

## Wait and see

### Practice will show whether the new law is a suitable instrument for achieving equal pay

By Jörg Salzmann

In order to promote wage fairness for women and men performing equal and equivalent work, the German Parliament (*Bundestag*) passed the Act to Promote Transparency of Pay (*Entgelttransparenzgesetz – EntgTranspG*) in early 2017 and it came into force on July 6, 2017. The Act, inter alia, provides for review processes and reporting obligations of the employer but also for employee information rights vis-à-vis the employer. The most crucial part of the Act, employee information rights, however, did not come into force until January 6, 2018. Only since that date do employees have the right to know how they are paid in comparison with a group of workers performing equal and equivalent work. In general, the Act favors employers bound by and implementing collective bargaining agreements.

#### Essential contents

The Act provides for amendments regarding a claim for payment of a higher remuneration in the case of discrimination, a claim derived from various legal

bases. While the claim has still not been expressly regulated, *EntgTranspG* tries to provide clarification at a factual level by defining equal and equivalent work in compliance with previous court rulings. Accordingly, equal work is defined as being identical or of the same kind. Equivalence is measured by an overall assessment of several factors, including type of work, qualification requirements and working conditions. It has to be emphasized that equivalence does not extend to the work result, i.e., there is no qualitative evaluation of the employee's performance at this level. However, differences in performance can of course be considered elsewhere; for example, within the scope of the reason for unequal treatment. It is to be expected that issues of equal or equivalent are going to be contentious in remuneration disputes even after the introduction of the aforementioned definition.

#### Claim for information

Also newly introduced is an individual claim for information by employees in

companies employing more than 200 employees.

#### Assertion

Employees are entitled, by means of an inquiry with the works council or the employer, to request information about the average monthly gross remuneration (statistic median) of the respective other gender of a comparison group and – via inquiry – up to two individual remuneration components. The term remuneration in this context also includes other cash compensation or compensation in kind, e.g., the provision of a company car. An inquiry about median remuneration components shall provide the employee with specific information about remuneration components where



Companies with more than 200 employees have to offer information on the criteria of remuneration.

© CalypsoArt /iStock/Thinkstock/Getty Images

the employee suspects unequal treatment. Furthermore, the employer has to disclose the criteria and procedures for setting remuneration.

The request can principally be made every two years. If the claim is asserted before January 6, 2021, a three-year

→

(instead of two-year) waiting period will apply until the next assertion.

### Median

The median is determined by sorting the salaries of the comparison group according to size. It then divides this data record into two (equal) halves so that the value in one half is no higher, and in the other half no lower, than the median value. The result of this calculation method can significantly deviate from the average value, but in the legislator's opinion, is preferable to the latter because few extreme values have so little influence. Nonetheless, the significance of such statistical values is limited for the question of equal treatment in remuneration. The fact that at least 50% of the comparison group earn more than the applicant can, for example, also indicate unequal treatment within the comparison group. Falling short of the comparison median does not necessarily correspond to unequal treatment. Conversely, income that equals the median does not exclude unequal treatment.

### Relief for employers bound by collective bargaining agreements

The Act provides simplified options for employers bound by and implementing collective bargaining agreements.

If the criteria and procedures for setting remuneration are based on statutory regulations or collective bargaining agreements, it will suffice to refer to these and indicate where they can be consulted. Furthermore, employers bound by and implementing collective bargaining agreements can use the remuneration of other employers in the applicant's remuneration or salary group for comparison purposes. Employers not bound by and not implementing collective bargaining agreements must principally provide information on the comparison group specified by the employee applying for information. If the employer wishes to select a different comparison group, this will require a statement of reasons.

Furthermore, and only for those employers not bound by and not implementing collective bargaining agreements, the Act stipulates a specific legal consequence for when employers do not comply with the claim for information or when the works council could not provide the information for reasons for which the employer is responsible. Only then shall a reversal of the burden of proof apply in the case of a dispute regarding the question of whether there is a breach of the equal pay obligation.

### Review process

Private employers with more than 500 employees are asked to review their compliance with the equal pay obligation. Such a process consists of a review of the current situation, an analysis and a report. The Act does not provide for any obligation to review, or for any legal consequences, in the event of nonperformance.

### Reporting obligations

Employers with more than 500 employees required to prepare a management report according to the German Commercial Code (*HGB*) are obliged to draw up a report on equal treatment and equal pay. This report has to explain, inter alia, the measures taken to promote equality and the achievement of equal pay. Employers bound by and implementing collective bargaining agreements have to prepare such a report every five years, all other employers every three years. The report has to be published in the German Federal Gazette, together with the management report.

### Conclusion

The Act does not affect companies with fewer than 200 employees. The extent

of the burden of individual information requests is still difficult to assess for larger companies. Likewise, it remains to be seen whether the claims for information turn out to be a suitable instrument for achieving equal pay.

In any case, concerned companies should provide the necessary structures in good time to process information requests in compliance with the mandatory data protection regulations and, if applicable, with the involvement of the works council. Companies with more than 500 employees may consider implementing a review process; if they are obliged to publish a management report, a report on equal treatment and equal pay must also be drawn up. ←



**Jörg Salzmann,**  
Rechtsanwalt, Senior  
Associate, Mayer Brown LLP,  
Frankfurt am Main

[jsalzmann@mayerbrown.com](mailto:jsalzmann@mayerbrown.com)

[www.mayerbrown.com](http://www.mayerbrown.com)