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ARAŞTIRMA MAKALESİ / RESEARCH ARTICLE

Analysis of Directive (EU) 2023/970 on Pay Transparency in Comparison with Turkish and German Law

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Abstract

Adopted on May 10, 2023, Directive (EU) 2023/970 aims to enforce equal pay for equal work or work of equal value between men and women through pay transparency and enforcement mechanisms. Member states must transpose this directive by June 7, 2026. It builds on longstanding EU principles of equal pay, addressing implementation challenges by emphasising transparency to prevent gender-based discrimination. Employers must provide information on pay levels and criteria for pay progression. German law, under the Pay Transparency Act enacted in 2017, aligns with the principles set out in the Directive but requires updates for full compliance, while Turkish law lacks provisions equivalent to the Directive's transparency measures. In contrast, German and Turkish law generally comply with the Directive's legal regime regarding the shift of the burden of proof. According to the Directive, the burden of proof shifts to employers once prima facie evidence of discrimination is presented. However, failure to meet transparency obligations further shifts this burden without needing prima facie evidence. This solution is not applicable in Turkish law, since there is no transparency regulation requiring the employer to provide employees with pay information. Furthermore, the Directive mandates comprehensive compensation for discrimination, including non-material damages. Member States must implement effective, proportional penalties and may impose structural workplace changes or exclusion from public tenders for repeated violations. Given that Turkish labour law also emphasises equal treatment but lacks specific transparency measures, aligning with Directive (EU) 2023/970 would enhance transparency and employee empowerment in Turkey.

Keywords

Equality, Gender Pay Gap, Pay Transparency, EU Law, Compensation

Türk ve Alman Hukukuyla Karşılaştırmalı Olarak Avrupa Birliği'nin Ücret Şeffaflığına İlişkin 2023/970 Sayılı Direktifi Üzerine Bir İnceleme

Öz

(AB) 2023/970 sayılı Direktif, 10 Mayıs 2023 tarihinde, eşit veya eşit değerdeki işi gören kadın ve erkekler arasındaki eşitliğin güçlendirilmesi amacıyla kabul edilmiştir. Direktif uyarınca üye devletler ulusal mevzuatlarını en geç 7 Haziran 2026 tarihine kadar Direktif hükümleri ile uyumlaştırmak zorundadırlar. Direktif'in amacı, yasal düzlemde yıllardan beri benimsenmekle birlikte uygulanmasında güçlük yaşanan ücrette eşitlik ilkesinin çeşitli mekanizmalar vasıtasıyla uygulamada da hayata geçirilmesinin sağlanmasıdır. Direktif ile işverenlere ücret düzeyleri ile ücret ilerlemesine ilişkin bilgi sağlama zorunluluğu getirilmiştir. Ücret şeffaflığı Alman hukukunda 2017 yılında yürürlüğe giren Ücrette Şeffaflık Kanunu ile düzenlenmiş olmakla birlikte Direktif hükümlerine uyum sağlanmasını teminen bazı yasal değişikliklerin yapılması gerekmektedir. Türk iş hukukunda ise ücret şeffaflığını düzenleyen bir hüküm bulunmamaktadır. Buna karşılık, her iki hukuk sistemi de Direktif'in ispat yükünün yer değiştirmesine ilişkin öngördüğü hukukî rejimle uyumlu düzenlemeler içermektedir. Buna göre, işçinin ilk görünüş ispatı itibarıyla ayrımcılığa uğradığına kanaat getirilmesi hâlinde, aksini işveren ispatlamak zorundadır. Öte yandan, ücret şeffaflığına ilişkin getirilen zorunluluklara uyulmaması

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durumunda, gerek Alman hukukunda, gerekse Direktif uyarınca işçinin ilk görünüş ispatına sevk olmasına dahi gerek olmaksızın ispat yükü yer değiştirmektedir. Türk hukukunda ise işverenin işçiye ücret şeffaflığı sağlama borcunun düzenlenmediği dikkate alındığında, işçiye şeffaflık sağlanmamış olması tek başına ispat yükünün yer değiştirmesine sebep olmayacaktır. İlaveten, Direktif cinsiyete dayalı ayrımcılık karşısında kamu ihalelerinden yasaklanmaya kadar kapsamlı tedbirler öngörmektedir. Öte yandan, Türk hukukunda da ücrette cinsiyet eşitliği benimsenmekle birlikte Direktif'te öngörülen hukukî rejim kadar kapsamlı mekanizmalar bulunmamaktadır. Neticeten, bu çalışmada, ücret şeffaflığının Türk hukukunda da benimsenmesinin işçinin hukukunu güçlendirici etkisi olduğu ifade edilerek şeffaflık düzenlemelerine ihtiyaç olduğu savunulmaktadır.

Anahtar Kelimeler

Eşitlik, Kadın-Erkek Arasında Ücret Eşitsizliği, Ücret Şeffaflığı, AB Hukuku, Tazminat

Extended Summary

Directive (EU) 2023/970, adopted on May 10, 2023, aims to enhance the principle of equal pay for equal work or work of equal value between men and women through pay transparency and enforcement mechanisms. This Directive shall be transposed by the Member States by June 7, 2026. The Directive seeks to address the longstanding principle of equal pay, which faces implementation challenges, by introducing pay transparency as a core mechanism to prevent gender-based discrimination.

The principle of equal pay was established by the Treaty of Rome in 1957. Various directives have since been adopted, including Directive 75/117/EEC in 1975, which emphasised administrative and judicial mechanisms for addressing discrimination but lacked provisions on the burden of proof. This was addressed by Directive 97/80/EC in 1997, which shifted the burden of proof to employers in cases of gender discrimination. Directive 2006/54/EC further reinforced these principles and highlighted the need for equality bodies. Directive 2023/970 builds on these by emphasising pay transparency and proactive measures against discrimination.

The Directive applies to all employers and includes provisions for job applicants. It identifies transparency as crucial for achieving gender equality, addressing the barriers to recognising and proving pay discrimination. Pay includes base wages, bonuses, allowances, and other benefits. Justifiable pay differences must be based on justifiable criteria, such as skills, effort and working conditions. Transparency implies openness, accountability, and communication. It includes collective measures such as pay reporting and individual measures like employee rights to access pay information. Employers must provide information on pay levels and criteria for pay progression. Job applicants must also receive information on initial pay or pay ranges, promoting informed decision-making, and demonstrating gender-neutral pay criteria. Additionally, pay reports must include gender-based pay differences, quartile distributions, and the proportion of employees receiving supplements, with varying requirements based on employer size.

German law mandates median earnings disclosure for comparison groups, whereas Turkish law lacks such provisions. Enacted in 2017 to align with Directive 2006/54/EC, the German Pay Transparency Act also aims to eliminate gender pay disparities. Employers with more than 500 employees must prepare a pay report every three years (or every five years if bound by a collective agreement). This report must outline measures taken to ensure gender equality and pay equality, as well as the average number of employees by gender and full/part-time status. On the other hand, the Directive requires more frequent and detailed pay reports, applicable to employers with at least 100 employees, covering gender pay differences, median pay levels and the proportion of employees receiving supplements.

In German law, employees have the right to request information about their wages and the pay elements. The employer must also provide the median earnings of the comparison group. The obligation to provide information applies to workplaces with more than 200 employees. Requests can be made every two years. The Directive, on the other hand, does not limit the information request period, whereas German law imposes a two-year interval. In addition, German law lacks provisions equivalent to the Directive's transparency on pay progression criteria.

The burden of proof shifts to employers if an employee demonstrates prima facie evidence of discrimination. If employers fail to meet transparency obligations, they must prove the absence of discrimination without requiring prima facie evidence from the employee. This principle has been reinforced by past CJEU rulings, and German law practices comply with it.

Compensation for gender-based pay inequality must cover all damages, including non-material damage. Member states must ensure effective, proportional and deterrent penalties, potentially including structural workplace changes and exclusion from public tenders for repeated violations. Turkish law also emphasises equal treatment but lacks specific transparency measures. The law provides limited compensation for discrimination and lacks provisions for suspending or interrupting the period of limitation in employment. Aligning Turkish practices with the Directive would enhance transparency and empower employees.

Pay transparency must not violate personal data laws. Whereas the Directive mandates that employers cannot seek job applicants' previous pay information unless relevant to the job, this issue raises different opinions in Turkish doctrine.

In conclusion, Directive (EU) 2023/970 strengthens the principle of equal pay through transparency, building on nearly seventy years of EU law. It introduces innovative measures, such as employee access to pay information and simplified burden of proof, aiming to foster a sociocultural shift towards valuing workers and

ensuring gender equality in pay. German law requires adjustments to fully align with the Directive, while Turkish law could benefit from adopting similar transparency measures to balance employer-employee power dynamics.

Introduction

In recent years, the principle of equality has been gaining momentum in European Union law.[1] As a result of increasing attention to this principle, the European Parliament and the Council of the European Union adopted a new directive on 10 May 2023, aimed at strengthening this principle in the field of gender equality, specifically in the context of equal pay for equal work or work of equal value[2]. Directive (EU) 2023/970 ('Directive') came into force on 6 June 2023[3]. Member States, at the latest, must transpose the provisions of the Directive into their national legislation by 7 June 2026[4].

The purpose of the Directive is to ensure that the principle of equal pay, which has been adopted at the legal level for many years but faces difficulties in implementation, is effectively applied in practice[5]. Building upon the longstanding principle of equal pay adopted in EU law, the Directive strengthens this principle through various mechanisms, such as pay transparency, which is the core aspect of this study, serving as a method of preventing gender-based discrimination.

It should be noted that in Turkish labour law, there is no equivalent provision for pay transparency as expected in the Directive. Therefore, analysing the key provisions adopted in Directive (EU) 2023/970, particularly those concerning pay transparency, will contribute to prospective discussions on pay transparency within the framework of Turkish labour law heightening public awareness, which, in turn, has the potential of leading to regulatory action.

I. Brief History of EU Labour Law in the context of the Principle of Equal Pay and Pay Transparency

The principle of equal pay highlighted in the Directive has been one of the fundamental principles shaping European Union law for the prevention of gender-based discrimination[6]. This principle was initially established on a positive legal

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1 See Sara Benedi Lahuerta, 'EU Transparency Legislation to Address Gender Pay Inequity: What is on the Horizon and its Likely Impact in Ireland' (2022) 24 Irish Journal of European Law, 161, 161.

2 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 [2023] OJ L132/21. See also Merve Kutlu Mutluer, 'Şeffaf ve Öngörülebilir Çalışma Koşulları: 2019/1152 Sayılı Avrupa Birliği Direktifi ve Türk İş Hukukunda İşverenin Çalışma Koşulları Hakkında İşçilere Bilgi Verme Yükümlülüğü' (2024) 28(2) Ankara Hacı Bayram Veli Üniversitesi Hukuk Fakültesi Dergisi 81, 103 ff.

3 Directive (n 2) Art 36.

4 Ibid. Art. 34.

5 Stefanie Jung, 'Die EU–Entgelttransparenz–Richtlinie: Eckpunkte und Umsetzungsspielräume' (2024) 2 Recht der Arbeit 89, 89; Regine Winter, 'Den Anforderungen der EU-Entgelttransparenzrichtlinie bald nackommen – Die Zeit läuft' (2024) 1 Neue Zeitschrift für Arbeitsrecht 8, 8.

6 Zeynep Günder and GamzeAşçıoğlu Öz, 'Avrupa Birliği Cinsiyet Eşitliği İlkesi Perspektifinden Türk Sosyal Güvenlik Sistemi' (2020) 20(48) Sosyal Politika Çalışmaları Dergisi 601, 605.

basis in the formation of the European Economic Community by the Treaty of Rome[7] in 1957[8]. Article 119 of the Treaty stipulates that Member States shall ensure that women and men receive equal compensation for equal work[9].

Since 1957, the Council of Europe has issued various directives addressing gender equality from different perspectives[10]. However, the first directive specifically addressing equal pay was adopted in 1975. Council Directive 75/117/EEC[11] generally emphasised the need for access to administrative and judicial mechanisms for employees alleging discrimination. However, it did not include provisions on the burden of proof for claims of discrimination.

The legal regime concerning the burden of proof in cases of gender-based discrimination was established in Council Directive 97/80/EC[12]. This directive cited the case law of the Court of Justice of the European Union ('CJEU') that once initial evidence suggests an employee has experienced discrimination, the burden of proof shifts to the employer to demonstrate the absence of discrimination[13]. Accordingly, it was stipulated that member states should create provisions where, if an employee provides evidence that indicates discrimination, the burden of proof shifts to the employer[14].

Through another directive adopted in 2006, Directive 75/117/EEC and Directive 97/80/EC were repealed and replaced, effective from 2009 onwards. Directive

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7 See Vertrag Zur Gründung Der Europäischen Wirtschaftsgemeinschaft <https://eur-lex.europa.eu/legal-content/DE/TXT/PDF/?uri=CELEX:11957E/TXT> accessed 24.07.2023.

8 Benedi Lahuerta (n 1) 163; Kübra Doğan Yenisey, 'Kadın-Erkek Eşitliği Bakımından Türk İş Hukuku'nun Avrupa Birliği Hukuku ile Olası Uyum Sorunları' (2002) 6(4) Kamu-İş 31, 51. The author describes Article 119 of the Treaty of Rome as the 'starting point of EU Equality Law.' For explanations on Article 119 of the Treaty of Rome and economic reasons for the legal establishment of the principle of pay equality, see also Pelin Kılınçarslan, 'Avrupa Birliği Toplumsal Cinsiyet Eşitliği Politikaları: Başlangıcından Günümüze Bağlamsal Bir İnceleme' (2024) 23(1) Ankara Avrupa Çalışmaları Dergisi 129, 133. At the European Union level, let us note that the Treaty on the European Union, which establishes the Union, includes provisions in Articles 2 and 6 supporting gender equality in working conditions, particularly in the context of the principle of equal pay.

9 For the European Commission's recommendation dated 24.07.1960, which states that the 'equal work' referred to in Article 119 of the Treaty of Rome should be interpreted as including 'work of equal value', see Nilgün Tunçcan Ongan 'AB'nin Kadın-Erkek Eşitliğine İlişkin Direktifleri', (2003) 53(1) İstanbul Üniversitesi İktisat Fakültesi Mecmuası 91, 94. Additionally, it should be noted that the Treaty of Rome was renamed as 'the Treaty on the Functioning of the European Union' ('TFEU') after its amendment by the Treaty of Lisbon in 2009. According to Article 157 of the TFEU, Member States must ensure equality between men and women in terms of equal work or work of equal value.

10 For a comprehensive list of the Council Directives, case-law of the Court of Justice of the European Union and other EU initiatives regarding gender equality, see Andreea Simona Chifan and Tania Da Silva Azevedo, 'Equality Between Men and Women' (*Fact Sheets on the European Union*, May 2024), accessed 23 July 2024. For general explanations about the relevant directives, see also Ertuğrul Yuvalı, *İşçinin Kişisel Özellikleri Bakımından İşverenin Eşit Davranma Borcu* (Turhan 2012) 26 ff; Günder and Aşçıoğlu Öz (n 6) 609-610; Kılınçarslan (n 8) 134 ff; Gonca Aydınöz, 'Avrupa Birliği ve ATAD Kararları Çerçevesinde Ayrımcılık Yasağı ve Ayrımcılığın İspatı' (2009) 3(22) Çalışma ve Toplum Dergisi 163, 165 ff.

11 Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women [1975] OJ L45/19.

12 Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex [1997] OJ L14/6.

13 See recital of Directive 97/80/EC para 18.

14 Directive 97/80/EC Art 4.

2006/54/EC[15] reaffirmed the need for employees accusing of discrimination to have access to competent authorities[16]. Additionally, in line with the case-law of the CJEU, it emphasised that there should be no predetermined upper limit on compensation in cases of gender-based discrimination[17]. Furthermore, it encouraged member states to promote dialog with social partners to ensure the application of the principle of equality. It also mandated the establishment of equality bodies by member states to enhance dialog[18].

The Directive (EU) 2023/970, which forms the subject of this analysis, did not repeal its predecessor Directive 2006/54/EC; instead, it introduced new regulations with a proactive approach towards combating gender-based discrimination in terms of pay[19]. The detailed regulation on 'pay transparency' outlined in the Directive is a product of this proactive stance.

As a matter of fact, this proactive stance has been in in the making for over a decade. In its 2013 report[20] on the implementation of Directive 2006/54/EC, the European Commission noted that the practical enforcement of equal-pay provisions was one of the most challenging aspects of the directive. It pointed out that unclear pay structures and insufficient information on the wages of employees performing similar work or work of equal value significantly contributed to the gender pay gap. To address this issue, the European Commission issued a 2014 recommendation urging Member States[21] to implement specific measures to enhance pay transparency.

The efforts of the European Commission proved fruitful, leading to the release of a proposed directive[22] to strengthen the application of the principle of equal pay. This, in turn, resulted in the adoption of Directive (EU) 2023/970, which provides a

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15 Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation [2006] OJ L204/23. For detailed information on the Directive 2006/54/EC and the case-law of the CJEU, see Fahrettin Korkmaz and Nihat Seyhun Alp, '2006/54/AT Sayılı Direktif ve Avrupa Birliği Adalet Divanı Kararları Işığında İstihdam ve Meslek Konularında Kadın ve Erkek Arasında Eşit Davranılması ve Fırsat Eşitliğinin Sağlanması', (2016) 74(Prof. Dr. Fevzi Şahlanan'a Armağan Sayısı) İstanbul Üniversitesi Hukuk Fakültesi Mecmuası 529, 529 ff.

16 See Directive 2006/54/EC Art 17.

17 Ibid. Art 18.

18 Ibid. Art 20

19 Winter (n 5) 13.

20 Report on the application of Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52013DC0861>

21 Commission Recommendation of 7 March 2014 on strengthening the principle of equal pay between men and women through transparency [2014] OJ L69/112.

22 For the Proposal for a Directive of the European Parliament and of The Council 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, see <https://eur-lex.europa.eu/procedure/EN/2021_50> accessed 25 July 2024. For further information on the proposed directive, see Benedi Lahuerta (n 1) 166 ff; Peter A. Bamberger, *Exposing Pay: Pay Transparency and What It Means for Employees, Employers and Public Policy* (Oxford 2023) 29; Ayşe Gül Kökkılınç and Gözde Kaya, 'AB Hukukunda Kadın Erkek Arasında Ücret Eşitliği İlkesi: Güncel Gelişmeler Üzerine Bir İnceleme' (2022) 2(48) Sicil İş Hukuku Dergisi 86, 87 ff.

comprehensive set of measures that may serve as an effective toolkit for advancing towards the right direction in terms of the empowerment of employees.

II. Comparative Overview of the Directive (EU) 2023/970

The Directive consists of four sections comprising 37 articles. The Directive, which applies to all employers regardless of whether they are in the private or public sector, is applicable to individuals who work under an employment contract[23]. The Directive not only addresses current employees but also includes provisions for job applicants[24].

According to the recital of the Directive, gender equality is one of the fundamental values of the EU[25]. Member States must execute all policies and activities intended to eliminate gender inequality[26]. The prohibition of gender-based discrimination and gender equality must be implemented in all areas, including employment, work, and pay[27].

As mentioned earlier, the Directive adopts principles already existing in EU law before its adoption. However, it introduces new measures, particularly those aimed at ensuring equal pay as a method to eliminate gender-based discrimination. On the other hand, the Directive tackles gender-based discrimination only from the perspectives of pay equality and pay transparency. In this context, the Directive does not contain provisions addressing other negative practices such as the unequal distribution of workload between men and women in the workplace or the employment of women in lower-paid jobs compared to men[28].

The Directive emphasises that it adopts the principle of equality in terms of the remuneration of 'equal work' or 'work of equal value' within the context of gender equality[29]. However, it identifies obstacles to the real implementation of the principle of equal pay. In particular, the lack of transparency in the payment of wages for equal work or work of equal value and the legal ambiguity regarding what constitutes 'equal work' or 'work of equal value,' make it difficult to achieve gender equality[30]. Specifically, a lack of pay transparency can prevent employees from realising they are subjected to gender-based discrimination or make it difficult to prove discrimination claims. Therefore, measures need to be taken to ensure pay transparency. Legal

23 Directive (n 2) Art 2.

24 See ibid. Art 5.

25 Recital of Directive para. 2

26 Ibid para 3.

27 Ibid para 7.

28 Jung (n 5) 90.

29 Recital of the Directive para 10.

30 Ibid para 11.

regulations clarifying the concepts of 'equal work' or 'work of equal value,' mechanisms increasing transparency, and ensuring transparency not only for current employees but also for job applicants are considered among the measures that help to implement the principle of equal pay[31].

In German law, the issue of pay transparency, which is among the measures serving to eliminate gender inequality, is regulated by the 'Act to Promote Transparency in Pay Structures' (hereinafter 'Pay Transparency Act' or 'EntgTranspG'), which came into force in 2017[32]. The Act was enacted to implement the requirements laid down in Directive 2006/54/EC[33]. Of course, the provisions of the German General Equal Treatment Act[34] ('AGG') remain applicable in the context of the principle of equality[35]. However, the specific provisions of the Pay Transparency Act concerning gender-based pay inequality shall take precedence over the General Equal Treatment Act[36].

In Turkish labour law, however, there is no regulation requiring the provision of pay transparency, as arranged in the Directive. Article 5 of the Labour Code[37] stipulates that lower wages cannot be agreed upon based on gender for equal work or work of equal value. However, it is clear that this regulation does not meet the need for additional measures (e.g. pay transparency) to combat gender-based discrimination addressed by the Directive. In this regard, it should be noted that in Turkish labour law, there is no legal regulation requiring the employer to publish a pay report, as arranged in the Directive[38], and the employer is not obliged to provide information on pay differences to current employees upon request.

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31 Ibid paras 16 and 20.

32 For detailed information and discussions see İrem Yayvak Namlı, 'Almanya'da Yürürlüğe Giren Ücrette Şeffaflık Kanunu' (2017) 75(2) İstanbul Üniversitesi Hukuk Fakültesi Mecmuası 741, 741 ff. See also Ulaş Baysal, 'Kişisel Veri Olarak Ücret ve Ücretin Gizliliği' in Tankut Centel (ed), İş Hukukunda Genç Yaklaşımlar III (On İki Levha 2018) 332 ff; Dilek Dulay Yangın, 'Ulusalüstü Hukukta Eşit Değerde İş İçin Eşit Ücret İlkesi' (2018) 15(59) Legal İş Hukuku ve Sosyal Güvenlik Hukuku Dergisi 829, 848 ff.

33 Thomas Kania, 'Entgelttransparenz' in Wolfdieter Küttner and Jürgen Röller (eds), Personalbuch (31st edn, C. H. Beck 2024) 1.

34 This Act was adopted in accordance with European Union Directives 2000/43/EC, 2000/78/EC, 2002/73/EC and 2004/113/EC and came into force in 2006. See Peter A. Windel, 'Aktuelle Beweisfragen im Antidiskriminierungsprozess' (2011) 4 Recht der Arbeit 193, 196; Heinz-Josef Willemsen and Ulrike Sceweibert, 'Schutz der Beschäftigten im Allgemeinen Gleichbehandlungsgesetz' (2006) 36 Neue Juristische Wochenschrift 2583, 2583; Wolfgang Schaffert, 'UWG § 3a Rechtsbruch' in Peter W. Heermann and Jochen Schlingloff (eds), Münchener Kommentar zum Lauterkeitsrecht (3rd edn, C. H. Beck 2020) 36.

35 § 2 Abs. 2 EntgTranspG.

36 Kania (n 33) 2.

37 Code Number 4857 dated 22.05.2003 (OG 10.06.2003/25134).

38 It is worth noting that, pursuant to Article 4 of the Code, the Commission on Equal Opportunities for Women and Men, established by Law No. 5840, has the authority to request information from natural and legal persons regarding matters within its jurisdiction. However, if this request is not fulfilled, the Commission does not have the authority to impose any sanctions. See the Code on the Commission on Equal Opportunities for Women and Men, Code Number 5840 dated 25.02.2009 (OG 24.03.2009/27179).

III. Key Concepts in the context of the Directive

A. Pay and Equal Pay

In the context of the Directive, the term 'pay' is not limited to base wages. Any monetary or in-kind payment or benefit shall be carried out in accordance with the principle of equal pay[39]. The principle of equal pay covers a wide range of remuneration elements, including but not limited to, base wage, overtime wages, premiums, bonuses, allowances, and compensation[40]. Similarly, in German law, it is stated that in the framework of pay transparency regulations, pay in the context of pay equality should be understood in the broad sense[41]. According to § 5 Abs. 1 EntgTranspG, the term pay refers to monetary payments and in-kind payments. In this regard, the term 'pay' adopted in the German Pay Transparency Act is compatible with European Union regulations[42]. Likewise, in Turkish law, the term pay referred to in paragraphs 4 and 5 of Article 5 of the Labour Code is also pay in a broad sense. Therefore, it includes bonuses, premiums, and similar payments[43].

The Directive accepts that certain conditions may justify pay differences between employees performing the same duties. For the created differences to be considered lawful, different pay levels must be based on objective justifications[44]. Differences in pay may be justified by factors such as the requirement for different professional or educational qualifications for the work performed, and differences in skills, effort, responsibility, or working conditions among employees[45]. These criteria are considered independently of the employer's area of activity. Each criterion has a different weight in reaching the conclusion, depending on the characteristics of the sector or position in which the employee works. Additional criteria can be adopted, provided they are legitimate and are related to the duties performed by the employee[46]. In contrast, gender difference alone is not an objective criterion. In this context, job advertisements or job titles should be prepared in a gender-neutral manner[47].

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39 Directive (n 2) Art 3(1) (a). For the case law of the Court of Justice of the European Union that all components constituting remuneration are subject to separate scrutiny under the principle of equality, see also Gaye Burcu Yıldız, 'İşverenin Eşit Davranma Borcu', III. Çalışma Yaşamı Kongresi - Çalışma Yaşamının Güncel Sorunları ve İş Mevzuatı (İş Müfettişleri Derneği 2010) 311.

40 Recital of the Directive para 21.

41 Kania (n 33) 7; Yayvak Namlı (n 32) 753.

42 Christian Rolfs and Laura Lex, 'Die Entgelttransparenz-Richtlinie: Entgeltgleichheit zum Preis bürokratischer Überlastung?' (2023) (21) Neue Zeitschrift für Arbeitsrecht 1353, 1354.

43 9th CC of the Court of Cassation 9093/6337, 17.03.2021 <www.legalbank.net> accessed July 23, 2024.

44 For the objective reasons addressed by the Court of Justice of the European Union see Kadriye Bakırcı, *Uluslararası Hukuk AB ve ABD Hukuku ile Karşılaştırmalı İş Hukukunda Cinsiyet Ayrımcılığı Yasağı İlkesinin İstisnaları ve Objektif Haklı Nedenler* (Seçkin 2012) 123 ff.; Dulay Yangın, 'Eşit Ücret' (n 32) 855 ff.

45 Directive (n 2) Art 4(4).

46 Recital of the Directive para 26.

47 Directive (n 2) Art 5(3).

In terms of Turkish law, it is not a violation of the duty to treat employees equally for an employer to treat employees differently based on justifiable reasons, such as performance[48], education, or length of service[49]. Again, according to the Court of Cassation, an error in the accounting system that resulted in a higher pay for some employees in a workplace where many employees work should not be considered a violation of the duty to treat employees equally. The Court did not consider the employer's failure to demand the return of overpaid amounts to have been effective[50]. Note that the Court of Cassation's approach is in line with the essence of the Directive. Indeed, Article 18 of the Directive, titled 'shift of burden of proof', maintains the possibility that the employer's failure to fulfil the obligations set out in the Directive may be due to an unintentional, simple mistake.

B. Equal Work and Work of Equal Value

Although the concepts of 'equal work' and 'work of equal value' are fundamental to the principle of equal pay in EU law, no legislative definition of these concepts exists within the context of EU directives on pay equality. On the other hand, according to the settled case-law of the CJEU, the terms 'equal work,' 'same job,' and 'work of equal value' are purely qualitative, focusing exclusively on the nature of the work actually performed. Determining whether the employees in question perform 'equal work' or 'work of equal value' is a factual assessment to be made by the national courts. It is up to national courts to decide if equal value can be attributed to employees' activities, taking into consideration the true nature of the tasks they perform. It should be assessed whether they are in a similar situation by considering various factors such as the type of work, skills, efforts, responsibilities and working conditions.The mere classification of employees in the same job category under the relevant employment contract does not, by itself, establish that they are doing the same work or work of equal value[51].

The specified concepts are regulated in § 4 EntgTranspG in German law, and as seen from the wording of the mentioned Act, it is safe to say that German law complies with the CJEU's approach towards equal work and work of equal value. According

[48] If an employee is claimed to have been not given a raise due to poor performance, the claim must be substantiated by an objective performance evaluation. Otherwise, the employee's claim for pay or pay increase differences should be granted. See 9th CC of the Court of Cassation 22105/8242, 17.09.2020 <www.legalbank.net> accessed July 23, 2024.

[49] Grand General Assembly of Civil Chambers of the Court of Cassation 1795/954, 25.11.2020; 9th CC of the Court of Cassation 4817/2405, 26.01.2021; 9th CC of the Court of Cassation 7135/920, 14.01.2021 <www.legalbank.net> accessed 23 July 2024. Although not specific to gender-based discrimination, for other cases where different treatment is not considered as discrimination in general, see Art. 7 of the Law on the Human Rights and Equality Institution of Türkiye. For further information regarding the mentioned Law see Ömer Ekmekçi and Esra Yiğit, *Bireysel İş Hukuku Dersleri* (5th edn, On İki Levha 2023) 382 ff.

[50] 22nd CC of the Court of Cassation 22523/34254, 10.12.2015; 22nd CC of the Court of Cassation 22609/37217, 29.12.2014 <www.legalbank.net> accessed July 23, 2024.

[51] Case C-381/99 Susanna Brunnhofer v Bank der österreichischen Postsparkasse AG [2001] ECR I-4961, paras 42, 44, 50; Case C-243/95, Hill and Stapleton v. Revenue Commissioners [1998] ECR I-3739, paras 34-35. For further explanations, see also Dulay Yangın, 'Eşit Ücret' (n 32) 832 ff.

to § 4 Abs. 1 EntgTranspG, female and male employees are considered to perform 'equal work' if they engage in identical or similar tasks. It is therefore accepted in German law that employees are considered to perform equal work if they can substitute for each other when needed[52]. In addition, according to the German Federal Labour Court, equal work is defined as when employees perform identical or similar tasks. Whether the work is equal is determined by a comprehensive comparison of the tasks. This assessment focuses on specific work processes and their relationships to one another. If tasks or their characteristics differ, the focus should be on the predominantly performed activity. Individual identical work processes alone are not sufficient to assume that the overall work activity owed is the same[53].

According to § 4 Abs. 2 EntgTranspG, the employees are regarded as performing 'work of equal value' if they are in a comparable situation when considering all relevant factors. These factors include the type of work, training requirements, and working conditions. The assessment is based on the actual requirements essential for the specific activity, independent of the employee performing the task and their level of performance.

One should bear in mind that the criteria specified in § 4 Abs. 2 EntgTranspG are kept abstract to apply across industries and professions. For specific cases, more concrete requirements need to be formulated, which can include necessary prior knowledge and experience, skills, and responsibilities related to managing people, objects, or finances, as well as specific physical or psychological burdens due to the work task or environment. Additionally, the requirements for the activity should be assessed independently of the current employees and their performance to ensure an objective evaluation of the activity's demands and burdens[54].

Turkish law does not define the concepts of equal work or work of equal value. According to the rationale of Article 5 of the Labour Code, which regulates the employer's obligation to treat employees equally, it is stated that 'one of our longstanding traditions in Turkey is not to discriminate based on gender in terms of working conditions,' followed by references to European Union regulations and the case-law of the Court of Justice of the European Union. In parallel, the Court of Cassation also rules in line with the approach of the Court of Justice of the European Union. According to the Court of Cassation, in determining whether the

[52] Martina Ahrendt, '§ 37 Entgeltgleichheit' in Günther Schaub (ed), Arbeitsrechts-Handbuch (20th edn, C. H. Beck 2023) 16; Rolf Wank, 'Das Entgelttransparenzgesetz – Prämissen und Umsetzung' (2018) 1 Recht der Arbeit 38, 41.

[53] Bundesarbeitsgericht 4 AZR 509/03, 26.01.2005 in BeckRS 2005, 30349675, beck-online; Bundesarbeitsgericht 8 AZR 488/19, 21.01.2021 <https://www.bundesarbeitsgericht.de/entscheidung/8-azr-488-19/> accessed July 23, 2024.

[54] Monika Schlachter, 'EntgTranspG § 4' in Rudi Müller-Glöge, Ulrich Preis, Inken Gallner and Ingrid Schmidt (eds), Erfurter Kommentar zum Arbeitsrecht (24th edn, C. H. Beck, 2024) 4. See also Wank (n 52). The author correctly contrasts reasons that justify creating pay discrepancies with those used to determine whether jobs are of equal value, noting that objective reasons for exceptions to pay equality often relate to an employee's personal traits or performance. However, when assessing job equivalence, the focus should be on the job characteristics rather than those of the employee.

work performed can be considered similar, the effort and responsibility required in performing the job and the skills necessary should also be similar[55].

C. Pay Transparency

1. Definition

Before examining the specific provisions of the Directive, it is worth introducing the concept of 'transparency.' Notably, this concept has not been defined in the Directive or in the preceding legislative actions. It is even contended that the term transparency is an 'elusive' concept, but certainly implies openness, accountability and communication[56]. Despite this 'toolkit' pointing out the features of the term, the lack of a legal definition has led to different opinions in the doctrine. Some authors contend that transparency encompasses more than openness, as it not only involves making information available but also ensuring its clarity and ease of understanding. Conversely, others assert that openness is a broader concept that encompasses both transparency and active participation, while others view them simply as interchangeable terms[57].

The understanding of transparency may differ depending on the context in which it is applied. For instance, the term transparency has an instrumental value within the context of public law in explaining legal certainty, democracy (i.e. participation in decision-making processes), and good governance[58]. However, within the context of gender-based pay inequality, it takes the form of 'pay transparency', encompassing various regulatory strategies aimed at enhancing the accessibility of pay information[59]. As far as we are concerned, pay transparency, as in the accessibility of pay information, easily leads to the conceptualisation of this concept as 'pay communication', which, in turn, can be defined as the organisational practices that dictate whether, when, how, and which pay information is shared with employees and potentially outsiders[60].

Strategies aimed at ensuring pay transparency can be divided into collective and individual measures. As we shall see in greater detail in subsequent explanations, collective measures involve the employer fulfilling the obligation to report and analyse pay data by gender and address sources of pay inequality. However, individual measures empower employees by providing means for those who wish to challenge

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55 Grand General Assembly of Civil Chambers of the Court of Cassation 1795/954, 25.11.2020 <www.legalbank.net> accessed July 23, 2024.

56 See Anoeska Wilhelmina Geertruida Johanna Buijze, *The Principle of Transparency in EU Law* (Dphil thesis, Utrecht University 2013) 27.

57 For the scholarly opinions, see ibid. 29.

58 Anoeska Buijze, 'The Six Faces of Transparency' (2013) 9(3) Utrecht Law Review 3, 5 ff.

59 Benedi Lahuerta (n 1) 162.

60 For the above-mentioned definition and other definitions, see Bamberger (n 22) 31 ff.

pay inequality[61]. For example, individual measures might include recognising the right of employees to access pay information through a request or shifting the burden of proof in cases where the employer fails to meet the obligations set out in legislative actions concerning transparency.

2. Obligation to Provide Information to Current Employees

a. In General

According to the Directive, an employee has the right to request and receive written information about his/her pay level and the average pay levels, broken down by gender, for equal work or work of equal value[62]. This information must be provided within a reasonable time from the employee's request, which in any case must not exceed two months[63]. Of course, an employer can also provide the pay information mentioned here proactively without waiting for a request from the employee[64]. To ensure transparency uniformly, information on pay levels to be given to the employee can be presented as annual gross pay and its hourly equivalent[65]. Additionally, employers must inform employees annually about their right to request this information and how they can exercise this right[66].

Information on the criteria used for pay progression should also be accessible to the employee. These criteria must be gender-neutral[67]. Performance, skill development, and service length can be among the criteria for pay increases. Member States can exempt employers with fewer than 50 employees from the obligation to ensure transparency in 'pay progression' as regulated in the first paragraph of Article 6 of the Directive[68].

b. Comparison with the German Pay Transparency Act

In German law, employers are also required to provide current employees with information about their own pay as well as the pay elements and determination criteria for the comparison group of employees. The employer's obligation to provide information includes sharing the median earnings of the comparison group with the employee[69]. In contrast, the same article stipulates that in cases where pay is

61 Benedi Lahuerta (n 1) 162-163.

62 Directive (n 2) Art 7(1).

63 Ibid. Art 7(4).

64 Recital of the Directive para 36.

65 Ibid para 22.

66 Directive (n 2) Art 7(3).

67 Ibid. Art 6(1).

68 Ibid. Art 6(2).

69 § 11 EntgTranspG.

determined by law or collective agreement, the employer fulfils the obligation to provide information by simply referring to the relevant regulations of the law or collective agreement and where these can be found[70]. As can be seen, while employers not bound by a collective agreement are expected to disclose the median earnings of the comparison group of employees of the other gender[71], employers bound by or applying collective agreement provisions in the workplace are considered to have fulfilled their obligation merely by referring to the collective agreement. In this respect, the law is said to grant a privilege to employers bound by or applying collective agreements[72].

Under German law, the obligation to provide information applies, in principle, in workplaces that have more than 200 employees working for the same employer[73]. When determining the extent of the obligation to provide information, the focus is on the workplace level rather than the enterprise level[74]. The employee must submit a written request for information to the employer. The request for pay information can, in principle, be repeated two years after the initial request is submitted to the employer[75]. Since the law starts the two-year period from the date the request is submitted to the employer, any delay in the response does not affect the start of this period[76].

There are significant differences between German law and the Directive regarding the information about pay that must be provided to employees to ensure pay transparency[77]. Unlike Article 7 of the Directive, as per § 11 Abs. 3 Satz 2 EntgTranspG, the requesting employee will be given the median earnings of the comparison group, not the average pay level for equal work or work of equal value. Similarly, under Articles 6 and 7 of the Directive, in principle 'every' employer must provide, upon request, information about the employee's own pay level, the criteria used for determining pay increases and the average pay level broken down by gender of the comparison group. In contrast, § 12 Abs. 1 EntgTranspG restricts the information obligation to employers with more than 200 employees in the workplace. Additionally, the EntgTranspG system lacks provisions equivalent to the transparency required by Article 6 of the Directive concerning pay progression criteria, highlighting

70 § 11 Abs. 2 EntgTranspG.

71 See § 11 Abs. 3 EntgTranspG.

72 Kania (n 33) 10.

73 § 12 Abs. 1 EntgTranspG.

74 Kania (n 33) 3.

75 § 10 Abs. 2 EntgTranspG.

76 Kania (n 33) 6.

77 For the differences between German law and the Directive regarding the obligation to inform employees currently working at the workplace, see Winter (n 5) 11; Jens Günther and Mona Schiffelholz, 'Die Entgelttransparenzrichtlinie: Inhalte und Unterschiede zum Entgelttransparenzgesetz' (2023) (11) NZA Rechtsprechungs-Report Arbeitsrecht 568, 570.

the need for amendments in German law to achieve alignment with the Directive[78]. Another distinction is that under § 10 Abs. 1 Satz 2 EntgTranspG, an employee seeking pay transparency information must identify the comparison group. However, the Directive does not impose such a burden on the requesting employee. Finally, it should be noted that, unlike German law's two-year limitation period, the Directive does not impose any time limit on the employee's request for information.

c. Turkish Law Perspective

In Turkish labour law, it is stipulated that an employee must be provided with a payroll slip[79] or, upon request, a seaman must be given records from the wage book[80]. As in the Directive and German law, Turkish labour law requires that 'all kinds of payments' made to the employee be shown in the relevant slip or record. However, there is no legal basis for an employee to request information on the average pay levels broken down by gender or the median pay levels of the comparison group. Therefore, in the event of a dispute, the plaintiff is only able to obtain the necessary comparable pay information through court. Consequently, the obligation to provide only the employee's own payroll slip or a record of the wage book has a limited deterrent effect on gender-based pay inequality. This is because it is natural for an employer to assume that an employee does not have and cannot obtain information on the pay level of the comparison group. In practice, gaining access to another employee's pay information can even be used by the employer as grounds for termination of the employment contract[81]. However, it should be noted that some decisions of the Court of Cassation on this issue have favoured the employee[82]. Indeed, in a 2017 decision, the 9th Civil Circuit of the Court of Cassation rightly ruled that 'in order for the wages and raise rates given to employees working in the same place to be audited under the principle of equal treatment, they must be known by the employee. The principle of equal treatment takes precedence over the principle of confidentiality. If the criteria are not clear, the employee must know whether the wage and raise rate received

78 Rolfs and Lex (n 42) 1356.

79 See Labour Code Art. 37; Turkish Code of Obligations Art. 407.

80 See Maritime Labour Code Art. 31.

81 For employers' reluctance regarding employees sharing pay information with each other, see also Benedi Lahuerta (n 1), 174.

82 The Court of Cassation does not consider an employee's access to another employee's salary or raise information alone as grounds for termination. This is because the employee's interest in monitoring whether the employer fulfils the duty of equal treatment outweighs other considerations. However, it is also necessary to consider the specifics of how an employee accessed the other employee's pay information. For instance, the Court of Cassation concluded that an employee who was alleged to have copied and shared other employees' salary information with other employees engaged in behaviour that undermined trust. For the decision, see 9th CC of the Court of Cassation 10379/22430, 22.06.2015 <www.legalbank.net> accessed 20 July 2024. Similarly, the reinstatement request of an employee who was alleged to have checked the account transactions of 39 employees instead of reporting a software vulnerability to the employer was denied. For the decision, see 9th CC of the Court of Cassation 16778/10508, 27.03.2014 <www.lexpera.com.tr> accessed 20 July 2024. In this context, it should be noted that whether the other employees' pay information was obtained incidentally or in connection with the employee's duties; in other words, whether this information was obtained 'in the flow' within the workplace without malicious intent; whether it was used for a limited purpose; and whether this information was shared, for example, with other employees or only with a supervisor are factors that influence the outcome.

while working in the same job and with the same seniority differs from those of other employees. In such cases, the wages and raise rates in the workplace cannot be considered confidential to the employee as long as they are not used maliciously. According to the case file, the plaintiff is a computer specialist at the workplace with the duty of checking computers as a technical support staff. During technical maintenance, he learned the wages and raise rates of employees while checking a computer and shared this information with his supervisor because it negatively affected him. The fact that the document he discovered had a negative impact on him and that he conveyed it to his supervisor as part of seeking his rights does not indicate a breach of confidentiality[83].'

According to another decision made by the same Chamber in 2022, 'in the concrete dispute, the employee's act of making a photocopy of another employee's payroll slip that he accidentally obtained and then seeking information from the Human Resources Department regarding pay differences was not done with the intent to disseminate personal data, but rather within the scope of monitoring the employer's duty to treat employees equally[84].' Because of this finding by the Chamber, the termination by the employer was deemed to be invalid. It is safe to say that these decisions by the Court are in accordance with the spirit of the Directive's provisions on pay transparency.

3. Obligation to Provide Information to Job Applicants

a. In General

Under the Directive, pay information must be provided not only to current employees but also to job applicants. The lack of pay information associated with a position can limit a job applicant's bargaining power. Moreover, providing this information enables job applicants to make informed decisions about the job position. Pay transparency during the application process also demonstrates that gender-neutral criteria are used in pay determination. The initial pay or pay range, for example, can be displayed in the job advertisement or shared with the applicant before the employment contract is concluded[85]. The pay information provided to the job applicant should include the starting wage or wage range determined based on gender-neutral criteria and, if applicable, the provisions of the collective bargaining agreement related to the position the applicant is applying for[86].

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83 9th CC of the Court of Cassation 24041/15069, 05.10.2017 <www.legalbank.net> accessed 15 July 2024. For an endorsing review, see Nurşen Caniklioğlu,'İş İlişkisinin Sona Ermesi ve Kıdem Tazminatı' Yargıtay'ın İş Hukuku ve Sosyal Güvenlik Hukuku Kararlarının Değerlendirilmesi 2017, (On İki Levha 2018) 244 ff.

84 9th CC of the Court of Cassation 5442/7075, 06.06.2022 <www.lexpera.com.tr> accessed 15 July 2024.

85 Directive (n 2) Art 5(1).

86 Ibid. Art 5(1) (a), (b). For the view that this rule is a sign of the proactive stance of the Directive, see Winter (n 5) 10.

Notably, the Directive recognises the need for transparency regarding pay information for job applicants but does not directly require sharing information on the average pay level or the pay increase process within the workplace, as it does for current employees. However, the wording of Article 8 of the Directive may cause confusion. According to the English and German versions of this article, 'employers shall provide any information shared with workers or applicants for employment pursuant to Articles 5, 6 and 7 in a format which is accessible to persons with disabilities and which takes into account their particular needs.' The requirement to share information on average pay levels and pay increases is regulated in Article 6 of the Directive. Therefore, one may momentarily think that Article 8 implies that this information must also be shared with job applicants. Nonetheless, Article 5, which specifically addresses the transparency required for job applicants, does not include average pay levels or pay increase information among the details to be shared. Similarly, Article 6 refers to the recipients of such information as 'workers', indicating that the term 'job applicant' is not used, thus showing that there is no obligation to provide job applicants with information on average pay levels and pay increases.

b. Comparison with the German Pay Transparency Act

The German Pay Transparency Act does not contain a provision requiring transparency for job applicants. However, if a collective bargaining agreement is in force at the workplace and is publicly available, a reference to the provisions of this agreement by the employer should be considered sufficient in terms of the transparency required for job applicants[87]. According to one perspective, when regulating in line with the Directive, the German legislator should balance the interests of the job applicant and the employer proportionally. Imposing an obligation on the employer to make pay information transparent to the job applicant also carries the risk of rival employers gaining insights into the pay structure of the employer who is required to provide transparency[88].

c. Turkish Law Perspective

Turkish law does not require the provision of information to job applicants. However, under the principle of good faith, each party participating in contract negotiations is obliged to provide the other party with accurate information on matters affecting the decision to conclude the contract. A party who provides incorrect information or withholds information due to negligence is liable for any damage caused by culpa in contrahendo[89].

87 Günther and Schiffelholz (n 77) 569.

88 Ibid 569. In terms of Turkish law, cf. Canikliоğlu (n 73) 248. According to the author's view, 'pay information is generally not considered confidential. However, if the pay information of individuals in special positions is significant in terms of competition, it is considered confidential.

89 Sabahattin Yürekli, 'İş Hukukunda Sözleşme Görüşmelerinden Doğan Sorumluluk (Culpa In Contrahendo)' (2014) 72(2) İstanbul Üniversitesi Hukuk Fakültesi Mecmuası 541, 558-559.

4. Pay Reporting

a. In General

In addition to the requirement for providing information on pay levels and average pay levels broken down by gender to current employees, the Directive stipulates that employers with at least 100 employees must publish a pay report periodically[90]. Member states may also mandate that employers with fewer than 100 employees publish a pay report to enhance transparency[91]. This report can be published on the employer's website[92].

According to Article 9 of the Directive, the pay report must include the following information separately for wages and wage supplements: The difference in average earnings levels by gender; The median pay levels; The median of wage supplements; The proportion of female and male employees receiving wage supplements; The proportion of female and male employees within four wage quartiles (e.g. low, medium-low, medium-high, and high).

Employers with 250 or more employees are required to report the aforementioned information by June 7, 2027, and annually thereafter for the previous calendar year. Employers with 150 to 249 employees must report this information by June 7, 2027, and every three years after that. Employers with 100 to 149 employees must provide the information by June 7, 2031, and every three years after that[93].

b. Comparison with the German Pay Transparency Act

Under the German Pay Transparency Act, employers with more than 500 employees are generally required to prepare reports[94]. Note that the pay report regulated by the Directive is more comprehensive in content than the report specified in the Pay Transparency Act[95]. According to the Pay Transparency Act, an employer must only demonstrate the measures taken to ensure gender equality and pay equality[96]. Additionally, under German law, the employer's report must include the average number of employees separated by gender, as well as the average number of full-time and part-time employees[97]. This report must be prepared every five years for

90 Directive (n 2) Art 9. For the view that this rule is a sign of the proactive stance of the Directive, see Winter (n 5) 12.

91 Ibid Art 9(5).

92 Ibid Art 9(7). See also recital of Directive 38.

93 Directive (n 2) Art 9.

94 § 21 EntgTranspG.

95 Günther and Schiffelholz (n 77) 571.

96 § 21 Abs. 1 EntgTranspG.

97 § 21 Abs. 2 EntgTranspG.

employers bound by or applying a collective labour agreement to cover the past five years[98], and every three years for other employers to cover the past three years[99].

c. The Absence of Pay Reporting Requirements in Turkish Law

Under Turkish law, the Commission on Equal Opportunities for Women and Men, established by Law No. 5840, has the authority to request information from natural and legal persons regarding matters within its jurisdiction, as per Article 4. However, if this request is not fulfilled, the Commission does not have the authority to impose any sanctions[100]. In the same manner, pursuant to Article 19 of the Law on the Human Rights and Equality Institution of Türkiye[101], the Board has the authority to request information from natural or legal persons during an investigation conducted either ex officio or upon request. On the other hand, Turkish law does not mandate employers to periodically prepare pay reports on their own initiative.

5. The Relationship Between Pay Transparency and Proof of Discrimination

a. In General

According to Article 18 of the Directive, titled 'shift of burden of proof', in the context of civil litigation, if an employee believes that the principle of equal pay has not been applied to them and presents facts indicating direct or indirect discrimination, the burden of proof shifts to the defendant to prove that no discrimination has occurred[102].

The recital of the Directive states that a 'prima facie' case of discrimination is sufficient as proof[103]. If it appears, at first sight, that the employee has been discriminated against, the employer must prove that there was no discrimination. Moreover, if the employer violates the transparency regulations stipulated in the Directive, such as failing to publish the pay report or not providing information on the average pay level upon the employee's request, the employer must prove that no discrimination occurred even without the employee needing to establish a prima facie case[104]. Member states may also implement other rules of proof that are more favourable to employees.

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98 § 22 Abs. 1 EntgTranspG.

99 § 22 Abs. 2 EntgTranspG.

100 Salih Sağlam, 'Komisyonun Yetkilerini Etkin Kullanması Sorunu' in Mehmet Ali Yavuz, Mustafa Keleş, and Muhammet Emin Güzel (eds), Meclis Araştırması Komisyonlarının Çalışma ve Rapor Sürecini Değerlendirme Çalıştayı (TBMM 2015) 19-20.

101 Code Number 6701 dated 06.04.2016 (OG 20.04.2016/29690).

102 Directive (n 2) Art 18(1).

103 Recital of the Directive para 52.

104 Directive (n 2) Art 18(2).

b. Key Decisions of the Court of Justice of the European Union

As stated in the recital of the Directive, Article 18 on the 'shift of burden of proof' follows previous regulations on the proof regime against discrimination in European Union law and reflects the case-law of the Court of Justice of the European Union[105]. The Danfoss case[106] in 1989 marked the Court's first ruling on shifting the burden of proof in discrimination cases[107]. In this case, it was found that female employees in the same or similar positions earned approximately 7% less than their male counterparts. The CJEU concluded in the Danfoss case that when a workplace's pay system is not transparent, it falls upon the employer to prove that any pay discrepancies are based on factors unrelated to gender discrimination[108]. This principle was also referenced in the CJEU's 1993 Enderby case[109], which reiterated that if prima facie evidence of discrimination exists, the employer must demonstrate that the pay differences are due to objective reasons. Without this shift in the burden of proof, employees would find it nearly impossible to prove discrimination in local courts. In scenarios where two jobs of equal value are predominantly occupied by women and men, respectively, and there are statistically demonstrable pay differences between them, it is up to the employer to prove that these differences are not due to gender-based discrimination[110].

The CJEU reaffirmed this approach in Brunnhofercase[111] in 2001, referencing both the Danfoss and Enderby cases. The court emphasised that while generally, the burden of proof lies with the claimant, in cases of apparent discrimination, the burden shifts to the employer. If an employee can show that they receive lower pay than a male colleague for the same or equivalent work, a prima facie case of gender-based discrimination is established, and the employer must then prove that the pay disparity is justified by objective reasons[112].

Article 19 of Directive 2006/54/EC also supports this principle, stating that individuals who believe the principle of equal treatment has not been applied to them must present facts suggesting direct or indirect discrimination, after which the defendant must prove there was no breach. The recital of Directive (EU) 2023/970 indicates that it follows the proof regime established by Directive 2006/54/EC and builds upon it by incorporating insights from the Danfoss case. Notably, Directive

105 Recital of the Directive para 52.

106 Case C-109/88 Handels- og Kontorfunktionærernes Forbund I Danmark v Dansk Arbejdsgiverforening, acting on behalf of Danfoss [1989] ECR 3199.

107 Canan Ünal, *İş Hukukunda Yaş Ayrımcılığı* (On İki Levha 2018) 411.

108 Case C-109/88 Handels- og Kontorfunktionærernes Forbund I Danmark v Dansk Arbejdsgiverforening, acting on behalf of Danfoss [1989] ECR 3199, para 16.

109 Case C-127/92: Dr. Pamela Mary Enderby v Frenchay Health Authority and Secretary of State for Health [1993] ECR I-5535.

110 Ibid paras 18-19.

111 Case C-381/99, Susanna Brunnhofer v Bank der österreichischen Postsparkasse AG [2001] ECR I-4961.

112 Ibid paras 58, 60.

(EU) 2023/970 goes further by stipulating that if an employer fails to ensure pay transparency, the burden of proof shifts to the employer without the need for the employee to present prima facie evidence of gender-based discrimination.

c. The Burden of Proof in Gender-Based Discrimination Claims under German Law

In German law, the issue of the burden of proof in claims arising from gender-based discrimination is split on the basis of whether the employer has fulfilled their obligation to ensure pay transparency[113]. If the employer has complied with this obligation, for instance, by sharing the elements of pay or the median earnings of the comparison group upon the employee's request, the employer must prove that there was no discrimination once the employee presents evidence suggesting gender-based discrimination[114]. The acceptance of prima facie evidence facilitates proving discrimination claims and eases the standard of proof[115]. According to the prima facie evidence rule ('Indizienbeweis') outlined in the Act, the evidence presented must demonstrate that discrimination is more probable than not, based on typical life experiences[116]('überwiegende Wahrscheinlichkeit'). Once the employee provides evidence indicating discrimination, the employer must either prove that there was no discrimination or that the differential treatment was based on non-discriminatory grounds[117].

In German law, gender-based discrimination is enacted if an employee receives lower pay than an employee of the opposite sex performing equal work or work of equal value[118]. According to the German Federal Labour Court, an employee fulfils the burden of proof required under § 22 AGG (prima facie evidence) if they can show that they receive lower pay than an employee of the opposite sex who performs equal work or work of equal value[119]. Similarly, the Federal Labour Court also holds that if the employee's pay is below the median earnings of the opposite sex provided by

[113] Jobst Hubertus Bauer and Sibylle Romero, 'Der individuelle Auskunftsanspruch nach dem Entgelttransparenzgesetz' (2017) (7) Neue Zeitschrift für Arbeitsrecht, 409, 412.

[114] § 22 AGG; § 1 AGG.

[115] Martina Ahrendt, '§ 36 Allgemeines Gleichbehandlungsgesetz und Mobbing' in Günther Schaub (ed), Arbeitsrechts-Handbuch (20th edn, C. H. Beck 2023) 79; Martin Franzen, 'Anwendungsfragen des Auskunftsanspruchs nach dem Entgelttransparenzgesetz (EntgTranspG)' (2017) 13 Neue Zeitschrift für Arbeitsrecht 814, 815; Monika Schlachter, 'AGG § 22 Beweislast' in Rudi Müller-Glöge, Ulrich Preis, Inken Gallner and Ingrid Schmidt (eds), Erfurter Kommentar zum Arbeitsrecht (24th edn, C. H. Beck, 2024) 1.

[116] Bundesarbeitsgericht 8 AZR 1012/08, 22.07.2010 <https://www.bundesarbeitsgericht.de/entscheidung/8-azr-1012-08/> accessed 24 July 2024. See also Windel (n 34) 196-197; Schlachter (n 115) 2.

[117] Windel (n 34) 198.

[118] § 3 Abs. 2 EntgTranspG. For detailed explanations regarding the compatibility of this rule with Article 2 of Directive 2006/54/EC and the legal regime of the burden of proof, see Bundesarbeitsgericht 8 AZR 450/21, 16.02.2023, para 26 <https://www.bundesarbeitsgericht.de/wp-content/uploads/2023/07/8-AZR-450-21.pdf> accessed 22 May 2024.

[119] Ibid para 43.

the employer under their information obligation, the employee is considered to have provided prima facie evidence of gender-based discrimination[120].

Under § 15 Abs. 5 EntgTranspG, which is a specific provision compared to § 22 AGG[121], if the employer fails to fulfil the transparency obligations stipulated by law, the burden of proof in disputes shifts directly to the employer. However, this rule applies only to employers who are not bound by or do not apply for a collective labour agreement. Consequently, a distinction is made between employers who do not share the median earnings of the comparison group, granting a privilege to those bound by or applying collective labour agreements[122]. The Pay Transparency Act does not impose penalties for failing to ensure transparency on employers who are bound by or applying collective labour agreements[123].

d. The Burden of Proof in Gender-Based Discrimination Claims under Turkish Law

Article 5 of the Turkish Labour Code also states that the burden of proof for discrimination claims, in principle, lies with the employee. However, according to this provision, 'if the employee presents a situation strongly indicating a violation, the employer must prove that no such violation occurred.' The term 'a situation strongly indicating a violation' corresponds with the German legal standard of a likelihood of discrimination[124] ('überwiegende Wahrscheinlichkeit'). Similarly, the burden of proof regime outlined in Article 5 of the Labour Code aligns with Article 18 of the Directive, which adopts the principle of prima facie evidence[125].

However, considering that Turkish law does not impose a transparency obligation on employers regarding the pay levels of other employees, the absence of any average pay levels or median earnings provided to the employee is not, by itself, a strong indication of a violation of non-discrimination rules, unlike the provisions of the Directive.

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120 Bundesarbeitsgericht 8 AZR 488/19, 21.01.2021 <https://www.bundesarbeitsgericht.de/entscheidung/8-azr-488-19/> accessed July 23, 2024. For the opposing view that a worker's wage being lower than the median earnings of the comparison group alone should not cause a shift in the burden of proof, see Nathalie Oberthür, 'Das Gesetz zur Förderung der Transparenz von Entgeltstrukturen: Ein Beitrag zu mehr Entgeltgerechtigkeit oder bürokratische Riesenkrake?' (2017) 31 Neue Juristische Wochenschrift 2228, 2233. See also Burkard Göpfert and Katja Giese, 'Entgelttransparenzgesetz- Folgt jetzt die Klagewelle?' (2018) 4 Neue Zeitschrift für Arbeitsrecht 207, 209. According to the authors, the fact that a worker receives a wage below the median value indicates that there are workers in the comparison group who also receive wages below this value. Otherwise, a worker receiving a wage below the median value does not, by itself, constitute evidence within the context of § 22 AGG. For the statement that this is the dominant opinion in German doctrine, see Georg Annuß, 'Entgelttransparenzgesetz-doch kein zahnloser Tiger?' (2021), 21 Neue Zeitschrift für Arbeitsrecht 1538, 1540. For further explanations and examples regarding the German case law on the burden of proof regime related to gender-based pay inequality, see Ahrendt, 'Mobbing' (n 115) 84, 88; Yayvak Namlı (n 32) 759.

121 Ahrendt (n 52) 27.

122 Rolfs and Lex (n 42) 1358.

123 Bauer and Romero (n 113) 412.

124 See also Ünal (n 107) 418.

125 In terms of EU law, in general, see ibid 418.

6. The Relationship Between Pay Transparency and Personal Data

a. In General

The requirement that employers provide pay transparency may spark discussions regarding personal data. Sharing average pay levels with employees or publishing pay reports inherently carries the risk of disclosing personal data. Therefore, the European Commission sought the opinion of the European Data Protection Supervisor (EDPS) on whether the draft Directive contravenes personal data laws[126].

b.Provisions to Mitigate Personal Data Risks

According to the EDPS's opinion[127], the Directive incorporates several provisions to mitigate the risk of personal data breaches. Specifically, the transparency process that employers must follow under the Directive should not directly or indirectly include information about any identifiable worker. Simultaneously, workers who wish to voluntarily share their pay information should not be hindered. This means that contractual clauses that prevent employees from voluntarily sharing their pay information are not permissible[128]. However, employers have the right to ensure that the pay information shared by a peer for the sake of enforcing the principle of equality is not used for any other purposes[129].

The EDPS's view is that an employee's awareness of his/her own pay level and the average pay level at his/her workplace does not, in itself, constitute a breach of other employees' personal data. Likewise, although the Directive mandates the publication of pay reports, these reports must be published in a manner that does not violate personal data and solely contributes to the principle of equality[130].

c. Alignment with Personal Data Protection Laws

The provisions laid down in the Directive for ensuring pay transparency are largely in alignment with the legal framework for personal data protection. However, Article 12/3 of the Directive recognises the potential risk of personal data breaches associated with the dissemination of pay reports or the sharing of pay information. Therefore,

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126 Recital of the Directive para 66. See also article 42 of the Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC [2018] OJ L295/39.

127 See Formal comments of the EDPS on the Proposal for a Directive of the European Parliament and of the Council 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 <https://www.edps.europa.eu/data-protection/our-work/publications/formal-comments/proposal-directive-european-parliament-and-0_en> accessed 15 May 2024.

128 Directive (n 2) Art 7(5).

129 Ibid. Art 7(6).

130 Ibid. Art 12(1); Art 12(2).

it allows member states to stipulate that pay information can only be shared with employee representatives, labour inspectors, or equality bodies when there is a risk of personal data being violated.

d. Comparative Analysis with German Law

German law also applies to the protective approach to personal data set out in the Directive. According to § 12 Abs. 3 EntgTranspG: If the comparison group consists of fewer than six employees, the requesting employee will not be provided with the comparative pay information. This aims to prevent the identification of other employees' wages. However, other employees are free to share their pay information voluntarily. Notably, a 2009 decision by the Higher Regional Court ruled that a contractual clause prohibiting an employee from sharing his/her pay information with colleagues was invalid. The Court held that such a clause could not prevent an employee from discussing his/her wage to check if the employer was adhering to his/her obligation of equal treatment in terms of pay[131]. It is worth noting that this decision aligns with the view of the Turkish Court of Cassation that the principle of equal treatment precedes the principle of confidentiality.

e. Provisions Restricting Employer Access to Pay History

The Directive also strengthens personal data protection by prohibiting employers from seeking or attempting to seek information about a job applicant's current or past wages[132]. This aligns with the 1983 decision of the German Federal Labour Court, which reached a similar conclusion but was based on the principle of 'equality of arms' in contract negotiations. If an employer seeks information about a candidate's previous wage solely to enhance their bargaining power in negotiations, it violates the principle of equal footing in contract negotiations. Unless the wage information is relevant to the position applied for and the candidate is not seeking at least their previous wage, the employer has no substantial reason to request this information[133].

f. Scholarly Opinions in Turkish Labour Law

In Turkish labour law, there are differing views on whether an employer can request information about a job applicant's previous wages. Before the enactment of the Personal Data Protection Law[134], one view held that employers had the right to ask about previous wages and that employees should not give misleading

[131] Landesarbeitsgericht Mecklenburg-Vorpommern 2 Sa 237/09, 21.10.2009, BeckRS 2010, 74409.

[132] Directive (n 2) Art 5(2).

[133] Bundesarbeitsgericht 2 AZR 171/81, 19.05.1983 in Arbeitsrechtliche Praxis, BGB § 123 Nr. 25, beck-online. See also Gerrit Forst, '§ 7 Informationserhebung bei der Einstellung und beim beruflichen Aufstieg' in Gregor Thüsing (ed), Beschäftigtendatenschutz und Compliance (3rd edn, C. H. Beck2021) 33.

[134] OG 29677, 07.04.2016.

answers to protect their bargaining power[135]. Misleading answers could result in the termination of the employment contract by the employer based on the employee's misrepresentation[136]. However, another perspective that aligns with our view is that an employee's misrepresentation of their previous wage cannot be used against them[137]. The legal framework for personal data protection supports this interpretation[138], suggesting that an employer's right to question a job applicant should be limited to questions essential for forming the employment contract[139]. Employers' inquiries should pertain to the job responsibilities and skills related to the position being applied for[140], rather than questions aimed solely at increasing the employer's bargaining power, which would not be compatible with the personal data protection regime.

IV. Sanctions and Potential Measures for Gender-Based Pay Inequality

a. In General

The Directive primarily addresses compensation as a sanction for gender-based pay inequality. Compensation must fully cover the damages suffered by the discriminated employee, including any pay differences[141]. Importantly, the scope of compensation extends beyond mere wage disparities. If an employee is denied certain benefits (such as bonuses or incentives) due to their pay level, they must also receive these benefits. The goal is to restore the employee's financial situation to what it would have been if the employer had complied with the duty of equal treatment[142]. In addition, compensation should cover the non-material damages suffered by the employee due to receiving a lower wage because of their gender[143]. The Directive's recital cites the distress caused by the devaluation of an employee's job as an example of non-material damage[144]. Furthermore, member states should not impose a predetermined upper limit on compensation[145].

135 Emine Tuncay Kaplan, 'Mukayeseli İş Hukukunda İşçinin Kişilik Haklarının Bilgisayarda Toplanan Bilgilere (Verilere) Karşı Korunması' (1999) 4(4) TÜHİS İş Hukuku ve İktisat Dergisi 51, 54; Yürekli (n 89) 551.

136 Kaplan (n 135) 54.

137 A. Eda Manav, 'İş İlişkisinde İşçinin Kişisel Verilerinin Korunması' (2015) 19(2) Gazi Üniversitesi Hukuk Fakültesi Dergisi 95, 115; Fatih Gültekin, *İş İlişkisinde İfade Özgürlüğü* (On İki Levha 2024) 106.

138 For consideration of wages or income as personal data, see Baysal (n 32) 323.

139 Esra Yiğit, *İş İlişkisinde Kişisel Verilerin Korunması* (2nd edn, On İki Levha 2023) 77. See, also, Yıldız, 'Eşit Davranma' (n 39), 298.

140 Yiğit (n 139) 78.

141 In the German Pay Transparency Act, there is no provision regarding sanctions an employer could face due to gender-based pay discrimination. However, the law states that the provisions of the General Equal Treatment Act are applicable. In this context, Article 15 of the AGG shall apply to claims for compensation by employees who allege discrimination. Following this provision, employees who have suffered discrimination can claim compensation for all material and non-material damages. Therefore, due to the Directive, it is stated that there is no need for a new compensation regulation in German law. For further explanations, see Rolfs and Lex (n 42) 1357; Günther and Schiffelholz (n 77) 573; Willemsen and Scweibert (n 33) 2588.

142 Rolfs and Lex (n 42) 1357.

143 Directive (n 2) Art 16(3).

144 See Recital of the Directive para 50.

145 Directive (n 2) Art 16(4).

b. Limitation Periods and Their Conditions

Member states must regulate the start date, duration and conditions that interrupt or suspend the limitation period for claims arising from gender-based pay inequality. The limitation period should not be less than three years, starting from when the employee became aware or should have become aware of the inequality. Member states may also stipulate that the limitation period does not start while the inequality persists or during the employment relationship[146].

c. Additional Measures Beyond Compensation

To prevent gender-based discrimination, measures beyond compensation sanctions are necessary[147]. For example, member states or local courts may mandate structural changes within the workplace, such as reassessing pay categorizations or requiring HR personnel to undergo mandatory training on gender-neutral jobs and pay classification. They may also require the employer to implement a plan to address any identified unfair inequalities[148].

d. Effective, Proportional, and Deterrent Penalties

Member states should impose effective, proportionate and deterrent penalties for violations of equality principles. The penalties could be based on the employer's gross annual turnover or total payroll data. Mitigating factors could be considered for penalty amounts, but aggravating factors, such as combining gender-based pay discrimination with other discrimination grounds, should also be considered[149].

e. Consequences of Repeated Violations

To enhance the prevention and deterrence of gender-based pay inequality, member states may decide to cancel incentives or disqualify employers from certain benefits or public tenders in the case of repeated violations[150]. Additionally, member states could stipulate that violations of the principle of equal pay by employers can be grounds for exclusion from public procurement processes. They could also mandate that procurement contracts include provisions for contract termination or other penalties in the event of such violations[151].

146 Ibid. Art 21,

147 Ibid. Art 17.

148 Recital of the Directive para 51.

149 Ibid para 55.

150 Ibid para 56.

151 Directive (n 2) Art 24(2).

f. Turkish Law Perspective

Turkish law also obligates employers to treat employees equally[152]. The principle of equality in labour law is examined under two headings[153]: the 'duty of equal treatment in the narrow sense' and the 'prohibition of discrimination.' The former refers to unjustified differential treatment among employees without a legitimate reason, while the latter addresses discrimination based on grounds such as language, religion, ethnicity, and gender[154].

According to Article 5 of the Turkish Labour Code, gender-based discrimination is prohibited in employment contracts and their termination. Violating this prohibition entitles the employee to compensation of up to four months' wages and other entitlements denied due to discrimination. However, the limitation of compensation for discrimination on four months' wages is considered insufficient[155]. The Directive also stipulates that no upper limit for compensation should be predetermined.

Additionally, the Directive requires the regulation of the start date, duration, and conditions that interrupt or suspend the limitation period for compensation sanctions, which is inadequately addressed in Turkish labour law. Supplementary Article 3 of the Turkish Labour Code stipulates a five-year limitation period for 'compensation arising from termination of employment contract without adherence to the principle of equal treatment', regardless of the applicable code. Since this provision is specific to the 'termination' of the employment contract, it does not cover compensation claims for discrimination occurring during the employment relationship, which fall under the general 10-year limitation period[156]. Consequently, the limitation periods for compensation claims differ depending on whether the discrimination occurred during employment or at termination, creating inconsistency[157].

In addition, the Turkish Labour Code does not provide provisions for suspending or interrupting the period of limitation for compensation for discrimination. Therefore,

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[152] For the fundamental principles underlying the employer's duty to treat employees equally, see Sarper Süzek, *İş Hukuku* (23rd edn, Beta 2023) 468 ff; Kübra Doğan Yenisey, 'İş Kanunu'nda Eşitlik İlkesi ve Ayrımcılık Yasağı' (2006) 11(4) Çalışma ve Toplum Dergisi 63, 64 ff; Gaye Burcu Yıldız, *İşverenin Eşit İşlem Yapma Borcu* (Yetkin 2008) 60; Yıldız, 'Eşit Davranma' (n 39) 287; Yuvalı (n 10) 34 ff.; Ünal (n 107) 100 ff.

[153] See Süzek (n 152) 468 ff; Doğan Yenisey, 'Eşitlik İlkesi' (n 152) 66; Ercüment Özkaraca and Canan Ünal Adınır, 'Dar Anlamda Eşit Davranma Borcunda Ayrımcılık Tazminatına Hak Kazanılıp Kazanılamayacağı (Karar İncelemesi)' (2021) (46) Sicil İş Hukuku Dergisi 127, 131 ff; Yıldız, 'Eşit Davranma' (n 39) 290-291; Deniz Ugan Çatalkaya, 'İş Hukukunda Eşitlik İlkesinin İki Bileşeni: İşverenin Dar Anlamda Eşit Davranma Borcu ve Ayrım Yasağı' (2021) 69(2) Çalışma ve Toplum Dergisi, 859, 866; Ünal (n 107) 54; Dilek Dulay Yangın and Hatice Duygu Özer, 'Anayasa Mahkemesi'nin İş İlişkisinde İşverenin Eşit Davranma Borcuna İlişkin Kararı ve Düşündürdükleri (2016/5824 No.lu 28/12/2021 Tarihli Burcu Reis Başvurusu)' (2022) 13(2) İnönü Üniversitesi Hukuk Fakültesi Dergisi 376, 380-381.

[154] Ugan Çatalkaya (n 153) 861.

[155] See Kadriye Bakırcı, 'İstihdamda Cinsiyetler Arası Eşitlik ve Mevzuatta ve Kamusal Politikalarda Yapılması Gereken Değişiklikler' (2007) (8) Sicil İş Hukuku Dergisi 22, 27; Ünal (n 107) 437.

[156] See Turkish Code of Obligations Art. 146.

[157] Süzek (n 152) 486; Hamdi Mollamahmutoğlu, Muhittin Astarlı and Ulaş Baysal, *İş Hukuku* (7th edn, Lykeion 2022) 747; Necla Doğan Ceylan, 'Yargıtay Kararları Işığında İşverenin Eşit Davranma Borcu' (2024) (51) Sicil İş Hukuku Dergisi 141, 160.

the relevant provisions of the Turkish Code of Obligations[158] apply. Continuing the employment relationship does not, in principle, suspend or interrupt the period of limitation. However, the limitation period does not start or is suspended during the employment relationship for 'domestic workers' concerning their claims against the employer[159].

Conclusion

Directive (EU) 2023/970 strengthens the principle of pay equality between men and women through various implementation mechanisms, emphasising that women are not merely 'secondary' labour force participants. The requirement for employers to provide information on the average pay levels of a group of employees of the opposite sex performing equal work or work of equal value upon the employee's request, or to publish pay reports, are the key manifestations of the Directive's emphasis.

Although the principle of equal pay between men and women has been embraced in European Union law for nearly seventy years, additional measures have proven necessary to ensure its practical implementation. Therefore, Directive (EU) 2023/970 introduces some distinct provisions not found in its predecessors. Innovations such as providing employees with pay level information or publishing pay reports are noteworthy, given their value in combating information asymetry. Furthermore, the Directive further simplifies the burden of proof for the benefit of the employee. If an employer fails to comply with the obligations set out in the Directive, the burden of proof is shifted directly to the employer. This rule, which has already been adopted in the case-law of the Court of Justice of the European Union, has gained formal recognition as an innovation introduced by the Directive.

German law also adheres to the principle of equal pay among employees who perform equal work of equal value. The Pay Transparency Act was enacted in 2017, in parallel with previous EU regulations. However, the implementation of Directive (EU) 2023/970 also requires certain legal changes in German law.

Turkish labour law lags behind EU law in terms of transparency. Although the principle of equal pay between men and women is theoretically embraced and the ease of proving discrimination aligns with EU law, Turkish labour law lacks any regulations ensuring the level of transparency envisaged by the Directive. It is evident that since Turkey is not an EU member state, the Directive does not directly impact Turkish law. However, enshrining pay transparency in Turkish labour law would offer employees the opportunity to feel valued, primarily as human beings, while

158 Turkish Code of Obligations, Code Number 6098 dated 11.01.2011 (OG 04.02.2011/27836).

159 Ibid. Art 153.

also empowering them despite the asymmetrical bargaining power of the employer.

Certainly, the obligation to ensure pay transparency imposes an additional burden on employers. However, this burden could be mitigated through standardised forms prepared by administrative bodies. Similarly, as in German law, imposing a time limit for requesting information on the pay levels of the comparison group could serve the mitigation of the said burden. Ultimately, pay transparency, as in inter alia enabling employees who believe they are being discriminated against to access relevant data before seeking legal redress and allowing them to communicate with each other about their pay levels without fear of termination of their employment contracts, represents more than just a statutory requirement. It signifies a sociocultural shift in how workers are perceived in Turkish society.

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