

LEGAL UPDATE LABOUR AND EMPLOYMENT LAW

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The EU Pay Transparency Directive: Employers need to prepare themselves

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The [EU Pay Transparency Directive](#), which came into force on 6 June 2023, aims to promote equal pay and counteract pay-related gender discrimination (see our [Legal Update dated 20/12/2023](#)). The directive must be implemented into German law by 7 June 2026, which means the German legislature must update the current Pay Transparency Act (EntgTranspG) which has been in force since 2017. The Federal Ministry for Family Affairs, Senior Citizens, Women and Youth is currently working on a corresponding draft bill.

Action required by employers

Although the implementation deadline is still a few years off, employers should start being active in this area now. The requirements of the directive are comprehensive and require careful planning and long-term preparations. Employers should therefore duly prepare themselves for compliance with their new obligations and the associated extra bureaucratic outlay.

The [EU Pay Transparency Directive](#) includes the following measures, in particular:

Equal pay for the same work or work of equal value

The directive reinforces the right to be paid equal pay for the same work or work of equal value. Employers are obligated to create pay structures based on "objective, gender neutral criteria". These criteria must be determined in coordination with workers' representatives and should include skills, effort, responsibility and working conditions, and, if appropriate, any other factors which are relevant to the specific job or position ([Art. 4 Pay Transparency Directive](#)). Analytical tools or methodologies to analyse the value of the work must also be established.

Pay transparency even prior to employment

Contrary to the current [EntgTranspG](#), which only applies upon the commencement of the employment contract, the directive extends the transparency requirements to the period before hiring. Currently, applicants have the right to receive information from the (prospective) employer about the initial pay and its range as well as, where applicable, the relevant provisions of a collective agreement applicable to the position

([Art. 5 Pay Transparency Directive](#)). This information must be provided in good time and in a suitable format so as to ensure an informed and transparent negotiation on pay, such as in a job vacancy notice, prior to the job interview or otherwise, however before the employment contract is concluded. Employers must adapt their application process accordingly. In addition, in future applicants may not be asked about their pay history in their current or previous employment, which is contrary to the current widely established practice.

Pay transparency even prior to employment applies to all employers, regardless of the number of workers and whether the applicant actively requested information. The bargaining power of the parties would not be restricted, however, by the new provisions and it should still be possible to negotiate pay outside of the given pay range. It is questionable whether the employer would be actually obligated to publish all relevant components of pay for an advertised position in the future. The directive defines "pay" 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 in respect of their employment from their employer ([Art. 3 Pay Transparency Directive](#)). This provision involves the risk for employers that sensitive, pay-related information could be unwittingly disclosed to competitors, which could give them an insight into the pay structure of the company. This requires weighing up the applicant's interest in having information and the employer's interest in maintaining confidentiality.

Pay transparency during employment

Employers are obligated to automatically make easily accessible to all their workers all criteria that are used by the employer to determine workers' pay, pay levels and pay progression.

([Art. 6 Pay Transparency Directive](#)). This obligation to provide information is a significant escalation in comparison to the current [EntgTranspG](#), which provides for a right to information regarding the criteria and process of determining pay only on request, in relation to determining only your own pay and generally only in enterprises with more than 200 workers under the same employer. The information obligations under the directive apply here regardless of the number of workers; however, the national legislature could implement an exception to the obligation for micro enterprises or small companies with less than 50 workers in the context of pay progression. It remains to be seen whether this option will be explored.

Individual right to information

The employer's obligation to provide information is enhanced by an individual right to information for workers ([Art. 7 Pay Transparency Directive](#)). This states that workers have the right to request and receive from their employer information on their individual pay level and the average pay levels, broken down by gender and for categories of workers performing the same work as them or work of equal value to theirs. Employers shall provide this information in writing no later than within two months from the date on which the request is made.

A right to information is already enshrined in [EntgTranspG](#), but with significant differences. The directive makes the right to information independent of the number of workers and cancels time limits that had previously applied. While German law imposes a minimum number of six workers in a group of comparators, there is no such threshold value in the directive. In addition, instead of the statistical median, the average of the pay levels is used as a benchmark. This enables workers to carry out detailed

comparisons and, with smaller group of comparators, to determine the actual pay of comparable workers of the same gender. Workers must also no longer state a particular same job or job of equal value in order to obtain information.

In addition, under the directive employers shall inform their workers on an annual basis of their right to receive information and of the steps that the worker is to undertake to exercise that right. Workers' rights to exchange information with each other about their pay are also strengthened. Contractual clauses restricting this shall be declared invalid.

Accessibility of information

The directive does not specify precisely in which form the information must be provided. However, it must be provided in a format which is accessible to persons with disabilities and which takes into account their particular needs ([Art. 8 Pay Transparency Directive](#)). This could include the provision of information in an understandable way which they can perceive, in fonts of adequate size, using sufficient contrast or other format appropriate to the type of their disability.

Reporting obligations

In the current [EntgTranspG](#) the reporting obligation is generally restricted to employers with more than 500 workers. This merely obligates employers to provide their measures to promote equality and equal pay between women and men every three years, or every five years if there is a collective agreement in place. Information about the average total pay of the workers is also required, as well as the distribution of full time and part time workers.

The new directive introduces more comprehensive obligations. In the future, employers with at

least 100 workers must provide detailed information about the current pay gap between genders ([Art. 9 Pay Transparency Directive](#)). The obligation to first present a report and the intervals at which a report must be presented is determined by the number of workers, whereby member states will have the opportunity to either further increase the reporting frequency or to likewise require regular reporting for companies with less than 100 workers. In the future, employers will have to transmit the relevant information to a monitoring body who will collect and publish this information. Employers may also publish the information on their own website or make it accessible in other ways, such as by integrating it into their Management Report. Furthermore, workers, workers' representatives, labour inspectorates and equality bodies shall have the right to ask employers for additional clarifications and details regarding any of the data provided. Employers are obligated to provide a substantiated reply within a reasonable time. Such provisions are currently lacking in [EntgTranspG](#).

Employers with more than 150 workers must file their first report on the pay gap by 7 June 2027. We recommend this be filed in good time.

Joint pay assessment with workers' representatives

Newly introduced is the obligation to carry out a joint pay assessment with workers' representatives if there is a difference in the average pay level between female and male workers of at least 5%, provided this is not justified on the basis of objective, gender-neutral criteria and has not been remedied within six months of the date of submission of the pay reporting ([Art. 10 Pay Transparency Directive](#)). The pay assessment obligates employers to analyse the existing pay structures and determine specific measures to rectify the inequalities. The results of the pay

assessment must be made available to the workers, workers' representatives and the monitoring body. This information must likewise be made available to the labour inspectorate and the equality body if requested. If there are no workers' representatives, they should be designated by workers for the purpose of the joint pay assessment.

In Germany the integration of the provisions of the directive into the existing structures could result in particular challenges. On the one hand, in practice there are often no agreements in place with the executive bodies of the Works Constitution and the staff association about the criteria to differentiate pay. On the other, there are collective agreements that apply across employers where a joint pay assessment at the level of an individual employer might possibly stretch things to their limit. This will be, in particular, the case in public services.

Right to compensation

When implementing the directive it must be ensured that any worker who has sustained damage as a result of an infringement of any right or obligation relating to the principle of equal pay has the right to receive full compensation or reparation (Art. 16 Pay Transparency Directive). It should include not only full recovery of back pay and related bonuses or payments in kind, but also compensation for lost opportunities, such as access to certain benefits depending on pay level. This likewise includes compensation for non-material damage, such as distress because of the undervaluation of work performed. In contrast to the provisions of the General Equal Treatment Act (Allgemeines Gleichbehandlungsgesetz, AGG), compensation or reparation in accordance with the directive may not be restricted to an upper limit determined in advance,

thereby granting the workers more comprehensive rights when making good their damage.

Reversal of the burden of proof

If discrimination is presumed, the burden of proof lies with the (respondent) employer (Art. 18 Pay Transparency Directive). The employer must prove that no direct or indirect discrimination has occurred. This also applies if the employer has not fulfilled their pay transparency obligations laid down in the directive, for example, they refuse to provide the employee with requested information or have not produced a report on the gender pay gap. If the employer proves that the infringement of their obligations was manifestly unintentional and of a minor character, the burden of proof does not reverse.

This extension of the reversal of the burden of proof places pressure on the employer. Producing evidence that no pay-related gender discrimination has taken place is rendered difficult by the fact that there are hardly any rulings at the highest level of the judiciary justifying the grounds of unequal pay. Employers should determine fixed criteria for the respective pay groups promptly. The reasons for pay differences should also be thoroughly documented. This will make it easier in the event of a dispute to objectively justify any inequality on the basis of objective, gender-neutral criteria and therefore comply with the burden of proof.

Penalties

The German legislature has to introduce 'effective, proportionate and dissuasive penalties' in order to be able to penalise infringements of the principle of equal pay (Art. 23 Pay Transparency Directive). The specifics will be prescribed by national law. Penalties should also include fines to guarantee 'a real deterrent effect' and should

be based on the employer's gross annual turnover or the total pay of the employer. Specific penalties should be provided for cases of repeated infringements of rights and obligations, such as the revocation of public benefits or the exclusion, for a certain period of time, from any further award of financial inducements or from any public tender procedure. Currently there are no such comparable penalties in EntgTranspG. It therefore remains to be seen which penalties the German legislature will decide upon.

Outlook

The Pay Transparency Directive provides significant progress in the fight against the gender pay gap but does not guarantee its complete defeat. The effectiveness of the new regulations majorly depends upon the national implementation thereof, which is still awaited. Regardless, employers should promptly initiate measures to prepare themselves for the stricter regulations.

Proactive preparation and prompt evaluation will be decisive to meet the requirements of the directive and guarantee smooth implementation. Existing pay structures should be systematically inspected for pay-related gender discrimination and adjusted if necessary. This includes negotiations with workers' representatives where co-determination applies. It is essential that the pay system is designed to be transparent and discrimination-free.

Employers should also ensure that they and their managers are able to understand and implement the new regulations. The period before the directive is implemented should be used to meet the administrative requirements and minimise potential future costs. It is advisable to set up a system to collect data and analyse the gender pay gap and develop a corresponding template.

Note

This overview is solely provided for information purposes and should not replace professional legal advice. If you have any questions, please contact your usual contact at GÖRG or the author on +49 40 500360 755 or csajgert@goerg.de. Information about the author is available on our website www.goerg.de.

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