



The Pay Transparency Directive

COM (2021) 93

Executive summary

The aim of this proposed directive is to strengthen the application of the principle of equal pay for equal work or work of equal value between men and women through pay transparency and enforcement mechanisms. Although this fundamental right has long been enshrined in law, women in the EU still earn 14% less than their male colleagues do. Progress is barely discernible, despite numerous efforts, in particular because until now there have been no specific binding measures at EU level.

Since pay transparency is an important measure to combat the gender pay gap, AK welcomes this initiative at EU level and the aim of this proposed directive. However, AK is of the opinion that the proposed directive should be strengthened and tightened in some points in order to ensure full pay transparency (see Key points below). There is a need for action and full pay transparency can make a major contribution to more equal treatment. It is a question of fairness.

Key points in AK's view:

- **Reporting:** AK expressly welcomes the introduction of public reporting by employers on the pay gap. However, AK points out that the threshold of 250 workers at which employers are obliged to report is set far too high. This threshold will result in approximately only one third of all workers in the EU being able to benefit from this measure. Therefore, the threshold should be lowered to 25 workers.
- **Joint pay assessment:** The proposed directive enshrines the obligation of employers to carry out an assessment of pay together with workers' representatives if reporting reveals an unjustified difference in the average income of at least 5% between men and women. This provision is to be welcomed, first of all because this forces employers to focus more on an objective and non-discriminatory evaluation of work; it also sets assessment criteria and takes corrective action. However, the limitation to companies with at least 250 workers gives rise to criticism for the reasons explained above.
- **Right to information:** AK is essentially in favour of the introduction of workers' right to information (independent of the size of the company) on the average income in comparable groups within the company, broken down according to gender. However, in the opinion of AK this right to information does not go far enough: In order to be able to track a suspected case of pay discrimination, information is needed about the specific amount and the composition of the income, broken down to individual colleagues.
- **Procedural law:** AK expressly welcomes the provisions to strengthen the rights of workers under procedural law, such as shifting the burden of proof to the employer, facilitating access to evidence, extending the limitation periods, the paradigm shift in the costs of judicial proceedings, and the explicit mention of compensation for lost opportunities. The strengthening of the position of workers' representatives and collective action law, which allows lawsuits to be filed for several workers, and more severe penalties also deserve a positive mention. It is of major importance that these significant advances are implemented in this form in the legislative procedure and are not diluted.
- **Social dialogue:** AK supports the approach that the social partners are to be the main players at the national level, according to the proposed directive. It is important that collective autonomy continues to be maintained as the cornerstone of trade union rights.

The AK's position

With regard to the Directive of the European Parliament and of the Council to strengthen the application of the principle of equal pay for equal work or work of equal value between men and women through pay transparency and enforcement mechanisms in short the Pay Transparency Directive, AK has the following comments (concerning the listed articles).

Article 3 - Definitions

The introduction of comprehensive and specific terminology is to be welcomed. In particular, the new definition of pay now explicitly includes - in order to implement jurisdiction - salary and any other consideration which the employer pays to the worker directly or indirectly on the basis of a contract of employment. Gender pay gaps are not only found in basic pay, but often and especially in additional types of consideration. In practical terms we see repeatedly that women are discriminated against indirectly when their company car is withdrawn for the duration of the parental part-time work, but no cash compensation is offered. AK welcomes in particular the fact that the proposed directive also recognises the intersectional aspects of discrimination, whereby pay discrimination is also discrimination based on a combination of gender and another type of discrimination. However, it is unclear which tools can be used and how to use them to reveal this. It must be ensured that cases where pay discrimination results from a combination of gender and another protected characteristic are recognised as such. Further clarification is required in the proposed directive concerning this point. We wish to note critically that the term "workers' representatives" is used throughout the proposed directive in different contexts, but that the term itself is not defined. Clarification is needed between an in-house context (works council, etc.) and an external context (chamber of labour, trade unions, etc.).

Article 4 - Equal work and work of equal value

Until now European legislation has not set any specific binding criteria for job evaluation. It is, therefore, a positive aspect that the definition of the term "work of equal value", which AK has long called for, has now been included in the proposed directive through clarification in keeping with case law of the CJEU and the introduction of objective criteria. However, it should be critically noted, that the measures of Member States to determine the value of work (criteria and comparability) must not result in collective autonomy being compromised. The tools and methods to determine the value of work should be developed with the participation of social partners. Furthermore, we wish to criticise the fact that in the proposed directive the characteristic requirements for women's work do not have to be considered when assessing work. It would be desirable if the necessary abilities and characteristics of work typically performed by women were not ignored, e.g., also include social skills which are typical for many professions dominated by women, e.g., care professions. This would help to counteract the undervaluation of work typically performed by women. Increasingly, digital skills are required in female-dominated employment fields in the service sector, but are not perceived as such. Digital skills and requirements should be made visible through job evaluation.

Article 5 and 6 - Pay transparency prior to employment, transparency of pay structures and career progression policy

Especially welcomed are the proposed measures to improve the availability of information prior to employment and the transparency of pay structures. In Austria the obligation for employers to indicate the initial pay level or its range in job vacancy notices was introduced in 2011. However, in practice this often merely leads to the addition of the words: "overpayment possible". This says very little about the actual readiness to pay, since only "whether", but not "how much", must be stated regarding excess pay. According to the proposed directive, the employer

has to inform applicants about the envisaged pay range (expected salary) of a job position prior to employment. Furthermore, during the application process employers are not permitted to ask about the pay history in former employment relationships. In addition, employers should make accessible to workers a description of the criteria used to determine pay levels and career progression. These aspects are very positive since we can assume that these provisions are appropriate to establish balanced and fair pay negotiations and to prevent existing pay discrimination from being perpetuated.

Article 7 - Right to information and prohibition of confidentiality clauses

The introduction of individual workers' right to information on their own individual pay level and the average pay levels broken down by sex, for category of workers doing the same work or work of equal value to theirs and independent of the size of the company is essentially a very welcomed approach. Whether a group comparison of average salaries is generally suitable to be able to successfully combat pay discrimination in individual cases is, however, questionable. Those affected would need information on the specific pay level and composition of the income, broken down to the level of individual workers. This deficiency is one of the key issues with this proposed directive. Instead of the right to information simply on request, mandatory annual in-company reporting would also be more effective; this would ensure full pay transparency and would remove the barriers to individual requests being made. One of the most significant obstacles on the path to equal pay is the in-house wall of silence, supported by the confidentiality clauses in employment contracts. Many women have no idea how much their male colleagues earn for the same work (or work of equal value). That is why differences in pay are often not visible at all and sometimes only by chance. The prohibition of confidentiality clauses expressly enshrined in the proposed directive is a welcomed clarification of the legal view, which already prevails in Austria (violation of *bonos mores*). However, it is to be feared that this proposed limitation to the purposes of asserting rights will, unfortunately, result in the impact being weakened in practice. First of all, it must be made clear that workers should be able to speak about their individual pay without restrictions. Second, workers must be able to speak openly about average pay with their in-house legal representatives (or representatives of their interests) because otherwise there is a risk that transparency will fall by the wayside because of the fear that they will lose their job.

Article 8 - Reporting on pay gap between female and male workers

Gender pay gap reporting is nothing new in Austria. Article 11a of the Austrian Equal Treatment Act already contains the basis for reporting on pay; this could be used to build on for implementation. Currently, employers who employ more than 150 workers on a permanent basis are required to compile a pay report every two years. Shortening the interval from two years to one year and mandatory publication, according to the proposed directive, is welcomed news. We also wish to comment positively on the mandatory breakdown of the pay gap into basic pay, as well as complementary or variable components of pay for worker groups, which is currently not required in pay reports and which can lead to better comparability. However, we are critical of the threshold of a minimum of 250 workers, which is set far too high in the proposed directive, if we remember that many companies, in particular in countries with a high percentage of small and medium-sized companies, are thus relieved of the obligation to report. This value is a step back from the recommendation of the Commission from 2014, which proposed an obligation to report for employers with at least 50 workers. If we are to take the principle of equal pay for men and women for equal work or work of equal value seriously, it should not be the case that two thirds of all workers in Europe who work in SMEs are excluded from this important aspect of pay transparency. Therefore, the obligation to report should apply from 25 workers upwards, and not to companies with at least 250 workers.

Article 9 - Joint pay assessment

The proposed directive is taking a big step forward in enshrining the obligation of employers to carry out pay assessment together with workers' representatives if reporting reveals an unjustified difference of at least 5% in the average income between men and women. This provision is expressly to be welcomed since this forces employers to focus more on objective and non-discriminatory job evaluation and classification criteria. However, the limitation to companies with at least 250 workers gives rise to criticism for the reasons explained above (see Article 8). The explanatory note states that if formal workers' representatives are absent in a company, the employer should be able to designate one or several workers for the purpose of jointly assessing pay. This calls for severe criticism since it by no means ensures that the persons selected by the employer enjoy the trust of the workforce and will act in their interest. Furthermore, due to their state of dependency, this puts the workers

in question under pressure and hence can prove counterproductive for the purpose and possibly have a negative effect on the establishment of work councils. Furthermore, criteria are lacking according to which workers should be selected. It is also unclear what the consequences will be if the employer does not remedy a situation with unjustified pay gaps. Nor are any time limits set by which a remedy must be provided. There is further need for clarification in the directive whether this in itself is a violation of the rights and obligations in the sense of Article 20, para 2, which can be penalised with a fine.

Article 10 - Data protection

Data privacy concerns are dispelled here in that access to information is limited to the workers' representatives or an equality body if there is a danger that individual wages and salaries could be identified. We suggest clarifying the directive so that this limitation becomes obsolete in judicial proceedings.

Article 11 - Social dialogue

The participation of social partners is ensured since, first of all, the Member States must discuss the rights and obligations which derive from this directive with the social partners and, second, the Member States can entrust the social partners with implementation of this directive. In the opinion of AK both measures are very worthy of support.

Article 13 - Procedures on behalf or in support of workers

Empowering equality bodies to file a suit in a court of law is a significant innovation. Hitherto they were only granted access to the Equal Treatment Commission. This is very welcomed in countries where no legal workers' representation has been created since it is already mandatory in all countries to create equality bodies, which could fill the gap here. We also take a positive view of the right to collective action, which also makes lawsuits for several workers possible. This means that lawsuits can be carried out for a whole group at less cost and faster. An important factor in the protection against gender-based discrimination is that the burden of judicial enforcement should not rest on the individual worker, but that a group is also able to start legal proceedings.

Article 14 - Right to compensation

A key improvement in the status of workers in gender-specific pay discrimination can be brought by the proposed strengthened requirement to compensation. Compensation is intended to place the worker in a position where s/he would have been if the discrimination had not occurred. This includes the full recovery of back pay and related bonuses or payments in kind, compensation for lost opportunities and moral prejudice. The explicit mention of lost opportunities includes discrimination during training, advanced training, and re-training measures, as well in career progression, in particular promotions; the result will be an improvement in the legal situation. We suggest that the directive should clearly state that damages in terms of social insurance, including damages relating to pensions, must be compensated.

Article 15 - Other remedies

The proposed directive standardises the issuance of temporary injunctions in the event of violations and, where necessary, recurring penalty payments, thus creating a deterrent. This is to be welcomed, in the opinion of AK.

Article 16 - Shift of burden of proof

AK welcomes the fact that a shift in the burden of proof is stated explicitly, in line with existing case law. If employers do not comply with their obligations established in this proposed directive, they will have to bear the full burden of proof, without the worker having to establish a prima facie case of discrimination. The enforcement of the claims established by this proposed directive is made simpler. This rule will strengthen the position of workers enormously in litigation and satisfies a long-standing demand of AK.

Article 17 - Access to evidence

A lack of access to pay data of reference persons as evidence is often a problem in practice and can result in a lawsuit being lost. This proposed clause is intended to ensure that employers can be required by a court of law to produce such data. This is a major, positive step to better enforcement of claims in cases of pay discrimination and is very much to be welcomed, in the opinion of AK.

Article 18 - Limitation periods

The reluctance of a worker to take action against the employer in an honest working relationship is often so high that many workers do not file a suit until after the employment contract has ended. This means that major claims are often lost due to the limitation period of three years which is applicable in Austria. According to this proposed regulation the limitation periods must last at least three years and should not begin to run before the violation of the equal pay principle or any infringement of the rights or obligations under this proposed directive has ceased and the worker knows, or can reasonably be expected to know, about the violation or infringement. If discrimination has lasted throughout the whole working relationship, workers can file claims for the whole duration of the discrimination. This is not only positive for individual claims of workers but can also act as a general deterrent against pay discrimination and is very welcomed.

Article 19 - Legal and judicial costs

This provision stipulates that the employer must compensate the plaintiff for legal and judicial costs, should the employer lose the case. Employers who prevail on a pay discrimination claim shall not have the right to recover any legal and experts' fees from the claimant(s) and costs, unless the claim was brought in bad faith, was clearly frivolous or where such non-recovery is considered manifestly unreasonable under the specific circumstances of the case. This is a paradigm shift which has long been called for and which removes a significant obstacle to filing a suit for those affected by gender-based pay discrimination. This type of reimbursement of costs corresponds to the principle of protection in labour law, whereby the weaker position of the worker is taken into account and therefore is very welcomed. However, the very open formulation of the exception from the obligation to reimburse costs should be specified further or narrowed in order to avoid long court cases to recover costs after each lost case. It can be expected that the prevailing employer will appeal because of the objection of a frivolous or unreasonable lawsuit in order to have his/her costs reimbursed by the worker.

Article 20 - Penalties

This provision seeks to create more severe penalties for violations of the rules established by the proposed directive. For example, fines which are intended to act as a deterrent are to be introduced. In the event of repeated violations, further specific penalties shall

be applied, e.g., the revocation of public benefits. We are pleased to see that the directive has gone far in this direction, also in terms of the revocation of public benefits or the exclusion, for a certain period of time, from any further award of financial inducements.

Article 21 - Public contracts and concessions

When awarding public contracts and concessions, special attention should be paid to pay equality. The proposed directive envisages here penalties and termination conditions for contracting authorities in order to protect the principle of equal pay in the execution of public contracts and concessions. This is to be welcomed, in the opinion of AK. Unfortunately, the effectiveness of this provision is severely limited in that it is restricted to employers with at least 250 workers with an unjustified difference of at least 5% in the average income between men and women. Companies with fewer workers should also be subject to this provision.



Contact us!

In Vienna:

Melanie Kocsan

T +43 (0) 1 501 651 2795
melanie.kocsan@akwien.at

Bundesarbeitskammer Österreich

Prinz-Eugen-Straße 20-22
1040 Vienna, Austria
T +43 (0) 1 501 65-0

www.arbeiterkammer.at

In Brussels:

Petra Völkerer

T +32 (0) 2 230 62 54
petra.voelkerer@akeuropa.eu

AK EUROPA

Permanent Representation of Austria to the EU
Avenue de Cortenbergh 30
1040 Brussels, Belgium
T +32 (0) 2 230 62 54

www.akeuropa.eu

About us

The Austrian Federal Chamber of Labour (AK) is by law representing the interests of about 3.8 million employees and consumers in Austria. It acts for the interests of its members in fields of social-, educational-, economical-, and consumer issues both on the national and on the EU-level in Brussels. Furthermore, the Austrian Federal Chamber of Labour is a part of the Austrian social partnership. The Austrian Federal Chamber of Labour is registered at the EU Transparency Register under the number 23869471911-54.

The main objectives of the 1991 established AK EUROPA Office in Brussels are the representation of AK vis-à-vis the European Institutions and interest groups, the monitoring of EU policies and to transfer relevant information from Brussels to Austria, as well as to lobby the in Austria developed expertise and positions of the Austrian Federal Chamber of Labour in Brussels.