

EMPLOYMENT LAW

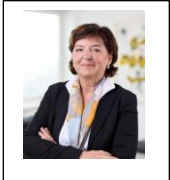
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This article examines the legal consequences for employers operating across the EU following the widespread failure of Member States to transpose the EU Pay Transparency Directive by its 7 June 2026 deadline. It offers practical guidance on which provisions may already produce direct legal effects and advises companies to proactively review their pay structures and HR processes in anticipation of full national implementation.

What if ... EU Member States Fail to Transpose the EU Pay Transparency Directive by 7 June 2026?

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Although three years have passed since the EU Pay Transparency Directive¹(PTD) saw the light, it now seems highly likely that very few EU Member States will have fully transposed their provisions into their national law systems by 7 June 2026, as required under the Directive². This failure to bring into force the laws, regulations, and administrative provisions necessary to comply with the PTD obviously leaves employers in a state of limbo: as a source of EU law, the Directive lays down minimum requirements that seek to strengthen the application of the principle of equal pay but leaves it to the Member States to implement these in accordance with their own national law and practices. In the absence of such legislation, employers with businesses in different EU member states now struggle to understand the exact scope of their obligations under the PTD. In this Newsletter we seek to offer some guidance.

The principle of equal pay is without any doubt firmly embedded in EU law, not only in article 157.1 TFEU but in various other legal provisions as well as in established case-law of the ECJ. Already in 1976³, the ECJ considered the principle that men and women should receive equal pay for equal work as one of the foundations of the European Community; it allowed private

persons to rely on it before the national courts, in particular where discriminations have their origin in legal provisions or collective labor agreements, as well as where men and women receive unequal pay for equal work.

The Pay Transparency Directive is the legal instrument that seeks to effectively close the pay gap that is still at an average of 11 % within the EU (i.e. men outearning women for the same work by 11 %) and enhance the principle of equal pay by requiring employers to be more transparent on their pay scales, pay setting and pay progression, to inform both job applicants and workers of the bandwidth of their pay and, depending on the number of workers employed, to report on the gender pay gap. Obtaining equal pay for equal work or work of equal value should thus become a daily reality, rather than a noble goal: as more light is shed on - often opaque and organically grown - pay structures, workers will become more aware of their rights and seek to obtain full compensation in court, all the more so since the access to justice is facilitated through various measures (e.g. burden of proof, extension of time-limits for claims, a provision on legal costs to be borne by the employer even where a (reasonable) claim is not successful etc. ...).

¹ Directive (EU) 2023/970 of the European Parliament and of the Council of 10 May 2023 to strengthen 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 (OJ 17 May 2023, L 132/21).

² Art. 34.1 PTD. Sweden, that had voted against the directive, has paused the implementation entirely

and calls for the directive to be renegotiated, on account of it being too administratively burdensome and not aligned with its own national long-standing traditions of promoting equal pay. The Netherlands and Denmark have announced they will miss the June 2026 deadline and will implement by 1 January 2027.

³ ECJ 8 April 1976, C- 43/75, *Defrenne*.

As a rule, **directives only impose obligations on Member States** (“vertical effect”) and cannot be relied upon as such against an individual, but only by an individual against the State where the State fails to timely or correctly implement the directive in national law⁴. Over the years, the European Court of Justice has considerably hollowed out this basic “creed” of EU law, by allowing individuals to invoke a directive for the sake of legal certainty, where the provision lays down an obligation which is not subject to any exception or condition and by its nature, does not require the intervention of any act on the part of the institutions of the member States⁵. A provision of a Directive that is sufficiently clear and precise, not accompanied by conditions, and with no margin of discretion left to the Member State may have direct effect, so that the individual is entitled to rely on them in the competent national court after expiry of the time-limit for transposition⁶. In two landslide cases, that specifically dealt with discrimination in respect of age in an employment context, the ECJ held that it is the responsibility of the national court to guarantee the full effectiveness of the general principle of non-discrimination in respect of age, setting aside any provision of

national law which may conflict with Community law, even where the time-limit for transposition has not yet expired⁷. Furthermore, the principle of equal pay was formally considered to have direct effect in proceedings between individuals by the ECJ⁸.

What does this mean for employers?

Employers that operate in Member States that have failed to transpose the directive by the 7th of June 2026 are faced with considerable legal uncertainty. Although the Commission has repeatedly confirmed there would be no “stop-the-clock” scenario, i.e. a suspension of the deadline for transposition pending renegotiation, there is still considerable political pressure, especially from employers’ organizations and certain countries for the EU Council and Commission to reconsider and to allow for the directive in its to be renegotiated on account of it being too burdensome. An EU summit was scheduled for the end of May, but no formal delay was granted.

However, regardless of whether “the clock” will be stopped, the directive is already undeniably a part of the EU legal order since its entry into force on the 20th day following

⁴ Art 288 TFEU: A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods; ECJ 26 February 1986, *Marshall*.

⁵ ECJ 4 December 1974, C41-74, *Van Duyn*.

⁶ ECJ 5 April 1979, C-148/78, *Ratti*.

⁷ ECJ 22 November 2005, C-144/04, *Mangold*; ECJ 19 January 2010, C-555/07, *Kücükdeveci*. Although, strictly speaking, the directive does not “create” rights for individuals, but only obligates the judge to “set aside a conflicting national law”, the lines

between these two hypotheses are fading. In this case, a national provision that allowed for lower severance pay for younger workers was deemed to be in violation of the principle of non-discrimination on the basis of age, and therefore to be set aside. As a result, the employee was granted “a right” to the same severance as an older employee, while the employer faced the obligation to pay this higher severance. The ECJ has since reiterated this jurisprudence on other fundamental principles, i.e. *Egenberger* (2018, C-414/16), *Cresco* (2019, C-193/17) and *Willmeroth* (2018, C-570/16).

⁸ ECJ 3 June 2021, C-624/19, *K v Tesco Stores*.

that of its publication in the Official Journal (6 June 2023).

The question therefore is which of its provisions can be deemed to be sufficiently precise to have direct effect and thus allowing individuals to invoke them in a court of law. The smaller the margin that is left to the Member States on its implementation, the more likely the provision will fall into that category. At first sight, one could argue that this could be the case for provisions such as ensuring one's job vacancy notices and job titles are gender-neutral and that recruitment processes are led in a non-discriminatory manner (art. 5.3). These provisions are mere expressions of the principle of non-discrimination that is firmly enshrined in both EU and Member States' constitutional law. Since *Mangold* and *Kücükdeveci*, the ECJ requires national judges to ensure the effectiveness of directives that seek to enhance fundamental principles of EU law, also in disputes between individuals, by setting aside national law which may conflict with community law.

In practice, we would expect most companies to already abide by these rules, as part of good (i.e. objective and gender-neutral) HR practices. For this reason, it would also be advisable/prudent to no longer ask employees about their pay history or continue to include confidentiality clauses on pay in employment contracts (prohibited under art. 5.2 and 7.5), even in the absence of a specific legal prohibition of this practice under national law.

On the other hand, it would be a step too far to assume that employers as of 7 June 2026

will be required to provide workers with information on the criteria for pay setting, pay levels and pay progression (art. 6.1). To be able to do so, the employer should already have set up pay structures ensuring equal pay for equal work or for work of equal value, although the Member States have not met their obligations to (i) ensure that employers have such pay structures (art. 4.1) and (ii) make easily accessible analytical tools or methodologies available to support and guide the assessment of the value of work (art. 4.2).

Moreover, Member States have the possibility to exempt employers with fewer than 50 workers from providing transparency on pay progression (art. 6.2). One could hardly expect an employer with a headcount lower than 50 to start setting up a scheme that informs the workers on their pay progression, while national legislation may yet exempt him from this obligation.

The same reasoning would apply to the provisions of the directive on the reporting on the pay gap between female and male workers: indeed, how can employers be required to provide the required information, when even the concept of "the employer" (the legal entity? aggregated companies? what if there are multiple employers?) is still to be defined by the Member States in order to determine at what level this obligation is to be executed.

Finally, the quite stringent remedy and enforcement regime as imposed by the directive (chapter III) would only become operational, if national legislation on procedural law and sanctions is duly implemented.

Conclusion

Even though the actual implementation of the PTD still lies on the drawing board of most Member States, and is, within those States, often left to social concertation between workers' and employers' representative organizations, the principle of equal pay for equal work or for work of equal value is undeniably here to stay as a cornerstone of the EU construction. Compliance with this fundamental principle should therefore be of immediate concern to all employers, regardless of their headcount and potential reporting obligations.

Those companies that have taken a headstart by checking their existing pay structures for inequalities (most of the time unintended) will find themselves better prepared for its transposition when it comes. Indeed, regardless of whether the EU ultimately decides to stop the clock altogether, allow for a postponement of the time limit until 1 January 2027 or any other compromise, it is always a good time to ensure that one's pay schemes are robust and based on objective and gender-neutral criteria and that one's HR recruitment processes are gender-bias free. This is where legal and HR counsel from the jurisdiction where the business operates in the EU can step in to assist.

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