

The EU Pay Transparency Directive

MCLE Materials

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Source: <https://www.independent.co.uk>

THE EU PAY TRANSPARENCY DIRECTIVE

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Source: <https://www.linkedin.com>

WHAT IS PAY TRANSPARENCY?

PAY TRANSPARENCY AS A TOOL TO TACKLE THE GPG

WHAT IS MEANT BY “PAY TRANSPARENCY”?

- **Policy interventions requiring “firms to disclose information on employees’ pay along the gender dimension”** (Duchini et al 2024)
- **"A series of policy strategies to improve the accessibility of pay information"** (Benedi Lahuerta 2022) → 2 types:
 - Collective: employers’ proactive duties (often with workers' reps) to report and/or analyse sex-disaggregated pay data + may require action to be taken to address the gap.
 - Individual: workers’ rights/employers’ duties to help workers better understand their relative position within the pay structure + may facilitate legal action to challenge pay inequity



Source: <https://www.psychologytoday.com>

WHAT IS “PAY TRANSPARENCY LEGISLATION” (PTL) VALUABLE FOR?

→Some sources of pay inequity:

-Workers in weak bargaining position for negotiating wages
-Women negotiate less

Workers not knowing if they are being underpaid compared to opposite-sex workers doing equivalent work

Employers not aware of / not taking responsibility for gender biases in pay structures

→How PTL can help:

Reducing **information asymmetries** → Rebalancing **bargaining power** in the pay-setting process

Helping workers build equal pay claims

Increasing **employers' accountability** to workers, shareholders, customers/service users, investors

EXAMPLE:
BENEFITS OF
REDUCING
INFORMATION
ASYMMETRY
DURING
RECRUITMENT

EMPIRICAL EVIDENCE:

- Salary history bans (US)
- Initial pay level info (Austria)

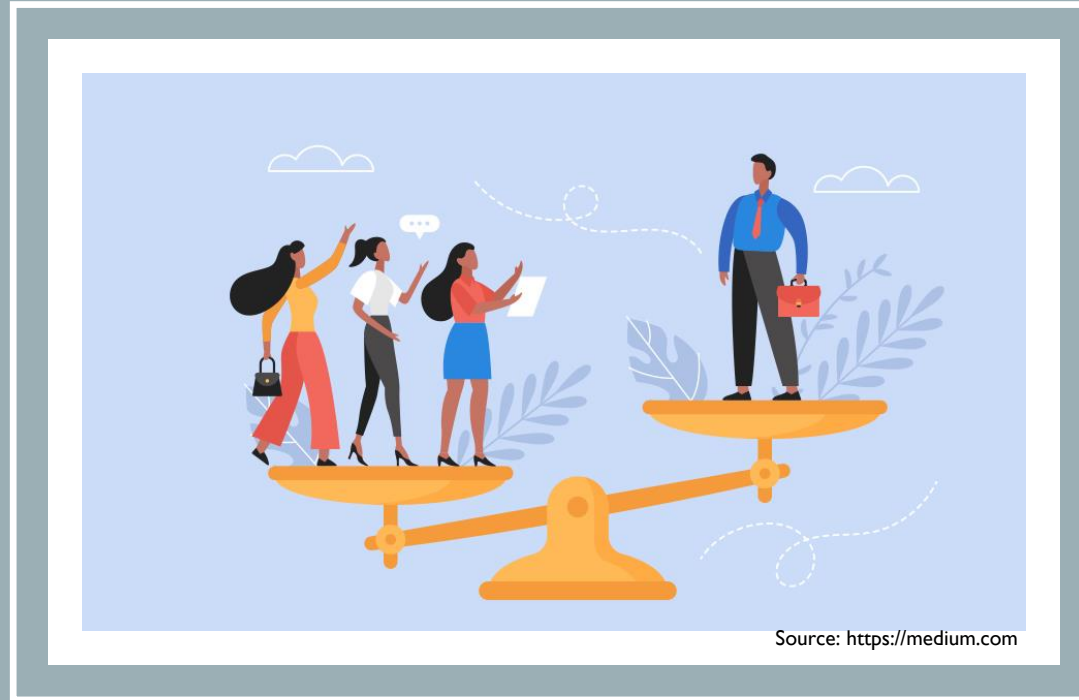


↓ **GPG**



Scenario	A	B	C
Prior salary	<ul style="list-style-type: none"> Anna: €30,000. Tom: €40,000. 	<ul style="list-style-type: none"> Anna: €30,000. Tom: €40,000. 	<ul style="list-style-type: none"> Anna: €30,000. Tom: €40,000.
Regulatory background	<ul style="list-style-type: none"> No initial pay information. Salary history inquiry allowed. 	<ul style="list-style-type: none"> No initial pay information. Salary history inquiry prohibited. 	<ul style="list-style-type: none"> Initial pay information provided. Salary history inquiry prohibited.
Annual salary information and offer by Company X	<ul style="list-style-type: none"> Anna is offered €33,000. Tom is offered €44,000. 	<ul style="list-style-type: none"> Anna is offered €40,000. Tom is offered €40,000. 	<ul style="list-style-type: none"> Candidates are informed that the salary range for the job is €40,000 - €50,000. They are told that: <ul style="list-style-type: none"> €40,000 is the entry level point. The salary point offered is commensurate to qualifications and experience. Anna and Tom are both offered a salary of €40,000.

Outcome (annual salary accepted)	<ul style="list-style-type: none"> Anna: €33,000. Tom: €44,000. 	<ul style="list-style-type: none"> Anna: €40,000. Tom: €45,000. 	<ul style="list-style-type: none"> Anna: €45,000. Tom: €45,000.
Annual pay differential	€11,000.	€5,000.	€0.



EU PAY EQUITY LEGISLATION

EU EQUAL PAY LEGISLATION

EU PRIMARY LEGISLATION:

Art. 119 EEC Treaty - Current **Art. 157 TFEU**:

"Each Member State shall ensure that the principle of equal pay for male and female workers for equal work OR work of equal value is applied"

↳ **Direct effect:**

Case 43/75 *Defrenne (No.2)* (1976) – vertical & horizontal direct effect

Case C-624/19 *Tesco Stores* (2021) – equal value clause has direct effect

+ **Also:**

- **Charter of Fundamental Rights, Art. 23**



Source: <https://www.thebulletin.be>

EU EQUAL PAY LEGISLATION

EU SECONDARY LEGISLATION:

- Current key instrument: **Directive 2006/54/EC** (recast) → Art 4:

“For the same work or for work to which equal value is attributed, **direct and indirect discrimination** on grounds of sex with regard to **all aspects and conditions of remuneration** shall be eliminated.

In particular, **where a job classification system is used** for determining pay, it shall be based on the same criteria for both men and women and so drawn up as to exclude any discrimination on grounds of sex.”

- **Recommendation 2014/124/EU** on reinforcing the principle of equal pay for men and women through transparency → choice of 1 out of 4 measures:

Pay reports broken
down by gender

Pay audits

Workers’ right to
pay information

Pay equity
discussions in
collective
bargaining

EU EQUAL PAY LEGISLATION

EU SECONDARY LEGISLATION (cont'd)

- **Recommendation 2014/124/EU** on reinforcing the principle of **equal pay** for men and women through transparency
- **Directive 2023/970/EU** 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

AIMS:



Empowering individual workers to assert their right to equal pay



↓ **The systemic undervaluation** of women's work within organisations



Source: <https://current.org/>



Source: <https://www.insperity.com/>

THE NEW EU PAY TRANSPARENCY DIRECTIVE (PTD)

PTD - TYPES OF MEASURES:

- **Clarifying & reinforcing concepts:** ‘equal value’ (Arts. 3(1)(g); 4) , ‘intersectional discrimination’ (Art. 3(2)(e))
- **Reducing information asymmetries:**
 - Rights for individual workers (before & during employment) (Arts. 5, 6, 7)
 - Proactive duties for employers: Pay reports (aggregated data broken down by gender) (Art. 9)
- **Encouraging pay structures & pay determination practices that are:**
 - Objective
 - Gender neutral

-Use of analytical tools to assess/compare the VALUE of work (Art. 4)
-Joint Pay Assessments (JPAs) (Art. 10)
- **Improving access to justice and enforcement, e.g.:**
 - Role of Equality Bodies (EBs) (Art. 28); collective redress (Art. 15)
 - Shift in the burden of proof (Art. 18); penalties (Art. 23)

SUBSTANTIVE MEASURES



Source: <https://mashable.com>

OVERVIEW OF MEASURES:

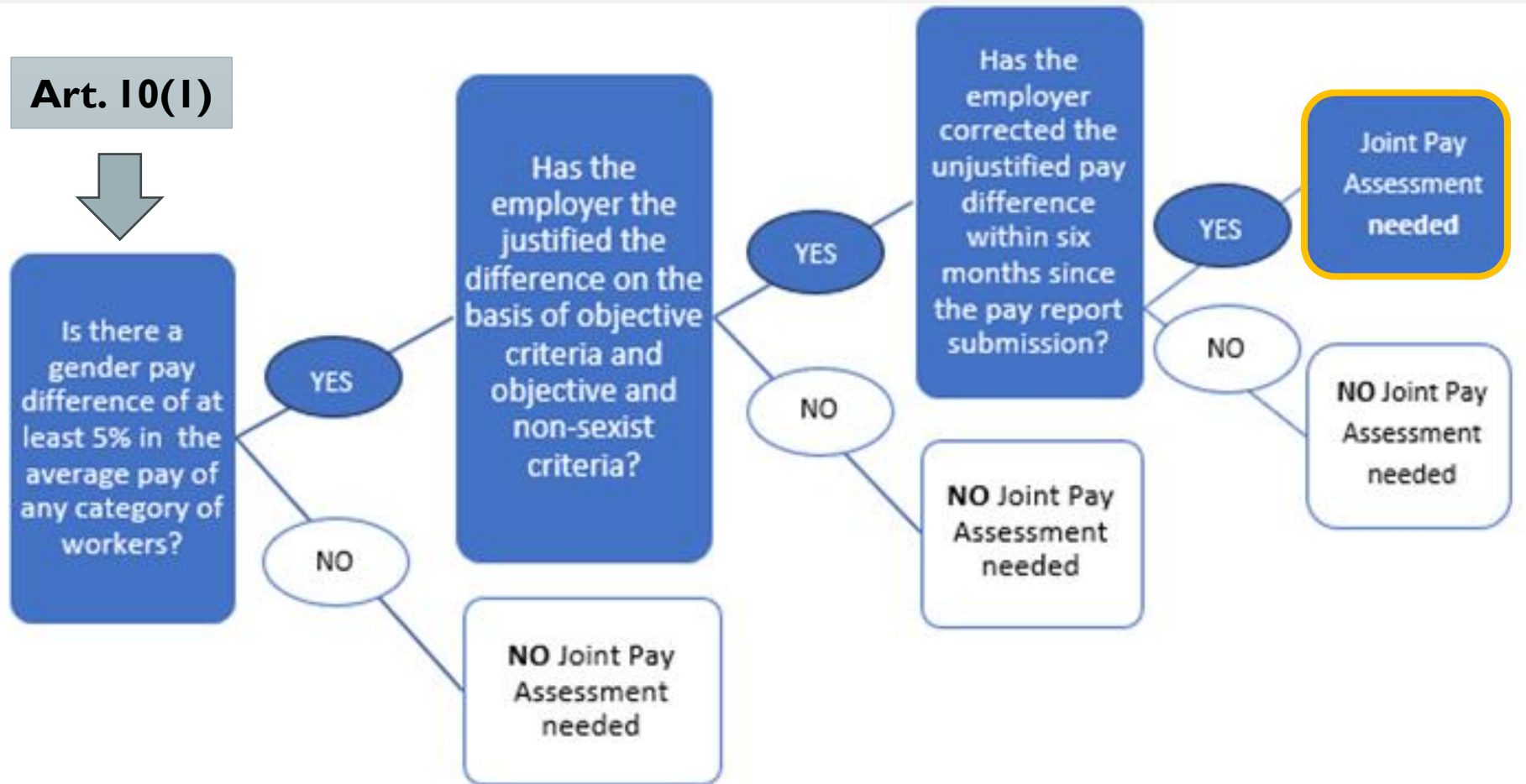
<i>Content</i>	<i>Employer Size</i>	<i>Right or duty bearer + Frequency</i>	<i>Publicity level</i>	<i>Disclosure target group</i>
<i>During recruitment:</i>				
<i>Duty to establish unbiased & transparent pay recruitment practices (Art. 5):</i> <i>-Prohibition of pay history enquiries</i> <i>-Gender-neutral job notices and non-discriminatory recruitment practices</i>	<i>No threshold</i>	<i>Employer's duty</i>	<i>n/a</i>	<i>Job applicants</i>
<i>Right to pay level/range information (Art. 5):</i> <i>(and collective agreement pay provisions, if any)</i>	<i>No threshold</i>	<i>Job applicant's right</i>	<i>To job applicants</i>	<i>Job applicants</i>

Content	Employer Size	Right or duty bearer + Frequency	Publicity level	Disclosure target group
During employment:				
Right to pay information (Art. 7): -Individual pay of the requesting worker -Average pay for categories of workers doing the same work or work of equal value, broken down by sex	No threshold	At a worker's request	To requesting worker only	The requesting worker (who can request the information directly or indirectly, through the workers' representatives or an equality body)
Right to discuss pay with co-workers (Art. 7(6))	No threshold	All workers	n/a	n/a
Duty to facilitate pay setting & pay progression criteria (Art. 6): -Criteria for workers' pay and pay levels -Pay progression criteria	No threshold	Employer's duty	Internal	Workers

Content	Employer Size	Right or duty bearer + Frequency	Publicity level	Disclosure target group
<p>‘Public metrics’ Art. 9(1)(a)-(f), (7)-(8):</p> <ul style="list-style-type: none"> o GPG regarding basic salary (mean & median) o GPG regarding variable components (mean and median) o Proportion of female/male workers receiving variable components o Proportion of female/male workers in each quartile pay band 	<p>100+ workers</p> <p>(staggered entry into force)</p>	<p>Employer’s duty</p> <p>Frequency according to employer’s size:</p> <p>a) 250+ workers: Annually</p> <p>b) 100-249 workers: Every three years</p>	<p>Public</p>	<p>-Key targets:</p> <ul style="list-style-type: none"> o Monitoring body o The public <p>-Disclosed by monitoring body</p> <p>-Voluntarily: in employer’s website or otherwise</p>
<p>‘Internal metrics’ Art. 9(1)(g), (9):</p> <p>GPG by gender and categories of workers for:</p> <ul style="list-style-type: none"> o Ordinary basic salary o Variable components 			<p>Internal</p>	<p>-Key targets (compulsory disclosure):</p> <ul style="list-style-type: none"> o Workers o Workers’ representatives <p>-Disclosure upon request to:</p> <ul style="list-style-type: none"> o Labour inspectorate o EB

ARE EMPLOYERS REQUIRED TO ADDRESS GAPS?

Art. 10(I)



Art. 9(10):

Employers still obliged to remedy unjustified GPGs:

- in reasonable time
- +
- in cooperation with other actors

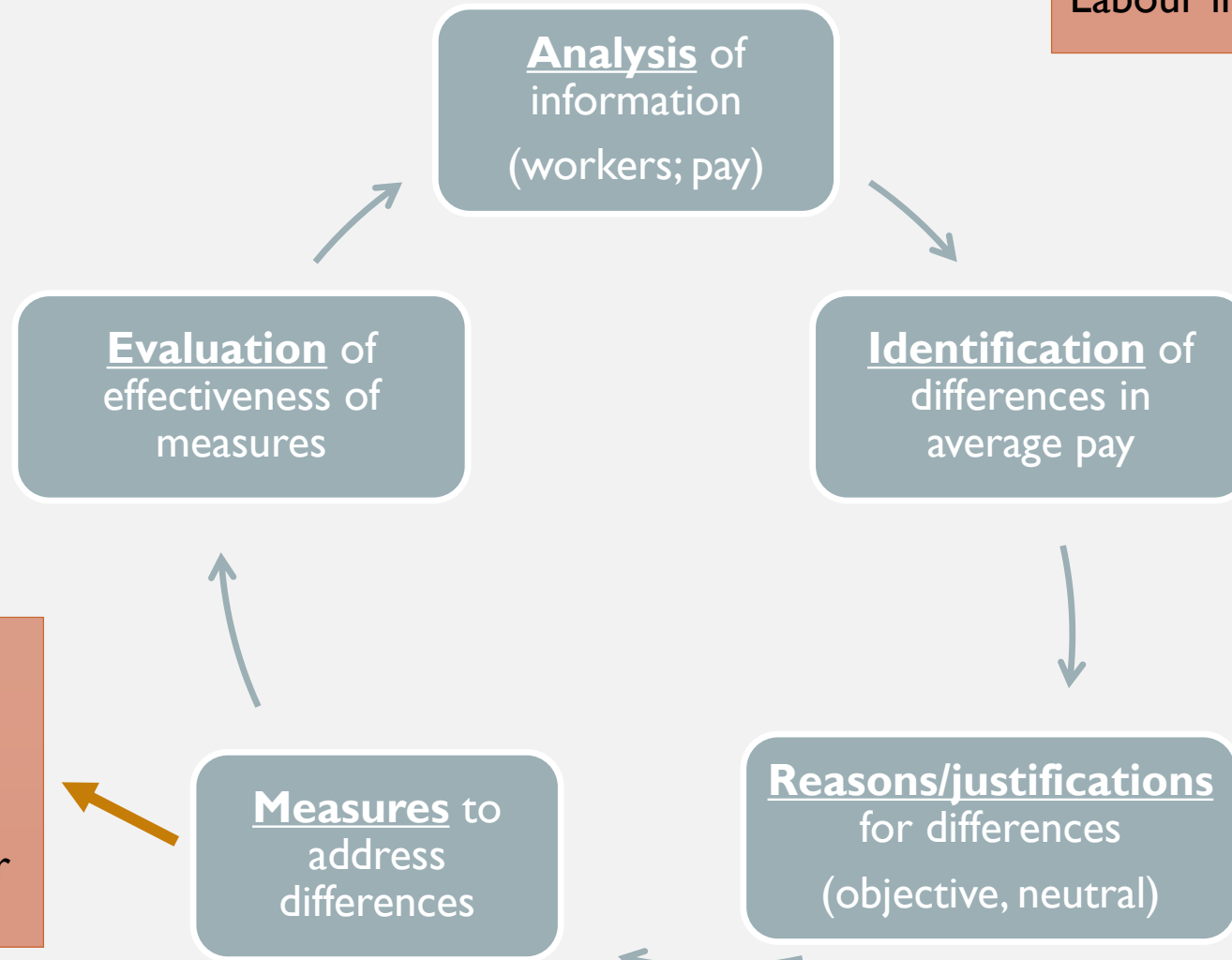
Joint Pay Assessment (JPA) - Article 10

Should include:



Available to:
Workers' reps + monitoring body

Upon request to:
Labour inspect. + equality bodies



-Remedy differences in reasonable period of time

-Analyse existing Job Evaluation/Classif. System, or set it up

ACCESS TO JUSTICE & ENFORCEMENT MEASURES

4 types of measures:

- Limitations periods (Art. 21)
- ↑ protection against victimisation (Art. 25)

Access to court



- Actions in the public interest (Art. 15)
- Hypothetical comparators (Art. 22)

Standing & procedure



- Extension of Equality Bodies' functions (Art. 28)
- New Monitoring Bodies (Art. 29)

Awareness, promotion, monitoring



- Injunctions to stop breaches/orders to apply rights (Art. 17)
- Reinforces penalties (Art. 23)

Remedies & penalties



Source: <https://www.abiggerpicture.com>

THE DIRECTIVE'S POTENTIAL BENEFITS

1

Clarifying & reinforcing concepts

(e.g. equal value, intersectional discrimination)

2

Reducing information asymmetries:

- Individual workers
- (Pay reports)



3

Encouraging gender-neutral pay structures



4

Generating accountability ('blame & shame') & comparability (within & across firms)



5

Improving access to justice and enforcement

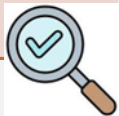
6

Reinforcing the pay equity institutional architecture

THE DIRECTIVE'S POTENTIAL IMPERFECTIONS

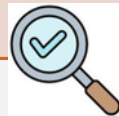
1

Threshold for reporting duties (100+ workers) **still high**



2

“Ask gap”: measures requiring that workers ask for information tend to be less effective



3

Limited access to pay **information** that can be useful to build an **equal pay case**

4

Some key provisions too flexible/vague → risk of formal transposition with minimal effects

5

Training & resources will be needed for an effective implementation

6

Data protection issues to be resolved at national level

Excerpt from the draft:

Introduction. Pay inequity: Old Problems, New Solutions?

By Sara Benedi Lahuerta, Katharine Miller and Laura Carlson

Included in the edited book: **Bridging the Gender Pay Gap through Transparency? Comparative Approaches and Key Regulatory Conundrums (forthcoming in 2024 in with Edward Elgar)**

[...]

4.The new EU Pay Transparency Directive

The PTD has two main specific objectives: (1) empowering *individual* workers to assert their right to equal pay, and (2) addressing the systemic undervaluation of women's work at organisational level.¹ To achieve this the PTD combines mechanisms to improve both pay transparency and access to justice. Pay transparency tools include both *organisational* measures (such as GPG disclosure obligations and evidence-based actions to address those gaps), and *individual* measures that improve access to pay information for job applicants, workers and their representatives. Both types of interventions are supplemented by the clarification and reinforcement of key concepts (such as 'pay', 'work of equal value' or the shift of the burden of proof) and provisions that strengthen access to justice and enforcement mechanisms.

Many of the elements in the Directive already exist elsewhere in EU law or in the national legislation of certain MS, although in others, little has been done. This section provides an overview of the key PTD provisions and is intended to be a synthetic reference point for the comparisons between the PTD and domestic PTL regimes found in subsequent chapters.

4.1 Scope

Overall, the PTD has a broad scope characterised by its application both to public and private employers, and by broad definitions of the concepts of 'worker'² and 'pay',³ in line with those found in the RecD and prior CJEU case law.

The PTD clarifies and/or expands certain pre-existing key concepts and defines some terms for the first time in EU law. For instance, the concept of 'work of equal value' was present in Article 119 EEC from the outset and forms part of the RecD (Art. 4) and extensive case law. However, it has often been misunderstood or misapplied in practice, which is why the PTD defines the concept for the first time in EU legislation. Article 3(1)(g) makes clear that, when comparing jobs, the only way to establish if they are of equal *value* is by assessing their relative worth through 'non-discriminatory and objective gender-neutral criteria'. This concept is further reinforced in Article 4(4) PTD, which refers to the job evaluation criteria that are widely

¹ Commission (EU), Impact Assessment accompanying the PTDP, 4.3.2021, SWD(2021) 41 final, p.24.

² Recital 18 PTD. See e.g. Cases C-66/85 Lawrie-Blum, C-256/01 Allonby; see also Recital 18 PTD that clarifies that atypical work falls within the PTD scope provided workers have a contract of employment or are in an employment relationship.

³ Art. 3(1)(a).

considered to be gender-neutral: skills, effort, responsibility and working conditions.⁴ The concept of equal value is. In fact, the PTD even introduces a positive obligation for MS to ‘take the necessary measures to ensure that employers have pay structures ensuring equal pay for equal work or work of equal value’ (Art. 4(1)). While not directly mandated by the PTD, the most obvious way to do so is through Job Evaluation Systems (JES), which Article 4(2) expressly recommends.⁵ Indeed, as per Article 4(4), the use of ‘analytical tools or methodologies’ to assess and compare jobs’ value, typically used in JES, must be facilitated by MS.

Thanks to the European Parliament amendments, a second key concept that the PTD reinforces is the idea of ‘intersectionality’, defined for the first time in EU legislation as ‘discrimination based on a combination of sex and any other ground or grounds of discrimination protected under Directive 2000/43/EC or 2000/78/EC’ (Art. 3(2)(e)). While the general PTD approach is far from being fully intersectional --its main focus remains on *gender* pay equity, intersectional considerations are more present in the PTD than in any other EU equality or anti-discrimination instrument, and they are particularly visible in the enforcement provisions.

4.2 Key substantive innovations

Articles 5, 6, 7, 9 and 10 PTD introduce various rights and duties with different features in terms of their individual or organisational scope, the publicity level required or the groups targeted by the information disclosure (see Table 1). Overall, these provisions are likely to increase access to pay-related information for many different groups, such as job applicants, workers and their representatives, monitoring and enforcement bodies, and the public (including consumers and investors).

Table 1. Overview of key rights, reporting duties and metrics included in the EU Pay Transparency Directive.

Type	Content	Employer Size	Right or duty bearer + Frequency	Publicity level	Disclosure target group
Individual rights/duties	During recruitment:				
	Duty to establish unbiased & transparent pay recruitment practices (Art. 5): -Prohibition of pay history enquiries -Gender-neutral job notices and non-discriminatory recruitment practices	No threshold	Employer’s duty	n/a	Job applicants
	Right to information on pay level or range (and collective agreement pay provisions, if any)	No threshold	Job applicant’s right	To job applicants	Job applicants
During employment:					

⁴ See e.g. Chicha, M. T. (2008) Promoting equity: gender-neutral job evaluation for equal pay: a step-by-step guide (ILO 2008).

⁵ Note that JES may also incorporate gender biases.

	Right to pay information (Art. 7): -Individual pay of the requesting worker -Average pay for categories of workers doing the same work or work of equal value, broken down by sex	No threshold	At a worker's request	To requesting worker only	The requesting worker (who can request the information directly or indirectly, through the workers' representatives or an equality body)
	Right to discuss pay with co-workers (Art. 7(6))	No threshold	All workers	n/a	n/a
	Duty to facilitate pay setting & pay progression criteria (Art. 6): -Criteria for workers' pay and pay levels -Pay progression criteria	No threshold	Employer's duty	Internal	Workers
Collective duties	'Public metrics' Art. 9(1)(a)-(f), (7)-(8): o GPG regarding basic salary (mean & median) o GPG regarding variable components (mean and median) o Proportion of female/male workers receiving variable components o Proportion of female/male workers in each quartile pay band	100+ workers (staggered entry into force)	Employer's duty Frequency according to employer's size: a) 250+ workers: Annually b) 100-249 workers: Every three years	Public	-Key targets: o Monitoring body o The public -Disclosed by monitoring body -Voluntarily: in employer's website or otherwise
	'Internal metrics' Art. 9(1)(g), (9): GPG by gender and categories of workers for: o Ordinary basic salary o Variable components	100+ workers		Internal	-Key targets (compulsory disclosure): o Workers o Workers' representatives -Disclosure upon request to: o Labour inspectorate o EB

Source: Adapted from Benedi Lahuerta (2022).

4.2.1 Individual rights

The *individual* rights and duties found in Articles 5-7 apply to *all* employers regardless their size.⁶ These provisions introduce five different rights or duties:

a) Employer's duties:

- The duty to establish unbiased & transparent pay recruitment practices, which requires not only ensuring that recruitment practices (including job notices) are gender-neutral and non-discriminatory, but also refraining from asking candidates about their pay history (orally or in writing).⁷ Having pay information in advance of the interview and not permitting pay history enquiries can facilitate more equitable pay negotiations thanks to a reduction of information asymmetries⁸ and the more likely avoidance of inherited gender biases in salary offers.⁹
- The duty to facilitate pay setting & pay progression criteria to workers, which must be objective and gender neutral.¹⁰ This duty is in line with the general transparency rationale

⁶ If so requested, Articles 5-7 PTD's information must be provided in accessible formats for persons with disabilities (Art. 8 PTD).

⁷ Art. 5(2)-(3) PTD.

⁸ See e.g. empirical evidence about the impact of salary information in job notices in Frimmel et al 2022.

⁹ See e.g. Benedi Lahuerta 2022.

¹⁰ Article 6(1) PTD. Note that MS are allowed to exempt employers with up to 49 workers from this obligation (Art. 6(2) PTD).

of the PTD and should come as the natural consequence of assessing and comparing jobs on the basis of their *value*, as per Article 4 PTD.

b) Job applicants/workers' rights:

- The right to receive information about the initial pay level or range in the job vacancy notice or before a job interview, including the relevant provisions of the applicable collective agreement.¹¹
- The right to obtain from their employer information 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.¹² Employers must provide this information within two months and may require that the information disclosed is not used for any purpose other than asserting the right to equal pay.¹³ Workers can request this information either directly or via their representatives or an equality body, and they are also entitled to request clarifications.¹⁴
- The right to discuss pay in the workplace: Confidentiality clauses are prohibited so that pay can be discussed among co-workers for the purpose of enforcing the right to equal pay.

4.2.2 Organisational duties

Conversely, the employer's *collective or organisational* duties regulated in Articles 9-10 only bind employers with 100+ workers and their entry into force will be staggered over five years (see Table 1). They include four different types of duties:

- *Submitting aggregated GPG metrics to the monitoring body for publication*: Employers must submit various GPG metrics to the monitoring body, including the mean and median GPG (separately for the basic salary and variable pay components), the proportions of workers by gender receiving variable components and the proportions of workers in each quartile pay band by gender. The national monitoring body is in charge of publishing this information, but employers may also publish it on their websites or otherwise.¹⁵ By having the same criteria for all employers, pay comparisons can be made between different employers for informational purposes.
- *Internally publishing GPG information by job category*: Employers must prepare GPG information broken down by gender, job categories as well as by basic and variable pay components.¹⁶ They must share this information with all workers, their representatives, and the national monitoring body.¹⁷ Workers and their representatives, labour

¹¹ Article 5(1) PTD. Note that in the initial PTDP this right was almost formulated as a positive duty of the employer, who had to disclose pay information 'prior to the job interview without the applicant having to request it', but this requirement has been eliminated from the adopted PTD.

¹² Art. 7(1)-(2) PTD.

¹³ Art. 7(3), (5) PTD.

¹⁴ Art. 7(2) PTD.

¹⁵ Arts. 9(4) and Article 29(3)(c) PTD.

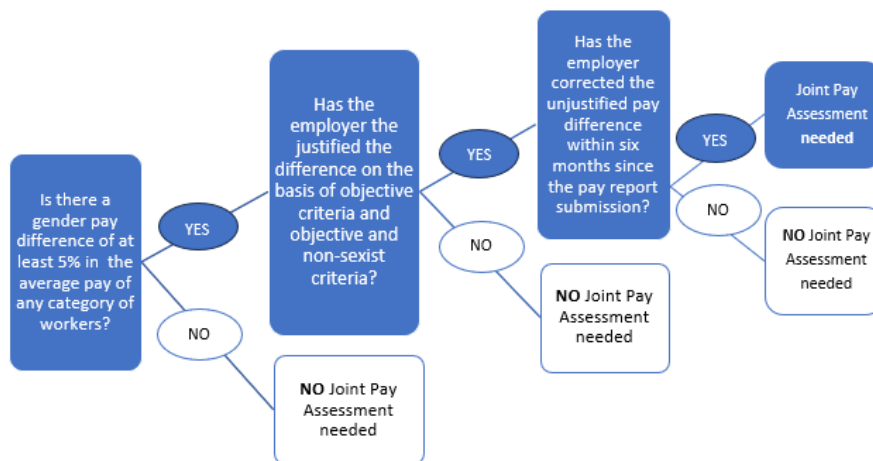
¹⁶ Art. 9(1)(g).

¹⁷ Art. 9(1)(9).

inspectorates and equality bodies also have the right to ask the employer for additional clarifications and details.¹⁸

- *Addressing unjustified pay differences:* Employers are obliged to remedy any gender pay differences that cannot be justified according to objective, gender-neutral criteria. They must do so within a ‘reasonable’ time and in cooperation with workers’ representatives, the labour inspectorate and/or the equality body.¹⁹
- *Undertaking a Joint Pay Assessment (JPA):* In certain cases, employers are obliged to undertake a JPA, but this obligation is only triggered if three conditions are simultaneously met: (1) there is a GPG of at least 5 % in the pay average of any workers’ category, (2) the employer cannot justify the gap on objective gender-neutral factors, and (3) the employer has not corrected the difference within six months since the pay report submission.²⁰ In that case, the employer will have to carry out a JPA in cooperation with workers’ representatives. JPAs are similar to pay audits in that they require the analysis of pay data to establish evidence-based actions to address the gaps identified. Consequently, they should include at least four stages: (1) the analysis of the pay information reported, 2) the identification of the GPGs reasons, (3) the measures to address the unjustified GPG (including analysing an existing JES or undertaking a JES), and (4) evaluating the effectiveness of previous JPAs.²¹

Diagram 2. Decision tree to establish if a Joint Pay Assessment is needed



Source: Own elaboration.

All these individual rights and the organisational duties envisaged in the PTD are complementary because, on their own, they may be insufficient to effectively tackle gender pay inequity. For instance, empirical evidence suggests that, in jurisdictions with engrained workplace salary taboos, workers’ are likely to be discouraged from using the right to pay

¹⁸ The metrics relating to the previous four years is to be made available upon request of a labour inspectorate or equality body (Art. 9(9) PTD).

¹⁹ Art. 9(10) PTD. Unfortunately, the concept of ‘reasonable’ time is open to interpretation but the six month period granted in Article 10(1)(c) PTD to remedy unjustified GPGs could be a good benchmark to be considered by MS in implementing this provision.

²⁰ Art. 10(1) PTD.

²¹ Art. 10(2)-(4) PTD. JPAs must be shared with workers, workers’ representatives, the monitoring body, the equality body and the labour inspectorate. Where the joint pay assessment reveals differences in pay that cannot be justified by objective and gender-neutral criteria, the employer is to remedy the situation in close cooperation with the workers’ representatives, labour inspectorate and/or equality body.

information and/or the right to discuss pay among co-workers.²² Furthermore, the right to pay information is unlikely to provide --*on its own*-- sufficient individualised information to build an equal pay claim -- remember: the *average* pay of a given job category must be disclosed by gender, *not* the *individual* pay of a named comparator. It is therefore crucial that the employer is obliged to proactively look at its pay data by gender, and more importantly, address any GPGs identified, particularly through gender-neutral JES that can help identify --and later correct-- gender biases within and across job categories. This systemic approach can, if properly implemented, reduce both collective and individual pay inequity.²³ At the same time, individual job applicants and workers need unbiased recruitment practices and better pay information to be able to make informed employment choices and have more equitable salary negotiations.²⁴

4.3 Encouraging pay transparency and observing data protection legislation: Mission Impossible?

As noted earlier, pay transparency rights and duties involve the disclosure of pay information at various levels. There is an obvious human rights and public interest rationale behind those disclosures, namely, improving the effectiveness of the right to equal pay and addressing the undervaluation of women's work. However, pay information disclosures could also affect another human right, the right to privacy, and more specifically, the right to data protection.

While anonymised pay data is not considered 'personal data' protected under the GDPR,²⁵ the basic or variable GPG for a given job category released in fulfilment of Article 9(1)(g) PTD could amount personal data if there were only two or three workers in that job category, whose individual salaries or variable pay could be indirectly identified following the disclosure. Additionally, individual workers' request to obtain pay information from the employer -- as per Article 7(1) PTD-- carries some risk that the pay data disclosed could indirectly allow to identify the pay levels of specific workers. Article 12 PTD seeks to ensure that any pay information disclosed in compliance with Articles 7, 9 or 10 observes the requirements set out in the GDPR.

Under Article 6(1)(c) GDPR, the processing of personal pay data to comply with the PTD obligations is in principle lawful because it is a legal obligation. However, employers must also ensure that personal data are processed 'fairly and in a transparent manner in relation to the data subject' (Article 5(1)(a) GDPR). In the context of Article 7(1) PTD's requests, this could involve performing a difficult balancing exercise between the interests of (a) the requesting

²² Z Cullen, Z and R Perez-Truglia, 'The salary taboo privacy norms and the diffusion of information' (2023) *Journal of Public Economics*, 222, 104890; Seitz, S. and Sinha, S., 'Pay Transparency, Workplace Norms, and Gender Pay Gap: Early Evidence from Germany' (2023) *SSRN Electronic Journal*, available at doi:<https://doi.org/10.2139/ssrn.4337703>; Burn, I., & Kettler, K., 'The more you know, the better you're paid? Evidence from pay secrecy bans for managers' (2019) *Labour Economics*, 59, 92-109.

²³ After implementing a gender-neutral JES and correcting any unjustified pay differences of jobs of equal value, there could still be a risk that an individual is not receiving equal pay compared to another worker doing equal value work, but such risk should have been minimised.

²⁴ See e.g.: Cullen, Z. (2023). *Is Pay Transparency Good?* National Bureau of Economic Research, (No. w31060). doi:10.2139/ssrn.4400702.

²⁵ Article 4(1) GDPR.

workers and (b) the worker/s whose pay information is sought.²⁶ Yet, Article 7(1) PTD requires the disclosure of *average* pay levels broken down by sex, so *individual* pay information should not be released. Of course, if the number of workers in the concerned job category is very low (e.g. below four) and/or some workers discuss their pay among themselves, it might be possible to identify the pay levels of some workers. The main solution that Article 7(3) PTD proposes if the data to be released under Articles 7, 9, 10 PTD could lead to the direct or indirect identification of a workers' pay is that *only* workers' representatives, the labour inspectorate or the EB are given access to such information (which should still be submitted to the monitoring body as per Article 29 PTD). However, this is just presented as an option to MS, who will need to adopt more specific measures to ensure that the PTD obligations can be fulfilled with full observance of the GDPR.²⁷

4.4 Enforcement and Access to Justice under the Pay Transparency Directive

One of the key objectives of the PTD is strengthening enforcement of the right to equal pay and access to justice for claimants and organisations wishing to assert it. As shown in Table 2, there are four broad areas where the PTD introduces enforcement or procedural innovations.

Table 2. Key enforcement and procedural innovations of the PTD.

Area	PTD innovations
Access to court	Art. 14: Court proceedings must be easily accessible, even after the employment relationship has ended Art. 21(1): Limitation periods cannot begin to run until the claimant is aware of the infringement Art. 21(2): Limitation periods must be interrupted once action is taken Art. 25: Protection against victimisation for workers and their representatives ²⁸
Standing & procedural rules	Art. 15: Interest organisations, EBs and workers' representatives must have standing to initiate court/administrative proceedings (<i>actio popularis</i>) Art. 18: Reinforces the shift of the burden of proof (automatic shift to the employer in case of breach of Arts. 5-7, 9-10 PTD) Art. 19: Clarification/expansion of options to prove work of equal value via statistics, 'single source' principle, non-contemporaneous comparators or hypothetical comparators. Art. 20: National authorities/courts must be able to order the disclosure of evidence held by the respondent Art. 22: Possibility to exempt unsuccessful claimants from paying the proceedings' costs if they had reasonable grounds for bringing the claim.
Awareness raising, monitoring & enforcement	Art. 28: EBs' competences are extended to cover the full scope of the PTD Art. 29: Monitoring bodies must be created and/or designated at national level with functions to raise-awareness, analysing the GPG causes, collecting and publishing employers' GPG data, collecting JPTs and aggregating pay discrimination complaints' data Art. 31: MS must submit up-to-date GPG data to the Commission (Eurostat) on annual basis
Remedies & penalties	Art. 16: Right to claim full and real compensation or reparation for workers affected by a breach of the equal pay principle, which must be dissuasive and proportionate Art. 17: Right for claimants to request injunctions to stop an infringement or orders that rights or obligations related to the principle of equal pay are applied Art. 23: MS must introduce effective, proportionate and dissuasive penalties for breaches of the principle of equal pay. They must be effectively applied, have a real deterrent effect and should include: fines, aggravating or mitigating factors, and penalties for repeated infringements Art. 24: MS <i>may</i> require that economic operators cannot participate in public procurement procedures, and/or are subject to penalties and termination conditions in public contracts/concessions if they have breached their PTD obligations, or they have unjustified GPG is over 5 % in any category of workers. ²⁹

Source: Own elaboration.

²⁶ See further Hoot and Pierce (2023) on how exiting CJEU case law on the application of GDPR principles to transparency requests linked to Regulation 1049/2001/EU could be applied, *mutatis mutandi*, to the PTD context.

²⁷ Various measures seeking to ensure compliance with GDPR are already in place in MS with PTL such as Belgium, Finland, Norway and Slovenai, see further Veldman 2017, S Benedi Lahuerta 2021.

²⁸ Expands pre-existing protection against victimisation found in Article 24 RecD.

²⁹ Expands and complements public procurement provisions found in in accordance with Article 30(3) of Directive 2014/23/EU, Article 18(2) of Directive 2014/24/EU and Article 36(2) of Directive 2014/25/EU.

As can be seen on Table 2, the PTD not only introduces minimum requirements to improve access to courts, it also develops or reinforces various standing and procedural rules. Many of these innovations could help improve claimants' chances of success in equal pay claims or encourage more workers, workers' representatives, interest organisations, or EBs to rely on adjudicatory procedures to assert the right to equal pay. For instance, the PTD establishes that a breach of Arts. 5-7, 9-10 PTD will automatically shift the burden of proof to the employer, which can significantly alleviate the claimant's efforts to build a successful case.³⁰ At the same time, Article 22 PTD requires that courts have the power to consider if a losing claimant had 'reasonable grounds for bringing the claim', in which case they may be exempted from paying the proceedings' costs. This, together with the recognition of various legal persons' to initiate legal proceedings, is also a substantial step forward given that alleged victims are often reluctant to take action against pay discrimination for various reasons, including emotional, time and financial costs.³¹ Similarly, the requirement that hypothetical comparators³² must be allowed in equal value claims significantly increases the possibilities to bring equal pay claims for women working in feminised sectors or professions, where finding a comparator who does the same job and works for the same employer is virtually impossible. Other procedural mechanisms integral to improving access to justice are also the extended access to evidence for national authorities and courts, and greater injunctive powers by courts.³³

Another positive PTD innovation is that various bodies must be involved in awareness raising, monitoring and enforcement activities. While Article 20 RecD already granted EBs their classic powers in terms of assistance to victims and equality promotion regarding gender pay discrimination, Article 28(1) PTD extends those powers to the whole scope of the PTD. Alongside EBs, the PTD envisages prominent functions for workers' representatives and labour inspectorates, who are meant to support workers' access to pay information,³⁴ hold the employer to account regarding the pay data reported³⁵ and cooperate with the employer to address potential GPGs.³⁶ Monitoring functions are specifically left to a new type of institution, 'monitoring bodies', who must collect data on pay discrimination complaints, GPG public metrics and JPTs, and publish select GPG data reported by employers. Monitoring bodies are also required to raise-awareness about the principle of equal pay and the right to pay transparency (including intersectional discrimination), for which they could be expected to collaborate with EBs.³⁷ Prior to the adoption of the PTD, all these functions may have been performed with great variation across MS, with very little action in some of them compared to very active EBs in others, sometimes complemented by other bodies, like labour inspectorates. The PTD's recurrent reliance on EBs, workers' representatives, labour inspectorates and the new monitoring bodies, should substantially reinforce the pay equity institutional architecture following its implementation at domestic level. Yet, to ensure that it

³⁰ Art. 18 PTD.

³¹ Note that this provision seems to require that *actio popularis* are available at domestic level, but not so much representative or collective actions.

³² Alongside non-contemporaneous comparators and the single source principle.

³³ See further Carlson, EELR.

³⁴ See e.g. Arts. 7(1) and 12(3) PTD.

³⁵ See e.g. Art. 9(6) PTD.

³⁶ See e.g. Arts. 9(10) and 10(10) PTD.

³⁷ See further Chapter 15.

is effective, close cooperation between these bodies and an adequate level of resources will be essential.³⁸

In sum, the access to justice and enforcement provisions of the PTD have many positive aspects, but from the MS perspective, they could be said to create some tensions between different enforcement models that may predominate at national level. In particular, the PTD seems to reinforce both private enforcement (through collective and individual claims) and public enforcement (through EBs and labour inspectorates), while also recognising the role of workers' representatives and social partners in tackling pay inequity through internal organisational procedures and collective bargaining. This invocation of different enforcement mechanisms may present challenges for MS depending on their labour law/industrial relations traditions, enforcement approaches, and the roles exercised by government agencies, EBs and non-governmental organisations. For instance, in labour markets where, to a large extent, the social partners set wages, such as in the Nordic countries, empowering individuals through access to justice changes the power dynamics of wage-setting. However, the PTD does not envision private enforcement as the *only* avenue to address equal pay, but as one of several tools that have been underutilised in some --if not most--MS. In contrast, in other jurisdictions such as the United Kingdom and Ireland, private enforcement through litigation and public enforcement through EBs has historically been more important, as recent individual³⁹ and group equal pay claims attest.⁴⁰

As with the PTD substantive rules, the different enforcement approaches foreseen in the PTD should be seen as complementary, rather than in competition. Private enforcement (through equal pay claims), industrial relations' enforcement (through wage setting in collective bargaining) and public enforcement (e.g. through EBs and labour inspectorates action) can have mutually reinforcing effects. For example, the richer case law that may result from greater levels of equal pay litigation at MS level can provide better guidance for the social partners as well as enforcement agencies, creating a stronger basis upon which labour unions and agencies can in their turn be more active.

³⁸ Both aspects are specifically mentioned in Article 28(2)-(3) PTD and in the forthcoming Directive on standards for equality bodies in the field of equal treatment and equal opportunities between women and men in matters of employment and occupation (provisionally agreed text of 15/12/2023), Arts. 2(2), 4 and 12.

³⁹ See Chapter 14.

⁴⁰ See e.g. in the UK, Glasgow City Council, Tesco and Asda in the UK, and ongoing claims led by Leighday, see 'Retail Equal Pay', <https://www.leighday.co.uk/our-services/employment-law-claims-and-disputes/retail-equal-pay/>. In Ireland, a claim against a hospital contractor in Ireland was recently supported by IHREC, 'Equal Pay Claim Highlights Importance of Women Being Aware of their Rights', 12 July 2023, <https://www.ihrec.ie/equal-pay-claim-highlights-importance-of-women-being-aware-of-their-rights/>. See also Chapter Suzanne and Benedi Lahuerta (2022).