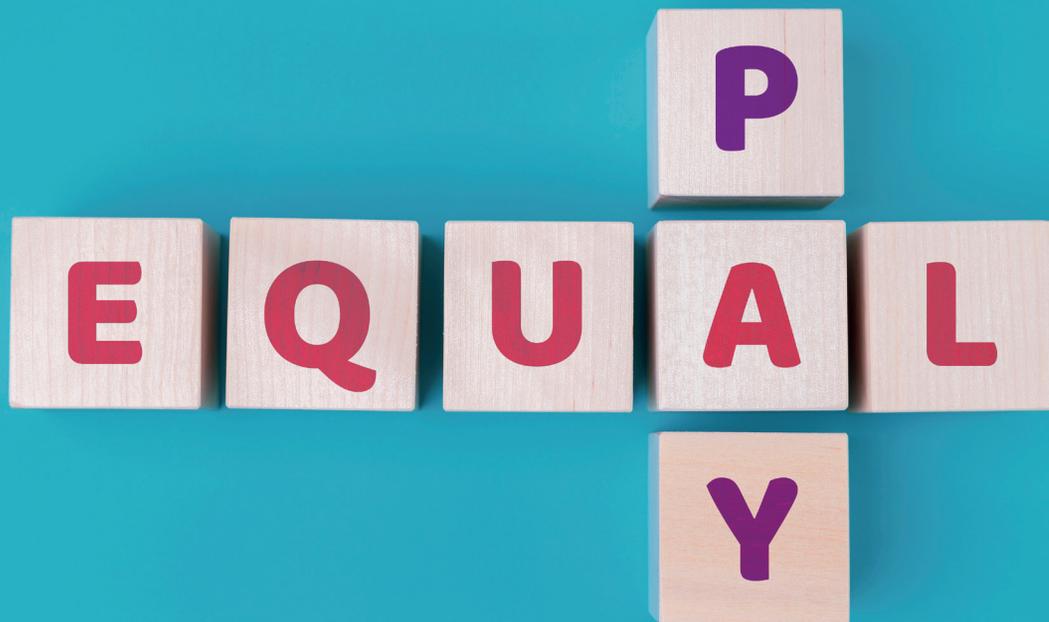


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## Special Newsletter Employment Law: Equal pay in light of the Pay Transparency Directive

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■ EDITORIAL

Dear readers,

it has been almost nine years since the Pay Transparency Act (Entgelttransparenzgesetz / EntgTranspG) came into force in Germany. At the time, the socio-political debates surrounding the Act were even more intense than the legal ones, particularly with regard to its scope and ability to actually ensure equal pay for men and women. Almost a decade later, assessments of the Act are mixed: although it has noticeably raised awareness of equal pay for work of equal value, in practice, it plays only a minor role.

The EU Pay Transparency Directive, adopted in May 2023, is now intended to further strengthen employees' rights. At the same time, the requirements for companies regarding equal pay and pay transparency are being tightened. The Directive must be transposed into national law by 7 June 2026. Whether the German Federal Government will implement the Directive by the deadline remains uncertain at present. As of the end of March 2026, no legislation has been presented, not even a draft.

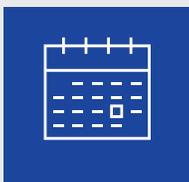
Nevertheless, with this special newsletter, we wish to use the approaching implementation deadline to present the upcoming changes to the German Pay Transparency Act, put them into context and analyse their practical implications for employers. The topic of pay transparency currently has a noticeable impact on advisory practice and is increasingly coming to the public's attention. Reason enough to shed light on the various aspects and implications of the upcoming legislative changes.

We hope you find this newsletter informative. Your feedback and questions are always welcome.

Yours

Achim Braner

Events, publications and blog



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You will find our blog [here](#).

■ TOPICS

## The status quo in the German Pay Transparency Act

The legal requirement for equal pay for men and women for the same or equivalent work in the EU is enshrined in Art. 157 TFEU and was initially transposed into German law indirectly via the General Equal Treatment Act (*Allgemeines Gleichbehandlungsgesetz / AGG*). With the Pay Transparency Act, which came into force in 2017, the German legislature created a standalone law to promote equal pay.



### Overview

The Pay Transparency Act is essentially divided into scope and definitions, the aim of the Act and the resulting obligations and prohibitions for employers, the content, procedure and scope of the employee's right to information, the internal review procedure and reporting obligations. The scope of the right to information and the employers' obligations are linked to the number of employees. Furthermore, the Act distinguishes between employers bound by collective agreements, employers applying collective agreements, and those who fall into neither category.

### Scope

Pursuant to Sec. 2 (1) Pay Transparency Act, the Act applies to employees. Under Sec. 5 (2) Pay Transparency Act, this includes employees, civil servants of the German Federal Government and of legal entities under public law directly subordinate to the government, judges, soldiers, apprentices and home workers, as well as persons treated as such. A non-collective agreement employer within the meaning of Sec. 5 (3) Pay Transparency Act is any natural or legal person, as

well as any partnership with legal capacity, which employs employees as defined in Sec. 5 (2) Pay Transparency Act. For home-based workers and those treated as such, the client or intermediary is deemed to be the employer.

Under Sec. 5 (4) Pay Transparency Act, employers bound by collective agreements are those who apply a collective wage agreement or a framework collective wage agreement pursuant to Sec. 3 (1) Collective Agreements Act (*Tarifvertragsgesetz / TVG*), are bound by such a collective agreement by virtue of a declaration of universal applicability, or apply wage provisions for home workers. Employers applying collective agreements are (pursuant to Sec. 5 [5] Pay Transparency Act) those who, within the scope of a collective wage agreement or framework collective wage agreement, have adopted the collective wage provisions by written agreement in a manner that is binding and identical in content for all activities and employees to whom these collective wage provisions apply.

### Prohibition of discrimination – principle of equal pay

Under Sec. 3 (1) Pay Transparency Act, an employer may not disadvantage employees for the same or equivalent work on the grounds of gender with regard to all components and conditions of remuneration. Similarly, the employer is bound by the resulting principle of equal pay under Sec. 7 Pay Transparency Act. Provisions that contravene this are invalid under Sec. 8 (1) Pay Transparency Act. Employees perform equal work if they carry out an identical or similar activity at different workplaces or successively at the same workplace, Sec. 4 (1) Pay Transparency Act. Under Sec. 4 (2) Pay Transparency Act, they are deemed to be performing work of equal value if, on the basis of a range of factors, they can be regarded as being in a comparable situation. These factors include, in particular, the nature of the work, the training requirements and the working conditions.

Discrimination may be direct or indirect. Under Sec. 3 (2) Pay Transparency Act, direct discrimination occurs where lower pay is paid on the grounds of gender for the same or equivalent work. Indirect discrimination occurs where seemingly neutral pay requirements may disadvantage the other gender in a particular way, unless they are proportionate. In particular, criteria relating to the labour market, performance and work outcomes that are equally proportionate are justifying factors, Sec. 3 (3) Pay Transparency Act.

## Employer obligations

Under Sec. 6 Pay Transparency Act, the employer is required to contribute to the achievement of equal pay within the scope of their duties and actions. This includes, pursuant to Sec. 6 (2) Pay Transparency Act, implementing all necessary and, where appropriate, preventive measures to protect employees from discrimination on grounds of gender in relation to pay. Employers who, pursuant to Sec. 4 (4) Pay Transparency Act, use a pay system for the remuneration of employees must also ensure that the system as a whole and its individual pay components do not result in discrimination.

Even though this is not a statutory obligation, private employers with more than 500 employees are required, under Sec. 17 et seq. Pay Transparency Act, to verify compliance with the obligations laid down in the Act by means of an internal audit procedure. Employers with generally more than 500 employees who are required to publish a management report under commercial law (Sec. 264 et seq. German Commercial Code [Handelsgesetzbuch / HGB]) must, pursuant to Sec. 21 et seq. Pay Transparency Act, prepare a report on equality and remuneration to be published in the Federal Gazette. Employers bound by collective agreements must prepare the report every five years, whilst other employers must do so every three years.

## Employees' right to information

At the heart of the German Pay Transparency Act is the individual employee's right to information under Sec. 10 Pay Transparency Act, which is intended to ensure compliance with the principle of equal pay. In doing so, employees must reasonably specify an identical or equivalent role (comparable role) and may request information on the average gross pay under Sec. 5 (1) Pay Transparency Act and up to two (additional) pay components. The request for information must be made in writing and may be repeated at the earliest after two years have elapsed, provided that a significant

change in the circumstances is demonstrated. Pursuant to Sec. 12 (1) Pay Transparency Act, this right applies only to establishments with, as a rule, more than 200 employees working for the same employer.

The employer's obligation to provide information must be fulfilled in accordance with Sec. 11-16 Pay Transparency Act and, pursuant to Sec. 11 (1)-(3) Pay Transparency Act, also include details of the criteria and procedures for determining remuneration, as well as information on comparative remuneration. The procedure is governed by Sec. 14 and Sec. 15 Pay Transparency Act and distinguishes between different types of employers. If a works council exists, the request for information must be made to it. Otherwise, the request is made directly to the employer. In the case of employers bound by collective agreements, a notification must be sent to the Equal Pay Officer to be appointed in accordance with Sec. 6 (2) Pay Transparency Act. Employers not bound by collective agreements must provide the information in writing within three months.

Employers bound by collective agreements face no sanctions for breaching the duty to provide information. By contrast, under Sec. 15 (5) Pay Transparency Act, other employers bear the burden of proof regarding compliance with the equal pay requirement in the event of a dispute. The same applies if the works council was unable to provide the information for reasons attributable to the employer. Furthermore, the employer may not take disciplinary action against employees, persons supporting them, or witnesses testifying in their favour for exercising their rights, Sec. 9 Pay Transparency Act.

## Future

With the Pay Transparency Directive, the EU is strengthening the enforcement of equal pay and transparency and modifying the rights and obligations outlined in various areas. The provisions of the Directive discussed in the following article will therefore need to be incorporated into the areas addressed here.

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# The key provisions of the Pay Transparency Directive

The Pay Transparency Directive (EU) 2023/970 focuses on strengthening employees' individual right to information, promoting proactivity and stricter reporting obligations for employers, as well as imposing tangible sanctions for breaches. The aim is to strengthen the application of the principle of equal pay for men and women for work that is the same or of equal value.

## Background and objective

The principle of equal pay for men and women for the same or equivalent work has long been enshrined in European primary law. Nevertheless, the European institutions presume that a gender pay gap still exists within the EU. In 2023, the unadjusted gender pay gap – the percentage difference in average gross hourly earnings between men and women – stood at around 12 % across the EU. Against this backdrop, the European legislator created a new regulatory framework with the Pay Transparency Directive of 10 May 2023. The aim of the Directive is to improve the practical enforcement of the principle of equal pay. To this end, companies are required, in particular, to provide greater transparency regarding pay structures, and the enforcement of claims is simplified.

The Directive requires member states to introduce corresponding national regulations by 7 June 2026. In Germany, this is expected to involve a comprehensive revision of the Pay Transparency Act. To prepare for the legislative process, a commission of experts was set up, which published its final report on 24 October 2025. According to the Federal Ministry of Education, Family Affairs, Senior

Citizens, Women and Youth, the legislative process was due to be initiated in early 2026. However, no legislation has been presented yet.

## Extended transparency and information obligations

Unlike in the German Pay Transparency Act, the scope of the Directive initially covers job applicants. The (potential) employer must, without being asked, inform the applicant of the starting salary or its range, including relevant provisions of a collective agreement under the Collective Agreements Act (Tarifvertragsgesetz / TVG). At the same time, employers will generally no longer be permitted to ask applicants about their previous salary or salary development in their current or previous employment. It will, however, remain permissible to ask about the amount of an alternative offer.

Employees, in turn, will in the future be entitled to written information regarding their individual pay level and the average pay level, broken down by gender and by group of employees performing the same or equivalent work. The expert commission recommends limiting the information to the total gross remuneration paid in the corresponding period of the previous year. A detailed breakdown of the individual components is not required. Another new feature of the Pay Transparency Directive is that every company is obliged to provide the information and every employee is entitled to it. The Directive does not provide for a threshold, as the German Pay Transparency Act has done to date (generally 200 employees). Furthermore, the Directive provides that employees may request and receive the information via the employee representative body or an equality body.

## Comparable employees

The group of comparable employees – i. e. those performing the same or equivalent work – is significantly expanded by the Pay Transparency Directive. When assessing whether



employees are in a comparable situation, employees of another employer may also need to be taken into account. This is the case where there is a single source that determines the pay conditions relevant for the comparison, for example where employees are subject to the same collective agreement or a pay system uniformly determined by the parent company. The pool of comparable employees is also being expanded in terms of time. The assessment of whether employees are in a comparable situation should not be limited solely to employees who are employed at the same time. Ultimately, it should even be possible to refer to a hypothetical comparable employee if no actual comparable person can be identified.

## Employer's proactivity

In relation to the individual right to information, the Pay Transparency Directive requires employers to take a proactive approach. Once the Directive comes into force, employers must proactively inform employees on an annual basis about their right to information and the steps they need to take to exercise that right. Furthermore, in accordance with the Directive, employers are required to inform their employees – even without a prior request for information – in an easily accessible manner about the criteria used to determine their pay, the level of their pay and the development of their pay. Correspondingly, the Directive includes a ban on confidentiality clauses in employment contracts that prevent employees from disclosing their pay. However, a duty of confidentiality regarding comparative pay is expressly permitted.

## Reporting obligations

Furthermore, new reporting obligations are being introduced for companies. Specifically, companies with 100 to 149 employees must comply with these obligations for the first time by 7 June 2031 and then every three years thereafter. Companies with 150 to 249 employees, as well as those with at least 250 employees, must fulfil this reporting obligation for the first time by 7 June 2027 – that is four years earlier. Companies with at least 250 employees must then report annually, whilst those with 150 to 249 employees must report every three years.

In terms of content, the reporting obligations cover the gender pay gap, the gender pay gap for supplementary or variable components, the average gender pay gap, the average gender pay gap for supplementary or variable components, the proportion of employees receiving supplementary or

variable components, the proportion of employees in each pay quartile, and the gender pay gap between employees within groups of employees, broken down by standard basic pay or salary as well as by supplementary or variable components.

Employers must submit the report to the competent public authority ('monitoring body'), which then publishes it. Employees, employee representatives, labour inspectorates and equality bodies may request additional clarifications and details from employers regarding all data provided in the report, including explanations of any gender pay differences.

## Joint pay assessment

The employer may be required to carry out a joint pay assessment with the employee representatives. This is the case under three conditions:

1. The report to be prepared shows that there is a difference of at least 5 % in the average pay of employees within a group of employees;
2. this difference cannot be justified by objective, gender-neutral criteria;
3. the employer does not correct this unjustified difference in average pay within six months of the date of the report.

To define the criteria, the German Federal Government's expert commission recommends providing for a statutory, non-exhaustive list of justifications. It also recommends a two-stage remedial procedure. At the first stage, where a pay gap exists, the employer should be obliged to inform the relevant employee representatives of the findings within six weeks. The employee representatives are given the opportunity to comment and to jointly analyse the causes of unequal treatment. In the second stage, a binding action plan to eliminate the pay inequality is then developed jointly with the employee representatives – provided that immediate elimination of the inequality is not possible.

The obligation to carry out a joint pay assessment is linked to the company's reporting obligation. According to the Pay Transparency Directive, it therefore applies 'only' to companies with 100 or more employees.

## Stricter enforcement

The envisaged enforcement mechanisms are also of considerable practical importance. The Directive obliges Member States to provide for effective sanctions for

infringements. At the same time, it facilitates the judicial enforcement of claims. In particular, the Directive provides for a far-reaching rule on the burden of proof: if an employer breaches transparency obligations, this alone may give rise to a presumption of pay discrimination. In such cases, it is up to the employer to prove that this is not the case.

## Conclusion

The EU Pay Transparency Directive imposes a wide range of new obligations on employers. Companies should familiarise themselves with the requirements of the Directive. This includes, in particular, reviewing existing remuneration systems, recruitment processes and internal reporting structures. Documenting the criteria for pay decisions is also likely to play a key role in future. As the specific transposition of the Directive into German law is still pending, it remains to

be seen how the German legislator will shape the European requirements in national law. Regardless of this, however, it is already foreseeable that the Directive will lead to a significant increase in the transparency and documentation requirements for employers. At the same time, the forthcoming implementation offers companies the opportunity to systematically review existing remuneration structures and establish clear, transparent criteria for pay decisions.

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# Requirements for non-discriminatory remuneration structures

The Directive (EU) 2023/970 on pay transparency must be implemented by the beginning of June. For companies, this means that remuneration systems will come under greater scrutiny from the courts. The aim of the Directive is to enforce the principle of 'equal pay for equal work or work of equal value' more effectively. Employers are therefore obliged to establish remuneration structures based on objective and gender-neutral criteria and to provide comprehensible justifications for pay differences. But what does this mean in practice?



## Remuneration is 'everything'

It all starts with the concept of pay. For the purposes of the Directive, this is to be understood in a broad sense. It covers not only basic pay but all monetary and non-monetary benefits provided by the employer. The principles of the Directive are therefore relevant to all components of remuneration and must be assessed individually within the remuneration structures.

## When work is 'the same' or 'equivalent'

Central to the assessment of pay differences is the question of which activities are comparable. Sec. 4 (1) Pay Transparency Directive builds on existing concepts from the

Pay Transparency Act, specifically its Sec. 4 (1). Work is considered 'equal' where identical or similar tasks are performed – whether at different workplaces or successively in the same role. A task is also 'equivalent' if, when the relevant factors are considered as a whole, it appears comparable. The decisive factor here is the actual requirements of the task, not the individual characteristics of the respective employees. An objective standard is therefore central. The Directive sets out four key criteria for this: competence, responsibility, workload and working conditions. These factors serve not only to identify comparable tasks, but also to objectively justify pay differences within a comparison group.

### **The comparison does not end at the company boundary**

When it comes to determining who can be compared with whom, the organisational structure is key. The decisive factor is whether there is a 'single source' for determining pay conditions. The starting point is generally the same employer. However, a single source may also exist where remuneration systems are determined by statutory provisions, collective agreements or group-wide guidelines. If, for example, a remuneration system is established centrally within a group, the comparison of employee groups may also be carried out on a group-wide basis. The same applies to collective agreement provisions: here, the geographical and personal scope of the collective agreement determines the group of comparable employees.

### **Objective criteria as the foundation of the remuneration system**

The Pay Transparency Directive requires employers to have transparent and objective pay structures. However, this does not mean that all employees must be paid the same. Differences in pay remain permissible – but they must be justifiable on the basis of objective criteria. The four key factors – competence, responsibility, workload and working conditions – play a significant role here. Employers may weight these criteria differently depending on their relevance to the specific role. Competence may include, for example, professional qualifications, interpersonal skills or levels of education. Workload may relate to the physical or mental demands of the role. Furthermore, other objective factors may be taken into account, provided they are relevant to the specific role and allow for objective conclusions to be drawn regarding the quality of the employee's performance. Criteria with no objective connection to the role are not permitted; these include, for example, negotiating skills during

recruitment, qualifications not required for the role, or the remuneration of a previous job holder.

Consequently, companies should document in a transparent manner why certain jobs have been classified as comparable and which criteria lead to pay differences. This transparency can be decisive in the event of a dispute – particularly if decisions are reviewed at a later date. Reliable documentation is essential here. It is worth noting in this context that the Directive (unlike Sec. 4 [5] German Pay Transparency Act in its current version) does not provide for a presumption of appropriateness for collective agreement remuneration systems. How employers can assess work in this context and review and adjust the remuneration components in collective agreements and works agreements for their direct and indirect gender neutrality will have to be clarified by the legislation or, ultimately, by case law.

### **How new remuneration systems can be introduced**

The process of introducing or adapting a remuneration system depends heavily on the collective bargaining framework. Of particular significance is whether there is collective bargaining coverage and whether a works council has been established. In companies without collective bargaining coverage and without a works council, a new remuneration model can be implemented relatively easily, for example through corresponding provisions in employment contracts or by means of a general undertaking. If there is a collective agreement (including through reference clauses), the relevant collective agreement initially determines the remuneration. The benchmark – again based on the 'source' of the remuneration provisions – is the company (in the case of in-house collective agreements) or (across employers) the entirety of employees falling within the scope of the (industry) collective agreement.

Comparable duties are generally determined here by the pay grades set out in the collective agreement. Scope for discretion remains, for example, in the case of employees not covered by the collective agreement, in the case of opening clauses in the collective agreement, or in the case of allowances exceeding the collective agreement. These special cases may still be regulated by individual contracts or by virtue of a general undertaking to the workforce. If, in addition to collective agreement coverage, a works council exists, the works council's right of co-determination is, in principle, excluded under the opening sentence of Sec. 87 Works Constitution Act (Betriebsverfassungsgesetz / BetrVG) for as long as the collective agreement remains in force. A

collective agreement that merely continues to have effect, however, does not exclude the works council's right of co-determination under Sec. 87 (1) No. 10 Works Constitution Act in matters of remuneration. With regard to the collective agreement provisions, all employees covered by them are comparable. With regard to the remuneration components that may be regulated by the works agreement, these are all employees covered by it. In the case of employees on annual salaries, the benchmark is likely to be all employees on annual salaries.

In companies not bound by collective agreements but with a works council, there is in any case a mandatory right of co-determination under Sec. 87 (1) No. 10 Works Constitution Act regarding matters of internal wage structure. This includes remuneration principles as well as the introduction or amendment of remuneration methods. However, the subject of co-determination is always 'merely' the structure of the distribution of the financial resources provided by the employer, but not the 'pot', i. e. the level of remuneration. Piecework and bonus rates, however, are subject to co-determination under Sec. 87 (1) No. 11 Works Constitution Act and are therefore a mandatory aspect of the implementation of transparent remuneration systems.

## Remuneration systems as a compliance issue

The Pay Transparency Directive makes it clear: remuneration is increasingly a matter of legal compliance. Companies will have to systematically review their remuneration structures and – where necessary – realign them. Given the expected complexity of the requirements and the sometimes significant organisational implications, it is advisable to tackle this review at an early stage. Those who design their remuneration structures in a timely manner to be transparent, comprehensible and non-discriminatory not only reduce legal risks but also create greater clarity and structure within their own remuneration system.

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## Pay transparency in the application and salary negotiation process

**One of the key provisions of the Pay Transparency Directive extends the obligation to disclose pay criteria to applicants. What are the implications of this 'pay transparency from the beginning'? And what consequences does it have for subsequent salary negotiations during the course of the employment relationship?**

### Directive requirements regarding applicants

To eliminate pay differences between men and women, Sec. 5 (1) of the Directive stipulates that employers are already obliged to provide applicants with information on the starting salary based on objective, gender-neutral criteria, as well as on the applicable provisions of a collective agreement. The Directive does not specify when this information must be provided. However, applicants must be enabled to conduct informed and transparent salary negotiations. Employers are not permitted to ask applicants, as part of the application process, about their salary progression or the wages they have earned to date. This is intended to prevent discriminatory pay differentials from previous employment from continuing

during negotiations on the starting salary. Furthermore, Sec. 5 (3) Pay Transparency Directive stipulates that both the wording of the job advertisement and the recruitment process must be gender-neutral. This is intended to strengthen the right to equal pay for equal work.

### Implications for job advertisements and interviews

It is to be expected that the transposition of the Pay Transparency Directive into national law will lead to similar requirements. Job advertising processes should therefore be adapted to these requirements already. Before employers advertise a vacancy, the starting salary should be specified in



concrete terms, along with any pay band and the associated objective, gender-neutral criteria for classifying the applicant within that band. This is because, although the employer is not required under the Directive to state the starting salary or range in the job advertisement, the information must be communicated to the applicant at a sufficiently early stage to ensure ‘informed and transparent negotiation’ regarding the salary.

It is advisable to send this information with the invitation letter to an interview. This prevents the starting salaries or the range of starting salaries and their grading criteria from being visible to the employer’s competitors through publication in the job advertisement. Presenting this information only during the interview, however, is likely to hinder informed salary negotiations, as the applicant, unlike the employer, has not been able to prepare for the salary discussion. The prohibition on asking about previous salaries and salary trends must be taken into account, particularly in digital application tools and forms to be completed by applicants.

Employers should, if they have not already done so, review their job advertisement processes and adapt them where necessary. By following the above-mentioned approach to preparing a job advertisement, employers will also be prepared in the event that national implementation leads to stricter requirements regarding the timing of disclosure, e. g. if information on the level of the starting salary or its range must already be specified in the job advertisement.

## Guidelines for salary negotiations

The protection afforded by the Pay Transparency Directive continues throughout the employment relationship. Sec. 6 of the Directive requires employers to make information on the

criteria used to determine wages, the level of pay and pay trends readily available to employees. Employers may only use objective and gender-neutral criteria.

## Implications for salary negotiations

The rules on the provision of information during the course of the employment relationship have a direct impact on employees’ salary negotiations. It is to be expected that these rules will also be reflected in a similar manner in national law. Although the Directive allows domestic legislators to exempt small and medium-sized enterprises with up to 50 employees from this requirement, it remains to be seen whether the German lawmakers will make use of this option.

It is to be expected that negotiations will be conducted more closely in line with the specific objective criteria set by the employer. The establishment of objective, gender-neutral criteria is therefore crucial. When determining the criteria for pay, the level of pay and, in particular, opportunities for development, employers should place particular emphasis on clear rules with reference points that are as fact-based and verifiable as possible. Otherwise, disputes over the interpretation of the criteria and their fulfilment are inevitable. Furthermore, it must be borne in mind that errors in establishing these criteria, in light of the principle of ‘equal pay for equal work’, can lead to a financial risk not only in individual cases.

## Conclusion

In general, it is advisable to review existing criteria governing remuneration, pay levels and pay progression and, where possible, to formulate them more specifically. If such criteria do not yet exist, the employer is not obliged to establish them. However, if they do so, it is advisable – as described above – to be thorough from the outset.

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# The role of the works council in enforcing pay transparency

The works council plays a key role in implementing and enforcing the provisions of the German Pay Transparency Act. This role will be expanded in future as a result of the requirements of the Pay Transparency Directive.

## Background

The Pay Transparency Act is intended to enforce the principle of 'equal pay for women and men for equal work or work of equal value' and sets out specific rights and obligations to this end (see the article by *Hahn/Bitzer* in this newsletter). The works council plays a key role in this regard, which is enshrined, inter alia, in Sec. 13 (1) Pay Transparency Act. Accordingly, within the scope of its general duties under Sec. 80 (1) Sentence 2a Works Constitution Act (*Betriebsverfassungsgesetz / BetrVG*), the works council promotes the enforcement of equal pay for women and men. The Pay Transparency Directive will expand this framework.

## Individual right to information

Employees in companies with generally more than 200 employees working for the same employer have an individual right to information regarding the criteria and procedure for determining pay for their role and a comparable role, as well as the median gross monthly pay and up to two further pay components for an identical or equivalent role held by a person of the opposite gender pursuant to Sec. 10, Sec. 11 (2) and (3), Sec. 12 (1) Pay Transparency Act. In the case of employers bound by or applying collective agreements who have a works council, the works council is generally responsible for providing the information, unless the body requests that the employer assume this duty (Sec. 14 [1] Sentences 1 and 4 Pay Transparency Act). Conversely, the employer may assume the duty to provide information either generally or in specific cases, Sec. 14 (2) Pay Transparency Act. In the case of employers not bound by collective agreements, the employer is generally responsible for providing the information, but may delegate the task to the works council or the works council may delegate it back to the employer (Sec. 15 [2] Pay Transparency Act).

## Enforceable claim by employees against the works council?

The role of the works council as the party obliged to provide information, as envisaged by the legislature, raises the



question of whether employees have an enforceable claim against the works council in this regard. The Federal Labour Court (*Bundesarbeitsgericht / BAG*) has answered this question in the negative. The procedure set out in Sec. 14 Pay Transparency Act does not grant employees an independent right to information directed against the works council as the debtor. The employer remains the sole party against whom the claim is directed, as the employer is also the party liable for payment (Federal Labour Court, decision of 25 June 2020 – 8 AZR 145/19). The works council thus acts merely as an agent of the employer.

## Rights of the works council to information and inspection

The provision of Sec. 13 (2) Pay Transparency Act grants the works council (or a designated committee) the right to inspect and analyse the lists of gross wages and salaries pursuant to Sec. 80 (2) Sentence 2 Works Constitution Act in order to process requests for information. The employer must make the remuneration lists available, broken down by gender and including all remuneration components – including allowances

exceeding the collective agreement and individually negotiated remuneration components (Sec. 13 [3] Pay Transparency Act). According to established case law, the right to inspect the gross remuneration lists must not be exercised anonymously, as this is the only way the works council can carry out the relevant analysis. However, if the employer has assumed the obligation to provide information, this right to analyse does not apply (Federal Labour Court, decision of 28 July 2020 – 1 ABR 6/19).

## Co-determination rights

The co-determination rights to which the works council is entitled under the Works Constitution Act remain unaffected by the Pay Transparency Act pursuant to its Sec. 13 (6). This applies in particular to matters relating to the company's pay structure pursuant to Sec. 87 (1) No. 10 Works Constitution Act (principles of remuneration, methods of remuneration, performance-related pay).

## Company review procedure

If an employer introduces a voluntary company review procedure to verify equal pay, they must inform the works council of this in good time, submitting the relevant documents in accordance with Sec. 20 Pay Transparency Act. In addition, the works council is entitled to the co-determination rights under Sec. 87 (1) No. 10 Works Constitution Act, in particular for the assessment of the equivalence of tasks, and to monitoring rights under Sec. 80 (1) Sentence 2a Works Constitution Act to ensure compliance with the requirements of the Pay Transparency Act. Depending on the structure of the company's review procedure, the right of co-determination under Sec. 87 (1) No. 6 Works Constitution Act may also be triggered, e. g. when using IT tools suitable for performance or conduct monitoring.

## Effects of the Pay Transparency Directive

The Pay Transparency Directive consolidates and expands the scope of the works council's activities. When determining equivalent work within the framework of pay structures, Sec. 4 (4) of the Directive stipulates that these must be designed in such a way that it is possible to assess, on the basis of objective, gender-neutral criteria agreed with the employees' representatives, whether employees are in a comparable situation with regard to the value of their work. Whether this provision is intended to grant works councils an independent right of co-determination is a matter of dispute. However, the

right of co-determination under Sec. 87 (1) No. 10 Works Constitution Act already exists in this regard.

The Directive further requires that criteria for determining pay, pay levels and pay trends must be gender-neutral (Sec. 6 Pay Transparency Directive). As a rule, the establishment of these criteria, as a pay principle, is also subject to co-determination in accordance with Sec. 87 (1) No. 10 Works Constitution Act. Employers must also fulfil reporting obligations regarding the pay gap and, if a pay gap of 5 % or more is identified and there is no justification, carry out a joint pay assessment within six months in cooperation with employee representatives, Sec. 10 of the Directive (see the article by *Ott/Jüttner* in this newsletter).

## Summary

The provisions contained in the Pay Transparency Directive regarding the enforcement of pay transparency include an extension of the works council's participation rights. It is therefore to be expected that the role of the committees as information providers, already established under the previous law, will in future be extended to all employers or to broader categories of cases. Furthermore, due to the stricter obligations to provide information, the works council will be involved in information procedures more frequently and systematically and will perform its explanatory and supervisory functions more closely. In view of the new requirements of the Directive, it is advisable to analyse existing remuneration systems together with the works council even before the Directive is transposed into national law. Alternatively, their introduction should in any case be prepared jointly, as should standardised processes for fulfilling the information obligations.

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# Equal pay claims and discrimination: Burden of proof for employers

Equal pay for equal work – in proceedings concerning equal pay claims, the burden of proof is increasingly shifting to employers. Current case law significantly tightens the requirements and increases litigation risk.



## The ‘equal pay claim’

The German Pay Transparency Act and the Pay Transparency Directive not only enshrine comprehensive transparency and information rights for employees, but also establish an independent legal basis for non-discriminatory pay, which employees can directly rely on in the context of an equal pay claim. Under Art. 157 (1) TFEU and Sec. 3 (1), Sec. 7 Pay Transparency Act, men and women performing the same or equivalent work have a legally enforceable right to equal pay.

If employees learn – through the right to information or by other means – of the higher salary of comparable colleagues, they may claim the pay difference from the employer. If the equal pay claim is successful, this can lead to substantial back pay for the past. Furthermore, the employer will then also be required to close the gender pay gap in future under the Equal Pay Act and must also expect legal action from other employees. The pay dispute proceedings are therefore of crucial importance.

## Graduated burden of proof for employees

Equal pay claims follow a graduated system of burden of proof and presentation of evidence, which makes it easier for employees to enforce their rights in court. In this context, the Federal Labour Court (Bundesarbeitsgericht / BAG) draws on the reversal of the burden of proof under Sec. 22 General Equal Treatment Act (Allgemeines Gleichbehandlungsgesetz / AGG) and, in an interpretation compliant with the Directive, modifies this even further in favour of employees: it is initially sufficient for a claimant employee to prove that the employer pays them a lower wage than that of a colleague of the opposite gender used as a comparison who performs the same or equivalent work. There is no need to present further evidence that would indicate, with a high degree of probability, that discrimination has taken place (BAG, decision of 23 October 2025 – 8 AZR 300/24).

## Existence of discrimination in a pair comparison

In the aforementioned decision, the Federal Labour Court clarified that, to substantiate a claim for equal pay, a single specifically named person of the opposite gender is sufficient as a benchmark (‘pair comparison’), even if the comparison group of the opposite gender consists of several people. Accordingly, it is sufficient if only one specifically named colleague of the opposite gender earns more for the same or equivalent work. It is not necessary to use the median – i. e. the entire comparison group – to substantiate the claim.

## Presumption of gender-based discrimination

If the claimant succeeds in proving that a person of the opposite gender receives higher pay for the same or equivalent work, the burden of proof is reversed: gender-based discrimination is presumed until the employer proves otherwise. An important defence strategy for the employer therefore lies in demonstrating that the work performed by the comparator is not, in fact, the same or equivalent. The burden

of proof regarding the sameness or equivalence of the comparator's work lies with the employee.

Under Sec. 4 (1) Sentence 1 Pay Transparency Act, female and male employees are deemed to be performing work of equal value if, on the basis of a range of factors, they can be regarded as being in a comparable situation. The factors to be taken into account include, amongst others, the nature of the work, the training requirements and the working conditions. The actual requirements essential to the respective work must be taken as a basis; these are independent of the employees performing the work and their performance.

## Ways to rebut the presumption of discrimination

If the employee has proven that a comparator receives a higher salary for the same or equivalent work, the burden of proof shifts: The employer must now present and prove facts demonstrating that the unequal pay is based exclusively on non-discriminatory criteria (i. e. on objective, gender-neutral factors) and that there is no breach of the principle of equal pay. General arguments are not sufficient here. In particular, the objection that the better-paid comparator 'negotiated better' is expressly insufficient.

In particular, the employer is required to:

- to set out the pay structure, the remuneration system and the relevant assessment criteria, such as job evaluation, performance and results-based components, or allowances – it is still possible to rebut the presumption of discrimination even if the employer's pay system appears, at first glance, to lack transparency;
- disclose the objective criteria on which the higher pay of the comparator is based (e. g. professional experience, length of service, special qualifications, market conditions or variable performance targets), whereby their weighting must be explained in a comprehensible manner in each individual case;
- demonstrate that these criteria were applied to the claimant in a non-discriminatory manner or were not applied for objective reasons.

If the employer fails to provide this 'rebuttal' to the full satisfaction of the court, they are liable to pay the higher remuneration granted to the comparator – even if the comparator in question is a top earner within the comparison group.

## Practical guidance

Current developments show a clear trend: equal pay claims are becoming increasingly easier for employees to enforce, whilst the options available to employers for defence are narrowing. In particular, the introduction of pair comparisons and the strict requirements for rebutting the presumption of discrimination significantly increase the litigation risk. Employers are therefore well advised to review their remuneration structures at an early stage and to design them in a transparent and non-discriminatory manner. Documented, objective criteria for salary decisions are not merely 'nice to have', but are crucial to the outcome of litigation. Only in this way can the necessary level of detail be achieved in the event of a dispute, whilst avoiding costly back payments and subsequent proceedings. To put it bluntly: anyone who still bases remuneration on negotiation today faces the risk of substantial back payments.

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■ EVENTS



### Unyer webinar on pay transparency

Do you have further questions regarding the upcoming changes brought about by the Pay Transparency Directive, perhaps even in a cross-border context?

If so, we would like to invite you to our Unyer webinar on pay transparency law on 28 May 2026. An official invitation with all further details will follow shortly. You are welcome to register today with our colleague Stephan Sura (stephan.sura@luther-lawfirm.com).

### Seminar at the Chamber of Industry and Commerce Stuttgart: Pay Transparency Directive – Practical implementation in your company

Our colleagues Kerstin Belovitzer-Franz and Ann-Marie Jüttner will also be presenting the key points and implications of the Pay Transparency Directive at a seminar organised by the Stuttgart Region Chamber of Industry and Commerce.

**When?** 22 April 2026, 9.30 am – 12 pm

**Where?** IHK Stuttgart Region, Jägerstraße 30, 70174 Stuttgart

**How?** Register at <https://www.ihk.de/stuttgart/system/veranstaltungssuche/vstdetail-karat/5787646/4244?termid=4244>

■ GENERAL INFORMATION

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