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Germany: New Transparency of Remuneration Act will enter into force shortly

On 11 January 2017, the German Federal Cabinet approved the Transparency of Remuneration Act ("Entgelttransparenzgesetz"), which is expected to enter into force before the summer break of the German Federal Parliament in July. The purpose of the Act is to ensure pay equality between women and men in order to close the gender pay gap.

I. Introduction

Dependent on which calculation methods are adopted, the gender pay gap in Germany is suspected to range from 7 to 21 %. The corrected pay gap is estimated about 7 % by the Federal Statistical Office due the facts that women pursue more often work in social occupations, work part-time or are likely to take more often a family sabbatical. The Act expressly states that it aims to promote and enforce the equal pay principle, meaning that equal pay must granted for equal or comparable work and that direct or indirect wage discrimination based on gender is prohibited. Even if the law is not yet in force as it needs to pass the last steps in the legislative procedure and some of the provisions are highly controversial, the legal framework seems to be quite clear now and companies should start getting in touch with the Act right away.

II. Previous legal situation

The principle of equal pay is already stated in several legal provisions. This leads to a repetition of an applying principle of law. The precept of equal pay of women and men for the equal work and for work with equal value is enshrined in Art. 157 of the treaty on the functioning of the European Union (*"Vertrag über die Arbeitsweise der europäischen Union"* – **AEUV**). Furthermore there is the German general principle of equality in Art. 3 of the basic law for the federal republic of Germany (*"Grundgesetz"* – **GG**) and in the General Law on equal treatment ("*Allgemeines Gleichbehandlungsgesetz*" – **AGG**). There is also an entrenchment in Sec. 80 (1) s. 2 (a) of the Works Constitution Act ("*Betriebsverfassungsgesetz*" – **BetrVG**). Nevertheless the legislator wanted to emphasize the principle of equal pay and therefore dedicated an entire new Act to this principle.

III. Legislative change

Key statutory changes include:

1. Legal definition of equal work (Sec. 4 of the Act)

(1) Female and male employees do the same work if they do the identical or similar task at different workspaces or one by one at the same workspace.

(2) Female and male employees do the same work in terms of this act, if they can be seen as in a similar situation on the basis of all factors. Factors to be taken into account are inter alia the nature of the work, the educational requirements and the employment conditions. Within this determination the actual requirements that are irrespective of the pursuing employee and his/her performance have to be taken into account. […]

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2. Individual right to be informed

The Act creates a right for individual employees to be informed about the remuneration of other employees within one comparison group. If the individual employee found indications that the remuneration of at least six other colleagues of the opposite sex for the same or similar performance is higher, he/she can request to have the own salary compared to the average income of the named colleagues.

The requesting employee has to mention the concerned comparison group within the application. The operation has to have at least 200 employees so that the individual employee can enjoy the above mentioned right.

a) Components of the right

The employee is allowed to request information about the criteria and procedure of the respective determination of the own salary. He/she has also the right to request information about two other components of the remuneration, e.g. bonus or a company car for an identical or similar task a colleague of the opposite sex pursues. Furthermore he/she can request the statistical median of the monthly salary of the colleagues of the opposite sex that pursue the identical or similar task.

b) The scope of application

The information can be requested every two years, but not earlier than six months after the entry into force of this regulation, then after two years when there haven't been any significant changes. The comparing procedure is only possible in case the comparison group consists of no less than six employees of the opposite sex. Furthermore the members of the comparison group have to be out of the same operation and have to work for the same employer.

The employee has to mention the comparison group in the request (textual form) by him/herself. In case the employer thinks the comparison group is not applicable, the right group has to be taken as a basis for the exchange of information. In a tariff-bound operation with a works council the works council is the person in charge for the employees. It has to bundle all requests and has access to the remuneration table of the employer.

c) Legal consequences

The employer has to exchange the information within three months. In case the employer fails to comply with these requests the presumption of unequal treatment will arise. However, the employer is authorized to put forward proportionate and reasonable justification for unequal payment. Moreover the employee has the claim for remuneration in case he/she feels disadvantaged based on the exchange of information. But there were no sanctions incorporated into the law in case an employer pays unequal. For the employer the period to assert claims is therefore limited to three years.

3. Operational audit procedure

Operations with more than 500 employees should audit the compliance of the precept of equality concerning remuneration ("*Betriebliche Verfahren zur Überprüfung und Herstellung von Entgeltgleichheit*"). This should be done at least every five years.

a) The scope of application

Operations with more than 500 employees are requested to do the operational audit procedure. But to do so is optional, there is no obligation like it was planned in the draft bill. There is also no schedule set, under the draft bill it had to be done every five years.

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b) Requirements to a proper operational audit procedure

An inventory of the operational general principles of the remuneration and their analysis has to be done by the operation. Additionally the operation has to generate a result report and has to document the procedural steps and results. The report has to be published internal by displaying it.

c) Consequences of the operational audit procedure

In case the result report has an indication of a disadvantage caused by the remuneration, the elimination of unequal treatment by taking appropriate measures is required.

4. Report of equality and equal payment

If an operation has the obligation to generate a status report based ("*Lagebericht*") on the German commercial code ("*Handelsgesetzbuch*" – **HGB**), Secs. 264, 289 HGB, this leads moreover to the obligation to generate a report about the promotion of women and the production of equal payment (every five years in case the operation is tariff-bound, otherwise every three years). Inter alia the report has to consist out of measures that are taken to promote equality and produce equal payment. Furthermore the total number of employees and information about the average number of full- or part-time workers has to be added.

5. Strengthening the rights of the works council

The works council is the person in charge and the coordinator of the claims of information. Also the works council can participate in preparing and choosing the examination procedure. Within the framework of his tasks laid down in Sec. 80 (1) s. 2 (a) of the BetrVG the works council promotes the enforcement of equal payment of women and men inside the operation. But the works council does not have its own strong right of co-determination laid down in the works constitution act, like it was planned in the draft bill.

IV. Summary

The previous draft bill got moderated. There is no general obligation to conduct the operational audit procedure, no co-determination of the works council. Also there are no specifications of the minimum remuneration in job advertisements required. Describing the act as a "toothless act" – if at all – only applies to small and medium sized operations.

Operations with more than 200 employees have to pay attention, there is a risk of retroactive back payment and high organizational effort could be requested. Furthermore, the damage of reputation should not be underestimated. Affected companies should therefore ensure that they are in line with the law and are prepared when the first employees make use of the right to be informed.

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