

TRANSPARENCY AND PAY IN THE EU

The European Commission has published its new proposals on pay transparency. This issue has always been a key priority for the EU, with a lack of transparency around pay seen as one of the main obstacles to ensure equal pay between men and women and broader gender pay gap issues.

The EU proposals aim to establish pay transparency standards and provide for strengthened enforcement mechanisms to empower female workers to claim their right to equal pay. Despite comparable efforts throughout the EU to promote equal pay, an initiative at EU level and a co-ordinated approach is also now being proposed to ensure a similar level of protection for workers across the EU, ensuring a level playing field for operators in the internal market.

Key enhancements include:

- pay information disclosure for job seekers,
- a right to know the pay levels for workers doing the same work,
- EU-wide gender pay gap reporting obligation for large companies (at least 250 workers), and
- greater access to justice for individuals affected.

The proposals will now be sent to the European Parliament and the Council for approval. Although EU Member States will have two years from adoption to transpose into national law, planning will need to start in the medium term, as significant changes will likely be needed to a number of internal policies and practices as well as the way in which roles are valued.

As a post-Brexit EU initiative, the UK is not obliged to implement the EU regime once finalised and has not indicated that it is contemplating doing so. However, the gender pay gap reporting regime that has been in place in the UK for some time may be extended in due course to employers with 50+ employees. It is also highly probable that ethnicity (and possibly disability) pay gap reporting will be introduced in the near future. It remains to be seen whether the UK will follow suit in strengthening its rules on pay transparency in other areas, particularly at the pre-employment stage.

Key issues

- EC has published its new proposals on pay transparency.
- Pay information will be disclosed for job candidates for the first time.
- A new right to know the pay levels for workers doing the same work to be introduced.
- A proposed EU-wide gender pay gap reporting obligation for large companies (at least 250 workers).
- An increased access to justice planned for individuals affected.

Here's what you need to know

Pay transparency at the pre-employment stage

- Minimum standards on pay transparency prior to employment do not currently exist at EU level. Under the proposals, employers will need to indicate the initial pay level or its range (based on objective and gender-neutral criteria) for a specific position or job. This information will need to be provided either in the job vacancy notice or otherwise before the interview, without the applicant having to request it.
- Employers will also no longer be allowed to ask candidates about their current or historic pay levels.
- The definition of pay includes salary and other types of remuneration or benefits (whether in cash or kind) which a worker receives, directly or indirectly, from the employer. This includes bonuses, overtime compensation, benefits, compensation for attending training, payments made in case of dismissal, statutory sick pay, other forms of statutory compensation and occupational pensions.

CC Comment

The aim of these provisions is to ensure that workers have the necessary information to engage in balanced and fair negotiations on pay. They will require companies to be more transparent on the criteria for offering a certain pay level as well as needing to provide detail on what such pay level entails.

Non-disclosure of pay history will likely be a significant change to HR practices in certain sectors and jurisdictions; the intent behind the change is to ensure that any existing pay discrimination and bias is not perpetuated over time, as and when individuals change jobs. The proposal follows similar bans on pay history questions that have been introduced in a number of US states over recent years.

Right to information

- Workers will have the right to request information from their employer on their individual pay level and on the average pay levels, broken down by sex, for categories of workers doing the same work or work of equal value.
- Employers will need to make accessible to workers a description of the criteria used to determine pay levels and career progression. These criteria will need to be gender neutral.
- Employers will be obliged to inform all workers, on an annual basis, of their right to receive this information and provide the requested information within a reasonable period of time.
- Certain confidentiality clauses will also be prohibited, insofar as the disclosure of any pay information is aimed at enforcing the right of equal pay.

CC Comment

Lack of transparency has been cited by the EU as impairing an individual's ability to detect and challenge pay discrimination. The proposed disclosure provision will therefore be a welcome added protection for female workers, allowing individuals to better assess whether they are paid in a non-discriminatory manner compared with their peers. The obligation on employers to inform individuals of this right may however lead to a material additional administrative burden for them and careful thought will be needed when determining what work is considered to be of equal value.

Employers will need to take care in drafting confidentiality and non-disclosure clauses in employment contracts and exit arrangements, ensuring that they do not fall foul of the new provisions.

In certain situations, the disclosure of information may lead directly or indirectly to the disclosure of the pay of an identifiable co-worker. The EU proposal leaves it up to the Member States to implement measures to ensure that such disclosure only happens to the workers' representatives or the equality body. The national approach towards these privacy concerns may lead to different results in different jurisdictions.

Gender pay gap reporting

- The proposals include an EU-wide obligation on gender pay gap reporting.
- Employers with at least 250 employees must publish information on the pay gap between female and male workers in their organisation. Certain information (broken down by categories of workers doing the same work or work of equal value) is considered more sensitive and will only need to be made available internally, rather than published publicly as part of the report.

CC Comment

The proposal brings EU-wide uniformity and alignment to gender pay gap reporting. Workers and their representatives will also have the right to ask for clarifications and further detail on the gender pay gap information provided by an employer. The employer will be required to respond within a reasonable timeframe, and will need to be able to objectively justify differences (see 'Joint pay assessment' below).

Joint pay assessment

- Where pay reporting reveals a gender pay gap of at least 5% and the employer cannot justify the gap on objective gender-neutral factors, employers will have to carry out a pay assessment, in co-operation with workers' representatives.
- The requirement of a joint pay assessment aims at triggering mandatory action on the part of employers to look into their pay setting practices and address any potential gender bias in pay structures infringing the equal pay principle.

- Where the pay differential cannot be justified by objective factors, the employer must take remedial measures, and where relevant, report on the effectiveness of previous measures taken.

CC Comment

Given that the average gender pay gap across the EU Member States is currently around 14%, the setting of the pay assessment threshold at 5% is particularly notable and underlines the EU's commitment to tackling the issue of pay disparity. Setting the threshold at 5% will likely result in a large proportion of companies being impacted and therefore required to both carry out an assessment and take remedial action.

Access to justice for victims of pay discrimination

- **Compensation** - workers who suffer gender pay discrimination can get compensation, including full recovery of back pay and related bonuses or payments in kind.
- **Burden of proof on employer** – the employer, not the worker, will need to prove that there was no discrimination in relation to pay.
- **Sanctions to include fines** – Member States should establish specific penalties for infringements of the equal pay rules, including a minimum level of fines.
- **Workers' representatives** – workers' representative bodies will be able to act in legal or administrative proceedings on behalf of individuals, as well as lead on collective claims on equal pay.

CC Comment

The introduction of specific compensation and sanctions will sharpen the focus of the EU's requirements for companies. In addition to the potential financial impact, companies will also be very mindful of the reputational risks of non-compliance with the potential adverse impact on recruitment pipeline, customer relations and on the 'social' aspects of its ESG credentials.

CONTACTS

Sonia Gilbert
Partner

T +44 207 006 2401
E Sonia.Gilbert
 @cliffordchance.com

Andrew Patterson
Partner

T +44 207 006 6160
E Andrew.Patterson
 @cliffordchance.com

Catrin Wright
Head of Practice
Development

T +44 207 006 2920
E Catrin.Wright
 @cliffordchance.com

Michael Crossan

Partner

T +44 207 006 8286
E Michael.Crossan
 @cliffordchance.com

Alistair Woodland

Partner

T +44 207 006 8936
E Alistair.Woodland
 @cliffordchance.com

**Chinwe Odimba-
Chapman**
Partner

T +44 207 006 2406
E Chinwe.Odimba-
Chapman
 @cliffordchance.com

Floris van de Bult
Partner

T +31 20 711 9158
E Floris.vandeBult
 @cliffordchance.com

Sanne Blankestijn
Associate

T +31 20 711 9131
E Sanne.Blankestijn
 @cliffordchance.com

Sara Schermerhorn
Senior Advisor

T +31 20 711 9332
E Sara.Schermerhorn
 @cliffordchance.com

Anne Lemerrier
Partner

T +33 1 4405 5214
E Anne.Lemerrier
 @cliffordchance.com

Ekaterina Zabousova
Counsel

T +33 1 4405 5380
E Ekaterina.Zabousova
 @cliffordchance.com

Ines Keitel
Partner

T +49 69 7199 1250
E Ines.Keitel
 @cliffordchance.com

Simonetta Candela
Partner

T +39 02 8063 4245
E Simonetta.Candela
 @cliffordchance.com

Juan Calvente
Counsel

T +34 91 590 7546
E Juan.Calvente
 @cliffordchance.com

David Kolacek
Partner

T +420 222 55 5262
E David.Kolacek
 @cliffordchance.com

Albert Moro
Partner

T +352 48 50 50 204
E Albert.Moro
 @cliffordchance.com

Gert Cuppens
Counsel

T +32 2 533 5015
E Gert.Cuppens
 @cliffordchance.com

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www.cliffordchance.com

Clifford Chance, 10 Upper Bank Street,
London, E14 5JJ

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