Association for Financial Markets in Europe

Position Paper

The Application of the EU Pay Transparency Directive to Financial Services

13 November 2023

Executive Summary

AFME welcomes the efforts by the EU authorities to support diversity and equality within European companies. The EU Pay Transparency Directive ("the Directive") is an important step in boosting gender diversity and complements work already underway within financial services.

However, as transposition of the Directive gets underway, we would like to make three recommendations which would help financial services firms' implementation:

1. Review by authorities of the complex set of pay equality requirements to which the sector is subject, at EU and national levels, to identify where duplication and conflicts can be addressed; and
2. Clarity that the Directive's definition of "pay" (Article 3) should be the amount awarded *for* a financial year (not the amount paid *in* a financial year). This will ensure the usefulness and accuracy of pay assessments;
3. Clarity that the pre-employment disclosures in Article 5 should be limited to fixed pay only, as the most useful information for applicants.

We would be happy to discuss these points in further detail with EU and national authorities.

Introduction

AFME and its members are committed to increasing diversity and equality within financial services and as such we welcome this initiative by the EU authorities.

Financial Services is a highly regulated sector, with our Members already subject to a number of different sets of requirements on corporate governance and diversity. Within this landscape, we see this Directive as an opportunity to increase harmonisation of regulatory obligations, with the intention of delivering clear and consistent information to stakeholders and reducing the administrative burden upon firms.

In addition, and as recognised by existing sectoral legislation, financial services firms use particular pay structures which incorporate both fixed and variable components, and use a variety of instruments in addition to cash. We have therefore identified two specific areas where further clarity is required on the application of the Directive within financial services, with respect to the definition of "pay".

We outline these themes in more detail below.

Harmonisation is Required to Address Duplicative and Conflicting Requirements

While this Directive is the first to address gender pay transparency at a horizontal EU level, there are many existing requirements on the subject to which financial services firms are subject, at both EU and national levels. We note, in particular:

1. Directive (EU) 2022/2464 - the EU Corporate Sustainability Reporting Directive ("CSRD");

2. The EBA Guidelines on the benchmarking exercises on remuneration practices, the gender pay gap and approved higher ratios under Directive 2013/36/EU (the Capital Requirements Directive, or "CRD")[1]; and
3. National measures such as the "Index de l'égalité professionnelle femmes-hommes" in France, the "Entgelttransparenzgesetz" in Germany, or the Real Decreto 902/2020 in Spain.

The gender pay requirements in these files, which are all driven by the same basic aim, impose a multitude of similar, overlapping and/or conflicting requirements upon firms, for example, in relation to:

- The definition of pay;
- The methods by which average pay, pay ranges etc. are calculated;
- The treatment of part-time or interim hires; and
- The format, means and timing by which transparency disclosures must be made.

The result is not only a resource intensive process for firms: multiple disclosures have great potential for causing stakeholder confusion – whether management, employees, shareholders or the general public. For example, if the means by which average pay is calculated differ (e.g. hourly vs yearly basis), or if data about part-time employees is treated differently (e.g. standardised vs non-annualised/full-time equivalent basis), a firm may be reporting a different gender pay gap in different disclosures. It could be unclear to a consumer of that data which figure to use or how to compare figures between different firms. It could also result in reputational issues for firms, as it may give rise to the perception that firms are seeking to avoid giving definitive information.

AFME Recommendations:

- We request that authorities at EU and Member State level review the increasingly complex landscape of gender pay requirements placed upon firms and consider the opportunities to remove duplicative or conflicting requirements.
- In transposing the Pay Transparency Directive, we request that Member States take into account the EBA reporting under CRD, to which many financial services firms are already subject. It would reduce duplication if those firms were permitted to use their existing EBA reports to fulfil the corresponding requirements of the Pay Transparency Directive, adding only additional information where required.
- In the absence of this, we request that Member States work together to harmonise the data requirements to the greatest possible extent.

Further Clarity is Required on the Application to Financial Services Pay Structures

It is a characteristic of financial services that pay arrangements for most individuals include both fixed and variable components. These are subject to existing regulatory requirements, particularly via CRD, such as deferral, malus and clawback provisions on variable pay elements. We note that the Directive is horizontal, rather than sector specific, and as such two related areas for clarification have arisen in relation to how the provisions should be applied to financial services.

[1] https://www.eba.europa.eu/sites/default/documents/files/document_library/Publications/Guidelines/2022/EBA-GL-2022-06%20GL%20on%20remuneration%20CRD/1036475/Final%20report%20on%20GLs%20on%20remuneration%20and%20gender%20pay%20gap%20benchmarking%20under%20CRD.pdf

The Definition of "Pay" Should Refer to the Amount Awarded for a Financial Year

Within Article 3(1)(a) pay is defined as *"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".* As noted above, pay within financial services generally contains both fixed and variable elements, with the variable elements often subject to deferral periods, meaning that the full amount awarded to an individual for a financial year is not necessarily paid to the individual within that same year. Therefore, pay can be considered as "amount awarded" for a particular year or "amount paid" in that same period, with the latter often including elements of pay awarded for previous years' performance. The definition given within the Directive does not specify which interpretation should be taken.

It is generally considered within the industry that "amount awarded" for a financial year is a more appropriate measure. This is partly due to the varying deferral periods to which variable pay can be subject (meaning that, as noted, the amounts distributed in relation to the awards can be actually received by an employee in several portions over a number of subsequent years), and partly because both the fixed and variable elements awarded refer to work done/performance assessed within a single financial year. Furthermore, where variable remuneration is awarded in instrument such as shares, variations in equity prices can complicate calculations of remuneration values over a period of time, meaning that the cash value of the amount paid can differ from that which was originally awarded.

AFME Recommendation:

- We request clarity that the definition of "pay" should refer both fixed and variable pay, and therefore to the amount awarded to an employee *for* a financial year (not the amount paid *in* a financial year).

Pay Transparency Disclosures Prior to Employment Should Be Limited to Fixed Pay

We acknowledge the requirements under Article 5 of the Directive to provide applicants for employment with information relating to pay ranges. In line with our point on the definition of pay above, it is not specified how variable pay should be treated.

Pay structures within financial services often involve individuals being eligible to receive discretionary, performance-dependent variable pay awards, which may be significant in size compared to their contractual fixed pay. However, variable pay is awarded based on a 'balanced scorecard' of a number of factors, including the performance of the firm, team, and/or individual, as well as a range of conduct metrics. This means that including information about discretionary variable pay in this disclosure could result in pay ranges that are too broad to be useful for applicants.

As a comparison, we note the approach taken in the US by New York State from September 2023, which requires private employers with four or more employees to include a range of pay for all advertised job, promotion, or transfer opportunities.[2] This disclosure is limited to fixed pay only, with any additional compensation and benefits listed separately. The New York State requirements follows a similar 2022 measure by New York City[3] which requires disclosure of *"the base annual or hourly wage or rate of pay"* specifically not including bonuses or other forms of compensation.

AFME Recommendation:

[2] New York State's Pay Transparency Law (New York State Labor Law Section 194-b) https://dol.ny.gov/system/files/documents/2023/10/p687-pay-transparency-law-for-employers_0.pdf
[3] New York City Human Rights Law (NYCHRL) https://www.nyc.gov/assets/cchr/downloads/pdf/publications/Salary-Transparency-Factsheet.pdf

- We suggest that the pay range disclosures to employment applicants required by Article 5 should be restricted to information about fixed pay only. This would give more useful information to applicants, given that variable pay will always be a discretionary decision based on a variety of factors.

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