European Union's Gender Pay Transparency Directive

By Tom Hayes and Henry D Eickelberg

On December 12, 2022, the European Parliament and EU Member States negotiators reached an agreement on a gender pay transparency directive "…to strengthen the application of the principle of equal pay for equal work or equal value work between men and women."[1] The vastly complex and far-reaching proposal is currently on its way to being ratified into law.

Why does this matter to companies operating in Europe?

For any company with 250 employees in a European Union member state, an *unprecedent* data-gathering compliance exercise will be required to provide annual public gender pay gap disclosures. Data will be required for all grades and categories of workers within an EU member state as defined by the law – not how companies categorize and band employees. A unique gender pay transparency analysis will be required for each EU state in which a company operates. Further complicating matters will be the required engagement of workers' representative bodies on the gender pay transparency data collection process and any needed remedial measures.

This paper sets out the key details, issues, and implications the Directive will impose on companies operating in any of the EU member states in four parts:

- *Part One: Analysis of the EU Gender Pay Transparency Directive – What is Required?*
- *Part Two: Key Issues and Implications in the EU Gender Pay Directive*
- *Part Three: Key Employee Relations Considerations*
- *Part Four: Appendix – Expanded Details and Analyses*

The Directive will result in even more attention on this issue globally by company Boards of Directors, key stakeholders, and the media. Companies should consider starting to ask questions internally to begin preparation in advance of eventual compliance in 2026.

Part One:

Analysis of the EU Gender Pay Transparency Directive – What is Required?

In Europe, individual member states will have discretion in transposing the legislation into country law to allow for accommodations for exiting gender pay transparency laws, industrial relations cultures, and traditions. Thus, although some time is needed still to see exactly what will be required, we know 90% of what be required right now from the existing provisional deal text in the European Parliament.

[1] *The numbering we refer to in this paper is the numbering to be found in the provisional text. That numbering may change in the final, official draft.*

Aside from the innumerable employee relations implications, from a compliance standpoint, the key considerations of the Directive are as follows:

- Salary Range – Required, Salary History – Banned: Companies will be required to post the at least the initial salary for all job postings. Further, companies will no longer be permitted to request a candidates salary history. This

- 250 Workers in a Country Results in Annual Public Reporting: Covered employers with more 250 workers in a country will be required to provide annual reporting on pay data within that country. Having 100-250 will mandate disclosure every three years. The data will be public. The information will be published by member states at the country-level theoretically allowing a comparison of individual employers, sectors, and regions.

- Required Internal Processes to Inform and Eliminate Gender Pay Gaps: Policies to prevent gender pay gaps must be in place and they must be easily accessible to workers and denote "a description of the (gender neutral) criteria used to define pay and career progression." Further, employees "will have the right to request information from their employer on their individual pay level and on the average pay levels, broken down by sex, for categories of workers doing the same work or work of equal value."

- Required Data Collection on Compensation: Companies will be required to gather in-depth, in-country compensation data for all grades and categories of workers (*not* "employee") in each individual EU member state. Workers will need to be categorized at least *according to the criteria of the EU gender pay transparency Directive* – this may differ from a company's framework. This likely means site-by-site collection.

- Compensation Includes All Benefits Related to the Work: Companies will need to include much more than base-pay (e.g., salary or hourly pay) and bonus in the calculation. Given the wide variety of benefits, which can include car allowances, home heating stipends, etc., the data collection exercise is potentially mammoth.

- Required Engagement with Workers' Representatives: The criteria for categorization, referenced above, will *need* to be agreed upon with workers' representatives, where they exist. Representatives *may have to be elected* where they do not exist. Further, employee representative bodies may represent workers when pay gaps are discovered.

- Required Analysis for Gender Pay Gaps: An extensive analysis of the gathered data will need to be performed by companies to identify any potential gender pay gaps. The text suggests that companies may be required to disclose the methodology for calculating gaps. This same information will be publicly disclosed on a country level.

- Required Action for Identified Pay Gaps: First and foremost, Companies will need to be able to explain why differences exist where they exist and then to take steps to eliminate non-justifiable differences. Further, when a pay gap is identified, workers who have suffered gender pay discrimination can receive compensation, including full recovery of back pay and related bonuses or payments in kind.

- Burden of Proof On the Employer: In cases where an employer is deemed to not have fulfilled their transparency obligations, the burden is on the employer – not the worker – to prove there is not a gender pay gap.

- Fines and Penalties for Non-Compliance to Be Defined by Countries: The framework for non-compliance will be left up to the individual member states' implementation.

The legislation is in the final stages at the European Parliament and once the agreement is "legally scrubbed", ratified, and translated into all relevant languages, then Member States will have three years in which to incorporate it into national law. This means the law will come into effect in 2026.

Despite the three-year cushion, given the complexity of the legislation, especially the data collection and analysis that will be required, it would be advisable for employers to look now at what they need to do. This paper takes an in-depth look at the key issues which will shape the compliance requirements and employee relations issues stemming from the proposal:

- The Scope of the Directive – Who is a "Worker"?
- What is Pay and What is "Equal Pay"?
- Data and Comparators.
- The Role of Employees' Representatives.

In our view, this measure is one of the most far-reaching pieces of legislation to have been adopted by the European Union in recent years. Not only will it require companies to produce detailed pay statistics on how men and women are paid, but companies will need to be able to explain why differences exist where they exist and then to take steps to eliminate non-justifiable differences.

Much of this will need to be done working with employees' representatives, who may have to be elected where they do not already exist. Who may be consider as employees' representatives and how they are to be elected/selected will be a matter for national law and will differ from country to country.

Adding additional complexity is the attention already on gender pay issues. Major stakeholder groups have brought significant focus on the issue over the past several years. Thus, the legislation is highly likely to be of major attention to the Board of Directors and C-Suite of multinational employers.

This paper provides three parts. First, in addition to the executive summary, abbreviated discussions of the five points above are provided. Second, an analysis of the employee relations implications provides insights for companies now and going forward. And third, an appendix contains extensive detail on each point, including additional analyses and direct citations to the text of the directive.

Part Two:

Key Issues and Implications in the EU Gender Pay Directive

Issue One - The Scope of the Directive – Who is a Worker?

Key Issue in the Directive: An employer's gender pay transparency analysis will be required to include all workers – everyone you could think of. This includes full-time, part-time, seasonal, contract workers, temporary workers, management, gig-workers, job applicants, etc.

Key Implications and Questions: The scope of the data collection here should not go unnoticed. Many multinationals have extensive HRIS systems which track employee compensation data. However, for other pools of workers, including third-party employed agency workers, independent contractors, and

other like arrangements, companies frequently do not maintain comprehensive data collection systems with the same access to "compensation" data.

Further, there are added complexities when defining the employee population – which is a completely fluid thing. Implementation at the country level must address the important question about at what moment is a company able to say, "this is my worker population".

Issue Two – What is Pay, "Equal Pay", and Reparation?

Key Issue in the Directive: The data analysis required by the Directive centres around the definition of three key terms, each of which are extraordinarily broad:

1. Pay – Basically anything of value given in exchange or related to a worker's work. This includes salary, bonus, allowances, sick pay, and basically anything else.

2. Equal Pay – Equal pay constitutes a gap less than five percent. Anything beyond that triggers action. Determining equal pay must be done in concert with workers' representatives and the text suggests that these bodies will have access to the methodologies used in the analyses.

3. Reparation: In essence is a "make-whole" definition which would require companies to compensate an individual in a way which places them in the position they would have been sans the discrimination. There is no upward limit for compensation, and it can include punitive penalties.

Key Implications and Questions: Each definition creates a troubling set of question for multinational employers:

1. Pay: Defining pay this broad creates a data collection nightmare. First, a company may not track all forms of pay which fall under this definition. Second, equating monetary value to some forms of compensation may prove difficult, particularly if doing a backwards looking analysis.

2. Equal Pay: Opening up methodologies for "consultation" with workers' representatives potentially creates a pandora's box scenario and a major potential point of contention. Companies, already saddled with a mammoth data collection exercise, may be accused of gaming the system through the methodology simply because the worker representative body did not like the results.

3. Reparation: Because of the myriad of factors contributing to employee compensation rates and promotions, it is all but impossible to accurately determine the proper amount of reparations for an individual. Further, the lack of an upward cap creates yet another potential litigation trap.

Issue Three – Data and Comparators

Key Issue in the Directive: In essence, there are two primary tasks that will be required of companies – company-wide gender pay gap and pay quartile disclosures AND granular gender pay gap disclosures between the various "categories of workers" at the company.

   a. "Category of workers" is *very* granular and means workers performing the "same work or work of equal value". These categories or groups must be created based on the

"gender neutral criteria" set out in the directive. These factors include (a) skills, (b) effort, (c) responsibility, (d) working conditions, and (e) any other relevant factor. Soft skills must be taken into account.

Key Implications and Questions: The company-wide disclosures will present enough difficulties. However, the "category" disclosures are an entirely different fiasco. First, companies must use the Directive to guide the creation of the categories – they cannot use internal classifications. Fine.

Second, and most problematically, the criterion set out by the Directive to guide the creation of the categories (e.g., skills, effort, soft skills) are entirely subjective in nature. There is no way to create an objective view of effort or "soft skills". T

he results, and particularly because worker representatives play such a present role in the process, will be a litigation minefield as parties litigate over what beauty constitutes in the eye of the beholder.

Issue Four - Information and Consultation

Key Issue in the Directive: From an employee relations perspective, this is one of the most interesting, and potentially far-reaching, aspects of the legislation. Put simply, where there are no existing employees' representatives, it could see the election of "pay committees" of workers' representatives to undertake joint assessments with management where pay gaps of more than 5% are found, and they have not been justified according to the criteria in the Directive, and management has not closed those gaps within six months.

That pay gaps that have persisted for years could suddenly be closed within six months seems somewhat far-fetched. Which means that joint assessments with employees' representatives on how the gap can be closed will have to be undertaken. As noted above, it is our view that here no representatives exist, they will have to be elected, if employees so wish.

Key Implications and Questions: Unlike collective redundancies and transfer of undertakings, where ad-hoc representatives may also have to be elected in the absence of standing representatives, "pay committees" have the potential to become permanent, as company with more than 250 employees will have to report on gender pay gaps every year. The "pay committee" in any company will need to stay in place until the gap is closed. Given the ingrained nature of gender pay gaps, for both sociological and structural reasons that are well identified in the Recitals to the Directive, closing the gap could take many years.

Once "pay committees" come into existence, could they morph into normal works councils?

Given the expertise that will be required on the part of employees elected to "pay committees" if they are to make a useful contribution, re-electing them annually would make no sense. Substantial training will be required if they are to be able to contribute in any meaningful way.

Part Three:

Key Employee Relations Considerations

This Directive has significant consequences for the employer-employee relationship. How companies manage its implication will have reputational consequences.

As with much European legislation of late, such as the Directive on an Adequate Minimum Wage with its provisions on collective bargaining coverage, and the decision that competition law should not prevent gig economy workers from organising and bargaining collectively, the Directive further reinforces the concept of, and need for, employee representation. If the pay numbers suggest unfairness, management is required to bring in workers' representatives. The suggestion is that employers, left to themselves, will not take the necessary steps to close the gap.

Sound employee relations are built on clear expectations. Employees have a right to understand what is expected of them and what they can expect from their employer. Expanding the new hire conversation about "where you fit in organizationally" to include "where you fit in from a compensation perspective" will give the additional clarity about their potential role and future opportunities to prospective employees that may not exist today.

How an employer manages compliance with this Directive will influence its reputation with its employees and in the employment marketplace. And with the increasingly socially conscious inventor community.

A choice needs to be made. Do we do the minimum, tick box exercise to comply with the new Directive, or do we use it as an opportunity to dig into our pay structures and finally root out unjustified gender pay discrepancies? Do we assume responsibility for the gaps, "own" the story, and proactively seek to mitigate inequalities? The choice is ours. Whatever a company decides, in the future pay will be visible, personal, and a quantified indicator of fairness for workers.

With three years+ before reporting requirements commence, employers have an opportunity now to assess their exposure and to take appropriate action to minimize unexplained inequality between the genders. Employers have several years to assess and address concerns that will need to be addressed in consultation with employees' representatives once the regulations become effective.

Understand the data. Build the story. Engage employees around transparency and pay equality on terms that go with the grain of your company culture.

Be ahead of the game.

Appendix – Expanded Details and Analyses

Issue One - The Scope of the Directive – Who is a Worker?

The directive applies to *all* workers who have an employment contract *or* employment relationship as defined by law, collective agreements and/or practice in force in each Member State with consideration of the case-law of the Court of Justice. [Article 2.2]

What this means is clarified in Recital 11 which reads:

> This Directive should apply to all workers, including part-time workers, fixed-term contract workers or persons with a contract of employment or employment relationship with a temporary agency, as well as workers in management positions, who have an employment contract or employment relationship as defined by the law, collective agreements and/or practice in force in each Member State, taking into account the case-law of the Court of Justice of the European Union ('the Court'). Provided that they fulfil relevant criteria, domestic workers, on-demand workers, intermittent workers, voucher based-workers, platform workers, workers in sheltered employment, trainees and apprentices fall within the scope of this Directive. The determination of the existence of an employment relationship should be guided by the facts relating to the actual performance of the work and not by the parties' description of the relationship.

This has obviously been written with a close eye on another piece of European legislation under consideration which will set out a framework for determining the employment status of gig economy and digital platform workers.

Recital 3(a) clarifies that the Directive will also apply to people who have changed their gender:

> The Court of Justice has held that the scope of the principle of equal treatment for men and women cannot be confined to the prohibition of discrimination based on the fact that a person is of one or other sex.2 In view of its purpose and the nature of the rights which it seeks to safeguard, it also applies to discrimination arising from the gender reassignment of a person.

The law will not only apply to employees but, as Article 2a says relevant parts of it will also apply to "applicants for employment." Employers will be obliged to publish salary information about the job on offer and it will be illegal to ask candidates about their previous pay history.

Issue Two – What is Pay, "Equal Pay", and Reparation?

"Pay" is comprised of all compensation and benefits in the form of "wage or salary and any other consideration, whether in cash or in kind…" (Recital 13). The directive casts a wide net, including:

> …not only salary, but also complementary or variable components of the pay. Under complementary or variable components, any benefits in addition to the ordinary basic or minimum wage, which the worker receives directly or indirectly, whether in cash or in kind, should be considered. These may include but are not limited to bonuses, overtime compensation, travel facilities, housing and food allowances, compensation for attending

> training, payments in case of dismissal, statutory sick pay, statutory required compensation and occupational pensions. It should include all elements of remuneration due by law, collective agreement and/or practice in force in each Member State.

Assessing pay equality must be done in concert with workers' representatives. Article (8)2 says, "The accuracy of the information shall be confirmed by the employer's management, following consultation of workers' representatives who shall have access to the methodologies applied." The word "methodologies" is a Pandora's Box which suggests the need to disclose the use of AI and algorithms in pay decision making, as well as details of job evaluation and grading systems.

A five percent gap between genders triggers action. A joint pay assessment "…to identify, remedy and prevent differences in pay" will be required under Article 9 if:

a. the pay reporting conducted in accordance with Article 8 demonstrates a difference of average pay level between female and male workers of at least 5 per cent in any category of workers;

b. the employer has not justified such difference in average pay level by objective and gender-neutral criteria, (and)

c. the employer has not remedied such unjustified difference in average pay level within six months of the date of submission of the pay reporting in accordance with Article 8.

Since action is required for gaps of five or more percent, we can take it that gaps of less than five percent between genders within a grade or job category constitutes "equal pay".

When it is found that an employee has been the victim of pay discrimination, then they will be entitled to appropriate "…compensation or reparation (that would) place the worker who has suffered harm in the position in which that person would have been if he or she had not been discriminated against…" Art. 14(3)

Recital 36 explains what compensation should cover:

> Compensation should cover in full the loss and damage sustained as a result of gender pay discrimination. It should include full recovery of back pay and related bonuses or payments in kind, as well as compensation for lost opportunities (such as access to certain benefits depending on pay level) and moral prejudice (such as moral suffering from the undervaluation of work performed). Where appropriate, the compensation can take into account harm caused by pay discrimination based on sex that intersects with other protected grounds of discrimination. No prior fixed upper limit for such compensation should be allowed.

Article 14 spells it out:

> 14:3 The compensation or reparation shall place the worker who has suffered harm in the position in which that person would have been if he or she had not been discriminated against based on sex or if no infringement of any of the rights or obligations relating to equal pay. Member States shall ensure that the compensation or reparation includes full recovery of back pay and related bonuses or payments in kind, compensation for lost opportunities, moral prejudice, any harm caused by other relevant factors which may include intersectional discrimination, as well as interest on arrears.

> 14:4 The compensation or reparation may not be restricted by the fixing of a prior upper limit (*i.e., no ceilings on backdating or additional compensatory payments).*

Where a *prima facie* case of pay discrimination is made, then the burden of proof to rebut that falls on the employer. Failure to follow the pay transparency reporting requirements creates an assumption of guilt and puts the employer on the defensive.

Recital 38

> Following the case law of the Court18, Directive 2006/54/EC establishes provisions to ensure that the burden of proof shifts to the defendant when there is a prima facie case of discrimination. Nevertheless, it is not always easy for victims and courts to know how to establish even that presumption. In the Case C-109/88 (Danfoss case) the Court held that when a system of pay is totally lacking in transparency, the burden of proof should be shifted to the defendant, irrespective of the worker showing a prima facie case of pay discrimination. This should in particular be the case when the employer did not comply with the pay transparency obligations under Articles 5 to 9 of this Directive, for instance refusing to provide information requested by the workers or not reporting on gender pay gap, where relevant. This should not apply where the employer proves that the infringement of those obligations was manifestly unintentional and of a minor character.

Article 16:2

> Member States shall ensure that, in judicial or administrative proceedings regarding alleged direct or indirect pay discrimination, where an employer did not implement the pay transparency obligations as set out in Articles 5 through 9 of this Directive, it shall be for the employer to prove that there has been no such discrimination. This shall not apply where the employer proves that the infringement of the obligations set out in Articles 5 through 9 was manifestly unintentional and of a minor character.

Issue Three – Data and Comparators

Employers within scope of the Directive will be obliged to report annually on gender pay statistics. For now, employers with less than 250 employees will only be required to report every three years.

Article 8.1 sets out what will be required.

> 1. Employers shall provide the following information concerning their organisation, in accordance with this article.
>
> (a) the gender pay gap
>
> (b) the gender pay gap in complementary or variable components;
>
> (c) the median gender pay gap;
>
> (d) the median gender pay gap in complementary or variable components;
>
> (e) the proportion of female and male workers receiving complementary or variable components;
>
> (f) the proportion of female and male workers in each quartile pay band;

> *(g)* the gender pay gap between workers by categories of workers broken down by ordinary basic salary and complementary or variable components

The pay analysis will have to be done by category of worker. Article 3 1(g) reads

> 'category of workers' means workers performing the same work or work of equal value grouped in a non-arbitrary manner and based on gender neutral criteria referred in Article 4(3) of this Directive, by the workers' employer and where applicable in cooperation with the worker's representatives in accordance with the national law and/or practice in each Member States.

The analysis will need to be done in granular detail by category. Company-wide data will not suffice.

It has long been clear in European law that where women and men do the same job they must be paid the same. What causes difficulties is the concept of "work of equal value". For example, is the work of a supermarket checkout cashier, who are predominantly female, of equal value to warehouse workers, who are predominantly men? Further, what criteria are to be used to determine equal value?

Further, what happens if there is no recognisable comparator? Which is what can happen when an occupation is predominantly female, such as some of the caring professions. Because an occupation is predominantly female, does it drive down pay?

The new Directive faces these issues head-on. On the concept of equal value, Article 3 1 (fa) notes

> 'work of equal value' means work that is determined to be of equal value in accordance with the non-discriminatory and objective gender-neutral criteria referred to in Article 4(3);

Article 4.3 sets out these criteria:

> Pay structures shall enable the assessment of whether workers are in a comparable situation in regard to the value of work on the basis of objective, gender-neutral criteria agreed with workers' representatives where these exist. These criteria shall not be based, whether directly or indirectly, on workers' sex. These objective criteria shall include:
>
> - skills,
> - effort,
> - responsibility,
> - working conditions, and,
> - if appropriate, any other factors which are relevant to the specific job or position.
>
> These criteria shall also be applied in an objective gender-neutral manner, excluding any direct or indirect discrimination based on sex. In particular, it shall be ensured that relevant soft skills are not undervalued.

To say that all of this is crystal-clear would be somewhat of an overstatement. It invites disputes and litigation. What, for example, are "soft skills"? Define them? Measure them. Which is not to say that there is consensus on what constitutes skills, effort, responsibility, and working conditions. Never mind what other "factors" are to be taken into consideration. If the employer wants to add other criteria, performance for example, this will have to be agreed with employees' representatives, where they exist.

Despite claims to the contrary, there is no scientific way to measure the worth of a job. It is always a matter of subjective judgement and negotiation between the parties, reflecting social and cultural values, not to mention economic leverage.

The language in the new Directive does not change that reality.

Claims of pay discrimination always turn on comparisons. "I am paid less than him because I am a woman and he is a man". Clear enough when both men and women are doing the same job. Less clear, when questions of "equal value" come into play.

It becomes even more complicated when a profession is predominantly female and there is no clear male comparator. Enter the concept of the "hypothetical comparator".

Recital 16 introduces the concept (our underlining):

> The identification of a valid comparator is an important parameter in determining whether work may be considered of equal value. It enables the worker to show that they were treated less favourably than the comparator of a different sex performing equal work or work of equal value. Building on the developments brought by the definition of direct and indirect discrimination in Directive 2006/54/EC, in situations where no real-life comparator exists, the use of a hypothetical comparator should be allowed, allowing a worker to show that they have not been treated in the same way as a hypothetical comparator of another sex would have been treated. This would lift an important obstacle for potential victims of gender pay discrimination, especially in highly gender-segregated employment markets where a requirement of finding a comparator of the opposite sex makes it almost impossible to bring an equal pay claim. In addition, workers should not be prevented from using other facts from which an alleged discrimination can be presumed, such as statistics or other available information. This would allow gender-based pay inequalities to be more effectively addressed in gender-segregated sectors and professions especially in female dominated ones such as the care sector.

Article 16(a) 3 does not use the word "hypothetical" but, in light of Recital 16, it can be read into it.

> In a situation where no real comparator can be established, it shall be allowed to use any other evidence to prove alleged pay discrimination, including statistics or a comparison of how a worker would be treated in a comparable situation.

The language of 16:3 is clumsy and there appears to be a word missing before "worker" in the last line, but the intention is clear, especially in light of the language in Recital 16. As if "hypothetical comparator" was not complicated enough, Recital 17 introduces a further twist:

> The Court has clarified that in order to compare whether workers are in a comparable situation, the comparison is not necessarily limited to situations in which men and women work for the same employer. Workers may be in a comparable situation even when they do not work for the same employer whenever the pay conditions can be attributed to a single source setting up those conditions and where these conditions are equal and comparable. This may be the case when the relevant pay conditions are regulated by statutory provisions or agreements relating to pay applicable to several employers, or when such conditions are laid down centrally for more than one organisation or business within a holding company or conglomerate. Furthermore, the Court clarified that the comparison is not limited to workers employed at the same time as the claimant. Additionally, when performing the actual

> assessment, it should be recognized that a difference in pay may be explained by factors unrelated to sex.

Article 16 (a) 1 and 2 sets this out clearly:

> 1. When assessing whether female and male workers are carrying out the same work or work of equal value, the assessment of whether workers are in a comparable situation shall not be limited to situations in which female and male workers work for the same employer but shall be extended to a single source establishing the pay conditions. A single source exists when it stipulates the elements of pay relevant for comparison of workers.
>
> 2. The assessment of whether workers are in a comparable situation shall also not be limited to workers employed at the same time as the worker concerned.

16.(a) 2 underscores that comparison can be made with people who used to be employed but no longer are.

What are the implications of this for multinational companies which may have multiple divisions and which will now be obliged to make data on gender pay differentials public. Could this result in cross-division equal pay claims based on the concept of equal value?

Where does it leave companies covered by sectoral agreements? Could it give rise to equal pay claims between different companies? Probably not, but where there is an ambiguous clause in a law, there is always a lawyer.

Issue Four – Information and Consultation

The involvement of workers' representatives starts from the moment a worker believes they may be the victim of pay discrimination.

Recital (13b)

> In order to protect workers and to address a fear of victimisation in the application of the principle of equal pay, workers should be able to be represented by a representative. This could be trade unions or other workers' representatives. If there are no workers' representatives, workers should be able to be represented by a representative of their choice. Member States should have a possibility to take into account national circumstances and different roles concerning workers' representation.

It is further elaborated on in Recital 24.

> All workers should have the right to obtain information, upon their request, on their pay and on the average pay level, broken down by sex, for the category of workers doing the same work or work of equal value. They should have the possibility to receive the information also through their representatives or the equality body. Employers should inform workers of this right on an annual basis as well as the steps to be taken in order to exercise that right. Employers may also, on their own initiative, opt for providing such information without workers needing to request it.

What this will mean is further clarified in Article 7.

Article 7 1 (a)

> Workers shall have the possibility to request and receive the information referred to in paragraph 1 through their representatives, in accordance with national law and/or practice. They shall also have the possibility to request and receive the information through an equality body. If the information is inaccurate or incomplete, the worker shall, personally or through their workers' representatives, have the right to request additional and reasonable clarifications and details regarding any of the data provided and receive a substantiated reply.

Where the data produced by an employer shows a pay gap of more than 5% the need for a joint pay assessment may be triggered.

Recital 29

> Joint pay assessments should trigger the review and revision of pay structures in organisations with at least 100 workers that show pay inequalities. The joint pay assessment should be carried out if employers and workers' representatives do not agree that the difference in average pay level between female and male workers of at least 5% can be justified by objective and gender-neutral criteria or if such a justification is not provided by the employer. The joint pay assessment should be carried out by employers in cooperation with workers' representatives; if there are no workers' representatives, they should be designated by workers for this purpose. Joint pay assessments should lead, within a reasonable time, to the elimination of gender discrimination in pay through the adoption of remedial measures. (Our underlining).

Article 9 says that the joint pay assessment may be avoided if a number of conditions are not met.

> 1. Member States shall take appropriate measures to ensure that employers subject to pay reporting pursuant to Article 8 conduct, in cooperation with their workers' representatives, a joint pay assessment where all the following conditions are met:
>
> (a) the pay reporting conducted in accordance with Article 8 demonstrates a difference of average pay level between female and male workers of at least 5 per cent in any category of workers;
>
> (b) the employer has not justified such difference in average pay level by objective and gender-neutral criteria.
>
> (ba) the employer has not remedied such unjustified difference in average pay level within six months of the date of submission of the pay reporting in accordance with article 8.

As noted earlier, the idea that decades old pay gaps could be closed in six months is somewhat far-fetched. Trying to justify pay gaps by objective and gender-neutral criteria will be something of an uphill struggle.

The average gender pay gap across Europe is 13%. This implies that gaps of 5% are widespread. It seems to us that this means that joint pay assessments could also be widespread as will be the election of "pay committees". How representation gaps are to be filled will be a matter for national law. For example, existing Spanish law says that where there are no workers representatives in a company, officials from the recognised sectoral unions will represent them, even if the unions have no members in the company.

Companies, and employers' associations, will need to pay close attention to how this matter is dealt with in national transposing laws. Article 9 goes on to outline what is expected of the joint pay assessment:

> 2. The joint pay assessment shall be carried out in order to identify, remedy and prevent differences in pay between female and male workers which cannot be justified by objective and gender-neutral factors and shall include the following:
>
> (a) an analysis of the proportion of female and male workers in each category of workers;
>
> (b) information on average female and male workers' pay levels and complementary or variable components for each category of workers;
>
> (c) identification of any differences in average pay levels between female and male workers in each category of workers;
>
> (d) the reasons for such differences in average pay levels and objective, gender-neutral justifications, if any, as established jointly by the workers' representatives and the employer;
>
> (da) the proportion of female and male workers who benefited from any improvement in pay following their return from maternity or paternity leave, parental leave, and carers leave, if such improvement occurred in the category of workers during the period that the leave was taken;
>
> (e) measures to address such differences if they are not justified on the basis of objective and gender-neutral criteria;
>
> (f) an evaluation of the effectiveness of measures from previous joint pay assessments.

To say the least, this is not something that can be done in an afternoon, or at one meeting! It will take considerable time and effort. And, as already noted, employees' representatives will need significant training if they are to make a meaningful contribution to the discussions.

The results of the joint pay assessment are to be made available to workers, workers' representatives and to relevant pay bodies. (Article 9:3).

> Employers shall make the joint pay assessments available to workers, workers' representatives and communicate them to the monitoring body pursuant to Article 26, paragraph 3, point (d). The joint pay assessment shall be made available to the equality body and labour inspectorate upon their request.

Article 9:4 goes on to spell out what is involved in implementing the outcome of the joint pay assessment.

> When implementing the measures from the joint pay assessment, the employer shall remedy the unjustified pay differences within a reasonable period of time, in close cooperation, in accordance with national law and/or practices, with the workers' representatives. The labour inspectorate and/or equality body may be asked to participate in the process. Such action shall include the analysis of the existing gender neutral job evaluation and classification systems or establishment where it's missing to ensure that any direct or indirect pay discrimination on grounds of sex is excluded.