Formal comments of the EDPS on the Proposal for a Directive of the European Parliament and of the Council to strengthen the application of the principle of equal pay for equal work or work of equal value between men and woman through pay transparency and enforcement mechanisms

1. Introduction and background

- On 4 March 2021, the Commission adopted a proposal for a Directive of the European Parliament and of the Council to strengthen the application of the principle of equal pay for equal work or work of equal value between men and woman through pay transparency and enforcement mechanisms ('the Proposal')[1].

- The Proposal aims at tackling the persisting inadequate enforcement of the fundamental right to equal pay and ensuring that this right is upheld across the EU, by establishing pay transparency standards to empower workers to claim their right to equal pay[2]. Against this background, the Proposal introduces in particular the following measures:
  - establishing pay transparency within organisations;
  - facilitating the application of the key concepts relating to equal pay, including 'pay' and 'work of equal value'; and
  - strengthening enforcement mechanisms.

- These comments are provided in reply to the request for legislative consultation on the Proposal by the Commission of 4 March 2021 pursuant to Article 42(1) of Regulation (EU) 2018/1725 ('the EUDPR')[3]. We limited our comments below to the provisions of the Proposal that are relevant from a data protection perspective.

- The EDPS welcomes the fact that he was consulted informally by the Commission, and hence had the opportunity to provide feedback in the early stage of the drafting of the Proposal.

2. Comments

- The EDPS notes that, as laid down under Article 1, the Proposal establishes "*minimum requirements to strengthen the application of the principle of equal pay between men and women for equal work or work of equal value enshrined in Article 157 TFEU and the*

[1] Proposal for a Directive of the European Parliament and of the Council to strengthen the application of the principle of equal pay for equal work or work of equal value between men and woman through pay transparency and enforcement mechanisms, COM(2021) 93 final, 04.03.2021.
[2] See Explanatory Memorandum, at page 2.
[3] Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC (Text with EEA relevance), OJ L 295, 21.11.2018, p. 39–98.

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prohibition of discrimination laid down in Article 4 of Directive 2006/54/EC[4], in particular through pay transparency and reinforced enforcement mechanism."

- The EDPS notes that Article 5 contains a provision, under paragraph (2)[5], that protects the applicant for employment in a broad sense but also, in line with the data protection principle of data minimization, having regard to her or his fundamental rights to privacy and to the protection of personal data.

- Article 7, on the worker's right to information **on her or his** individual pay level and on **the average** pay level, does not seem to unduly interfere with the right to the protection of personal data of the other workers (working for the same employer). Further safeguards are laid down in this respect under paragraph (6)[6] strictly defining the purpose of the right to information, as well as under Article 10(2) and (3).

- The EDPS welcomes Article 10(1), which states that "to the extent that any information provided pursuant to the measures taken under Article 7, 8, and 9 involves the processing of personal data, it shall be provided in accordance with Regulation (EU) 2016/679." The EDPS notes and welcomes that **the purpose** of the data processing envisaged in Articles 7, 8 or 9 is clearly specified in Article 10(2)[7].

- Moreover, the EDPS also welcomes Article 10(3), which clarifies that *"Member States may decide that, where the disclosure of information pursuant to Articles 7, 8 and 9 would lead to the disclosure, either directly or indirectly, of the pay of an identifiable co-worker, only the workers' representatives or the equality body shall have access to that information. The representatives or equality body shall advise workers regarding a possible claim under this Directive without disclosing actual pay levels of individual workers doing the same work or work of equal value. The monitoring body referred to in Article 26 shall have access to the information without restriction."*

- The EDPS also notes that recital 30 specifies that [bold added] "*Any processing or publication of information under this Directive should comply with Regulation (EU) 2016/679 of the European Parliament and of the Council.* ***Specific safeguards should be added to prevent the direct or indirect disclosure of information of an identifiable co-worker****. On the other hand, workers should not be prevented from*

[4] Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) OJ L 204, 26.7.2006, p. 23–36.

[5] Article 5(2) of the Proposal states: *"An employer shall not, orally or in writing, personally or through a representative, ask applicants about their pay history during their previous employment relationships"*

[6] Article 7(6) of the Proposal states: *"Employers shall have the right to require that any worker having obtained information pursuant to this Article shall not use that information for any other purpose than to defend their right to equal pay for the same work or work of equal value and not disseminate the information otherwise."*

[7] Article 10(2) of the Proposal states that "*Any personal data collected by employers pursuant to Articles 7, 8 or 9, shall not be used for any other purpose than to implement the principle of equal pay for equal work or work of equal value.*"

voluntarily disclosing their pay for the purpose of enforcing the principle of equal pay between men and women for equal work or work to which equal value is attributed."

- In this regard, the EDPS recommends **adding in the substantive part of the Proposal, as a separate paragraph under Article 10, the specification contained in the recital** (i.e., that specific safeguards should be implemented to prevent the direct or indirect disclosure of information of an identifiable worker), and adding that such safeguards will be implemented in particular having regard to the information to be compiled and made public pursuant to Article 8(4)[8].

3. Concluding remarks

- The EDPS considers that the Proposal does not raise major data protection issues. However, the EDPS recommends strengthening the safeguards to prevent the direct or indirect disclosure of information of an identifiable worker.

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[8] Article 8(4) of the Proposal states: "*Member States may decide to compile the information set out in paragraph 1, points (a) to (f) themselves, on the basis of administrative data such as data provided by employers to the tax or social security authorities. This information shall be made public in accordance with paragraph 6.*"