Legal Update
Labour Law

Transparency of Remuneration Structures?

Phillip Raszawitz

Cologne, 10.08.2017

Introduction

According to the second sentence of Article 3(2) of the Basic Law (Grundgesetz – GG), the state is tasked with promoting the actual implementation of equal rights for men and women and taking steps to eliminate existing disadvantages. After what was in part a heated debate, the German Bundestag adopted the Act to Promote Transparency in Pay Structures (Gesetz zur Förderung der Transparenz von Entgeltstrukturen – Entgelttransparenzgesetz; EntgTranspG; hereinafter referred to as the "Act") on 30 March 2017 [BT-Drucks. 288/17 (B)], thus following on from the 2006 General Equal Treatment Act (Allgemeines Gleichbehandlungsgesetz – AGG) and fulfilling its constitutional directive. The Act entered into force and effect on 6 July 2017.

Key Elements of the New Act

The aim of the Act is to implement a requirement that men and women receive equal pay for equal or equivalent work and to promote pay equity for men and women. The legislature defines "equal or equivalent work" in § 4 of the Act. According to this definition, employees engage in equal work if they perform identical work or work of the same kind at different workplaces or in quick succession at the same workplace.

Equivalent work occurs where in light of all of the factors involved, such as the kind of work, educational requirements and working conditions, employees can be seen as being in a comparable situation. The definition does, of course, leave room for interpretation, and it is not unlikely that this will be a source of dispute in the future. To promote pay equality for equal or equivalent work, the Act provides, *inter alia,* for a prohibition on gender discrimination (§ 3 (1) of the Act), a r ight to a remuneration adjustment (§ 7 of the Act), a prohibition on retaliatory measures (§ 9 of the Act) and the invalidity of agreements which violate the principle of equal pay for equal work (§ 8 (1) of the Act).

In addition, the Act introduces significant new enforcement mechanisms, such as an individual right to request information for employees in companies and government offices with more than 200 employees, a requirement that private employers with more than 500 employees review their pay structure regularly as well as a requirement that employers provide updates on the status of measures to promote equality between men and women and wage parity if such employers are obliged to prepare a management report and they have more than 500 employees. Let us now turn to the details of these provisions:

Employee's Right to Request Information

The individual right to request information, which is granted pursuant to § 10 to § 16 of the Act to employees in establishments in which the same employer regularly employs more than 200 employees, is a core element of the Act as well as being a significant innovation. Pursuant to § 11 of the Act, the aim of the right to request information is to allow the employee to ascertain the criteria and the process used by the employer for determining pay and to obtain information about the pay of the comparison group. It only extends to pay rates of the same employer in the same establishment. The right to request information specifically excludes regional pay differences and comparisons of different groups of employees (§ 12 (1) Nos. 1 to 3 of the Act). The information requested must pertain to the average monthly gross remuneration and no more than two specifiable remuneration components of members of the comparison group of the respective other gender performing equal or equivalent work. The request for information regarding the remuneration of the comparison group relates to

the statistical median remuneration and not the total average remuneration (§ 11 (3) of the Act).

Employers which are bound by or which implement collective bargaining agreements must supply information on the median remuneration of members of the other gender who belong to the same pay scale group. Where an employer's remuneration provisions are based on statute or regulations contained in industry-wide collective agreements, it will be adequate if the employer simply makes reference to them.

Due to data protection considerations, an employer is only required to provide information about the salaries of a comparison group where the work that is being compared is performed by at least six employees – including senior employees – of the respective other gender (§ 12 (3) of the Act). As a rule, personal data must not be disclosed or must be anonymised accordingly. The right to request information is not intended to allow individual employees to find out which colleague earns what. The request for information must be recorded in writing (an original signature is not required) or electronically, and it must specify the job with which the comparison should be made (§ 10 (2), first sentence, of the Act). As a rule, the works council (if there is one) is the appropriate contact point or otherwise the employer should be contacted directly. The works council or the committee appointed will then inspect the documents showing the gross salaries in order to be able to provide information. The employer is obliged to prepare lists for these purposes.
The employer may, however, take over responsibility for the disclosure process during the respective works council's term of office, but must give reasons for doing so. Nonetheless, even in these cases the works council must be informed about the request for information and the respective response of the employer. The employer must give its response within three months and must also do so in writing (an original signature is not required) or electronically. Failure by the employer to comply with a request for information will shift the burden of proof onto the employer, so that it has to disprove the existence of a violation of the requirement of equal pay for equal work (§ 15 (5), first and second sentences, of the Act).

Employees will be able to make requests for information for the first time as from 6 January 2018 and will then be able to make such requests every two years thereafter unless the prerequisites and circumstances have significantly changed in the meantime, for example, through a job change. If the right to request information is asserted within the first three years following 6 January 2018, the two-year waiting period will be extended on a one-off basis to three years pursuant to § 25 (1) of the Act.

Voluntary Review of Equal Pay for Equal Work

§ 17 (1) of the Act asks private employers which normally employ more than 500 persons to conduct regular reviews of their remuneration regulations and the various remuneration components as well as of their implementation to verify their compliance with the requirement of equal pay for equal work. For these purposes, all jobs must be included which are subject to the same system of remuneration irrespective of whether they are based on an employment contract, a collective bargaining agreement or company regulations. The procedure itself is briefly outlined in § 18 of the Act. The employer must give the works council adequate advance warning of its plans for a review process and subsequently notify it of the results.

Duty to Report on the Status of Measures to Promote Equality between Men and Women and Wage Parity

Employers which normally employ more than 500 employees and which are required by § 264 and § 289 of the German Commercial Code (Handelsgesetzbuch – HGB) to prepare a management report have a duty under § 21 of the Act to report on the measures they have taken to promote equality between men and women and to achieve wage parity between the sexes and to explain the effects of such measures. Nonetheless, the duty to report on such measures should not be confused with a duty to adopt such measures. However, employers which do not take measures to promote equality must give reasons for not doing so in their report, see § 21 (1), second sentence, of the Act. Employers which are bound by or which implement collective bargaining agreements must prepare a report every five years; all other employers must do so every three years. The report must be appended to the company's management report and published in the Federal Gazette. Companies which are affected by the new legislation will first be under a reporting duty in 2018.

Conclusion

The Act has been subject in part to strong criticism on the grounds that the legal benefit that it provides is so small – due to its narrow scope and the existing legislation, especially the General Equal Treatment Act – that the effort involved in implementing it is not justified. It

remains to be seen whether the Act in its final form, which in comparison with the draft proposal is less stringent for employers, does in fact cause the feared additional workload. In any case, other points of criticism cannot simply be discounted. These include, for example, the question whether information regarding the statistical median remuneration of the comparison group is even suitable for providing a solid indication of gender discrimination.

Notwithstanding all of the criticism, companies will, in any case, in practice be initially encouraged to use the transitional periods provided for in the Act and to check which, if any, of its provisions they must comply with (e. g. information and reporting duties). The next step for them will be to prepare for the additional bureaucracy that compliance will involve – even if the scope of this cannot yet be estimated. Thus, especially those employers which employ more than 200 persons in their business should immediately consider whether their existing structures and remuneration system can provide individual employees with information. In this connection, they will in particular also have to check which group of employees can be used for the purposes of comparison, i.e. which jobs are equal or equivalent within the meaning of the Act. It may also be advisable to prepare standardised procedures and forms for providing information so as to be able to respond on time and with as few errors as possible, even where there are a large number of requests for information. Furthermore, employers should consult with works councils in good time as regards the actual implementation of the requirements of the Act. In this connection, serious consideration has to be given, *inter alia,* to the question of whether a company with over 500 employees should voluntarily introduce a cost-intensive review procedure regarding its remuneration regulations.

Note

Our offices

GÖRG Partnerschaft von Rechtsanwälten mbB

BERLIN
Kantstraße 164, 10623 Berlin
Phone +49 30 884503-0, Fax +49 30 882715-0

COLOGNE
Kennedyplatz 2, 50679 Köln
Phone +49 221 33660-0, Fax +49 221 33660-80

ESSEN
Alfredstraße 220, 45131 Essen
Phone +49 201 38444-0, Fax +49 201 38444-20

FRANKFURT AM MAIN
Neue Mainzer Straße 69 – 75, 60311 Frankfurt am Main
Phone +49 69 170000-17, Fax +49 69 170000-27

HAMBURG
Dammtorstraße 12, 20354 Hamburg
Phone +49 40 500360-0, Fax +49 40 500360-99

MUNICH
Prinzregentenstraße 22, 80538 München
Phone +49 89 3090667-0, Fax +49 89 3090667-90