

## PAY TRANSPARENCY DIRECTIVE

Directive (EU) 2023/970 of the European Parliament and of the Council on strengthening 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, also known as the Pay Transparency Directive (the "**Directive**"), came into force on 6 June 2023. The Directive introduces far-reaching measures aimed at reducing the gender pay gap, in particular by increasing the transparency of information on pay and making it easier for workers to pursue equal pay claims.

In this publication, we present the main provisions of the Directive and analyse its practical effects on Polish employers.

### Main assumptions of the Directive

The main objective of the Directive is to ensure equal pay for men and women. The principle of equal pay in EU law (and in the legislation of individual Member States) is nothing new, but its practical implementation has so far been seriously hindered by the lack of transparency as regards pay. It is difficult to question the validity of this observation. In Poland, workers seldom are provided with detailed information about the levels of pay within the organisation they work for. What is more, it is common practice for Polish employers to prohibit workers (e.g. in employment contracts) from disclosing information about their pay to anyone. According to the motives of the Directive, similar problems are common throughout the European Union and this is one of the reasons for the continued existence of the so-called **pay gap**, i.e. the difference in pay for the same work or work of equal value between women and men. According to Eurostat, in 2021 the pay gap in the European Union was 12.7%, and in Poland it was 4.7%.

The Directive is aimed at addressing the practical problems with determining the existence of pay discrimination and pursuing related claims, as well as at compelling employers to be more transparent with regard to the remuneration principles applied by them.

The Directive applies to employers in both the private and public sectors and to all workers employed under a contract of employment. Therefore, the provisions of the Directive do not cover persons engaged under civil law contracts. Nevertheless, it is possible for a member state to extend the scope of application of the Directive also to such persons during implementation.

Under the principle of equal treatment of women and men, women and men should be paid equally for equal work or work of equal value. At the same time, pay is to be understood broadly, and is to include, in addition to basic salary, also all benefits in cash or in kind granted to the employee in connection with their employment. Importantly, the Directive does not require that all workers employed in the same position be paid equally. However, if pay is to be differentiated, employers must be guided by objective, gender-neutral criteria, such as skills, effort, responsibility, working conditions, and any other factors that are relevant to the workplace or position.

## **Pay transparency**

### **Pay gap reporting**

New reporting obligations will be imposed on employers, relating to information on employees' pay. The relevant reports will have to be submitted to the supervision authority responsible for collecting pay gap data and each member state will be required to designate such an authority. Employers will also be able (but not obliged) to publish the information contained in the reports on their website or otherwise make it publicly available.

The pay gap reports will have to include information on:

- the gender pay gap;
- the gender pay gap in the form of complementary or variable components;
- the median gender pay gap;
- the median gender pay gap in the form of complementary or variable components;
- the percentage of female and male workers receiving complementary or variable components;
- the percentage of female and male workers in each quartile pay band; and
- the gender pay gap among workers by category of worker.

Employers employing at least 250 workers and those employing between 150 and 249 workers will be obliged to submit their first reports by 7 June 2027, with the former group required to report annually and the latter every three years. Employers employing between 100 and 149 employees will be required to submit their first report by 7 June 2031 and report every three years. The reports are to cover information relating to the calendar year preceding the submission of the report (also in the case of employers reporting every three years, the report covers only the period of one calendar year). Member States may also decide to impose the reporting obligations on smaller employers (employing less than 100 employees).

If the employer's report shows a difference in the average level of pay between men and women of 5% or more in any category of employees, and this difference is not justified by objective criteria or remedied within six months of the submission of the report, the employer will be required to carry

out, in cooperation with employees' representatives, a joint pay assessment in order to remove the gap.

### **Information for employees**

Employers must also provide information on the pay gap and the criteria used to determine the levels of pay to all employees as well as their representatives. In addition, at their request, the employer will also be required to provide information from the previous four years, if available.

In addition, the employer will be obliged to provide any employee who makes such a request in writing with information on their individual pay level and also average pay levels at the employer, broken down according to gender, for the category of employees performing the same work or work of equal value as the employee requesting the information.

### **Confidentiality of remuneration**

The provisions of the Directive constitute a final confirmation that prohibiting employees from disclosing their pay is not allowed (this view has already been expressed in case law). Employees will have the full right to disclose their pay for the purposes of enforcing the principle of equal pay.

It is worth noting that the Directive introduces full transparency only for the purposes of ensuring equal pay. It therefore does not affect the possibility of introducing confidentiality of pay for any other purpose or reason. As a consequence, employers will still be able to oblige employees not to disclose their pay to third parties (such as competitors), if this is justified, for example, by the need to protect trade secrets and the employer's business interests.

### **Candidates for employment**

The Directive separately addresses a number of important issues concerning candidates for employment.

Candidates for employment should receive information about the initial pay offered or range thereof from the prospective employer. This information should be provided to the candidate before the job interview and on the employer's initiative (i.e. not in response to the candidate's request).

In addition, the Directive explicitly states that an employer must not ask applicants any questions about their current or previous pay.

### **Pursuing equal pay claims**

How is a comparable employee identified?

In order to successfully pursue equal pay claims, the employees concerned must show that they are paid less than an employee of the opposite gender performing the same work or work of equal value. It is therefore necessary for the employee to find a so-called comparator. The Directive requires Member States to clarify in their national legislation the mechanisms facilitating the identification of 'the same work or work of equal value'.

The Directive explicitly states that the comparison of pay conditions does not have to take place within the same employer. In a situation where the pay conditions are determined within a "single source", i.e. when the pay conditions are set centrally for more than one employer, e.g. within a group, the comparison can also be made with employees employed in other entities (we address in detail the CJEU ruling establishing the principle of single source in a separate client briefing available here:

<https://www.cliffordchance.com/briefings/2021/10/admissibility-of-regionalization-of-wages--in-light-of--cjeu-jud.html>).

Moreover, the comparison does not have to be limited to workers employed by the employer at the same time as the person asserting their rights. A person employed by the employer in the past may be a comparator for these purposes.

### **Full compensation**

An employee discriminated against based on sex will have the right to obtain full compensation, ensuring real and effective compensation for the losses and damages suffered. The compensation is to put the employee in the position in which they would have been if they had not been discriminated against and the compensation must therefore include full recovery of outstanding pay and related bonuses or benefits, as well as compensation for lost opportunities and for non-material damage.

Member States may not impose any maximum limit on the amount of compensation. Member States may, however, specify in their national legislation the limitation periods for such claims, which must not be shorter than three years.

### **Implementation and practical effects**

Member States are required to implement the Directive by 7 June 2026.

For the time being, no draft act implementing the provisions of the Directive into Polish law has been prepared. Nevertheless, in our opinion, it is recommended for employers to carry out comprehensive analyses of their remuneration structure long before the new regulations come into force.

Transparency of information about pay levels can make it much easier for employees to identify pay gaps. If the employer is unable to identify objective criteria for differing pay levels, the existence of pay gaps will not only result in the need to take systemic measures to eliminate them, but will also give the underpaid employees strong arguments to bring claims for compensation - for losses resulting from the differences that have existed even prior to the relevant laws implementing the Directive coming into force and for a period of up to three years back (in accordance with the current limitation period for employment-related claims).

At the same time, taking into account the recent amendments to the Act on Court Fees, under which employees are now exempt from the obligation to pay fees on the submission of a statement of claim, regardless of the value of the subject of the dispute, we expect the employees to be more eager to pursue high claims against their employers (we address in detail the changes in court proceedings involving employees in a separate client briefing available here: <https://www.cliffordchance.com/briefings/2023/10/-significant-changes-in-court-proceedings-involving-employees.html>). As a result of these recent changes, even if an employee (or ex-employee) believes that the chances of such a claim being successful are limited, they will not bear a significant financial risk in trying to pursue it. Consequently, in addition to the risk of claims for compensation for losses, we may reasonably expect to see more frequent attempts to pursue relatively high claims for non-material damage (harm).

The pay transparency among employees in particular categories may also encourage the employees to compare their pay to employees also from other categories, if the work performed within such different categories (and not only within their own category), is, in their opinion, of the same or similar value.

In light of the above, the Directive requires the careful development of the entire pay scales applied. In order to minimise the above-mentioned risks, such pay structure should be designed and implemented before the beginning of the period for which the employer is to prepare the first report (i.e. in the case of employers with at least 150 workers – before 1 January 2026). It will not be possible to achieve this task overnight, as it will require a detailed analysis of the value of the work in particular positions, including careful classification of employees into appropriate categories and taking into account the type of work performed. In addition, it will be necessary to calculate the average pay and the value of other benefits for each category of workers, while taking into account the breakdown according to gender. If, as a result of these calculations, pay gaps are identified a business and legal analysis will be necessary to determine whether such a gap can be objectively justified. Due to the multitude of factors potentially at play, identifying such justification could be a complex process. If no such justification exists, it would be advisable for employers to take steps to eliminate the pay gap, preferably already before the first reporting period begins.

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