

Last week, we were joined by clients and contacts, as well as members of our European Labour and Employment team, for a roundtable discussion on the likely role of workers' representatives under the Pay Transparency Directive.

With just under 12 months to go until the Directive comes into force, affected businesses should be planning for how they will meet their new obligations. Understandably, the current focus is mainly on scrutinising pay structures and processes, as well as collating the necessary pay data, but businesses should be aware of the significantly expanded role of workers' representatives under the new Directive, and be thinking now about how to engage with them, both in the run up to implementation of the Directive and thereafter.

Workers' representatives have been given a key role under the Directive. This appears to be quite deliberate on the part of the European legislators who want EU member states and employers to step up their efforts in tackling the gender pay gap and pay discrimination, and believe that workers' representatives have an important part to play in achieving this.

So, who are "workers' representatives"? They are defined in the Directive as "the workers' representatives in accordance with national law and/or practice". In other words, member states will have the flexibility to determine who those representatives are in accordance with their own local legislation/practices. In the Netherlands, for example, recently published draft legislation gives works councils a key role, whereas in Sweden it will be the trade unions that take the lead on these issues, in line with their existing structures for worker representation.

Workers' representatives have the following key rights under the Directive:



Equal work and work of equal value (Article 4) – Employers' pay structures should be such as to enable the assessment of whether workers are in a comparable situation in regard to the value of work based on objective, gender-neutral criteria agreed with workers' representatives where such representatives exist. Such criteria shall include skills, effort, responsibility and working conditions and, if appropriate, any other factors which are relevant to the specific job or position.



The right to receive pay information (Article 7) – Workers will be able to request information about their individual pay level and average pay levels, broken down by sex, for categories of workers performing the same work or work of equal value to them, either directly or via their workers' representatives. If the information received is inaccurate or incomplete, they will have the right to request further information regarding any of the data provided and to receive a "substantiated" (i.e. reasoned and evidenced) reply. Workers' representatives have been given these rights because the legislators recognise that workers may be reluctant to ask for this information out of fear of victimisation or cultural reticence.



The right to get involved in pay gap reporting (Article 9) – Employers caught by the reporting obligations will have to confirm the accuracy of this information after consulting workers' representatives. There is no definition of "consulting" in the Directive, but this is likely to mean actively seeking and considering workers' representatives' views before publishing any information. Workers' representatives will have the right to assess the methodologies applied by the employer to facilitate this. Workers' representatives will also have the right to ask employers for additional clarifications and details regarding any of the data provided, including explanations concerning any gender pay differences. Where gender pay differences are not justified on the basis of objective and gender-neutral criteria, employers must remedy the situation within a reasonable period of time in "close cooperation" with workers' representatives, the labour inspectorate and/or the relevant equality body.



The right to compel a joint pay assessment (Article 10) – Crucially, these representatives will also have the ability to force a joint pay assessment (effectively an equal pay audit), if (i) the pay reporting shows a difference in the average pay level between male and female workers of at least 5% in any category; (ii) the employer cannot justify such a difference on the basis of objective, gender-neutral criteria; and (iii) it has not remedied the difference within six months of the pay reporting date. This assessment must be carried out "in cooperation" with the workers' representatives.

"Cooperation" is also not defined in the Directive. On the face of it, this should not entail any rights of veto or codetermination on the part of the representatives (although local legislation may place a higher burden on employers), but it will certainly require consultation with a visible view to agreement in which the cosmetic indicators of openness are at least as important as the reality of the employer's actual willingness to work with them.

We will of course have to see how local member states implement these provisions, but it is clear that they will give workers' representatives much greater access to an employer's pay data, and more scope to challenge an employer in relation to any gender pay gaps and their pay practices more generally, especially if they believe that the pay transparency obligations are not being met or that significant unjustified pay gaps exist. Increased pay transparency may also result in heightened demands during collective bargaining discussions on pay, particularly regarding job classifications or pay structures. On the flip side, if an employer has engaged with its workers' representatives in the run up to implementation of the Directive this should help send a clear message about the company's commitment to pay transparency, and could not only reduce the scope for challenge, but the workers' representatives could also act as a useful bridge between leadership and the wider workforce in terms of communicating information, facilitating understanding and gaining buy-in. Furthermore, if the workers' representatives are on board with the company's approach, or are at least persuaded that the employer is doing its best to be transparent and cooperative, this should reduce the risk of future claims, including by individual employees.

As companies continue their preparations for implementation of the Directive we would therefore strongly recommend they consider how they are going to engage with their workers' representatives. Key issues to consider include:



Who are your existing workers' representatives and what information do they currently receive about pay, gender pay gaps, etc?

In some EU member states, they already play a meaningful and active part in matters relating to pay transparency and equality. In Spain, for example, pay transparency is a central concern for trade unions and employee representatives and they have access to a lot of pay data as part of the equality plans, salary registers and wider transparency obligations.



Be aware of local differences. For example, under the implementation proposals in the Netherlands the works councils are expected to play a key role in ensuring compliance with the upcoming pay transparency rules. Employers that meet the 50-employee threshold, but have not established a works council may therefore find themselves unable to fulfil certain obligations under the new legislation. The Dutch legislator has deliberately chosen not to provide an alternative mechanism for such situations. This means that if no works council has been established and there are 50 or more employees, it is crucial for companies to act promptly and take steps towards the establishment of a works council in early course.



If you have workers' representatives in place, how good is your relationship with them? Are there member states in which you have a particularly good relationship? If so, you might consider starting any discussions about pay transparency there before engaging with representatives in other jurisdictions.



Are your workers' representatives talking about pay transparency?

From our roundtable discussion, it seems that pay transparency is not a hot topic for trade unions/works councils currently, but this is likely to change. For example, in Germany next year the works council elections (which will take place between March and May) are likely to coincide with the finalisation and implementation of the pay transparency legislation. We anticipate that the works councils may strategically use the topic of pay transparency to campaign or exert pressure on employers. Existing works councils that are seeking re-election could use this issue to push for action from employers and new candidates may use it to position themselves in the elections and demonstrate results early on. It is important that employers have a strategy in place and know what they are going to say about pay transparency before they start being asked questions on this issue.



Communication – Think about how you are going to communicate with your workers' representatives in each affected jurisdiction. What is the narrative you want to get across? You may wish to engage your internal communications team to ensure you are sending the right message to the right people at the right time.



Training – Have you thought about training your workers' representatives? Pay transparency is a difficult area. Consider training your representatives so they understand the key concepts, how to analyse the data properly, etc., as this may lead to more informed and meaningful discussions. Also, think about upskilling your HR team and your managers, as they will play an important role in maintaining effective relationships with your workers' representatives, both in the run up to implementation and thereafter.

And don't forget – If you are proposing changes to your job categories/pay structures and processes to ensure compliance with the Directive, you may be required under existing local legislation/agreements to consult any workers' representatives on those changes. In Belgium, for example, the works council has the right to be informed and consulted on intended changes to the company's employment conditions, including pay structure and job categories. They also have the right to be consulted on measures intended to bridge the pay gap. Depending on the level of sophistication of the works council and the importance of the changes to be imposed, this process may take between one and three months. This will therefore need to be built into any action plan.

We can support you in relation to all aspects of preparing for the new rules, as well as your broader pay equity strategy. If you would like to discuss the implications of the Directive for your business, please speak to your usual contact at the firm or one of our experts in the first instance.

Also, take a look at our latest [pay transparency “snapshot” guide](#), where we have collaborated with our Global Edge contributors to set out the current state of play in 15 key EU member states, including an indication of the likely scale of change in different jurisdictions and the potential need for union/works council consultation along the way.



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