

The Pay Transparency Directive: EU negotiations begin

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Background

In March 2021, the European Union submitted legislative proposal aimed to strengthen equal pay for equal work or work of equal value between men and women, including the introduction of pay transparency measures and enforcement mechanisms. Discussions at Parliament level will now begin to develop the Directive on Equal Pay and Pay Transparency (the “**Directive**”).

What are the causes of gender pay gap?

While legislation and case law has focused on ensuring equal pay for equal work or work of equal value, and that has certainly improved, the more pertinent issue of gender pay gap still continues. This is different to the concept of equal pay, whereas gender pay gap focuses on the average remuneration between men and women and looks at the reason why there may be differences. Although the situation is improving, progress has been slow in the EU. The current gender pay gap across the EU is 14.1%. A number of factors contribute to the gender pay gap such as:

- a lack of women in leadership;
- unequal sharing of care and unpaid work; and
- segregation in education and the labour market.

The Directive proposes to tackle the persisting inadequate enforcement of the fundamental right to equal pay and ensure that this right is upheld across the EU. The Directive pursues these objectives by:

- 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.

Benefits of the Directive

More transparency in pay would help uncover unjustified gender-based pay differences for equal work or work of equal value and help victims of pay discrimination to seek redress and enforce their equal pay right. Some of the provisions the Directive seeks to introduce in an attempt to curb this issue include the following:

Extension of the term “worker”: The Directive extends the definition of a “worker” to include not only employees, but agency workers and those in the gig economy also. Job applicants will also be entitled to information about pay levels.

Prohibition of pay secrecy: The Directive provides that both current workers and job applicants will be entitled to information about pay levels. Employers will need to ensure that initial pay levels or ranges are published in job advertisements or provided to applicants before an interview. Workers will also be entitled to a breakdown by sex of average pay levels for workers doing the same work or work of equal value.

Right to information: The Parliament has proposed that companies with at least 50 employees (instead of 250 as originally proposed by the Commission and defended by the Council) be required to disclose information that makes it easier for those working for the same employer to compare salaries and expose an existing gender pay gap in their organisation. If there is a pay gap of at least 5% which cannot be justified based on gender-neutral factors, a pay assessment will be required. Notably the Gender Pay Gap Information Act 2021 currently only requires employers with employees of 250 or more to report on gender pay gap. This will reduce to 50 employees by June 2022, with the reports being published by December of this year.

Scope of cover: The Directive does not only apply to a worker’s basic salary, but also to other job-related benefits such as bonus payments, overtime, allowances, sick pay and occupational pensions.

Right to compensation: The Directive requires 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 obtain full compensation for the harm caused in a way which is dissuasive and proportionate to the damage suffered. This includes the full recovery of back pay and related bonuses or payments in kind, and compensation for lost opportunities and moral prejudice.

Shift of burden of proof: In cases where a worker feels that the principle of equal pay has not been applied and takes the case to court, national legislation should oblige the employer to prove that there has been no discrimination.

Protection against victimisation: Workers and their representatives should not be treated less

favourably after having exercised their right to equal pay or any right provided for in the Directive. Member states will be required to introduce measures at national level to protect workers against dismissal or any other adverse treatment by employers following a complaint or the initiation of legal proceedings taken which are aimed at enforcing compliance with the rights set out in the Directive.

Penalties: Any penalties set in member states should include fines, the amount of which must take into account a number of aggravating elements such as the gravity and duration of the infringement, as well as any intent or serious negligence on the part of the employer. This provision also requires member states to establish specific penalties to be applied in cases of repeated infringements.

The Directive is currently before the European Parliament for consideration and it is expected to be adopted by July of this year. If adopted, member states will have two years to implement the Directive into national law, meaning a 2024 deadline is likely.

Conclusion

Pay transparency allows workers to detect and prove possible discrimination based on sex. It also highlights gender bias in pay systems and job grading that do not value the work of women and men equally in a gender-neutral way, or that fail to value certain occupational skills that are mostly seen as female qualities. Given that such bias is often unconscious, the requirements under the Directive can help raise awareness of gender pay gap and identify discriminatory gender-based pay differences that cannot be justified by valid discretionary factors.

The Directive will thus act as an essential tool for dispelling doubts on equal pay between men and women and to support the elimination of gender bias in pay practices. Whilst discussions are ongoing, it would be prudent for employers to undergo a gender pay gap reporting exercise in a bid to prepare for what's to come.

For further information on gender pay gap reporting or the incoming Directive, please contact Marianne Norton by emailing marianne.norton@ogier.com

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