the application of the principle of equal pay and the prohibition of discrimination set out in the

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<sup>30</sup> Ibid.

<sup>31</sup> [Article 157\(3\) of the TFEU](#).

<sup>32</sup> See page 3 thereof. [Explanatory Memorandum to COM \(2021\)93 - Proposal for a Directive to strengthen the application of the principle of equal pay for equal work between men and women through pay transparency and enforcement mechanisms - EU monitor](#). European Commission, 4 March 2021. The European Commission refers to Directive 2006/54/EC as the ‘Recast Directive’.

<sup>33</sup> For example, the concepts of ‘pay’, ‘equal pay’, ‘same work’ and ‘work of equal value’ are derived directly from Article 157 TFEU. See *European Commission staff working document of the relevant provisions in the Directive 2006/54/EC implementing the Treaty principle on ‘equal pay for equal work or work of equal value, 050320, page 17.*

Recast Directive, through both pay transparency and reinforced enforcement mechanisms.

- 3.13. Specifically, the PTD makes clear the link between its key objective and a key objective of the Recast Directive. In particular, the PTD indicates, at the outset, in Article 1 (subject matter), that the PTD lays down minimum requirements to strengthen the application of the principle of equal pay in Article 157 TFEU and the prohibition of discrimination in Article 4 of the Recast Directive, in particular through pay transparency and reinforced enforcement mechanisms (our emphasis).
- 3.14. Importantly, of note is that it states that the application of the principle of equal pay is strengthened through both pay transparency and reinforced enforcement mechanisms, and that binding measures to improve pay transparency ‘*need to be complemented*’ by provisions clarifying existing legal concepts, such as the concepts of pay and work of equal value, and measures improving enforcement mechanisms and access to justice.<sup>34</sup>
- 3.15. The recitals to the PTD (Recital 11) reinforce this by indicating that a European Commission evaluation (2020) of the Recast Directive found that the application of the principle of equal pay was 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.<sup>35</sup>
- 3.16. The European Commission’s evaluation (2020) highlights that a number of lessons emerged from the evaluation of the Recast Directive, “*reflecting further needs for better implementation of the principle of equal pay*”.
- 3.17. These included the need:
- to clarify how to apply and use some existing legal concepts;
  - to better define a mandate and increase resources of monitoring bodies (e.g. equality bodies and labour inspectorates);
  - for a minimum level of fines and compensation in cases of gender-based pay discrimination;
  - to promote awareness of rights to redress which would increase the incentive for victims to seek access to justice;
  - to improve the practical application of the reversed burden of proof;
  - to promote the use of gender-neutral job classifications/evaluations in Member States;

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<sup>34</sup> PTD, at Recital 16.

<sup>35</sup> PTD, Recital 11 also states “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 the social partners to take appropriate action to ensure the application of the right to equal pay for equal work and work of equal value (the ‘right to equal pay’)”.

- to ensure gender neutrality in terms of the actuarial factors used to calculate contributions and benefits in occupational social security schemes;
  - to promote training and the exchange of good practices on building gender-based pay discrimination cases;
  - to ensure pay transparency measures are better implemented across the EU;
  - to promote data collection and research on the impacts of policies that promote the application of the equal pay principle.
- 3.18. It makes clear that “*addressing these needs would potentially strengthen the implementation of the ‘principle of equal pay for equal work’ in the EU*”.
- 3.19. In summary, it is clear from the European Commission’s evaluation of the Recast Directive that these key provisions in the PTD were introduced to strengthen the application of the principle of equal pay, and to address shortcomings in the implementation of the Recast Directive.<sup>36</sup>
- 3.20. In addition, the European Commission’s explanatory memorandum to the draft Directive (COM(2021)93) states that the 2014 Recommendation had not achieved the objective of more effective implementation of the equal pay principle through pay transparency due to its non-binding nature and resulting limited implementation by Member States and that the Recast Directive should therefore be “*complemented and supported*” by the proposed PTD.<sup>37</sup>
- 3.21. The European Commission also makes clear that a key objective of the proposed PTD is “*facilitating the application of the key concepts relating to equal pay, including ‘pay’ and ‘work of equal value’*” (our emphasis).<sup>38</sup> These are key concepts contained within the Recast Directive.
- 3.22. The European Commission also refers to the proposed PTD “*building on the Recast Directive*” and introducing “*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.*”
- 3.23. In addition, the PTD in its recitals refers to “*building on the developments brought by the definition of direct and indirect discrimination*” in the Recast Directive, so as to allow for the use of a hypothetical comparator in claims of discrimination related to equal pay, in situations where no real-life comparator exists.<sup>39</sup>

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<sup>36</sup> For example, the European Commission states that the added value of the Recast Directive “had been hampered by the lack of clarification of the key legal concepts that are central to implementing equal pay measures, particularly for employers, employees and the courts”. European Commission evaluation of the Recast Directive page 67.

<sup>37</sup>See page 3 thereof. [Explanatory Memorandum to COM \(2021\)93 – Proposal for a Directive to strengthen the application of the principle of equal pay for equal work between men and women through pay transparency and enforcement mechanisms – EU monitor](#), European Commission, 4 March 2021.

<sup>38</sup> Ibid.

<sup>39</sup> PTD, Recital 28.

3.24. Further, the objectives of both the PTD and the Recast Directive are in line with the Charter, in particular, Articles 21 and 23, and the recitals of both the PTD and the Recast Directive reference these relevant Charter provisions.<sup>40</sup>

### *Enforcement*

- 3.25. Further, the PTD makes clear that its provisions relating to remedies and enforcement “*apply to*” proceedings relating to any right or obligation relating to the principle of equal pay set out in the Recast Directive (Article 4).
- 3.26. In particular, the PTD, at Article 26, states that the PTD’s ‘Remedies and Enforcement’ provisions in Chapter III “*apply to proceedings concerning any right or obligation relating to the principle of equal pay set out in Article 4 of Directive 2006/54/EC*”<sup>41</sup>. It will be noted that Article 4 of the Recast Directive, as regards equal pay, prohibits discrimination (direct and indirect) on grounds of sex.<sup>42</sup>
- 3.27. In addition, the Recitals to the PTD (Recital 59) state that the PTD ‘*should strengthen the existing enforcement tools and procedures*’ in relation to the equal pay provisions set out in the Recast Directive.<sup>43</sup>
- 3.28. The European Commission has made clear that the proposed PTD’s “*enhanced enforcement measures will improve access to justice and the enforcement of rights granted under EU law.*”
- 3.29. Therefore, in summary, the Commissions consider that these provision in the PTD on remedies and enforcement (Chapter III) makes it very clear that the PTD ‘amends and replaces’ the provisions in the Recast Directive in these areas, for the purposes of WF Article 13.
- 3.30. This includes, but is not limited to, provisions of the PTD referenced below on limitation periods (Article 21); penalties (Article 23); right to compensation (Article 16); and proof of equal work or work of equal value (Article 19).

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<sup>40</sup> See PTD Recital 7 and Recast Directive Recital 5.

<sup>41</sup> Article 26: Relationship with Directive 2006/54/EC: Chapter III of this Directive shall apply to proceedings concerning any right or obligation relating to the principle of equal pay set out in Article 4 of Directive 2006/54/EC.

<sup>42</sup> Article 4: “For the same work or for work to which equal value is attributed, direct and indirect discrimination on grounds of sex with regard to all aspects and conditions of remuneration shall be eliminated. In particular, where a job classification system is used for determining pay, it shall be based on the same criteria for both men and women and so drawn up as to exclude any discrimination on grounds of sex.”

<sup>43</sup> Recital (para 59) states as follow: “In order to improve the enforcement of the principle of equal pay, 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”.

3.31. Further, as set out in more detail below, a number of Articles within the ‘Remedies and Enforcement’ provisions in PTD Chapter III also incorporate a number of clarifications established in case law of the CJEU.

#### *Degree of overlap*

- 3.32. Another relevant key factor is the degree of overlap in terms of the substance of the rights and safeguards between the PTD and the Recast Directive. In summary, the Commissions consider that there is a considerable degree of overlap in these areas.
- 3.33. As noted above, the PTD makes clear that its provisions relating to remedies and enforcement apply to proceedings relating to rights as regards the principle of equal pay in the Recast Directive.
- 3.34. Further, as noted above, the PTD recitals expressly states that it “*builds on*” similar existing provisions in the Recast Directive, for example, as regards the defence of rights. In some instances, detailed below, the provisions in the PTD strengthen and improve rights for individuals and the powers of ECNI, in areas covered by existing provisions in the Recast Directive.
- 3.35. Further, in considering the extent to which the PTD ‘amends or replaces’ the Recast Directive, the Commissions consider that it is essential that the provisions of the PTD, and their applications, are considered in their entirety.
- 3.36. For example, in certain areas, the provisions on remedies and enforcement in PTD Chapter III cross reference and *relate to* provisions in other PTD Chapters.<sup>44</sup>
- 3.37. Further, some of the provisions on remedies and enforcement are *complemented and supported* by provisions in other PTD Chapters.<sup>45</sup> Taking a piecemeal and limited approach to the transposition of the PTD, for example, by only transposing certain (and not all) of the provisions, would therefore weaken the overall effectiveness of these provisions, including on enforcement and remedies.
- 3.38. This is subject to the caveat that the Commissions consider that a small number of provisions of the PTD are no longer relevant now that the UK has left the EU, for example, reporting requirements to the European Commission,

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<sup>44</sup> See for example, Article 18 (2) on Shift on burden of proof. The European Commission has stated that “Pay transparency measures have the potential to support the implementation of the reversed burden of proof.” EC evaluation of Recast Directive 2020, page 25.

<sup>45</sup> For example, as regards the remit of equality bodies (Art 28).

as outlined below.<sup>46</sup> However, whilst it may no longer be appropriate for the UK Government to report to the European Commission on these matters, the Commissions consider that there is value in the UK Government/ NI Executive taking forward a number of these measures. This includes, for example, the regular collection and publication of gender pay data relating to Northern Ireland, so as to assist with data comparisons with EU countries in this area, as referred to in more detail below.

*Clarifies existing concepts, including core concepts: CJEU case law*

- 3.39. Another relevant consideration is the extent to which the PTD clarifies existing provisions and/or concepts in the Recast Directive, including in accordance with CJEU case law.
- 3.40. This must be considered in the context of the obligation on the UK Government, under the WF, that the Annex 1 Directives, which include the Recast Directive, must be interpreted in line with CJEU case law relating to the Annex 1 Directives delivered both before and after the end of the Brexit implementation period.
- 3.41. The PTD makes it clear that it clarifies a number of existing concepts, including core concepts related to equal pay for equal work or work of equal value, including in accordance with CJEU case law;<sup>47</sup> case law which pre-dates the end of the Brexit transition period. These clarifications strengthen rights for individuals facing pay discrimination and facilitate the application of those concepts.
- 3.42. Examples of these clarifications are set out below.

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<sup>46</sup> See for example, sections below on PTD Article 31 (Statistics) and Article 35 (Reporting and Review).

<sup>47</sup> PTD: Recital 20: "In order to remove obstacles for victims of gender-based pay discrimination to exercise their right to equal pay, and to guide employers in ensuring respect of that right, the core concepts related to equal pay for equal work or work of equal value, such as pay and work of equal value, should be clarified in accordance with the case-law of the Court of Justice. This should facilitate the application of those concepts, especially for micro, small and medium-sized enterprises."

### **Examples: Concept / Definition of pay (Article 3)**

- 3.43. The PTD in its recitals states that the PTD clarifies that, *“in accordance with CJEU case law”*, the ‘concept of pay’ should comprise not only salary, but also complementary or variable components of the pay.<sup>48 49</sup>
- 3.44. Further, as regards to the concept of work of equal value, it refers to the need to assess and compare the value of work, *“in accordance with the case law of the CJEU”*, on the basis of objective criteria, and sets out examples of a number of criteria that should be used.<sup>50</sup>
- 3.45. The PTD highlights in its recitals that the reasons for clarifying these core concepts is so as to *“remove obstacles for victims of gender-based pay discrimination to exercise their right to equal pay”*, and to *“guide employers in ensuring respect of that right”*.<sup>51</sup> The recitals also refer to that this clarification will *“facilitate the application of the concept of work of equal value, especially for micro, small and medium-sized enterprises”*.<sup>52</sup>
- 3.46. It is therefore apparent from the above analysis that both the PTD and the provisions within the Recast Directive on equal pay are primarily aimed at strengthening the application and enforcement of the principle of equal pay and the prohibition of discrimination. In addition, provisions in the PTD build on and improve existing provisions in the Recast Directive in this area.
- 3.47. Aligned to this, the Commissions have set out in section 4 below their views on the specific provisions of the PTD in the context of these factors.

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<sup>48</sup> PTD, Recital 21. In accordance with the case-law of the Court of Justice , the concept of pay should comprise not only salary, but also complementary or variable components of the pay.”

<sup>49</sup> See also PTD, Article 3.1 (a) (Definitions) : “ ‘pay’ means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which a worker receives directly or indirectly (complementary or variable components) in respect of his or her employment from his or her employer.”

See also Article 3.1 (g): “‘work of equal value’ means work that is determined to be of equal value in accordance with the non-discriminatory and objective gender-neutral criteria referred to in Article 4(4)”.

<sup>50</sup> PTD: Recital (26): “In order to respect the right to equal pay, employers must have pay structures in place ensuring that there are no gender-based pay differences between workers performing the same work or work of equal value that are not justified on the basis of objective, gender-neutral criteria. Such pay structures should allow for the comparison of the value of different jobs within the same organisational structure. It should be possible to base such pay structures on existing Union guidelines related to gender-neutral job evaluation and classification systems, or on indicators or gender-neutral models. In accordance with the case law of the Court of Justice, the value of work should be assessed and compared on the basis of objective criteria, including educational, professional and training requirements, skills, effort, responsibility and working conditions, irrespective of differences in working patterns. To facilitate the application of the concept of work of equal value, especially for micro, small and medium-sized enterprises, the objective criteria to be used should include four factors: skills, effort, responsibility and working conditions. Those factors have been identified by the existing Union guidelines as being essential and sufficient for evaluating the tasks performed in an organisation regardless of to which economic sector the organisation belongs.”

<sup>51</sup> PTD , Recital 20.

<sup>52</sup> Ibid.

# 4.0 Specific Provisions of the Pay Transparency Directive

## *Introduction*

- 4.1. The Commissions have elaborated below on their views on *specific* provisions of the PTD in the context of the factors outlined above, in terms of assessing whether or not the PTD ‘amends or replaces’ the PTD, further to WF Article 13.
- 4.2. This includes an indication of the Commissions’ views on the degree to which they consider the provisions strengthen the application of the principle of equal pay and the prohibition of pay discrimination, and/or build on and improve existing provisions in the Recast Directive in this area.

## **Chapter 1-General Provisions**

### **Article 3 - Definitions**

- 4.3. As noted above, in Article 3, the PTD clarifies a number of existing concepts, including core concepts related to equal pay for equal work or work of equal value, including in accordance with CJEU case law.
- 4.4. Further, the PTD terms and concepts in Article 3 include not only relevant existing definitions in 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.<sup>53</sup>
- 4.5. In addition, the PTD clarifies, in Article 3, via a new definition, that discrimination includes “intersectional discrimination”, which is discrimination based on a combination of sex and a number of other equality ground/s protected under EU equality Directives.<sup>54</sup>
- 4.6. Further, the recitals to the PTD highlight that this clarification will result in *“removing any doubt that may exist in this regard under the existing (our emphasis) legal framework and enabling national courts, equality bodies and other competent authorities to take due account of any situation of*

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<sup>53</sup> See [Explanatory Memorandum to COM \(2021\)93 - Proposal for a Directive to strengthen the application of the principle of equal pay for equal work between men and women through pay transparency and enforcement mechanisms - EU monitor](#), European Commission, 4 March 2021.

<sup>54</sup> PTD, Article 3 (Definitions): Discrimination includes “intersectional discrimination, which is discrimination based on a combination of sex and any other ground or grounds of discrimination protected under Directive 2000/43/EC or 2000/78/EC”. The Directives listed are the Race Directive and the Framework Directive which covers discrimination in employment and occupation on grounds of age, sexual orientation, disability, and religion or belief.

*disadvantage arising from intersectional discrimination, in particular for substantive and procedural purposes”.*<sup>55</sup>

- 4.7. The Commissions consider that the provisions on definitions strengthen the application of the principle of equal pay and the prohibition of pay discrimination, and build on and enhance existing provisions in the Recast Directive in this area.

#### **Article 4 (Equal work and work of equal value)**

- 4.8. These provisions in the PTD on equal work and work of equal value build on, and enhance, existing provisions in the Recast Directive in this area (Article 4), including in accordance with CJEU case law. Article 4 of the Recast Directive includes provisions prohibiting direct and indirect discrimination on the grounds of sex for the same work or for work of equal value.<sup>56</sup>
- 4.9. Article 4 (1) of the PTD provides that Member States *“shall take the necessary measures to ensure that employers have pay structures ensuring equal pay for equal work or work of equal value”*.<sup>57</sup>
- 4.10. Further, the PTD recitals state that Article 4 (2) of the PTD requires that Member States ensure that *“training and specific tools and methodologies are made available to support and guide employers in the assessment of what constitutes work of equal value”*.<sup>58 59</sup>
- 4.11. In addition, Article 4 (4) of the PTD specifies that: *“Pay structures shall be such as to enable the assessment of whether workers are in a comparable situation in regard to the value of work on the basis of objective, gender-neutral criteria agreed with workers’ representatives where such representatives exist. Those criteria shall not be based directly or indirectly on workers’ sex. They shall include skills, effort, responsibility and working conditions, and, if appropriate, any other factors which are relevant to the specific job or position. They shall be applied in an objective gender-neutral manner, excluding any direct or indirect discrimination based on sex.”*

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<sup>55</sup> PTD Recital 25.

<sup>56</sup> Recast Directive, Article 4: Prohibition of discrimination: “For the same work or for work to which equal value is attributed, direct and indirect discrimination on grounds of sex with regard to all aspects and conditions of remuneration shall be eliminated. In particular, where a job classification system is used for determining pay, it shall be based on the same criteria for both men and women and so drawn up as to exclude any discrimination on grounds of sex.”

<sup>57</sup> PTD Art 4(1).

<sup>58</sup> See PTD Recital 30.

<sup>59</sup> PTD Art 4 (2): “Member States shall, in consultation with equality bodies, take the necessary measures to ensure that analytical tools or methodologies are made available and are easily accessible to support and guide the assessment and comparison of the value of work in accordance with the criteria set out in this Article. Those tools or methodologies shall allow employers and/or the social partners to easily establish and use gender-neutral job evaluation and classification systems that exclude any pay discrimination on grounds of sex.”

- 4.12. The PTD recitals also make clear that *“in accordance with the case law of the Court of Justice (our emphasis), the value of work should be assessed and compared on the basis of objective criteria, including educational, professional and training requirements, skills, effort, responsibility and working conditions, irrespective of differences in working patterns.”*<sup>60</sup>
- 4.13. The PTD recitals make clear that to *“facilitate the application of the concept of work of equal value”*, especially for micro, small and medium-sized enterprises, the objective criteria to be used should include four factors: skills, effort, responsibility and working conditions.<sup>61 62</sup>
- 4.14. In addition, the European Commission’s Explanatory Memorandum on the draft PTD, makes clear that this Article *“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”*.<sup>63</sup> There is therefore a direct reference back to Article 4(2) of the Recast Directive.
- 4.15. The Commissions consider that these provisions on equal work and work of equal value strengthen the application of the principle of equal pay and the prohibition of pay discrimination, and build on and improve existing provisions in the Recast Directive in this area (Article 4).

## Chapter II – Pay Transparency

### Introduction

- 4.16. As set out above, the PTD states that the application of the principle of equal pay is strengthened through pay transparency measures. These provisions on pay transparency are set out in Chapter II of the PTD.
- 4.17. This is elaborated on in the recitals to the PTD which make clear that *“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”*.<sup>64</sup>
- 4.18. They further state that binding measures are therefore needed *“to improve pay transparency, encourage organisations to review their pay structures to ensure*

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<sup>60</sup> PTD Recital 26.

<sup>61</sup> PTD Recital 26.

<sup>62</sup> PTD Recital 30: “Member States should ensure that training and specific tools and methodologies are made available to support and guide employers in the assessment of what constitutes work of equal value. This should facilitate the application of that concept, especially for micro, small and medium-sized enterprises.”

<sup>63</sup> Explanatory Memorandum to COM (2021)93 - Proposal for a Directive to strengthen the application of the principle of equal pay for equal work between men and women through pay transparency and enforcement mechanisms - EU monitor. European Commission, 4 March 2021.

<sup>64</sup> PTD Recital 16.

*equal pay for women and men performing the same work or work of equal value, and to enable victims of discrimination to exercise their right to equal pay*" (our emphasis).<sup>65</sup>

- 4.19. The PTD recitals further clarify how the new obligations on employers in terms of pay reporting and joint pay assessments link with ensuring compliance the principle of equal pay.
- 4.20. In particular, they state that: *"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. Reporting and joint pay assessments contribute to an increased awareness of gender bias in pay structures and of pay discrimination and contribute to addressing such bias and discrimination in an effective and systemic way, thereby benefitting all workers employed by the same employer. At the same time, the sex-disaggregated data should assist competent public authorities, workers' representatives and other stakeholders in monitoring the gender pay gap across sectors (horizontal segregation) and functions (vertical segregation)."*<sup>66</sup>
- 4.21. In addition, some of the provisions in the PTD in this section, such as on prohibiting the use of pay secrecy clauses, make clear the link with enforcement of the principle of equal pay.
- 4.22. These minimum standards on pay transparency (Articles 5-13) include the following key measures set out in more detail below. They include provisions which reflect the specific nature and requirements of the PTD. For example, the provisions on data protection are relevant to the new obligations on certain employers to collect and publish certain gender pay data.
- 4.23. Whilst there are no existing similar provisions in the Recast Directive on pay transparency, the Commissions consider that these provisions on pay transparency strengthen the application and enforcement of the principle of equal pay and the prohibition of pay discrimination set out in the Recast Directive.

#### **Article 5 – Pay transparency prior to employment**

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

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<sup>65</sup> PTD Recital 16.

<sup>66</sup> PTD Recital 39.

- 4.25. The recitals to the PTD state that “*an important element of eliminating pay discrimination is pay transparency prior to employment*” and makes clear that the PTD should therefore also apply to applicants for employment.<sup>67</sup>
- 4.26. The Commissions consider that these provisions on pay transparency prior to employment strengthen the application of the principle of equal pay and the prohibition of pay discrimination.

#### **Article 6 – Transparency of pay setting and career progression policy**

- 4.27. This provision requires employers to make accessible to workers a description of the gender-neutral criteria used to define their pay and career progression, in order to ensure the gender-neutrality of pay setting and career progression.
- 4.28. The Commissions consider that these provisions on transparency of pay setting and career progression policy strengthen the application of the principle of equal pay and the prohibition of pay discrimination.

#### **Articles 7/ 8 – Right to information/ Accessibility of information**

- 4.29. The European Commission has made clear that the provisions on right to information is aimed 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 (our emphasis).<sup>68</sup>
- 4.30. 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.
- 4.31. 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. The provision allows them to request the information through their representatives or through an equality body.
- 4.32. In order to assist potential victims of gender pay discrimination, employers are prohibited from using pay secrecy or 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. However employers may request that the use of any information obtained remains limited to the enforcement of the right to equal pay.

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<sup>67</sup> Recital 19.

<sup>68</sup> [Explanatory Memorandum to COM \(2021\)93 - Proposal for a Directive to strengthen the application of the principle of equal pay for equal work between men and women through pay transparency and enforcement mechanisms - EU monitor](#). European Commission, 4 March 2021.

- 4.33. Critically, the PTD itself makes clear the link with this measure and the enforcement of the principle of equal pay.<sup>69</sup>
- 4.34. The Commissions consider that these provisions on right to information and accessibility of information strengthen the application and enforcement of the principle of equal pay and the prohibition of pay discrimination.

#### **Article 9 – Reporting on pay gap between female and male workers**

- 4.35. The PTD introduces the following new gender pay gap reporting requirements on certain employers:
- Employers with at least 250 workers are required to report annually, from 7 June 2027, on the gender pay gap in their organisation to the relevant national authority.
  - For employers with 150 to 249 workers, the reporting obligation will take place every three years, from 7 June 2027. For employers with 100 to 149 workers, the reporting obligation will take place every three years, from 7 June 2031. Therefore, employers with 100-149 employees have a longer time to comply with the PTD compared with larger employers; namely, 5 years after the PTD must be transposed (i.e. by 2031).
- 4.36. Employers with less than 100 workers do not have any reporting obligations, but can do so on a voluntary basis.
- 4.37. The information that employers with at least 100 workers must provide is as follows: (a) the gender pay gap; (b) the gender pay gap in complementary or variable components; (c) the median gender pay gap; (d) the median gender pay gap 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 gender pay gap between workers by categories of workers broken down by ordinary basic wage or salary and complementary or variable components.
- 4.38. Employers must report on this data to the monitoring body charged with compiling and publishing such data. Employers may publish some of this information (namely (a) to (f) above) on their websites or make them publicly available in another manner. Employers must provide the information outlined in point (g) above to all workers and their representatives, and labour inspectorate and equality bodies should be able to obtain the information upon request.
- 4.39. Workers and their representatives, labour inspectorates and equality bodies have the right to ask the employer for clarifications and details regarding any

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<sup>69</sup> PTD Art 7 (5): Workers shall not be prevented from disclosing their pay for the purpose of the enforcement of the principle of equal pay. In particular, Member States shall put in place measures to prohibit contractual terms that restrict workers from disclosing information about their pay.

data provided, 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.

- 4.40. The European Commission has made clear that: *“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 (our emphasis).”*<sup>70</sup> This information also serves as a trigger to launch a joint pay assessment as set out in Article 10 (see below).
- 4.41. The Commissions consider that these provisions on gender pay gap reporting strengthen the application of the principle of equal pay and the prohibition of pay discrimination.

#### **Article 10 - Joint pay assessment**

- 4.42. As regards employers who are subject to the pay gap reporting requirements, if the pay reporting reveals a gender pay gap of at least 5% in any category of workers that cannot be justified by objective, gender-neutral criteria, the employer will be required to take action in the form of a **joint pay assessment** and carried out in cooperation with workers' representatives.<sup>71</sup>
- 4.43. Employers are required, when implementing the measures arising from the joint pay assessment, to remedy the unjustified differences in pay within a reasonable period of time, in close cooperation with the workers' representatives. The labour inspectorate and/or the equality body may be asked to participate in the process.
- 4.44. Critically the PTD states that *“The implementation of the measures shall include an analysis of the existing gender-neutral job evaluation and classification*

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<sup>70</sup> Explanatory Memorandum to COM (2021)93 - Proposal for a Directive to strengthen the application of the principle of equal pay for equal work between men and women through pay transparency and enforcement mechanisms - EU monitor . European Commission, 4 March 2021.

<sup>71</sup> PTD Recital 43: “Joint pay assessments should trigger the review and revision of pay structures in organisations with at least 100 workers that show pay inequalities. The joint pay assessment should be carried out if employers and the workers' representatives concerned do not agree that the difference in average pay level between female and male workers of at least 5 % in a given category of workers can be justified on the basis of objective, gender-neutral criteria, if such a justification is not provided by the employer, or if the employer has not remedied such a difference in pay level within six months of the date of submission of the pay reporting. The joint pay assessment should be carried out by employers in cooperation with workers' representatives. If there are no workers' representatives, they should be designated by workers for the purpose of the joint pay assessment. Joint pay assessments should lead, within a reasonable period of time, to the elimination of gender-based pay discrimination through the adoption of remedial measures.”

*systems or the establishment of such systems, to ensure that any direct or indirect pay discrimination on the grounds of sex is excluded*" (our emphasis)<sup>72</sup>

- 4.45. Further, the European Commission has stated that "*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*" (our emphasis).<sup>73</sup>
- 4.46. The Commissions consider that these provisions on joint pay assessment strengthen the application of the principle of equal pay and the prohibition of pay discrimination.

#### **Article 11 - Support for employers with fewer than 250 workers**

- 4.47. The PTD places obligations on Member States to provide support, in the form of technical assistance and training, to employers with fewer than 250 workers and to the workers' representatives concerned, to facilitate their compliance with the obligations laid down in the Directive.
- 4.48. This provision reflects the specific nature of this Directive, namely that it places obligations on certain employers, including small-medium sized employers, to collect and publish certain gender pay data.
- 4.49. The Commissions consider that this provision which is aimed at helping micro and small employers to comply with the PTD, strengthens the application of the principle of equal pay, and the prohibition of pay discrimination.

#### **Article 12 – Data protection**

- 4.50. This provision requires that the potential processing and/or disclosure of personal data pursuant to the pay transparency measures under the PTD must be carried out in accordance with the EU General Data Protection Regulation.<sup>74 75</sup>
- 4.51. It specifies that any personal data collected by employers pursuant to the PTD 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.
- 4.52. Where the disclosure of information would lead to the disclosure, either directly or indirectly, of the pay of an identifiable co-worker. Member States

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<sup>72</sup> PTD Art 10 (4).

<sup>73</sup> Explanatory Memorandum to COM (2021)93 - Proposal for a Directive to strengthen the application of the principle of equal pay for equal work between men and women through pay transparency and enforcement mechanisms - EU monitor . European Commission, 4 March 2021.

<sup>74</sup> (EU) 2016/679 (GDPR).

<sup>75</sup> The Commissions consider that the EU General Data Protection Regulation (Reg 2016/679) falls within the scope of WF Article 2. See ECNI, NIHRC [Working Paper: The Scope of Article 2\(1\) of the Ireland/ Northern Ireland Protocol](#), (ECNI and NIHRC, December 2022).

may decide that in such case, accessibility of the information shall be limited to the workers' representatives or to the equality body.

- 4.53. This provision reflects the specific nature of the PTD, namely that it places obligations on certain employers to collect and publish certain gender pay data.
- 4.54. The Commissions consider this to be an ancillary measure that is relevant and appropriate in the context of the new gender pay gap reporting requirements under the PTD. As stated above, these requirements strengthen the application of the principle of equal pay and the prohibition of pay discrimination.

### **Article 13 – Social dialogue**

- 4.55. This provision on social dialogue aligns with similar provisions in the Recast Directive (Article 21) on social dialogue. It also builds on and strengthens these provisions in the Recast Directive by extending obligations on social dialogue, to the rights and obligations in the PTD, including on tackling pay discrimination and pay transparency mechanisms.
- 4.56. Member States, are required to take adequate measures to ensure the effective involvement of social partners, and that the rights and obligations under this Directive are discussed with social partners.<sup>76</sup> Member States must also take adequate measures to promote the role of social partners, and encourage the exercise of the right to collective bargaining on measures to tackle pay discrimination and its adverse impact on the valuation of jobs predominantly carried out by workers of one sex.
- 4.57. The European Commission has recognised that the involvement of social partners in advancing gender equality in employment relations is important, and that 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.<sup>77</sup>
- 4.58. This is an important measure that is aimed at ensuring that social partners discuss and pay particular attention to matters of equal pay, including in collective bargaining, and facilitates the application of the principle of equal pay.
- 4.59. The Commissions consider that the provisions on social dialogue strengthen the application of the principle of equal pay and the prohibition of pay

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<sup>76</sup> Art 13: without prejudice to the autonomy of social partners and in accordance with national law and practice, and where applicable upon their request.

<sup>77</sup> Explanatory Memorandum to COM (2021)93 - Proposal for a Directive to strengthen the application of the principle of equal pay for equal work between men and women through pay transparency and enforcement mechanisms - EU monitor . European Commission, 4 March 2021.

discrimination, and build on and enhance existing provisions in the Recast Directive in this area.

### **Remedies and Enforcement - Chapter III**

- 4.60. As stated above, the PTD makes clear that its provisions relating to remedies and enforcement apply to proceedings relating to rights the Recast Directive.
- 4.61. In particular, the PTD, at Article 26, states that the PTD's 'Remedies and Enforcement' provisions in Chapter III "*apply to proceedings concerning any right or obligation relating to the principle of equal pay set out in Article 4 of Directive 2006/54/EC*".<sup>78</sup> It will be noted that Article 4 of the Gender Equality (Employment) Directive, as regards equal pay, prohibits discrimination (direct and indirect) on grounds of sex.<sup>79</sup>
- 4.62. As referred to above, the Commissions consider that this provision makes it very clear that these provisions of the PTD amend and/or replace the provisions in the Recast Directive in these areas.
- 4.63. In addition, the recitals to the PTD (Recital 59) state that the PTD '*should strengthen the existing enforcement tools and procedures*' in relation to the equal pay provisions set out in the Recast Directive.<sup>80</sup>
- 4.64. The European Commission has made clear that the proposed PTD's "enhanced enforcement measures will improve access to justice and the enforcement of rights granted under EU law".
- 4.65. Therefore, in summary, the Commissions consider that the provisions in the PTD on remedies and enforcement (Chapter III) amend and/or replace existing provisions in the Recast Directive that relate to equal pay proceedings.

### **Article 14 - Defence of Rights**

- 4.66. This provision on defence of rights is broadly similar to the provision on defence of rights in the Recast Directive (Article 17 (1)), subject to below points. It reflects the need for Member States to ensure that all workers should have the necessary procedures at their disposal to facilitate the exercise of their right of access to justice as regards the enforcement of their rights relating to the principle of equal pay. This includes even after the employment relationship has ended.

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<sup>78</sup> Article 26: Relationship with Directive 2006/54/EC: Chapter III of this Directive shall apply to proceedings concerning any right or obligation relating to the principle of equal pay set out in Article 4 of Directive 2006/54/EC.

<sup>79</sup> Article 4: "For the same work or for work to which equal value is attributed, direct and indirect discrimination on grounds of sex with regard to all aspects and conditions of remuneration shall be eliminated. In particular, where a job classification system is used for determining pay, it shall be based on the same criteria for both men and women and so drawn up as to exclude any discrimination on grounds of sex."

<sup>80</sup> Recital (para 59) states as follow: "In order to improve the enforcement of the principle of equal pay, 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".

- 4.67. It refers, unlike in the Recast Directive, to the need for such proceedings to be easily accessible to workers and those who act on their behalf.<sup>81</sup>
- 4.68. The European Commission in its Explanatory Memorandum to the proposed PTD makes clear the link with the Recast Directive by stating that this provision is ‘*building on Article 17 of the Recast Directive*’.<sup>82</sup>
- 4.69. The Commissions consider that the provisions on defence of rights strengthen the application and enforcement of the principle of equal pay and the prohibition of pay discrimination, and build on and improve existing provisions in the Recast Directive in this area.

### **Article 15 - Procedures on behalf or in support of workers**

- 4.70. This provision places an obligation on Member States to ensure that associations, organisations, equality bodies and workers’ representatives or other legal entities which have a legitimate interest in ensuring equality between men and women, “may engage in any administrative procedure or court proceedings regarding an alleged infringement of the rights or obligations relating to the principle of equal pay”.
- 4.71. It makes clear that “they may act on behalf of, or in support of, a worker who is an alleged victim of an infringement of any right or obligation relating to the principle of equal pay, with that person’s approval.”
- 4.72. This provision on procedures on behalf or in support of workers is broadly similar to the provision in this area in the Recast Directive (Article 17 (2) Defence of rights), subject to below points.
- 4.73. The PTD, unlike the Recast Directive, expressly refers to the right of ‘equality bodies’ to engage in court proceedings or administrative procedures regarding an alleged infringement of rights or obligations relating to the principle of equal pay.
- 4.74. The Recitals to the PTD make clear that such organisations can bring claims on behalf or in support of several workers . They state that “*collective claims have the potential to uncover systemic discrimination and create visibility of the right to equal pay and of gender equality in society as a whole*”.<sup>83</sup>
- 4.75. This provision will ensure that the ECNI, as well as associations, organisations and workers’ representatives or other legal entities with an interest in ensuring

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<sup>81</sup> The PTD Recitals (46) also make clear that national legislation providing for the use of conciliation, or making the intervention of an equality body compulsory or subject to incentives or penalties should not prevent parties from exercising their right of access to the courts.

<sup>82</sup> “[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.” (our emphasis). See [Explanatory Memorandum to COM \(2021\)93 - Proposal for a Directive to strengthen the application of the principle of equal pay for equal work between men and women through pay transparency and enforcement mechanisms - EU monitor](#). European Commission, 4 March 2021.

<sup>83</sup> PTD Recital 48

equality between men and women, are able to represent individuals who have been subjected equal pay discrimination contrary to the PTD.

- 4.76. The Commissions consider that the provisions on procedures on behalf or in support of workers strengthen the application and enforcement of the principle of equal pay and the prohibition of pay discrimination, and build on and improve existing provisions in the Recast Directive in this area.

### **Article 16 - Right to Compensation**

- 4.77. These provisions on the right to compensation in the PTD strengthen, and clarify in accordance with CJEU case law, existing provisions in the Recast Directive relating to compensation or reparation (Article 18).
- 4.78. They require 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.<sup>84</sup>
- 4.79. The European Commission in its Explanatory Memorandum to the proposed PTD makes clear the link with the Recast Directive by stating that this provision is *'building on Article 18 of the Recast Directive'*.<sup>85</sup>
- 4.80. It is also clear from the recitals to the PTD (Recital 50) that this provision introduces requirements in line with CJEU case law. For example, they state that "compensation should cover in full the loss and damage sustained as a result of gender-based pay discrimination in accordance with the case-law of the Court of Justice".<sup>86</sup>
- 4.81. Specifically, the provisions in the PTD, extend the protections in this area, to include full recovery of back pay and related bonuses or payments in kind, as well as compensation for lost opportunities, such as access to certain benefits depending on pay level, and for non-material damage, as well as interest on arrears.<sup>87</sup> It also makes clear that, where appropriate, the compensation can also take into account damage caused by pay discrimination based on sex that intersects with other protected grounds of discrimination.<sup>88</sup>

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<sup>84</sup> [Explanatory Memorandum to COM \(2021\)93 – Proposal for a Directive to strengthen the application of the principle of equal pay for equal work between men and women through pay transparency and enforcement mechanisms – EU monitor](#), European Commission, 4 March 2021.

<sup>85</sup> *Ibid.* "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" (our emphasis).

<sup>86</sup> PTD Recital 50.

<sup>87</sup> PTD Article 16 (Right to compensation).

<sup>88</sup> PTD Recital 50: "Compensation should cover in full the loss and damage sustained as a result of gender-based pay discrimination in accordance with the case-law of the Court of Justice. It should include full recovery of back pay and related bonuses or payments in kind, as well as compensation for lost opportunities, such as access to certain benefits

- 4.82. Further, unlike the Recast Directive, the PTD makes clear that “the compensation or reparation shall place the worker who has sustained damage in the position in which that person would have been if he or she had not been discriminated against based on sex or if there had been no infringement of any of the rights or obligations relating to the principle of equal pay.”<sup>89</sup>
- 4.83. The Commissions consider that the provisions on the right to compensation strengthen the application and enforcement of the principle of equal pay and the prohibition of pay discrimination, and build on and improve existing provisions in the Recast Directive in this area.

#### **Article 17 - Other remedies**

- 4.84. As regards this provision on ‘other remedies’, the European Commission has stated that this provision was introduced “*in order to step up enforcement of the right to equal pay*”.<sup>90</sup>
- 4.85. It makes clear that 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.<sup>91</sup>
- 4.86. Furthermore, it makes clear that courts or competent authorities should, for instance, be able to require an employer to take structural or organisational measures to comply with its obligations regarding equal pay.<sup>92</sup>
- 4.87. In addition, the courts or competent authorities may impose a recurring penalty payment order.
- 4.88. The Commissions consider that these provisions on other remedies strengthen the application and enforcement of the principle of equal pay and the prohibition of pay discrimination.

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depending on pay level, and for non-material damage, such as distress because of the undervaluation of work performed. Where appropriate, the compensation can take into account damage caused by pay discrimination based on sex that intersects with other protected grounds of discrimination. Member States should not fix a prior upper limit for such compensation.” See, Judgment of the Court of Justice of 17 December 2015, Arjona Camacho, C-407/14, ECLI:EU:C:2015:831, para. 45.

<sup>89</sup> PTD Article 16(3).

<sup>90</sup> Explanatory Memorandum to COM (2021)93 - Proposal for a Directive to strengthen the application of the principle of equal pay for equal work between men and women through pay transparency and enforcement mechanisms - EU monitor . European Commission, 4 March 2021.

<sup>91</sup> Ibid.

<sup>92</sup> PTD Recital 51: The recital 51 to the PTD indicates “that 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 of their right to equal pay; and to establish a mandatory training for human resources staff on equal pay and gender-neutral job evaluation and classification.”

## **Article 18 - Shift of Burden of Proof**

- 4.89. These provisions on the shift of the burden of proof reflect some existing provisions in the Recast Directive (Article 19), but also strengthen, and clarify the provisions in accordance with CJEU case law, as regards areas within the scope of the PTD.
- 4.90. Specifically, the PTD makes clear in its recitals that: *“In case C-109/88, the Court of Justice held that when a system of pay is totally lacking in transparency, the burden of proof should be shifted to the respondent, irrespective of the worker showing a prima facie case of pay discrimination. Accordingly, the burden of proof should be shifted to the respondent where an employer does not comply with the pay transparency obligations set out in this Directive, ...”*.<sup>93</sup> This applies to proceedings alleging direct or indirect pay discrimination.<sup>94</sup>
- 4.91. The provisions on burden of proof relating to the pay transparency measures in the PTD therefore apply and reflect the approach set out in CJEU case law delivered before the end of the Brexit transition period.
- 4.92. The European Commission has made clear that *“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.”*<sup>95</sup>
- 4.93. The Commissions consider that the provisions on the burden of proof strengthen the application and enforcement of the principle of equal pay and the prohibition of pay discrimination, and build on and improve existing provisions in the Recast Directive in this area.

## **Article 19 - Proof of equal work or work of equal value**

- 4.94. As made clear from Recital 29 of the PTD, this Article on proof of equal work or work of equal value is aimed at clarifying the definitions of discrimination in Recast Directive, and the concept of equal pay, in accordance with CJEU case law delivered prior to the end of the Brexit Transition Period.<sup>96</sup>
- 4.95. These clarifications, in accordance with CJEU case law, relate to permitting workers to bring equal pay claims to compare their situations to other workers who do not work for the same employer but where the pay conditions were

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<sup>93</sup> The obligations are set out in Articles 5,6,7,9 and 10 of the PTD.

<sup>94</sup> PTD Recital 52: See Judgment of the Court of Justice of 17 October 1989, Danfoss, C-109/88, ECLI:EU:C:1989:383.

<sup>95</sup> Explanatory Memorandum to COM (2021)93 - Proposal for a Directive to strengthen the application of the principle of equal pay for equal work between men and women through pay transparency and enforcement mechanisms - EU monitor . European Commission, 4 March 2021.

<sup>96</sup> PTD (Article 19) (1).

from a single source (single source rule)<sup>97</sup> as well as making clear that comparators, for the purposes of equal pay claims, are not limited to workers employed at the same time as the claimant.<sup>98</sup>

- 4.96. Further, the European Commission in the Explanatory Memorandum to the proposed PTD explicitly makes clear that “the incorporation of these clarifications will improve the application in practice of the principle of equal pay”.<sup>99</sup>
- 4.97. The Commissions consider that the provisions on proof of equal work or work of equal value strengthen the application and enforcement of the principle of equal pay and the prohibition of pay discrimination, and build on and improve existing provisions in the Recast Directive in this area.

#### **Article 20 - Access to evidence**

- 4.98. These provisions on access to evidence of proof strengthen rights to enforce the principle of equal pay as regards areas within the scope of the PTD. They develop the principle in Article 17 of the Recast Directive that there should be judicial procedures available “*for the enforcement of obligations under this Directive*”.
- 4.99. The provisions in the PTD (Article 20) provide that Member States must ensure that national courts or other competent authorities are able to order the respondent to disclose relevant evidence lying in respondent’s control, during proceedings concerning an equal pay claim.
- 4.100. In particular, they must ensure that competent authorities or national courts have the power to order the disclosure of evidence containing confidential information where they consider it relevant to the equal pay claim. They also must have effective measures to protect such information.
- 4.101. The European Commission has indicated that 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.<sup>100</sup>
- 4.102. The Commissions consider that these provisions on access to evidence, strengthen the application and enforcement of the principle of equal pay and

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<sup>97</sup> For example, the PTD (Recital 29) states that : “The Court of Justice has clarified that in order to assess 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. See Judgment of the Court of Justice of 17 September 2002, Lawrence and others, C-320/00, ECLI:EU:C:2002:498.

<sup>98</sup> For example, the PTD (Recital 29) states that : “Furthermore, the Court of Justice has clarified that the comparison is not limited to workers employed at the same time as the claimant”. See Judgment of the Court of Justice of 27 March 1980, Macarthys Ltd, C-129/79, ECLI:EU:C:1980:103.

<sup>99</sup> Explanatory Memorandum to COM (2021)93 - Proposal for a Directive to strengthen the application of the principle of equal pay for equal work between men and women through pay transparency and enforcement mechanisms - EU monitor. European Commission, 4 March 2021.

<sup>100</sup> Ibid.

the prohibition of pay discrimination and build on and improve existing provisions in the Recast Directive.

### **Article 21 - Limitation Periods for bringing claims**

- 4.103. These provisions on limitation periods for bringing claims clarify, in accordance with CJEU case law, the limitation periods for bringing equal pay claims, and improve the rights of individuals to enforce the principle of equal pay.
- 4.104. For example, the Recitals to the PTD (Recital 53) states that: *“In accordance with the case-law of the Court of Justice, national rules on limitation periods relating to the bringing of claims regarding alleged infringements of the rights provided for in the PTD should be such that they do not render virtually impossible or excessively difficult the exercise of those rights.”*
- 4.105. The provisions provide that the limitation period for bringing claims is at least three years and that limitation periods should not begin to run before the claimant is aware, or can reasonably be expected to be aware, of the infringement.
- 4.106. Further, Member States must ensure that a limitation period is suspended or interrupted as soon as a claimant undertakes action by lodging a claim before a court or bringing the claim to the attention of the employer.
- 4.107. These provisions are designed to remove obstacles for victims of gender-based pay discrimination.
- 4.108. The Commissions consider that the provisions on limitation periods strengthen the application and enforcement of the principle of equal pay and the prohibition of pay discrimination, and build on and improve existing provisions in the Recast Directive in this area.

### **Article 22 - Legal Costs**

- 4.109. These provisions on legal costs improve the rights of individuals in terms of enforcement of the right to equal pay.
- 4.110. These provisions are designed to remove a significant procedural obstacle to justice, and the PTD places an obligation on Member States to ensure that national courts can assess whether an unsuccessful claimant had reasonable grounds for bringing the claim and, if so, whether it is appropriate that claimant should not be required to pay the costs of the proceedings.
- 4.111. As set out in the Recitals to the PTD (Recital 54), *“litigation costs create a serious disincentive for victims of gender-based pay discrimination to bring claims regarding alleged infringements of their right to equal pay, leading to the insufficient protection of workers and the insufficient enforcement of the right to equal pay”*. The Recitals make clear that these provisions were

*introduced “in order to remove that significant procedural obstacle to justice.”<sup>101</sup>*

- 4.112. The Recitals state that the provisions in the PTD should *“in particular apply where a successful respondent has not complied with the pay transparency obligations”* in the PTD.
- 4.113. The Commissions consider that these provisions on legal costs strengthen the application and enforcement of the principle of equal pay and the prohibition of pay discrimination.<sup>102</sup>

### **Article 23 - Penalties**

- 4.114. Provisions in the PTD on penalties enhance existing provisions in the Recast Directive relating to penalties (Article 25), and they strengthen enforcement by individuals of the right to equal pay.
- 4.115. In particular, these provisions strengthen enforcement by providing that Member States must ensure that penalties include fines, as well as that the penalties should take into account any relevant aggravating or mitigating factors that may apply in the circumstances of the case, for instance, intersectional discrimination. There are also obligations placed on Member States to establish specific penalties for repeated infringements of any right or obligation relating to the principle of equal pay.
- 4.116. The European Commission’s explanatory memorandum<sup>103</sup> to the proposed PTD makes clear that this provision *“strengthens the existing (our emphasis) 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.”*
- 4.117. The Commissions consider that these provisions on penalties strengthen the application and enforcement of the principle of equal pay and the prohibition

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<sup>101</sup> PTD Recital 54.

<sup>102</sup> PTD, Recital 53: “In accordance with the case-law of the Court of Justice, national rules on limitation periods relating to the bringing of claims regarding alleged infringements of the rights provided for in this Directive should be such that they do not render virtually impossible or excessively difficult the exercise of those rights. Limitation periods create specific obstacles for victims of gender-based 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 suspended or interrupted, and should provide that the limitation period for bringing claims is at least three years. Limitation periods should not begin to run before the claimant is aware, or can reasonably be expected to be aware, of the infringement. Member States should be able to decide that the limitation period does not begin to run while the infringement is ongoing or before the end of the employment contract or employment relationship.”

<sup>103</sup> Explanatory Memorandum to COM(2021)93 - Proposal for a Directive to strengthen the application of the principle of equal pay for equal work between men and women through pay transparency and enforcement mechanisms. EC, March 2021.

of pay discrimination and build on and improve provisions in the Recast Directive in this area.<sup>104</sup>

#### **Article 24 - Equal Pay in public contracts and concessions**

- 4.118. These provisions on equal pay in public contracts and concessions improve the rights of individuals in terms of enforcement of the right to equal pay.
- 4.119. In accordance with obligations on Member States in the fields of environmental, social and labour law under Directive 2014/23/EU<sup>105</sup> on the award of concession contracts, Directive 2014/24/EU on public procurement,<sup>106</sup> and Directive 2014/25/EU on procurement by entities in certain sectors,<sup>107</sup> Member States are required to take appropriate measures to ensure that, in the performance of public contracts or concessions, economic operators comply with the obligations relating to the principle of equal pay.
- 4.120. The Recitals to the PTD state that: *“In order to comply with those obligations on employers 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 gender pay gap between workers in any category of workers performing equal work or work of equal value that cannot be justified on the basis of gender-neutral criteria”*.
- 4.121. The provisions in the PTD state that Member States should consider requiring 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.
- 4.122. The Recitals also state that: *“Contracting authorities should also be able to take into account non-compliance with the principle of equal pay by the bidder or one of the bidder’s subcontractors when considering the application of*

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<sup>104</sup> PTD, Recital 53: “In accordance with the case-law of the Court of Justice, national rules on limitation periods relating to the bringing of claims regarding alleged infringements of the rights provided for in this Directive should be such that they do not render virtually impossible or excessively difficult the exercise of those rights. Limitation periods create specific obstacles for victims of gender-based 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 suspended or interrupted, and should provide that the limitation period for bringing claims is at least three years. Limitation periods should not begin to run before the claimant is aware, or can reasonably be expected to be aware, of the infringement. Member States should be able to decide that the limitation period does not begin to run while the infringement is ongoing or before the end of the employment contract or employment relationship.”

<sup>105</sup> Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts.

<sup>106</sup> 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.

<sup>107</sup> 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.

*exclusion grounds or when taking a decision not to award a contract to the tenderer submitting the most economically advantageous tender.”<sup>108</sup>*

4.123. The Commissions consider that these provisions on equal pay in public contracts and concessions strengthen the application of the principle of equal pay and the prohibition of pay discrimination, particularly for those employed by contractors and sub-contractors.<sup>109</sup>

#### **Article 25 – Victimisation and protection against less favourable treatment**

4.124. These provisions on victimisation broadly reflect the existing provisions on victimisation in Article 24 of the Recast Directive, and codify decisions of the CJEU, subject to the points below. They also strengthen rights relating to the prohibition of discrimination in this area.

4.125. They provide that Member States must ensure that 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. They provide that Member States must 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.

4.126. The Recitals to the PTD (58) make it clear that *“according to the case-law of the Court of Justice <sup>110</sup> the category of employees who are entitled to the protection should be interpreted broadly and include all employees who may be subject to retaliatory measures taken by an employer in response to a complaint of discrimination on grounds of sex”*. They also state that *“the protection is not limited solely to employees who have lodged complaints or their representatives, or to those who comply with certain formal requirements governing the recognition of a certain status, such as that of a witness.”*

4.127. It will be noted that, unlike the Recast Directive, the PTD refers to the need for Member States to ensure protection against victimisation for not only workers

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<sup>108</sup> PTD Recital 57.

<sup>109</sup> PTD, Recital 53: “In accordance with the case-law of the Court of Justice, national rules on limitation periods relating to the bringing of claims regarding alleged infringements of the rights provided for in this Directive should be such that they do not render virtually impossible or excessively difficult the exercise of those rights. Limitation periods create specific obstacles for victims of gender-based 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 suspended or interrupted, and should provide that the limitation period for bringing claims is at least three years. Limitation periods should not begin to run before the claimant is aware, or can reasonably be expected to be aware, of the infringement. Member States should be able to decide that the limitation period does not begin to run while the infringement is ongoing or before the end of the employment contract or employment relationship.”

<sup>110</sup> Judgment of the Court of Justice of 20 June 2019, Hakebbracht and others, C-404/18, ECLI:EU:2019:523.

and their workers' representatives but also those who *"have supported another person in the protection of that person's rights"*.

4.128. The Commissions consider that these provisions on victimisation strengthen the application of the principle of equal pay and the prohibition of pay discrimination and build on and improve existing provisions in the Recast Directive in this area.<sup>111</sup>

#### **Article 26 – Relationship with Directive 2006/54/EC**

4.129. As referred to above, and as made clear by the European Commission in its explanatory memorandum to the proposed PTD, *"this provision clarifies the relationship with Directive 2006/54/EC in regard to enforcement measures."*

4.130. It states that the enforcement measures of PTD *"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"*.

4.131. As stated above, the Commissions consider that this provision makes it very clear that these provisions of the PTD 'amend or replace' the provisions in the Recast Directive in these areas.

### **Chapter IV - Horizontal provisions**

#### **Article 27 - level of protection**

4.132. This provision on level of protection replicates provisions in the Recast Directive in this area (Article 27).

4.133. These provisions make clear that Member States may introduce or maintain provisions that are more favourable to workers than those laid down in the PTD and that the implementation of the PTD must under no circumstances constitute grounds for reducing the level of protection in the fields covered by the PTD.

4.134. The Commissions consider that, as the PTD strengthens the application of the principle of equal pay and expands areas that are subject to the prohibition of

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<sup>111</sup> PTD, Recital 53: "In accordance with the case-law of the Court of Justice, national rules on limitation periods relating to the bringing of claims regarding alleged infringements of the rights provided for in this Directive should be such that they do not render virtually impossible or excessively difficult the exercise of those rights. Limitation periods create specific obstacles for victims of gender-based 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 suspended or interrupted, and should provide that the limitation period for bringing claims is at least three years. Limitation periods should not begin to run before the claimant is aware, or can reasonably be expected to be aware, of the infringement. Member States should be able to decide that the limitation period does not begin to run while the infringement is ongoing or before the end of the employment contract or employment relationship."

pay discrimination, this provision indirectly contributes to the objectives of the PTD by making clear that Member States can go beyond the provisions in the PTD and introduce more favourable provisions .

4.135. Critically, it indirectly contributes by placing a requirement on Member States to ensure there can be no reduction in levels of protection in areas covered by the PTD, when it is being implemented. It also replicates provisions in the Recast Directive in this area.

### **Article 28 - Equality Bodies**

4.136. The provisions on equality bodies replicate some of the provisions in the Recast Directive on the role and remit of equality bodies as regards the discrimination on grounds of sex, including in the area of pay (Article 20), subject to the points below.

4.137. Of note, these provisions also extend the role and remit of equality bodies to matters falling within the scope of the PTD.

4.138. Critically, unlike in the Recast Directive, Article 28(3) PTD states that Member States must *“provide their equality bodies with the adequate resources necessary for effectively carrying out their functions with regard to the respect for the right to equal pay”*.

4.139. The Recitals to the PTD refer to that: *“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”*.

4.140. They also state that: *“This includes, for instance , 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 bringing pay discrimination claims or assisting and supporting victims in bringing such claims.”*<sup>112</sup>

4.141. Further, unlike in the Recast Directive, Article 28(2) PTD states that Member States must , in accordance with national law and practice, *“take active measures to ensure close cooperation and coordination among the labour inspectorates, the equality bodies and, where applicable, the social partners with regard to the principle of equal pay.”*

4.142. The Commissions consider that these provisions on equality bodies strengthen the application and enforcement of the principle of equal pay and the prohibition of pay discrimination, and build on and improve existing provisions in the Recast Directive in this area.

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<sup>112</sup> PTD Recital 49.

## **Article 29 – Monitoring and awareness-raising**

- 4.143. These provisions on monitoring and awareness raising provide that “*Member States must ensure the consistent and coordinated monitoring of and support for the application of the principle of equal pay and the enforcement of all available remedies.*”<sup>113</sup>
- 4.144. It will be noted that this obligation relates both to the application of the principle of equal pay and to the enforcement of all remedies (which are covered in PTD Chapter III).
- 4.145. This Article also provides that Member States set up or designate a dedicated monitoring body, in order to ensure proper monitoring of the implementation of the right to equal pay.
- 4.146. 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 in the PTD and gather certain data to monitor pay inequalities and the impact of the pay transparency measures.
- 4.147. The main functions of the monitoring body must include to:
- a) 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, including by addressing intersectional discrimination in relation to equal pay;
  - b) analyse the causes of the gender pay gap and provide tools to help assess pay inequalities;
  - c) collect and publish data from employers<sup>114</sup>, pursuant to the pay transparency measures under the PTD and ensure their publication in accessible and user-friendly and that allows for comparison between employers, sectors and regions of the Member State;
  - d) collect joint pay assessment reports pursuant to the PTD;
  - e) aggregate 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.
- 4.148. The Commissions consider that the obligation (Article 29 (4)) on Member States, to provide, in a single submission, to the European Commission, by 7 June 2028 and every two years thereafter, with data referred to in points (c), (d), and (e) above, should not be mandatory as regards the UK Government as the UK has now left the EU. However, the Commissions consider that the regular publication of that data relating to Northern Ireland, provided it is published in a transparent and accessible format, is important as it will assist with data comparisons with EU countries in this area. It will also assist in

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<sup>113</sup> Article 29(1).

<sup>114</sup> Data from employers to be published is that set out in PTD Article 9 (1), points (a) to (f). See para 4.37 above.

monitoring progress in Northern Ireland as regards the implementation of the right to equal pay.

4.149. The Commissions consider that these provisions on monitoring and awareness strengthen the application and enforcement of the principle of equal pay and the prohibition of pay discrimination.

### **Article 30 – Collective bargaining and action**

4.150. This provision reaffirms that the PTD 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.<sup>115</sup>

4.151. The Commissions consider this to be an ancillary provision that reaffirms rights of social partners on collective bargaining and action.

### **Article 31 - Statistics**

4.152. This provision requires Member States, on an annual basis, to provide the European Commission (Eurostat) with up-to-date national data for the calculation of the gender pay gap in unadjusted form. Those statistics must be broken down by sex, economic sector, working time (full-time/part-time), economic control (public/private ownership) and age and shall be calculated on an annual basis. The data must be transmitted from 31 January 2028 for reference year 2026.

4.153. The Commissions consider that this obligation should not be mandatory as regards the UK Government as the UK has now left the EU. However, the Commissions consider that the regular publication of that data relating to Northern Ireland, in a transparent and accessible format, is important as it will assist with data comparisons with EU countries in this area.<sup>116</sup> It will also assist with measuring progress in Northern Ireland as regards the implementation of the right to equal pay.

### **Article 32 – Dissemination of information**

4.154. This Article is aimed at ensuring Member States raise awareness of the rights of the rights and obligations in the PTD as well as on other already existing rights in the same field.

4.155. The Commissions consider that these provisions on awareness raising strengthen the application of the principle of equal pay and the prohibition of pay discrimination.

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<sup>115</sup> See Explanatory Memorandum to COM (2021)93 - Proposal for a Directive to strengthen the application of the principle of equal pay for equal work between men and women through pay transparency and enforcement mechanisms - EU monitor. European Commission, 4 March 2021.

<sup>116</sup> ECNI recognises that certain data on the gender pay gap in NI is already published annually by NISRA. See link. [Employee earnings in Northern Ireland 2023 | Northern Ireland Statistics and Research Agency \(nisra.gov.uk\)](https://www.nisra.gov.uk/employee-earnings-in-northern-ireland-2023).

### **Article 33 - Implementation**

- 4.156. This Article provides that Member States may entrust the social partners with the implementation of the PTD, provided that Member States take all the necessary steps to ensure that the results sought by the PTD are guaranteed at all times.
- 4.157. The Recitals to the PTD make clear that *“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”* and that *“Member States should therefore have the possibility to entrust the social partners with the implementation of all or part of this Directive, provided that Member States take all the necessary steps to ensure that the results sought by this Directive are guaranteed at all times.”* The tasks entrusted to social partners may include the development of analytical tools or methodologies or financial penalties equivalent to fines.
- 4.158. The Commissions consider that these provisions on implementation strengthen the application and enforcement of the principle of equal pay and the prohibition of pay discrimination.

### **Article 34 - Transposition**

- 4.159. This provision establishes that Member States must transpose the PTD into national law by 7 June 2026 and immediately communicate the relevant texts to the European Commission. When informing the European Commission, Member States must also provide it with a summary of the results of an assessment regarding the impact of their transposition measures on workers and employers with fewer than 250 workers and a reference to where such assessment is published.
- 4.160. The Recitals to the PTD elaborate on why an impact assessment is required. They state that *“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 or medium-sized enterprises”* and should *“therefore assess the impact of their transposition measures on micro, small and medium sized enterprises in order to ensure that those enterprises are not disproportionately affected, giving specific attention to microenterprises, to alleviate the administrative burden...”*.
- 4.161. The Commissions consider that this obligation to communicate to the European Commission, including on an impact assessment, should not be mandatory as regards the UK Government as the UK has now left the EU. However the Commissions consider that any consultation on implementing the

PTD in NI should consider the impact on workers and employers with fewer than 250 workers.

4.162. As regards the transposition timeline, the Commissions consider that the relevant provisions of the PTD should be transposed into NI law by 7 June 2026, aligned to the deadline in the PTD for Member States.

#### **Article 35 – Reporting and review**

4.163. This provision establishes an obligation for Member States to communicate to the European 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. Specifically, by June 2031, Member States must inform the European Commission about the implementation of the PTD and its impact in practice.

4.164. The Commissions consider that this obligation to communicate to the European Commission on the implementation of the PTD should not be mandatory as regards the UK Government as the UK has now left the EU. However, the Commissions consider there is value in government, after a reasonable period of time, carrying out an independent review of the application and impact of the PTD in Northern Ireland, and publishing that review.

## **5.0 Conclusions and Recommendations**

5.1. In conclusion, the Commissions consider that, apart from a small number of provisions of the PTD that are no longer relevant now that the UK has left the EU, **all other provisions** of the PTD amend and/or replace provisions in the Recast Directive which is contained in Annex 1 of the WF. This includes as regards changes to substantive rights and procedural rights and rights relating to access to remedies, in this area.

5.2. We therefore consider that the UK Government, further to its dynamic alignment obligations arising out of WF Article 13 (3), must transpose these provisions of the PTD into NI law by 7 June 2026.

5.3. In assessing the degree to which the provisions of the PTD amend and/or replace provisions in the Recast Directive, the Commissions have taken into account a number of relevant factors including that:

- the legal basis for both the PTD and the Recast Directive is the same, namely Article 157(3) TFEU on equal pay for equal work;

- the PTD is aimed at strengthening the application of the principle of equal pay and the prohibition of discrimination set out in the Recast Directive, through both pay transparency and reinforced enforcement mechanisms, and this is clearly stated in the PTD;
- the PTD makes clear that its provisions relating to remedies and enforcement “apply to” proceedings relating to any right or obligation relating to the principle of equal pay set out in the Recast Directive (Article 4);
- there is a considerable degree of overlap on the substance of the rights and safeguards between the PTD and the Recast Directive; there are also references in the PTD to ‘building on’ the Recast Directive. In addition, the PTD clarifies a number of existing concepts in the Recast Directive, including core concepts related to equal pay for equal work or work of equal value. This includes in accordance with CJEU case law, and which strengthen rights for individuals facing pay discrimination and facilitate the application of those concepts.

5.4. It is therefore apparent from the above analysis that both the PTD and the provisions within the Recast Directive on equal pay are primarily aimed at strengthening the application and enforcement of the principle of equal pay and the prohibition of discrimination. In addition, provisions in the PTD build on and improve existing provisions in the Recast Directive in this area.

### ***Recommendations***

- 5.5. The Commissions therefore **recommend** that the UK Government, the NI Executive, and the NI Department for Communities ensure that, apart from a small number of provisions of the PTD that are no longer relevant now that the UK has left the EU<sup>117</sup>, **all other provisions** of the PTD, as detailed above, are transposed into NI law by 7 June 2026. The timing of the transposition into NI law should therefore, align with the transposition deadline for Member States in relation to the PTD.
- 5.6. The Commissions **recommend** that the European Commission, further to its obligations under the Windsor Framework,<sup>118</sup> informs the Joint Consultative Working Group in a timely manner of the PTD as an EU measure that amends or replaces the Recast Directive in Annex 1 to the WF.

<sup>117</sup> For example, reporting requirements to the European Commission.

<sup>118</sup> WF Article 15 (3): Within the working group (a) the Union and the United Kingdom shall, in a timely manner, exchange information about planned, ongoing and final relevant implementation measures in relation to the Union acts listed in the Annexes to this Protocol; (b) the Union shall inform the United Kingdom about planned Union acts within the scope of this Protocol, including Union acts that amend or replace the Union acts listed in the Annexes to this Protocol.

- 5.7. We stress that the requirements of the PTD should be considered minimum requirements and we would encourage government to adopt an approach when implementing the PTD that goes beyond these minimum standards where this reflects best practice, including international human rights best practice, and where it seeks to strengthen rights in this area. For example the ECNI has called for the power to bring discrimination cases in its own name (own motion powers) which is not envisaged under the PTD.<sup>119</sup>
- 5.8. Therefore, the Commissions **recommend** that the UK Government, the NI Executive and the NI Department for Communities, in the development of any legislation introducing requirements relating to strengthening the application of equal pay, ensure that, where necessary, this legislation goes beyond the minimum standards in the PTD, and reflects best practice, including international human rights best practice and standards, so as to ensure robust rights and protections. This should be in addition to ensuring law in NI is amended to keep pace with changes required pursuant to the UK Government's obligations relating to WF Article 2.

**4 March 2024**

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<sup>119</sup> See ECNI response to TEO consultation on review of the Race Relations (NI) Order 1997, June 2023. [Equality Commission's response to the Executive Office's consultation on the review of Race Relations \(NI\) Order 1997 \(equalityni.org\)](https://equalityni.org/).