



THE NEW EU PAY TRANSPARENCY DIRECTIVE

A Glance at Key Elements of the New Rules

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BACKGROUND

The gender pay gap continues to persist in the European Union, reaching 13% in 2020, with significant differences between the Member States and a minimal reduction over the last 10 years. In Germany, for example, the gender pay gap in 2022 is even higher than the European average at 18%. Art. 157 TFEU and Directive 2006/54/EC on equal pay enshrine the right of women and men to equal pay for equal work or work of equal value. However, implementing and enforcing this principle has long been challenging.

THE NEW DIRECTIVE

Pay transparency has been included as a key priority in the EU's gender equality strategy for 2020-2025. On April 24, 2023, the European Council adopted the Pay Transparency Directive. Through pay transparency and enforcement mechanisms,

the Directive marks a turning point in the long-standing effort to ensure equal pay for equal work across the EU. The aim of this EU Directive is to combat discrimination in the area of pay and to contribute to closing the gender pay gap in the EU.

IMPLEMENTATION INTO NATIONAL LAW REQUIRED

The EU Directive, as of now, has no directly binding legal effect in the Member States - at least as long as the implementation period for the Directive has not expired. However, all national legislators in the EU have to implement the contents of the Directive into national law. Since the Directive is already unusually detailed and complete, there is not much room to maneuver for the national legislator to deviate from it. Rather, the core of the regulation has already been determined. The right of every employee to equal pay is to be real-

ized and protected.

To comply with this, employers must determine remuneration structures. These are intended to eliminate gender-specific differences in remuneration. This should primarily depend on four objective criteria, namely:

- competencies,
- burdens,
- responsibility, and
- working conditions.

The determination of so-called "comparison persons" will become important for the question of whether the work can be considered equivalent. Job applicants should receive information regarding the initial salary so that well-founded and transparent negotiations on remuneration are guaranteed. In the future, employers will need information about the average income of other employees who perform the

same or equivalent work.

In order to enforce the right to equal pay, class actions are to be made possible in the future and the costs of which can also affect the employer. In the coming years, more violations will likely become the subject of proceedings, especially in disputes concerning dismissals. Employees can claim damages, including full remuneration payments for at least the last three years and additional payments of associated premiums in addition to compensation for lost promotion opportunities and the associated higher earnings. Finally, Member States should provide effective, proportionate, and dissuasive sanctions for violations. These sanctions should be allowed to reach fines up to the amount of the gross annual turnover of the employer or the company's total payroll.

KEY ELEMENTS IN A NUTSHELL

The following points will take a glance at the key elements of the new rules:

- **Gender pay gap reporting obligation**
Pursuant to Art. 9 Pay Transparency Directive, employers with 100 or more employees must provide information on the pay gap between male and female employees.
 - In the first phase, companies with 250 or more employees will have to report on their pay structure to the competent national authorities for the first time no later than one year after the entry into force of the Directive, and thereafter annually.
 - In the next step, companies with 150 to 249 employees will have to report on their pay structure to the competent national authorities no later than one year after the entry into force of the Directive and every three years thereafter.
 - The obligation to report on pay transparency will be later extended to companies with between 100 and 149 employees. They will also have to report on their pay structure every three years.
- **Joint pay assessment**
If the report reveals a pay gap of at least 5%, which cannot be justified on the basis of objective, gender-neutral criteria, the companies will be required to take action in the form of a joint pay assessment carried out in cooperation with the employees' representatives. The joint pay assessment shall be carried out in order to identify, remedy and prevent differences in pay between female and male workers that are not justified on the basis of objective, gender-neutral criteria. It shall include an analysis of the proportion of

female and male workers in each category of workers, information on average female and male workers' pay levels and complementary or variable components for each category of workers etc.

- **Provide job seekers with pay transparency**
Job seekers have the right to obtain information from the prospective employer on the initial pay or its range based on objective, gender-neutral criteria for the position. This information shall be provided in such a way as to enable informed and transparent negotiation on pay, such as in a published vacancy notice, before the job interview or otherwise. Employers should not be allowed to ask prospective employees about their previous salary.
- **Right to information for employees**
Art. 7 says that employees should be entitled to request information in writing from their employer about their individual and average earnings, broken down by gender and by groups of workers who perform the same or equivalent work.
- **Compensation for employees**
Under Art. 16, Member States are obliged to ensure that employees who have been disadvantaged receive compensation or reparation. This includes not only the full back payment of arrears of pay and corresponding bonuses or benefits in kind but also compensation for all consequences caused by the discrimination, such as loss of opportunity, non-material damage or other damage that may also result from the overlapping of several grounds of discrimination.
- **Shift of burden of proof**
Art. 18 of the Pay Transparency Directive reverses the burden of proof. The employer will have to prove in any court proceedings that it has not discriminated against the employee with regard to pay; this applies to all cases mentioned in the Directive. This means that even a breach of the annual information requirement on the right to information could potentially result in a reversal of the burden of proof.
- **Penalties**
In order to enforce the principle of equal pay for equal work, Member States must lay down sanctions that are effective, proportionate and dissuasive, pursuant to Art. 23 of the Directive. This could also include fines based on the employer's annual turnover or total remuneration.
- **Collective claims**
Art. 15 of the Directive also envisaged

that equal treatment bodies and employee representatives will be able to act on behalf of employees in court or administrative proceedings and take the lead in collective claims for equal pay cases.

CURRENT LEGISLATION IN GERMANY

Since 2017, the Pay Transparency Act has been in force in Germany to strengthen the principle of "equal pay for equal or equivalent work" between women and men. This principle has recently been underlined and strengthened by the German Federal Labor Court in several landmark decisions.

WHAT CAN EMPLOYERS DO TO PREPARE?

Even if the Directive still takes time to be enacted into national law, there is a need for action for employers just because of its far-reaching consequences. In the past, it was often former employees who left a company who made claims for alleged violations of equal pay. A significant increase can be expected here, especially from the point of view of new class actions. If such lawsuits are successful, sanctions and a demotivated workforce can be expected. In this respect, HR departments should prepare early for what is sure to come. This involves conducting a so-called "directive-compliance job evaluation" to identify comparable positions, ensuring a flexible and cost-effective approach. Addressing any identified pay gaps with corrective measures is crucial, and seeking external expert support can enhance compliance.

A proactive approach, including awareness and strategic readiness, will position companies to navigate the upcoming regulatory changes effectively.



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